IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29639

LYNN ALTHOFF, as Personal Representative of the Estate of Justin Althoff,
Plaintiff/Appellee,

vs.

PRO-TEC ROOFING, INC.
Defendant/Appellant.

Appeal from the Third Judicial Circuit
Codington County, South Dakota
The Honorable Robert L. Spears, Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

This Brief adopts the trial court's party designations. Appellant Pro-Tec Roofing, Inc. will be referred to as "Pro-Tec." Appellee Lynn Althoff, as Personal Representative of the Estate of Justin Althoff, will be referred to as the "Estate." References to the Settled Record, Codington County, South Dakota, Lynn Althoff, as Personal Representative of the Estate of Justin Althoff v. Pro-Tec Roofing, Inc, 14 CIV. 17-000216, shall be denoted by "SR" followed by the applicable page number. References to the summary judgment hearing transcript will be referred to as "HT" with the applicable page number.

JURISDICTIONAL STATEMENT

Pro-Tec appeals an Order Denying Summary Judgment (SR 1350) and a Memorandum thereon. (SR 1338). Notice of Entry of Order was filed and served on May 4, 2021 (SR 1353). ProTec filed its Petition for Permission to Appeal on May 17, 2021. This Court entered its Order Granting Petition for Allowance of Appeal from Intermediate Order on June 9, 2021 (SR 1358). This Court has jurisdiction pursuant to SDCL §§ 15-26A-3(6) and 15-26A-17.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the trial court erred when it failed to rule, as a matter of law, that the Estate's claim was exclusively limited to workers' compensation benefits?

The trial court erred when it failed to apply South Dakota Supreme Court precedent and, instead, ruled that it was a question of fact whether the Estate's loss was substantially certain to occur.

- *Harn v. Continental Lumber Co.*, 506 N.W.2d 91, 100 (S.D. 1993)
- *Fryer v. Kranz*, 2000 S.D. 125, 616 N.W.2d 102
- *McMillin v. Mueller*, 2005 S.D. 41, 695 N.W.2d 217

STATEMENT OF THE CASE

On or about October 28, 2019, the Estate initiated a civil lawsuit against Pro-Tec in Codington County, Third Judicial Circuit, South Dakota, arising from an incident when Justin Althoff ("Althoff") fell from the roof of the Watertown Community Center. (SR 1102). The Honorable Robert Spears was assigned to this case.

Pro-Tec filed a Motion for Summary Judgment on July 24, 2020. (SR 1125). The Motion was heard by the trial court on February 23, 2021. (SR 1350). Pro-Tec's Motion for Summary Judgment was denied and an Order denying the Motion was entered on March 26, 2021 (SR 1350). The trial court's Memorandum Decision was entered on March 24, 2021. (SR 1338). Notice of Entry of Order was filed and served on May 4, 2021. (SR 1353). On May 17, 2021, Pro-Tec filed its Petition for Permission to Appeal from the Order denying its Motion for Summary Judgment. This Court entered its Order Granting Petition for Allowance of Appeal from Intermediate Order on June 9, 2021 (SR 1356).

STATEMENT OF THE FACTS

The dispute in this case arises from a roofing accident. In 2015, Pro-Tec entered into a subcontract with the Puetz Corporation[1] for the construction of the Watertown Community Center in Watertown, South Dakota. (SR 1211). In April of 2016, Althoff was hired as an employee of Pro-Tec, and he was given a copy of the Pro-Tec Roofing Inc. Safety and Health Manual. (SR 1211). On April 21, 2016, in the scope and course of his employment, Althoff was working on the roof of the Watertown Community Center. (SR 1211). That day, Althoff fell off the roof, ultimately resulting in his death. (SR 1211). Althoff had not been harnessed on the roof. (SR 1299, 1329). In 2011, Pro-Tec had established internal guidelines that, *inter alia*, called for the use of harnesses on certain roofing projects. (SR 1293, 1329).

While harnesses were not in place, the general contractor's Project Superintendent, Jason Enfield, was on the roof of the Watertown Community Center the day of Althoff's fall and observed a warning line in place. (SR 1127, 49-50, 60). Following the April 21, 2016 incident, the Occupational Safety and Health Administration (OSHA) and Pro-Tec settled on penalties of $50,000 related to various violations arising from OSHA's investigation. (SR 1212). Workers' compensation benefits have since been paid to or on behalf of the Estate. (SR 1212).

Prior to the 2016 accident, Pro-Tec had received only three separate citations from OSHA. The first of the OSHA citations was issued to Pro-Tec on September 10, 2009. (SR 1289, 1329). That citation centered on a project in Platte, South Dakota and

[1] Puetz Corporation was also sued under theories basically identical to those relating to Pro-Tec. Those claims, however, were eventually dismissed, with prejudice.

related to the issues of proper scaffolding and the placement of ladders at points-of-access. (SR 1289, 1329). The second citation was received on January 11, 2011. (SR 1290, 1329). That citation centered on a project in Aberdeen, South Dakota and related to guardrail systems on low-slope roofs. (SR 1290, 1329). The third citation was received on July 2, 2012. (SR 1291, 1329). That citation centered on a project in Mitchell, South Dakota and, like the 2011 citation, related to guardrail systems on low-slope roofs. (SR 1291, 1329). Pro-Tec received no other OSHA citations between 2012 and the time of Althoff's fall. (SR 1291-92). The only other OSHA citations Pro-Tec received were related to the incident at the center of this case. (SR 1313-21).

STANDARD OF REVIEW

A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c); *Hofer v. Redstone Feeders, LLC,* 2015 S.D. 75, ¶ 10, 870 N.W.2d 659, 661-62. "'All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party.'" *Garrido v. Team Auto Sale, Inc*., 2018 S.D. 41, ¶ 15, 913 N.W.2d 95, 100. (quoting *Hofer, LLC,* 2015 S.D. 75, ¶ 10, 870 N.W.2d at 661-62). "[T]he nonmoving party must substantiate allegations with sufficient probative evidence that would permit a finding in favor on more than mere speculation, conjecture, or fantasy." *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 29, 916 N.W.2d 151, 159 (citations omitted).

"'Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case,

and on which that party will bear the burden of proof at trial.'" *Rodriguez v. Miles*, 2011 S.D.29, ¶ 6, 799 N.W.2d 722, 724-25 (quoting *Zephier v. Catholic Diocese of Sioux Falls*, 2008 S.D. 56, ¶ 6, 752 N.W.2d 658, 662). When there are no genuine issues of material fact, summary judgment is looked upon favorably. *Owens v. F.E.M. Electric Ass'n, Inc.*, 2005 S.D. 35, ¶ 6, 694 N.W.2d 274, 277 (citations omitted). A trial court's denial of summary judgment is reviewed de novo. *North Star Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 12, 873 N.W.2d 57, 61. When the material facts are not in dispute, the question becomes one of law. *See Harn v. Continental Lumber Co.,* 506 N.W.2d 91, 95 (S.D. 1993). *See also Kuhnert v. John Morrell & Co. Meat Packing, Inc.*, 5 F.3d 303, 304 (8th Cir. 1993) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.") (citation omitted).

ARGUMENT

I. Workers' Compensation is the Exclusive Remedy

A. The Circuit Court misapplied the controlling law

South Dakota Workers' Compensation Law, specifically, SDCL § 62-3-2, provides:

> The rights and remedies granted to an employee subject to this title, on account of personal injury or death arising out of and in the course of employment, *shall exclude all other rights and remedies of the employee*, the employee's personal representatives, dependents, or next of kin, on account of such injury or death against the employer or any employee, partner, officer, or director of the employer, except rights and remedies arising from intentional tort.

SDCL § 62-3-2 (emphasis added). Over twenty years ago, this Court stated, "Workers' compensation covers employment-related accidental injury of every nature. No matter

what form employer conduct takes, be it careless, grossly negligent, reckless, or wanton, if it is not a 'conscious and deliberate intent directed to the purpose of inflicting an injury,' workers' compensation remains the exclusive remedy." *Fryer v. Kranz*, 2000 S.D. 125, ¶ 8, 616 N.W.2d 102, 105 (quoting 6 Larson's Workers' Compensation Law (MB) § 103.03 at 103–6 (November 1999)). To avoid the exclusivity rule, at minimum, an employee must demonstrate that the injury or loss in issue was substantially certain to occur. The "substantial certainty" exception is exceedingly narrow and has been strictly enforced by this Court.

Seven years prior to *Fryer*, this Court took great pains to illuminate the limits of the substantial certainty exception. *See generally, Harn v. Continental Lumber Co.,* 506 N.W.2d 91 (S.D. 1993). "Worker's compensation was designed by the legislature to be the exclusive method for compensating workers injured on the job in all but extraordinary circumstances." *Id.* at 95 (citing *Jensen v. Sport Bowl, Inc.*, 469 N.W.2d 370 (S.D. 1991)). According to the *Harn* Court, even in circumstances where the loss was probable, workers' compensation was still the exclusive remedy. *See id.* (citing *Jensen*, 469 N.W.2d at 372; *VerBouwens v. Hamm Wood Products*, 334 N.W.2d 874, 876 (S.D. 1983), *overruled on other grounds by Holscher v. Valley Queen Cheese Factory*, 2006 S.D. 35, 713 N.W.2d 555, 568, n. 2). To escape exclusivity, at minimum, "[t]he known danger must cease to become only a foreseeable risk which an ordinary, reasonable, prudent person would avoid (ordinary negligence) and become a substantial certainty." *Id.* (citing *Brazones v. Prothe*, 489 N.W.2d 900, 906 (S.D. 1992); *Jensen*, 469 N.W.2d at 372; *VerBouwens*, 334 N.W.2d at 876).

The *Harn* Court described the holdings in *Brazones*, *Jensen*, and *VerBouwens* as "rather strict" and stated that "one must be reminded that what is being tested here is not the degree of gravity or depravity of the employer's conduct, but the narrow issue of intentional versus accidental quality of the precise event producing injury." *Id.* at 97. In each of those cases, the Court rejected efforts by plaintiffs to escape workers' compensation exclusivity. After detailing South Dakota's "strict" holdings, the *Harn* Court shifted focus to compare South Dakota precedent with Ohio workers' compensation jurisprudence. *See id.* at 97-99. In one such case, the Ohio Supreme Court reversed a directed verdict in favor of an employer due to evidence in the record demonstrating that the employer, based simply upon the inherent dangers within its plant, knew that the solvent-related injuries to the employees were substantially certain to occur. *See id.* at 99 (citing *Ailiff v. Mar–Bal, Inc.*, 575 N.E.2d 228 (Ohio 1990)).

The South Dakota Supreme Court rejected Ohio's porous application of the substantial certainty exception as a "slippery path" that permitted

> actions to go forward which are ordinary negligence actions, i.e., injury is possible, and actions describing wanton or reckless conduct, i.e., injury is probable. That is exactly what workmen's compensation was designed to avoid. An employee should be allowed to recover from an employer if the employer hits the employee on the head with a board—that is an intentional tort. But "substantially certain" should not be allowed to be so watered down as to allow ordinary negligent conduct or reckless or wanton conduct on the employer's part to overcome the exclusivity of workmen's compensation. Every workmen's compensation case would then become a common-law action.

Id. at 100.

Instead, the *Harn* Court stated that it was following a path led by Michigan, which demanded "a strict interpretation of substantial certainty." *See id.* and n. 1 (citing *O'Shea*

v. Detroit News, 887 F.2d 683 (6th Cir. 1989)). To that end, to escape workers' compensation exclusivity, an employee must show

> that the employer had actual knowledge of the dangerous condition and that the employer still required the employee to perform. Substantial certainty of injury to the employee should be equated with virtual certainty to be considered an intentional tort. Any less of a showing would render our workmen's compensation scheme a hollow shell and would encourage endless litigation in the courts. If an employee worked under such conditions where the employer actually knew of the danger and that injury was substantially certain (virtually certain) to occur, and such injury did occur, the employer should not escape civil liability for placing the employee in such a dangerous position. That is the type of conduct the intentional tort exception deters.

Id.

The jurisprudential landscape has not changed. Since *Harn*, this Court has adhered to its strict interpretation of the substantial certainty exception. By the time of *Fryer*, the South Dakota Supreme Court had yet to confront a set of facts that satisfied the exclusivity exception. *See Fryer*, 2000 S.D. 125, ¶ 15, 616 N.W.2d at 107. Since *Fryer*, the South Dakota Supreme Court has continued to reject efforts to expand the purview of substantial certainty. *See, e.g., McMillin v. Mueller*, 2005 S.D. 41, 695 N.W.2d 217 (affirming summary judgment against the estates of employees that sought to avoid the exclusivity rule). Substantial certainty is an exacting standard. It remains vanishingly narrow. Only the rarest of cases may avoid workers' compensation exclusivity.

Exclusivity, *inter alia*, serves two important functions: First, it "imparts efficiency to the workers' compensation system," and, second, it avoids "'superimposing the complexities and uncertainties of tort litigation on the compensation process.'" *See Fryer*, 2000 S.D. 125, ¶ 8, 616 N.W.2d at 105 (quoting Larson's, *supra*, § 103.05[6] at 103–44 (May 2000)). Again, it is the rare case that avoids the exclusivity rule. "Only

injuries 'intentionally inflicted by the employer' take the matter outside the exclusivity of workers' compensation coverage." *See id.* at ¶ 11. According to the *Harn* Court, an injury that is substantially certain to occur may be likened to intentional conduct for purposes of avoiding exclusivity, but "[s]ubstantial certainty of injury to the employee should be equated with *virtual certainty* to be considered an intentional tort." *See Harn*, 506 N.W.2d at 100 (emphasis added).

The material facts in this case are not in dispute. HT at 20:7-8. The central focus of the parties' summary judgment motions was whether Pro-Tec intentionally effected Althoff's death. HT at 20:8-10. In the summary judgment proceeding, the Estate did not dispute that Althoff was an employee of Pro-Tec. Further, the Estate did not dispute that the incident occurred in the course of Althoff's employment. Given these concessions, this case fits squarely within the plain meaning of SDCL § 62-3-2. As such, the Estate received workers' compensation benefits, which, again, are the exclusive remedy in this case.

Given that there is no dispute as to the material facts, judgment should have been entered in favor of Pro-Tec as a matter of law. *See Kuhnert*, 5 F.3d at 304. The Circuit Court erred by ruling questions of fact remain for a jury's consideration. *Cf. Harn*, 506 N.W.2d at 95 (stating that when the material issues are not in dispute the question of exclusivity becomes one of law). As set forth below, the facts relied upon by the Circuit Court are immaterial to the question of exclusivity and, therefore, do not create a question of fact to be resolved by a jury. More specifically, the OSHA citations that Pro-Tec had received years prior to Althoff's fall do not create genuine issues of material fact.

i. Prior OSHA citations did not make the loss substantially certain to occur

In its Memorandum Denying Summary Judgment, the Circuit Court stated that "Plaintiff here cannot prove that it was a substantial certainty that Althoff would fall off the roof at a job site that day[.]" (SR 1347). However, that is precisely the Estate's burden to carry. *See McMillin*, 2005 S.D. 41, ¶12, 695 N.W.2d at 222 ("*Only if the employee* can show that an ordinary, reasonable, prudent person would believe an injury was substantially certain to result from the employer's conduct can that worker bring suit against the employer at common law.") (emphasis added). Despite the recognition that the Estate cannot carry its burden, the Circuit Court denied Pro-Tec's Motion for Summary Judgment. The Circuit Court couched the denial in the three OSHA citations that Pro-Tec received related to earlier projects. Specifically, the Circuit Court stated, "Pro-Tec's pattern of past violations is well-documented and applicable towards the exact legal result they were meant to prevent—injury or death by falling." (SR 1347). The Circuit Court also placed emphasis on these prior citations during the hearing on the Motions for Summary Judgment. *See* HT at 12:14-19, 13:4-7.

These prior citations do not create a genuine issue of material fact. Indeed, the citation nearest in time to Althoff's fall was four years prior. Moreover, the 2012 citation focused on an altogether different issue and project. Nothing about the prior citations could conceivably impute to Pro-Tec "actual knowledge of the dangerous condition" on the roof of the Watertown Community Center. *See*, *supra*, *Harn*. Nothing about the citations made Althoff's fall a substantial certainty. By holding otherwise, the Circuit Court misapplied *Harn* and its progeny.

In denying Pro-Tec's Motion, the Circuit Court relied heavily on *McMillin* due to the facts in that case involving a safety plan from OSHA. In *McMillin*, two individuals were asphyxiated while cleaning molasses tanks. *See McMillin*, 2005 S.D. 41, ¶ 7, 695 N.W.2d at 220. The individuals' estates brought tort claims against the employer. *See id.* at ¶ 7. In response to the employer's defense of workers' compensation exclusivity, the estates stated that a pre-incident OSHA safety plan took the incident out of workers' compensation. *See id.* The trial court, finding that workers' compensation was the exclusive remedy, ultimately granted summary judgment to the employer. *See id.* at ¶ 8. The estates appealed. *See id.*

Affirming the trial court, this Court, interpreting the narrow limits of "substantial certainty," stated:

> [E]ven though the employer's conduct is careless, grossly negligent, reckless or wanton and even if that employer knowingly permits a hazardous work condition to exist, knowingly orders a claimant to perform an extremely dangerous job, or willfully fails to furnish a safe workplace, those acts still fall within the domain of workers' compensation.

Id. at ¶ 14. The *McMillin* Court went on to note that the OSHA safety plan was not directly targeted to cure the environment that ultimately caused the employees to be asphyxiated. *See id.* at ¶ 21. The Court stated that "[a]t most, [the employer's] actions constituted negligence for not following the safety plan as approved by OSHA." *See id.* at ¶ 24. The *McMillin* Court refused to hinge the defendants' liability on "what injuries they should have known were possible or even probable [and], instead, look[ed] to their actual knowledge of a dangerous condition, the substantial certainty of an injury to occur, and their requirement of an employee to still perform." *See id.* at ¶ 21.

While Pro-Tec had received OSHA citations years prior to Althoff's fall, the citation closest in time was issued in 2012. (SR 1289-1291). The three citations were wholly unrelated to the 2016 Watertown Community Center project; they related to entirely different projects. No other incident had occurred related to the Watertown Community Center project. Thus, as was true in *McMilli*n, the prior citations issued to Pro-Tec were in no way targeted at the loss suffered by the Estate.

The citations cannot be used as a basis for avoiding the strict application of the exclusivity rule. *See Harn,* 506 N.W.2d at 97 (stating that the focus of the substantial certainty exception is "the narrow issue of intentional versus accidental quality *of the precise event producing injury*.") (emphasis added). While the prior OSHA citations related to roofing safety,[2] the Estate presented no evidence during the summary judgment proceeding demonstrating that Althoff's death was a substantial certainty due to some condition on the Watertown Community Center roof. In fact, the undisputed facts demonstrate the opposite: A warning line was in place on the roof of the Watertown Community Center project prior to Althoff's fall. (SR 1127, 49-50, 60).

Just as in *McMillin,* even if it could be said that "[Pro-Tec's] actions constituted negligence for not following the safety plan as approved by OSHA[,]" ordinary negligence is insufficient to satisfy the exclusivity exception. Again, negligence, and even gross negligence or recklessness, is insufficient to bring a work-related injury out of workers' compensation exclusivity. It was error for the Circuit Court to hold otherwise. The Circuit Court itself recognized that the Estate could make no such showing without relying on the past OSHA citations. *See supra.*

[2] A fact that is not surprising given that Pro-Tec is a *roofing* company.

McMillin is not an outlier in workers' compensation jurisprudence. The United States Eighth Circuit Court of Appeals came to a similar conclusion in *Kuhnert*. There, the plaintiff was employed by John Morrell & Co. Meat Packing, Inc. in Sioux Falls, South Dakota. *Kuhnert*, 5 F.3d at 304. While in the scope of employment, the plaintiff suffered serious burns after hot water from a washing machine back-splashed. *Id.* The plaintiff then brought a tort action against Morrell, asserting that he had been intentionally injured. *Id.* In support of his claim, the plaintiff, in large part, relied on prior OSHA citations that Morrell had received related to the defective washers. *See id.* at 305. The federal district court granted summary judgment to Morrell. *Id.* at 304.

Affirming the district court, the Eighth Circuit agreed with Morrell that the plaintiff had failed to show that it was a substantial certainty that he would suffer injury. *See id.* at 305. Relying on *Jensen*, *Brazones*, and *VerBouwens*, the *Kuhnert* court recognized that OSHA had previously cited Morrell for failing "to keep the workplace free of hazards to which its employees were exposed[,]" but that

> these facts do not allege the elements necessary for an intentional tort cause of action and therefore do not fall within the exception for intentional torts provided in S.D. Codified Laws Ann. § 62–3–2. . . . [A]lthough it may have been foreseeable to a reasonable person that the washers could backsplash and burn someone, it was by no means substantially certain that the washers would backsplash hot water."

Id. at 305-06.

Palazzola v. Karmazin Prod. Corp. offers further instruction. 565 N.W.2d 868 (Mich. Ct. App. 1997). In that case, the defendant manufactured radiators. *Palazzola*, 565 N.W.2d at 871. Radiator components were cleaned using Trichloroethylene (TCE). *Id.* In its liquid state, TCE could be handled safely. *See id.* In its gaseous state,

however, TCE could be fatal if inhaled. *See id.* On the day of the injury, the plaintiff was assisting his team drain a holding tank of water. *See id.* Once the tank was emptied, the team observed sludge on the bottom. *See id.* After a team member removed three buckets of sludge, the plaintiff was instructed to do the same. *See id.* After the first team member had been out of the tank for a number of minutes, he indicated that he was nauseous and that the odor of fumes was strong. *See id.* The plaintiff was then ordered to exit the tank, but he had already collapsed. *See id.* A rescue effort followed, but the plaintiff ultimately died from TCE exposure. *See id.* at 871-72.

The plaintiff's estate brought a tort action against the employer. *See id.* at 870. To that end, the estate relied on the intentional tort exception to Michigan's workers' compensation exclusivity rule. *See id.* at 870-71. The trial court granted the employer's motion for summary judgment. *See id.* at 871. The estate appealed to the Michigan Court of Appeals. *See id.* at 872. The *Palazzola* court stated that "it is a question for the court to determine whether the facts alleged are sufficient to constitute an intentional tort within the meaning of the act." *Id.* (citation omitted). Only after a court rules that the facts alleged fall within the exception does a jury determine the veracity of the facts. *See id.*

The *Palazzola* court detailed the elements a plaintiff must prove to satisfy Michigan's substantial certainty exception. *See id.* at 873. In line with *McMillin*, the *Palazzola* court stated that a plaintiff must prove, *inter alia*, that the injury was certain to occur. *See id.*

> This element establishes an "extremely high standard" of proof that cannot be met by reliance on the laws of probability, *the mere prior occurrence of a similar event*, or conclusory statements of experts. Further, an

> employer's awareness that a dangerous condition exists is not enough. Instead, an employer must be aware that injury is certain to result from what the actor does.

Id. (emphasis added). In an attempt to satisfy the extremely high standard, the plaintiff produced a Michigan Occupational Safety and Health Act (MIOSHA) report. *See id.* at 874. The report was prepared after the plaintiff's death and "indicated that [the employer] provided insufficient training and protection for workers asked to work in confined spaces." *Id.* Statements from a MIOSHA investigator also indicated that the employer willfully violated safety regulations. *See id.* Finally, the plaintiff produced a citation that the employer had received six years prior stemming from an unrelated inhalation accident. *See id.* The court rejected the plaintiff's claim that the MIOSHA evidence alone showed that the employer had actual knowledge that an injury was certain to occur. *See id.*

Ultimately, the *Palazzola* court held that the record established

> that [the employer] had no prior knowledge that employees would enter the holding tank to clean remaining sludge, or even that the tank, when drained, would contain sludge. Further, although plaintiff alludes to a prior incident involving a worker poisoned by the inhalation of nitrogen gas in a confined space, that incident did not involve TCE *or maintenance of the holding tank at issue in this case.* . . . At best, this evidence supports a conclusion that it was foreseeable that working in the holding tank might be dangerous to the [the employer's] employees. As stated by our Supreme Court, mere negligence in failing "to act to protect a person who might foreseeably be injured from an appreciable risk of harm" does not satisfy the intentional tort exception of the act.

Id. at 876 (quoting *Travis v. Dreis & Krump Mfg. Co.*, 551 N.W.2d 132 (Mich. 1996)) (emphasis added).

McMillin, *Kuhnert*, and *Palazzola* all stand for the proposition that a plaintiff may not resort to prior, unrelated OSHA citations to escape workers' compensation

exclusivity. Instead, a plaintiff must present evidence "that the employer had actual knowledge of the dangerous condition and that the employer still required the employee to perform." *Harn*, *supra*. Accordingly, the evidence must relate specifically to the task assigned to the employee. *See id.* at 97 (stating that the focus of the substantial certainty exception is "the narrow issue of intentional versus accidental quality *of the precise event producing injury*.") (emphasis added). Focused only on that relevant, task-specific evidence, "it is a question for the court to determine whether the facts alleged are sufficient to constitute an intentional tort within the meaning of the act." *Palazzola*, *supra*. Indeed, in *Brazones*, *Jensen*, *VerBouwens*, *Harn*, *Fryer*, and *McMillin*, this Court ruled in favor of the employers as a matter of law prior to any facts being submitted to a jury. These cases demonstrate both the enormity of the Estate's burden in the instant case and the duty of the Circuit Court to rule as a matter of law after the Estate failed to meet its burden.

Here, there is no genuine issue of material fact. On the day of Althoff's fall, a warning line was in place on the roof of the Watertown Community Center. The Estate offered no evidence in dispute. Furthermore, the Estate offered no evidence *specific to the Watertown Community Center roof* that demonstrated that Pro-Tech had actual knowledge that an injury was substantially certain to occur. The Circuit Court itself recognized that the Estate cannot meet that burden. Instead, in an effort to escape the exclusivity rule, the Estate relied principally on the three OSHA citations that Pro-Tec had received years prior to Althoff's fall. In denying Pro-Tec's Motion for Summary Judgment, the Circuit Court, likewise, relied on these citations and stated that they created a genuine issue of material fact. The Circuit Court's decision was a flagrant

misapplication of South Dakota Supreme Court precedent. The Circuit Court's decision should be reversed and it should be ordered to enter Summary Judgment in favor of Pro-Tec.

B. The Estate failed to demonstrate that Pro-Tec acted intentionally

As stated above, it is mandatory that summary judgment be entered against a party that fails to present evidence on an element of the case that it must prove at trial. *See Rodriguez*, 2011 S.D. 29, ¶ 6, 799 N.W.2d at 724-25 (citation omitted). In opposition to Pro-Tec's Motion for Summary Judgment, it was the Estate's burden to "substantiate [its] allegations with sufficient probative evidence that would permit a finding in [its] favor on more than mere speculation, conjecture, or fantasy." *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398. The Estate failed to carry its burden.

The Estate failed to substantiate its claims that Pro-Tec acted with any intent to effect Althoff's death. "Merely alleging that the conduct was intentional or that the injury was substantially certain to occur does not meet the strict standard of liability to overcome the exclusiveness of workmen's compensation." *Harn*, 506 N.W.2d at 99. As the *Fryer* Court recognized, "with an artfully drafted complaint simply alleging that the employer intended to cause bodily harm or death, every employee would arguably be permitted to litigate his workers' compensation claim as an intentional tort." *Fryer*, 2000 S.D. 125, ¶ 11, 616 N.W.2d at 106 (citing *Handley v. Unarco Indus., Inc.*, 463 N.E.2d 1011 (Ill. App. Ct. 1984)).

In this case, the Estate's Complaint is an ordinary negligence claim masquerading as an intentional tort. While the Complaint repeatedly refers to willful and intentional conduct, at its core, the Estate's contention is that Pro-Tec consciously disregarded a

great risk, i.e., acted recklessly. Recklessness, however, as a matter of law, cannot clear the hurdle set by the substantial certainty exception to the exclusivity rule. During the Summary Judgement Hearing, the Estate presented no evidence to support its claims that Pro-Tec acted intentionally. Instead, it relied on the OSHA citations. During the hearing, the Estate stated that it was relying on facts showing that Pro-Tec failed to comply with its "own laws [that] say the employees have to be harnessed." HT at 15:12-15. According to the Estate, these were Pro-Tec's own written rules or laws. HT at 15:19-20. These rules or laws, the Estate continued, were developed around 2011 in connection to promises made to OSHA. HT at 16:12-14, 17:23-25-18:1. Thus, the Estate's reference to "Pro-Tec's laws" is simply a separate means of relying on past OSHA citations.

As set forth above, however, the OSHA citations did not relate to the project at which Althoff fell. As a matter of law, these citations cannot and do not create a genuine issue of material fact. Moreover, the undisputed material facts show that a warning line was installed on the Watertown Community Center roof. *See* (HT 18:24-25, 19:9-10; SR 1127, 49-50, 60). The facts unquestionably do not support an allegation that Pro-Tec acted in such a manner that it knew that Althoff's death was a substantial certainty.

At any rate, despite the implied reliance on the past OSHA citations, both in its Statement of Undisputed Material Facts and during the Summary Judgment Hearing, the Estate argued that a lack of harnesses on the roof of the Watertown Community Center alone made it a substantial certainty that Althoff would fall. *See* (SR 1299). The Estate argued that, pursuant to Pro-Tec's laws, employees working on roofs must be harnessed. (HT at 16:22-25, 17:1-19). According to the Estate, Pro-Tec "knowingly failed daily, yearly[]" to adhere to the harness requirement. (HT at 17:17-19). The Estate further

posited that a knowing failure to comply with its own rules made it a substantial certainty that Althoff would fall. HT at 18:12-15, 19:2-6. Even further, the Estate argued that Pro-Tec intentionally violated its own rules every day, which "guaranteed absolutely certain that Althoff would hit the ground." HT at 21:22-26, 22:1-2. Finally, the Estate misstated the law that Pro-Tec recited above: "[N]othing of what happened on the roof top (sic) is relevant in the fact that it doesn't matter because of when [Althoff's] harnessed he can't hit the ground and can't get killed." HT at 19:12-15. *But see*, *Harn*, *supra* (stating that the focus of the substantial certainty exception is "the narrow issue of intentional versus accidental quality *of the precise event producing injury*.") (emphasis added).

The Estate's reliance on Pro-Tec's internal safety rules is misplaced. First, even assuming, *arguendo*, that Pro-Tec had violated its own rules on a yearly and daily basis, again, the substantial certainty test focuses on "the precise event producing injury." *Harn*, *supra*. What Pro-Tec may have or have not done in the years and days prior to Althoff's fall is irrelevant. Second, a knowing violation of its safety rules did not make Althoff's fall a substantial certainty. Stated differently, the lack of a harness on the roof of the Watertown Community Center did not guarantee that Althoff would fall. In fact, by the Estate's own admission, Althoff had been on the roof in the days prior and without a harness. *See* (SR 1299, 1329-30).[3]

Substantial certainty is akin to virtual certainty. *Harn*, 506 N.W.2d at 100. The Estate failed to demonstrate that Althoff's fall was a virtual certainty. Rather than present evidence narrowly focused on the circumstances immediately surrounding Althoff's fall, the Estate generally cites to Pro-Tec's internal rules, the alleged violation

[3] Further, no one else fell from the roof during this same timeframe.

thereof, and the general danger of the work. *See supra*. *But see*, *Harn*, 506 N.W.2d at 97 (discussing *Ailiff v. Mar–Bal, Inc.*, 575 N.E.2d 228 (Ohio 1990) and rejecting Ohio's broad interpretation of substantial certainty); *McMillin*, 2005 S.D. 41, ¶ 14, 695 N.W.2d at 220 (workers' compensation is the exclusive remedy even in cases where an employer knowingly allows a dangerous condition to exist).

McMillin, *Kuhnert*, and *Palazzola* are all instructive here. In each of those cases, the courts rejected arguments inviting consideration of an employer's pre-incident behavior. At most, the pre-incident behaviors displayed in those cases made the injuries in issue the result of negligence or recklessness. Thus, workers' compensation was the exclusive remedy in all three. So too here. Pro-Tec's internal rules and previous violation of the same did not make Althoff's fall substantially certain to occur.

In sum, as Pro-Tec has repeatedly stated above, the Circuit Court itself recognized that the Estate cannot meet its burden without relying on the OSHA citations. As this Court held in *Fryer*, even a finding of recklessness does not warrant avoiding the exclusivity rule. Accordingly, because the Estate has failed to demonstrate that Althoff's death was a substantial certainty, this Court should reverse the Circuit Court and order that Summary Judgment be entered in favor of Pro-Tec.

CONCLUSION

The material facts in this case are undisputed. While the parties dispute the import of pre-accident OSHA citations, that dispute is immaterial to this matter. Those citations related to projects separate and apart from the project at the center of Althoff's death. At most, the OSHA citations could convince a jury that Pro-Tec acted with recklessness. As *Harn* and its progeny make inescapably clear, however, a showing of

recklessness does not satisfy the heavy burden necessary to meet the substantial certainty exception. In addition, as shown by *McMillin*, *Kuhnert*, and *Palazzola*, the Estate cannot focus its reliance on the OSHA citations to show that Pro-Tec acted intentionally. It is the Estate's burden to produce evidence related specifically to the environment that caused Althoff's fall. The Estate has made no such showing.

To escape the exclusivity of South Dakota's Workers' Compensation scheme, a plaintiff must demonstrate that the injury was substantially certain to occur. Conduct on the part of an employer that is negligent or even reckless is not enough to obviate the exclusivity rule. In this case, as the Circuit Court itself recognized in its Memorandum Opinion Denying Summary Judgment, the Estate cannot demonstrate that Althoff's death was a substantial certainty. That, however, is the very burden that the Estate must carry. The Circuit Court should be reversed and it should be ordered to enter Summary Judgment in Pro-Tec's favor.

Dated this 3rd day of September, 2021.

MAY & JOHNSON, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing *Appellant's Brief* was served on each of the following by electronically mailing said copy to them at their respective email addresses this 3rd day of September, 2021:

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/s/ Richard L. Travis
Richard L. Travis

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this Brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Office Word and contains 5804 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this Certificate.

/s/ Richard L. Travis
Richard L. Travis

APPELLANT'S APPENDIX PURSUANT TO SDCL § 15-26A-60(8)

STATE OF SOUTH DAKOTA) SS COUNTY OF CODINGTON)		IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT

* * *

LYNN ALTHOFF, as Personal Representative of the Estate of Justin Althoff, Plaintiff, vs. PRO-TEC ROOFING, INC., Defendant.	)	14CIV17-000216 ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

* * *

Hearing having been held in the above-captioned matter on the 23rd day of February, 2021, and based upon the pleadings on file and the arguments of counsel, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is hereby denied and Plaintiff's Motion for Summary Judgment is hereby denied.

BY THE COURT:

Attest:
Feldmeyer, Cindy
Clerk/Deputy

Signed: 3/26/2021 5:02:56 PM

Robert L. Spears

HON. ROBERT L. SPEARS
Circuit Court Judge

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT
CODINGTON COUNTY COURTHOUSE
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March 23, 2021

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Ref: 14CIV17-216, Lynn R. Althoff, as Personal Representative of the Estate of Justin Althoff v. Pro-Tec Roofing, Inc.

Counselors,

The decision of the Court pertains to both Plaintiff's and Defendant's motions for summary judgment. For the reasons stated herein, both Plaintiff's and Defendant's motions are denied.

PROCEDURAL FACTS

On June 24, 2017, the Estate of Justin Althoff ("Estate" or "Plaintiff") filed a complaint against Pro-Tec Roofing, Inc. ("Pro-Tec" or "Defendant") and against Puetz Corporation ("Puetz"). On July 6-7, 2017, both Pro-Tec and Puetz moved to dismiss Plaintiff's Complaint. On August 10, 2017, these motions to dismiss were denied. On May 28, 2019, Puetz moved for summary judgment. On October 25, 2019, the Court granted dismissal regarding Plaintiff's claims against Puetz.

On October 28, 2019, Plaintiff filed its Amended Complaint. On July 24, 2020, Defendant Pro-Tec moved for summary judgment. On September 25, 2020, Plaintiff filed its response to Defendant, and also moved for its own summary judgment. On November 13, 2020, Pro-Tec filed its Reply Brief and resistance to Plaintiff's Motion. On January 22, 2021, Plaintiff filed its Reply Brief. On February 12, 2021, Defendant filed its Answer to Plaintiff's Amended Complaint. On February 17, 2021, Plaintiff filed its Supplemental Brief. A hearing for these cross-motions for summary judgment was held on February 23, 2021.

FACTS OF CASE

In 2015, Pro-Tec entered into a subcontract with the City of Watertown for the construction of the Watertown Community Center ("Project"). On April 7, 2016, Justin Althoff ("Althoff") was hired as an employee of Pro-Tec, and he was given a copy of the Pro-Tec Roofing Inc. Safety and Health Manual. On April 21, 2016, Althoff was working on the roof of the Project when a co-worker warned Althoff that he was near the edge. Shortly thereafter, and while in the course of his employment duties, Althoff fell off the roof ultimately resulting in his death.

The General Contractor's Project Superintendent was on the roof of the Project prior to the accident and observed a warning line in place. The Occupational Safety and Health Administration ("OSHA") and Pro-Tec settled on penalties of $50,000 related to various violations arising from the OSHA investigation following the April 21, 2016 incident.

Plaintiff lists several OSHA citations that Pro-Tec received before and after Althoff's death *(2009 "Serious" citation for scaffolding/ladder violations in Platte, SD; 2011 "Serious citation for exposing employees to falls of 13 feet while roofing in Aberdeen, SD; 2012 "Repeat-Serious" citation for exposing employees to falls of 14 feet while roofing in Mitchell, SD; 2016 "Serious" and "Willful" citations for numerous violations following Althoff's death, including exposing employees to fall hazards of 33 feet while doing roofing work).* Plaintiff argues that Defendant's actions (or omissions) are an "intentional tort" against Althoff; Defendant argues they do not, thus, Althoff's rights and remedies remain under workers' compensation laws.

APPLICABLE LAW

"Summary judgment is authorized if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *(McMillin v. Mueller, 2005 S.D. 41, 695 N.W.2d 217; SDCL § 15-6-56(c)).* "Summary judgment is an extreme remedy," and is "not intended as a substitute for a trial." *(Stern Oil Co., Inc. v. Brown, 2012 S.D. 56, 817 N.W.2d 395).* "All facts and favorable inferences from those facts must be viewed in a light most favorable to the nonmoving party. Summary judgment is generally not feasible in negligence cases." *(Andrushchenko v. Silchuk, 2008 S.D. 8, 744 N.W.2d 850).*

South Dakota law determines that workers' compensation laws dictate an employee's rights and remedies unless they arose from "intentional" torts.

> The rights and remedies granted to an employee subject to this title, on account of personal injury or death arising out of and in the course of employment, shall exclude all other rights and remedies of the employee, the employee's personal representatives, dependents, or next of kin, on account of such injury or death against the employer or any employee, partner, officer, or director of the employer, *except rights and remedies arising from intentional tort.*

(SDCL § 62-3-2 (emphasis added)). "The intentional tort exception to workmen's compensation is fact specific." *(Fryer v. Kranz, 2000 S.D. 125, 616 N.W.2d 102).* Regarding the necessity of this statute, it was recognized that:

> In the workers' compensation scheme, exclusivity serves two important values: (1) it maintains the balance of sacrifices between employer and employee in the substitution of no-fault liability for tort liability, and (2) it minimizes litigation, even litigation of undoubted merit. Exclusiveness imparts efficiency to the workers' compensation system. Every presumption is on the side of avoiding superimposing the complexities and uncertainties of tort litigation on the compensation process.

(McMillin v. Mueller, 2005 S.D. 41). "Even when employers act or fail to act with a conscious realization that injury is a probable result, workers' compensation is still the exclusive remedy for workers thereby injured." *Id.* The employee must "demonstrate *an actual intent* by the employer to injure or *a substantial certainty* that injury will be the inevitable outcome of employer's conduct." *Id.* Specifically, at issue here, is if there was a "substantial certainty" that injury was to occur.

Worker's compensation is the exclusive remedy for all on-the-job injuries to workers except those injuries intentionally inflicted by the employer. To establish intentional conduct, more than the knowledge and appreciation of risk is necessary. The known danger must cease to become only a foreseeable risk which an ordinary, reasonable, prudent person would avoid

(ordinary negligence) and become a substantial certainty. Substantial certainty should not be equated with substantial likelihood (i.e., probable). "More specifically, the substantial certainty standard requires that the employer had actual knowledge of the dangerous condition and that the employer still required the employee to perform." *(McMillin v. Mueller, 2005 S.D. 41; Brazones v. Prothe, 489 N.W.2d 900 (S.D. 1992); Jensen v. Sport Bowl, Inc., 469 N.W.2d 370 (S.D. 1991); VerBouwens v. Hamm Wood Products, 334 N.W.2d 874 (S.D. 1983)).*

The South Dakota Supreme Court has clarified the type of employer conduct that is *not* considered "intentional":

> Unless the employer's action is a 'conscious and deliberate intent directed to the purpose of inflicting injury,' the lone remedy is workers' compensation. Moreover, even though the employer's conduct is careless, grossly negligent, reckless or wanton and even if that employer knowingly permits a hazardous work condition to exist, knowingly orders a claimant to perform an extremely dangerous job, or willfully fails to furnish a safe workplace, those acts still fall within the domain of workers' compensation.

(McMillin v. Mueller, 2005 S.D. 41). In *McMillin*, a mill produced livestock feed by processing grains and mixing them with molasses in a large tank. The inside of the tank needed to be cleaned manually by a person, and which had been done for many years. One day, an employee was lowered into the large tank. The employee said he could not breathe, and was removed from the tank immediately. Shortly after, another employee was lowered into the tank, and then died by asphyxiation.

Several years before this event, a previous death occurred at the mill, as a result of a fall that occurred in an area other than the molasses tank. Afterward, the Defendant implemented an OSHA-approved safety plan. The Plaintiffs argued that the recent safety plan removed the recovery from the workers' compensation laws and into intentional tort law. They alleged that

since the safety plan was in effect, the Defendants knew of the probable harm of entering the tank without a breathing apparatus and deliberately put their employees at risk.

The Supreme Court disagreed, and found that "a person having trouble breathing when being lowered into an underground tank with only one exit does not necessarily mean that asphyxiation is substantially certain to occur." However, a major issue in *McMillin* was whether the Defendants had "actual knowledge" of a dangerous condition. That is, if they knew of the asphyxiation risks when entering the molasses tank.

Notwithstanding, the SD Supreme Court has examples of other scenarios that were not considered intentional torts. In *Fryer,* an employer knew that a cleaning solvent previously caused an employee to become ill, and subsequently told another employee to use it again. The Court found that the employer's supervision of employee may have been negligent, reckless, or even wanton, but there was simply no showing that he intended to injure employee. (*Fryer v. Kranz, 2000 S.D. 125).* In *Harn*, an employee was injured when a piece of lumber flew out from a sawmill and struck him. The Court held that even though the removal of the safety device made the injury probable, it did not rise to the level of a substantial certainty. *(Harn v. Continental Lumber Co., 506 N.W.2d 91 (S.D. 1993)).* In *Brazones*, several employees were killed or severely injured when they were sent into an empty petroleum tank. Using metal scrapers to clean the interior walls of the tank, it was thought a spark ignited the fumes and caused an explosion. The Court concluded that the employer was not substantially certain the employees' injuries would be the inevitable outcome of employer's conduct, much less to say the employers actually intended employees' injuries. (*Brazones, 489 N.W.2d 900 (S.D. 1992)).* In *Jensen*, a 14-year-old employee was lost his finger in a pinball accident while

performing a maintenance task which the employer knew from personal experience to be risky. The Court held that the injury was not substantially certain to occur and that the employer's conduct did not rise to the level of intentional tort. *(Jensen, 469 N.W.2d 370 (S.D. 1991))*. Lastly, in *VerBouwens*, the Court held that the employer's acts did not rise to the level of intentional tort and determined that "to establish intentional conduct, *more than the knowledge and appreciation of risk is necessary;* the known danger must cease to become only a foreseeable risk which an ordinary, reasonable, prudent person would avoid (ordinary negligence), and become a substantial certainty." *(VerBouwens, 334 N.W.2d 874 (S.D. 1983))*.

Plaintiff cites a district court case in South Dakota that *denied* summary judgment on this intentional tort issue. In *Heil v. Belle Starr Saloon & Casino, Inc.*, the employer knew of and was aware of prior sexual harassment of employees. The owners were privy to the daily activities of the harassing manager, and were personally present at the Belle Starr when the manager groped and grabbed female employees. The owners did nothing to prevent the manager's conduct. The employer never took any affirmative action to control the manager's conduct. The District Court found that the owners were personally engaged in conduct which a jury could view as sexual harassment or sexual abuse. Specifically, that a jury could reasonably conclude the owners endorsed, condoned, and encouraged the physical and sexual abuse of their employees by the manager. At no time did the owners take any affirmative action to control the manager's conduct. *(Heil v. Belle Starr Saloon & Casino, Inc., 2013 WL 943811 (D.S.D. 2013))*.

Regarding summary judgment, the District Court held that, viewing the evidence in the light most favorable to Ms. Heil for summary judgment purposes, a jury could find the course

and pattern of conduct at the Belle Starr was substantially certain to cause an assault or IIED of female employees, including Ms. Heil. It was ultimately a question of fact for the jury to determine whether the evidence satisfies the substantial certainty standard from the exclusivity provision of SDCL § 62-3-2.

Additionally, Plaintiff cites a recent Oklahoma case, which has similar facts to this case. In *Wells v. Oklahoma Roofing & Sheet Metal, L.L.C.*, an employee died when he fell during a roofing activity. Prior to this event, the defendant was cited by OSHA for a violation related to the duty to have a sufficient fall protection system. The court held "that the willful, deliberate, specific intent of the employer to cause injury, and those injuries that an employer knows are substantially certain to occur, are both intentional torts that are not within the scheme of the workers' compensation system or its jurisdiction." *(Wells v. Oklahoma Roofing & Sheet Metal, L.L.C., 2019 OK 45, 457 P.3d 1020).*

ANALYSIS

Plaintiff states that there is not a reported South Dakota case where the employer intentionally and repeatedly violated their own safety program and federal safety statutes. In *McMillin*, the Court did not categorize the employer's liability by what injuries they should have known were possible or even probable but, instead looked to their "actual knowledge of a dangerous condition, the substantial certainty of an injury to occur, and their requirement of an employee to still perform." At most, the employer's actions "constituted negligence for not following the safety plan as approved by OSHA." The Court noted that while there were OSHA violations when another employee died by *falling* several years earlier, the second employee's death was a result of *asphyxiation*. Notably, the Court was careful in specifying that the

asphyxiation death was unrelated to the prior fall death and its subsequent safety procedures supported by OSHA. Unlike *McMillin*, where the tank asphyxiation death was unrelated from the previous falling death, here Pro-Tec's safety procedures and their repeated violations were directly related to fall prevention and safety. Yet, although Pro-Tec had knowledge of a probable risk of injury, that alone does not come within the intentional tort exception to workers' compensation coverage. (*See McMillin*; *Brazones*).

It has been recognized that the vast majority of the courts in the country that have interpreted this type of statute determined that "intent pointedly means intent." *(See McMillin, Harn).* While the Oklahoma court in *Wells* provides a convincing argument on expanding what constitutes an intentional tort, the South Dakota Supreme Court has repeatedly ruled on many dangerous instances that are below the substantial certainty bar. Even when an employer "knowingly permits a hazardous work condition to exist, knowingly orders a claimant to perform an extremely dangerous job, or willfully fails to furnish a safe workplace," that is not an intentional tort. The employer's acts or omissions may have been substantially probable or likely of an employee's injuries or death, but that still is not enough.

Plaintiff argues that the facts demonstrate Defendant's course and pattern of conduct of knowingly and repeatedly violating their own safety program and federal safety statutes for years. In *Heil*, the employer never took any affirmative action to control the manager's conduct. The District Court in *Heil* held that a jury could find that the employer's course and pattern of conduct was substantially certain to cause an assault or IIED on its employees. Therefore, it was ultimately a question of fact for the jury to determine whether the evidence satisfies the substantial certainty standard from the exclusivity provision of SDCL § 62-3-2.

Heil is clearly factually distinguishable, even more so than *McMillin*, and it is not binding authority upon this Court. However, it provides a persuasive interpretation on an employer's course and pattern of conduct. Here, after several OSHA violations, Defendant took *some* action (including warning Althoff when he was close to the edge). Yet, after another OSHA investigation after Althoff's death, Pro-Tec's actions still violated its known safety rules (such as its warning line not properly in place on the roof or not furnishing a harness). There were many OSHA violations against the defendant before Althoff's death, providing evidence of defendant's conduct and actions leading up to his death. Pro-Tec's own rules could have prevented Althoff's lethal fall of 33 feet, but its well-documented pattern of disregard demonstrates an intent to not follow those rules. However, the law is clear—there must be substantial certainty. There may have been a substantial *likelihood* that an employee could fall to his death, when Althoff was close to the roof's edge and did not wear a safety harness. A contractor superintendent observed a warning line in place, even if it was not fully or completely in place. A substantial *likelihood* is not substantial *certainty*.

However, while Plaintiff here cannot prove that it was a substantial certainty that Althoff would fall off the roof at a job site that day, Pro-Tec's pattern of past violations is well-documented and applicable towards the exact lethal result they were meant to prevent—injury or death by falling. The "intentional tort exception to workmen's compensation is fact specific." *(See McMillin; Fryer; Horn)*. Here, starting in 2009, OSHA issued a citation to Pro-Tec for two "Serious" violations in Platte, South Dakota (platforms were not fully planked; scaffolding ladder issues). Less than two years later, OSHA issued a citation to Pro-Tec for a "Serious" violation in Aberdeen, South Dakota (roofing activity with unprotected sides).

Despite an OSHA settlement agreement with Pro-Tec for implementing its own fall protection policy, only one year later did OSHA *again* issued citations for a "Repeat—Serious" violation in Mitchell, South Dakota (regarding roofing activities and safety). In sum, OSHA issued three serious violations in three separate projects in three separate locations in South Dakota—two of them directly related to roofing activities and safety—*all* within a three-year period.

The facts show that on April 17, 2016, Pro-Tec once again violated its own implemented safety rules in its attempts to comply with OSHA. The facts show a hazardous work condition and an employee performing an extremely dangerous job. The facts evince an employer that willfully failed to furnish a safe workplace for its employees, when Pro-Tec neglected their own safety rules.

The mission of OSHA is to "ensure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance." (*https://www.osha.gov/aboutosha*). Meanwhile, the purpose of South Dakota's intentional tort exception was to account for the conscious and deliberate intent directed to the purpose of inflicting injury upon an employee. As the Court in *McMillin* stated in terms of the workers' compensation scheme, exclusivity serves to maintain the balance of sacrifices between employer and employee in the substitution of no-fault liability for tort liability, and to minimize litigation, even litigation of undoubted merit. "Exclusiveness imparts efficiency to the workers' compensation system."

In this balance, *McMillin* demonstrates that interpretation of SDCL § 63-32-2 considers OSHA's role in workplace safety. Specifically, it considers an employer's rules, in compliance with OSHA, directly related to prevent injury. However, despite all the OSHA investigations,

fines, and settlements, it is clear there were not safe working conditions at Pro-Tec's job sites. OSHA's actions here were ineffective and it failed to live up to its mission in enforcing safe working conditions at Pro-Tec. Furthermore, it is difficult to believe that the South Dakota Legislature intended to provide armor to an employer with the practical effect of complete tort immunity, when that very employer intentionally and repeatedly failed to adequately train its employees and provide appropriate safety equipment in dangerous construction activities such as roofing.

CONCLUSION

This Court previously denied Defendant Pro-Tec's Motion to Dismiss, and held that discovery was necessary to allow Plaintiff an opportunity to establish facts that invoke the intentional tort exception. This discovery demonstrates a genuine issue of material fact exists, and a jury could find Pro-Tec's actions (or omissions) at its construction job sites were substantially certain to cause an injury or death of an employee within the intentional tort exception.

Therefore, both Defendant's and Plaintiff's Motions for Summary Judgment are denied. Mr. McCahren shall prepare an Order consistent with this Memorandum.

Robert L. Spears
Circuit Court Judge

STATE OF SOUTH DAKOTA) SS COUNTY OF CODINGTON)		IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT

* * *

LYNN ALTHOFF, as Personal Representative of the Estate of Justin Althoff, Plaintiff, vs. PRO-TEC ROOFING, INC., Defendant.	)	14CIV17-000216 NOTICE OF ENTRY OF ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

* * *

TO: DEFENDANT PRO-TEC ROOFING, INC. and their attorney RICHARD L. TRAVIS

NOTICE IS HEREBY GIVEN that the attached ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT in the above-captioned action was signed by the Honorable Robert L. Spears on the 26th day of March, 2021 and filed on the 26th day of March, 2021. A copy of said Order is attached hereto as Exhibit A and incorporated herein by reference.

DATED this 4th day of May, 2021.

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/s/ Lee C. "Kit" McCahren

BY: _____
LEE C. "KIT" MCCAHREN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of May, 2021, he filed and served the foregoing regarding the above-captioned matter by and through the Odyssey File and Serve System upon:

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BY: */s/ Lee C. "Kit" McCahren*
LEE C. "KIT" MCCAHREN
Attorney for Plaintiff

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
SS
COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

* * *

LYNN ALTHOFF, as Personal Representative of the Estate of Justin Althoff, Plaintiff, vs. PRO-TEC ROOFING, INC., Defendant.	)	14CIV17-000216 ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

* * *

Hearing having been held in the above-captioned matter on the 23rd day of February, 2021, and based upon the pleadings on file and the arguments of counsel, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is hereby denied and Plaintiff's Motion for Summary Judgment is hereby denied.

BY THE COURT:

Attest:
Feldmeyer, Cindy
Clerk/Deputy

Signed: 3/26/2021 5:02:56 PM

Robert L. Spears
HON. ROBERT L. SPEARS
Circuit Court Judge

EXHIBIT
tabbies
A

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	SS	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT
LYNN ALTHOFF, as Personal Representative of the Estate of Justin Althoff,	)	14CIV17-000216
Plaintiff,	)	
vs.	)	PLAINTIFF'S RESUBMITTED STATEMENT OF UNDISPUTED MATERIAL FACTS
PRO-TEC ROOFING, INC.	)	
Defendant.	)	

Plaintiff hereby submits this *Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment:*

1. On September 10, 2009, OSHA issued citations to Defendant Pro-Tec Roofing, Inc. as follows:

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 313701823
Inspection Dates: 08/25/2009 08/25/2009
Issuance Date: 09/10/2009

Citation and Notification of Penalty

Company Name: Pro-Tec Roofing & Sheet Metal
Inspection Site: 609 East Seventh Street, Platte, SD 57369

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident.

Citation 1 Item 1A Type of Violation: **Serious**

29 CFR 1926.451(b)(1): Each platform on all working levels of scaffolds was not fully planked or decked between the front uprights and the guardrail supports:

(a) For the employee installing metal flashing from a welded metal frame scaffold using one 20-inch wide plank, located at 609 East Seventh Street, Platte, South Dakota.

Abatement Note: Abatement certification is required for this item (see enclosed "Sample Abatement Certification Letter").

[redacted]

Citation 1 Item 1B Type of Violation: **Serious**

29 CFR 1926.451(e)(1): 2 feet above or below a point-of-access, portable ladders, hook-on ladders, attachable ladders, stair towers, or similar surfaces were not used:

(a) For the employee installing flashing from a welded metal frame scaffold while climbing the end frames, located at 609 East Seventh Street, Platte, South Dakota.

Abatement Note: Abatement certification is required for this item (see enclosed "Sample Abatement Certification Letter").

[redacted]

(Plaintiff's Request for Admissions to Defendant No. 1, served 03/18/20 deemed admitted; EXHIBIT F – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

2. On January 11, 2011, OSHA issued a citation to Defendant Pro-Tec Roofing, Inc. as follows:

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 315002139
Inspection Dates: 12/14/2010 - 12/14/2010
Issuance Date: 01/11/2011

Citation and Notification of Penalty

Company Name: Pro-Tech Roofing
Inspection Site: 2201 Sixth Avenue SE, Aberdeen, SD 57401

Citation 1 Item 1 Type of Violation: Serious

29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels, was not protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, warning line system and personal fall arrest system, or warning line system and safety monitoring system; or, on roofs 50 feet (15.25 m) or less in width, the use of a safety monitoring system alone:

(a) For the employees exposed to falls of approximately 13 feet while removing roofing materials at 2201 Sixth Avenue SE, Aberdeen, SD.

Date By Which Violation Must be Abated: Corrected During Inspection
Proposed Penalty: $ 2550.00

(Plaintiff's Request for Admissions to Defendant No. 2, served 03/18/20 deemed admitted; EXHIBIT F – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

3. The 2011 Aberdeen citation was resolved with an Informal Settlement Agreement as follows: The Informal Settlement Agreement reflected a penalty reduction to $1,785.00. The employer agreed to implement a safety and health program to comply with OSHA's "Safety and Health Management Guidelines". The company submitted a Pro-Tec Roofing Fall Protection Policy. The policy outlined the use of a warning line system, safety monitor system, covers, protection from falling objects and training. The training segment listed that the program was to be provided to each employee who might be exposed to hazards and that employees need to recognize the hazards. The document indicates the employer shall assure that each employee has been trained by a competent person in the correct way to set up and maintain fall protection

equipment, the use of a warning line system and safety monitor system, the role of each employee, the use of equipment in these areas and storage of equipment, and the responsibility of everyone. (Complaint ¶3, dated 10/28/2019) Defendant has not filed a responsive pleading denying this allegation.

4. On July 2, 2012, OSHA issued a citation to Defendant Pro-Tec Roofing, Inc. as follows:

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 441233
Inspection Date(s): 05/22/2012 - 05/22/2012
Issuance Date: 07/02/2012

Citation and Notification of Penalty

Company Name: Pro-Tec Roofing & Sheetmetal
Inspection Site: 1314 West Havens Avenue, Mitchell, SD 57301

Citation 1 Item 1 Type of Violation: **Repeat - Serious**

29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels, was not protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, warning line system and personal fall arrest system, or warning line system and safety monitoring system; or, on roofs 50 feet (15.25 m) or less in width, the use of a safety monitoring system alone:

(a) On or about May 22, 2012, for the employees installing roofing materials on a flat roof approximately 15 feet wide and 25 feet long and exposed to a potential fall of approximately 14 feet, located at 1314 West Havens Avenue in Mitchell, South Dakota.

Note: This company was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard which was contained in OSHA Inspection Number 315002139, Citation 1, Item 1, and was affirmed as a final order on January 25, 2011, with respect to a workplace located at 2201 Sixth Avenue SE in Aberdeen, South Dakota.

Date by which Violation must be Abated: Corrected During Inspection
Proposed Penalty: $4000.00

(Plaintiff's Request for Admissions to Defendant No. 3, served 03/18/20 deemed admitted; EXHIBIT F – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

5. In or about May of 2015, Pro-Tec Roofing, Inc. entered into a subcontract for building construction with the City of Watertown for the Watertown Community Center. (Plaintiff's Request for Admissions to Defendant No. 4, served 03/18/20 deemed admitted).

6. Pro-Tec Roofing, Inc. was contractually obligated and agreed to establish a safety program implementing safety measures, policies, and standards conforming to those required or recommended by governmental and quasi-governmental authorities at the Watertown Community Center Project. (Plaintiff's Request for Admissions to Defendant No. 5, served 03/18/20 deemed admitted).

7. The subcontract issued by the City of Watertown mandated to Pro-Tec Roofing, Inc., "[t]his is to advise you that all labor, materials, tools, and equipment used in fulfillment of the above-named project will fully comply with the Occupational Safety and Health Act of 1970 and all other current federal, state, and local regulations" at the Watertown Community Center Project. (Plaintiff's Request for Admissions to Defendant No. 7, served 03/18/20 deemed admitted).

8. On or about April 7, 2016, Pro-Tec Roofing, Inc. hired Justin Althoff, and about the same point in time hired Jonathan Hines, to work at the Watertown Community Center Project. (Plaintiff's Request for Admissions to Defendant No. 8, served 03/18/20 deemed admitted).

9. At the time they were hired, Pro-Tec Roofing, Inc. did not provide Justin Althoff or Jonathan Hines any required formal safety training to employees exposed to fall hazards as required by OSHA and instead only provided each with a copy of the Pro-Tec Roofing, Inc. Safety and Health Manual. (Plaintiff's Request for Admissions to Defendant No. 9, served 03/18/20 deemed admitted).

10. Pro-Tec also enacted safe work rules by at least 2011 which mandated in pertinent part the following:

(1) You must follow all OSHA, State, Federal, and Pro-Tec Roofing, Inc. standards at all times.

(22) Be sure to place barricades and safety signs floor openings, elevator pit openings, roof openings or any other area that may cause injury.
(23) Use safety harness when close to the hazard of falling

Pro-Tec Roofing, Inc.'s Safety and Health Manual mandated:

Safety and Health Policy

It is the responsibility of the corporation officers and foremen to see that the policies of this corporation are followed and that we meet all OSHA and local safety standards (at the Watertown Community Center Project).

(Plaintiff's Request for Admissions to Defendant No. 10, served 03/18/20 deemed admitted;

EXHIBIT D – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

11. Althoff was provided with Pro-Tec Roofing, Inc.'s Safety and Health Manual which mandated in part as follows:

ROOFING PERSONNEL

Personal Protective Equipment

7. Use lifelines, safety harnesses or lanyards when you are working higher than 6 feet off the ground.

FALL PROTECTION PROGRAM

Purpose
The purpose of this fall protection program is to establish guidelines to protect all employees engaged in outdoor or indoor work activities that expose them to potential falls from elevations.

This fall protection program includes all institutional buildings and institutional staff and inmates. In particular those staff/inmates engaged in work activities, which exposes them to falls from heights of 6 feet or more. This Fall Protection Program has been developed to prevent the occurrence of falls from elevations of 6 feet or hither. This goal will be accomplished through effective education, engineering and administrative controls, use of fall protection systems, and enforcement of the program. This fall protection program will be continually improved upon to prevent all falls from occurring.

OSHA/COMM Guidelines
1) Employers must determine if walking/working surfaces meet certain requirements. **(29 CFR 1926.501(a)(2))**

Has employer determined if the walking/working surfaces on which employees are working have the strength and structural integrity to support employees safely?

Verify that employees are allowed to work **only** on those surfaces that have the requisite strength and structural integrity.

2) Employees on a walking/working surface must be protected from falling under certain circumstances. **(29 CFR 1926.501(b)(1))**

Verify that each employee on a walking/working surface (horizontal and vertical) with an unprotected side or edge that is 6 ft. or more above a lower level is protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

3) Employees who are constructing leading edges or working nearby must be protected from falling. **(29 CFR 1926.501(b)(2)**

Verify that each employee who is constructing a leading edge that is 6 ft. or more above lower levels is protected from failing by the use of guardrail systems, safety net systems, or personal fall arrest systems 100% of the time.

ALSO: When an employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer must develop and implement a fall protection plan that meets the requirements of 29 CFR 1926.502(k). However, there is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above listed fall protection systems; accordingly, the burden of proof is on the employer to establish that it is appropriate to implement the fall protection plan only.

Verify that each employee on a walking/working surface 6 ft. or more above a lower level where leading edges are under construction but who is not engaged in the leading edge work, is protected from falling by a guardrail system, safety net system, or personal fall arrest system.

4) Employees in a hoist area must be protected from falling. **(29 CFR 1926.501(b)(3))**

8) Employees engaged in roofing activities on low slope roofs must be protected from falling. **(29 CFR 1926.501(b)(10))**

Except as provided otherwise in 29 CFR 1926.501(b), verify that each employee engaged in roofing activities on low sloped roofs, with unprotected sides and edges 6 ft. or more above lower levels is protected from falling, by any of the following:

i) guardrail systems; safety net systems; personal fall arrest systems;
ii) a combination of warning line system and guardrail system;
iii) a combination of a warning line system and safety net system;
iv) a combination of a warning line system and personal fall arrest system;

v) a combination of a warning line system and safety monitoring system; or
vi) a safety monitoring system alone (on roofs 50 ft. or less in width only).

15) Employees working on, at, above, or near wall openings must be protected from falling. **(29 CFR 1926.501(b)(13)**

If there are wall openings (including those with chutes attached) where the outside bottom edge of the wall opening is 6 ft. or more above lower levels and the inside bottom edge of the wall opening is less than 39 inches above the walking/working surface then verify that each employee working on, at, above, or near such openings is protected from falling by any of the following:

i) guardrail systems;
ii) safety net systems; or
iii) personal fall arrest systems.

3) Personal fall arrest systems.

- Anchor points (rated at 5,000 pounds)
- Full body harness
- Restraint line or lanyard
- Shock absorbing lanyard
- Retractable lanyard
- Rope grabs
- Connectors (self-locking snaphooks)

Personal Fall Protection Systems

All employees on any project that will be required to wear a personal fall arrest or restraint system will follow these guidelines:

The employer or fall protection supplier will performing training as to proper inspection procedures, proper wearing procedures, etc. as deemed by competent person.

1) A full body harness will be used at **all** times.
2) **All personal fall arrest systems will be inspected before each use by the employee.** Any deteriorated, bent, damaged, impacted and/or harness showing excessive wear will be removed from service.
3) Connectors will be inspected to ensure they are drop forged, pressed, or formed steel or are made of equivalent materials **and** that they have a corrosion resistant finish as well as that all surfaces and edges are smooth to prevent damage to interfacing parts of the system.
4) Verify that D rings and snap hooks have a minimum tensile strength of 5,000 lbs and that the D rings and snap hooks are proof tested to a minimum tensile load of 3,600 lbs without cracking, breaking, or taking permanent deformation.
5) Only shock absorbing lanyards or retractable lanyards are to be used so as to keep impact forces at a minimum on the body (fall arrest systems).
6) Only nylon rope or nylon straps with locking snaphooks are to be used for restraints.
7) All lanyards will have self-locking snaphooks.
8) Verify that unintentional disengagement of snap hooks is prevented by either of the following means:
   a) Snap hooks are a compatible size for the member to which they are connected.
   b) Locking type snap hooks are used.

Effective January 1, 1998, only locking type snap hooks may be used.

Verify that unless the snap hook is a locking type and is designed for the following connections, snap hooks are not engaged in the following manners:

i) directly to webbing, rope, or wire rope;
ii) to each other;
iii) to a D ring to which another snap hook or other connector is attached; to a horizontal lifeline;
iv) or to any object that is incompatibly shaped or dimensioned in relation to the snap hook such that unintentional disengagement could occur by the connected object being able to depress the snap hook keeper and release itself.

The maximum free fall distance is not to exceed 6 feet. Consideration must be given to the total fall distance. The following factors can affect total fall distance:

1. Length of connecting means (i.e., lanyard length, use of carabiners, snaphooks, etc.).
2. Position and height of anchorage relative to work platform/area (always keep above head whenever possible).
3. Position of attachment and D-ring slide on the full body harness.
4. Deployment of shock absorber (max 42").
5. Movement in lifeline.
6. Initial position of worker before free fall occurs (i.e., sitting, standing, etc.).

Warning Line System

All greater than 50 feet wide flat roof (i.e., roof with less than 4/12 slope) work which is performed 6 feet or further back from the edge of the roof can be completed by installing a Warning Line and using a safety monitor. If the roof is flat and less than 50 feet wide, a competent person safety monitor may be used. Warning Lines will consist of the following:

1. Will be erected 6 feet from the edge of the roof.
2. Be constructed of stationary posts made of wood or metal.
3. Wire or nylon rope and "Caution" tape will be strung from post to post and must be able to withstand 16 pounds of force.
4. The entire perimeter of the roof where work is being performed will be guarded by the warning line.

If an employee must access an area within 6 feet of the roof for reasons *other than* exiting the roof via a ladder or fixed industrial ladder, another employee must monitor that individual and warn him/her of any dangers. If another employee is not available to act as a safety monitor, then the employee must don a full body harness and attach a fall restraint lanyard to an anchor point to prevent reaching the edge of the roof.

Inspection of Fall Protection Systems;

The following criteria will be utilized to maintain all equipment in good working condition. Please note that there are inspection forms for the various equipment listed below in the attached addendum 2.

Full Body Harnesses

1) Inspect before each use.
   - Closely examine all of the nylon webbing to ensure there are no burn

marks, which could weaken the material.

- Verify there are no torn, frayed, broken fibers, pulled stitches, or frayed edges anywhere on the harness.
- Examine D-ring for excessive wear, pits, deterioration, or cracks.
- Verify that buckles are not deformed, cracked, and will operate correctly.
- Check to see that all grommets (if present) are secure and not deformed from abuse or a fall.
- Harness should never have additional punched holes.
- All rivets should be right, not deformed.
- Check tongue/straps for excessive wear from repeated buckling.

2) Annual inspection of all harnesses will be completed by a *competent person,* documentation will be maintained on file (see Addendum 2).

Training

Employers must provide a fall prevention training program for each employee who might be exposed to fall hazards. The training program must include recognition of the hazards of falling and procedures to follow to minimize these hazards. Training materials must be reviewed to verify that each employee has been trained, in their native language, as necessary, by a competent person qualified in the following areas:

a) the nature of fall hazards in the work area;
b) the correct procedures for erecting, maintaining, disassembling, and inspecting the fall protection systems to be used;
c) the use and operation of guardrail systems, personal fall arrest systems, safety net systems, warning line systems, safety monitoring systems, CAZS, and other protection to be used;
d) the role of each employee in the safety monitoring system when this system is used;
e) the limitations on the use of mechanical equipment during the performance of roofing work on low sloped roofs;
f) the correct procedures for the handling and storage of equipment and materials and the erection of overhead protection;
g) the role of employees in fall protection plans;
h) the requirements contained in 29 CFR 1926 Subpart M.
i) understanding and following all components of this fall protection program and identifying the enforceable Department of Labor/OSHA standards and ANSI standards that pertain to fall prevention.

Employers must maintain a written certification record for employee training. The record must contain the following information:

a) the name or other identity of the employee trained
b) the date(s) of the training; and
c) the signature of the person who conducted the training or the signature of the employer.

FALL PROTECTION CONSTRUCTION SAFETY GUIDELINES

A. HOLES AND OPENINGS

Holes are defined as a gap or void 2 inches or more in its least dimension, in a floor, roof or other walking working surfaces. Holes, including skylights, 6 feet or more above a lower level should be protected by use of personal fall arrest systems, covers, guardrails or skylight nets around each hole.

Covers should be strong enough to withstand twice the weight of a person, materials and equipment that may be on the cover at any time. Roofing materials should never be used as cover for holes.
All covers should be secured in place by either nails or screws. Color coding and marking covers by painting "hole" or "cover" should be completed to indicate a roof opening is present.

B. ROOF PERIMETER AND WORKING SURFACE FALL PROTECTION

Each employee on a walking/working surface with unprotected sides or edges and over 6 feet from a lower level shall be protected by guardrail systems, safety-net systems, personal fall arrest systems or warning lines. In addition, safety monitors may be used in certain circumstances.

Guardrail Systems

Top edge of guardrail should be 42 inches plus or minus 3 inches.
Mid-rails, screens, mesh or intermediate structural members should be installed between the top edge of the guardrail system and walking/working surface when there is no wall or parapet wall at least 21 inches high. If vertical structures are used, such as balusters, they should be spaced no more than 19 inches apart.
Guardrail systems shall be capable of withstanding at least 200 pounds applied within 2 inches of the top edge in any outward or downward direction at any point along the top edge.
Guardrails used on ramps and runways shall be erected along all unprotected sides and edges.

Safety Nets

Safety net systems use should comply with all provisions of CFR 1926.502(c).
Safety nets should be inspected prior to each use and installed by competent persons.
Safety nets, if used, should be installed as close as possible under the working surface, on which employees are working. In no case should the safety nets be more than 30 feet below such level.
Safety nets shall be installed with sufficient clearance under them to prevent contact with the surface or structures below when subjected to drop test specification as outlined in CFR 1926.502(c)(4)(i).

Personal Fall Arrest Systems (PFAS)

A system to arrest a falling employee from a working level should consist of an anchorage, connectors and a body harness. It may also include a lanyard, deceleration device, lifeline or suitable combination of the above.

Safety Monitoring Systems

A competent employee trained to recognize and warn employees of potential fall hazards may be the only one allowed to act as a safety monitor.
The safety monitor shall be on the same working level and in visual sight of roofers and close enough to verbally warn employees approaching potential fall hazards or acting in an unsafe manner.
The safety monitor shall have no other duties or responsibilities while acting in this capacity
Mechanical equipment shall not be used or stored in areas where safety monitoring is being provided.

(Plaintiff's Request for Admissions to Defendant No. 11, served 03/18/20 deemed admitted; EXHIBIT E – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

12. Every day of Althoff's employment, including April 21, 2016, Defendant, despite all prior OSHA violations, their clear knowledge of OSHA laws, contractual requirements, and internal Pro-Tec rules and fall protection program, which they had previously promised OSHA in 2012 that they would follow, failed to dedicate a safety monitor and failed to have a warning line in place there was no dedicated safety monitor or warning line and Pro-Tec employees deliberately failed to provide Althoff with a safety harness to stop his fall at six feet rather than guaranteeing his body would slam into the ground 33 feet below and kill him when he ricocheted off the ground. (Plaintiff's Request for Admissions to Defendant No. 10-11, served 03/18/20 deemed admitted; EXHIBIT D – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

13. The unharnessed 33 foot fall to the earth which would have been stopped at no more than six feet had Pro-Tec employees provided Althoff with a safety harness which their rules required on April 21, 2016 caused Justin Althoff conscious pain, suffering, worry, terror, and fear of impending doom, and ultimately death. (*Id.;* Complaint ¶13, dated 10/28/2019). Defendant has not filed a responsive pleading denying this allegation.

14. On April 21, 2016, OSHA commenced an investigation which included recorded interviews with Pro-Tec employees. (Plaintiff's Request for Admissions to Defendant No. 12, served 03/18/20 deemed admitted).

15. An OSHA representative conducted initial interviews of Pro-Tec Roofing, Inc. employees on April 21, 2016. Portions of Bob Koehn's initial interview is as follows:

OSHA: Eleven? Ok. Now from a company perspective, a safety health perspective, do you guys have a safety health program?

KOEHN: Well yes and no. You know that's where it's not good because it's not well- documented. We've done OSHA training. There's about six of us that have a ten-hour OSHA and actually eight or nine of us that did a four-hour OSHA actually about a month ago.

OSHA: Right. How many years in the roofing industry?

KOEHN: Uh – 32.

OSHA: And obviously you've heard of OSHA.

KOEHN: Yes.

OSHA: You've heard that we have standards related to construction.

KOEHN: Yes.

OSHA: You know that we have standards associated with fall protection and construction.

KOEHN: Correct.

OSHA: What kind of training have you had specific to construction related hazards involving the roofing industry?

KOEHN: Well like I said I've done the 10-hour OSHA . . .

OSHA: But wait a minute, how long ago was that?

KOEHN: Uh the 10-hour was actually in 2010.

OSHA: Ok. Then you did a four-hour . . .

KOEHN: Did a four-hour one here about a month ago.

OSHA: What did that cover?

KOEHN: Fall protection and scaffolding, stuff like that.

OSHA: Ok. So it was mostly fall surround . . .

KOEHN: Use of harnesses . . .

OSHA: So it was a fall protection . . .

KOEHN: Fall protection deal, yes.

OSHA: So is it um, from your perspective, the two new guys specifically, were they provided fall protection training?

KOEHN: No.

OSHA: Did you know that they had to be provided fall protection training as a part of what they're doing on a roof with possible perimeter exposures regarding falls?

KOEHN: Not specifically. No.

OSHA: But you told me you had the 10-hour . . . .

KOEHN: I did the 10-hour, yes.

OSHA: And you had the specific training here four weeks ago. Did they cover the OSHA standard at all? Do you remember?

KOEHN: Well we went through, he went through some numbers in the book. I can't remember off-hand what the numbers are.

OSHA: Ok.

KOEHN: But I guess I don't remember that every new hire, I don't remember him saying had to specifically have that.

OSHA: Ok. Um, they do.

KOEHN: Ok.

OSHA: Is there anything that would deter your people from walking over to the edge and possibly exposing themselves?

KOEHN: Well there's the common-sense factor. They're following everybody else to where the work is.

OSHA: Ok. What's to say that somebody couldn't?

KOEHN: Nothing says they couldn't.

KOEHN: Yeah. A refresher.

OSHA: Refresher? That was at the office?

KOEHN: Right. He came there _____.

OSHA: Ok. Did he talk about warning line systems and how they function and work?

KOEHN: Not specifically. Them warning lines (wind) working with harnesses.

OSHA: Have you ever used harnesses?

KOEHN: Yep.

OSHA: On a roof like this, if you're not using warning lines, and you knew people were outside of the warning line, could you implement a personal fall risk system on this type of roof.

KOEHN: Yeah we have one of those _____ carts.

OSHA: Oh you do? Have you ever thought about using that just to insure that if somebody does work outside that line, to be protected?

KOEHN: Not on a daily basis.

OSHA: How many carts to you have?

KOEHN: One.

OSHA: Ok.

KOEHN: When we do use it, if we do we'd have three people.

OSHA: Three people can be tied to it?

KOEHN: (wind) working outside the perimeter.

OSHA: Alright. So any time on a roof like this on any given day there can be multiple people as a part of the implementation of your roof system outside the line working?

KOEHN: Could be.

OSHA: Right. When was the last time you had multiple people outside your warning line system installing your roof material? In the last two weeks I suppose you had at least one day.

KOEHN: Well it's gonna happen every time you start at the end and you end. You're gonna have it. This, when we did down here (wind noise). _____ your danger area.

OSHA: When you use the system (wind noise) outside the warning line, do you normally have someone standing inside here watching or are they allowed to work?

KOEHN: No. (wind noise)

OSHA: When we're talking about all these different standards, normally, a roofing contractor, there's a pretty narrow, when it comes to OSHA standards that you have to deal with.

KOEHN: Everybody's got harnesses.

(Plaintiff's Request for Admissions to Defendant No. 12-13, served 03/18/20 deemed admitted).

16. On May 7, 2016, OSHA conducted final interviews with Pro-Tec employees.

Portions of Bob Koehn's final interview is as follows:

OSHA: So you guys provided me with your safety and health program.

KOEHN: Uh huh.

OSHA: Do you guys ever use that? That program?

KOEHN: Not on a day to day basis. You know, we talk to people and, like I said, we do a pre-job deal when we're going to the job with setup and we let everybody know what's going on and for us most of the time it's barriers and a monitor.

OSHA: Right.

KOEHN: It works out the best for what we do.

OSHA: Sure.

KOEHN: There's times where you get, where there's a situation, but we have one of those big yellow carts that off to and be harnessed to.

OSHA: Do you use that often?

KOEHN: Ahh, not a lot. I mean, if we're in that situation we do.

OSHA: When you guys bring new people on, what's the standard? What's the protocol? How do you handle that as far as training, providing them training?

KOEHN: Basically it's on the job. Like I tell it's easier to show ya, than to try to tell ya.

KOEHN: Not prior to going on the job. Once they see, 'cause once they see, cause you can tell em what a barrier is and if they don't know what a barrier, you can tell them basically it's a traffic cone. You know, until you see it, it's just another one of them deals, well vision, ok this is what it is.

OSHA: Right.

KOEHN: Cause it's the first thing off the boom truck is the barrier basket.

OSHA: Did you cover (dead air- a second or two) as far as the warning line system and monitors and how they work?

KOEHN: Not specifically.

OSHA: Don't you think it's important to discuss the limitations and how it's used and if you go outside the warning line that you then have to integrate or utilize - since you've chosen this method, system.

KOEHN: Right.

OSHA: The monitor. And what they do, how they perform their job, stuff like that.

KOEHN: Yeah, probably should do it in more detail.

OSHA: Do you, have you ever talked with your guys as far as what the role of a monitor is?

KOEHN: Yes. We've had that and most of my guys have had the OSHA training . . .

OSHA: Right. That was in March, wasn't it?
KOEHN: And it's been over, they go over it with that too.

OSHA: Now, in that March training did you guys cover this stuff?

KOEHN: They didn't do big - basically we're talking more so on harnesses.

OSHA: Oh ok.

KOEHN: Fall protection with harnesses is what that covered for the most part.

OSHA: Right.

OSHA: But then by saying that, on that same token, you can't really consider Justin or Jon a monitor, can you? They have no clue.

KOEHN: Well no, but they're not out there. They're typically not out there either because I have my regular guys do it until they learn that.

OSHA: That's not what I'm told, Bob. (Chuckling) Based on and talking to every one of your guys, everybody, at any time, can go outside that warning line without any sort of monitor at all and they can work out there. There was no control. None of that. That's strictly from them.

KOEHN: Well that's not entirely true.

OSHA: _____ were outside the warning line working and nobody is watching them. You had another guy, I forgot his name, it's in my notes. On the other end of the roof that was working by himself, not being monitored. There's absolutely no control. That's what I'm saying.

KOEHN: Ok.

OSHA: And if you choose this system and you know that a monitor has to go or works, is integrated into the process as far as using this safety system, and you don't have people that area designated, all hell can break loose.

KOEHN: Um hum.

OSHA: And that's essentially what happened. In my opinion. That's strictly my opinion.

OSHA: Here's the deal. You were up on the roof, Aaron's up on the roof. Both have supervisory responsibilities. You've got guys working outside the warning line systems, and obviously you've were all (skips) who was working over there who really wasn't a designated monitor. He did have the ability to tell him to watch out. He did. And then he went back to work.

KOEHN: Right.

OSHA: Here's the deal Bob. You guys knew, I'm not putting it solely on you, it's a shared responsibility by the company.

KOEHN: Yep.

OSHA: You and Aaron and whoever else, Kyle. He's right below Aaron.

KOEHN: Yep.

OSHA: You guys knew that when people work outside the warning line ... Because you chose this system ...

KOEHN: Yep.

OSHA: .... that you have to utilize a monitor.

KOEHN: Right.

OSHA: What happened? (dead air for a few seconds)

KOEHN: _____ he went and picked up two or three more pieces of insulation. And he turned around and Justin was gone.

OSHA: Right. Um .... the whole monitor deal is ... give me an idea, give me your thoughts, your feelings on the system. Do you have a problem, or do you have issues with having designated monitor, or did you have, I should say, did you have issues with having somebody that's designated as a monitor and really didn't perform a whole lot of work because obviously they're not able to do their job roofing that week and stand there?

KOEHN: No I don't have an issue with that.

OSHA: Ok. Ok. What if you ....

KOEHN: Part of the problem is the guy that's the monitor gets bored out of his mind.

OSHA: Right.

KOEHN: Because also when you're inside the barriers, if nobody's outside the barriers, they can be doing something.

OSHA: Ok. So looking at what happened, to wrap this up, what do you think could have been done differently that may have prevented this tragic event?

KOEHN: Well the thing that would be the perfect scenario is the new guy doesn't get within 20 feet of any edge. In the perfect scenario.

OSHA: Do you have somebody up there that's designated to insure that the warning line system is kept in place, it's being adhered to, it's not being

pushed toward the edge because obviously the warning line doesn't do you any good when it's next to the edge. Whose responsibility is it to insure that that warning line is in place?

KOEHN: It's up to everybody. It's everybody's responsibility.

OSHA: But whose overall responsibility?

KOEHN: The monitor.

OSHA: But beyond that. Whose crew is it?

KOEHN: Then it comes to me. And everybody has been told over, time and time again. We've had this talk many, many times about warning lines.

OSHA: But then you know you may have a couple of employees that choose not to follow what you're saying.

KOEHN: Yep.

OSHA: You know, and you identify that these people are moving that warning line system ...

KOEHN: Yep.

OSHA: And shouldn't be moving it, how do you address that?

OSHA: Right. Do you know that, what year was that, I think it was up in Aberdeen you guys had an issue with OSHA?

KOEHN: I was doing a, actually I believe it's a little Caesar's building right now and I think, I can't remember what the roof was. I think it was 40 x 60.

OSHA: Where you on site?

KOEHN: I was on a roof. Yes.

OSHA: Troy was up there too.

KOEHN: No.

OSHA: Troy wasn't?

KOEHN: No.

OSHA: Well you guys got cited for almost the same damn thing. The monitor ... not using the monitor properly.

OSHA: Because what happened was, and I just read over briefly, I got it from Bismarck, trying to put stuff together here, is you guys didn't have a monitor and it's the same damn issue. The monitor issue. So I'm just trying to figure out what's the company's stance on the use of the monitor, you know, before the incident. Did you guys believe it in it, did you use it or was it all just kind of a free for all that it's all on everybody else if

KOEHN: I don't call it a free for all. It's like I said, everybody's responsible.

OSHA: In my mind ...

KOEHN: To me there's no system that's 100% fail safe. You know....

OSHA: Well, if it's used right and it's set up right, and it's engineered, I think that uh, I believe personally that if you're in an engineered conventional fall protection system, full body harness, you've got obviously many choices that you can use to tie in and be anchored you stand a pretty damn good chance. Everything can fail, obviously.

KOEHN: Well . . . .

OSHA: But I think you stand a lot better chance than not having anything.

KOEHN: Right. I agree. There's a lot of instances with the harness, if you're out in the middle of this roof and you're dragging cords around and you're dragging rope around you can't get near adhesive.

OSHA: Sure.

KOEHN: You know ...

(Plaintiff's Request for Admissions to Defendant No. 12; 14, served 03/18/20 deemed admitted).

17. Portions of Pro-Tec employee Aaron Cashman's interview is as follows:

OSHA: As far as what you know in regards to Pro-Tec and how it's set up, what's established as far as a training regimen to allow new employees to have some exposure.

CASHMAN: Not much.

OSHA: Why is that do you think?

CASHMAN: I just don't think there's anybody in the office that pertains to it. You know . . .

OSHA: Somebody's not wearing that hat?

OSHA: Doesn't really have a good understanding of the warning line system and beyond that what a monitor even is.

CASHMAN: Right.

OSHA: You know, I truly believe that you guys had that training from that OSHA 10-hour.

CASHMAN: Right.

OSHA: And training sessions beyond that. You guys chose to use the warning line monitor system.

CASHMAN: Um huh.

OSHA: Right. Why . . . . . what happened on that end up on that roof?

CASHMAN: When?

OSHA: The day the incident occurred.

CASHMAN: I was on the north end. I had no idea what was even going on until I bet a minute after it actually happened.

OSHA: My question is, from a cultural standpoint, with the crews, the use of a monitor, why don't you think there was a designated person acting as a monitor on that roof? Where people were outside the line?

CASHMAN: Why there wasn't an active one?

OSHA: Right.

CASHMAN: I don't know.

OSHA: You think it . . . . and this is your opinion, did it have anything to do with the fact that you're trying to get the job done by having somebody standing there not being able to get their hands on the material and lay it down is a part of the roofing process that takes away from the production aspects of it?

CASHMAN: Yeah.

OSHA: Was that kind of the thought behind not using a designated person?

OSHA: Have there been situations where you've used monitors in the past?

CASHMAN: Yeah.

OSHA: When was the last time?

CASHMAN: Yesterday. (laughs)

OSHA: I mean before the incident.

CASHMAN: Well it all stems back to before the incident, everybody would just look out for everybody.

OSHA: Right.

CASHMAN: That's how we did it. Was it right? Yes and no. We're just trying to protect each other.

OSHA: Yeah. I understand that.

CASHMAN: You know . . . .

OSHA: But there's no control.

CASHMAN: There's no control. Right.

OSHA: Nobody's communicating, nobody's raising a flag as far as identifying if you're going to go outside the lines.

OSHA: Did you guys have any conversations . . . . were you on that roof when OSHA showed up the last time?

CASHMAN: _____ ticket? Citation? Where was that one at?

OSHA: It was in Mitchell.

CASHMAN: Mitchell?

CASHMAN: I was on the roof. Yeah.

OSHA: Were ya? Was the issue kind of the same thing, the whole monitor thing?

CASHMAN: As in ....

OSHA: Not having a monitor?

CASHMAN: No. It was just everybody look out for each other and two guys were working taking off and they were on their hands and knees. They were safe. I mean... safer.

OSHA: Right. Obviously instead of ...

CASHMAN: leaning way over.

OSHA: But you know as well as I do, and I don't know if you've read the standard, you know that, and correct me if I'm wrong, that if you have a warning line, people outside that warning line, there's some options. What are those options?

CASHMAN: Either a monitor or harnesses.

OSHA: Right. And do you believe you guys were following the standard?

CASHMAN: On that one? Aberdeen? We didn't have a monitor. Everybody looked out for ...

(Plaintiff's Request for Admissions to Defendant No. 12; 15, served 03/18/20 deemed admitted).

18. Pertinent portions of the OSHA Safety Narrative are as follows:

The companies involved own tools, supplies; and equipment that were manufactured in other states; therefore, the companies are engaged in interstate commerce and subject to regulation under 29 CFR 1926. SEE SDCL 62-3-4

Chad Fischer, Lieutenant and paramedic with the Watertown Fire Department. It just so happened Mr. Fischer was working on the site the day of the incident and responded to the incident. Mr. Fischer owns Do All Insulation. His company had the contract to insulate the community center. Mr. Fischer attempted to provide medical attention to the victim. Once the interview with Mr. Fischer was complete, CSHO conducted an initial interview with Bob Koehn, Supervisor/owner, Pro-Tec Roofing, Inc.

Koehn told CSHO he had worked in the roofing industry for 32 years. Koehn stated that OSHA had inspected the metal crew roughly six years ago in Platte, SD. The crew was working on a hospital when an OSHA compliance officer drove by and witnessed employees exposed to fall hazards while working on scaffolding. Koehn thought the company received a citation as a result. Koehn told CSHO that he had been personally involved in an OSHA inspection in Aberdeen, SD. Koehn indicated to CSHO it was an edge issue. He said the inspector was getting gas and observed the crew working on the roof of a Little Caesar's. Koehn stated he thought the company received a fine for fall

protection related to barriers and not having a monitor. The company was issued a citation for the lack of a monitor in Aberdeen, SD.

The inspection took place on 12/14/2010. Employees were exposed to a 13 foot fall hazard. Koehn was the supervisor on the project. The crew was working on a Little Caesar's in Aberdeen, SD. At the time of the inspection, the crew was involved in tearing off an existing roof. The roof dimensions were 43 feet in length by 28 feet wide. Koehn told the inspector that the AGC told him that roofs less than 50 feet in width did not require any type of warning or protection.

The employer agreed to implement a safety and health program to comply with OSHA's "Safety and Health Management Guidelines". The company submitted a ProTec Roofing Fall Protection Policy. The policy outlined the use of a warning line system, safety monitor system, covers, protection from falling objects and training. The training segment listed that the program was to be provided to each employee who might be exposed to hazards and that employees need to recognize the hazards. The document indicates the employer shall assure that each employee has been trained by a competent person in the correct way to set up and maintain fall protection equipment, the use of a warning line system and safety monitor system, the role of each employee, the use of equipment in these areas and storage of equipment, and the responsibility of everyone.

Pro-Tec Roofing was also inspected on May 22, 2012 at 1314 West Havens Avenue, Mitchell, SD. The company was issued a repeat 1926.501(b)(10) citation. A Pro-Tec roofing crew was engaged in roofing activities on a flat roof without any visible fall protection systems in place. The company had four employees working on the roof. The crew was not using a safety monitor. The roof was small with the employees working next to the edge exposed to a fall hazard of approximately 14 feet. The supervisor on-site was Troy Bramer. Bramer is also one of the owners of Pro-Tec. Bramer was also working on the Watertown Community Center prior to the fatality, but was out sick the day of the fatality.

CSHO asked Koehn if the company had a safety program. Koehn replied, "Well, yes and no. It's not good, because it's not well documented." Koehn indicated that some of the crew have taken the OSHA l0 hour. He also said that he and a majority of his crew had a four hour fall protection course at the shop in March. He said a consultant provided the training that covered full body harnesses and scaffolding. A portion of the training did cover warning line systems and monitors. The training was provided by Gary Miles. Miles works for Fischer, Rounds & Associates. On 6/30/2016, in a telephone conversation Miles acknowledged covering warning lines and monitors during the class with Pro-Tec. CSHO obtained the class roster and training content from Miles. The training roster identifies that both Koehn and (.) attended the class. Miles said the crew asked some specific questions regarding the system. When asked about safety training and warning line and safety monitors, Koehn stated that going outside the barriers that you should let the monitor know and you should be working on your knees.

CSHO asked Koehn, "So how do you ensure on the job that these guys understand and realize the hazards associated with fall protection systems you guys choose?" Koehn replied, "Well, part of it they have to put on themselves. It's about a common sense issue. Koehn acknowledged not providing fall protection to the two new employees. One of those employees was the victim. CSHO asked Koehn if it was his responsibility as one of the owners and supervisors on the project to handle the function of safety and health.

Koehn told CSHO that the way they talk about it, it's everybody's responsibility to be safe.

CSHO observed that the warning line system did not begin at the roof hatch access point and questioned Koehn regarding placement of the warning line. CSHO identified the fall hazards regarding the edge on the roof where employees accessed. CSHO asked Koehn if there was anything in place to deter employees from walking over to the edge. Koehn replied, "No, just common sense. They should be following everybody else to where the work is." CSHO observed an issue involving how employees were using ladders

CSHO observed that the warning line terminated prematurely on the east and west sides of the roof. The east and west edges of the roof did have a parapet. The parapet was not 39" in the area where were the warning line stanchions terminated thereby potentially exposing employees to fall hazards while working on the roof. There was nothing outside of the last stanchions to identify to employees that they were reaching the "danger zone" near the roof perimeters edge. CSHO discussed the issue with Koehn. Koehn told CSHO he was unaware that the warning line needed to fully encompass the work since the parapets were not entirely 39", which would have been considered fall protection based on the height of the wall. Koehn was aware that the parapet had: to be 39 inches to be considered fall protection. Koehn identified where the incident occurred. Koehn described the events leading up to the fall. Koehn told CSHO that he was on the roof approximately an hour before the employee fell. Koehn indicated that two employees were working on the south end of the roof placing the first layer of ISO. Koehn told CSHO he was working near the east edge of the roof directing a load that was picking a load when Justin fell. Koehn stated he saw the Justin and ( ) working on the south end cutting and placing roof panels the last time he looked. Koehn told CSHO that he looked at Justin and ( ), when he heard ,( ) yell at Justin to inform him he was getting close to the roof's edge. Koehn said ( ), turned around to retrieve more roofing material and Justin fell. Koehn said he heard ( )yell at him and he knew something was wrong. Koehn ran to the edge of the south roof and saw Justin on the ground. He immediately called 911. Koehn told CSHO the crew continued to work after Justin had been taken by ambulance to the hospital. Koehn told CSHO that the warning line had been moved after the incident to allow for roofing panels to be placed in that area. It wasn't until later that morning the crew was notified that Justin had died. The walk-around continued on the roof.

Koehn indicated more than one time that everybody was considered a monitor. The crew did not have dedicated monitors.

(Plaintiff's Request for Admissions to Defendant No. 16, served 03/18/20 deemed admitted).

19. On July 28, 2016, OSHA issued a citation to Defendant Pro-Tec Roofing, Inc. as follows:

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 1143071
Inspection Date(s): 04/21/2016 - 05/06/2016
Issuance Date: 07/28/2016

Citation and Notification of Penalty

Company Name: Pro-Tec Roofing, Inc.
Inspection Site: 1515 15th St. NE, Watertown, SD 57201

Citation 1 Item 1 Type of Violation: Serious

29 CFR 1910.1200(e)(1): Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met, and which also included a hazardous chemicals list and methods used to inform employees of the hazards of non-routine tasks:

(a) Pro-Tec Roofing, Inc. @ 1515 15th St. NE, Watertown, SD 57071: On or prior to April 21, 2016, the exposing employer did not ensure a written hazard communication program which at least described how the criteria specified for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also included a hazardous chemicals list and methods used to inform employees of the hazards of non-routine tasks, had been developed for employee exposures, such as but not limited, to the followins:

(1) Carlisle Sure Seal 90-8-30A Bonding Adhesive- Adhesive which contains toluene, solvent naphtha, petroleum, light aliphatic, and acetone, and;

(2) Carlisle HP-250 Primer-which contains toluene, heptane, and phenolic resin.

Abatement Note: The requirements applicable to construction work under 29 CFR 1926.56 are identical to those set forth at 29 CFR 1910.1200 of this chapter.

Abatement Note: Abatement certification and documentation is required for this item (see enclosed "Certification of Corrective Action Worksheet").

ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM

Date By Which Violation Must be Abated:	08/23/2016
Proposed Penalty:	$2640.00

(Plaintiff's Request for Admissions to Defendant No. 17, served 03/18/20 deemed admitted; EXHIBIT F – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

20. On July 28, 2016, OSHA issued a citation to Defendant Pro-Tec Roofing, Inc. as follows:

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 1143071
Inspection Date(s): 04/21/2016 - 05/06/2016
Issuance Date: 07/28/2016

Citation and Notification of Penalty

Company Name: Pro-Tec Roofing, Inc.
Inspection Site: 1515 15th St. NE, Watertown, SD 57201

Citation 1 Item 2 Type of Violation: Serious

29 CFR 1910.1200(h)(1): Employees shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets:

(a) Pro-Tec Roofing, Inc. @ 1515 15th St. NE, Watertown, SD 57071: On and prior to April 21, 2016, the exposing employer did not provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area such as but not limited to:

(1) Carlisle Sure Seal 90-8-30A Bonding Adhesive- Adhesive which contains toluene, solvent naphtha, petroleum, light aliphatic, and acetone, and;

(2) Carlisle HP-250 Primer-which contains toluene, heptane, and phenolic resin.

Abatement Note:

(a) Employees shall be informed of:

(1) Any operation in their work area where hazardous chemicals are present; and,

(2) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and safety data sheets required by this section.

(b) Employee training shall include at least:

(1) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);

(2) The physical and health hazards of the chemicals in the work area;

(3) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used;

(4) The details of the hazardous communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

Abatement Note: Abatement certification and documentation is required for this item (see enclosed "Certification of Corrective Action Worksheet").

ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM

Date By Which Violation Must be Abated:	08/23/2016
Proposed Penalty:	$2640.00

(Plaintiff's Request for Admissions to Defendant No. 18, served 03/18/20 deemed admitted; EXHIBIT F – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

21. On July 28, 2016, OSHA issued a citation to Defendant Pro-Tec Roofing, Inc. as follows:

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 1143071
Inspection Date(s): 04/21/2016 - 05/06/2016
Issuance Date: 07/28/2016

Citation and Notification of Penalty

Company Name: Pro-Tec Roofing, Inc.
Inspection Site: 1515 15th St. NE, Watertown, SD 57201

Citation 1 Item 3 Type of Violation: **Serious**

29 CFR 1926.20(b)(2): The employer did not initiate and maintain programs which provided for frequent and regular inspections of the job site, materials and equipment to be made by a competent person(s):

(a) Pro-Tec Roofing, Inc. @ 1515 15th St. NE, Watertown, SD 57071: On or prior to April 21, 2016, the exposing employer did not ensure employees were exposed to fall hazards, ladder hazards, electrical and fire hazards while conducting roofing work on the Watertown Community Center. A "competent" person had not conducted frequent and regular inspections to ensure employees were protected from roofing related hazards during the installation of the EPDM roof.

Abatement Note: OSHA defines a "competent" person as one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

Abatement Note: Abatement certification and documentation are required for this item (see enclosed "Certification of Corrective Action Worksheet").

ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM

Date By Which Violation Must be Abated:	08/23/2016
Proposed Penalty:	$3080.00

(Plaintiff's Request for Admissions to Defendant No. 19, served 03/18/20 deemed admitted; EXHIBIT F – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

22. On July 28, 2016, OSHA issued a citation to Defendant Pro-Tec Roofing, Inc. as follows:

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 1143071
Inspection Date(s): 04/21/2016 - 05/06/2016
Issuance Date: 07/28/2016

Citation and Notification of Penalty

Company Name: Pro-Tec Roofing, Inc.
Inspection Site: 1515 15th St. NE, Watertown, SD 57201

Citation 1 Item 6 Type of Violation: Serious

29 CFR 1926.502(f)(1): Warning lines were not erected around all sides of the roof work area:

(a) Pro-Tec Roofing, Inc. @ 1515 15th St. NE, Watertown, SD 57071: On and prior to April 21, 2016, the exposing employer did not ensure that the warning line system that was being utilized as a fall protection system for employees conducting roofing activities on the Watertown Community Center was erected around all sides where fall hazards existed. The warning line system used was not fully erected on the north and south ends of the roof up to the point where the parapet wall reached a height of at least 39 inches. This condition exposed employees to a fall hazard of approximately 33 feet.

Abatement Note: Abatement certification is required for this item (See enclosed "Sample Abatement-Certification Worksheet").

ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM

Date By Which Violation Must be Abated:	08/23/2016
Proposed Penalty:	$3080.00

(Plaintiff's Request for Admissions to Defendant No. 22, served 03/18/20 deemed admitted; EXHIBIT F – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

23. On July 28, 2016, OSHA issued a citation to Defendant Pro-Tec Roofing, Inc. as follows:

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 1143071
Inspection Date(s): 04/21/2016 - 05/06/2016
Issuance Date: 07/28/2016

Citation and Notification of Penalty

Company Name: Pro-Tec Roofing, Inc.
Inspection Site: 1515 15th St. NE, Watertown, SD 57201

Citation 1 Item 7 Type of Violation: Serious

29 CFR 1926.502(f)(1)(iii): Points of access, materials handling areas, storage areas, and hoisting areas shall be connected to the work area by an access path formed by two warning lines.

(a) Pro-Tec Roofing, Inc. @ 1515 15th St. NE, Watertown, SD 57071: On and prior to April 21, 2016, the exposing employer did not ensure that the warning line system was connected to the work area by an access path formed by two warning lines. Employees accessed the main roof through a roof hatch that did not have warning lines creating a path to the east roof, where employees were engaged in EPDM roof installation on the Watertown Recreation Center. This condition exposed employees to a fall hazard of approximately 33 feet.

Abatement Note: Abatement certification is required for this item (see enclosed "Certification of Corrective Action Worksheet").

Date By Which Violation Must be Abated:	08/23/2016
Proposed Penalty:	$2640.00

(Plaintiff's Request for Admissions to Defendant No. 23, served 03/18/20 deemed admitted; EXHIBIT F – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

24. On July 28, 2016, OSHA issued a citation to Defendant Pro-Tec Roofing, Inc. as follows:

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 1143071
Inspection Date(s): 04/21/2016 - 05/06/2016
Issuance Date: 07/28/2016

Citation and Notification of Penalty

Company Name: Pro-Tec Roofing, Inc.
Inspection Site: 1515 15th St. NE, Watertown, SD 57201

Citation 1 Item 8 Type of Violation: Serious

29 CFR 1926.1053(b)(4): Ladders were used for purposes other than the purposes for which they were designed:

(a) Pro-Tec Roofing, Inc. at 1515 15th St. NE, Watertown, SD 57071: On and prior to April 21, 2016, the exposing employer allowed two Louisville 8-foot step ladders to be used in the closed position and leaned up against a parapet wall to allow employees to access the east roof of the Watertown Community Center. Using the step-ladders in this configuration is contrary to manufacturer's instructions and exposes employees to falling off the ladder. This hazard exposed the employee to falls from heights of approximately 6 feet.

Abatement Note: Abatement certification is required for this item (See enclosed "Sample Abatement-Certification Worksheet").

Date By Which Violation Must be Abated: 08/23/2016
Proposed Penalty: $2640.00

(Plaintiff's Request for Admissions to Defendant No. 24, served 03/18/20 deemed admitted; EXHIBIT F – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

25. On July 28, 2016, OSHA issued a citation to Defendant Pro-Tec Roofing, Inc. as follows:

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 1143071
Inspection Date(s): 05/21/2016 - 05/06/2016
Issuance Date: 07/28/2016

Citation and Notification of Penalty

Company Name: Pro-Tec Roofing, Inc.
Inspection Site: 1515 15th St. NE, Watertown, SD 57201

Citation 2 Item 1 Type of Violation: Willful

29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low-sloped roofs with unprotected sides and edges 6 feet (1.8m) or more above lower levels was not protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line systems and guardrail systems, warning line systems and safety net systems, or warning line systems and personal fall arrest systems, or warning line systems and safety monitoring systems:

(a) Pro-Tec Roofing, Inc. @1515 15th St. NE, Watertown, SD 57071: On and prior to April 21, 2016, the exposing employer did not ensure employees engaged in EPDM roof system installation on the Watertown Community Center were protected from fall hazards. A warning line system was partially erected along the edge of a commercial roof as a means of fall protection. The employer did not dedicate a safety monitor to ensure employees working outside the warning line were aware of their proximity to the edge of the roof. On April 21, 2016, an employee working outside of the warning line system, fell approximately 33 feet and later died from injuries sustained from the fall. This condition exposed employees working outside of the warning line system to fall hazards of approximately 33 feet.

Abatement Note: Abatement certification and documentation are required for this item (See enclosed "Certification of Corrective Action Worksheet").

ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM

Date By Which Violation Must be Abated:	08/23/2016
Proposed Penalty:	$30800.00

(Plaintiff's Request for Admissions to Defendant No. 25, served 03/18/20 deemed admitted; EXHIBIT F – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

26. On July 28, 2016, OSHA issued a citation to Defendant Pro-Tec Roofing, Inc. as follows:

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 1143071
Inspection Date(s): 04/21/2016 - 05/06/2016
Issuance Date: 07/28/2016

Citation and Notification of Penalty

Company Name: Pro-Tec Roofing, Inc.
Inspection Site: 1515 15th St. NE, Watertown, SD 57201

Citation 2 Item 2 Type of Violation: **Willful**

29 CFR 1926.503(a)(1): The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards:

(a) **Pro-Tec Roofing, Inc. @ 1515 15th St. NE, Watertown, SD 57071:** On and prior to April 21, 2016, the exposing employer did not ensure that each employee engaged in roofing operations on the Watertown Community Center, had been trained to recognize the hazards associated with working at elevations over 6 feet. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards. On April 21, 2016, an employee engaged in the installation of an EPDM roof system, fell approximately 33 feet to his death. Two new employees did not receive fall protection training before working at elevations over 6 feet. The condition exposed employees to the hazard of falling from an elevation of approximately 33 feet.

Abatement Note: Abatement certification and documentation are required for this item (see enclosed "Sample Abatement-Certification Worksheet").

ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM

Date By Which Violation Must be Abated:	08/23/2016
Proposed Penalty:	$24200.00

(Plaintiff's Request for Admissions to Defendant No. 26, served 03/18/20 deemed admitted; EXHIBIT F – Pro-Tec Roofing, Inc. Response to Request for Production of Documents).

27. The serious, willful penalties issued to Pro-Tec Roofing, Inc. as to its violations at the Watertown Community Center Project on April 21, 2016 involved total penalties of $77,000.00 and payment in the amount of $50,000.00 was made by Pro-Tec Roofing, Inc. to satisfy said penalties.

Inspection: 1143071.015 - Pro-Tec Roofing & Sheet Metal

Violation Summary

	Serious	Willful	Repeat	Other	Unclass	Total
Initial Violations	7	1				8
Current Violations	5	1		2		8
Initial Penalty	$22,000	$55,000	$0	$0	$0	$77,000
Current Penalty	$7,000	$40,000	$0	$3,000	$0	$50,000

(Plaintiff's Request for Admissions to Defendant No. 27, served 03/18/20 deemed admitted).

28. Defendant's false statements, actions, misrepresentations, and concealment were intentional, willful, and/or wanton. (Complaint ¶27, dated 10/28/2019). Defendant has not filed a responsive pleading denying this allegation.

29. Pro-Tec Roofing, Inc. willfully and intentionally deceived Justin Althoff regarding their failure to comply with OSHA and safety programs, manuals, and contracts into accepting employment which he otherwise would not have accepted on the Watertown Community Center Project. (Complaint ¶28, dated 10/28/2019). Defendant has not filed a responsive pleading denying this allegation.

30. Defendant at all times all too clearly had knowledge superior to Justin Althoff, who had been deprived of OSHA training Defendant knew was required resulting in his complete reliance on the promises and representations made by Defendant and its agents to the public, all workers, and Justin Althoff, as to jobsite safety inspections, documentation, safety equipment, and OSHA compliance. (Complaint ¶29, dated 10/28/2019). Defendant has not filed a responsive pleading denying this allegation.

31. Every day of Althoff's employment, including April 21, 2016, Defendant was clearly and obviously aware that fall protection, including complete warning lines and dedicated monitors, was required by their own internal rules and OSHA statutes were not present and that safety harnesses were required to stop Althoff's fall at no more than six feet and the actions of their employees broke their own internal rules and OSHA statutes and the unharnessed 33 foot fall would with complete certainty lead to serious injury or death. (Complaint ¶30, dated 10/28/2019). Defendant has not filed a responsive pleading denying this allegation.

32. On or about April 21, 2016, Defendant intentionally violated their own safety rules and up to ten OSHA statutes. (Complaint ¶31, dated 10/28/2019). Defendant has not filed a responsive pleading denying this allegation.

33. Defendant's actions and inactions were intentional, willful, and/or wanton, and repeated prior similar or identical OSHA violations. (Complaint ¶32, dated 10/28/2019). Defendant has not filed a responsive pleading denying this allegation.

34. Lynn Althoff, as the personal representative of the Estate of Justin Althoff, is the proper party to prosecute this survival action. (Complaint ¶33, dated 10/28/2019). Defendant has not filed a responsive pleading denying this allegation.

35. Defendant has paid no worker's compensation benefits directly to the Estate of Justin Althoff. (Complaint ¶33, dated 10/28/2019). Defendant has not filed a responsive pleading denying this allegation.

36. Prior to April 21, 2016, Defendant had been cited by OSHA on at least three prior occasions for exposing employees to fall hazards, one of which was issued in 2012 for a repeat violation as described in the OSHA violations fully set forth above. (Complaint ¶34, dated 10/28/2019). Defendant has not filed a responsive pleading denying this allegation.

37. Pro-Tec employees' deliberate actions, known to be in violation of their own safety rules and OSHA statutes well before Althoff's death, constitute willful, misconduct as described in SDCL 62-4-37 and Defendant's employees' knowing, deliberate actions and willful misconduct were the proximate cause of Justin Althoff's fall, injuries, and death. (Complaint ¶35, dated 10/28/2019). Defendant has not filed a responsive pleading denying this allegation.

DATED this 22nd day of January, 2021.

OLINGER, LOVALD, MCCAHREN,
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/s/ Lee C. "Kit" McCahren

BY: _____
LEE C. "KIT" MCCAHREN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of January, 2021, he filed and served the foregoing regarding the above-captioned matter by and through the Odyssey File and Serve System upon:

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May & Johnson
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/s/ Lee C. "Kit" McCahren

BY: _____
LEE C. "KIT" MCCAHREN
Attorney for Plaintiff

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	SS	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT
LYNN ALTHOFF, as Personal Representative of the Estate of Justin Althoff,	)	14CIV17-000216
Plaintiff,	)	PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF
vs.	)	UNDISPUTED MATERIAL FACTS
PRO-TEC ROOFING, INC.	)	
Defendant.	)	

1. In 2015, Pro-Tec entered into a subcontract with the City of Watertown for the construction of the Watertown Community Center. (Complaint at ¶6).

RESPONSE: Undisputed.

2. In April of 2016, Justin Althoff (Althoff) was hired as an employee of Pro-Tec, and he was given a copy of the Pro-Tec Roofing Inc. Safety and Health Manual. (Complaint at ¶10).

RESPONSE: Undisputed.

3. On April 21, 2016, Althoff was working on the roof of the Watertown Community Center when a Pro-Tec coworker warned Althoff that he was near the edge. (Aff. Travis, Ex A).

RESPONSE: Disputed. Objection, failure to provide direct citation. Objection, misrepresentation of the underlying facts. There is nothing in the record that establishes as fact that an unidentified Pro-Tec employee issued a warning to Althoff. *See* SUMF ¶18. Even if Althoff was warned by a fellow Pro-Tec coworker this alleged person then ignored Althoff who fell unwitnessed. *Id.*

4. Shortly thereafter, and while in the course of his employment duties, Althoff fell off the roof ultimately resulting in his death. (Aff. Travis, Ex A).

RESPONSE: Objection, failure to provide direct citation. Disputed that Althoff fell off the roof "shortly thereafter" after being warned by a Pro-Tec worker who must have ignored Althoff afterward. Althoff started employment on April 11, 2016 and every day Pro-Tec employees deliberately failed to furnish Althoff a safety harness to prohibit freefall of more than six feet as their own rules required knowing he would be working 33 feet above the ground. *See* SUMF ¶18. Undisputed that Althoff fell off the roof during the course of his employment and Pro-Tec employees, on a daily basis, deliberately failed to furnish Althoff with a harness to stop his fall at no more than six feet and the deliberate failure

Filed: 9/25/2020 12:50 PM CST Codington County, South Dakota 14CIV17-000216

to furnish Althoff with a safety harness guaranteed he would hit the ground 33 feet below causing his death. *See* SUMF ¶¶10-13, 18, 22, 25, 28-33.

5. The General Contractor's Project Superintendent, Jason Enfield, was on the roof of the Watertown Community Center prior to the accident and observed a warning line in place. (Aff. Travis, Ex B).

RESPONSE: Disputed. Objection, failure to provide direct citation. Objection, misrepresentation of the underlying facts. Jason Enfield admitted that he was not in the area while Althoff was working on the morning of April 21, 2016, or even present on the roof to see that there was no dedicated safety monitor or warning line or that Pro-Tec employees deliberately failed to provide Althoff with a safety harness to stop his fall at six feet rather than guaranteeing he ricochet off the ground at 33 feet below. *See* Aff. Travis. Ex. B, 12:15-13:11. OSHA cited Puetz Corporation and Pro-Tec for the lack of adequate fall protection. *See* SUMF ¶¶19-33. Further, OSHA citied Puetz Corporation and Pro-Tec for fall hazard violations Althoff was exposed to working on the roof of the Watertown Community Center. *See* SUMF ¶¶19-28.

6. OSHA and Pro-Tec settled on penalties of $50,000 related to various violations arising from the OSHA investigation following the April 21, 2016 incident. (Complaint at ¶26).

RESPONSE: Undisputed.

7. Workers' compensation benefits have since been paid to the estate. (Honorable Robert L. Spears Letter Decision dated August 9, 2017, page 2).

RESPONSE: Disputed. Worker's compensation benefits were paid directly to the ambulance, hospital and funeral home but no benefits were ever paid to the Estate of Justin Althoff. *See* 14PRO17-000006, *Estate of Justin Althoff.*

DATED this 25th day of September, 2020.

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/s/ Lee C. "Kit" McCahren

BY: _____
LEE C. "KIT" MCCAHREN
Attorney for Plaintiff

Filed: 9/25/2020 12:50 PM CST Codington County, South Dakota 14CIV17-000216

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of September, 2020, he filed and served the foregoing regarding the above-captioned matter by and through the Odyssey File and Serve System upon:

Richard L. Travis – dtravis@mayjohnson.com
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BY: */s/ Lee C. "Kit" McCahren*
LEE C. "KIT" MCCAHREN
Attorney for Plaintiff

Filed: 9/25/2020 12:50 PM CST Codington County, South Dakota 14CIV17-000216

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT

LYNN R. ALTHOFF, as Personal Representative of the ESTATE OF JUSTIN ALTHOFF, Plaintiff, vs. PRO-TEC ROOFING, INC., Defendant.	14CIV17-000216 **STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant Pro-Tec Roofing, Inc. ("Pro-Tec") hereby submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment:

1. In 2015, Pro-Tec entered into a subcontract with the City of Watertown for the construction of the Watertown Community Center. (Complaint at ¶ 6).
2. In April of 2016, Justin Althoff (Althoff) was hired as an employee of Pro-Tec, and he was given a copy of the Pro-Tec Roofing Inc. Safety and Health Manual. (Complaint at ¶ 10).
3. On April 21, 2016, Althoff was working on the roof of the Watertown Community Center when a Pro-Tec coworker warned Althoff that he was near the edge. (Aff. Travis, Ex A).
4. Shortly thereafter, and while in the course of his employment duties, Althoff fell off the roof ultimately resulting in his death. (Aff. Travis, Ex A).
5. The General Contractor's Project Superintendent, Jason Enfield, was on the roof of the Watertown Community Center prior to the accident and observed a warning line in place. (Aff. Travis, Ex B).

6. OSHA and Pro-Tec settled on penalties of $50,000 related to various violations arising from the OSHA investigation following the April 21, 2016 incident. (Complaint at ¶ 26).

7. Workers' compensation benefits have since been paid to the estate. (Honorable Robert L. Spears Letter Decision dated August 9, 2017, page 2).

Dated this 24th day of July, 2020.

MAY & JOHNSON, P.C.

BY _____

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Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of July, 2020, a true and correct copy of the foregoing **Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment** was served using the Odyssey File & Serve system which upon information and belief will send e-mail notification of such filing to:

Lee C. McCahren
OLINGER, LOVALD, MCCAHREN
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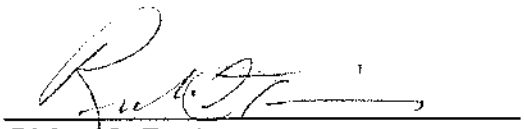

Richard L. Travis

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT

LYNN ALTHOFF, as Personal Representative of the Estate of Justin Althoff, Plaintiff, vs. PRO-TEC ROOFING, INC., Defendant.	14CIV17-000216 **DEFENDANT'S RESPONSES TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Defendant Pro-Tec Roofing, Inc. ("Pro-Tec"), through its counsel of record, submits the following Responses to Plaintiff's Statement of Undisputed Material Facts:

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Undisputed.

6. Undisputed.

7. Undisputed.

8. Undisputed.

9. Undisputed as to Justin Althoff.

10. Undisputed.

11. Undisputed.

12. Undisputed as to the fact that OSHA determined that Defendant failed to dedicate a safety monitor, failed to have a warning line in place in conformance with OSHA regulations,

and did not provide Altoff with a safety harness. Except as herein acknowledged as undisputed, the balance of the statement is disputed on the basis that it is only allegations and not established as a matter of record.

13. Disputed. The statement is an allegation, and not established as a matter of record.

14. Undisputed.

15. Undisputed.

16. Undisputed.

17. Undisputed.

18. Undisputed but for the reference to SDCL 62-3-4.

19. Undisputed.

20. Undisputed.

21. Undisputed.

22. Undisputed.

23. Undisputed.

24. Undisputed.

25. Undisputed.

26. Undisputed.

27. Undisputed.

28. Disputed. The statement is an allegation, and not established as a matter of record.

29. Disputed. The statement is an allegation, and not established as a matter of record.

30. Disputed. The statement is an allegation, and not established as a matter of record.

31. Disputed. The statement is an allegation, and not established as a matter of record.

32. Disputed. The statement is an allegation, and not established as a matter of record.

33. Disputed. The statement is an allegation, and not established as a matter of record.

34. Undisputed.

35. Undisputed.

36. Undisputed.

37. Disputed. The statement is an allegation, and not established as a matter of record.

Dated this 12th day of February, 2021.

MAY & JOHNSON, P.C.

BY _____
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dtravis@mayjohnson.com
Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of February, 2021, a true and correct copy of the foregoing **Defendant's Responses to Plaintiff's Statement of Undisputed Material Facts** was filed and served using the Court's Odyssey File & Serve system which upon information and belief will send e-mail notification of such filing to:

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Richard L. Travis

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

LYNN R. ALTHOFF, as Personal Representative of the Estate of Justin Althoff,

Plaintiff,

vs.

PRO-TEC ROOFING, INC.,

Defendant.

Motions Hearing

14CIV17-000216

BEFORE: THE HONORABLE ROBERT L. SPEARS
Circuit Court Judge
Watertown, South Dakota
February 23, 2021 at 1:45 p.m.

APPEARANCES:

For the Plaintiff: LEE C. "KIT" McCAHREN
Olinger, Lovald, McCahren, Van Camp & Thompson, PC
117 E Capitol Avenue
Pierre, South Dakota

For the Defendant: RICHARD L. TRAVIS
May & Johnson
6805 Minnesota Avenue #100
Sioux Falls, South Dakota

(WHEREUPON, the following proceedings were duly had:)

THE COURT: Now the Court is going to call the following case for summary judgment hearing: Lynn R. Althoff, as Personal Representative of the Estate of Justin Althoff versus Pro-Tec Roofing, Inc., and Puetz Corporation -- or Puetz Corporation. I can't remember the pronunciation of that name. It's still showing up as a defendant, but they were dismissed from the case, I believe, quite some time ago. This is Codington County Civil File Number 14CIV17-0216.

Counselors, starting with the plaintiff, note your formal appearance on this record.

MR. McCAHREN: Lee C. "Kit" McCahren, attorney for Plaintiff.

MR. TRAVIS: Good afternoon, Judge. Dick Travis appearing on behalf of Pro-Tec Roofing. Seated with me at counsel table with the Court's permission is Zach Schmidt. Zach is a second-year law student at USD and worked in our office this past summer and is from Watertown and happened to be in Watertown today, so I told him to come to the hearing.

THE COURT: All right. Any objection, Mr. McCahren?

MR. McCAHREN: No, Your Honor.

THE COURT: All right.

MR. McCAHREN: He's working for my partner starting

tomorrow, so we've been having a nice conversation as South Dakota is a small place.

THE COURT: It is. It is. All right. Well, Mr. Schmidt, we've all been seated where you are at some point in our law school careers, so welcome.

All right. Both sides, as I understand it, and I did my best to review everything that was submitted to me, but I'm not going to say I have everything memorized. But based on my review, both sides are making motions for summary judgment; is that correct, counselors?

MR. McCAHREN: Correct.

THE COURT: I will start with Mr. McCahren.

MR. McCAHREN: Yes, that's correct, Your Honor.

THE COURT: Mr. Travis.

MR. TRAVIS: That is correct, Your Honor.

THE COURT: All right. So I forgot who filed the motion for summary judgment first, so I ask the question. Any volunteer to go first?

MR. TRAVIS: I'd be happy to go first, Judge.

THE COURT: Any objection to that, Mr. McCahren, or did you file first?

MR. McCAHREN: I don't know that I did technically file first, but I thought that I had, based upon Mr. Travis's responsive pleadings, which I had just got, I had shortened my presentation quite a bit, which I thought

might make things go faster.

THE COURT: All right.

MR. TRAVIS: I'll defer.

THE COURT: You can go first, Mr. McCahren.

MR. TRAVIS: Yeah, that's fine. Thank you, Judge.

MR. McCAHREN: If it would please the Court, Your Honor, when I say that I've narrowed things down, it doesn't matter why Justin Althoff fell from the roof at the community center. It doesn't matter whether he was pushed. It doesn't matter whether he was tripped, because Pro-Tec's laws that they have passed required their employees to be harnessed.

Pro-Tec employees did not harness Justin Althoff. In fact, they didn't harness anyone on the roof of the community center. So the focus doesn't start with Justin's feet on the roof. The focus starts with the fact that an employee had fallen.

And when Pro-Tec intentionally failed to harness all their employees, it was absolutely certain that Justin Althoff was going to hit the ground and get killed. The sole proximate cause of his death was the fact that Pro-Tec knowingly broke their own safety laws, not just that day, but every day.

So Plaintiff asking for summary judgment that -- I mean, Defendant doesn't even deny the fact that their

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safety laws required harnesses, that the employees weren't harnessed, and that Althoff got killed because he wasn't harnessed.

With that, it's undisputed that the acts of Pro-Tec were intentional, so the proximate cause of Plaintiff's death and that Plaintiff is entitled to summary judgment on just basically those three -- those three facts is all we -- is all it takes, that their laws required harnesses.

They committed willful misconduct by not harnessing their employees and it caused this kid's death. Because unharnessed, it's absolutely certain that he's gonna fall all the way to the earth.

It's like the joke, Your Honor, where it's not the fall that hurt him, it was the sudden stop at the bottom. That's what caused this kid's death was the fact that he wasn't harnessed and that Pro-Tec broke their laws daily knowing that.

So that is my shorter version of the facts and allegations, because that's all we need to prove the tort was that the fact that the proximate cause was that Pro-Tec broke their own safety laws.

THE COURT: And, Mr. McCahren, in reading your submissions that I received yesterday and previously and your statements just made on this record, I am to understand your client's position is that's enough to overcome the

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workers' compensation laws of this state and case precedent?

MR. McCAHREN: Correct.

THE COURT: All right. All right. Anything else?

MR. McCAHREN: No.

THE COURT: Thank you, Mr. McCahren.

Mr. Travis, I assume you have a response to that?

MR. TRAVIS: I do, Judge.

THE COURT: Go ahead.

MR. TRAVIS: Thank you for the opportunity, may it please the Court. Mr. McCahren alleges that it is undisputed that Pro-Tec intentionally caused the death of Justin Althoff. Needless to say, I vehemently and adamantly disagree with such a representation and such an assertion.

Granted, Pro-Tec did not adhere to its own safety protocol; granted, Pro-Tec did not adhere to applicable OSHA regulations.

But the failure to adhere to its own safety protocol and the failure to adhere to OSHA regulations, Judge, does not rise to the level necessary to escape the clear mandate of 62-3-2, which provides that workers' compensation benefits are the sole and exclusive remedy for claims arising out of the workplace, unless the employer commits an intentional act.

South Dakota Supreme Court has consistently and

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uniformly over the years applied a very narrow exception to that general rule that work comp benefits are the exclusive remedy when there is an injury or a death arising out of and in the course of employment.

And it's only in those instances where the employer's conduct rises to the level of an intentional tort does a claimant or plaintiff have a claim beyond what is statutorily prescribed by Title 62, the compensable benefits.

The disagreement between Plaintiff and Defendant in this case, Judge, in respect to the issues pending before the Court is what is the definition of an intentional tort. As I've said already, South Dakota Supreme Court has defined that -- has defined the term "intentional tort" several times in the context of the workers' compensation law and the case law, interpretation of that law.

For the plaintiff to meet -- and the plaintiff in this case is the estate. For the plaintiff to meet its burden of proof, the plaintiff must establish that there was an actual intent by the employer to cause the death of Mr. Althoff, or alternatively, a substantial certainty that the claimant's death would be the inevitable outcome.

The failure to provide a safety harness doesn't rise to that required level of intent, Judge. There is nothing

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in this record to indicate that the employer had any intent, that Pro-Tec had any intent to cause the death of Mr. Althoff, nor was it an absolute certainty that failure to provide the safety harness would cause his death.

You know, Pro-Tec and any employer can assume that all employees, including Mr. Althoff in this case, would exercise common safety protocol, be conscious of their respective locations on the roof. There was a warning line system and --

THE COURT: Is that warning line -- was that up or was that disputed?

MR. TRAVIS: No. There was a warning line, but it didn't comply specifically with the applicable OSHA regulations. The warning line was --

THE COURT: That was some type of a --

MR. TRAVIS: A flag.

THE COURT: -- string.

MR. TRAVIS: A string with flags on it.

THE COURT: Or a chalk line within certain footage from the edge of the roof?

MR. TRAVIS: That's correct.

THE COURT: All right. Go on.

MR. TRAVIS: But, again, not strict compliance -- it did not strictly comply with the applicable OSHA regulations. But what we've got here, Judge, it's not what were the --

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it's the end result, and is there evidence in this record to establish that the employer Pro-Tec intended the consequences that ultimately occurred here. And there's simply nothing in the record to establish that.

Yes, there was a failure to comply with safety protocol. Yes, there was a failure to adhere to all the applicable OSHA regulations. But neither of those events rises to the level of the intentional conduct on the part of Pro-Tec so as to cause Mr. Althoff's death.

You know, the employer's conduct may have been careless. That's not an intentional tort. Employer's conduct may have been grossly negligent. That's not an intentional tort.

The employer's conduct may have been reckless. That's not an intentional tort. The employer's conduct may have been a wanton misconduct. Again, by the interpretation of the applicable standard by the South Dakota Supreme Court, none of those levels of care or acts on the part of an employer rise to the level of an intentional tort.

I'd refer the Court to "McMillin v. Mueller" that was cited in one of the submissions to the Court on behalf of Pro-Tec, cited in 205 South Dakota 41. In that case, to briefly summarize it, the employer lowers an employee into a vat to clean it out.

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THE COURT: I am familiar with that case, but go on.

MR. TRAVIS: The employee gets sick.

THE COURT: From some type of --

MR. TRAVIS: From the fumes in the --

THE COURT: -- fumes, decay, or in the cleaning solvent used.

MR. TRAVIS: Correct. And so they have to --

THE COURT: In cleaning the inside of the vat, right?

MR. TRAVIS: Correct.

THE COURT: All right. Go on.

MR. TRAVIS: They have to bring the employee out because of the reaction. They send another employee in there knowing how the first employee reacted and was injured as a result of the employer's conduct in lowering the employee into the vat.

The second employee gets so ill they have to send a third employee down to help the second employee. Employee two, employee three die, are asphyxiated. Claimant's estate brings the action alleging an intentional tort, alleging that the acts of the employer get around the provisions of exclusivity prescribed by 62-3-2.

South Dakota Supreme Court says, no, it doesn't rise to that level. That's a case when the employee actually knew what the results were of the employer's actions. And that's not what we have here.

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THE COURT: Mr. Travis, in that case -- and I haven't reviewed it for a while. But, unfortunately, I have other cases where that case has been cited as controlling in addition to this one.

As I recall from that case -- and correct me if I'm wrong. Again, I haven't reviewed it recently. I will before I issue an opinion on this case. Both sides need to be rest assured on that.

But in that case, wasn't it also a factual consideration by our South Dakota Supreme Court that even though this -- these symptoms or these problems with three separate employees they lowered into the vat, the employer had no previous experience cleaning that vat with the solvent or the materials that were decaying in the bottom of that vat?

And would you agree with me, that's part of the facts of the case in "McMillin v. Mueller" or am I mistaken?

MR. TRAVIS: No. I believe that's correct, Your Honor, but I am going to fall back on your earlier comment. It's been a while since I've looked at that case.

THE COURT: And I understand. I understand that on both sides.

MR. TRAVIS: But in respect of that, Judge, the employer knew what the reaction was and what harm it was exposing its employees to by lowering them into that vat after

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employee number one became so ill that he had to be pulled out of, we'll call it, the vat.

THE COURT: All right. All right. I understand the argument you're making to me, Mr. Travis, in good faith here this afternoon, but I think there was language in that opinion that the employer really didn't know what was going on at that point in time.

And I think that was one of the facts the Supreme Court took in consideration denying the intention tort claim -- excuse me -- of the plaintiff in that case.

But, now, and I think you know, both sides are experienced civil attorneys in front of me here this afternoon, you probably are anticipating my next question. How does that "McMillin v. Mueller" apply or distinguish from the facts of this case where you have the defendant -- or excuse me -- the defendant construction company warned no less than five times in those citations on this very thing that's in front of me this very afternoon?

MR. TRAVIS: Well, what you've got in the -- there was three prior OSHA citations issued to Pro-Tec, none of which involved a fall. But two of the citations dealt with failure to -- I think I jotted it down -- have the, I will call it, the roof fall measures in place to protect the employees. That's what they were cited for in two

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prior occasions.
What is also the case here, Judge, is that there was never any prior instances of an employee fall.
THE COURT: But there were prior instances of not having ropes, harnesses, and safety devices in place. And there were instances where the employees were not trained; is that correct? Or am I misreading something here?
MR. TRAVIS: Well, I don't know about the latter about the failure to train, but I do know --
THE COURT: Well, that's certainly the allegation.
MR. TRAVIS: But clearly there was at least two prior instances where these safety measures need to comply with OSHA regulations had not been adhered to. But what "McMillin" also stands for the proposition, Judge, that the violation of an OSHA regulation is not synonymous with an intentional tort.
You know, to meet that standard, the plaintiff has to establish that it was the result, the intended result of the failure to comply with the safety protocol, that the intended result of that decision of that act was to cause the death of Mr. Althoff.
And there can be nothing farther from the truth than that, Judge. As I stated earlier, I think the employer, as any employer would expect common sense to be exercised by employees, standard common sense, safety protocol to be

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exercised by employees, and even when safety equipment was not utilized it's not the means to the end, but it's what was the end and was that end the intended result of the employer.
And I think that's how the South Dakota Supreme Court has looked at these issues, and I think that's what needs to be established for a plaintiff to abrogate the rule of the exclusivity rule and to get around the exclusivity rule.
So what you got here, the question is: Was the failure to adhere to the safety measures, does that create a virtual certainty of injury? And it just -- the facts don't support that here, Judge, plain and simple.
You know, yes, safety measures decreased the risk of injury, but failure to adhere to safety measures does not create that reckless and virtual certainty of injury. You know, to grant the relief requested by the plaintiff or correspondingly to deny Pro-Tec's request for the relief that is asked for would require this Court to ignore and set aside well-established precedent.
The facts of this case simply do not support such a result, Judge. There was the facts to support and the plaintiff's position to assert that the intentional act exclusion applies here. It has not been met. And I respectfully request that the motion filed on behalf of

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Pro-Tec be granted.
THE COURT: All right. Anything else, Mr. Travis?
MR. TRAVIS: No.
THE COURT: Mr. McCahren.
MR. McCAHREN: Yes, Your Honor. As I said, I had narrowed the focus. The first question is: Does Pro-Tec's law require employees to be harnessed? Yes.
THE COURT: When you say "Pro-Tec law," that's their policies and that is also OSHA law?
MR. McCAHREN: No.
THE COURT: All right. Go on.
MR. McCAHREN: Pro-Tec -- it's Pro-Tec's law. Pro-Tec's own laws say the employees have to be harnessed. I am not looking to OSHA. I am not looking at what's common sense. It's Pro-Tec's laws say you have to be harnessed.
Right, Dick?
THE COURT: Well, when you say a law, do you mean Pro-Tec's personnel policies?
MR. McCAHREN: No. Well, their written rules, their written laws.
THE COURT: Okay. All right. Out of their handbook?
MR. McCAHREN: Well, yeah, wherever their laws are published.
THE COURT: All right. You're just -- I don't mean to be argumentative with you --

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MR. McCAHREN: Oh, no. No.
THE COURT: -- or put you into a corner. You are just confusing me somewhat, Pro-Tec's laws, whether you are referring to OSHA administrative rules, which have the effect of law or employee handbook policies as conditions of employment that employees have to follow.
Maybe I am making this more complicated when I listen to you than it should be and inferring too much. But I was a -- before I went to law school, I was a vice president of human resources for a couple of healthcare corporations, so that's why I ask the questions that I do.
MR. McCAHREN: So by at least 2011, Pro-Tec, in response, promised to OSHA that they would -- that they would develop rules.
THE COURT: All right. That's where you're -- all right. Go on. I think I understand your point now better. Go on.
MR. McCAHREN: So Pro-Tec passed rules, one of which, use safety harness when close to the hazard of falling. That's number 23 in Pro-Tec's own work rules. Pro-Tec also had a fall protection program which they had developed due to prior OSHA violations. And their fall protection program requires use lifelines, safety harness, or lanyards when you are working higher than six feet up, Your Honor.

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And they have extensive rules about the fact that the harnesses have to be rated at 5,000 pounds, a full body harness, restraint line, or lanyard. And it says the employer will -- which is Pro-Tec -- will provide a full body harness which will be used at all times.

And they have very detailed rules, Pro-Tec does, about inspecting these harnesses and the -- how the harnesses are supposed to be constructed. But they are supposed to verify there are no torn, frayed, broken fibers anywhere on the harness.

All their rules require them, the Pro-Tec -- and the Pro-Tec executive employees required them to harness everyone on that roof. This isn't like "McMillin". "McMillin" is a little bit of like I wonder if what would happen if we dropped somebody in this vat, we don't really know what would happen.

But Pro-Tec knows what's going to happen because it passed laws requiring harnesses. They knowingly failed daily, yearly.

THE COURT: Excuse me.

(A brief discussion was held off the record.)

THE COURT: Go on. Sorry for the interruption.

MR. McCAHREN: No worries. So largely in part to other legal issues they had, Pro-Tec passed laws and rules requiring the use of safety harnesses and violated that on

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the daily basis as opposed to "McMillin," which was, you know, some events that took place in a short amount of time of one day. And it did not violate any of their own internal -- those acts did not violate any of their own internal rules.

Pro-Tec had specific rules. One, their employees have to be harnessed, that's -- two, they didn't harness their employees. So when they -- and that's willful misconduct according to SDCL 62-4-37, when their executive employees failed to provide them with safety harnesses that their laws require.

And it's not substantially certain or probable. It's absolutely certain that if you are not harnessed, you are going to hit the ground. They knowingly failed to harness every employee up there.

The only reason Althoff is dead is because they violated their own laws and didn't harness that kid or any other kid, person, employee, not that -- his mom is here. And I didn't really want to -- I am not using the word "kid" in a demeaning matter, but they -- you also asked -- they hadn't trained him at all.

However, it doesn't matter for -- as I've narrowed this down, because the Pro-Tec executives are required to harness everyone. So regardless of the training, the warning line, and anything else, it's impossible for an

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employee to hit the ground because they are harnessed.

When Pro-Tec willfully violated their own rules and laws, it was absolutely 100 percent certain Althoff was going to hit the ground 33 feet below and get killed. They had -- Pro-Tec had intent when they passed the laws, and they had intent when they broke the laws.

And so under that analysis, it doesn't matter what OSHA says. It doesn't matter the fact that they didn't have safety monitors. It doesn't matter about their warning line. It doesn't matter about this make-believe common sense business that they think should control on the rooftop, because nothing of what happened on the roof top is relevant in the fact that it doesn't matter because of when he's harnessed he can't hit the ground and can't get killed.

The only thing that caused his death was ricocheting off the ground 33 feet below, which it was impossible, would have been impossible to occur had Pro-Tec followed its own laws. That's the extent of my response, Your Honor.

THE COURT: Thank you, Mr. McCahren.

Now, Mr. Travis, I think your motion for summary judgment was argued in response to Mr. McCahren's. But on your motion, do you have anything further to add?

MR. TRAVIS: No. I would just sum up and respond to

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Mr. McCahren's arguments. The facts aren't really in dispute here, Judge. It's the application of facts to what is the governing standard to get around the rule of exclusivity of workers' compensation benefits.

THE COURT: I understand.

MR. TRAVIS: You know, so --

THE COURT: I understand neither side -- it's apparent to me neither side is disputing the actual facts. It's just whether there was intent as a matter of law.

MR. TRAVIS: And that's the key factor here, Judge. Pro-Tec's failure to harness the employees may have been negligent, may have been reckless, may have been grossly negligent by failing to adhere to and enforce its own safety measures, but that's not the analysis.

The key analysis here is what -- did Pro-Tec as the employer intend the consequences or did it intend to have the result that did occur, occur? Did Pro-Tec intend to cause the death of Justin Althoff?

And the answer is absolutely not, Judge. Could they have utilized a better warning system or a harness which is apparently, you know, the focus of the discussion today. There was warning lines there. Were they in harnesses? No. Could they have been in harnesses? Yes.

But that fact does not lead, does not connect the dots that the intended consequence of failure to enforce

the rule to require the use of harnesses was to cause the death of Justin Althoff. Those dots don't connect.

The reference to 62-4-37, willful misconduct, is not even -- that statute deals with an employee's misconduct, may be a bar to a claim for workers' compensation benefits. It has no applicability to an employer's conduct. I add that just as a footnote, Judge.

But I reiterate that what the Court is directed to look at and what the Supreme Court has consistently and continually looked at was the -- did the employer intend the result that did occur. And the answer is no.

The remedy of the plaintiff is the workers' compensation benefits to which the estate is entitled. That's the exclusive remedy that's consistent with the law. Again, I renew my request that Defendant's motion be granted and Plaintiff's be denied. Thank you.

THE COURT: All right. And I will give Mr. McCahren the last word on his motion if he feels it's necessary.

MR. McCAHREN: I do, because there's two questions.

THE COURT: Go ahead.

MR. McCAHREN: One, first question, does Pro-Tec's laws require the use of safety harnesses? Yes. Two, did Pro-Tec executive employees intentionally break their own rules by failing to harness anyone? Yes. They did it every day. Their acts were intentional, violated the

rules, broke their own laws, and guaranteed absolutely certain that Althoff would hit the ground.

Again, two questions: Pro-Tec's laws require the use of safety harnesses? Yes. Two, did Pro-Tec employees knowingly on a daily basis fail to harness anyone on that roof? Yes. The kid's death is absolutely guaranteed. It's inescapable it's what's going to occur. There's no way around it. They did it every day.

THE COURT: Anything else, Mr. McCahren?

MR. McCAHREN: No, Your Honor.

THE COURT: Okay. Thank you, gentlemen. With that, I am going to take the matter under advisement. I am going to review the materials one more time, review the cases cited by both of you, and I will issue a written opinion as soon as I can get it out. Anything further I should be aware of?

MR. TRAVIS: Not from me, Judge.

THE COURT: Mr. McCahren?

MR. McCAHREN: No, Your Honor.

THE COURT: All right. Thank you, counselors. On this file, the Court will be in recess.

MR. TRAVIS: Thank you, Judge.

(WHEREUPON, the foregoing proceedings concluded.)

STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF DAY)

I, KELLI LARDY, RPR, an Official Court Reporter and Notary Public in the State of South Dakota, Third Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings in the above-entitled matter and that Pages 1 through 23, inclusive, are a true and correct copy, to the best of my ability, of my stenotype notes of said proceedings had before the HONORABLE ROBERT L. SPEARS, Circuit Court Judge.

Dated at Watertown, South Dakota, this 22nd day of July, 2021.

/s/ Kelli Lardy
KELLI LARDY, RPR
My Commission Expires: 8/30/22

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29639

LYNN ALTHOFF, as Personal Representative
of the Estate of Justin Althoff,

PLAINTIFF AND APPELLEE

vs.

PRO-TEC ROOFING, INC.

DEFENDANT AND APPELLANT

APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT L. SPEARS
CIRCUIT COURT JUDGE PRESIDING

APPELLEE'S BRIEF

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Order Granting Petition for Allowance of Appeal from Intermediate Order: June 9, 2021

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SOUTH DAKOTA STATUTES

PRELIMINARY STATEMENT

In this Brief, Plaintiff/Appellee will be referred to as Appellee or Althoff. Defendant/Appellant will be referred to as Appellant or Pro-Tec Roofing, Inc.

STATEMENT OF FACTS

1. On September 10, 2009, OSHA issued a citation to Appellant as follows:

Citation 1, Item 1A Type of Violation: Serious

29 CFR 1926.451(b)(1): Each platform on all working levels of scaffolds was not fully planked or decked between the front uprights and the guardrail supports:

(a) For the employee installing metal flashing from a welded metal frame scaffoldusing one 20-inch wide plank, located at 609 East Seventh Street, Platte, South Dakota.
(CI 1172-1173)

2. On January 11, 2011, OSHA issued a citation to Appellant as follows:

Citation 1, Item 1 Type of Violation: Serious

29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low- slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lowerlevels, was not protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, warning line systemand personal fall arrest system, or warning line system and fall monitoring system: or, on roofs 50 feet (15.25 m) or less in width, the use of a safety monitoring system alone:

(a) For the employees exposed to falls of approximately 13 feet while removing roofing materials at 2201 Sixth Avenue SE, Aberdeen, SD.
(CI 1173)

3. The 2011 Aberdeen citation was resolved with an Informal Settlement Agreement as follows: The Informal Settlement Agreement reflected a penalty reduction to Agreement reflected a penalty reductionto $1,785.00. The employer agreed to

implement a safety and health program to comply with OSHA's "Safety and Health Management Guidelines". **(CI 1174)**

4. On July 2, 2012, OSHA issued a citation to Appellant as follows:

> Citation 1, Item 1 Type of Violation: **Repeat – Serious**
>
> 29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels, was not protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, warning line system and personal fall arrest system, or warning line system and safety monitoring system; or, on roofs 50 feet (15.25 m) or less in width, the use of a safety monitoring system alone:
>
> (a) On or about May 22, 2012, for the employees installing roofing materials on a flat roof approximately 15 feet wide and 25 feet long and exposed to a potential fall of approximately 14 feet, located at 1314 West Havens Avenue in Mitchell, South Dakota.
>
> Note: This company was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard which was contained in OSHA Inspection Number 315002139, Citation 1, Item 1, and was affirmed as a final order on January 25, 2011, with respect to a workplace located at 2201 Sixth Avenue SE in Aberdeen, South Dakota.
> **(CI 1174)**

5. The undisputed material facts demonstrate that Appellant, after OSHA fall hazard-related citations on September 10, 2009, January 11, 2011, and July 2, 2012 made promises to OSHA, in exchange for a more favorable resolution of the prior OSHA citations, enacted a Safety and Health Manual which included a Fall Protection Program. **(CI 1173)**

6. Pro-Tec Roofing, Inc. enacted safe work rules which mandated in pertinent part the following:

> (1) You must follow all OSHA, State, Federal, and Pro-Tec Roofing, Inc. standards at all times.

(22) Be sure to place barricades and safety signs floor openings, elevator pit openings, roof openings or any other area that may cause injury.
(23) *Use safety harness when close to the hazard of falling.*

Pro-Tec Roofing, Inc.'s Safety Program mandated, in part, as follows:

ROOFING PERSONNEL

Personal Protective Equipment

7. *Use lifelines, safety harnesses or lanyards when you are working higher than 6 feet off the ground.*

3) Employees who are constructing leading edges or working nearby *must* be protected from falling. **(29 CFR 1926.501(b)(2))**

Verify that each employee who is constructing a leading edge that is 6 ft. or more above lower levels is protected from failing by the use of guardrail systems, safety net systems, or personal fall arrest systems 100% of the time.
(CI 1175-1176)

7. Pro-Tec Roofing, Inc.'s Safety and Health Manual mandated in part, as follows:

It is the responsibility of the corporation officers and foremen to see that *the policies of this corporation are followed and that we meet all OSHA and local safety standards.*
(CI 1176)

8. In or about May of 2015, Pro-Tec Roofing, Inc. entered into a subcontract for building construction with the City of Watertown for the Watertown Community Center. (Plaintiff's Request for Admissions to Defendant No 4, served 03/18/20 ultimately admitted).

(CI 1174)

9. Pro-Tec Roofing, Inc. was contractually obligated and agreed to establish a safety program implementing safety measure, policies, and standards conforming to those required or recommended by governmental and quasi-governmental authorities at

the Watertown Community Center Project. (Plaintiff's Request for Admissions to Defendant No. 5, served 03/18/20 ultimately admitted).

(CI 1174)

10. The subcontract issued by the City of Watertown mandated to Pro-Tec Roofing, Inc., ""[t]his is to advise you that all labor, materials, tools, and equipment used in fulfillment of the above-named project will fully comply with the Occupational Safety and Health Act of 1970 and all other current federal, state, and local regulations" at the Watertown Community Center Project. (Plaintiff's Request for Admissions to Defendant No. 7, served 03/18/20 admitted).

(CI 1175)

11. From on or around January 7, 2016 until April 21, 2016, Pro-Tec Roofing, Inc.'s foremen knowingly and intentionally failed to provide any employee on the 33-foot high Watertown project with a safety harness required by Pro-Tec's own rules and Pro-Tec's Work and Safety Program. This daily violation of work rules, Pro-Tec's Safety Manual, and OSHA statutes made it absolutely certain that a falling employee would die rather than be stopped at a fall of less than 6 feet had the harnesses Pro-Tec requires been furnished.

(CI 1181)

13. Thus, Pro-Tec Roofing, Inc.'s foremen deliberately and knowingly failed to provide any employee with a mandatory lifesaving safety harness every hour of every workday on the roof and the failure was the proximate cause of Althoff's death. Pro-Tec Roofing, Inc. knowingly violated the mandatory rules they enacted themselves and their own written Safety and Health Manual and Safety Program Pro-Tec Roofing, Inc. and

had an absolute requirement to follow as well as OSHA Statutes. **(Id.)**

14. An OSHA representative conducted initial interviews of Pro-Tec Roofing, Inc. employees on April 21, 2016. Portions of Bob Koehn's initial interview is as follows:

OSHA:	Eleven? Ok. Now from a company perspective, a safety health perspective, do you guys have a safety health program?
KOEHN:	Well yes and no. You know that's where it's not good because it's not well- documented. We've done OSHA training. There's about six of us that have a ten-hour OSHA and actually eight or nine of us that did a four-hour OSHA actually about a month ago.
OSHA:	Right. How many years in the roofing industry?
KOEHN:	Uh – 32.
OSHA:	And obviously you've heard of OSHA.
KOEHN:	Yes.
OSHA:	You've heard that we have standards related to construction.
KOEHN:	Yes.
OSHA:	You know that we have standards associated with fall protection and construction.
KOEHN:	Correct.
OSHA:	What kind of training have you had specific to construction related hazards involving the roofing industry?
KOEHN:	Well like I said I've done the 10-hour OSHA . . .
OSHA:	But wait a minute, how long ago was that?
KOEHN:	Uh the 10-hour was actually in 2010.
OSHA:	Ok. Then you did a four-hour . . .
KOEHN:	Did a four-hour one here about a month ago.
OSHA:	What did that cover?
KOEHN:	Fall protection and scaffolding, stuff like that.
OSHA:	Ok. So it was mostly fall surround . . .
KOEHN:	Use of harnesses . . .
OSHA:	So it was a fall protection . . .
KOEHN:	Fall protection deal, yes.
OSHA:	So is it um, from your perspective, the two new guys specifically, were they provided fall protection training?
KOEHN:	No.
OSHA:	Did you know that they had to be provided fall protection training as a part of what they're doing on a roof with possible perimeter exposures regarding falls?
KOEHN:	Not specifically. No.

OSHA: But you told me you had the 10-hour . . . .
KOEHN: I did the 10-hour, yes.
OSHA: And you had the specific training here four weeks ago. Did they cover the OSHA standard at all? Do you remember?
KOEHN: Well we went through, he went through some numbers in the book. I can't remember off-hand what the numbers are.
OSHA: Ok.
KOEHN: But I guess I don't remember that every new hire, I don't remember him saying had to specifically have that.
OSHA: Ok. Um, they do.
KOEHN: Ok.
OSHA: Is there anything that would deter your people from walking over to the edge and possibly exposing themselves?
KOEHN: Well there's the common-sense factor. They're following everybody else to where the work is.
OSHA: Ok. What's to say that somebody couldn't?
KOEHN: Nothing says they couldn't.
KOEHN: Yeah. A refresher.
OSHA: Refresher? That was at the office?
KOEHN: Right. He came there _____.
OSHA: Ok. Did he talk about warning line systems and how they function and work?
KOEHN: Not specifically. Them warning lines (wind) working with harnesses.
OSHA: Have you ever used harnesses?
KOEHN: Yep.
OSHA: On a roof like this, if you're not using warning lines, and you knew people were outside of the warning line, could you implement a personal fall risk system on this type of roof.
KOEHN: Yeah we have one of those _____ carts.
OSHA: Oh you do? Have you ever thought about using that just to insure that if somebody does work outside that line, to be protected?
KOEHN: Not on a daily basis.
OSHA: How many carts to you have?
KOEHN: One.
OSHA: Ok.
KOEHN: When we do use it, if we do we'd have three people.
OSHA: Three people can be tied to it?
KOEHN: (wind) working outside the perimeter.
OSHA: Alright. So any time on a roof like this on any given day there can be multiple people as a part of the implementation of your roof system outside the line working?
KOEHN: Could be.

OSHA: Right. When was the last time you had multiple people outside your warning line system installing your roof material? In the last two weeks I suppose you had at least one day.

KOEHN: Well it's gonna happen every time you start at the end and you end. You're gonna have it. This, when we did down here (wind noise). _____ your danger area.

OSHA: When you use the system (wind noise) outside the warning line, do you normally have someone standing inside here watching or are they allowed to work?

KOEHN: No. (wind noise)

OSHA: When we're talking about all these different standards, normally, a roofing contractor, there's a pretty narrow, when it comes to OSHA standards that you have to deal with.

KOEHN: Everybody's got harnesses.

(CI 1182-1184)

15. On May 7, 2016, OSHA conducted final interviews with Pro-Tec employees. Portions of Bob Koehn's final interview is as follows:

OSHA: So you guys provided me with your safety and health program.

KOEHN: Uh huh.

OSHA: Do you guys ever use that? That program?

KOEHN: Not on a day to day basis. You know, we talk to people and, like I said, we do a pre-job deal when we're going to the job with setup and we let everybody know what's going on and for us most of the time it's barriers and a monitor.

OSHA: Right.

KOEHN: It works out the best for what we do.

OSHA: Sure.

KOEHN: There's times where you get, where there's a situation, but we have one of those big yellow carts that off to and be harnessed to.

OSHA: Do you use that often?

KOEHN: Ahh, not a lot. I mean, if we're in that situation we do.

OSHA: When you guys bring new people on, what's the standard? What's the protocol? How do you handle that as far as training, providing them training?

KOEHN: Basically it's on the job. Like I tell it's easier to show ya, than to try to tell ya.

KOEHN: Not prior to going on the job. Once they see, 'cause once they see, cause you can tell em what a barrier is and if they don't know what a barrier, you can tell them basically it's a

traffic cone. You know, until you see it, it's just another one of them deals, well vision, ok this is what it is.

OSHA: Right.

KOEHN: Cause it's the first thing off the boom truck is the barrier basket.

OSHA: Did you cover (dead air- a second or two) as far as the warning line system and monitors and how they work?

KOEHN: Not specifically.

OSHA: Don't you think it's important to discuss the limitations and how it's used and if you go outside the warning line that you then have to integrate or utilize - since you've chosen this method, system.

KOEHN: Right.

OSHA: The monitor. And what they do, how they perform their job, stuff like that.

KOEHN: Yeah, probably should do it in more detail.

OSHA: Do you, have you ever talked with your guys as far as what the role of a monitor is?

KOEHN: Yes. We've had that and most of my guys have had the OSHA training . . .

OSHA: Right. That was in March, wasn't it?

KOEHN: And it's been over, they go over it with that too.

OSHA: Now, in that March training did you guys cover this stuff?

KOEHN: They didn't do big - basically we're talking more so on harnesses.

OSHA: Oh ok.

KOEHN: Fall protection with harnesses is what that covered for the most part.

OSHA: Right.

OSHA: But then by saying that, on that same token, you can't really consider Justin or Jon a monitor, can you? They have no clue.

KOEHN: Well no, but they're not out there. They're typically not out there either because I have my regular guys do it until they learn that.

OSHA: That's not what I'm told, Bob. (Chuckling) Based on and talking to every one of your guys, everybody, at any time, can go outside that warning line without any sort of monitor at all and they can work out there. There was no control. None of that. That's strictly from them.

KOEHN: Well that's not entirely true.

OSHA: _____ were outside the warning line working and nobody is watching them. You had another guy, I forgot his name, it's in my notes. On the other end of the roof that was working by himself, not being monitored. There's absolutely no control. That's what I'm saying.

KOEHN: Ok.

OSHA: And if you choose this system and you know that a monitor has to go or works, is integrated into the process as far as using this safety system, and you don't have people that area designated, all hell can break loose.

KOEHN: Um hum.

OSHA: And that's essentially what happened. In my opinion. That's strictly my opinion.

OSHA: Here's the deal. You were up on the roof, Aaron's up on the roof. Both have supervisory responsibilities. You've got guys working outside the warning line systems, and obviously you've were all (skips) who was working over there who really wasn't a designated monitor. He did have the ability to tell him to watch out. He did. And then he went back to work.

KOEHN: Right.

OSHA: Here's the deal Bob. You guys knew, I'm not putting it solely on you, it's a shared responsibility by the company.

KOEHN: Yep.

OSHA: You and Aaron and whoever else, Kyle. He's right below Aaron.

KOEHN: Yep.

OSHA: You guys knew that when people work outside the warning line ... Because you chose this system ...

KOEHN: Yep.

OSHA: .... that you have to utilize a monitor.

KOEHN: Right.

OSHA: What happened? (dead air for a few seconds)

KOEHN: _____ he went and picked up two or three more pieces of insulation. And he turned around and Justin was gone.

OSHA: Right. Um .... the whole monitor deal is ...give me an idea, give me your thoughts, your feelings on the system. Do you have a problem, or do you have issues with having designated monitor, or did you have, I should say, did you have issues with having somebody that's designated as a monitor and really didn't perform a whole lot of work because obviously they're not able to do their job roofing that week and stand there?

KOEHN: No I don't have an issue with that.

OSHA: Ok. Ok. What if you ....

KOEHN: Part of the problem is the guy that's the monitor gets bored out of his mind.

OSHA: Right.

KOEHN: Because also when you're inside the barriers, if nobody's outside the barriers, they can be doing something.

OSHA: Ok. So looking at what happened, to wrap this up, what do you think could have been done differently that may have prevented this tragic event?

KOEHN: Well the thing that would be the perfect scenario is the new guy doesn't get within 20 feet of any edge. In the perfect scenario.

OSHA: Do you have somebody up there that's designated to insure that the warning line system is kept in place, it's being adhered to, it's not being pushed toward the edge because obviously the warning line doesn't do you any good when it's next to the edge. Whose responsibility is it to insure that that warning line is in place?

KOEHN: It's up to everybody. It's everybody's responsibility.

OSHA: But whose overall responsibility?

KOEHN: The monitor.

OSHA: But beyond that. Whose crew is it?

KOEHN: Then it comes to me. And everybody has been told over, time and time again. We've had this talk many, many times about warning lines.

OSHA: But then you know you may have a couple of employees that choose not to follow what you're saying.

KOEHN: Yep.

OSHA: You know, and you identify that these people are moving that warning line system ...

KOEHN: Yep.

OSHA: And shouldn't be moving it, how do you address that?

OSHA: Right. Do you know that, what year was that, I think it was up in Aberdeen you guys had an issue with OSHA?

KOEHN: I was doing a, actually I believe it's a little Caesar's building right now and I think, I can't remember what the roof was. I think it was 40 x 60.

OSHA: Where you on site?

KOEHN: I was on a roof. Yes.

OSHA: Troy was up there too.

KOEHN: No.

OSHA: Troy wasn't?

KOEHN: No.

OSHA: Well you guys got cited for almost the same damn thing. The monitor ... not using the monitor properly.

OSHA: Because what happened was, and I just read over briefly, I got it from Bismarck, trying to put stuff together here, is you guys didn't have a monitor and it's the same damn issue. The monitor issue. So I'm just trying to figure out what's the company's stance on the use of the monitor, you know, before the incident. Did you guys believe it in it, did

you use it or was it all just kind of a free for all that it's all on everybody else if

KOEHN: I don't call it a free for all. It's like I said, everybody's responsible.

OSHA: In my mind ...

KOEHN: To me there's no system that's 100% fail safe. You know....

OSHA: Well, if it's used right and it's set up right, and it's engineered, I think that uh, I believe personally that if you're in an engineered conventional fall protection system, full body harness, you've got obviously many choices that you can use to tie in and be anchored you stand a pretty damn good chance. Everything can fail, obviously.

KOEHN: Well . . . .

OSHA: But I think you stand a lot better chance than not having anything.

KOEHN: Right. I agree. There's a lot of instances with the harness, if you're out in the middle of this roof and you're dragging cords around and you're dragging rope around you can't get near adhesive.

OSHA: Sure.

KOEHN: You know ...

(CI 1184-1190)

16. Portions of Pro-Tec employee Aaron Cashman's interview is as follows:

OSHA: As far as what you know in regards to Pro-Tec and how it's set up, what's established as far as a training regimen to allow new employees to have some exposure.

CASHMAN: Not much.

OSHA: Why is that do you think?

CASHMAN: I just don't think there's anybody in the office that pertains to it. You know . . .

OSHA: Somebody's not wearing that hat?

OSHA: Doesn't really have a good understanding of the warning line system and beyond that what a monitor even is.

CASHMAN: Right.

OSHA: You know, I truly believe that you guys had that training from that OSHA 10-hour.

CASHMAN: Right.

OSHA: And training sessions beyond that. You guys chose to use the warning line monitor system.

CASHMAN: Um huh.

OSHA: Right. Why . . . . . what happened on that end up on that roof?

CASHMAN: When?

OSHA: The day the incident occurred.

CASHMAN: I was on the north end. I had no idea what was even going on until I bet a minute after it actually happened.
OSHA: My question is, from a cultural standpoint, with the crews, the use of a monitor, why don't you think there was a designated person acting as a monitor on that roof? Where people were outside the line?
CASHMAN: Why there wasn't an active one?
OSHA: Right.
CASHMAN: I don't know.
OSHA: You think it . . . . and this is your opinion, did it have anything to do with the fact that you're trying to get the job done by having somebody standing there not being able to get their hands on the material and lay it down is a part of the roofing process that takes away from the production aspects of it?
CASHMAN: Yeah.
OSHA: Was that kind of the thought behind not using a designated person?
OSHA: Have there been situations where you've used monitors in the past?
CASHMAN: Yeah.
OSHA: When was the last time?
CASHMAN: Yesterday. (laughs)
OSHA: I mean before the incident.
CASHMAN: Well it all stems back to before the incident, everybody would just look out for everybody.
OSHA: Right.
CASHMAN: That's how we did it. Was it right? Yes and no. We're just trying to protect each other.
OSHA: Yeah. I understand that.
CASHMAN: You know . . . .
OSHA: But there's no control.
CASHMAN: There's no control. Right.
OSHA: Nobody's communicating, nobody's raising a flag as far as identifying if you're going to go outside the lines.
OSHA: Did you guys have any conversations . . . . were you on that roof when OSHA showed up the last time?
CASHMAN: _____ ticket? Citation? Where was that one at?
OSHA: It was in Mitchell.
CASHMAN: Mitchell?
CASHMAN: I was on the roof. Yeah.
OSHA: Were ya? Was the issue kind of the same thing, the whole monitor thing?
CASHMAN: As in ....
OSHA: Not having a monitor?

CASHMAN: No. It was just everybody look out for each other and two guys were working taking off and they were on their hands and knees. They were safe. I mean... safer.
OSHA: Right. Obviously instead of ...
CASHMAN: leaning way over.
OSHA: But you know as well as I do, and I don't know if you've read the standard, you know that, and correct me if I'm wrong, that if you have a warning line, people outside that warning line, there's some options. What are those options?
CASHMAN: Either a monitor or harnesses.
OSHA: Right. And do you believe you guys were following the standard?
CASHMAN: On that one? Aberdeen? We didn't have a monitor. Everybody looked out for ...
(CI 1190-1193)

17. On and prior to April 21, 2016, Pro-Tec Roofing, Inc. was clearly and obviously aware that harnesses were required by their own internal rules and OSHA statutes and that they also broke their own internal rules and OSHA statutes by failing to provide required safety training, inspections, equipment, complete warning lines, and dedicated monitors. Serious injury or death was absolutely certain when Pro-Tec foremen chose to violate their own rules by failing to harness employees to stop a fall from 33 feet. **(CI 1174-1181)**

18. On or about April 21, 2016, Pro-Tec Roofing, Inc. intentionally violated their own safety program and safety rules and up to ten OSHA statutes. Pro-Tec Roofing, Inc.'s actions and inactions were intentional, willful, and/or wanton, and repeated prior similar or identical to their other OSHA violations. As a result of Althoff's death, OSHA issued a citation to Pro-Tec Roofing, Inc. as follows:

> (a) Pro-Tec Roofing, Inc. @1515 15th St. NE, Watertown, SD 57071: On or prior to April 21, 2016, the exposing employer did not ensure a written hazard communication program which at least described how the criteria specified for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also included a hazardous chemicals list and methods used to inform

employees of the hazards of non-routine tasks, had been developed for employee exposures, such as but not limited to the following:

(1) Carlisle Sure Seal 90-8-30A Bonding Adhesive which contains toluene, solvent naphtha, petroleum, light aliphatic, and acetone, and

(2) Carlisle HP-250 Primer-which contains toluene, heptane, and phenolic resin. **(CI 1194)**

19. As a result of Althoff's death, OSHA issued a citation to Pro-Tec Roofing, Inc. as follows:

(a) Pro-Tec Roofing, Inc.@ 1515 15th St. NE, Watertown, SD 57071: On and prior to April 21, 2016, the exposing employer did not provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area such as but not limited to:

(1) Carlisle Sure Seal 90-8-30A Bonding Adhesive-Adhesive which contains toluene, solvent naphtha, petroleum, light aliphatic, and acetone, and;

(2) Carlisle HP-250 Primer-which contains toluene, heptane, and phenolic resin.

(CI 1197)

20. As a result of Althoff's death, OSHA issued a citation to Pro-Tec Roofing, Inc. as follows:

(a) Pro-Tec Roofing, Inc.@ 1515 15th St. NE, Watertown, SD 57071: On or prior to April 21, 2016, the exposing employer did not ensure employees were exposed to fall hazards, ladder hazards, electrical and fire hazards while conducting roofing work on the Watertown Community Center. A "competent" person had not conducted frequent and regular inspections to ensure employees were protected from roofing related hazards during the installation of the EPDM roof. **(CI 1199)**

21. As a result of Althoffs death, OSHA issued a citation to Pro-Tec Roofing, Inc. as follows:

(a) Pro-Tec Roofing, Inc.@ 1515 15th St. NE, Watertown, SD 57071: On and prior to April 21, 2016, the exposing employer did not ensure that the warning line system that was being utilized as a fall protection system for employees conducting roofing activities on the Watertown Community Center was erected around all sides where fall hazards existed. The

warning line system used was not fully erected on the north and south ends of the roof up to the point where the parapet wall reached a height of at least 39 inches. This condition exposed employees to a fall hazard of approximately 33 feet. **(CI 1200)**

22. As a result of Althoff's death, OSHA issued a citation to Pro-Tec Roofing, Inc. as follows:

(a) Pro-Tec Roofing, Inc.@ 1515 15th St. NE, Watertown, SD 57071: On and prior to April 21, 2016, the exposing employer did not ensure that the warning line system was connected to the work area by an access path formed by two warning lines. Employees accessed the main roof through a roof hatch that did not have warning lines. Employees accessed the main roof through a roof hatch that did not have warning lines creating a path to the east roof, where employees were engaged in EPDM roof installation on the Watertown Recreation Center. This condition exposed employees to a fall hazard of approximately 33 feet.
(CI 1201)

23. As a result of Althoff's death, OSHA issued a citation to Pro- Tec Roofing, Inc. as follows:

(a) Pro-Tec Roofing, Inc at 1515 15th St. NE, Watertown, SD 57071: On and prior to April 21, 2016, the exposing employer allowed two Louisville 8-foot step ladders to be used in the closed position and leaned up against a parapet wall to allow employees to access the east roof of the Watertown Community Center. Using the step-ladders in this configuration is contrary to manufacturer's instructions and exposes employees to falling off the ladder. This hazard exposed the employee to falls from heights of approximately 6 feet.
(CI 1202)

24. As a result of Althoff's death, OSHA issued a citation to Pro- Tec Roofing, Inc. as follows:

(a) Pro-Tec Roofing, Inc.@ 1515 15th St. NE, Watertown, SD 57071: On and prior to April 21, 2016, the exposing employer did not ensure employees engaged in EPDM roof system installation on the Watertown Community Center were protected from fall hazards. A warning line system was partially erected along the edge of a commercial roof as a means of fall protection. The employer did not dedicate a safety monitor to ensure employees working outside the warning line were aware of their proximity to the edge of the roof. On April 21, 2106, an employee

> working outside of the warning line system, fell approximately 33 feet and later died from injuries sustained from the fall. This condition exposed employees working outside of the warning line system to fall hazards of approximately 33 feet.
>
> **(CI 1203)**

25. As a result of Althoffs death, OSHA issued a citation to Pro- Tec Roofing, Inc. as follows:

> Pro-Tec Roofing, Inc.@ 1515 15th St. NE, Watertown, SD 57071: On and prior to April 21, 2016, the exposing employer did not ensure that each employee engaged in roofing operations on the Watertown Community Center, had been trained to recognize the hazards associated with working at elevations over 6 feet. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards. On April 21, 2016, an employee engaged in the installation of an EPDM roof system, fell approximately 33 feet to his death. Two new employees did not receive fall protection training before working at elevations over 6 feet. The condition exposed employees to the hazard of falling from an elevation of approximately 33 feet.
>
> **(CI 1204)**

STANDARD OF REVIEW

The standard for summary judgment is well-settled. Summary judgment is proper when no genuine issue of material fact exists, and thus, the party moving for summary judgment is entitled to judgment as a matter of law. SDCL § 15-6-56(c). Further, "[a]ll facts and favorable inferences from those facts must be viewed in a light most favorable to the nonmoving party." *Andrushchenko v. Silchuk*, 2008 S.D. 8, ¶ 8, 744 N.W.2d 850, 854 (citation omitted). "'Summary judgment is an extreme remedy, [and] is not intended as a substitute for a trial.'" *Stern Oil, Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 9, 817 N.W.2d 395, 399 (citation omitted) (alteration in original)."'Summary judgment is generally not feasible in negligence cases.'" *Andrushchenko*, 2008 S.D. 8, ¶ 8, 744 N.W.2d at 854 (citation omitted).

ARGUMENT

It is the responsibility of the Pro-Tec Roofing, Inc.'s corporation officers and foreman to see that the policies of this corporation are followed and that we meet all OSHA and local safety standards (at the Watertown Community Center Project). CITE?

Pro-Tec Roofing, Inc. has safe work rules which mandated in pertinent part in the following:

(1) You must follow all OSHA, State, Federal, and Pro-Tec Roofing, Inc. standards at all times.
(2) Be sure to place barricades and safety signs floor openings, elevator pit openings, roof openings or any other area that may cause injury.
(3) Use safety harness when close to the hazard of falling.

Pro-Tec Roofing, Inc.'s Safety Program mandated, in part, as follows:

ROOFING PERSONNEL

Personal Protective Equipment

7. Use lifelines, safety harnesses or lanyards when you are working higher than 6 feet off the ground. CITE

Falls are the leading cause of death in construction workers and there were 320 fatalities from falls out of 1008 construction fatalities according to 2018 OSHA statistics. CITE Excepting Sundays, a worker is killed from a fall every day and since it is a matter of WHEN an employee falls not IF Pro-Tec rules require all their employees to wear harnesses when exposed to fall hazards. When Pro-Tec employees are harnessed as their rules require, Pro-Tec employees cannot strike the ground and get killed when they fall. In their brief Pro-Tec Roofing, Inc. candidly admits they violated their own rules daily when Pro-Tec foremen failed to harness employees ensuring that the first Pro-Tec employee to fall, whenever that occurred, would end with the employee slamming into the earth. In this action, Appellee doesn't have to prove that Pro-Tec knows which unharnessed employee is going to fall on any given day at any particular time particularly

since the fall itself caused no harm and is irrelevant. What is relevant that Pro-Tec Roofing, Inc. and the entire construction industry knows a fatal fall occurs daily and as a result, Pro-Tec rules require their employees to be harnessed so they aren't killed when they HIT the ground from 33 feet as Althoff did with no one noticing. CITE OSHAS Fall Prevention Campaign.

Pro-Tec Roofing, Inc.'s foremen's intentional tort started in Watertown in January of 2016 in Watertown when foremen began violating their own rules, safety program and OSHA statutes by failing to provide their required harnesses. Pro-Tec Roofing, Inc.'s foremen willfully, wantonly and knowingly broke their own rules and their own written safety program which mirrors, cites and follows the federal safety statutes. The known danger of an unharnessed 33-foot fall is with absolute certainty death or catastrophic injury. Of course, there is not a reported South Dakota case where the employer intentionally and blatantly violated their own safety program, internal rules, and federal safety statutes, once, much less flagrantly on a daily basis for years because this Court will not approve willful misconduct as was found to exist in many of its opinions. *See Driscoll v. Great Plains Marketing Co.,* 322 N.W.2d (1933); *Harn v. Continental Lumber Co.,* 506 N.W.2d (1933) *Therkildsen v. Fisher Beverage,* 1966 S.D. 121; 554 N.W.2d 485 (1996); *Grynberg v. Citation Oil & Gas Corp.,* 1977 S.D. 121; 573 N.W.2d 493 (1977); *Goebel v. Warner Transp.,* 2000 S.D. 79; 612 N.W.2d 18 (2000); *Fryer v. Kranz,* 2000 S.D.125; 616 N.W.2d (2000); *Pommerville v. Liberty Mutual and Zurich-American,* HF 96, 2000/01; *McMillin v. Mueller,* 2005 S.D. 36; 695 N.W.2d 217 (2005); *VanSteenwyk v. Baumgartner Trees and Landscaping,* 2007 S.D. 36; 731 N.W.2d 214

(2007); *see also Heil v. Belle Starr Saloon & Casino, Inc.,* Not Reported in F. Supp, 2d (2013); 2013 WL 943811.

In *Heil v. Belle Starr Saloon & Casino, Inc.,* Not Reported in F. Supp, 2d (2013); 2013); 2013 WL 943811, Federal District Court Judge Jeffery Viken denied the defendants' motion for summary judgement and allowed the plaintiffs intentional tort claim to proceed. *See Heil v. Belle Starr Saloon & Casino, Inc.,* Not Reported in F. Supp, 2d (2013); 2013 WL 943811 ("Viewing the evidence in the light most favorable to Ms. Heil for summer judgement purposed, a jury could find the course and pattern of conduct at the Belle Starr was sustainably certain to cause an assault or IIED of female employees, including Ms. Heil. It is ultimately a question of fact for the jury to determine whether the evidence satisfies the substantial certainty standard.")

Pro-Tec's foremen's daily actions for months of deliberately knowingly and intentionally failing to provide their required safety harness and violating their own rules and Safety and Health Manual, Safety Program, their own Fall Protection Program, as well as the Federal Safety Statutes is far, far worse than the conduct in *Heil* where the intentional tort claim was allowed to proceed. *See Heil v. Belle Starr Saloon & Casino, Inc.,* Not Reported in F. Supp, 2d (2013); 2013 WL 943811.

The Oklahoma Supreme Court recently discussed a similar case to the case at the bar *See Wells v. Oklahoma Roofing & Sheet Metal, L.L.C.,* 2019 OK 45; 457 P.3d 1020 (2019). An employee of Defendant was working on a roof applying a membrane roof on a three-story building when he was required by Defendant to unhook his single line lanyard requiring him to cross over two coworkers. *See Wells v. Oklahoma Roofing &*

Sheet Metal, L.L. C., 2019 OK 45, ¶ 3; 457 P.3d 1020, 1023 (2019). He walked ten feet beyond the point where he had unhooked.

In addition to failing to provide safety harnesses which caused Althoff's death, Pro-Tec Roofing, Inc. committed many other violations which would be relevant at the punitive damage aspect of the trial. Pro-Tec Roofing, Inc. repeatedly chose not to have a known dedicated safety monitor and knew and admitted that warning lines were out of place, on April 21, 2016. Pro-Tec, despite all prior OSHA violations, their clear knowledge of OSHA laws, contractual agreements, and internal Pro-Tec rules and fall protection program, which they had previously promised OSHA in 2012 that they would follow to settle all other OSHA violations.

After Pro-Tec deliberately failed to provide a safety harness daily for months to all employees including Althoff as mandated by their own internal safety rules and fall protection policy, Althoff fell from a height of 33 feet with apparently no one noticing, slamming into the earth because Pro-Tec Roofing, Inc. failed to harness anyone and the failure to provide harnesses was the proximate cause of his death.

On May 7, 2016, Pro-Tec employees made the following admissions:

OSHA:	So you guys provided me with your safety and health program.
KOEHN:	Uh huh.
OSHA:	Do you guys ever use that? That program?
KOEHN:	Not on a day to day basis. You know, we talk to people and, like I said, we do a pre-job deal when we're going to the job with setup and we let everybody know what's going on and for us most of the time it's barriers and a monitor.
OSHA:	Right.
KOEHN:	It works out the best for what we do.
OSHA:	Sure.
KOEHN:	There's times where you get, where there's a situation, but we have one of those big yellow carts that off to and be harnessed to.

OSHA: Do you use that often?

KOEHN: Ahh, not a lot. I mean, if we're in that situation we do.

OSHA: Don't you think it's important to discuss the limitations and how it's used and if you go outside the warning line that you then have to integrate or utilize – since you've chosen this method, system.

KOEHN: Right.

OSHA: The monitor. And what they do, how they perform their job, stuff like that.

KOEHN: Yeah, probably should do it in more detail.

OSHA: Do you, have you ever talked with your guys as far as what the role of a monitor is?

KOEHN: Yes. We've had that and most of my guys have had the OSHA training . .

OSHA: Right. That was in March, wasn't it?

KOEHN: And it's been over, they go over it with that too.

OSHA: Now, in that March training did you guys cover this stuff?

KOEHN: They didn't do big - basically we're talking more so on harnesses.

OSHA: Oh ok.

KOEHN: Fall protection with harnesses is what that covered for the most part.

OSHA: But then by saying that, on that same token, you can't really consider Justin or Jon a monitor, can you? They have no clue.

KOEHN: Well no, but they're not out there. They're typically not out there either because I have my regular guys do it until they learn that.

OSHA: That's not what I'm told, Bob. (Chuckling) Based on and talking to every one of your guys, everybody, at any time, can go outside that warning line without any sort of monitor at all and they can work out there. There was no control. None of that. That's strictly from them.

KOEHN: Well that's not entirely true.

OSHA: _____ were outside the warning line working and nobody is watching them. You had another guy, I forgot his name, it's in my notes. On the other end of the roof that was working by himself, not being monitored. There's absolutely no control. That's what I'm saying.

KOEHN: Ok.

OSHA: And if you choose this system and you know that a monitor has to go or works, is integrated into the process as far as using this safety system, and you don't have people that area designated, all hell can break loose.

KOEHN: Um hum.

OSHA: And that's essentially what happened. In my opinion. That's strictly my opinion.
(CI 1187)

Pro-Tec Roofing, Inc.'s employees' daily conscious, deliberate, thus intentional actions and decisions refusing to provide their required harnesses to all employees prior to Althoff's death clearly exceed even the threshold of "willful misconduct" as the same is described under the South Dakota worker's compensation statutory scheme which contemplates the intentional doing of something with the knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences. SDCL 62-4-37.

Pro-Tec Roofing, Inc. was absolutely certain of what they were exposing Althoff to by intentionally failing to harness him or provide an operable fall protection system. SUMF 10-12, 28-33; CITE *see also* South Dakota Pattern Jury Instruction 20-50-20. South Dakota Pattern Jury Instruction 20-50-20, Intentional Tort - Definition of Intent, states "(c)onduct is intentional when a person acts or fails to act for the purpose of causing injury or knowing that injury is substantially certain to occur. Knowledge or intent may be inferred from the person's conduct and the surrounding circumstances." South Dakota Pattern Jury Instruction 20-50-20

"[A]n employer's intentional acts against its employee come within the exclusivity exception to the workers' compensation laws, as intentional acts are neither accidental in nature nor arise out of the normal course and scope of an employee/employer relationship." *Wells* at ¶10 (internal citation omitted). "[T]he legal justification for an intentional tort action at common law, is the non-accidental, deliberate character of the injury judged from the employer's subjective standpoint. *Wells* at ¶10 (internal citation

omitted). The court's focus should not be "limited to a particular employee and the injury sustained; but rather, the employer's intentional acts or willful failure to act as contemplated by the Oklahoma Workers' Compensation scheme. *Wells* at ¶10 (internal citation omitted).

> Cloaking an employer with immunity from liability for their intentional behavior unquestionably would not promote a safe and injury-free work environment. An employer's impunity to commit an intentional act with the knowledge that, at the very most, his workers' compensation premiums may rise slightly is not in accord with Oklahoma public policy. Because Oklahoma workers' compensation laws clearly underscore and contemplate the accidental character of a workplace injury, an employer's immunity, then, cannot be stretched to include the employer's intentional acts.

Wells" (internal citations omitted).

"[W]hen an employer '(1) desire[s] to bring about the worker's injury or (2) act[s] with the knowledge that such injury was substantially certain to result from the employer's conduct,' an intentional tort action will lie." *Wells"* (internal citation omitted). The *Wells* court acknowledged that "all consequences which the actor desires to bring about are intended.11 *Wells"* (internal citation omitted). "That intent, whether an intentional act or intentional inaction, is, by definition, deliberate." *Wells"*. Further, "[i]ntent denotes a desire to cause the consequences of his act that the actor knows is certain, or substantially certain to result, then under the law, the actor has in fact desired to produce the result." Restatement (Second) or Torts § 8A (Am. Law Inst. 1965).

> Deliberate intent follows as a deduction from the allegation of knowledge of the danger and the carelessness, negligence, and recklessness of defendant in not obviating it A deliberate act is one the consequences of which are weighed in the mind beforehand. It is prolonged premeditation, and the word when used inconnection with an injury to another denotes design and malignity of heart. It has been defined so many times that it is difficult to select any one definition which covers every phase in which the word is used, but some of the most apt are:

> "The word 'deliberate' is derived from two Latin words, which mean, literally, 'concerning,' and 'to weigh.'*** As an adjective*** it means that the manner ofthe performance was determined upon after examination and reflection-that theconsequences, chances and means weighed, carefully considered and estimated."
>
> "Deliberation is that act of the mind which examines and considers whether a contemplated act should or should not be done."

Wells at 116 citing *Jenkins v. Carman Mfg. Co.,* 79 Or. 448, 453, 155 P. 703, 705 (1916)(citations omitted).

"An employer's 'specific intent' to injure, or knowledge that an injury is 'substantially certainty to result,' equate to an intentional tort." *Wells* at 117. "Both require a knowledge of foreseeable consequences and are interpreted to mean intentionally knowing culpable acts. The belief that one has a different level or degree of a tortious act, and thereby concluding that specific intent and substantial certainty are different animals, is a fallacy." *Wells* at 117.

"An employer's knowledge may be inferred from the employer's conduct and all the surrounding circumstances." *Wells* at 118. (citation omitted). "Therefore, an employer's conduct and the surrounding circumstances can be established through circumstantial evidence." *Wells* at 118. (citation omitted) "To illustrate, assume a defendant pushes [a] plaintiff into a room, locks the door and throws away the key." *Wells* at ¶ 8 citing § 29 The Meaning of Intent, Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick. "Because 'the trier of fact has no mind reading machine to determine the defendant's subjective intent, 'the trier of fact is entitled to infer [from external or objective evidence] that the defendant intends to confine the plaintiff, at least for a time.'" *Wells* at 118 citing § 29 The Meaning of Intent, Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick. "Evidence that the defendant intended any given act may be good evidence

that he also intended the results that tend to follow such an act." *Wells* at 118 citing § 29 The Meaning of Intent, Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick. "Such a determination is clearly a question of fact that is ordinarily inferred from the employer's conduct or acts under the circumstance of a particular case." *Wells* at 118. (citation omitted). Thus, at a minimum, questions of material fact regarding defendant's intent preclude a grant of summary judgment.

"The original Industrial Bargain/Grand Bargain struck between employees and employers is premised on compensating employees for accidental work-related injuries regardless of fault." *Wells* at 120. (citation omitted). "'The workers' compensation statutes were designed to provide the exclusive remedy for accidental injuries sustained during the course and scope of a worker's employment and were not designed to shield employers or co-employees from willful, intentional or even violent conduct.'" *Wells* at 120. (citation omitted). "[I]ntentional injuries have never been inside the walls of the workers' compensation scheme[.]" *Wells* at 123.

"[T]he willful, deliberate, specific intent of the employer to cause injury, and those injuries that an employer knows are substantially certain to occur, are both intentional torts that are not within the scheme of the workers' compensation system or its jurisdiction. *Wells v. Oklahoma Roofing & Sheet Metal, L.L.C.*, 2019 OK 45, ¶3; 457. The safety rules mandated by Pro-Tec Roofing, Inc's Safety and Health Manual and Safety Program specifically identify known dangers of fall hazards and Pro-Tec enacted their own mandatory requirements which also quote and are consistent with very well-known OSHA federal safety statutes. (CI 1174-1180)

Pro-Tec Roofing, Inc. foremen admittedly fully aware of the danger of fall hazards deliberately and intentionally violated their very own mandatory rules they enacted themselves in their written Safety and Health Manual and Safety Program Pro-Tec Roofing Inc. on a daily basis violating their absolute requirement to harness all employees. Despite everything, Pro-Tec Roofing, Inc. promised OSHA following prior violations, Pro-Tec foremen failed to provide harnesses they required every day which killed Althoff and knowingly violated many other statutes and rules.

CONCLUSION

The facts demonstrate that Pro-Tec Roofing, Inc., after OSHA fall citations on September 10, 2009, January 11, 2011, July 2, 2012, and making promises to OSHA in exchange for resolution of prior OSHA citations, Pro-Tec wrote safety rules and programs years before April 21, 2016. Pro-Tec Roofing, Inc. then deliberately chose daily not to provide safety harnesses their own rules required to follow their very own safety manual requirements which caused Althoff to fall 33 feet while choosing not to have a dedicated safety monitor and warning line in place at all times.

Pro-Tec Roofing, Inc.'s foremen candidly admitted their deliberate conduct which they knew violated the mandates of their own internal safety rules and fall protection plan and knew that the failure to provide a safety harness device on a daily basis to stop a fall at no more than six feet would kill a falling employee. Their deliberate daily actions month after month cannot be protected by South Dakota Worker's Compensation laws. As Pro-Tec's actions are undisputed, are openly flagrant and even laughed about by Pro-Tec Roofing, Inc., and deliberate and intentional as described in South Dakota intentional jury instructions. All that is left is to be determined by a trial jury is the amount of

damages flowing from the intentional tort as well as punitive damages. The operative fact is that Pro-Tec foremen's deliberate daily failure to furnish all employees and Althoff, safety harness guaranteed the first 33-foot fall would result in death. Appellee agrees the Court's denial of summary judgment to Appellee is appropriate and summary judgment should have been granted to Appellee finding that the failure of Pro-Tec foremen to provide harnesses was willful misconduct as described by SDCL 62-4-37 and was the proximate cause of Althoff slamming into the ground causing his death.

DATED this ___ day of November, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that this Appellant's Reply Brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word 2016 and contains _____ words.

DATED this ____ day of November, 2021.

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The undersigned hereby certifies that on the _____ day of November, 2021, a copy of the Appellee's Brief was served by email upon:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29639

LYNN ALTHOFF, as Personal Representative of the Estate of Justin Althoff,
Plaintiff/Appellee,

vs.

PRO-TEC ROOFING, INC.
Defendant/Appellant.

Appeal from the Third Judicial Circuit
Codington County, South Dakota
The Honorable Robert L. Spears, Circuit Court Judge

APPELLANT'S REPLY BRIEF

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I. The Estate Cannot Satisfy the Substantial Certainty Exception

In opposition to Pro-Tec's Motion for Summary Judgment, it was the Estate's burden to "substantiate [its] allegations with sufficient probative evidence that would permit a finding in [its] favor on more than mere speculation, conjecture, or fantasy." *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398. The Estate failed to carry its burden. Half of the Estate's Brief is a mere resubmittal of its Statement of

Undisputed Material Facts. (*See* Appellee's Brief at 1-16; SR 1289-1325). None of these facts, however, create a genuine dispute of material fact.

A. The prior OSHA citations are irrelevant

In its factual statement, the Estate recites facts related to the three citations that Pro-Tec received from OSHA in 2009, 2011, and 2012. (*See id.* at 1-2). As Pro-Tec argued in its opening Brief, these citations are irrelevant to the substantial certainty analysis. (*See* Appellant's Brief at 12-19). Nothing about the prior citations impute "actual knowledge of the dangerous condition" on a wholly separate project—i.e., the Watertown Community Center. *See Harn v. Continental Lumber Co.*, 506 N.W.2d 91, 100 (S.D. 1993). Moreover, nothing about the citations demonstrate that Althoff's fall was a substantial certainty. The Estate offers no response. Instead, it argues that Pro-Tec knowingly violated its own safety rules for a prolonged period of time, which resulted in Althoff's death.

B. The Estate has not shown that Pro-Tec acted with the requisite intent.

In an effort to satisfy the substantial certainty exception, the Estate relies principally on safety regulations Pro-Tec instituted in or around 2012. (*See* Appellee's Brief at 2-3). The use of harnesses was made part of these regulations. (*See id.*). According to the Estate, beginning on January 7, 2016, and ending on the date of Althoff's fall, Pro-Tec "knowingly and intentionally failed to provide any employee on the 33-foot high Watertown project with a safety harness required by Pro-Tec's own rules and . . . Work Safety Program." (*Id.* at 4). The Estate posits that this "knowing and intentional" omission constitutes an intentional tort. *See infra*.

According to the Estate, this "intentional tort started January, 2016" and persisted "daily for months to all employees including Althoff[.]"[1] (Appellee's Brief at 18, 20). The Estate asserts that Pro-Tec intentionally and continually failed to provide Althoff with a harness, which was certain to cause Althoff's death. (*See id.* at 22). The Estate's labels do not obviate workers' compensation exclusivity. *See Harn*, 506 N.W.2d at 99 (mere allegations do not satisfy substantial certainty). Instead, focused on "the precise event producing injury[,]" it is the Estate's burden to show that Althoff's fall was known by Pro-Tec to be a substantial, or virtual, certainty. *Id.* at 97; *McMillin v. Mueller*, 2005 S.D. 41, ¶12, 695 N.W.2d 217, 222 ("*Only if the employee* can show that an ordinary, reasonable, prudent person would believe an injury was substantially certain to result from the employer's conduct can that worker bring suit against the employer at common law.") (emphasis added).

As if it were self-evident, the Estate baldly argues that the consistent lack of harnesses from January to April 2016 made Althoff's fall and death a substantial certainty. (Appellee's Brief at 20). The Estate proffers no facts specific to Althoff on the day of his fall that plausibly demonstrate that the fall was a substantial certainty that a reasonably prudent employer would have foreseen. *See Harn*, 506 N.W.2d at 95 ("The worker must allege facts that plausibly demonstrate . . . a substantial certainty that injury will be the inevitable outcome of the employer's conduct.") (citations omitted). Instead, the Estate focuses on a range of time, as opposed to the day in question, and argues that all employees, not just Althoff, were affected. (Appellee's Brief at 18, 20). As

[1] The Estate's timeline has shifted since the summary judgment hearing in circuit court, where the Estate originally suggested that Pro-Tec "knowingly failed daily, yearly[]" to adhere to harnessing requirements. (*See* HT at 17:17-19).

previously noted by Pro-Tec, no other individual fell from the roof during the period of time in issue. (Appellants' Brief at 21, n. 3). Given the number of days wherein no falls occurred, it cannot be said that Althoff's fall was a substantial certainty.

Notwithstanding, the Estate further asserts that it does not "have to prove that Pro-Tec knows which unharnessed employee is going to fall on any given day at any particular time particularly since the fall itself caused no harm and is irrelevant." (Appellee's Brief at 18). The Estate's assertion has no basis in South Dakota law and is contrary to established precedent. *See, e.g., Harn*, 506 N.W.2d at 97. To avoid the invocation of the exclusivity rule of workers' compensation, the Estate must prove that Pro-Tec had actual knowledge of a dangerous condition on the roof of the Watertown Community Center and that the condition was substantially certain to lead precisely to Althoff's fall. That is to say, the focus is "the precise event producing injury." *Id.* This is the burden that the circuit court itself stated that the Estate could not carry. (SR 1347). In sum, the Estate relies exclusively on the type of general claims that the *Harn* Court admonished to be insufficient. That is, the Estate alleges that Pro-Tec withheld a safety device, i.e., harnesses, in January 2016, which set the stage for Althoff's fall three months later. Under *Harn*, these vague and generalized allegations cannot reach the high benchmark set by substantial certainty.

Harn and *Brazones v. Prothe*, 489 N.W.2d 900 (S.D. 1992), control here. In *Harn*, an employer, a lumber company, utilized an "anti-kickback safety device" on its edgers in its sawmill. *Harn*, 506 N.W.2d at 93. Operating the edger and the safety device was a two-person job. *See id.* The employer was transitioning to a new sawmill and edging was reduced to a one-person job. *Id.* As a result, the safety device was

"disengaged by propping up or jimmying [its] lever with a piece of wood." *Id.* at 94. On the date of the employee's injury, the safety device had been disengaged in this way and a board was thrown backward, striking the employee in the cheek and forehead. *Id.*

This Court awarded summary judgment to the employer based upon workers' compensation exclusivity, stating: "Even when employers act or fail to act 'with a conscious realization that injury is a *probable* ... result,' worker's compensation is still the exclusive remedy for workers thereby injured." *Id.* at 95 (quoting *Jensen v. Sport Bowl, Inc.*, 469 N.W.2d 370, 372 (S.D. 1991); *VerBouwens v. Hamm Wood Products*, 334 N.W.2d 874, 876 (S.D. 1983)) (emphasis in original). Further, the *Harn* Court recognized:

> The intentional removal of a safety device may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such an injury does happen, that this was an intentional infliction of harm comparable to a left jab to the chin.

Id. at 97 (citation omitted).

In *Brazones*, employees worked at a petroleum storage tank. 489 N.W.2d at 902-903. An explosion eventually occurred in the storage tank while the employees were cleaning it. *Id.* at 903. Several employees were killed while others were burned. *Id.* In a lawsuit, the employer moved for summary judgment based on exclusivity. *Id.* at 906-07. Affirming summary judgment in favor of the employer, the *Brazones* Court stated,

> Essentially, Plaintiffs allege that the defendants sent the crew to clean the tank without proper equipment for the job; without sufficient training and instruction as to cleaning, operation of equipment and safety; and allowing potentially unsafe conditions to be present. These allegations *may* amount to knowledge of a probable risk of injury to plaintiffs on defendants' part. . . . We are unable to say that defendants were substantially certain that plaintiffs' injuries would be the inevitable outcome of defendants' conduct[.]

Id. at 907 (emphasis in original).

In both cases, plaintiffs alleged that employers allowed dangerous work conditions to persist and failed to supply proper equipment. This Court rejected the claims and, instead, held that the cases were controlled by workers' compensation. Here, the Estate alleges analogous facts and argues Pro-Tec failed to provide any of its employees with harnesses during the roofing project, amounting to a dangerous work environment resulting in a death. However, "[e]ven when an employer's acts entail knowingly permitting a hazardous work condition to exist, knowingly ordering a claimant to perform an extremely dangerous job, [or] wilfully (sic) failing to furnish a safe place to work, still they come within the ambit of workers' compensation." *Fryer v. Kranz*, 2000 S.D. 125, ¶ 8, 616 N.W.2d 102, 105 (internal quotations and citations omitted) (first set of brackets added). The Estate has failed to show that the foreseeable risk of harm was a substantial certainty, much less produce any evidence focused on the "precise event producing injury." *Id.* at ¶ 12, 616 N.W.2d at 106; *Harn*, 506 N.W.2d at 99.

Mead v. Western Slate, Inc. offers additional instruction. 848 A.2d 257 (Vt. 2004). There, the plaintiff worked as a slate quarry operator excavating a wall of a quarry with explosives. *Id.* at 258. On the day of the injury, the plaintiff arrived at his worksite and observed evidence of a rock fall. *Id.* After being informed of the situation, the plaintiff's employer instructed the plaintiff to continue the excavation. *Id.* While continuing the excavation, the plaintiff was struck by a rock fall. *Id.* A personal injury action followed wherein the plaintiff alleged the employer's misconduct was willful, wanton, and malicious. *Id.* The trial court instructed the jury that the plaintiff must show

either that the employer intentionally caused the plaintiff's injury or "knew to a substantial certainty that their actions would bring about his injury." *Id.* at 259. Finding that the injury was substantially certain, the jury returned a verdict in favor of the plaintiff. *Id.*

The Vermont Supreme Court reversed a denial of the employer's motion for judgment as a matter of law on the basis that, even if it were the appropriate standard, the plaintiff could not satisfy substantial certainty.[2] Signaling an inclination to strictly apply the standard, the *Mead* court listed jurisdictions that have adopted a strict interpretation of substantial certainty. *Id.* at 261 (listing cases).[3] In such jurisdictions, the *Mead* court noted, substantial certainty "operate[s] as a 'very narrow exception[.]'" *Id.* at 262 (citation omitted). In that light, the *Mead* court stated, at most, the employer directed the plaintiff to continue working in "a dangerous situation that required attention." *Id.* at 263. Further, the *Mead* court acknowledged expert testimony that the employer had violated federal regulations. *Id.* Notwithstanding, the circumstances did not demonstrate that the employer's misconduct made the plaintiff's injury a substantial certainty:

> All that the evidence show[ed] . . . [was] a substantial risk of [a] second fall, but there [was] no evidence that it was substantially certain to occur within a few hours, or a day, or a month. Nor was there any evidence presented of prior falls leading to injuries under similar circumstances at the Western quarry or elsewhere within defendants' knowledge. Thus, the evidence cannot support a reasonable inference that defendants knew to a

[2]At the time of *Mead*, Vermont did not recognize "substantial certainty" as an exclusivity exception. *See Mead*, 848 A.2d at 260-61. Instead, it required claimants to prove an employer's specific intent to injure, *see id.*, which remains the standard. *See Martel v. Connor Contracting, Inc.*, 200 A.3d 160, 167 (Vt. 2018).

[3] The *Mead* court noted that South Dakota was among the States applying the strictest of substantial certainty interpretations. *Mead*, 848 A.2d at 280 (citing *Fryer v. Kranz*, 616 N.W.2d 102, 106 (S.D. 2000)).

> substantial certainty that the decision directing plaintiff to continue to work . . . would result in plaintiff's injury.

Id.

Here, the Estate failed to demonstrate the significance of April 21, 2016. That is to say, no evidence in the record shows why Althoff's fall was substantially certain to occur on that day as opposed to every other day that Althoff was on the roof of the Watertown Community Center. Moreover, the Estate presented nothing showing that any other employee fell from the roof in the specified time period. The record is devoid of any evidence demonstrating that Pro-Tec had actual knowledge that Althoff's fall was a substantial certainty on April 21, 2016.

The Estate relies on an unreported South Dakota federal district court opinion.[4] *See Heil v. Belle Starr Saloon & Casino, Inc.*, CIV. 09–5074–JLV, 09–5099–JLV, 2013 WL 943811 (D.S.D. Mar. 11, 2013). *Heil* is wholly inapposite here, and the circuit court stated that it "is clearly factually distinguishable[.]" (SR 1347). This Court should reject its application *in toto*. In *Heil*, an employee of the Belle Starr was repeatedly subjected to sexual harassment by her manager, which was reported to the business's owners. *Id.* at *2-*5. The harassment escalated and, at one point, the manager assaulted the employee by touching her between the legs and throwing her to the ground. *Id.* The employee eventually brought suit, alleging that the manager was acting in the scope of employment at the time of the assault. *Id.* at *5.

[4] According to the Eighth Circuit, unreported opinions are not binding authority. *See U.S. v. Jordan*, 812 F.3d 1183, 1187 (8th Cir. 2016). This Court should apply its own primary mandatory authority over this unreported opinion.

The owners moved for summary judgment based on workers' compensation exclusivity, which was denied. *Id.* at *5, *9. According to the *Heil* court, "'it is not enough simply to use the right terminology [to] invok[e] the intentional tort exception.'" *Id.* at *6 (quoting *Jensen*, 469 N.W.2d at 372) (brackets in original). Instead, facts must be alleged that "'plausibly demonstrate an actual intent by the employer to injure or a substantial certainty that injury will be the inevitable outcome of employer's conduct.'" *Id.* The federal district court found that such facts had been alleged: "By their nature, claims of assault and battery and IIED are intentional torts as they require intentional conduct, as opposed to mere negligence."[5] *Id.*

Heil is factually distinguishable from the instant case.[6] Managers assaulting, battering, and inflicting emotional distress on their employees inherently demonstrates an intent to inflict injury. Indeed, these claims are called intentional torts. Workers' compensation exclusivity has never been construed to cover intentional torts. *See Harn*,

[5] Tellingly, in its recitation of the standard of review, the Estate states that "'[s]ummary judgment is generally not feasible in *negligence* cases.'" (Appellee's Brief at 16) (quoting *Andrushchenko v. Silchuk*, 2008 S.D. 8, ¶ 8, 744 N.W.2d 850, 854) (emphasis added). Thus, the Estate has tacitly conceded that it has alleged only negligence.

[6] This Court should further reject *Heil* due to the court there failing to appropriately apply the substantial certainty exception. In *Heil*, the federal district court cited to the dissenting opinions in *Fryer* and *McMillin* wherein the dissenting Justices disagreed with "substantial certainty" being supplanted by "virtual certainty." *See Heil*, 2013 WL 943811, at *7. The court and the parties in *Heil* appeared to treat "substantial certainty" and "virtual certainty" as separate standards. *See id.* at *8 ("[Defendants] argue[] when plaintiff's view of the facts in this case are evaluated under the "substantial certainty" standard, ..."). The *Heil* court's view of South Dakota precedent is erroneous. First, dissenting opinions are not binding authority. Second, substantial certainty and virtual certainty are not dualistic, competing standards. On the contrary, they are one and the same: "Substantial certainty of injury to the employee should be equated with virtual certainty to be considered an intentional tort." *Harn*, 506 N.W.2d at 100. Accordingly, in this case, it was the Estate's burden to present evidence demonstrating that Althoff's fall was a virtual certainty.

506 N.W.2d at 100. A workplace accident—regardless of adherence to safety measures—is in no way similar to the intentional torts asserted in *Heil*. Instead, in essence, the allegations in *Heil* can be equated to "the employer hit[ting] the employee on the head with a board—that is an intentional tort[,]" and employees may assert such claims outside of the realm of workers' compensation. *See id.*

Next, the Estate quotes *Wells v. Oklahoma Roofing & Sheet Metal, LLC*, 457 P.3d 1020 (Okla. 2019), *ad nauseam* for the uncontroversial proposition that an employer's intentional conduct is excepted from workers' compensation exclusivity. (Appellee's Brief at 22-25). This Court should disregard *Wells* and, instead, rely on its own well-established body of case law. Even if this Court were to analyze *Wells*, it is not supportive of the Estate's position.

In *Wells*, the estate of a decedent-employee challenged the constitutionality of an Oklahoma statute that extricated substantial certainty from the intentional tort exception. *Wells*, 457 P.3d at 1024. In other words, an employee could no longer evade workers' compensation exclusivity by proving that the injury was substantially certain to occur. *See id.* Instead, the law required the employee to strictly prove the employer's specific intent to injure. *See id.* Finding that the law unconstitutionally narrowed the definition of intentional tort *vis a vis* workers' compensation, the *Wells* court struck down the law. In doing so, the *Wells* court stressed that including "substantial certainty" within the definition of "intentional tort" is not an expansion of the exception to workers' compensation exclusivity:

> [W]e by no means expand[ed] the narrow intentional tort exception to [the] workers' compensation exclusivity provision. . . . Rather, we stated that both elements constitute an intentional tort and spoke directly to the

> tortfeasor's requisite mental state—that is, the employer's subjective appreciation of the resulting injury.

Id. at 1025-26 (quotations and citation omitted) (first set of brackets added). By striking down the Oklahoma law, the *Wells* court returned Oklahoma to the *status quo*, but one not precisely occupied by South Dakota. *Compare id.* at 1027 ("An employer's 'specific intent' to injure, or knowledge that an injury is 'substantially certainty to result,' equate to an intentional tort."), *with Harn*, 506 N.W.2d at 95 ("Under the intentional tort exception, workers may bring suit against their employers at common law only when an ordinary, reasonable, prudent person would believe an injury was substantially certain to result from the employer's conduct.").

Even though the South Dakota and Oklahoma Supreme Courts treat substantial certainty as being covered by the intentional tort exception, the *Wells* court took a broader view of what is subsumed by "intentional" conduct:

> The equaling factor here is not that substantial certainty equals an intentional tort, but rather negligence may be in such reckless disregard of the consequences or in callous indifference to the life of another that the intentional failure to perform a manifest duty may result in such a gross want of care for the rights of others that a finding of a wilful (sic), wanton and deliberate act may amount to negligence so gross it is deemed the equivalent to evil intent justifying an action for intentional tort.

Wells, 457 P.3d at 1037. This Court, however, has never equated willful and wanton with intentional conduct:

> [W]illful and wanton conduct [is distinguishable] from intentional conduct. Willful and wanton misconduct is something more than ordinary negligence but less than deliberate or intentional conduct. Conduct is gross, willful, wanton, or reckless when a person acts or fails to act with a conscious realization that injury is a probable[.]

Harn, 506 N.W.2d at 96 (discussing *VerBouwens*, 334 N.W.2d at 876). Under *Wells*, the Oklahoma Supreme Court applied a porous interpretation of substantial certainty that this Court previously rejected in *Harn*. *See id.* at 99-100 (stating that Ohio's interpretation of substantial certainty is a "slippery path" that would permit actions alleging wanton and reckless conduct to evade workers' compensation exclusivity). Again, this Court should reject any application of *Wells*.

Thus, this Court should further reject the Estate's assertion that reckless, willful, or wanton misconduct equals substantial certainty. (Appellees' Brief at 18, 21-22). It does not. As this Court stated nearly 40 years ago, alleging that an employer's conduct was reckless, willful, or wanton, i.e., wherein an injury is probable, is insufficient for purposes of avoiding workers' compensation exclusivity. *See VerBouwens*, 334 N.W.2d at 876. *See also, Jensen*, 469 N.W.2d at 371-72 (noting that a minority of jurisdictions have expanded substantial certainty to include willful, wanton, and reckless misconduct, but that South Dakota adheres to the majority view that construes the exception narrowly). That parameter has not changed. *See McMillin*, 2005 S.D. 41, ¶ 20, 695 N.W.2d at 223.

In an effort to lower the quantum of proof to reckless, willful, or wanton misconduct, the Estate cites SDCL § 62-4-37. (Appellee's Brief at 22). According to the Estate, § 62-4-37 "contemplates the intentional doing of something with the knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences." (*Id.* at 21-22). What the Estate fails to note is that § 62-4-37 precludes an employee from recovering in workers' compensation when the *employee's* own willful misconduct causes injury: "No compensation may be allowed for any injury or death due

to the *employee's willful misconduct*[.]" SDCL § 62-4-37 (emphasis added). Accordingly, when § 62-4-37 is activated, it operates to bar an employee-claimant from recovering workers' compensation benefits. In this case, workers' compensation benefits have been paid, and the Estate is seeking tort remedies based upon Pro-Tec's, not Althoff's, alleged misconduct. In short, SDCL § 62-4-37 is irrelevant.

Aside from *Wells* being legally distinguishable, it is also factually inapposite. The majority in *Wells* expressed no opinion as to whether the facts alleged satisfied substantial certainty. At any rate, in *Wells*, the employee's estate alleged that the employer, a roofing business, required the employee "to temporarily unhook his safety anchor in order to pass over the other co-workers working on the roof." *Wells*, 457 P.3d at 1023. While the anchor was unhooked, the employee fell to his death.[7] Thus, in *Wells*, the employee's estate alleged a specific action at a precise time attributable to the employer that resulted in a death. *Cf. Harn*, 506 N.W.2d at 100 ("[O]ne must be reminded that what is being tested here is not the degree of gravity or depravity of the employer's conduct, *but the narrow issue of intentional versus accidental quality of the precise event producing injury*.") (emphasis added). On the other hand, the Estate here vaguely claims that Pro-Tec's "intentional tort started January, 2016" and persisted "daily for months to all employees including Althoff[.]" (Appellee's Brief at 18, 20). Thus,

[7] Pro-Tec does not concede that the facts presented in *Wells* would satisfy South Dakota's substantial certainty exception. On the contrary, Pro-Tec submits that the facts presented in *Wells* are akin to those presented in *McMillin*, wherein an employer ordered a number of its employees to clean molasses tanks, which resulted in their asphyxiation. 2005 S.D. 41, ¶¶ 4-7, 695 N.W.2d at 219-20. Just as in *Wells*, the employees in *McMillin* were ordered by their employer to take actions that resulted in death. This Court in *McMillin*, however, found that the estates were restricted to workers' compensation.

unlike in *Wells*, and as described above, the Estate utterly fails to focus on any precise event or employee.[8]

While South Dakota narrowly applies the exclusivity exception, this Court recognized the necessity of such a narrow construction in *McMillin*, where it stated that exclusivity "'maintains the balance of sacrifices between employer and employee in the substitution of no-fault liability for tort liability, and . . . minimizes litigation, even litigation of undoubted merit." *McMillin*, 2005 S.D. 41, ¶ 12, 695 N.W.2d at 221 (quoting *Fryer*, 2000 SD 125, ¶ 9, 616 N.W.2d at 105). Exclusivity comports with the thrust of workers' compensation, which is "a public policy compromise in which the employee gives up the right to sue the employer in tort in return for which the employer

[8] Aside from *Heil* and *Wells*, the Estate offers a string-cite of cases that it purports shows that "this Court will not approve willful misconduct as was found to exist in many of its opinions." (Appellee's Brief at 18-19). None of the cases support the Estate's position that Althoff's fall was a substantial certainty. Curiously, the Estate cites *Harn*, *Fryer*, and *McMillin*, each of which serve to weaken the Estate's position. The majority of the remaining cases cited by the Estate are appeals to this Court originating from workers' compensation administrative proceedings and relating to claims of employee misconduct under SDCL § 62-4-37. Thus, in each of the cases, the issues presented stem from whether actions attributable to the employees precluded recovery of workers' compensation benefits. *See Driscoll v. Great Plains Marketing Co.*, 322 N.W.2d 478, 479-80 (S.D. 1982); *Therkildsen v. Fisher Beverage*, 1996 S.D. 39, ¶¶ 14, 23, 545 N.W.2d 834, 837-39; *Fenner v. Trimac Transp., Inc.*, 1996 S.D. 12, ¶ 15, 554 N.W.2d 485, 489; *Goebel v. Warner Transp.*, 2000 S.D. 79, ¶ 39, 612 N.W.2d 18, 28; *VanSteenwyk v. Baumgartner Trees and Landscaping*, 2007 S.D. 36, ¶ 20, 731 N.W.2d 214, 222. Next, the Estate cites a case that has no connection to workers' compensation or its exceptions. *See Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, 573 N.W.2d 493 (analysis of whether a fraud claim was independent of a breach of contract claim for purposes of punitive damages). Finally, the Estate cites a South Dakota workers' compensation administrative opinion. *See* Pommerville v. Transway, Inc., et al., HF 96, 2000/01 (S.D. Dep't of Labor Nov. 19, 2004). First, the Estate's citation to an administrative opinion is erroneous given that, in this case, the Estate is seeking extra-administrative remedies. Second, the focus of Pommerville was whether the employee's misconduct was willful or excusable, not whether an injury was substantially certain to have occurred. In short, the Estate has failed to cite any primary mandatory authority that supports its position that Althoff's fall was substantially certain to occur.

assumes strict liability and the obligation to provide a speedy and certain remedy for work-related injuries." *Mead*, 848 A.2d at 260 (internal quotations and citations omitted). Any broadening of substantial certainty in the way of *Wells* would invite the uncertainties of tort litigation to supplant the efficiency and reliability of workers' compensation. *Cf. Harn*, 506 N.W.2d at 95 ("[South Dakota's] worker's compensation provision is to provide an injured employee a remedy which is both expeditious and independent of proof of fault."). The Estate has offered no basis or argument in favor of departing from the strict standard.

In sum, the Estate alleges that Pro-Tec allowed a dangerous condition to exist in the work environment during the stated period of time. The estate has not alleged that Pro-Tec acted with "'conscious and deliberate intent directed to the purpose of inflicting injury[.]'" *McMillin*, 2005 S.D. 41, ¶ 9, 695 N.W.2d at 222. The Estate has submitted nothing demonstrating that Pro-Tec acted with any intent to effect Althoff's death. Likewise, the Estate has submitted nothing to show that Pro-Tec's alleged misconduct made it substantially certain that Althoff would fall from the Watertown Community Center roof on April 21, 2016. At most, the Estate has alleged recklessness, which SDCL § 22-1-2(d) defines as a "conscious and unjustifiable disregard of a substantial risk[.]"[9]

Even if an injury is the result of an employer's "careless, grossly negligent, reckless or wanton [conduct] and even if that employer knowingly permits a hazardous work condition to exist, knowingly orders a claimant to perform an extremely dangerous

[9] According to Black's Law Dictionary, recklessness is described as "[c]onduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk. Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing." RECKLESSNESS, BLACK'S LAW DICTIONARY (11th ed. 2019).

job, or willfully fails to furnish a safe workplace, those acts still fall within the domain of workers' compensation." *McMillin*, 2005 S.D. 41, ¶ 14, 695 N.W.2d at 222. The Estate failed to show that Althoff's death was substantially (or virtually) certain to occur. As a result, the Estate is restricted to workers' compensation. The circuit court should be reversed and Summary Judgment should be entered in favor of Pro-Tec.

CONCLUSION

The material facts in this case are undisputed. In an effort to carry its burden, the Estate asserts that Pro-Tec knowingly and intentionally violated its internal safety regulations for a prolonged period of time, which resulted in Althoff's fall. As explained above, at most, these facts could persuade a jury that Pro-Tec acted with recklessness. As *Harn* and its progeny make inescapably clear, a showing of recklessness does not satisfy the heavy burden necessary to meet the substantial certainty exception. It is the Estate's burden to produce evidence related specifically to the event that caused Althoff's fall. The Estate has made no such showing. The circuit court should be reversed, and it should be ordered to enter Summary Judgment in Pro-Tec's favor.

Dated this 7th day of December, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing *Appellant's Reply Brief* was served on each of the following by electronically mailing said copy to them at their respective email addresses this 7th day of December, 2021:

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this Brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Office Word and contains 4819 words from the Argument through the Conclusion. I have relied on the word count of a word-processing program to prepare this Certificate.

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