IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28664

SHIRLEY TAMMEN,
PLAINTIFF / APPELLANT,

v.

K&K MANAGEMENT SERVICES, INC.
/ FRY'N PAN RESTAURANT
DEFENDANT / APPELLEE.

APPEAL FROM THE JURY VERDICT FOR THE DEFENDANT,
CIRCUIT COURT - SECOND JUDICIAL CIRCUIT,
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE RODNEY J. STEELE
CIRCUIT COURT JUDGE, RETIRED, SITTING BY DESIGNATION,
CIRCUIT COURT JUDGE PRESIDING

BRIEF OF APPELLANT

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PLAINTIFF'S NOTICE OF APPEAL FILED JULY 11, 2018

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JURISDICTIONAL STATEMENT

Plaintiff/Appellant appeals from the whole and all parts of the *Verdict for Defendant* dated June 14, 2018 [SR-359; APP-01] and *Judgment* dated June 29, 2018 [SR-969; APP-2], of the Second Judicial Circuit Court of South Dakota, the Honorable Rodney J. Steele, Circuit Judge, Retired, sitting by designation, presiding (49CIV14-002429), which dismissed Plaintiff's *Complaint*, dated October 1, 2014 [SR-2], and all causes of action against the Defendant in their entirety with prejudice and on the merits. Notice of Entry of the Judgment was served on each party on June 29, 2018 via Odyssey File & Serve System. Defendant served and filed a *Notice of Entry of Judgment* [SR-970] on July 2, 2018 via Odyssey File & Serve System. *Notice of Appeal* [SR-975] was timely filed and served by the Plaintiff on July 11, 2018. This Court has jurisdiction pursuant to SDCL 1-26-37 and SDCL 15-26A-3(1)(2).

STATEMENT OF THE ISSUES

Scope of Review

(1) *Jahnig v. Coisman,* 283 N.W.2d 557, 560 (S.D. 1979)
(2) ..... *Papke v. Harbert,* 2007 S.D. 87, ¶13, 738 N.W.2d 510, 515
(3) ..... *Walter v. Fuks,* 2012 S.D. 62, ¶16, 820 N.W.2d 761, 766

III. Did the Trial Court prejudicially err by failing to give "full and complete" instructions to the jury?

The Trial Court held in the negative.

(1) *Nugent v. Quam,* 152 N.W.2d 371, 377 (S.D. 1967), citing Restatement (Second) of Torts, §283, and comments
(2) ..... *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶31, 780 N.W.2d 497, 501-02, 507 (Justices Zinter and Konenkamp concurring)
(3) ..... *Mitchell v. Ankeny,* 396 N.W.2d 312, 313-14 (S.D. 1986), citing Restatement (Second) of Torts, §343, comments b and d

IV. Did the Honorable Trial Court err by instructing on and refusing to strike the defense of contributory negligence and by refusing to instruct on asymptomatic and dormant pre-existing conditions?

The Trial Court held in the negative.

A. Contributory Negligence

(4) *Thompson v. Mehlhaff,* 2005 S.D 69, ¶¶42, 44, 698 N.W.2d 512, 525
(5) *Johnson v. Armfield*, 2003 S.D. 134, ¶11, 672 N.W.2d 478, 481

B. Dormant Conditions

(6) *Shippen v. Parrott,* 1996 S.D. 105, ¶44, footnote 3, 553 N.W.2d 503, 513, footnote 3.

PRELIMINARY STATEMENT

The Minnehaha County Clerk of Court's Settled Record assembled in this case will be identified as "SR-__." The Circuit Court's *Verdict for Defendant* [SR-359] can be found in the Appendix of this Brief at APP-01 (Tab A), and its *Judgment* [SR-969] is at APP-02 (Tab B). In this Brief, the following references will be used:

(1)	Circuit Court Judge Rodney J. Steele	Court; Trial Court; Judge
(2)	Plaintiff/Appellant Shirley Tammen	Plaintiff; Appellant; Shirley; Tammen; Shirley Tammen
(3)	Defendant/Appellee K&K Management Services, Inc. / Fry'n Pan Restaurant	Defendant, Appellee, Restaurant; Fry'n Pan
(4)	*Plaintiff's Pretrial Brief on Jury Instructions*, dated May 25, 2018 [SR-81]	*Plaintiff's Pretrial Brief* [SR-81]
(5)	Sealed Transcript containing excerpts of Jury Selection, Selection of Alternate Juror, and Polling of the Jury (pages 1-106), Maxine Risty, Court Reporter [SR-1007]	[SR-1007, S-Tr, p.___]
(6)	Jury Trial Transcript, Volume 1 of 3 (pages 1-73), Maxine Risty, Court Reporter [SR-1113]	[SR-1194, JT-Tr-1, p.___]
(7)	Jury Trial Transcript, Volume 2 of 3 (pages 74-257), Maxine Risty, Court Reporter [SR-1194]	[JT-Tr-2, p.___]
(8)	Jury Trial Transcript, Volume 3 of 3 (pages 258-295), Maxine Risty, Court Reporter [SR-1395]	[SR-1395, JT-Tr-3, p.___]
(9)	Robert VanBeek Deposition taken June 6, 2018 [SR-927]	[SR-927, VanBeek Dep. p.___]
(10)	South Dakota Pattern Jury Instructions	SDPJIs; Patterns

STATEMENT OF THE CASE

This case was tried to a jury of twelve in the Second Judicial Circuit Court, Minnehaha County Courthouse, Sioux Falls, South Dakota, the Honorable Rodney J. Steele, Circuit Judge presiding, on the 12th day of June, 2018. The trial in this slip-and-fall case resulted in a verdict being returned in favor of the Defendant on June 14, 2018 [see *Verdict for Defendant*, SR-359, APP-01], *Judgment* on which verdict was entered and filed on June 29, 2018 [SR-969, APP-02]. Notice of Entry of the Judgment was served on each party on June 29, 2018 via Odyssey File & Serve System. Defendant served and filed a *Notice of Entry of Judgment* [SR-970] on July 2, 2018, via Odyssey File & Serve System. Plaintiff timely filed and served a *Notice of Appeal* [SR-975] to this Honorable Court on July 11, 2018.

STATEMENT OF FACTS[1]

1. The only evidence from Restaurant concerning inspection of the condition of the spot where the Plaintiff fell came entirely from Adam Lee, the Restaurant Manager. Lee testified that he did an inspection of the whole parking lot that morning, which lasted "a couple of minutes … up to five minutes max." [JT-Tr-2, p.160].

2. Immediately after filling out the incident report with Plaintiff after her fall, Lee looked in the parking lot in the general vicinity of where he thought Plaintiff fell. He did not know exactly where she had fallen and, in fact, thought she had fallen in the west part of the parking lot. [JT-Tr-2, pp.154, 167]. In fact, Ernie Tammen parked his car on the west side of the west parking lot; then he and Shirley walked east across the lot towards the north/south sidewalk running along the west side of the Restaurant building. In so

[1] In this Brief, all references to JT-Tr-2, pp.74-257, can be found at SR-1194.

doing, they had to walk single file between the cars parked against the sidewalk on the east side of the west lot. [See SR-915, Exhibit 5; SR-1113, JT-Tr-1, pp.49-50].

3. Lee's "inspection" did not include walking on the area where Plaintiff fell. [JT-Tr-2, p.159]. Although he said he never saw any dangerous looking ice in the parking lot that day [JT-Tr-2, p.161)], Lee also admits that one cannot see or stand on black ice and that it is "very dangerous." [JT-Tr-2, pp.160-61].

4. Lee does not contend that Plaintiff could have seen the ice, and he does not blame her for not seeing ice. [JT-Tr-2, p.161]. It sometimes just looks "wet." [JT-Tr-2, p.165].

5. Lee agreed that where it is shady, wet surfaces can become icy. [JT-Tr-2, p.168].

6. There is a drain pipe in the southeast corner of the parking lot that drains into the parking lot and runs over to the area where Plaintiff fell. [JT-Tr-2, pp.168-69].

7. Since there is both shade and drainage where the cars park against the west side of the Restaurant, Lee has seen ice form there [*i.e.*, between where the cars park (*i.e.*, where Plaintiff fell)]. [JT-Tr-2, p.169].

8. Lee merely "assumed" that First Rate Excavate sanded between the parked vehicles. [JT-Tr-2, p.160]. Lee admits his "inspection" did not include actually walking on the potentially dangerous areas. [JT-Tr-2, p.162]. He was only "glancing out there." [JT-Tr-2, p.166]. He also admits he did not instruct his employees to shovel or salt the areas between the parked cars. [JT-Tr-2, p.162]. He agreed that he did not walk between the cars where the customers walk. [JT-Tr-2, p.177].

9. In fact, the Restaurant on the subject occasion had deferred to First Rate

Excavate to shovel and sand the parking lot. [JT-Tr-2, p.162; SR-927, VanBeek Dep. p.7].

10. On the subject occasion, it was very busy when First Rate Excavate came to sand, and First Rate's sanding truck could not get in between the cars parked against the building. This was not a call back to get in between the parked cars; it was the one and only trip made by First Rate on that occasion, and VanBeek sanded only the main traveled portion of the lot. Lee does not argue with that fact, which was testified to by Robert VanBeek of First Rate Excavate who actually operated the sanding truck the night before the Plaintiff's fall. [JT-Tr-2, p.175; SR-927, VanBeek Dep. pp.15-16].

11.Lee agrees that wherever the cars park, ice will sometimes form between them, and it is important to salt there. [JT-Tr-2, p.169].

12. Lee admitted it would not have been difficult to salt between the cars manually when they shovel and salt the sidewalk which lies at the front of the parked cars. [JT-Tr-2, pp.171-72].

13. Lee agreed that salting when they shoveled the sidewalks would be reasonable care because salt both melts ice and prevents it from forming. [JT-Tr-2, p.169]. He admits the Restaurant did not do so. [JT-Tr-2, pp.162-63].

14. Lee admitted the Restaurant was not contending that the black ice, which was described by Shirley and upon which she fell, was not there. [JT-Tr-2, p.161].

15. The parking lot has the snow plowed and sanding done by First Rate Excavate which is, among other things, a commercial snow removal service. [JT-Tr-2, pp.139-144]; further, the Restaurant shovels ands salts its own sidewalks. [JT-Tr-2, p.141].

16. Lee agreed that hiring First Rate Excavate does not excuse the Restaurant from using reasonable care to make the parking lot safe. [JT-Tr-2, p.162].

17. When cars are parked beside the building, the sand from the sander does not reach in between the cars, and it just hits the backs of the vehicles. To get sand in between the cars you would have to do it by hand, and First Rate does not do that; they were not hired to do it. [SR-927, VanBeek Dep. pp.9, 21].

18. First Rate was instructed by Restaurant to "plow around the cars." [JT-Tr-2, p.206].

19. Fry'n Pan could have called First Rate to come back when there were no or fewer vehicles against the building so the sanders could get closer and sand where the vehicles park, but they did not. [JT-Tr-2, p.194].

20. Fry'n Pan could, but does not, hire First Rate's manual snow shoveling service that would have salted between the cars. [JT-Tr-2, p.176]. It only hires the large plows and sanding machines. [JT-Tr-2, pp.141-42].

21. Lee also agrees that when they are busy (*i.e.*, when there are vehicles parked up against the building), the parking lot does not get sanded between the parked vehicles. [JT-Tr-2, p.175].

22. Restaurant knows the sanding machines cannot get sand between parked cars. Stan Mitzel (30(B)(6) testified there are many times First Rate does not get the parking spots close to the building where people (including the Plaintiff) walk. [JT-Tr-2, p.196].

23. When First Rate had been there on the 30th (the night before the fall), the Restaurant lot was busy [JT-Tr-2, p.174] and the lot did not get sanded between the parked cars, and the Restaurant did not call for any return trip from First Rate nor did

they themselves salt between the cars. [JT-Tr-2, p.174-76]. There was simply no salting of the areas in between the cars. [JT-Tr-2, p.198]. When the sanding trucks cannot get sand in between the parked vehicles, as on the subject occasion, the area between the parked vehicles does not get the same care as the rest of the lot. [JT-Tr-2, p.197].

24. The parking lot has been the same for years with the same drainage, the same layout, and the same slope towards the area where the Plaintiff was injured between the parked cars. [SR-927, VanBeek Dep. pp.21-2].

25. The Restaurant knows the water from other parts of the parking lot and off the roof drain to the area where the Plaintiff fell leaving it wet which makes it dangerous when it thaws and freezes. [JT-Tr-2, p.200].

26. As a Rule, 30(b)(6) representative of the Defendant, Stan Mitzel admitted that the Defendant, at that time, did not even know if there was ice present. [JT-Tr-2, p.207].

27. As a Rule, 30(b)(6) representative of the Defendant, Stan Mitzel admitted that the area in question where Plaintiff fell would have been in the shade. [JT-Tr-2, p.208].

28. As a 30(b)(6) representative of the Defendant, on top of other factors, Mr. Mitzel testified that the Restaurant actually likely shoveled the snow off the sidewalk and onto the area where customers and the Plaintiff walked between the parked cars where the snow becomes part of the freezing and thawing. [JT-Tr-2, p.198].

ARGUMENTS AND AUTHORITIES

SCOPE OF REVIEW

> The trial court has a duty to instruct the jury on applicable law where the theory is supported by competent evidence. *Egan v. Sheffer*, 86 S.D. 684, 201 N.W.2d 174 (1972); *Zakrzewski v. Hyronimus*, 81 S.D. 428, 136 N.W.2d 572 (1965). Refusal to give a requested instruction

> setting forth applicable law is not only error, but prejudicial error. *Miller v. Baken Park, Inc.*, 84 S.D. 624, 175 N.W.2d 605 (1970); *Tufty v. Sioux Transit Co.*, 69 S.D. 368, 10 N.W.2d 767 (1943); *Kerr v. Staufer*, 52 S.D. 223, 217 N.W. 211 (1927). It is not error, however, to refuse to amplify instructions given which substantially cover the principle embodied in the requested instruction. *Egan v. Sheffer, supra*; *Jorgenson v. Dronebarger*, 82 S.D. 213, 143 N.W.2d 869 (1966); *Peters v. Hoisington*, 72 S.D. 542, 37 N.W.2d 410 (1949). Instructions are adequate when, considered as a whole, they give a full and correct statement of the applicable law. *Mueller v. Mueller*, 88 S.D. 446, 221 N.W.2d 39 (1974); *Dwyer v. Christensen*, 77 S.D. 381, 92 N.W.2d 199 (1958).

Jahnig v. Coisman, 283 N.W.2d 557, 560 (S.D. 1979). (Underlining supplied).

> A trial court has discretion in the wording and arrangement of its jury instructions, and therefore we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. See *Luke v. Deal*, 2005 S.D. 6, ¶11, 692 N.W.2d 165, 168; *Parker v. Casa Del Rey–Rapid City, Inc.*, 2002 S.D. 29, ¶5, 641 N.W.2d 112, 115. However, no court has discretion to give incorrect, misleading, conflicting, or confusing instructions: to do so constitutes reversible error if it is shown not only that the instructions were erroneous, but also that they were prejudicial. *First Premier Bank v. Kolcraft Enter., Inc.*, 2004 S.D. 92, ¶40, 686 N.W.2d 430, 448 (citations omitted). Erroneous instructions are prejudicial under SDCL 15–6–61 when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party. Accordingly, when the question is whether a jury was properly instructed overall, that issue becomes a question of law reviewable de novo. Under this de novo standard, "we construe jury instructions as a whole to learn if they provided a full and correct statement of the law." *Id.* ¶40 (quoting *State v. Frazier*, 2001 S.D. 19, ¶35, 622 N.W.2d 246, 259 (citations omitted)).

Papke v. Harbert, 2007 S.D. 87, ¶13, 738 N.W.2d 510, 515.

> Trial courts have broad discretion in instructing a jury, but their instructions must provide a full and correct statement of the law. *Papke v. Harbert*, 2007 S.D. 87, ¶13, 738 N.W.2d 510, 515 (citations omitted). Because Fuks is challenging an instruction, he bears the burden of proving that the instruction was not only erroneous, but also prejudicial. See *id*. (citing *First Premier Bank v. Kolcraft Enter., Inc.*, 2004 S.D. 92, ¶40, 686 N.W.2d 430, 448). To be prejudicial, the erroneous instruction must have in all probability produced some effect upon the verdict and be harmful to the substantial rights of a

party. *Id.*

Walter v. Fuks, 2012 S.D. 62, ¶16, 820 N.W.2d 761, 766.

ARGUMENT I
THE TRIAL COURT PREJUDICIALLY ERRED BY FAILING TO GIVE SUFFICIENTLY COMPLETE INSTRUCTIONS TO THE JURY

This case has one main issue, to wit: whether the Trial Court's instructions, considered as a whole, provided the jury with a complete statement of the law on the liability issues relevant to premises liability of Defendant to its business invitee, Plaintiff, in this slip and fall case.

The SDPJIs on premises liability, while accurate insofar as they go, are not adequate for this case because the jury would not receive the "full and correct statement of the applicable law." *Jahnig*, 283 N.W.2d at 560. Additionally, the instructions given by the Trial Court were essentially the SDPJIs, and the Trial Court uniformly declined to instruct beyond the Patterns despite Plaintiff having proposing instructions embodying the "full and correct statement of the applicable law." *Id.*

The SDPJIs are very general and basic in nature and do not begin to discuss the specific rights of business invitees and the specific duties our Court's caselaw have placed upon business possessors and occupants of land, especially where snow and ice accumulations constitute a danger to their business invitee customers.

The Trial Court's Instruction No. 1 provided in pertinent part:

> The law that applies in this case is contained in these instructions and the preliminary instructions previously given, and it is your duty to follow them.

The jury, having taken an oath to follow the law, was locked into the Court's instructions.

Plaintiff, knowing the Pattern Jury Instructions on Premises Liability are

incomplete, wrote a pre-trial brief on jury instructions laying out the caselaw as it applied to the instant case, as well as full sets of proposed instructions. [SR-81-202, 277-89, 341-54, 360-372]. Later at trial, when instructions were being settled, Plaintiff again proposed the instructions necessary to give the jury the "full and correct" statement of the applicable law. [SR-954-959, 964-965, at APP-39-44, 45-46; see also, pertinent portions of Trial Transcript, settlement of instructions, JT-Tr-2, pp.74, 221-55, at APP-03-38].

Rather than adopting Plaintiff's proposed premises liability instructions (which will be discussed *infra.*), the Trial Court instructed the jury, in pertinent part, as follows:

CC. Instruction No. 11:

> Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. The law does not say how a reasonable person would act under facts similar to those shown by the evidence. That is for you to decide.

DD. Instruction No. 11A:

> A person who is exercising reasonable care has a right to assume that others will perform their duty and obey the law. Unless there is reasonable cause for thinking otherwise, people can assume that they are not exposed to danger from another person's violation of their duty of care.

EE. Instruction No. 12:

> The term "reasonable person" refers to a person exercising those qualities of attention, knowledge, intelligence, and judgment that society requires of its members for the protection <u>of their own interests and</u> the interests of others.

FF. Instruction No. 14:

> The possessor of land owes an invitee the duty of exercising reasonable or ordinary care for the invitee's safety.

(Underlining supplied). Plaintiff's objections to these instructions (for their incompleteness) as well as the transcript of Plaintiff offering the Plaintiff's Proposed

Instructions on the same subject matter are found at JT-Tr-2, pp.74, 221-55, and APP-03-38. The cites to the pertinent proposed instructions are set forth below as each is discussed.

During the trial, the jury heard the evidence, most of which was undisputed, and a fair reading of which, in a light supporting the verdict, is as follows:

33. The Restaurant shoveled and salted its own side-walks and did so adequately with reasonable care. [JT-Tr-2, p.141].

34. The Restaurant hired First Rate Excavate to use its snow plowing and sanding/salting heavy equipment on the parking lot. [JT-Tr-2, pp.141-42, 176].

35. The Restaurant did not itself shovel or salt any part of the parking lot. [JT-Tr-2, p.176]

36. The Restaurant knew that its customers who parked vehicles anywhere in its west parking lot would be walking between the vehicles parked against and perpendicular to the north-south sidewalk which lay adjacent to the west side of the Restaurant building. [JT-Tr-2, p.198].

37. The Restaurant knew that water on the parking lot drained to the said areas between the vehicles thusly parked perpendicular to the said sidewalk and was subject to thawing and freezing to become invisible black ice. [SR-927, VanBeek Dep. pp.21-22].

38. The Restaurant knew that said area lay in the shade and that black ice that you could not see or stand on sometimes formed there. [JT-Tr-2, pp.161-62, 168-69, 208].

39. The Restaurant knew that salting the area between the vehicles was reasonable, but they did not do so. [JT-Tr-2, pp.161-63, 169].

40. The Restaurant knew that the heavy equipment used by First Rate Excavate could not salt effectively between the parked vehicles as the salt hit the back ends of the vehicles parked against the sidewalk. [JT-Tr-2, pp.175, 196; SR-927, VanBeek Dep. p.9].

41. The Restaurant knew that it did not hire the available manual crews from First Rate Excavate to salt between the said parked vehicles. [JT-Tr-2, pp.141-42, 176].

No contention was made by the Plaintiff that the Defendant did not use reasonable or ordinary care (a) on the sidewalk or (b) on the main traveled drive through area of the parking lot. The Plaintiff's contention was that between the parked cars was a different story, and no reasonable care was used between the parked vehicles.

From these facts, it can be seen how important it was to make certain the law was specific and complete enough so:

1. The jury would know that the law does tell them in this situation how a reasonable person must act. Contrary to the Trial Court's Instruction No. 11, how a reasonable person must act (*i.e.,* the Restaurant must have taken reasonable care to inspect the premises, to have ascertained the actual condition of the premises, to have made the actual condition of the premises safe by repair or, at least, by having provided a warning of the risks involved and that the Plaintiff has a right to expect the same). [See Plaintiff's Proposed Instructions No. 15 (refused) and No. 18 (refused) at SR-954-55 and APP-39-40].

The Trial Court, on the other hand, incorrectly allowed the jury unbridled discretion, unguided in any respect (Court's Instruction No 11: "The law does not say how a reasonable person would act under facts similar to those shown by the evidence. That is for you to decide"). This instruction was SDPJI 20-20-10. Plaintiff respectfully submits that, whatever discretion the law might allow the jury in deciding reasonableness, the Plaintiff was entitled to have the bounds of the Defendant's legal duties(within which the law requires that discretion to operate) established by the Court in the jury instructions. *Mitchell v. Ankeny,* 396 N.W.2d 312, 313-14 (S.D. 1986) [citing Restatement (Second) of Torts, §343, comments b and d. (Duties to inspect, warn and

make safe are "subparts" of the general duty to exercise "reasonable care." *Id*.)] Yet, the jury was never told that.

This instruction was essentially SDPJI 20-20-10. The comment to said Pattern notes that the last two sentences may need to be modified in a case involving negligence per se. This tells us that, while we do not have a safety statute at issue in the instant case, just as in a case involving negligence per se, the case-law of the instant case provides the specification as to exactly how a reasonable person is to act (with as much force of law as a statute would have),[2] thus making the last two sentences of the Pattern (and Court's Instruction No.11) inapposite and misleading to the jury. This became even more important as the Plaintiff laid out her proposed instructions.

See also Plaintiff's Proposed Instruction No.19 (refused) at SR-956 and APP-41 (Possessor in the best position to … "investigate, inspect, and discover such risk of harm and then must exercise reasonable care to remedy the risk of harm or to warn the customer of it in order to make the property reasonably safe."). This proposed instruction came from *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶31, 780 N.W.2d 497, 501-02, 507 (Justices Zinter and Konenkamp concurring).

See also, Plaintiff's Proposed Instruction No. 22 (refused) at SR-957 and APP-42, which incorporates the law set forth in both *Janis*, 2010 S.D. at ¶31, 780 N.W.2d at 507, and *Mitchell*, 396 N.W.2d at 313-14, as well as comments b and d of Restatement (Second) of Torts, §343, which essentially restate the duties and sub-duties.

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[2] Caselaw is an accepted source of specific duty jury instructions to show how a "reasonable person" must act. Only when the law (statutes and caselaw) is silent is "reasonableness" to be left for the jury. *On Determining Negligence, Hand Formula Balancing, The Reasonable Person Standard, and the Jury*, Stephen G. Gilles, Vanderbilt Law Review, Vol. 54:3:813, 834.

2. The instructions needed to be specific and complete enough that the jury would not over broadly construe the term "reasonable care" to excuse or justify Defendant's failure to salt between the cars. The lack of guidance in the Court's Instructions No. 11, 11A, 12, and 14) left the jury without guidance as to how to apply the legal duties of the Defendant against whatever reasonable care the Defendant actually did apply. As instructed, the jury could have considered the care given to the sidewalk and main traveled drive-through portion of the parking lot to be reasonable and thereby justify or excuse Defendant's admitted near total omission of any care for ice in the areas between the parked cars where that walk-way was not made safe. [See Exhibit 5 at SR-915].

The only way to avoid such an over-broad construction by the jury was to provide the jury with the more specific sub-duty instructions in the law set forth in Plaintiff's Proposed Instructions Nos. 15, 18, 19, and 22, discussed above [SR-954-957 and APP-39-42], which reveal the purpose and scope of the sub-duties. The Trial Court's Instructions 11 and 12 do not do so. The sub-duties make it clear that Defendant's obligations are not general, but apply to <u>all</u> parts of the premises. The sub-duties are a part of reasonable care that the jury was never informed of, but which the evidence showed was violated by Restaurant. Plaintiff's Proposed Instruction No. 16 (refused) [SR-964, APP-45] also would have instructed that the reasonable person is <u>always</u> up to standard, not just usually, mostly, or part of the time.

Said another way, a general duty to use reasonable care which applied to the whole premises might well be conceived as allowing Restaurant to not be "up to standard" [See Plaintiff's proposed Reasonable Person Instruction No. 16 at SR-964 and

APP-45] on the part of the premises upon which the hazard existed that caused Plaintiff to fall, or on that occasion rather than always. The kind of "reasonable care" prescribed by the Court to the jury permitted reasonable care in one part of the premises to be used to justify and excuse negligence on another part of the premises.

The Court said only that:

> The possessor of land owes an invitee the duty of exercising reasonable or ordinary care for the invitee's safety. Trial Court's Instruction No. 14 at SR-386 and APP-49.

By contrast, Plaintiff's proposed instructions did contain specific premises liability requirements; whereas, the Court's Instructions did not contain language requiring that the reasonable care be exercised for the purpose of making the land reasonably safe for the business invitee. Except for the definition of invitee and a mention of possessor in Court's Instruction No. I4, no one would know these were "premises liability" jury instructions as opposed to general negligent conduct instructions.

3. The instructions needed to be specific and complete enough that the jury would not over-broadly construe reasonable care to mean mere reasonable levels of "concern or caring," or a reasonable level of exertion or effort which falls short of the "standard of care necessary to avoid injury to themselves or others"; Restatement (Second) of Torts, §283 and comments.

Again, despite the lack of guidance in the Court's Instructions No. 11, 11A, 12, and 14, the Plaintiff needed to make certain the jury understood that the term "reasonable care" did not refer to merely a level of concern for safety beyond which acts or omissions not "up to standard" would be excused (*e.g.*, "they cared"), but rather that a reasonable care refers to acts and omissions that are "ideal," "always up to standard," and "never

negligent." The jury was entitled to know that the Defendant is "required to act as this ideal person would have acted" to avoid injury to themselves or others. SDPJI 20-20-15 and comment. *Nugent v. Quam*, 152 N.W.2d 371, 377 (S.D. 1967), citing Restatement (Second) of Torts, §283 and comments.

The Plaintiff proposed its own "Reasonable Person" Instruction No. 16, which was from SDPJI 20-20-15 and comment, and which set forth this essential information for the jury, but the proposed instruction was "refused" [See SR-964 and APP-45]. Therefore, the jury was forced to decide the negligence issue (which it did in favor of the Defendant) without ever knowing what the qualities that define a "reasonable person" really are.

4. The instructions needed to be specific and complete enough that the jury would not construe "reasonable care" to mean reasonable "effort" rather than the reasonably careful "actions" necessary to achieve the safety owed to the Plaintiff, Shirley Tammen. See Plaintiff's Proposed Instruction No. 19 [SR-956 at APP-41].

Since we know that a reasonable person is "always up to standard" and is "never negligent" (*Nugent*, 152 N.W.2d at 377), the concern is that the Court's lack of guidance in Instructions 11, 11A, 12, and 14, will allow a jury to incorrectly conclude that the words "reasonable" or "ordinary" infer allowable deviations from always being "up to standard" and would consider those deviations from standard to be "reasonable" (*e.g.*, "It was a mistake, but it wasn't unreasonable to make that kind of mistake"; or "Everybody makes mistakes once in a while"; or "it was a reasonable deviation from the standard").

The standard, however, is not subjective. It is "external and objective," and that message must be conveyed to the jury. Restatement (Second) of Torts, §283 and

comments.

Restatement (Second) of Torts), §283, comment, reads in pertinent part:

> Standard of the "Reasonable Man"
>
> Negligence is a departure from the standard of conduct demanded by the community for the protection of others against unreasonable risk. The standard which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual. It must be the same for all persons, since the law can have no favorites; and yet, allowance must be made for some of the differences between individuals,the risk apparent to the actor, his capacity to meet it, and the circumstances under which he must act.
>
> ***
>
> The actor is required to do what this ideal individual would do in his place. The reasonable man is a fictitious person, who is never negligent, and whose conduct is always up to standard. He is not to be identified with any real person; and in particular he is not to be identified with the members of the jury, individually or collectively. It is therefore error to instruct the jury that the conduct of a reasonable man is to be determined by what they would themselves have done.
>
> ***
>
> … and at the same time affords a formula by which, so far as possible, a uniform standard may be maintained.
>
> ***
>
> In determining whether the actor should realize the risk which his conduct involves, the qualities which are of importance are those which are necessary for the perception of the circumstances existing at the time of his act or omission and such intelligence, knowledge, and experience as are necessary to enable him to recognize the chance of harm to others involved therein.
>
> ***
>
> Where a defendant's negligence is to be determined, the "reasonable man" is a man who is reasonably "considerate" of the safety of others and does not look primarily to his own advantage.

Restatement (Second) of Torts, §283, comment. The jury was never instructed as to any of those qualities. The Court's Instructions 11, 12, and 14 did not contain these prescriptions. The jury was left with the term "reasonable or ordinary care" devoid of both context and guidance. They were not guided by these Courts' instructions away from pure subjectivity and into the external and objective standard required and

prescribed by the law.

5. The instructions needed to be specific and complete enough that the jury would understand that the hiring of an independent contractor (First Rate Excavate) to do the Restaurant's snow and ice treatment does not, in and of itself, constitute "reasonable care" by the Restaurant due to the fact that, under the law, the Restaurant's duty to provide a safe premises for Shirley is "non-delegable." Refusal of Plaintiff's Proposed Instruction No. 25 [SR-958 at APP-43] left the jury without proper legal instructions on this point.

The entirety of the services that were supposed to render the "reasonable care" to the part of the premises where Shirley Tammen was injured were contracted out to First Rate Excavate, an independent contractor, by Restaurant. Instructing the jury that Restaurant remains liable for the negligent failure to render proper care is essential. See Plaintiff's Proposed Instruction No. 25 at SR-958 and APP-43. Giving a non-delegable duty instruction is similar to instructing that a driver's negligence is not imputable to his/her passengers. Juror's cannot be expected to know which duties the law imputes to others and which it does not (*e.g.*, SDPJI 20-230-10). This is an important principle since, in the instant case, the jury found the Restaurant was not negligent even though no care was rendered between the cars by anyone. [SR-359].

Under the Court's Instructions, the jury might well have concluded it was "reasonable" to hire First Rate Excavate to do the Restaurant's snow and ice work, and therefore, the Restaurant cannot be faulted. Given the admissions made by the Restaurant regarding the lack of ice treatment and prevention that occurred between the parked vehicles in the area where patrons walked between the parked vehicles, this

construction by the jury seems likely. The rejection of the "non-delegable duty" instruction by the Court likely led to: "Well, even if First Rate fell down on the job, the Restaurant should not be faulted because the Restaurant hired First Rate and that is 'reasonable care' on the Restaurant's part." That of course, is not the law.

The lack of guidance to the jury on this issue obfuscated the distinction between (a) a Restaurant fulfilling its duty to make the premises safe (including making certain First Rate did its job fully), and (b) a Restaurant showing some degree of good intention which nevertheless falls short of due care and leaves the subject hazard completely untreated.

6. The instructions needed to be specific and complete enough that the jury would understand, despite the lay meaning of words like "reasonable" and "ordinary," that reasonable/ordinary care in the context of Restaurant/Business invitee requires more care than a homeowner would exercise or that an individual juror might themselves exercise at their home or in a non-business invitee situation.

See Plaintiff's proposed Instructions No 18, 19, and 22 [SR-955-957 and APP-40-42], describing the qualities of "reasonable care" that are found in our case-law.

> The requirement that a landowner know of the dangerous condition on his property limits his duty to warn, but does not constrain his more general duty to keep his property reasonably safe.[3]

[3] While a landowner usually must know of a dangerous condition before he/she/it should warn the invitee, the same is not always true. The duty to engage in such actions as remedying potentially dangerous conditions, preventing dangers from arising, or warning of them once they have arisen are activated when the condition involves either a recurring danger (such as here) or where the Restaurants "operations" give rise to a foreseeable risk of harm. *Mitchell*, 396 N.W.2d at 313-14 ("This general duty includes the duties owed to licensees: to warn of concealed, dangerous conditions known to the landowner and to use ordinary care in active operations on the property. Rest.2d, *supra*, §343, comments b and d."). (Underlining supplied). [See also, Plaintiff's Proposed Jury Instruction No. 26 at SR-959 and APP-44].

***

> The liability of a landowner to an invitee for failure to render the premises reasonably safe for an invitee, or failure to warn him of a dangerous condition on the premises, is predicated upon a landowner's superior knowledge concerning the dangers of his property.

Janis, 2010 S.D. at ¶31, 780 N.W.2d at 506-07.

> Thus, contrary to Nash Finch's arguments, the authorities generally recognize that a duty arises when there has been a failure to exercise due care in inspecting for or discovering a previously unrecognized condition that poses an unreasonable risk of harm. See Restatement (Second) Torts §343 comment b. Simply stated, the possessor of business premises "is under an affirmative duty to protect [invitees], not only against dangers of which he knows, but also against those which with reasonable care he might discover." Prosser and Keeton on Law of Torts, §61, at 419. On remand, the jury should be instructed to determine both whether Nash Finch, by the exercise of reasonable care, would have discovered the condition, and whether, under all the facts and circumstances, it presented an unreasonable risk of harm that Nash Finch should have realized. In future cases, courts should consider both elements in determining whether a duty exists.

Janis, 2010 S.D. at ¶31, 780 N.W.2d at 506-07 (Justices Zinter and Konenkamp concurring). [See Plaintiff's Proposed Instructions No. 18, 19, and 22 at SR 955-957 and APP-40-42]. The Trial Court simply did not do this.

In summary, the most important pronouncements in our case law governing premises liability have never been reduced to Patterns, and these important principles, including some of the duties the Defendant owed the Plaintiff, were not contained in the Court's Instructions and were never conveyed to the jury.

ARGUMENT II
IT WAS ERROR TO INSTRUCT ON CONTRIBUTORY NEGLIGENCE AND TO REFUSE PLAINTIFF'S PROPOSED INSTRUCTIONS NO. 31 AND 32 ON *SHIPPEN V. PARROTT*

A. PLAINTIFF WAS NOT CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW

Plaintiff filed a Pretrial *Motion in Limine & Motion to Strike Defense: Bar any Argument or Suggestion that Plaintiff was Contributorily Negligent* [SR 259-63]. Plaintiff renewed the motion at the end of Defendant's case [JT-Tr-2, p.210] and during settlement of instructions [JT-Tr-2, p.228].

The relevant facts support the striking of Contributory Negligence and are:

7. SR-1113, JT-Tr-1, pp.41-42: Ernie Tammen had no trouble walking until he went between the parked vehicles. When he got between the parked cars it was slippery; he turned around to tell Shirley, but she was down on the ice between the vehicles. He couldn't tell it was slippery until he started to slip between the vehicles. [See also *Id.* at pp.56-58].

8. JT-Tr-2, pp.86-88: Shirley was looking where she was walking and could not see ice ahead of her.

9. JT-Tr-2, p.190: Stan Mitzel, the Rule 30(b)(6) representative for the Defendant, testified Fry'n Pan did not know whether First Rate salted or not and that Fry'n Pan did not have its own employees salt the area either.

10. JT-Tr-2, pp.202-05, 207: Although Mitzel contended that people generally must watch where they're going in the winter, when asked what Fry'n Pan claimed she should have been looking out for, he stated: "Oh, I have no idea. I wasn't there on that date." [*Id.* at 203-04]. When asked whether Shirley saw ice before she fell, Mitzel answered: "No idea." Mitzel also agreed Shirley had only a few seconds at best to assess the situation. [*Id.* at 207].

11. JT-Tr-2, p.161: Adam Lee, Fry'n Pan Manager, admitted that Fry'n Pan did not contend that there was no ice where Shirley Tammen fell. He also admitted he could not see anything dangerous that he felt he needed to worry about in the lot. Additionally, over a sustained objection without an order to strike (which ruling is herein appealed), Lee testified that he did not contend Shirley was negligent for not seeing the ice.

The Defendant was allowed the benefit of a version of the facts better than that to which it testified.

> A party cannot claim the benefit of a version of relevant facts more favorable to his contentions than he himself has given in his own testimony. *Miller v. Stevens*, 63 S.D. 10, 256 N.W. 152.

Cowan v. Dean, 137 N.W.2d 337, 342 (S.D. 1965). The Defense was allowed to play litigation games with the truth at the expense of the Plaintiff. Fry'n Pan has presented no evidence that Shirley Tammen acted other than a reasonable person would have acted with due regard for her own safety.

Because contributory negligence is an affirmative defense, the Defendant has the burden of proof in establishing that Plaintiff was contributorily negligent. *Johnson v. Armfield*, 2003 S.D. 134, ¶11, 672 N.W.2d 478, 481. Defendant's deposition testimony and Interrogatory Answers demonstrate that any allegation by Defendant of contributory negligence would be based upon bare assertions and incorrect assumptions, which are not themselves competent evidence to support the affirmative defense of contributory negligence. *Id.* See also, *Thompson v. Mehlhaff*, 2005 S.D 69, ¶¶42, 44, 698 N.W.2d 512, 525 (speculation that general contractor's employee "might have been" driving on the "wrong" side of the road on construction side did not meet the threshold necessary to create a question of fact for jury regarding whether deceased was contributorily negligent). Defendant has not met the burden of proof to sustain the affirmative defense of contributory negligence, and therefore, the Court's gatekeeping function should have barred the Defendant from presenting this defense in any manner to the jury.

B. THE TRIAL COURT PREJUDICIALLY ERRED BY NOT GIVING THE *SHIPPEN V. PARROTT* INSTRUCTION PROPOSED BY PLAINTIFF

At JT-Tr-2, pp.248-50, Plaintiff offered Plaintiff's Proposed Instructions No. 31 and 32 [SR-960-961 at APP-47-48], which instructed the jury they could not apportion anything to a pre-existing condition that was dormant and asymptomatic prior to the

injury. The Defendant had emphasized the pre-existing fragility of Plaintiff's bones and her diabetes at Dr. Bechtold's deposition [Bechtold Dep. pp.45-46, SR-___[4] and APP-52]. Dr. Bechtold, however, testified:

> Q. Do you have an opinion as to whether Shirley's right wrist, and specifically any fragility or osteopenia, was asymptomatic or active prior to the fall of 1-31-14?
>
> A. It appears, to the best of my knowledge and her documentation and history, that it was not symptomatic prior.

[Bechtold Dep. p.41 at SR-___ and APP-51]. Shirley Tammen testified she had no problems or symptoms with her right wrist or hand before the subject incident [JT-Tr-2, pp.81, 100].

Plaintiff, therefore, needed the instructions so the jury would not be confused on causation and attribute causation to a pre-existing dormant condition. The instructions were refused, and the jury had no guidance. The law, however, is clear on the issue.

> See *Owen v. Dix*, 210 Ark. 562, 196 S.W.2d 913, 915 (1946) (when defendant's negligence aggravates a dormant or diseased condition, defendant is liable for entire damages, notwithstanding the dormant or diseased condition).

Shippen v. Parrott, 1996 S.D. 105, ¶44, footnote 3, 553 N.W.2d 503, 513, footnote 3.

CONCLUSION

WHEREFORE, Plaintiff requests that this Court vacate the jury's verdict and reverse and remand to the Circuit Court for a new trial.

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[4] At the time of printing this Brief, the Settled Record had been amended to include the deposition of Dr. Bechtold but had not been "re-bundled." Therefore, no Settled Record page could be inserted. See APP-50-52.

REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellant hereby requests Oral Argument.

N. Dean Nasser, Jr.
N. Dean Nasser, Jr.

Dated this 26th day of October, 2018.

NASSER LAW FIRM, P.C.

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CERTIFICATE OF COMPLIANCE
SDCL 15-26A-66(b)

The undersigned being one of the attorneys of record for the Plaintiff/Appellant in the above-entitled matter hereby certifies that the *Brief of Appellant* submitted in this matter which was done in proportionally spaced type face does not exceed 33 pages but also does not exceed the typed volume limitation set forth in SDCL 15-26A-66(b)(2); further, that the word processing program computer computation for the entire brief exclusive of Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of the Issues, Addendum materials, and Certificates of Counsel is 7,295 words.

Dated this 26th day of October, 2018.

N. Dean Nasser, Jr.
N. Dean Nasser, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document and this Certificate of Service was served on Eric C. Schulte of Davenport, Evans, Hurwitz, and Smith, LLP, 206 West 14th Street, Sioux Falls, SD 57104, eschulte@dehs.com, attorneys for the Defendant/Appellee, by electronically mailing said copy to them at the foregoing email address via the Supreme Court's electronic filing system, this 26th day of October, 2018.

N. Dean Nasser, Jr.
N. Dean Nasser, Jr.

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

SHIRLEY TAMMEN, Plaintiff / Appellant, vs. K&K MANAGEMENT SERVICES, INC. / FRY'N PAN RESTAURANT, Defendant / Appellee.	**No. 28664** **APPENDIX TO APPELLANT'S BRIEF**

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SHIRLEY TAMMEN, Plaintiff / Appellant, vs. K&K MANAGEMENT SERVICES, INC. / FRY'N PAN RESTAURANT, Defendant / Appellee.	**No. 28664** **APPENDIX** **TO APPELLANT'S BRIEF**

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

SHIRLEY TAMMEN, Plaintiff, vs. **K&K MANAGEMENT SERVICES, INC., d/b/a FRYN' PAN,** Defendant.	49CIV14-002429 **VERDICT FOR DEFENDANT**

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues therein, find for the defendant because (check either option 1 or 2):

X 1) The defendant was not negligent; or

_____ 2) The defendant was negligent, but the plaintiff's negligence was more than slight in comparison to the defendant's negligence.

Dated this 14 day of June, 2018.

Foreperson

FILED
JUN 14 2018
Minnehaha County, S.D.
Clerk Circuit Court

EXHIBIT
A

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

SHIRLEY TAMMEN,

Plaintiff,

vs.

K & K MANGEMENT SERVICES, INC. / FRYN' PAN,

Defendant.

CIV. 14-2429

JUDGMENT

This matter having come on for trial, and a jury having been duly impaneled and sworn to try the issues therein, the trial having taken place on June 12, 13, and 14, 2018, the Honorable Rodney Steele, Circuit Court Judge, presiding, and the jury having rendered its verdict for K&K Management Services, Inc./Fryn' Pan, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of the Defendant and against the Plaintiff, with Defendant, K&K Management Services, Inc./Fryn' Pan, being entitled to tax costs in the amount of $_____ against the Plaintiff; and the Plaintiff's Complaint and causes of action against the Defendant may be, and the same hereby are, dismissed with prejudice, and on the merits.

BY THE COURT:

Rodney Steele

The Honorable Rodney Steele
Circuit Court Judge

1

FILED
JUN 29 2018
Minnehaha County, S.D.
Clerk Circuit Court

EXHIBIT
B

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

* *

SHIRLEY A. TAMMEN,

Plaintiff,

-vs-

K&K MANAGEMENT SERVICES, INC.,
FRY N RESTAURANT,

Defendant.

* *

49CIV14-2429

JURY TRIAL

VOLUME 2 OF 3

(Pages 74 - 257)

BEFORE: THE HONORABLE RODNEY STEELE
Circuit Court Judge
in and for the Second Judicial Circuit
State of South Dakota
Sioux Falls, South Dakota

APPEARANCES: MR. N. DEAN NASSER, JUNIOR
Nasser Law Firm
204 South Main Avenue
Sioux Falls, South Dakota 57104

Attorney for Plaintiff.

MR. ERIC C. SCHULTE
Davenport, Evans, Hurwitz & Smith
Post Office Box 1030
Sioux Falls, South Dakota 57101

Attorney for Defendant.

PROCEEDINGS: The above-entitled proceeding commenced at 9:00 A.M.
On the 13th day of June, 2018,
Minnehaha County Courthouse, Courtroom 5A,
Sioux Falls, South Dakota

THE COURT: Number 9, "A witness may qualify as an expert."
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: Ten, "The credibility of a witness may be attacked by."
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: Eleven, "Negligence is the failure to use reasonable care."
MR. NASSER: We would object to the last two sentences of that instruction, Your Honor. And the reason for that is, in this case, the law does tell how the reasonable person is supposed to act. They're supposed to exercise reasonable care. And that's vague, but it is still a direction by the law as to how they're supposed to act. I believe the comment says sometimes you leave that last part off, and I would ask that we do that.
THE COURT: Anna, is this a pattern?
MS. LIMOGES: Yes.
MR. SCHULTE: I think the jury instruction is fine. I would resist Mr. Nasser's attempts, and I would agree with this instruction.
THE COURT: The objection is noted and overruled. Eleven will be given.
All right. Number 12 -- This is an inside joke.

MR. NASSER: I object to No. 12, not to the giving of a reasonable person instruction, but to the leaving out of the objective standard that is required by *Nugent versus Quam* and the Restatement of Torts, Second that is cited within *Nugent versus Quam*, which objective standard says that a reasonable person is never negligent and is always up to standard. That avoids the possibility that the jury will think that just doing something half-baked reasonably is acceptable even if it's below the standard. And so I am very convinced, as was the American Law Institute and the Supreme Court, that we need to have the objective standard put in there. It is referred to by *Nugent* as an objective standard.

THE COURT: I've heard that someplace before.

MR. SCHULTE: I don't think I need to say very much. I would resist that, and I believe the pattern should be given. It appropriately defines --

THE COURT: To be honest with you, this isn't the pattern.

MR. SCHULTE: Oh, okay.

THE COURT: The inside joke is Mr. Nasser and I are both on the pattern jury instruction committee and did extensive talking about this all summer long about defining a reasonable person. It has never been defined in pattern instructions. This particular one is the one that the pattern jury instruction committee is seriously considering

but has not adopted and won't adopt it until next year. So this is kind of my submission here.

MR. SCHULTE: I agree with your submission.

THE COURT: All right. Your objection is noted, overruled, and No. 12 will be given.

Number 13, an invitee is a public or business visitor. Mr. Nasser?

MR. NASSER: I wonder if we couldn't, for the sake of the jury, make it a little simpler by just saying a business -- using the last sentence: A business visitor is an invitee who is invited to enter or remain on land for a purpose connected with the business of the owner.

I don't object to the instruction, but it's a confusing area of the law to say the least, and the less confusion the better.

THE COURT: This is a pattern; right?

MR. NASSER: Yes. But it doesn't all have to be given and isn't in some cases.

THE COURT: But you're not really objecting.

MR. NASSER: No, I'm not objecting.

MR. SCHULTE: And I'm not objecting either.

THE COURT: All right. Number 13 will be given.

Fourteen, "The possessor of land owes an invitee the duty of exercising reasonable care."

MR. NASSER: I object only insofar as it's an incomplete

statement of the law of South Dakota in that there are specific duties that are to accompany this instruction and we have proposed them. They include the duty to inspect. They include more specific duties. And we can get to those if any objections of the proposed instructions. But insofar as it goes, it's a correct statement of the law.

THE COURT: The ones that you were proposing, were they to be in lieu of this one or what?

MR. NASSER: In addition to it.

THE COURT: Okay. Well, then any objection?

MR. SCHULTE: No.

THE COURT: All right. Instruction 14 will be given.

Fifteen, "In general, an owner of the land is liable to an invitee for physical harm."

MR. NASSER: I do strenuously object to this because there is no evidence of a danger known or obvious to the invitee. The evidence is undisputed that even Adam Lee couldn't see it, and so there's just none there. This pattern by the way is out of the middle of the law, and we should be saying the duty -- you start with the duty is to use reasonable care and to exercise -- to accomplish safety. And then this is supposed to be an exception to the rule where you don't have to use reasonable care to do -- when it's open and obvious. This is the only pattern we have. We don't have the one that should be in front of it

specifying the duty. So -- but anyway, in this case there's no evidence of an open and obvious danger.

THE COURT: Mr. Schulte?

MR. SCHULTE: I think the record should be clear, I didn't propose this. I don't believe I did. But I think it is an accurate reflection of the law. It's a pattern. This is where I'm at on this. I'm not going to demand this is in here.

THE COURT: Okay.

MR. SCHULTE: I'm not, but I think it's an accurate reflection of the law, and I think evidence supports it.

THE COURT: Yeah. I kind of agree with some of the things Mr. Nasser said. I think this is maybe one that Jill Moraine put in there. I don't think -- I don't remember me putting it in here either. I'm going to withdraw that one.

So the next one would be No. 15, "contributory negligence."

MR. NASSER: We, of course, object.

MR. SCHULTE: I do not object.

THE COURT: All right. Plaintiff's objection is overruled, and 15 will be given.

MR. NASSER: Same objection to the second contributory negligence, No. 16.

THE COURT: Yeah, No. 16.

MR. SCHULTE: No objection to it.

THE COURT: Plaintiff's objection is noted and overruled. Sixteen will be given.

I have stricken the assumption of the risk so the next one is withdrawn by the Court.

MR. SCHULTE: I would just incorporate my arguments from before with respect to these instructions.

THE COURT: Okay.

MR. NASSER: I didn't hear what the Court is doing with the one following assumption of the risk. While the same conduct on the plaintiff may amount to both assumption --

THE COURT: I'm just getting to that.

MR. NASSER: Oh, I'm sorry. Okay. I thought you were commenting on it.

THE COURT: No. The next one I'm going to withdraw also.

MR. SCHULTE: So I don't have to keep repeating myself, I'll state one time for the record that I'm objecting to the withdrawal of any instructions that reference assumption of the risk and incorporate my prior arguments and urge them to be added in and that way I won't have to repeat myself as we do this.

THE COURT: Thank you. So the next one, 17, "A legal cause is a cause that produces some harmful result."

MR. NASSER: No objection.

MR. SCHULTE: No objection.

THE COURT: Eighteen, "There may be more than one legal

cause of an injury."

MR. NASSER: Is that contained... No. That's a proper instruction. I do not object.

MR. SCHULTE: No objection.

THE COURT: Number 19, "The issues to be determined by you in this case are these."

And here, Anna, I'm going to have you retype some of this, and Seth, so it says -- it's going to be: "The issues to be determined by you in this case are these:"

The next sentence -- "First, did the plaintiff assume the risk of injury?" -- I'm striking that and I'm striking the next sentence -- "If you find that the plaintiff assumed the risk, you must return a verdict for the defendant. If you find that the plaintiff did not assume the risk, you have a second issue to determine, namely:".

I'm striking those two sentences so that they -- that first paragraph will read:

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

"First, was the defendant negligent?

"If the defendant was not negligent, you must return a verdict for the defendant," et cetera.

And then --

MR. NASSER: The second issue there instead of the third.

THE COURT: Yeah. Yes, the second issue instead of the

third.
MR. NASSER: And then where it says --
THE COURT: Then where it says fourth, it would be third issue.
And where it says fifth, it will be fourth.
And where it says sixth, it will be fifth.
MR. NASSER: It covers it.
THE COURT: So with those redactions and adjustments here, that will be the Court's proposed.
MR. NASSER: Yeah, the plaintiff objects to contributory negligence in that instruction.
THE COURT: And you're objecting because of -- you got you're standing objection.
MR. SCHULTE: Sure. Yes.
THE COURT: All right. So, Anna, did you get all that?
MS. LIMOGES: (Indicating).
THE COURT: Okay. So that will be instruction 19.
Twenty, In civil actions, the party who asserts the affirmative issue -- let's see. That one I'll have to adjust also down where it has "Defendant has the burden of proving these issues:"
The assumption of the risk, No. 1, I'm redacting that. So number -- what is numbered two would be one, what's numbered three will be two, and what's numbered four will be three.

MR. NASSER: I'm wondering how that is going to work. Can we just take a minute and talk about two, three, and four? The law -- I'm just thinking out loud. The law is that the defense is only -- the burden of proof on the defense is that it's contributory negligence more than slight in relation to the defendant. I'm wondering if that shouldn't be in the first line.

THE COURT: Is what?

MR. NASSER: If it shouldn't be in the first element and that it should say, "The plaintiff was contributorily negligent in a degree more than slight compared to that of the defendant."

THE COURT: This is a pattern, isn't it?

MR. NASSER: Not really. It's a pattern that I think -- maybe I'm wrong -- but I think it's a pattern that you put things into for issues. Maybe I'm wrong. But regardless, the law is that before they get to legal cause, whether the plaintiff's contributory negligence was a legal cause, it has to be shown to be more than slight.

THE COURT: Well, you've got to show contributory negligence, and you've got to show that that contributory negligence was a legal cause. And then once they make those two determinations, then they have to determine whether the contributory negligence was more than slight in comparison with that of the --

MR. NASSER: Oh, that's all right. It's one of those bags of worms. That's fine. So we're renumbering two to one, three to two, four to three.
THE COURT: Right.
MR. NASSER: Okay. And striking No. 1.
THE COURT: Yeah. Right.
MR. NASSER: The only objection is for the inclusion of the defense.
THE COURT: Right.
MR. NASSER: As previously stated.
THE COURT: All right. Twenty-one, "You may have heard the terms 'direct evidence' and 'circumstantial evidence.'"
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: Twenty-three (sic), "If you decide for the plaintiff on the question of liability," the amount of money plaintiff...
MR. NASSER: Let me read this a moment, please. (Reviewing.) Yeah, I think that's fine.
MR. SCHULTE: No objection.
THE COURT: Okay. Twenty-three, "Plaintiff does not claim damages for future medical expense."
MR. NASSER: That I think draws an undue focus to the damages. It may cause them to wonder why it's in there. We're not claiming it, and it is not part of what you've

allowed them to award. And I've never seen this before, but we'd object to it.
THE COURT: Well, that's because I put it in there because you said you weren't going to claim it.
MR. NASSER: No, I'm not. But I don't think we need to emphasize those things. There's a lot of things I'm not claiming.
THE COURT: I don't want them -- you are claiming future damages for disability and pain and suffering --
MR. NASSER: Yeah. Yeah.
THE COURT: -- so I want to make sure they understand this --
MR. NASSER: Okay. I mean I felt I'd treat it like a motion in limine. I'm not going to argue it.
THE COURT: All right. Any objection by the --
MR. SCHULTE: No, Your Honor.
THE COURT: Okay. Twenty-three will be given.
All right. Now we get to a series. I'm not sure how you people feel about -- "If you find that the plaintiff had a condition prior to the conduct of the defendant at issue," I don't know if either one of you proposed this.
MR. NASSER: No.
THE COURT: And I think this is something Jill threw in there again. It has to do with aggravation of a prior condition, and I don't know if --

MR. NASSER: We're not claiming it.
THE COURT: Yeah.
MR. SCHULTE: And I did not propose this, and I'm fine with taking it out, Your Honor.
THE COURT: Okay. Well, I'm going to withdraw that.
And likewise the next one, "If you find that the plaintiff had a prior condition making her more suspectable," I'll withdraw that one.
MR. NASSER: Yeah.
THE COURT: And also the next one, "In considering whether conduct is a substantial factor," I think that's all part of that aggravation and so I'm going to withdraw that.
And the next one, "If you find that the plaintiff is entitled to recover for an aggravation of preexisting condition," I'm going to withdraw that one.
So the next Court's proposed would be 24, and that's "The law allows damages for detriment reasonably certain to result" --
MR. NASSER: Oh, is this one of the ones you gave us later?
THE COURT: Yeah.
MR. NASSER: Okay. Got it. I'm sorry, what number?
THE COURT: Twenty-four.
MR. NASSER: Twenty-four?
THE COURT: Any objection by the plaintiff?
MR. NASSER: No.

MR. SCHULTE: No.
THE COURT: Twenty-five, "According to the mortality table."
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: Twenty-six --
MR. NASSER: Whoops. I don't have anymore.
MS. LIMOGES: How about these?
THE COURT: That's the other new one I gave you.
MR. NASSER: Twenty-four, 25 -- I'm sorry, what one is it?
THE COURT: "According to the mortality table" would be 25.
MR. NASSER: I have that.
THE COURT: Okay. Twenty-six, "If you determine that a party should recover a verdict, you should not return what is known as a quotient verdict."
MR. NASSER: I think that's one of the most outmoded instructions I've ever seen. We don't need that, do we?
MR. SCHULTE: I like it.
MR. NASSER: Oh, do you? Well, I mean you're entitled I suppose. I don't know. I object to it. There's a million ways they could skew a verdict, and this only addresses one of them. So...
THE COURT: Well, put it on next year's agenda. I'll give that one.
Twenty-seven, "There are certain rules you must follow

as you deliberate." Plaintiff?
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: And then there's two pages to that. And then the verdict forms -- verdict for the plaintiff, verdict for the defendant -- either party have any objection to those?
MR. SCHULTE: No objection.
MR. NASSER: No objection.
THE COURT: Okay.
MR. NASSER: Except for the verdict for the defendant, yeah. No objection to the verdict for the plaintiff.
MR. SCHULTE: Well --
MR. NASSER: No, I'm serious.
THE COURT: Yeah, I get it.
MR. NASSER: It's my motion.
MR. SCHULTE: Well, then I guess I would object to the verdict for the plaintiff.
THE COURT: All right. Let's see. Plaintiff's proposed.
MR. NASSER: Okay. I need my plaintiff's proposed.
THE COURT: And hold on, Anna, before you go down I may end up having you do more work here. We'll see.
MR. NASSER: All right. Does the Court have our proposed? We've submitted them.
THE COURT: Yeah, I do. I have them on the screen.
MR. NASSER: I've pulled out all the ones that are

unnecessary, and I will just...
THE COURT: I suppose their proposed are down in your office, huh?
MS. LIMOGES: Yes, Judge. You want me to go print us all copies? Do you want a copy?
THE COURT: Yeah.
THE CLERK: I can.
MR. NASSER: I'll tell you, I have an extra copy without cites. And I will use that and give you the one with cites that we're proposing.
THE COURT: That's fine.
THE CLERK: Two copies?
MS. LIMOGES: Can you make three? Thank you.
(Recess taken at 3:17 P.M. and reconvened at 3:25 P.M. out of the presence of the jury and with counsel and parties present.)
THE COURT: Let's go on the record. The question here is whether I should -- counsel has stipulated that the case will be argued tomorrow. The question is whether I should read the instructions today or tomorrow. Mr. Nasser indicates he would rather wait until tomorrow before I instruct the jury. Do you have any...
MR. SCHULTE: That's fine with me, your Honor, to do it that way.
THE COURT: All right. Les, let's bring the jury in. I'll

explain to them where we're at and where we're going here.

(Jury enters the courtroom at 3:28 P.M.)

THE COURT: Ladies and gentlemen, we're in the process of settling instructions in this case, and we're almost done. And the way the process works is I read you the instructions as it pertains to this case; and then counsel will give you their final arguments; and then the case will be submitted to you for your consideration. When the case is submitted to you, you'll be sequestered. You won't be able to leave the jury room and things like that until a verdict has been reached. So counsel -- it's late in the day, and by the time we get through reading instructions and counsel gives you their final arguments, you're probably looking at at least 4:30 before you get the case, and that's too late. So we're going to send you home fairly early basically -- I knew you would be happy -- and then you can report at 9:00 in the morning. And at that time, I will read you the laws that pertains to this case, counsel will give you their final arguments, and the case will be submitted to you for your consideration.

So during this evening recess, it's your duty not to converse amongst yourselves or with anyone else on any subject connected with the trial or to form or express any opinion until the case is finally submitted to you.

So 9:00 tomorrow.

(Jury exits the courtroom at 3:30 P.M., and the following proceedings were had.)
THE COURT: All right. The record should show we're out of the presence of the jury, and we'll finish settling instructions here starting with plaintiff's proposed.
MR. NASSER: Do you want me to renumber these, or is it okay if we just use the numbers we have?
THE COURT: Why don't -- let's see.
MR. NASSER: We've eliminated so many. I can just use No. 13.
THE COURT: Yeah, that's fine. I'm going to --
MR. NASSER: Okay.
THE COURT: -- put your plaintiff's proposed on each instruction.
MR. SCHULTE: If I may interrupt briefly, Your Honor, Mr. Nasser, can Mr. Mitzel go to work now and be excused?
MR. NASSER: Oh, sure.
THE COURT: I don't see any reason to stay.
MR. NASSER: You want to go too since there's nothing else for us to do except a little paperwork? Okay. Yeah, you can go too then. We'll see you first thing tomorrow at 9:00 tomorrow.
(Parties exit the courtroom.)
MR. NASSER: Give me one minute.
(Discussion off the record.)

MR. NASSER: Your Honor, instruction No. 13 that we have proposed was a pattern, and it comes from 1-50-20 and basically it's the issues to be determined. Our proposed does not have contributory negligence in it and so we have to propose that. And the Court's kind of indicated it's going to reject it, but that's our first proposal.

THE COURT: All right. Well, I think the other instructions -- other pattern jury instructions cover this area of the law adequately. I'm going to refuse that one.

Okay. Next one.

MR. NASSER: Next is our proposed No. 14, and that's the burden of proof pattern. And the issues are set forth therein and do not include contributory negligence.

THE COURT: Here again, I think the Court's proposed adequately covers that; so noted and refused.

MR. NASSER: Instruction No. 15 says, "Negligence is the failure to use reasonable care. It is the duty of something which a reasonable person would not do or the failure to do something which a reasonable person would do under facts similar to those shown by the evidence. It is conduct which breaches a duty imposed by the law." And we believe this would be a better way of saying it as there is a duty that the Court refers to, and it makes it clear to the jury that when they breach a duty, it's negligence.

THE COURT: Here, again, I think that's adequately covered

in the Court's proposed instruction 11. Noted and refused.
MR. NASSER: Instruction No. 16 is what the Court and I talked about a short while ago with *Nugent versus Quam*, and it is the ideal reasonable person instruction. And I believe it should hopefully -- the pattern that is being adopted says that you can put in these sentences at the option of the Court, and I have put them in.

I also have included the term "reasonable care" from *Corey versus Kocer*. The term "reasonable care" means that degree of care which a reasonable person would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence. The Court has not proposed a definition of reasonable care, and we're proposing one here. I believe that *Corey versus Kocer*, this comes right out of that, and I think it's an accurate statement of the law. I don't believe the Court's instructions do cover what reasonable care is, and I would ask that we do include it. I think that this whole business of reasonableness can be so confusing for a jury between effort and achievement. And reasonable effort often gets mistaken for reasonable care. And reasonable care is an exercise of care, not just a reasonable effort.
THE COURT: Your source is twenty -- pattern jury instruction 20-20-15, what's that one say?
MR. NASSER: I think that's the reasonable person

instruction, and I do think that we adopted it already. It's not pending. I think that it was adopted. And -- but with those notes that we've talked about, the comment says the Court can include these comments.

THE COURT: Well, I think they -- the definition of reasonable person in the Court's proposed, together with all the other instructions, is sufficient to apprize the jury of what the law is. So that's also noted and refused.

MR. NASSER: Are you also refusing the reasonable care?

THE COURT: Reasonable care also, yeah.

MR. NASSER: All right. Number 18, this is a very important instruction, and it's one of our key cases. It cites the Restatement (Second) of Torts, Section 343, *Mitchell versus Ankeny*, and it says, "As a business invitee, Shirley Tammen is entitled to expect that the restaurant will have taken reasonable care to ascertain the actual condition of the premises and, having discovered its actual condition, will either have made it reasonably safe by repair or will have given her a warning of the risks involved. Therefore, a customer is not required to discover dangers which, were she not a customer, she might otherwise be expected to discover. A customer is entitled to expect the restaurant to have made far greater prepositions for the customer's safety than a household possessor of land would make for his or her invitee."

Now there's no way the jury is going to know that law unless this instruction is given to them. And it's very important that they understand how special this relationship is between possessor and business invitee. Shirley is entitled -- they're entitled to know that Shirley was legally entitled to expect that the premises was reasonably safe. It's very similar to the instruction that we quite often give where we say that you're entitled to assume another's good conduct until it is unreasonable to assume it. And so I'm asking that the Court somehow inform the jury that she was entitled to expect that the premises was made reasonably safe for her. She was entitled to expect that they had exercised due care, and that's part of the law that governs this situation.

THE COURT: All right. Well, I hesitate to expand on the general principle of law, and that simply is that the invitee is owed a duty of reasonable and ordinary care for the invitee's safety, and that's Court's proposed 14.

You can argue that, Mr. Nasser, but I'm not going to give that one. That's refused.

Nineteen.

MR. NASSER: Nineteen talks about the superior knowledge of the condition of the land. It's from the other key slip and fall case, *Janis versus Nash Finch Company*. And they have superior knowledge of the condition of the land, and

as such, a business -- they owe their customers the duty of exercising reasonable care to keep the premises reasonably safe during the restaurant's active operations of the property. The duty is an affirmative duty of the business to protect its invitees not only against dangers actually known to the business but also against those dangers which, with a reasonable care, the business might discover.

Now that part of it gets to the issue of Mr. Lee saying, "Well, I didn't know it was bad." Well, we have cited to the Court the cases that say that's not an excuse when it comes out of your active operations on your property. And the law says that when circumstances indicate a foreseeable risk of harm, which we have presented evidence on in this case, the restaurant must investigate, inspect, and discover such reasonable risk of harm and then must exercise reasonable care to remedy the risk of harm or warn the customer. And the failure to exercise that care is negligence. And this is -- the Supreme Court was very strong on this, including the concurrences of Justice Zinter and Konenkamp cited at the bottom. And this was the first case to adopt the duty to inspect the property and discover the hazards. And they have been strong on it, and they advised trial courts after that point to take note of that. So I'm asking that we give this instruction and let the jury know that when this comes from the restaurant's

active operations, that they have to investigate and discover it and take care of it.

Now we've got contributory negligence in this case against the wishes of the plaintiff, of course, but here what we're saying is, if they would have inspected, if they would have done their job and taken care of this, you would not have had Shirley facing this problem. And the affirmative duty is on them to have eliminated it so she never has to face it. We need this instruction.

THE COURT: All right. For the same reason I'm going to note and refuse that. I think that's just another expansion on what is simply the duty of the existing the exercising of reasonable and ordinary care; so noted and refused.

MR. NASSER: Instruction 22, Your Honor, a business invitee enters onto a business premises upon an implied representation by the business that the business has prepared the land and made it safe and ready to receive the invitee. As a business invitee, Shirley Tammen was entitled to expect that the restaurant had taken reasonable care to ascertain the actual condition of the premises and, having discovered its actual condition, had either made it reasonably safe by repair or would have given her a warning of the risks. She is entitled to expect the premises is safe and that they've done their job. And unless there is

something that shows her otherwise that puts her on notice, she is entitled by law to expect that. And it's the same as the other jury instruction we've mentioned earlier where it says she's entitled to assume that another person is acting non-negligently. And that's part of what should be weighed by the jury in considering her contributory negligence issue. The cases cited are the two key slip and fall cases in South Dakota, *Janis versus Nash Finch Company* and *Mitchell versus Ankeny*.

THE COURT: Okay. Noted and refused for the same reason. You can argue this kind of thing, but it's --

MR. NASSER: Number 23, "Pedestrians have a right to take the most convenient route to their destination, and, while they cannot recklessly place themselves in danger, they need not forsake such walks merely because of such (sic) danger in passing over them, especially when no safer route is reasonably convenient."

Well, what we've got here is Mr. Schulte saying, "Why didn't they walk up the hill and around the corner instead of taking the most direct route?" So we have evidence on this, and we believe it's the Court's obligation when there's direct examination on an issue to instruct on that so there's no confusion.

THE COURT: Noted and refused for the same reason. You can argue that too.

MR. NASSER: Number 24, "A person who is exercising reasonable care has a right to assume others will perform their duty and obey the law. Unless there's reasonable cause for thinking otherwise, people can assume that they are not exposed to danger from another person's violation of their duty of care." That is a pattern, 20-30-50, and it most certainly does apply to this case. We would urge the Court to give this instruction.

THE COURT: I've seen this in the context of car accidents and that kind of thing.

MR. NASSER: There aren't a lot of slip and falls.

THE COURT: What -- another person's violation of their duty of care, you're talking about Fryn' Pan employees?

MR. NASSER: Right. About the violation of the duty of care owed to her, she has a right to expect that they will have done their job.

THE COURT: What's your thought on that, Mr. Schulte?

MR. SCHULTE: I've never seen this in the context of a slip and fall case. I'm just speaking from experience. I've seen it in car accident cases that have been given before. I'm trying to track in my mind how this would flow under the facts that have been given to the jury.

MR. NASSER: There's been direct evidence that they expect her to have discerned the danger, and this bears directly on that. It's just not the law that she is solely

responsible. She is entitled to assume.
THE COURT: Well, I'm still thinking. I'm trying to think if there would be any reversible error if I didn't give it, or if I did give it.
MR. NASSER: It isn't if you did.
THE COURT: Huh?
MR. NASSER: There clearly isn't if you give it.
THE COURT: Well, if I don't give it, I guess I'll find out one way or the other. I'm going to give this so I'm going to adopt this one.
Seth, can you -- I'll need this typed up into a Court's proposed.
MR. LOPOUR: What instruction number will this become?
THE COURT: Well, it's plaintiff's proposed. You've got plaintiff's proposed?
MR. LOPOUR: Yep.
THE COURT: Okay. Plaintiff's proposed 24, "A person who is exercising reasonable care." Got that one?
MR. LOPOUR: (Nods head.)
THE COURT: Okay. I'm going to adopt that one.
Next one, "A business which hires an independent contractor to exercise reasonable care."
MR. NASSER: Right. This is a nondelegable duty instruction. And that has -- that's part of the law. And we would not -- there's been evidence in the case that

someone else other than the restaurant did the work, and the jury may end up confused as to what effect legally that has on the liability of the restaurant.

Now we have -- we do have one other instruction, to be candid with the Court, that addresses this a little bit, and it's on legal cause. And it says that it's -- that a person who is not a party to the lawsuit cannot be the legal cause, but it doesn't yet talk about the duty part of it or the negligence part of it. So the duty is nondelegable and they need to know that.

I think if I recall you weren't arguing with that proposition.

MR. SCHULTE: I'm not arguing a nondelegable duty. I don't think it's necessary. My concern is it's based on Connecticut law apparently. To inject this into a case where it's not an issue I don't think it would be appropriate.

THE COURT: I think it's a nonissue anyway because you're not -- plainly made that apparent to the jury. But noted and refused. I think the evidence instruction adequately...

MR. NASSER: Now this is another one of the instructions that we don't have a pattern on. I took it out of California instructions. But I believe it is even the law of South Dakota, or would be adopted that way, where a

business by its operations or from a recurring condition should know -- knows or should know that a recurring condition or a condition from its -- created by it in its operations. If they know that there is likely to be such a condition, then knowledge of the condition is imputed to the restaurant. So in other words, we have produced evidence that this was a recurring condition. That there was drainage. That there's a pipe there that drains into the parking lot right at the parking spaces. There is a downhill drainage that goes to the -- past those parking places and puts water there, and it is part of the restaurant's operations. And so we would not want them arguing they don't know about it and that -- or they didn't know about it and therefore they're excused because that is not the law. I don't believe we have any South Dakota cases on it.

THE COURT: Okay. I think the other instructions adequately...

MR. NASSER: On No. 31, I believe this one stands independently of the preexisting condition situation. We aren't asking for preexisting -- or to a portion or to anything like that. And we had a motion in limine to the Court that the Court kind of deferred to the time of trial, and there wasn't any testimony about dormant conditions being responsible. But the jury could well find if they're

confused that there -- that somehow her age and her -- which was accentuated in the evidence -- her diabetes -- which was accentuated -- and it is called a fragility fracture -- that was in the evidence -- they could find that these dormant conditions, if they're confused enough, are partially responsible for this -- for the damages, and this is to avoid that confusion. Clearly, the law is that if there is a dormant condition that was asymptomatic -- and that's the only proof in the case is that it was asymptomatic -- then there can be no attribution of this to the preexisting condition. That's against the law. And that's what I wanted to be able to tell the jury: That they can't get confused and apportion this to something other than the injury since the undisputed evidence is everything came from the injury.

THE COURT: Well, there's --

MR. SCHULTE: I would -- I don't mean to interrupt you, Judge.

THE COURT: Go ahead.

MR. SCHULTE: I would resist this. There hasn't been evidence of that. Mr. Nasser is correct; there was a motion in limine on this issue filed about a preexisting condition. I didn't resist that, I didn't go into that at trial, so there's no evidence that a preexisting condition caused the break. But if we get into this, then there

should be instructions on a substantial factor, and I just think it opens up a can of worms and it's not necessary.

THE COURT: I think this is where Jill picked up on preexisting conditions. There's been no evidence that I remember that a jury could in any way infer that it was a preexisting condition to the wrist. So that's noted and refused.

MR. NASSER: The same comments accompany a different version of 31 that we have got numbered 32, and it's very simple. "When an accident lights up and makes active a preexisting condition that was dormant and asymptomatic immediately prior to an accident, the preexisting condition is not a legal cause of the resulting damages." And that is consistent with footnote 5 of *Shippen versus Parrott*, which I should have down as a source, and *Harris versus Drake*.

THE COURT: Noted and refused for the same reason.

MR. NASSER: Footnote 3, not 5 there.

Then the final proposal by the plaintiff, instruction No. 35, "If you award medical expenses to the plaintiff, you must award them in an amount that fully compensates the plaintiff for all reasonable charges billed for the treatment she necessitated as a result of the fall in accordance with instructions from the Court. You must not speculate or consider any other possible sources of benefit

the plaintiff may have received." And this is *Moore versus Kluthe & Lane Agency, Inc.*. And all it says is we don't want them talking about whether this was paid by Medicare or not paid by Medicare. They know how old she is and, therefore, speculation, that they should be warned not to speculate.

MR. SCHULTE: I think it's inviting something that shouldn't be invited. It's not based on a pattern. Apparently based on two other sets of pattern instructions from other jurisdictions. I don't think it's necessary and I would resist this. The instructions currently given by the Court appropriately define how to determine damages.

THE COURT: Well, this is kind of a collateral source instruction. Well, it's not a pattern. But I think it is an accurate statement of the law. And given the plaintiff's age, Mr. Nasser may have a point that the jury may take off and speculate on Medicare or other insurance payments which may have been made. I'm going to go ahead and adopt that one.

MR. NASSER: Thank you, Your Honor. That's all we have.

THE COURT: Mr. Schulte?

MR. SCHULTE: Real briefly so the record is clear. I think with respect to plaintiff's instruction No. 24, which the Court adopted on a person who is exercising reasonable care assuming conduct of others, I just want the record to be

clear that I'm objecting to that instruction.

THE COURT: Okay.

MR. SCHULTE: I think that mine will hopefully go fairly quickly, Judge. I've just got a few, and I would begin with defendant's proposed instruction 17.

Proposed instruction No. 17 is the instruction that we proposed regarding mitigation of damages. As the record was clear, prior to trial we moved to amend our answer to assert a claim for mitigation of damages. That was subsequently filed with that affirmative defense. Ms. Miller argued the motion. And this is the pattern jury instruction on mitigation of damages. I believe that sufficient evidence has been presented at trial indicating quite clearly that there's a legal issue as to whether or not Mrs. Tammen complied with the instructions of her physician to do exercises to help her fist improve. That's certainly a jury question. I can go into detail everything that was said, but I think it was abundantly clear, including a reference from her doctor, her normal doctor several months later, saying you've got to continue to do this for a year. And her testimony was that after about six weeks she basically stopped doing it. She did say she did do it somewhat after that. But I think there's certainly a jury question when Dr. Bechtold says, "My impression was that she could have gotten better if she

didn't do that because she didn't do it as frequently as she could have." And No. 2, Dr. Bechtold said he referred her to another specialist. That is in the medical records. She didn't go to another specialist. So I think this instruction is warranted.

MR. NASSER: With all due respect to my friend and colleague, that is a gross misstatement of the evidence in the case. He did not refer her to anyone. First of all, he said that she could come back if she wanted to see a hand specialist if things didn't work. She went back to him and he did not refer her. He helped her. And so that part is inaccurate, completely.

The other part is, he clearly stated that he did not expressly tell her how long she was supposed to do these. And he did not give her clear instructions. He did not say that she did not do it. He said he didn't know and we would have to ask her. And he said -- she said, "I did everything that he told me to do as best I could." And she wore out the gloves that they gave her the second time around. She did not stop doing anything. She kept doing it. And so there is no opinion here from the doctor that she did not do what he told her. He says he doesn't know really what she did. He had an expectation. And if you remember, I brought this up in the motions in limine where we said he initially, in his deposition, got a little

confused and then I straightened it out. He only expected her to do, I think it was, four to eight weeks or something beyond that. But he said that John Arneson read today. And she kept going away after that, exactly as he said. And she was still doing it the whole year, twice a day, at least two to three times a day.

Now in order to have a mitigation of damage instruction, we've got to -- he would have to -- Eric would have to get an opinion from the doctor that she would have been better had she not done it. He did not say that. He said that the utility of doing it after a few weeks is very little. And so there's no evidence that she would have gotten better had she done even more than she did.

THE COURT: Well, I did allow amendment of the complaint to allege mitigation and failure to mitigate damages. I kind of agreed the evidence is pretty thin there, but I think there's enough to justify giving the instructions. It's up to the jury to decide that. You guys can argue what you want to on that. I'm going to adopt that instruction.

Seth and Anna, you know which one I'm talking about there?

MS. LIMOGES: (Indicating.)

MR. LOPOUR: (Nods head.)

THE COURT: Defendant's proposed 17.

MR. SCHULTE: My only other comments, Your Honor, and I'll

be brief, but instructions 28 and 29 reference assumption of the risk. And for all the arguments I previously stated on the record with objections, I would ask that those be given, and that all of the instructions which reference assumption of the risk I request to be given.

THE COURT: All right. Both of those are noted and refused.

All right. Now as to instruction 24, plaintiff's proposed instruction 24, I've adopted that and I will give that as instruction, I think, 11A, right after instruction 11 on negligence.

And as to plaintiff's proposed instruction 35, I'll give that as instruction 22A, right after the instruction concerning the elements of compensation.

As to defendant's proposed No. 17, I'll give that as instruction 22A. And then the plaintiff's proposed instruction 35 I'll give as 22B. You two got all that?

MR. LOPOUR: Yup.

THE COURT: Okay. Can you guys print those off now so everybody -- including the numbers, the instruction number. I want the numbers in.

(Brief recess at 4:15 P.M. and reconvened at 4:19 P.M.)

MR. NASSER: Eric, what do you need?

MR. SCHULTE: Well, my standard answer one I defend is I want as much as the plaintiff gets. So if he says --

Plaintiff's proposed

Instruction No. 15

Refused 6/13/18 MA

Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. It is conduct which breaches a duty imposed by the law.

Source:
SDPJI 20-20-10

Refused as proposed 6/13/18 MS

Instruction No. 18

As a business invitee, Shirley Tammen is entitled to expect that the Restaurant will have taken reasonable care to ascertain the actual condition of the premises and, having discovered its actual condition, will either have made it reasonably safe by repair or will have given her a warning of the risks involved. Therefore, a customer is not required to discover dangers which, were she not a customer, she might otherwise be expected to discover. A customer is entitled to expect the Restaurant to have made far greater preparations for the customer's safety than a household possessor of land would make for his or her invitee.

Source:
Mitchell v. Ankeny, 396 N.W.2d 312, 313 (S.D.1986) [citing Restatement (Second) of Torts §343, comments b & d]

Plaintiffs Proposed Refused 6/13/18

Instruction No. 19

A possessor of land who operates a business on the land has superior knowledge of the condition of the land to that of the customers it invites to come on the land for its business purposes and the business therefore, is often in the best position to avoid harm to its customers.

The Fry'n Pan, as such a business owes its customers, including Shirley Tammen, the duty of exercising reasonable care to keep the premises reasonably safe during the Restaurant's active operations on the property. The duty is an affirmative duty of the business to protect its invitees not only against dangers actually known to the business but also against those dangers which, with a reasonable care, the business might discover.

When circumstances indicate a foreseeable unreasonable risk of harm to its customers the Restaurant must investigate, inspect, and discover such risk of harm and then must exercise reasonable care to remedy the risk of harm or to warn the customer of it in order to make the property reasonably safe.

The failure to exercise such reasonable care is negligence.

Source:
Janis v. Nash Finch Co., 2010 S.D. 27, ¶31, 780 N.W.2d 497, 507
(Justices Zinter and Konenkamp concurring)

Plaintiff's proposed Refused 6/13/18

Instruction No. 22

A business invitee enters onto a business premises upon an implied representation or an assurance by the business that the business has prepared the land and made it ready and safe to receive the invitee. As a business invitee, Shirley Tammen was entitled to expect that the Restaurant had taken reasonable care to ascertain the actual condition of the premises and, having discovered its actual condition, had either made it reasonably safe by repair or would have given her a warning of the risks involved. A customer is not required to discover dangers which, were she not a the business's customer, she might otherwise be expected to discover. A business customer is entitled to expect the business to have made far greater preparations for its customer's safety than a household possessor of land would make for his or her invitee. The Customer is therefore entitled to expect that the business will have exercised reasonable care to have made the land safe for the her entry and use for the purposes of the invitation before she enters.

Source:
Janis v. Nash Finch Co., 2010 S.D. 27, Footnote 3, 780 N.W.2d 497, 507
Mitchell v. Ankeny, 396 N.W.2d 312, 313, 315 (S.D.1986)
[citing Restatement (Second) of Torts §343, comments b, d, & f]

Plaintiff's Proposed refused 6/13/18

Instruction No. 25

A business which hires an independent contractor to exercise the reasonable care the business is required to exercise does not by hiring such independent contractor delegate or transfer the business' obligations to its invitees to maintain a safe premises as described herein. The business' duty to its invitees remains with the business and is nondelegable.

Source:
Smith v. Community Co-op Ass'n of Murdo, 209 N.W.2d 891, 893 (S.D. 1973)
Gazo v. City of Stamford, 765 A.2d 505, 510, 512 (Conn. 2001)

Plaintiff's Proposed

Instruction No. 26

Refused 6/13/18 M

If you find that the condition which caused the risk of harm was created by Fry'n Pan or its agents or employees in maintaining the lot, in the operating of its business, or was from a recurring condition on the premises, then you must conclude that the Fry'n Pan should have known of the condition at the time of injury, and knowledge of the condition is "imputed" to the Restaurant from such circumstances.

Source:
BAJI 8.21
CACI 1012
Hatfield v. Levy Bros., 18 Cal.2d 798, 806, 117 P.2d 841 (1941)
Sanders v. MacFarlane's Candies, 119 Cal.App.2d 497, 501, 1259 P.2d 1010 (1953)
Oldham v. Atchison, T. & S.F. Ry. Co., 85 Cal.App.2d 214, 218-19,192 P.2d 516 (1948)

Plaintiff's proposed 6/13/18

Instruction No. 16

The term "reasonable person" refers to a fictitious ideal, reasonable, prudent person exercising those qualities of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own interests and the interests of others. The actor whose conduct is being considered is required to do what this ideal individual would do in the same or similar circumstances as those shown by the evidence. The reasonable person is never negligent, and his, her, or its conduct is always up to standard.

The term "reasonable care" means that degree of care which a reasonable person would use in order to avoid injury to themselves or to others under circumstances similar to those shown by the evidence.

Source:
SDPJI 20-20-15
Nugent v. Quam, 152 N.W.2d 371, 82 S.D. 583 (1967)
Corey v. Kocer, 193 N.W.2d 589, 596, 86 S.D. 221, 232 (1972)

Defendant's Requested Proposed 1/13/18

Instruction No. 23

Pedestrians have a right to take the most convenient route to their destination, and, while they cannot recklessly place themselves in danger, they need not forsake such walks merely because of some danger in passing over them, especially when no safer route is reasonable convenient.

Source:
Smith v. City of Yankton, 23 S.D. 352 (1909)

Plaintiff's proposed refused 6/13/18 MD

Instruction No. 31

If you find that Shirley Tammen's preexisting condition, if any, was latent, dormant, or asymptomatic, and was not causing her pain, suffering, or disability prior to her fall on January 31, 2014, but that said preexisting condition when combined with injury from the subject fall on ice brought on her pain, suffering, or disability by aggravating the preexisting condition and making it active, then a Defendant whose negligence caused the aggravation, and not the Plaintiff's preexisting condition, is the legal cause of Shirley's pain, suffering, and disability, and such Defendant is liable for the entire loss. In such a case, you must attribute the entire damage to the fall and you must not apportion any damages to Shirley's latent, dormant, or asymptomatic pre-existing condition.

Source:
Bennett v. Messick, 457 P.2d 609 (Wash 1969)
Sumpter v. City of Moulton, 519 N.W.2d 427 (Ia. 1994)
Shippen v. Parrott, 1996 SD 105, ¶¶10-14, 553 N.W.2d 503, Footnote 3
Harris v. Drake, 99 P.3d 872 (Wash. 2004

Plaintiffs proposed refused 6/13/18 KP

Instruction No. 32

When an accident lights up and makes active a preexisting condition that was dormant and asymptomatic immediately prior to an accident, the preexisting condition is not a legal cause of the resulting damages.

Source:
Harris v. Drake, 99 P.3d 872 (Wash. 2004)

Instruction No. 14

The possessor of land owes an invitee the duty of exercising reasonable or ordinary care for the invitee's safety.

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

SHIRLEY & ERNEST TAMMEN, 49CIV14-002429

Plaintiffs,

-vs-

K & K MANAGEMENT SERVICES, INC./
FRYN' PAN,

Defendant.

* *

DEPOSITION OF

Dr. C. Dustin Bechtold

* *

APPEARANCES:

Nasser Law Firm, Attorneys at Law, Sioux Falls, South Dakota,
by Mr. N. Dean Nasser, Jr.,

for the Plaintiffs;

Davenport, Evans, Hurwitz & Smith, Attorneys at Law,
Sioux Falls, South Dakota,
by Mr. Eric C. Schulte,

for the Defendant.

ALSO PRESENT: Carole Nasser

INDEX OF EXAMINATION

INDEX OF EXHIBITS

STIPULATION

It is stipulated and agreed by and between the above-named parties, through their attorneys of record, whose appearances have been hereinabove noted, that the deposition of Dr. C. Dustin Bechtold may be taken at this time and place, that is, at the offices of Sanford Orthopedics & Sports Medicine, Sioux Falls, South Dakota, on the 28th day of March, 2018, commencing at the hour of 4:55 o'clock p.m.; said deposition taken before Wayne K. Swenson, a Notary Public within and for the State of South Dakota; said deposition taken for the purpose of discovery or for use at trial or for each of said purposes, and said deposition may be used for all purposes contemplated under the applicable Rules of Civil Procedure as if taken pursuant to written notice. Insofar as counsel are concerned, the objections, except as to the form of the question, may be reserved until the time of trial.

DR. C. DUSTIN BECHTOLD,

called as a witness, being first duly sworn, deposed and said as follows:

(Deposition Exhibits Number 1 through 17 was marked for identification by the court reporter).

EXAMINATION BY MR. NASSER:

Q Will you state your name, please?

A Carl Dustin Bechtold.
Q And, Dr. Bechtold, we're taking your deposition for purposes of a jury trial in a lawsuit involving your patient Shirley Tammen. Is that your understanding?
A Yes.
Q And it's my understanding that your patient care and other professional obligations are expected to prevent you from being personally present at the time of trial; is that correct?
A Yes.
Q You've agreed to tell us what you know by means of this deposition?
A Yes.
Q And how long have you been with Sanford Health Systems?
A Roughly nine years.
Q And your occupation with them?
A Orthopedic surgeon.
Q And are you an employee with the system?
A I am.
Q What is orthopedics?
A The care of musculoskeletal pathology, which would include bones, joints, tendons, etcetera.
Q And, in particular, would it include broken wrists?
A Yes.
Q Would you tell us your training and education since high

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X-rays and your surgery of her, your subsequent examinations and testing, and the occupational therapy that you ordered and that she performed, have you formed certain opinions based upon reasonable medical certainty?
A. Yes.
Q. Do you have an opinion as to what the cause of Shirley's right wrist fracture of 1-31-14 was?
A. Yes.
Q. Will you state that opinion?
A. A fall onto an outstretched hand.
Q. Was that fall at least, if not more, a substantial factor in causing the right wrist fracture?
A. Yes.
Q. Do you have an opinion as to whether Shirley's right wrist, and specifically any fragility or osteopenia, was asymptomatic or active prior to the fall of 1-31-14?
A. It appears, to the best of my knowledge and her documentation and history, that it was not symptomatic prior.
Q. All right. Was the treatment she's received as set forth in Exhibit 2, that medical bill summary, all reasonable and necessary to treat the right wrist injuries from the fall?
A. Yes.

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Q. Do you have an opinion as to what her permanent condition was as of the last time you saw her?
A. Yes.
Q. Will you tell us about that?
A. I think that the biggest residual problem that she had was this continued stiffness. I think that likely without any further changes in her treatment or therapy and/or a new intervention, she would likely maintain that deficit over the prolonged time. I think the unknown variable would be over the course of years how much she would or would not develop arthritis at the wrist from that injury.
Q. All right. And if you were to prescribe more treatment for her, I know she hasn't come back, but is there any other surgery or any other modality that might make any difference in her functionality?
MR. SCHULTE: Object to the form, calls for speculation. Foundation.
Q. Well, is there -- do you know of any treatment that you could offer her that might make a difference?
MR. SCHULTE: Same objection.
MR. NASSER: Go ahead.
A. In my level of expertise I think that would go beyond my area of specialty and I would refer her to one of our hand and wrist specialists to determine if there is

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something that could be done further.
Q. Do you know of anything?
MR. SCHULTE: Same objection as before.
A. I would probably, at the most aggressive, say that there would have to be an open debridement or a cleaning out of tissues and scar tissue around the tendons, with very aggressive therapies to follow. That would be the most aggressive approach for that.
Q. How certain are you that that would make a difference?
MR. SCHULTE: Same objection, form and foundation.
A. It would be hard for me to speculate outside of that specialty area, having no experience directly with those procedures or their outcomes.
Q. Are the plates and screws, then, permanent for her?
A. They typically are. They are only removed if they are felt to be causing a problem. But most typically they're left in place.
Q. And with those -- with her age and osteopenia of her bones, do you feel it's wise to leave the plates in?
A. Oh, I think it's probably not related to her age or bone density, it's more -- there's more harm than benefit to remove hardware if it's not causing problems.
Q. All right.

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MR. NASSER: And we'll offer Exhibits 16 and 17.
MR. SCHULTE: No objection.
Q. Doctor, are all the opinions that you've given here today based on reasonable medical certainty?
A. Yes.
Q. And are they all more likely than not true?
A. Yes.
MR. NASSER: Thank you.
EXAMINATION BY MR. SCHULTE:
Q. Good afternoon, Doctor. My name is Eric Schulte, and we met briefly before this deposition started today; is that correct?
A. Correct.
Q. I represent Fryn' Pan, which has been sued by Mr. and Mrs. Tammen in this particular case, and I just have a few questions for you, Doctor.
A. Yes.
Q. It shouldn't take that long. I just want to be clear. Mr. Nasser asked you questions about the history that you knew of Miss Tammen. Did you look at any records at all that predated this particular incident that we're talking about?
A. I did not, to any recollection today.
Q. Okay. So as far as her prior history and what's stated

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in the medical records, that would be something that you wouldn't be aware of because that hasn't been given to you?
A Correct.
Q It's been a long time, I think, since you've seen Miss Tammen. Do you have any independent memory of her, or are you relying primarily on what's stated in your written records?
A I am primarily on the written records. I would say I have a general recollection of her and the nature of her being so stiff after the surgery.
Q Have you, by chance, looked at the Center for Family Medicine records? I want to make sure exactly what you've looked at.
A I have not. Certainly not now, and I don't recall having looked at them before.
Q Okay. I don't want to go into that if you haven't seen them, then, Doctor. Mr. Nasser asked you a variety of questions about fragility and osteopenia. Do you recall those questions?
A I do.
Q Based upon your education and training, Doctor, is there any connection, causal connection between diabetes and low bone density, if you're aware?
A I'm trying to recall details. I would say that it's

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probably not one of the main, direct causal relationships, but diabetes has an impact on many systems that could have some impact.
Q On bone density?
A On bone density. But not one of the direct causal concerns.
Q Okay. Let's talk a little bit about the records you visited with Mr. Nasser about, and I'm going to go through just a few. We talked about the surgery, and I believe you told Mr. Nasser you thought that it was a good result, did I hear that correctly?
A Correct.
Q That was your impression after the surgery and that impression continued on during your treatment with her; is that correct?
A Correct.
Q I'm looking at the initial discharge summary, which I can show you, but it's dated, I believe, January 3rd of 2014.
MR. SCHULTE: You can look at it first, Mr. Nasser, if you would like to.
MR. NASSER: January 31st?
MR. SCHULTE: No, I said 3rd.
MR. NASSER: Yes. Go ahead.
Q I believe in your note of that date, Doctor --

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A Is it February 3rd, maybe?
Q Well, I believe it's February 3rd, yes.
A Yeah. I have a copy of that, too.
Q Okay. Looking at your note, I believe it indicates, patient progressed well with therapies and was able to ambulate fully in physical therapy; is that correct?
A Yes. It's documented by Ryan Krempges.
Q And those would be the therapies that you provided immediately after surgery; is that correct?
A Correct.
Q Okay. She was able to achieve adequate pain relief, I believe the note says, with various oral pain medications that you gave her; is that correct?
A Correct.
Q And she was supposed to return in a couple of weeks to see you?
A Yes.
Q Okay. After that, and feel free to look at your notes, but I'm looking at a note which I believe is dated 2-20 of 2014, and I think there was some discussion with Mr. Nasser whether that was February 19th or 20th?
A Correct.
Q When she returned to see you on that day I believe she stated to you that she was doing fairly well; is that correct?

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A Correct.
Q And in the third paragraph of your note, Doctor, I believe you state, on exam she has a normal motor and sensory examination of the hand; is that correct?
A Correct.
Q And just tell the jury and Mr. Nasser and myself, what do you mean by that?
A That would indicate the function of the nerve status, if the nerves are providing innervation for motion or mechanical motor and the sensation of the skin.
Q Okay. So the nerve function appeared to be doing well at that particular time?
A Yeah, it indicates more than -- the range of motion indicates the ability to fire those muscles, I guess, is a good way to describe that.
Q I think you told Mr. Nasser you put her in a splint at that time and you wanted her to come back in about six weeks?
A About four weeks.
Q About four weeks, okay. I'm looking at a note dated March 9th of 2014, Doctor, which apparently was perhaps written by Ashley Merkel; is that correct?
A Yeah, that would be probably the person who roomed her at that time.
Q She would be so somebody that works with you, then?

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 28664

SHIRLEY TAMMEN,
Plaintiff/Appellant,

vs.

K&K MANAGEMENT SERVICES, INC.
/FRYN' PAN RESTAURANT,
Defendant/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit, Minnehaha County, South Dakota
The Honorable Rodney J. Steele, Circuit Court Judge, Retired,
Circuit Court Judge Presiding

BRIEF OF APPELLEE
K&K MANAGEMENT SERVICES, INC./FRYN' PAN

NOTICE OF APPEAL FILED July 11, 2018
ORAL AGRUMENT REQUESTED

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PRELIMINARY STATEMENT

Citations to the settled record in this matter appear as "SR.," followed by the page number assigned by the Minnehaha County Clerk of Court in its indices. The Circuit Court's *Verdict for Plaintiff* (SR. 404) is included in the Appendix of this Brief at (Appellee App.-1), and the Circuit Court's *Verdict for Defendant* (SR. 359) is included in the Appendix of this Brief at (Appellee App.-2). The Circuit Court's *Judgment* (SR. 969) is included in the Appendix of this Brief at (Appellee App.-3). References to documents included in the Appendix to the Appellant's Brief will be denoted as "Appellant App.," followed by the assigned document number.

For clarity, references to the jury trial transcript will be denoted as "Tr.," followed by the page and line numbers as they appear in the transcript. The portion of the jury trial transcript pertaining to the settlement of jury instructions (Tr. 217:22-256:20), is included in the Appendix of this Brief at (Appellee App.-4). Exhibits introduced at trial, (SR 408-950), will be denoted as "Tr. Ex.," followed by the exhibit number. The deposition transcript of Robert VanBeek (SR. 927), which was read to the jury (*See* Tr. 27:5-7), will be denoted as "VanBeek. Depo.," followed by the page and line numbers as they appear in the deposition transcript. The deposition transcript of Dr. Dustin Bechtold, which was read to the jury (*See* Tr. 66:9-10), is included in the Appendix to this Brief at (Appellee App.-46), and will be denoted as "Dr. Bechtold Depo.," followed by the page and line numbers as they appear in the deposition transcript.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Shirley A. Tammen ("Shirley") appeals from the Judgment dated June 29, 2018, in the matter numbered 49 CIV. 14-2429, in the Second Judicial

Circuit Court of South Dakota, the Honorable Rodney J. Steele, Circuit Court Judge, Retired, sitting by designation, presiding, following a jury trial in which the jury by its verdict found in favor of Defendant-Appellee K&K Management Services, Inc., d/b/a Fryn' Pan (the "Fryn' Pan"). SR. 951. Notice of Entry of the Judgment was filed on July 2, 2018. SR. 952. Notice of Appeal was filed on July 11, 2018. SR. 957.

STATEMENT OF THE ISSUES

1. Whether the Circuit Court properly exercised its discretion in wording its instructions to the jury on the issue of negligence?

The Circuit Court correctly instructed the jury on the issue of negligence in accordance with settled South Dakota law, and the Circuit Court properly refused a series of additional instructions proposed by Shirley related to the issue of negligence.

- *Schultz v. Scandrett*, 2015 S.D. 52, 866 N.W.2d 128
- *Carlson v. Constr. Co.*, 2009 S.D. 6, 761 N.W.2d 595
- *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶ 10, 780 N.W.2d 497, 501
- *Lord v. Hy-Vee Food Stores*, 2006 S.D. 70, 720 N.W.2d 443

2. Whether the Circuit Court properly exercised its discretion when it instructed the jury on the Fryn' Pan's affirmative defense of contributory negligence?

The Circuit Court properly instructed the jury on the law of contributory negligence because competent evidence adduced at trial warranted presenting such instructions to the jury.

- *Burhenn v. Dennis Supply Co.*, 2004 S.D. 91, 685 N.W.2d 778
- *Schultz v. Scandrett*, 2015 S.D. 52, 866 N.W.2d 128
- *City of Rapid City v. Big Sky, LLC*, 2018 S.D. 45, 914 N.W.2d 541
- *Rowland v. Log Cabin, Inc.*, 2003 S.D. 20, 115, 658 N.W.2d 76

3. Whether the Circuit Court properly exercised its discretion when it refused Shirley's proposed instructions on asymptomatic and dormant pre-existing conditions?

The Circuit Court properly exercised its discretion when it refused Shirley's proposed instructions on asymptomatic and dormant pre-existing conditions because there had been no evidence introduced at trial from which the jury could infer that there was an asymptomatic or dormant pre-existing condition affecting Shirley's wrist.

- *Schultz v. Scandrett*, 2015 S.D. 52, 866 N.W.2d 128

- *Shippen v. Parrott*, 1996 S.D. 105, 553 N.W.2d 503

STATEMENT OF THE CASE

This case centers on slip-and-fall claim arising out of an incident that occurred on January 31, 2014, in the parking lot of the Fryn' Pan family restaurant. *See* SR. 2 (*Complaint*). Shirley[1] asserted the Fryn' Pan was negligent in that it failed to take reasonable measures to remove snow and ice from its parking lot, which allegedly caused Shirley to fall and sustain injuries. *Id.* The Fryn' Pan denied it was negligent and asserted affirmative defenses, including contributory negligence and assumption of the risk. SR. 8 (*Answer*). The case was tried to a jury in the Second Judicial Circuit Court of South Dakota, Minnehaha County, the Honorable Rodney J. Steele, presiding, beginning on June 12, 2018, and concluding on June 14, 2018, when the jury returned its verdict and found the Fryn' Pan was not negligent. SR. 359. The Circuit Court entered its Judgment on June 29, 2018. SR. 951. Notice of Entry of the Judgment was filed on July 2, 2018. SR. 952. Notice of Appeal was filed on July 11, 2018. SR. 957.

STATEMENT OF FACTS

The Fryn' Pan is a family-style restaurant located at 2708 East 10th Street, in Sioux Falls. Tr. 179:24-180:4. The Fryn' Pan is open for business twenty-four hours per day, seven days per week. Tr. 183:5-7. It is undisputed Shirley came with her husband, Ernest Tammen ("Ernest"), and ate lunch at the Fryn' Pan on January 31, 2014. Tr. 39:19-40:1. It is also undisputed Shirley fell in the Fryn' Pan's parking lot while she was walking toward the entrance of the restaurant, and that she injured her right wrist in the

[1] Shirley's husband, Ernest Tammen, was originally named as a Plaintiff who asserted a loss of consortium claim related to this incident. This claim was subsequently dismissed, without prejudice, by stipulation of the parties and an Order of the Circuit Court. SR. 319. The caption of this action was also amended accordingly. *See id.*

fall. Tr. 88:22-89:9. The key issues in the case were whether the Fryn' Pan took reasonable measures to remove snow and ice from its parking lot and, if not, whether Shirley was contributorily negligent. However, the jury never reached the contributory negligence issue because the jury concluded the Fryn' Pan was not negligent.

Three witnesses testified as to the snow and ice removal measures taken by the Fryn' Pan: Adam Lee, the restaurant's general manager, (Tr. 138:8-9); Stan Mitzel, a former general manager and current part-owner of the Fryn' Pan, (Tr. 179:20-181:4); and Robert VanBeek of First Rate Excavate, the third-party company hired by the Fryn' Pan to sand and to remove snow and ice from the restaurant's parking lot. *See* Tr. 26:13-19. Robert's deposition transcript was read to the jury. *Id.*

The snow and ice removal activities on the Fryn' Pan premises are conceptually divided into two parts: removal of snow and ice from the sidewalks, and removal of snow and ice from the restaurant's parking lot. Fryn' Pan personnel remove snow and ice from both the public sidewalk near the restaurant and from the sidewalk that encircles the Fryn' Pan's building. Tr. 141:5-15. There is no allegation or assertion of negligence with respect to how the Fryn' Pan maintains the sidewalks; rather, the issue at trial was whether the Fryn' Pan took reasonable measures to remove snow and ice from its parking lot. *See* Tr. 162:11-14; *see also* (Appellant's Brief at 11).

First Rate Excavate has removed snow and ice from Fryn' Pan's parking lot for at least the past fifteen years, and did so in 2014. Tr. 182:2-5; Tr. 140:1-4. Weather reports introduced at trial showed about .91 inches of snow fell on January 30, 2014, and that it did not snow at all on January 31, 2014, which was the date of the incident. Tr. 172:7-173:3; Tr. Ex. 3. First Rate Excavate was called to remove snow and ice from the Fryn'

Pan parking lot on January 30, 2014, and the evidence adduced at trial showed First Rate Excavate worked for an hour-and-a-half to remove snow and ice from the parking lot that day. Tr. Ex. 101.

Robert testified in his deposition that First Rate Excavate has a two-step snow and ice removal method it uses on the Fryn' Pan's parking lot. VanBeek Depo. 4:13-15. First, a snow plow is used to clear the snow from the parking lot and, second, a chemical sand is applied to the parking lot to melt ice and to keep it from forming. *Id.* The chemical sand will melt and suppress ice at temperatures as low as twenty to twenty-five below zero, and it also provides traction. VanBeek Depo. 5:8-23. The temperature on January 30, 2014, was approximately 36 degrees above zero, and the temperature on January 31, 2014, was approximately 20 degrees above zero. Tr. 172:16-173:3.

Robert explained First Rate Excavate typically makes three to four passes through the Fryn' Pan parking lot to ensure proper application and coverage of the chemical sand. VanBeek Depo. 7:7-12. He estimated First Rate Excavate applies about a ton-and-a-half to two tons of chemical sand on the parking lot on average. VanBeek Depo. 18:9-10.

On January 30, 2014, First Rate Excavate plowed the snow and made three passes with the sander through the Fryn' Pan's parking lot. VanBeek Depo. 11:24-12:8. Robert noted that the Fryn' Pan is open for business twenty-four hours per day and seven days per week. VanBeek Depo. 15:12-13. As such, he acknowledged there are often cars parked in the parking lot. VanBeek Depo. 15:5-15. Robert also acknowledged that it can be difficult to apply the chemical sand between cars that are parked right next to one another without hitting the vehicles with the sander or the sand. VanBeek Depo. 11:2-4.

Robert testified that First Rate Excavate does not apply the chemical sand by hand; in other words, he will not exit the sander to apply sand under or between parked cars. VanBeek Depo. 9:21-10:18. However, Robert explained that First Rate Excavate does the best it can at removing snow and applying the chemical sand with respect to the location of the parked cars. VanBeek Depo. 10:19-24. Thus, Robert will often "weave" in and around parked cars with the sander to apply the chemical sand to as much of the parking lot as possible. VanBeek Depo. 8:12-23. Robert also confirmed First Rate Excavate will come back to make additional passes with the sander if necessary. VanBeek Depo. 8:24-25.

Both Adam and Stan testified about their knowledge and experience with the Fryn' Pan's snow and ice removal practices. Adam began working at the Fryn' Pan in 1999 as a busboy and while he was still a freshman in high school. Tr.137:6-19. He eventually worked his way up to become the restaurant's general manager in 2011. Tr.138:8-12. Adam has been involved with snow and ice removal at the Fryn' Pan for as long as he has worked at the restaurant. Tr. 138:21-25. Adam explained that when he arrives for work the first thing he does is make an inspection of the parking lot for debris or other areas of concern. Tr. 142:21-143:4. Adam specifically stated that he looks for snow and ice accumulation in the parking lot, including in the spaces between parked vehicles, and that he does so as a safety precaution. Tr. 143:5-10. Adam testified that he will call First Rate Excavate if he discovers any areas in the parking lot that need to be cleared. Tr. 143:11-15.

Adam was working at the Fryn' Pan on January 31, 2014–the date of the incident. Tr. 144:3-13. In accordance with his routine, Adam made an inspection of the Fryn' Pan

parking lot when he arrived for work that day. Tr. 144:5-11. Adam observed the sidewalks had already been cleared by the time he arrived. Tr. 144:9-11. Adam testified the Fryn' Pan's parking lot appeared to be clear and in good condition as well, and that he did not believe it was necessary to call First Rate Excavate at the time. Tr. 144:11-13.

Like Adam, Stan began working at the Fryn' Pan in 1984 as a busboy and while he was still in high school. Tr. 180:5-14. Stan also eventually worked his way up to become the restaurant's general manager, and Stan managed the Fryn' Pan from approximately 1999 or 2000 and until 2011 when Adam took over at the position. Tr. 181:8-13. Stan then became a part owner of the Fryn' Pan on East Tenth Street, as well as the two other Fryn' Pan restaurants in Sioux Falls and the four others located in South Dakota, North Dakota, and Minnesota. Tr. 179:20-180:2; Tr. 191:13-19. Though Stan was not certain whether he was present at the Fryn' Pan on the date of the incident, Tr. 185:21-25, he was designated as the company's representative at the trial. Tr. 201:9-12.

Like Adam, Stan is also familiar with the snow and ice removal practices at the Fryn' Pan. Tr. 184:23-185:11. Stan testified snow and ice removal is important, and it is something the Fryn' Pan and its employees take seriously. Tr. 189:3-8. He described the efforts taken by First Rate Excavate to remove snow and ice. Tr. 182:13-21. Stan confirmed the Fryn' Pan will recall First Rate Excavate when necessary to remove snow and ice from its parking lot, and that First Rate Excavate will clear snow and ice from any locations that were inaccessible during an earlier undertaking. Tr. 184:18-22. Both Adam and Stan testified they were happy with the snow and ice removal services provided by First Rate Excavate, and they both felt First Rate Excavate does a good job. Tr. 139:10-16; Tr. 184:15-22.

Stan also explained how the Fryn' Pan installed a drainage conduit in its parking lot to channel water away from the parking lot and ultimately out into the sewer. Tr. 186:16-22. This drainage conduit was installed in the 1990s, and thus it was in place during the date of the incident in question. Tr. 186:23-187:3. Stan testified this conduit was installed specifically to remove water from melting snow from the parking lot so the water does not pool and freeze. Tr. 187:4-14. Stan testified he has never heard of the Fryn' Pan having any issues with pooling water in its parking lot. Tr. 187:4-11.

On January 31, 2014, Shirley and Ernest parked their vehicle in the western side of the Fryn' Pan parking lot. Tr. 84:23-85:6. Shirley testified at trial that she could see the sidewalk surrounding the Fryn' Pan was free of snow and ice. Tr. 112:10-16. Shirley also testified the Fryn' Pan's parking lot was free of snow and ice, except for some areas between some of the cars parked next to the building. Tr. 109:10-23. The jury also heard testimony that Shirley and Ernest took a direct path from their vehicle to the sidewalk surrounding the restaurant, which took them across the parking lot and between the cars parked next to the building. Tr. 41:8-15.

Unfortunately, Shirley fell and hurt her wrist while walking between the cars parked next to the building. Tr. 113:16-25. The Tammens then went inside the Fryn' Pan, ate their lunch, and on their way out of the restaurant informed Adam that Shirley had fallen in western side of the parking lot. Tr. 145:15-17. Adam filled out an incident report, and then went outside to look for snow and ice in the parking lot. Tr. 146:7-147:11. Adam walked down the sidewalk and looked for slick spots in between the parked vehicles. Tr. 153:12-15. However, Adam did not find any areas in the parking lot that appeared dangerous or concerning. Tr. 147:11-13.

Following the close of evidence, the Circuit Court instructed the jury on, and among other things, the law in South Dakota as it applies to negligence and contributory negligence. *See* Tr. 262:3. Special verdict forms were provided to the jury for it to complete depending on whether the jury found in favor of Shirley or the Fryn' Pan. SR. 404 ("Verdict for Plaintiff"); SR 359 ("Verdict for Defendant"). The special verdict form for the Fryn' Pan asked the jury to specify whether it found in favor of the Fryn' Pan because either (1) the Fryn' Pan was not negligent, or; (2) the Fryn' Pan was negligent, but Shirley's contributory negligence was more than slight in comparison to the Fryn' Pan's negligence. SR 359. The jury returned its verdict and found the Fryn' Pan was not negligent. SR 359. Accordingly, the jury never reached the contributory negligence issue.

ARGUMENT

I. The Circuit Court's Jury Instructions Correctly Stated the Law and Informed the Jury

A. Standard of Review

This Court in *Schultz v. Scandrett* explained the standard of review applicable to the manner in which a Circuit Court instructs the jury:

> A trial court has discretion in the wording and arrangement of its jury instructions. But no court has discretion to give incorrect, misleading, conflicting, or confusing instructions. Thus, we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. To constitute reversible error, an instruction must be shown to be both erroneous and prejudicial, such that in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party. The jury instructions are to be considered as a whole, and if the instructions when so read correctly state the law and inform the jury, they are sufficient.

2015 S.D. 52, ¶ 12, 866 N.W.2d 128, 133–34 (internal citations and quotations omitted). As the party challenging the Circuit Court's instructions, Shirley bears the burden of proving the instructions were erroneous *and* prejudicial. *Walter v. Fuks*, 2012 S.D. 62, ¶

16, 820 N.W.2d 761, 766 ("Because Fuks is challenging an instruction, he bears the burden of proving that the instruction was not only erroneous, but also prejudicial"). Significantly, a Circuit Court "does not commit error, however, when it 'refuses to amplify instructions which substantially cover the principle embodied in the requested instruction.'" *Schultz*, 2015 S.D. 52 at ¶ 35 (quoting *State v. Klaudt*, 2009 S.D. 71, ¶ 20, 772 N.W.2d 117, 123); *see also State v. Grey Owl*, 295 N.W.2d 748, 751 (S.D. 1980) ("We recognize that it is not error to refuse to give jury instructions which are already embodied in other given instructions").

B. The Circuit Court's Jury Instructions

This case was tried to the jury as a negligence case predicated on an alleged slip-and-fall in the Fryn' Pan parking lot on January 31, 2014. As this Court is well aware, "negligence is the failure to exercise ordinary care under the circumstances" and "[o]rdinary care is that which an ordinarily prudent or reasonable person would exercise under the same or similar circumstances." *Lovell v. Oahe Elec. Co-op.*, 382 N.W.2d 396, 398 (S.D. 1986). Accordingly, the Circuit Court instructed the jury as follows:

Instruction No. 11

> Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. The law does not say how a reasonable person would act under facts similar to those shown by the evidence. That is for you to decide.

Instruction No. 11A

> A person who is exercising reasonable care has a right to assume that others will perform their duty and obey the law. Unless there is reasonable cause of thinking otherwise, people can assume that they are not exposed to danger from another person's violation of their duty of care.

Instruction No. 12

> The term "reasonable person" refers to a person exercising those qualities of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own interests and the interests of others.

Instruction No. 13

> An invitee is either a public invitee or a business visitor.
>
> A public invitee is a member of the public who is invited to enter or remain on land for a purpose for which the land is held open to the public.
>
> A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with the business of the owner of land.

Instruction No. 14

> The possessor of land owes an invitee the duty of exercising reasonable or ordinary care for the invitee's safety.

SR. 382-386.

Shirley acknowledges the Circuit Court's jury instructions were "essentially the [South Dakota Pattern Jury Instructions]," and that those instructions were "accurate insofar as they go[.]" (Appellant's Brief at 8). Nonetheless, Shirley contends the Circuit Court should have "instruct[ed] beyond the Patterns" by adopting her proposed instructions. (*Id.* at 8-9). At best, Shirley's proposed instructions would have merely amplified the instructions given by the Circuit Court that substantially covered the principles embodied in her proposed instructions. Thus, the Circuit Court did not err when it refused to give Shirley's proposed instructions. *Schultz,* 2015 S.D. 52 at ¶ 35. At worst, Shirley's proposed instructions ventured beyond the settled law of South Dakota, and would have been confusing or misleading to the jury. Consequently, the Circuit Court correctly refused to give Shirley's proposed instructions. *Id.* at ¶ 12. Under either

lens, Shirley cannot meet her burden of proving the Circuit Court's jury instructions were erroneous and prejudicial, "such that in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party." *Id.*

C. Shirley Cannot Show the Circuit Court's Instructions Were Erroneous or that the Circuit Court Abused its Discretion When it Refused Her Proposed Instructions

1. *Shirley's Proposed Instruction No. 15*

Shirley proposed a series of six[2] negligence-related jury instructions, which the Circuit Court ultimately declined to present to the jury. Her Proposed Jury Instruction No. 15 would have defined "negligence" to the jury as follows:

> Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. It is conduct which breaches a duty imposed by law.

Appellant App.-39. This proposed instruction is largely identical to the Circuit Court's Instruction No. 11, with the exception that the last two sentences of that instruction–"The law does not say how a reasonable person would act under facts similar to those shown by the evidence. That is for you to decide."–were omitted and replaced by Shirley's proposed dictation that negligence "is conduct which breaches a duty imposed by law." The Circuit Court concluded its Instruction No. 11 adequately defined negligence for the jury, and refused Shirley's Proposed Instruction No. 15. Tr. 238:25-239:1.

[2] The Appendix to Shirley's brief includes her Proposed Jury Instruction No. 23, Appellant App.-46, though she does not argue anywhere in her brief that the Circuit Court's refusal to give this proposed instruction was error. The Appendix also includes her Proposed Jury Instruction No. 26, Appellant App.-44, which, aside from a single passing mention in a footnote, (Appellant's Brief at 20 n.3), she also does not argue that the Circuit Court's refusal to give this proposed instruction was error.

The Circuit Court's Instruction No. 11 is taken verbatim from SDPJI 20-20-10. In addition, the Circuit Court's instruction that the jury is the arbiter of reasonableness is a correct statement of the law. Indeed, this Court explained in *Carlson v. Constr. Co.*, 2009 S.D. 6, ¶ 13, 761 N.W.2d 595, 599, a premises liability case involving the same jury instruction as the one given by the Circuit Court here, that "our law [is] that the reasonable person standard, as indicated by the circuit court's instructions, is determined by the evidence and decided by the jury." Thus, the Circuit Court's Instruction No. 11 correctly stated the law, and the Circuit Court did not abuse its discretion by rejecting Shirley's Proposed Instruction No. 15.

Also, Shirley's Proposed Instruction No. 15 is in form and substance an instruction based on negligence *per se.* Shirley acknowledges, however, that "we do not have a safety statute at issue in the instant case[.]" (Appellant Brief at 12). Consequently, a negligence *per se*-type instruction was not warranted by the evidence, and it would have been error for the Circuit Court to give Shirley's Proposed Instruction No. 15. *Schultz*, 2015 S.D. 52 at ¶ 12 ("But no court has discretion to give incorrect, misleading, conflicting, or confusing instructions"). Thus, Circuit Court did not abuse its discretion by refusing Shirley's Proposed Instruction No. 15.

2. *Shirley's Proposed Instruction No. 16*

Shirley's Proposed Instruction No. 16 would have defined a "reasonable person" to the jury as follows:

> The term "reasonable person" refers to a fictitious, ideal, reasonable, prudent person exercising those qualities of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own interests and the interests of others. The actor whose conduct is being considered is required to do what this ideal individual would do in the same or similar circumstances as those shown

> by the evidence. The reasonable person is never negligent, and his, her, or its conduct is always up to standard.
>
> The term "reasonable person" means that degree of care which a reasonable person would use in order to avoid injury to themselves or to others under circumstances similar to those shown by the evidence.

Appellant App.-45.

The Circuit Court's Instruction No. 12, which defined a "reasonable person" for the jury, is taken nearly verbatim from comment (b) to the Restatement (Second) of Torts § 283, which provides:

> The words "reasonable man" denote a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.

Restatement (Second) of Torts § 283 cmt b. (1965). While this Court has never held that a Circuit Court ***must*** instruct the jury on the definition of a "reasonable person," this Court has cited approvingly to the same passage from the Restatement that the Circuit Court relied upon. *See Westover v. E. River Elec. Power Co-op Inc.*, 488 N.W.2d 892, 897 n.11 (S.D. 1992). Thus, the Circuit Court's Instruction No. 12 correctly states the law and, therefore, is not erroneous.

Shirley's Proposed Instruction No. 16 does not come from a Pattern Instruction, although she references a non-existent "SDPJI 20-20-15 and comment" in her brief. (*See* Appellant's Brief at 16).[3] Nonetheless, while the first sentence in Shirley's Proposed Instruction No. 16 is somewhat similar to the Circuit Court's Instruction No. 12, the additional language in Shirley's instruction is a mere, through verbose, amplification of

[3] According to the Circuit Court, its Instruction No. 12 is the instruction South Dakota's Pattern Jury Instruction Committee is strongly inclined to adopt next year. Tr. 222:20-223:2.

the Circuit Court's Instruction No. 12, as well as the Circuit Court's Instruction No. 11, and is, therefore, unnecessary. *Schultz*, 2015 S.D. 52 at ¶ 35.

Also problematic for Shirley's Proposed Instruction No. 16 is that her version is likely to mislead and confuse the jury. The extra verbiage in Shirley's Proposed Instruction No. 16 appears to come from further explication of what a "reasonable person" is according to the Restatement. Whereas the Circuit Court's Instruction No. 12 provided a succinct explanation of what a "reasonable person" is, Shirley's Proposed Instruction No. 16 is would likely confuse a jury of laypersons who are not versed in the intricacies and jargon of the law. The references in Shirley's Proposed Instruction No. 16 to an "ideal" person as one who is "never negligent" and one whose "conduct is always up to standard" could easily be construed by a jury to mean that anything less than something approaching perfect conduct amounts to negligence. But "reasonableness," not perfection, is the measure of conduct for negligence. *Lovell*, 382 N.W.2d 396 at 398. Thus, the Circuit Court did not err when it refused Shirley's Proposed Instruction No. 16.

3. *Shirley's Proposed Instructions No. 18, 19, and 22*

Shirley's Proposed Instructions No. 18, 19, and 22 are not Pattern Instructions and all center on her view of a possessor of land's duties owed to an invitee. Notably, these three instructions are largely cumulative of one another. While Shirley contends all of these instructions should have been given, "[c]umulative instructions are properly refused." *Sommervold v. Grevlos*, 518 N.W.2d 733, 743 (S.D. 1994). Nonetheless, all three will be considered together here.

First, Shirley's Proposed Instruction No. 18 would have instructed the jury:

> As a business invitee, Shirley Tammen is entitled to expect that the Restaurant will have taken reasonable care to ascertain the actual condition of the premises and, having discovered its actual condition, will

> either have made it reasonably safe by repair or will have given her a warning of the risks involved. Therefore, a customer is not required to discover dangers which, were she not a customer, she might otherwise be expected to discover. A customer is entitled to expect the Restaurant to have made far greater preparations for the customer's safety than a household possessor of land would make for his or her invitee.

Appellant App.-40. The Circuit Court refused this instruction and explained it was an unnecessary expansion of its Instruction No. 14, *i.e.*, "a possessor of land owes an invitee the duty of exercising reasonable or ordinary care for the invitee's safety." Tr. 241:15-22.

Next, Shirley's Proposed Instruction No. 19 would have instructed the jury:

> A possessor of land who operates a business on the land has superior knowledge of the condition of the land to that of the customers it invites to come on the land for its business purposes and the business thereof, [sic] is often in the best position to avoid harm to its customers.
>
> The Fryn' Pan, as such a business owes its customers, including Shirley Tammen, the duty of exercising reasonable care to keep the premises reasonably safe during the Restaurant's active operations on the property. The duty is an affirmative duty of the business to protect its invitees not only against dangers actually known to the business but also against those dangers which, with a [sic] reasonable care, the business might discover.
>
> When circumstances indicate a foreseeable unreasonable risk of harm to its customers the Restaurant must investigate, inspect, and discover such risk of harm and then must exercise reasonable care to remedy the risk of harm or to warn the customer of it in order to make the property reasonably safe.
>
> The failure to exercise such reasonable care is negligence.

Appellant App.-41. The Circuit Court refused this instruction and explained that it, like Shirley's Proposed Instruction No. 18, was also an unnecessary expansion of the Circuit Court's Instruction No. 14. Tr. 243:10-14.

Finally, Shirley's Proposed Instruction No. 22 would have instructed the jury:

> A business invitee enters onto a business premises upon an implied representation or an assurance by the business that the business has prepared the land and made it ready and safe to receive the invitee. As a

> business invitee, Shirley Tammen was entitled to expect that the Restaurant had taken reasonable care to ascertain the actual condition of the premises and, having discovered its actual condition, had either made it reasonably safe by repair or would have given her a warning of the risks involved. A customer is not required to discover dangers which, were she not a the [sic] business's customer, she might otherwise be expected to discover. A business customer is entitled to expect the business to have made far greater preparations for its customer's safety than a household possessor of land would make for his or her invitee. The Customer [sic] is therefore entitled to expect that the business will have exercised reasonable care to have made the land safe for the her [sic] entry and use for the purpose of the invitation before she enters.

Appellant App.-42. Again, the Circuit Court rejected this instruction because it, too, was an unnecessary expansion of the Circuit Court's Instruction No. 14. Tr. 244:10-11.

The Circuit Court's Instruction No. 14 was taken verbatim from SDPJI 20-90-60. As it was designed to be, this Pattern Instruction is consistent with numerous iterations of the same rule announced by this Court throughout the decades. *Cf. Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶ 10, 780 N.W.2d 497, 501 (explaining "the possessor of land owes an invitee or business visitor the duty of exercising reasonable or ordinary care for the benefit of the invitee's safety, and the possessor is liable for the breach of such duty") (quoting *Mitchell v. Ankney*, 396 N.W.2d 312, 313 (S.D. 1986)). As this Court explained long ago, "[t]his, however, is the extent of the duty. The possessor of land is not an insurer as to the safe condition of the premises." *Norris v. Chicago, M., St. P. & P. R. Co.*, 51 N.W.2d 792, 793 (S.D. 1952). Accordingly, the Circuit Court's Instruction No. 14 correctly stated the law and, therefore, was not erroneous.

In addition, the Circuit Court was correct that Shirley's Proposed Instructions No. 18, 19, and 22, were merely expansions of the Circuit Court's Instruction No. 14. The Circuit Court's Instruction No. 14, as well as Shirley's Proposed Instructions No. 18, 19, and 22, all inform the jury in so many words that, ultimately, the Fryn' Pan must exercise

reasonable or ordinary care for the safety of its invitees. The Circuit Court was not required to amplify its instructions which substantially cover the principles embodied in Shirley's proposed instructions. *Schultz*, 2015 S.D. 52 at ¶ 35. Thus, the Circuit Court did not err when it refused Shirley's Proposed Instructions No. 18, 19, and 22.

Moreover, Shirley's Proposed Instructions No. 18, 19, and 22 contain inaccurate or incomplete statements of the law, and likely would have misled or confused the jury. For example, both Shirley's Proposed Instruction No. 18 and 22 would have told the jury without qualification that Shirley is "not required to discover dangers which, were she not a customer, she might otherwise be expected to discover." This is, at best, an incomplete statement of the law. Even invitees must exercise ordinary care for their own safety and, "[i]n some instances, the burden to avoid the harm is on the invitee." *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶ 13, n.1, 780 N.W.2d 497, 502. In addition, the "danger" here is the potential presence of snow and ice outdoors during the winter months in South Dakota, a danger Shirley acknowledged is simply a fact of life living in the Midwest. Tr. 128:8-9. Testimony was also presented to the jury that Shirley *did discover* snow and ice between the very parked cars she and Ernest walked between while heading toward the restaurant. Tr. 111:9-112:9. However, Shirley's instructions would have, in effect, told the jury to ignore this testimony because invitees are not expected to be cognizant of even everyday dangers like snow and ice. Thus, Shirley's Proposed Instructions No. 19 and 22 do not accurately set forth the law, and likely would have confused or misled the jury.

Similarly, both Shirley's Proposed Instruction No. 18 and 22 state the Fryn' Pan's duty to an invitee is "far greater" than that of a "household possessor of land." Even assuming this is true, the jury would be left to guess what a "household possessor of

land" is, let alone why one matters, and the instructions offer no guidance to the jury on how to possibly measure the Fryn' Pan's "far greater" duty against the undefined duty of the household possessor of land. Again, Shirley's Proposed Instructions No. 18 and 22 would have likely confused or misled the jury.

Shirley's Proposed Instruction No. 19 has similar flaws. Notably, this instruction contains undefined legalese that would likely be confusing to a jury. A Circuit Court's instructions should be simple, easy to understand, and capable of comprehension by a layperson juror. *Accord State Highway Comm'n v. Fortune*, 91 N.W.2d 675, 686 (S.D. 1958) ("A term should not be so used that doubt can arise as to its meaning and application to the facts"). However, Shirley's Proposed Instruction No. 19's otherwise undefined references to "superior knowledge," an "affirmative duty," and the so-called "foreseeable unreasonable risk of harm" would only serve to confuse the jury.

Also, informing the jury the Fryn' Pan possesses "superior knowledge of the condition of the land" to that of its customers and that the Fryn' Pan "is often in the best position to avoid harm to its customers" would be misleading and prejudicial to the Fryn' Pan. This language is misleading because the case did not involve a concealed, dangerous condition on the land only the Fryn' Pan knew or had reason to know about and, as noted, *supra*, invitees still must exercise reasonable care for their own safety and "[i]n some instances, the burden to avoid the harm is on the invitee." *Janis*, 2010 S.D. 27, ¶ 13, n.1. The language is also prejudicial because it could be construed by the jury as instructing it to resolve any doubts about who is responsible for Shirley's accident against the Fryn' Pan. However, Shirley bore the burden of proving the Fryn' Pan's negligence, and it would be error to give the jury an instruction that would effectively shift the burden of

proof onto the Fryn' Pan to disprove its negligence. *Rantapaa v. Black Hills Chair Lift Co.*, 2001 S.D. 111, ¶ 28, 633 N.W.2d 196, 205 (holding instruction that improperly shifted the burden of proof was erroneous). Thus, it would have been improper for the Circuit Court to give Shirley's Proposed Instruction No. 19.

Shirley's Proposed Instruction No. 19 also misstates the law by claiming the Fryn' Pan has a duty to protect or warn its invitees against dangers it "*might*" discover by using reasonable care. However, such a duty arises only with respect to those dangers a business *would* discover through the use of reasonable care. *Nash Finch*, 2010 S.D. 27 at ¶ 14 (discussing a landowner's liability for harm to an invitee arises "if, but only if, [it] . . . knows or by the exercise of reasonable care *would* discover the condition") (quoting Restatement (Second) of Torts § 343) (emphasis added). Whereas the word "would" denotes certainty, the word "might" implies only possibility, and "[a] landowner is not required to take measures against a risk [that] would not be anticipated by a reasonable person." *Id.* at ¶ 15.

The remainder of Shirley's Proposed Instruction No. 19 would have merely though gratuitously emphasized her theory of the case. Accordingly, the Circuit Court did not abuse its discretion when it refused Shirley's Proposed Instruction No. 19, and the Circuit Court also did not abuse its discretion when it refused Shirley's Proposed Instructions No. 18 and 22.

4. *Shirley's Proposed Instruction No. 25*

Shirley's Proposed Instruction No. 25 would have told the jury:

> A business which hires an independent contractor to exercise the reasonable care the business is required to exercise does not by hiring such independent contract delegate or transfer the business' obligations to its invitees to maintain a safe premises as described herein. The business'

duty to its invitees remains with the business and is nondelegable. Appellant App.-43. Notably, the Fryn' Pan never argued that it delegated or transferred its responsibility to maintain its property in a reasonably safe manner to First Rate Excavate (or to anyone, for that matter). In addition, the Circuit Court's Instruction No. 18, which defined legal cause, instructed the jury:

> There may be more than one legal cause of an injury. If you find that the defendant was negligent and that the defendant's negligence was a legal cause of the plaintiff's injury, *it is not a defense that the negligence of some third person, not a party to this action, was also a legal cause of plaintiff's injury*.

SR. 390 (emphasis added). Thus, not only was Shirley's Proposed Instruction No. 25 unnecessary, but the substance of that instruction was provided to the jury. The Circuit Court did not err by refusing to amplify its instruction with Shirley's Proposed Instruction No. 25. *Schultz*, 2015 S.D. 52 at ¶ 35.

Also, Shirley's Proposed Instruction No. 25 could have confused or misled the jury. It is undisputed the Fryn' Pan hired First Rate Excavate and that First Rate Excavate performs snow and ice removal services for the Fryn' Pan. The jury must be allowed to consider all the evidence properly presented at trial to determine whether the Fryn' Pan was negligent under the circumstances or not. *Carlson*, 2009 S.D. 6 at ¶ 13. However, Shirley's Proposed Instruction No. 25 could have confused or misled the jury into believing that it should not consider the Fryn' Pan's utilization of First Rate Excavate's services at all when considering whether the Fryn' Pan exercised reasonable care to make its premises reasonably safe. Thus, the instruction would have been improper, and the Circuit Court did not abuse its discretion by refusing it. *Schultz*, 2015 S.D. 52 at ¶ 12.

D. Shirley Cannot Show She Was Prejudiced by the Circuit Court's Instructions

Even assuming the Circuit Court's instructions were erroneous–which they were not–Shirley cannot show prejudice. That is, Shirley cannot show "*that in all probability* [the Circuit Court's instructions] produced some effect upon the verdict and were harmful to the substantial rights of a party." *Schultz*, 2015 S.D. 52 at ¶ 12 (emphasis added). Importantly, "[m]ere assertions of what a jury may have concluded are insufficient to show prejudice." *Lord v. Hy-Vee Food Stores*, 2006 S.D. 70, ¶ 9, 720 N.W.2d 443, 447. However, Shirley's assertions of prejudice boil down to no more than speculation, assumptions, and assertions of what the jury may have concluded.

For example, Shirley surmises the jury "could have" concluded from the Circuit Court's instructions that the Fryn' Pan's efforts to clear its sidewalk somehow excused it from exercising reasonable care over its parking lot. (Appellant's Brief at 13-14). The Circuit Court's instructions simply do not suggest that possibility to the jury at all. Shirley's counsel also argued to the jury to keep the snow and ice removal measures taken on the sidewalk separate from those taken on the parking lot. Tr. 267:23-268:1.[4] Shirley then speculates the jury "might well have conceived" the Fryn' Pan could neglect part of its property on certain days so long as it maintained the other parts of its property on other days. (Appellant's Brief at 14). This, too, is simply not borne out by the Circuit Court's instructions or the evidence. Shirley likewise assumes "the jury might well have concluded" the Fryn' Pan could not be faulted because it hired First Rate Excavate, and that such a "construction by the jury seems likely." (Appellant's Brief at 18-19).

[4] Notably, *Shirley's counsel* went so far as to say to the jury the Fryn' Pan "does a beautiful job on the sidewalk" and "[t]hey should get credit for that." Tr. 265:17-18.

However, such an inference is unwarranted when (a) the Circuit Court's Instruction No. 18 stated the opposite; (b) the Fryn' Pan never made such an argument; and (c) Shirley's counsel emphasized to the jury the "Fryn' Pan remains responsible [for the parking lot], and they agree with that," even though First Rate Excavate was hired to clear the parking lot. Tr. 264:7-18.

Most of Shirley's grievances, however, default back to an assessment of whether the Circuit Court's instructions correctly stated the law. However, the Circuit Court's instructions were entirely proper. Finally, it is worth emphasizing that had the Circuit Court gave Shirley's proposed instructions, then *the Fryn' Pan* would have been prejudiced. As detailed, *supra*, Shirley's proposed instructions contained numerous incomplete or misstatements of the law, and likely would have confused and mislead the jury to the Fryn' Pan's prejudice.[5] Consequently, for all these reasons, Shirley cannot show she was prejudiced by the Circuit Court's instructions to the jury. Thus, the Circuit Court should be affirmed.

II. The Circuit Court Properly Instructed the Jury on the Fryn' Pan's Affirmative Defense of Contributory Negligence

Shirley contends the Circuit Court erred by instructing the jury on contributory negligence. However, even assuming the Circuit Court erred–which it did not–Shirley cannot show *prejudicial* error because the jury never reached the contributory negligence issue. *Burhenn v. Dennis Supply Co.*, 2004 S.D. 91, ¶ 37, 685 N.W.2d 778, 786 ("Since the jury's verdict did not consider, let alone depend upon, any issues related to assumption of the risk or contributory negligence, they are now moot"); *Bell v. E. River Elec. Power Co-op., Inc.,* 535 N.W.2d 750, 755 (S.D. 1995) ("As the jury never reached

[5] The Circuit Court also has no duty to modify or edit a party's proposed instructions when those instructions are incorrect. *Carlson*, 2009 S.D. 6 at ¶ 16.

the question of Bell's contributory negligence, Bell's Estate has failed to show how these instructions relating to contributory negligence would have resulted in a different verdict on assumption of the risk had they not been given"); *see also Ainsworth v. First Bank of S. Dakota*, 472 N.W.2d 786, 788 (S.D. 1991) ("Since the jury found for defendants on the issue of liability, it could never have reached the damages issue and, thus, no prejudice could have occurred, even assuming that Ainsworths' legal arguments have merit"). Nonetheless, the Fryn' Pan will address Shirley's arguments on their merits because the contributory negligence instructions were proper and warranted by the evidence.

A. Standard of Review

Shirley does not argue the Circuit Court's instructions on contributory negligence erroneously set forth the law. Rather, Shirley contends the Circuit Court erred by giving the instructions at all. Thus, the Circuit Court's decision to instruct the jury on contributory negligence is reviewed for an abuse of discretion. *Schulz*, 2015 S.D. 52 at ¶ 12 ("Thus, we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard").

It is well-settled that the Circuit Court "should instruct the jury on issues that are 'supported by competent evidence in the record[.]'" *City of Rapid City v. Big Sky, LLC*, 2018 S.D. 45, ¶ 21, 914 N.W.2d 541, 547 (quoting *Johnson v. Armfield*, 2003 S.D. 134, ¶ 7, 672 N.W.2d 478, 481). While the jury never reached the contributory negligence issue, a "claim that the evidence was insufficient to [warrant an instruction must be] viewed in the light most favorable to upholding the verdict." *Id.* (alteration in original) (internal quotation omitted).

B. Competent Evidence Supports the Circuit Court's Submission of the Contributory Negligence Instructions to the Jury

Shirley testified at trial that the sidewalk surrounding the Fryn' Pan was free of snow and ice on the date of the incident. Tr. 112:10-16. Shirley also testified the Fryn' Pan's parking lot was free of snow and ice, except for some of the areas between some of the cars parked next to the building. Tr. 109:10-23. The jury heard testimony that Shirley and Ernest took a direct path from their vehicle to the sidewalk surrounding the restaurant that took them across the parking lot and between the cars parked next to the building. Tr. 41:8-15.

Testimony was presented from Shirley and Ernest that both of them saw snow and ice between the very parked cars they walked between while heading toward the restaurant. Tr. 54:7-23 (testimony of Ernest); Tr. 110:20-112:9 (testimony of Shirley). Shirley agreed neither she nor Ernest looked for an alternative route or for a different pair of cars to walk between to get to the restaurant. Tr. 127:5-9. In addition, rather than walking around the cars parked near the building to access the sidewalk from the open area to the north of the restaurant, the Tammens chose to cut in-between the cars parked along the side of the building, *i.e.*, across the very area where they observed snow and ice. Tr. 127:10-19. Unfortunately, Shirley fell while walking between the cars parked next to the building. Tr. 113:16-25.

The Circuit Court's instructions to the jury on contributory negligence were warranted by the evidence. A jury could find from the evidence presented at trial that there was snow and ice between the very parked cars Shirley chose to walk between to get to the restaurant. Because the snow and ice present in the pathway selected by Shirley was visible and seen by her, a reasonable jury could conclude that she was contributorily

negligent for failing to avoid it. A jury could also find that even though Shirley was aware the snow and ice was present, she did not look for an alternative route or for a different set of cars to walk between to get to the restaurant. A reasonable jury could, therefore, conclude Shirley's decision not to do so constituted contributory negligence. Because there was competent evidence presented from which the jury could find Shirley failed to exercise ordinary care for her safety while walking through the Fryn' Pan parking lot, the Circuit Court's instructions to the jury on contributory negligence were proper.

C. The Circuit Court Did not Err by Refusing to Strike the Fryn' Pan's Affirmative Defense of Contributory Negligence

Finally, Shirley argues the Circuit Court erred when it refused to strike the Fryn' Pan's affirmative defense of contributory negligence. This Court has repeatedly stated that "[q]uestions of negligence, contributory negligence and assumption of the risk are for the jury in all but the rarest of cases so long as there is evidence to support the issues." *Rowland v. Log Cabin, Inc.*, 2003 S.D. 20, ¶ 14, 115, 658 N.W.2d 76 (citing *Pettry v. Rapid City Area School Dist.*, 2001 S.D. 88, ¶ 7, 630 N.W.2d 705, 708). "It is only when reasonable men can draw but one conclusion from facts and inferences that they become a matter of law and this rarely occurs." *Id.*; *see also Luther v. City of Winner*, 2004 S.D. 1, ¶ 24, 674 N.W.2d 339 (stating that issues of contributory negligence "are ordinarily questions of fact and it must be a clear case before a trial judge is justified in taking these issues from the jury."). As the evidence adduced at trial makes clear, *supra*, a question of fact existed as to whether Shirley exercised ordinary care for her safety. Thus, it was proper for the Circuit Court to submit the contributory negligence issue to the jury.

III. The Circuit Court Did not Abuse its Discretion by Refusing Shirley's Proposed Jury Instruction Premised on the Apportionment Rules Articulated in *Shippen v. Parrott*

A. Standard of Review

The Circuit Court refused Shirley's Proposed Instructions No. 31 and No. 32, which would have instructed the jury that it could not apportion Shirley's damages, if any, to an asymptomatic or dormant pre-existing condition. The Circuit Court's decision is reviewed under the abuse of discretion standard. *Schulz,* 2015 S.D. 52 at ¶ 12 ("Thus, we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard").

B. The Circuit Court Properly Refused Shirley's Proposed Apportionment Instructions

Shirley's Proposed Jury Instructions No. 31 and No. 32 were premised on the apportionment rules discussed in *Shippen v. Parrott,* 1996 S.D. 105, 553 N.W.2d 503. There, and among other things, this Court explained:

> The damage rule generally applicable in aggravation cases makes a defendant responsible for the aggravation of any preexisting condition or ailment. An injured party is entitled to an award in an amount which will reasonably compensate that party for all damages suffered as a result of the injury, including the aggravation of any preexisting condition. However, in such cases, the plaintiff has the burden of proving that the subsequent act caused or aggravated the injury. This requires evidence that the subsequent act had a worsening effect on a preexisting injury or made the preexisting condition more difficult to treat. We have also found aggravations where the subsequent act superimposes or adds or imposes injury without integrating.

Shippen, 1996 S.D. 105 at ¶ 10 (internal citations and quotations omitted). Shirley's Proposed Jury Instructions No. 31 and No. 32 would have instructed the jury that it could not apportion Shirley's damages, if any, to an asymptomatic or dormant pre-existing condition. Appellant App.-47, -48.

The Fryn' Pan never argued to the jury or put on evidence suggesting Shirley's injury to her wrist was the result of a pre-existing condition. It appears the entire basis for this argument stems from an immaterial portion of Dr. Dustin Bechtold's deposition, the entire transcript of which was read to the jury. Tr. 66:9-10. During this deposition, *Shirley's counsel* elicited testimony from Dr. Bechtold that, due to Shirley's age and low bone density, her injury was likely worse than it would have been if she were younger and had higher bone density. Dr. Bechtold Depo. 17:8-16. Likewise, *Shirley's counsel* asked Dr. Bechtold whether Shirley had a pre-existing condition that may have been aggravated in the fall, to which Dr. Bechtold demurred. Dr. Bechtold Depo. 41:15-20. The Fryn' Pan asked Dr. Bechtold a single, simple follow-up question of whether there was a "causal connection between diabetes and low bone density," to which Dr. Bechtold responded in the negative. Dr. Bechtold Depo. 45:22-46:6. The Fryn' Pan plainly did not "emphasize[] the pre-existing fragility of [Shirley's] bones and her diabetes" at Dr. Bechtold's deposition. (*Contra* Appellant's Brief at 23). As the Circuit Court correctly observed during the settlement of jury instructions, there had been no evidence introduced from which the jury "could in any way infer that [there] was a preexisting condition to [Shirley's] wrist." Tr. 250:4-6. Thus, the Circuit Court did not abuse its discretion by refusing Shirley's Proposed Jury Instructions No. 31 and No. 32.

CONCLUSION

The Circuit Court's instructions to the jury were correct and properly set forth the law of negligence in South Dakota, and Shirley cannot show she was prejudiced by the instructions given by the Circuit Court. The Circuit Court also properly instructed the jury on the law of contributory negligence, because competent evidence adduced at trial

warranted such an instruction. Nonetheless, Shirley simply cannot show prejudicial error occurred from the contributory negligence instructions because the jury never reached the contributory negligence issue. Finally, the Circuit Court did not abuse its discretion by refusing Shirley's proposed instructions on asymptomatic or dormant pre-existing conditions. Thus, the Circuit Court should be affirmed in all respects.

REQUEST FOR ORAL ARGUMENT

Defendant-Appellee hereby requests oral argument.

Dated at Sioux Falls, South Dakota, this 7th day of December, 2018.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

/s/ Eric C. Schulte

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellee K&K Management Services, Inc./Fryn' Pan Restaurant complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 8,176 words and 41,580 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 7th day of December, 2018.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellee K&K Management Services, Inc./Fryn' Pan Restaurant" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capitol Avenue, Pierre, South Dakota, 57501-5070, on December 7, 2018.

The undersigned further certifies that an electronic copy of "Brief of Appellee K&K Management Services, Inc./Fryn' Pan Restaurant" was emailed to the attorneys set forth below, on December 7, 2018:

N. Dean Nasser, Jr.
Nasser Law Firm, PC
204 South Main Avenue
Sioux Falls, SD 57104-6310
dean@nasserlaw.com

Dated at Sioux Falls, South Dakota, this 7th day of December, 2018.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

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APPENDIX TABLE OF CONTENTS

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
SHIRLEY TAMMEN, Plaintiff, vs. **K&K MANAGEMENT SERVICES, INC., D/B/A FRYN' PAN,** Defendant.	CIV. 14-2429 **VERDICT FOR PLAINTIFF**

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues therein, find for the plaintiff and assess plaintiff's damages as follows:

- For past medical expenses incurred by plaintiff, if any: $_____.

- For the disability; disfigurement; physical pain and suffering, mental anguish and emotional distress, and loss of capacity of the enjoyment of life suffered in the past and reasonably certain to be experienced in the future, if any: $ _____.

Dated this ____ day of June, 2018.

_____

Foreperson

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

SHIRLEY TAMMEN, Plaintiff, vs. **K&K MANAGEMENT SERVICES, INC., d/b/a FRYN' PAN,** Defendant.	49CIV14-002429 **VERDICT FOR DEFENDANT**

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues therein, find for the defendant because (check either option 1 or 2):

X 1) The defendant was not negligent; or

_____ 2) The defendant was negligent, but the plaintiff's negligence was more than slight in comparison to the defendant's negligence.

Dated this 14 day of June, 2018.

Foreperson

FILED
JUN 14 2018
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

SHIRLEY TAMMEN,

Plaintiff,

vs.

K & K MANGEMENT SERVICES, INC. / FRYN' PAN,

Defendant.

CIV. 14-2429

JUDGMENT

This matter having come on for trial, and a jury having been duly impaneled and sworn to try the issues therein, the trial having taken place on June 12, 13, and 14, 2018, the Honorable Rodney Steele, Circuit Court Judge, presiding, and the jury having rendered its verdict for K&K Management Services, Inc./Fryn' Pan, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of the Defendant and against the Plaintiff, with Defendant, K&K Management Services, Inc./Fryn' Pan, being entitled to tax costs in the amount of $_____ against the Plaintiff; and the Plaintiff's Complaint and causes of action against the Defendant may be, and the same hereby are, dismissed with prejudice, and on the merits.

BY THE COURT:

Rodney Steele

The Honorable Rodney Steele
Circuit Court Judge

1

FILED
JUN 29 2018
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

* *

SHIRLEY A. TAMMEN, 49CIV14-2429

Plaintiff,

JURY TRIAL

-vs-

VOLUME 2 OF 3

K&K MANAGEMENT SERVICES, INC.,
FRY N RESTAURANT, (Pages 74 - 257)

Defendant.

* *

BEFORE: THE HONORABLE RODNEY STEELE
Circuit Court Judge
in and for the Second Judicial Circuit
State of South Dakota
Sioux Falls, South Dakota

APPEARANCES: MR. N. DEAN NASSER, JUNIOR
Nasser Law Firm
204 South Main Avenue
Sioux Falls, South Dakota 57104

Attorney for Plaintiff.

MR. ERIC C. SCHULTE
Davenport, Evans, Hurwitz & Smith
Post Office Box 1030
Sioux Falls, South Dakota 57101

Attorney for Defendant.

PROCEEDINGS: The above-entitled proceeding commenced
at 9:00 A.M.
On the 13th day of June, 2018,
Minnehaha County Courthouse, Courtroom 5A,
Sioux Falls, South Dakota

icy?"

"Well, I could see there was ice there but, you know, when you walk on ice -- there's a lot of difference in ice. If it's thawing a little bit, you know, it's a lot slipperier than if it's 20 below."

THE COURT: Okay. Well, I agree with the defendant that what the plaintiffs say in and of itself is not necessarily controlling, but I think it's a fair entrance based on all the evidence here that the jury could consider the defense of contributory negligence. It is, after all, the jury's function to -- usually both assumption of the risk and contributory negligence are questions of fact for the jury. But here as to the defense of the affirmative -- defense of assumption of the risk, I just -- assumption of the risk requires a knowing and voluntary acceptance of a known risk, and I just can't see any evidence here to support that defense. So I'm going to strike the affirmative defense -- or the assumption of the risk defense but not the contributory negligence.

All right. Any other motions here?

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

THE COURT: Are we ready to settle instructions then?

MR. NASSER: Yes.

THE COURT: Okay. I got my special helpers over here. Can you guys -- I'm going to be doing some adjusting here

obviously. Can you guys do anything from up here, or do you have to go down to your office?
MS. LIMOGES: (Indicating.)
THE COURT: Okay.
MS. LIMOGES: Can I get a copy of the current instructions that you have?
THE COURT: Sure. Why don't you just --
MS. LIMOGES: There's a copier right out there, too, if you have them.
THE COURT: I don't know what I kept and what I didn't here. Well, here are... Well, I'll tell you, I'll just give you -- you want copies?
MS. LIMOGES: Sure, that will work.
THE COURT: Those are the ones you gave me with the --
MS. LIMOGES: Yeah. Do you need these?
THE COURT: If I need them, I'll call on you. How's that?
MS. LIMOGES: Oh, good.
THE COURT: All right.
MR. NASSER: We don't need you here right now.
(Off-the-record discussion between Mr. Nasser and Mrs. Tammen.)
MR. SCHULTE: Can Mr. Mitzel -- he needs to use the rest room, Your Honor?
THE COURT: Sure.
MR. SCHULTE: Okay.

THE COURT: You too.

(Off-the-record discussion between Mr. Schulte and Mr. Mitzel.)

THE COURT: All right. We'll go through the Court's proposed and number them as we go, and then I'll entertain any of the parties' proposed instructions.

MR. SCHULTE: Give me just one moment while I get your instructions, Judge. (Pause.) I got them, Your Honor.

THE COURT: Just let me know when you're ready and then we'll go.

MR. SCHULTE: I'm ready anytime.

THE COURT: Are you ready, Dean?

MR. NASSER: Yes.

THE COURT: All right. Let's go through the Court's proposed first and then proposed instructions by the parties.

Court's proposed No. 1, "Ladies and gentlemen of the jury," any objection by the plaintiff?

MR. NASSER: No.

THE COURT: Defense?

MR. SCHULTE: No.

THE COURT: Number 2, "It is your duty as a jury to determine the facts." Plaintiff?

MR. NASSER: No objection.

MR. SCHULTE: No objection.

THE COURT: Number 3, "The attorneys for the respective parties will present to you their arguments." Plaintiff?
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: Defense? Number 4, "The fact that one of the parties to this action is a corporation."
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: Number 5, "In weighing the evidence in this case."
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: Number 6, "You are the sole judges of all the fact and the credibility of witnesses."
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: Number 7, "If you believe that any witness testifying in this case has knowingly sworn falsely."
MR. NASSER: I don't believe it's necessary, but no objection.
MR. SCHULTE: No objection.
THE COURT: Let's see, that's 7. Number 8, "During the trial certain evidence was presented to you by deposition."
MR. NASSER: No objection.
MR. SCHULTE: No objection.

THE COURT: Number 9, "A witness may qualify as an expert."
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: Ten, "The credibility of a witness may be attacked by."
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: Eleven, "Negligence is the failure to use reasonable care."
MR. NASSER: We would object to the last two sentences of that instruction, Your Honor. And the reason for that is, in this case, the law does tell how the reasonable person is supposed to act. They're supposed to exercise reasonable care. And that's vague, but it is still a direction by the law as to how they're supposed to act. I believe the comment says sometimes you leave that last part off, and I would ask that we do that.
THE COURT: Anna, is this a pattern?
MS. LIMOGES: Yes.
MR. SCHULTE: I think the jury instruction is fine. I would resist Mr. Nasser's attempts, and I would agree with this instruction.
THE COURT: The objection is noted and overruled. Eleven will be given.
All right. Number 12 -- This is an inside joke.

MR. NASSER: I object to No. 12, not to the giving of a reasonable person instruction, but to the leaving out of the objective standard that is required by *Nugent versus Quam* and the Restatement of Torts, Second that is cited within *Nugent versus Quam*, which objective standard says that a reasonable person is never negligent and is always up to standard. That avoids the possibility that the jury will think that just doing something half-baked reasonably is acceptable even if it's below the standard. And so I am very convinced, as was the American Law Institute and the Supreme Court, that we need to have the objective standard put in there. It is referred to by *Nugent* as an objective standard.

THE COURT: I've heard that someplace before.

MR. SCHULTE: I don't think I need to say very much. I would resist that, and I believe the pattern should be given. It appropriately defines --

THE COURT: To be honest with you, this isn't the pattern.

MR. SCHULTE: Oh, okay.

THE COURT: The inside joke is Mr. Nasser and I are both on the pattern jury instruction committee and did extensive talking about this all summer long about defining a reasonable person. It has never been defined in pattern instructions. This particular one is the one that the pattern jury instruction committee is seriously considering

but has not adopted and won't adopt it until next year. So this is kind of my submission here.

MR. SCHULTE: I agree with your submission.

THE COURT: All right. Your objection is noted, overruled, and No. 12 will be given.

Number 13, an invitee is a public or business visitor. Mr. Nasser?

MR. NASSER: I wonder if we couldn't, for the sake of the jury, make it a little simpler by just saying a business -- using the last sentence: A business visitor is an invitee who is invited to enter or remain on land for a purpose connected with the business of the owner.

I don't object to the instruction, but it's a confusing area of the law to say the least, and the less confusion the better.

THE COURT: This is a pattern; right?

MR. NASSER: Yes. But it doesn't all have to be given and isn't in some cases.

THE COURT: But you're not really objecting.

MR. NASSER: No, I'm not objecting.

MR. SCHULTE: And I'm not objecting either.

THE COURT: All right. Number 13 will be given.

Fourteen, "The possessor of land owes an invitee the duty of exercising reasonable care."

MR. NASSER: I object only insofar as it's an incomplete

statement of the law of South Dakota in that there are specific duties that are to accompany this instruction and we have proposed them. They include the duty to inspect. They include more specific duties. And we can get to those if any objections of the proposed instructions. But insofar as it goes, it's a correct statement of the law.
THE COURT: The ones that you were proposing, were they to be in lieu of this one or what?
MR. NASSER: In addition to it.
THE COURT: Okay. Well, then any objection?
MR. SCHULTE: No.
THE COURT: All right. Instruction 14 will be given.
Fifteen, "In general, an owner of the land is liable to an invitee for physical harm."
MR. NASSER: I do strenuously object to this because there is no evidence of a danger known or obvious to the invitee. The evidence is undisputed that even Adam Lee couldn't see it, and so there's just none there. This pattern by the way is out of the middle of the law, and we should be saying the duty -- you start with the duty is to use reasonable care and to exercise -- to accomplish safety. And then this is supposed to be an exception to the rule where you don't have to use reasonable care to do -- when it's open and obvious. This is the only pattern we have. We don't have the one that should be in front of it

specifying the duty. So -- but anyway, in this case there's no evidence of an open and obvious danger.

THE COURT: Mr. Schulte?

MR. SCHULTE: I think the record should be clear, I didn't propose this. I don't believe I did. But I think it is an accurate reflection of the law. It's a pattern. This is where I'm at on this. I'm not going to demand this is in here.

THE COURT: Okay.

MR. SCHULTE: I'm not, but I think it's an accurate reflection of the law, and I think evidence supports it.

THE COURT: Yeah. I kind of agree with some of the things Mr. Nasser said. I think this is maybe one that Jill Moraine put in there. I don't think -- I don't remember me putting it in here either. I'm going to withdraw that one.

So the next one would be No. 15, "contributory negligence."

MR. NASSER: We, of course, object.

MR. SCHULTE: I do not object.

THE COURT: All right. Plaintiff's objection is overruled, and 15 will be given.

MR. NASSER: Same objection to the second contributory negligence, No. 16.

THE COURT: Yeah, No. 16.

MR. SCHULTE: No objection to it.

THE COURT: Plaintiff's objection is noted and overruled. Sixteen will be given.

I have stricken the assumption of the risk so the next one is withdrawn by the Court.

MR. SCHULTE: I would just incorporate my arguments from before with respect to these instructions.

THE COURT: Okay.

MR. NASSER: I didn't hear what the Court is doing with the one following assumption of the risk. While the same conduct on the plaintiff may amount to both assumption --

THE COURT: I'm just getting to that.

MR. NASSER: Oh, I'm sorry. Okay. I thought you were commenting on it.

THE COURT: No. The next one I'm going to withdraw also.

MR. SCHULTE: So I don't have to keep repeating myself, I'll state one time for the record that I'm objecting to the withdrawal of any instructions that reference assumption of the risk and incorporate my prior arguments and urge them to be added in and that way I won't have to repeat myself as we do this.

THE COURT: Thank you. So the next one, 17, "A legal cause is a cause that produces some harmful result."

MR. NASSER: No objection.

MR. SCHULTE: No objection.

THE COURT: Eighteen, "There may be more than one legal

cause of an injury."
MR. NASSER: Is that contained... No. That's a proper instruction. I do not object.
MR. SCHULTE: No objection.
THE COURT: Number 19, "The issues to be determined by you in this case are these."
And here, Anna, I'm going to have you retype some of this, and Seth, so it says -- it's going to be: "The issues to be determined by you in this case are these:"
The next sentence -- "First, did the plaintiff assume the risk of injury?" -- I'm striking that and I'm striking the next sentence -- "If you find that the plaintiff assumed the risk, you must return a verdict for the defendant. If you find that the plaintiff did not assume the risk, you have a second issue to determine, namely:".
I'm striking those two sentences so that they -- that first paragraph will read:
"The issues to be determined by you in this case are these:
"First, was the defendant negligent?
"If the defendant was not negligent, you must return a verdict for the defendant," et cetera.
And then --
MR. NASSER: The second issue there instead of the third.
THE COURT: Yeah. Yes, the second issue instead of the

third.
MR. NASSER: And then where it says --
THE COURT: Then where it says fourth, it would be third issue.
And where it says fifth, it will be fourth.
And where it says sixth, it will be fifth.
MR. NASSER: It covers it.
THE COURT: So with those redactions and adjustments here, that will be the Court's proposed.
MR. NASSER: Yeah, the plaintiff objects to contributory negligence in that instruction.
THE COURT: And you're objecting because of -- you got you're standing objection.
MR. SCHULTE: Sure. Yes.
THE COURT: All right. So, Anna, did you get all that?
MS. LIMOGES: (Indicating).
THE COURT: Okay. So that will be instruction 19.
Twenty, In civil actions, the party who asserts the affirmative issue -- let's see. That one I'll have to adjust also down where it has "Defendant has the burden of proving these issues:"
The assumption of the risk, No. 1, I'm redacting that. So number -- what is numbered two would be one, what's numbered three will be two, and what's numbered four will be three.

MR. NASSER: I'm wondering how that is going to work. Can we just take a minute and talk about two, three, and four? The law -- I'm just thinking out loud. The law is that the defense is only -- the burden of proof on the defense is that it's contributory negligence more than slight in relation to the defendant. I'm wondering if that shouldn't be in the first line.

THE COURT: Is what?

MR. NASSER: If it shouldn't be in the first element and that it should say, "The plaintiff was contributorily negligent in a degree more than slight compared to that of the defendant."

THE COURT: This is a pattern, isn't it?

MR. NASSER: Not really. It's a pattern that I think -- maybe I'm wrong -- but I think it's a pattern that you put things into for issues. Maybe I'm wrong. But regardless, the law is that before they get to legal cause, whether the plaintiff's contributory negligence was a legal cause, it has to be shown to be more than slight.

THE COURT: Well, you've got to show contributory negligence, and you've got to show that that contributory negligence was a legal cause. And then once they make those two determinations, then they have to determine whether the contributory negligence was more than slight in comparison with that of the --

MR. NASSER: Oh, that's all right. It's one of those bags of worms. That's fine. So we're renumbering two to one, three to two, four to three.
THE COURT: Right.
MR. NASSER: Okay. And striking No. 1.
THE COURT: Yeah. Right.
MR. NASSER: The only objection is for the inclusion of the defense.
THE COURT: Right.
MR. NASSER: As previously stated.
THE COURT: All right. Twenty-one, "You may have heard the terms 'direct evidence' and 'circumstantial evidence.'"
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: Twenty-three (sic), "If you decide for the plaintiff on the question of liability," the amount of money plaintiff...
MR. NASSER: Let me read this a moment, please. (Reviewing.) Yeah, I think that's fine.
MR. SCHULTE: No objection.
THE COURT: Okay. Twenty-three, "Plaintiff does not claim damages for future medical expense."
MR. NASSER: That I think draws an undue focus to the damages. It may cause them to wonder why it's in there. We're not claiming it, and it is not part of what you've

allowed them to award. And I've never seen this before, but we'd object to it.
THE COURT: Well, that's because I put it in there because you said you weren't going to claim it.
MR. NASSER: No, I'm not. But I don't think we need to emphasize those things. There's a lot of things I'm not claiming.
THE COURT: I don't want them -- you are claiming future damages for disability and pain and suffering --
MR. NASSER: Yeah. Yeah.
THE COURT: -- so I want to make sure they understand this --
MR. NASSER: Okay. I mean I felt I'd treat it like a motion in limine. I'm not going to argue it.
THE COURT: All right. Any objection by the --
MR. SCHULTE: No, Your Honor.
THE COURT: Okay. Twenty-three will be given.
All right. Now we get to a series. I'm not sure how you people feel about -- "If you find that the plaintiff had a condition prior to the conduct of the defendant at issue," I don't know if either one of you proposed this.
MR. NASSER: No.
THE COURT: And I think this is something Jill threw in there again. It has to do with aggravation of a prior condition, and I don't know if --

MR. NASSER: We're not claiming it.
THE COURT: Yeah.
MR. SCHULTE: And I did not propose this, and I'm fine with taking it out, Your Honor.
THE COURT: Okay. Well, I'm going to withdraw that.
And likewise the next one, "If you find that the plaintiff had a prior condition making her more suspectable," I'll withdraw that one.
MR. NASSER: Yeah.
THE COURT: And also the next one, "In considering whether conduct is a substantial factor," I think that's all part of that aggravation and so I'm going to withdraw that.
And the next one, "If you find that the plaintiff is entitled to recover for an aggravation of preexisting condition," I'm going to withdraw that one.
So the next Court's proposed would be 24, and that's "The law allows damages for detriment reasonably certain to result" --
MR. NASSER: Oh, is this one of the ones you gave us later?
THE COURT: Yeah.
MR. NASSER: Okay. Got it. I'm sorry, what number?
THE COURT: Twenty-four.
MR. NASSER: Twenty-four?
THE COURT: Any objection by the plaintiff?
MR. NASSER: No.

MR. SCHULTE: No.
THE COURT: Twenty-five, "According to the mortality table."
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: Twenty-six --
MR. NASSER: Whoops. I don't have anymore.
MS. LIMOGES: How about these?
THE COURT: That's the other new one I gave you.
MR. NASSER: Twenty-four, 25 -- I'm sorry, what one is it?
THE COURT: "According to the mortality table" would be 25.
MR. NASSER: I have that.
THE COURT: Okay. Twenty-six, "If you determine that a party should recover a verdict, you should not return what is known as a quotient verdict."
MR. NASSER: I think that's one of the most outmoded instructions I've ever seen. We don't need that, do we?
MR. SCHULTE: I like it.
MR. NASSER: Oh, do you? Well, I mean you're entitled I suppose. I don't know. I object to it. There's a million ways they could skew a verdict, and this only addresses one of them. So...
THE COURT: Well, put it on next year's agenda. I'll give that one.
Twenty-seven, "There are certain rules you must follow

as you deliberate." Plaintiff?
MR. NASSER: No objection.
MR. SCHULTE: No objection.
THE COURT: And then there's two pages to that. And then the verdict forms -- verdict for the plaintiff, verdict for the defendant -- either party have any objection to those?
MR. SCHULTE: No objection.
MR. NASSER: No objection.
THE COURT: Okay.
MR. NASSER: Except for the verdict for the defendant, yeah. No objection to the verdict for the plaintiff.
MR. SCHULTE: Well --
MR. NASSER: No, I'm serious.
THE COURT: Yeah, I get it.
MR. NASSER: It's my motion.
MR. SCHULTE: Well, then I guess I would object to the verdict for the plaintiff.
THE COURT: All right. Let's see. Plaintiff's proposed.
MR. NASSER: Okay. I need my plaintiff's proposed.
THE COURT: And hold on, Anna, before you go down I may end up having you do more work here. We'll see.
MR. NASSER: All right. Does the Court have our proposed? We've submitted them.
THE COURT: Yeah, I do. I have them on the screen.
MR. NASSER: I've pulled out all the ones that are

unnecessary, and I will just...
THE COURT: I suppose their proposed are down in your office, huh?
MS. LIMOGES: Yes, Judge. You want me to go print us all copies? Do you want a copy?
THE COURT: Yeah.
THE CLERK: I can.
MR. NASSER: I'll tell you, I have an extra copy without cites. And I will use that and give you the one with cites that we're proposing.
THE COURT: That's fine.
THE CLERK: Two copies?
MS. LIMOGES: Can you make three? Thank you.
(Recess taken at 3:17 P.M. and reconvened at 3:25 P.M. out of the presence of the jury and with counsel and parties present.)
THE COURT: Let's go on the record. The question here is whether I should -- counsel has stipulated that the case will be argued tomorrow. The question is whether I should read the instructions today or tomorrow. Mr. Nasser indicates he would rather wait until tomorrow before I instruct the jury. Do you have any...
MR. SCHULTE: That's fine with me, your Honor, to do it that way.
THE COURT: All right. Les, let's bring the jury in. I'll

explain to them where we're at and where we're going here.

(Jury enters the courtroom at 3:28 P.M.)

THE COURT: Ladies and gentlemen, we're in the process of settling instructions in this case, and we're almost done. And the way the process works is I read you the instructions as it pertains to this case; and then counsel will give you their final arguments; and then the case will be submitted to you for your consideration. When the case is submitted to you, you'll be sequestered. You won't be able to leave the jury room and things like that until a verdict has been reached. So counsel -- it's late in the day, and by the time we get through reading instructions and counsel gives you their final arguments, you're probably looking at at least 4:30 before you get the case, and that's too late. So we're going to send you home fairly early basically -- I knew you would be happy -- and then you can report at 9:00 in the morning. And at that time, I will read you the laws that pertains to this case, counsel will give you their final arguments, and the case will be submitted to you for your consideration.

So during this evening recess, it's your duty not to converse amongst yourselves or with anyone else on any subject connected with the trial or to form or express any opinion until the case is finally submitted to you.

So 9:00 tomorrow.

(Jury exits the courtroom at 3:30 P.M., and the following proceedings were had.)
THE COURT: All right. The record should show we're out of the presence of the jury, and we'll finish settling instructions here starting with plaintiff's proposed.
MR. NASSER: Do you want me to renumber these, or is it okay if we just use the numbers we have?
THE COURT: Why don't -- let's see.
MR. NASSER: We've eliminated so many. I can just use No. 13.
THE COURT: Yeah, that's fine. I'm going to --
MR. NASSER: Okay.
THE COURT: -- put your plaintiff's proposed on each instruction.
MR. SCHULTE: If I may interrupt briefly, Your Honor, Mr. Nasser, can Mr. Mitzel go to work now and be excused?
MR. NASSER: Oh, sure.
THE COURT: I don't see any reason to stay.
MR. NASSER: You want to go too since there's nothing else for us to do except a little paperwork? Okay. Yeah, you can go too then. We'll see you first thing tomorrow at 9:00 tomorrow.
(Parties exit the courtroom.)
MR. NASSER: Give me one minute.
(Discussion off the record.)

MR. NASSER: Your Honor, instruction No. 13 that we have proposed was a pattern, and it comes from 1-50-20 and basically it's the issues to be determined. Our proposed does not have contributory negligence in it and so we have to propose that. And the Court's kind of indicated it's going to reject it, but that's our first proposal.

THE COURT: All right. Well, I think the other instructions -- other pattern jury instructions cover this area of the law adequately. I'm going to refuse that one.

Okay. Next one.

MR. NASSER: Next is our proposed No. 14, and that's the burden of proof pattern. And the issues are set forth therein and do not include contributory negligence.

THE COURT: Here again, I think the Court's proposed adequately covers that; so noted and refused.

MR. NASSER: Instruction No. 15 says, "Negligence is the failure to use reasonable care. It is the duty of something which a reasonable person would not do or the failure to do something which a reasonable person would do under facts similar to those shown by the evidence. It is conduct which breaches a duty imposed by the law." And we believe this would be a better way of saying it as there is a duty that the Court refers to, and it makes it clear to the jury that when they breach a duty, it's negligence.

THE COURT: Here, again, I think that's adequately covered

in the Court's proposed instruction 11. Noted and refused.
MR. NASSER: Instruction No. 16 is what the Court and I talked about a short while ago with *Nugent versus Quam*, and it is the ideal reasonable person instruction. And I believe it should hopefully -- the pattern that is being adopted says that you can put in these sentences at the option of the Court, and I have put them in.

I also have included the term "reasonable care" from *Corey versus Kocer*. The term "reasonable care" means that degree of care which a reasonable person would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence. The Court has not proposed a definition of reasonable care, and we're proposing one here. I believe that *Corey versus Kocer*, this comes right out of that, and I think it's an accurate statement of the law. I don't believe the Court's instructions do cover what reasonable care is, and I would ask that we do include it. I think that this whole business of reasonableness can be so confusing for a jury between effort and achievement. And reasonable effort often gets mistaken for reasonable care. And reasonable care is an exercise of care, not just a reasonable effort.
THE COURT: Your source is twenty -- pattern jury instruction 20-20-15, what's that one say?
MR. NASSER: I think that's the reasonable person

instruction, and I do think that we adopted it already. It's not pending. I think that it was adopted. And -- but with those notes that we've talked about, the comment says the Court can include these comments.

THE COURT: Well, I think they -- the definition of reasonable person in the Court's proposed, together with all the other instructions, is sufficient to apprize the jury of what the law is. So that's also noted and refused.

MR. NASSER: Are you also refusing the reasonable care?

THE COURT: Reasonable care also, yeah.

MR. NASSER: All right. Number 18, this is a very important instruction, and it's one of our key cases. It cites the Restatement (Second) of Torts, Section 343, *Mitchell versus Ankeny*, and it says, "As a business invitee, Shirley Tammen is entitled to expect that the restaurant will have taken reasonable care to ascertain the actual condition of the premises and, having discovered its actual condition, will either have made it reasonably safe by repair or will have given her a warning of the risks involved. Therefore, a customer is not required to discover dangers which, were she not a customer, she might otherwise be expected to discover. A customer is entitled to expect the restaurant to have made far greater prepositions for the customer's safety than a household possessor of land would make for his or her invitee."

Now there's no way the jury is going to know that law unless this instruction is given to them. And it's very important that they understand how special this relationship is between possessor and business invitee. Shirley is entitled -- they're entitled to know that Shirley was legally entitled to expect that the premises was reasonably safe. It's very similar to the instruction that we quite often give where we say that you're entitled to assume another's good conduct until it is unreasonable to assume it. And so I'm asking that the Court somehow inform the jury that she was entitled to expect that the premises was made reasonably safe for her. She was entitled to expect that they had exercised due care, and that's part of the law that governs this situation.

THE COURT: All right. Well, I hesitate to expand on the general principle of law, and that simply is that the invitee is owed a duty of reasonable and ordinary care for the invitee's safety, and that's Court's proposed 14.

You can argue that, Mr. Nasser, but I'm not going to give that one. That's refused.

Nineteen.

MR. NASSER: Nineteen talks about the superior knowledge of the condition of the land. It's from the other key slip and fall case, *Janis versus Nash Finch Company*. And they have superior knowledge of the condition of the land, and

as such, a business -- they owe their customers the duty of exercising reasonable care to keep the premises reasonably safe during the restaurant's active operations of the property. The duty is an affirmative duty of the business to protect its invitees not only against dangers actually known to the business but also against those dangers which, with a reasonable care, the business might discover.

Now that part of it gets to the issue of Mr. Lee saying, "Well, I didn't know it was bad." Well, we have cited to the Court the cases that say that's not an excuse when it comes out of your active operations on your property. And the law says that when circumstances indicate a foreseeable risk of harm, which we have presented evidence on in this case, the restaurant must investigate, inspect, and discover such reasonable risk of harm and then must exercise reasonable care to remedy the risk of harm or warn the customer. And the failure to exercise that care is negligence. And this is -- the Supreme Court was very strong on this, including the concurrences of Justice Zinter and Konenkamp cited at the bottom. And this was the first case to adopt the duty to inspect the property and discover the hazards. And they have been strong on it, and they advised trial courts after that point to take note of that. So I'm asking that we give this instruction and let the jury know that when this comes from the restaurant's

active operations, that they have to investigate and discover it and take care of it.

Now we've got contributory negligence in this case against the wishes of the plaintiff, of course, but here what we're saying is, if they would have inspected, if they would have done their job and taken care of this, you would not have had Shirley facing this problem. And the affirmative duty is on them to have eliminated it so she never has to face it. We need this instruction.

THE COURT: All right. For the same reason I'm going to note and refuse that. I think that's just another expansion on what is simply the duty of the existing the exercising of reasonable and ordinary care; so noted and refused.

MR. NASSER: Instruction 22, Your Honor, a business invitee enters onto a business premises upon an implied representation by the business that the business has prepared the land and made it safe and ready to receive the invitee. As a business invitee, Shirley Tammen was entitled to expect that the restaurant had taken reasonable care to ascertain the actual condition of the premises and, having discovered its actual condition, had either made it reasonably safe by repair or would have given her a warning of the risks. She is entitled to expect the premises is safe and that they've done their job. And unless there is

something that shows her otherwise that puts her on notice, she is entitled by law to expect that. And it's the same as the other jury instruction we've mentioned earlier where it says she's entitled to assume that another person is acting non-negligently. And that's part of what should be weighed by the jury in considering her contributory negligence issue. The cases cited are the two key slip and fall cases in South Dakota, *Janis versus Nash Finch Company* and *Mitchell versus Ankeny*.

THE COURT: Okay. Noted and refused for the same reason. You can argue this kind of thing, but it's --

MR. NASSER: Number 23, "Pedestrians have a right to take the most convenient route to their destination, and, while they cannot recklessly place themselves in danger, they need not forsake such walks merely because of such (sic) danger in passing over them, especially when no safer route is reasonably convenient."

Well, what we've got here is Mr. Schulte saying, "Why didn't they walk up the hill and around the corner instead of taking the most direct route?" So we have evidence on this, and we believe it's the Court's obligation when there's direct examination on an issue to instruct on that so there's no confusion.

THE COURT: Noted and refused for the same reason. You can argue that too.

MR. NASSER: Number 24, "A person who is exercising reasonable care has a right to assume others will perform their duty and obey the law. Unless there's reasonable cause for thinking otherwise, people can assume that they are not exposed to danger from another person's violation of their duty of care." That is a pattern, 20-30-50, and it most certainly does apply to this case. We would urge the Court to give this instruction.

THE COURT: I've seen this in the context of car accidents and that kind of thing.

MR. NASSER: There aren't a lot of slip and falls.

THE COURT: What -- another person's violation of their duty of care, you're talking about Fryn' Pan employees?

MR. NASSER: Right. About the violation of the duty of care owed to her, she has a right to expect that they will have done their job.

THE COURT: What's your thought on that, Mr. Schulte?

MR. SCHULTE: I've never seen this in the context of a slip and fall case. I'm just speaking from experience. I've seen it in car accident cases that have been given before. I'm trying to track in my mind how this would flow under the facts that have been given to the jury.

MR. NASSER: There's been direct evidence that they expect her to have discerned the danger, and this bears directly on that. It's just not the law that she is solely

responsible. She is entitled to assume.
THE COURT: Well, I'm still thinking. I'm trying to think if there would be any reversible error if I didn't give it, or if I did give it.
MR. NASSER: It isn't if you did.
THE COURT: Huh?
MR. NASSER: There clearly isn't if you give it.
THE COURT: Well, if I don't give it, I guess I'll find out one way or the other. I'm going to give this so I'm going to adopt this one.
Seth, can you -- I'll need this typed up into a Court's proposed.
MR. LOPOUR: What instruction number will this become?
THE COURT: Well, it's plaintiff's proposed. You've got plaintiff's proposed?
MR. LOPOUR: Yep.
THE COURT: Okay. Plaintiff's proposed 24, "A person who is exercising reasonable care." Got that one?
MR. LOPOUR: (Nods head.)
THE COURT: Okay. I'm going to adopt that one.
Next one, "A business which hires an independent contractor to exercise reasonable care."
MR. NASSER: Right. This is a nondelegable duty instruction. And that has -- that's part of the law. And we would not -- there's been evidence in the case that

someone else other than the restaurant did the work, and the jury may end up confused as to what effect legally that has on the liability of the restaurant.

Now we have -- we do have one other instruction, to be candid with the Court, that addresses this a little bit, and it's on legal cause. And it says that it's -- that a person who is not a party to the lawsuit cannot be the legal cause, but it doesn't yet talk about the duty part of it or the negligence part of it. So the duty is nondelegable and they need to know that.

I think if I recall you weren't arguing with that proposition.

MR. SCHULTE: I'm not arguing a nondelegable duty. I don't think it's necessary. My concern is it's based on Connecticut law apparently. To inject this into a case where it's not an issue I don't think it would be appropriate.

THE COURT: I think it's a nonissue anyway because you're not -- plainly made that apparent to the jury. But noted and refused. I think the evidence instruction adequately...

MR. NASSER: Now this is another one of the instructions that we don't have a pattern on. I took it out of California instructions. But I believe it is even the law of South Dakota, or would be adopted that way, where a

business by its operations or from a recurring condition should know -- knows or should know that a recurring condition or a condition from its -- created by it in its operations. If they know that there is likely to be such a condition, then knowledge of the condition is imputed to the restaurant. So in other words, we have produced evidence that this was a recurring condition. That there was drainage. That there's a pipe there that drains into the parking lot right at the parking spaces. There is a downhill drainage that goes to the -- past those parking places and puts water there, and it is part of the restaurant's operations. And so we would not want them arguing they don't know about it and that -- or they didn't know about it and therefore they're excused because that is not the law. I don't believe we have any South Dakota cases on it.

THE COURT: Okay. I think the other instructions adequately...

MR. NASSER: On No. 31, I believe this one stands independently of the preexisting condition situation. We aren't asking for preexisting -- or to a portion or to anything like that. And we had a motion in limine to the Court that the Court kind of deferred to the time of trial, and there wasn't any testimony about dormant conditions being responsible. But the jury could well find if they're

confused that there -- that somehow her age and her -- which was accentuated in the evidence -- her diabetes -- which was accentuated -- and it is called a fragility fracture -- that was in the evidence -- they could find that these dormant conditions, if they're confused enough, are partially responsible for this -- for the damages, and this is to avoid that confusion. Clearly, the law is that if there is a dormant condition that was asymptomatic -- and that's the only proof in the case is that it was asymptomatic -- then there can be no attribution of this to the preexisting condition. That's against the law. And that's what I wanted to be able to tell the jury: That they can't get confused and apportion this to something other than the injury since the undisputed evidence is everything came from the injury.

THE COURT: Well, there's --

MR. SCHULTE: I would -- I don't mean to interrupt you, Judge.

THE COURT: Go ahead.

MR. SCHULTE: I would resist this. There hasn't been evidence of that. Mr. Nasser is correct; there was a motion in limine on this issue filed about a preexisting condition. I didn't resist that, I didn't go into that at trial, so there's no evidence that a preexisting condition caused the break. But if we get into this, then there

should be instructions on a substantial factor, and I just think it opens up a can of worms and it's not necessary.

THE COURT: I think this is where Jill picked up on preexisting conditions. There's been no evidence that I remember that a jury could in any way infer that it was a preexisting condition to the wrist. So that's noted and refused.

MR. NASSER: The same comments accompany a different version of 31 that we have got numbered 32, and it's very simple. "When an accident lights up and makes active a preexisting condition that was dormant and asymptomatic immediately prior to an accident, the preexisting condition is not a legal cause of the resulting damages." And that is consistent with footnote 5 of *Shippen versus Parrott*, which I should have down as a source, and *Harris versus Drake*.

THE COURT: Noted and refused for the same reason.

MR. NASSER: Footnote 3, not 5 there.

Then the final proposal by the plaintiff, instruction No. 35, "If you award medical expenses to the plaintiff, you must award them in an amount that fully compensates the plaintiff for all reasonable charges billed for the treatment she necessitated as a result of the fall in accordance with instructions from the Court. You must not speculate or consider any other possible sources of benefit

the plaintiff may have received." And this is *Moore versus Kluthe & Lane Agency, Inc.*. And all it says is we don't want them talking about whether this was paid by Medicare or not paid by Medicare. They know how old she is and, therefore, speculation, that they should be warned not to speculate.

MR. SCHULTE: I think it's inviting something that shouldn't be invited. It's not based on a pattern. Apparently based on two other sets of pattern instructions from other jurisdictions. I don't think it's necessary and I would resist this. The instructions currently given by the Court appropriately define how to determine damages.

THE COURT: Well, this is kind of a collateral source instruction. Well, it's not a pattern. But I think it is an accurate statement of the law. And given the plaintiff's age, Mr. Nasser may have a point that the jury may take off and speculate on Medicare or other insurance payments which may have been made. I'm going to go ahead and adopt that one.

MR. NASSER: Thank you, Your Honor. That's all we have.

THE COURT: Mr. Schulte?

MR. SCHULTE: Real briefly so the record is clear. I think with respect to plaintiff's instruction No. 24, which the Court adopted on a person who is exercising reasonable care assuming conduct of others, I just want the record to be

clear that I'm objecting to that instruction.

THE COURT: Okay.

MR. SCHULTE: I think that mine will hopefully go fairly quickly, Judge. I've just got a few, and I would begin with defendant's proposed instruction 17.

Proposed instruction No. 17 is the instruction that we proposed regarding mitigation of damages. As the record was clear, prior to trial we moved to amend our answer to assert a claim for mitigation of damages. That was subsequently filed with that affirmative defense. Ms. Miller argued the motion. And this is the pattern jury instruction on mitigation of damages. I believe that sufficient evidence has been presented at trial indicating quite clearly that there's a legal issue as to whether or not Mrs. Tammen complied with the instructions of her physician to do exercises to help her fist improve. That's certainly a jury question. I can go into detail everything that was said, but I think it was abundantly clear, including a reference from her doctor, her normal doctor several months later, saying you've got to continue to do this for a year. And her testimony was that after about six weeks she basically stopped doing it. She did say she did do it somewhat after that. But I think there's certainly a jury question when Dr. Bechtold says, "My impression was that she could have gotten better if she

didn't do that because she didn't do it as frequently as she could have." And No. 2, Dr. Bechtold said he referred her to another specialist. That is in the medical records. She didn't go to another specialist. So I think this instruction is warranted.

MR. NASSER: With all due respect to my friend and colleague, that is a gross misstatement of the evidence in the case. He did not refer her to anyone. First of all, he said that she could come back if she wanted to see a hand specialist if things didn't work. She went back to him and he did not refer her. He helped her. And so that part is inaccurate, completely.

The other part is, he clearly stated that he did not expressly tell her how long she was supposed to do these. And he did not give her clear instructions. He did not say that she did not do it. He said he didn't know and we would have to ask her. And he said -- she said, "I did everything that he told me to do as best I could." And she wore out the gloves that they gave her the second time around. She did not stop doing anything. She kept doing it. And so there is no opinion here from the doctor that she did not do what he told her. He says he doesn't know really what she did. He had an expectation. And if you remember, I brought this up in the motions in limine where we said he initially, in his deposition, got a little

confused and then I straightened it out. He only expected her to do, I think it was, four to eight weeks or something beyond that. But he said that John Arneson read today. And she kept going away after that, exactly as he said. And she was still doing it the whole year, twice a day, at least two to three times a day.

Now in order to have a mitigation of damage instruction, we've got to -- he would have to -- Eric would have to get an opinion from the doctor that she would have been better had she not done it. He did not say that. He said that the utility of doing it after a few weeks is very little. And so there's no evidence that she would have gotten better had she done even more than she did.

THE COURT: Well, I did allow amendment of the complaint to allege mitigation and failure to mitigate damages. I kind of agreed the evidence is pretty thin there, but I think there's enough to justify giving the instructions. It's up to the jury to decide that. You guys can argue what you want to on that. I'm going to adopt that instruction.

Seth and Anna, you know which one I'm talking about there?

MS. LIMOGES: (Indicating.)

MR. LOPOUR: (Nods head.)

THE COURT: Defendant's proposed 17.

MR. SCHULTE: My only other comments, Your Honor, and I'll

be brief, but instructions 28 and 29 reference assumption of the risk. And for all the arguments I previously stated on the record with objections, I would ask that those be given, and that all of the instructions which reference assumption of the risk I request to be given.

THE COURT: All right. Both of those are noted and refused.

All right. Now as to instruction 24, plaintiff's proposed instruction 24, I've adopted that and I will give that as instruction, I think, 11A, right after instruction 11 on negligence.

And as to plaintiff's proposed instruction 35, I'll give that as instruction 22A, right after the instruction concerning the elements of compensation.

As to defendant's proposed No. 17, I'll give that as instruction 22A. And then the plaintiff's proposed instruction 35 I'll give as 22B. You two got all that?

MR. LOPOUR: Yup.

THE COURT: Okay. Can you guys print those off now so everybody -- including the numbers, the instruction number. I want the numbers in.

(Brief recess at 4:15 P.M. and reconvened at 4:19 P.M.)

MR. NASSER: Eric, what do you need?

MR. SCHULTE: Well, my standard answer one I defend is I want as much as the plaintiff gets. So if he says --

THE COURT: Is what?
MR. SCHULTE: As much as Mr. Nasser would have, it would be my request for the same amount. But as I sit here now, I can't imagine that I'm going to be talking for longer than 30 minutes. So that's my thought now. But my caveat is I would want as much time as Mr. Nasser.
MR. NASSER: I don't think I'm going to go 30 minutes. I really don't.
THE COURT: 30, 20, and 10?
MR. NASSER: Yeah, that's fine. Twenty and 10 is -- I mean I don't -- if the Court doesn't mind, I don't want to nitpick about how much I leave myself. And maybe, you know, on rebuttal I'm probably going to use 5 to 10. It's okay if we each get 30 minutes.
THE COURT: Twenty and 10 and 30.
MR. NASSER: Yeah.
MR. SCHULTE: (Nods head.)
THE COURT: Okay. That's it.
(Proceedings in recess at 4:20 P.M.; to be reconvened at 9:00 A.M. on June 14th, 2018.)

C E R T I F I C A T E

STATE OF SOUTH DAKOTA)
: ss
COUNTY OF MINNEHAHA)

I, MAXINE J. RISTY, Registered Professional Reporter, Notary Public in and for the State of South Dakota, hereby certify that I was present for and reported the proceedings as described on page 74 herein of Volume 2 of 3, and that this transcript contains a true and correct record of the proceedings so had.

To all of which I have hereunto set my hand this 10th day of August, 2018.

/s/ Maxine J. Risty
MAXINE J. RISTY, RPR
Notary Expiration: November 6, 2023

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

SHIRLEY & ERNEST TAMMEN, 49CIV14-002429

Plaintiffs,

-vs-

K & K MANAGEMENT SERVICES, INC./
FRYN' PAN,

Defendant.

* *

DEPOSITION OF

Dr. C. Dustin Bechtold

* *

APPEARANCES:

Nasser Law Firm, Attorneys at Law, Sioux Falls, South Dakota,
by Mr. N. Dean Nasser, Jr.,

for the Plaintiffs;

Davenport, Evans, Hurwitz & Smith, Attorneys at Law,
Sioux Falls, South Dakota,
by Mr. Eric C. Schulte,

for the Defendant.

ALSO PRESENT: Carole Nasser

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INDEX OF EXHIBITS

STIPULATION

It is stipulated and agreed by and between the above-named parties, through their attorneys of record, whose appearances have been hereinabove noted, that the deposition of Dr. C. Dustin Bechtold may be taken at this time and place, that is, at the offices of Sanford Orthopedics & Sports Medicine, Sioux Falls, South Dakota, on the 28th day of March, 2018, commencing at the hour of 4:55 o'clock p.m.; said deposition taken before Wayne K. Swenson, a Notary Public within and for the State of South Dakota; said deposition taken for the purpose of discovery or for use at trial or for each of said purposes, and said deposition may be used for all purposes contemplated under the applicable Rules of Civil Procedure as if taken pursuant to written notice. Insofar as counsel are concerned, the objections, except as to the form of the question, may be reserved until the time of trial.

DR. C. DUSTIN BECHTOLD,

called as a witness, being first duly sworn, deposed and said as follows:

(Deposition Exhibits Number 1 through 17 was marked for identification by the court reporter).

EXAMINATION BY MR. NASSER:

Q Will you state your name, please?

A Carl Dustin Bechtold.

Q And, Dr. Bechtold, we're taking your deposition for purposes of a jury trial in a lawsuit involving your patient Shirley Tammen. Is that your understanding?

A Yes.

Q And it's my understanding that your patient care and other professional obligations are expected to prevent you from being personally present at the time of trial; is that correct?

A Yes.

Q You've agreed to tell us what you know by means of this deposition?

A Yes.

Q And how long have you been with Sanford Health Systems?

A Roughly nine years.

Q And your occupation with them?

A Orthopedic surgeon.

Q And are you an employee with the system?

A I am.

Q What is orthopedics?

A The care of musculoskeletal pathology, which would include bones, joints, tendons, etcetera.

Q And, in particular, would it include broken wrists?

A Yes.

Q Would you tell us your training and education since high

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school?
A. Yes. I went to Brigham Young University for my undergraduate degree. Do you want specifics of degrees, etcetera?
Q. Yes, please.
A. So I graduated with a major in Spanish and a minor in zoology. And then I went to Creighton University for medical school. From there I went to the University of Rochester in New York for my orthopedic residency. Then I did an additional one-year fellowship at Mayo Clinic in Rochester to specialize further in hip and knee reconstruction.
Q. And what else did you do after that?
A. After my fellowship I began my work here at Sanford.
Q. And are you a board certified surgeon?
A. I am.
Q. In orthopedics?
A. Correct.
Q. And I am showing you what's marked Bechtold Deposition Exhibit Number 1. I'd ask that you identify that.
A. That is my CV.
Q. And a CV is what?
A. Curriculum vitae or my -- what's the other word that --
Q. Resume?
A. My resume. We don't use that term much.

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Q. All right. Have you had some publications?
A. I have, yeah.
Q. And would you just briefly tell us what publications you have?
A. I did some early work on -- sort of a benchtop research regarding osteolysis, which is a phenomenon in hip and knee replacement. I did a brief participation in a book chapter on nutrition and wound healing. And then I did an additional sort of senior project again on osteolysis using a mouse model, that's most pertinent to polyethylene wear in hip and knee replacement. And then I presented some data from the Mayo Clinic on metal-on-metal hip and its inherent complications.
Q. What's osteolysis?
A. It would be the destruction of bone through a biologic process where the bone building is not kept up by the bone's destruction, essentially.
Q. All right. In the area of hip and knee replacement, you've told us about your practice there.
A. Um-hmm.
Q. Does your practice include other aspects of orthopedics?
A. It does. I continue to take call, which would mean that any patient who has an injury, infection, or other orthopedic problem would be triaged and treated by me, except where I'm outside of my comfort zone, I would

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pass that on to another specialist when required.
Q. All right. You have done, in this case, a wrist repair, so to speak, on my client, Shirley Tammen, correct?
A. Correct.
Q. And is that within your area of competence?
A. It is. And I continue to treat those injuries when I do call duties, depending on my clinical availability.
Q. How many surgeries do you feel you've done to repair broken bones?
A. It would be a wild guess at best. I would say it's fair to say I have reasonable experience over the course of the last decade.
Q. All right. Is Exhibit 1 true, correct, and complete?
A. I haven't looked at the whole thing, but Linda, my secretary, keeps it nicely up-to-date, and I presume it to be.
Q. All right.
MR. NASSER: Is that satisfactory?
MR. SCHULTE: Sure. And you can offer it if you want.
MR. NASSER: We'll offer Exhibit 1.
MR. SCHULTE: I will, of course, not object.
And, again, if you don't want to offer it you don't have to.

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MR. NASSER: No, that's fine. Thank you.
Q. Now, you know Shirley Tammen. How do you know her?
A. She's a patient who came under my care through my call responsibilities.
Q. And was that Cathy Miller of the Center for Family Medicine that referred her?
A. I don't recall, but we can look. She may have come through the emergency department. I'd have to look directly at that. I don't have a direct recollection of it. It appears that I saw her -- okay. So I'm looking at a note that indicates that there was a Cathy at Center for Family Medicine that had given us instructions -- or information regarding her injury, and I had advised that the patient be sent directly to Sanford for further evaluation and surgery.
Q. All right. And what was the information that was provided?
A. Just likely, although not seen here, a description of her -- the nature of her injury, and it's quite likely that I would have been able to look at X-rays at that time to determine.
Q. All right. But was it reported to be a particular condition?
A. Yes, a fracture of the distal radius.

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Q And this was dated 1-31 of '14, correct?
A Correct.
Q And did you see her that day?
A I did.
Q Do you believe that you had some X-rays to look at at that time?
A Yes.
Q All right. And when you saw her did you take a history from her?
A I did.
Q Now, I have in front of me records from January 31, 2014 through January 9 of 2015, and is that the period of time that you treated her for?
A I believe so.
Q And I will tell you that counsel have agreed to stipulate in a complete medical record involving this right wrist.
A Okay.
Q And so we may show you records from time to time, and you can confirm that those are indeed records, and you can testify from them if you want to.
MR. NASSER: That's by agreement of counsel; is that correct?
MR. SCHULTE: Yes.
Q Okay. Now, when you saw her you saw her first at the

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Surgical Tower; is that correct?
A I believe so.
Q And you -- can you tell us what you learned at that time and how you learned it?
A I had an encounter with the patient, asking questions regarding the nature of her injury, and according to my documentation that I have, and not so much from my direct memory, she indicated that she was a 71-year-old right hand dominant female who states that she fell on the ice after eating lunch at the Fryn' Pan Restaurant around noontime today. I indicated that she'd been seen and found to have this comminuted distal radius fracture, meaning in several different parts, and she was splinted and then sent over to Sanford for further definitive management. I had asked her, and she denied any loss of consciousness or any other injury related to that fall, and at that time she denied pain elsewhere, meaning other than in the right wrist.
Q And were there, again, some X-rays that you looked at at that time?
A Correct.
Q Before going further I'm going to show you Exhibit Number 2, Bechtold Deposition Exhibit 2. You and I went through this exhibit just before this deposition, correct?

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A Correct.
Q And does that itemize the treatment that she received from -- not just from you, but from Center of Family Medicine and through you from 1-31 of '14 through, actually, 1-30 of '15, which would be the last appointment she had with occupational medicine?
A It does appear to be that way.
Q All right. And was all of this treatment reasonable and necessary for treatment of her right wrist?
A Yes.
MR. NASSER: All right. We'd offer Exhibit 2.
MR. SCHULTE: No objection.
Q Then showing you Bechtold Deposition Exhibits 3, 4 and 5, can you take them one at a time, 3 first, and identify them and tell us what's significant on them?
A Yeah, this is marked as a right on the X-ray. It involves -- is largely focused on the wrist or the distal radius, being the end of the radius bone, and this does show a fracture of that bone. Some anatomic changes include shortening of the height of the radius bone, a loss of its normal inclination angle, and multiple fracture lines that are exiting into the joint space. Additionally, there are some minor degenerative changes in the wrist itself.

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Q All right. The shortening of the bone, what is that from?
A Assuming some normal anatomic parameters of average human anatomy, it would indicate that this bone has been crushed down and it's lost its normal position.
Q All right. Now, she described to you in her history the nature of the fall?
A Yes.
Q And is that crush injury consistent with the nature of the fall she described?
A It is consistent with a fall onto an outstretched hand.
Q All right. How many pieces can be identified that were broken?
A Well, I'll admit that that's a more challenging question. We would describe these as multiframentary. On this image I can see at least three large segments at the wrist space, but there are numerous smaller fragments. And with the bone being likely of poor quality, some of these fragments are simply crushed together more than being identifiable fragments.
Q When you say likely of poor quality, would her age be part that?
A Age would be some indication of that. And, additionally, some of the appearance of the X-ray and the density of the bone would be a hint towards that.

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Q What are you able to conclude about her preinjury condition in that wrist, based upon what you have just described?
A Very little, other than I don't see any major degenerative changes or other anatomic changes that would be highly suspicious of any wrist troubles prior to the injury.
Q All right. And was that consistent with her history that -- as to whether she had any symptoms or not before this?
A It would be. I would additionally note I did not ask her about that, which sometimes we would, but she also did not offer that up, nor would I suspect it by the X-ray.
Q All right. So if she were to testify that she was not having any symptoms, would that be consistent with what you see?
A At the wrist level very much so, yes.
Q All right. Now, the X-ray -- which view is this?
A That would be the AP or the front-to-back view.
Q How about 4?
A This is a more oblique view of the same right wrist. This one does show a little bit more of the base of the thumb where she does have some arthritic changes, but I would comment that those symptoms are typically far from

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the wrist and they are common in this age group. The wrist itself just further shows the fragmentation and the sort of anatomic changes of the fracture.
Q All right. And how about Exhibit Number 5, Bechtold Deposition Exhibit 5?
A So this would be a lateral or a side view of that same right wrist, as marked. This is an important view in our, sort of, assessment of the nature of an injury, and I see today, and I would have noted and did comment on the fact that the back of the wrist has what we would refer to as dorsal comminution, or meaning there are multiple fragments on the backside of that wrist, and I would also note there's, again, a decrease in the height of the radius bone and there's a change in the normal angular alignment of that bone on this side view.
Q Are you able to circle where those are? And I don't know if I have a good pen for that.
A Circle the dorsal comminution?
Q The abnormalities that you just mentioned.
A Well, I don't know if circling would do it justice. I'd have to draw lines and angles but --
Q Go ahead. Identify them as best you can.
A Should I write verbiage on here, too?
Q Sure.
A I'm writing dorsal comminution where I circled it, and I

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would draw a line to indicate perhaps a more normal angulation versus her current angulation.
Q So the top line is normal and the bottom line is what happened to her?
A Yeah, and this (indicating) would be a volar tilt.
Q All right. And those are abnormalities caused by this fracture?
A Yes, assuming a normal, average anatomy prior to the injury.
Q And any other abnormalities you can identify that you could label?
A I would note the shortening of the bone.
Q Okay. How about individual fragments?
A Oh, I think that that -- in general I think the most key clinical descriptor of that would be this dorsal comminution. I can identify some. I'd hate to mark them up more, it's probably going to make it less meaningful than more but --
Q All right. But there are more than just contained in that circle?
A Correct.
Q Okay. How about on another X-ray?
A And that meaningful probably would be this one you've marked 3, which is the AP or front view. I could note on here -- I'll write loss of radial height. I would

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note loss of radial inclination. And I've tried to draw some lines of a more normal inclination angle. And, again, multiple fragments including -- I'll just put small dots where I can say 100 percent sure that they've gone into the joint space, as separate fragments into the joint space, at least.
Q All right. And these X-rays that you're -- Exhibits 3, 4 and 5, those are exact replicas of the X-rays contained in your file?
A They certainly appear to be.
Q All right. And they're good quality?
A Very good quality.
Q Thank you.
MR. NASSER: We'll offer Exhibits 3, 4 and 5.
MR. SCHULTE: No objection.
Q Now, the surgery that you did, did you first -- what did you learn from the history and from your examination of her and from Exhibits 3, 4 and 5, those X-rays, prior to operating? What did you conclude?
A I concluded that there was alteration of the normal anatomy of the wrist, including several fracture fragments going into the joint space or the articular space.
Q Did you have a working diagnosis of what caused that to

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happen?
A. Yes. I would have had no doubt that her history provided of a fall onto her wrist would create that deformity and injury.
Q. Your records have used the term fragility fracture, correct?
A. Correct.
Q. Will you tell us what a fragility fracture is?
A. Its basic definition is a fracture caused by a low-energy mechanism that leads to a fracture, where perhaps another normal skeleton in a similar situation would not have fractured. More commonly used in a hip fracture, for example, where an elderly patient falls gently to the ground and breaks their hip, whereas a patient who is younger may not, and that would define a fragility fracture.
Q. All right. And that can happen on a wrist?
A. Yes.
Q. All right. Normally, then, does that -- does that term, fragility fracture, does that in any way infer that the fracture happened by itself rather than from a fall?
A. No, it does not.
Q. All right. How important is it that someone who has some fragility, such as a 71-year-old woman, not be subjected to forces like falls?

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A. How important is it that they not be? Well, the best way to answer that is that part of the orthopedic responsibility is to try to help people avoid falling and educate about bone density, and anyone who is known to have osteoporosis or a metabolic bone problem would be encouraged to avoid falls at all costs.
Q. All right. And is -- naturally you have to know that you have the condition in order to take those precautions, correct?
A. Correct.
Q. Is there anything in the records that indicates that Shirley was aware that she had any degree of osteopenia?
A. Not to my knowledge, no.
Q. All right. And your records do use the term osteopenia, correct?
A. I believe I saw that in some areas. I'm not looking right now but --
Q. I think in the March notes that you had when examining an X-ray taken at that time.
A. Okay.
Q. All right. And we'll get to that.
A. And some of the further detail regarding that might be nicely elucidated in the note by Dr. Brandon Allard, who we consulted because of concerns of her bone density and quality.

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Q. And why is -- when you're treating someone and repairing a fracture, why is the bone density and quality important to you?
A. Entirely to help mitigate future risk and problems for that patient.
Q. Can those patients have healing problems?
A. It can increase the likelihood of a complication in a hardware-related surgery, and/or sometimes delayed healing, depending on that severity.
Q. All right. And was that a concern in this case?
A. It was a concern.
Q. And did you follow her any more closely than you would someone who was younger, for example, that didn't have fragility?
A. Yeah, I think there are two factors there that contribute. One is probably more the severity of the injury than her actual bone density concern. For example, had she been a young patient with a severe injury I would also have followed that patient for longer. On the contrary, if she were an older patient with a simple injury with poor bone quality, I may not have needed to follow her along as well, so the length of that follow-up was largely because of the severity of the injury. But also the density makes it more possible that she'd have complications of that surgery that would

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also require close follow-up.
Q. All right. And are women especially of concern with osteopenia and osteoporosis and such?
A. The percentage is higher, but I would say that the number of men undiagnosed for metabolic bone problems is actually quite high. But, still, statistically women are more prone to that problem.
Q. All right. What is the range of treatments that are available in the case of wrist fractures like Shirley's?
A. One -- the most conservative option would be some type of an immobilization, splinting or casting. Surgical options range from something called an external fixator, which involves pins through the skin into the bone with bars on the outside that help hold a certain alignment. There's a plate and screw fixation, which is what we elected to do. There's sometimes even multiframentary small plate fixation options for even more fine-tuned type of approaches. There is the possibility of pins inserted through the skin into the fracture and left exiting the skin or buried under the skin. Those would be the main options that I could think of right now.
Q. All right. And how did you decide on what to do for Shirley?
A. So the debate is always the likelihood of a better clinical outcome with surgical versus nonsurgical

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options. One of the indicators of potential trouble is the so-called dorsal comminution that I mentioned earlier, so a patient who has that is more likely to fall back into that damaged area of bone in a nonsurgical treatment pathway. In fairness, I would mention that there's still some debate about whether fixing the fracture or not fixing the fracture can be proven to have a different clinical outcome. We can say with certainty that with surgical fixation we can improve the anatomy, we can improve the biomechanics, we can, in this case, improve the joint space, which I was concerned about with these fragments going up into her joint space. So after discussing with the patient, we elected to proceed with surgery to try to improve that anatomy and mechanics.

Q. All right. And the particular surgery you did was an ORIF; is that correct?

A. Correct.

Q. And will you tell us what that is?

A. It stands for open reduction internal fixation. So open reduction would mean opening up the anatomy with surgical incisions and movement of tissues, as compared to these percutaneous pinnings and things that I've mentioned. And then --

Q. Percutaneous meaning --

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A. Meaning through the skin.

Q. -- outside?

A. Just simply a pin passed through the skin into the bone. So that's open reduction. And internal fixation means fixing the fragments internally. Typically it implies hardware; plates, screws, that type of thing.

Q. And will you tell us, then, what you did with Shirley in particular. Did this involve general anesthesia?

A. I'll have to look if I documented that, because it can be done in different ways. But let's see my operative note. I did indicate this was a general anesthesia.

Q. And how long would she have been under that anesthesia?

A. I'd have to look at the operative report to tell. I would say, by my recollection, a typical, average wrist fracture for me is about an hour of operative repair but -- here we have -- where we would start would be incision. Let's see if we can find that.

Q. The record should reflect we're providing Dr. Bechtold with the operative records so he can review them.

A. I'm not finding the typically documented times where we would have, for example, incision and close. I don't have those records in this list.

Q. So can you estimate for us based on your usual practice?

A. Yeah, I would say my typical for a distal radius is about an hour. I did read my operative note recently

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and I talked about some additional manipulation and trying to deal with the fragmentation, that may have led to it being a little bit longer than average.

Q. All right. So this was a fairly severe break?

A. It was significant, yes.

Q. Now, will you describe for us what this operation consists of, how you go about it? Do you open the underside of the wrist?

A. Um-hmm.

Q. And how long of an incision does that involve?

A. That really depends on how far up the wrist we need to go. Typically probably -- I'm really not very good at estimating distances, but maybe a six-inch, give or take a few inches, but essentially it's along the underside of the wrist where we will move aside the important structures, including tendons and the nerves and arteries. We do cut through some muscle that's just at the undersurface of the wrist to access the bone. Once we've accessed the bone I would use techniques to align the fracture, to improve those anatomic parameters that I previously mentioned.

Q. Tell me what techniques you're talking about.

A. Well, they'd be generally called direct and indirect fracture manipulation techniques, so I might use tools to directly move fragments. And I would also use

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indirect forces outside of the wrist or traction, longitudinal pulling, squeezing, those types of indirect things to bring those fragments and the alignment together.

Q. So this is a very mechanical process --

A. Quite so.

Q. -- to get those bones lined up?

A. Correct.

Q. And is there -- then once you have them lined up the way you want them, what comes next?

A. We'll either use additional supplementary wires to hold pieces in position temporarily, but essentially we put the -- in this technique I would place the plate and then subsequently position screws in sequence, checking at intervals that the fracture is nicely aligned and the hardware is in a good position to try to hold those fragments in a good anatomic position until the body can heal them back together.

Q. And what do you use to drill the screws?

A. A drill.

Q. Is it an unusual drill, or does it look like something you'd buy at Home Depot or Lowe's or something?

A. It looks very much like that, but being medical it's much more expensive.

Q. All right. So looking at Deposition -- Bechtold

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Deposition 6 -- Exhibits 6, 7 and 8, will you tell us what those are?
A. The exhibit marked 6 is, again, a side view or lateral projection of the wrist, and that shows a plate placed on the underside or volar surface of the wrist. It seems to match her anatomy nicely, where I would like it to be. It also shows restoration of the volar tilt of the wrist, and it shows that the screws are in a good position within the bone and I've restored the anatomy to a close approximation of what a normal anatomy would look like for her.
Q. The word volar, what does that mean?
A. So volar means the underside. It's an anatomic description which would mean the underside of the wrist versus the backside of the hand, for example.
Q. Which would be the dorsal side?
A. The dorsal side.
Q. All right. The -- does Exhibit 6 show the screws?
A. It does.
Q. And the plate?
A. Correct.
Q. And what are they made of?
A. These would be titanium.
Q. And the view that is on Number 6, what view is that?
A. That would be a lateral view.

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Q. And the view that's on 7?
A. AP or front-to-back.
Q. Is this the top or the bottom we're looking at?
A. Well, meaning that -- clarify what you mean.
Q. Well, tell me what we're looking at on Number 7.
A. We're looking at a front-to-back view of the wrist and the end of the radius bone. Because X-rays are a composition of shadows, whether it's an AP or a PA is actually a little bit more difficult to see, meaning if the beam is shot from front-to-back or back-to-front, but it's a superimposition of all the shadows showing that this plate is aligned where I'd like it to be on the bone and there's been restoration of that radial inclination angle and the radial height based on a normal anatomy and her fragments coming back together.
Q. All right. Are we looking, in Number 7, at her hand on the volar aspect?
A. Yes. It could be still looking from the dorsal, but the projection is almost the same. Whether I'm looking from front-to-back or back-to-front, it shows the same alignment parameters that we'd be looking for.
Q. All right.
A. But, yes, as if you're looking kind of at your hand facing your face sort of an image.
Q. Thank you. Number 8, what does that show us?

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A. Well, this is a specialized view that was described in literature where if one flexes the wrist and aligns the X-ray beams, looking at the back of the wrist it helps me to see and ensure that I have not placed the screws beyond the bone, into an area where they would cause trouble for tendons and other soft tissues. This is a good approximation for me to see that my screws are still within the bone.
Q. Good. Thank you. And these are exact replicas, that is, Deposition Exhibits 6, 7 and 8 are exact replicas of the original X-rays that are in your file?
A. They very much appear to be.
MR. NASSER: All right. Can we offer those.
MR. SCHULTE: Sure. No objection.
MR. NASSER: Thanks.
Q. So how did you feel the surgery went?
A. Very well.
Q. And as far as you knew at that time, were you expecting a reasonable result, a return of function and so forth?
A. Yes, with the caveat that I had talked to the patient beforehand that due to the severity of the injury her wrist had developed a stiffness in the wrist and late or subsequent arthritis was actually higher, again, because of the nature of the injury.

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Q. All right. And by the nature you mean the comminuted fracture?
A. Correct. And the fact that it's intra-articular or into the joint space.
Q. All right. So at that time she stayed overnight in the hospital --
A. Correct.
Q. -- for one day, and then was released to do some healing; is that correct?
A. Correct.
Q. And -- but she wasn't done treating for her wrist after the surgery; is that correct?
A. Correct.
Q. What, then -- can you tell us what happened after that?
A. Yes. We had her immobilized in a splint to help protect the tissues and support the wrist and to provide comfort, and then we had her follow up in the office for repeat X-rays and a physical exam.
Q. Was that February 19 and 20 of 2014?
A. Yes, I have encounter date of February 19. Twenty, I'm not quite sure where that number comes from but --
Q. On the second page it said 20 instead of just 19.
A. Oh, this one -- this probably is when the note was done, I'm guessing, on the 20th, revision history.
Q. Okay. So this appointment would have been on the 19th?

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A Yes. I think the 20th -- it looks like I signed my note on the 20th at 1:29 p.m.
Q All right. I'm showing you now what's been marked as Bechtold Exhibit 9 and Bechtold Deposition Exhibit 10.
A Um-hmm.
Q Can you identify those for me?
A Yeah, 9 is an AP or a front-to-back view of the wrist marked right, and 10 is a side view or lateral view of the right wrist.
Q And will you tell us what these show?
A These show, again, the same hardware that I described before with plates and screws. They also show surgical skin staples on the underside of the wrist.
Q Is that those 23 little circles?
A I haven't counted them but most likely, yeah.
Q I did, so -- and they're shown on both sets of X-rays?
A Correct.
Q All right. How is she healing at that point? Can you tell anything at that early stage?
A What I can tell from that is that she's been able to maintain the anatomic alignment that we were able to achieve in surgery. At the two-week visit we don't expect to see the actual bone healing, we're looking to make sure that we've maintained hardware and fracture position.

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Q All right.
A Which looks good.
Q And so what was the plan after that?
A At that time, again referencing my note, I talked about some discussion of whether we would have her get into a fabricated splint versus a cast, and in order to get her motion started we elected to have a removable so-called Orthoplast splint, which is a brand name, to begin some gentle range of motion and allow her to do showering and skin care, and a plan for repeating those X-rays in four weeks.
Q And did she come back in four weeks?
A She did come back, it looks to be dated, on 3-19-14, which is, I'm assuming to be roughly that time.
Q All right. I believe we've established these as exact copies of your own X-rays, and I'm referring to Bechtold Deposition Exhibits 9 and 10.
A Correct.
MR. NASSER: We'd offer those.
MR. SCHULTE: No objection.
Q Going, then, to that appointment of March 19, did you again take X-rays?
A We did.
Q I'm showing you Bechtold Exhibits 11 and 12. Are those exact copies of what's in your file?

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A Yes.
Q And will you identify what 11 shows and then what 12 shows?
A Eleven shows the front-to-back or AP view, and 12 shows a side or lateral view, again, with the plate and screw construct with subsequent removal of those skin staples.
Q Okay. The -- how is she doing at that point?
A Everything appears to be largely unchanged from an anatomic perspective and -- although we can't see bridging healing at all of those small fracture levels, there does appear to be consolidation of the bone across them, which would indicate a nice amount of healing at that stage.
Q And as of 3-19-14, then, given the healing that she had, was there some other treatment that you were considering having her do?
A Yes. By typical recollection and reviewing this note, at that point we become more concerned about stiffness and motion and trying to improve those factors. And then still being somewhat careful of the fracture, but considering it largely healed at that point.
Q All right. So you felt that it was safe to do some other modalities?
A Correct, in terms of therapies, especially.
Q And what kind of therapy did you prescribe for her at

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that point?
A I'll have to look just to be clear because I'm not remembering, but we said here in the note that we're going to proceed with occupational therapy to work on range of motion and strengthening both of the fingers and the wrist.
Q Tell me what the difference is in the therapies that you had available to you.
A So physical therapy versus occupational therapy. The types of treatment given there depend a little bit regionally and on the local provider, but occupational therapy often has a little bit more focus on hand and wrist, although they can cross over between therapies.
Q All right. So this is some therapy involving flexibility and strengthening of the hand?
A Correct.
Q And is that done with the understanding, then, that it's safe to do it at that point given the healing that she had experienced?
A Correct. And if there are concerns we would typically put those parameters into the description for the therapist to work through.
Q All right. So at this point how satisfied are you with her healing, as of this March 19?
A So as of the documentation from Kari Gill, who was doing

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the documentation that day and I reviewed her documentation and planning, we were concerned a bit about her stiffness. She had improved significantly from the two-week visit in terms of her ability to rotate her wrist into the sort of upward position or supination, but she still had aways to go there. One of the main findings was that she was still stiff in her fingers and unable to make a composite fist, or basically to close her fist entirely.

Q How about the bone, the healing of the bone at that point? How satisfied were you that she was on schedule?

A By documentation and even current review, it really looks to be in good shape. The articular or the joint surface has some irregularities, which are certainly expected in some small part because of that fragmentation at the joint surface. But, frankly, I was quite pleased given the severity of her injury.

Q All right. So even though she may have had some osteopenia in the bone, she was healing on time?

A Correct.

Q All right. And she had, then, how many physical therapy -- or occupational therapy sessions? Let me withdraw that question for just a moment.

They were giving her therapeutic exercises and something called fluidotherapy. What is fluidotherapy?

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A Admittedly, that would be in the tool box of the occupational therapist in a term we generically call modalities, and I'm actually not familiar with the exact mechanism of that. But, in general terms, we have them use these for soft tissue manipulation in trying to improve range of motion.

Q All right. The -- she had ten visits, according to the records, between March 26th and April 23rd, ten sessions. Would that square with the understanding as to what you prescribed?

A Yes.

Q All right. And she then saw you again after that, and that's on April 30, 2014; is that correct?

A Correct.

MR. NASSER: Excuse me. Off the record a minute.

(Off the record discussion).

MR. NASSER: We'll offer Deposition Exhibits 11 and 12.

MR. SCHULTE: No objection.

MR. NASSER: Thank you.

Q So how was she, then, after the occupational therapy when you saw her on April 30?

A Having no direct recollection I'll refer to the note, and she states that she wasn't really having much in the

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way of pain. She had what she described as a dull ache on occasion. She had stated she was doing her home exercise, but she did complain of still having trouble making a composite fist, but she did state she was working on that at home. I commented on my physical exam that I was not feeling any crepitation, which would indicate grinding or abnormal motion of the tendons. I mention that she wasn't having any troubles when I'd push on the wrist, or feel anything that would make me feel there was screw penetration. I commented that she was extending the wrist better than 20 degrees, flexing better than 15, which was an improvement. Although she was much improved, she was still unable to completely turn her wrist into an upward direction, so I comment on lacking ten degrees in supination, but she was fully able to turn it downward. Again, I comment on her inability to make a full fist, but she was fully extending all of her fingers. I comment that she was healing well.

Q So is she extending her hand, meaning opening it wide?

A Correct.

Q But not able to make a fist by closing her hand?

A Correct.

Q All right. Anything else?

A Well, I had mentioned to her that she did need to

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continue working on this stretching of her fingers, and I commented to her, and typically demonstrate using the other hand to push the fingers into a flexed position, as well as using her hand actively trying to get that motion to improve. I commented to her that there was still some irregularity of that joint surface and that she may develop arthritis in the future, but I had commented I thought her result was quite good considering the severity of her initial injury. She indicated to me she was quite satisfied. And I did tell her that I'd like her to contact me if she was having any struggles. And I did ask her to pay attention if she noticed any crepitation, which would be that grinding sensation, or a loss of finger motion that would be consistent with a tendon injury, and she indicated that she would do so.

Q To your knowledge she's never reported the tendon injury or crepitation?

A Correct.

Q All right. So any deficits she had are not part of that mechanism? Anything she ended up with, any loss of ability to close her hand, that's not related to a tendon injury?

A In the sense of a rupture of the tendon, which is what I would be looking for, there's no indication of a

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rupture.
Q. All right. Thank you. And at that point was there any follow-up planned with her?
A. Only if she was having ongoing or consistent troubles or concerns.
Q. Okay. Now, you did take X-rays on that visit of 3-28, I believe these are, 3-20 --
MS. CAROLE NASSER: No, those are 4-30.
Q. I'm sorry, 4-30. For some reason -- oh, here we go. Yes, these X-rays, Bechtold Deposition Exhibits 13, 14 and 15, these were the X-rays taken on that 4-30-14 date, correct?
A. Correct.
Q. And how do they -- will you tell me what view 13 is, 14, and then 15?
A. Thirteen is a front-to-back view or AP view. It appears that 14 was an attempt at a side view but the radiology technologist felt that they didn't have it aligned well so they repeated it, likely to 15, which is a side view that's better aligned.
Q. All right. Tell me what these show you.
A. They, again, show the plate and screw construct with really generally maintained alignment of the anatomic parameters, and some irregularity at the joint space

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that's not completely smooth at the location where those fragments entered the joint space.
Q. And the healing, the degree of healing that they show?
A. They do show bridging bone across the fracture fragments so I would quantify that as a healed fracture.
Q. All right. Very good. At this point she was released and was to continue -- she didn't have any planned therapy other than some home exercises, correct?
A. I believe that's true based on that note, yes.
Q. Okay. And these Exhibits 13, 14 and 15 are exact reproductions of your file X-rays?
A. Yes.
MR. NASSER: All right. I'd offer these.
MR. SCHULTE: No objection.
Q. Now, you didn't see her, then, from April 30 to January 9 of 2015, that would be April 30 of '14 to January 9 of '15. Do you know why she returned to see you?
A. By the notation, she mentions that -- I'll just have to scan for a minute here. So she presents stating today that she has never been able to regain full ROM or range of motion of the fingers, and is unable to make a composite fist. Further quoting, she has pain in the fingers when she tries to stretch them down into a fist. She indicated she does not have much for pain in

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the wrist. Her main concern is she is unable to grip anything with the limited finger range of motion.
Q. Is that similar to what you understand she had the previous time she saw you?
A. Yes.
Q. And so she just hasn't been able to make progress that way, to increase that?
A. Correct.
Q. All right. And so -- but she was having pain in her fingers when she was attempting to grasp or close into a fist?
A. She does further indicate to Kari in her documentation that she was having pain over the ring finger, long finger, and index finger, which she did quantify as a one out of ten aching intermittent pain made worse by trying to flex or make a fist.
Q. All right. What did you prescribe for her at that point?
A. We elected to start her on occupational therapy again to work on that range of motion and improve her grip, with a plan for if ongoing continued problems or concerns we would send her to one of our hand and wrist specialists for further treatment and evaluation.
Q. And did she then do seven more sessions of occupational therapy?

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A. Referencing your documentation, I would presume that to be accurate. Correct.
Q. And so she attended those seven sessions like she had attended the previous ten, correct?
A. It appears, yes.
Q. And do you know what -- how she ended up after the occupational therapy? She never actually had another appointment with you after she was done. Did you -- have you received any report, or anything that you know of?
A. Not related to that, to any documentation or memory of mine.
Q. All right. Does that -- have you told us pretty much what you did for her and the treatment and her healing, how much she healed and so forth?
A. Yes.
Q. Is there anything you need to add to that description, any treatment that I haven't touched on or anything?
A. No, I think that covers all the treatment that we had outlined for her.
Q. All right. Thank you. Then what I'd like to do is ask you to give us whatever opinions you formed based on your treatment. So based on your training, experience, expertise, the history provided in Shirley's medical records and the X-rays from CFM, as well as your own

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X-rays and your surgery of her, your subsequent examinations and testing, and the occupational therapy that you ordered and that she performed, have you formed certain opinions based upon reasonable medical certainty?
A. Yes.
Q. Do you have an opinion as to what the cause of Shirley's right wrist fracture of 1-31-14 was?
A. Yes.
Q. Will you state that opinion?
A. A fall onto an outstretched hand.
Q. Was that fall at least, if not more, a substantial factor in causing the right wrist fracture?
A. Yes.
Q. Do you have an opinion as to whether Shirley's right wrist, and specifically any fragility or osteopenia, was asymptomatic or active prior to the fall of 1-31-14?
A. It appears, to the best of my knowledge and her documentation and history, that it was not symptomatic prior.
Q. All right. Was the treatment she's received as set forth in Exhibit 2, that medical bill summary, all reasonable and necessary to treat the right wrist injuries from the fall?
A. Yes.

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Q. Do you have an opinion as to what her permanent condition was as of the last time you saw her?
A. Yes.
Q. Will you tell us about that?
A. I think that the biggest residual problem that she had was this continued stiffness. I think that likely without any further changes in her treatment or therapy and/or a new intervention, she would likely maintain that deficit over the prolonged time. I think the unknown variable would be over the course of years how much she would or would not develop arthritis at the wrist from that injury.
Q. All right. And if you were to prescribe more treatment for her, I know she hasn't come back, but is there any other surgery or any other modality that might make any difference in her functionality?
MR. SCHULTE: Object to the form, calls for speculation. Foundation.
Q. Well, is there -- do you know of any treatment that you could offer her that might make a difference?
MR. SCHULTE: Same objection.
MR. NASSER: Go ahead.
A. In my level of expertise I think that would go beyond my area of specialty and I would refer her to one of our hand and wrist specialists to determine if there is

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something that could be done further.
Q. Do you know of anything?
MR. SCHULTE: Same objection as before.
A. I would probably, at the most aggressive, say that there would have to be an open debridement or a cleaning out of tissues and scar tissue around the tendons, with very aggressive therapies to follow. That would be the most aggressive approach for that.
Q. How certain are you that that would make a difference?
MR. SCHULTE: Same objection, form and foundation.
A. It would be hard for me to speculate outside of that specialty area, having no experience directly with those procedures or their outcomes.
Q. Are the plates and screws, then, permanent for her?
A. They typically are. They are only removed if they are felt to be causing a problem. But most typically they're left in place.
Q. And with those -- with her age and osteopenia of her bones, do you feel it's wise to leave the plates in?
A. Oh, I think it's probably not related to her age or bone density, it's more -- there's more harm than benefit to remove hardware if it's not causing problems.
Q. All right.

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MR. NASSER: And we'll offer Exhibits 16 and 17.
MR. SCHULTE: No objection.
Q. Doctor, are all the opinions that you've given here today based on reasonable medical certainty?
A. Yes.
Q. And are they all more likely than not true?
A. Yes.
MR. NASSER: Thank you.
EXAMINATION BY MR. SCHULTE:
Q. Good afternoon, Doctor. My name is Eric Schulte, and we met briefly before this deposition started today; is that correct?
A. Correct.
Q. I represent Fryn' Pan, which has been sued by Mr. and Mrs. Tammen in this particular case, and I just have a few questions for you, Doctor.
A. Yes.
Q. It shouldn't take that long. I just want to be clear. Mr. Nasser asked you questions about the history that you knew of Miss Tammen. Did you look at any records at all that predated this particular incident that we're talking about?
A. I did not, to any recollection today.
Q. Okay. So as far as her prior history and what's stated

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in the medical records, that would be something that you wouldn't be aware of because that hasn't been given to you?
A Correct.
Q It's been a long time, I think, since you've seen Miss Tammen. Do you have any independent memory of her, or are you relying primarily on what's stated in your written records?
A I am primarily on the written records. I would say I have a general recollection of her and the nature of her being so stiff after the surgery.
Q Have you, by chance, looked at the Center for Family Medicine records? I want to make sure exactly what you've looked at.
A I have not. Certainly not now, and I don't recall having looked at them before.
Q Okay. I don't want to go into that if you haven't seen them, then, Doctor. Mr. Nasser asked you a variety of questions about fragility and osteopenia. Do you recall those questions?
A I do.
Q Based upon your education and training, Doctor, is there any connection, causal connection between diabetes and low bone density, if you're aware?
A I'm trying to recall details. I would say that it's

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probably not one of the main, direct causal relationships, but diabetes has an impact on many systems that could have some impact.
Q On bone density?
A On bone density. But not one of the direct causal concerns.
Q Okay. Let's talk a little bit about the records you visited with Mr. Nasser about, and I'm going to go through just a few. We talked about the surgery, and I believe you told Mr. Nasser you thought that it was a good result, did I hear that correctly?
A Correct.
Q That was your impression after the surgery and that impression continued on during your treatment with her; is that correct?
A Correct.
Q I'm looking at the initial discharge summary, which I can show you, but it's dated, I believe, January 3rd of 2014.
MR. SCHULTE: You can look at it first, Mr. Nasser, if you would like to.
MR. NASSER: January 31st?
MR. SCHULTE: No, I said 3rd.
MR. NASSER: Yes. Go ahead.
Q I believe in your note of that date, Doctor --

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A Is it February 3rd, maybe?
Q Well, I believe it's February 3rd, yes.
A Yeah. I have a copy of that, too.
Q Okay. Looking at your note, I believe it indicates, patient progressed well with therapies and was able to ambulate fully in physical therapy; is that correct?
A Yes. It's documented by Ryan Krempges.
Q And those would be the therapies that you provided immediately after surgery; is that correct?
A Correct.
Q Okay. She was able to achieve adequate pain relief, I believe the note says, with various oral pain medications that you gave her; is that correct?
A Correct.
Q And she was supposed to return in a couple of weeks to see you?
A Yes.
Q Okay. After that, and feel free to look at your notes, but I'm looking at a note which I believe is dated 2-20 of 2014, and I think there was some discussion with Mr. Nasser whether that was February 19th or 20th?
A Correct.
Q When she returned to see you on that day I believe she stated to you that she was doing fairly well; is that correct?

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A Correct.
Q And in the third paragraph of your note, Doctor, I believe you state, on exam she has a normal motor and sensory examination of the hand; is that correct?
A Correct.
Q And just tell the jury and Mr. Nasser and myself, what do you mean by that?
A That would indicate the function of the nerve status, if the nerves are providing innervation for motion or mechanical motor and the sensation of the skin.
Q Okay. So the nerve function appeared to be doing well at that particular time?
A Yeah, it indicates more than -- the range of motion indicates the ability to fire those muscles, I guess, is a good way to describe that.
Q I think you told Mr. Nasser you put her in a splint at that time and you wanted her to come back in about six weeks?
A About four weeks.
Q About four weeks, okay. I'm looking at a note dated March 9th of 2014, Doctor, which apparently was perhaps written by Ashley Merkel; is that correct?
A Yeah, that would be probably the person who roomed her at that time.
Q She would be so somebody that works with you, then?

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A At that time, yes.
Q She's listed as a CMA; is that correct?
A Correct.
Q And what does that mean?
A I believe it's a certified medical assistant.
Q Okay.
A I'm not sure.
Q And feel free to look at the note, but at that time I believe, on March 19th of 2014, Miss Tammen was rating her pain at one out of ten; is that correct?
A I don't have that one in my notes so I'll refer to yours, if that's okay.
Q Please feel free to do so.
A So this is the note where Ashley states, patient rates her pain one out of ten, quantified as sore.
Q And I just want to make sure the jury understands one out of ten, but as I understand it, there's a scale of zero being no pain and ten being --
A The worst pain imaginable.
Q And on this particular day, on March 19th of 2014, Miss Tammen listed the pain as one out of ten?
A Correct. And Kari Gill, in her note, rates that at the same level as given to her by the patient, presumably.
Q On that same day?
A Correct.

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Q Okay. And I believe you told Mr. Nasser that you decided that occupational therapy would be something that she should have explored; is that correct?
A Correct.
Q And have you looked at any of the occupational therapy notes at all, Doctor, for this interview?
A I have not.
Q Okay. I'm showing you a note, which I'll represent lists the goals given to her in occupational therapy, which is dated March 26th of 2014.
MR. SCHULTE: Mr. Nasser, do you want to review that first?
Q Feel free to look at that record, but does that appear to be a record that lists what the goals would be for occupational therapy?
A In general terms or specific terms?
Q Specifically to her. However you would describe it, Doctor, you're the witness.
A Yeah, this appears to be a fairly standard set of goals given to any general patient, to the best of my knowledge. And it seems to be more specific to her, perhaps, in the long-term goal, over a longer term with this grip strength compared to her opposite hand.
Q And was the goal -- and just tell me if I'm wrong, but on the bottom of that sheet does it list a goal of 50

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percent of an increase in grip strength in the right hand?
A Correct, as compared to her left hand for functional completion of ADLs.
Q And to be clear, was that your goal that you told the occupational therapist, or was that the occupational therapist's goal?
A That would be a independent occupational therapist's goal in this description.
Q Okay. Thank you, Doctor. And I believe the plan was to see -- for her to be seen by the occupational therapist two to three times a week for four to six weeks; is that correct?
A It does say that, yes.
Q Was that your recommendation to her, Doctor?
A Yeah, we typically do write the prescription. And, again, not from memory, but a typical is that time interval and it seems consistent with what we write.
Q Okay. Now, I'm not going to go through every occupational therapy record, and I think you said before you haven't seen them; is that correct?
A Correct.
Q But is it fair to say that she did improve in occupational therapy?
A I believe that even on my documentation over the course

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of time, especially in her wrist rotation, she had a notable improvement. By my memory and documentation it's hard to state an exact quantification of how much her flexion improved but --
Q Let me show you a couple things that were given to me in the records. I'm showing you an occupational therapy note with very small writing dated April 7th of 2014, Doctor.
A Okay.
Q And I believe I've highlighted the record at the bottom there. Please feel free to look at that.
A Yeah, this highlighted area says, patient reports that her fingers are stiff -- I'm sorry, are still stiff but improving.
Q So at least at that time there was stiffness, but there was some improvement noted by the occupational therapist?
A Correct.
Q Jumping ahead to April 21st of 2014. I want to ask you about that occupational therapy record. Please feel free to look at that, Doctor, and I've highlighted some language at the bottom.
A This highlighted portion says, patient reports that she is making slow gains.
Q Then if you go to the next page of that record there was

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something I couldn't understand.
A I can't see that one.
Q Take all the time you need to look at this, but I believe this is also dated April 21st of 2014, and I was going to ask you about what's written in the highlighted area.
MR. NASSER: What's the date on that, again?
MR. SCHULTE: April 21, 2014, I believe.
A Correct. So this indicates the passive range of motion, meaning the therapist pushing on her, of composite flexion to extension, active tendon gliding, but she doesn't quantify how much at that. Blocking to FDS and FDP, or the tendons, to increase digit range of motion, describing again what they were doing. This indicates, the highlighted portion, composite stretching of all digits hook to full fist. To be truthful, "hook to" is not something I'm familiar with, but trying to get into a full fist. This comments that she was able to stretch to a full fist today, so at that point in time she was able to make a full fist with stretching. And then she describes finishing with gripping with a calibrated gripper that would tell how much she's able to squeeze. She doesn't say how much, but she mentions 15

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repetitions over three sets.
Q Okay. Does that record demonstrate, in your opinion, an improvement in occupational therapy?
A It does, yeah.
Q Thank you. And we talked about her being discharged after a certain number of sessions, and I want to visit with you about that now. But she was discharged from occupational therapy; is that correct?
A Yes.
Q And I believe this should be in your notes, but this is the USD Sanford Medical Center record dated April 23rd of 2014. I wanted to ask you about that.
MR. SCHULTE: Do you want to look at it first, Mr. Nasser?
Q It's probably easier just to look at mine. If you'll --
A And I don't have this within my copies so I'll look at yours.
Q Okay. I'm showing you a record, I believe, dated April 23rd of 2014; is that correct?
A Correct.
Q And take all the time you need to look at that, Doctor, but does that record indicate that she, Miss Tammen, reports that she would like to continue on her own with home therapy?
A Yes, it does say in a highlighted portion that she

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requests to continue on her own with a home program of strengthening and range of motion.
Q And that's not unusual, is it, Doctor?
A It is not.
Q Would you have given her recommendations, then, as to how frequently to do that home therapy?
A At the time when I -- if I were to see her, I'm not very specific about exact times for most injuries, some I am, I would have had to decide that based on her ultimate goals, her level of satisfaction and expectations of improvement at the time interval, generically asking.
Q Do you know, as you sit here today, how frequently you would have told her to do this home therapy that you've described?
MR. NASSER: I'll have to object as to foundation, and calls for speculation.
MR. SCHULTE: I'll go back and I'll rephrase the question to hopefully cure Mr. Nasser's concern.
Q You did instruct Mrs. Tammen to do some type of home therapy when she left occupational therapy; is that correct?
A Correct.
Q And as you sit here now, do you have any memory as to how frequently you told her to do that particular

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therapy?
A I don't have a direct memory, but I can say that it is my usual protocol to tell them to do it as frequently as they can so that they can get continue to make progress.
Q Is your usual protocol to say you should to it every day, or once a week, or occasionally?
A It would be, actually, more just several times a day, especially early on, until goals are met.
Q Okay. Looking at this record further, Doctor, and, again, feel free to read all of it, but I believe the conclusion by the therapist was her grip strength has improved at her right hand, however, it continues to be approximately 50 percent of her nondominant left hand. Did I read that correctly?
A Yes.
Q And I do have another note, which may refresh your recollection, that I believe that you authored, Doctor, dated May 1st of 2014.
MR. SCHULTE: Which I'd like to show you, Mr. Nasser. Would you like to see it first?
MR. NASSER: Yes.
A I would clarify, my documentation, at least, is 4-30-14. That other date is probably when I signed the note.
Q Feel free to look at that record, Doctor. The one I'm

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looking at, I think, confirms what you said before, that you told her that she certainly needs to continue working on passive stretching of her fingers, using her other hand, as well as active range of motion?
A. Correct.
Q. And I think you also advised that, ultimately I think her result is quite good considering the severity of her initial injury?
A. Correct.
Q. And it states that she is satisfied as well?
A. Yes.
Q. So this -- given with what you were treating, this was a good result still at that particular time; is that correct?
A. Yes.
Q. And you still believe it was a good result today?
A. Yes.
Q. We talked earlier that after she was initially discharged with physical therapy she came back to see you later on; is that correct?
A. Yes.
Q. And I believe that was in 2015; is that correct?
A. Yes.
Q. And what is the date that you have, to see if it corresponds with my date?

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A. Encounter date, 1-19-15.
Q. Okay. And she would have seen, as I understand it, perhaps Kari Gill?
A. Correct.
Q. And is Kari Gill your physician's assistant?
A. She was directly with me at that time. She still works in the office, but not as directly with me.
Q. Okay. And I just want to go through a few things. Feel free to look at that note, Doctor. She was told by Kari Gill that -- well, let me go back.
Does it state in this record the patient was last seen in our clinic on April 30, 2014, where it was discussed that she needed to continue to work on passive stretching of her fingers using her other hand, as well as active range of motion?
A. Correct.
Q. And if you go to the next page, I believe she lists her pain at that particular time again as one out of ten; is that correct?
A. If we're in the same paragraph I have it, yes, listed again as one out of ten.
Q. Right. And I believe that's on the next page of the record. Or at least my record, it's the next page. In yours it's all in one paragraph.
A. Yeah.

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Q. Okay. And it's intermittent pain; is that correct?
A. Yes, she describes it as characteristic aching intermittent pain that does not radiate.
Q. And just so that's clear to the jury, intermittent pain means it comes and goes; is that correct?
A. Correct.
Q. And when something does not radiate, what does that mean, Doctor?
A. It doesn't go to another body location, it stays localized.
Q. Okay. And I believe the last sentence of that paragraph states, she states that she occasionally worked on the stretching exercises after her last visit with us?
A. Correct.
Q. Did I read that correctly?
A. Yes.
Q. As you sit here now, do you have any knowledge about how frequently she did those stretching exercises after she initially left occupational therapy?
A. I do not, other than this -- what appears to be an inference on Kari in her discussion, that it was occasional.
Q. And if I understood your testimony to Mr. Nasser, she was put in occupational therapy again at that time and you haven't seen her at all since?

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A. Correct.
Q. Okay.
A. Or at least not to my knowledge or regarding that. I don't have any recollection of that.
MR. SCHULTE: Dr. Bechtold, thank you very much. I have no further questions for you, sir.
THE WITNESS: Thank you.
MR. NASSER: I've got just a few follow-ups.
EXAMINATION BY MR. NASSER:
Q. Mr. Schulte used the word good result in connection with the surgery and you agreed with that. That's kind of a vague term.
A. Um-hmm.
Q. What does that mean to you?
A. It's a great comment and, in fact, without sounding flippant sometimes people joke in the hand world, a good result-bad result can be a matter of degrees. Good result (indicating), bad result. (Indicating). I think that when I quantify a good result it would have a lot to do with the patient's feeling of how they're doing and their general functional status relative to the severity of the injury. A good result from an X-ray finding was that the bone appeared to heal in good

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anatomic parameters without any major complication, like infection, early onset of arthritis, hardware failure, and a return to functional daily activity, or activities of daily living, as we would call it. And so as she quantified her result as good and a high level of satisfaction, in my parameters that I looked for mechanically speaking I would say that that is good. I think I noted in several of those areas, if I had some concern that I documented and continued to talk with her, I'd say that the range of motion was less than might be achieved, but she was satisfied with that and so I was, therefore, as well.

Q. All right. So when the therapist, at the end of the second round of therapy on 4-23-14, says only 50 percent of the ability, strength, and so forth in her right hand compared to her left, that means there are deficits, correct?

A. There would be, yes.

Q. And those are pretty significant deficits in her right hand remaining?

A. I think the best way to answer that is, as they documented in their goals, that a 50 percent grip strength compared to the others would equate to reasonable activities of daily living, which I read in that chart, so I would defer to their expertise of

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quantification because it's something I don't quantify in my office directly.

Q. But you would agree that there are remaining deficits as of that time?

A. Based on this documentation, yes.

Q. And to say that it's a good result doesn't mean that it's a perfect result with no deficits; is that fair?

A. A perfect non -- I guess the best way to say it is a perfect result would be no deficit, no compromise, no symptoms.

Q. Right. Okay. And with a fracture as bad as this one you weren't even expecting that, were you, necessarily?

A. I don't think I could say that with a degree of certainty. I would say that my expectations are always that we have the best level of outcome based on the patient's involvement in therapies, the biology of healing, and the mechanics of the construct. So the truth be told, my expectation and hope is that every patient have a perfect outcome.

Q. And that wouldn't be realistic, fair?

A. Yeah, I think it would be a bigger stretch with the severity of injury that she had to have a so-called perfect outcome.

Q. All right. So when we say she -- we go through various entries in her medical records, as she progresses

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through occupational therapy and they say she's doing fairly well, would that mean fairly well as of that time?

A. I think that's fair to assume, yeah.

Q. And that that's a work in progress, in other words, her healing is a work in progress?

A. Correct.

Q. All right. Now, pain has not really been the big issue with her, has it?

A. It definitely does not appear to be.

Q. All right. And if Shirley were here she would probably tell you it's not the pain that bothers me.

A. Um-hmm.

Q. Her claim is more the loss of the function in her hand. Is that your understanding of the deficit she still has?

A. By her descriptions as documented, it certainly seems to be.

Q. On that 4-21-14 entry where it says she was able to stretch to a full fist today, that's in therapy, correct?

A. It does seem to be that way, yes.

Q. And somebody, either Shirley with her left hand or the therapist, is helping her go through a range of motion --

MR. SCHULTE: Objection.

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Foundation.

Q. -- is that fair?

MR. SCHULTE: Objection.

Foundation.

A. Yeah, based on even that documentation I couldn't say that because they have separated out parts that were passive and parts that were active. But at that sentence they didn't document whether it was active, self-directed, or passive, so I couldn't say.

Q. So there is no indication in the records that she was able to do that by herself, make the fist by herself?

A. Yeah, without a point of clarification from that therapist I couldn't say. It could represent that by that sentence, but it also could not.

Q. It was just ambiguous?

A. Yeah, in that use, yes.

Q. All right. And as of 1-9-15 she had not lost the progress she'd made from physical therapy -- or occupational therapy, rather; is that correct?

A. Yeah, I'd have to look directly at these comparisons, but I do see a notation of her wrist extension and flexion which seems fairly consistent with my recollection of mind. She seems to be more concerned not with wrist range of motion anyway, it's the finger flexion. Kari Gill documents that she's, by her

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description, one inch short of making a full fist, so almost there but not quite.
Q. And that's pretty much the way she was back in April when you last saw her, April of '14?
A. Yeah, I admit that this documentation is much more thorough than the previous, so based on an assumption, it appears to be.
Q. All right. Now, it wasn't as though she wasn't doing home exercises, is that --
A. I think that question -- and knowing myself and how I write and some of that vague recollection that I have of the patient, I did get the sense that her diligence may have been less than what I would consider ideal in terms of how frequently and often she did it, and partly corroborated by the occupational therapist offering additional work and her declining that opportunity, as well as the fact that ultimately she was instructed to come back and see a hand specialist if she did not make progress, which she also declined to do. So my recollection of her by the notes in here was that she was satisfied with how things went, and our feeling was that she could have done better had she pursued further with either diligence or a specialty follow-up.
Q. All right. And -- but she was -- your note of 4-23 did not specify how often she was to do her home exercises?

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A. The note does not specify that, no.
Q. All right. And that's not something you would typically get into with her?
A. I would not quantify it by numbers, but general trends. As an example, even now as my patients -- when I do a knee replacement, for example, I say frequently, as many times as often during each given day, so that you're making progress. And that's been a trend for me through all of my practice. I'm not as big of a fan of quantifying, but having a general understanding that it needs to be frequent, it needs to be meaningful.
Q. The only way we're going to know how often she did it, though, is to talk to her?
A. Correct.
Q. With an injury like this are you kind of inferring that she is condemned, if she wants to be perfect, to having to do these exercises multiple times per day, whether or not she was ever told that, but in order to achieve some optimum result was she going to have to do home exercises with her hands constantly, in other words, multiple times per day for the rest of her life?
A. No.
Q. Tell me what you envision.
A. Yeah, the early phase of care is the most critical part of that. At some point the body develops scar tissue,

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adhesions, connections between tissues that really aren't insurmountable just by motion and exercises, that's where a surgical intervention would be required. So the key part of diligence in early motion, whether it be a knee, a wrist, or whatever postsurgical, is in the early recovery phase.
Q. Okay. And by early recovery what are you talking about?
A. Well, certainly in the first several months, anyway, depending on injury, etcetera. In her case the first six to 12 weeks is probably the most critical.
Q. All right. After that it's not going to affect the result as much?
A. The likelihood of improvement becomes less as time goes by.
Q. All right. So if she was doing her exercises fairly diligently from the time that she was able to start doing occupational therapy, for the next six to 12 weeks, that would be the most important?
A. Correct.
Q. All right. Is there any indication in the record that she didn't do that? In other words, we know that she was doing them occasionally, whatever that means, as of the time she saw you in January?
A. Um-hmm.
Q. Is there any indication in your record that she didn't

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do them diligently, as she set out to do right after the occupational therapy in round one?
A. For that question I think I'll probably refer to one of my comments just so I know exactly what I said on there but -- there's a part I'm thinking about but -- so I would reference on the April 30th notation, which is my addendum to the Kari Gill note, the sentence where I say, told her that she certainly needs to continue working on passive stretching of her fingers using her other hand, as well as active range of motion. Some of this is memory speculation or otherwise, but I will say that my usual -- if I document that, it indicates that there needs to be some improvement in how the patient is doing her work, and so my demonstrating that to her and showing her more, indicated some concern about how she was doing it, whether number of times or effectiveness, which I couldn't say by this note, but I did feel that she needed some improvement in that. So that's about as clear as I can be about that, other than I was trying to get her to do a little bit better with that at home.
Q. As of April 30, though, she had not been on home exercises.
A. We had her start, actually -- from the two-week postoperative visit we had indicated having her get out of her splint more and do home exercises, so she was at

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that time.
Q. Okay. So she was doing them and she was also in occupational therapy up to that note of April 30?
A. And I'll have to clarify, too, I don't remember the date that the occupational formally started.
Q. That was, I believe, the 23rd. Let me give that to you.
A. And that becomes important because I do it differently and I can't say that I recall.
Q. You're not -- you're just assuming some statements from your notes?
A. Yeah.
Q. Occupational therapy started 3-26 of '14, and the first round ended on April 23rd of '14 --
A. Yeah.
Q. -- after ten visits of occupational therapy.
A. Correct. And it does clarify that we had not formally started her on the occupational therapy between the two-week and four-week visit, that was where we had instructed her to work on it on her own with daily range of motion.
Q. Okay. And that was -- that would have began on April 30, that's when you saw her?
A. Well, we saw -- the six-week visit was the 3-19 visit.
Q. Right.

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A. And that's when we had intended for her to start physical therapy. That's when we ordered -- or more specifically, occupational therapy, so we ordered her to start that on March 19th.
Q. Right. And she began on 3-26 --
A. Yeah.
Q. -- and then continued through the end of April.
A. Yup. That seems to be correct. Yup.
Q. Okay. And so you wouldn't have expected her to have done home exercises until done with occupational therapy, then?
A. No, I would clarify that we did want her doing home exercises between weeks two and four. Two and six.
Q. Oh. And was that contained in the notes?
A. Yes.
Q. All right.
A. So on the two-week visit or 19 days from surgery, on the note dated 2-19, we wanted her to treat the Orthoplast splint similar to a cast except for range of motion daily, so we did instruct her to begin motion on a daily basis. And although not quantified in this note, we would typically give her instructions about what that means. It's not the best documentation of that, but that's what we would typically do.
Q. And is there any indication she didn't do that, any note

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that says she wasn't doing it, or anything like that?
A. I'll just briefly review the next one because that's where we would comment on that or not so -- she indicates that she had been wearing the splint at all times except when showering and doing gentle range of motion a few times a day. So she states that she was, in fact, doing those exercises on a daily basis.
Q. So as far as we know, then, she was completely compliant at least up until 4-30 of 2014, correct?
A. I can say with certainty that she says that she was doing it daily. I couldn't comment onto the effectiveness or frequency, but according to our general understanding she was trying. I think that's a fair statement.
Q. All right. And then after that we don't know -- from your notes we don't know how long she was -- she remained doing it as she had been?
A. Correct.
Q. All right. And it very well may be that she did do it for quite a while, or perhaps she didn't, but she would have to tell us that?
A. Yeah. I think the only comment that we can say was that she commented it was occasionally, but we don't know what that means based on this documentation.
Q. Right. And that was as of January 9 of '15 she was

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apparently doing it occasionally?
A. I believe so, yup.
MR. NASSER: All right. I think that's all I have.
Anything else?
MR. SCHULTE: Nothing further.
MR. NASSER: All right. Doctor, thank you very much. You can either read the deposition or you can waive the reading and signing.
THE WITNESS: Off the record. I'd like to read it directly from this. (Indicating). I will waive the right to read the deposition.
(The originals of Bechtold Deposition Exhibits 3 through 17 were maintained by Mr. Nasser).

STATE OF SOUTH DAKOTA)
:SS CERTIFICATE
COUNTY OF MINNEHAHA)

I, Wayne K. Swenson, Court Reporter and Notary Public within and for the State of South Dakota:

DO HEREBY CERTIFY that the witness was first duly sworn by me to testify to the truth, the whole truth, and nothing but the truth relative to the matter under consideration and that the foregoing pages 1 - 72, inclusive, are a true and correct transcript of my stenotype notes made during the time of the taking of the deposition of this witness.

I FURTHER CERTIFY that I am not an attorney for, nor related to the parties to this action, and that I am in no way interested in the outcome of this action.

In testimony whereof, I have hereto set my hand and official seal this _____ day of April, 2018.

Wayne K. Swenson, Notary Public

(NOTE: The original transcript was delivered to Mr. Nasser).

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28664

SHIRLEY TAMMEN,
PLAINTIFF / APPELLANT,

v.

K&K MANAGEMENT SERVICES, INC.
/ FRY'N PAN RESTAURANT
DEFENDANT / APPELLEE.

APPEAL FROM THE JURY VERDICT FOR THE DEFENDANT,
CIRCUIT COURT - SECOND JUDICIAL CIRCUIT,
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE RODNEY J. STEELE
CIRCUIT COURT JUDGE, RETIRED, SITTING BY DESIGNATION,
CIRCUIT COURT JUDGE PRESIDING

REPLY BRIEF OF APPELLANT

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PLAINTIFF'S NOTICE OF APPEAL FILED JULY 11, 2018

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JURISDICTIONAL STATEMENT

Appellant incorporates by reference the *Jurisdictional Statement* contained in *Appellant's Brief* at pp. iv.

STATEMENT OF THE ISSUES

I. Did the Trial Court give "Full and Complete" Instructions on the Applicable Law?

The trial court held in the affirmative.

Kreager v. Blomstrom Oil Co., 379 N.W.2d 307, 309-10 (SD 1985)
Miller v. Baken Park, Inc., 84 S.D. 624, 175 N.W.2d 605 (1970)
Walter v. Fuks, 2012 S.D. 62, ¶16, 820 N.W.2d 761, 766.

II. Was the failure to give Plaintiff's Proposed Instruction No. 25 (the non-delegability of duty instruction) prejudicial error?

The trial court held in the negative.

Miller v Baken Park, Inc., 175 N.W.2d at 609.

III. Was the refusal of the Trial Court to give Plaintiff's Proposed Instruction No. 16 (Definition of a "Reasonable Person") prejudicial error?

The trial court held in the negative.

Nugent v. Quam, 152 N.W.2d 371, 377 (S.D. 1967).

IV. In the event of Remand, was there evidence to support instructing the jury on Contributory Negligence?

The trial court held in the affirmative.

Cowan v. Dean, 137 N.W.2d 337, 342 (S.D. 1965)
Miller v Baken Park, Inc., 175 N.W.2d at 609

V. In the event of Remand, did the trial court err in refusing to submit Plaintiff's Proposed Instructions Nos. 31 & 32 (*Shippen v. Parrott*)?

The trial court held in the negative.

Shippen v. Parrott, 1996 S.D. 105, ¶44, 553 N.W.2d 503, 513, footnote 3.

PRELIMINARY STATEMENT

The Minnehaha County Clerk of Court's Settled Record assembled in this case will be identified as "SR-__." In this Brief, the following references will be used:

(1)	Circuit Court Judge Rodney J. Steele	Court; Trial Court; Judge
(2)	Plaintiff/Appellant Shirley Tammen	Plaintiff; Appellant; Shirley; Tammen; Shirley Tammen
(3)	Defendant/Appellee K&K Management Services, Inc. / Fry'n Pan Restaurant	Defendant, Appellee, Restaurant; Fry'n Pan
(4)	*Plaintiff's Pretrial Brief on Jury Instructions*, dated May 25, 2018 [SR-81]	*Plaintiff's Pretrial Brief* [SR-81]
(5)	Sealed Transcript containing excerpts of Jury Selection, Selection of Alternate Juror, and Polling of the Jury (pages 1-106), Maxine Risty, Court Reporter [SR-1007]	[SR-1007, S-Tr, p.___]
(6)	Jury Trial Transcript, Volume 1 of 3 (pages 1-73), Maxine Risty, Court Reporter [SR-1113]	[SR-1194, JT-Tr-1, p.___]
(7)	Jury Trial Transcript, Volume 2 of 3 (pages 74-257), Maxine Risty, Court Reporter [SR-1194]	[JT-Tr-2, p.___]
(8)	Jury Trial Transcript, Volume 3 of 3 (pages 258-295), Maxine Risty, Court Reporter [SR-1395]	[SR-1395, JT-Tr-3, p.___]
(9)	Robert VanBeek Deposition taken June 6, 2018 [SR-927]	[SR-927, VanBeek Dep. p.___]
(10)	South Dakota Pattern Jury Instructions	SDPJIs; Patterns
(11)	Deposition of C. Dustin Bechtold, MD	[SR-1488, Bechtold Dep. p. ____]

STATEMENT OF THE CASE

Plaintiff relies upon, and incorporates herein by reference, the Statement of the Case previously set forth in *Brief of Appellant* at page 2.

STATEMENT OF FACTS[1]

Plaintiff relies upon, and incorporates herein by reference, the Statement of Facts previously set forth in Brief of Appellant at pages 2-6. Plaintiff does take issue with various misstatements of fact by Defendant in its *Appellee's Brief*, and will comment on said misstatements in the arguments below.

ARGUMENTS AND AUTHORITIES

ARGUMENT I

THE PLAINTIFF'S PROPOSED INSTRUCTIONS WERE NOT MERELY "AMPLIFICATIONS" OF AN ALREADY "FULL AND COMPLETE STATEMENT OF THE LAW"

Restaurant contends:

> At best, Shirley's proposed instructions would have merely amplified the instructions given by the Circuit Court that substantially covered the principles embodied in her proposed instructions.

Brief of Appellee, p. xii. Restaurant's contention is apparently that only a basic definition of negligence and a basic instruction that reasonable care is required, suffices in every case because any specificity beyond the broad basic instructions will be a "mere amplification" thereof. Under Appellee's overly-expansive use of the term "amplification" the jury would never be entitled to know of, or apply, any specific duty

[1] In this Brief, all references to JT-Tr-2, pp.74-257, can be found at SR-1194.

imposed by the law on the Defendant. The word “amplify” in the context of the instant case means either:

> 1: to expand something, (such as a statement) by the use of detail or illustration or by closer analysis; or
>
> 2 a: to make larger or greater (as in amount, importance, or intensity): increase; b: to increase the strength or amount of, *especially:* to make louder.

Merriam–Webster Online Dictionary, https://www.merriam-webster.com/dictionary/amplify?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited December 12, 2018).

In other words, “amplification” does not involve a substantive change in the thing amplified. It does not involve adding new or different substance to a concept (e.g., a jury instruction). It might “clarify" by setting forth greater detail about the thing being amplified, but amplification does not add something new and different which is not contained within the thing being amplified.

Not included within “amplify” is the kind of "change" “metamorphosis” and “evolution” that Plaintiff’s proposed and refused instructions would have made to the instructions given by the trial court. The Plaintiff’s proposed instructions did not "merely amplify" instructions already given to the jury, but rather added new substance to them that was very important - very material - and which was not already contained within what the court gave the jury. The Plaintiff’s proposed instructions contained the Plaintiff’s message about what the law specifically required a Restaurant to do whereas the court’s instructions did not. The proposed instruction conveyed duties that were not in any way or degree contained within the court’s instructions. We must recall:

> Refusal to give a requested instruction setting forth applicable law is not only error, but prejudicial error. *Miller v. Baken Park, Inc.,*

> 84 S.D. 624, 175 N.W.2d 605 (1970); *Tufty v. Sioux Transit Co.*, 69 S.D. 368, 10 N.W.2d 767 (1943); *Kerr v. Staufer*, 52 S.D. 223, 217 N.W. 211 (1927). It is not error, however, to refuse to amplify instructions given which substantially cover the principle embodied in the requested instruction. *Egan v. Sheffer*, *supra*; *Jorgenson v. Dronebarger*, 82 S.D. 213, 143 N.W.2d 869 (1966); *Peters v. Hoisington*, 72 S.D. 542, 37 N.W.2d 410 (1949). Instructions are adequate when, considered as a whole, they give a full and correct statement of the applicable law. *Mueller v. Mueller*, 88 S.D. 446, 221 N.W.2d 39 (1974); *Dwyer v. Christensen*, 77 S.D. 381, 92 N.W.2d 199 (1958).

(Underlining supplied). *Jahnig v. Coisman*, 283 N.W.2d 557, 560 (S.D. 1979); and

> However, no court has discretion to give incorrect, misleading, conflicting, or confusing instructions...

Papke v. Harbert, 2007 S.D. 87, ¶13, 738 N.W.2d 510, 515.

> Trial courts have broad discretion in instructing a jury, but their instructions must provide a full and correct statement of the law. *Papke v. Harbert*, 2007 S.D. 87, ¶13, 738 N.W.2d 510, 515 (citations omitted).

(Underlining supplied). *Walter v. Fuks*, 2012 S.D. 62, ¶16, 820 N.W.2d 761, 766.

We know that the trial court does not have the discretion to give less than a "full and correct statement of the law". *Id.* We also know the trial court can refuse proposed "amplifications" of the court's instructions if and when its instructions are already "a full and complete statement" of the applicable law, but not otherwise. *Id.* In the instant case, the trial court instructed the jury:

> The law does not say how a reasonable person would act under facts similar to those shown by the evidence. That is for you to decide.

(Instruction No. 11). Since all the instructions on specific duties (e.g., inspect, discover, warn or remediate, non-delegable, etc.) were refused by the trial court, the jury was left to measure the Restaurant's conduct subjectively and without any clear picture of what was

required by the law, this even though Plaintiff's proposed instructions contained all of the duties and guidance the jury needed to know. Since the burden of proof was on the Plaintiff, the jury had no choice but to conclude the Plaintiff had not proven its case. There would very likely have been a different outcome if the jury had been told what the law required of the Restaurant (and which Restaurant had already admitted it did not do). Instead, Restaurant was able to hide behind: "We did a good job" (TR 116, 120, 121, 122, 126) even though admitting that (aside from a cursory brief inspection), it did not anticipate the harm it created from its operations, inspect and discover the black ice (which it admitted it is not denying was there - Tr. 206), warn its customers of the danger that it either found or is known to form there, remediate the danger, or make certain per its non-delegable duty that its agent (First Rate Excavate) did so.

The law is extremely detailed and clear as to what was objectively required of the Restaurant in this situation. These requirements were concealed from the jury and should have been instructed on. *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶31, 780 N.W.2d 497, 501-02, 507, (Justices Zinter and Konenkamp concurring).

The jury's verdict tells us there was sufficient evidence to find against the Plaintiff if the law is broad and vague (as given by the trial court), but the verdict does not in any way tell us that there was enough evidence to rule against the Plaintiff if a "full and correct statement of the law" had been given. [See, Plaintiff's Proposed Instructions No. 15 and 18 (SR-954-55 and APP-39-40), 19 (SR-956 and APP-41), and 22 (SR-957 and APP-42).

Respectfully, the court erred in failing to give a full and complete statement of the law to the jury. The error was definitely harmful to and affected substantial rights of the

Plaintiff. Additionally, correcting the error probably would in all probability have had some effect on the verdict and produced a different result.

> Because Fuks is challenging an instruction, he bears the burden of proving that the instruction was not only erroneous, but also prejudicial. See *id*. (citing *First Premier Bank v. Kolcraft Enter., Inc.*, 2004 S.D. 92, ¶40, 686 N.W.2d 430, 448). To be prejudicial, the erroneous instruction must have in all probability produced some effect upon the verdict and be harmful to the substantial rights of a party. *Id.*

Walter v. Fuks, 2012 S.D. 62, ¶16, 820 N.W.2d 761, 766.

Finally, despite the rule cited by Restaurant that the Plaintiff, *when challenging an erroneous instruction* bears the burden of proving that failure to give a correct instruction prejudiced the Plaintiff, Plaintiff submits that said rule does not apply in the same manner where the court's instructions fail to contain a "full and complete statement of the law" in the first instance. Rather in such a case:

> Refusal to give a requested instruction setting forth law applicable thereto is not only error but prejudicial error. *Tufty v. Sioux Transit Co.*, 69 S.D. 368, 10 N.W.2d 767; *Kerr v. Staufer*, 52 S.D. 223, 217 N.W. 211. This requires reversal of the judgments as to Elaine Miller.

Miller v Baken Park, Inc., 175 N.W.2d at 609; See also, *Wolf v. Graber*, 303 N. W.2d 364, 366 (SD 1981), *Jahnig v. Coisman*, 283 N.W.2d at 560 (S.D.1979).

> The rule is that where the Trial Court has failed to give a full and complete statement of the law the Supreme Court reviews the jury instructions as a whole and de novo and prejudice is found where the outcome or substantial rights were affected by the failure (i.e., the instruction was "on a legal question of such importance").

Miller v Baken Park, Inc., 175 N.W.2d at 609. Another decision said it most succinctly:

> When a proposed theory is supported by competent evidence, the trial court must instruct the jury on the applicable law, and <u>failure to so instruct constitutes prejudicial error.</u> *Rosenberg v. Mosher*, 331 N.W.2d 79 (S.D.1983); *Atyeo v. Paulsen*, 319 N.W.2d 164 (S.D.1982); *Miller v.*

Baken Park, Inc., 84 S.D. 624, 175 N.W.2d 605 (1970). But as we stated in *Jahnig v. Coisman*,283 N.W.2d 557, 560 (S.D.1979):

> It is not error, however, to refuse to amplify instructions given which substantially cover the principle embodied in the requested instruction. *Egan v. Sheffer,* [86 S.D. 684, 201 N.W.2d 174 (1972)]; *Jorgenson v. Dronebarger,* 82 S.D. 213, 143 N.W.2d 869 (1966); *Peters v. Hoisington,* 72 S.D. 542, 37 N.W.2d 410 (1949). Instructions are adequate when, considered as a whole, they give a full and correct statement of the applicable law. *Mueller v. Mueller,* 88 S.D. 446, 221 N.W.2d 39 (1974); *Dwyer v. Christensen,* 77 S.D. 381, 92 N.W.2d 199 (1958).

(underlining supplied) *Kreager v. Blomstrom Oil Co*., 379 N.W.2d 307, 309 (SD 1985).

ARGUMENT II
FAILURE TO GIVE PLAINTIFF'S PROPOSED INSTRUCTION NO. 25 (THE NON-DELEGABILITY OF DUTY INSTRUCTION) WAS PREJUDICIAL ERROR

The Appellee at pp xxii-iii of *Appellee's Brief* states:

Shirley's Proposed Instruction No. 25 would have told the jury:

> A business which hires an independent contractor to exercise the reasonable care the business is required to exercise does not by hiring such independent contract delegate or transfer the business' obligations to its invitees to maintain a safe premises as described herein. The business' duty to its invitees remains with the business and is nondelegable.

Appellant App.- 43. Notably, the Fryn' Pan never argued that it delegated or transferred its responsibility to maintain its property in a reasonably safe manner to First Rate Excavate (or to anyone, for that matter). In addition, the Circuit Court's Instruction No. 18, which defined legal cause, instructed the jury:

> There may be more than one legal cause of an injury. If you find that the defendant was negligent and that the defendant's negligence was a legal cause of the plaintiff's injury, *it is not a defense that the negligence of some third person, not a party to this action, was also a legal cause of plaintiff's injury*.

> SR. 390 (emphasis added). Thus, not only was Shirley's Proposed Instruction No. 25 unnecessary, but the substance of that instruction was provided to the jury.

Appellee's Brief at pp xxii-iii.

The Appellee has completely missed the legal issue on this argument. Proposed Instruction No. 25 is a *duty* instruction which goes to the issue of whether Restaurant was negligent or not. Court's Instruction No. 18 on the other hand does not address that issue at all, but rather is confined entirely to the issue of *proximate cause*. The jury never reached the point where it dealt with proximate cause because it did not have the proper "duty" instructions before it. Court's Instruction No. 18 did not contain Plaintiff's Proposed Instruction No. 25 nor did giving the former instruction cure the harm done by failure to instruct as to the latter. In fact, Court's Instruction No. 25 highlights the prejudice to the outcome that occurred (by failure to give PPI No. 25) because No 18 requires the jury to find Restaurant negligent *before* applying Court's Instruction No. 18. Again, it is the court's duty to fully and completely state the law. If it does not, it is not just error, but prejudicial error. This also is a *Miller* issue "on a legal question of such importance" that a further showing of prejudice is not required. *Miller v Baken Park, Inc.*, 175 N.W.2d at 609.

Restaurant has spent a lot of time in its brief attempting to find fault with Plaintiff's proposed Instructions (e.g., Appellee's Br. xxii, "might" instead of "would" discover, Appellee's Br. xxv, "...likely would have confused and mislead (sic) the jury to the Fryn' Pan's prejudice"…etc.). However, Restaurant did not even mention how the failure of the instructions to give a full and complete statement of the law is itself prejudicial error. *Id.*

ARGUMENT III
SDPJI 20-20-15, THE DEFINITION OF A REASONABLE PERSON WAS ENACTED BY THE PATTERN JURY COMMITTEE IN APRIL, 2018.

The Appellee and the trial court were incorrect in their belief that the pattern had not been adopted at the time of the July 2018 trial of this case. See, *Appellee's Brief,* xv-xvi. More importantly, *Nugent v. Quam,* 152 N.W.2d 371, 377 (S.D. 1967) which adopted the Restatement, is long and well established as the law in South Dakota. Plaintiff relies on the *Nugent* argument in its *Appellant's Brief, pp. 15, 16.*

Suffice it to say that while the broad definition of the Reasonable Person was presented to the jury, the fact that the reasonable person is "always up to standard" and is "never negligent," was not. This language is the critical part of what a reasonable person is. The legal meaning of "reasonable person" is not contained within lay parlance, and therefore, the jury has no way to know and apply this principle unless it is instructed.

The jury therefore applies a lay definition of the term "reasonable" based on individuals' *subjective* standard. Sometimes the overlap between legal definition and the law definition creates a "no harm - no foul" situation. This case, however, hinged on the jury knowing that the standard of care was the *objective* standard of this "ideal individual," rather than a subjective standard that permits and often excuses deviations from the standard of care. *Nugent,* 152 N.W.2d at 377 citing the Restatement (Second) of Torts § 283, comments a-d.

ARGUMENT IV
THE JURY SHOULD NOT HAVE BEEN INSTRUCTED ON CONTRIBUTORY NEGLIGENCE

Plaintiff relies on its *Appellant's Brief* as to this argument except to clarify that Appellee has misstated the facts. Although Plaintiff did see a little snow between the cars

by the curb, she never reached the area near the curb and the "snow" is not what she fell on. She was unable to see the actual hazard, the black ice, until the time she fell on it, nor was her husband Ernest, or the Restaurant able to see it. Restaurants statements to the contrary are flawed and Restaurant is arguing a set of facts contrary to that of its Rule 30(b)(6) witness when, in *Appellee's Brief* it states:

> Shirley also testified the Fryn' Pan's parking lot was free of snow and ice, except for some of the areas between some of the cars parked next to the building. Tr. 109:10-23. The jury heard testimony that Shirley and Ernest took a direct path from their vehicle to the sidewalk surrounding the restaurant that took them across the parking lot and between the cars parked next to the building. Tr. 41:8-15. Testimony was presented from Shirley and Ernest that both of them saw snow and ice between the very parked cars they walked between while heading toward the restaurant. Tr. 54:7-23 (testimony of Ernest); Tr. 110:20-112:9 (testimony of Shirley). Shirley agreed neither she nor Ernest looked for an alternative route or for a different pair of cars to walk between to get to the restaurant. Tr. 127:5-9. In addition, rather than walking around the cars parked near the building to access the sidewalk from the open area to the north of the restaurant, the Tammens chose to cut in-between the cars parked along the side of the building, *i.e.*, across the very area where they observed snow and ice. Tr. 127:10-19. Unfortunately, Shirley fell while walking between the cars parked next to the building. Tr. 113:16-25.

Id. at xxvii. If the court will please read the actual testimony cited by the Restaurant above, it will see that the Plaintiff did not mention having seen ice anywhere. There is no evidence (as opposed to Restaurant's argument) of any negligent choices or conduct made by Plaintiff. Moreover Ernest never discovered the ice until he was slipping on it (Tr. 42) and Adam Lee, the manager, never saw ice either (Tr.143-4, 147). Most importantly, Stan Mitzel, the Restaurant's Rule 30(b)6) witness testified that the customers were expected to walk right where *Appellee's Brief* claims Plaintiff was negligent for walking (Tr. 190-91) and that the Restaurant was not claiming that Shirley should have at that time been looking for any specific hazard (Tr. 202-3); the restaurant

had "no idea" if she saw the ice before she fell. (Tr. 206); the Restaurant itself did not and does not know (i.e., did not determine) if there was ice between the cars (Tr. 206); the Restaurant agrees Shirley had only a few seconds to judge the condition between the cars (Tr. 207); and that where she was walking, it was shady (Tr. 208).

It is unfair that the jury was called upon throughout the entire trial to focus on whether the Plaintiff was contributorily negligent since Plaintiff had moved to strike the defense in its pretrial motions pointing out these identical facts from the depositions. While the denial of that motion might not be prejudicial error by itself, the instructing of the jury on that issue was error that clearly affected the outcome and affected substantial rights. *Miller,* 175 N.W.2d at 609. Rule 30(b)(6) should be applied to make certain a party does not have the benefit of a set of facts better than that to which it has testified. *Cowan v. Dean*, 137 N.W.2d 337, 342 (S.D. 1965). Under the facts of this case, the Restaurant would not blame Shirley for failure to see ice, so its lawyers on appeal should not be able to call her negligent either. (Tr. 161).

ARGUMENT V
Plaintiff's Proposed *Shippen v. Parrott* Instructions (31 & 32) Should Be Given at Trial on Remand.

Contrary to Restaurant's assertions in its Appellee's Br. Xxix-xxx, there clearly was discussion in the evidence about the effects of Plaintiff's pre-existing "fragility" on her permanent condition. As stated in *Appellant's Brief,* 23-4[2]:

> The Defendant had emphasized the pre-existing fragility of Plaintiff's bones and her diabetes at Dr. Bechtold's deposition [Bechtold Dep. pp.45-46, SR-1499 and APP-52]. Dr. Bechtold, however, testified:

[2] *Appellant's Reply Brief* has inserted the citations to Dr. Bechtold's Deposition within the Settled Record, which citations were omitted from *Appellant's Brief* due to not having been available at the time of printing the *Appellant's Brief.*

> Q. Do you have an opinion as to whether Shirley's right wrist, and specifically any fragility or osteopenia, was asymptomatic or active prior to the fall of 1-31-14?
>
> A. It appears, to the best of my knowledge and her documentation and history, that it was not symptomatic prior.
>
> [Bechtold Dep. p.41 at SR-1498 and APP-51]. Shirley Tammen testified she had no problems or symptoms with her right wrist or hand before the subject incident [JT-Tr-2, pp.81, 100].

Id. Plaintiff proposed the instruction because the evidence could leave the jury confused as to whether they should be pondering whether the undisputedly asymptomatic condition (fragility and osteoporosis) should be considered a "proximate cause" (or that Restaurant's negligence was not) such that a normal person might not have been injured or injured as badly as Plaintiff. The jury on remand would need and be entitled to know that the law does not permit apportionment or discounting of the damages just because of an asymptomatic dormant condition. *Shippen v. Parrott*, 1996 S.D. 105, ¶44, footnote 3, 553 N.W.2d 503, 513, footnote 3.

CONCLUSION

WHEREFORE, Plaintiff requests that this Court vacate the jury's verdict and the judgment based thereon, reverse, and remand to the Circuit Court for a new trial.

REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellant hereby requests Oral Argument.

N. Dean Nasser, Jr.
N. Dean Nasser, Jr.

Dated this 10th day of January, 2019.

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CERTIFICATE OF COMPLIANCE
SDCL 15-26A-66(b)

The undersigned being one of the attorneys of record for the Plaintiff/Appellant in the above-entitled matter hereby certifies that the *Reply Brief of Appellant* submitted in this matter which was done in proportionally spaced type face does not exceed 16 pages but also does not exceed the typed volume limitation set forth in SDCL 15-26A-66(b)(2); further, that the word processing program computer computation for the entire brief exclusive of Table of Contents, Table of Authorities, and Certificates of Counsel is 3,596 words.

Dated this 10th day of January, 2019.

N. Dean Nasser, Jr.
N. Dean Nasser, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document and this *Certificate of Service* was served on Eric C. Schulte of Davenport, Evans, Hurwitz, and Smith, LLP, 206 West 14th Street, Sioux Falls, SD 57104, eschulte@dehs.com, attorneys for the Defendant/Appellee, by electronically mailing said copy to them at the foregoing email address via the Supreme Court's electronic filing system, this 10th day of January, 2019.

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