IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30309

TODD WEILAND

Plaintiff and Appellant,

v.

PATRICK BUMANN

Defendant and Appellee.

Appeal from the Circuit Court, Second Circuit
Minnehaha County, South Dakota

The Honorable Sandra Hoglund-Hanson
Circuit Court Judge

APPELLANT TODD WEILAND'S BRIEF

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Notice of Appeal filed April 3, 2023

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PRELIMINARY STATEMENT

Plaintiff/Appellant Todd Weiland shall be referred to as "Dr. Weiland," Defendant/Appellee/Cross-Appellant Patrick Bumann shall be referred to as "Bumann," and the South Dakota Highway Patrol shall be referred to as the "SDHP" unless otherwise specified herein. References to the Settled Record are cited as (SR), references to trial exhibits are cited as (Ex), and references to Dr. Weiland's Appendix are cited as (App.). References to the summary judgment transcript are referred to as (SJT), references to the trial transcript are referred to as (TT), and references to the jury selection transcript are referred to as (JST).

JURISDICTIONAL STATEMENT

Dr. Weiland appeals from the Order Denying the Motion for Partial Summary Judgment dated April 12, 2022, filed April 13, 2022, and noticed on April 14, 2022; (2) the Judgment dated and filed on December 20, 2022, and noticed on December 21, 2022, which incorporates the jury's Special Verdict dated November 18, 2022, and filed on November 21, 2022; and (3) the Order Denying Plaintiff's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial entered, filed, and recorded on March 20, 2023, and noticed on March 21, 2023. The Notice of Appeal was filed April 3, 2023.

STATEMENT OF LEGAL ISSUES

1. **The Circuit Court Erred When Denying Dr. Weiland's Motion for Partial Summary Judgment and for Judgment as a Matter of Law on Negligence.**

   The circuit court erred in ruling that genuine issues of material fact precluded summary judgment on Bumann's negligence under the common law and the negligence per se doctrine. The circuit court also erred by instructing the jury on negligence.

   - *Christenson v. Bergeson*, 2004 S.D. 113, 688 N.W.2d 421
   - *Cooper v. Rang*, 2011 S.D. 6, 794 N.W.2d 757

2. **The Circuit Court Erred When Denying Dr. Weiland's Motion for Partial Summary Judgment and for Judgment as a Matter of Law on Contributory Negligence.**

   The circuit court erred in determining Bumann satisfied his burden of proof so as to preclude summary judgment on his affirmative defense of contributory negligence. The circuit court also erred by instructing the jury on the affirmative defense.

   - *Johnson v. Armfield*, 2003 S.D. 134, 672 N.W.2d 478
   - *Steffen v. Schwan's Sales Enterprises, Inc.*, 2006 S.D. 41, 713 N.W.2d 614

3. **The Circuit Court Erred When Denying Dr. Weiland's Motion for Partial Summary Judgment and for Judgment as a Matter of Law on Failure-to-Mitigate Damages.**

   The circuit court erred in ruling Bumann satisfied his burden of proof to preclude summary judgment on his affirmative defense of failure-to-mitigate damages. The circuit court also erred by instructing the jury on the affirmative defense.

   - *Jurgensen v. Smith*, 2000 S.D. 73, 611 N.W.2d 439
   - *Greenwood v. Mitchell*, 621 N.W.2d 200, 206 (Iowa 2001)

4. **The Circuit Court Erred When Excluding the South Dakota Accident Report from Evidence.**

   The circuit court erred when excluding the South Dakota Accident Report. The circuit court further erred when determining such exclusion did not require a new trial.

   - *Johnson v. Farrell*, 2010 S.D. 68, 787 N.W.2d 307
   - SDCL § 19-19-803(6)

5. **The Circuit Court Erred When Excluding Evidence Pertaining to the SDHP's Investigative Materials and Conclusions.**

   The circuit court erred when requiring certain redactions to the SDHP Supervisor Report and Accident Review Board decision letter. The circuit court further erred when determining such exclusion did not require a new trial.

   - *Morrison v. Mineral Palace Ltd. P'ship*, 1999 S.D. 145, 603 N.W.2d 193
   - *Skrovig v. BNSF Ry. Co.*, 916 F.Supp.2d 945 (D.S.D. 2013)

6. **The Circuit Court Erred When Excluding Evidence of Representations Made to Dr. Weiland by Bumann's Insurance Representative.**

   The circuit court erred when ruling Dr. Weiland was not permitted to discuss the representations made to him by Bumann's insurance representative to rehabilitate from impeachment regarding Dr. Weiland's self-authored records. The circuit court further erred when determining such exclusion did not require a new trial.

   - *Stygles v. Ellis*, 123 N.W.2d 348, 353 (S.D. 1963)
   - *Brue v. Brue*, 190 N.W.2d 64, 65 (S.D. 1971)

7. **The Circuit Court Erred When Omitting the Cautionary Instruction Regarding Insurance from the Jury Instructions.**

   The circuit court erred when declining to instruct the jury to disregard insurance when insurance was interjected during voir dire and during trial when a juror asked, "[w]here does the money come from? You know, does he have to pay for it?" The circuit court further erred when determining such omission did not require a new trial.

   - *Baraniak v. Kurby*, 862 N.E.2d 1152 (Ill. Ct. App. 2007)
   - *Center of Life Church v. Nelson*, 2018 S.D. 42, 913 N.W.2d 105

8. **The Circuit Court Erred When Precluding Dr. Weiland from Presenting a Per Diem Calculation of Non-Economic Damages During Closing Argument.**

   The circuit court erred when precluding Dr. Weiland's counsel from asking the jury to award $75,000 per year for Weiland's life expectancy in future non-economic damages. The circuit court further erred when determining the same did not require a new trial.

   - *Schoon v. Lobby*, 2003 S.D. 123, 670 N.W.2d 885
   - *Higgins v. Hermes*, 552 P.2d 1227 (N.M. Ct. App. 1976)

INTRODUCTION

The undisputed facts and evidence at summary judgment and at trial demonstrated Dr. Weiland was entitled to Judgment as a Matter of Law on Bumann's negligence and his affirmative defenses of contributory negligence and failure-to-mitigate. South Dakota law unequivocally holds erroneously instructing the jury on these issues requires a new trial on damages. A new trial is further necessitated by erroneous evidentiary rulings which left Dr. Weiland to navigate a minefield of impeachment that could have been rebutted by the evidence he was prohibited from introducing. The jury was also left without proper instruction to disregard instruction despite a juror's question about "who pays." Finally, Dr. Weiland was improperly prevented from explaining his calculation of damages based on the evidence during closing argument. Any one of these numerous errors warrants a new trial. All of them combined puts the prejudice beyond dispute. Dr. Weiland accordingly asks this Court to reverse and remand for a new trial on damages.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

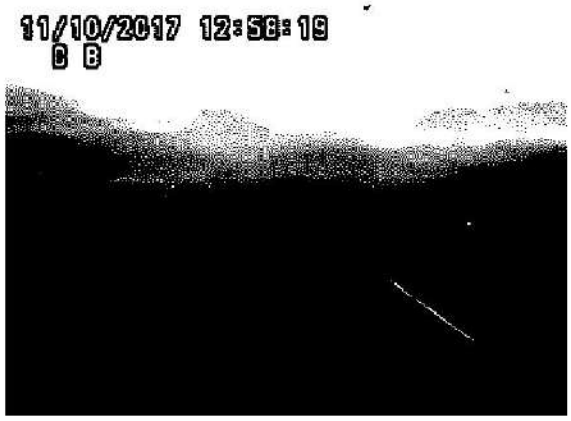
On March 26, 2020, Dr. Weiland filed suit against Bumann and the SDHP in the Second Judicial Circuit, Minnehaha County, the Honorable Sandra Hoglund Hanson presiding. (SR2). Dr. Weiland alleged then-SDHP trooper Bumann caused a collision between their vehicles by negligently driving his patrol car without due regard for Weiland's safety. (SR788). Bumann denied liability and asserted affirmative defenses of contributory negligence and failure-to-mitigate. (SR797). The SDHP was dismissed on immunity grounds on May 28, 2021. (SR390). On April 13, 2022, the circuit court denied Dr. Weiland's Motion for Partial Summary Judgment on negligence, causation,

contributory negligence, and failure-to-mitigate. (App.00097-98). Pre-trial orders were entered on November 10, 2022. (App.000124-130).

A jury trial began on November 15, 2022, during which the circuit court denied cross-motions for Judgment as a Matter of Law on liability and damages. (TT777:11-778:19). A verdict was returned on November 18, 2022, finding Bumann negligent, Dr. Weiland contributorily negligent, but slight in comparison to Bumann's negligence, with both being a legal cause of injuries. (App.00131-32). The jury awarded $17,500 in non-economic damages, $1,161.50 in past medical expenses, and $0 in future medical expenses. (App.00133). On January 4, 2023, Dr. Weiland filed a Renewed Motion for Judgment as a Matter of Law and Motion for New Trial asserting judgment as a matter of law in his favor should have been entered on negligence, contributory negligence, and failure-to-mitigate, and a new trial was required because of the erroneous exclusion of relevant evidence, improper admission of opinion testimony, failure to give the cautionary jury instruction regarding insurance, and prohibiting a per diem damages argument. (SR4176-78). The court denied the motions on March 20, 2023. (App.00136-41).

B. Liability

On November 10, 2017, Bumann was driving westbound on South Dakota Highway 42 near the intersection of Highway 19 while patrolling when he saw an eastbound vehicle speeding with expired tags. (TT43:3-25). Meanwhile, Dr. Weiland was driving eastbound on Highway 42 towards Sioux Falls, South Dakota. (TT393:22-25). Bumann, who knew Highway 42 was often busy, was driving in a no-passing zone, near the intersection with Highway 19, with his view of oncoming traffic obstructed by two large trucks pulling trailers, as shown below: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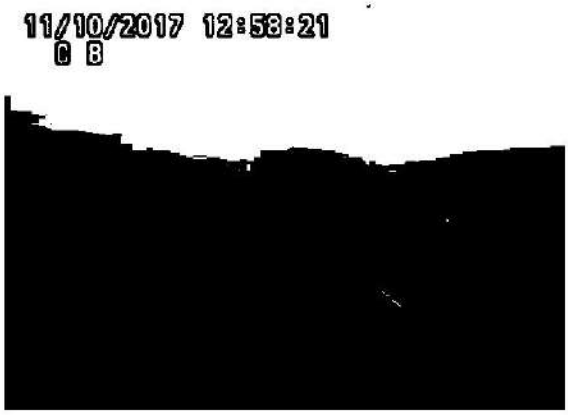
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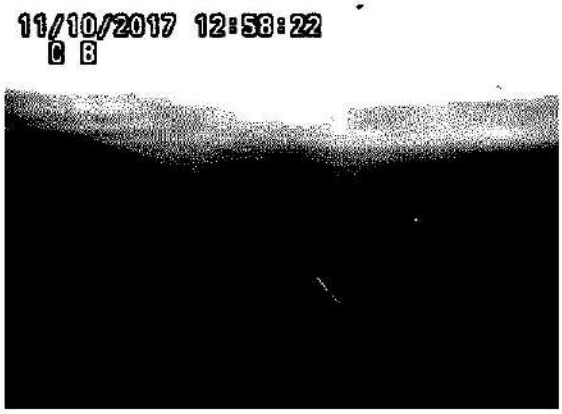
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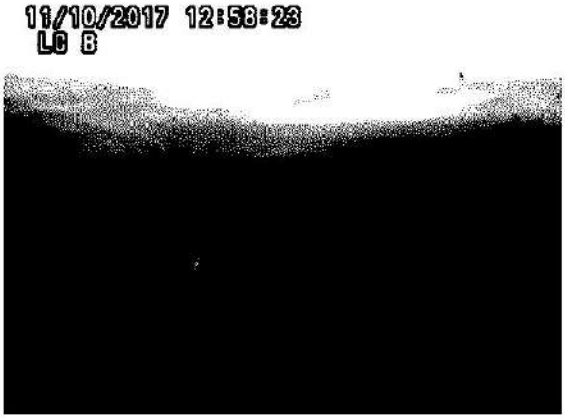
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(TT43:16-18, 44:1-45:2; SR842,4347, Exs. 1-4).

Nevertheless, Bumann turned toward the shoulder to perform a U-turn and then activated his lights. (TT44:11-16). Bumann did not see Dr. Weiland's vehicle until he was already in "the process of completing [his] U-turn" and their vehicles collided "like a second later or two seconds later" in the eastbound lane. (TT45:7-15). Dr. Weiland testified the patrol cruiser appeared "out of nowhere" and "the distance was so close ….There was no time to think or react. All I did was brace myself, slam on the brakes, and it happened almost immediately." (TT394:1-395:12). At the scene, Bumann called his supervisor, Sergeant Steve Schade ("Sgt. Schade"), and described the collision as "one hundred percent my bad" and said he would lose his "safe driving miles," which accrue for every mile driven without a "preventable" collision. (TT:64:17-21; SR842, 4347; Ex. 3). Bumann admitted "this collision could have been prevented if [he] had waited to make sure that it was clear of oncoming traffic before [he] did [his U-turn[.]" (TT66:12-15).

Deputy Tyrone Albers responded to the scene and talked to both parties. (App.0001, Ex. 15). As documented in the crash report, he determined Bumann's failure to yield was a contributing circumstance to the collision and did not attribute any contributing circumstances to Dr. Weiland. *Id.* The circuit court excluded any reference to the crash report despite Bumann's denial of liability and claim of contributory negligence. (TT145:4-147:11; SJT27:15-17)

Bumann wrote in his Damage to State Property Report, "[a]s I was turning around I observed another vehicle traveling eastbound a short distance from me. Because of the short distance between my vehicle and the other eastbound vehicle a collision occurred." (App.00009, Ex. 18). Bumann also testified, "when I conducted my U-turn I should have

waited longer. And I do believe I could have been more cautious for that U-turn." (TT55:14-16, 63:1-12). He later claimed he did not know if the collision was avoidable because he did not know Dr. Weiland's "vantage point." (TT74:19-21, 79:23-80:7, 89:19-90:1). Bumann's accident reconstructionist, Dr. Jerry Ogden, opined the black box data from Dr. Weiland's vehicle showed a speed of 68-69-mph four-to-five seconds before the collision. (TT691:13-15). The crash report indicated Dr. Weiland told Deputy Albers he was travelling 65-mph. (App.0002, Ex. 15). When asked whether this was the range of speed he would be travelling, Dr. Weiland testified, "Maybe a touch more. I would normally drive at the speed limit or just…near it." (TT394:20-24).

Sgt. Schade prepared a Supervisor's Report on November 19, 2017. (App.00032-33, Ex. 22). He determined Bumann violated SDHP policy 7.105 and wrote, "[a] division vehicle shall not be driven in a careless manner at any time, [and][i]f Trooper Bumann would have waited and been able to get a better view of oncoming traffic, he would have avoided this collision." *Id.* On December 6, 2017, the SDHP Accident Review Board investigated the collision and sent a letter to Bumann informing him it had determined the crash was "preventable" and he "needed to use more caution when operating [his] patrol vehicle to turn around on violators." (App.00034-35, Ex. 23). Sgt. Schade testified neither the SDHP nor Bumann ever attributed any fault to Dr. Weiland. (TT298:17-19, 300:5-11). The trial court excluded the quoted portions of the Supervisor Report and letter despite Bumann's denial of liability and claim of contributory negligence. (App.00126).

C. DAMAGES

Within an hour after the collision, Dr. Weiland started having neck and upper back pain, which progressed throughout the night. (TT398:1-401:4). He began receiving

chiropractic treatment at the Ortman Clinic where he is a fourth-generation chiropractor. (TT393:9-12). The claims adjuster, Blake Dykstra, incorrectly told him he could not submit bills from the Ortman Clinic because he worked there and, as a result, Dr. Weiland told Dykstra he would keep his own notes for this treatment. (App.00077-78 (Weiland Depo. 30:12-14, 46:9-15 ("I was told by Blake…that I could not bill for these visits.")). Dr. Weiland continued to receive chiropractic care, massage therapy, and used various treatment modalities, all of which helped but never resolved his symptoms. (TT401:15-402:22). Dr. Chris Janssen, a physiatrist, recommended Dr. Weiland also complete a course of physical therapy. (TT434:14-16). When physical therapy only provided temporary relief, Dr. Janssen recommended Dr. Weiland undergo two sets of medial branch blocks and later, a radiofrequency ablation. (TT189:14-192:4). By the time of trial, Dr. Weiland had undergone two radiofrequency ablations. (TT197:3-6).

Dr. Weiland called Dr. Janssen, Dr. Nathan Ligtenberg, Dr. Ross McDaniel, and Dr. Doug Ortman who opined this collision was a legal cause of permanent injury to Dr. Weiland necessitating past and future treatment. (Exs. 56-58). Bumann called Dr. Ogden, who opined this was a low velocity collision, but confirmed he was not offering an opinion on injury. (TT706:3-5, 745:10-12). Dr. Walter Carlson, Bumann's only medical expert, agreed Dr. Weiland was injured because of the collision but thought he recovered after 6-12 weeks. (TT549:17-21, 564-65). Bumann also called Dr. Jay Ortman who testified about treatment at the Ortman Clinic and a laser he tested on Dr. Weiland's neck 17-years-ago. (TT536:13-537:15). Dr. Weiland, his wife, son, and mother testified they did not recall him having neck and upper back pain prior to this collision. (TT103:7-9, 110-33, 325-36, 822-29). Dr. Weiland's family members also testified about his physical and mental changes since the collision, the numerous treatments he tried, the modalities he

used, and the appointments he attended to try and get better. *Id.* Likewise, all medical experts, including Dr. Carlson, testified Dr. Weiland made every reasonable effort to treat his injuries. (TT200:1-18, 205:22-24, 259:9-11, 361:20-363:1).

Additional facts will be discussed below when pertinent to specific issues.

ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN DENYING DR. WEILAND'S MOTION FOR SUMMARY JUDGMENT AND FOR JUDGMENT AS A MATTER OF LAW ON NEGLIGENCE, CONTRIBUTORY NEGLIGENCE, AND FAILURE-TO-MITIGATE.

The circuit court's erroneous denial of Dr. Weiland's motion for summary judgment and for judgment as a matter of law on negligence, contributory negligence, and failure-to-mitigate requires a new trial on damages.

This Court reviews "the denial of a motion for summary judgment under the de novo standard of review." *DT-Trak Consulting, Inc. v. Kolda*, 2022 S.D. 50, ¶ 11, 979 N.W.2d 304, 308 (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" SDCL § 15-6-56(c)). Although evidence is viewed "most favorably to the non-moving party," the nonmoving party "must present specific facts showing that a genuine, material issue for trial exists." *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804. "Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* (citation omitted).

Judgment as a matter of law should be granted when a "party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue[.]" SDCL § 15-6-50(a). "[A] circuit court's decision to grant or deny a motion for judgment as a matter of law must be reviewed de novo on appeal." *Magner v. Brinkman*, 2016 S.D. 50, ¶ 13, 883 N.W.2d 74, 81; *compare Weber v. Rains*, 2019 S.D. 53, ¶ 23, 933 N.W.2d 471, 478 ("We also review the grant or denial of a motion for new trial under the abuse of discretion standard."). "In reviewing a renewed motion for judgment as a matter of law after the jury verdict, the evidence is reviewed 'in a light most favorable to the verdict or to the nonmoving party.'" *Magner*, 2016 S.D. 50, ¶ 13, 883 N.W.2d at 81.

A. Denying Summary Judgment and Judgment as a Matter of Law on Negligence was Error.

"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." SDPJI 20-20-10. Further, "[t]he violation of a statute enacted to promote safety constitutes negligence per se." *Engel v. Stock*, 225 N.W.2d 872, 873 (S.D. 1975).

Dr. Weiland asserted Bumann was negligent and also negligent per se for violating the following statutes:

> [A] vehicle shall be driven as nearly as practicable entirely within a single lane and may not be moved from such lane until the driver has first ascertained that such movement can be made with safety[.]
>
> The driver of any vehicle upon a highway before starting, stopping, or turning from a direct line shall first see that such movement can be made in safety and…whenever the operation of any other vehicle may be affected by such movement shall give a signal as required in § 32-26-23 plainly visible to the driver of such other vehicle of the intention to make such movement[.]

> No vehicle, within a no-passing zone…may be turned so as to proceed in the opposite direction, nor may any such turning movement be otherwise made unless it can be made in safety and without interfering with other traffic[.]

SDCL §§ 32-26-6, 32-26-22, 32-26-25; (SR788).

Negligence is established as a matter of law when no non-negligent explanation is provided. In *Christenson v. Bergeson*, the defendant drove into the plaintiff's vehicle after she abruptly stopped for a bicyclist who suddenly appeared in front of her. 2004 S.D. 113, ¶ 2, 688 N.W.2d 421, 422, abrogated on other grounds. The defendant admitted "[he] had sufficient time to take evasive maneuvers, [but] he elected to steer around [plaintiff's] pickup rather than stop behind it," and "misjudged the distance[.]" *Id.* Because the defendant "provided no other reason for his failure to clear [the plaintiff's] vehicle, instead freely admitting he miscalculated the distance," the Court held it was error to instruct on negligence and remanded for a new trial. *Id.* at ¶ 26. This rationale was re-affirmed in *Cooper v. Rang*, where this Court held even if it "ignore[d] [defendant's] partial admission of fault" during a deposition and at trial, "no reasonable jury could have…concluded that she did not breach her duty of care. [She] offered no non-negligent explanation for her rear end collision." 2011 S.D. 6, ¶¶ 2-3, 10, 794 N.W.2d 757, 758 (citing *Christenson*).

At summary judgment, Bumann produced no evidence disputing his fault. In fact, Bumann admitted during his deposition he believed both parties were at fault, but never said what Dr. Weiland supposedly did wrong. (SR1296, App.00024, 00039 (Bumann Depo. 94:25-96:4)). The sole reason he disagreed the collision was *solely* his fault was: "I don't know the totality of the investigation. I only know what I did. I didn't – I don't know any part of what Mr. Weiland was involved in this crash." (SR872, App.00021

(Bumann Depo. at 88:8-16)); *Peters v. Great W. Bank*, 2015 S.D. 4, ¶ 13, 859 N.W.2d 618, 624 (non-moving party at summary judgment "must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy."). This is the same explanation (or lack thereof) proscribed by *Christenson* and *Cooper*.

Even if relying on a *lack* of facts was sufficient to overcome summary judgment, Bumann's deposition confirmed he made a U-turn while driving in a no-passing zone, near an intersection, behind two large trucks blocking his view of oncoming traffic. (SR847-42, 866, App.00012, 00014-16, 00019 (Bumann Depo. 30:13-31:7, 43:2-5, 53:21-23, 78:4-6)). Indeed, Bumann testified "U-turns can be dangerous maneuvers if…another vehicle that is not seen, anything of that nature, obstructing traffic…coming at you as well." (SR854, App.00016-17 (Bumann Depo. 55:2-7, 59:18-60:3)); *Thompson v. Summers*, 1997 S.D. 103, ¶ 13, 567 N.W.2d 387, 392 ("Wrongful activity can be foreseeable upon common experience."). Likewise, Sgt. Schade testified in his deposition performing "a U-turn in a no-passing zone" is an "unsafe maneuver" and Bumann should have waited until he "had a better field of vision[.]" (SR900-01, App.00030-31 (Schade Depo. 32:7-11, 33:18-21)). Furthermore, Bumann told Sgt. Schade at the scene the crash was "one hundred percent my bad" and he would lose his "safe driving miles." (SR842, 4347). Most importantly, Deputy Albers determined Bumann failed to yield, Sgt. Schade determined Bumann should have waited before executing his U-turn, and the SDHP determined Bumann needed to exercise more caution. (App.0004, 00032, 00034).

Bumann undisputedly made a blind U-turn that put him directly in Dr. Weiland's path without the ability to give him sufficient warning under circumstances he knew were

unsafe. In doing so, Bumann failed to act with due regard for Dr. Weiland's safety and violated SDCL §§ 32-26-6, 32-26-22, 32-26-25. *See Barnhart v. Ahlers*, 110 N.W.2d 125, 126 (S.D. 1961) (determining defendant was negligent for failing to look effectively before making a turn "described as a most dangerous movement" under the circumstances); *Dartt v. Berghorst*, 484 N.W.2d 891, 892 (S.D. 1992) (holding that proceeding to drive despite reduced field of vision was negligent per se as a matter of law). Dr. Weiland's motion for summary judgment on negligence should have been granted.

At trial, Bumann's admissions of fault surpassed those from his deposition and those in *Christenson* and *Cooper*. Bumann conceded he knew the highway was busy, U-turns are dangerous, oncoming traffic was travelling around 65 mph, and he was approaching an intersection in a no-passing zone with obstructed vision. (TT43:16-25, 44:1-4, 45:2, 62:18-21). Bumann also admitted he failed to meet statutory requirements because it was his responsibility to ensure the safety of his U-turn and he failed to do so. (TT63:1-12); *see Baddou v. Hall*, 2008 S.D. 90, ¶ 25, 756 N.W.2d 554, 561 ("Admissions of statutory violations meeting the 'exceptional' standard justify taking such cases from the jury."). Dispositively, Bumann testified he should have been more cautious and waited longer, and if he had, the collision would not have happened. (TT55:14-16, 63:1-12). As *Christenson* explains, Bumann's admissions of negligence *alone* entitled Dr. Weiland to judgment as a matter of law. The circuit court erred when denying Dr. Weiland's motion because "no reasonably jury could have…concluded that [he] did not breach [his] duty of care." *Cooper*, 2011 S.D. 6, ¶ 3, 94 N.W.2d 757, 758.

The prejudice resulting from the error in sending the issue of Bumann's negligence persists despite the jury's verdict. Prejudice resulting from *any* error may be

gleaned from looking at the entire record, including factoring in all errors. *Davis v. Knippling*, 1998 S.D. 31, ¶ 14, 576 N.W.2d 525, 529 (holding failure-to-mitigate instruction was prejudicial because record showed "the jury would have reached a different result" especially "[c]onsidering the two erroneous contributory negligence instructions"). In addition to multiple, one-sided evidentiary rulings, the error of instructing on negligence is compounded by the erroneous contributory negligence instruction. These errors worked in tandem to result in a speculative finding of contributory negligence and a reduction to Dr. Weiland's damages. *Johnson v. Armfield*, 2003 S.D. 134, ¶ 13, 672 N.W.2d 478 ("it is logical to conclude that the jury denied any recovery for [plaintiff] because it believed [his] negligence was more than slight in comparison to [defendant's] admitted negligence."). The cumulative effect of these errors was prejudicial and requires reversal. *Accord Hills of Rest Memorial Park v. White*, 472 N.W.2d 848 (S.D. 1988) (Wuest, C.J. dissenting) (agreeing with reversal because "[c]umulatively, I think these problems and errors require a new trial"); *State v. Perovich*, 2001 S.D. 96, ¶ 30, 632 N.W.2d 12, 18 ("The cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial.").

B. Denying Summary Judgment and Judgment as a Matter of Law on Contributory Negligence was Error.

Allowing contributory negligence to be tried and considered by the jury on the sole basis Dr. Weiland was allegedly driving 68-mph was prejudicial error. The party asserting an affirmative defense has the burden of proof on it. *Burhenn v. Dennis Supply*, 2004 S.D. 91, ¶ 32, 685 N.W.2d 778, 786. Contributory negligence is a "breach of duty which the law imposes upon persons to protect themselves from injury, and which,

concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." *Johnson*, 2003 S.D. 134, ¶ 10, 672 N.W.2d at 481 (citation omitted).

This Court held in *Johnson v. Armfield* that "[t]he causal connection between excessive speed and the collision must be established by the evidence and cannot be left to mere speculation and conjecture." *Id.* at ¶ 13. There, the jury returned a contributory negligence verdict after the defendant claimed the plaintiff was speeding when he hit her vehicle as he exited a driveway and crossed two lanes of traffic. *Id.* at ¶¶ 3-5. This Court reversed denial of judgment as a matter of law because "[e]ven assuming arguendo [plaintiff] was speeding, her negligence must have been the proximate cause of her injury in order to bar recovery." *Id.* at ¶ 13 (citation omitted). The defendant's testimony did "not sufficiently establish that [plaintiff's] speed was the proximate cause of her injuries" because he "failed to present any competent evidence that [plaintiff's] speed was the proximate cause of her injuries" or that "that [plaintiff] could have acted in time to avoid the accident." *Id.* (citing *Lockwood v. Schreimann*, 933 S.W.2d 856 (Mo.Ct.App. 1996) ("[t]he causal connection between excessive speed and the collision must be established by the evidence and cannot be left to mere speculation and conjecture."); *Mudlin v. Hills Materials Co.*, 2005 S.D. 64, ¶ 30, 698 N.W.2d 67, 76 ("whether [plaintiff] was speeding or not, [defendant] fails to establish that her injuries were due to the fact that she was speeding"); *Klarenbeek v. Campbell*, 299 N.W.2d 580, 581 (S.D. 1980) ("the record is totally devoid of any evidence indicating [plaintiff] was contributorily negligent, or that her stopping prior to entering traffic…was a proximate cause of this accident.").

Bumann relied on the allegation Dr. Weiland was speeding but presented *no* evidence speed was a proximate cause of injuries or the collision was avoidable as the

cited cases require. Indeed, Bumann's response at summary judgment consisted of one paragraph:

> It is undisputed the speed limit on Highway 42 is 65 miles per hour. [Weiland] was travelling at 69 miles per hour before the accident.... [Weiland] was driving in violation of SDCL § 32-25-3. It is for the jury to determine the degree to which [Weiland's] speeding contributed to the accident. Furthermore, fact questions exist as to whether [Weiland] should have seen [Bumann's] emergency lights and whether [Weiland] should have been able to stop or otherwise avoid the accident.

(SR985). Despite disclosing three expert witnesses, Bumann offered no competent evidence Dr. Weiland's speed was a proximate cause of the collision *or* his injuries. *See id.* It is true the jury determines contribution, but that is only *if* Bumann provides competent evidence speed was a proximate cause of Dr. Weiland's injuries. *Johnson*, 2003 S.D. 134, ¶ 13, 672 N.W.2d at 482. Simply writing "fact questions exist" does not create a genuine issue of material fact on any issue.

Indeed, Bumann wrote in his Damage to State Property Report, "***[b]ecause*** of the short distance between my vehicle and the other eastbound vehicle a collision occurred." (SR1318, App.00009 (emphasis added)). Further, Bumann admitted he did not "contend [Weiland] violated any laws or standards of care at the time of or immediately prior to the collision in question" when answering written discovery without objection and amended only *after* summary judgment (SR1296, App.00039 (Interrogatory No. 25)). Bumann agreed in his deposition he did not "have an adequate basis to say whether" it "was true or not" Dr. Weiland was "unable to avoid a collision." (SR871, App.00020 (Bumann Depo. 85:14-24)). Then, when asked whether he claimed the collision was, in any measure, Dr. Weiland's fault, Bumann responded, "I don't know the facts and circumstances regarding that so I couldn't agree or disagree" and when pressed said, "I don't have any evidence that I could point to right now as I wasn't part of the

investigation." (SR872-73, App.00021 (Bumann Depo. 88:20-89:17)). Bumann conducted extensive discovery and had the crash report and video footage—both of which he confirmed showed Dr. Weiland did nothing wrong. (SR873, App.00022 (Bumann Depo. 89:18-24). Importantly, those who investigated, Deputy Albers and the SDHP, attributed no fault to Dr. Weiland. (App.0004, 00032, 00034), (SR897, App.00027-29 (Schade Depo. 29:16-30:10; 31:18-23)). Bumann's response was insufficient under well-settled summary judgment standards and his defense should have been dismissed before trial.

At trial, there was still no competent evidence Dr. Weiland's injuries would be any different or that the collision was avoidable if he had been driving 3-4-mph slower. Bumann's accident reconstructionist was *precluded* from testifying about contributory negligence. (SR2139). Bumann again admitted because he did not know Dr. Weiland's "vantage point," he did not know whether the collision was avoidable (TT74:19-21, 79:23-80:7, 89:19-90:1, 93:6-23). However, Dr. Weiland testified without contradiction, "the distance was so close....There was no time to think or react. All I did was brace myself, slam on the brakes, and it happened almost immediately." (TT394:1-14). At the same time, Bumann admitted he should have been more cautious and waited longer. (TT55:14-16). Sgt. Schade confirmed Bumann never attributed fault to Dr. Weiland nor did the SDHP. (TT300:5-11). Bumann's bald assertion of speed fails to meet his burden to prove speed was a legal cause of Dr. Weiland's injuries, as required by *Johnson*. 2003 S.D. 134, ¶ 13, 672 N.W.2d at 482 ("[b]y itself, [defendant's] testimony does not sufficiently establish that [plaintiff's] speed was the proximate cause of her injuries.").

In *Steffen v. Schwann's Sales Enterprises, Inc.*, the defendant claimed the plaintiff was contributorily negligent because her vehicle remained stopped in the driving lane

after an emergency vehicle had passed. 2006 S.D. 41, ¶ 4, 713 N.W.2d at 617. In reversing the contributory negligence verdict, the Court noted, "[w]hether the emergency vehicle had in fact proceeded past [the parties] did not excuse [defendant's duties as a driver. It was [defendant] who made the conscious decision to resume travel. He knew that a car had been in front of him." *Id.* at 12. Here, it was Bumann, not Dr. Weiland, who made the conscious decision to perform a U-turn despite knowing he was travelling on a busy highway, in a no-passing zone, with obstructed vision. "The only reasonable interpretation of the facts is that" Bumann failing to yield to Dr. Weiland by performing a blind U-turn "and striking [Dr. Weiland's] vehicle was the proximate cause of [his] injuries." *Johnson*, 2003 S.D. 134, ¶ 13, 672 N.W.2d at 482. Judgment as a matter of law should have been granted.

Lastly, denying summary judgment and judgment as a matter of law on contributory negligence was prejudicial error. The jury was instructed if it determined Dr. Weiland was contributorily negligent, which it did, his "damages ***must*** be reduced in proportion" therewith. (SR4098 (emphasis added)); (App.00087-96, Exs. 87-91). This case aligns with this Court's numerous decisions remanding for a new trial due to an erroneous contributory negligence instruction in motor vehicle collision cases. *Johnson*, 2003 S.D. 134, ¶ 13, 672 N.W.2d at 482; *Steffen*, 2006 S.D. 41, ¶ 13, 713 N.W.2d at 620 (reversing for erroneous contributory negligence instruction); *Harmon v. Washburn*, 2008 S.D. 42, ¶ 21, 751 N.W.2d 297 (same); *Klarenbeek*, 299 N.W.2d at 581 (same). A new trial on damages is required. *Steffen*, 2006 S.D. 41, ¶ 16, 713 N.W.2d at 621 (erroneous contributory negligence instruction requires new trial because "the jury was required to reduce [plaintiff's] award in relation to her negligence.").

C. Denying Summary Judgment and Judgment as a Matter of Law on Failure-to-Mitigate was Error.

A defendant alleging failure-to-mitigate must show the plaintiff "by some voluntary act" that he had a "duty to refrain from, or if by neglect" he "failed to exert himself reasonably to eliminate the injury and prevent the damages, and has thereby suffered some additional injury." *Security State Bank v. Benning*, 433 N.W.2d 232, 235 (S.D. 1988) (citation omitted). This defense "does not require more than that the injured party exercise diligence to avoid further loss." *Boxa v. Vaughn*, 2003 S.D. 154, ¶ 23, 674 N.W.2d 306, 313. The failure-to-mitigate instruction should only be given when there is sufficient evidence for a reasonable jury to conclude a plaintiff failed to "exercise reasonable care to avoid further injury that could have been prevented by the exercise of reasonable care." SDPJI 50-140-10. Bumann failed to present the requisite competent evidence Dr. Weiland's conduct was unreasonable and the proximate cause of further injury.

At summary judgment and at trial, Bumann's lone medical expert, Dr. Carlson, opined Dr. Weiland needed 6-12 weeks of chiropractic care or physical therapy, and a home exercise program ("HEP") to heal his injuries from the collision. (SR952, TT561:24-562:1). It was undisputed Dr. Weiland received chiropractic care immediately after the collision from Ortman Clinic and Dr. McDaniel, which continued through trial and successfully completed physical therapy on schedule with his physical therapist's plan. (App.00053, Ex. 95).

Bumann's only response to these facts at summary judgment consisted of two allegations: Dr. Weiland "skipp[ed] traction treatments" and was "noncompliant" with his HEP. (SR986). As to the former, Bumann only referenced Dr. Weiland's notes

stating he was doing traction treatments as time allowed, but never explained or offered evidence this was unreasonable or how it was non-compliant with a treatment plan. *Id.* Likewise, the latter allegation was exclusively based on the physical therapist's notations generally consisting of: "pt. reporting F to F+ completion of HEP." *Id.*; (App.00041-53). Again, Bumann did not offer *any* evidence "F" stood for "failed" as opposed to "fair"—a conclusion supported by the manual muscle test scale physical therapists use regularly. *See* Heidi Pendleton, *Pedretti's Occupational Therapy: Practice Skills for Physical Dysfunction* at 529-44 (7th Ed.). Bumann's reliance on a speculative interpretation to defend his affirmative defense from summary judgment is insufficient under well-settled law. The circuit court erred when denying summary judgment on failure-to-mitigate.

Bumann recycled these allegations at trial, but still did not present evidence Dr. Weiland failed to take reasonable steps to treat his injuries, that his conduct was unreasonable or caused further injury. In fact, the evidence was consistent with this Court's holding in *Jurgensen v. Smith* that a failure-to-mitigate instruction was *properly* refused because the "record [was] replete with evidence [plaintiff] took reasonable steps to improve his condition" while "there [was] little, if any, evidence in the record to support" the instruction. 2000 S.D. 73, ¶¶ 21-22, 611 N.W.2d at 442-43. Here, every medical expert testified Dr. Weiland took all reasonable steps to get better. (TT205:22-24, 259:9-11, 586:1-17). In fact, Dr. Carlson testified he "absolutely" agreed Dr. Weiland "made every reasonable effort to get better," had "made great effort" and "tried really hard[.]" (TT586:1-17). This is in addition to the testimony of three lay witnesses and Dr. Weiland regarding the medications, tools, and numerous appointments he attended to treat his injuries. (TT110-33, 325-36, 822-29).

No witness testified any of Dr. Weiland's actions, including those regarding his

HEP, were unreasonable or caused further injury. Rather, Dr. Janssen and Dr. McDaniel agreed Dr. Weiland's injuries would worsen if he was *not* active. (TT200:4-18, 362:5-363:1). To that end, Dr. Carlson said none of Dr. Weiland's injuries were prolonged or worsened because Dr. Weiland completely recovered within 6-12-weeks. (TT561:24-562:1, 564:20-565:1). Dr. Carlson commended Dr. Weiland's actions: "look[ing] at the things he was able to do....I think that's all good. I think the treatment for [sprain/strain] is that you should stay active....You should push through it. And he did all of that, so I think that was all very appropriate." (TT568:15-23).

Even assuming, *arguendo*, Dr. Weiland was noncompliant with a treatment plan, other jurisdictions recognize that testimony is insufficient when couched in terms of what-if's, rather than given to a reasonable degree of medical certainty. In *Greenwood v. Mitchell*, the Iowa Supreme Court emphasized that a lack of "expert testimony that...continuation of [a HEP]" would have prevented certain damages was fatal to the failure-to-mitigate defense. 621 N.W.2d 200, 206 (Iowa 2001). Specifically, a physical therapist's statement that a HEP "'*should* help decrease *some* of the discomfort' and that while he is '*hopeful* that through exercise...this pain will reduce, [plaintiff] is still very likely going to be limited in some activities overhead" was too uncertain. *Id.* (emphasis in original) (citing *Cox*, 935 P.2d at 1380 (expert testimony that recovery "might have" been "hastened" by the recommended HEP was insufficient)). "Simply stated, the defendant's case lacked expert testimony that [plaintiff's] subsequent symptoms were caused by his failure to follow his [HEP]." *Id.*

While witnesses testified a HEP is *generally* helpful, no one testified Dr. Weiland acted unreasonably or caused further injury due to supposed noncompliance. Indeed, Dr. Carlson's testimony about the matter consists only of the following:

[Defense]: And was he compliant with that exercise program?
[Carlson]: To my understanding, not completely.
[Defense]: He had given himself an F for his … [HEP]?
[Carlson]: Yes … But he – I got the sense he was doing other things.

(TT569:5-20). Dr. Carlson was speculating as to whether Dr. Weiland was noncompliant at all, and gave no testimony, let alone to a reasonable degree of medical certainty, he worsened or prolonged any injury. Instead, "[t]he jury was left to speculate whether any part of [Dr. Weiland's] damages was proximately caused by his own inaction and, if so, what portion could have been avoided." *See Greenwood*, 621 N.W.2d at 206; *see, e.g., Cox v. Keg Restaurants U.S.*, 935 P.2d 1377, 1380 (Wash.Ct.App. 1997) (testimony that "it might have been useful" to revisit doctor's recommendation did not support failure-to-mitigate instruction); *Fuches v. S.E.S.*, 459 N.W.2d 642, 643 (Iowa.Ct.App. 1990) ("to find a failure to undergo medical treatment was a failure to mitigate damages, there must be a showing that such treatment would in fact have mitigated the damages."); *Etheredge v. St. Paul Mercury Ins.*, 814 So.2d 119, 123 (La.Ct.App. 2002) (finding that plaintiff working constituted failure-to-mitigate was "plainly wrong" when the evidence consisted of his doctor's advice to "avoid activity that aggravated his back"); *Lublin v. Weber*, 833 P.2d 1139, 1140 (Nev. 1992) (finding failure-to-mitigate instruction erroneous due to insufficient evidence of the "reasonableness" of plaintiff's actions and lack of expert testimony that "pain and suffering would have been less severe if he took the [prescribed] medication."). Dr. Weiland's Motion for Judgment as a Matter of Law should have been granted.

The prejudice from the erroneous denial of summary judgment and instruction, which told the jury to reduce Dr. Weiland's damages, is shown by the jury awarding a fraction of Dr. Weiland's claimed medical expenses. (App.00087-96, Exs. 87-91);

Davis, 1998 S.D. 31, ¶ 14, 576 N.W.2d at 529 (the Court was "convince[d]" "the jury probably would have reached a different result" but for the erroneous instruction the full amount of medical expenses was not awarded); *Loup–Miller v. Brauer & Assocs. Rocky Mtn.*, 572 P.2d 845 (Colo.Ct.App. 1977) (presuming prejudice resulted from erroneous failure-to-mitigate instruction when the verdict does not require specifying the reduction). Therefore, a new trial on damages is required.

II. THE CIRCUIT COURT ERRED WHEN PRECLUDING EVIDENCE OF THE CRASH REPORT, THE SDHP'S INVESTIGATION, AND THE REPRESENTATIONS OF AN INSURANCE ADJUSTER.

The circuit court's erroneous exclusion of the crash report, the SDHP's investigation, and Dr. Weiland's conversations with an insurance adjuster was prejudicial. The circuit court's evidentiary rulings are reviewed for an abuse of discretion. *Sedlack v. Prussman Contracting*, 2020 S.D. 18, ¶ 16, 941 N.W.2d 819, 823 (citation omitted). An erroneous evidentiary ruling is reversible when such error was prejudicial. *Id.* (citation omitted). An "[e]rror is prejudicial when, in all probability, it produced some effect upon the final result and affected the rights of the party assigning it." *Id.* (citation omitted).

"For evidence to be admitted during trial, it first must be found to be relevant." *Supreme Pork v. Master Blaster*, 2009 S.D. 20, ¶ 30, 764 N.W.2d 474, 484. To be relevant, evidence need only have "any tendency to make a fact [of consequence] more or less probable than it would be without the evidence[.]" *Ferguson v. Thaemart,* 2020 S.D. 69, ¶ 12, 952 N.W.2d 277, 281; *St. John v. Peterson*, 2015 S.D. 41, ¶ 15, 865 N.W.2d 125, 130 (once found relevant, "the balance tips emphatically in favor of admission").

A. The Crash Report Should Have Been Admitted.

The circuit court's exclusion of the crash report (Ex. 15) was error. South Dakota does not recognize a per se rule of exclusion for crash reports. Instead, a "[police] report may be admitted if the declarant officer's statement meets the business record exception and the declarant witness's statement qualifies as a non-hearsay admission." *Johnson v. Farrell*, 2010 S.D. 68, ¶ 17, 787 N.W.2d 307, 313. This Court previously held that witness statements contained within a social services report were inadmissible, but this was specifically because the statements were from third-party bystanders. *Dubray v. South Dakota Dep. of Social Services*, 2004 S.D. 130, ¶¶ 18, 20, 690 N.W.2d 657, 663-64. Here, the crash report is not barred by the Rule Against Hearsay and fulfills *Dubray*'s reliability standard.

The business records exception to the hearsay rule requires that (A) "[t]he record was made at or near the time by — or from information transmitted by — someone with knowledge; (B) [t]he record was kept in the course of a regularly conducted activity of a business…; (C) [m]aking the record was a regular practice of that activity[.]" SDCL § 19-19-803(6). Deputy Albers testified he investigated the collision and authored the crash report, both of which he routinely did during his 29-years in law enforcement. (TT305-307). He also confirmed the information contained therein was transmitted by the parties, who were the only witnesses. (TT308:11-13). Thus, the crash report satisfied the business records exception.

The crash report also satisfies the reliability threshold discussed in *Dubray* and *Johnson* because the testimony of Dr. Weiland, Bumann, and Deputy Albers confirmed nothing in the report, including the narrative provided below, contained third-party statements:

> Hp 72 (vehicle 2) was driving westbound running radar and locked in on a speeding vehicle going eastbound. He activated his lights and made a u turn. A semi and trailer obstructed his view to the west and he did not see oncoming vehicle 1. Vehicle 1 hit his brakes but did not have time to avoid a collision with the rear of vehicle 2. Damage was to the front right of vehicle 1 and the rear of vehicle 2.

(App.0006); *Johnson*, 2010 S.D. 68, ¶ 24, 787 N.W.2d at 315-16 (explaining reliability was not questioned because the report only contained defendants' statements). Furthermore, the narrative is admissible under the present sense impression exception (SDCL § 19-19-803(1)) because it contains the parties' description of the collision after perceiving it; the party opponent exclusion (SDCL § 19-19-801(d)(2)) because Bumann's statements could be offered against him regarding liability and contributory negligence; and the prior consistent statement exclusion (SDCL § 19-19-801(d)(1)) because Dr. Weiland testified he routinely travels the speed limit and this is also what he told Deputy Albers, according to the crash report. (TT394:20-24; App.0002).

Lastly, exclusion of the crash report was prejudicial as shown by the contributory negligence verdict because Dr. Weiland could have used the crash report to show there were no contributing circumstances attributed to him, only to Bumann, he was travelling 65 miles-per-hour, and he did not have time to avoid the collision. Therefore, the circuit court's ruling should be reversed and the case remanded.

B. The SDHP's Investigative Materials Should Have Been Admitted.

The circuit court erroneously required redactions of Exhibits 22 and 23. Sgt. Schade issued a Supervisor Report containing his conclusions, including that Bumann's U-turn violated SDHP policy 7.105 that "[a] division vehicle shall not be driven in a careless manner at any time. If Trooper Bumann would have waited and been able to get a better view of oncoming traffic he could have avoided the collision." (App.00032).

Similarly, the SDHP Accident Review Board sent Bumann a letter stating, "[f]ollowing our review of your crash on [November 10, 2017], it was determined that the crash was preventable. It was determined that you need to use more caution when operating your patrol vehicle to turn around on violators." (App.00034). Bumann "accepted" the decision and did not appeal. (App.00036, Ex. 24). Pursuant to the pre-trial order, however, the circuit court required the redaction of the foregoing statements. (SR2135-36; App.00033, 00035).

The SDHP's policies are relevant because they are probative of negligence and contributory negligence. The SDHP's investigation is not a conclusion based on the *legal* standard of fault, but rather the application of SDHP policy. Unlike other juries that only apply the Rules of the Road to civilian drivers, this jury was put in the unique position of determining how the reasonable trooper should operate a vehicle with due regard for the safety of others, without the benefit of patrol experience. The SDHP's policies and investigation would have helped the jury do so.

The circuit court ignored this Court's support for the rule that violations of an employer's internal policies and procedures can be considered by the jury as *probative* evidence of negligence. *Morrison v. Mineral Palace Ltd. P'ship*, 1999 S.D. 145, ¶ 12, 603 N.W.2d 193, 197 n.4 ("failure to comply with a company rule does not constitute negligence per se; the jury may consider the rule, but the policy does not set forth a standard of conduct that establishes what the law requires of a reasonable person under the circumstances."); *Skrovig v. BNSF Ry. Co.*, 916 F.Supp.2d 945, 956 (D.S.D. 2013) ("It is established law in South Dakota" that employee's violation of "internal safety rules" "may be considered by the jury as evidence of negligence."). Here, Bumann and Sgt. Schade testified Bumann was trained on and expected to follow SDHP policy.

(TT57:19-25, 58:18-59:16, 301:12-23). Most importantly, Bumann did not disagree with the determination he had violated policy and could have prevented the collision, which bears significantly on negligence and contributory negligence. (App.00035-36, Exs. 23-24). Full admission of Exhibits 22-23 is consistent with *Morrison* and *Skrovig*.

Because of the redaction of these exhibits, Dr. Weiland could not impeach Bumann's testimonial claims of contributory negligence with the fact Bumann did not disagree with the SDHP's determination that he violated policy and *he* could have *prevented* the collision, not Dr. Weiland. The contributory negligence verdict demonstrates the prejudice from excluding this evidence and requires reversal. (App.00132).

C. The Representations of Bumann's Insurance Representative Should Have Been Admitted.

The circuit court's refusal to allow Dr. Weiland to call adjuster Blake Dykstra ("Dykstra") was prejudicial error. Dykstra incorrectly told Dr. Weiland he could not submit bills from Ortman Clinic for payment because he worked there, and as a result, Dr. Weiland documented his own treatment instead of asking the doctors who treated him to do so because they would not be paid for their services.[1] (SR1578-77, App.00077-78 (Weiland Depo. 30:12-14 (46:9-15 ("I was told by Blake…that I could not bill for these visits."); SR1581, App.00081 ("I was told by Defendant's representatives that I could not submit charges for their services because they are co-workers.")). Dykstra had numerous conversations with Dr. Weiland about his injuries and was provided with all of his notes, but he never requested the chiropractors prepare the notes instead. (SR1530 (Dykstra

[1] Excerpts of Dr. Weiland's notes are provided in the Appendix for context. (App.00054-74, Ex. 92).

writing, "He said his colleagues are treating him so not going to bill for anything but he is keeping personal notes/records so its all documented"). The defense latched onto this and during the depositions they took of every Ortman chiropractor, whether they treated Dr. Weiland or not, provided an excerpt of ARSD 29:41:10:50:02, which discusses chiropractic record keeping, and inquired why other chiropractors "don't keep notes on their own treatment and why [Weiland] did." (SR1529-30, App.00084-85 (Ligtenberg Depo. 5:16-6:5; 8:12-18)). Bumann has never identified any law or regulation precluding reimbursement for Ortman treatment.

Through Motions in Limine, Dr. Weiland sought permission to call Dykstra and explain these events in order to rehabilitate attacks against the credibility of his notes, his providers, and himself. (SR1514). Dr. Weiland proposed Dykstra could be referred to as "Defendant's representative" or "investigator" and that no mention of "insurance," "adjuster," or likewise would be made. *Id.* The circuit court disagreed and instead ordered Dr. Weiland to only say he was "under the impression records were not needed," which misrepresents the events, and the defense was narrowly precluded from "criticizing the recordkeeping practices of Ortman Clinic, including reference to [ARSD 29:41:10:50:02] or standards related thereto." (App.00125).

This ruling did not stop the defense from using Dr. Weiland's documentation as impeachment by repeatedly referring to these records as his "own" notes and characterizing them as a "diary" or "journal." The intent behind these statements is readily discernible in the following lengthy, unnecessary exchange:

> [Defense]: And you summarized your visits with them in kind of like a diary basically?
> [Weiland]: Correct.
> [Defense]: [Ex. 92] contains the notes, I think, that you prepared; right?
> [Weiland]: Correct.

> [Defense]: This is not the official Ortman Clinic records, though, is it?
> [Weiland]: They're Ortman Clinic record – I guess they're whatever records you want to call them.
> [Defense]: They're just your notes; right?
> [Weiland]: They're records from the clinic.
> [Defense]: Not by the doctor who did the treatment; correct?
> [Weiland]: Correct.
> [Counsel]: They're just your personal thoughts and feelings of what happened during the treatment; right?
> [Objection overruled]
> [Counsel]: So your Exhibit 92 is your handwritten notes[?]

(TT496:12-497:23, 269:19-22 ("[Weiland] kind of took his own notes or journal as to his treatment and what he was experiencing")). The same rhetoric was driven home during the defense's closing argument:

> Had [Weiland] -- had a new injury, Dr. Jay Ortman would have done a history; he would have done an assessment, like, an intake form . . . Ortman Clinic's been around a long time. That's just what you do. If you have someone that comes in with an injury, you need to take these steps to make sure you're giving appropriate and safe treatment.

(TT863:9-17); (TT265:17-266:2, 267:19-20 (asking Dr. Lightenberg, "And that's the goal of getting this intake form so that you know their past treatment, how they were injured, if they were injured, so on; right?" and "[N]o formal evaluation, though, was done on Dr. Weiland until 2019[?])).

Dr. Weiland should have been permitted to call Dykstra and accurately explain why he documented his own treatment in the way Dykstra approved. Rule 411 was not crafted as a bright line prohibition of any evidence relating to insurance; rather, it provides that "[e]vidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently." SDCL § 19-19-411. The evidence offered by Dr. Weiland pertaining to Dykstra does not meet this definition because it was not offered to prove and does not suggest Bumann acted negligently. *Center of Life Church v. Nelson*, 2018 S.D. 42, ¶ 32, 913 N.W.2d 105, 113 (finding

insurance reference did not suggest defendant was negligent and was permissible). In fact, the issue has nothing to do with liability at all.

Even assuming, *arguendo*, the general rule of Rule 411 applies, the evidence was offered for an admissible purpose: rehabilitation. "[T]he court may admit evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control." SDCL § 19-19-411; *Brue v. Brue*, 190 N.W.2d 64, 65 (S.D. 1971) (explaining exceptions to Rule 411 are permitted "when evidence is relevant to a material issue or matter involved."). Indeed, this Court has recognized the importance of this exception because it "resulted from judicially attempting to balance the equities and insure a fair and impartial jury for both parties." *Lowe v. Steel Const. Co.*, 368 N.W.2d 610, 613 (S.D. 1985).

Requiring Dr. Weiland to misrepresent why he did not bill for treatment and kept his own records utterly failed to balance conflicting interests. Analogously, this Court adopted the "almost universal rule" in personal injury cases when statements given to adverse insurance representatives are "used for the purpose of impeaching plaintiff or one of his witnesses, it is proper for plaintiff's counsel to show that the person procuring such statement was a representative of defendant's insurance company." *Stygles v. Ellis*, 123 N.W.2d 348, 353 (S.D. 1963) (citation omitted). The *Stygles* Court held that precluding counsel from eliciting testimony a witness's statement was taken by the defendant's insurer "improperly denied plaintiff the right to ascertain the identity of the statement taker and his interest in the litigation." *Id.* at 353. "Counsel had the right to seek to inform the jury of the interest of the person who took the statement so it could be considered in weighing conflicting testimony and evidence." *Id.* at 355-56. Here, Dr.

Weiland was entitled to explain Bumann's representative advised him treatment from Ortman was not reimbursable. This is, after all, why no formal records were kept.

Concerns of prejudice stemming from insurance are adequately remedied by narrowly eliciting testimony on the subject topic, referring to Dykstra as a "representative," and admonishing the jury. *See Lamar Advertising v. Kay*, 267 F.R.D. 568, 573 (D.S.D. 2010) (the parties could "stipulate to any foundational requirements prior to [testimony] so reference to insurance or [the adjuster's] employment with [the plaintiff's] insurance carrier would be unnecessary" or "agree that [the adjuster] characterize his employment simply as that of a representative of [plaintiff].") Conversely, forcing Dr. Weiland to misrepresent what actually happened while Bumann impeached him without risk of rehabilitation resulted in irremediable prejudice. Dr. Weiland could not submit bills for his Ortman treatment, which resulted in a lower award of damages that benefitted Bumann and prejudiced Dr. Weiland as a *fraction* of his claimed medical expenses were awarded. (App.00087-96, Exs. 87-91). As a result, a new trial on damages is required.

III. THE CIRCUIT COURT ERRED WHEN REFUSING TO GIVE SDPJI 1-20-60 REGARDING INSURANCE.

Leaving the jury to speculate about the existence of insurance is reversible error. "[T]he circuit court's decision to grant or deny a specific jury instruction" is reviewed under "an abuse of discretion." *Montana–Dakota Utils. Co. v. Parkshill Farms, LLC*, 2017 S.D. 88, ¶ 25, 905 N.W.2d 334, 343. The trial court must "set forth instructions to the jury 'as to the law of the case as it pertains to any theory of the parties supported by the evidence[.]'" *LDL Cattle Co., Inc. v. Guetter*, 1996 S.D. 22, ¶ 33, 544 N.W.2d 523, 530 (citation omitted). This Court construes jury instructions "as a whole to learn if they

provide a full and correct statement of the law." *Lord v. Hy-Vee Food Stores*, 2006 S.D. 70, ¶ 9, 720 N.W.2d 443, 447 (citation omitted). "The party alleging error on appeal must show error affirmatively by the record, and not only must the error be demonstrated, but it must also be shown to be prejudicial error." *Id.* (citation omitted). "[A] trial court's failure to give a requested instruction that correctly sets forth the law, in the absence of another instruction which sufficiently does the same, is prejudicial error." *Id.*

Insurance was injected by jurors during voir dire, including two instances of jurors having similar insurance claims. (JST49:1-50:20, 56:18-22, 94:10-13, 95:2-6). The issue was broached again on the third day of trial when a juror asked the bailiff, "[w]here does the money come from? You know, does he have to pay for it?" to which he responded, "I can't answer that. But you will get all of the information about that you need to hear to make a decision in the courtroom." (TT666:1-9). The circuit court refused Dr. Weiland's renewed request to give SDPJI 1-20-60, which states: "Whether a party is insured has no bearing whatever on any issue that you must decide. You must refrain from any inference, speculation, or discussion about insurance." (TT808:17-811:7).

Although this Court has not considered whether omitting SDPJI 1-20-60 is error, other jurisdictions have. In *Baraniak v. Kurby*, the plaintiff requested the cautionary instruction be given after the jury sent a note asking, "[w]ho paid the $50,935.48 in medical bills (plaintiff/insurance)?" 862 N.E.2d 1152, 1155 (Ill.Ct.App. 2007), abrogated on other grounds. The trial court instead responded, "You have received all the evidence and instructions in this case. Please continue to deliberate until you reach a verdict." *Id.* When the jury asked again, it received a variation of the same response. *Id.* The Court of Appeals emphasized the jury's question indicated it was considering an

impermissible matter despite neither party interjecting insurance. *Id.* In remanding for a new trial, the court reasoned, "[t]he simple expedient of giving [the cautionary instruction] after the jurors sent out the first note, and certainly the second one, would have served a useful purpose by providing them with an accurate answer and eliminating their obvious confusion." *Id.*; *Hojek v. Harkness*, 733 N.E.2d 356, 357-58 (Ill.Ct.App. 2000) (not answering jury question of whether insurance paid medical bills with the cautionary instruction was reversible error).

Baraniak is consistent with the principle that generally, "if a court excludes improperly admitted evidence and directs the jury to disregard it, the error is cured." *Young v. Oury*, 2013 S.D. 7, ¶ 24, 827 N.W.2d 561, 568. Here, the topic of insurance was interjected the first day of trial and later, like *Baraniak*, the jury impermissibly considered "who pays." This may not have been prejudicial *if* the jury was given SDPJI 1-20-60. *Center of Life Church*, 2018 S.D. 42, ¶ 32, 913 N.W.2d at 113 (SDPJI 1-20-60 cured any prejudice from insurance reference); *Welch v. Haase*, 2003 S.D. 141, ¶ 36, 672 N.W.2d 689, 700 ("there was a sufficient basis to give a clarifying instruction" when "some jurors thought land owners could be liable as a matter of law"). This conclusion and resulting prejudice is shown through the references to insurance made during trial, the SDHP's involvement, and the verdict amount. The jurors undoubtedly speculated Bumann would pay. The jury may also have altered the verdict due to health insurance. The error was never cured and the jury was left to factor in financial ability due to a lack of proper instruction. This constitutes reversible error.

IV. THE CIRCUIT COURT ERRED WHEN PRECLUDING WEILAND FROM PRESENTING A PER DIEM CALCULATION OF DAMAGES.

The circuit court erroneously and prejudicially precluded Dr. Weiland from presenting a per diem calculation of non-economic damages during closing argument. (App.000128). During closing argument, counsel "may argue and comment upon the law as given in the instructions of the court, as well as upon the evidence in the case." SDCL § 15-14-18. "[C]ounsel are allowed wide latitude in argument and a court should not too narrowly limit the manner and form of presentation and the inferences and conclusions to be drawn from the evidence, so long as unfair means are not employed to prejudice the jury." *Schoon v. Lobby*, 2003 S.D. 123, ¶ 18, 670 N.W.2d 885, 891 (citation omitted); *Higgins v. Hermes*, 552 P.2d 1227 (N.M.Ct.App. 1976) (per diem argument permissible because attorneys and juries discuss and infer sums from the evidence); *Beagle v. Vasold*, 417 P.2d 673 (Cal. 1966) (same).

Per diem calculations are consistent with South Dakota law. This Court has continuously "refrain[ed] from dictating any specific formula for calculating damages." *McKie v. Huntley*, 2000 S.D. 160, ¶ 18, 620 N.W.2d 599, 604. Per diem calculations are faithful to the requirement that parties provide the jury with a "reasonable basis for calculating the loss. While jurors cannot speculate, they have some leeway in figuring damages." *Id.* at ¶ 20. Indeed, SDPJI 50-120-20, which expressly references "future damages," requires such a calculation.

Dr. Weiland's request for non-economic damages was based upon the evidence presented about his pain and suffering, mental anguish, disability, and loss of enjoyment of life experienced since the collision and quantified based on his life expectancy. *Grossnickle v. Germantown*, 209 N.E.2d 442, 447 (Ohio 1965) (per diem calculation

"illustrated the basis for the total amount sought as compensation for that loss."). The per diem calculation contextualizes this request, the evidence and encourages the jury to look closely at lay testimony about the injury's effect, expert testimony on injury duration, life span, and the totality of the circumstances. Indeed, the jury was instructed on Dr. Weiland's life expectancy (SR4111) because it is directly relevant to calculating damages. *Bottum v. Kamen*, 180 N.W. 948, 950 (S.D. 1921) (life expectancy table is a "chief factor in estimating the amount of such [pecuniary] damages" from injuries). Per diem calculations assist the jury with the difficult task of calculating values for injuries taking place over decades with no fixed monetary value. *Tufty v. Sioux Transit*, 17 N.W.2d 700, 701 (S.D. 1945) ("difficulties stem from the absence of an accurate means of measuring the pecuniary damages actually suffered by others through the destruction of a particular life."); *Stormo v. Strong*, 469 N.W.2d 816, 825 (S.D. 1991) (allowing examples by attorney for calculating damages for family provided services "[g]iven the nature of the services provided and the absence of a well-established market").

Although this Court has not ruled on the issue,[2] our District Court and a majority of courts considering them have endorsed their use. *See, e.g.*, 2 American Law of Torts § 8:8; *White v. Cooper Tools*, 2010 WL 1329572 at *6 (D.S.D. March 30, 2010); *DeMaris v. Whittier*, 569 P.2d 605 (Or. 1977); *Higgins*, 552 P.2d 1227; *Debus v. Grand Union Stores*, 621 A.2d 1288 (Vt. 1993); *Tucker v. Union Oil*, 603 P.2d 156 (Idaho 1979); *Cardamon v. Iowa Lutheran Hospital*, 128 N.W.2d 226 (Iowa 1964); *Newbury v. Vogel*, 379 P.2d 811 (Colo. 1963); *Louisville & N. R. v. Mattingly*, 339 S.W.2d 155 (Ky. 1960);

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[2] In *Reindl v. Opitz*, the Court declined to opine on the circuit court's allowance of a per diem arguments due to limited use. 217 N.W.2d 873, 876 (S.D. 1974).

Yates v. Wenk, 109 N.W.2d 828 (Mich. 1961); *Arnold v. Ellis*, 97 So.2d 744 (Miss. 1957); *Streeter v. Sears, Roebuck & Co.*, 533 So.2d 54 (La.App.Ct. 1988); *Howle v. PYA/Monarch*, 344 S.E.2d 157 (S.C.App.Ct. 1986); *Cafferty v. Monson*, 360 N.W.2d 414 (Minn.Ct.App. 1985); *Feldman v. Bethel*, 484 N.Y.S.2d 147 (N.Y.Ct.App. 1984); *Weeks v. Holsclaw*, 285 S.E.2d 321 (N.C.Ct.App. 1982); *Sunset Brick & Tile v. Miles*, 430 S.W.2d 388 (Tex.App.Ct. 1968); *Hardwick v. Price*, 152 S.E.2d 905 (Ga.Ct.App. 1966); *Kampo Transit v. Powers*, 211 N.E.2d 781 (Ind.Ct.App. 1965); *Beman v. Kopman*, 28CIV16-0032 (S.D.Cir.2017) ("[i]t appears illogical . . . plaintiff should be required to prove damages and at the same time be artificially muted regarding how [he] calculated the damage amount."); *Weber v. Rains*, 30CIV16-000023 (S.D.Cir.2018) (allowing per diem calculation); *Volk v. Heart Hospital of South Dakota*, 41CIV16-000070 (S.D.Cir.2022) (same).

Per diem calculations provide the jury with an analytical framework for awarding damages it can accept or reject. Any unlikely risk of prejudice is accounted for by the circuit court's use of limiting instructions, reducing excessive awards, and granting new trials. *Roth v. Farner-Bocken*, 2003 S.D. 80, ¶ 40, 667 N.W.2d 651, 664 (citation omitted) ("It is a well-settled premise" "a jury will use their reason in weighing the evidence and follow the instructions of the trial court."). For example, the jury was instructed that closing arguments are "not evidence" and to "disregard any" "remark of counsel which has no basis in the evidence." SDPJI 1-20-30. Even so, Dr. Weiland was still precluded from providing a method to the jury for calculating non-economic damages based on his life expectancy and the evidence. The resulting prejudice is shown by the jury's award of non-economic damages for a fraction of that requested.

CONCLUSION

Dr. Weiland respectfully requests that this Court reverse the circuit court's decisions and remand for a new trial on damages.

Dated this 24th day of July, 2023.

CUTLER LAW FIRM, LLP
Attorneys at Law

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument before the Court.

/s/Michael D. Bornitz

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,896 words, exclusive of the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Michael D. Bornitz

CERTIFICATE OF SERVICE

I, Michael D. Bornitz, do hereby certify that on this 24th day of July, 2023, I have electronically filed the foregoing with the Supreme Court using the Odyssey File & Serve system which will send notification of such filing to the following:

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Jake R. Schneider
Woods, Fuller, Shultz & Smith, P.C.
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/s/ Michael D. Bornitz

INDEX TO APPELLANT'S APPENDIX

STATE OF SOUTH DAKOTA INVESTIGATOR'S MOTOR VEHICLE TRAFFIC ACCIDENT REPORT		Mail to: Office of Accident Records, 118 W. Capitol Ave., Pierre, SD 57501	
		TraCS ID: **97547**	TraCS Sequence: **0**
Form DPS - AR1 12/12/2014		Agency Use **WEILAND**	Report Type **WEILAND**
Is this only a Wild Animal Hit Report?	Agency Name **MINNEHAHA COUNTY SHERIFF'**	Date of Accident **11/10/2017**	Time of Accident **13:00 Hrs.**
Reporting Officer Last Name **ALBERS**	Reporting Officer First Name **TYRONE**	Reporting Officer Middle Name **AUSTIN**	Reporting Officer # **S088**

LOCATION

Location Description **265TH ST**					
Latitude			Longitude		
County **50**	County Name **50 - MINNEHAHA**		City or Rural **0695 - Humboldt**	Roadway Surface Condition **01 - Dry**	
On Road, Street, or Highway **265TH ST**				Roadway Surface Type **02 - Asphalt (Blacktop)**	
At Intersection with **SD HWY 19**				Roadway Align/Grade **01 - Straight and level**	
Distance	Units	Direction of	MRM (milepost)	Relation to Junction **00 - Non-junction**	
Distance	Units	Direction and	Distance	Units	Direction of
Junction or Intersecting Street **01 - Junction**			Name of Junction, Road, Street, or Highway		

UNIT 001

Unit Type **01 - Motor vehicle in transport with driver**				Hit and Run **02 - No**
Driver's Name - Last **WEILAND**	First **TODD**	Middle		
Address [redacted]		Address (Line 2)		
City **SIOUX FALLS**	State **SD**	Zip [redacted]	Date of Birth [redacted]	Sex **1 - Male**
		Non - Motorist Location **96 - Not Applicable**		
Phone [redacted]	DL State **SD**	DL Class **1**	Non - Motorist Action **96 - Not Applicable**	
DL Status **01 - Normal within restrictions**			Non - Motorist Contributing Circumstances (Up to Two) **96 - Not Applicable**	
Driver Contributing Circumstances (Up to Two) **00 - None**			Drug Use **00 - None used**	Drug Test **02 - Test not given**
Vision Contributing Circumstance **00 - None**			Alcohol Use **00 - None used**	Alcohol Test **91 - Test not given**
Injury Status **05 - No injury**			Ejection **00 - Not ejected**	
Safety Equipment **03 - Lap belt and shoulder harness used**			Citation Charge? **02 - No**	
Seating Position **01 - Operator**			Citation #1	
Air Bag Deployed **00 - Not deployed**			Citation #2	
Transported To			Citation #3	
Source of Transport **00 - Not Transported**			Citation #4	
Is Driver the Owner **Yes**				
Owner's Name - Last **WEILAND**	First **TODD**	Middle		
Address 1441 W WATERSTONE DR		Address (Line 2)		
City **SIOUX FALLS**	State **SD**	Zip **57108**	Red Tag **A269297**	
Year **2013**	Make **General Motors - GMC**	Model **TRN**	VIN **2GKFLWE38D6163844**	
License Plate # **44NK75**	State **SD**	Year **2017**	Estimated Travel Speed **65**	Speed - How Estimated? **02 - Driver Statement**
Speed Limit **65**	Total Occupants **1**		Damage Extent **03 - Disabling Damage**	Vehicle Towed **01 - Yes**
Damage Amount (Vehicle and Contents) **2000**			[redacted]	
[redacted]			[redacted]	
Emergency Vehicle Use?			Vehicle Configuration **02 - SUV (sport utility/ suburban)**	
Trailer Type			Cargo Body Type **00 - No cargo body**	
Direction of Travel Before Crash **03 - Eastbound**		Trailer LP # Attached to Power Unit	State	Year
Initial Point of Impact **12 - Position 12**	Most Damaged Area **01 - Position 1**	Trailer 2 License Plate #	State	Year
Underride/Override **00 - No underride or override**		Trailer 3 License Plate #	State	Year
Traffic Control Device Type **00 - No controls**			Vehicle Contributing Circumstance **00 - None**	
Vehicle Maneuver **01 - Straight ahead**			Road Contributing Circumstance **00 - None**	

First Event **25 - Motor vehicle in transport**			Second Event			
Third Event			Fourth Event			
Most Harmful Event for this Vehicle **25 - Motor vehicle in transport**						
Does the accident involve one or more of the following; • a truck having a GCWR of 10,001 or more pounds; OR • a vehicle displaying a hazardous material placard; OR • a vehicle designed to transport 9 or more people, including driver			Did the accident result in one or more of the following: • a fatality; OR • an injury requiring transportation for immediate medical attention; OR • a vehicle was disabled requiring a towaway from the scene			
Accident Involved Vehicle - Purpose			Carrier Name			
Street Address			Street Address (Line 2)			
City	State	Zip	US DOT # **98**	GVWR	GCWR	
Hazardous Material Released?	Hazardous Material Content Code	Hazardous Material Class Code		Hazardous Materials Description		

UNIT 002

Unit Type **01 - Motor vehicle in transport with driver**				Hit and Run **02 - No**
Driver's Name - Last **BUMANN**	First **PATRICK**	Middle [redacted]		
Address [redacted]		Address (Line 2)		
City **SIOUX FALLS**	State **SD**	Zip [redacted]	Date of Birth [redacted]	Sex **1 - Male**
		Non - Motorist Location **96 - Not Applicable**		
Phone [redacted]	DL State **SD**	DL Class **1**	Non - Motorist Action **96 - Not Applicable**	
DL Status **01 - Normal within restrictions**			Non - Motorist Contributing Circumstances (Up to Two) **96 - Not Applicable**	
Driver Contributing Circumstances (Up to Two) **01 - Failed to yield to vehicle**			Drug Use **00 - None used**	Drug Test **02 - Test not given**
Vision Contributing Circumstance **08 - Motor vehicle (including load) not parked**			Alcohol Use **00 - None used**	Alcohol Test **91 - Test not given**
Injury Status **05 - No injury**			Ejection **00 - Not ejected**	
Saftey Equipment **03 - Lap belt and shoulder harness used**			Citation Charge? **02 - No**	
Seating Position **01 - Operator**			Citation #1	
Air Bag Deployed **00 - Not deployed**			Citation #2	
Transported To			Citation #3	
Source of Transport **00 - Not Transported**			Citation #4	
Is Driver the Owner **No**				
Owner's Name - Last **STATE OF SD**	First		Middle	
Address 118 W CAPITOL AVE			Address (Line 2)	
City **PIERRE**	State **SD**	Zip **57501**	Red Tag **A269296**	
Year **2014**	Make **Chevrolet - CHEV**	Model **CAP**	VIN **6G3NS5U29EL948530**	
License Plate # **HP72**	State **SD**	Year **2017**	Estimated Travel Speed **15**	Speed - How Estimated? **02 - Driver Statement**
Speed Limit **65**	Total Occupants **1**		Damage Extent **03 - Disabling Damage**	Vehicle Towed **01 - Yes**
Damage Amount (Vehicle and Contents) **5000**			[redacted]	
[redacted]			[redacted]	
Emergency Vehicle Use?			Vehicle Configuration **01 - Passenger car**	
Trailer Type **00 - No trailer/attachment**			Cargo Body Type **00 - No cargo body**	
Direction of Travel Before Crash **03 - Eastbound**		Trailer LP # Attached to Power Unit	State	Year
Initial Point of Impact **06 - Position 6**	Most Damaged Area **06 - Position 6**	Trailer 2 License Plate #	State	Year
Underride/Override **00 - No underride or override**		Trailer 3 License Plate #	State	Year
Traffic Control Device Type **00 - No controls**			Vehicle Contributing Circumstance **00 - None**	
Vehicle Maneuver **07 - Making U-turn**			Road Contributing Circumstance **00 - None**	
First Event **25 - Motor vehicle in transport**			Second Event	

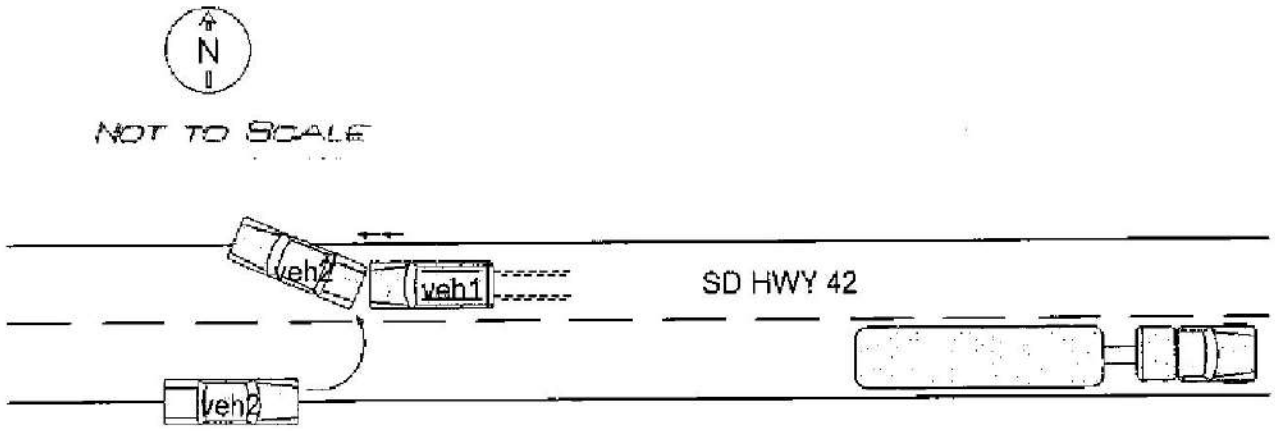
	Third Event			Fourth Event		
	Most Harmful Event for this Vehicle **25 - Motor vehicle in transport**					
	Does the accident involve one or more of the following: • a truck having a GCWR of 10,001 or more pounds; OR • a vehicle displaying a hazardous material placard; OR • a vehicle designed to transport 9 or more people, including driver			Did the accident result in one or more of the following: • a fatality; OR • an injury requiring transportation for immediate medical attention; OR • a vehicle was disabled requiring a towaway from the scene		
	Accident Involved Vehicle - Purpose			Carrier Name		
	Street Address			Street Address (Line 2)		
	City	State	Zip	US DOT # **98**	GVWR	GCWR
	Hazardous Material Released?	Hazardous Material Content Code	Hazardous Material Class Code	Hazardous Materials Description		

Work Zone Related? **02 - No**	First Harmful Event? **25 - Motor vehicle in transport**
Workers Present?	Location of First Harmful Event **01 - On roadway**
Work Zone **96 - Not Applicable**	
Work Zone Location **96 - Not Applicable**	Trafficway Description **01 - Two-way, not divided**
Manner of Collision **01 - Rear-end (Front-to-rear)**	Light Condition **01 - Daylight**
School Bus Related? **00 - No**	Weather Conditions (up to two) **02 - Cloudy**

D O	Damaged Object (Property Other Than Vehicles)			Estimate of Damage
A B	Owner's Full Name - Last		First Name	Middle Name
M J	Address		Address (Line 2)	
A E G C E T D	City		State	Zip

I P	Unit #	Last Name	First Name		Middle Name	
N E	Address		Address (Line 2)			
J R	City	State	Zip	Date of Birth	Sex	
U S	Injury Status		Ejection			
R O	Seating Position		Safety Equipment			
E N	Air Bag Deployed		Source of Transport			
D	Transported to		EMS Trip #			

DIAGRAM



NARRATIVE
HP 72 (VEHICLE 2) WAS DRIVING WESTBOUND RUNNING RADAR AND LOCKED IN ON A SPEEDING VEHICLE GOING EASTBOUND. HE ACTIVATED HIS LIGHTS AND MADE A U TURN. A SEMI AND TRAILER OBSTRUCTED HIS VIEW TO THE WEST AND HE DID NOT SEE ONCOMING VEHICLE 1. VEHICLE 1 HIT HIS BRAKES BUT DID NOT HAVE TIME TO AVOID A COLLISION WITH THE REAR OF VEHICLE 2. DAMAGE WAS TO THE FRONT RIGHT OF VEHICLE 1 AND THE REAR OF VEHICLE 2.

WITNESS				
	Last Name	First Name		Middle Name
	Address			
	Address (Line 2)			
	City	State	Zip	Phone #

Date Notified **11/10/2017**	Time Notified **13:00** Hrs.	Date Arrived **11/10/2017**	Time Arrived **13:20** Hrs.
Agency Type **02 - Sheriff department**	Investigation Made at Scene? **01 - Yes**	Photos Taken? **N**	Date Approved **11/27/2017**
Approval Officer	Last Name **GOFF**	First Name **LOIS**	Middle Name

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 30309

TODD WEILAND

Plaintiff and Appellant,

v.

PATRICK BUMANN

Defendant and Appellee.

Placeholder page for

Dash Camera Videos (Exs. 1-2)

Recorded Call (Ex. 3)

SOUTH DAKOTA HIGHWAY PATROL

DAMAGE TO STATE PROPERTY

Case# HP17006131CR

Officer Name: 72 - Bumann, Patrick HP Number 72

District No. 2

Located at 5316 W 60th St N, Sioux Falls, SD 57107-6465 Date 11/10/17 12:59

Property damage description: Rear end damage to vehicle.

Date and time of damage or loss: 11/10/17 12:57

Location of damage: SD 42 & SD 19

Estimated amount of damage: 7272.22 Equipment I.D. #: AL935 DPS Inventory # _Odometer: 0

Incident description:
I was traveling west on SD 42 near its intersection with SD 19. There was a pickup with a box trailer in front of me and a semi pulling a grain trailer in front of the pickup. I observed a vehicle traveling east on SD 42 that was speeding and was displaying expired license plates. I pulled onto the westbound shoulder and did not observe any east bound traffic between the pickup and semi. I activated my emergency lights and turned around to initiate a traffic stop with the vehicle that was speeding. As I was turning around I observed another vehicle traveling eastbound a short distance from me. Because of the short distance between my vehicle and the other eastbound vehicle a collision occurred. The front passenger side of the GMC struck the rear of my patrol car.

We pulled our vehicles onto the shoulder of the road and I immediately checked the other driver for injuries, which none were reported. Minnehaha County Sheriff's Office handled the crash report and both vehicles were towed from the scene.

Damage caused by: Employee
Name: HP72 BUMANN, PATRICK
Address: [redacted]
Phone: [redacted]

[redacted]

Vehicle One

Make: Chevrolet Model: CAPRICE POLICE Year: 2014 State: SD License: HP72

Owners name: SD HIGHWAY PATROL Address:

Vehicle Two

Make: GMC Model: TERRAIN SLT Year: 2013 State: SD License: 44NK75

EXHIBIT
tabbies 18

Owners name: Address:

Witnesses

Name: Address: Phone:

Name: Address: Phone:

Police notified? Department and dateYes - **Minnehaha County Sheriff's Office - 11/10/2017** Case number (If stolen):

Prepared by: *** Trp Patrick Bumann 72**

STATE OF SOUTH DAKOTA IN CIRCUIT COURT
COUNTY OF MINNEHAHA SECOND JUDICIAL CIRCUIT

* *

TODD WEILAND, 49CIV20-000969

Plaintiff,

vs.

PATRICK BUMANN and SOUTH DAKOTA HIGHWAY PATROL,

Woods Law Firm
Sioux Falls, SD
January 14, 2021
8:50 a.m.

Defendants.

* *

V I D E O T A P E D D E P O S I T I O N O F

PATRICK BUMANN

* *

APPEARANCES

Mr. Michael D. Bornitz
Cutler Law Firm
Sioux Falls, South Dakota
for the Plaintiff;

Mr. Gary P. Thimsen
Ms. Alexis A. Warner
Woods, Fuller, Shultz & Smith
Sioux Falls, South Dakota
for the Defendants.

Also present: Craig Ambach
Jason Husby

Q. Is that a car that you specifically are assigned to?
A. Yes.
Q. And so you take it home, and then does it sit, like, at your house, for example, over the weekend if you're done working your shift?
A. Yes, it does.
Q. All right. So let's just jump in and talk about this motor vehicle collision from November 10th of '17.
A. Okay.
Q. Tell us how it happened, tell us what occurred.
A. So I was traveling west on Highway 42 near the intersection of Highway 19, and I observed a vehicle traveling east on Highway 42 near that same location. I observed the vehicle was traveling above the posted speed limit of 65 miles per hour and it had expired license plates as well.

After I saw those violations, I pulled to the shoulder of road and turned my emergency lights on. There was a semi pulling a grain trailer and then right behind that semi, which was in front of me, and then right behind that semi between my vehicle and that semi was a

pickup pulling a large box trailer. So I pulled to the shoulder where I believed I could see between those two vehicles and I thought it was safe to conduct a safe U-turn, and as I conducted the U-turn, I observed a vehicle coming at me. I tried to maneuver more onto the shoulder but our vehicles collided after that.

Q. All right. How did you determine that the vehicle that was going east was speeding?

A. I used my radar.

Q. How does the radar work in your vehicle in terms of being able to tell that someone is speeding? I -- I don't know. Can you explain that?

A. Yeah. So when I first saw the vehicle, I could tell that it was speeding which is why I activated my radar. Essentially I have a remote that has buttons to turn it on and off, and then on the front driver's side of the windshield, the radar is attached or suction-cupped to the windshield or it's on Velcro sitting there so it doesn't move. And I activated it by pressing the button which gave me the reading of the vehicle coming at me which I -- is what the speed it was going was.

Q. And how fast was it going, if you remember?

going.

Q. Do you have any reason to believe that Todd Weiland was distracted in any way?

A. I didn't see him so I couldn't attest to that, either.

Q. I'm going to show you what we've marked as Exhibit Number 1. You've seen that already, I know.

A. Yes.

Q. Is that the traffic crash report from this incident?

A. Yes.

Q. All right. You know, it looks like there's sometimes different versions of this. Is this a version that you're familiar with?

A. I've seen versions similar. This is not the version that I saw for this particular crash.

Q. How is it that there's different versions of the same kind of report?

A. I am not sure, to be honest with you.

Q. Okay. And because I've seen that, too. I mean, I've seen two different versions of this report. I mean, I think they have the same information, but I wasn't sure if you knew how that difference is?

Q. It says, "He did not see oncoming Vehicle Number 1." Do you see that?
A. Correct, yes.
Q. And that's consistent with what you told us, that you did not see Mr. Weiland's vehicle right away, correct?
A. Correct.
Q. "Vehicle 1 hit his brakes but did not have time to avoid a collision." Do you see that?
A. I do.
Q. Do you believe that that is accurate?
A. I did not see him activate his brakes so I could not attest to that.
Q. And, of course, there's nothing in this report, is there, about Todd Weiland speeding?
A. Not that I could see, no.
Q. And there's nothing in this report about Todd Weiland being distracted while he was driving, correct?
A. Correct.
Q. Would you consider Highway 42 to be a busy South Dakota Highway?
A. I would.
Q. And was -- was Highway 42 a busy highway around the time that this collision occurred?

experience as a trooper?

A. U-turns can be dangerous maneuvers if -- for many reasons. Could be if there is a pedestrian obstructing the way that is not seen, another vehicle that is not seen, anything of that nature, obstructing traffic behind you or coming at you as well.

Q. The reason that you were performing this U-turn was to pull over somebody who was speeding and who had expired tags, correct?

A. Correct.

Q. So there wasn't any other reason that you were performing the U-turn at that point in time, correct?

A. Correct.

Q. All right. In other words, this was not someone who you perceived to be a fleeing felon, correct?

A. At that time, no, correct.

Q. Other than the fact that this driver was speeding and had expired tags, did you have any reason to believe that that driver of the pickup was a danger to public safety?

A. Other than the speeding, no, and the expired tags, no.

Q. And you told us that at the time of this

of the circumstances at that time what I was feeling and everything surrounding the circumstances of that exact time, I can't put myself back in that position without physically being there so I don't think that's something that I could even answer.

Q. Okay. If you were faced with the same circumstances today after you left this deposition, would you make the same U-turn?

A. Once again, I couldn't say because it's a situation that I would have to recall every existing surrounding circumstance for that -- for that certain situation. I do my best to follow all the rules of the road, policies, procedures and everything, so it would be hard for me to put myself back in that situation without physically being there.

Q. Did you know at the time that performing a U-turn could be something that put yourself in danger?

A. Yes, I did.

Q. Did you know at the time that performing a U-turn could be something that put other drivers in danger?

A. Yes, I did.

Q. And did you know at the time that you had to be a

hundred percent sure that it was clear before you made your U-turn?

A. Yes, I did.

Q. Did the highway patrol investigate this collision?

A. For the collision itself, it was the Minnehaha County Sheriff's Office that investigated it.

Q. Was there any sort of preventability analysis or determination made by the South Dakota Highway Patrol in regard to this collision?

A. Yes, there was.

Q. And what was the decision on whether this was preventable?

A. They deemed it was preventable.

Q. Was any determination made about whether your driving constituted a violation of any South Dakota Highway Patrol policy?

A. I would have to review the document. I don't recall exactly what it said.

Q. Are you familiar with South Dakota Highway Patrol Policy 7.105?

A. Just off the top of my head with the number, I wouldn't be able to tell you what it is but I am familiar with our policy manual.

Q. Do you have a copy of the highway patrol policy

A. (Complies).

(Video recording paused at this time.)

BY MR. BORNITZ:

Q. So based on your review of the video, did this occur in a no passing zone?

A. Yes, it did.

Q. Okay. And in the video, there's a point in time where we go from having no audio to having audio, correct?

A. Correct.

Q. And based on what you told me earlier, that should be about 30 seconds or so from the start of the video to when the audio starts; is that correct?

A. Correct.

Q. Okay. And the audio will start at basically the time when you turn the camera on?

A. Correct. Either turn the camera on physically or turn my lights on, yes.

Q. Okay. In this case, did you turn your lights on and your camera or just your camera?

A. I don't recall. I know that I did turn my lights on. I don't remember if I turned my camera on before that or if it was lights that turned the camera on itself.

Q. -- it says, "Defendant Bumann performed a U-turn to get into the eastbound lane of traffic on South Dakota Highway 42."

Did I read that correctly?

A. Yes, you did.

Q. And is that a true statement, in your opinion?

A. Yes, it is.

Q. Okay. Paragraph 9, "Defendant Bumann performed this U-turn in front of plaintiff's vehicle."

Did I read that correctly?

A. You did.

Q. Do you believe that to be a true statement?

A. Yes, I do.

Q. Paragraph 10, "Plaintiff slammed on the brakes but was unable to avoid a collision with Defendant Bumann's vehicle."

Did I read that correctly?

A. You did.

Q. And I think you've told us, you don't know that you have an adequate basis to say whether that's true or not. Is that fair?

A. That is correct, yes.

Q. And you still believe that to be the case?

A. Yes, sir.

Q. Paragraph 11, "Plaintiff's vehicle hit the

mind every time. Can you repeat just -- just your question one more time.

Q. Yeah. Subject to Mr. Thimsen's objection --

MR. THIMSEN: Okay.

Q. -- do you agree or disagree that this collision was your fault?

A. I disagree.

Q. And what facts do you rely upon to disagree with that?

A. Because I don't know the totality of the investigation. I only know what I did. I didn't -- I don't know any part of what Mr. Weiland was involved in in this crash.

Q. Is there any other reason that you disagree that this collision was your fault?

A. No.

Q. I'm sorry?

A. Not off the top of my head, no, none that I can think of.

Q. Okay. Let's turn in Exhibit 6 to paragraph 8. Now, what this says is, again, to paraphrase, that the collision was also Todd Weiland's fault, at least in part. That's kind of what the implication of that is. I want to ask you, do you agree or disagrees that this collision was

also, at least in some measure, Todd Weiland's fault?

MR. THIMSEN: Same objection as previously stated.

Go ahead.

A. In this situation, I don't know the facts and circumstances regarding that so I couldn't agree or disagree.

Q. Would -- would it be fair to say that if I asked you to point to any evidence that Mr. Weiland was at fault, that you would not be able to point to any as you sit here today?

MR. THIMSEN: And, again, I'll object as to what constitutes evidence as a legal conclusion.

A. Once again, I don't have any evidence that I could point to right now as I wasn't part of the investigation.

Q. Are you aware of anything that you would point to from either looking at the video or from looking at the crash report that would -- would indicate to you as a -- as a trooper that Todd Weiland did anything wrong in this incident?

A. Just referring to the video and just referring to the crash report, no.

Q. In any of the reports that you have read, that

A. I'm not sure if it occurred on the lane of travel or if it was on the shoulder.
Q. Okay. Is that because you said you had tried to get over to the right?
A. Correct.
Q. That's what you mean by that?
A. Yes, correct.
Q. Let's go to Interrogatory Number 26 on page 9.
A. Yes.
Q. I'm going to ask you about Number 25 which is a question that asked if you contended that Todd Weiland violated any laws or standards at the time, okay. And the answer at that time is no. Do you see that?
A. I do.
Q. And as you sit here today, do you agree that you're not aware of any law or standard that Todd Weiland violated at the time of this collision?
A. Yes. Like I said, at this time I'm not aware of any, no, that's correct.
Q. Okay. And now let's go to 26. That's talking about fault or responsibility in terms of the collision. Do you see that?
A. I do.
Q. And it says: I believe both parties contributed

in some manner to the collision. Do you see that?

A. Yes.

Q. How do you believe that Todd Weiland contributed in some manner to the collision?

A. So, once again, I don't have all of the evidence for Mr. Weiland so I -- I'm not sure at this point.

Q. Have you spoken to anybody at the highway patrol who told you that Todd Weiland was at fault or responsible for this collision in any way?

A. No, I've not.

Q. Have you spoken to anybody at the Minnehaha County Sheriff's Office who felt that this collision was Todd Weiland's fault or responsibility in any way?

A. No, I've not.

Q. Have you spoken to anybody else who thought that this collision was Todd Weiland's fault or responsibility in any way?

A. I've not.

Q. And you say also in your Answer to Interrogatory Number 26 there is no document to that effect. Do you see that?

A. Correct.

Q. And as you sit here today, do you have any documents that would indicate that Todd Weiland was at fault in any way in this crash?
A. I do not.
Q. All right. I've clipped some documents together that I'm going to show you that are marked as Exhibit Number 8.
A. Okay.
Q. Now, Mr. Thimsen produced some manuals, okay, for me at my request.
A. Okay.
Q. And those are, in part, attached here. So what I want you to do, and I didn't -- you know, some of these are a hundred pages --
A. Yes.
Q. -- okay, but these are the four that were produced as Exhibits 12, 13, 14 and 15 so I -- and what I did is I put the cover page and then up to a table of contents, all right. So I want you to -- I'm just going to ask you a few questions about these --
A. Yes.
Q. -- so at least take a look at those.
A. (Complies).
Q. So the first one is Basic On-Scene and

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

= =

TODD WEILAND,

Plaintiff,

vs. 49CIV20-000969

PATRICK BUMANN,

Defendant.

= =

Videotaped Deposition of: STEVEN SCHADE
Date: January 21, 2022
Time: 9:01 a.m.

= =

APPEARANCES

Michael D. Bornitz
Abigale M. Farley
Cutler Law Firm, LLP
Sioux Falls, South Dakota

Attorneys for the Plaintiff

Melanie L. Carpenter
Justin Bergeson
Woods, Fuller, Shultz & Smith, P.C.
Sioux Falls, South Dakota

Attorneys for the Defendant

REPORTED BY: Audrey M. Barbush, RPR

correct?

A Correct.

Q And that's what made this particular collision occur, true?

A That is part of why this collision occurred.

Q What other reasons did this collision occur?

A The -- you know, the design of the road -- so whatever the design was for the no-passing zone -- and then the limited view obstruction around that area, with the vehicles in front of him.

Q Okay. When you reviewed this collision, did you -- strike that.

You spoke with Trooper Bumann following this collision, correct?

A Correct.

Q When you spoke with him, did he ever blame Dr. Weiland at all, even the smallest amount, for causing or contributing to cause the collision?

A I do not remember.

Q Do you remember any conversation with Trooper Bumann where he blamed Dr. Weiland in any respect for causing or contributing to cause the collision?

A I do not remember.

Q Have you seen it in writing anywhere, in any of the various reports, where you reviewed that Trooper Bumann

said that Dr. Weiland caused or contributed to cause this collision in any event?

A Not in any of the reports associated with this case.

Q Okay. And that's not a conclusion that you reached, correct?

A No.

Q Right. You didn't find any fault with him, true -- with Dr. Weiland?

A With the reports that Trooper Bumann wrote, I did not see anything that he had indicated that.

Q Okay. And if, in fact, Trooper Bumann said, "Yeah, it's my bad a hundred percent," would you agree with that?

MS. CARPENTER: I object. Form of the question, calls for a legal conclusion, ultimate issue.

You can answer.

BY MR. BORNITZ:

Q Go ahead.

A I do not recall.

Q Okay. But I'm not asking that. I'm asking, if Trooper Bumann had said, "It's my bad a hundred percent," would you agree with him, based on your review of this collision?

MS. CARPENTER: Same objection.

THE WITNESS: That is Trooper Bumann's formulated

opinion of the incident. He has the totality of the whole circumstance, where I have a limited view and a limited view -- or involvement in the case. So that would be his statement, and if that's his statement, that's his statement, but I am not going to agree or disagree with his statement.

BY MR. BORNITZ:

Q Okay. You've never heard him go back on that statement that it was his bad a hundred percent, correct?

A He's never said anything different to me.

Q Okay. And nobody has pointed out to you any reason why Dr. Weiland was at fault in causing this collision, correct?

A I do not know what Dr. Weiland was doing in his car. I don't know anything about that. I'm just going off of the one side of the story that I heard. So I don't -- I don't know.

Q Well, my question was, has anybody pointed out to you anything to show that Dr. Weiland was at fault in causing or contributing to cause the collision?

A Nobody's pointed anything out to me.

Q Okay. And you've never found anything either, correct?

A Correct.

Q Do you, as a supervisor at the highway patrol, consider performing a U-turn in a no-passing zone with

obstructed vision to be a dangerous maneuver?
A Again, I -- with the limited information I have, I feel that was not the most safe thing to do. But I was not there, and I don't know the whole -- totality of the whole circumstance of what Trooper Bumann was seeing and everything else around it.
Q Okay. And my question was, okay, as a supervisor, do you consider it to be a dangerous maneuver to perform a U-turn in a no-passing zone with obstructed vision ahead?
A I feel that would be an unsafe maneuver.
Q And it would be dangerous potentially to the trooper and to other drivers, correct?
A There is the potential, yes.
Q And that's, in fact, what happened here, true? There was a collision?
A Correct.
Q Would you agree that Trooper Bumann failed to drive with due caution under these circumstances?
A I do agree.
Q Exhibit 2 there. One of the things that Sergeant Kinney wrote was -- in the second paragraph, he says "It was determined that you need to use more caution when operating your patrol vehicle to turn around on violators." Do you see that?

A Yes.
Q Do you agree with Trooper -- or excuse me, Sergeant Kinney's assessment, what he wrote there?
A Yes.
Q What do you believe -- or what did you recommend that should have been done to have avoided this collision?
A So in Exhibit 3, my supervisor report, towards the bottom -- let's see. Where did it...

(Examines document.)

It would have been my recommendation to wait -- maybe it's not in here. Let's -- let me read this again, make sure I'm...

(Examines document.)

The last sentence, "If Trooper Bumann would have waited and been able to get a better view of the oncoming traffic, this collision could have been avoided."

Q Okay. And waiting would have helped why?
A The view obstruction in front of him would have gotten a little further down the road and he could have had a better field of vision before executing that turn.
Q Was Trooper Bumann's maneuver of making this U-turn in a no-passing zone with obstructed vision ahead of him -- was that consistent or inconsistent with South Dakota Highway Patrol policy?

SOUTH DAKOTA HIGHWAY PATROL

SUPERVISOR REPORT

Incident Report Number:	HP17006131SUPR				
Incident Date:	11/10/17				
Primary Trooper:	Steven Schade	**District:**	2	**Squad:**	Sioux Falls A
Assisting Personnel:					
Incident Code:	DLSP : Damage/Loss of State Property				
Supervisor Completing Report:	26 - Schade, Steven			**Date:**	11/19/17
Policy Followed:	No				

Supervisor Narrative:

On 11/10/17 at around 1300 hours I got a call from Trooper Bumann stating he had been in a crash while working. Trooper Bumann stated he was traveling westbound on SD Hwy 42 near the intersection of SD Hwy 19. There was a pickup with a box trailer in front of him and a semi pulling a grain trailer in front of the pickup. Trooper Bumann observed a vehicle traveling eastbound on SD Hwy 42 that had some violations. Trooper Bumann pulled onto the westbound shoulder and did not see any east bound traffic between the pickup and semi. As Trooper Bumann was turning around he saw another vehicle traveling eastbound a short distance from him. Because of the short distance between his vehicle and the other eastbound vehicle, the eastbound vehicle ran into the back of his vehicle.
I reviewed his video from his vehicle. The video show Trooper Bumann following a truck pulling a trailer. You see the vehicle he was going to stop. After the vehicle he wanted to stop pass him, he pulls to the right should and makes his turn. As he was making his turn you can see the other eastbound vehicle a short distance away from him. As he finishes the turn the vehicle hits him.
This would be a violation of South Dakota Highway Patrol Policy which states 7.105 A Division vehicle shall not be driven in a careless manner at any time. If Trooper Bumann would have waited and been able to get a better view of on coming traffic he could have avoided the collision.

I recommend verbal counseling and go to SDHP EVOC in service.

SOUTH DAKOTA HIGHWAY PATROL

SUPERVISOR REPORT

Incident Report Number:	HP17006131SUPR				
Incident Date:	11/10/17				
Primary Trooper:	Steven Schade	**District:**	2	**Squad:**	Sioux Falls A
Assisting Personnel:					
Incident Code:	DLSP : Damage/Loss of State Property				
Supervisor Completing Report:	[redacted] 28 - Schade, Steven			**Date:**	11/19/17

Supervisor Narrative:

On 11/10/17 at around 1300 hours I got a call from Trooper Bumann stating he had been in a crash while working. Trooper Bumann stated he was traveling westbound on SD Hwy 42 near the intersection of SD Hwy 19. There was a pickup with a box trailer in front of him and a semi pulling a grain trailer in front of the pickup. Trooper Bumann observed a vehicle traveling eastbound on SD Hwy 42 that had some violations. Trooper Bumann pulled onto the westbound shoulder and did not see any east bound traffic between the pickup and semi. As Trooper Bumann was turning around he saw another vehicle traveling eastbound a short distance from him. Because of the short distance between his vehicle and the other eastbound vehicle, the eastbound vehicle ran into the back of his vehicle.
I reviewed his video from his vehicle. The video show Trooper Bumann following a truck pulling a trailer. You see the vehicle he was going to stop. After the vehicle he wanted to stop pass him, he pulls to the right should and makes his turn. As he was making his turn you can see the other eastbound vehicle a short distance away from him. As he finishes the turn the vehicle hits him.

[redacted]

I recommend verbal counseling and go to SDHP EVOC in service.

EXHIBIT
22

SOUTH DAKOTA
DEPARTMENT
OF PUBLIC SAFETY
prevention – protection – enforcement

SOUTH DAKOTA HIGHWAY PATROL

DIVISION HEADQUARTERS
118 West Capitol Avenue · Pierre, South Dakota 57501
Telephone: 605·773·3105 Fax: 605·773·6046
Web: dps.sd.gov/enforcement/highway_patrol/

12/06/2017

Trooper Patrick Bumann
[redacted]

Date of Crash: 11/10/2017
Location: Minnehaha County

Trooper Bumann,

Lieutenant Gerken, Sergeant Schade and I met on December 6, 2017. Following our review of your crash on the date listed above, it was determined that the crash was preventable.

It was determined that you need to use more caution when operating your patrol vehicle to turn around on violators.

Please print this letter out so that you can indicate your intentions to either accept the decision or to appeal the decision. You have the right to appeal this decision to the Accident Review Board. To do so, you will need to notify Sergeant Kinney in writing ***within 10 days*** by filling out the top section of the form on the next page. Please return it to the address listed on that page within the allotted timeframe.

If you have any questions, please feel free to give me a call at (605) 574-0252.

Sincerely,

Sergeant Kevin R. Kinney
Crash Reconstruction Program Director

CC: Captain Husby

SOUTH DAKOTA
DEPARTMENT
OF PUBLIC SAFETY
prevention – protection – enforcement

SOUTH DAKOTA HIGHWAY PATROL
DIVISION HEADQUARTERS
118 West Capitol Avenue · Pierre, South Dakota 57501
Telephone: 605·773·3105 Fax: 605·773·6046
Web: dps.sd.gov/enforcement/highway_patrol/

12/06/2017

Trooper Patrick Bumann
[redacted]

Date of Crash: 11/10/2017
Location: Minnehaha County

Trooper Bumann,

Lieutenant Gerken, Sergeant Schade and I met on December 6, 2017, [redacted]

[redacted]

Please print this letter out so that you can indicate your intentions to either accept the decision or to appeal the decision. You have the right to appeal this decision to the Accident Review Board. To do so, you will need to notify Sergeant Kinney in writing *within 10 days* by filling out the top section of the form on the next page. Please return it to the address listed on that page within the allotted timeframe.

If you have any questions, please feel free to give me a call at (605) 574-0252.

Sincerely,

Sergeant Kevin R. Kinney
Crash Reconstruction Program Director

CC: Captain Husby

EXHIBIT
23

I hereby acknowledge that I have received and reviewed the above correspondence for HP17006131.

___ I do wish to appeal this decision to the Accident Review Board.

___ I do wish to appeal this decision and appear before the Accident Review Board to present additional information.

X I do not wish to appeal this decision.

Trooper 12/11/17 Date Supervisor 12-11-17 Date

Send the signed form and letter to:

South Dakota Highway Patrol – District 3
Attn: Sergeant Kevin R. Kinney
P.O. Box 2474
Rapid City, SD 57709-2474

This is to acknowledge that an appeal has been requested and that a date and time has been set for the Accident Review Board to meet.

The date and time for the Accident Review Board to meet is _____ at _____ hrs.
(NOTE: *Central Time will be indicated.*)

_____
Recon Sergeant Date

EXHIBIT
24

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

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

TODD WEILAND,	:	49CIV20-000969
Plaintiff,	:	**DEFENDANT PATRICK BUMANN'S ANSWERS TO PLAINTIFF'S INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS, AND REQUESTS FOR ADMISSION (FIRST SET)**
v.	:	
PATRICK BUMANN and SOUTH DAKOTA HIGHWAY PATROL,	:	
Defendants.	:	

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

STATE OF SOUTH DAKOTA	)	
	:SS	
COUNTY OF MINNEHAHA	)	

Defendant Patrick Bumann makes the following answers to interrogatories pursuant to SDCL § 15-6-33. These responses are made within the scope of SDCL § 15-6-26(e) and shall not be deemed continuing nor be supplemented except as required by that rule. Defendant Bumann objects to the Instructions and Definitions in answering the interrogatories to the extent that they deviate from the South Dakota Rules of Civil Procedure.

INTERROGATORIES

INTERROGATORY NO. 1. State the name and capacity of each person answering these Interrogatories as or on behalf of the Defendant.

ANSWER: Patrick Bumann.

INTERROGATORY NO. 2. Please state the following:

a. Your full legal name and any other names by which you have been or are presently known;

ANSWER: No.

INTERROGATORY NO. 19. If you are aware of any communications or conversations with any other persons (not including your attorney) concerning the subject collision, please state who was present at such conversations and exactly what was said, identifying who said what.

ANSWER: I had a conversation with Plaintiff at the accident scene. I also had a conversation with the Minnehaha County Sheriff's Office deputy investigating the incident and with supervisors up my chain of command at SDHP. I likely discussed it with my family as well.

INTERROGATORY NO. 20. Please describe fully and completely the weather and road surface condition at the time and location of the subject collision, setting forth conditions of light, precipitation, and temperature.

ANSWER: The road surface was asphalt. The weather was clear with no precipitation. It was daylight with dry roadways.

INTERROGATORY NO. 21. Describe in detail what damage, if any, was done to your vehicle in the collision, and give the cost of repair of your vehicle.

ANSWER: The final bill for repairs to the SDHP patrol car I was driving was $4,232.50. The damage was to the rear of the vehicle which included damage to the luggage lid panel, luggage lid molding, lock cylinder, left and right trim panel, left and right lamp assembly, bumper cover, left and right impact bracket, and energy absorber.

INTERROGATORY NO. 22. At the time of the collision in question, what was the condition of the brakes, signaling devices, tires, and steering apparatus of the vehicle you were driving?

ANSWER: All equipment was functioning and working normally.

INTERROGATORY NO. 23. What was the posted speed limit applicable to the roadways or streets on which any of the vehicles involved in this collision were traveling at the time of the collision?

ANSWER: 65 m.p.h.

INTERROGATORY NO. 24. Do you claim the weather, lighting, or visibility conditions in any way contributed to or caused the collision? If so, state specifically in what manner you claim they contributed to or caused the collision.

ANSWER: The obstruction created by the two trucks pulling trailers in front of me caused a visibility issue so I could not see far down the roadway.

INTERROGATORY NO. 25. Do you contend that Plaintiff violated any laws or standards of care at the time of or immediately prior to the collision in question? If so, please describe, either by statute or number, what you contend to be such violations.

ANSWER: No.

INTERROGATORY NO. 26. Do you deny fault, responsibility, or negligence in connection with the subject collision? If so, please state the facts upon which you base such denials and list, identify, and describe the contents of each document which it is contemplated will be offered in evidence in support of your answer.

ANSWER: I believe both parties contributed in some manner to the collision. There is no document to that effect.

INTERROGATORY NO. 27. Is it the contention of the Defendant that Plaintiff, by any act or omission, caused or contributed to cause the subject collision? If so, please state the facts upon which you base this contention and list, identify, and describe the contents of each document which it is contemplated will be offered in evidence in support of your answer.

ANSWER: *See* Answer to Interrogatory No. 26.

INTERROGATORY NO. 28. Describe in detail what injuries, if any, you received in the collision.

ANSWER: None.

INTERROGATORY NO. 29. Were you arrested, cited, or otherwise charged with any violation of any criminal statute or ordinance following the subject motor vehicle collision? If so, state the following:

a. The statute or ordinance that you were charged with violating;

b. The court that has jurisdiction over such violation;

c. The title of the cause and the docket number of the action;

d. The plea that you entered to such charge; and

REQUEST NO. 14. Admit that Defendant Bumann was operating his vehicle in the course and within the scope of his employment with South Dakota Highway Patrol.

RESPONSE: Admit.

REQUEST NO. 15. Admit that the value of Plaintiff's personal injury claim is a minimum of one million five hundred thousand dollars ($1,500,000.00).

RESPONSE: This can be neither admitted nor denied as it calls for an opinion or conclusion rather than a statement of fact.

Dated this 22nd day of June, 2020.

Patrick Bumann

Subscribed and sworn to before me
this 22nd day of June, 2020.

Notary Public – South Dakota
My Commission Expires: 3-6-21

BECKY MORRILL
NOTARY PUBLIC
SOUTH DAKOTA
SEAL SEAL
My Commission Expires

McCook Therapy
511 South Nebraska
Salem SD 57058-9068
Phone: (605) 425-3303 Fax: (605) 425-3306

Initial Evaluation & Plan of Care

Patient Code: 17189TW
Patient Name: Todd Weiland
Birth Date: [redacted]
Date Of Note: 8/28/2019 Onset:
M25.511-Pain in right shoulder M25.611-Stiffness of right shoulder not els

Case/Incident: 1. OT Neck/UE
Initial Visit: 08/28/2019 / Total Visits: 1
Referral: Christopher Janssen
Other Referral:

Subjective

Reason For Referral/Current History
Pt. presents with complaints of RUE pain and stiffness referring into his upper trap. Pt. reported he was in a motor vehicle accident in November of 2017 with probable whiplash. Pt. has tried other treatment such as chiropractic and massage therapy with only short term resolution noted.

PMH: See chart
Medications
See chart

Objective

Psycho Social/Prior level of Function
Pt. is married, male who has 3 children. Pt. works full time as a chiropractor in his family's business. Pt. enjoys spending time with his family, jogging,
Clinical Findings
OT Evaluation Med Complexity Dur:32 Min / MANUAL THERAPY Dur:14 Min / THERAPEUTIC EXERCISES Dur:10 Min
Total Dur: 56 Min

Posture: Pt. noting forward, extended neck position and slightly rounded shoulder position. Pt. noted good clavicular alignment; however, first and second rib elevated on R side with positive response.

Pain/symptoms: Pain 3/10 current, average/typical 5-6/10, and at its worst 8/10 which is following work or UE use. Pt. did report numbness/tingling initially right after accident but none recently. Pt. reports no vertigo/dizziness.

Soft tissue: STM completed to scalene, SCM, and upper trap mm with moderate to max tension R side scalene and SCM and min upper trap. Pt. noted trigger point at levator insertion this date with deep pressure effective. Also completed subscap and pec minor rub with mod tension noted. Joint mobilization to GHJ followed by passive stretch per sleeper position.

ROM: RUE horizontal abd/add WFL, supine IR=58, supine ER=68, sidelying IR=14, forward flexion=162, and abduction=165 before tension/pain noted.

MMT: Deep neck flexor assess completed with pt. noting "somewhat hard" per Borg. RUE 4-/5 forward flexion, abduction and triceps and 4/5 ER with remaining 5/5. LUE WFL at 5/5.

NDI (Neck Disability Index) Score: 22 - 44%

Assessment

Prognosis
Pt. noting good prognosis given no prior therapy, age, good health, motivation to improve, and functional status prior to MVA. Due to time elapsed, contracture may take more time to resolve.

Plan

Impression/Comments
Pt. is appropriate for skilled intervention due to pain, increased soft tissue tension/irritability, decreased ROM/strength of R neck and shoulder mm, and decreased ADL, work, and leisure

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EXHIBIT
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Continuation of Impression/Comments

function.

Treatment Plan

Modalities as needed to increase ROM(US, Neuroreed)
Manual therapy(STM, joint mobilization, traction)
Progressive neck and RUE ROM and strengthening
Postural retraining
HEP/wellness instruction

Frequency and Duration

2-3X/week X12 weeks

Long Term Goals

12 weeks
Pt. will note good postural awareness.
Pt. will note decrease to mild irritability in scalene, SCM, and pec mm.
Pt. will note neck and RUE AAROM WFL with <2/10 end range pain.
Pt. will note RUE strength WFL to allow prior ADL, work, and leisure function.
Pt. will note I in HEP/wellness programming to allow pt. to sustain d/c status.

Short Term Goals

4 weeks
Pt. will note <2/10 average pain/symptoms.
Pt. will decrease to mild irritability in scalene, SCM, and pec mm.
Pt. will RUE IR to WFL with <2/10 end range pain.
Pt. will complete neck isometrics X5 reps X10 ct hold with no increase in symptoms.
Pt will note good postural awareness with occasional v/c's during session.
Pt. will note I in HEP as directed.

Exercises performed on 8/28/2019

Description	Dur	Sets	Pounds	Reps
Soft Tissue Mobilization	per charges			SCM, scalenes, pec
Neck P/AAROM Upper Trap Stretch	10-20	1	0	5
Neck P/AAROM SCM stretch	10-20	1	0	5
Neck P/AAROM Scalene stretch	10-20	1	0	5
Neck P/AAROM Levator Stretch	10-20	1	0	5
Neck P/AAROM Rotation with Flexion	10-20	1	0	5
Neck Isometric Deep Flexors	10	1	0	5
Neck Isometric retraction	10	1	0	5

Amy Heumiller, OT

Signature_____ Date: 8/28/2019

Amy M. Heumiller NPI: 1265629471 This note was digitally signed.

I certify that the above rehabilitative services are required and authorized by me, and that the patient's plan will be reviewed every 15( ) 30( ) 60( ) 90 ( ) days.

*Referral*_____ *Date: __/__/____*

Christopher Janssen Phone: (605) 328-1848 Fax: (605) 328-1898

McCook Therapy
511 South Nebraska
Salem SD 57058-9068
Phone: (605) 425-3303 Fax: (605) 425-3306

Progress / Encounter

Patient Code: 17189TW
Patient Name: Todd Weiland
Birth Date: [redacted]
Date Of Note: 9/19/2019 Onset:
M25.511-Pain in right shoulder M25.611-Stiffness of right shoulder not els

Case/Incident: 1. OT Neck/UE
Initial Visit: 08/28/2019 / Total Visits: 8
Referral: Christopher Janssan
Other Referral:

Subjective

Subjective Report
"I feel about the same."

Objective

Objective Measurements
MANUAL THERAPY Dur:17 Min / THERAPEUTIC EXERCISES Dur:26 Min
Total Dur: 43 Min

Pt. is being seen for RUE neck and shoulder pain.

Pain: Pt. presented with pain today at 3-4/10. Pt. expressed no increased pain following session.

Posture: Pt. continues to note forward, extended neck position with pt. expressing that he still needs to work at this.

Soft Tissue: STM completed to scalene, SCM, and upper trap mm with mild tension noted today in R side scalene and SCM compared to mild L. Joint mobilization to GHJ followed by passive stretch per sleeper position with continued restrictions. Pt. also advised to ensure that the mm is at a stretch at mild to uncomfortable tension at least 30-50 seconds or rebound may occur.

Ther ex: Pt. completed ther ex per flow sheet with F to F+ tolerance and technique with mod resistive theraband exercises. Pt. required frequent cuing for proper form. Prone PRE's completed 1# per horizontal abd, ER, and forward flexion. Pt. completed prone extension and row at 3# but with F tolerance. Pt. did note moderate fatigue, but pt. encouraged to try to get more consistency with his HEP.

HEP: Pt.'s HEP same except pt. provided with mod tband also to attempt transition from min as tolerated.

Assessment

Overall Assessment
Pain pain 3-4/10 today with no increase in symptoms, but pt. continues to fatigue easily with ther ex. Prone PRE's completed this date with F to F+ tolerance. Tband ther ex reviewed with pt. to attempt transition to mod resistance. HEP same.

Plan

Plan
Plan to continue to address STG's established.

4 weeks
Pt. will note <2/10 average pain/symptoms. 75%
Pt. will decrease to mild irritability in scalene, SCM, and pec mm. 50%
Pt. will RUE IR to WFL with <2/10 end range pain. 75%
Pt. will complete neck isometrics X5 reps X10 ct hold with no increase in symptoms. MET
Pt will note good postural awareness with occasional v/c's during session. 75%
Pt. will note I in HEP as directed. 75%

Signature Tisha Weber, COTA Date: 9/19/2019
Tisha Weber NPI: This note was digitally signed.

McCook Therapy
511 South Nebraska
Salem SD 57058-9068
Phone: (605) 425-3303 Fax: (605) 425-3306

Progress / Encounter

Patient Code: 17189TW
Patient Name: Todd Weiland
Birth Date: [redacted]
Date Of Note: 9/24/2019 Onset:
Case/Incident: 1. OT Neck/UE
Initial Visit: 08/28/2019 / Total Visits: 9
Referral: Christopher Janssen
Other Referral:

M25.511-Pain in right shoulder M25.611-Stiffness of right shoulder not els

Subjective

Subjective Report
"We had the tornado hit next to our house. I was running a chain saw and lifting logs and branches for clean up."
Pt. also stated he had to complete some over the head work but required frequent breaks per weakness and discomfort.

Objective

Objective Measurements
MANUAL THERAPY Dur:22 Min / THERAPEUTIC EXERCISES Dur:24 Min
Total Dur: 46 Min

Pt. is being seen for RUE neck and shoulder pain.

Pain: Pt. presented with pain today at 3/10. Pt. expressed no increased pain following session.

Posture: Pt. noting forward, extended neck position with pt. continuing to require occasional v/c's to keep chin level and retracted.

Soft Tissue: STM completed to scalene, SCM, and upper trap mm with moderate tension R side scalene and SCM.. Cervical mobilization noting mod to max restriction with discomfort noted B but slightly L vs R Joint mobilization to GHJ followed by passive stretch per sleeper position. Initial sleeper 60 and final measurement 67.

Ther ex: Prone PRE's noted improvements but continue to note difficulty. Pt. did however increase ER, extension and Row on this date. Pt. attempted to complete prone PRE's bilaterally with mild improvement per RUE performance. Pt. however, noted difficulty maintaining G head positioning. Pt. noted slight improved demonstration per second set.

HEP: Pt.'s HEP to include SCM and cervical rotation stretch. Pt. provided with min resistive tband but was advised to with hold if pain increases or notes increased difficulty.

Assessment

Overall Assessment
Pain same. Manual techniques noting F+ effect at this time. Neck mm noting improved per tension. Ther ex tolerating F overall with slightly improved performance.
HEP reviewed.

Plan

Plan
Plan to continue to address STG's established.

4 weeks
Pt. will note <2/10 average pain/symptoms.
Pt. will decrease to mild irritability in scalene, SCM, and pec mm.
Pt. will RUE IR to WFL with <2/10 end range pain.
Pt. will complete neck isometrics X5 reps X10 ct hold with no increase in symptoms.
Pt will note good postural awareness with occasional v/c's during session.
Pt. will note I in HEP as directed.

Continued On Page 2

Continuation of Progress / Encounter Dated 9/24/2019 for Patient (Todd Weiland)

Signature Tisha Seeber, COTA Date: 9/24/2019

Tisha Weber NPI: This note was digitally signed.

McCook Therapy
511 South Nebraska
Salem SD 57058-9068
Phone: (605) 425-3303 Fax: (605) 425-3306

Progress / Encounter

Patient Code: 17189TW
Patient Name: Todd Weiland
Birth Date: [redacted]
Date Of Note: 9/26/2019 Onset:
M25.511-Pain in right shoulder M25.611-Stiffness of right shoulder not els

Case/Incident: 1. OT Neck/UE
Initial Visit: 08/28/2019 / Total Visits: 10
Referral: Christopher Janssen
Other Referral:

Subjective

Subjective Report
"I'm going to be seeing Chris Jansen Oct. 7th, We'll look at what we want to do going forward. I think I want try to continue with therapy here. My other choices might be injections or last resort burning the nerves."

Objective

Objective Measurements
MANUAL THERAPY Dur:13 Min / THERAPEUTIC EXERCISES Dur:29 Min
Total Dur: 42 Min

Pt. is being seen for RUE neck and shoulder pain.

Pain: Pt. presented with pain at 3-4/10 continued. Pt. reported average as 4-5/10 with best of 1-2/10.

Posture: Pt. noting forward, extended neck position with pt. continuing to require occasional v/c's to keep chin level and retracted.

Soft Tissue: STM completed to scalene, SCM, and upper trap mm with light tension R side scalene and SCM now. Joint mobilization to GHJ followed by passive stretch per sleeper position. Initial sleeper continued at 65-67 degrees.

Ther ex: Prone PRE's noted improvements but continue to note difficulty. Pt. completed ther ex per flow sheet with F+ tolerance and periodic v/c's required. Pt. reviewed 1st rib self mobilization with F+ return demonstration.

HEP: Reviewed with F+ follow through. Pt. advised to completed 1st Rib Mobilization.

Exercises performed on 9/26/2019

Description	Dur	Sets	Pounds	Reps
Soft Tissue Mobilization	per charges			SCM, scalenes, pec
Neck P/AAROM Upper Trap Stretch	10-20	1	0	5
Neck P/AAROM SCM stretch	10-20	1	0	5
Neck P/AAROM Scalene stretch	10-20	1	0	5
Neck P/AAROM Levator Stretch	10-20	1	0	5
Neck P/AAROM Rotation with Flexion	10-20	1	0	5
Neck Isometric Deep Flexors	10	1	0	5
Neck Isometric retraction	10	1	0	5
Pec doorway stretch	10	1	0	5
Median Nerve Glide	10	1	0	5
Prone PRE Forward Scaption	3	2	2	
Prone PRE Horizontal Abduction	3	2	2	
Prone PRE External Rotation	3	2	2	
Prone PRE's Extension	3	2	3	
Prone PRE Row	3	2	3	

Assessment

Overall Assessment
Pain same. Manual techniques noting F+ effect at this time. Neck mm noting improved per tension. Ther ex tolerating F overall with slightly improved performance. HEP reviewed with F+ follow through.

Plan

Plan

Continued On Page 2

Continuation of Progress / Encounter Dated 9/26/2019 for Patient (Todd Weiland)

Continuation of Plan

Plan to continue to address STG's established.

4 weeks
Pt. will note <2/10 average pain/symptoms.
Pt. will decrease to mild irritability in scalene, SCM, and pec mm.
Pt. will RUE IR to WFL with <2/10 end range pain.
Pt. will complete neck isometrics X5 reps X10 ct hold with no increase in symptoms.
Pt will note good postural awareness with occasional v/c's during session.
Pt. will note I in HEP as directed.

Signature Tisha Seeber, COTA Date: 9/26/2019

Tisha Weber NPI: This note was digitally signed.

McCook Therapy
511 South Nebraska
Salem SD 57058-9068
Phone: (605) 425-3303 Fax: (605) 425-3306

Progress / Encounter

Patient Code: 17189TW
Patient Name: Todd Weiland
Birth Date: [redacted]
Date Of Note: 10/1/2019 Onset:
M25.511-Pain in right shoulder M25.611-Stiffness of right shoulder not els

Case/Incident: 1. OT Neck/UE
Initial Visit: 08/28/2019 / Total Visits: 11
Referral: Christopher Janssen
Other Referral:

Subjective

Subjective Report
"I think everything is working, I just think it's about time."

Objective

Objective Measurements
MANUAL THERAPY Dur:15 Min / THERAPEUTIC EXERCISES Dur:32 Min
Total Dur: 47 Min

Pt. is being seen for RUE neck and shoulder pain.
Pt. is returning to physician on Oct. 7th. Pt. stated he would like to continue with therapy.

Pain: Pt. presented with pain at 3-4/10 continued. Pt. reported average as 4-5/10 with best of 1-2/10. Pt. completed yard work over the weekend, resulting in severely increased symptoms to a 7/10. Pt. reported improved pain per massage treatment yesterday.

Posture: Pt. noting forward, extended neck position. Pt. requires continued occasional v/c's to keep chin level and retracted.

Soft Tissue: STM completed to scalene, SCM, and upper trap mm with light tension R side scalene and SCM now. Joint mobilization to GHJ followed by passive stretch per sleeper position. Pt. continues to note initial sleeper at 45-50 degrees with approximately a 10 degree increase by last rep. Pt. advised that the goal would be

Ther ex: Prone PRE's continue to note improvements with "light" to "somewhat hard exertion". Pt. reported shoulder extension as most difficult. Pt. completed tband isometrics with pt. reporting more difficult than Prone ther ex. Per writer's observation, pt. noted decreased muscular instability (quivering) during tband than prone. Pt. also noted better performance of tband than prone. Pt.

HEP: Pt. reported F follow through per HEP due to work schedule. Pt. advised of importance of completing his HEP daily, especially stretching to continue progressing during session vs. maintaining. Pt. noted G response to recommendation.

Exercises performed on 10/1/2019

Description	Dur	Sets	Pounds	Reps
Prone PRE Forward Scaption	3	2	2	
Prone PRE Horizontal Abduction	3	2	2	
Prone PRE External Rotation	3	2	2	
Prone PRE's Extension	3	2	3	
Prone PRE Row	3	2	3	

Assessment

Overall Assessment
Pain same. Manual techniques noting F+ effect at this time. Neck mm noting improved per tension. Ther ex tolerating F overall with slightly improved performance. HEP reviewed with F+ follow through.

Plan

Plan

Continued On Page 2

Continuation of Progress / Encounter Dated 10/1/2019 for Patient (Todd Weiland)

Continuation of Plan

Plan to continue to address STG's established.

4 weeks
Pt. will note <2/10 average pain/symptoms.
Pt. will decrease to mild irritability in scalene, SCM, and pec mm.
Pt. will RUE IR to WFL with <2/10 end range pain.
Pt. will complete neck isometrics X5 reps X10 ct hold with no increase in symptoms.
Pt will note good postural awareness with occasional v/c's during session.
Pt. will note I in HEP as directed.

Signature Tisha Weber, COTA Date: 10/1/2019

Tisha Weber NPI: This note was digitally signed.

McCook Therapy
511 South Nebraska
Salem SD 57058-9068
Phone: (605) 425-3303 Fax: (605) 425-3306

10th/Physician's Note

Patient Code: 17189TW
Patient Name: Todd Weiland
Birth Date: [redacted]
Date Of Note: 10/3/2019 Onset:
M25.511-Pain in right shoulder M25.611-Stiffness of right shoulder not els

Case/Incident: 1. OT Neck/UE
Initial Visit: 08/28/2019 / Total Visits: 12
Referral: Christopher Janssen
Other Referral:

Subjective

Subjective Report
"I think this has all been beneficial."

Objective

Objective Measurements
MANUAL THERAPY Dur:12 Min / THERAPEUTIC EXERCISES Dur:34 Min
Total Dur: 46 Min

Pt. is being seen for RUE neck and shoulder pain.
Pt. is returning to physician on Oct. 7th. Pt. stated he would like to continue with therapy.

Pain: Pt. presented with pain at 3-4/10 continued. Pt. reports average as 4-5/10 with best of 1-2/10. Worst pain 7/10 following heavy work.
(Baseline: Pain/symptoms: Pain 3/10 current, average/typical 5-6/10, and at its worst 8/10 which is following work or UE use. Pt. did report numbness/tingling initially right after accident but none recently. Pt. reports no vertigo/dizziness.)

Posture: Pt. noting forward, extended neck position. Pt. requires continued occasional v/c's to keep chin level and retracted.

Posture: Pt. noting forward, extended neck position. Pt. requires continued occasional v/c's to keep chin level and retracted with 5 v/c's to draw attention to posture this visit. Pt. noting RUE scapular winging esp with resistance.

Soft Tissue: STM completed to scalene, SCM, and upper trap mm with light tension throughout B neck mm which is much more balanced than baseline. Joint mobilization to GHJ followed by passive stretch per sleeper position. RUE sidelying IR at 63 initially and WFL at 70 by 3rd rep.

ROM: RUE horizontal abd/add= WFL, supine IR=WFL, supine ER=WFL, sidelying IR=65, forward flexion=WFL, and abduction= WFL.

MMT: 4+/5 RUE horizontal abduction and elbow extension with remaining 5/5 WFL. See also flow sheet as to strength/endurance.

Ther ex: Prone PRE's noted improved performance and tolerance today. Pt. noted "light" exertion level per Borg scale. Pt. was able to increased row to 5# with F tolerance. Ther ex tolerated F+ overall with pt. requiring occasional v/c's for accuracy.

HEP: Pt. reported F to F+ follow through per HEP due to work schedule. Pt. advised of importance of completing his HEP daily, especially stretching to continue progressing during session vs. maintaining. Pt. noted G response to recommendation.

NDI (Neck Disability Index)
Score: 20 - 40%

Exercises performed on 10/3/2019

Description	Dur	Sets	Pounds	Reps
Soft Tissue Mobilization				SCM, scalenes, pec
Neck P/AAROM Upper Trap Stretch	10	1	0	5
Pec doorway stretch	10	1	0	5
Neck Isometric Deep Flexors	10	1	0	5

Continued On Page 2

Continuation of Exercises Dated 10/3/2019 for Patient (Todd Weiland)

Neck Isometric retraction	10	1	0	5
Prone PRE Forward Scaption	3	2-3	2	15
Prone PRE Horizontal Abduction	3	2-3	2	15
Prone PRE External Rotation	3	2-3	2	15
Prone PRE's Extension	3	2-3	3	15
Prone PRE Row	3	2-3	5	15

Assessment

Overall Assessment

Pain continues average 4/10 with increase primarily following work. Soft tissue noting significantly decreased tension and postural balance noted. AAROM WFL with stretching program compliance. MMT noting slight weakness continuing in R rhomboids and tricep r/o effects of prior cervical impingement. Ther ex progressing well with pt. reporting F to F+ completion of HEP.

Plan

Plan

Plan to continue to address STG's established.

Pt. will note <2/10 average pain/symptoms. 50%
Pt. will decrease to mild irritability in scalene, SCM, and pec mm. MET
Pt. will RUE IR to WFL with <2/10 end range pain. MET
Pt. will complete neck isometrics X5 reps X10 ct hold with no increase in symptoms. MET
Pt will note good postural awareness with occasional v/c's during session. 75%
Pt. will note I in HEP as directed. 75%

New goals:
Pt. will complete prone PRE's X3 sets X3#(hor abd, ER, FF) X5#(row/extension) X15 reps with no increase in symptoms and report of "somewhat hard".
Pt. will complete mod resistive scap and RTC tband X10 reps X5 ct hold with no increase in symptoms.
Pt. will increase level 2 scap stabilizers(wall push ups, mod planks, horizontal ball on wall, etc.) with no increase in symptoms.
Pt will complete1# standing PRE's to 120 with good RUE scap rhythm and little to no winging.

Amy Heumiller, OT

Signature_____ Date: 10/3/2019

Amy M. Heumiller NPI: 1265629471 *This note was digitally signed.*

McCook Therapy
511 South Nebraska
Salem SD 57058-9068
Phone: (605) 425-3303 Fax: (605) 425-3306

Discharge Note

Patient Code: 17189TW
Patient Name: Todd Weiland
Birth Date: [redacted]
Date Of Note: 11/13/2019 Onset:
M25.511-Pain in right shoulder M25.611-Stiffness of right shoulder not els

Case/Incident: 1. OT Neck/UE
Initial Visit: 08/28/2019 / Total Visits: 19
Referral: Christopher Janssen
Other Referral:

Subjective

Subjective Report
"I feel like I am at least 80%."

Objective

Objective Measurements
MANUAL THERAPY Dur:8 Min / THERAPEUTIC EXERCISES Dur:15 Min
Total Dur: 23 Min

Pt. is being seen for RUE neck and shoulder pain.

Pain: (NPRS) Numeric Pain Rating Scale
Score: Cervical Region Current-2(Mild) Best-1(Mild) Worst-5(Moderate) which continues to be following a busy day at work.
(Baseline: Pain/symptoms: Pain 3/10 current, average/typical 5-6/10, and at its worst 8/10 which is following work or UE use. Pt. did report numbness/tingling initially right after accident but none recently. Pt. reports no vertigo/dizziness.)

Posture: Pt. continues to note forward, extended neck position. Pt. requires continued occasional v/c's to keep chin level and retracted from periodic baseline.

Soft Tissue: STM completed to scalene, SCM, and upper trap mm with only mild tension R scalene and none L neck mm which is much more balanced than baseline. Joint mobilization to GHJ followed by passive stretch per sleeper position. RUE sidelying IR at 63 initially and WFL at 70 by 3rd rep. Pt. has been good about his HEP to maintain with only minimal rebound also effected by work.

ROM: Pt. is now WFL throughout B neck and shoulder mm.

MMT: Pt. noting 5/5 BUE's throughout from prior 4+/5 RUE horizontal abduction and elbow extension. See also flow sheet as to strength/endurance. Pt. also reports attending gym 2-3X/week with good tolerance of cybex.

Ther ex/HEP: Pt. reported F+ follow through per HEP per flow sheet. Pt. advised of importance of completing his HEP daily, especially stretching to avoid rebound esp in pec and scalene mm. Pt. also reports good use of HEP after long work days and feels like he knows how to manage symptoms better. Pt. also advised on busy work days to stretch after every 2 patients to avoid overdemand on neck/shoulder. Pt. noted G response to recommendations.

NDI (Neck Disability Index)Score: 3 - 6% from prior Score: 20 - 40% and baseline 22%.

Exercises performed on 11/13/2019

Description	Dur	Sets	Pounds	Reps
Median Nerve Glide	10	1	as tol	5
Cybex Forward Press	5	1	20	10
Cybex Row	5	1	30	10
Cybex Lat pull	5	1	50	10
Cybex shoulder extension/triceps	5	1	40	1
Scapular Elevation/Shrugs	5	2	mod or 3#	10
Scapular Depressors/Chair dips	10 sec	1		5

Continued On Page 2

Continuation of Exercises Dated 11/13/2019 for Patient (Todd Weiland)

Physioball Rollout/Pushup	5	1	as tol	10
Standing A/AAROM Forward Flexion	1	1		20
Standing A/AAROM Abduction/Deltoid	1	1	mild sub	20
Planks on stable surface	30	3	Modified	

Assessment

Overall Assessment

Pain significantly improved overall with good management reported. Soft tissue noting only mild tension and F+ postural balance. B neck and UE ROM and strength WFL. Final HEP tolerated well with pt. transitioned to gym/wellness .

Plan

Plan

Plan to discharge pt. this date as goals met or plateaued with pt. noting good understanding of written, pictorial HEP.

Pt. will note <2/10 average pain/symptoms. 80%
Pt. will decrease to mild irritability in scalene, SCM, and pec mm. MET
Pt. will RUE IR to WFL with <2/10 end range pain. MET
Pt. will complete neck isometrics X5 reps X10 ct hold with no increase in symptoms. MET
Pt will note good postural awareness with occasional v/c's during session. 75%
Pt. will note I in HEP as directed. 90%

New goals:
Pt. will complete prone PRE's X3 sets X3#(hor abd, ER, FF) X5#(row/extension) X15 reps with no increase in symptoms and report of "somewhat hard". MEt
Pt. will complete mod resistive scap and RTC tband X10 reps X5 ct hold with no increase in symptoms. MET-- Now max tband and cybex.
Pt. will increase level 2 scap stabilizers(wall push ups, mod planks, horizontal ball on wall, etc.) with no increase in symptoms. MET
Pt will complete1# standing PRE's to 120 with good RUE scap rhythm and little to no winging. MET

Amy Heumiller, OT

Signature_____ Date: 11/13/2019

Amy M. Heumiller NPI: 1265629471 *This note was digitally signed.*

ORTMAN
CHIROPRACTIC CLINIC
PO BOX 157, CANISTOTA, SD 57012
(605) 296-3431 • WWW.ORTMANCLINIC.COM

11-10-11

MVA approx 11:00 pm, happened on Hwy 42 on way home to Sioux Falls.
{See MVA accident info}

Started to get HA about 60-90 min after the accident, while getting a ride home with my Dad, Lon Weiland. All areas of the neck and upper back started to hurt on the drive home, bil neck, bil traps, bil upper thoracics, were tight, stiffening up, achy pain; it just continued to worsen throughout the night, with the severity of symptoms worsening as evening. I was able to see around 2:30-3:00 pm, but, after 10 minutes, had to then leave for Vermillion, to Dakotadome, where son Brock was playing in the State AA Championship game. By 5:00 pm I could hardly move my neck from Left to Right, and the HA was 7/10, the Ibuprofen brought it down to a 4 or 5/10. The worst part, however, was the concussion-like symptoms I was experiencing, that unfortunately made what should have been a joyful experience, not so joyful. Lots of brain fog, confusion, slow to think, slow to respond, slow to react to conversation, noise was very irritating, and bright lights were bothersome. I was just very tired and wanted to just lay down and go to rest. We ended up getting home around 11:45pm that evening.

EXHIBIT
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Told Weiland 4-6-16

ORTMAN
CHIROPRACTIC CLINIC

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(605) 296-3431 • WWW.ORTMANCLINIC.COM

11-11-17 (Sat)

All areas same or worse; very tight and stiff neck and upper shoulder, traps, rh blader. HA constant. Cerv/thoracic 5/10 VAS, the HA 6 or 7/10 VAS
Taking currently 2 Herbalveze every 4 hours and 2, 2, 2 Relaxall throughout day, ibup. morning, and 2 ibuprofen evening.
Treatment manip (Ortman Technique) by Dr Lon Weiland around 10:30 AM which gave some relief for about 1 hour.
Used 4x, 20 min per time to neck/traps/thoracics.

11-12-17 (Sun.)

Same.
All areas same, neck, thoracics, rh blader, and constant HA pain.
C-T/traps 5/10 VAS HA 6 or 7/10 VAS.
Taking 2 ibup. morning 2 ibup. evening
Relaxall & Herbal-Eze throughout day.
Still on normal daily routine of 7-10 supplements (multi, B-complex, Fish oils, Vit D3, pro-biotics).

Tx. manip Dr Lon Weiland around 4:00 pm.
Brain/concussion symptoms still present, same.
Very limited in what I could do/get done Sunday, didn't do much, just tried to move around house and try to loosen neck/shoulders.
Used 3x

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11-13-17 (Mon.)

same

Tx. manip (Or, Lon), Ultrasound therapy bil. lower lateral neck and upper bil. trap/sh blades

same nutrition, supplements, ibuprofen.

Added today 2 supplements: Brain Restore 1/day
Creatine 1 teaspoon/day

These will aid in the recovery of the concussion/brain.

Treating patients today went "fine", but just difficult to think, make decisions, concentrate, just mental/brain difficulties in a "daze"

HA 6/10 VAS neck/sh/trap. 5/10

Brain/concussion symptoms moderate degree. Not sleeping well last 2 nights.

Iced at noon and 9 pm

11-14-17 (Tue.)

Same (no change), HA have been constant/continuous since the MVA it manageable, but it always there. Constant ache and muscle tightness in the neck, traps, upper back, sh blade region. Work to challenging and difficult due to the concussion symptoms ("brain fog", "out of it", "dazed", "slow" to think and make decisions with my patients, concentration lacking, lethargic) Slept better last night, but sleep have been poor since the MVA.

Left work early @ 3 pm cause long/difficult day.

Treatment manip (Or, Lon), U.S. therapy bil neck/thoracics

Iced once @ noon and before bedtime.

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11-15-17 (Wed.)

Same; no change in symptoms; woke up at 1:00 AM last night with HA. Took Ibuprofen. The concussion symptoms are the same so far. Work was better, but it's still a long day due to the pain + symptoms. Tx. manip by Dr. Lon. Also had U.S. therapy. Also tried cervical traction therapy @ 12 lb pull on the neck, roller set @ 8. Iced neck/trap @ 12:30 and also @ 6:00 pm.

Tried to jog/exercise cause haven't been able to since the collision. After about 20 seconds I had to stop, had a pounding/throbbing HA and it felt like my disc's in the neck were smashing together with each step taken. (Normally jog 2 times per week). I did end up at least walking for 20 minutes which helped, afterwards the tension/ache was less for 1/2 hour or so.

Since MVA 11-10-17, not really any improvement so far, maybe 5% better. Work has been a slight struggle, and at home it hasn't been pleasant, mostly due to the loudness from the kids (5 yr old twins). Noise in general just cause the HA to worsen and throb.

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11-16-17

Tx manip by Dr. Ivan, US therapy to bil cerv/thoracic/levator regions. Everything is the same thus far. Lots of pain, yet, daily struggle to get through the day.

11-17-17

Tx manip by Dr. Lon, US therapy to bil cerv/thoracic areas; 14lb cerv traction therapy. Significant pain, tightness, stiffness , tenderness, hypertonicity, muscle aches; daily HA's continue, neck, traps, upper sh's, upper to middle thoracics. Left work today at 2:30pm, due to the pain/irritation, its just been a long day; went to gym/health club to try and run on treadmill, but after 1 min, already had a throbbing HA, with stabbing pain, and it just feels like the bones in my neck are smashing together, like there is no disc there, it s hard to describe, but its been painful; very frustrating, I need to exercise, but am unable to get anything done. I was able to walk for about 10 min on the treadmill, but then it all still was tense and tight, so I went home and took it easy most of the evening, iced at 6pm and 9:30pm before bed. Still not sleeping well at all, so took 2 ibuprofen before bed.

11-18-17

Tx manip (Ortman Technique) by Dr. Lon. All areas same

11-19-17

Today is the 1st day since the accident that I awoke with no Headache! The neck /shoulders were some better for morning, then worsening as the day progressed. The HA returned late afternoon and lasted all evening. Iced 3x today. 2 Ibuprofen before bed. I have "doubled" the following supplements to try and help with healing/pain/inflammation and muscle pains:

Ultra GI Replenish -- taking 4 scoops per day (was 2/day before MVA)

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Vit D3--10,000 IU (was on 5,000IU)

EPA-DHA Fish Oil-- 2 tablespoon/day (was on 1 tbl/day)

Glycogenics B vitamins-- 3/day (was taking 1-2/day)

Herbal-eze-- taking 4-5/day (was on 1-2/day)

New supplements and med's for the MVA/whiplash/concussion:

Brain Restore-- 7 capsules / day

Creatine powder-- 1 teaspoon/day

Relaxall-- 6/day

Ibuprofen-- 2-4 per day

11-20-17

Tx manip by Dr. Lon, US therapy bil cerv/thor, 14lb cerv traction therapy.

Slow, slow going on the recovery/healing at this point, but all things are gradually improving. The treatments continue to help, the US therapy is helpful, and the cerv traction therapy is helping, it all feels better after a tx manip and the therapies. Its still very hard to work and get through the day, treating patients and trying to think and make decisions has not been good, just still lots of brain/concussion like symptoms, foggy, groggy, tired, lethargic, not able to think clearly, not able to be sharp, and just frustrating trying to work, its been a real problem. I would say current VAS is 5/10 neck/sh/trap/thoracics, 5 or 4/10 HA pain, and the brain/concussion symtpoms are about 10-25% better, depending on the day.

11-21-17

Tx manip by Dr. Nathan, and US therapy. Continuing with daily stretches while at work, few times throughout the day, then occas some stretching exercises at home; still unable to exercise, but trying to just move at work throughout the day, so not as to get so stiff/tight.

11-22-17

Tx. manip by Dr. Derrick, US therapy bil cerv/thorac, 14lb cerv traction therapy.

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11-24-17

Tx manip by Dr. Doug, US therapy, traction therapy 14lb pull

2 weeks post MVA, still very frustrated, gradually improving, but extremely slow with progress. Unable to run/jog, unable to do my Tabata type workouts, not able to really do any activity; playing with the kids has been rough. The neck/traps/thoracics still the worst area, then the brain/concussion symtpoms, then the tiredness/fatigue, then the HA 's. Tried to run on treadmill at gym, was unable to after about 2-3 minutes, neck started to hurt, throbbing in head started, and almost spasm like feel in thoracic/sh blades began to start happeneing. Ice upon returning home, which helped, and iced before bed. Still on same nutrition, still taking 2-4 ibuprof per day, still using ice once at work, then 1-2 times at home; not sleeping great yet, but sleeping is improving. Work is going "okay", but its still just been a general struggle.

11-27-17

Woke up with more LBP today, like a mild tightness, stiffness across the LB. Sunday morning I had some mild LBP, stiff, but not very noticeable or anything; then Sunday afternoon Jody and I and the twins (5 yr old twins) went hiking/walking at Blood Earth state park, only hiked maybe 45 minutes, and it was an easy and enjoyable hike, but after that, on the ride home, could just feel my LB starting to just kind of tense up; took Relaxall again in evening (averaging 4-6 Relaxall per day), and this moring, just had LBP, and its been more and more throughout the day...2/10 VAS

11-28-17

Tx manip Dr. Jay, still more LBP, stiffness in LB, unable to move the greatest, the pain is mild, 2/10 or so VAS, but still there; neck/sh same, HA dull, mild, same;

11-30-17

Tx manip by Dr. Doug, focusing more on the LB/SI/pelvis, but also usual areas of the neck, thoracics, sh blades, c0-C1/HA....still just more LB stiffness. After work, went swimming at pool/gym, and it did feel alot better for 1-2 hours after swimming, no LBP, and the neck/sh/thoracics all felt alot better for 1-2 hours, before bed however, all areas started to hurt again, with tension, tightness, achyness, pain; iced before bed, 2 ibuprofen. Still taking daily

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supplements, and the few extra supplements.

12-1-17

Tx manip by Dr. Esser, all areas basically, LB/SI, cerv/thoracics.

12-4-17

Tx manip Dr. Doug

LB/SI 4/10 VAS; neck/sh/thoracics 4/10 VAS; HA's 3 to 4/10 VAS

Concussion/brain symptoms gradually improving, approx 30-40% improved.

Cerv/thoracic improvement approx 25-30% better

HA's are 25% improved, not lasting 24/7 anymore, less freq, less severity.

12-5-17

Tx manip by Dr. Lon, bil US therapy to cerv/thoracics. Still LB/SI restriction, lack of movement, decreased ROM with mild pain, 2 or 3/10 VAS

Tried to jog on Treadmill at health club/gym, it felt decent at the time, but 1 hour later, around 6:30pm , started to just really hurt in the lumbar /SI regions, stiffness, tightness, restriction, pain, it feels like spasming is going to occur; Relaxall, ibup, iced at 7pm and 10pm

12-6-17

Moderate-Severe LB spasm, could hardly get out of bed, it was a struggle to shower and get ready for work; LB/SI pretty much spasmed whole drive to work; was only 1/2 booked for the day, so was able to move around some, ice 2-3x at work, take relaxall, and ibuprofen; it was pretty hard to treat patients; VAS 8/10, almost no ROM in pelvic/sacral region.

Tx manip by Dr. Lon, used bil US therapy to lumbo-sacral regions.

12-7-17

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LB spasm same, 8/10 VAS, hardly able to move and get out of bed; significant amount of pain, very stiff; iced several times today; Relaxall, herbal-eze, ibuprofen

Tx manip Dr. Jay, bil US therapy to lumbar/SI areas; tx manip still to neck/sh/thoracics, but the LB is most severe currently; HA mild

12-8-17

Tx manip by Dr. Derrick, Cold Level Laser therapy to bil lumbar/SI

LUmbar traction therapy, 85lb pull, to lumbo-sacral area, roller level at 8.

Iced 3 times, 2 on the LB, 1 on neck/sh.

after work, went to pool, did some water aerobics, and swimming, and afterwards, all areas were feeling better, less overall pain, less spasm, less tightness, better ROM, just felt pretty good for about 1 hour to 90min, after that, things slowly started to worsen again each hour after, until bedtime, slept fair, but still interm good/bad nights of sleep, due to the pain, and uncomfortablness.

VAS LB 6/10

VAS neck/sh/traps 4/10

VAS HA's 3/10

concussion/brain symptoms, still there, gradually improving...40% improved.

12-11-17

Tx manip by Dr. Doug, LAser therapy to LB/SI regions, 14 cerv neck traction.

Overall, it s been gradually getting better; the LB spasm/flare-up is 50% better; never have had a LB flare-up of this nature, so its concerning, but all in all, its gradually getting better, and have been able to still work all this time, and been able to do more at home, and with the kids. Swimming last night and water aerobics went good, was very helpful. Swimming/pool has been about the only exercise I can do thats been pain-free.

neck/sh/thoracics 40-50% better; 3 to 4/10 VAS

HA's 60-70% better, mild when occurring, 2/10 VAS

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Concussion /brain like symptoms....40-50% healed

still general fatigue, lethargy, tiredness since MVA....30-40% better

12-13-17

Tx manip Dr. Doug, with neck/sh/thoracics main area, then LB/SI, then fatigue.

The LB is 65% improved. HA moderate today. STill using ice 1-2x per day, which helps. Still on my usual vitamin routine, with 3-4 supplements doubling, and extra's being the Relaxall, Creatine, Brain Restore. Still doing light stretching throughout the day. Still moving around at work best I can for breaks and movement. Sleep is improving, much better sleep last 1 week. The Low Back flare-up is gradaully improved, started Nov 26th, so this has been a unusual occurrance, having spams/stiffness for so long, but its improving.

14lb cerv neck traction

12-14-17

Tx manip by Dr. Jay; US therapy bil cerv/thoracics

Lb, neck, sh'traps, HA

12-15-17

Tx manip Dr. Lon, 14 cerv traction therapy; Laser therapy lumbar/SI

Dec 16-20, Vacation in St. Petersburg, Florida.....

The Vacation was good, lot of fun, able to do alot, but still had a lot of issues, the neck was bothersome, the thoracics and sh blades were hurting at times. Walks on the beach helpful, but the LB hurt in the afternoons; swimming in pool at hotel was very helpful, did swimming 3x while there. Had 2 dull HA's while there. Had to ice the LB twice while there. Still tired/fatigued, but the vacation helped to not have to work, and to enjoy the days.

12-21-17

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Tx manip by Dr. Lon; sore/hurting in neck/sh/trap from last night.

Neck/thoracic/trap 2 or 3/10 VAS

HA 1 or 2/10 VAS

LB 2/10 VAS

Concussion/brain symptoms are 50-60% healed/improved

Fatigue/lethary/tiredness since MVA is 40% improved

12-22-17

Tx manip by Dr. Derrick

Tried to do my Tabata work-out last night, and I couldn't within minutes, just had HA, and pain in the neck, still that feeling like my vertebrae are crushing togther, like its bone on bone, like my discs are crunching together, so I stopped, changed, and went walking for 15 min on treadmill. The LB and neck both felt better after walking.

12-26-17

Tx manip Dr Esser

Gradually, slowly, improving, all areas are getting some better.

12-27-17

Tx manip Dr. Doug

12-29-17

Tx manip Dr. Doug; at this point, its been about 50 days since the accident (approx 7 weeks)

Summary:

Each week things are gradually improving, overall pain is less each week, tension/tightness is much less each week, especially last few weeks, and better ROM, and overall better movement. But, it has just been very , very, slow. Its been incredibly frustrating to this point. It s just been

Todd Weiland 4-6-16

alot of pain, symptoms, and struggle each day and week. I know that these injuries can take time, but at this point, I really thought I would be just fine. Work was a significant struggle for the first 14 days, and its actually still been a struggle for about the first month, due to the severity of the concussion/brain symtpoms, I feel like I wasn't a very good doctor to my patients at all, I wasn't able to talk or communicate very well, wasn't able to be sharp about decisions and treatment plans for my patients, so its just been a struggle..the last 7-10 days, its been alot better, and it is much improved...just hoping it will fully keep healing . I dont want to lose patients or feel like they think I'm not doing my job, or look like I'm tired or disinterested. The fatigue and tiredness is a huge concern. Before this accident occurred, I was feeling great; since then, the last 3-4 weeks have had ton of fatigue, tiredness, lethargy, and general malaise, its hard to get through the day, its affecting my relationship with my wife, and I just haven't been able to do what I would like with my kids, can't play with them, just really want to go to bed and sleep. The pain in the neck/sh/thoracics is much improved. I would say that area is 60-75% healed, depending on the day. The HA's are much less, only getting now 1 or 2 HA's per week, mild dull in nature, 1/10 or 2/10 at worst. The brain/concussion symptoms are much better, approx 60-80% healed would be my guess; its somewhat confusing knowing if its just general fatigue or brain tiredness, so its a little bit of both basically, but overall its better. Overall, just really frustrated by this whole ordeal, really upset with the Highway Patrol officer, even though he is trying to do his job, that move he made was wreckless, and endangered everyone involved; I could have been killed, he could have been killed, my family and his could have been left without us, its just reallly frustrating and irritates me thinking about it. I know its only been 7 weeks, so all these injuries can keep getting better, I understand that, so I continue to hope and pray that everything will keep improving . What I'm really nervous/scared about, is the long-term problems that could arrise down the road, 5 years later, 10 or 20 years later....I treat MVA injured patients all the time, in my 17 year career as Chiropractor, so I see all those long term injuries all the time; some heal fine in a few weeks after a collision, but other s are still getting chiropractic treatments for their injuries 20-30 years later, so its those types of things I'm concerned about. I am concerned about potential for herniated disc in cerv or lumbar in later years, or needing future care, or needing a discectomy or other surgery down the road, these are all things I'm concerned about.....Am I going to be able to work till I'm 65 years old?? Am I going to have these LB flare-ups in the future, this LB flare-up lasted approx 21 days, and I've never had a LB do that for more that 3-4 days...just typing this summary is makes all areas of my neck and sh blades and thoracics start to ache, and hurt and tense up; last night, I tried to just wrestle/play with my two 5yr old twins, and after few minutes, my neck just started to hurt, could feel the crunching/bone feeling again, and then neck tightness with a HA started, its just frustrating. Swimming is going good, I've probably have swam and done water aerobics 6-8 times now, and it always helps, so thankfully, thats been a blessing; however, I dont really like it, and would prefer to get back to running/jogging 2/week which I loved, and haven't been able to do at all since the collision/MVA. Haven't been able to do any high intensity or Tabata type workout at all, and that helps me so much in the past, for good overall health. This

Todd Weiland 4-6-16

fatigue/tiredness is a real issue, and its better, by about 50%, but I really need to fully heal from this tired/fatigue completely. I am extremely blessed to be a Chiropractor at the Ortman Clinic, where I can just get the needed treatments and therapies that I need, all free of charge, and minimal hassle, but am still hoping I dont' have to get this number of frequency of treatments the next several years, its time consuming, and bothersome to my collegues. For those reading this, sorry to ramble on, just trying to get my thoughts on paper, and to try and summarize where things are at this point, and how things have been going. I am really getting alot better, its just slow, and frustrating, and lately makes me just real concerned about my long-term health and what it could lead too. I can live with getting a treatment or 2 a week forever, but my quality of life is dimished significantly so far and its frustrating. Anyway, to summarize, its overall much better, I would say overall healing is approx 75%, depending on day, and what I try and do with work, kids, play, exercise, chores, etc.

Todd Weiland 4-6-16

1-2-18

Tx manip by Dr. Doug

1-3-18

Tx manip by Dr. Nathan, cerv/thoracics mosIty, mildly LB/SI. The LB/SI is 90% better.

Swimming last night helpful, 20-30 min laps and aerobic exercises.

1-4-18

Tx manip by Dr. Jay

Tried to run on treadmill last night, was able to for 4-5 min, but then all areas of neck and upper thoracics started to hurt again, with the bouncing around movement causing pain in the neck, the bone/crushing feeling again, with mild HA.

Still using ice 1-2x per week for either the neck/sh/trap, or the LB/SI areas, always helpful.

Currently, the nutrition is the same, still my usual regimen that I was on before the MVA.

Doubled since the MVA are: GI Replenish, D3, EPA-DHA , Glycogenics B vitamins, Herbal-eze

New since the MVA: Still on 5/day Brain Restore, 1 teaspoon Creatine, 2-4 Relaxall/day, Ibuprofen on occasion , more at night if hurting.

1-8-18

Tx manip by Dr. Doug

At this point:

VAS 1 or 2/10 cerv/thoracics

VAS 1/10 HA, 1-2 per week on average, dull , mild

VAS 1/10 LB/SI, 90-100% improved, unless I try to run/jog...

Concussion / Brain issues: 75-80% healed

Todd Weiland 4-6-76

Fatigue...50% better, still not doing well with energy, tiredness, lethargic

1-10-18

Tx manip by Dr. Lon (retired, here at clinic this morning)

cerv/thoracics 75-80% improved

LB/SI 100% currently, no issues

Fatigue /tiredness is the same.

Told Weiland 4-6-18

Neck Index / thoracic / rt blade

Patient Name Todd Weiland **Date** 1-19-18

This questionnaire will give your provider information about how your neck condition affects your everyday life. Please answer every section by marking the one statement that applies to you. If two or more statements in one section apply, please mark the one statement that most closely describes your problem.

Pain Intensity
⓪ I have no pain at the moment.
① The pain is very mild at the moment.
● The pain is moderate at the moment.
③ The pain is fairly severe at the moment.
④ The pain is very severe at the moment.
⑤ The pain is the worst imaginable at the moment.

Personal Care
⓪ I can look after myself normally without causing extra pain.
● I can look after myself normally but it causes extra pain.
② It is painful to look after myself and I am slow and careful.
③ I need some help but I manage most of my personal care.
④ I need help every day in most aspects of self care.
⑤ I do not get dressed, wash with difficulty and stay in bed.

Lifting
⓪ I can lift heavy weights without extra pain.
① I can lift heavy weights but it causes extra pain.
② Pain prevents me from lifting heavy weights off the floor, but I can manage if they are conveniently positioned (e.g., on a table).
● Pain prevents me from lifting heavy weights, but I can manage light to medium weights if they are conveniently positioned.
④ I can only lift very light weights.
⑤ I cannot lift or carry anything at all.

Reading
⓪ I can read as much as I want with no neck pain.
① I can read as much as I want with slight neck pain.
● I can read as much as I want with moderate neck pain.
③ I cannot read as much as I want because of moderate neck pain.
④ I can hardly read at all because of severe neck pain.
⑤ I cannot read at all because of neck pain.

Headaches
⓪ I have no headaches at all.
● I have slight headaches which come infrequently.
② I have slight headaches which come frequently.
③ I have moderate headaches which come infrequently.
④ I have moderate headaches which come frequently.
⑤ I have headaches almost all the time.

Concentration
⓪ I can concentrate fully when I want with no difficulty.
① I can concentrate fully when I want with slight difficulty.
● I have a fair degree of difficulty concentrating when I want.
③ I have a lot of difficulty concentrating when I want.
④ I have a great deal of difficulty concentrating when I want.
⑤ I cannot concentrate at all.

Work
⓪ I can do as much work as I want.
① I can only do my usual work but no more.
● I can only do most of my usual work but no more.
③ I cannot do my usual work.
④ I can hardly do any work at all.
⑤ I cannot do any work at all.

Driving
⓪ I can drive my car without any neck pain.
① I can drive my car as long as I want with slight neck pain.
② I can drive my car as long as I want with moderate neck pain.
● I cannot drive my car as long as I want because of moderate neck pain.
④ I can hardly drive at all because of severe neck pain.
⑤ I cannot drive my car at all because of neck pain.

Sleeping
⓪ I have no trouble sleeping.
① My sleep is slightly disturbed (less than 1 hour sleepless).
② My sleep is mildly disturbed (1-2 hours sleepless).
● My sleep is moderately disturbed (2-3 hours sleepless).
④ My sleep is greatly disturbed (3-5 hours sleepless).
⑤ My sleep is completely disturbed (5-7 hours sleepless).

Recreation
⓪ I am able to engage in all my recreation activities without neck pain.
① I am able to engage in all my usual recreation activities with some neck pain.
② I am able to engage in most but not all my usual recreation activities because of neck pain.
● I am only able to engage in a few of my usual recreation activities because of neck pain.
④ I can hardly do any recreation activities because of neck pain.
⑤ I cannot do any recreation activities at all.

I still cannot jog/run on treadmill

Neck Index Score 44 %

Low Back / Sacrum

Back Index

Patient Name Todd Weiland **Date** 1-19-18

This questionnaire will give your provider information about how your back condition affects your everyday life. Please answer every section by marking the one statement that applies to you. If two or more statements in one section apply, please mark the one statement that most closely describes your problem.

Pain Intensity

- ⓪ The pain comes and goes and is very mild.
- ① The pain is mild and does not vary much.
- ● The pain comes and goes and is moderate.
- ③ The pain is moderate and does not vary much.
- ④ The pain comes and goes and is very severe.
- ⑤ The pain is very severe and does not vary much.

Personal Care

- ● I would not have to change my way of washing or dressing in order to avoid pain.
- ① I do not normally change my way of washing or dressing even though it causes some pain.
- ② Washing and dressing increases the pain but I manage not to change my way of doing it.
- ③ Washing and dressing increases the pain and I find it necessary to change my way of doing it.
- ④ Because of the pain I am unable to do some washing and dressing without help.
- ⑤ Because of the pain I am unable to do any washing and dressing without help.

Lifting

- ⓪ I can lift heavy weights without extra pain.
- ① I can lift heavy weights but it causes extra pain.
- ② Pain prevents me from lifting heavy weights off the floor, but I can manage if they are conveniently positioned (e.g., on a table).
- ③ Pain prevents me from lifting heavy weights off the floor.
- ● Pain prevents me from lifting heavy weights, but I can manage medium weights if they are conveniently positioned.
- ⑤ I can only lift very light weights at the most.

Walking

- ⓪ I have no pain when walking.
- ① I have some pain when walking, but it does not increase with distance.
- ● I cannot walk more than one mile without increasing pain.
- ③ I cannot walk more than ½ mile without increasing pain.
- ④ I cannot walk more than ¼ mile without increasing pain.
- ⑤ I cannot walk at all without increasing pain.

Sitting

- ⓪ I can sit in any chair as long as I like.
- ① I can only sit in my favorite chair as long as I like.
- ② Pain prevents me from sitting more than 1 hour.
- ● Pain prevents me from sitting more than ½ hour.
- ④ Pain prevents me from sitting more than 10 minutes.
- ⑤ I avoid sitting because it increases pain immediately.

Worse on bleachers, 10-15 minutes

Standing

- ⓪ I can stand as long as I want without extra pain.
- ① I have some pain on standing, but it does not increase with time.
- ● I cannot stand for longer than 1 hour without increasing pain.
- ③ I cannot stand for longer than ½ hour without increasing pain.
- ④ I cannot stand for longer than 10 minutes without increasing pain.
- ⑤ I avoid standing because it increases pain immediately.

Sleeping

- ⓪ I get no pain in bed.
- ① I get pain in bed but it does not prevent me from sleeping well.
- ● Because of pain, my normal sleep is reduced by less than 25%.
- ③ Because of pain, my normal sleep is reduced by less than 50%.
- ④ Because of pain, my normal sleep is reduced by less than 75%.
- ⑤ Pain prevents me from sleeping at all.

Social Life

- ⓪ My social life is normal and gives me no extra pain.
- ① My social life is normal but increases the degree of pain.
- ② Pain has no significant effect on my social life apart from limiting my more energetic interests (e.g., dancing, etc.).
- ● Pain has restricted my social life and I do not go out as often.
- ④ Pain has restricted my social life to my home.
- ⑤ I have hardly any social life because of the pain.

Traveling

- ⓪ I get no pain while traveling.
- ① I get some pain while traveling but none of my usual forms of travel make it worse.
- ● I get extra pain while traveling but it does not cause me to seek alternate forms of travel.
- ③ I get extra pain while traveling which causes me to seek alternate forms of travel.
- ④ Pain restricts all forms of travel.
- ⑤ Pain prevents all forms of travel except that done by lying down.

Changing Degree of Pain

- ⓪ My pain is rapidly getting better.
- ① My pain fluctuates, but is definitely getting better.
- ● My pain seems to be getting better, but improvement is slow at present.
- ③ My pain is neither getting better nor worse.
- ④ My pain is gradually worsening.
- ⑤ My pain is rapidly worsening.

Back Index Score 44 %

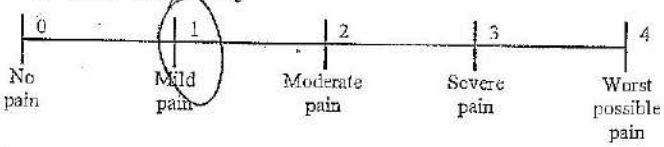
Todd Weiland
1-19-18

Functional Rating Index

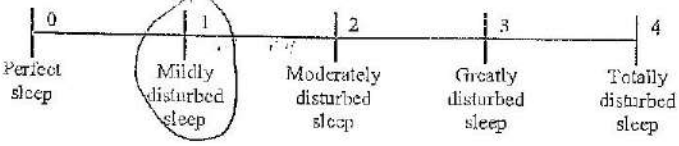
For use with Neck and/or Back Problems only.

In order to properly assess your condition, we must understand how much your neck and/or back problems has affected your ability to manage everyday activities. For each item below, please circle the number which most closely describes your condition right now.

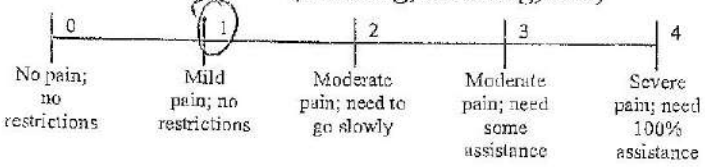
1. Pain Intensity



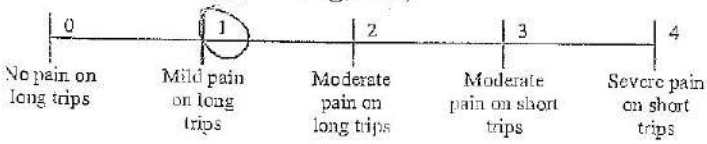
2. Sleeping



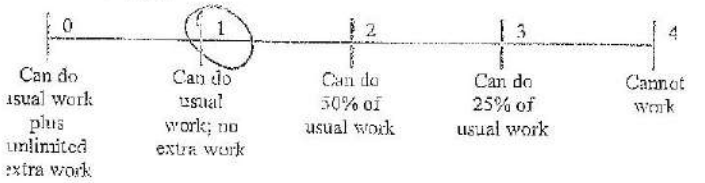
3. Personal Care (washing, dressing, etc.)



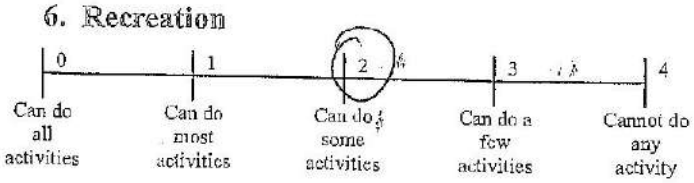
4. Travelling (driving, etc.)



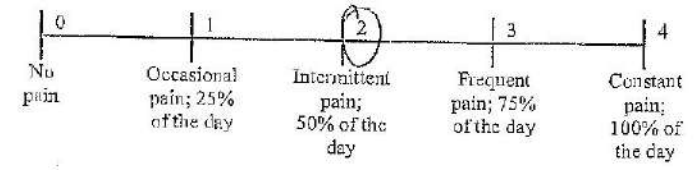
5. Work



6. Recreation

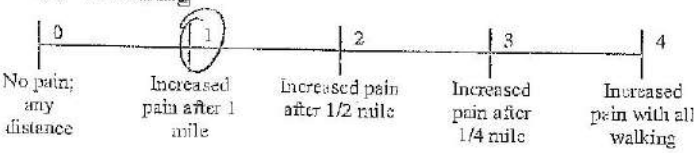


7. Frequency of Pain

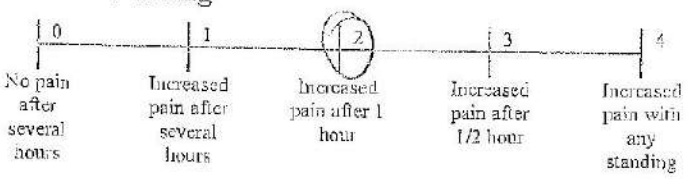


8. Lifting

9. Walking



10. Standing



Patient's Signature

1-19-18
Date

For Office Use Only:

Practitioner ID#: _____

Total Score _____ / 40

Clinical Diagnosis Codes:

Patient ID#: _____

Immucore, NAC-600, Cellular Energy, Creatine, Glycogenics, herbal-eze. Also take Relaxall throughout the week as needed. He has ordered me to be on the Creatine for 3 months, then go off of it for 1 month, then back on it for 3 months, etc...etc...)

3-29-18

tx manip by Dr. Doug

continued supplments, stretches, swimming, walking, theracane, traction as time allows. VAS 3/10. The R sh/arm is getting better, but its gradual, and slow; still troublesome to play catch with Jax, throw a nerf ball, play basketball, play arcade basketball, sharp pain and weakness R sh/arm...but its gradually improving.

4-2-18

tx manip by Dr. Derrick ; 22lb cervical traction therapy

Sore from playing with kids yesterday; was unable to wrestle with Jax , it just started to hurt the neck too much; frustrating used to be able to wrestle and play more with him. VAS Sunday 4/10, today 3/10

(4-3-18 massage with Kristina...90min)

4-5-18

tx manip by Dr. Nathan

had dentist this morning, so just more tense and achying in the upper traps/thoracics, neck tight; cont pain/symptoms all areas cerv/thoracics.

4-9-18

tx manip by Dr. Nathan; 22lb traction

moderate exacerbation over the weekend due to prolonged sitting at chiropractic seminar at The Sheraton, 12 credit hours, so just too much sitting, and since the accident, that is not a good combination, lot more achyness, tension knots, spasming, soreness, pain upper traps,

(have written in my notes just alot more pain, more general fatigue in Aug/Sept, more tired, more brain fog, low mood; no creatine from August 1st till today; started Creatine again August 19th; not sure how much relation or not; not sure about relation of everything, adrenals/thyroid, pain, Car-accident symptoms, brain/concussion symptoms, etc.)

(9-20-18...massage therapy with Kristina at 8:00am, 90min...in my notes I have written I still hurt alot Sept 22, 23, and 24...felt some better on the 25th, but then bad again on Sept 26th...so didn't get the usual help that I normally would receive from her; unsure why, but she says there was so much tension, knots, tightness, trigger points, etc it was just so flared up)

9-24-18

tx manip by Dr. Ryan O. ; 22lb traction; bil US therapy

daily pain/symptoms; just hurting more; VAS 5/10; not as much relief from last massage

9-27-18

tx manip by Dr. Doug

just been rough days and weeks, more pain, just doing my usual things, Relaxall, ice at times, stretches, theracane at work, traction if I have time; trying to walk or jog at night, walking is more comfortable; able to play with kids, just I hurt; played football with Jax few nights ago, and was tackling hime to the ground, and rolling around on the ground with him, and it just hurts alot in the neck/shoulders, traps, and felt those clunking/crunching noises again in my neck when landing on the ground tackling him few times

10-1-18

tx manip by Dr. Esser; 22lb traction therapy

quick tx by Esser, busy day; had alot of pain Saturday and Sunday; Saturday morning I went to Lake Madison to winterize our camper and put all the outside patio furniture and things in my Dads garage, lots of lifting/moving, 6 chairs, 2 heavy rocking chairs, large fireplace high-top table, lawn mower, kids toys, several plastice containers, rugs, just lots of stuff, felt decent while doing it, took about 2 hours, but on the drive home back to SFalls, just started to hurt alot, spasm, pain, tightness, R arm/shoulder disc/like referral symtpoms, all the same usual

pretty nice average week at work, and still felt pretty good, mild pain is all..2/10, 3/10 when hurting

11-7-18

tx manip by Dr. Esser

moderate exacerbation...more pain, more symptoms, busy at clinic, not time to get tx really; theracane between patients, stretches b/w patients , more supplements, more Relaxall; tx by Esser helped. VAS 5/10

11-9-18

tx manip by Dr. Doug

long week, busy week with patients, back /spine hurt all week, every day, just was too busy to do much about it...approx 25 patients per day; tried to self-massage all week, theracane, etc. I did go swimming last night (Thur night) with Jia, swimming felt good, but then I threw/launched her in the air few times, and already could feel the pain/symptoms in upper traps starting to develop, interm R arm/sh pain/pares/referrral symtpoms, then poker/cards from 7:30-11:30 pm made it uncomfortable as well, with the huched over card playing on poker table. Doug 's tx helpful

11-13-18

tx manip by Dr. Doug ; 22lb neck traction

average - busy week at work...25-28/day ; "normal " pain/symptoms; 3/10 to 5/10 when really hurting ; have tried few times to exercise more, but it aggravates everything, so not getting much accomplished for activity/exercise; swimming and water aerobics still very helpful, after swimming or pool , VAS goes down 2-3 points on VAS scale

11-16-18

tx manip by Dr. Nathan

same

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

= =

TODD WEILAND,

Plaintiff,

vs. 49CIV20-000969

PATRICK BUMANN and SOUTH DAKOTA HIGHWAY PATROL,

Defendants.

= =

Deposition of: TODD WEILAND
Date: December 15, 2020
Time: 9:24 a.m.

= =

APPEARANCES

Mr. Michael D. Bornitz
Cutler Law Firm, LLP
Sioux Falls, South Dakota

Attorney for the Plaintiff

Mr. Gary P. Thimsen
Ms. Alexis A. Warner
Woods, Fuller, Shultz & Smith, P.C.
Sioux Falls, South Dakota

Attorneys for the Defendant

ALSO PRESENT: Craig Ambach

REPORTED BY: Audrey M. Barbush, RPR

how the accident happened to the best of your recollection.

A Yes. So I was traveling home on Highway 42. It's a 65-mile-per-hour road. And where it happened -- I know where it is, but let's just say approximately halfway home. So I was driving, and all of a sudden a police car was right in front of me, like, just out of nowhere. I slammed on the brakes and, boom, collision happened.

Q Where was the police car when you first saw it --

A When I first saw --

Q -- or first noticed it?

A When I first saw the police car, it was right in the middle of the road.

Q Like over the centerline?

A I would say, like, half of the car on the other center lane and the other half on my side of the road; so, like, literally right in the middle of the road.

Q Which direction was it pointed?

A It was pointed south.

Q Did you see any emergency lights on it?

A I don't recall.

Q Did you hear a siren?

A I don't believe so.

Q What did you do when you saw this police car in the

(a) A description of the patient's complaint;

(b) A history;

(c) A record of diagnostic and therapeutic procedures; and

(d) A record of daily documentation which must include subjective data, objective data, assessment and plan for the patient's care.

End quote.

And you're telling me that none of the seven or eight practitioners who treated you for almost two years did any of those things?

A So to answer your question on this No. 5, I was told by Blake from Claims Associates that I could not bill for these visits.

Q I'm not asking you about bills. I'm asking you whether or not the chiropractic practitioners who treated you between November of 2017 and September 12th of 2019 complied with the Subsection 5 of this regulation.

MR. BORNITZ: I think, just for the record, the objection is that -- he complied with it by maintaining these records. Subsection 5 does not say that --

MR. THIMSEN: Don't --

MR. BORNITZ: -- does not say who has to do it, Gary.

MR. THIMSEN: Don't be testifying here. If you've

Will you get back to me on those two things?

MR. BORNITZ: I will.

MR. THIMSEN: All right. That's all I have this morning.

MR. BORNITZ: Okay. We will -- oh, let me just ask a few follow-ups here.

EXAMINATION

BY MR. BORNITZ:

Q You had mentioned, Todd, that there was a conversation that you had had where someone had told you that you couldn't submit bills from the Ortman Clinic for your care here?

A That's my recollection.

Q Who told you that?

A Blake Dykstra.

Q Mr. Thimsen had asked you some questions about your wife's Facebook page. Do you remember that?

A Yes.

Q A series of questions.

Were you the one who posted those photos?

A No.

Q Do you know, necessarily, without looking back at the photo, if the dates of all of the photos in Facebook correspond with the same date that they were posted?

A Oh, I have no idea.

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

TODD WEILAND, Plaintiff, vs. PATRICK BUMANN and SOUTH DAKOTA HIGHWAY PATROL, Defendants.	49CIV20-000969 **PLAINTIFF'S ANSWERS TO DEFENDANTS' FIRST SET OF INTERROGATORIES**

Plaintiff Todd Weiland provides the following answers to Defendants' First Set of Interrogatories:

ANSWERS TO INTERROGATORIES

1. State the full name, present address, phone number, date of birth, and occupation of the person answering these Interrogatories.

ANSWER: Todd Weiland; 1441 W. Waterstone Dr., Sioux Falls, SD 57108; [redacted]; doctor of chiropractic.

2. If the person identified in the answer to the foregoing Interrogatory is other than Plaintiff, state such person's relationship to the Plaintiff.

ANSWER: N/A.

3. If you were assisted in answering any Interrogatory or any sub-part, identify specifically each such Interrogatory or sub-part and further state the full name, present address and phone number, occupation and relationship to the Plaintiff of the person so assisting.

ANSWER: My attorney, Michael Bornitz, assisted me.

EXHIBIT 24

Neck Massager 2b	**Treatment Photo 10**
Neck Traction 1a	**Trigger Point Massager**
Neck Traction 1b	**Ultrasound**
Neck Traction 2a	

15. With respect to your normal activities state:

a. If such normal activities were interrupted;

b. The nature of such activities; and

c. For what period of time such activities were interrupted, giving dates and the nature and extent to which you were unable to perform or participate in such activities.

ANSWER:

My injuries are to my neck and upper shoulder and back area. I have a constant achy pain, tightness, and tension in my lower neck, upper traps, upper thoracics, shoulder blades, lateral neck and front neck. I have pain all the time from when I get up to when I go to bed, and it affects my sleep. This pain gets flared up by many of my regular activities. I now realize how many of these activities involve my neck, upper shoulder and upper back muscles. These injuries affect me at work because of the way I perform chiropractic care with the Ortman Technique. I have to elevate both of my arms when I treat patients. Outside of work, the injuries affect me when I play with my kids, and when I golf, play tennis, bicycle, bowl, shovel, play pool, ping pong, and type on the computer, to name a few. I basically cannot do any activity I used to without it causing pain. I have decided to not do some of them because it is not worth the price I have to pay. I love some of these things too much to give up so I just live with the pain. I feel on many days as though I am hurting more than the patients coming to see me. I just have to put on a smile and grin and bear the pain. Some days, I feel I am losing compassion and empathy as a doctor because of this pain. The busier I am at work, the more pain I generally have. Having this constant pain has caused me to not be as sharp and on top of things as before, and I am not in as good of a mood or as energetic as I used to be. I am disappointed because I am not myself any more. I find it harder to find joy and be happy. I feel I am not the same father as before, and I am not the same husband as before. This pain has taken its toll in the form of worse focus and concentration because the pain is always on my mind. I am concerned I had a concussion because my ability to remember, focus and concentrate is different now than before. I have pain when I get up, pain when I drive to work, pain at work, and pain when I get home. The pain affects my ability to sleep well. This is repeated every day. I struggled in the past with chronic fatigue syndrome. Dr. Ross McDaniel helped me with

EXHIBIT 24

this. Since the collision, fatigue has been a major issue and problem. I try to maintain my condition by getting massage therapy and taking time to get treatment from colleagues at work. I will also use other forms of therapy such as cervical traction and ultrasound therapy. My injuries have affected my relationship with my wife. I do not tell her how much I hurt and do not want to complain to her about this. I try to keep this from her. I don't like to complain because it does not solve the problem.

The crash has caused me to be anxious when driving. I realize how easily I could have been killed in this collision. I commute 38 miles each way to work and think about the collision on these daily drives. My wife commented on how I now drive close to the edge of the road and I hadn't noticed it. I feel like I am always "on alert" and "edgy" when driving. Driving is no longer something I take for granted. I love my job. It is physically demanding, especially in the upper body. I wonder if I will be able to work to age 65. I believe I have lost patients because of my injuries. I know that patients of mine see other doctors at the clinic. I worry the pain will never be gone. I know from treating patients who have been in similar crashes that they still have pain 30 years after the crash. I am concerned I will get worse over time and need a disc surgery or worse yet, a spine fusion surgery. I worry about chronic pain and what the future holds. I worry about the long-term effects of the concussion and how it affects how I think and my memory. I feel as though I am not as quick in my decision making with patients and I have a harder time remembering what we had been treating the patient for, which causes me to need to review the notes more than I used to in the past. I also worry that I am always going to hurt. I am concerned about other modifications I will need to make as I get older. My wife and I have discussed the cost of the massage therapy and other treatments. These injuries and how they affect me has been a source of friction in our family. I need to be at my best while at work for my patients and then I get home and let my guard down at times and can't be the same dad or husband I used to be.

I had two bad flare-ups in November and December of 2019 during busy times at work. I get regular chiropractic treatments from some of the doctors at the Ortman Clinic. I was told by the Defendant's representatives that I could not submit charges for their services because they are co-workers. I use a Theracane to work on certain areas in my neck and upper back. I never had to use a Theracane before this crash. I also use ice on my neck and upper back and I apply Biofreeze to help treat the symptoms. I use traction therapy at the office once every 2-3 weeks and get massages about every three weeks. The 90-minute massages I get at Chirosport are particularly helpful, but they cost $120 for that visit. I don't like having to pay for them, and they are painful, but they help with my quality of life and relieve my pain and symptoms for 2-4 days. I have to leave work early to get to those appointments, so they also cost me in the form of lost time at work. I have used Relaxall, which is an herbal remedy for pain and muscle relaxation.

I have treated with Dr. Chris Janssen. He is a specialist in physical medicine and rehabilitation at Sanford. I had a course of physical therapy and some trigger point injections and will be having a rhizotomy surgery. I could barely turn my head following the trigger point injections. The rhizotomy surgery is supposed to deaden the nerve that is generating the pain. Dr. Janssen informed me that the pain is likely coming from the

EXHIBIT 24

injured muscles and facet joints. The facet joints hold the spinal bones together. Each spinal level has two facet joints, one on the right and one on the left. Each facet joint has two nerves that supply sensation. Facet joints help with range of motion of the spine, and they can become damaged from trauma. People who have injured their facet joints have neck pain like I have. I hope the rhizotomy surgery helps like Dr. Janssen said it could.

16. If you obtained professional medical treatment as a result of your accident of November 10, 2017, state the names and addresses of each physician, chiropractor, or other practitioner who treated you and list the dates of treatment from each.

ANSWER: Plaintiff objects to the use of the term "accident" on the grounds that the term "accident" inaccurately suggests an absence of fault. This claim arises out of a motor vehicle collision that occurred as a result of the negligent conduct of Defendant Bumann. Without waiving this objection, see medical records previously disclosed.

17. Describe the nature of the treatments and the cost of each treatment, attaching a complete copy of your doctor, hospital, or other medical bills.

ANSWER: See medical records and bills previously disclosed.

18. If you were hospitalized as a result of your accident of November 10, 2017, state the name and address of the hospital and the dates of confinement, attaching a copy of your complete hospital bill, if any.

ANSWER: Plaintiff objects to the use of the term "accident" on the grounds that the term "accident" inaccurately suggests an absence of fault. This claim arises out of a motor vehicle collision that occurred as a result of the negligent conduct of Defendant Bumann. Without waiving this objection, N/A.

19. If you are still under treatment, state the name of the physician or person rendering treatment, the frequency and nature of treatment and the date of the last treatment.

ANSWER: See medical records previously disclosed.

20. Set forth in detail all injuries which you allege that you received in the incident or attach to your answers to the Interrogatories a detailed statement from your attending physician or physicians describing the injuries.

EXHIBIT 24

STATE OF SOUTH DAKOTA IN CIRCUIT COURT
COUNTY OF MINNEHAHA SECOND JUDICIAL CIRCUIT

* *

TODD WEILAND, 49CIV20-000969

Plaintiff,

vs.

PATRICK BUMANN and SOUTH DAKOTA HIGHWAY PATROL,

Defendants.

* *

D E P O S I T I O N O F

NATHAN LIGTENBERG
September 1, 2021
10:05 a.m.

* *

APPEARANCES

Mr. Michael D. Bornitz (appearing via Zoom)
Cutler Law Firm
Sioux Falls, South Dakota
for the Plaintiff;

Mr. Gary P. Thimsen
Ms. Jacquelyn A. Bouwman
Woods, Fuller, Shultz & Smith
Sioux Falls, South Dakota
for the Defendants.

Also present: Craig Ambach
Sara Brusseau
Lexi Jones

white, can't remember, Terrain, GMC Terrain at the body shop here in town. I think that's where it got -- Yeah, front end was pretty crushed and so forth and realized that was his vehicle, yeah. I think they towed it right here, if I'm not mistaken, so soon after that.

Q. Very soon.

A. Yeah.

Q. When is the first time you ever talked, if you ever did, to Todd about the accident?

A. Probably that following Monday or, I don't know what day that happened on a Friday, probably or. Soon after, probably, couple days after that he had -- because I think he was driving a different car or something and whatever -- and yeah.

Q. All right. You see Exhibit 1 to your right there, Nathan?

A. My left.

Q. Your left, yes, I'm sorry.

A. Yes, okay.

Q. And Number 5, are you familiar with that?

A. Fairly familiar, yes, I mean, yes.

Q. What is it as far as in your --

A. It's -- it's writing -- it's basically documentation on -- pertaining to patients that

are -- that receive -- come into the clinic or into any clinic, I guess. My guess is this is a state --

Q. It's a state administrative regulation?

A. Yeah.

Q. All right. Well, I've got copies of your records here, and the first one I see is dated November 21, '17, and I will represent to you that these were provided to me by Mr. Bornitz and they are notes that Dr. Weiland made on his own concerning treatment he received, so the blackout areas refer to things other than that accident. He says that -- And you can look in here, that's Exhibit 2 --

MS. BOUWMAN: There's a tab with your name on it.

Q. There's a tab with your name on it, Exhibit 2 here.

A. Okay.

Q. Yeah, and we can follow along. It says that you gave him a therapeutic manipulation, stretches, et cetera; is that correct?

A. You know, I -- four years ago, or what do we got, five years, I don't recall that day. I must have maybe given him a treatment.

colleague or family member or someone that you know that needs -- has something that's an ache or a discomfort or pain, you know.

Q. I understand, I understand. Have you had other practitioners in the clinic treat you that way, kind of informally?

A. I have.

Q. Do you keep notes on that?

A. Not all the time, no.

Q. See, that's -- and I'm not being accusatory here.

A. Yeah.

Q. I'm seeing that Todd Weiland got some treatment and I understand that it seems to be the custom on an informal basis that the report referred to in that regulation, Exhibit 1, is not always completed. I'm just curious as to why the other people I've talked to don't keep notes on their own treatment and why he did.

A. Yeah, I don't know. That would be a question for him, I guess --

Q. All right.

A. -- and why he probably felt that pertaining to journaling or --

Q. Did he --

A. -- documentation from his whatever, but yeah.

TODD WEILAND – MEDICAL EXPENSES
NOVEMBER 10, 2017 MOTOR VEHICLE COLLISION

Medical Provider	DOS	Bates Nos.	Amount of Bill
ChiroSport	12/5/2017	ChiroSport Bills 1	$96.00
	1/16/2018	ChiroSport Bills 1	$96.00
	2/27/2018	ChiroSport Bills 1	$136.00
	3/19/2018	ChiroSport Bills 1	$40.00
	3/27/2018	ChiroSport Bills 1	$121.50
	4/3/2018	ChiroSport Bills 1	$105.00
	4/17/2018	ChiroSport Bills 2	$105.00
	5/1/2018	ChiroSport Bills 2	$116.00
	5/29/2018	ChiroSport Bills 2	$105.00
	6/19/2018	ChiroSport Bills 2	$105.00
	6/26/2018	ChiroSport Bills 2	$136.00
	7/10/2018	ChiroSport Bills 2	$105.00
	8/7/2018	ChiroSport Bills 2	$201.00
	8/28/2018	ChiroSport Bills 2	$105.00
	9/20/2018	ChiroSport Bills 3	$105.00
	10/9/2018	ChiroSport Bills 3	$105.00
	10/23/2018	ChiroSport Bills 3	$128.36
	10/26/2018	ChiroSport Bills 3	$105.00
	11/20/2018	ChiroSport Bills 3	$105.00
	12/4/2018	ChiroSport Bills 3	$201.00
	1/29/2019	ChiroSport Bills 3	$96.00
	2/19/2019	ChiroSport Bills 3	$105.00
	3/14/2019	ChiroSport Bills 3	$105.00
	3/28/2019	ChiroSport Bills 4	$105.00
	5/7/2019	ChiroSport Bills 4	$136.00
	6/4/2019	ChiroSport Bills 4	$105.00
	6/25/2019	ChiroSport Bills 5	$136.00
	7/11/2019	ChiroSport Bills 5	$105.00
	8/6/2019	ChiroSport Bills 5	$105.00
	8/27/2019	ChiroSport Bills 5	$105.00
	9/24/2019	ChiroSport Bills 5	$136.00
	10/8/2019	ChiroSport Bills 5	$105.00
	11/5/2019	ChiroSport Bills 5	$96.00
	11/19/2019	ChiroSport Bills 5	$105.00
	12/23/2019	ChiroSport Bills 5	$75.00
	1/7/2020	ChiroSport Bills 6	$96.00
	1/14/2020	ChiroSport Bills 6	$105.00
	4/7/2020	ChiroSport Bills 6	$157.50
	4/21/2020	ChiroSport Bills 6	$105.00

TODD WEILAND – MEDICAL EXPENSES
NOVEMBER 10, 2017 MOTOR VEHICLE COLLISION

	5/5/2020	ChiroSport Bills 6	$105.00
	5/26/2020	ChiroSport Bills 6	$105.00
	6/30/2020	ChiroSport Bills 6	$105.00
	7/7/2020	ChiroSport Bills 6 & 15	$136.00
	8/4/2020	ChiroSport Bills 6	$105.00
	9/15/2020	ChiroSport Bills 15	$115.00
	9/29/2020	ChiroSport Bills 15	$96.00
	10/13/2020	ChiroSport Bills 15	$96.00
	10/27/2020	ChiroSport Bills 15	$315.00
	12/8/2020	ChiroSport Bills 15	$105.00
	1/19/2021	ChiroSport Bills 17	$105.00
	2/16/2021	ChiroSport Bills 17	$96.00
	3/2/2021	ChiroSport Bills 17	$105.00
	3/30/2021	ChiroSport Bills 17	$96.00
	4/13/2021	ChiroSport Bills 18	$105.00
	5/25/2021	ChiroSport Bills 18 & 19	$105.00
	6/16/2022	ChiroSport Bills 19	$145.00
	7/7/2022	ChiroSport Bills 19	$145.00
Subtotal			**$6,590.36**
McCook Therapy and Wellness	8/28/2019	McCook Bills 1	$270.00
	8/29/2019	McCook Bills 1	$240.00
	9/3/2019	McCook Bills 1	$180.00
	9/5/2019	McCook Bills 1	$180.00
	9/10/2019	McCook Bills 1	$180.00
	9/12/2019	McCook Bills 1	$180.00
	9/16/2019	McCook Bills 1	$180.00
	9/19/2019	McCook Bills 1	$200.00
	9/24/2019	McCook Bills 1	$200.00
	9/26/2019	McCook Bills 1	$200.00
	10/1/2019	McCook Bills 1	$200.00
	10/3/2019	McCook Bills 1	$200.00
	10/7/2019	McCook Bills 1	$200.00
	10/9/2019	McCook Bills 1	$200.00
	10/14/2019	McCook Bills 1	$180.00
	10/16/2019	McCook Bills 1	$200.00
	10/23/2019	McCook Bills 1	$200.00
	10/30/2019	McCook Bills 1	$200.00

TODD WEILAND – MEDICAL EXPENSES
NOVEMBER 10, 2017 MOTOR VEHICLE COLLISION

	11/13/2019	McCook Bills 1	$140.00
Subtotal			**$3,730.00**
Ortman Chiropractic	9/12/2019	Ortman Bills 9	$144.00
	9/23/2019	Ortman Bills 9	$54.00
	9/25/2019	Ortman Bills 9	$84.00
	9/30/2019	Ortman Bills 9	$54.00
	10/4/2019	Ortman Bills 9	$84.00
	10/14/2019	Ortman Bills 10	$84.00
	10/17/2019	Ortman Bills 10	$54.00
	10/24/2019	Ortman Bills 10	$84.00
	11/1/2019	Ortman Bills 10	$54.00
	11/4/2019	Ortman Bills 10	$84.00
	11/7/2019	Ortman Bills 10	$84.00
	11/14/2019	Ortman Bills 11	$84.00
	11/15/2019	Ortman Bills 11	$84.00
	11/18/2019	Ortman Bills 11	$84.00
	11/22/2019	Ortman Bills 11	$84.00
	11/27/2019	Ortman Bills 12	$84.00
	12/3/2019	Ortman Bills 12	$54.00
	12/12/2019	Ortman Bills 12	$84.00
	12/19/2019	Ortman Bills 12	$54.00
	12/27/2019	Ortman Bills 12	$54.00
	1/2/2020	Ortman Bills 12	$84.00
	1/9/2020	Ortman Bills 12	$56.00
	1/28/2020	Ortman Bills 13	$56.00
	2/18/2020	Ortman Bills 13	$56.00
	2/28/2020	Ortman Bills 13	$56.00
	3/11/2020	Ortman Bills 14	$86.00
	3/25/2020	Ortman Bills 14	$56.00
	4/1/2020	Ortman Bills 14	$116.00
	4/15/2020	Ortman Bills 15	$86.00
	4/24/2020	Ortman Bills 15	$56.00
	5/8/2020	Ortman Bills 15	$86.00
	6/12/2020	Ortman Bills 15	$56.00
	7/2/2020	Ortman Bills 16	$86.00
	7/14/2020	Ortman Bills 16	$56.00
	8/12/2020	Ortman Bills 16	$56.00
	8/21/2020	Ortman Bills 16	$86.00
	8/27/2020	Ortman Bills 17	$86.00

TODD WEILAND – MEDICAL EXPENSES
NOVEMBER 10, 2017 MOTOR VEHICLE COLLISION

	9/4/2020	Ortman Bills 17	$86.00
	9/18/2020	Ortman Bills 17	$56.00
	10/15/2020	Ortman Bills 17-18	$86.00
	11/5/2020	Ortman Bills 18	$56.00
	11/13/2020	Ortman Bills 18	$56.00
	12/10/2020	Ortman Bills 18	$56.00
	12/30/2020	Ortman Bills 19	$56.00
	1/13/2021	Ortman Bills 19	$58.00
	2/18/2021	Ortman Bills 20	$58.00
	3/4/2021	Ortman Bills 20	$58.00
	3/17/2021	Ortman Bills 20	$58.00
	4/8/2021	Ortman Bills 23	$58.00
	4/20/2021	Ortman Bills 23	$58.00
	4/23/2021	Ortman Bills 23	$58.00
	5/14/2021	Ortman Bills 23	$58.00
	6/4/2021	Ortman Bills 23	$58.00
	6/22/2021	Ortman Bills 23	$58.00
	7/5/2021	Ortman Bills 24	$58.00
	7/8/2021	Ortman Bills 24	$88.00
	7/14/2021	Ortman Bills 22	$68.00
	7/15/2021	Ortman Bills 22	$68.00
	8/10/2021	Ortman Bills 24	$68.00
	8/17/2021	Ortman Bills 24	$58.00
	8/27/2021	Ortman Bills 24	$68.00
	9/14/2021	Ortman Bills 25	$58.00
	10/7/2021	Ortman Bills 25	$58.00
	10/28/2021	Ortman Bills 25	$58.00
	11/16/2021	Ortman Bills 25	$58.00
	12/16/2021	Ortman Bills 26	$58.00
	1/27/2022	Ortman Bills 26	$58.00
	2/11/2022	Ortman Bills 30	$58.00
	2/18/2022	Ortman Bills 30	$58.00
	2/25/2022	Ortman Bills 31	$58.00
	3/2/2022	Ortman Bills 31	$58.00
	3/3/2022	Ortman Bills 31	$58.00
	3/23/2022	Ortman Bills 31	$58.00
	4/20/2022	Ortman Bills 32	$58.00
	4/29/2022	Ortman Bills 32	$58.00
	5/25/2022	Ortman Bills 33	$58.00
	6/2/2022	Ortman Bills 33	$58.00
	6/9/2022	Ortman Bills 33	$58.00

TODD WEILAND – MEDICAL EXPENSES
NOVEMBER 10, 2017 MOTOR VEHICLE COLLISION

	6/13/2022	Ortman Bills 33	$58.00
	6/14/2022	Ortman Bills 33	$55.00
	6/15/2022	Ortman Bills 33	$55.00
	6/30/2022	Ortman Bills 34	$55.00
	7/6/2022	Ortman Bills 34	$55.00
	7/18/2022	Ortman Bills 40	$55.00
	8/2/2022	Ortman Bills 34	$55.00
	8/19/2022	Ortman Bills 35	$55.00
	8/24/2022	Ortman Bills 35	$81.00
	9/1/2022	Ortman Bills 35	$81.00
	9/8/2022	Ortman Bills 35-36	$81.00
	9/23/2022	Ortman Bills 38	$81.00
	10/5/2022	Ortman Bills 38-39	$81.00
Subtotal			**$6,092.00**
Sanford	8/26/2019	Sanford Bills 6	$415.00
	10/7/2019	Sanford Bills 13	$184.00
	11/20/2019	Sanford Bills 14	$184.00
	2/20/2020	Sanford Bills 15	$272.00
	3/18/2020	Sanford Bills 16	$279.00
	4/9/2020	Sanford Bills 17	$272.00
Subtotal			**$1,606.00**
Open Upright MRI	5/17/19	MRI Bills 1	$600.00
Subtotal			**$600.00**
Avera McKennan Hospital	6/4/2020	AMH Bills 3	$3,333.06
	6/25/2020	AMH Bills 2	$3,333.06
	8/7/2020	AMH Bills 1	$10,495.61
	10/1/2021	AMH Bills 7-8	$12,147.38
Subtotal			**$29,309.11**
Why Knot Massage	4/17/2019	Why Knot Bills 1	$53.00
	5/21/2019	Why Knot Bills 1	$53.00
	6/19/2019	Why Knot Bills 1	$53.00
	7/23/2019	Why Knot Bills 1	$53.00
	9/19/2019	Why Knot Bills 1	$53.00

TODD WEILAND – MEDICAL EXPENSES
NOVEMBER 10, 2017 MOTOR VEHICLE COLLISION

	10/30/2019	Why Knot Bills 1	$53.00
	12/11/2019	Why Knot Bills 1	$53.00
	2/6/2020	Why Knot Bills 2	$53.00
	11/17/2020	Why Knot Bills 2	$53.00
	1/5/2021	Why Knot Bills 6	$53.00
	2/9/2021	Why Knot Bills 6	$53.00
	5/4/2021	Why Knot Bills 3	$53.00
	6/15/2021	Why Knot Bills 3	$53.00
	7/27/2021	Why Knot Bills 3	$53.00
	9/7/2021	Why Knot Bills 3	$53.00
	10/19/2021	Why Knot Bills 3	$53.00
	11/30/2021	Why Knot Bills 5	$53.00
	1/20/2022	Why Knot Bills 4	$53.00
	2/22/2022	Why Knot Bills 4	$53.00
	3/29/2022	Why Knot Bills 6	$53.00
	5/17/2022	Why Knot Bills 6	$53.00
	6/28/2022	Why Knot Bills 6	$53.00
Subtotal			**$1,166.00**
Ni Hao Asian Massage	2/19/2022	Ni Hao Bills 1	$70.00
	9/21/2022	Ni Hao Bills 2	$90.00
Subtotal			**$160.00**
Westside Chiropractic	8/3/2021	Westside Chiro Bills 1	$120.00
	9/28/2021	Westside Chiro Bills 1	$125.00
Subtotal			**$245.00**
KBMT	11/9/2021	KBMT Bills 1	$100.00
	12/14/2021	KBMT Bills 1	$100.00
	2/8/2022	KBMT Bills 1	$100.00
	3/15/2022	KBMT Bills 1	$100.00
	4/26/2022	KBMT Bills 1	$110.00
	6/7/2022	KBMT Bills 1	$100.00
	7/19/2022	KBMT Bills 1	$110.00
	8/30/2022	KBMT Bills 1	$105.00
Subtotal			**$825.00**

TODD WEILAND – MEDICAL EXPENSES
NOVEMBER 10, 2017 MOTOR VEHICLE COLLISION

Dr. Metz	6/4/2020	Metz Bills 1	$1,088.00
	6/25/2020	Metz Bills 1	$939.00
	8/7/2020	Metz Bills 1	$1,935.00
	10/1/2021	Metz Bills 2	$2,386.00
Subtotal			**$6,348.00**
Grand Total			**$56,671.47**

Todd Weiland Future Radiofrequency Ablation Costs

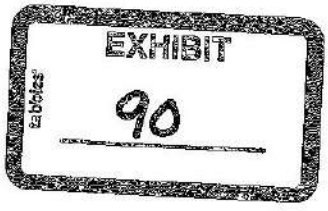
Life Expectancy: 35.2 years (422 months)

Frequency of Radiofrequency Ablations	14 months
Future Radiofrequency Ablation Procedures	30
Last Radiofrequency Ablation Procedure Charge	$14,533.38
Future Radiofrequency Ablation Procedure Costs	**$436,001.40**

Todd Weiland Future Massage Therapy Costs

Life Expectancy: 35.2 years (1830 weeks)

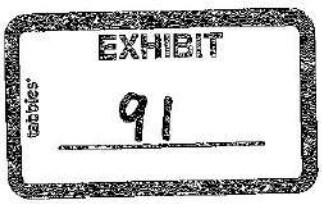
Frequency of MT Treatments	3 weeks
Future MT Treatments	610
MT Treatment Charge Range	$53.00-$110.00
Future Massage Therapy Treatment Costs	**$32,330-$67,100.00**



Todd Weiland Future Chiropractic Treatment Costs

Life Expectancy: 35.2 years (422 months)

Frequency of Chiropractic Treatments	Twice a month
Future Chiropractic Treatments	844
Chiropractic Charge Range	$55.00 to $81.00
Future Chiropractic Costs	**$46,420-$68,364**



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

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TODD WEILAND,	:	49CIV20-000969
Plaintiff,	:	
v.	:	**ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY *JUDGMENT***
PATRICK BUMANN,	:	
Defendant.	:	

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

On March 4, 2022, Plaintiff Todd Weiland filed a motion for partial summary judgment. On April 11, 2022, a hearing on Plaintiff's motion for partial summary judgment was held before the Honorable Sandra Hanson in the Minnehaha County Courthouse in Sioux Falls, South Dakota. Plaintiff Todd Weiland appeared by Cutler Law Firm, LLP and Michael D. Bornitz and Abigale M. Farley, his attorneys; and Defendant Patrick Bumann appeared by Woods, Fuller, Shultz & Smith, P.C. and Melanie L. Carpenter and Justin Bergeson, his attorneys.

After considering the written briefs, the arguments of counsel, all of the materials on file, and otherwise being fully advised, it is hereby

ORDERED, ADJUDGED AND DECREED that fact issues exist which preclude the grant of partial summary judgment on the issues of negligence, causation, contributory negligence, and failure to mitigate; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's motion for partial summary judgment is denied.

Dated this 12th day of April, 2022.

BY THE COURT:

Honorable Sandra Hanson
Circuit Court Judge

ATTEST:

Angelia Gries, Clerk

By _____
Deputy

UNIFIED JUDICIAL SYSTEM
STATE OF SOUTH DAKOTA

FILED
APR 13 2022
Minnehaha County, S.D.
Clerk Circuit Court

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

TODD WEILAND, Plaintiff, vs. PATRICK BUMANN, Defendant.	49CIV20-000969 **PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW Plaintiff Todd Weiland, by and through his counsel, for his Statement of Undisputed Material Facts in support of his Motion for Partial Summary Judgment.

1. Defendant Patrick Bumann ("Defendant") began working as a trooper for the South Dakota Highway Patrol ("SDHP") in August of 2014. *See* Aff. of Counsel, Ex. 1 (Patrick Bumann Deposition at 12:9-11). As an employee of the SDHP, Defendant was trained in crash investigation and served as a crash reconstructionist. *Id.* at 12:24.

2. On November 10, 2017, Defendant was working an overtime shift, driving westbound in an SDHP patrol vehicle on South Dakota Highway 42. *Id.* at 26:7-10, 30:8-16. Defendant knew this to be a busy highway with a speed limit of 65 miles-per-hour. *Id.* at 30:16-19, 53:21-23.

3. Defendant owed a duty to other drivers on the highway to drive with due caution and to drive with due regard for the safety of all persons. *See* Aff. of Counsel, Exs. 5 (Sgt. Steven Schade Deposition at 25:21-26:8), 7 (Sgt. Kevin Kinney Deposition at 29:22-30:7).

4. At or around 1 p.m., Defendant observed a vehicle in the eastbound lane that "was traveling above the posted speed limit of 65 miles per hour and it had expired license plates as well." *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 30:16-19).

Filed: 3/4/2022 1:51 PM CST Minnehaha County, South Dakota 49CIV20-000969

5. The traffic violation observed by Defendant did not present a significant risk to public safety, nor did Defendant believe it did at the time. *See* Aff. of Counsel, Exs. 1 (Bumann Depo. at 55:16-24), 5 (Schade Depo. at 26:24-27:17).

6. Defendant's view of oncoming traffic was obstructed because he was travelling behind a pickup pulling a trailer and a semi-truck. *See* Aff. of Counsel, Ex. 1 (Bumann Depo. 52:19-22).

7. Defendant had also entered into a no-passing zone and was nearing an intersection. *Id.* at 54:14-15, 78:4-6.

8. Under these circumstances, Defendant began to perform a U-turn and then activated his lights with the intent of effectuating a traffic stop. *Id.* at 80:11-20.

9. After beginning the U-turn, Defendant's vehicle did not pause or otherwise stop until the collision. Aff. of Counsel, Ex. 15 (Dash Cam at 12:58:21-12:58:24).

10. The Dash Cam did not show any space between the two trucks travelling in front of Defendant to see between them. *Id.* at 12:58:23.

11. Defendant knew that no passing zones are located at "places with obscured viewed or obstructed views." *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 83:9-16).

12. Defendant knew that no-passing zones are located near intersections because "there's vehicles that could be coming and going near intersections which could make passing unsafe[.]" *Id.* at 84:9-12.

13. Defendant knew that U-turns "can be dangerous maneuvers if -- for many reasons. Could be if there is a pedestrian obstructing the way that is not seen, another vehicle that is not seen, anything of that nature, obstructing traffic behind you or coming at you as well." *Id.* at 55:2-7.

14. Defendant knew that executing a U-turn with an obstructed field of vision was dangerous for himself and for others. *Id.* at 59:18-60:3.

15. Defendant knew that he had an obligation to yield to other drivers before performing a U-turn, and that he "had to be a hundred percent sure it was clear before" making a U-turn. *Id.* at 58:2-10, 59:18-60:3.

16. Defendant performed the U-turn in front of Dr. Todd Weiland's vehicle. *Id.* at 31:4-7.

17. Defendant could not see Dr. Weiland until he had entered the eastbound lane. *See* Aff. of Counsel, Exs. 1 (Bumann Depo. at 43:2-5), 2 (Todd Weiland Deposition at 17:3-9).

18. Dr. Weiland slammed on his brakes, but was unable to avoid colliding with the rear of Defendant's vehicle. *See* Aff. of Counsel, Exs. 1 (Bumann Depo. at 85:19-12), 2 (Weiland Depo. at 18:2-3).

19. The U-turn performed by Defendant interfered with traffic. *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 31:5-7).

20. The U-turn performed by Defendant was an unsafe maneuver under the circumstances. Aff. of Counsel, Exs. 1 (Bumann Depo. at 55:2-7, 56:22-57:3, 59:18-60:3, 83:17-23, 84:9-12), 5 (Schade Depo. at 32:7-11).

21. Defendant called Sergeant Steve Schade ("Sgt. Schade") on his cellphone immediately after the collision. *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 80:11-20).

22. During this phone conversation, Defendant said the collision was one hundred percent his fault and that he would lose his safe driving miles. *Id.* at 81:2-5, 81:16-21.

23. Sgt. Schade testified that he was not aware of Defendant retracting his statement or attributing fault to anyone else. *See* Aff. of Counsel, Ex. 5 (Schade Depo. at 29:16-30:10, 31:18-23).

24. The deputy who responded on the scene determined that Defendant's failure to yield to Dr. Weiland contributed to the collision. *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 75:8-17). Defendant did not disagree with the deputy's determination. *Id.* at 64:3-17.

25. In his Supervisor's Report on November 19, 2017, Sgt. Schade determined that Defendant was in violation of South Dakota Highway Patrol Policy 7.105: "[a] division vehicle shall not be driven in a careless manner at any time, [and] [i]f Trooper Bumann would have waited and been able to get a better view of oncoming traffic, he could have avoided this collision." *See* Aff. of Counsel, Ex. 4 (Sgt. Schade Supervisor Report, dated November 19, 2017). Sgt. Schade confirmed that he still agrees with the conclusions he made in his report. *See* Aff. of Counsel, Ex. 5 (Schade Depo. at 20:14-21).

26. On December 6, 2017, SDHP officers Sgt. Kevin Kinney ("Sgt. Kinney"), Sgt. Schade, and Lt. Paul Gerken discussed an investigation of the circumstances surrounding the collision. *See* Aff. of Counsel, Ex. 6 (Sgt. Kinney letter to Bumann dated December 6, 2017).

27. The SDHP investigation concluded the crash was "preventable" and "that [Defendant] needed to use more caution when operating [his] patrol vehicle to turn around on violators." *See* Aff. of Counsel, Ex. 6. The supervisors did not attribute fault to anyone other than Defendant. *Id.*

28. Sgt. Kinney testified that he believed the investigation was done properly and agrees with the conclusions that were reached. *See* Aff. of Counsel, Ex. 7 (Kevin Kinney Deposition at 15:20-24, 27:11-17, taken Jan. 21, 2022).

29. Defendant agrees that the motor vehicle collision was preventable. *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 63:8-11).

30. Defendant agreed at the time of the SDHP investigation that he needed to use more caution when turning around on traffic violators. *Id.* at 63:12-18.

31. Sgt. Kinney sent a letter to Defendant advising him of their determination. *Id.*

32. Defendant had the right to appeal the determination, but chose not to. *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 62:13-19).

33. Defendant did not tell any of his supervisors that he disagreed with their determination. *See* Aff. of Counsel, Exs. 1 (Bumann Depo. at 73:5-13), 7 (Kinney Depo. at 25:24-26:17).

34. There is nothing in the crash report or dash cam video indicating Dr. Weiland had any fault in the collision. *Id.* at 89:18-24.

35. Defendant is unaware of any facts that indicate Dr. Weiland contributed to the collision. *Id.* at 85:9-12.

36. Dr. Chris Janssen concluded that the motor vehicle collision caused Dr. Weiland injury. *See* Aff. of Counsel, Ex. 8 (Chris Janssen, M.D. Report).

37. Dr. Nathan Ligtenberg concluded that the motor vehicle collision caused Dr. Weiland injury. *See* Aff. of Counsel, Ex. 9 (Nathan Lightenberg, D.C. Opinion Letter at 3-4).

38. Dr. Ross McDaniel concluded that the motor vehicle collision caused Dr. Weiland injury. *See* Aff. of Counsel, Ex. 10 (Ross McDaniel, D.C. Opinion Letter at 3-4).

39. Dr. Doug Ortman concluded that the motor vehicle collision caused Dr. Weiland injury. *See* Aff. of Counsel, Ex. 11 (Doug Ortman, D.C. Opinion Letter at 3-4).

40. Dr. Walter Carlson concluded that the motor vehicle collision caused Dr. Weiland injury. *See* Aff. of Counsel, Ex. 12 (Walter Carlson, M.D., Report at 6).

41. Dr. Jason Evans concluded that the motor vehicle collision caused Dr. Weiland injury. *See* Aff. of Counsel, Ex. 13 (Jason Evans, D.C., Report at 4).

42. Dr. Carlson opined that Dr. Weiland would have needed 12 weeks of chiropractic care or physical therapy because of the motor vehicle collision on November 10, 2017. *See* Aff. of Counsel, Ex. 12 (Carlson Report at 6).

43. On November 13, 2017, Dr. Weiland started receiving chiropractic treatment, and has regularly received chiropractic care from the Ortman Clinic and ChiroSport since. *See* Aff. of Counsel, Ex. 8 (Janssen Report at 6-12).

44. On August 26, 2019, Dr. Weiland began treating with Dr. Janssen. *Id.* at 10. Dr. Janssen prescribed physical therapy for Dr. Weiland. *Id.* at 11. On August 28, 2019, Dr. Weiland began physical therapy, and completed the recommended treatment plan on November 13, 2019, at McCook Therapy and Wellness. *Id.* at 10-11.

45. On February 20, 2020, Dr. Janssen recommended Dr. Weiland receive trigger point injections. *Id.* at 11-12. On March 18, 2020, Dr. Weiland received the trigger point injections from Dr. Janssen. *Id.* at 12.

46. On May 11, 2020, Dr. Janssen referred Dr. Weiland to Dr. Timothy Metz for cervical medial branch blocks. *Id.* On June 4, 2020, Dr. Weiland began treating with Dr. Metz. *Id.* at 6.

47. Dr. Metz recommended Dr. Weiland receive "cervical medial branch blocks at the bilateral C4 to C6 levels." *Id.* On June 4, 2020, and June 25, 2020, Dr. Weiland received the cervical medial branch blocks from Dr. Metz. *Id.*

48. On August 7, 2020, Dr. Metz recommended and performed a cervical radiofrequency ablation procedure on Dr. Weiland.

Dated this 4th day of March, 2022.

CUTLER LAW FIRM, LLP

/s/ Abigale M. Farley

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Abigale M. Farley, do hereby certify that on this 4th day of March, 2022, I have electronically filed the foregoing with the Clerk of Court using the Odyssey File & Serve system which will send notification of such filing to the following:

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Jacquelyn A. Bouwman
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300 South Phillips Avenue, Suite 300
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Attorneys for Defendant

/s/ Abigale M. Farley
One of the *Attorneys for Plaintiff*

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

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TODD WEILAND,	:	49CIV20-000969
Plaintiff,	:	
v.	:	**DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS**
PATRICK BUMANN,	:	
Defendant.	:	

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Pursuant to SDCL § 15-6-56(c)(2), Defendant Trooper Patrick Bumann submits this Response to the Statement of Undisputed Material Facts in Support of Motion for Summary Judgment filed by Plaintiff, Todd Weiland ("Weiland").

1. Defendant Patrick Bumann ("Defendant") began working as a trooper for the South Dakota Highway Patrol ("SDHP") in August of 2014. *See* Aff. of Counsel, Ex. 1 (Patrick Bumann Deposition at 12:9-11). As an employee of the SDHP, Defendant was trained in crash investigation and served as a crash reconstructionist. *Id.* at 12:24.

RESPONSE: Undisputed.

2. On November 10, 2017, Defendant was working an overtime shift, driving westbound in an SDHP patrol vehicle on South Dakota Highway 42. *Id.* at 26:7-10, 30:8-16. Defendant knew this to be a busy highway with a speed limit of 65 miles-per-hour. *Id.* at 30:16-19, 53:21-23.

RESPONSE: Trooper Bumann does not dispute the date, that he was working an overtime shift, driving westbound in an SDHP patrol vehicle on Highway 42, that he considers Highway 42 to generally be a busy highway, and that the speed limit on Highway 42 is 65 miles per hour, but disputes that Highway 42 was busy at the time of the accident. *See* Aff. of Counsel, Ex. A. (Bumann Depo. 53:24 to 54:2.) This is not a *material* fact pertinent to Plaintiff's pending Motion for Summary Judgment.

3. Defendant owed a duty to other drivers on the highway to drive with due caution and to drive with due regard for the safety of all persons. *See* Aff. of Counsel, Exs. 5 (Sgt. Steven Schade Deposition at 25:21-26:8), 7 (Sgt. Kevin Kinney Deposition at 29:22-30:7).

RESPONSE: This statement is a legal conclusion, not a statement of fact, and is thus denied. The existence of duty in a negligence case is a question of law for the Court to decide.

4. At or around 1 p.m., Defendant observed a vehicle in the eastbound lane that "was traveling above the posted speed limit of 65 miles per hour and it had expired license plates as well." *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 30:16-19).

RESPONSE: Undisputed.

5. The traffic violation observed by Defendant did not present a significant risk to public safety, nor did Defendant believe it did at the time. *See* Aff. of Counsel, Exs. 1 (Bumann Depo. at 55:16-24), 5 (Schade Depo. at 26:24-27:17).

RESPONSE: Trooper Bumann disputes this statement of fact because it is a legal and factual conclusion. Trooper Bumann disputes that the traffic violation did not present a significant risk to public safety and that he did not think so at the time. Trooper Bumann

believed the driver of the pickup constituted a risk to public safety. (Aff. of Counsel, Ex. A, Bumann Depo. 55:19-24.)

6. Defendant's view of oncoming traffic was obstructed because he was travelling behind a pickup pulling a trailer and a semi-truck. *See* Aff. of Counsel, Ex. 1 (Bumann Depo. 52:19-22).

RESPONSE: Disputed. Trooper Bumann could see the pickup violating South Dakota law in the eastbound lane of Highway 42 and he could see between the two vehicles in front of him. (Aff. of Counsel, Ex. A, Bumann Depo. 30:13 to 31:7.)

7. Defendant had also entered into a no-passing zone and was nearing an intersection. *Id.* at 54:14-15, 78:4-6.

RESPONSE: Disputed. Trooper Bumann was approximately .15 miles away from Highway 42's intersection with Highway 19. (See Aff. of Counsel, Ex. F, Engineering Analysis at p. 7.)

8. Under these circumstances, Defendant began to perform a U-turn and then activated his lights with the intent of effectuating a traffic stop. *Id.* at 80:11-20.

RESPONSE: Trooper Bumann executed a U-turn and activated his lights with the intent to begin a traffic stop of the speeding pickup with expired plates. (Aff. of Counsel, Ex. A, Bumann Depos. 30:13 to 31:7.) Trooper Bumann disputes he executed the U-turn under the circumstances described in Plaintiff's Statement of Undisputed Material Facts No. 7.

9. After beginning the U-turn, Defendant's vehicle did not pause or otherwise stop until the collision. Aff. of Counsel, Ex. 15 (Dash Cam at 12:58:21-12:58:24).

RESPONSE: Disputed. Trooper Bumann pulled to the shoulder of the road after seeing the speeding pickup with expired plates and before executing the U-turn. He also attempted to move to the shoulder of the eastbound lane of Highway 42 after completing the U-turn. (Aff. of Counsel, Ex. A, Bumann Depos. 30:13 to 31:7.)

10. The Dash Cam did not show any space between the two trucks travelling in front of Defendant to see between them. *Id.* at 12:58:23.

RESPONSE: Disputed. The dash cam does not represent precisely what Trooper Bumann saw and Trooper Bumann testified there was visible space between the two trucks in front of him, allowing him to see into the eastbound lane of Highway 42. (Aff. of Counsel, Ex. A, Bumann Depos. 30:13 to 31:7.)

11. Defendant knew that no passing zones are located at "places with obscured viewed or obstructed views." *See* Aff. of Counsel, Ex. 1 (Bumann Depo. 83:9-16).

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Trooper Bumann testified at his deposition that he did not know why there was a no passing zone in his lane of travel and that he did not know why certain areas are designated no passing zones. (Aff. of Counsel, Ex. A, Bumann Depo. 83:6-16.) Trooper Bumann only testified he has observed no passing zones tend to be in places with obscured or obstructed views. (*Id.*)

12. Defendant knew that no-passing zones are located near intersections because "there's vehicles that could be coming and going near intersections which could make passing unsafe[.]" *Id.* at 84:9-12.

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Trooper Bumann testified at his deposition that he did not know why there was a no passing zone in his lane of travel and that he did not know why certain areas are designated no passing zones. (Aff. of Counsel, Ex. A, Bumann Depo. 83:6-16.) Trooper Bumann only testified he has observed no passing zones tend to be in places with obscured or obstructed views. (*Id.*)

13. Defendant knew that U-turns "can be dangerous maneuvers if -- for many reasons. Could be if there is a pedestrian obstructing the way that is not seen, another vehicle that is not seen, anything of that nature, obstructing traffic behind you or coming at you as well." *Id.* at 55:2-7.

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment.

14. Defendant knew that executing a U-turn with an obstructed field of vision was dangerous for himself and for others. *Id.* at 59:18-60:3.

RESPONSE: This is disputed and is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Trooper Bumann testified a U-turn "could" be a dangerous traffic maneuver, but not that the U-turn at issue was dangerous. (Aff. of Counsel, Ex. A. Bumann Depo. 59:18-20.)

15. Defendant knew that he had an obligation to yield to other drivers before performing a U-turn, and that he "had to be a hundred percent sure it was clear before" making a U-turn. *Id.* at 58:2-10, 59:18-60:3.

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment.

16. Defendant performed the U-turn in front of Dr. Todd Weiland's vehicle. *Id.* at 31:4-7.

RESPONSE: Trooper Bumann performed a U-turn and his vehicle ended up in front of Plaintiff's vehicle at the completion of the turn. (Aff. of Counsel, Ex. A, Bumann Depo. 30:13 to 31:7.)

17. Defendant could not see Dr. Weiland until he had entered the eastbound lane. *See* Aff. of Counsel, Exs. 1 (Bumann Depo. 43:2-5), 2 (Todd Weiland Deposition 17:3-9).

RESPONSE: Disputed. Plaintiff's Statement of Undisputed Material fact cites to Trooper Bumann's testimony that he could not see whether Dr. Weiland was distracted in his car. (Aff. of Counsel, Ex. A, Bumann Depo. 43:2-5.)

18. Dr. Weiland slammed on his brakes, but was unable to avoid colliding with the rear of Defendant's vehicle. *See* Aff. of Counsel, Exs. 1 (Bumann Depo. 85:19-12), 2 (Weiland Depo. 18:2-3).

RESPONSE: Disputed. Weiland was speeding at the time of the accident. (Aff. of Counsel, Ex. F, Engineering Analysis at p. 7.) Trooper Bumann does not dispute Weiland testified there was nothing he could do to avoid the accident and slammed on his brakes.

19. The U-turn performed by Defendant interfered with traffic. *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 31:5-7).

RESPONSE: Disputed.

20. The U-turn performed by Defendant was an unsafe maneuver under the circumstances. Aff. of Counsel, Exs. 1 (Bumann Depo. at 55:2-7, 56:22-57:3, 59:18-60:3, 83:17-23, 84:9-12), 5 (Schade Depo. at 32:7-11).

RESPONSE: Disputed.

21. Defendant called Sergeant Steve Schade ("Sgt. Schade") on his cellphone immediately after the collision. *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 80:11-20).

RESPONSE: Trooper Bumann does not dispute this statement of fact, but disputes it is a material fact.

22. During this phone conversation, Defendant said the collision was one hundred percent his fault and that he would lose his safe driving miles. *Id.* at 81:2-5, 81:16-21.

RESPONSE: Trooper Bumann does not dispute he said he would lose his safe driving miles, but disputes it is a statement of material fact. Trooper Bumann disputes he said the collision was his fault. (Aff. of Counsel, Ex. A, Bumann Depo. 81:16 to 82:2.)

23. Sgt. Schade testified that he was not aware of Defendant retracting his statement or attributing fault to anyone else. *See* Aff. of Counsel, Ex. 5 (Schade Depo. at 29:16-30:10, 31:18-23).

RESPONSE: Trooper Bumann does not dispute this statement, but asserts it is not a statement of *material* fact.

24. The deputy who responded on the scene determined that Defendant's failure to yield to Dr. Weiland contributed to the collision. *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 75:8-17). Defendant did not disagree with the deputy's determination. Id. at 64:3-17.

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Furthermore, this alleged evidence is inadmissible and as such may not be properly considered in a motion for summary judgment. *See Smith v. Kilgore*, 926 F.3d 479, 485 (8th Cir. 2019); *see also Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401.

25. In his Supervisor's Report on November 19, 2017, Sgt. Schade determined that Defendant was in violation of South Dakota Highway Patrol Policy 7.105: "[a] division vehicle shall not be driven in a careless manner at any time, [and] [i]f Trooper Bumann would have waited and been able to get a better view of oncoming traffic, he could have avoided this collision." *See* Aff. of Counsel, Ex. 4 (Sgt. Schade Supervisor Report, dated November 19, 2017). Sgt. Schade confirmed that he still agrees with the conclusions he made in his report. *See* Aff. of Counsel, Ex. 5 (Schade Depo. at 20:14-21).

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Furthermore, this alleged evidence is inadmissible and as such may not be properly considered in a motion for summary judgment. *See Smith v. Kilgore*, 926 F.3d 479, 485 (8th Cir. 2019); *see also Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401.

26. On December 6, 2017, SDHP officers Sgt. Kevin Kinney ("Sgt. Kinney"), Sgt. Schade, and Lt. Paul Gerken discussed an investigation of the circumstances surrounding the collision. *See* Aff. of Counsel, Ex. 6 (Sgt. Kinney letter to Bumann dated December 6, 2017).

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Furthermore, this alleged evidence is inadmissible and as such may not be properly considered in a motion for summary judgment. *See Smith v. Kilgore*, 926 F.3d 479, 485 (8th Cir. 2019); *see also Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401.

27. The SDHP investigation concluded the crash was "preventable" and "that [Defendant] needed to use more caution when operating [his] patrol vehicle to turn around on violators." See Aff. of Counsel, Ex. 6. The supervisors did not attribute fault to anyone other than Defendant. *Id.*

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Furthermore, this alleged evidence is inadmissible and as such may not be properly considered in a motion for summary judgment. *See Smith v. Kilgore*, 926 F.3d 479, 485 (8th Cir. 2019); *see also Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401.

28. Sgt. Kinney testified that he believed the investigation was done properly and agrees with the conclusions that were reached. See Aff. of Counsel, Ex. 7 (Kevin Kinney Deposition at 15:20-24, 27:11-17, taken Jan. 21, 2022).

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Furthermore, this alleged evidence is inadmissible and as such may not be properly considered in a motion for summary judgment. *See Smith v. Kilgore*, 926

F.3d 479, 485 (8th Cir. 2019); *see also Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401.

29. Defendant agrees that the motor vehicle collision was preventable. *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 63:8-11).

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment.

30. Defendant agreed at the time of the SDHP investigation that he needed to use more caution when turning around on traffic violators. *Id.* at 63:12-18.

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Furthermore, this alleged evidence is inadmissible and as such may not be properly considered in a motion for summary judgment. *See Smith v. Kilgore*, 926 F.3d 479, 485 (8th Cir. 2019); *see also Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401.

31. Sgt. Kinney sent a letter to Defendant advising him of their determination. *Id.*

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Furthermore, this alleged evidence is inadmissible and as such may not be properly considered in a motion for summary judgment. *See Smith v. Kilgore*, 926 F.3d 479, 485 (8th Cir. 2019); *see also Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401.

32. Defendant had the right to appeal the determination, but chose not to. *See* Aff. of Counsel, Ex. 1 (Bumann Depo. at 62:13-19).

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Furthermore, this alleged evidence is inadmissible and as such may not be properly considered in a motion for summary judgment. *See Smith v. Kilgore*, 926 F.3d 479, 485 (8th Cir. 2019); *see also Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401.

33. Defendant did not tell any of his supervisors that he disagreed with their determination. *See* Aff. of Counsel, Exs. 1 (Bumann Depo. at 73:5-13), 7 (Kinney Depo. at 25:24-26:17).

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Furthermore, this alleged evidence is inadmissible and as such may not be properly considered in a motion for summary judgment. *See Smith v. Kilgore*, 926 F.3d 479, 485 (8th Cir. 2019); *see also Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401.

34. There is nothing in the crash report or dash cam video indicating Dr. Weiland had any fault in the collision. *Id.* at 89:18-24.

RESPONSE: This is not a statement of material fact pertinent to Plaintiff's pending Motion for Summary Judgment. Furthermore, this alleged evidence is inadmissible and as such may not be properly considered in a motion for summary judgment. *See Smith v. Kilgore*, 926 F.3d 479, 485 (8th Cir. 2019); *see also Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401.

35. Defendant is unaware of any facts that indicate Dr. Weiland contributed to the collision. *Id.* at 85:9-12.

RESPONSE: Disputed. Weiland was speeding immediately before the accident occurred. (Aff. of Counsel, Ex. F, Engineering Analysis at p. 7.)

36. Dr. Chris Janssen concluded that the motor vehicle collision caused Dr. Weiland injury. See Aff. of Counsel, Ex. 8 (Chris Janssen, M.D. Report).

RESPONSE: Trooper Bumann does not dispute this statement of fact, but disputes it is a statement of *material* fact. Trooper Bumann disputes the causation, nature, and extent of Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

37. Dr. Nathan Ligtenberg concluded that the motor vehicle collision caused Dr. Weiland injury. *See* Aff. of Counsel, Ex. 9 (Nathan Lightenberg, D.C. Opinion Letter at 3-4).

RESPONSE: Trooper Bumann does not dispute this statement of fact, but disputes it is a statement of material fact. Trooper Bumann disputes the causation, nature, and extent of Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

38. Dr. Ross McDaniel concluded that the motor vehicle collision caused Dr. Weiland injury. *See* Aff. of Counsel, Ex. 10 (Ross McDaniel, D.C. Opinion Letter at 3-4).

RESPONSE: Trooper Bumann does not dispute this statement of fact, but disputes it is a statement of material fact. Trooper Bumann disputes the causation, nature, and extent of

Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

39. Dr. Doug Ortman concluded that the motor vehicle collision caused Dr. Weiland injury. *See* Aff. of Counsel, Ex. 11 (Doug Ortman, D.C. Opinion Letter at 3-4).

RESPONSE: Trooper Bumann does not dispute this statement of fact, but disputes it is a statement of material fact. Trooper Bumann disputes the causation, nature, and extent of Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

40. Dr. Walter Carlson concluded that the motor vehicle collision caused Dr. Weiland injury. *See* Aff. of Counsel, Ex. 12 (Walter Carlson, M.D., Report at 6).

RESPONSE: Trooper Bumann does not dispute this statement of fact, but disputes it is a statement of material fact. Trooper Bumann disputes the causation, nature, and extent of Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

41. Dr. Jason Evans concluded that the motor vehicle collision caused Dr. Weiland injury. *See* Aff. of Counsel, Ex. 13 (Jason Evans, D.C., Report at 4).

RESPONSE: Trooper Bumann does not dispute this statement of fact, but disputes it is a statement of material fact. Trooper Bumann disputes the causation, nature, and extent of Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

42. Dr. Carlson opined that Dr. Weiland would have needed 12 weeks of chiropractic care or physical therapy because of the motor vehicle collision on November 10, 2017. *See* Aff. of Counsel, Ex. 12 (Carlson Report at 6).

RESPONSE: Trooper Bumann does not dispute this statement of fact, but disputes it is a statement of material fact. Trooper Bumann disputes the causation, nature, and extent of Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

43. On November 13, 2017, Dr. Weiland started receiving chiropractic treatment, and has regularly received chiropractic care from the Ortman Clinic and ChiroSport since. *See* Aff. of Counsel, Ex. 8 (Janssen Report at 6-12).

RESPONSE: Disputed. Weiland has missed treatments throughout his rehabilitation. (Aff. of Counsel, Exs. B and G.) Trooper Bumann disputes the causation, nature, and extent of Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

44. On August 26, 2019, Dr. Weiland began treating with Dr. Janssen. *Id.* at 10. Dr. Janssen prescribed physical therapy for Dr. Weiland. *Id.* at 11. On August 28, 2019, Dr. Weiland began physical therapy, and completed the recommended treatment plan on November 13, 2019, at McCook Therapy and Wellness. *Id.* at 10-11.

RESPONSE: Disputed. Plaintiff did not comply with all recommendations from McCook Therapy and Wellness. Trooper Bumann disputes the causation, nature, and extent of

Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

45. On February 20, 2020, Dr. Janssen recommended Dr. Weiland receive trigger point injections. *Id.* at 11-12. On March 18, 2020, Dr. Weiland received the trigger point injections from Dr. Janssen. *Id.* at 12.

RESPONSE: Trooper Bumann does not dispute this statement of fact, but disputes it is a statement of material fact. Trooper Bumann disputes the causation, nature, and extent of Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

46. On May 11, 2020, Dr. Janssen referred Dr. Weiland to Dr. Timothy Metz for cervical medial branch blocks. *Id.* On June 4, 2020, Dr. Weiland began treating with Dr. Metz. *Id.* at 6.

RESPONSE: Trooper Bumann does not dispute this statement of fact, but disputes it is a statement of material fact. Trooper Bumann disputes the causation, nature, and extent of Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

47. Dr. Metz recommended Dr. Weiland receive "cervical medial branch blocks at the bilateral C4 to C6 levels." *Id.* On June 4, 2020, and June 25, 2020, Dr. Weiland received the cervical medial branch blocks from Dr. Metz. *Id.*

RESPONSE: Trooper Bumann does not dispute this statement of fact, but disputes it is a statement of material fact. Trooper Bumann disputes the causation, nature, and extent of

Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

48. On August 7, 2020, Dr. Metz recommended and performed a cervical radiofrequency ablation procedure on Dr. Weiland.

RESPONSE: Trooper Bumann does not dispute this statement of fact, but disputes it is a statement of material fact. Trooper Bumann disputes the causation, nature, and extent of Plaintiff's alleged injury. Trooper Bumann also disputes the reasonableness of and need for treatment and that it was causally related to the accident.

Dated this 28th day of March, 2022.

WOODS, FULLER, SHULTZ & SMITH, P.C.

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2022, a true and correct copy of the Defendant's Response to Plaintiff's Statement of Undisputed Material Facts was filed and served via Odyssey File and Serve which will automatically send email notification of such service to the following:

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

TODD WEILAND, Plaintiff, vs. PATRICK BUMANN, Defendant.	49CIV20-000969 **ORDER ON PRE-TRIAL MOTIONS**

This matter came before the Court on October 18, 2022, at 9:00 a.m., for a pretrial conference and on November 7, 2022, at 1:30 p.m. for further pretrial conference. At these hearings, Plaintiff Todd Weiland was represented by and through his attorneys, Michael D. Bornitz and Abigale M. Farley. Defendant Patrick Bumann was represented by and through his attorneys, Melanie L. Carpenter and Jake R. Schneider.

After considering Plaintiff's Motions in Limine, the written briefs, the arguments of counsel, the files and records in this matter, and being fully advised, this Court hereby enters the following ORDER on Plaintiff's Motions in Limine:

1. Plaintiffs' Motion in Limine seeking to preclude any reference to Plaintiff's tax returns is DENIED. This denial does not prohibit proper objection to reference to or introduction of the same, nor does it preliminarily rule such matters are necessarily admissible. Such ruling will depend upon the testimony and evidence received at trial. The Court further orders Plaintiff to produce his 2020 and 2021 tax returns to Defendant.

2. Plaintiff's Motion in Limine to preclude reference to any of his criminal history and traffic citations is GRANTED.

3. Plaintiff's Motion in Limine to preclude reference to Plaintiff's divorce from 2002 is GRANTED.

4. Plaintiff's Motion in Limine to preclude reference to any other times that Dr. Christopher Janssen has served as an expert witness for parties represented by the Cutler Law Firm, LLP is GRANTED and is further made reciprocal as to Defendant's expert witnesses and any of their previous affiliation(s) with Woods, Fuller, Shultz & Smith, PC. or parties it has represented.

5. Plaintiff's Motion in Limine for an advance ruling which permits him to call Blake Dykstra as a witness is DENIED. In conjunction with this ruling, counsel and witnesses are prohibited from criticizing the recordkeeping practices of the Ortman Clinic, including reference to any administrative rules or standards related thereto. Reference to or criticism of such recordkeeping practices, rules, and standards shall be redacted from any reports introduced into evidence.

6. Plaintiff's Motion in Limine for an advance ruling which permits him to call Kelly Rud as a witness and or reference her report is GRANTED, in part, and DENIED, in part. Plaintiff is not precluded, in advance, from calling Ms. Rud to testify as a witness, but no reference may be made to PEPL coverage/insurance, Claims Associates, or claimants, including and not limited to Ms. Rud's report or anticipated testimony. The Court directed Plaintiff to provide proposed redactions of Ms. Rud's report to Defendant by Friday, October 21, 2022, with Defendant to provide Plaintiff any additional proposed redactions by Friday, October 28, 2022. Because the parties did not reach an agreement on the entirety of such redactions, the Court reviewed each party's proposed redactions and ruled on them at the November 7, 2022 hearing. The Court's oral rulings on those redactions are incorporated herein by this reference.

7. Plaintiff's Motion in Limine for an advance ruling which permits him to admit evidence of and make reference to South Dakota Highway Patrol ("SDHP") policies and procedures and the training troopers receive is GRANTED to the extent such information does not seek to usurp the functions of the court or the jury and is otherwise admissible in keeping with the rules of evidence.

8. Plaintiff's Motion in Limine for an advance ruling which permits him to admit evidence of the Supervisor Report of Sergeant Steven Schade, dated November 19, 2017, is GRANTED, in part, and DENIED, in part. The following portions of such report and any testimony, evidence, or argument related thereto shall be redacted and considered inadmissible and not for mention in the presence of the jury: "Policy Followed: No." and "This would be a violation of South Dakota Highway Patrol Policy which states 7.105 A Division vehicle shall not be driven in a careless manner at any time. If Trooper Bumann would have waited and been able to get a better view of oncoming traffic he could have avoided the collision." Plaintiff is not prohibited in advance from properly introducing or referencing other portions of this report.

9. Plaintiff's Motion in Limine for an advance ruling which permits him to call Sergeant Kinney and Sergeant Schade to testify is GRANTED, in part, and DENIED, in part. They may be called to testify about their first-hand knowledge pertaining to the collision from which this action arises, including conversations with Defendant, knowledge of SDHP policies, procedure, and training, and discipline Defendant received, to the extent consistent with the Court's rulings and the rules of evidence.

Further, after considering Defendant's Motions in Limine, the written briefs, the arguments of counsel, the files and records in this matter, and being fully advised, this Court hereby enters the following ORDER on Defendant's Motions in Limine:

1. Defendant's Motion in Limine to preclude reference to the PEPL fund is GRANTED.

2. Defendant's Motion in Limine to preclude reference to his prior motor vehicle collisions is GRANTED.

3. Defendant's Motion in Limine to preclude the testimony of Sergeant Kinney and Sergeant Schade pertaining to their opinions on the Rules of the Road, their post-accident review and conclusions, including Sergeant Schade's supervisor report and Sergeant Kinney's letter is GRANTED, in part, and DENIED, in part, as stated by the Court during the pretrial hearings and as set forth in the Court's rulings on Plaintiff's Seventh and Eighth Motions in Limine, which are incorporated herein. Neither party may refer to or elicit testimony or evidence regarding the opinions or statements of Sergeant Schade which have been stricken from his Supervisor Report. Further, neither party may reference or elicit testimony or evidence regarding the following portions of Sergeant Kinney's letter: "Following our review of your crash on the date listed above, it was determined that the crash was preventable. . . . It was determined that you need to use more caution when operating your patrol vehicle to turn around on violators."

4. Defendant's Motion in Limine to preclude evidence of SDHP internal policies, training, and post-accident internal investigations is DENIED in part, and GRANTED, in part, as stated by the Court during the pretrial hearings and as set forth in the Court's rulings on Plaintiff's Seventh and Eighth Motions in Limine, and Defendant's Third Motion in Limine, which are incorporated herein.

5. Defendant's Motion in Limine to preclude reference to Ms. Rud's report is addressed in the Court's ruling on Plaintiff's Sixth Motion in Limine and was addressed by the Court during the pretrial hearings, which rulings are incorporated herein.

6. Defendant's Motion in Limine to preclude reference to "negligence" was HELD IN ABEYANCE on October 18, 2022, pending further hearing, and at the November 8, 2022 hearing, the Court stated its conclusion that the standard of care applicable in this matter is governed by the laws of negligence. As such, this motion is DENIED.

7. Defendant's Motion in Limine to limit the number of medical providers who testify on Plaintiff's behalf is DENIED. This denial does not preclude Defendant from proper objection if Defendant believes such testimony becomes cumulative or otherwise objectionable.

8. Defendant's Motion in Limine to limit Dr. Nathan Ligtenberg, Dr. Ross McDaniel, and Dr. Doug Ortman from testifying to medical procedures is DENIED. This denial does not preclude Defendant from proper objection if Defendant believes such testimony lacks necessary foundation or is otherwise objectionable.

9. Defendant's Motion in Limine to preclude undisclosed experts from providing expert testimony is GRANTED and is hereby made reciprocal to both parties.

10. Defendant's Motion in Limine to preclude introduction of witness statements prepared by Plaintiff's counsel is DENIED. This denial does not preclude Plaintiff from appropriate use of the same or Defendant from proper objection to use of the same.

11. Defendant's Motion in Limine to prevent use of videotaped depositions at trial is HELD IN ABEYANCE. Plaintiff will timely disclose to Defendant any video testimony which he plans to use at trial, and Defendant is not precluded from proper objection to the same.

12. Defendant's Motion in Limine to preclude use of a "Golden Rule" argument is GRANTED and is hereby made reciprocal to both parties.

13. Defendant's Motion in Limine to prevent Plaintiff from using a per diem argument is GRANTED.

14. Defendant's Motion in Limine to preclude either party from employing a "sending a message" argument is GRANTED and is hereby made reciprocal to both parties.

15. Defendant's Motion in Limine to preclude either party from referencing Plaintiff's financial condition, in general, is GRANTED. However, Plaintiff's tax returns may be relevant and admissible, depending upon the testimony and evidence received at trial, as set forth in the Court's ruling on Plaintiff's First Motion in Limine, which is incorporated herein.

16. Defendant's Motion in Limine to prevent either party from referencing allegation of lost wages or loss of earning capacity of Plaintiff is GRANTED. However, Plaintiff's tax returns may be relevant and admissible, as set forth in the Court's ruling on Plaintiff's First Motion in Limine, which is incorporated herein.

17. Defendant's Supplemental Motion in Limine to exclude reference to Defendant's retention of and failure to call Dr. Jason Evans as a witness is GRANTED.

Finally, after considering Plaintiff's Motion to Exclude Certain Opinions of Defendant's Expert Witnesses, the written briefs, the arguments of counsel, the files and records, and otherwise being fully advised, this Court hereby enters the following ORDER:

1. Plaintiff's Motion to prohibit Defendant's expert, Dr. Jerry Ogden, from testifying that the severity levels experienced by Dr. Weiland are consistent with vigorous daily living activities; that the front-end impact experienced by Dr. Weiland resulted in the torso engaging the seatbelt system preventing Dr. Weiland from striking his head or body against any rigid objects inside the vehicle interior; that the seatbelt prevented any rotation, torsion or differential motion of his low back and upper back; and that the minor level of impact produced nothing more than rotation within a normal range of motion is DENIED. Either party may assert proper objection to expert testimony at trial.

2. Plaintiff's Motion to preclude Dr. Jerry Ogden from testifying about contributory negligence is GRANTED. Either party may assert proper objection to expert testimony at trial.

3. Plaintiff's Motion to preclude Dr. Walter Carlson from testifying about the forces applied in this collision is DENIED. Either party may assert proper objection to expert testimony at trial.

It is further ORDERED that if a party believes there has been a lack of compliance with the Court's rulings on the parties' motions in limine, counsel may approach the bench to raise such a concern outside the presence of the jury. Similarly, if a party believes that the other has "opened the door" to testimony, evidence, or argument otherwise excluded by the Court's rulings on the parties' motions in limine, counsel may approach the bench to raise such a concern outside the presence of the jury.

Dated this 10th day of November, 2022.

BY THE COURT:

Honorable Sandra Hoglund Hanson
Circuit Court Judge

ATTEST:

ANGELIA M. GRIES, Clerk

By: _____
Deputy Clerk

(SEAL)

FILED
NOV 10 2022
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
TODD LON WEILAND, Plaintiff, vs. **PATRICK BUMANN,** Defendant.	CIV. 20-969 **SPECIAL VERDICT**

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues therein, find as follows on the special interrogatories submitted to us:

INTERROGATORY NO. 1

Was Defendant negligent or did the defendant fail to drive with due regard for the safety of others?

ANSWER: X Yes _____ No

If you answered Interrogatory No. 1 "No," you do not need to answer any additional Interrogatories. Please sign and date the bottom of this form and notify the bailiff that you have reached a verdict.

If you answered Interrogatory No. 1 "Yes," you must proceed to Interrogatory No. 2.

INTERROGATORY NO. 2

Was Defendant's negligence or failure to drive with due regard for the safety of others a legal cause of injury to Plaintiff?

ANSWER: X Yes _____ No

If you answered Interrogatory No. 2 "No," you do not need to answer any additional Interrogatories. Please sign and date the bottom of this form and notify the bailiff that you have reached a verdict.

If you answered Interrogatory No. 2 "Yes," you must proceed to Interrogatory No. 3.

INTERROGATORY NO. 3

Was Plaintiff contributorily negligent?

ANSWER: X Yes _____ No

If your answer to Interrogatory No. 3 is "No," then proceed to Interrogatory No. 6. If your answer to Interrogatory No. 3 is "Yes," then proceed to Interrogatory No. 4.

INTERROGATORY NO. 4

Was Plaintiff's contributory negligence a legal cause of his injuries or damages?

ANSWER: X Yes _____ No

If your answer to Interrogatory No. 4 is "No," then proceed to Interrogatory No. 6. If your answer to Interrogatory No. 4 is "Yes," then proceed to Interrogatory No. 5.

INTERROGATORY NO. 5

Was Plaintiff's contributory negligence, under the circumstances, slight in comparison with the negligence of Defendant?

ANSWER: X Yes _____ No

If your answer to Interrogatory No. 5 is "NO," then you are finished. Please sign and date the bottom of this form and notify the bailiff that you have reached a verdict.

If your answer to Interrogatory No. 5 is "YES," Plaintiff is still entitled to recover. You should continue to Interrogatory No. 6, but the damages, if any, to be awarded Plaintiff must be reduced in proportion to the amount of Plaintiff's contributory negligence.

INTERROGATORY NO. 6

What amount of damages did Plaintiff incur as a legal result of Defendant's negligence or failure to drive with due regard for the safety of others? (Fill in the sum you have decided is appropriate.)

The pain and suffering, mental anguish, and loss of capacity of the enjoyment of life experienced and disability by the plaintiff in the past, and reasonably certain to be experienced in the future, as a result of the injury, if any. $ 17,500.00

The reasonable value of necessary medical care, treatment, and services received in the past, if any. $ 1,161.50

The reasonable value of necessary medical care, treatment, and services reasonably certain to be received in the future, if any. $ 0

Dated this 18 day of November, 2022.

Alex Jones
Foreperson

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

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TODD WEILAND,	:	49CIV20-000969
Plaintiff,	:	
v.	:	**JUDGMENT**
PATRICK BUMANN,	:	
Defendant.	:	

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The above-captioned action having been tried to a jury on November 15-18, 2022, the Honorable Sandra Hoglund Hanson, presiding, and the jury having entered a verdict that Plaintiff was entitled to recover $1,161.50 for the reasonable value of necessary medical care, treatment, and services received in the past, and $17,500.00 for the pain and suffering, mental anguish, and loss of capacity of the enjoyment of life experienced and disability by Plaintiff in the past, and reasonably certain to be experienced in the future, as a result of the injury, and $0 for the reasonable value of necessary medical care, treatment, and services reasonably certain to be received in the future;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover from the Defendant the sum of $18,661.50; plus pre-judgment interest on past medical bills in the amount of $539.90; plus Plaintiff's disbursements in the amount of $2,958.36 incurred prior to Defendant's Offer of Judgment made on October 3, 2022, such costs having been stipulated to by the parties;

IT IS FURTHER ORDERED that Defendant is entitled to costs and disbursements incurred in this action from the date of Defendant's Offer of Judgment made on October 3, 2022 through the date of the verdict in the amount of $1,037.51, such costs having been stipulated to by the parties;

IT IS FURTHER ORDERED that after offsetting Defendant's costs, the total judgment amount due to Plaintiff is $21,122.25.

12/20/2022 1:15:47 PM

BY THE COURT:

Honorable Sandra Hoglund Hanson
Circuit Court Judge

Attest:
Russell, Lisa
Clerk/Deputy

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

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TODD WEILAND,	:	49CIV20-000969
Plaintiff,	:	
v.	:	**ORDER DENYING PLAINTIFF'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR NEW TRIAL**
PATRICK BUMANN,	:	
Defendant.	:	

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On March 13, 2023, a hearing was held before the Honorable Sandra Hanson in the Minnehaha County Courthouse in Sioux Falls, South Dakota. Plaintiff Todd Weiland appeared by Cutler Law Firm, LLP and Michael D. Bornitz and Abigale M. Farley, his attorneys; and Defendant Patrick Bumann appeared by Woods, Fuller, Shultz & Smith, P.C. and Melanie L. Carpenter and Jake R. Schneider, his attorneys. The Court considered Plaintiff's renewed motion for judgment as a matter of law and motion for new trial. After considering the written briefs, the arguments of counsel, all of the materials on file, and otherwise being fully advised, it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiff's renewed motion for judgment as a matter of law is denied.

(a) The Court finds that questions of fact existed with regard to Plaintiff's claim for recovery on the basis of negligence by Defendant sufficient for proper submission of such matters to the jury;

(b) The Court finds that evidence existed from which a reasonable jury could have determined that Plaintiff was contributorily negligent and that his contributory negligence was a proximate cause of the accident. Evidence was presented from which the jury could have determined that Plaintiff was traveling at an excessive rate of speed and that had he not been, the accident would not have occurred. Sufficient evidence existed to allow the jury to perform a comparative negligence determination. Sufficient issues of fact were presented to permit submission of the matters to the jury for resolution; and

(c) Evidence of Plaintiff's failure to mitigate his damages existed in support of submission of the issue to the jury and the jury's verdict. The jury could have determined on the basis of the testimony and evidence at trial that Plaintiff's participation in a doctor-recommended home exercise program would have mitigated his damages. Plaintiff's testimony and the testimony and records of various treating health care providers established that it was recommended and reasonable for Plaintiff to perform home exercises, that he did not fully complete home exercises as recommended, and that when he did complete home exercises, as recommended, his pain and physical issues decreased, and, if the jury accepted that testimony and evidence, the jury could have reasonably concluded Plaintiff failed to mitigate damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's motion for new trial is denied.

(a) The exclusion of the law enforcement accident report, itself, from evidence was proper, and Plaintiff fails to demonstrate that its exclusion caused him unfair prejudice. The report contained inadmissible evidence, particularly, the reporting deputy sheriff's opinions on the circumstances which contributed to the accident, which would have impermissibly usurped the province of the jury, provided lay-person opinion testimony by a non-expert who did not personally witness the accident, and failed to otherwise qualify for admissibility under SDCL §§ 19-19-401, 19-19-402, 19-19-403, 19-19-402, 19-19-602, and 19-19-701. Further, such information contained within the report which was otherwise admissible was provided to the jury via the oral testimony of witnesses, and thus, the report, itself, was cumulative to that testimony.

(b) The exclusion of certain opinions and conclusions contained in the South Dakota Highway Patrol ("SDHP") reports was appropriate. Admission of the SDHP opinion or conclusion that the accident was "preventable" would have usurped the function of the jury and was likely to impermissibly confuse the jury as to the import of the term "preventable" as not consistent with or relevant to a negligence or contributory negligence determination because the SDHP opinions and conclusions involved different fault terms or standards than those involved in a negligence determination by a jury at trial. Various SDHP standards and Power Point slides were properly excluded because they concerned directions or instructions regarding how to report accidents and how to avoid accidents and were, thus, irrelevant to these proceedings under SDCL §§ 19-19-401 and 19-19-402, or their minimal relevancy was

substantially outweighed by unfair prejudice under SDCL § 19-19-403 in their propensity to confuse the jury with fault standards different from the negligence determinations appropriate to the trial in this case.

(c) The exclusion of testimony by or about claims adjuster Blake Dykstra allegedly telling Plaintiff that he could not submit bills for treatment done by the Ortman Clinic during the year following the accident was proper under SDCL §§ 19-19-403 and 19-19-411, as such testimony would have impermissibly created the risk of unfair prejudice and inadmissible testimony regarding disclosure of Defendant's liability/PEPL coverage and would have been substantially more prejudicial than probative. Plaintiff and other doctors at the Ortman Clinic confirmed via in-court testimony that they regularly provided treatment to one another in the clinic without keeping records or billing for the treatment, and this practice occurred both before and after the accident; so Plaintiff's testimony about receiving treatment by other doctors at the clinic, for which no records were kept and for which no payment was sought or made was consistent with the testimony regarding that practice. Additionally, Plaintiff testified regarding the notes he personally kept of this treatment and his condition during this time. Plaintiff did not offer evidence or testimony regarding the value of the treatment performed at the Ortman Clinic during the relevant time frame. Thus, Plaintiff's objectives regarding proposed testimony about or by the claims adjuster does not appear to relate to whether Plaintiff could recover damages for the value of that treatment and what the amount of those damages would have been, or whether Plaintiff received treatment during that time

frame and what treatment Plaintiff received. Rather than Plaintiff identifying other permissible reasons for such testimony, it appears such proffered testimony would likely give rise to impermissible conjecture relative to insurance or liability coverage of Defendant. Finally, Plaintiff has not established unfair prejudice by the exclusion of the testimony of or about the claims adjuster and what Plaintiff alleges the claims adjuster said to Plaintiff regarding payment of bills at the Ortman Clinic by the PEPL Fund during the year following the accident.

(d) The testimony of Dr. Jerry Ogden satisfied *Daubert* standards, which were applied by the Court, and as such, his testimony was properly admitted. The testimony was reliable, repeatable, approved by cohorts in his field of expertise, based upon scientifically valid principles, met generally applicable standards, rested on a reliable foundation, and was helpful to the jury. Further, Dr. Ogden was a qualified expert in his field. Plaintiff's criticisms of Dr. Ogden's testimony go to its weight and not its admissibility, and Plaintiff was able to vigorously cross-examine upon these matters. Plaintiff fails to demonstrate unfair prejudice as a result of the admission of the testimony of Dr. Jerry Ogden.

(e) Plaintiff's request to give a cautionary instruction to the jury to disregard the presence or absence of insurance was properly denied. Evidence of insurance or PEPL Fund coverage was not disclosed to the jury by the Court or the parties and witnesses at trial. During trial, some jurors remarked on insurance in other matters during voir dire, and a juror asked a bailiff a question about who would pay a recovery in the instant case, and the bailiff responded by directing the juror to listen to what was said

in court. The potential jurors' statements during voir dire and the juror question and bailiff reply did not result in a motion for mistrial. Even had the juror's question to the bailiff regarding who would "pay" been considered a disclosure, the inquiry would have been prejudicial to Defendant, who objected to the instruction being given to the jury. Plaintiff has not established that the Court's refusal of this instruction unfairly prejudiced him.

(f) Plaintiff's request to make a per diem/per annum argument was properly denied, and Defendant's motion in limine on the same was properly granted, as per diem arguments are improper arguments by counsel which are speculative, not suitably grounded in testimony and evidence, tantamount to testimony by counsel, and likely to suggest that the jury should engage in undue conjecture and/or improperly reach a verdict by placing themselves in the position of Plaintiff. Thus, such arguments create an unreasonable potential for verdicts that are the result of passion and prejudice. Plaintiff failed to establish unfair prejudice from the Court's refusal to permit a per diem/per annum argument during opening statement or closing argument.

Dated at Sioux Falls, South Dakota, this 20th day of March, 2023.

BY THE COURT:

Sandra Hanson

Honorable Sandra Hanson
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By _____, Deputy

FILED
MAR 20 2023
Minnehaha County, S.D.
Clerk Circuit Court

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30309
Appeal No. 30311 (NOR)

TODD WEILAND,

Appellant,

vs.

PATRICK BUMANN,

Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE SANDRA HANSON, CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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Notice of Appeal Filed April 3, 2023
Notice of Review Filed April 11, 2023

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JURISDICTIONAL STATEMENT

Plaintiff/Appellant, Todd Weiland, ("Weiland") has appealed the circuit court's Order Denying Motion for Partial Summary Judgment entered April 12, 2022 and noticed on April 14, 2022 (Settled Record (SR) 1319–20), the Judgment on jury verdict entered December 20, 2022 and noticed on December 21, 2022 (SR 4171), and the Order Denying Plaintiff's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial entered March 20, 2023, and noticed on March 21, 2023. (SR 4291–97). Weiland's Notice of Appeal was filed April 3, 2023. (SR 4305.)

By Notice of Review, Defendant/Appellee, Patrick Bumann, ("Bumann") appeals the circuit court's Order on Pre-Trial Motions denying Bumann's Motion in Limine on the applicable standard of care, filed November 10, 2022, the circuit court's oral Order denying Bumann's Motion for Judgment as a Matter of Law on the same issue, and the resulting Judgment dated December 20, 2022. (SR 2137 (Appendix at 5); Trial Transcript (TT) 787–88.) Bumann also appeals the circuit court's oral orders denying Bumann's Motion for Judgment as a Matter of Law on Weiland's claim for future medical expenses. (TT 469–75, 618, 619, 788, 789.) The Notice of Review was filed April 11, 2023.

STATEMENT OF LEGAL ISSUES

1. **Whether the trial court properly submitted the issue of negligence to the jury and whether Weiland's appeal of the issue is moot.**

   The court denied Weiland's motions for summary judgment and judgment as a matter of law based on the disputed material facts and submitted the issue of negligence to the jury. The jury found Bumann negligent.

   Hewitt v. Felderman, 2013 S.D. 91, 841 N.W.2d 258

   Skjonsberg v. Menard, Inc., 2019 S.D. 6, 922 N.W.2d 784

   SDCL § 32-31-1

SDCL § 32-31-2

SDCL § 32-31-5

2. **Whether the jury was properly allowed to determine the issue of contributory negligence based on Weiland's unlawful speed, Bumann's evasive action, and the minimal impact between the vehicles.**

   The court correctly denied Weiland's Motion for Summary Judgment and Judgment as a Matter of Law on contributory negligence.

   Stoltz v. Stonecypher, 336 N.W.2d 654 (S.D. 1983)

   Johnson v. Armfield, 2003 S.D. 134, ¶ 11, 672 N.W.2d 478

   Lockwood v. Schreimann, 933 S.W.2d 856 (Mo. Ct. App. 1996)

3. **Whether the issue of Weiland's failure to mitigate his pain and suffering was properly submitted to the jury.**

   The court correctly denied Weiland's Motion for Summary Judgment and Judgment as a Matter of Law on failure to mitigate, and there is no evidence the jury found Weiland failed to mitigate his damages.

   Sedlacek v. Prussman Contracting, Inc., 2020 S.D. 18, 941 N.W.2d 819

   Ducheneaux v. Miller, 488 N.W.2d 902 (S.D. 1992)

   Martinez v. Vigil, 737 P.2d 100 (N.M. Ct. App. 1987)

4. **Whether the trial court abused its discretion by excluding the accident report which contained opinions on negligence and liability.**

   The court properly excluded the accident report from trial.

   Dubray v. S.D. Dept. of Soc. Servs., 2004 SD 130, 690 N.W.2d 657

   Baddou v. Hall, 2008 S.D. 90, 756 N.W.2d 554

   Robbins v. Buntrock, 1996 S.D. 84, 550 N.W.2d 422

5. **Whether liability and negligence opinions from the South Dakota Highway Patrol's post-accident review were properly excluded.**

   The circuit court correctly redacted the SDHP Supervisor Report and Accident Review Board letter to exclude opinions on negligence and liability.

   State v. Buchholtz, 2013 S.D. 96, 841 N.W.2d 449

   Robbins v. Buntrock, 1996 S.D. 84, 550 N.W.2d 422

6. **Whether Weiland preserved the issue of the exclusion of testimony by Blake Dykstra for appeal and, if so, whether the testimony was properly excluded.**

   The trial court ruled in limine that Blake Dykstra's testimony would be excluded. At trial, Weiland failed to make an offer of proof as to Dykstra's testimony.

   Walker v. Walker, 2006 S.D. 68, 720 N.W.2d 67

   LDL Cattle Co v. Guetter, 1996 S.D. 22, 44 N.W.2d 523

   SDCL § 19-19-411

7. **Whether the court properly refused to instruct the jury to disregard insurance.**

   Because there was no evidence or argument which established the existence of insurance coverage, the court properly declined to give SDPJI 1-20-60.

   Beck v. Wessel, 90 S.D. 107, 237 N.W.2d 905

   Atkins v. Stratmeyer, 1999 S.D. 131, 600 N.W.2d 891

   SDCL § 19-19-411

8. **Whether the court abused its discretion by prohibiting Weiland from making a per diem argument.**

   The court granted Bumann's motion in limine prohibiting Weiland from making a per diem argument.

   Roth v. Farner-Bocken Co., 2003 S.D. 80, 667 N.W.2d 651

   Parker v. Artery, 889 P.2d 520, 526 (Wyo. 1995)

   Affett v. Milwaukee & Suburban Transp. Co.,106 N.W.2d 274 (Wis. 1960)

9. **Whether the circuit court erred in applying a negligence standard to Bumann.**

   Pursuant to SDCL § 32-31-5, Bumann moved the court to apply a recklessness standard to this case. The trial court erroneously determined the applicable standard of care was negligence as opposed to recklessness.

   Robbins v. City of Wichita, 172 P.3d 1187, 1196 (Kan. 2007)

   State ex rel. Oklahoma Dep't of Pub. Safety v. Gurich, 238 P.3d 1, 7 (Okla. 2010)

   SDCL § 32-31-1

   SDCL § 32-31-2

   SDCL § 32-31-5

10. Whether the circuit court erred in admitting evidence of Weiland's claim for future damages for yearly radiofrequency ablation procedures.

The trial court improperly allowed Weiland to present speculative and foundationally deficient evidence regarding the need for future radiofrequency ablations.

Klein v. W. Hodgman & Sons, Inc., 77 S.D. 64, 85 N.W.2d 289 (1957)

Lamb v. Winkler, 2023 S.D. 10, 987 N.W.2d 398

Koenig v. Weber, 84 S.D. 558, 174 N.W.2d 218 (1970)

STATEMENT OF THE CASE

On March 27, 2020, Weiland brought this personal injury suit against Bumann and his then employer, the South Dakota Highway Patrol (SDHP). (SR 2–7.)[1] Bumann denied liability and alleged Weiland was guilty of contributory negligence and failure to mitigate damages. (SR 798.) On March 4, 2022, Weiland filed a Partial Motion for Summary Judgment as to negligence, contributory negligence, causation, and failure to mitigate. (SR 800). The court denied the motion on April 13, 2022, and the case was set for trial. (SR 1319–20.)

Prior to trial, the court determined negligence was the appropriate standard of care, as opposed to recklessness. (SR 1456, 2137) (TT 787–88.) The parties filed motions in limine on which the court ruled on November 10, 2022. (SR 1505–06, 1589-1607, 2133–39.) A jury trial was held on November 15-18, 2022.

The jury returned a Special Verdict in favor of Weiland, finding Bumann negligent. (SR 4082.) It also found that Weiland was contributorily negligent, less than slight in comparison to Bumann. (SR 4083.) The court entered a Judgment consistent with the jury verdict on December 20, 2022. (SR 4082–84; 4170–71.) On January 3,

[1] SDHP's motion for summary judgment was granted in 2021, removing SDHP from the case. (SR 389.)

2023, Weiland filed a Renewed Motion for Judgment as a Matter of Law and for a New Trial. (SR 4176.) Those motions were denied on March 20, 2023. (SR 4291–97.)

STATEMENT OF FACTS

On November 10, 2017, SDHP Trooper Patrick Bumann[2] was on patrol and was traveling west in his cruiser on Highway 42 nearing its intersection with Highway 19. (TT 43.) Ahead of Bumann in the westbound lane was a semi-truck and a pickup pulling a box trailer. (TT 73.) The semi-truck intended to turn onto Highway 19 and slowed his vehicle to 30 mph. Bumann also slowed to 30 mph. (TT 74.) The speed limit on Highway 42 is 65 miles per hour. (TT 73.)

Bumann then noticed an eastbound vehicle with expired registration tags which was exceeding the speed limit. (TT 74.) Intending to stop the speeding vehicle, Bumann pulled completely onto the north shoulder of the road, slowed to approximately 15 miles per hour, and activated his emergency lights. (TT 74.) Bumann's vehicle had red and blue lights in the front windshield, each side mirror, and the back windshield. (TT 72.) When the lights are activated, the headlights, backup lights, and brake lights flash. (TT 72.) While pulled over on the shoulder, Bumann looked between the two trailers in front of him for additional oncoming traffic but saw none. (TT 44; 74.) Bumann then began to execute what he believed was a safe U-turn. (TT 74.)

At approximately that same time, Weiland was traveling eastbound on Highway 42 at 69 miles per hour. (TT 691.) As Bumann was about halfway through his U-turn, he saw Weiland. (TT 74.) At that point, Bumann was facing south, towards the ditch, and Weiland was about 150 feet away. (TT 74.) Bumann immediately accelerated and

[2] Bumann has since retired from the SDHP and is now an agent with the FBI.

attempted to drive straight down into the south ditch and out of Weiland's path. (TT 74.) Bumann was able to move his vehicle onto the south shoulder and off the roadway. (TT 75-77.) Weiland testified that he also moved his vehicle to the right and partially onto the shoulder, where the accident occurred. (TT 394.) The front passenger corner of Weiland's bumper clipped Bumann's rear bumper. (TT 706.) Bumann's vehicle was pushed forward about 1 foot after impact. (TT 78.) It did not spin and was not pushed into the ditch. (TT 79.) Neither Weiland's nor Bumann's airbags activated. (TT 78.)

Dr. Jerry Ogden, a civil and mechanical engineer who specializes in forensic engineering, performed an analysis of the accident. (TT 668-670; 676.) As part of his analysis, Dr. Ogden visited the accident scene and noted the terrain was relatively flat and that drivers could typically see several thousand feet. (TT 679.) The area where the accident occurred was a no passing zone because of its proximity to an intersection and not due to visibility issues. (TT 681.)

Dr. Ogden downloaded and analyzed the information from the electronic data recorders (EDRs) from the two vehicles. (TT 683.) The EDR data showed that Bumann's change in velocity as a result of the accident was less than 5 miles per hour. (TT 686.) The EDR data also showed that Weiland's vehicle was traveling 69 miles per hour 5 seconds before the accident, that Weiland braked before the accident, and that his change in velocity was 6.91 miles per hour. (TT 691, 693, 699, 703; SR 4019-20.) The evidence also established that the width of damage to Weiland's vehicle was only 15 inches – meaning only 15 inches of the front passenger corner of Weiland's vehicle clipped Bumann's bumper. (TT 729.) Dr. Ogden described the accident as a "scraping incident" or a "nondirect engagement sideswipe." (TT 708-709; 737.)

Dr. Ogden testified that the National Transportation Safety Board has established a scale of severity levels for accidents. (TT 704-705.) Under this scale, the accident fit within the low-velocity or low-harm level. (TT 706.) Utilizing MADYMO, a mathematical dynamics model, Dr. Ogden determined that the movement Weiland's body experienced due to the accident would not have exceeded a normal range of motion. (TT 710, 719.) The impact Weiland felt in the accident would have been comparable to levels of an amusement park ride or if one pulled into a garage at 7 miles per hour and clipped the corner of his or her vehicle on the side of the garage. (TT 720.)

After exiting his vehicle, Weiland told Bumann that he was uninjured. (TT 88.) Weiland did not call an ambulance or seek medical attention that day. (TT 485, 486.) In fact, Weiland did not seek treatment from a medical doctor until almost two years after the accident. (TT 486.) Weiland received chiropractic treatment for neck pain at Ortman Clinic where Weiland worked as a chiropractor. (TT 490.) Weiland also later treated with physical therapy, massage, and radiofrequency ablations. (TT 425.)

Weiland was seen by orthopedic surgeon, Dr. Walter Carlson for an independent medical examination. Dr. Carlson testified that Weiland had pre-existing degenerative arthritis in his neck and that he treated for neck pain prior to the accident. (TT 184, 414, 436, 491, 494-495, 562.) Dr. Carlson also testified that Weiland sustained a sprain/strain injury in the accident which resolved in 6 to 12 weeks. (TT 564-65.) This was borne out by the fact that within 2 months of the accident, Weiland had jumped on a trampoline, shoveled snow, went down waterslides, and had cervical pain of 1 or 2 out of 10 on a pain scale. (TT 502-505.) Weiland never missed a day of work due to the accident even

though his work was and is physically demanding. (TT 487.) He did not present a wage loss claim to the jury.

At the conclusion of the trial, Weiland asked the jury for $3,500,000.00. (TT 853.) The jury entered a Special Verdict in favor of Weiland, finding Bumann negligent and Weiland contributorily negligent less than slight. (SR 4082–84.) Weiland was awarded $17,500.00 in non-economic damages, $1,161.50 for past medical care, and $0 for future medical care. (*Id.*)

ARGUMENT

I. Issues of negligence, contributory negligence, and failure to mitigate were properly submitted to the jury.

Weiland moved for summary judgment and for judgment as a matter of law on the issues of negligence, contributory negligence, and failure to mitigate. The trial court properly held that factual issues existed which required the denial of these motions. The denial of summary judgment and judgment as a matter of law is reviewed de novo. *Davies v. GPHC, LLC*, 2022 S.D. 55, ¶ 17, 980 N.W.2d 251, 258.

In considering a post-verdict renewed motion for judgment as a matter of law, this Court has held that, "the evidence is reviewed 'in a light most favorable to the verdict or to the nonmoving party.'" *Magner v. Brinkman*, 2016 S.D. 50, ¶ 14, 883 N.W.2d 74, 81 (quoting *Alvine Family Ltd. P'ship v. Hagemann*, 2010 S.D. 28, ¶ 18, 780 N.W.2d 507, 512). "[W]ithout weighing the evidence, the court must [then] decide if there is evidence [that] ... support[s] a verdict." *Ctr. of Life Church v. Nelson*, 2018 S.D. 42, ¶ 18, 913 N.W.2d 105, 110. Judgment as a matter of law is not appropriate where facts exist upon which reasonable minds could differ. *Id.*

Affirmance of a denial of summary judgment is proper "[i]f there exists any basis which supports the ruling of the trial court." *Davies*, 2022 S.D. 55, ¶ 17, 980 N.W.2d at 258. "Summary judgment is an extreme remedy, [and] is not intended as a substitute for a trial." *Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 9, 817 N.W.2d 395, 399. As such, "summary judgment is generally not feasible in negligence cases." *Andrushchenko v. Silchuk*, 2008 S.D. 8, ¶ 8, 744 N.W.2d 850, 854. "[Q]uestions of negligence [and] contributory negligence . . . are for the jury in all but the rarest of cases [.]" *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶ 7, 780 N.W.2d 497, 500. "It is only when reasonable men can draw but one conclusion from facts and inferences that they become a matter of law[.]" *Id.* Similarly, the issue of mitigation of damages is a fact question for the jury. *Douglas Cos., Inc. v. Com. Nat. Bank of Texarkana*, 419 F.3d 812, 820 (8th Cir. 2005); *see also Tedd Bish Farm, Inc. v. Sw. Fencing Servs., LLC*, 867 N.W.2d 265, 270 (Neb. 2015). Here, fact questions existed which precluded summary judgment and sufficient evidence supports the verdict.

A. Negligence

The issue of negligence was submitted to the jury over Weiland's objection, and the jury found that Bumann was negligent. (SR 4082.) Weiland attempts to appeal this issue even though he was the prevailing party. As this Court has held: "An appeal will be dismissed as moot where . . . the actual controversy ceases and it becomes impossible for the appellate court to grant effectual relief." *Hewitt v. Felderman*, 2013 S.D. 91, ¶ 11, 841 N.W.2d 258, 261–62. "A case is moot when the issue presented is academic or nonexistent and when judgment, if rendered, will have no practical legal effect upon the

existing controversy." *Id.* ¶ 11, 841 N.W.2d at 262; *see also Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, ¶ 14, 922 N.W.2d 784, 789.

Here, as in *Hewitt*, "[t]he controversy [Weiland] puts before this Court—whether [Bumann] acted negligently—was already resolved by the jury in favor of [Weiland]." 2013 S.D. 91, ¶ 12, 841 N.W.2d at 262. It is "a purely academic exercise for this Court to determine whether the question of negligence should have been submitted to the jury." *Id.* There is no effectual relief this Court can grant to Weiland on this issue. Whether by summary judgment, judgment as a matter of law, or the jury's verdict, Weiland prevailed. *See Jones v. Dappen*, 359 N.W.2d 894, 895 (S.D. 1984) ("[W]hen a judgment is entered in a [party's] favor, that person cannot be an aggrieved party.").

Weiland argues that somehow, the "improper" submission of negligence to the jury resulted in a speculative finding of contributory negligence. (Appellant Br. at 12.) The jury, however, was specifically advised in Instruction 17 that the initial determinations of negligence and contributory negligence are made independently. (SR 4093-94.) Whether the trial court or the jury determined Bumann was negligent had no impact on the jury's contributory negligence finding.

The controversy arising from the denial of Weiland's motions on negligence ceased when the jury found Bumann negligent. The appeal is moot. If, however, this Court finds the issue properly before it, sufficient evidence existed to submit negligence to the jury.

At trial, the jury was instructed in accordance with SDCL §§ 32-31-1, 32-31-2, and 32-31-5, that under certain circumstances emergency vehicle operators may disregard "traffic regulations governing the direction of movement or turning in a specified

direction." (SR 4100.) At the time of the accident, Bumann was driving an authorized emergency vehicle, pursuing a violator of the law, and using visual signals. He pulled to the shoulder of the road, slowed to 15 miles per hour and looked for oncoming traffic. (TT 44, 54, 87.) Bumann testified: "I believe I drove over far enough to see between the two vehicles to see the oncoming lane of traffic. . . ." (TT 87.) After doing so, Bumann executed what he thought was a safe U-turn.

Reasonable minds could differ as to whether Bumann exercised due regard pursuant to the provisions of SDCL §§ 32-31-1, 32-31-2, and 32-31-5, and the issue was properly reserved for the jury. (TT 777, 778.) Even if the issue had not been rendered moot by the verdict, the trial court correctly denied Weiland's motions on negligence.

B. Contributory Negligence

The trial court denied Weiland's motions for summary judgment and judgment as a matter of law on contributory negligence. The jury found that Weiland was contributorily negligent but not more than slight in comparison to Bumann's negligence. (SR 4083.) "Questions relating to . . . contributory negligence are questions of fact for determination by the jury in all except the rarest of instances." *Stoltz v. Stonecypher*, 336 N.W.2d 654, 657 (S.D. 1983). The evidence supported the jury's finding of Weiland's contributory negligence.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of duty which the law imposes upon persons to protect themselves from injury, and which . . . contributed to the injury complained of as a proximate cause." *Gerlach v. Ethan Coop Lumber Ass'n*, 478 N.W.2d 828, 830–31 (S.D. 1991). "As long as there is competent evidence to support the theory of contributory negligence, it is

proper for the issue to go to the jury." *Johnson v. Armfield*, 2003 S.D. 134, ¶ 10, 672 N.W.2d 478, 481.

A driver who fails to follow a posted speed limit is negligent. *See Butler v. Engel*, 68 N.W.2d 226, 239 (Minn. 1954). The evidence is undisputed that Weiland was exceeding the speed limit and was traveling 69 miles per hour before the accident. (TT 691.) This evidence comes straight from the EDR of Weiland's vehicle and the expert testimony of Dr. Ogden and was not subject to challenge. (TT 691.) The evidence unequivocally establishes Weiland's negligence. The only question that remains is causation. "Questions of proximate cause are for the jury in all but the rarest of cases." *Thompson v. Summers*, 1997 S.D. 103, ¶ 18, 567 N.W.2d 387, 394. This is not one of those rare cases. Here, the jury could have reasonably found that had Weiland been traveling the speed limit, the accident would not have occurred.

In considering the impact Weiland's speed had on the accident, the jury considered the actions of Bumann and the nature of the accident itself. As Bumann was about halfway through his U-turn, he saw Weiland. (TT 74.) At that point, Bumann was facing south, towards the ditch, and Weiland was about 150 feet away, facing east. (TT 74.) Bumann was an experienced highway patrol officer who was able to use his training to take instant evasive action. (TT 69.) As soon as he saw Weiland, Bumann immediately accelerated and attempted to drive straight down into the south ditch and out of Weiland's path. (TT 74.) Bumann was able to completely clear the roadway and move his vehicle to the south shoulder and off the roadway prior to impact. (TT 75-77; SR 4018, 4024.) Bumann was continuing to accelerate when the accident occurred. (TT 74.)

The impact between the vehicles occurred on the shoulder and not in the driving lane because, as Weiland testified, he moved his vehicle to the right and partially onto the shoulder. (TT 77, 394.) Weiland was also actively braking and had slowed from 69 to 44.1 miles per hour in the seconds before the accident. (TT 691, 723.) The undisputed evidence established that the width of damage to Weiland's vehicle was only 15 inches – meaning only 15 inches of the front passenger corner of Weiland's vehicle clipped Bumann's bumper. (TT 729.) Dr. Ogden described the accident as a "scraping incident" or a "nondirect engagement sideswipe." (TT 708-709; 737.) The two vehicles barely hit one another.

Given the fact that Bumann was accelerating away from the location of the impact and off the road, the facts were sufficient to allow the jury to reasonably conclude that had Weiland been traveling the speed limit, Bumann would have moved at least 15 inches further off the road, and the accident never would have occurred.

Weiland asserts there was insufficient evidence to establish proximate cause between his breach and his injuries and that expert testimony is required to establish proximate cause. (*See* Appellant's Br. 13-14). Neither assertion is correct. In the case of *Johnson*, 2003 S.D. 134, ¶ 13, 672 N.W.2d at 482, this Court cited *Lockwood v. Schreimann*, 933 S.W.2d 856, 859 (Mo. Ct. App. 1996) as authority. While the *Lockwood* case does state that causation must not be left to speculation, it also states: "This rule, however, does not require that there must be direct proof of the fact itself; it is sufficient if the facts proved are of such a nature and are so connected and related to each other, that the conclusion therefrom may be fairly inferred." *Id.* (quoting *Roper v. Archibald,* 680 S.W.2d 743, 748 (Mo. Ct. App. 1984)). Having placed into evidence the

speed of Weiland's vehicle, the use of emergency lights, the location of the vehicles when the impact occurred, the location of the damage to the vehicles, and the evasive maneuvers exercised by Bumann, the jury was allowed to use its common sense to draw reasonable inferences about the proximate cause of Weiland's injuries. It did so and determined Weiland's own negligence contributed to the accident. Expert testimony was not required.

Weiland asks this Court to supplant the jury's determination by arguing about the weight to be given to certain facts and the credibility of the witnesses. (*See* Appellant Br. 14-15.) These issues are squarely within the purview of the jury. In fact, this Court has specifically ruled that credibility issues are "not grist for summary judgment or directed verdict." *Carpenter v. City of Belle Fourche*, 2000 S.D. 55, ¶ 26, 609 N.W.2d 751, 762

Weiland also asks the Court to consider evidence that was excluded by the trial court, specifically, the opinions of Deputy Sheriff Albers and the SDHP, that they were not aware of any actions of Weiland that contributed to the accident. (Appellant Br. 15.) Neither witness had access to the EDR data when they arrived at their opinions and as will be discussed below, the exclusion of their opinion testimony was proper. In any event, had those witnesses possessed the relevant information with which the jury was presented, they would have been able to easily determine had Weiland been traveling the speed limit, the vehicles would have cleared each other by over five feet. They could have determined, based on testimony and evidence presented by Dr. Ogden, a vehicle travels 1.47 feet per second for each mile per hour traveled (5280 feet per mile divided by 3600 seconds per hour). Thus, a vehicle traveling 69 miles per hour travels 101 feet per second. A vehicle traveling 65 miles per hour travels 95 feet per second. If Weiland

would have been traveling 65 miles per hour in the 5 seconds before the accident, he would have traveled 30 feet less, and it would have taken another .3 seconds to reach the location of the impact. With that extra .3 second, Bumann's vehicle, which was traveling 15 miles per hour or 22 feet per second, would have moved another 6.6 feet off the road. Because only 15 inches of the vehicles impacted, the accident would not have occurred had Weiland been traveling the speed limit and obeying the law.

The cases cited by Weiland are readily distinguishable. *Johnson v. Armfield*, involved a "bare assertion" that the plaintiff had been speeding without "any expert testimony tending to show [the plaintiff] was speeding at the time of the accident." 2003 S.D. 134, ¶ 12, 672 N.W.2d at 482. The only evidence of plaintiff's speed was the defendant's assumption plaintiff was speeding, which was expressed even though the defendant never saw plaintiff prior to impact. *Id.* ¶ 3, 672 N.W.2d at 480. That is not the case here where the EDR data conclusively established Weiland exceeded the speed limit. (TT 691.)

Similarly, in *Steffen*, "[t]he only evidence offered on the issue of contributory negligence" was "equivocal" testimony from the defendant. *Steffen v. Schwan's Sales Enter.'s, Inc.*, 2006 S.D. 41, ¶ 11, 713 N.W.2d 614, 618. The EDR data and Dr. Ogden's testimony interpreting it was anything but equivocal and clearly demonstrated Weiland "was driving at a speed greater than was prudent[.]" *Stoltz*, 336 N.W.2d at 657.

Viewing the evidence in the light most favorable to the verdict and the nonmoving party, *Nelson*, 2018 S.D. 42, ¶ 18, 913 N.W.2d at 110, there was "competent evidence to support the theory of contributory negligence, [and] it [was] proper for the

issue to go to the jury." *Johnson*, 2003 S.D. 134, ¶ 10, 672 N.W.2d at 481. The trial court's rulings on contributory negligence were correct.

C. Failure to Mitigate

The trial court denied Weiland's motions to take the issue of failure to mitigate from the jury. While a special verdict form was submitted to the jury, the question of failure to mitigate was not included. (SR 4082–84.) Weiland did not object to that omission. (*See* TT 804-805.) There is no evidence that the jury found Weiland failed to mitigate his damages, and no evidence exists showing the jury would have reached a different verdict had it not been instructed on the issue. *See Thomas v. Sully Cnty.*, 2001 S.D. 73, ¶ 12, 629 N.W.2d 590, 594 (holding plaintiff could not establish prejudice because "we have no way of knowing whether the jury based its decision upon Instruction 9"). This case is akin to situations in which this Court has been asked to review a verdict issued on a general verdict form. In those instances, this Court has held:

> Without special interrogatories detailing the basis for the jury's determination of no liability, we are unable to discern the reason for its verdict, which could have rested on multiple permissible bases. Under the circumstances, we cannot assess prejudice even if the court abused its discretion. We must therefore affirm without reaching the merits of Sedlacek's issues.

Sedlacek v. Prussman Contracting, Inc., 2020 S.D. 18, ¶ 22, 941 N.W.2d 819, 824; *see also State Farm Mut. Auto. Ins. Co. v. Miranda*, 2019 S.D. 47, ¶ 10, 932 N.W.2d 570, 573. The Court need go no further in its assessment. Nevertheless, there was sufficient evidence to support the instruction and a finding of failure to mitigate.

"The law imposes upon a party injured from another's . . . tort the active duty of making reasonable exertion to render the injury as light as possible." *Ducheneaux v. Miller*, 488 N.W.2d 902, 917 (S.D. 1992). "If, by his negligence or willfulness, he allows

the damages to be unnecessarily enhanced, the increased loss . . . falls upon him." *Id.* As this Court has held, "it is a duty of great importance." *Id.*

A court must "instruct the jury on issues supported by competent evidence in the record." *Jurgensen v. Smith*, 2000 S.D. 73, ¶ 22, 611 N.W.2d 439, 443. The party challenging the instruction "has the burden of proving that the jury might and probably would have returned a different verdict" in the absence of the instruction. *Id.* "If there is some evidence bearing on the issue, a reviewing court will not disturb the trial court's giving of an instruction." *Gerlach*, 478 N.W.2d at 830.

Here, the evidence established that following the accident, when Weiland engaged in an exercise program, his pain was reduced. While exercise was recommended for Weiland by his providers, he failed to comply. Weiland asked the jury to award him damages for past and future pain and suffering. (SR 4084.) Sufficient facts existed to allow the jury to determine that had Weiland engaged in his recommended exercise program, his pain and suffering would have been reduced – as would have his damages.

Following the accident, Weiland was repeatedly told to engage in an exercise program by his chiropractors, physical therapist, and medical doctor. Dr. Chris Janssen testified that he would recommend an exercise program for Weiland and that it would be important to and helpful for Weiland. (TT 200, 216-17.) Weiland's physical therapist repeatedly stressed the importance of an exercise program. (TT 216.) Chiropractor, Dr. Ross McDaniel, also recommended an exercise program. (TT 371.) Dr. Nathan Ligtenberg, Weiland's treating chiropractor at the Ortman Clinic, testified that exercise programs were helpful for patients to recover from injury and to maintain recovery. (TT 292-293.)

Following the accident, Weiland prepared contemporaneous notes regarding treatment with his co-workers at the Ortman clinic, his physical condition, and activity level. (TT 496.) These notes were admitted into evidence and confirm that Weiland had success in reducing his pain by engaging in an exercise program. His neck pain was improved after exercise, stretching, swimming, walking, and water aerobics. (SR 2367, 2369, 2371, 2379, 2388, 2403, 2409, 2414-15, 2417.) Weiland specifically indicated that stretching and exercise was helpful. (SR 2391.) He stated that when he engaged in exercise, all areas of his body felt better. (SR 2368.) He had less pain, less spasm, less tightness, and better range of motion. (*Id.*) On November 13, 2018, Weiland specifically quantified the relief he received from exercise, stating his pain was reduced on the pain scale by 2 to 3 points after swimming. (SR 2414.) He also commented that "the walking/exercise helps everything." (SR 2403.) Weiland's compliance with an exercise program was sporadic, and by 2019, he was sent to physical therapy.

When Weiland completed an exercise program – which he was doing during his physical therapy appointments – his condition improved, and his pain lessened. Only one week after starting physical therapy, he noted that he could tell already that he was not feeling as tight. (SR 3657.) On September 5, 2019, he told the therapist "Oh we're on the right track – I can tell these are helping." (SR 3658.) On September 16, 2019, he told the physical therapist that "I do feel like these exercises are beneficial, but I have not gotten to complete them as much with everything going on." (SR 3663.) As of early October of 2019, Weiland was reporting beneficial results with the physical therapy program but F to F+ follow through on his home exercise program due to his work

schedule. (SR 3672, 3674; TT 215.)[3] Weiland was advised of the importance of completing his home exercise program daily to avoid rebound problems. (TT 216.) He also reported to Dr. McDaniel that he was not compliant with his exercise program. (SR 3606.)

On November 13, 2019, Weiland told his physical therapist that he felt like he had improved by at least 80%. (SR 3686.) By that point, he had been doing better with his home exercise program which allowed him to maintain his progress with only minimal rebound due to his job. (*Id.*) The therapist noted "good use of HEP (home exercise program) after long workdays and feels like he knows how to manage symptoms better." (*Id.*) His pain was significantly improved with good management after committing to his home exercise program. (SR 3687.) After Weiland's physical therapy goals were met, he was transitioned strictly to a home exercise program. (TT 219.)

Although both Weiland and his physical therapist recorded the fact that his pain decreased with exercise, Weiland failed to maintain compliance with his exercise program. By the time of trial, he was not engaging in an exercise program. He testified for over 10 pages in the trial transcript about different "treatments" he was using to alleviate his pain complaints – including such things as ice, massage, a theracane, supplements, and so on – all of which are passive modalities. (TT 401-411, 426-428.) He did not testify that he was performing any home exercises. According to Dr. Carlson, it is appropriate and important that Weiland maintain a home exercise program. (TT

[3] Weiland seeks to argue about the meaning of the physical therapy notes by contending "F" meant "fair." Dr. Janssen, who prescribed physical therapy confirmed that the notes documented non-compliance with the exercise program. (TT 215.) Weiland could have called the therapist to testify if she had a different opinion.

569.) He also testified that Weiland had not been compliant with his recommended home exercise program. (TT 569.)

Weiland's admitted failure to follow his exercise program and the resultant pain and suffering it caused demonstrates that he "unnecessarily enhanced" his damages. *Ducheneaux*, 488 N.W.2d at 917. Much like other courts have held, Weiland's failure to take steps to reduce his pain was a failure to mitigate. *See, e.g., Olechowski v. CAD Enterprises*, 2000 WL 33389749, *1 (Mich. Ct. App. Dec. 26, 2000); *Rouse v. Marshall*, 2007 WL 2472554, * 3 (Minn. Ct. App. Sept. 4, 2007); *Martinez v. Vigil*, 737 P.2d 100, 103 (N.M. Ct. App. 1987); *Bryant v. Calantone*, 669 A.2d 286, 290 (N.J. Super. Ct. App. Div. 1996).

Weiland claims Bumann was required to produce evidence of Weiland's failure to mitigate through expert opinion "to a reasonable degree of medical certainty[.]" (Appellant's Br. 20.) However, this is not true when "a jury could reasonably infer from the evidence" and Weiland's own notes that Weiland's admitted failure to follow an exercise program caused additional pain and suffering. *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 40, 916 N.W.2d 151, 161. The fact that his exercise program provided relief and that his failure to follow through with that plan necessarily caused additional pain are "medical matters which are within the common experience, observation, or knowledge of laymen, [and] no expert testimony is required to permit a conclusion on causation." *Willis v. Westerfield*, 839 N.E.2d 1179, 1188 (Ind. 2006).

Weiland also claims there was insufficient evidence to show his conduct was unreasonable. (Appellant's Br. 18–19.) As an initial matter, "where the defendant has legitimately raised the issue of reasonableness, juries are best equipped to resolve the

conflicts." *Baddou v. Hall*, 2008 S.D. 90, ¶ 27, 756 N.W.2d 554, 561. More importantly, there is a direct, obvious, and causal link between Weiland's failure to follow his exercise plan and the additional pain and suffering that resulted. This case differs from *Greenwood v. Mitchell* cited by Weiland. 621 N.W.2d 200, 202 (Iowa 2001). There, the testimony was only that following a home exercise program "should help decrease some of the discomfort." Here, Weiland's own statements established that exercise did in fact decrease his pain. From that evidence, the jury could reasonably infer that Weiland's failure to follow the exercise program was unreasonable and resulted in additional pain and suffering damages not caused by Bumann. Therefore, the court was correct to instruct the jury on failure to mitigate.

Weiland contends the only explanation for the amount of the verdict was that the jury found Weiland failed to mitigate his damages. (Appellant's Br. 20–21.) This cannot be further from the truth, nor can it be proven. The jury heard from Dr. Ogden that the accident was low impact which exerted only minor force on Weiland – like riding an amusement park ride. (TT 720.) The jury also heard that following the accident, Weiland stated he was not injured, missed no work, and was not seen by a medical doctor for 2 years. The jury likely agreed with Dr. Carlson that Weiland suffered only a temporary exacerbation of his pre-existing arthritis which resolved within 6–12 weeks. Appropriate treatment for the exacerbation was 3 chiropractic visits a week for 6–12 weeks. (TT 565.) The cost for a chiropractic visit was $54. (SR 2285.) The amount of damages the jury awarded for medical care is entirely consistent with Dr. Carlson's opinions. In addition, the jury heard that following the accident, Weiland could work full time, jump on a trampoline, waterslide, and shovel snow. (TT 487; 504.) Giving no

consideration to a failure to mitigate defense, the jury's verdict is supported by the evidence.

II. Weiland has failed to establish the trial court abused its discretion in evidentiary rulings and instructions.

"A circuit court's evidentiary rulings will not be overturned absent a clear abuse of discretion." *Sedlacek*, 2020 S.D. 18, ¶ 16, 941 N.W.2d at 822. "An abuse of discretion is a fundamental error of judgment, a choice outside the reasonable range of permissible choices, a decision ... [that], on full consideration, is arbitrary or unreasonable." *Coester v. Waubay Twp.*, 2018 S.D. 24, ¶ 7, 909 N.W.2d 709, 711. As this Court has held, "[w]hen applying the abuse of discretion standard of review, we must be careful not to substitute our reasoning for that of the trial court." *In re S. Dakota Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶ 27, 707 N.W.2d 85, 98.

To prevail on his appeal, Weiland must prove more than an abuse of discretion. He must demonstrate the "error was a *prejudicial error* that in all probability affected the jury's conclusion." *Sedlacek*, 2020 S.D. 18, ¶ 16, 941 N.W.2d at 822. "Error is prejudicial when, in all probability it produced some effect upon the final result and affected the rights of the party assigning it." *Id.* ¶ 16, 941 N.W.2d at 822–23.

A. The accident report was properly excluded.

Retired sheriff's deputy, Tyrone Albers, responded to the accident and completed an accident report. The report stated that the actions of Bumann but not Weiland contributed to the accident. (SR 2204, 2206.) Specifically, it stated that Bumann's failure to yield was a contributing circumstance to the accident. The report also contained a brief narrative summarizing the statements by Bumann and Weiland. (SR. 2208.) Albers conducted no reconstruction of the accident, nor was he qualified to do so.

(TT 311.) He took no measurements or photos at the scene and had little independent recollection of the accident. (TT 311.) Albers testified as a lay witness. He was not designated by either party as an expert. Albers was allowed to review and refer to his accident report while testifying. (TT 307.)

The trial court properly excluded the report as inadmissible hearsay which invaded the province of the jury by speaking to the ultimate issue of negligence and liability. Generally, police reports are not admissible as they do not satisfy an exception to the hearsay rule. *Dubray v. S.D. Dept. of Soc. Servs.*, 2004 SD 130, ¶ 18, 690 N.W.2d 657, 663. The holding in *Dubray* prohibits the admission of accident reports to "substantively prove the contents of the report." *Johnson v. O'Farrell*, 2010 S.D. 68, ¶ 19, 787 N.W.2d 307, 314. That is exactly what Weiland was attempting to offer it for. (*See* Appellant's Br. 23 ("Dr. Weiland could have used the crash report to show there were no contributing circumstances attributed to him[.]"))

Weiland claims the document met the business record exception to the hearsay rule. However, Weiland failed to ask Albers any questions to lay foundation for its admission under SDCL § 19-19-803(6). Weiland attempts to argue that simply because Albers responded to the accident and completed an accident report the exception is met. (Appellant's Br. 22.) However, as this Court has stated: "[A] proper foundation consists of testimony 'that a document has been prepared and kept in the course of a regularly-conducted business activity.'" *State v. Stokes*, 2017 S.D. 21, ¶ 16, 895 N.W.2d 351, 355–56 (quoting *DuBray*, 2004 S.D. 130, ¶ 15, 690 N.W.2d at 662). This testimony was not provided. In fact, Albers testified Exhibit 15 was not the same report he authored, but instead "a printout of a newer system." (TT 307.) No hearsay exceptions applied.

The report was also properly excluded because it contained Alber's opinions that Weiland did not contribute to the accident and that Bumann failed to yield. Testimony from any witness regarding fault, negligence, or responsibility for an accident usurps the function of the jury. *See Baddou*, 2008 SD 90, ¶ 29, 756 N.W.2d at 561–62. Law enforcement officers may not testify regarding the causes or "contributing factors" of an accident. *See, e.g., id.* ¶ 5, 756 N.W.2d at 557 (noting the court prevented investigating officer's opinion regarding fault); *Robbins v. Buntrock*, 1996 S.D. 84, ¶ 8, 550 N.W.2d 422, 425. It was the jury's job to decide whether Bumann failed to yield and whether Weiland's acts contributed to the accident. *See Zimmer v. Miller Trucking Co., Inc.*, 743 F.2d 601, 603 (8th Cir. 1984) (court properly excluded report and section entitled "driver/vehicle related contributing circumstances"); *Khan v. Gutsgell*, 55 S.W.3d 440, 442–43 (Mo. Ct. App 2001) ("[A]n investigating officer who was not an eyewitness may not properly state his or her opinion as to which of the parties was at fault in causing a traffic accident").

Notwithstanding the exclusion of the report itself, Weiland was free to and did ask Albers about the statements made by the parties to him. (TT 308.) In any event, both Bumann and Weiland testified extensively about the facts surrounding the accident. Their testimony was consistent with the narrative in the accident report. In fact, Weiland used the police report to cross-examine Bumann. (TT 54.) Thus, the only "evidence" Weiland arguably lost from the exclusion of the police report was improper opinion testimony regarding fault. The exclusion of the report does not prejudice Weiland.

B. The court correctly excluded SDHP liability opinions.

Weiland also takes issue with the redaction of certain information from two SDHP reports. The reports were generated after the accident without the benefit of any formal reconstruction or evaluation of the accident. (SR 2234.) Bumann's supervisor, Sergeant Schade, was allowed to testify regarding his supervisor report. (TT 302-303.) The jury was told Bumann received verbal counseling after the accident. (TT 303.) Bumann also testified he lost his safe driving miles after a determination by the SDHP that the accident was preventable. (TT 64.) Weiland was also allowed to elicit testimony regarding the SDHP's policies. (TT 58; 59.)

The court excluded the following language from Exhibit 22, Schade's Supervisor Report: "Policy Followed: No." and "This would be a violation of South Dakota Highway Patrol Policy which states 7.105 A Division vehicle shall not be driven in a careless manner at any time. If Trooper Bumann would have waited and been able to get a better view of oncoming traffic he could have avoided the collision." (SR 2135, 2234.) Opinions telling the jury how to decide an issue are impermissible. Even expert "opinions merely telling a jury what result to reach are impermissible as intrusive[.]" *State v. Buchholtz*, 2013 S.D. 96, ¶ 24, 841 N.W.2d 449, 457. Thus, the liability determinations in the supervisor report were properly excluded, as the unredacted exhibit would have invaded the province of the jury. *See Robbins*, 1996 S.D. 84, ¶ 8, 550 N.W.2d at 425.

Weiland also complains that the court ordered redaction of Exhibit 23, an Accident Review Board letter. (SR 2136.) Weiland, however, never offered Exhibit 23 at trial. Establishing prejudice in the jury's verdict from redactions to an unoffered

exhibit is impossible at this juncture. *Sedlacek*, 2020 S.D. 18, ¶ 16, 941 N.W.2d at 822. Furthermore, the Court cannot review the issue as an offer of proof was not made. (*See infra* II.C.)

Weiland argues a violation of an employer's policy may be considered by the jury as evidence of negligence. Here, the jury was allowed to consider the SDHP policies. Bumann testified it would be a violation of SDHP policy to drive a vehicle in a careless manner. (TT 59.) Thus, even though the policy was redacted from the Supervisor Report, the jury still heard evidence of it. It was the jury's responsibility to determine whether Bumann's alleged violation of the policy was probative evidence of negligence.

The jury was able to apply the facts of the accident to the policies about which Bumann testified to make determinations as to the negligence of both of the parties. The jury found Bumann negligent notwithstanding the redaction. Nothing in the redaction commented on or applied to Weiland's contributory negligence. Not only were the redacted portions inadmissible, but their redaction did not prejudice Weiland in any way—let alone to an extent the jury would have reached a different verdict after reading the redacted information. *Sedlacek*, 2020 S.D. 18, ¶ 16, 941 N.W.2d at 822.

C. The testimony of Blake Dykstra was properly excluded.

Prior to litigation, Weiland's personal injury claim was referred to Claims Associates adjuster Blake Dykstra working on behalf of the PEPL fund. Weiland alleges that during the claims process Dykstra told Weiland he could not bill for treatment at the Ortman Clinic. Weiland never deposed Dykstra so has no evidence of Dykstra's reply to the allegation. Prior to trial, Weiland moved the court via a motion in limine for a ruling that he could call Dykstra as a witness. This motion was denied. (SR 2134.) The court

also entered an order that Bumann was not to criticize the recordkeeping practices of the Ortman Clinic or argue its doctors were required to keep records. (SR 2134.)

First, it must be noted that Weiland failed to preserve this issue for appeal. Dykstra was not called as a witness at trial, and Weiland failed to make an offer of proof regarding his testimony. As this Court has repeatedly held,

> [T]he proponent of the evidence must attempt to present the excluded evidence at trial, and if an objection to the proffered evidence is sustained, the proponent must then make an offer of proof. Such a requirement is strictly applied because a trial judge should be given an opportunity to reconsider [the] prior ruling against the backdrop of the evidence adduced at trial.

Walker v. Walker, 2006 S.D. 68, ¶ 26, 720 N.W.2d 67, 74 (quoting *Joseph v. Kerkvliet*, 2002 SD 39, ¶ 7, 642 N.W.2d 533, 535.) "[W]here a party does not attempt to introduce evidence at trial or make an offer of proof, the issue has not been preserved for appeal." *Id.*

If, however, the Court determines the issue was preserved, reversal is not warranted as the trial court ruled correctly. The testimony was properly excluded because it was irrelevant and improperly injected PEPL fund coverage into the case. *See* SDCL § 19-19-411. Dykstra's testimony was also more prejudicial than probative. *See LDL Cattle Co. v. Guetter*, 1996 S.D. 22, ¶ 27, 544 N.W.2d 523, 529 ("[T]here is no doubt that the presence of liability insurance is a matter likely to prejudice the jury.").

In addition, Weiland can establish no prejudice by the exclusion of Dykstra. First, there is no evidence in the record to suggest that had he testified, Dykstra would have agreed he made the statement. Likely, he would have denied the statement, and the jury would have been free to disregard Weiland's allegation. Furthermore, the undisputed testimony elicited at trial confirmed the information presented to the jury. The testimony

established Weiland and his colleagues routinely treated one another for various conditions but did not keep records or charge one another. (TT 262, 490, 493.). This happened before the accident and continued afterward, regardless of what Dykstra allegedly told Weiland. (TT 262; 263.) Instead of records from the treating chiropractor, Weiland kept his own notes documenting his symptoms and his daily activities between the accident and the end of 2018 when the Clinic began generating formal records for Weiland. (TT 496.) Weiland was allowed to testify that it was his "understanding that it was not necessary to keep formal records and bills for the treatment following the collision[.]" (TT 413.)

Weiland now asserts he should have been allowed to call Dykstra to rehabilitate himself after defense counsel pointed out Weiland had no formal records from Ortman Clinic. Weiland's notes, however, were not used for impeachment nor were they a statement given to an insurance agent. *Cf. Stygles v. Ellis*, 80 S.D. 346, 356, 123 N.W.2d 348, 354 (1963) (holding court erred in preventing plaintiff from revealing source of written statement used for impeachment). The records were used to confirm Weiland's activity and pain levels from his own contemporaneous notes. Defense counsel did not suggest Weiland had somehow lied or changed his story. *See State v. Ager*, 416 N.W.2d 871, 873 (S.D. 1987) (describing rehabilitative evidence as that "which counteracts the suggestion that the witness change[d] his story in response to some threat or scheme or bribe[.]").

Weiland also argues he should have been able to recover damages for treatment at Ortman Clinic and being unable to call Dykstra "resulted in a lower award of damages[.]" (Appellant's Br. 29.) Weiland certainly could have presented the cost of the treatment to

the jury; a plaintiff may recover the cost of gratuitous medical services. *See Degen v. Bayman*, 90 S.D. 400, 410, 241 N.W.2d 703, 708 (1976). However, Weiland chose not to specifically present those alleged damages to the jury. He cannot now claim prejudice because of that choice.

D. The Court properly declined to instruct the jury regarding insurance.

The refusal to give jury instructions is reviewed for abuse of discretion. *Est. of Lynch v. Lynch*, 2023 S.D. 23, ¶ 43, 991 N.W.2d 95, 110. "Error occurs if, as a whole, the instructions misled, conflicted, or caused confusion." *Id.* "For such error to be reversible, the party challenging the instruction must show that in all probability it produced some effect upon the verdict and harmed that party's substantial rights." *Id.*

Here, Weiland claims that when a juror asked the bailiff "where does the money come from" during a trial recess, the court was required to give SDPJI 1-20-60 admonishing the jury not to consider insurance. (TT 665; 666.) The comment section of SDPJI 1-20-60 provides, in part: "This instruction should be given only where the question of insurance coverage has been disclosed." That did not happen here.

Analogously, in *Beck v. Wessel*, the jury asked the judge during deliberations: "Can you tell us the amount of insurance each party has?" 90 S.D. 107, 113, 237 N.W.2d 905, 908 (1976). Without informing counsel, the judge responded "No." *Id.* This Court held that, while, "in a technical sense the court erred in answering the note sent by the jury without consulting counsel" the jury did not ask "for an additional instruction on the law of the case or for an explanation of an instruction already given[.]" *Id.* In holding that answering the question was not prejudicial error, the Court noted, "if [the judge] had consulted counsel and called the jury back into open court to admonish them not to

consider liability insurance, he may well have compounded the problem by making a much larger issue of liability insurance in the minds of the jury." *Id.* at 909.

The same is true here. If anyone was prejudiced by the jury's potential consideration of insurance, it was Bumann. *See Atkins v. Stratmeyer*, 1999 S.D. 131, ¶ 13, 600 N.W.2d 891, 896 (noting prejudice from insurance most often comes from "the mention of defendant's liability insurance, not the mention of plaintiff's health insurance."). Weiland cannot show any prejudice. No disclosure of the parties' insured status was made. The jurors did not ask for clarification on instructions or raise the question about insurance during deliberations. As the court aptly ruled, "I don't think we're yet at a point where the issue has been explicitly injected into the subject matter of this suit such that this instruction is appropriate at this time." (TT 811.) No abuse of discretion occurred here, and the court's ruling on the requested instruction should be affirmed.

E. Per diem arguments are improper.

The court prohibited Weiland from making a per diem argument at trial. (SR 2137.) Nevertheless, in his opening statement, Weiland's counsel told the jury he would ask for $75,000 per year for Weiland's 40-year life expectancy. (TT 31; 321.) The court ordered Weiland's counsel to comply with its pretrial order during closing, finding Weiland's per diem argument improper. (TT 779.) That ruling was not an abuse of discretion, and no prejudice resulted. *See Vanskike v. ACF Indus.*, Inc., 665 F.2d 188, 211 (8th Cir. 1981).

Per diem arguments suggest or argue to the jury that damages may be calculated on a daily or other fixed basis. *Parker v. Artery*, 889 P.2d 520, 526 (Wyo. 1995). They

"assume an arbitrary figure for pain and suffering and multiply that figure by some unit of time over which it is assumed the injured person will suffer." *Id.* In short, per diem arguments "mislead the jury and clothe with an aura of reasonableness the often fantastic claims made on behalf of such calculations." *Id.*

The use of mathematical formulas for measuring damages on a per diem basis involves speculation of counsel and amounts to the attorney giving testimony in summation. *See Certified T.V. & Appliance, Inc. v. Herrington*, 109 S.E.2d 126, 127 (Va. 1959). "The estimates of counsel may tend to instill in the minds of jurors impressions not founded on the evidence. Verdicts should be based on . . . the evidence presented and not the mere adaptation of calculations submitted by counsel." *Id.*

Additionally, per diem arguments intrude on the province of the jury. "The basic reasoning behind the use of any mathematical formula is not so much to aid, or even to persuade, the jury as it is to ultimately establish a fixed standard to displace the jury's concept of what is a fair and reasonable amount[.]" *Affett v. Milwaukee & Suburban Transp. Co.*, 106 N.W.2d 274, 279–80 (Wis. 1960). Jurors are familiar with pain and suffering and are qualified to make their own determination as to their value. Here, the jury was allowed to calculate those damages using its own common sense based on the evidence. Weiland cannot establish any prejudice resulted from his inability to make a per diem argument. In fact, he told the jury in opening statement what he felt a proper yearly award would be – so it was aware of his position despite the court's ruling. (TT 31.)

Per diem arguments, like the one Weiland wished to make, confuse the issues by assigning an "arbitrary figure" to that claim and asking the jury to complete a simple

math equation. *Parker*, 889 P.2d at 526. Calculating non-economic damages is not so simple, and Weiland cannot establish that his inability to assign a pre-determined value to his alleged pain and suffering resulted in "a miscarriage of justice." *Roth v. Farner-Bocken Co.*, 2003 S.D. 80, ¶ 37, 667 N.W.2d 651, 664.

As set forth above, Weiland's appeal is without merit, and the jury verdict should be upheld. If, however, the Court finds error, Bumann asks for consideration of his notice of review issues.

III. The court erred when it applied a negligence rather than reckless standard of care.

Under SDCL §§ 32-31-1, -2, and -5, an authorized emergency vehicle pursuing a violator of the law may "[d]isregard regulations governing direction of movement or turning in a specified direction" as long as the emergency vehicle is not acting in a reckless manner. SDCL § 32-31-2, -5. Thus, the jury should have been instructed that Weiland was required to prove Bumann was reckless, not negligent.[4]

The text of SDCL §32-31-5 states:

> The provisions of this chapter shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, *nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.*

(Emphasis added).

Under that statute, the driver of an emergency vehicle is subject to a recklessness standard of care, "obligating plaintiffs to establish more consequential, material, and wanton acts to support a breach[.]" *Robbins v. City of Wichita*, 172 P.3d 1187, 1196 (Kan. 2007) (citing K.S.A. 8-1506(d), containing language identical to SDCL § 32-31-

[4] Questions involving statutory interpretation are reviewed de novo. *Johnson v. Markve*, 2022 S.D. 57, ¶ 29, 980 N.W.2d 662, 672.

5). As the Kansas Supreme Court noted, "many other jurisdictions that recognize a duty of care" for emergency responders "also impose a more restrictive standard of care, usually requiring reckless disregard or willful and wanton conduct." *Id.* at 467–69 (collecting cases); *see also Greene v. City of Greenville*, 736 S.E.2d 833, 835 (N.C. Ct. App. 2013) ("[A]n officer's liability in a civil action . . . is determined pursuant to a gross negligence standard of care."); *Jones v. Ahlberg*, 489 N.W.2d 576 (N.D. 1992) (holding a police officer will "be subject to liability for damages incurred as a result of [a] pursuit, if the officer's conduct constitutes gross negligence."). Since Bumann was on duty, driving an emergency vehicle, and pursuing a suspect, the appropriate standard of care in this case is recklessness.

As this Court has held, "[i]n conducting statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole." *Reck v. S. Dakota Bd. of Pardons & Paroles*, 2019 S.D. 42, ¶ 11, 932 N.W.2d 135, 139. When interpreting statutes, "[n]o wordage should be found to be surplus. No provision can be left without meaning. If possible, effect should be given to every part and every word." *Peterson, ex rel. Peterson v. Burns*, 2001 S.D. 126, ¶ 32, 635 N.W.2d 556, 568. Holding drivers of emergency vehicles to a recklessness standard rather than a negligence standard gives meaning to SDCL § 32-31-5's "reckless disregard" language. The "reckless disregard" clause of SDCL § 32-31-5 cannot be considered mere surplusage; it establishes "the standard of care for evaluating whether the driver of an emergency vehicle breached the duty to drive with due regard for the safety of all other persons." *State ex rel. Oklahoma Dep't of Pub. Safety v. Gurich*, 238 P.3d 1, 7 (Okla. 2010) (citing 47 Okl.St.Ann. § 11-106(E), containing language identical to SDCL § 32-31-5).

Public policy considerations also mandate a recklessness standard based on the split-second decisions a trooper must make when engaging in a pursuit. *See Gurich*, 238 P.3d at 7; *see also* SDCL § 20-9-4.1 and *Gabriel v. Bauman*, 2014 S.D. 30, 847 N.W.2d 537. The "reckless disregard" language from § 32-31-5 is designed to protect individuals providing emergency services from civil liability unless they act recklessly.

Here, Bumann noticed a vehicle speeding and traveling with expired tags. He made the decision to conduct a U-turn and pursue the violator. He looked for vehicles traveling in the opposite direction and saw none. At that point, he initiated his turn. As the trial court held, this does not constitute reckless conduct. (TT 788) ("there's not evidence that Mr. Bumann . . . acted with a conscious disregard for the safety of others.") The proper standard of care was recklessness.

IV. The court erred in denying Bumann's motion for judgment as a matter of law on certain future damages.

Over objection by Bumann, Weiland was allowed to ask the jury to award him damages for yearly radiofrequency ablation procedures for his life expectancy at a cost of $436,001.40. (SR 2352.) "Damages for future pain and suffering or permanent injury cannot be arrived at by conjecture or speculation." *Klein v. W. Hodgman & Sons, Inc.*, 77 S.D. 64, 69, 85 N.W.2d 289, 292 (1957). Rather, damages for future medical expenses must be supported by evidence and proven with reasonable certainty. *See Lamb v. Winkler*, 2023 S.D. 10, ¶ 21, 987 N.W.2d 398, 406; *Shippen v. Parrott*, 1996 S.D. 105, ¶ 27, 553 N.W.2d 503, 510; SDCL § 21-1-10. When evidence of future medical expenses is provided by expert opinion, those opinions must be "based upon medical certainty or medical probability, but not upon possibility." *Koenig v. Weber*, 84 S.D. 558, 569, 174 N.W.2d 218, 224 (1970).

Here, none of Weiland's expert witnesses testified to a reasonable degree of medical certainty that Weiland would require yearly radiofrequency ablations (RFA). Dr. Janssen testified he referred Weiland to Dr. Metz to perform RFA, but Dr. Metz did not testify. (TT 189; 190.) Instead, Dr. Janssen merely speculated that Weiland could continue to receive RFAs "[a]s long as they continue to work." (TT 197.) Dr. Ligtenberg testified that whether Weiland should continue to receive RFAs was not his "call to make." (TT 277.) This falls well short of establishing future medical damages with reasonable medical certainty. *See Cooper v. Brownell*, 2019 S.D. 10, ¶ 17, 923 N.W.2d 821, 825.

Based on this lack of evidence, the court erred in denying Bumann's motion for judgment as a matter of law on Weiland's future medical damages. (TT 788; 789.) Bumann asks that, in the event a new trial on damages is granted, this Court enter judgment as a matter of law in favor of Bumann on future radiofrequency ablation procedures, removing that issue from the jury's consideration.

CONCLUSION

For the foregoing reasons, Bumann respectfully requests that this Court affirm the judgment on jury verdict, the trial court's denial of Weiland's Motions for Summary Judgment and for Judgment as a Matter of Law, and the court's rulings on the evidence and jury instructions. In the alternative, Bumann requests this Court vacate the Judgment and enter Judgment in favor of Bumann based on the application of a recklessness standard of care. If necessary, Bumann requests this Court reverse the decision of the trial court denying his motion to exclude evidence on the need for future radiofrequency ablation procedures.

REQUEST FOR ORAL ARGUMENT

Appellee Patrick Bumann requests oral argument on all of the issues set forth herein.

/s/ Melanie L. Carpenter
One of the Attorneys for Appellee

Dated this 15th day of September, 2023.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2013, Times New Roman (12 point) and contains 9,637 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, certificates of counsel, and appendix. I have relied on the word and character count of the word-processing program to prepare this certificate.

/s/ Melanie L. Carpenter
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2023, I electronically filed and served Defendant/Appellee's Brief through the Odyssey File and Serve system upon the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30309
Appeal No. 30311 (NOR)

TODD WEILAND,

Appellant,

vs.

PATRICK BUMANN,

Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE SANDRA HANSON, CIRCUIT COURT JUDGE

APPELLEE'S APPENDIX

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Notice of Appeal Filed April 3, 2023
Notice of Review Filed April 11, 2023

APPENDIX INDEX

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

TODD WEILAND, Plaintiff, vs. PATRICK BUMANN, Defendant.	49CIV20-000969 **ORDER ON PRE-TRIAL MOTIONS**

This matter came before the Court on October 18, 2022, at 9:00 a.m., for a pretrial conference and on November 7, 2022, at 1:30 p.m. for further pretrial conference. At these hearings, Plaintiff Todd Weiland was represented by and through his attorneys, Michael D. Bornitz and Abigale M. Farley. Defendant Patrick Bumann was represented by and through his attorneys, Melanie L. Carpenter and Jake R. Schneider.

After considering Plaintiff's Motions in Limine, the written briefs, the arguments of counsel, the files and records in this matter, and being fully advised, this Court hereby enters the following ORDER on Plaintiff's Motions in Limine:

1. Plaintiffs' Motion in Limine seeking to preclude any reference to Plaintiff's tax returns is DENIED. This denial does not prohibit proper objection to reference to or introduction of the same, nor does it preliminarily rule such matters are necessarily admissible. Such ruling will depend upon the testimony and evidence received at trial. The Court further orders Plaintiff to produce his 2020 and 2021 tax returns to Defendant.

2. Plaintiff's Motion in Limine to preclude reference to any of his criminal history and traffic citations is GRANTED.

3. Plaintiff's Motion in Limine to preclude reference to Plaintiff's divorce from 2002 is GRANTED.

4. Plaintiff's Motion in Limine to preclude reference to any other times that Dr. Christopher Janssen has served as an expert witness for parties represented by the Cutler Law Firm, LLP is GRANTED and is further made reciprocal as to Defendant's expert witnesses and any of their previous affiliation(s) with Woods, Fuller, Shultz & Smith, PC. or parties it has represented.

5. Plaintiff's Motion in Limine for an advance ruling which permits him to call Blake Dykstra as a witness is DENIED. In conjunction with this ruling, counsel and witnesses are prohibited from criticizing the recordkeeping practices of the Ortman Clinic, including reference to any administrative rules or standards related thereto. Reference to or criticism of such recordkeeping practices, rules, and standards shall be redacted from any reports introduced into evidence.

6. Plaintiff's Motion in Limine for an advance ruling which permits him to call Kelly Rud as a witness and or reference her report is GRANTED, in part, and DENIED, in part. Plaintiff is not precluded, in advance, from calling Ms. Rud to testify as a witness, but no reference may be made to PEPL coverage/insurance, Claims Associates, or claimants, including and not limited to Ms. Rud's report or anticipated testimony. The Court directed Plaintiff to provide proposed redactions of Ms. Rud's report to Defendant by Friday, October 21, 2022, with Defendant to provide Plaintiff any additional proposed redactions by Friday, October 28, 2022. Because the parties did not reach an agreement on the entirety of such redactions, the Court reviewed each party's proposed redactions and ruled on them at the November 7, 2022 hearing. The Court's oral rulings on those redactions are incorporated herein by this reference.

7. Plaintiff's Motion in Limine for an advance ruling which permits him to admit evidence of and make reference to South Dakota Highway Patrol ("SDHP") policies and procedures and the training troopers receive is GRANTED to the extent such information does not seek to usurp the functions of the court or the jury and is otherwise admissible in keeping with the rules of evidence.

8. Plaintiff's Motion in Limine for an advance ruling which permits him to admit evidence of the Supervisor Report of Sergeant Steven Schade, dated November 19, 2017, is GRANTED, in part, and DENIED, in part. The following portions of such report and any testimony, evidence, or argument related thereto shall be redacted and considered inadmissible and not for mention in the presence of the jury: "Policy Followed: No." and "This would be a violation of South Dakota Highway Patrol Policy which states 7.105 A Division vehicle shall not be driven in a careless manner at any time. If Trooper Bumann would have waited and been able to get a better view of oncoming traffic he could have avoided the collision." Plaintiff is not prohibited in advance from properly introducing or referencing other portions of this report.

9. Plaintiff's Motion in Limine for an advance ruling which permits him to call Sergeant Kinney and Sergeant Schade to testify is GRANTED, in part, and DENIED, in part. They may be called to testify about their first-hand knowledge pertaining to the collision from which this action arises, including conversations with Defendant, knowledge of SDHP policies, procedure, and training, and discipline Defendant received, to the extent consistent with the Court's rulings and the rules of evidence.

Further, after considering Defendant's Motions in Limine, the written briefs, the arguments of counsel, the files and records in this matter, and being fully advised, this Court hereby enters the following ORDER on Defendant's Motions in Limine:

1. Defendant's Motion in Limine to preclude reference to the PEPL fund is GRANTED.

2. Defendant's Motion in Limine to preclude reference to his prior motor vehicle collisions is GRANTED.

3. Defendant's Motion in Limine to preclude the testimony of Sergeant Kinney and Sergeant Schade pertaining to their opinions on the Rules of the Road, their post-accident review and conclusions, including Sergeant Schade's supervisor report and Sergeant Kinney's letter is GRANTED, in part, and DENIED, in part, as stated by the Court during the pretrial hearings and as set forth in the Court's rulings on Plaintiff's Seventh and Eighth Motions in Limine, which are incorporated herein. Neither party may refer to or elicit testimony or evidence regarding the opinions or statements of Sergeant Schade which have been stricken from his Supervisor Report. Further, neither party may reference or elicit testimony or evidence regarding the following portions of Sergeant Kinney's letter: "Following our review of your crash on the date listed above, it was determined that the crash was preventable. . . . It was determined that you need to use more caution when operating your patrol vehicle to turn around on violators."

4. Defendant's Motion in Limine to preclude evidence of SDHP internal policies, training, and post-accident internal investigations is DENIED in part, and GRANTED, in part, as stated by the Court during the pretrial hearings and as set forth in the Court's rulings on Plaintiff's Seventh and Eighth Motions in Limine, and Defendant's Third Motion in Limine, which are incorporated herein.

5. Defendant's Motion in Limine to preclude reference to Ms. Rud's report is addressed in the Court's ruling on Plaintiff's Sixth Motion in Limine and was addressed by the Court during the pretrial hearings, which rulings are incorporated herein.

6. Defendant's Motion in Limine to preclude reference to "negligence" was HELD IN ABEYANCE on October 18, 2022, pending further hearing, and at the November 8, 2022 hearing, the Court stated its conclusion that the standard of care applicable in this matter is governed by the laws of negligence. As such, this motion is DENIED.

7. Defendant's Motion in Limine to limit the number of medical providers who testify on Plaintiff's behalf is DENIED. This denial does not preclude Defendant from proper objection if Defendant believes such testimony becomes cumulative or otherwise objectionable.

8. Defendant's Motion in Limine to limit Dr. Nathan Ligtenberg, Dr. Ross McDaniel, and Dr. Doug Ortman from testifying to medical procedures is DENIED. This denial does not preclude Defendant from proper objection if Defendant believes such testimony lacks necessary foundation or is otherwise objectionable.

9. Defendant's Motion in Limine to preclude undisclosed experts from providing expert testimony is GRANTED and is hereby made reciprocal to both parties.

10. Defendant's Motion in Limine to preclude introduction of witness statements prepared by Plaintiff's counsel is DENIED. This denial does not preclude Plaintiff from appropriate use of the same or Defendant from proper objection to use of the same.

11. Defendant's Motion in Limine to prevent use of videotaped depositions at trial is HELD IN ABEYANCE. Plaintiff will timely disclose to Defendant any video testimony which he plans to use at trial, and Defendant is not precluded from proper objection to the same.

12. Defendant's Motion in Limine to preclude use of a "Golden Rule" argument is GRANTED and is hereby made reciprocal to both parties.

13. Defendant's Motion in Limine to prevent Plaintiff from using a per diem argument is GRANTED.

14. Defendant's Motion in Limine to preclude either party from employing a "sending a message" argument is GRANTED and is hereby made reciprocal to both parties.

15. Defendant's Motion in Limine to preclude either party from referencing Plaintiff's financial condition, in general, is GRANTED. However, Plaintiff's tax returns may be relevant and admissible, depending upon the testimony and evidence received at trial, as set forth in the Court's ruling on Plaintiff's First Motion in Limine, which is incorporated herein.

16. Defendant's Motion in Limine to prevent either party from referencing allegation of lost wages or loss of earning capacity of Plaintiff is GRANTED. However, Plaintiff's tax returns may be relevant and admissible, as set forth in the Court's ruling on Plaintiff's First Motion in Limine, which is incorporated herein.

17. Defendant's Supplemental Motion in Limine to exclude reference to Defendant's retention of and failure to call Dr. Jason Evans as a witness is GRANTED.

Finally, after considering Plaintiff's Motion to Exclude Certain Opinions of Defendant's Expert Witnesses, the written briefs, the arguments of counsel, the files and records, and otherwise being fully advised, this Court hereby enters the following ORDER:

1. Plaintiff's Motion to prohibit Defendant's expert, Dr. Jerry Ogden, from testifying that the severity levels experienced by Dr. Weiland are consistent with vigorous daily living activities; that the front-end impact experienced by Dr. Weiland resulted in the torso engaging the seatbelt system preventing Dr. Weiland from striking his head or body against any rigid objects inside the vehicle interior; that the seatbelt prevented any rotation, torsion or differential motion of his low back and upper back; and that the minor level of impact produced nothing more than rotation within a normal range of motion is DENIED. Either party may assert proper objection to expert testimony at trial.

2. Plaintiff's Motion to preclude Dr. Jerry Ogden from testifying about contributory negligence is GRANTED. Either party may assert proper objection to expert testimony at trial.

3. Plaintiff's Motion to preclude Dr. Walter Carlson from testifying about the forces applied in this collision is DENIED. Either party may assert proper objection to expert testimony at trial.

It is further ORDERED that if a party believes there has been a lack of compliance with the Court's rulings on the parties' motions in limine, counsel may approach the bench to raise such a concern outside the presence of the jury. Similarly, if a party believes that the other has "opened the door" to testimony, evidence, or argument otherwise excluded by the Court's rulings on the parties' motions in limine, counsel may approach the bench to raise such a concern outside the presence of the jury.

Dated this 10th day of November, 2022.

BY THE COURT:

Honorable Sandra Hoglund Hanson
Circuit Court Judge

ATTEST:

ANGELIA M. GRIES, Clerk

By: _____
Deputy Clerk

(SEAL)

FILED
NOV 10 2022
Minnehaha County, S.D.
Clerk Circuit Court

32-31-1. Emergency vehicle--Traffic regulations.

The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm or when operating a funeral escort vehicle as defined in § 32-26-51, may exercise the privileges set forth in § 32-31-2, but subject to the conditions stated in §§ 32-31-3 and 32-31-5.

Source: SDC 1939, § 44.0308 as added by SL 1967, ch 191; SL 2020, ch 125, § 7.

32-31-2. Particular regulations which may be disregarded.

The driver of an authorized emergency vehicle may:

(1) Park or stand, irrespective of the provisions of chapter 32-30;

(2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

(3) Disregard regulations governing direction of movement or turning in specified directions.

Source: SDC 1939, § 44.0308 as added by SL 1967, ch 191.

32-31-5. Duty of operator to use care--Liability for recklessness.

The provisions of this chapter shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Source: SDC 1939, § 44.0320 as added by SL 1959, ch 252, § 1; SL 1963, ch 254; SL 1967, ch 191.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30309

TODD WEILAND

Plaintiff and Appellant,

v.

PATRICK BUMANN

Defendant and Appellee.

Appeal from the Circuit Court, Second Circuit
Minnehaha County, South Dakota

The Honorable Sandra Hoglund-Hanson
Circuit Court Judge

APPELLANT TODD WEILAND'S REPLY AND RESPONSE BRIEF

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Notice of Appeal filed April 3, 2023

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STATEMENT OF ISSUES ON REVIEW

1. **The Circuit Court Properly Determined that a Breach of the Duty to Drive with Due Regard for the Safety of Others is Negligence.**

   The circuit court properly determined that Bumann had a duty to drive with due regard for the safety of all persons and consequently, he could be liable for negligence.

   - SDCL § 32-31-5
   - *Blacksmith v. U.S.*, 2008 WL 11506053 (D.S.D. Jan. 16, 2008)

2. **Bumann's Appeal on Future Damages is Moot. Even so, the Circuit Court Properly Admitted Evidence of Dr. Weiland's Future Damages.**

   The circuit court properly admitted evidence of Dr. Weiland's future damages. However, the jury did not award any future damages and the issue is moot.

   - SDCL § 21-1-10
   - *Thomas v. St. Mary's Roman Catholic Church*, 283 N.W.2d 254 (S.D. 1979)

ARGUMENT

I. THE CIRCUIT COURT ERRED BY DENYING DR. WEILAND'S MOTIONS FOR SUMMARY JUDGMENT, JUDGMENT AS A MATTER OF LAW, AND NEW TRIAL ON NEGLIGENCE, CONTRIBUTORY NEGLIGENCE, AND FAILURE-TO-MITIGATE.

Dr. Weiland's appeals on negligence, contributory negligence, and failure-to-mitigate requires evaluating summary judgment proceedings independently from trial. Bumann conflates the evidence presented at summary judgment and trial to avoid discussing his patent shortcomings, particularly at summary judgment. This Court should remand for a new trial on damages.

A. Bumann Failed to Offer a Non-Negligent Explanation for the Collision.

Prejudice may be found when considering *all* errors made. *Davis v. Knippling*, 1998 S.D. 31, ¶ 14, 576 N.W.2d 525, 529 (finding prejudice from failure-to-mitigate instruction because a "review of the record convinces us the jury would have reached a different result," especially "[c]onsidering the two erroneous contributory negligence instructions"). This Court should find prejudice persists because of the cumulative effect of all the errors made, especially since Bumann's negligence was indisputable *before* trial. *Hills of Rest Memorial Park v. White*, 472 N.W.2d 848 (S.D. 1988) (Wuest, C.J. dissenting) ("Cumulatively, I think these problems and errors require a new trial so I join the majority opinion, at least in part."); *State v. Perovich*, 2001 S.D. 96, ¶ 30, 632 N.W.2d 12, 18 ("The cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial.").

The evidence, including his testimony, put Bumann's negligence at summary judgment and trial beyond dispute. This Court held and re-affirmed negligence is established as a matter of law when no non-negligent explanation is given. *Cooper v. Rang*, 2011 S.D. 6, ¶¶ 3, 10, 794 N.W.2d 757, 758; *Christenson v. Bergeson*, 2004 S.D.

113, ¶¶ 2, 26, 688 N.W.2d 421, 422. Bumann's testimony that he should have been more cautious and failed to ensure he could execute his U-turn safely conclusively establishes his negligence. *Baddou v. Hall*, 2008 S.D. 90, ¶ 25, 756 N.W.2d 554, 561 ("Admissions of statutory violations meeting the 'exceptional' standard justify taking such cases from the jury."). This Court should reverse.

B. No Evidence of the Causal Connection Between Dr. Weiland's Alleged Speed and the Collision or His Injuries was Offered.

Bumann declines to respond to Dr. Weiland's summary judgment appeal on contributory negligence because his failure to satisfy SDCL § 15-6-56(c) for his affirmative defense is beyond dispute. "Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101. It bears repeating this was Bumann's only response at summary judgment:

> It is undisputed the speed limit on Highway 42 is 65 miles per hour. [Weiland] was travelling at 69 miles per hour before the accident....[Weiland] was driving in violation of SDCL § 32-25-3. It is for the jury to determine the degree to which [Weiland's] speeding contributed to the accident. Furthermore, fact questions exist as to whether [Weiland] should have seen [Bumann's] emergency lights and whether [Weiland] should have been able to stop or otherwise avoid the accident.

(SR985). However, the rule as to what must be offered to salvage contributory negligence is unequivocal: "[t]he causal connection between excessive speed and the collision must be established by the evidence and cannot be left to mere speculation and conjecture." *Johnson v. Armfield*, 2003 S.D. 134, ¶ 13, 672 N.W.2d 478, 482.

Importantly, this Court *expressly* stated the *Johnson* holding applied "even assuming arguendo that [plaintiff] was speeding." *Id.* Thus, "[e]ven assuming arguendo [Dr. Weiland] was speeding, [his] negligence must have been the proximate cause of

[his] injury[.]" *Id.* At summary judgment, Bumann did not discuss "causation," let alone offer the evidence *Johnson* requires. *Cavender v. Bodily, Inc.*, 1996 S.D. 74, ¶ 22, 550 N.W.2d 85, 90 ("Where no probative evidence is offered, the party who bears the burden of proof must lose."). Even if there was evidence of causation, which there was not, Bumann did not identify it. SDCL § 15-6-56(c); *Hauck v. Clay County Comm.*, 2023 S.D. 43, 994 N.W.2d 707, n.4 ("Arguments not raised at the trial level are deemed waived on appeal."). Accordingly, this Court must remand for a new trial on damages, and its review of this issue need go no farther.

At trial, Bumann again failed to present competent evidence of contributory negligence, which was only compounded by his repeated admissions. The question for Bumann to answer is not whether travelling 68-69mph contributed to Dr. Weiland's injuries as a proximate cause because that was undisputedly not his speed at impact. Bumann needed to explain how fast Dr. Weiland would have been travelling at impact if driving 65-mph and how that differential contributed to the collision *and* his injuries as a proximate cause. Such a question "does not fall within the common experience and capability of a lay person to judge" and requires expert testimony. *Sheard v. Hattum*, 2021 S.D. 55, ¶ 28, 965 N.W.2d 134, 142-43. However, no expert witness testified as to whether and how Dr. Weiland's speed contributed to his injuries (or if he could have avoided the collision if driving 3-4 mph slower).

The reality of Dr. Ogden's testimony is uncomplicated. He was never offered to testify about causation and was precluded from testifying about contributory negligence. (App.00130). To assert the jury was conducting the calculations an engineer referenced in passing when opining on a *different* issue is disingenuous and ultimately, not probative. Dr. Ogden could have reconstructed the collision under any hypothetical

speed. However, the only individual offering opinions on contributory negligence was Bumann's counsel during closing argument. (TT856:5-14).

Lastly, the extent of Dr. Weiland's injuries was hotly contested. Dr. Weiland alleged he suffered a permanent cervical facet joint injury. Conversely, Dr. Carlson testified Dr. Weiland suffered soft tissue injuries that resolved after 10-12 weeks. If Dr. Weiland's claim required expert testimony, so does Bumann's claim that a mere 3-4-mph contributed to the cause of the *same* injuries. This Court found such a lack of evidence fatal to negligence claims because: "[t]o conclude otherwise would effectively allow the jury to speculate on an unguided determination of causation without the benefit of medical expert evidence." *Cooper v. Brownell*, 2019 S.D. 10, ¶ 17, 923 N.W.2d 821, 825. This Court should find the same here and remand for a new trial.

C. Bumann's Failure-to-Mitigate Defense was Based on Conjecture, Not Evidence.

The erroneous failure-to-mitigate instruction was prejudicial. Prejudice exists when "the jury probably would have reached a different verdict, one more favorable to him, had correct instructions been given." *Davis*, 1998 S.D. 31, ¶ 14, 576 N.W.2d at 529. The *Davis* Court determined a failure-to-mitigate instruction was prejudicial because a "review of the record convince[d] [it] the jury probably would have reached a different result" due to an erroneous contributory negligence instruction and the jury not awarding "the full amount of medical expenses directly attributable to the accident." *Id.*; *Francis ex rel. Goodridge v. Dahl*, 107 P.3d 1171, 1174 (Colo.Ct.App. 2005) (ordering a new trial for erroneous failure-to-mitigate instruction despite no special interrogatory); *Johnson*, 2003 S.D. 134, ¶ 15, 672 N.W.2d at 482 (finding erroneous instruction was prejudicial despite general verdict). Here, Dr. Weiland was only awarded $1,161.50 in medical expenses after erroneous negligence and contributory negligence instructions,

significantly less than the expenses he incurred. (App.00131-33).

Bumann relies on speculation, not evidence, to assert Dr. Weiland failed to follow the physical therapist's home exercise program (the "HEP").[1] In fact, Dr. Weiland was timely discharged from physical therapy for meeting his goals. (App.00035). As such, he could not have failed to mitigate his damages. Furthermore, like Dr. Carlson, Dr. Janssen could not "confirm" the physical therapist's notes "document non-compliance with the [HEP]" because he is not a physical therapist. Bumann at p.19. Regardless, Dr. Janssen's testimony did not "confirm" anything—he only quoted the note:

> [Carpenter]: And he reported he gave himself an F grade for follow through on [the HEP] due to his work schedule; right?
>
> [Janssen]: That's correct.
>
> [Carpenter]: So obviously, the physical therapist said you need to do these home exercises, and he said he wasn't getting them done because he was too busy essentially.
>
> [Janssen]: Yeah. He said he gave -- he reported F follow through per home exercise due to work schedule.

(TT215:13-21). Additionally, Dr. McDaniel told Bumann's counsel that this notation, "[h]e's still noncompliant with exercise program [sic]," related to cardiovascular exercise prescribed for an unrelated thyroid condition, not the HEP. (TT377:3-16); (SR3606). Indeed, he responded "[y]ou got it" when asked, "I guess you'll defer to the physical therapist report and notes as to whether he was noncompliant with her program as well I assume?" (TT377:13-16). Bumann's assertion that "[Dr.] Weiland could have called the therapist to testify if she had a different opinion," is unavailing because he bore the burden of proof.

---

[1] Bumann also asserts Dr. Weiland "sporadically" complied with a pre-physical therapy "exercise program." No such program existed and the supposed "sporadic" compliance is unidentified. Bumann at p.18.

Even assuming, *arguendo*, there was evidence of non-compliance, Bumann did not offer evidence of unreasonableness. Critically, no one testified Dr. Weiland should be doing the same HEP three years after physical therapy or that his pain was "abated by and at times resolved" by the HEP as Bumann asserts. Moreover, generalized remarks that a HEP, rather than the HEP, can be "helpful" are insufficient. *See, e.g., Cox v. Keg Restaurants U.S.*, 935 P.2d 1377, 1380 (Wash.App. 1997) (expert testimony that "it might have been useful" to revisit doctor's recommendation was insufficient); *Willis v. Westerfield*, 839 N.E.2d 1179, 1188 (Ind. 2006) (expert testimony that plaintiff's failure to attend physical therapy "didn't help herself" was insufficient); *Lublin v. Weber*, 833 P.2d 1139, 1140 (Nev. 1992) (insufficient evidence questioning "reasonableness" of plaintiff's actions, including no expert testimony that "pain and suffering would have been less severe if he took the [prescribed] medication"); *Fuches v. S.E.S.*, 459 N.W.2d 642, 643 (Iowa.Ct.App. 1990) ("to find a failure to undergo medical treatment was a failure to mitigate damages, there must be a showing that such treatment would in fact have mitigated the damages.").

Finally, "[i]t is not enough to establish that the plaintiff acted unreasonably. The defendant must establish resulting identifiable quantifiable additional injury." *Willis*, 839 N.E.2d at 1188. Bumann only generically asserted Dr. Weiland "failed to mitigate his claimed pain and suffering damages" by alleged noncompliance with the HEP, and he never quantified what component of pain and suffering was due to the same. Other jurisdictions recognize "expert medical testimony is required to prove causation" when "the plaintiff's injuries are subjective in nature," like pain and suffering. *Harris v. Jones*, 143 N.E.3d 1012, 1017 (Ind.Ct.App. 2020) (reversing for erroneous failure-to-mitigate instruction). However, every expert testified Dr. Weiland made every reasonable effort

to get better. This Court should reverse.

II. THE CIRCUIT COURT ERRONEOUSLY EXCLUDED EVIDENCE OF THE CRASH REPORT, SDHP MATERIALS, AND DYKSTRA'S MISREPRESENTATIONS.

A. The Crash Report was Admissible.

The crash report (Exhibit 15) satisfied the rule that "[a] [police] report may be admitted if the declarant officer's statement meets the business record exception and the declarant witness's statement qualifies as a non-hearsay admission." *Johnson v. Farrell*, 2010 S.D. 68, ¶ 17, 787 N.W.2d 307, 313. Bumann's reliance on *Dubray v. South Dakota Department of Social Services* is misplaced. *Dubray* explained that narratives in police reports are often inadmissible because they frequently contain the "statements of bystanders." 2004 S.D. 130, ¶¶ 18-20, 690 N.W.2d 657, 663-64. Here, Exhibit 15 only incorporated the parties' statements. (TT52:13-24, 308:11-13).

By the time Albers testified, the circuit court had affirmed its ruling on Exhibit 15 three times. (TT53:16-17, 55:1-11, 143:1-147:11). Thus, he was not asked to specifically discuss its contents. Even though he could not recall many details from a five-year-old collision, Albers confirmed he investigated it, (TT305:19-21), explained one duty in his 29-year career was "investigat[ing] collisions," (TT306:1-5), and otherwise "defer[red] to the accident report," (TT306:12-23). Albers also testified Exhibit 15 being a "printout from a newer system" only affected "layout" and "[t]he information look[ed] to be the same." (TT307:11-15). Dr. Weiland then made a second offer of proof on Exhibit 15. (TT312:18-313:9). In response, Bumann did not raise the supposed lack of foundation he inserts now. (TT313:15-22); *Hauck*, 2023 S.D. 43, 994 N.W.2d at n.4 ("Arguments not raised at the trial level are deemed waived on appeal.").

Finally, driver contributing circumstances are not equivalent to statutory violations/citations by default. For example, a collision caused by a driver's health

emergency is a "driver contributing circumstance" in the same manner as failing to yield. The recognized distinction between statutory violations and contributing circumstances is evident from how officers note contributing circumstances *independent* of citations in crash reports. In fact, Albers determined Bumann's failure to yield was a contributing circumstance, but he was not issued a citation. Moreover, this evidence cannot be considered unduly prejudicial when Bumann testified that he failed to yield. Therefore, this Court should reverse.

B. The Jury was Erroneously Prevented from Considering Violations of SDHP Policy.

An offer of proof was made on Exhibit 23. This exhibit—a letter from Sgt. Kinney detailing the crash review board's findings—redacted the determination "the crash was preventable." (App.00034). Dr. Weiland's counsel informed the circuit court:

> [W]e'll also make the offer of proof on the issue of preventability. I know the Court's already ruled on that....But we had requested that the Court allow us to elicit testimony and submit evidence on the issue of preventability. So I just want to renew that for the record.

(TT147:14-22); (TT148:1-18 (Bumann's counsel responding, "[t]he issue that the court addressed before was the crash review board...that's the issue that we went through with...the letter from Sergeant Kinney")).

More importantly, violations of internal policy are not "liability determinations." Rather, "failure to comply with a company rule does not constitute negligence per se[.]" *Morrison v. Mineral Palace Ltd. P'ship*, 1999 S.D. 145, ¶ 12, 603 N.W.2d 193, 197 n.4. However, "the jury may consider the rule, but the policy does not set forth a standard of conduct that establishes what the law requires of a reasonable person under the circumstances." *Id.* The jury was prevented from "consider[ing] the rule" because the rule and determinations therefrom were redacted from Exhibits 22 and 23. Indeed,

Bumann's characterizing his violations as "alleged," when he failed to disagree with them, demonstrates Exhibit 23's redaction prevented the jury from considering the evidence. Violations of SDHP policy is *probative* evidence of the standard of conduct and would have been helpful in measuring the conduct of an SDHP trooper who is subject to additional, different rules than other drivers. Therefore, this Court should reverse.

C. Dykstra's Misrepresentations were Admissible.

i. The Issue was Preserved by Motions in Limine, Multiple Attempts to Offer the Evidence, and Post-Trial Motions.

Pursuant to SDCL § 19-19-103(a), error in excluding evidence is preserved if it "affects a substantial right of the party and…a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." If an offer of proof is made, it can be done "at trial or prior to trial." *Wilcox v. Vermeulen*, 2010 S.D. 29, ¶ 7, 781 N.W.2d 464 (citing SDCL § 19-19-103(a)). Alternatively, SDCL § 19-19-103(b) provides, "[o]nce the court rules definitively on the record--either before or at trial--a party need not renew an objection or offer of proof to preserve a claim of error for appeal." "A 'definitive' ruling is 'a final and authoritative determination regarding [the] admission of...evidence[.]'" *Liebig v. Kirchoff*, 2014 S.D. 53, ¶ 19, 851 N.W.2d 743, 749 ("the circuit court's in limine ruling was a final and authoritative determination regarding the admission of evidence").

Dr. Weiland moved in limine to call Blake Dykstra as a witness. The substance of this evidence was provided: "it was Dykstra who informed Dr. Weiland he could not submit bills from [Ortman]…As a result, Dr. Weiland documented his own treatment[.]" (SR1511-12). Dr. Weiland alternatively requested the motion be "held in abeyance depending on how [Bumann] characterizes the fact that Dr. Weiland kept his own

notes[.]" (SR1911). However, the circuit court definitively denied the ability to call Dykstra: "Plaintiff's Motion in Limine for an advance ruling which permits him to call Blake Dykstra as a witness is DENIED." (App.00125). Nevertheless, Dykstra was still designated as a witness. (SR2107).

Dr. Weiland's counsel also attempted to introduce this evidence during Dr. Weiland's direct examination:

> [Bornitz]: what was your understanding whether you could submit bills from the Ortman Clinic?
>
> [Carpenter]: Your honor, I'm going to object. Maybe we need to…
>
> [Court]: I would ask you to approach.
>
> (Off-the-record bench conference.)

(TT412:22-413:6). During the bench conference, the circuit court reaffirmed its ruling, *and* expanded it—an additional error—to provide Dr. Weiland could only testify it was his impression formal records were unnecessary, as shown by the next question: "Dr. Weiland, was it your understanding that it was not necessary to keep formal records and bills for the treatment following the collision?"[2] (TT412:22-413:6).

Dr. Weiland again attempted to offer the evidence during his cross-examination:

> [Carpenter]: They're just your personal thoughts and feelings of what happened during the treatment; right?
>
> [Bornitz]: Your honor, I'm going to object on this based on our motion in limine.
>
> [Court]:…I'll overrule the objection at this point.
> ….

[2] Pursuant to his issue statement Dr. Weiland's appeal is not limited to the inability to call Dykstra: "[t]he circuit court erred when excluding evidence of representations made to Dr. Weiland by Bumann's insurance representative." It logically follows the same considerations apply to either's testimony.

> [Weiland]: No, that's not really true. I was informed I could not bill for this. And so –
>
> [Carpenter]: Your honor, move to strike.
>
> [Court]: The jury will be instructed to disregard the part of the answer following "no, that's not true" as non-responsive.

(TT497:5-19). During a recess, Bumann's counsel broached the issue again:

> [Carpenter]: The other issue I have is that plaintiff violated the motion in limine on telling that he couldn't – he was told he couldn't bill for treatment. And I don't know what the remedy is other than moving for a mistrial. It's a clear violation of the motion in limine, the order on it though. I think at this point though, we would just ask the Court for an admonishment so that that doesn't happen again. And then that type of evidence is not argued or brought up in closing argument.
>
> [Court]: So if I understand correctly, defendant is not moving for a mistrial at this time, but as remedy for testimony or questions relative to Dr. Weiland saying he was told he could not bill for procedures at Ortman Clinic, that there be an admonishment to plaintiff that that statement may not be reiterated?
>
> [Carpenter]: Correct.
>
> [Bornitz]: We're not going to bring it up.
>
> [Court]: Okay. So consider yourselves admonished that it may not be further presented in testimony or argument or mentioned in front of the jury.

(TT620:17-621:11). The attempt(s) to offer this evidence was apparently clear enough to justify a mistrial. SDCL § 19-19-103(a)(2) ("the substance was apparent from the context.").

After trial, the issue was briefed and argued in Dr. Weiland's Motion for New Trial. (SR4198). At the hearing, counsel and the court addressed the exclusion of Dykstra's *and* Dr. Weiland's testimony:

> [Bornitz]: in regard to our request to present [Dykstra's] testimony [] as the court will recall, the plaintiff did not have formal records for his treatment at the Orman Clinic, and he did not have formal bills for that treatment because Mr. Dykstra told the plaintiff he could not be reimbursed for it….This evidence [] should have been admitted….The other issue related

> to this [was] how...plaintiff was required to misrepresent what actually happened, and he was required to testify that he was under the impression that he did not need to have formal records, which is what he ended up testifying to at trial[.]

(PTT7:11).[3]

> [Court]: The next issue would relate to the court's granting of motion in limine to not permit plaintiff to call [Dykstra], who the court understood to be a claims adjuster. The court had granted that motion in limine because of the worry that it would open the door to improper evidence such as liability coverage….The plaintiff claimed that he wished to call the claims adjuster to provide testimony, that the claims adjuster told the plaintiff he could not bill for treatment at the Ortman Clinic….The plaintiff says that he had to misrepresent to the jury a statement that he didn't need formal records and says that was untrue, but that was actually their practice at the clinic. The [plaintiff] claims that he did not write down records immediately following the accident because [] the claims adjuster told him that.

(PTT29:7-30:13). The circuit court was apprised of the evidence because the issue was squarely before it and it is ripe for review.

ii. But for Dykstra's Misrepresentations, the Verdict Would Be Larger.

The assertion "there is no evidence in the record to suggest that had he testified, Dykstra would have agreed he made the statement" is blatantly false. Bumann at p.27. Three exhibits were offered in support of the motion in limine. The first was Dysktra's note dated January 12, 2018, stating, in part, "He said his colleagues are treating him so not going to bill for anything, but he is keeping personal notes/records so it's all documented[.]" (SR1526). The second was Dr. Weiland's deposition testimony:

> [Weiland to Thimsen]: I was told by Blake from Claims Associates that I could not bill for these visits.
>
> ….
>
> [Bornitz]: You had mentioned…someone had told you that you couldn't submit bills from the Ortman Clinic[?]
>
> [Weiland]: That's my recollection.

[3] "PTT" refers to the post-trial transcript.

[Bornitz]: Who told you that?

[Weiland]: Blake Dykstra.

(SR1573-74). The third exhibit was Dr. Weiland's response to an Interrogatory stating, in part, "I was told by the Defendant's representatives that I could not submit charges for their services because they are co-workers." (SR1577). Conversely, Bumann failed to produce *any* evidence concerning Dykstra's position. Even if Dykstra disputed the statement, it is the jury's job to weigh credibility. *State v. Larson*, 512 N.W.2d 732, 737 (S.D. 1994) ("It is a function of the jury to determine the credibility of the witnesses and to accept one witness' version of the facts and reject another's.").

Rule 411 prohibits admission of liability insurance to "prove whether the person acted negligently." SDCL § 19-19-411. Even if Dykstra's representations had anything to do with negligence, which they do not, they fall squarely within the "another purpose" exception. Further, Dr. Weiland did not offer evidence of liability insurance—he proposed Dykstra be referred to as Bumann's representative or investigator, not unlike Dr. Carlson. *Accord Lamar Advertising v. Kay*, 267 F.R.D. 568, 573 (D.S.D. 2010). Indeed, this Court recognizes the title "adjuster" does not make their conduct per se immune from admissibility. *Stygles v. Ellis*, 123 N.W.2d 348, 355-56 (S.D. 1963). In failing to balance the conflicting interests, the circuit court's order falsely imputed blame upon Dr. Weiland and diminished his credibility, especially as a chiropractor.

This issue was unquestionably a central part of the defense as shown by the tireless questioning of six witnesses concerning recordkeeping practices. (Suppl.App.00142-00161). In fact, Bumann's contention that the "undisputed testimony elicited at trial confirmed the information presented to the jury" exemplifies the resulting prejudice. The testimony was "undisputed" because Dr. Weiland could not give or elicit

contrary testimony *because* of the circuit court's ruling. Instead, Dr. Weiland was required to give incomprehensibly vague testimony that "he" did not believe records were necessary. The jury was erroneously precluded from weighing all evidence to determine whether formal records were not kept because that was common practice *or* because Dykstra misled Dr. Weiland.

Importantly, Dr. Weiland contends different recordkeeping practices would have been followed, but for Dykstra's representations. Bumann did not elicit testimony the same practices are followed for Ortman colleagues injured in a highway collision. Rather, Dr. Ligtenberg's testimony about recordkeeping was specifically related to "informal tune ups." (TT262:1-263:16). Ironically, Bumann agrees different practices would be followed because he argued exactly that in closing arguments to claim Dr. Weiland did not have a new or serious injury.

As a result of Dykstra's misrepresentations, Dr. Weiland did not have Ortman billing documentation until September 12, 2019, and was consequently unable to request those damages. The jury's award of medical expenses demonstrates there would have been a higher verdict *if* there were bills in 2017 and 2018. Moreover, the jury either improperly reduced the verdict or wholly rejected Dr. Carlson's opinion because the $1,161.50 award in medical expenses is inconsistent with a 10–12-week recovery. (Ex. 87). In any case, but for Dykstra's representations, the verdict would have been larger. Therefore, this Court should reverse.

III. FAILING TO ADDRESS THE JURY'S QUESTION ABOUT "WHO PAYS" CAUSED PREJUDICIAL SPECULATION.

The circuit court's failure to give SDPJI 1-20-60 was prejudicial error. Bumann's reliance on *Beck v. Wessel* to claim otherwise is unavailing. *Beck* narrowly determined it was not reversible error to answer a jury question without consulting counsel.

237 N.W.2d 905, 908-09 (S.D. 1976). More importantly, the *Beck* jury *did* receive guidance from the court, while this jury was left to determine "who pays?" solely from the bailiff's response: "I can't answer that. But you will get all of the information about that you need to hear to make a decision in the courtroom." (TT666:1-9). The circuit court's failure to give the jury "all of the information" it needed left it to impermissibly speculate. SDPJI 1-20-60 is a "simple, instruction [that] would have resolved the confusion of the jurors and properly informed them not to infer, speculate or discuss" who pays. *Hojek v. Harkness*, 733 N.E.2d 356, 357-58 (Ill.Ct.App. 2000).

The prejudice from the jury's speculation is evident. The State's involvement was unavoidably discussed at length, which would only cause a juror to assume taxes pay the verdict. Additionally, the question of "who pays" is indicative of a juror who feels sympathetic to a young defendant in law enforcement as compared to an experienced chiropractor. Insurance is a pervasive and often inescapable topic for a jury. Shari Diamond, JURY ROOM RUMINATIONS ON FORBIDDEN TOPICS, 87 Va.L.Rev. 1857, 1876 (2001) (finding insurance was referenced "at least four times during deliberations" in "85% of all cases."). When the issue is specifically raised, failing to give the cautionary instruction and/or allow counsel to address this issue is reversible error.

IV. THE MAJORITY RULE PERMITS PER DIEM AND PER YEAR CALCULATIONS OF NON-ECONOMIC DAMAGES.

The circuit court erred by precluding per diem calculations in its pre-trial order and by precluding per year calculations at trial when sustaining an objection to the following: "[t]hat's why we're going to ask you for a verdict of about $75,000 per year for those 40 years." (TT31:22-32:7). Either calculation is consistent with South Dakota law and the pattern jury instructions on life expectancy and future damages that were given. Indeed, counsel explained that "those 40 years" are composed of the previous five

years and Dr. Weiland's life expectancy. *Id.* This Court should join a decisive majority of jurisdictions in allowing such calculations. Appellant's Brief at p.32-33.

V. THE CIRCUIT COURT PROPERLY DETERMINED THE STANDARD OF CARE.

SDCL Chapter 32-31 prescribes the standards with which drivers of "emergency vehicle[s]" must conform "when in the pursuit of an actual or suspected violator of the law." SDCL § 32-31-1. Bumann alleged he was not liable for the collision because SDCL § 32-31-2 allowed him to "[d]isregard regulations governing direction of movement or turning in specified directions." However, exercise of this privilege is subject to SDCL § 32-31-5:

> The provisions of this chapter shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

The jury instructions included this statute. The jury answered yes to the following interrogatory, "1. Was Defendant negligent or did defendant fail to drive with due regard for the safety of others?" (App.00131).

Statutory interpretation is a question of law reviewed de novo. *Farm Bureau Life Ins. Co. v. Dolly*, 2018 S.D. 28, ¶ 7, 910 N.W.2d 196, 199 (citation omitted). "This [C]ourt assumes that statutes mean what they say and that legislators have said what they meant." *Id.* at ¶ 9. "When the language in a statute is clear, certain[,] and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Id.* Bumann ignores the text of the statute and urges this Court to look past the crux of this issue—the meaning of the "duty to drive with due regard for the safety of all persons." However, "[s]tatutory analysis begins with the language of the statute and absent a clearly expressed legislative intent to the contrary that language must ordinarily be considered conclusive." *State v. Galati*, 365 N.W.2d

575, 577 (S.D. 1985).

First, "due regard" must be "understood in [its] ordinary sense." SDCL § 2-14-1. Consistent with the duty of reasonable care, Black's Law Dictionary defines "due" as "[j]ust proper, regular, and reasonable" while "regard" is defined as "[a]ttention, care, or consideration." (11th ed.). Likewise, this Court routinely references "due regard" in conjunction with the exercise of "reasonable care." *See, e.g., Nelson v. McClard*, 357 N.W.2d 517, 519 (S.D. 1984) ("this does not relieve him from keeping a lookout, or using reasonable care, with due regard for the safety of others."); *Treib v. Kern*, 513 N.W.2d 908, 913 (S.D. 1994) (same); *Burmeister v. Youngstrom*, 139 N.W.2d 226, 229 (S.D. 1965) (same); *see also Pogoso v. Sarae*, 382 P.3d 330, 338 (Haw.Ct.App. 2016) ("the phrase 'due regard' is typically construed as imposing a negligence standard."). Therefore, the "duty of due regard" is equivalent to the ordinary standard of care, not recklessness.

Second, the Legislature's use of "shall not" and "nor shall" are important. The "nor" in SDCL § 32-31-5 denotes that the reckless disregard provision is a "second, *additional* negative." *U.S. v. Garcia*, 178 F.Supp.3d 1250, 1252 (S.D.Ala. 2016) ("'nor' means '[a]nd not; or not; not either.' It therefore denotes a second, additional negative.") (emphasis added). Therefore, the plain language of the statute signifies the Legislature's intent that Bumann must act with "due regard for the safety of all persons" *and* not act recklessly.

This interpretation is consistent with the Honorable Andrew Bogue's decision in *Blacksmith v. U.S.* where he determined South Dakota police officers owe a duty of ordinary care *in addition* to not acting recklessly. 2008 WL 11506053 at *6-8 (D.S.D. Jan. 16, 2008). Judge Bogue was unconvinced South Dakota would adopt the "harsh,"

"blanket rule exempting police officers from a duty to exercise ordinary care[.]" *Id.* (citing *State v. Seidschlaw*, 304 N.W.2d 102, 107-08 (S.D. 1981) (Dunn, J., concurring) (favorably citing the "civil liability rule" that officers are not liable for damages sustained during an arrest unless they "act[] in a negligent, careless or wanton manner"). He found "it significant the South Dakota legislature [had] not extended further exemptions to police officers, and instead subjects these officers to the same driving laws that citizens must obey." *Id.* at *8 (explaining Chapter 32-31 privileges apply in "very limited situations."). He also referenced *Carpenter v. Belle Fourche*'s approval of a jury instruction stating, "speed limits do not apply to authorized vehicles" pacing another vehicle, but that said pacing "must be done 'with due regard for the safety of all persons'…[F]ailure to follow this standard of care is negligence." *Id.* (quoting 2000 S.D. 55, ¶ 29, 609 N.W.2d at 763). Judge Bogue reasoned this "demonstrate[ed] [South Dakota's] acceptance of the proposition that it is *negligence* for officers to fail to act with due regard for others' safety." *Id.* at *7 (emphasis in original).

The Legislature's intent to impose an ordinary standard of care is augmented by the omission of the duty of due regard from the Good Samaritan statute:

> No…member of any fire department, police department, … or any other person ***is liable for any civil damages*** as a result of their acts of commission or omission arising out of and in the course of their rendering in good faith, any emergency care and services during an emergency which is in their judgment indicated and necessary at the time. Such relief from liability for civil damages extends to the operation of any motor vehicle in connection with any such care or services.
>
> ***Nothing in this section grants any relief to any person causing any damage by his willful, wanton or reckless act of commission or omission.***

SDCL § 20-9-4.1 (emphasis added). Conversely, the emergency vehicle statutes apply to broader circumstances:

> The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm or when operating a funeral escort vehicle…may exercise the privileges set forth in § 32-31-2, but subject to the conditions stated in §§ 32-31-3 and 32-31-5.

SDCL § 32-31-1. The reason for this distinction is because individuals rendering emergency care are under markedly different circumstances than a driver of a funeral escort vehicle, for example. In fact, such a driver *is* liable for mere negligence. SDCL § 32-26-56 ("the law enforcement officer operating a funeral escort vehicle may not be imposed" with liability for personal injury unless the same "is proximately caused by [the officer's] negligent or intentional act or omission"). The Legislature's expansion of SDCL § 32-31-5 "beyond typical emergency situations indicates that [the legislature] intended the more conventional and customary negligence standard to apply." *Pogoso*, 382 P.3d at 338-39 (interpreting an identical statute); *In re Certification of a Question of Law from United States District Court, District of South Dakota, Southern Division*, 2010 S.D. 16, ¶ 15, 779 N.W.2d 158, 163 ("the Legislature intended a broad shield from liability for South Dakota rescuers.").

At least 24 of the jurisdictions addressing this issue hold law enforcement officers to the ordinary standard of care. *See, e.g., Seals v. City of Columbia*, 641 So.2d 1247 (Ala. 1994) (testimony pertaining to pursuing officer's negligence precluded motion for summary judgment); *Little Rock v. Weber*, 767 S.W.2d 529 (Ark. 1989) ("driver of an emergency vehicle is held to a standard of ordinary care in the exercise of these statutory privileges"); *Estate of Aten v. Tucson*, 817 P.2d 951 (Ariz. 1991) (agreeing intent of the statute is "not to hold patrolmen to less than the usual degree or standard of care."); *Tetro v. Stratford*, 458 A.2d 5 (Conn. 1983) (affirming the submission of negligence question to the jury concerning an officer's decision to pursue a fleeing vehicle); *Pogoso*, 382 P.3d

at 339 (imposing a negligence standard of care under the same statute); *Masters v. Idaho*, 668 P.2d 73 (Idaho 1983) (finding officer liable for negligence during pursuit); *Patrick v. Miresso*, 848 N.E.2d 1083 (Ind. 2006) ("police officers are not immune from liability for injuries caused by the officer's negligent operation of a police vehicle while pursuing a fleeing suspect."); *Gonzalez v. Johnson*, 581 S.W.3d 529 (Ky. 2019) ("an officer can be…the cause of damages inflicted upon a third party as a result of a negligent pursuit. The duty of care owed to the public at large by pursuing officers is that of due regard"); *Baltimore v. Fire Ins. Salvage Corps*, 148 A.2d 444, 447 (Md. 1959) ("'with due regard for the safety of all persons using the street' renders [driver] liable for…a failure to exercise reasonable care and diligence under the circumstances."); *Cairl v. St. Paul*, 268 N.W.2d 908 (Minn. 1978) ("we have always held that liability arising out of the operation of emergency vehicles is predicated upon negligence."); *Robinson v. Collins*, 613 N.W.2d 307 (Mich. 2000) (pursuing officers may be liable for negligently causing injuries to third parties); *Stanley v. Independence*, 995 S.W.2d 485 (Mo. 1999) (officers' negligence could be proximate cause of injury from collision between plaintiffs and pursued vehicle); *Stenberg v. Neel*, 613 P.2d 1007 (Mont. 1980) ("statute may well have been intended to protect the driver of an emergency vehicle, but it does not relieve him of exercising ordinary care."); *Lee v. Omaha*, 307 N.W.2d 800 (Neb. 1981) ("a police officer pursuing a traffic violator 'is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances.'"); *Saltzman v. Saltzman*, 475 A.2d 1 (N.H. 1984) (emergency vehicle driver liable for negligence); *H.C. Johnson v. Brown*, 345 P.2d 754 (Nev. 1959) ("the driver of an emergency vehicle answering an emergency call to exercise reasonable precautions against the extraordinary dangers of the situation which duty compels him to

create"); *Dee v. Pomeroy*, 818 P.2d 523 (Ore.App. 1991) (finding officer's continuation of pursuit for minor traffic violation was evidence of negligence); *Jones v. Chieffo*, 700 A.2d 417 (Pa. 1997) (officers can be jointly liable with fleeing driver for negligence); *Haynes v. Hamilton Cnty.*, 883 S.W.2d 606 (Tenn. 1994) (officers could be liable for negligent pursuit); *Clegg v. Wasatch Cnty.*, 227 P.3d 1243 (Utah 2010) ("[t]he test is whether the driver of the emergency vehicle acted reasonably and with appropriate care for the safety of others in light of all the circumstances."); *Brown v. Spokane County Fire Protection Dist. No. 1*, 668 P.2d 571 (Wash. 1983) ("the test of due regard as applied to emergency vehicle drivers is whether, given the statutory privileges [], he acted as a reasonably careful driver."); *Estate of Cavanaugh v. Andrade*, 550 N.W.2d 103 (Wis. 1996) (officers are liable for negligent or failure to drive with due regard); *Teton Cnty. v. Basset*, 8 P.3d 1079 (Wy. 2000) (officers held to "standard of the ordinarily prudent police officer in similar circumstances" pertaining to roadblock used during pursuit).

Interpreting SDCL § 32-31-5 as only imputing liability for recklessness renders the "duty to drive with due regard for the safety of all persons" a nullity. "Such a reading of [the statute] renders meaningless the duty of due regard…The imposition of a duty of due regard would be nugatory if one who neglected that duty were not held liable for that breach." *Maple v. Omaha*, 384 N.W.2d 254, 261 (Neb. 1986); *Engel v. Stock*, 225 N.W.2d 872, 873 (S.D. 1975) ("when the legislature by statute has fixed a standard of conduct 'the omission of that duty is negligence in and of itself.") (citation omitted). The purpose of the emergency vehicle statutes is not to preclude liability for negligence, but to ensure the safety of "all persons." This Court should affirm.

VI. EVIDENCE OF DR. WEILAND'S FUTURE DAMAGES WAS PROPERLY ADMITTED.

Pursuant to Bumann's issue statement, he is asking "[w]hether the circuit erred in

admitting evidence of Weiland's claim for future damages for yearly radiofrequency ablation procedures," *not* whether his motion for judgment as a matter of law was properly denied. Bumann at p.4. Accordingly, this Court cannot "enter" judgment as a matter of law if a new trial is granted, especially since different evidence could be offered by that time. *Id.* at p.35. This Court must affirm unless it determines the circuit court abused its discretion and the error "produced some effect upon the final result and affected the rights of [Bumann]." *Sedlack v. Prussman Contracting*, 2020 S.D. 18, ¶ 16, 941 N.W.2d 819, 823. However, Bumann's appeal on future damages is moot and any alleged error was harmless because the jury did not award any. (App.00133); *Hewitt v. Felderman*, 2013 S.D. 91, ¶ 32, 841 N.W.2d 258, 266 (the admission of testimony concerning the "potential need for future medical treatment" was moot because of the "complete denial of damages").

This Court recognizes the distinction between the standard an expert must testify to establish facts and that by which damages are proven: "[t]he word "certain" appearing in [SDCL § 21-1-10] is not used in the absolute sense; its purpose is to insure that facts exist as shown by a fair preponderance of evidence which then affords a basis for measuring plaintiff's loss with reasonable certainty." *Thomas v. St. Mary's Roman Catholic Church*, 283 N.W.2d 254, 258 (S.D. 1979). In *Thomas*, a doctor testified to a "reasonable medical probability" the plaintiff "suffered twenty-five percent permanent partial disability in both arms and unequivocally stated his reasons forthwith." *Id.* The defendant argued an "opinion prefaced upon a reasonable medical probability is not the equivalent of a reasonable certainty required by SDCL 21-1-10 in awarding damages for permanent injuries." *Id.* The Court explained, "(m)edical experts are qualified to express their opinions based upon medical certainty or medical probability, but not upon

possibility." *Id.* The Court held that "submitting the issues of permanent damages to the jury" was "justified," and the "matter of measuring damages was not left to mere speculation of the jury" "[g]iven the testimony of the physician…whose opinion was based upon a reasonable medical probability." *Id.*

Here, Dr. Janssen responded "yes" when asked "whether Todd's injuries from the collision are more likely than not permanent." (TT203:2-204:5). This alone entitled the jury to consider future damages for a permanent injury. *Weekley v. Prostrollo*, 2010 S.D. 13, ¶ 24, 778 N.W.2d 823, 829 ("Once a plaintiff has established the fact she has been damaged, uncertainty over the amount of her damages is not fatal to recovery."). Dr. Janssen further explained the progression of Dr. Weiland's neck injury: "they typically don't improve…most of the time, they also don't get worse. So I'm not expecting to progress to something where he needs surgery or something that's going to be more debilitating as long as he continues to do the things that he's doing." (TT205:3-8).

> As to the radiofrequency ablation procedures ("RFA"), Dr. Janssen testified:
>
> [Janssen]: Dr. Weiland has…an injury to the facet joints at C4-C5 and C5-C6. And unfortunately, we don't have a cure for that, but what we can do is burn the very tiny nerves that are responsible for transmitting the pain to the rest of the body.

TT189:17-21. He confirmed he is unaware of a "more effective treatment" "for facet joint injuries other than [RFAs]" and that "in [his] 13 years at Sanford, he ha[s] not sent somebody to surgery for just a cervical facet problem." (TT196:15-22).

Dr. Weiland testified he had two RFAs, one year apart, since the collision, with another scheduled in December. (TT422:9-16). Dr. Janssen confirmed he "had good outcomes with the [RFAs] in terms of pain relief and that he could continue to get them "[a]s long as they continue to work." (TT197:15-17). Evidence of the cost of each RFA

and Dr. Weiland's life expectancy was also submitted. (App.00087-94).

Accordingly, the evidence was consistent with the rule that "the word 'certain'…cannot be construed as only embracing those consequences or elements of damages which are absolutely certain to follow a given injury, for future happenings are necessarily somewhat uncertain." *Peters v. Hoisington*, 37 N.W.2d 410, 416 (S.D. 1949); *Martino v. Park Jefferson Racing Ass'n*, 315 N.W.2d 309, 311 (S.D. 1982) ("to recover for loss of future earning capacity, [plaintiff] did not have to prove that he could no longer ride as a jockey as a result of the injury or prove actual loss of earnings, but rather impairment of his general earning capacity."); *Zakas v. Jackson*, 835 S.E.3d 371, 373 (Ga.Ct.App. 2019) (affirming award of future damages when doctor "testified that [plaintiff] might need an annual [RFA]"). This Court should affirm.

CONCLUSION

Dr. Weiland respectfully requests that this Court reverse and remand for a new trial on damages as set forth herein. Further, this Court should affirm the decisions concerning the standard of care and future damages.

Dated this 9th day of November, 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply and Response Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 7,492 words, exclusive of the table of contents, table of authorities, statement of legal issues on review, any addendum materials, and any certificates of counsel.

/s/ Michael D. Bornitz

CERTIFICATE OF SERVICE

I, Michael D. Bornitz, do hereby certify that on this 9th day of November, 2023, I have electronically filed the foregoing with the Supreme Court using the Odyssey File & Serve system which will send notification of such filing to the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30309

TODD WEILAND

Plaintiff and Appellant,

v.

PATRICK BUMANN

Defendant and Appellee.

Appeal from the Circuit Court, Second Circuit
Minnehaha County, South Dakota

The Honorable Sandra Hoglund-Hanson
Circuit Court Judge

APPELLANT'S SUPPLEMENTAL APPENDIX

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Notice of Appeal filed April 3, 2023

INDEX TO APPELLANT'S SUPPLEMENTAL APPENDIX

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

* *

TODD LON WEILAND, 49CIV20-969

Plaintiff,

-vs- JURY TRIAL
(VOLUME 2 OF 4)

PATRICK BUMANN, (Pages 153 to 388)

Defendant.

* *

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

APPEARANCES: MR. MICHAEL BORNITZ
MS. ABIGALE FARLEY
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PROCEEDINGS: The above-entitled proceedings commenced
On November 16th, 2022, at 8:48 A.M.,
Minnehaha County Courthouse, Courtroom 5B
Sioux Falls, South Dakota

A Yes.
Q So Sanford sends a bill for your time; correct?
A That's correct.
Q And how much does Sanford charge for your time?
A $640 per hour.
Q That's all I have.
THE COURT: We're a little early for our morning break, but I do anticipate that a cross-examination of Dr. Janssen is not likely to be done in 10 to 15 minutes. So what I would propose we do is take our morning recess for 15 minutes. So with my clock showing it being 10:20 A.M., why don't we recess until 10:35 so that people can attend to their needs.

Thank you. We'll be in recess.

Please rise for the jury.

(Recess taken at 10:20 A.M.; and reconvened at 10:41 A.M. in the presence of the jury, counsel, and parties.)

THE COURT: The record may reflect that we are back into court session after a morning recess. I have all 13 jurors and alternate present. When we took our morning recess, the defense was about to commence its examination of Dr. Janssen.

And you may proceed.

MS. CARPENTER: Thank you, Your Honor.

CROSS-EXAMINATION

about today.
Q Now you have said that Dr. Weiland has no difficulties with his neck or shoulders prior to the accident.
A That's correct.
Q Okay. And that's what Dr. Weiland has told you I assume.
A Yeah, that's my understanding. And I don't also see any medical records that reflect that there was a problem before that time period.
Q And did Dr. Weiland -- he told you he was involved in a 2000 accident where he was rear-ended?
A That's right.
Q And he had an injury to his neck which he had treatment for?
A That's right. He saw one of his mentors and had, I think, a month to two months' worth of treatment.
Q Did he tell you that before the accident he was receiving chiropractic care from his partners?
A Again, I asked him about his neck and whether or not he was receiving treatment for that. So my understanding is that he wasn't. I don't have any records to reflect anything else.
Q So generally when you perform medical review, you have the pre-accident records to look at I assume.
A I try to get as many as possible, yeah.

Q And you didn't see any notes from the Ortman Clinic before the accident; right?
A I didn't see anything specific that indicated there was a neck problem.
Q And there are no notes from before the accident at the Ortman Clinic; correct?
A I guess I don't know.
Q I think the jury will hear evidence that there were no notes prepared from before the accident for various treatment. And so obviously, you didn't have anything to look at; right?
A I didn't see any notes, no.
Q So you're just going on basically what Dr. Weiland told you.
A I guess I'm going on what's been provided to me.
Q Dr. Janssen, I think those are all the questions I have for you. Thank you.
THE COURT: Thank you, Ms. Carpenter.
Mr. Bornitz, do you have any redirect examination for Dr. Janssen?
MR. BORNITZ: Yes. I'll be brief.

REDIRECT EXAMINATION

Q (By Mr. Bornitz) Dr. Janssen, Ms. Carpenter asked you about prior medical records and neck and back pain. Dr. Weiland would see his family practice doctors from time

MS. CARPENTER: Thank you, Your Honor.

CROSS-EXAMINATION

Q (By Ms. Carpenter) Good afternoon, Dr. Ligtenberg.
A Good afternoon, Ms. Carpenter.
Q You have been at the Ortman Clinic since 2014?
A Correct.
Q And that is three years before the accident; right?
A Correct.
Q And Dr. Weiland is your business partner?
A Colleague, business partner.
Q He's a friend of yours as well?
A Yes.
Q And you said your mom used to work at the clinic?
A That's right.
Q So you kind of grew up around the clinic?
A Grew up in town and around, yup.
Q Okay. So how long have you known Dr. Weiland?
A I've known him pretty much my entire life.
Q And do your families socialize together?
A Occasionally. In a small town, yeah. My mom's a colleague, worked in the clinic; so, yes.
Q With Dr. Weiland's family?
A That's right.
Q And have you ever been boating with Dr. Weiland?
A I have been on -- boating with him in the past, yes.

Q Now I think you said -- well, you treated Dr. Weiland before the accident for various issues; correct?
A Yeah. I would say for occasional tune-ups.
Q And so before the accident, I think we said that's five years ago; right? The accident was five years ago?
A I think it was about five years ago, yeah.
Q Okay. And you told the jury I think that you treat between 20 and 40 patients a day?
A It really varies; but, yeah.
Q So if I say on a low end of the scale, 20 people a day?
A Yeah.
Q Are you treating around 5,000 patients a year -- or 5,000 treatments a year?
A That's pretty correct.
Q Okay. So in the last five years, you've done 25,000 treatments.
A I don't know specifically but roughly estimated.
Q Okay. Now it's not uncommon, then, for doctors at your clinic to perform treatments on one another.
A Not uncommon.
Q And you've treated other partners of yours?
A Not very frequent. On occasion.
Q You don't keep records of the treatment that you've performed on your partners typically?
A Typically, if it's a colleague, we don't keep -- it's

more of an informal tune-up treatment.
Q And there's no record, though?
A There's no formal record, no.
Q There's no record at all, is there?
A I don't know about anybody else in the whole clinic, but it's my understanding there's no record of treatment when they're treating a colleague.
Q Okay. And so you don't have any records of the treatment that you did on Dr. Weiland before the accident; right?
A No -- no formal record --
Q Okay.
A -- prior to that, no. I think you're right.
Q Yeah. And you're saying "formal record," but there's no record at all.
A Correct.
Q Okay. You can't, then -- because you don't have a record, you can't recall when each of these treatments would have occurred; correct?
A I can't recall each one, no.
Q And you can't recall what specifically was done at each of the treatments.
A Are you referring to after --
Q Before the accident.
A Oh, before the accident. Not each one, but the

frequency was very low.
Q Okay. So before the accident -- now you've had 25,000 other treatments; right?
A Yeah, kind of do the math too; but, yeah.
Q So it's fair to say, though, that you don't have a good recollection of what exactly you did with Dr. Weiland before the accident; true?
A That would be true.
Q Okay. Now you did treat Dr. Weiland also after the accident; right?
A Yeah, that's true.
Q And you don't have, then, records of treatment after the accident until 2019; right?
A I think that's right.
Q And when a patient -- well, let me ask -- let me back up a second, just talking about treating partners. The video that you played where you were doing the Ortman method or demonstrating the Ortman method, you were demonstrating that on one of your partners?
A That's correct.
Q Dr. Esser?
A Right.
Q And I think you said as you were doing it, you found that he had some symptomatic areas or there was some areas of muscle tightness on him; right?

Q Do you believe Todd was injured in the collision on November 10th, 2017? Yes or no?
A Yes.
Q So I'll just have you put your initials below there and circle it.
A (Complies.)
Q Does Todd continue to have injuries related to the November 10th, 2017, collision?
A Yes.
Q Are Todd's injuries from the November 10th, 2017, collision permanent in your opinion?
A Yes.
Q And why do you believe his injuries are permanent?
A Well, his injury was five years ago. If they weren't going to be permanent, it would have resolved by now.
MS. FARLEY: I have nothing further.
THE COURT: Thank you.
Ms. Carpenter, do you have cross-examination for him?
MS. CARPENTER: I do, Your Honor.
THE COURT: Thank you. Please proceed.

CROSS-EXAMINATION

Q (By Ms. Carpenter) Good afternoon, Dr. McDaniel.
A Hello.
Q You have a relationship with Dr. Weiland other than just chiropractor/plaintiff; correct?

Q And you were not asked to provide it.
A Correct.
Q So this would have been done at the Ortman Clinic.
A Presumably, yeah.
Q And did you ever review any records or discuss his case with any of the -- his partners or doctors at the Ortman Clinic?
A No.
Q It was your understanding that they would provide care to one another and not complete treatment notes; is that -- are you aware of that?
A I can't say that.
Q Okay. Now the next record I want you to take a look at is 21, is the Bates number. So this is about a month after the accident, December 5 of 2017; correct?
A Mm-hmm.
Q I think -- can you say "yes" instead --
A Yes.
Q -- so the court reporter can get it down. Thank you. Sorry about that.
Dr. Weiland was reporting almost a hundred percent improvement in his overall energy; correct?
A Yes.
Q And he mentioned the auto accident to you; right?
A Yes.

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

* *

TODD LON WEILAND, 49CIV20-969

Plaintiff,

-vs- JURY TRIAL
(VOLUME 3 OF 4)

PATRICK BUMANN, (Pages 389 to 627)

Defendant.

* *

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

APPEARANCES: MR. MICHAEL BORNITZ
MS. ABIGALE FARLEY
Cutler Law Firm
Sioux Falls, South Dakota

Attorneys for Plaintiff.

MS. MELANIE CARPENTER
MR. JAKE SCHNEIDER
Woods Fuller
Sioux Falls, South Dakota

Attorneys for Defendant.

PROCEEDINGS: The above-entitled proceedings commenced
On November 17th, 2022, at 9:00 A.M.,
Minnehaha County Courthouse, Courtroom 5B
Sioux Falls, South Dakota

A That's about right.
Q And is Exhibit Number 91 in front of you?
A Yes.
Q And is that an exhibit that has an estimate of future cost, chiropractic care, going forward at two times per month for what is expected to be your natural life expectancy?
A Yes, that's what it says.
MR. BORNITZ: I'll move for the admission of Exhibit 91 for demonstrative purposes.
MS. CARPENTER: Same objection.
THE COURT: Thank you. The exhibit will be received for the same reasons as previously stated, for demonstrative purposes.
MR. BORNITZ: That's all I have. Thank you.
THE COURT: Thank you. Now, Mr. Weiland, defense counsel has the opportunity to cross-examine you.
And you may proceed anytime, Ms. Carpenter.
MS. CARPENTER: Thank you, Your Honor.

CROSS-EXAMINATION

Q (By Ms. Carpenter) Good afternoon, Dr. Weiland.
A Good afternoon, Ms. Carpenter.
Q I'm going to ask you some questions about the accident. At the time, you were traveling 68, 69 miles an hour; you agree with that, correct?

to this -- every two to three months or so; right?
A It's really approximate. It's when I would have a flare-up of my lower back.
Q And but you were also receiving treatment for your neck was part of the treatment; correct?
A Before the accident, we called it a tune-up.
Q Okay. And a tune-up would address the whole spine?
A Yeah, it's a whole spine treatment; correct.
Q And you get a tune-up if you're having some sort of difficulty I assume; correct?
A A tune-up can be for a lot of things. We do it for general health even when you don't have any pain or problems. We sometimes -- after a few months of working really hard, you can feel some tension, all sorts of things.
Q So your testimony is that sometimes you get chiropractic treatment even though you may not be experiencing any, necessarily, pain or problems?
A Yeah. Correct.
Q Okay. But sometimes you get chiropractic treatment because you do have pain and problems; right?
A Correct.
Q The treatment of various -- I guess, treatment of chiropractors by other chiropractors at the Ortman Clinic, that's a common or not unusual practice; correct?

A I'd say we all do it about the same amount.
Q And when that happens, a chiropractic record of the visit is not prepared; right?
A That is correct. Generally, that's correct.
Q So you don't have any treatment records from the Ortman Clinic before the accident in 2017; correct?
A Not that I know of.
Q So there's no written record to establish what parts of your body were treated or how often before this accident; correct?
A Correct.
Q And you're a supporter, I assume, of the Ortman Technique; right?
A Yes.
Q So when you have a soft tissue or musculoskeletal issue, you go to the Ortman Clinic for treatment.
A That what a lot of people do, yes.
Q How about you, you personally?
A If I would?
Q Yes.
A If I would, then that's where I would go.
Q Okay. So right now, Dr. Ligtenberg is your treating chiropractor; true?
A He's the main one, yes.
Q Okay. Now you were in another auto accident in 2000,

Q And you still have that today?
A Well, I'm on medication so it's being treated, yup.
Q And you had complained about fatigue with Mr. Combs and also with Dr. McDaniel; correct?
A Correct.
Q And you are aware that thyroid imbalances can cause fatigue; true?
A Correct.
Q And you were having fatigue problems prior to this accident; correct?
A Correct.
Q Now after the accident, you had some chiropractic treatment with some of your partners at the clinic; correct?
A Correct.
Q And you summarized your visits with them in kind of like a diary basically?
A Correct.
Q And Exhibit 92 which has been admitted into evidence, that contains the notes, I think, that you prepared; right?
A Correct.
Q This is not the official Ortman Clinic records, though, is it?
A They're Ortman Clinic record -- I guess they're whatever records you want to call them.

Q They're just your notes; right?
A They're records from the clinic.
Q Not by the doctor who did the treatment; correct?
A Correct.
Q They're just your personal thoughts and feelings of what happened during the treatment; right?
MR. BORNITZ: Your Honor, I'm going to object to this based on our motion in limine.
THE COURT: I'll allow him to answer this question. I mean, I'll overrule the objection at this point. You need that question repeated, sir?
THE WITNESS: I'm sorry, can you repeat it?
(Last question read back.)
A No, that's not really true. I was informed I could not bill for this. And so --
MS. CARPENTER: Your Honor, move to strike.
THE COURT: The jury will be instructed to disregard the part of the answer following "no, that's not true" as nonresponsive.
Q (By Ms. Carpenter) So your Exhibit 92 is your handwritten notes and notes that you typed up kind of on a daily or however frequent basis; right?
A Yes.
Q I want to then show you some of the notes. I've just pulled some out that I want to ask you about from Exhibit

JAY ORTMAN,

Called as a witness, having been first duly sworn, testified as follows:

THE COURT: Dr. Ortman, if you could have a seat at the funny shaped little desk.

THE WITNESS: Okay.

THE COURT: And I'd ask you to start by please just spelling your first and last name, sir.

THE WITNESS: Jay, J-A-Y, Ortman, O-R-T-M-A-N.

THE COURT: Thank you, sir.

Ms. Carpenter, you may proceed.

MS. CARPENTER: Thank you, Your Honor.

DIRECT EXAMINATION

Q (By Ms. Carpenter) Good afternoon, Dr. Ortman.

A Good afternoon.

Q You are a chiropractor at the Ortman Clinic?

A Correct.

Q And how long have you been at the clinic?

A 28 years.

Q And you're a partner of Dr. Weiland's?

A Correct.

Q Dr. Todd Weiland I guess.

A Yes.

Q When I say "Dr. Weiland," I'll just be referring to Todd Weiland if that makes sense.

A Yup.
Q And are you related to Dr. Weiland?
A Yeah. Our dad's are first cousins. My grandpa and his grandma are brother/sister.
Q And how long have you known each other?
A I grew up in the house across the yard from him.
Q And you've worked together for over 20 years I suppose?
A Correct.
Q And you have a good relationship?
A Yeah.
Q Now during the time that you and Dr. Weiland worked together at the orthopedic -- or the Ortman Clinic, excuse me, you would periodically give him chiropractic treatments; correct?
A Yup.
Q And when you would provide him treatment, would you necessarily provide or prepare a formal chiropractic record?
A No. No, typically we wouldn't have.
Q All right. And so you can't recall all the various times you provided treatments to Dr. Weiland or what the specific treatment was to address?
A No.
Q Do you know the dates of any of the treatments?
A I do not.

Q And in people who have not necessarily had an automobile accident; is that right?
A True.
Q Dr. Weiland testified that he had a full spine chiropractic treatment probably two or three weeks before the 2017 accident. Do you remember if you would have done that?
A I don't remember.
Q And you don't, again, have any recollection of the specific treatment dates when you have -- would have worked with Dr. Weiland prior to the 2017 accident?
A I do not.
Q The accident that we're talking about today happened November 10th of 2017 just for your reference. And according to Dr. Weiland's notes, you saw him on November 28th, 2017. Do you remember that?
A Not specifically, no.
Q It was 18 days later. So let me just show you if I can.
MS. CARPENTER: May I approach?
THE COURT: Yes.
MS. CARPENTER: This Ortman note 7.
Q (By Ms. Carpenter) And these were just some notes taken by Dr. Weiland. Have you ever seen this before?
A I think Mr. Thimsen showed me something in a deposition. I don't know if this was the one.

you in.

WALTER CARLSON,

Called as a witness, having been first duly sworn, testified as follows:

THE COURT: Thank you, Doctor. If you could have a seat at that funny little desk. And as you're getting seated, the first thing that I'll ask you to do is please state and spell your first and last name, sir.

THE WITNESS: Sure. Walter Carlson. W-A-L-T-E-R, C-A-R-L-S-O-N.

THE COURT: Thank you, Doctor.

Ms. Carpenter, you may proceed whenever you're ready.

MS. CARPENTER: Thank you, Your Honor.

DIRECT EXAMINATION

Q (By Ms. Carpenter) Could you introduce yourself to the jury, please.

A Yes. My name is Dr. Walter Carlson, and I'm a retired orthopedic surgeon from Orthopedic Institute. Currently not doing orthopedic surgery but doing more of the, what we call, forensic medicine or medical legal, that sort of work.

Q Can you explain to the jury what the field of orthopedics is or what an orthopedic surgeon does?

A Sure. The field of orthopedic surgery deals with the musculoskeletal system; so bones, muscles, tendons,

A I have. I'm retired.
Q And -- yeah. And if you're -- the point is this. If your testimony had been consistent with Dr. Janssen or Dr. Ligtenberg or Dr. McDaniel, you wouldn't be here testifying making that money; correct?
A Well, I mean, you would have heard my opinion. And if my opinion ended up happening to be similar to Dr. Janssen's, you would have still heard my opinion, and I would have still charged my fee. So I don't think my -- their opinions matter with my opinion.
Q You think they would have called you if your opinion agreed with all those other opinions?
A I have no idea what they would have done.
Q You wouldn't have made that money, though, would have you?
A I don't know if they would have called me or not.
Q Okay. Thank you. That's all I have.
THE COURT: Ms. Carpenter, do you have redirect examination?
MS. CARPENTER: I do, Your Honor. Thank you.

REDIRECT EXAMINATION

Q (By Ms. Carpenter) Dr. Carlson, are you personal friends with Patrick Bumann?
A No.
Q Have you just met him today for the first time?

A He introduced himself to me.
Q And are you aware that Dr. Janssen and Dr. McDaniel are personal good friends with Dr. Weiland?
A I've heard that.
Q You heard today, while you were waiting to testify, Dr. Weiland's testimony?
A I did.
Q And you heard testimony from Dr. Ortman?
A I did.
Q And did you hear them say that -- Dr. Ortman say that he had treated Dr. Weiland in the past for neck pain?
A I did.
Q So is it your understanding there are no records of that pre-accident treatment because they just -- it was their habit not to keep them?
A Well, I don't have any records to review. And Jay Ortman, I think, when he testified implied that, yes.
Q And Dr. Weiland stated that he would get regular chiropractic treatments prior to the accident; is that right?
A Yes.
Q Is it difficult to quantify the amount of neck pain and chiropractic treatment that he had before the accident because there are no records?
A It makes it very difficult.

Q It's impossible, isn't it?
A It is impossible.
Q Now you gave the opinion that Dr. Weiland suffered a sprain/strain in this accident; correct?
A Yes.
Q Have you reviewed studies and literature that are relied upon in the medical field that state whether these types of injuries resolve or don't resolve?
A Yes.
Q And what do those studies state?
A They state that --
MR. BORNITZ: Objection. This is undisclosed medical testimony, Your Honor.
MS. CARPENTER: It's the same opinion he's already given.
MR. BORNITZ: Not -- not -- there's no literature listed in his reports.
THE COURT: I'll sustain the objection and you can continue.
MS. CARPENTER: Thank you, Your Honor.
Q (By Ms. Carpenter) Dr. Carlson, your opinions are based on your almost 40 years of experience; is that right?
A Yes.
Q And with that experience, what is your opinion as to whether or not these types of sprain/strain whiplash injuries will continue be permanent or will they heal?

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

* *

TODD LON WEILAND, 49CIV20-969

Plaintiff,

-vs- JURY TRIAL
(VOLUME 4 OF 4)

PATRICK BUMANN, (Pages 628 to 895)

Defendant.

* *

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

APPEARANCES: MR. MICHAEL BORNITZ
MS. ABIGALE FARLEY
Cutler Law Firm
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Attorneys for Plaintiff.

MS. MELANIE CARPENTER
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Sioux Falls, South Dakota

Attorneys for Defendant.

PROCEEDINGS: The above-entitled proceedings commenced
On November 18th, 2022, at 8:30 A.M.,
Minnehaha County Courthouse, Courtroom 5B
Sioux Falls, South Dakota

INDEX OF EXHIBITS CONTINUED

EX#	DESCRIPTION	OFFERED	RECEIVED
Defendant's Exhibits:			
NN	Occupant kinematics response (Demonstrative)	712	712
OO	MADYMO diagrams - Figures 12 and 13 (Demonstrative)	715	715
PP	MADYMO diagrams - Figures 14 and 15 (Demonstrative)	715	715
QQ	MADYMO video (Demonstrative)	718	718
RR	MADYMO video (Demonstrative)	718	718
CCC	Dr. Janssen's documents used while he was testifying	--	--

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been in an accident. Just all of a sudden he comes in with neck pain. It wasn't unusual. He didn't ask, "Hey, what happened? Did you get in an accident?" No, it was just part of his continuing treatment that he had been doing. He's treated him 15 more times over the next year, and he still had no idea that he was relating any of this neck pain to the accident. That's because it wasn't uncommon for Dr. Weiland to be treated at that clinic for neck pain. Had he done -- had a new injury, Dr. Jay Ortman would have done a history; he would have done an assessment, like, an intake form; he would have done an examination. And, you know, these -- Ortman Clinic's been around a long time. That's just what you do. If you have someone that comes in with an injury, you need to take these steps to make sure you're giving appropriate and safe treatment. He didn't do it. Why? Because he didn't think there was any new injury.

Now he testified also that he remembers treating Dr. Weiland before the accident for neck pain, for upper back pain. All of the doctors he said at Ortman Clinic have neck pain. They all have tension and tightness after performing this Ortman Technique. It's not related to the accident. Dr. Jay Ortman also didn't see any change in his physical demeanor, saw no evidence of permanent injury.

Now Dr. Weiland persists that he had no neck or upper