

CASE NO. A06-1824

State of Minnesota
In Court of Appeals

NEAL PETERSON, A Minor, By and Through His Parent
And Natural Guardian, WANDA PETERSON, et al,

Appellants,

vs.

DAVID DONAHUE,

Respondent.

APPELLANTS' LETTER ARGUMENT AND APPENDIX
PURSUANT TO MINNESOTA CIVIL APPELLATE RULE 128.01, SUBD. 2

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Court of Appeals
State of Minnesota
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**Re: Neal Peterson, a minor, by and through his parent and natural guardian,
Wanda Peterson, et al., v. David Donahue**

Case No.: A06-1824

To The Honorable Court of Appeals:

Appellants submit this letter argument and rely on previously-submitted trial memoranda in support of their appeal from a grant of summary judgment.

This case arises out of a skiing accident which occurred on February 26, 2000, at Afton Alps Ski Area in Washington County, Minnesota. Appellants alleged that Respondent, David Donahue, was skiing in such a careless and negligent fashion so as to ski directly into the path of Appellant, Neal Peterson, causing Neal to unavoidably collide with Respondent. Appellants further alleged that Respondent was negligent in failing to look for and yield to

downhill skiers before merging onto the bunny hill via a crossover between ski trails. As a result of the collision, Appellant, Neal Peterson, then 11 years old, was knocked unconscious, and has sustained a severe and permanent traumatic brain injury.

Respondent brought a motion seeking summary judgment on the grounds that primary assumption of risk bars any claim by Appellants. The motion was heard on May 12, 2006, before the Honorable Gregory G. Galler, Judge of District Court for Washington County. After cursory oral arguments, an order and judgment granting summary judgment and dismissing Appellants' claims was entered by the court on August 8, 2006. (A-51.) Appellants now bring this appeal.

ARGUMENT

Minnesota law is clear that the court's function on motions for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist. Minn. R. Civ. P. 56.01. If the Appellants had made an offer of proof of any evidence to support a finding of negligence on the part of the Respondent, summary judgment should not have been granted in favor of the Respondent. Lowry Hills Properties, Inc. v. Ashback Const. Co., 194 N.W.2d 767, 775 (Minn. 1971). In a negligence claim specifically, the law does not require every fact and circumstance which make up a case of

negligence to be proved by direct and position evidence or by the testimony of eyewitnesses; circumstantial evidence alone may authorize a finding of negligence. Hanson v. Christensen, 275 Minn. 204, 213, 145 N.W.2d 868, 874 (1966).

In this case, however, the district court not only decided the issues of fact but refused to allow Appellants to present and explain the genuine issues of fact present in this case. For example, as apparent from the transcript of the proceedings and from the memorandum accompanying the court's order, the district court determined the credibility of the eyewitnesses. From the transcript, one can see that the district court gave great weight to the testimony of the two witnesses, the Respondent and his wife, as the only ones that have any first-hand testimony. (A-61). Then, the court notes in its memoranda that "here, there is *no evidence from the eyewitnesses* that Defendant engaged in any improper conduct..." (emphasis added) (A-56). Thus, the court concluded that the eyewitness-testimony of Respondent and his wife was credible and therefore because they were the only two witnesses there was no genuine issues of material fact. Such conclusions are improper on a motion for summary judgment. Moreover, if eyewitness testimony was determinative in each case, plaintiffs in Minnesota, having cases involving claims for wrongful death or cases where the plaintiff was rendered

unconscious and could not remember the facts of the accident, would lack the "requisite" first-hand testimony, and could never bring a successful claim.

Aside from merely determining the credibility of Respondent's eyewitness accounts, the district court further prevented Appellants from offering evidence of genuine issues of material fact by refusing to allow Appellants to offer visual exhibits at the hearing. The courtroom was full and had numerous cases before it that Friday morning. Nevertheless, Appellants had prepared and wished to present charts that would show not only the improbability but also the impossibility of Respondent's version of the facts. Understanding the layout and characteristics of the accident site is essential in determining the issues of fact in this case. The charts would have significantly aided in such understanding, however, the trial judge, having skied at the location in question a few times, apparently did not need or want to see the charts. When Appellants attempted to show the charts to demonstrate the inaccuracy and improbability of the eyewitness testimony and to offer circumstantial evidence as an attack on the witnesses' credibility, the district court stated;

"I don't need the charts. Let's just do this. I mean here is the issue. What have you got? I mean you have got no witnesses and you have an expert who came out five or six years later is what you've got, right?" (A-62)

Although the court later says "Sure" during counsel's argument, it was apparent at the time of the hearing that the court was referring to counsel's

statement that the accident happened on the bunny hill and not to counsel's request to show the exhibits, especially in light of the fact that counsel was never permitted to show his prepared exhibits throughout the course of the hearing. Thus at oral arguments, the district court failed to even consider Appellants' offer of proof of genuine issues of material fact. The determination of facts and the credibility of witnesses is for the finder of fact and not for the court.

Where there are genuine factual issues regarding negligence it is reversible error to award summary judgment. Ill. Farmers Ins. V. Tapemark Co., 273 N.W.2d 630 (Minn. 1978). When reviewing a motion for summary judgment, the appellate court must review the evidence de novo. Ingram v. Syverson, 674 N.W.2d 233 (Minn. Ct. App. 2004.) On appeal from a summary judgment, the court of appeals asks two questions: 1) whether there are any genuine issues of material fact in dispute; and 2) whether the district court erred in applying the law. State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990). The court of appeals views the facts in the light most favorable to the party against whom judgment was granted and accepts as true the facts presented by that party. Fabio v. Bellomo, 504 N.W.2d 759 (Minn. 1993).

In this case, Appellants have shown that there are genuine issues of material fact as to Respondent's negligence and the credibility of Respondent's

testimony. The district court granted summary judgment on the basis of primary assumption of risk. Primary assumption of risk is applicable only where the parties have voluntarily entered a relationship in which the plaintiff assumes well-known, incidental risks and the defendant has no duty to protect the plaintiff. Olson v. Hansen, 299 Minn. 39, 43-44, 216 N.W.2d 124, 127 (1974). However, primary assumption of the risk does not apply where a defendant owes a duty to the plaintiff and/or enlarges the risk to the plaintiff. *Id.* In this case, Appellants offered ample evidence that Respondent, David Donahue, not only had a duty and acknowledged his duty to other skiers as imposed by the Skier Responsibility Code, but also that David Donahue had admittedly enlarged the risk to Neal Peterson by failing to look up hill for oncoming skiers before crossing over the ski hill. In this regard, despite the fact that David Donahue has impaired vision, and despite the fact that he failed to look up the hill prior to entering, Respondent further stated that once he was aware that a collision was imminent, he "did not need to take evasive action because [he] was at the bottom of the hill on the downhill side, and shouldn't have had to take evasive action." However, based upon Respondent's deposition testimony, and the exhibits marked by Respondent himself, it appears that Respondent was either confused or incorrect, because the accident was not at the "bottom of the hill" but in fact was approximately 140

feet up from the base of the hill at Chair Lift 4. (See D. Donahue Depo. at 25 ll.8-11, 79 ll. 14-24; 109 l.1 and D. Donahue Depo Ex. D. attached to the Aff. of D. Patrick McCullough, Esq. filed April 28, 2006 at Ex. D and Ex. N; see also the Aff. of Steven C. Harris filed April 28, 2006.)

Similarly, Respondent's wife, the other eyewitness, claimed that Neal Peterson "came out of a group of trees." (C. Donahue Depo. at 47 l. 17, attached to the Aff. of D. Patrick McCullough, Esq. filed April 28, 2006 at Ex. E.) However, Respondent's wife's deposition testimony indicated that Neal Peterson had been traveling from the south in a northwest direction prior to the collision. (C. Donahue Depo. at 58 l.11 and Ex. A, attached to the Aff. of D. Patrick McCullough, Esq. at Ex. E, filed on April 28, 2006). If Respondent's wife's recollections as to Neal Peterson's origin and direction of travel at the time of the incident are correct, it would have been impossible for Neal Peterson to have come from a group of trees, because there are simply no trees or any ski runs passing through the trees within the vicinity of where Neal Peterson was coming from on the bunny hill. (Aff. of Steven C. Harris filed April 28, 2006.) Appellants' charts would have demonstrated these inconsistencies to the trial judge had he viewed them.

In addition to these issues regarding the witnesses' credibility, Appellants' memoranda presented sufficient evidence of other genuine issues of material fact that should be determined by a jury. Such evidence includes:

- 1) **Respondent entered the crossover in an area that was blind to oncoming bunny hill skiers, without first looking for oncoming skiers;** thereby acting negligently and increasing the risk of injury to Neal Peterson.
- 2) **Respondent "looked up" only after he was already on the bunny hill and then only "split seconds" before the impact.** Therefore, Respondent was negligent and increased the risk of injury to Neal Peterson.¹
- 3) **Respondent skied directly into Neal Peterson's path; thus increasing Neal Peterson's risk of injury.** Neal Peterson was skiing down the bunny hill when Respondent suddenly appeared in front of him. Although only 11 years old, Neal Peterson was experienced in quickly maneuvering around gates while skiing and therefore likely could have avoided Respondent, had Respondent not been negligent in entering the bunny trail in an area that was blind to oncoming skiers and directly into the path of Neal Peterson.
- 4) **The Skier Responsibility Code required that, "When entering a trail or starting the hill, yield to other skiers."**² Respondent admitted that he was familiar with his duties pursuant to the Skier's Responsibility Code. Nevertheless, Respondent further admitted that in spite of this duty, he was already on the bunny hill before he looked up.³
- 5) **Neither Respondent, nor Neal Peterson voluntarily entered into any relationship that released Respondent from this duty to act reasonably while skiing.** Respondent had a duty to act reasonably so as not to

¹ D. Donahue Depo. at 79 ll. 14-24, attached to the Aff. of D. Patrick McCullough, Esq. at Ex. D, filed April 28, 2006; Steven C. Harris Report dated March 15, 2006, attached to the Aff. of Steven C. Harris filed April 28, 2006.

² Skier Responsibility Codes attached to the Aff. of D. Patrick McCullough, Esq., at Ex. J, filed April 28, 2006.

³ D. Donahue Depo. at 13-16; 29-30, attached to the Aff. of D. Patrick McCullough, Esq., at Ex. D filed April 28, 2006.

injure other skiers. Respondent was an experienced skier and was familiar with his duties pursuant to the Skier's Responsibility Code which required that "when entering a trail... [one must] yield to other skiers."⁴

- 6) **Respondent did not act reasonably in that, knowing that he lacked peripheral vision in his right eye, he should have been even more prudent in looking for oncoming skiers before entering the ski hill.** During his deposition, Respondent admitted that he had a partial loss of peripheral vision in his right eye.⁵ When questioned about his visual acuity in his right eye, Respondent replied, "I don't have good vision in my right eye with or through any kind of corrections."⁶ Nevertheless, knowing that he had poor vision, Respondent failed to take the necessary and reasonable precaution of looking for oncoming skiers prior to entering the ski hill.

- 7) **Respondent was skiing so fast through the crossover that he suddenly appeared in front of Neal Peterson.** Respondent's testimony that he had "checked" his speed and was "skating" lacks credibility in that he had just skied down a much steeper hill, was attempting to cross the entire span of the bunny hill in order to reach the parking lot for lunch, and was likely traveling at a high rate of speed in order to reach his destination.⁷

- 8) **Appellant Neal Peterson would have been only practicing his skiing maneuvers while on the bunny hill and would not have been able to achieve a high rate of speed as proposed by Respondent.** Neal Peterson testified that if he was on the bunny hill it was because he did not have to worry about speed and instead could practice for his race by focusing more on his feet and body position.⁸ Moreover, had Neal Peterson wanted to "bomb" a hill there were "real" hills that

⁴ D. Donahue Depo. at 29-30, attached to the Aff. of D. Patrick McCullough, Esq., at Ex. D, filed April 28, 2006.

⁵ D. Donahue Depo. at 60, attached to the Aff. of D. Patrick McCullough, Esq., at Ex. D, filed April 28, 2006.

⁶ D. Donahue Depo. at 61 l.15, attached to the Aff. of Sandra P. Barnes, at Ex. 2, filed April 10, 2006.

⁷ D. Donahue Depo. at 25 ll. 8-11; 79 ll. 14-24; 109 l.1, attached to the Aff. of D. Patrick McCullough, Esq., at Ex. D, filed April 28, 2006; Steven C. Harris Report Dated 2/3/05 attached to the Aff. of Steven Harris filed April 28, 2006.

⁸ N. Peterson Depo. at 56 ll. 13-22; 57 ll.7-14; 137 ll. 13-25; 138 ll. 1-4, attached to the Aff. of D. Patrick McCullough, Esq., at Ex. F, filed April 28, 2006.

would have been more appropriate for "bombing" if that was Neal Peterson's intent. Thus, Respondent's claim that Neal Peterson was bombing the hill at the time of the accident is inaccurate. Ski Patroller Gary LePage testified that Respondent's recollection of Neal Peterson's speed is inconsistent with the slope of the bunny hill because an individual simply cannot ski at a high rate of speed on the bunny hill, thus further contradicting Respondent's account of Neal Peterson traveling at a high rate of speed down the bunny hill.⁹

- 9) **Respondent's recollections of Neal Peterson's rate of speed is inaccurate because it was unseasonably warm on the date of the incident and the snow was inconsistent.** In fact, at approximately 9:00 a.m. that morning, it was 43 degrees Fahrenheit and by 12:00 p.m. it was 44 degrees Fahrenheit. The high for the day was actually 52 degrees Fahrenheit.¹⁰ This warm weather caused the snow to melt in certain areas leaving the snow unusually soft and wet in many areas. Given that the bunny hill is simply not very steep and the snow was soft, it is unlikely that Neal Peterson was traveling as fast as Respondent claims.
- 10) **Respondent did not see Neal Peterson until "split" seconds before the collision and he did not report in his initial Skier Collision Report that Neal Peterson was "bombing" the hill with two other boys.**¹¹ Furthermore, the two other boys with whom Respondent and his wife claim that Neal Peterson was racing with have never been identified and at no time after the accident have come forward as witnesses to the accident. This evidence, or lack there of, in addition to Respondent's limited vision in his right eye, goes to the credibility of Respondent's later deposition testimony regarding Neal Peterson's rate of speed.

⁹ G. LePage Depo. at 54 ll. 4-8; 25 ll. 18-21, attached to the Aff. of D. Patrick McCullough, Esq., at Ex. G, filed April 28, 2006.

¹⁰ Weather Report Data attached to the Aff. of D. Patrick McCullough, Esq., at Ex. K, filed April 28, 2006.

¹¹ D. Donahue Depo. at 13-16; 89 l.6; 77, attached to the Aff. of D. Patrick McCullough, Esq., at Ex. D, filed April 28, 2006; Skier Collision Report attached to the Aff. of D. Patrick McCullough, Esq., at Ex. H, filed April 28, 2006.

- 11) Respondent claimed that when he allegedly saw Neal Peterson "bombing" the hill he called out his son's name, yet he failed to include this additional fact in his initial Skier Collision Report and his wife, standing only 50 to 70 yards away failed to hear this alleged exclamation.¹² Again, this evidence or lack there of, goes to Respondent's credibility in his recollection of the circumstances surrounding the accident.
- 12) Neither Respondent nor his wife reported to the Ski Patrol or their insurance company that she had witnessed the collision. It was only after suit was filed in this matter that Respondent's wife came forward as an eyewitness.¹³ Such evidence leads one to question her credibility.
- 13) Respondent's wife claimed Neal Peterson entered the bunny trail through a group of trees, yet there are no ski trails through any trees allowing access to the bunny hill from the southeast. As previously noted, Respondent's wife's testimony and the arrow she identified as depicting Neal Peterson's direction of travel as adopted by Respondent's wife at her Deposition Exhibit A, indicated that Neal Peterson had been traveling from the south in a northwest direction prior to the collision.¹⁴ If Respondent's wife's recollections are correct, it would have been impossible for Neal Peterson to have come from a group of trees, because there are simply no trees or any ski runs passing through the trees in the area of where Respondent's wife testified Neal Peterson was coming from or going through.
- 14) Respondent's wife claims she did not report witnessing the accident at the time because she did not realize it was her husband involved in the accident, yet she could recall specifically that Neal Peterson was in a tucked position with his head up, and she knew that he was traveling at a high rate of speed because she could see that his skis were actually off of the snow. Despite her ability to see these

¹² D. Donahue Depo. at 13-16; 89 l. 6; 77, attached to the Aff. of D. Patrick McCullough, Esq., at Ex. D, filed April 28, 2006; Skier Collision Report attached to the Aff. of D. Patrick McCullough, Esq., at Ex. H, filed April 28, 2006; C. Donahue Depo. at 37-77, attached to the Aff. of D. Patrick McCullough, Esq., at Ex. F, filed April 24, 2006.

¹³ C. Donahue Depo. at 76 ll.7-10, attached to the Aff. of D. Patrick McCullough, Esq., at Ex. F, filed April 24, 2006; see also discussion in Pl.s' Memorandum in Support of Motion to Compel at pp. 20-23, filed April 24, 2006.

¹⁴ C. Donahue Depo. at 58 l. 11 and Ex. A, attached to the Aff. of D. Patrick McCullough, Esq., at Ex. E, filed on April 28, 2006.

events so clearly, she was unable to recognize her husband, standing no more than 50 to 70 yards from her.¹⁵ Thus, there is a question as to her credibility.

All of this evidence as to Respondent's duty of care, negligence in increasing the risk of injury to Neal Peterson, relative rate of speed and direction of travel, and the eyewitnesses' credibility is in dispute between the parties and presents genuine issues of material fact to be decided by a jury. Although the trial court may have considered such evidence circumstantial in determining a motion for summary judgment, circumstantial evidence alone is enough to make a showing of negligence and defeat summary judgment. Hanson v. Christensen, 275 Minn. 204, 213, 145 N.W.2d 868, 874 (1966). Moreover, such evidence was appropriately presented to the district court. The district court however, failed to consider these statements by Respondent David Donahue and instead held that "there is no evidence from the eyewitnesses that Defendant engaged in any improper conduct that would have enlarged the risk of a collision." (A-56). The district court further failed to apply the appropriate law in examining the assumption of risk argument. As demonstrated in the transcript, the district court felt that it had experience in skiing and had seen the disclaimers on ski tickets warning skiers. (A-65 line 15.) Counsel tried to explain to the court that those disclaimers are intended

¹⁵ C. Donahue Depo. at 37-77, attached to the Aff. of D. Patrick McCullough, Esq., at Ex. F, filed April 24, 2006; see also discussion in Pl.s' Memorandum in Support of Motion to Compel p. 21, filed April 24, 2006.

for the ski resort itself, and the law is different for a skier v. skier collision. (A-66 line13). Although a skier may be aware of risks associated with skiing, it does not mean that s/he assumes the risk of another skier's negligence. See generally, Olson v. Hansen, at 128. To hold otherwise would allow primary assumption of risk to apply in every motor vehicle accident simply because drivers are aware that accidents can happen.

After reviewing the transcript of the proceeding and the court's order and judgment, one can see that the district court based its decision upon a misunderstanding of the law governing the facts of this case. Moreover, one can only conclude that the district court had decided to dismiss the case based solely on its own interpretation and opinion of the facts. This is not the district court's function on a motion for summary judgment. Instead, *it is for a jury to view all evidence* and then reach a decision regarding Respondent's negligence and liability, not the court. Even if it is unlikely that a party will prevail upon trial, that fact is not a sufficient basis for refusing such party his or her day in court. Whisler v. Findeisen, 280 Minn. 454, 116 N.W.2d 153, 155 (1968).

As such, the court in Lowry Hill Properties, Inc. v. Ashback Const. Co., held that if a plaintiff has made an offer of proof of **any evidence** to support a finding of negligence on the part of the defendants, it is improper to grant summary judgment to the defendants. 194 N.W.2d 767, 775 (Minn. 1971). In

Lowry, the plaintiffs offered to prove that defendant subcontractor caused excessive vibrations by the method it employed to rip up the old pavement; that such conduct was unnecessary and negligently performed; and that an alternative method of removing pavement was available. Id. at 440. Defendant subcontractor disputed much of this evidence. Nevertheless, the appellate court held that it was necessary to view the disputed facts in the light most favorable to the plaintiff. Id. In doing so, the appellate court further found that “the trial court **mistakenly made a finding of fact that defendants were not negligent, rather than making a determination as to whether or not there was evidence** to support a finding of negligence.” (emphasis added) Id. at 439.

So too did the trial court in the present case mistakenly make a finding of fact regarding Respondent’s negligence. Appellants have offered extensive evidence to show that 1) primary assumption of risk does not apply because Respondent owed a duty to Appellant Neal Peterson and Respondent was not released of such duty by way of any voluntary agreement to enter into any relationship with Neal Peterson; and that 2) Respondent enlarged any risk to Appellant Neal Peterson by negligently entering a ski trail directly into the path of Neal Peterson so as to cause a collision with, and severe injuries to, Neal Peterson. Just as in Lowry, this evidence is disputed by Respondent,

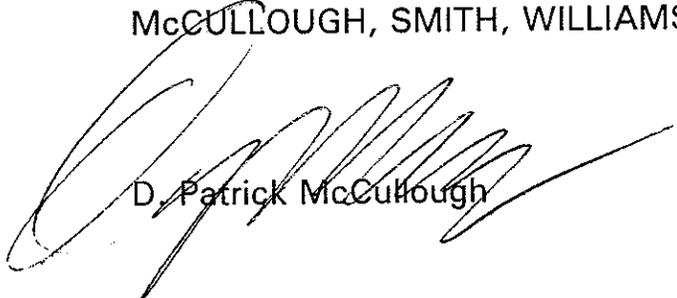
however when viewed in a light most favorable to Appellants, such evidence, when presented to a jury, may well lead to a finding of negligence on the part of Respondent. Therefore, the Court should hold, as it did in Lowry, that summary judgment should not be granted in favor of Respondent.

CONCLUSION

For these reasons, Appellants respectfully request that the Court of Appeals review all of the evidence de novo and in a light most favorable to the Appellants as prescribed by Minnesota law. After such review, Appellants ask that the Court find there are genuine issues of material fact present in this case. Appellants then ask the Court to reverse the district court's order, deny Respondent's motion for summary judgment, and remand the matter to the district court for trial.

Respectfully submitted,

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D. Patrick McCullough

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).