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**State of Minnesota**  
**In Supreme Court**

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AJA BJERKE,

*Respondent,*

vs.

SUZETTE ELAINE JOHNSON,

*Appellant,*

and

KENNETH DEAN BOHLMAN,

*Defendant.*

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**BRIEF AND APPENDIX OF APPELLANT  
SUZETTE ELAINE JOHNSON**

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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).

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## LEGAL ISSUES

### **I. Whether Appellant owed Respondent a duty to protect her from sexual assault.**

#### **A. Whether a special relationship existed between Appellant and Respondent.**

In its Order Granting Partial Summary Judgment, filed December 19, 2005, the district court dismissed Respondent's claims against Appellant finding no special relationship existed. The Minnesota Court of Appeals reversed, finding that Appellant entered into a special relationship with Respondent based on Restatement (Second) of Torts § 324A.

Apposite cases:

*Donaldson v. Young Women's Christian Ass'n*, 539 N.W.2d 789 (Minn. 1995)

*Gilbertson v. Leininger*, 599 N.W.2d 127 (Minn. 1999)

*H.B. ex. rel. Clark v. Whittemore*, 552 N.W.2d 705 (Minn. 1996)

#### **B. Whether the sexual assault suffered by Respondent was foreseeable to Appellant.**

In its Order Granting Partial Summary Judgment, filed December 19, 2005, the district court dismissed Respondent's claims against Appellant finding Defendant Bohlman's sexual assault of Respondent was not foreseeable by Appellant. The Minnesota Court of Appeals disagreed, finding there was enough evidence to raise a genuine issue of material fact on this issue.

Apposite cases:

*K.L. v. Riverside Med. Ctr.*, 524 N.W.2d 300 (Minn. Ct. App. 1994)

*Spitzak v. Hylands, Ltd.*, 500 N.W.2d 154 (Minn. Ct. App. 1993)

*Whiteford v. Yamaha Motor Corp.*, 582 N.W.2d 916 (Minn. 1998)

### **II. Whether the doctrines of comparative fault and primary assumption of the risk are proper defenses in a civil suit by a minor victim of sexual assault against a non-criminal defendant who is alleged to have allowed the assault to occur.**

In its Order Granting Partial Summary Judgment, filed December 19, 2005, the district court dismissed Respondent's claims against Appellant on the basis that Respondent voluntarily assumed the risk of her own actions. The Minnesota Court of Appeals reversed on the grounds that consent of a minor is not a defense to criminal sexual conduct, relying on Minn. Stat. § 609.342, Subd. 1(b).

Apposite cases:

*Greaves v. Galchutt*, 289 Minn. 335, 184 N.W.2d 26 (1971)

*Tate v. Bd. of Educ. of Prince George's Co.*, 155 Md. App. 536, 843 A.2d 890 (2004)

*Toetschinger v. Ihnot*, 312 Minn. 59, 250 N.W.2d 204 (Minn. 1977)

### STATEMENT OF THE CASE

From the summer of 1997 to the fall of 2001, Respondent Aja Bjerke (“Respondent”) was a periodic guest at Island Farm, a horse farm owned by Appellant Suzette Johnson (“Appellant”) near Lake Crystal, Minnesota. Respondent was invited to Island Farm to take riding lessons from Defendant Kenneth Bohlman (“Bohlman”) who lived with Appellant at the farm. At all times relevant, Respondent was a minor female. In June of 2002, Bohlman was charged with five counts of criminal sexual conduct involving Respondent and, in October of 2004, he was convicted of three of those counts and sentenced to 144 months in prison (See *State v. Bohlman*, No. A05-207, 2006 WL 915765 at \*2 (Minn. Ct. App. April 11, 2006). (A6.)

In July of 2002, Respondent commenced this civil suit (A12-17) in Blue Earth County District Court, alleging that Bohlman repeatedly sexually and physically assaulted her and that Appellant negligently permitted the assaults to occur. In September of 2005, Appellant moved for summary judgment on two counts, that she did not owe Respondent a duty and that Respondent had voluntarily assumed the risk of her injuries (A21-22). On December 19, 2005, following a hearing, the district court, by the Honorable Bradley Walker, entered its Order Granting Partial Summary Judgment, granting Appellant’s motion on both counts (A23-37). Respondent appealed. In its Opinion filed February 13, 2007, the Minnesota Court of Appeals reversed the district

court on both counts. *See Bjerke v. Johnson*, 727 N.W.2d 183 (Minn. Ct. App. 2007).

(A40-55.) Appellant then petitioned this Court for review, which was granted by Order dated April 25, 2007 (A56).

### STATEMENT OF FACTS

Appellant has been in the horse business for over thirty years. During that time, she has owned and resided at Island Farm, a horse farm near Lake Crystal, Minnesota, that consists of a house, a barn, and a riding arena on a small acreage (A59). Appellant is also a licensed attorney and, beginning in 1992, worked full-time for a law office in Mankato, Minnesota (A62).

During much of the past thirty years, Appellant has generously shared her knowledge and love of horses with young people. From 1972 until she started law school in 1987, she trained horses professionally and gave private riding lessons at Island Farm (A62). She also hosted interns from two horse management programs, one at Hennepin County Vocational School and the other at the University of Minnesota – Waseca. As a part of the curriculum, students in those programs, mostly young women, would spend 8-12 week periods at Island Farm learning the horse business. Appellant was paid nothing for hosting the interns, but provided them with room and board in exchange for the work they did around the farm (A65-66).

Appellant was accustomed to having young guests stay in her home. In addition to the interns, she frequently invited her own students to stay at Island Farm for one to two week periods (A66), although one young woman stayed longer, perhaps for as long as one year (A73). These students ranged in age from 13 to 18 (A66).

Appellant and Bohlman became acquainted at horse shows and, in 1982, developed a romantic relationship (A64). Like Appellant, Bohlman was a seasoned horseman. Sometime in 1983, he moved to Island Farm (A85) and lived there with Appellant until his incarceration in 2004 (A86). He did not pay rent, but he did buy groceries (A87). Appellant and Bohlman were physically intimate until 1994, when a medical procedure rendered Bohlman impotent (A68-69). In 1999, they began sleeping in separate bedrooms (A80-81). In addition to managing a local drug store, Bohlman and the farm manager, Andrea Pidde, gave riding lessons and trained horses at Island Farm (A58; A78). Prior to his arrest in 2002, Bohlman did not have a criminal record.

In 1993, Bohlman met Respondent and her mother, Vicki Bjerke, at a horse show he was judging in Le Seuer, Minnesota (A59-60; A94). Bohlman told Respondent and her mother that they were welcome to come to Island Farm for riding lessons (A60). Soon, Respondent's parents (sometimes referred to as the "Bjerkes") were bringing her to Island Farm for riding lessons on weekends on a regular basis (A60). Her parents would bring Respondent and her horse to Island Farm, and they would return home the same day (A94). Bohlman or Andrea Pidde taught almost all of Respondent's riding lessons. Appellant was present a time or two, and allowed Respondent to ride her horse (A95), but had relinquished her professional status in 1987 and was no longer teaching riding lessons (A62-63).

Early in the summer of 1997, when Respondent was 14 years old (Respondent's birthdate is April 20, 1983 (A112)), Bohlman and Appellant said that Respondent could stay at Island Farm briefly, as other young women had done, to observe, help out on the

farm, and take riding lessons (A60; A67). Respondent was initially invited for a week, but enjoyed herself very much and stayed about two and a half weeks (A68).

After her two and a half week stay at Island Farm, Respondent returned home to Elko, Minnesota to live with her parents and attend school (A105). During the next three school years, she continued to visit Island Farm on some weekends for lessons and occasionally attended horse shows with Bohlman, Appellant and Andrea Pidge (A70-74; A76). Her parents would often attend the horse shows with her and sometimes stayed at Island Farm also (A68; A108-09). During the summers of 1998 and 1999, she spent most of her time at Island Farm (A72; A76). In April of 2000, in her junior year of high school, Respondent moved to Island Farm where she lived until October of 2001 (A77). By then, Respondent had her driver's license and commuted back and forth from Island Farm to school. In the fall of 2000, Respondent open-enrolled at Minnesota State University Mankato ("MSU") and took all of her senior-year courses at MSU (A106). Respondent turned 18 on April 20, 2001.

Appellant was never paid for any of the training that Respondent, or Respondent's horse, received at Island Farm (A77). Likewise, Appellant did not pay Respondent for any of the work she did at Island Farm, although she did provide Respondent and her horse with room and board (A77). At all times Respondent had her own bedroom at Island Farm (A79-80).

During the time Respondent lived at Island Farm, Appellant's arrangement with Respondent and her parents was simple. Appellant expected Respondent to do her homework, attend school and help with farm chores and around the house (A77). When

Respondent attended horse shows, Appellant also expected her to behave properly, to not swear or drink (A78). Appellant provided Respondent and her horse with food and shelter, but she never had an agreement with Respondent or her parents that she would do that or any other thing (A67-68; A72-73) that could be considered a parental duty. The Bjerkes signed a county 4-H release authorizing Appellant, Bohlman or Andrea Pidde to obtain emergency medical treatment for Respondent if she needed it (A73).

Appellant believed that Respondent was responsible for herself (A75) and that her parents were ultimately in control of her (A75). Even in April of 2000, when Respondent came to stay full time at Island Farm and commute to school, Appellant never had a conversation with the Bjerkes about the new arrangement (A77). Appellant did not feel that she had any more authority over Respondent than did Bohlman or Andrea Pidde (A76).

While at Island Farm, Respondent spent most of her time with Bohlman or Andrea Pidde (A91). She did not look to Appellant for parental guidance. Respondent testified that if she needed to talk about something, "99.9% of the time those discussions would have been with Ken Bohlman" (A107). Because Appellant worked off the farm as a full-time attorney, and also attended horse shows, she was not physically present much of the time. In a statement she gave to law enforcement authorities dated April 15, 2002, Respondent stated: "[Appellant] really wasn't around a lot. She works and in general things really didn't involve her. She would not be home or she would be at work or had other things to do. I mean we really didn't do very many things with her" (A118). Respondent had no knowledge of any conversations between her parents and Appellant

or Bohlman about who was responsible for her during her time at Island Farm (A107). She considered her permanent residence in those years to be her parents' home (A104).

Bohlman testified that Respondent was responsible for herself, that she was not his or anyone else's responsibility (A88). Vicki Bjerke told Bohlman that no one at Island Farm was responsible for Respondent and that if Respondent had any problems, to call her (A88-89). Respondent was in frequent, if not daily, contact with her parents by phone or in person (A89; A90). Her parents provided her with spending money, took her to the doctor and eye doctor, and frequently asked her if everything was going okay (A91). Bohlman did not think Appellant was responsible for Respondent because they spent very little time together (A91). Bohlman never saw Appellant do anything to indicate that she had taken over the role of Respondent's parent, nor had the Bjerkes indicated to Bohlman that they thought Appellant or Bohlman had done so (A91). Bohlman did not think Appellant and Respondent had a close relationship (A92).

Respondent's father, Steven Bjerke, did not think Appellant had any parental responsibility for Respondent. He did not communicate to anyone, including doctors, teachers or insurance companies, that Appellant had specific parental duties for his daughter (A124). Mr. Bjerke believed his address, 3625 Vincent Drive, Elko, Minnesota, was always Respondent's permanent residence and address and the address she used on her driver's license. Respondent always had a room in his home. She attended school in New Prague (near Elko) until she open-enrolled at MSU. He attended all of Respondent's teacher conferences. He helped her learn to drive. He gave Respondent spending money when she needed it and paid for her horse show fees (A120-21).

Respondent's mother, Vicki Bjerke, testified similarly. Her testimony indicates that she believed her husband and she were responsible for Respondent (A95-98). She stated that she had no agreement with anyone at Island Farm regarding her daughter's care (A102). There were no guardianship papers signed appointing Appellant as guardian of Respondent (A96). The Bjerkes did not change Respondent's address to Island Farm on her social security or other records (A98). Vicki Bjerke has no recollection of Appellant ever transporting Respondent back and forth from Elko to Island Farm for training (A98). Most of Vicki Bjerke's conversations about Respondent were with Bohlman, not Appellant (A102). Vicki Bjerke was well aware that Appellant worked full time away from the farm and also attended horse shows, and that Respondent would be alone with Bohlman much of the time she was at Island Farm (A99).

It is Respondent's claim that, between the fall of 1998 and the spring of 2001, Bohlman repeatedly physically and sexually assaulted her, not only at Island Farm, but at other locations as well, including hotel rooms in Mankato and the Twin Cities (A115-16). Notwithstanding Respondent's allegations, she testified that Bohlman never forced her to have sex with him (A110). She stated that on one occasion she was "pissed off" that her mother's overnight stay at Island Farm prevented her from having private time with Bohlman (A109). She also testified that she and Bohlman went to considerable lengths to hide the nature of their relationship because they both felt it was inappropriate (A111). Respondent was in love with Bohlman and considered him to be a boyfriend (A113). She knew he would get in trouble if their relationship were made public, so she never told anyone (A115).

If there was a sexual relationship between Respondent and Bohlman, they successfully hid it from Appellant, because Appellant was not aware of it (A83). Respondent never told Appellant about it. She saw Appellant as a rival and was jealous when Bohlman spent time with Appellant (A113). Even in October of 2001, when Respondent went back to Island Farm to retrieve her belongings, she did not tell Appellant that she had been involved in a sexual relationship with Bohlman (A127). Bohlman did not tell Appellant either. The record indicates that a number of people suspected the relationship, but none of them shared their suspicions with Appellant until after Bohlman's arrest (A129; A131; A132-3). Appellant did not learn about Respondent's allegations against Bohlman until sometime after Respondent moved away from Island Farm.

Respondent did not tell her parents about her sexual relationship with Bohlman, although Vicki Bjerke suspected it (A100). But Mrs. Bjerke told her husband, not Appellant, about her suspicions (A100). Steven Bjerke did not personally observe anything about his daughter's relationship with Bohlman, that he thought was inappropriate, but when he asked Respondent if she was having any trouble, Respondent told him that everything was fine (A122; A123). Like his wife, he did not express any concern to Appellant (A122). Steven Bjerke phoned Respondent frequently while she was at Island Farm, and she always assured him that all was well (A125). Neither of the Bjerkes learned about their daughter's allegations until shortly before criminal charges were filed against Bohlman (A101; A123).

If anything, Appellant believed Respondent's relationship with Bohlman was like a best friend or a father (A82). Appellant's friend, Dara Stevens, told Appellant that Respondent had a "huge crush" on Bohlman and warned Appellant that it could damage her own relationship with Bohlman (A135).

## ARGUMENTS

### I. Appellant did not owe Respondent a duty to protect her from sexual assault.

**Standard of Review:** On an appeal from summary judgment, this Court examines two questions, whether there are any genuine issues of material fact and whether the lower courts erred in their application of the law. *Cummings v. Koehnen*, 568 N.W.2d 418, 420 (Minn. 1997) (citing *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990)). An appellate court must view the evidence in the light most favorable to the party against whom judgment was granted. *Cummings*, 568 N.W.2d at 420 (citing *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)).

Respondent's claim against Appellant is a claim of negligence. To prove a claim of negligence, Respondent must show: (1) Appellant owed her a duty, (2) Appellant breached that duty, (3) a causal connection between Respondent's injuries and Appellant's breach, and (4) injury in fact. See *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982). The existence of a legal duty is an issue for the court to determine as a matter of law. *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985).

Generally speaking, a defendant has no duty to control the conduct of a third person in order to prevent that person from causing injury to another. *Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1979). An exception to this rule permits imposing

a duty on the defendant if: (1) there is a "special relationship" between the defendant and the third person, and (2) the harm to be prevented is foreseeable. *Lundgren v. Fultz*, 354 N.W.2d 25, 27 (Minn. 1984).

In this case, Respondent claims that Appellant negligently permitted Bohlman to sexually assault Respondent, based on the theory that there was a special relationship between Respondent and Appellant and that Respondent's injuries should have been foreseeable by Appellant. The district court granted Appellant's motion for partial summary judgment, ruling that Appellant did not owe a duty of care to Respondent.

This issue was appropriate for summary judgment because the facts are not in dispute. By applying the appropriate law to the facts contained in the record, as the district court did, it is clear that Appellant did not owe Respondent a duty. Summary judgment is appropriate in a negligence action "when the record reflects a complete lack of proof of an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). More specifically, in the absence of a legal duty, the negligence claim fails. *Hudson*, 326 N.W.2d at 157.

The court of appeals reversed, finding both a duty under Restatement (Second) of Torts § 324A (but not under § 314A) and enough evidence to raise a genuine issue of material fact on foreseeability. The court of appeals has muddied the waters of negligence law with its analysis of this issue. Not only does the court ignore the testimony in the record, but it imposes the duty to protect, which it says is a parental responsibility, on Appellant, who is not Respondent's parent. Based on the court's opinion, it is no longer obvious who has parental responsibilities for minors. It is

incredulous that the court extends the duty to protect to a minor who, in this case, absolutely did not want to be protected.

**A. No special relationship existed between Appellant and Respondent.**

**1. Overview of Minnesota case law.**

A "special relationship" arises only in very limited circumstances, as in relationships between parents and children, masters and servants, and common carriers and their passengers. *Delgado*, 289 N.W.2d at 483-84. In addition, a special relationship has been found on the part of innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection. *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993). Also, as cited by the court of appeals, a duty may arise if there is evidence that an individual has in some way entrusted his or her safety to another, and the other has accepted that entrustment. This assumes that the harm to be prevented by the defendant is one that the defendant is in a position to protect against and should be expected to protect against. *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168 (Minn. 1989). Finally, a special relationship may also arise where one accepts responsibility to protect another, although there was no initial duty. *Walsh v. Pagra Air Taxi, Inc* , 282 N.W.2d 567, 570 (Minn. 1979).

In the past twenty years, Minnesota courts have found a duty to protect, based on a special relationship, in only four cases<sup>1</sup>: *Andrade v. Ellefson*, 391 N.W.2d 836, 843 (Minn. 1986) (county was in a special relationship with children in a day care that it inspected for licensure, giving rise to a duty to protect); *Erickson*, 447 N.W.2d at 169-170 (commercial parking ramp operator and security firm it hired owed a duty to protect customers from criminal assaults by third parties); *Lundman v. McKown*, 530 N.W.2d 807, 820-21 (Minn. Ct. App. 1995) (mother, stepfather, nurse and Christian Science practitioner had special relationships with sick child who died and should have protected him); and *Laska v. Anoka County*, 696 N.W.2d 133, 138-139 (Minn. Ct. App. 2005) (daughter of home day care operator, who agreed to help her mother supervise the children, accepted entrustment of all the children, including an infant who died while she was helping, and thus the daughter had a special relationship with the infant, giving rise to a duty of care).

By applying the law to the facts in the present case, it is obvious that Appellant was not Respondent's parent or employer, nor was this a common carrier/passenger situation. Appellant was not an innkeeper, since Respondent was not paying her to stay at Island Farm, nor was Appellant holding her land open to the public.

Thus, under existing Minnesota case law, the "very limited" circumstances in which Appellant could be found to have had a special relationship with Respondent are:

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<sup>1</sup> Bartell and Neubauer, *Laska v. Anoka County: A Quest for Justice for an Infant Who Died of SIDS Resulting in Appellate Court Finding Day Care Helper Owes a Duty to Protect*, 32 WMLR 1549, 1550 (2006).

(1) if she had custody of Respondent and Respondent was deprived of normal opportunities of self-protection because she was vulnerable and dependent upon Appellant, and Respondent expected Appellant to protect her (*Harper*, 499 N.W.2d at 474, *Lundman*, 530 N.W.2d at 821, and *Laska*, 696 N.W.2d at 138), or (2) if Respondent entrusted her safety to Appellant and Appellant accepted that entrustment and was in a position to protect, and was expected to protect, Respondent from Bohlman (*Erickson*, 447 N.W.2d at 168); or (3) if Appellant accepted responsibility to protect Respondent (*Walsh*, 282 N.W.2d at 570, and *Lundman*, 530 N.W.2d at 820-821).

The court of appeals determined that Respondent was not deprived of normal opportunities for self-protection. Although Appellant disputes that she took custody of Respondent, she would agree with the court that Respondent had the same opportunities for self-protection when she was in Appellant's home as she did when she was in her parents' home. *See Bjerke*, 727 N.W.2d at 190 (A48). That is, Respondent was just as capable of reporting her sexual abuse to Appellant as she was of reporting it to her parents, and she had those opportunities whether or not Appellant assumed parental duties for her.

## **2. Analysis under Restatement (Second) of Torts § 324A.**

The court of appeals concluded that Appellant had a special relationship with Respondent because, "when [Respondent's] parents entrusted her to [Appellant], [Appellant] agreed to shelter and feed [Respondent] and to protect her from the unreasonable risk of harm. By accepting the entrustment, [Appellant] thus undertook to perform duties [Respondent's] parents otherwise owed [Respondent]. . . [Appellant]

thereby entered into a special relationship with [Respondent] under section 324A.”  
*Bjerke*, 727 N.W.2d at 190 (citing Restatement (Second) of Torts § 324A and *Erickson*, 447 N.W.2d at 170) (A48). In this short analysis of the facts, the court of appeals did not specify what is meant by “entrusting” or “accepting entrustment of” parental duties, at what point that occurred in the present case, or how that translates into a special relationship.

Restatement (Second) of Torts § 324A (hereinafter “§ 324A”) reads in relevant part as follows:

“One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

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(b) he has undertaken to perform a duty owed by the other to the third person, or  
\*\*\*”

This Section of the Restatement says nothing about “special relationship.” In fact, the Restatement of Torts does not include an exception for parents to the basic rule that there is no duty to control the conduct of a third person in order to prevent that person from causing injury to another. In other words, the Restatement does not impose a duty on parents to protect their minor children (*See* Restatement (Second) of Torts §§ 315, 314A and 320), although Minnesota courts have recognized that custodial parents have such a duty (*See Lundman*, 530 N.W.2d at 820, and *Sunnarborg v. Howard*, 581 N.W.2d 397, 399 (Minn. Ct. App. 1997)).

Relying on § 324A, the court of appeals asserted that Appellant gratuitously undertook to perform the parental duties owed by the Bjerkes to their daughter. It is true

that Appellant provided Respondent with food and shelter and, in looking back on the situation, testified, "I'm sure that [Respondent's parents] felt that I would, you know, try and do my best in order to make sure that she didn't get injured, yes." (A68.) However the duties that Appellant undertook to perform, and did perform, were not duties undertaken on behalf of Respondent's parents, but rather, were duties of reasonable care she owed directly to Respondent and to all guests of Island Farm. As a host, Appellant was obligated to provide safe food, safe shelter, and safe premises for Respondent, and to not harm Respondent by her own actions or inactions. Minnesota law does not impose parental duties on Appellant in this situation and it is clear from the record that Appellant did not accept any such parental duties for Respondent.

Appellant was not Respondent's adoptive parent, stepparent, surrogate parent, legal guardian, custodian, babysitter, or day care provider. In no way did Appellant seek an *in loco parentis* relationship with Respondent.<sup>2</sup> Appellant did not assume any parental responsibility for Respondent's financial support, health care (other than emergency care), progress in school, discipline, sex education, moral training, transportation or protection. Appellant believed that Respondent was responsible for herself and that Respondent's parents were ultimately in control of her. She never made an agreement with Respondent's parents to do anything for Respondent, much less take

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<sup>2</sup> See *London Guarantee & Acc. Co. v. Smith*, 242 Minn. 211, 215, 64 N.W.2d 781, 784 (1954) ("The term 'in loco parentis', according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption and embodies the two ideas of assuming the parental status and discharging the parental duties.")

on parental responsibilities and, in fact, had very little contact and very few conversations with them at all.

The testimony of Respondent's parents confirms this. They believed Respondent was their responsibility and that she remained at all times under their parental care, custody and control. They never requested Appellant, either orally or in writing, to assume any responsibility for Respondent's care (other than emergency medical care). They provided financial support, transportation and health insurance, and attended all school conferences. Steven Bjerke testified that he never thought Appellant had any parental responsibility for his daughter. Vicki Bjerke testified that most of her conversations with anyone at Island Farm about her daughter were with Bohlman. She knew Appellant worked away from Island Farm and that Respondent would be alone with Bohlman much of the time. Even when she became suspicious of the relationship between her daughter and Bohlman, she talked to her husband, and neither she nor Steven Bjerke ever talked to Appellant about her suspicions. If either of them had any expectation that Appellant was responsible for protecting Respondent from sexual abuse, surely they would have addressed Appellant with their concerns.

In light of this overwhelming evidence, it is difficult to determine how the court of appeals concluded that Appellant undertook to perform parental duties on behalf of Respondent's parents. The court ignored the testimony of both Appellant and the Bjerkes, and summarily stated that Appellant assumed the duties. Since there are no facts in the record to support this conclusion, it must be the court's opinion that

Appellant assumed parental duties simply by allowing Respondent, a minor, to stay in her home.

Moreover, the court did not specify *which* parental duties were undertaken or *when* they were undertaken, despite its statement that “the extent of the duty owed under section 324A is defined by the extent of the undertaking.” *Bjerke*, 727 N.W.2d at 190 (A48). One can only assume that the court is implying an undertaking by Appellant to protect Respondent from the harm resulting from Respondent’s own intentional misconduct, and that the court believes this is a parental duty.

### **3. Analysis under *Erickson*.**

The court of appeals relied on *Erickson*, 447 N.W.2d at 165, in addition to § 324A, to determine that Appellant entered into a special relationship with Respondent. In *Erickson*, a parking ramp customer was raped in her car. The *Erickson* Court held that the commercial parking ramp operator owed a duty of reasonable care to protect its customers from criminal acts by third persons. *Id.* at 169. Further it held that the security firm hired by the parking ramp operator owed a similar duty of care, because it undertook that duty per § 324A. *Id.* at 170.

*Erickson* can be distinguished from the present case on many levels. First, all parties on whom the court in *Erickson* imposed a special relationship were business enterprises. They were in the business of making money and were hired to provide or perform a service. Appellant is not a business; Appellant is a private homeowner and she was not hired to protect Respondent. *Erickson* specifically states that “a private homeowner generally is not in a position to protect against third-party criminal activity

and is not expected to provide such protection” (citing *Pietila v. Congdon*, 362 N.W.2d 328, 333 (Minn. 1985)). Even “as to business enterprises generally, the law has been cautious and reluctant to impose a duty to protect.” *Erickson*, 447 N.W.2d at 168.

Second, all the parties in *Erickson* were in contractual relationships with one another. The customer/plaintiff had been a monthly contract parker in the parking ramp for six months prior to the crime. The parking ramp operator leased space in the ramp to another business and also employed the security firm. The purpose of these contracts was, presumably, to clarify the rights and duties of the parties to each other. By contrast, there was no agreement, written or otherwise, between Appellant and Respondent or her parents and the law should not impose a duty to protect on someone who has not knowingly undertaken that duty.

Third, in *Erickson*, the parking lot operator’s duty to protect extended only to criminal activity occurring on its premises. The court did not impose a duty on the operator to protect its customers from criminal activity occurring away from its premises. Yet that is precisely what the court of appeals imposed on Appellant. While some of the sexual encounters between Respondent and Bohlman occurred at Island Farm, when Appellant may or may not have been on-site, many of them occurred in hotels, oftentimes while Appellant was at work. It is not reasonable to expect Appellant to have protected Respondent in those situations.

Finally, *Erickson* states that the special relationship assumes that the harm to be prevented is something that the defendant is in a position to protect against and should be expected to protect against. *Id.* at 168. In that case, the parking lot operator knew that its

parking lot was in a dangerous location and attractive to criminals, and for that reason had hired a security firm. The operator was in a position to protect its customers from criminal activity occurring in the parking ramp and was therefore expected to do so. “Actual knowledge of a dangerous condition tends to impose a special duty to do something about that condition. Actual knowledge, not mere constructive knowledge, is required.” *Andrade*, 391 N.W.2d at 841. In the present case, Appellant was not in a position to protect Respondent from sexual assault by Bohlman, because she did not know about it, she did not suspect it, and nobody told her about it.

Erickson is not similar to the present case in any way and should not be used as precedent in determining the outcome of the present case.

**4. Analysis under *Gilbertson, Clark and Donaldson*.**

Three decisions by this Court, with fact situations similar to the facts of the present case, support Appellant’s position on the duty issue. In *Gilbertson v. Leininger*, 599 N.W.2d 127 (Minn. 1999), this Court held that social hosts did not have a duty to protect their guest from injuring herself after consuming alcohol, falling asleep on the couch and sustaining a head injury when she fell during the night. No special relationship existed between the hosts and their guest because (1) the hosts did not have physical custody or control of their guest, (2) the guest had not entrusted her health to her hosts and the hosts did not accept responsibility for their guest’s physical condition, and (3) the hosts did not have experience or training in treating medical conditions and were therefore not in a position to protect their guest from an unknown injury, and the guest had no reasonable expectation that they would protect her from injuring herself.

Likewise, no special relationship existed between Appellant and Respondent, who was a guest in Appellant's home, because (1) Appellant did not have physical custody or control of Respondent, (2) neither Respondent nor her parents had entrusted Respondent's sexual activity to Appellant, nor had Appellant accepted responsibility for Respondent's sexual activity, and (3) Appellant did not have any special experience or training in adolescent sexual behavior or in recognizing when sexual abuse was occurring and was simply not in a position to protect Respondent from an unknown risk of sexual abuse. Additionally, because Respondent chose to keep her sexual relationship with Bohlman a secret, and consciously went to great lengths to hide the relationship, Respondent had no reasonable expectation that Appellant could or would protect her from injuring herself. Thus, Appellant has no duty to protect Respondent.

In *H.B. ex. rel. Clark v. Whittemore*, 552 N.W.2d 705 (Minn. 1996), this Court ruled that the resident manager of a trailer park did not have a duty to protect children residing in the trailer park from the sexual abuse of another trailer park tenant, even though the children reported the abuse to her. The Court ruled that no special relationship existed between the manager and the children, because (1) the manager did not accept entrustment of the children's safety, and (2) the children were not in the manager's custody or control. The opinion states, "An adult who does not stand in a caretaking relationship with a child should not have thrust upon her an ill-defined legal responsibility . . . because the child chose to report mistreatment to her." *Id.* at 709.

The children in *Clark*, ages four to seven, eventually reported the abuse to their parents, which the Court recognized as their ability to protect themselves. Respondent,

who was much older, was also capable of reporting Bohlman's abuse, but instead chose to keep it secret. Respondent could have protected herself, if she had wished, but she chose to protect Bohlman instead. Respondent did not, therefore, entrust her safety to anyone, including Appellant, and Appellant did not accept the entrustment of Respondent's safety. Again, under this analysis, Appellant had no duty to protect Respondent.

Finally, in *Donaldson v. Young Women's Christian Ass'n*, 539 N.W.2d 789 (Minn. 1995), this Court held that a YWCA housing facility had no duty to prevent a guest's suicide. Although there is a special relationship between an innkeeper and a guest that gives rise to a duty to protect a guest from harm caused by third parties, an innkeeper has no duty to protect a guest from self-inflicted harm.

Likewise, in the present case, Appellant had no responsibility to protect Respondent from herself. Respondent intentionally engaged in a long-term, secretive, sexual relationship with Bohlman without reporting it to Appellant, her parents, or anyone else. As in *Donaldson*, the relationship between Appellant and Respondent lacked the degree of dependence and control necessary to form a special relationship.

**5. Public policy considerations.**

Whether a duty is imposed is ultimately a question of public policy. *Erickson*, 447 N.W.2d at 169. This case raises a number of important public policy considerations. The decision reached by the court of appeals is the wrong result in this case and for Minnesota law in general, for the following reasons.

**a. Section 324A does not apply to the performance of parental duties.**

This is the first case in Minnesota decided under § 324A that allows parents to relinquish parental duties to another person who arguably undertakes to perform those duties on behalf of the parents. In the great majority of Minnesota cases decided under § 324A, the principles of that section are applied to a private business or government agency that is either hired or obligated by law to perform a service. See *Andrade*, 391 N.W.2d at 842, *Laska*, 696 N.W.2d at 133, *Erickson*, 447 N.W.2d at 165, and *Walsh*, 282 N.W.2d at 567.

It is not good public policy to allow parents to informally relinquish their parental duties or for other persons to informally undertake those duties. Parental duties exist because of the unique relationship between parent and child, which is perhaps the most important and sacred relationship of all. Parental rights are not lightly severed by the law and should neither be assumed nor relinquished unintentionally. If a situation arises where those duties must be transferred from a parent to another person, it should be done only by implementing one of several available legal proceedings, such as adoption or appointment of a guardian or custodian, or by specific agreement. Formal legal proceedings or specific agreement are desirable because they define the nature of the relationship between the new parent figure and the child, and because they provide clarity as to that person's responsibilities for the child.

Without these formalities, it will be difficult if not impossible to determine who owes parental duties to a child. Until the court of appeals decision in the present case, parental duties were owed only by custodial parents, non-custodial parents during

visitation, and step-parents (*See Lundman*, 530 N.W.2d, at 820-21, where the court of appeals found a parental duty to protect on the part of the custodial mother and step-father). Under the present court of appeals ruling, it is no longer clear who owes parental duties to a minor or whether more than one person can owe the same parental duties at the same time.

According to Respondent's testimony in this case, she first had sexual intercourse with Bohlman during one of her weekend visits to Island Farm in January of 1998 (A114). If Appellant had a duty to protect Respondent at that time, it becomes a question whether all homeowners now have parental duties for every minor who is a weekend guest, or for that matter, an afternoon guest in their homes. In addition to homeowners, relatives, babysitters, and children's friends' parents can wonder if they have parental duties for children at other locations. Also, if someone such as Appellant owes parental duties to a minor, it becomes a question whether the custodial parents are relieved of those duties, or whether both parties owe parental duties simultaneously. The court of appeals did not determine in this case whether the Bjerkes relinquished their parental duties or remained jointly obligated.

The court of appeals decision raises additional questions, including how persons other than the child's custodial parent will know when they owe a duty to a child, and what particular duties they owe, especially when considering the duty to protect a child from criminal conduct. As noted in *Erickson*, 447 N.W.2d at 169, "[A] duty to protect against the devious, sociopathic, and unpredictable conduct of criminals does not lend itself easily to an ascertainable standard of care uncorrupted by hindsight nor to a

determination of causation that avoids speculation.” The problems inherent in carrying out a duty to protect from third party criminals are noted in *Goldberg v. Housing Authority of City of Newark*, 38 N.J. 578, 589, 186 A.2d 291, 297 (1962) which states, “Fairness ordinarily requires that a man be able to ascertain in advance of a jury's verdict whether the duty is his and whether he has performed it. . . It is an easy matter to know whether a stairway is defective and what repairs will put it in order, . . . but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic?”

In this case, it would have been easy for Appellant to know whether there was a defective condition in her barn and what repairs were necessary to make the condition safe for Respondent. But it is far more difficult to identify what could have been done to prevent Respondent from secretly engaging in a sexual relationship with Bohlman.

These questions illustrate the uncertainty of the law governing parental duties under the court of appeals decision in the present case. For the sake of clarity and good public policy, this Court should not allow parties to transfer or relinquish parental rights without a more formal proceeding or agreement.

**b. A parent has no duty to protect a minor child if the parent does not know the child is in danger.**

Only one of the cases in which Minnesota courts have found a duty to protect involves parental duty. The *Lundman* Court determined that the custodial mother and stepfather had the parental duty to protect the minor child by obtaining appropriate medical care. In that case, the custodial parents knew exactly what danger their son was

in and chose, for religious reasons, not to obtain medical help. *Lundman*, 530 N.W.2d at 820-21.

In the present case, the court of appeals assumed that Respondent's parents were obligated to protect her and that Appellant undertook that obligation. But in the present case, the minor child was a teenage girl who welcomed and pursued a sexual relationship and kept that relationship a secret. Without actual knowledge of the danger Respondent was in, there is nothing her parents or Appellant could have done to protect her. She did not want their protection and actively avoided it. As a matter of public policy, a parent cannot be expected to protect a child if the parent does not know the child is in danger. By extension, that same reasoning must apply to someone like Appellant, if she is found to stand in the shoes of a parent.

To impose on the Bjerkes, or on Appellant, a duty to protect in this case is as unjustified as it would have been to impose a duty to protect on the parents of the day care children injured in *Andrade*. In that case, the parents of children at a licensed day care facility sued the facility and the county when they discovered that their children had been physically and sexually abused by an employee of the facility. This Court found that the county, not the parents, owed a duty to the children. Although decided on other grounds, the court stated, "Actual knowledge of a dangerous condition tends to impose a special duty to do something about that condition. Actual knowledge, not mere constructive knowledge, is required." *Andrade*, 391 N.W.2d at 841.

It would have been equally unjustified to impose a duty to protect on the parents of the children in *Clark*. The children were sexually abused, without their parents'

knowledge, by another resident of the trailer park in which they lived. No one, least of all the courts, suggested the parents were at fault. When a parent does not know a minor child is being sexually assaulted, the parent is not in a position to protect the child.

It seems that, in the present case, the court of appeals has imposed a higher duty on Appellant than it would have imposed on the Bjerkes had these events occurred while Respondent was living with them.

Minnesota courts have imposed the duty to protect in very few cases. The present case should not be one of them. Both Appellant and the Bjerkes maintain that Appellant did not undertake to perform any parental duties, specifically the duty to protect, on behalf of Respondent's parents, nor did Respondent's parents expect her to assume any such duties. The only duty Appellant owed to Respondent was the duty of reasonable care that she owed to any guest of Island Farm. For all of the public policy reasons stated above, Minnesota should not impose parental duties or a special relationship of any kind on Appellant.

**B. The sexual assault suffered by Respondent was not foreseeable to Appellant.**

Even if Appellant assumed a parental duty to protect Respondent from Bohlman's sexual assaults, she cannot be found liable for the harm Respondent suffered unless the harm was foreseeable. "Foreseeability has been called the fundamental basis of the law of negligence. Justice Cardozo succinctly expressed the central relationship between the foreseeability of harm and the existence of a legal duty . . . stating that '[t]he risk reasonably to be perceived defines the duty to be obeyed.'" *Lundgren*, 354 N.W.2d at 28

(citing *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100, 59 A.L.R. 1253, 1256 (1928)).

In determining what is foreseeable, “courts look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.” *Whiteford v. Yamaha Motor Corp.*, 582 N.W.2d 916, 918 (Minn. 1998). The test of foreseeability is whether a defendant was aware of facts indicating a plaintiff was being exposed to an unreasonable risk of harm. *Spitzak v. Hylands, Ltd*, 500 N.W.2d 154, 158 (Minn. Ct. App. 1993).

“A duty to prevent a wrongful act by a third party will be imposed only where those wrongful acts can be reasonably anticipated.” Sexual assault will rarely be deemed foreseeable in the absence of prior similar incidents. *K.L. v. Riverside Med. Ctr.*, 524 N.W.2d 300, 302 (Minn. Ct. App. 1994). Generally, the issue of foreseeability is for the district court to decide, *Larson*, 373 N.W.2d at 289, although “close questions on foreseeability should be given to the jury.” *Lundgren*, 354 N.W.2d at 28.

In the present case, the district court determined that Respondent could not prevail on the issue of foreseeability. In its Memorandum, the court stated, “There is no evidence in the record that Bohlman had a prior criminal record or that [Appellant] knew that he had any propensity to be involved in abusive sexual behavior with children. There is some indication in the record that Bohlman may have acted inappropriately with another individual female minor who resided at [Island Farm], but there is no indication of record that [Appellant] was ever made aware of that single instance of claimed inappropriate behavior or had an opportunity to react to it” (A33).

An additional reason why Appellant would not have reasonably anticipated Bohlman's sexual assault of Respondent is that Bohlman was Appellant's boyfriend. Bohlman and Appellant participated in a sexual relationship until 1994 when a medical procedure left Bohlman impotent. When Respondent first came to Island Farm in 1997, it had been over two years since Appellant and Bohlman had engaged in sexual relations, although they continued to share a bedroom until 1999. Appellant had no reason to suspect that Bohlman would pursue a physical relationship with Respondent because she did not think Bohlman was capable of it.

Nonetheless, the court of appeals concluded that Respondent had submitted sufficient evidence to raise a genuine issue of material fact as to whether the risk of abuse was foreseeable. In reaching this conclusion, the court of appeals focused on one isolated incident, which occurred in January of 2001, three months prior to Respondent's 18<sup>th</sup> birthday, and three-and-a-half years after Respondent first visited Island Farm.

The court relied on the testimony of Janice Krenz, Appellant's friend, who stated that on one occasion, Appellant came to Krenz's home and said "that she had to get out of the house, that [Bohlman] and [Respondent] were fooling around on the couch and it was more than what a father-daughter should be doing and it made her uncomfortable, it was too sexual and she left" (A130). Krenz does not say what the actual behavior was, nor whether she thought Appellant should have reasonably anticipated harm to Respondent. Based on this testimony, a jury would have to speculate as to what Appellant observed. Respondent does not testify as to the event. This information is

vague and second-hand and does not indicate that the sexual abuse was foreseeable to Appellant.

The court also cited an incident that occurred in October of 2001, when Respondent and her father came to Island Farm to collect Respondent's belongings and Steven Bjerke allegedly found some of those belongings, including a pair of Respondent's underwear, in Bohlman's bedroom. However, if true, this incident occurred a full six months after Respondent turned 18. Whether Appellant knew or should have known that Bohlman and Respondent were sharing a room at that time is immaterial to whether Appellant should have reasonably anticipated that they were engaged in a sexual relationship when Respondent was still a minor. Further, there is no showing that Appellant knew what was in Bohlman's bedroom, either at that time or when Respondent was a minor, since Appellant did not share that bedroom, nor does Respondent claim to have shared that bedroom with Bohlman.

To summarize, the court of appeals, based on one incident that occurred when Respondent was almost 18 years old, believes Respondent has put forth a "viable" argument that the risk of sexual abuse was foreseeable to Appellant. But this one incident does not make this a "close question" of foreseeability, enough to send the issue to a jury. Even viewed in the light most favorable to Respondent, this one incident is dwarfed by the large amount of evidence indicating that Appellant could not have reasonably anticipated Bohlman would sexually assault Respondent. Appellant thought Bohlman was impotent. Bohlman had no history of this behavior, so far as Appellant knew. Appellant worked away from Island Farm and did not spend much time with

Respondent. Appellant did not witness what she considered to be “inappropriate” behavior from Bohlman. Many of the sexual encounters between Bohlman and Respondent occurred away from Island Farm in hotel rooms. Finally, Respondent actively concealed the relationship from Appellant.

Taking the evidence as a whole, the district court correctly reached the conclusion that Respondent could not prevail on the issue of foreseeability. Even the jury in the criminal trial associated with this case acquitted Bohlman of two counts of criminal sexual conduct that occurred during this time period, after Respondent turned 16, implying that the jury believed Bohlman was not in a position of authority over Respondent.

**II. The doctrines of comparative fault and primary assumption of the risk are proper defenses in a civil suit by a minor victim of sexual assault against a non-criminal defendant who is alleged to have allowed the assault to occur.**

**Standard of Review:** As stated above, on appeal from summary judgment, this Court examines whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Cummings*, 568 N.W.2d at 420. ¶The evidence must be viewed in the light most favorable to the non-moving party, and any doubts regarding the existence of a material fact should be resolved in that party's favor. *Clark*, 552 N.W.2d at 707. On appeal from summary judgment where no material facts are in dispute and the only question is one of law, this Court reviews *de novo*. *Dairyland Ins. Co. v. Starkey*, 535 N.W.2d 363, 364 (Minn. 1995).

**A. Overview of Minnesota case law.**

“Primary assumption of the risk” arises when parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks. Under the doctrine of primary assumption of the risk, the defendant has no duty to protect the plaintiff from the well-known, incidental risks assumed, and the defendant is not negligent if any injury to the plaintiff arises from an incidental risk. *Snilsberg v. Lake Washington Club*, 614 N.W.2d 738, 743 (Minn. Ct. App. 2000). Under this doctrine, the plaintiff consents to look out for himself and relieves the defendant of any duty. *Id.* at 743-44. Primary assumption of the risk acts as a complete bar to a plaintiff’s recovery. *Schneider v. Erickson*, 654 N.W.2d 144, 148 (Minn. Ct. App. 2002). *See also Rieger v. Zaskoske*, 321 N.W.2d 16, 23 (Minn. 1982). Although generally a question for the jury, the court may decide whether “primary assumption of the risk” applies as a matter of law when reasonable people can draw only one conclusion from the undisputed facts. *Snilsberg*, 614 N.W.2d at 744.

Primary assumption of the risk is proved if the plaintiff:

- (1) Had knowledge of the risk;
- (2) Had an appreciation of the risk; and
- (3) Voluntarily chose to take the risk when faced with a choice of avoiding it.

*Id.* at 746.

There is legal precedent in Minnesota that a minor can primarily assume the risk. In *Greaves v. Galchutt*, 289 Minn. 335, 184 N.W.2d 26 (1971), this Court held that the defense of assumption of the risk was appropriate in an action to recover damages for the wrongful death of an 11-year-old child killed by a rifle discharged by a playmate. There is also legal precedent in Minnesota that a minor can be found contributorily negligent.

In *Toetschinger v. Ihnot*, 312 Minn. 59, 250 N.W.2d 204 (1977), a child not yet six years old was found to be contributorily negligent in causing his injuries sustained when he suddenly ran across a highway and was struck by a car.

**B. Application of law to the present case.**

The district court allowed Appellant to amend her Answer to include the affirmative defenses of primary assumption of risk and comparative negligence. (A18-20). That is, Appellant alleged that, (1) even if she did have a duty to protect Respondent, that duty was relieved because Respondent knowingly entered into a consensual sexual relationship with Bohlman and primarily assumed the risk of any damages associated with that relationship, and (2) even if Respondent did not primarily assume the risk, her negligence in the matter should be compared with Appellant's negligence, if any. The district court concluded that Respondent assumed the risk of participating in a "consensual, clandestine relationship with Bohlman." (A33).

It is clear from the record in the present case that Respondent understood and appreciated the risk of her behavior. She and Bohlman went to considerable lengths to hide their relationship because they both felt it was inappropriate. Respondent knew that if they were found out, Bohlman would be in legal trouble. Even though Respondent had ample opportunity over a four-year period to avoid sexual contact with Bohlman, either by reporting him to her parents or to Appellant, or by staying away from Island Farm, she continued to return to Island Farm and voluntarily engage in sex with him, which she testified was never forced. There is no question that Respondent's sexual relationship with Bohlman was consensual, that she knew it was wrong and could be harmful, that she

could have avoided it, but voluntarily engaged in it anyway, and that she contributed to her injuries by consenting to it. These uncontroverted facts establish primary assumption of the risk or, at the very least, comparative fault.

Nobody is blaming Respondent for the sexual abuse she suffered from Bohlman. Bohlman's guilt has already been established in criminal court. But now that Respondent has chosen to bring this lawsuit seeking civil damages from Appellant, who was not a party in the criminal case, it is only right that Respondent's actions in assuming the risk be examined. To hold Respondent appropriately accountable for her conduct is not to blame her for Bohlman's criminal conduct.

**C. Analysis by the court of appeals.**

Nonetheless, the court of appeals has ruled that Respondent cannot have assumed the risk in this case because she was a minor and thus protected by Minn. Stat. §§ 609.342, Subd. 1(b) (consent is not a defense where the victim is between 13 and 16 years of age and the actor is more than 48 months older than the victim and in a position of authority over the victim). *Bjerke*, 727 N.W.2d at 194. (A51). Appellant agrees this is a good rule of law as applied to Bohlman. But Appellant was a bystander, not an actor, in this drama, and should not be bound by the same rule. Whether, for civil-liability purposes, the doctrines of primary assumption of the risk and comparative fault are proper defenses in a civil suit by a minor victim of sexual assault against a non-criminal defendant who is alleged to have allowed the assault to occur, is an issue of first impression in Minnesota.

The court claims to follow a majority of jurisdictions, which it says excludes consent as a defense in these types of cases. *Id.*, at 193 (A51). But, despite the court's statement, there is no national consensus regarding the age of consent, or regarding the treatment of adolescent consent to sexual activity. Criminal and civil laws handle the same consensual behavior differently<sup>3</sup> and jurisdictions are split almost evenly on this issue. The court of appeals also ignores the fact that Appellant was not the perpetrator in this case, but rather a bystander who is alleged to have allowed the assault to occur. On that narrower issue, existing case law favors Appellant's position.

**D. Case law from other jurisdictions.**

*Tate v. Bd. of Ed. of Prince George's Co.*, 155 Md. App. 536, 843 A.2d 890 (2004) is such a case. In *Tate*, a minor high school student was sexually assaulted by an uncle with whom she left school without permission. The student deceived school staff as to her intention to leave school with her uncle. The student sued the school board for negligence, for permitting her to be taken from school by someone other than her parent, contrary to school policy. The Maryland Court of Appeals held that the trial court properly dismissed the case because the student was competent to consent, for purposes of civil litigation, to being in her uncle's company, knowing his intentions, and that she therefore assumed the risk of her conduct. The *Tate* Court held that the facts of the case permitted only one conclusion, that the plaintiff knew the risk involved. *Id.*, at 892. The defense of assumption of the risk precluded recovery in the negligence action.

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<sup>3</sup> Drobac, *Sex and the Workplace: "Consenting Adolescents and a Conflict of Laws,"* 79 Wash. L. Rev.471, 498 (2004).

In Maryland, as in Minnesota, consent of the victim was not available as a defense to a criminal prosecution. However, the *Tate* Court found that the rule was not “equally applicable in the civil court,” and held that the defense of assumption of the risk was available to a defendant who is sued in tort by a minor plaintiff. *Id.*, at 897. The *Tate* Court cited several Maryland opinions where a minor was found to have assumed the risk of his or her injuries, completely barring recovery, and concluded that a minor could also assume the risk of sexual assault if she would reasonably have known what lay before her. *Id.*, at 898.

Courts in other jurisdictions have determined this issue in a manner similar to the *Tate* Court. See *McNamee v. A.J.W.*, 519 S.E.2d 298 (Ga. Ct. App. 1999) (homeowners had no duty to prevent their minor son from having sex with a 15-year-old girl in their home while they were at work, and evidence that the minor girl consented to the sexual acts was relevant and admissible, despite Georgia law that consent is not a defense to statutory rape of a person under age 16); *Beul v. ASSE Int’l, Inc.*, 233 F.3d 441 (7<sup>th</sup> Cir. 2000) (whether the sponsor organization for a 16-year-old foreign exchange student was negligent in failing to protect the student from becoming sexually involved with her host father was a jury question; jury was instructed that Wisconsin law prevented a child under age 18 from consenting to sexual intercourse and that it was to consider the student’s comparative fault; jury assessed 41% fault to the student); and *Benefield v. Bd. of Trs. of the Univ. of Alabama at Birmingham*, 214 F. Supp. 2d 1212 (N.D. Ala. 2002) (in this Title IX case, the state university could not be held liable for failing to prevent a 15-year-old student’s consensual sexual activities with other students, even though the

student was below the age of consent; the university did not have *in loco parentis* relationship with the minor student, even though she lived on campus).

*Tate*, *McNamee*, and *Benefield* are similar because, in those cases: (1) the defendants were all third parties and not the perpetrators of sexual misconduct with the minor plaintiffs, (2) the courts found those defendants had no duty to the minor plaintiffs, and (3) the behavior of the minor plaintiffs, all of whom voluntarily engaged in improper sexual relations, was considered by the courts in determining fault. In *Beul*, the sponsor organization had a contractual relationship with the foreign exchange student and her parents and may have had a duty to protect her, but the court still allowed the minor plaintiff's fault to be compared to the fault of the other parties.

In addition, other jurisdictions have allowed juries to consider the minor plaintiff's conduct in sexual abuse cases where the claim was directly against the perpetrator, or against a third party who employed the perpetrator, or otherwise had a duty to control the perpetrator, which is different from the facts in the present case. See *Braun v. Heidrich*, 62 N.D. 85, 241 N.W. 599 (1932), *Parsons v. Parker*, 160 Va. 810, 170 S.E.1 (1933), *Barton v. Bee Line, Inc.*, 265 N.Y.S. 284, 238 A.D. 501 (1933), *Harvey Freeman & Sons, Inc. v. Stanley, et. al.*, 259 Ga. 233, 378 S.E.2d 857 (1989), *Cynthia M. v. Rodney E.*, 279 Cal. Rptr. 94 (Cal. Ct. App. 1991), *Robinson v. Roberts*, 423 S.E.2d 17 (Ga. Ct. App. 1992), *L.K. v. Reed*, 631 So.2d 604 (La. Ct. App. 1994), and *Doe by Roe v. Orangeburg Co. Sch. Dist.*, 518 S.E.2d 259 (S.C. 1999). In some of these cases, the plaintiff's conduct was considered only as to damages.

The court of appeals cited several cases to support its position that consent should be excluded as a defense in civil suits arising out of statutory rape, but are all easily distinguished from the present case. The court cited *Christensen v. Royal Sch. Dist. No. 160*, 124 P.3d 283 (Wash. 2005), where a minor student sued the school district and principal for negligently hiring and supervising a teacher who sexually assaulted her. The Washington Supreme Court held that the school district and principal had a duty to control the teacher in order to protect the student, unlike the present case where Appellant had no duty to control Bohlman or to protect Respondent.

The court also cited *Wilson v. Tobiassen*, 777 P.2d 1379 (Or. Ct. App. 1989), where a boy scout sued his council and the national organization for negligent supervision of a troop leader, who sexually assaulted him. The Oregon Court of Appeals extended Oregon's criminal code provision, that a person under age 18 is incapable of consenting to a sexual act, to civil cases, and held that the council and national organization were liable for damages. Again, the council and national organization had a duty to supervise individual troop leaders, unlike Appellant who did not have a duty to supervise Bohlman. Beyond that, a later unpublished case, "*Z*" *ex. rel. Reeder v. Worley*, No. Civ. 00-1725-KI, 2001 WL 34047074 (D. Or. July 2, 2001) (A136-37), held that *Wilson* did not address the issue of whether consent can be relevant to damages even if it is not relevant to liability. Therefore, in Oregon, it is still an open question whether courts will consider the consent of a minor as a defense, as to damages.

Finally, the court cited *Doe by Doe v. Greenville Hosp Sys.*, 448 S.E.2d 564 (S.C. Ct. App. 1994), where a minor "candy striper" sued a hospital for the negligent hiring and

supervision of its employee who sexually assaulted her. The South Carolina Court of Appeals held that South Carolina's consent law, making a minor under the age of 16 incapable of voluntarily consenting to a sexual battery committed by an older person, is applicable in either the criminal or civil context. As in *Christensen* and *Wilson*, the hospital had a duty to supervise its employee, a duty Appellant did not have over Bohlman. In addition, in a subsequent case already cited above, the South Carolina Supreme Court modified the holding in *Greenville* and determined that evidence of a minor student's consent to a sexual battery was admissible insofar as it pertained to her claim for damages. See *Orangeburg Co. Sch. Dist.*, 518 S.E.2d 259.

**E. Restatement (Second) of Torts § 892C(2).**

In its opinion in this case, the Minnesota Court of Appeals also relied on the language of Restatement (Second) of Torts § 892C(2), which reads as follows:

“(2) If conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action.”

The court of appeals used this Section of the Restatement to extend the restrictions of Minn. Stat. § 609.342, Subd. 1(b) to Appellant, a non-criminal defendant in this civil suit. But the court is misguided in applying § 892C(2) to Appellant. Comment “d” to Section 892C(2) states, “. . . In furtherance of the legislative purpose, the court will hold that the consent given is ineffective, not only as a defense in a criminal prosecution but also as a defense to a tort action for the criminal conduct . . .”(emphasis added).

Respondent is not suing Appellant in a tort action for the criminal conduct, but rather for negligence. Based on Comment “d,” it is clear that Section 892C(2) is meant

to apply to civil defendants like Bohlman, who was found guilty of criminal conduct, and not to defendants like Appellant. Comment “d” does not say that consent is ineffective as a defense to a tort action for negligence, but that is what the court of appeals has done. As discussed below, the court’s application of this Section serves no public purpose.

**F. Public policy considerations.**

The court of appeals found no reason to not apply Minn. Stat. § 609.342, Subd. 1(b) to Appellant in this civil case. *See Bjerke*, 727 N.W.2d at 196. But there are several reasons why this Court should not affirm the court of appeals decision. Three important public policy considerations follow.

**1. Barring comparative fault defenses for non-criminal defendants does not prevent sexual abuse of children.**

The court of appeals opinion states, “Minnesota has unambiguously declared its strong interest in preventing the sexual abuse of children.” *Id.*, at 194 (A52). However, barring comparative fault defenses for non-criminal defendants in civil cases for sexual abuse does not promote the State’s interest in preventing sexual abuse. That is because the criminal statutes, such as Minn. Stat. § 609.342, Subd. 1(b) cited by the court of appeals, were not enacted to protect children from people like Appellant, who was a bystander in this case. Further, the statutes impose no duty on people like Appellant.

The legislature has not determined, nor has the court of appeals substantiated, that children need protection from bystanders like Appellant. When children who have suffered sexual abuse pursue a negligence action against people like Appellant, they are no less protected from sexual abuse if their own conduct is scrutinized. To deprive a

non-criminal defendant, accused of negligence, of the usual comparative fault defenses does not afford children any additional protection from sexual abuse. The criminal prosecution and the unavailability of the consent defense in civil actions against the criminal himself are sufficient to protect children from such abuse.

**2. Barring comparative fault defenses for non-criminal defendants makes them strictly liable and relieves plaintiffs of personal responsibility.**

In the present case, if it is established that Appellant was negligent in not protecting Respondent from Bohlman's sexual abuse, and if Appellant is also barred from raising Respondent's consent as a defense, for the purpose of comparing Respondent's fault to Appellant's fault, then Appellant would be held strictly liable for her negligence, just as Bohlman would be held strictly liable for his intentional conduct. Respondent, on the other hand, would be totally relieved of personally responsibility for her role in this case. This is an unfair result and leads to poor public policy.

It is poor public policy to make Appellant strictly liable if she is found negligent in protecting Respondent, just because this is a civil case dealing with sexual misconduct. Everyone, even minors, has a duty to use reasonable care for their own safety, especially in the delicate area of sexuality. To allow a minor to engage in sexual misconduct, knowing she will have no liability, serves no public purpose. Rather than protecting a minor from sexual activity, this policy actually encourages it. Beyond that, in contrast to other areas of negligence law, this policy allows minors to take advantage of bystanders, like Appellant, forcing them to pay damages for injuries invited by the minor, which could have prevented *but for* the minor's conduct. It is unwise public policy to protect

minors who engage in such deliberate actions, then seek money damages in claims of negligence against bystanders as a result of their own conduct. It is sufficient to protect minors from the criminal participants in such conduct.

**3. Uniformity in negligence law requires minors' fault be compared with fault of non-criminal defendants in civil sexual abuse suits.**

As noted above, there is legal precedent in Minnesota for a minor to primarily assume the risk (*See Greaves*, 184 N.W.2d at 28) and to be found contributorily negligent (*See Toetschinger*, 250 N.W.2d at 207). There is no good policy reason to distinguish claims of negligence for sexual misconduct, and to hold that a minor cannot assume the risk or be found contributorily negligent, particularly when the defendant is not the perpetrator, but a third person alleged to have allowed the abuse to occur. A better public policy is to treat all negligence suits alike and allow the same defenses against all types of negligence claims.

The court of appeals reasoned that Minn. Stat. § 609.342, Subd. 1(b) precludes consideration of a minor's fault because, under the statute, a minor is incapable of consenting to sexual abuse if the minor is under age 16. But that statute does not make a minor incapable of summoning help, or of reporting the sexual abuse. The proper question in the present case is whether Respondent assumed the risk, or used reasonable care under the circumstances in securing her own safety (*See Toetschinger*, 250 N.W.2d at 207, where the court affirmed the trial court's jury instruction, which stated, "In the case of a child, reasonable care is that care which a reasonable child of the same age, intelligence, training and experience . . . would have used under like circumstances").

A jury is best able to make that determination, particularly in this case, where much of the sexual activity Respondent complains of occurred after she was 16 years old. A jury must be allowed to consider Respondent's age, intelligence, training and experience in determining whether she acted reasonably under the circumstances.

For all these policy reasons, Appellant urges this Court, like the courts in *Tate*, *McNamee*, and *Benefield*, to allow the consideration of Respondent's conduct in order to determine whether Respondent assumed the risk of her sexual activity with Bohlman. The facts are clear that Respondent reasonably knew what lay before her and she should not be allowed to shift the entire burden of her poor choices to Appellant.

Implicit in the district court ruling in this case is that, if primary assumption of the risk did not apply, comparative fault would still be available to Appellant as a defense. The court of appeals held that assumption of the risk did not apply, but did not address the issue of comparative fault. Even if this Court agrees that Respondent could not assume the risk, the parties need a ruling on comparative fault in the event this case is remanded.

### CONCLUSION

In this case, the Court must determine whether Appellant, who periodically welcomed Respondent, a minor visitor, to her farm, had a parental duty to protect Respondent from sexual abuse encountered at the farm and elsewhere, when Respondent kept the sexual relationship a secret from Appellant. The Court must also determine whether the sexual abuse was foreseeable to Appellant. Finally, the Court must

determine whether the normal defenses of assumption of the risk and comparative fault are available to Appellant in assessing fault.

With regard to duty, Appellant urges this Court to consider the well-reasoned public policies set forth above and determine that Appellant did not owe Respondent a parental duty of protection. The only duty Appellant owed to Respondent was the same duty of reasonable care she owed to all her guests. The record is clear that Appellant was not Respondent's parent and did not knowingly assume any parental responsibilities for Respondent, nor did Respondent's parents relinquish any parental responsibilities. Without formal legal proceedings to determine parental duties, no duties should be transferred or relinquished. Additionally, no one, not even Respondent's parents, could be expected to protect Respondent from danger of which they were unaware. To impose a duty on Appellant, to protect Respondent from an unknown danger, is to hold her to a higher standard than a parent has. Minnesota courts have imposed the duty to protect in very few cases (and have never imposed the duty to protect on a homeowner). For all the reasons cited, this case should not be one of them.

Beyond duty, it was not foreseeable to Appellant that Respondent would become sexually involved with Bohlman, Appellant's boyfriend. There is no evidence that Bohlman had a prior criminal record or had ever been sexually abusive to children, and Appellant believed he was impotent. The court of appeals pointed to just one incident that it says may have made the abuse foreseeable, but that incident was relayed secondhand, was vaguely described, and occurred within just three months of Respondent's 18<sup>th</sup> birthday. Throughout, Respondent actively concealed her relationship

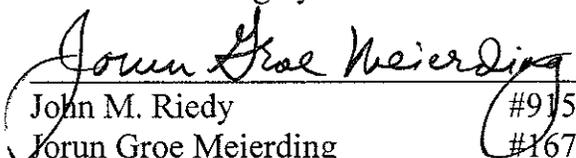
with Bohlman from Appellant. Considering all the evidence, foreseeability is not a close question in this case and was appropriately decided by the district court.

Finally, there is no good reason to bar Appellant's comparative fault defenses in this case. Barring her, a non-criminal defendant in a civil case for sexual abuse, from raising these normal defenses, does not promote the State's interest in protecting children from sexual abuse and only serves to impose strict liability on her and others like her. It also relieves plaintiffs like Respondent from personal responsibility for their actions and differentiates between negligence claims in cases of sexual abuse and other negligence cases.

Respondent's conduct in this case was a major factor in the duration and amount of sexual abuse she endured and should be considered in assessing any fault. Respondent's testimony, that she loved Bohlman, that she wanted to continue a sexual relationship with him, and that she repeatedly returned to Island Farm primarily for that purpose, presents evidence so overwhelming that the district court could reach no other conclusion than that Respondent knew of the risk, appreciated it, could have avoided it, and voluntarily chose to repeatedly encounter the risk. There is no evidence to the contrary.

Appellant Johnson respectfully requests that this Court reverse the decision of the Minnesota Court of Appeals and reinstate the ruling by the district court in all respects.

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