

A08-1209

State of Minnesota  
In Supreme Court

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Patrick Brian Stewart,

Respondent,

v

Christopher Michael Koenig and  
Jean Marie Koenig,

Petitioners.

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**BRIEF AND APPENDIX OF PETITIONERS  
CHRISTOPHER MICHAEL KOENIG  
AND JEAN MARIE KOENIG**

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STATEMENT OF THE ISSUE

IS A DRIVER OF A MOTOR VEHICLE OPERATING HIS VEHICLE ON A PRIVATE DRIVEWAY THAT REQUIRES THE MOTOR VEHICLE TO CROSS A STATE RECREATIONAL TRAIL TO OBTAIN EGRESS TO A PUBLIC ROADWAY A "TRAIL USER" AND THEREFORE SUBJECT TO A RULE PROMULGATED BY THE DEPARTMENT OF NATURAL RESOURCES WHICH STATES: "ANY TRAIL USER WHO IS ABOUT TO ENTER ONTO OR CROSS A TRAIL TREADWAY SHALL YIELD THE RIGHT-OF-WAY TO ANY TRAIL USER ALREADY ON THE TREADWAY TO BE ENTERED OR CROSSED"?

In re Alexandria Lake Area Sanitary District NPDES/STES Permit No. MN0040738,  
763 N.W.2d 303 (Minn. 2009).

Minn. Stat. § 645.001.

Minn. Stat. § 645.08.

## STATEMENT OF THE CASE AND FACTS

This case arises out of a June 1, 2005 automobile/bicycle collision that occurred where the Douglas Trail, a state recreational trail located in Olmsted County, crosses a private driveway. (A. 22; T. 67). The trial court, the Honorable Joseph F. Chase, held that a motor vehicle while being operated on a private driveway that crosses a state recreational trail does not become a “trail user” at that crossing and is not subject to Department of Natural Resources-promulgated trail rules. (T. 213-217; A. 7). The Court of Appeals held to the contrary and on that ground granted a new trial. Stewart v. Koenig, 767 N.W.2d 497 (Minn. Ct. App. 2009). (A. 1). Petitioners/Defendants seek reversal of the Court of Appeals’ grant of a new trial and reinstatement of the judgment entered in favor of Petitioners.

**A. Douglas Trail Is a State Recreational Trail Maintained by the Department of Natural Resources.**

The Department of Natural Resources (DNR) has acquired railroad rights of way and converted railroad beds into recreational trails. State of Minnesota by Washington Wildlife Preservation, Inc. v. State, 329 N.W.2d 543, 546 (Minn. 1983). The DNR also has been statutorily authorized to acquire easements or other interests in private land for trails and recreational uses related to trails. Minn. Stat. § 84.029, subd. 2; Minn. Stat. § 85.015, subd. 1(a). (A. 36). In addition, and pursuant to Minn. Stat. § 85.015, subd. 1(b) (A. 36), a private property owner who has a preexisting right of ingress and egress over the trail right-of-way is granted, without charge, a permanent easement for ingress and egress purposes. Id.

Douglas Trail (Trail) is a legislatively authorized state recreational trail managed by the DNR. Minn. Stat. § 85.015, subd. 4. (A. 37). DNR state trail rules provide the framework for allowable trail uses as described:<sup>1</sup>

In general. Subject to the limitations imposed by these parts and other duly enacted statutes, rules and ordinances, or unless specifically prohibited by the commissioner, trails may be used for snowmobiling and all nonmotorized forms of recreation, including but not limited to hiking, bicycling, horseback riding, snowshoeing, cross-country skiing, camping and picnicking.

Minn. R. 6100.3400, subp. 1. (A. 29).

Definitions exist in Minn. R. 6100.3300 for bicycle, horseback riding, snowmobiles and motor vehicles. (A. 27). Minn. R. 6100.3400, subp. 2 prohibits motorized use of the trail except for snowmobiles.

Subpart 2. Motor vehicles. No motor vehicle, other than a snowmobile, shall be operated within a trail, except upon a legal road or highway as those terms are defined in Minnesota Statutes, section 160.02, subdivision 26, and except as authorized by the commissioner.

(A. 29).

**B. Respondent Stewart Is an Avid Bicyclist Who Used the Trail to Train for a Race.**

Respondent/Plaintiff Patrick Brian Stewart (Stewart) is an avid bicyclist who races competitively. At the time of the June 1, 2005 accident, he was riding his Trek 5200 carbon fiber bicycle on the paved Trail. (T. 65, 69, 81). Stewart was training for an

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<sup>1</sup> The promulgation of such rules by the DNR governing trail use is statutorily authorized by Minn. Stat. §§ 84.03 and 84.86. (A. 34, 30).

upcoming bicycle race and estimated he was traveling at approximately 18 to 20 miles per hour on the Trail. (T. 68, 77, 104).

**C. Petitioner Koenig Was Operating His Mother's 1994 Ford Escort on a Private Driveway.**

At the same time, Petitioner/Defendant Christopher Koenig (Koenig), driving a 1994 Ford Escort owned by his mother, Petitioner/Defendant Jean Koenig, had left the home of a friend, Chase Zimmerman. (T. 171-173). The Trail crosses Zimmerman's private gravel driveway. It is necessary to cross the Trail for ingress and egress to the Zimmerman residence. (T. 178). There are no stop signs at that intersection crossing. (T. 262-263, 267).<sup>2</sup>

**D. Koenig Approached the Trail/Private Driveway Slowly and Cautiously.**

Koenig had visited the Zimmerman home numerous times before the day in question. He also had used the Trail for bicycling and for skateboarding. (T. 172). He was aware that bicyclists and others used the Trail. (*Id.*) Koenig therefore approached the Trail/private driveway crossing slowly and cautiously. (T. 183).

When leaving the Zimmerman residence, the private driveway has a straight stretch of about 40 feet. It then S bends to the left and curves back to the right. Where the driveway enters the S bend, the gravel driveway is full of potholes. (T. 173). Because

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<sup>2</sup> There is a sign on the Trail north of the intersection with the driveway that informs of a stop ahead. (T. 267). There is a stop sign on the Trail 50 to 75 yards south of where the driveway is located. (T. 250). The trial court ruled the stop ahead sign had nothing to do with the Zimmerman private driveway. (T. 267).

of the size of the potholes, Koenig's speed through this area was approximately 10 miles per hour. (T. 174-176).

Before Koenig came up to the Trail, he decreased his speed even further. (T. 177). When his vehicle was five feet from the Trail, and because of the tree foliage, Koenig was able to see 5 to 10 feet of the Trail when he looked to the left. (T. 177). When Koenig looked to his left, he did not see anyone coming. He then looked to his right. Again, he did not see anyone coming. Given the fact that due to the foliage there was some obstruction in Koenig's view of the Trail to his left, he "slowly crept through" the intersection. (T. 183). As he was looking forward, Koenig saw out of the corner of his left eye a bicycle. (T. 179).<sup>3</sup> Koenig slammed on his brakes. (T. 180). Koenig came to a sudden halt and he heard a collision. According to Koenig, Stewart collided with the front bumper of the driver's side of Koenig's vehicle. (T. 180-181).

**E. Stewart, Who Knew There Was a Private Driveway That Crossed the Trail, Did Not Slow His Speed as He Approached That Crossing.**

Stewart was very familiar with the Trail and had been on the Trail "hundreds of times." (T. 69-70). Stewart was in the process of training for a bicycle race, and while training, it was his practice to ride his bike at a speed of 18 to 20 miles per hour. (T. 104-105). An average recreational biker does not bike at that high speed. (T. 105).

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<sup>3</sup> Stewart was riding his bicycle to Koenig's left and Koenig was crossing the Trail to Stewart's right. (Trial Exhibits 1, 2, 3; T. 71, 72, 73; A. 17, 18, 19).

Stewart knew that there was a private driveway that crossed the Trail. (T. 106-107). As he approached the area of the Zimmerman private driveway, he was chatting with a friend bicycling next to him. (T. 106). Stewart did not slow his speed as he approached the driveway. (Id.) As he approached the driveway, he could see at least a couple of feet of the Zimmerman private driveway, but he could not see the entire driveway because of trees to his right. (T. 107-108). Even though his view of the driveway was obstructed by trees and bushes to the right, Stewart did not slow down before entering the area of the driveway. (T. 108).

**F. Stewart and Koenig Collided in the Crossing of the Private Driveway and Trail.**

Stewart and Koenig collided where the private driveway and Trail cross. (T. 111, 180-181). Because of the noise he heard, Stewart was aware that Koenig had applied his brakes before the car and his bicycle collided. (T. 109). Stewart did not apply his brakes to avoid impact with Koenig's vehicle. Stewart has no idea of the speed at which Koenig was traveling before the impact. (Id.) Stewart contends that Koenig hit his bicycle and not vice versa. (T. 110).

After the collision, Stewart landed on the Trail. (T. 79). He was able to get up and retrieve his cell phone from his bike. He called his wife, who then drove him to St. Mary's Hospital in Rochester. (T. 83).

**G. Stewart Has Resumed Competitive Bicycling and Has No Physical Restrictions as a Result of the Collision.**

As a result of the collision, Stewart suffered a fractured vertebra in his neck. (T. 143). By August 2005, Stewart was reporting no neck pain. (T. 117-121). While Stewart has suffered a permanent but minor slippage of one vertebra on top of another, his treating physician has testified that Stewart's prognosis is "excellent." (T. 145-146, 153, 161). His fractured vertebra has healed. (T. 159-160). Stewart has no restrictions on his physical activities. (T. 159; see also T. 151-159). Stewart has returned to his regular activities without difficulties, including competitive bicycle racing. (T. 119-123).

**H. Stewart Sues Koenig Asserting Koenig Was Negligent.**

Stewart brought this lawsuit claiming that Koenig was negligent in the operation of his mother's 1994 Ford Escort and that as a result Stewart sustained personal injuries. (A. 22; T. 47). Koenig asserted that any injuries Stewart sustained resulted entirely from his own negligence in the operation of his bicycle. (A. 25; T. 47-48).

At trial, significant discussion was had as to Stewart's requested jury instruction based on Minn. R. 6100.3400, subp. 6(D). (See T. 9-13, 191-200, 213-216, 246-248). It states: "Any trail user who is about to enter onto or cross a trail treadway, shall yield the right of way to any trail user already on the treadway to be entered or crossed." (A. 30). DNR Rule 6100.3330 defines a trail as "all of that land contained within the area designated as a state recreational trail by the commissioner" and a treadway is "that part of the trail constructed for travel." *Id.* at subp. 11 and 12. (A. 28). The DNR Rules do not define "trail user." See Minn. R. 6100.3300. (A. 27).

Based on DNR Rule 6100.3400, subp. 6(D), Stewart requested the jury be instructed:

You are instructed that the term “trail” is defined as all of that land contained within the area designated as a state recreational trail by the commissioner. The term “treadway” means that part of the trail constructed for travel.

You are instructed that any trail user who is about to enter onto or cross a trail treadway, shall yield the right-of-way to any trail user already on the treadway to be entered or crossed.

You are instructed that Defendant Christopher Koenig was about to cross a trail treadway, and Plaintiff Patrick Stewart was a trail user already on the treadway to be crossed. A violation of this regulation is negligence per se, and Defendant Christopher Koenig has no legal excuse for violating the regulation.

(A. 15).

The thrust of Stewart’s request is that he wanted the jury to be instructed that violation of this regulation “is not prima facie evidence of negligence, it is negligence per se.” (T.11).

**I. The Trial Court Concludes Koenig Is Not a Trail User and Instructs The Jury on Common Law Principles.**

The trial court denied Stewart’s proposed jury instruction concluding that Koenig did not constitute a trail user. (T. 214). The trial court turned to Minn. R. 6100.3400, subp. 1, which states that “trails may be used for snowmobiling and all non-motorized forms of recreation, including but not limited to hiking, bicycling, horseback riding, snowshoeing, cross-country skiing, camping and picnicking” and Minn. R. 6100.3400, subp. 2, which states that “[n]o motor vehicle, other than a snowmobile, shall be operated within a trail . . . .” (T. 10-13, 191; A. 29). Reading DNR Rule 6100.3400 as a whole,

the trial court concluded: “I think it stretches that term [trail user] beyond the breaking point to call a motorist crossing a DNR trail a trail user. Defendant Koenig’s car cannot legally be used on the trail . . . . The regulation could have simply said anyone who is about to enter or cross a trail treadway shall yield, but it doesn’t read that way. It applies to trail users and I’m not in a position to change or place some kind of expansive gloss on that term. I just don’t think that a motorist driving across a DNR trail in a vehicle that could not be used on the trail would commonly be understood to be a trail user, and thus I don’t find that right-of-way provision to apply here.” (T. 214-215).

The trial court also found none of the statutory right-of-way provisions contained in the Minnesota’s statutes governing motor vehicles applied.<sup>4</sup> (T. 214-215). The conduct of the parties was accordingly to be analyzed based on common law principles without either party entitled to an instruction that their party has a statutory or regulatory right-of-way. (T. 216). The trial court utilized Civil JIG 65.10 (common law duties of a driver) and JIG 25.12 (right to assume another’s good conduct). (T. 216-217). The jury was instructed:

Reasonable care is the care a reasonable person would use in the same or similar circumstances. Negligence is the failure to use reasonable care. Ask yourself what a reasonable person would have done in these circumstances. Negligence occurs when a person does something a reasonable person would not do or fails to do something a reasonable person would do.

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<sup>4</sup> The trial court stated: “If we announce to the public that this paved path through the woods is a highway, I think the common person would think we were crazy.” (T. 216).

The violation of the duty to use reasonable care is negligence. The duty of reasonable care includes these duties. Drivers must keep a reasonable lookout. A driver must keep his or her vehicle under reasonable control. Whether any of these duties was violated depends on the risks of the situation, dangers that were known or could have been anticipated, and all the existing circumstances.

A person is entitled to assume that others will use reasonable care. A person is also entitled to assume that others will obey the law. However, a person is only entitled to assume that others will use a reasonable care and will obey the law until it reasonably appears that they will not.

(T. 277-278).

**J. The Jury Returns a Verdict in Favor of Koenig and the Trial Court Denies Stewart's Motion for a New Trial.**

The jury returned a verdict finding that Koenig was not negligent in the operation of his motor vehicle and that Stewart was negligent in the operation of his bicycle.

(T. 328; A. 13). The jury concluded that Stewart had sustained a permanent injury as a result of the collision, but awarded Stewart no damages. (T. 328-29; A. 14).

Stewart sought a new trial based on his claim that Minn. R. 6100.3400, subp. 6(D) controlled. (A. 6). The trial court disagreed and explained:

Koenig was crossing this recreational trail at a right angle as he drove his car on a private driveway. . . . The trail had nothing to do with Koenig's journey, other than the fact it crossed his path of travel. In fact, he could not legally "use" the trail because he was driving a motor vehicle. Defendant Koenig cannot reasonably be described as a "user" of the trail, anymore than a driver who crosses a sidewalk as he backs down his driveway to the street could be reasonably called a "user" of the sidewalk.

(A. 7-8).

Stewart also argued he was entitled to a new trial on damages because the jury's verdict included a finding of permanent injury but no damages. (A. 9). The trial court held that Stewart was not entitled to a new trial based on the jury's finding of no liability on the part of Koenig, which finding was supported by credible evidence. (Id.) The trial court relied on Otterness v. Horsley, 263 N.W.2d 403, 404 (Minn. 1978), and Pomush v. McGroarty, 285 N.W.2d 91, 94 (Minn. 1979). In Otterness, this Court affirmed the trial court's denial of a new trial where the jury's answer on a special verdict form reflected findings of no negligence on the part of the defendant and a permanent injury to the plaintiff, yet failed to award any damages for that injury. 263 N.W.2d at 404. This Court in Otterness ruled that as long as the finding of no negligence on the part of the defendant is supported by credible evidence, it does not make any difference how the jury answers the damage questions.

**K. The Minnesota Court of Appeals Reversed and Has Granted Stewart a New Trial.**

Stewart appealed and the Minnesota Court of Appeals reversed. The Court of Appeals ruled that the DNR trail rules do apply to this case and that a driver of a motor vehicle operating on a private driveway that crosses a state recreational trail is a "trail user" and therefore subject to DNR rules governing the trail. 767 N.W.2d at 500. (A. 5). Based on this legal conclusion, the Court of Appeals held that Koenig had a duty to yield the right-of-way to a trail user who is already on the treadway. Id. A new trial on liability was ordered "[b]ecause the district court's jury instructions did not accurately convey the controlling law." Id.

The Court of Appeals also concluded that the jury's finding that Koenig was not negligent "cannot stand in light of the erroneous jury instruction." Therefore, the Court of Appeals held that a "new trial on damages is also warranted." Id. at 501. (A. 5).

Koenig sought further review with this Court, which was granted by Order of the Court dated September 16, 2009.

### ARGUMENT

#### **A DRIVER OF A MOTOR VEHICLE OPERATING HIS VEHICLE ON A PRIVATE DRIVEWAY THAT REQUIRES THE DRIVER TO CROSS A STATE RECREATIONAL TRAIL IS NOT SUBJECT TO A RULE PROMULGATED BY THE DEPARTMENT OF NATURAL RESOURCES WHICH APPLIES ONLY TO TRAIL USERS.**

##### **A. The Trial Court Has Discretion in Instructing the Jury.**

This Court reviews a district court's decision on jury instructions under an abuse of discretion standard. Rowe v. Munye, 702 N.W.2d 729, 735 (Minn. 2005). District courts have "considerable latitude" in instructing the jury, and where the instructions overall fairly and correctly state the applicable law, a party is not entitled to a new trial. Hilligoss v. Cargill, Inc., 649 N.W.2d 142, 147 (Minn. 2002).

##### **B. The Court of Appeals' Grant of a New Trial Rests on Its Interpretation of the Term "Trail User."**

The Court of Appeals held that a new trial was to be awarded because a motor vehicle driver, while on a private driveway that intersects a state recreational trail, is a "trail user" and subject to DNR rules governing trail users. 767 N.W.2d at 500. (A. 5). To reach its legal conclusion, the Court of Appeals declares that although DNR Rule 6100.3400, entitled "Trail Uses," states in subp. 1 that "trails may be used for

snowmobiling and all nonmotorized forms of recreation” and in subp. 2 that “no motor vehicle, other than a snowmobile, shall be operated within a trail,” a motor vehicle (and its operator) becomes a “trail user” under subp. 6(D) where the private driveway crosses the trail. (A. 5, 29). According to the Court of Appeals, that motor vehicle driver, pursuant to Rule 6100.3400, subp. 6(D), “must yield the right-of-way as a matter of law to a trail user already on the treadway to be entered or crossed” and the jury was to be so instructed. The failure of the trial court to so instruct the jury, according to the Court of Appeals, mandates a new trial. (*Id.* at A. 5).

**C. The Meaning of Words Used in a DNR Regulation Presents a Question of Law.**

The DNR has not separately defined the term “trail user.” And the Court of Appeals’ grant of a new trial rests solely on its interpretation of that term. The meaning of words in a regulation is a question of law which this Court reviews de novo. In re Rate Appeal of Benedictine Health Ctr., 728 N.W.2d 497, 503 (Minn. 2007). If the language of the regulation is clear and free from ambiguity, the Court must give effect to its plain meaning. In re Alexandria Lake Area Sanitary District NPDES/STES Permit No. MN0040738, 763 N.W.2d 303, 310-11 (Minn. 2009).

As with statutes, this Court applies the common and approved usage to a term unless there is a special definition provided by rule. Minn. Stat. § 645.001. Words or phrases are not to be read in isolation but read in the context of surrounding circumstances. In re Alexandria Lake Area Sanitary District, 763 N.W.2d at 310-11. As with a statute, the court construes the rule as a whole to give effect to all of its provisions

so, if possible, “no word, phrase or sentence should be deemed void, superfluous or insignificant.” Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000).

The DNR did not declare that anyone who is about to enter or cross a state trail must yield. It stated that “any trail user” is to yield to any trail user already on the treadway. Minn. R. 3100.3400, subp. 6(D). (A. 30). It is necessary for a motor vehicle on the Zimmermans’ private driveway to cross the Trail to continue on the private driveway to a public roadway. The Court of Appeals’ determination that Koenig, while operating his motor vehicle on a private driveway, was a trail user is not in accord with the plain meaning of that term and the DNR rules as written.

**D. A Motor Vehicle While Being Operated on a Private Driveway That Crosses a Trail Is Not a Trail User.**

The trial court correctly concluded that when an automobile remains on a private driveway that crosses a recreational trail that motor vehicle/driver is not “using” the trail as the word is commonly used and understood. Minn. Stat. § 645.08. The common and ordinary meaning of the word “use” is “to put or bring into action or service; employ for or apply to a given purpose.” Webster’s New World College Dictionary (4<sup>th</sup> ed. 2001). Use “implies the putting of a thing . . . into action or service so as to accomplish an end.” Id. While the motor vehicle and its operator “uses” the private driveway as it continues on its pathway from private residence to public highway, it does not “use” the DNR trail simply because the DNR trail crosses the driveway’s path.

The primary basis for the Court of Appeals' conclusion to the contrary is its decision in Erickson v. State, 599 N.W.2d 589 (Minn. Ct. App. 1999). 767 N.W.2d at 500. (A. 4). In Erickson, vehicles approaching each other on a public logging road collided. 599 N.W.2d at 590. The issue in that case was whether the logging road immunity exception which applies to "a loss arising out of a person's use of a logging road" was applicable. The Court of Appeals concluded there that both drivers were engaged in the "use of" the logging road. Id. at 591.

The trial court aptly explained why Erickson supports the proposition that Koenig was not a trail user. (A. 7). As the trial court explained, "like the drivers in Erickson, Plaintiff Stewart was 'employing' the Trail. He was traveling down it. Defendant Koenig was not. The trail had nothing to do with Koenig's journey, other than the fact it crossed his path of travel." (A. 7). To follow the Court of Appeals' logic, the Court would need to conclude that when railroad tracks intersect a private driveway, the driver becomes a railroad track user where the two intersect. The trial court rejected such a holding, explaining that to do so stretches the term "user" beyond the breaking point. (T. 214). This Court should also so hold.<sup>5</sup>

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<sup>5</sup> That is why the Indiana Court of Appeals in Reed v. Brown, 152 N.E.2d 257, 261 (Ind. App. 1958), *reh'g denied*, concluded that an employee who, while driving on an employer's private road, was struck by a train on tracks crossing the private property, was on the employer's premises. The fact that the accident occurred while crossing the railroad tracks did not take the employee off the employer's premises. Likewise, continuing on the private driveway where it crosses the Trail does not make Koenig a trail user.

The Court of Appeals states that “[a]ny distinction between merely ‘being on’ the recreational trail and ‘using’ the trail is, in the context of crossing the trail, strained and artificial.” 767 N.W.2d at 500. (A. 4). But to conclude, as the Court of Appeals has done, that when a motor vehicle operator is required to cross a DNR trail to continue on a private driveway, a motor vehicle operator becomes a trail user at that point is strained and artificial when read in the context of DNR Rule 6100.3400 as a whole.

The DNR had made clear that a motor vehicle cannot use DNR recreational trails. DNR Rule 6100.3400 is entitled “Trail Uses.” (A. 29). DNR Rule 6100.3400, subp. 2 states “no motor vehicle, other than a snowmobile, shall be operated within a trail . . . .” (Id.) The DNR used the phrase “trail user” knowing that there are private property owners who have rights of ingress and egress over the trails. *See* Minn. Stat. § 85.015, subd. 1b. (A. 36). Not only, according to the DNR rules, can a motor vehicle not be operated within a trail, to construe that a motor vehicle is so operating when a private driveway is intersected by a trail would mean, according to the Court of Appeals’ construction, that the DNR could limit when a private landowner ingresses and egresses his own property.

DNR Rule 6100.3400, subp. 5 states: “Any specific use of a trail may be limited to hours designated by the commissioner and any use in violation of such limitation is unlawful.” (A. 29). Under the Court of Appeals’ interpretation of trail user, if the DNR limits trail use to the hours of 8:00 a.m. to 5:00 p.m., a motor vehicle operator on a private driveway who crosses the trail at 6:00 a.m. is in violation of DNR rules and is acting

unlawfully. There is no statutory authority for the proposition that the DNR can so control ingress and egress by a landowner to his own property. The term “trail user,” read in context, supports the proposition that the DNR does not consider a motor vehicle operated on a private driveway to be a trail user.

That a motor vehicle is not, according to the DNR, a trail user is also made clear in Minn. R. 6100.3900, subp. 6, where the DNR declares: “Safety. While being ridden or operated within a trail, horses, bicycles and snowmobiles must be under the control of the operator at all times.” (A. 31). Notably, motor vehicles are not so listed because they are not trail users.

Based on the clear and unambiguous meaning of trail user when read in the context of the DNR rules as a whole, an operator of a motor vehicle being driven on a private driveway is not a DNR trail user.

**E. Even if the Term Trail User Is Ambiguous, That Phrase Cannot Be Construed so as to Conclude Koenig Was a Trail User.**

Stewart provided the trial court with no interpretation by the DNR of its rules which supports his position. Accordingly, this case does not present a situation where, if the rule is found ambiguous, any deference is to be owed to the DNR. Citizens Advocating Responsible Development v. Kandiyohi County Board of Commissioners, 713 N.W.2d 817, 827 (Minn. 2006) (“If a regulation is ambiguous, agency interpretation will generally be upheld if it is reasonable.”).

Even assuming that the DNR intended what the Court of Appeals concludes – that anyone who is about to enter or cross a state trail must yield – the Court will not construe a regulation so as to mean that which an agency intended but did not so express. *Id.* That is particularly true where, as here, a violation of such a regulation subjects a party to criminal penalties. See State v. Ibarra, 355 N.W.2d 125, 128-29 (Minn. 1984), *reh'g denied*; Marshall v. The Anaconda Co., 596 F.2d 370, 376 (9th Cir. 1979) (“If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.”).

The Court of Appeals, after reaching its legal conclusion premised on the word “use,” states its ruling is further guided by the occasion and necessity for the DNR trail rules, the object the rules seek to obtain, and other rules and laws upon the same or similar subject. 767 N.W.2d at 500. (A. 4). However, as stated above, when read in context, the term trail user cannot be construed to include motor vehicle drivers such as Koenig.

Notably, the Court of Appeals ignores that to abide by its interpretation is to subject motorists to potential criminal penalties in that Minn. R. 6100.4300 declares “[a]ny person who shall violate any rules promulgated herein shall be guilty of a misdemeanor and subject to arrest.” (A. 33). This Court has demanded, consistent with due process, that in such situations a rule must be sufficiently definite to give notice of the conduct required to anyone who decides to avoid its penalties. Ibarra, 355 N.W.2d

128-29. That is certainly not the situation here. The construction and interpretation placed on trail user by the Court of Appeals cannot stand.

Moreover, not only must the agency rule be read in its entirety and in context, one is not to interpret a rule to go beyond the authority of the statute vesting an agency with rule-making authority. See Dixon v. United States, 381 U.S. 68, 74 (1965). While Minn. Stat. § 84.03 vests the DNR with the authority to promulgate reasonable rules governing the use of state trails, it does not vest the DNR with authority to govern the conduct of the motoring public on private driveways. To conclude, as the Court of Appeals has done, would be to vest authority in the DNR which has not been granted to it.<sup>6</sup>

While it is obvious that the Court of Appeals wants a statute or rule that mandates a duty on a motorist to yield the right-of-way under these circumstances, the Legislature has not so statutorily enacted and one cannot reach such a conclusion by an interpretation of DNR Rule 6100.3400, subp. 6(D) to so hold.<sup>7</sup>

Here, the trial court's instruction to the jury was in accord with Minnesota law. The trial court appropriately instructed the jury on common law negligence principles, including the duty of reasonable lookout. Since the trial court did not abuse its discretion in instructing the jury, Koenig respectfully requests that the Court of Appeals be reversed and the trial court's denial of a new trial be reinstated.

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<sup>6</sup> See also Minn. Stat. § 85.018.

<sup>7</sup> The trial court had ruled Minnesota's "highway traffic code and its statutory right-of-way rules inapplicable here." (A. 8). The Court of Appeals does not rule to the contrary. 767 N.W.2d at 500. (A. 5).

**F. The Grant of a New Trial Must Be Reversed as to Both Liability and Damages.**

Stewart had also argued that he was entitled to a new trial on damages, asserting that because the jury's verdict included a finding of permanent injury but no damages, it cannot be reconciled. However, as properly concluded by the trial court, when there is a finding of no liability on the part of the defendant, which finding is supported by credible evidence, then it was proper for the trial court to deny a new trial motion. (A. 9).

Otterness v. Horsley, 263 N.W.2d 403, 404 (Minn. 1978) (in the absence of a finding of negligence on the part of the defendant, a jury's inconsistent answers with respect to a permanent injury and award of damages are meaningless and do not entitle the plaintiff to a new trial on the issue); Pomush v. McGroarty, 285 N.W.2d 91, 94 (Minn. 1979) (citing Otterness).

In this case, the jury found that Koenig was not negligent, which finding the trial court held was fully supported by credible evidence. (A. 9, 13). As the trial court properly concluded, based on the facts of record, the jury could reasonably determine the Stewart alone was at fault for the collision.

The evidence produced at trial showed that Stewart, an avid bicyclist, was riding his bicycle along the Trail at approximately 18-20 miles per hour and was engaged in some casual conversation with his riding partner as he approached the crossing with the Zimmerman driveway. Although Stewart was well aware of the approaching driveway and the fact that his view of it was obscured by surrounding foliage, he did not slow his speed as he approached and he did nothing to ensure that it would be safe to cross the

driveway prior to doing so. Koenig, by contrast, took several protective measures, including reducing the speed of his vehicle significantly as he approached the intersection because he knew his view of the Trail was obscured by the heavy surrounding foliage.

The evidence at trial showed that Koenig acted reasonably and safely under the circumstances; it also showed that there were several measures Stewart could have taken to avoid this collision and that he failed to take any of them. The evidence adduced at trial shows that Stewart failed to take any precautionary measures, such as slowing down when approaching a known, obscured intersection with a private driveway upon which cars might be traveling. The jury's finding with respect to the parties' negligence, therefore, was entirely supported by the credible evidence adduced at trial and the trial court so found.

The jury had significant evidence upon which to base its finding of no negligence on the part of Koenig. The Court of Appeals granted a new trial on damages as well as liability based on its conclusion that the no negligence verdict cannot stand due to the erroneous jury instruction on liability. 767 N.W.2d at 501. (A. 5). Accordingly, if the jury instruction is held by this Court to be in accord with Minnesota law, so, too, must the trial court reverse the grant of a new trial for damages as well. Pursuant to Otterness, 263 N.W.2d 403, and its progeny, Stewart was also not entitled to a new trial on the issue of damages.

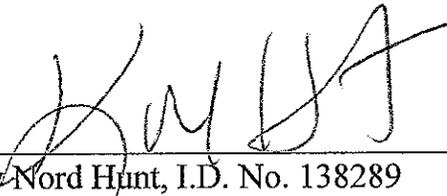
**CONCLUSION**

Petitioners respectfully request that the Court of Appeals be reversed and the judgment in favor of Petitioners be reinstated.

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