

A10-1184

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State of Minnesota  
In Supreme Court

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Christopher John Daly,

Respondent,

v.

Zachary John McFarland,

Petitioner.

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**BRIEF AND ADDENDUM OF PETITIONER/APPELLANT  
ZACHARY JOHN McFARLAND**

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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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## STATEMENT OF THE ISSUES

- I. SNOWMOBILING IS A RECREATIONAL ACTIVITY THAT OCCURS IN AN UNPREDICTABLE NATURAL ENVIRONMENT. MAY PRIMARY ASSUMPTION OF THE RISK DOCTRINE BE APPLIED TO PRECLUDE ANY NEGLIGENCE LIABILITY TO AN EXPERIENCED SNOWMOBILE DRIVER FOR APPRECIABLE WELL-KNOWN RISKS ASSOCIATED WITH SNOWMOBILE OPERATION ON UNFAMILIAR TERRAIN AND WHILE OPERATING IN CLOSE PROXIMITY TO OTHER SNOWMOBILES?

This issue was presented in Appellant's Minn. R. Civ. P. 50.02 motion for judgment as a matter of law, which was denied by the trial court and affirmed by the Court of Appeals. It was also presented in his request for jury instructions, which was denied, and in Appellant's motion for a new trial, which was also denied. The Court of Appeals affirmed.

Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971).

Moe v. Steenberg, 275 Minn. 448, 147 N.W.2d 587 (1966).

Wagner v. Thomas J. Obert Enters., 396 N.W.2d 223 (Minn. 1986).

- II. 30% OF THE NEGLIGENCE THAT CONTRIBUTED AS A DIRECT CAUSE OF RESPONDENT/PLAINTIFF DALY'S ACCIDENT WAS APPORTIONED BY THE JURY TO RESPONDENT, BUT IT ALSO FOUND RESPONDENT'S NEGLIGENCE WAS NOT CAUSAL OF THE ACCIDENT. DID THE TRIAL COURT IMPROPERLY INFRINGE ON THE JURY'S FACTFINDING FUNCTION WHEN THE TRIAL COURT CHANGED THE JURY'S ANSWER TO THE COMPARATIVE FAULT QUESTION TO ZERO AND, BASED ON THE FACTS OF RECORD, COMMITTED ERROR IN DENYING APPELLANT A NEW TRIAL BASED ON THE JURY'S INCONSISTENT VERDICT?

The trial court signed Respondent's proposed findings after the jury verdict, thereby changing the answer to the jury's verdict on apportionment as a matter of law. Appellant challenged the trial court's ruling post trial, seeking judgment as a matter of law or in the alternative a new trial, which motions were denied. The Court of Appeals affirmed with one judge in his dissent citing to Orwick v. Belshan, 304 Minn. 338, 231 N.W.2d 90, 95 (1975).

Orwick v. Belshan, 304 Minn. 338, 231 N.W.2d 90 (1975).

Carufel v. Steven, 293 N.W.2d 47 (Minn. 1980).

Meinke v. Lewandowski, 306 Minn. 406, 237 N.W.2d 387 (1975).

- III. WHERE THE TRIAL COURT DOES NOT FIND APPELLANT'S PRE-COLLISION CONDUCT WAS NEGLIGENT AS A MATTER OF LAW AND WHERE, BASED ON THE EVIDENCE PRESENTED, THE JURY COULD FIND THAT RESPONDENT'S RESULTING INJURIES OCCURRED FROM THE APPELLANT'S SPLIT SECOND RESPONSE TO A SUDDEN EMERGENCY, WAS APPELLANT ENTITLED TO HAVE THE JURY INSTRUCTED ON THE EMERGENCY RULE, CIVJIG 25.16, AND, THEREFORE, APPELLANT IS ENTITLED TO A NEW TRIAL?

The trial court denied Appellant's requested CIVJIG 25.16 instruction, which refusal was raised as a ground for new trial. That motion was denied. The Court of Appeals, with one judge dissenting, affirmed.

W.G.O. v. Crandall, 640 N.W.2d 344 (Minn. 2002).

Minder v. Peterson, 254 Minn. 82, 93 N.W.2d 699 (1958).

## STATEMENT OF THE CASE AND FACTS

This case arises out of injuries sustained by Respondent/Plaintiff Christopher John Daly (Daly) on January 20, 2007 while snowmobiling with Petitioner/Defendant Zachary John McFarland (McFarland) and two other friends, Neil Forsberg (Forsberg) and Jeff Engelkes (Engelkes). (T. 93). The jury found both Daly and McFarland negligent and apportioned 30% of the causal negligence to Daly even though it had also found Daly's negligence was not a direct cause of the accident. (T. 551-52; Addendum [Add.] 19).

The trial court, the Honorable Timothy K. Connell, concluded it would not honor the jury's apportionment of fault and changed the jury's Special Verdict answer to place 100% of the causal fault on McFarland. (Add. 16-17). The trial court denied without explanation McFarland's motion for judgment as a matter of law based on Daly's assumption of the risk. (Add. 15). It declined to instruct the jury on the emergency rule or primary assumption of the risk and denied McFarland's motion for a new trial on that basis. It refused to grant a new trial based on the jury's inconsistent direct cause responses in answer to the special verdict interrogatories. (Id.) The Court of Appeals affirmed, with one judge dissenting on the denial of a new trial. (Add. 1). The material facts are as follows.

**A. The Participants on January 20, 2007 Are All Experienced Snowmobile Operators and Have Been Riding Together for Years.**

Daly, McFarland, Forsberg and Engelkes are all in their mid-30s. (T. 149, 153, 405). They have been friends for years and have been riding snowmobiles for over 20

years. (Id.; T. 133, 267, 269, 381, 405). They have ridden thousands of miles on their snowmobiles and all are experienced snowmobile operators. (Id.; T. 271, 382).

Daly and McFarland have been riding together since 2000-2001. (T. 150). They have experienced all kinds of different snow conditions and have done ditch riding, riding on lakes and on rivers as well as riding through fields. (T. 271-72).

**B. Daly Had Been Injured Before on a Group Ride and Was Well Aware of the Hazards of Snowmobiling in a Group.**

At age 15 or 16, Daly injured himself while snowmobiling with a friend. Daly hit a culvert while ditch riding and was “bucked” off his snowmobile. (T. 157). Daly acknowledges since then snowmobiles have “gotten a lot faster” and now have “reeded engines.” (T. 150). They now have adjustable suspensions that make a smoother, nicer ride. (T. 150-56). This suspension makes the front of the snowmobile lighter. (T. 154).

In addition to riding snowmobiles, Daly is an avid motor sports person — riding motorcycles, four-wheelers, go-carts, and even working on race cars. (T. 205-06). Daly agrees that someone who chooses to operate a snowmobile accepts the hazards involved in that activity. (T. 220-21). According to Daly, snowmobiling is more hazardous than driving a car and is riskier than riding a motorcycle. (T. 213-16). The reason is that snowmobiles, unlike motorcycles, ride on uneven, snow-covered terrain with variations in elevation and changing snow conditions. The snow hides obstacles from view. (T. 210, 216). A snowmobile also does not have safety devices that cars do — such as restraints to hold the driver in place. (T. 213-14).

According to Daly, group snowmobile riding is safer than riding alone in the sense that if a rider is in trouble there is help available. He agrees, however, that riding in a group does increase the chance or the risk of collision with other operators. (T. 219).

**C. On January 20, 2007, the Participants Rode Their Snowmobiles in the Ditches Until They Came to a Bean Field Outside of Fulda, Minnesota.**

On January 19, 2007, Daly called Engelkes to go snowmobiling. (T. 162). The next day, Daly met Engelkes, McFarland and Forsberg at Engelkes' small engine/snowmobile repair shop and they headed off to Fulda via the ditches. (T. 162-63).

It was a windy day with patchy sun. (T. 164-65). The snow encountered that day was "fairly powdery" and was consistent in its density. (T. 225). No icy patches were encountered. (Id.) During the ditch ride, the group reached speeds of 60 mph. (T. 226).

When driving his snowmobile, Daly chooses to listen to music on his iPod. (T. 163). Wearing an iPod generally impairs his ability to hear. (T. 222-23). Daly also wore a face mask that covered his ears, plus a helmet. (Id.)

**D. The Participants Rode Down the Bean Field in Close Formation.**

Outside of Fulda, the group reached a bean field. (T. 166). There they stopped, positioning their snowmobiles side by side heading south. (T. 229, 273, 385). They decided to travel south down the bean field in a side-by-side formation. Daly asserts they were not racing and this was their typical method for traversing a field. (T. 166, 234-35). Daly estimated the snowmobiles were positioned 15 feet away from each other. (T. 236; see also 280-281). McFarland was closest to the ditch. Daly was next to him, followed

by Engelkes and Forsberg. (T. 229-30, 274). The four of them had crossed fields in similar fashion before. (T. 166, 324). Daly was unable to hear the snowmobiles positioned on either side of him. (T. 234). He acknowledges that while riding down the bean field there was no horseplay or reckless conduct. (T. 235).

A bean field generally has fewer obstacles than a ditch. (T. 218). When looking down the bean field, Daly did not look to the left or right but “just looked forward down [his] line,” even though he acknowledges that the best practice for the snowmobile operator is to be aware of what is going on to the side of his snowmobile as well. (T. 230, 232). Daly saw no upcoming obstacles in his line. (T. 231). Looking down the field, Daly saw no drifts and the field looked “pretty flat.” (T. 231). The snow base was estimated to be 5 to 6 inches. (T. 232-33).

McFarland explained that prior to heading down the bean field, he had encountered drifts of various sizes. (T. 272). At the bean field, the snowmobiles lined up with the expectation that the group was going to ride across the bean field in formation. (T. 311-12). If anyone decided that the snowmobiles were too close together, or if someone did not want to cross the field in formation, he could have placed himself to the outside of the group. (T. 312). The snowmobile drivers were free to give themselves as much room as they wanted in traversing the field. (Id.)

McFarland, like Daly, surveyed the field looking for any obstacles before he headed down the field. (T. 313). He saw nothing that looked like an impediment to forward progress. (T. 313). Unlike Daly, McFarland also scanned the bean field not just

for the area immediately in front of him in his line of sight but also the area to the side of his snowmobile. (T. 314). All he saw was snow and a “little bit of the bean stubble sticking through” the snow. (T. 318).

**E. McFarland Passed Daly Because He Was Going to Lead Through the Upcoming Ditch and Then the Accident Occurred.**

Daly estimated his speed to be 60 to 65 miles per hour downfield, which he felt was safe for the conditions. (T. 234). As they headed down the field, Daly was initially ahead of McFarland. (T. 166, 235, 274). Daly decided to slow down as they were approaching the end of the field because he would not take the lead in the upcoming ditch. (T. 166). Daly did not brake but “let off the accelerator.” (T. 235-36). Snowmobiles lose speed quickly. (T. 236, 323-24).

It was McFarland’s intent to take the lead when he entered the ditch at the end of the bean field. (T. 282). That was because he was familiar with the ditch and the standard safety practice of the group is the person closest to the ditch goes first. (T. 319). That way no one crosses in front of the rider to his left when entering the ditch. (Id.) Accordingly, when McFarland passed Daly, he did so to take the lead through the upcoming ditch. (T. 283).

McFarland estimates that his speed at the highest was 60 to 65 miles per hour. (T. 283). He, like Daly, felt safe at the speed the participants were riding. (T. 318). McFarland could see Daly as he went down the field. He could also hear Daly’s snowmobile. (T. 319-20).

When McFarland pulled even with Daly's snowmobile, he let off the throttle. (T. 283, 323). He began to slow down. (Id.) Shortly thereafter, and when he was ahead of Daly, McFarland's snowmobile launched into the air. (T. 170). This occurred while McFarland was sitting squarely on his snowmobile with both hands on the handlebars and paying attention to what was in front of him. (T. 170, 320). McFarland estimated the elapsed time between the time he let off the throttle and the time he became airborne was 30 seconds to a minute. (T. 325).

Daly did not hear McFarland pass him, but saw him pass on the left. (T. 236). He could not estimate McFarland's speed. (T. 172). Daly observed McFarland's snowmobile hit "something," but Daly does not know what McFarland hit. He saw McFarland's snowmobile shoot up into the air. (T. 170, 237). According to Daly, McFarland had no choice but to abandon his snowmobile or it "would've probably killed him." (T. 237; see also T. 277). Daly feared for McFarland's life. (T. 173). Daly admits there was nothing McFarland could have done to avoid the accident and he had never seen a snowmobile react as McFarland's did that day. (T. 237). Daly describes what occurred that day as a "freak accident." (T. 238).

McFarland physically pushed the snowmobile away from his body. His snowmobile crashed to the ground with him no longer on it. (T. 277-78). McFarland rolled on the ground and did not see where his snowmobile landed. (T. 278).

When Daly saw McFarland's snowmobile heading toward him, he tried to "turn out of it," but he did not want to turn too sharp or too fast because he did not know where

Forsberg or Engelkes were to his right. (T. 170). At that point, Daly thinks he “lost complete control.” Daly fell off his snowmobile and was injured. (T. 170-71). Daly does not believe he was struck by McFarland’s snowmobile. (T. 173).

McFarland has testified that he did not see the drift before he hit it. (T. 329). At the time of trial, he testified that he was “sure” he saw the drift, but he didn’t “remember it.” (T. 320; see also T. 330-31). It did not appear to be a hazardous condition. (T. 321). He has never seen a snowmobile react the way his snowmobile reacted to this drift that day. (T. 327). McFarland did not go back and look at the drift he hit. (T. 291). McFarland stated that if he was back in that bean field, he would again proceed at the same speed. (T. 326).

**F. Forsberg and Engelkes Concur That the Participants Were Operating Their Snowmobiles in a Safe and Responsible Manner.**

Forsberg characterized their group as being advanced snowmobile riders. (T. 382). Forsberg himself became a licensed snowmobile operator at age 12. (T. 381-82). Forsberg recalled that the snow conditions were “kind of crappy, as in hard and soft snow, mixture.” (T. 384). The snow conditions, according to Forsberg, were pretty much the same from Slayton through the bean field. (T. 384).

Forsberg, like McFarland, scanned the bean field for hazards before heading down the field. (T. 384-85). Forsberg could see no hazards and the bean field looked smoother than the ditches. (T. 384-85). He acknowledged that even if the surface of the snow appears level, underneath it are contours that the rider cannot see. (T. 392).

Forsberg felt comfortable in the spacing between snowmobiles because of the participants' experience. (T. 388-89). The three of them, with Engelkes holding back, rode down the field more or less side by side. (T. 389).<sup>1</sup> If riding with less experienced riders, Forsberg would give them more room. (T. 388-89). Forsberg thought they may have been crossing the bean field at 45 to 50 miles per hour. (T. 390).

As Forsberg crossed the field, there were small drifts — maybe 3 to 4 inches in height. (T. 390). The largest drift in the field, to his recollection, was maybe 12 inches high. He felt comfortable crossing a drift of that size at the speed that the parties were proceeding on down the field. (T. 390-91). The new snowmobiles handle such drifts easily. (T. 391). He felt no need to slow down for a drift a foot higher or smaller. (T. 391). Forsberg did not observe McFarland going faster than anybody else or going too fast for the conditions. (T. 391-92).

Forsberg saw the front of McFarland's snowmobile go up in the air. (T. 393). To Forsberg, it looked like the snowmobile threw McFarland off rather than that McFarland let go, but snow dust obscured Forsberg's visibility. (T. 394-95, 399-400). The snowmobile then started to roll. Forsberg does not know if McFarland's snowmobile knocked Daly off his sled or if Daly jumped off. (T. 401). Forsberg did not go back and look at the drift McFarland hit. (T. 398).

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<sup>1</sup> Daly thought Engelkes held back because the snow dust blinded him and caused him to slow down. (T. 233).

Forsberg acknowledged it is impossible for a snowmobile driver to maintain control of his snowmobile at all times. (T. 402-03). In Forsberg's snowmobile riding history, he has been thrown off 3 to 5 times the way McFarland was that day. (T. 394). He had run into objects that were unseen underneath the snow. (Id.)

The other participant was Engelkes. (T. 406). He began operating snowmobiles at age 9 and has a certification in snowmobile repair. (T. 404-05). Before heading across the bean field, Engelkes also had cause to survey the field. He did not observe any hazards. (T. 409). He recalled that there was probably 3 to 6 inches of snow on the bean field with some finger drifts of 6 to 10 inches in height. (T. 407). As they rode down the field, Engelkes was somewhat behind the others — probably 50 to 100 feet. (T. 407). He maintained the same speed as the others and felt comfortable doing so. (T. 407-08).

When Engelkes was crossing the drifts in the bean field, he maintained a constant speed. When he encountered drifts up to 10 inches high, he did not slow down. (T. 408). He felt comfortable not slowing down based on the size of drifts and he did not feel he was at any risk of losing control of his snowmobile. (T. 408-09). Engelkes, who is a snowmobile mechanic, stated that in his opinion the snowmobiles are designed to handle such snow drifts. (T. 409-10). It is common practice for someone with snowmobile riding experience to drive over drifts of that size at that speed. (T. 409).

Engelkes did not see any unsafe riding conduct as his fellow participants crossed the bean field. (T. 409). He did not see the actual accident because he was the last person in the group and there was snow from the snowmobiles obscuring his view.

(T. 410, 413). He looked at the drift after McFarland hit it, but does not know what it might have looked like before he rode through it. (T. 411). The drift had snow cover over it. (Id.)

**G. No Accident Reconstruction Was Done at the Scene.**

When the Nobles County Sheriff's Department, Officer Chad Kempema, arrived at the scene of the accident, Daly had already been loaded into the ambulance. (T. 118-19). It was Officer Kempema's impression that the two snowmobiles did not collide. (T. 121). He did not conduct any forensic examination of the scene. He did take a few photographs. (Id.) One of the photographs, Trial Exhibit 4 (A. 18), shows where the accident occurred, but without the snowmobiles. (T. 126). Officer Kempema did not look at the drift that may have been hit by McFarland. (T. 125).

**H. Daly Brought This Negligence Suit Against McFarland.**

Ten months after the accident, Daly brought this negligence lawsuit against McFarland. (A. 5). Based on the testimony of the four participants, the trial court denied Daly's motion for partial summary judgment, stating "there is evidence, which if believed, would allow for a finder of fact to conclude the speed [McFarland] was traveling was reasonable and that [McFarland's] operation of his snowmobile was not negligent." (A. 4). The case proceeded to trial to a jury in March 2010.

**I. Daly's Expert Opines That McFarland's Snowmobile Had Contact With Daly's Snowmobile.**

In addition to the testimony of Daly, McFarland, Forsberg, Engelkes and Officer Kempema, the jury heard testimony from Daly's expert Kenneth Drevnick, an accident reconstruction expert. (T. 333-34). Because no field measurements were taken at the scene, Mr. Drevnick admits all physical evidence "was lost." (T. 354). Mr. Drevnick admitted he could not estimate the speed of McFarland's snowmobile when he went airborne. (Id.) He nonetheless opines that it was McFarland's speed coupled with what he hit that led to the vault into the air and it is then McFarland lost control. (T. 359).

By examining Daly's snowmobile, Mr. Drevnick also concludes it came "in contact with something." (T. 341). He opines that McFarland's snowmobile tumbled over Daly's, although he did not have McFarland's snowmobile by which to make such comparisons. (T. 348-49, 377).

**J. McFarland's Accident Reconstruction Expert Explains the Hazards of Snowmobiling.**

McFarland presented the expert testimony of William Elkin. Mr. Elkin, also an accident reconstructionist, has reconstructed snowmobile accidents. (T. 420-23). He has training as a snowmobile safety instructor and is a recreational snowmobiler, having operated snowmobiles for 15 to 17 years. (T. 422-23).

Mr. Elkin agreed with Daly's testimony that snowmobiling presents risks that driving an automobile or driving a motorcycle do not present. (T. 425). Even safe snowmobilers can be injured while snowmobiling and while operating at slow speeds.

(T. 443-44). Coming into contact with a variation in elevation is a risk inherent in snowmobiling. (T. 440).

One cannot ride a snowmobile without encountering a drift when riding off a groomed trail. (Id.) Snowmobiles are designed to go over obstacles such as drifts. (T. 430-33). Snowmobile operators typically do not slow down for a drift 12 inches or less. (T. 441). As Mr. Elkin explained, a drift of 8 to 10 inches but with a hard lip that is partially covered by freshly fallen powder is a hazard that would be difficult for a driver to identify. (T. 445).

Snowmobiles do not have seatbelts and hitting an obstacle at a slow speed can throw off the driver. (T. 443-44). And if the operator is in the air with his snowmobile and in danger of being crushed by the snowmobile, the rider is justified in leaving his snowmobile. (T. 443).

Riding in a group does present hazards that snowmobiling alone does not present. (T. 433-34, 439). It presents a “greater chance of collision.” (T. 434-35). A snowmobile rider riding in a group has to be aware not only of hazards in his path of travel, but also of hazards in his vicinity. (T. 435-36). As Mr. Elkin explained,

In riding [in a group], it would be important for the rider to know what’s in front of him, to know what’s on the trails in front of the riders next to him. It would be important for that rider not only to be looking ahead but to be turning his head looking left and right so that he could maintain a contact and know what’s going on or where the other riders are and try to look for anything, to keep scanning your field of travel . . . .

(T. 436).

It is also very important that snowmobilers be able to hear what is going on around them. (T. 437). Listening to music on an iPod decreases “your sense of perception.” (Id.) If one chooses to listen to music while riding a snowmobile, one has to be more visually attuned to what is going on around oneself. (T. 438).

Contrary to Mr. Drevnick’s testimony and as Mr. Elkin explained, speed is not the determinative factor in how high a vehicle vaults in the air when it encounters a fixed object. (T. 457-58). Of importance to determining height is the angle of liftoff. (Id.)

**K. The Trial Court Refused to Instruct the Jury on the Emergency Rule and Precluded Submission to the Jury of Daly’s Primary Assumption of the Risk.**

The trial court, over McFarland’s objection, refused to instruct the jury on the emergency rule, CIVJIG 25.16. (T. 472-73). CIVJIG 25.16 states:

If there was an emergency that a person did not cause, that person is not negligent if he or she acted in a way a reasonable person would have acted. In deciding if he or she acted reasonably consider:

- (1) The circumstances of the emergency; and
- (2) What the person did or did not do.

(A. 42).

The trial court also precluded submission of any issue with regard to Daly’s assumption of the risk. (A. 10; A. 15; Add. 19; see also T. 220, 475; see Defendant’s Memorandum of Law on Primary Assumption of Risk Jury Instructions, dated March 9, 2010).

**L. The Jury Returns an Inconsistent Verdict.**

The jury returned its verdict finding McFarland negligent in the operation of his snowmobile, which was a direct cause of the accident. (T. 551-52; Add. 19). The jury also found Daly was negligent in the operation of his snowmobile, but it was not a “direct cause” of the accident. (Id.; Add. 19) The jury was asked by the special verdict form submitted to take “all of the negligence that contributed as a direct cause of the accident” as 100% and attribute a percentage to McFarland and Daly. (Add. 20). Even though the jury had found that Daly’s negligence was not a direct cause of the accident, it nonetheless attributed 30% of the “direct cause of the accident” to Daly. (Id.) The jury awarded Daly \$442,633.50 in damages. (Add. 20).

**M. The Trial Court Signs Daly’s Findings, Addressing the Inconsistent Verdict.**

After receiving the jury’s verdict and recognizing the inconsistent verdict, Daly submitted proposed Findings of Fact, Conclusions of Law and Order for Judgment, which the trial court signed upon receipt without change and without waiting for input from McFarland.<sup>2</sup> (A. 19; Add. 16). The Findings of Fact state:

The Jury returned its Special Verdict annexed hereto as Exhibit 1, finding [McFarland] negligent and that his negligence was a direct cause of injury to [Daly]. [Daly] was found negligent, but his negligence was not a direct cause of his injuries. Accordingly, although the jury completed responses to the comparative fault question, as instructed by the Special Verdict form, the Court

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<sup>2</sup> The issued Findings of Fact, Conclusions of Law and Order for Judgment even contain the signature of Daly’s attorney. (Add. 18).

finds that no fault comparison was legally required or necessary and that no fault reduction would be appropriate.

(Add. 16-17).

**N. McFarland's Request for Post-Trial Relief Is Denied.**

McFarland brought post-trial motions. (A. 11). McFarland sought, pursuant to Minn. R. Civ. P. 50.02, judgment as a matter of law, asserting the court should hold McFarland was not negligent as a matter of law based on the doctrine of primary assumption of the risk. (Defendant's Memorandum of Law in Support of Motion for Amended Findings, New Trial and JNOV, pp. 3-8, dated April 21, 2010). Daly opposed that motion, arguing "[i]t is well established that the operation of a snowmobile does not involve primary assumption of risk," citing this Court's decision in Olson v. Hansen, 299 Minn. 39, 216 N.W.2d 124, 127-28 (1974), and Carpenter v. Mattison, 300 Minn. 273, 219 N.W.2d 625, 629 (1974) (Memorandum of Law in Opposition to Defendant's Motion for Amended Findings, New Trial and JNOV, pp. 5-8, dated May 6, 2010).

McFarland also asserted that he was entitled to judgment as a matter of law, amending the court's Findings of Fact and Conclusions of Law to reconcile the jury's answers to special interrogatories by changing the jury's answer to Question No. 4 — as to direct cause — to yes. In the alternative, McFarland requested a new trial because of the inconsistent verdict. (Id. at pp. 2, 14-20). McFarland also sought a new trial for errors based on the failure of the trial court, among other things, to instruct the jury on the emergency rule and assumption of the risk. (Id. at pp. 8-14).

By Order filed May 19, 2010, and without explanation, the trial court denied McFarland's motions for post-trial relief. (Add. 15). The Court of Appeals affirmed, with one Judge dissenting in the denial to McFarland of a new trial. (Add. 1).

### ARGUMENT

#### **I. PRIMARY ASSUMPTION OF THE RISK COMPLETELY NEGATES MCFARLAND'S NEGLIGENCE.**

Two varieties of assumption of the risk are recognized in Minnesota, each with its own effect on a defendant's liability. Bjerke v. Johnson, 742 N.W.2d 660, 669 (Minn. 2007). The variety at issue in this appeal is primary assumption of the risk. It arises "only where the parties have voluntarily entered into a relationship in which plaintiff assumes well-known, incidental risks." Olson v. Hansen, 299 Minn. 39, 216 N.W.2d 124, 127 (1974). Primary assumption of the risk completely negates a defendant's negligence. Id. Primary assumption of the risk occurs when the plaintiff voluntarily participates in an activity involving certain inherent risks and encounters one of these risks; the defense is a complete bar to recovery because there is no duty of care to protect another from the risks inherent in that voluntary activity. Wagner v. Thomas J. Obert Enterprises, 396 N.W.2d 223, 226 (Minn. 1986).<sup>3</sup>

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<sup>3</sup> Secondary assumption of risk is "an affirmative defense to an established breach of duty." Id. at 226. It is a form of contributory negligence. Id.

Under primary assumption of the risk a person assumes the inherent risks of his chosen recreational or sporting activity and cannot recover for injuries absent a showing of reckless or intentional misconduct on the part of the defendant. Moe v. Steenberg, 275 Minn. 448, 147 N.W.2d 587, 589 (1966) (recognizing doctrine applies to ice skating, but plaintiff would not assume the risk of conduct of other skaters “so reckless or inept as to be wholly unanticipated”); Marchetti v. Kalish, 559 N.E.2d 699, 700-02 (Ohio 1990) (case law citations from other jurisdictions holding individuals who engage in recreational or sports activities assume the ordinary risk of the activity and cannot recover unless other party’s actions were so reckless to be totally outside the range of the ordinary activity or the co-participant intentionally injures another); Dare v. Freefall Adventures, Inc., 793 A.2d 125, 131 (N.J. Super. Ct. App. Div. 2002) (plaintiff, a veteran skydiver, was hurt when he tried to avoid colliding with a fellow skydiver. A recklessness standard applied to the co-participant, noting it “would hardly promote vigorous participation in the activity if skydivers were exposed to lawsuits when their mere negligence during descent caused an injury to a co-participant”).

Snowmobiling is a recreational sporting activity that occurs in an unpredictable natural environment. McFarland asserts that the doctrine of primary assumption of the risk should be applied to preclude any negligence liability to an experienced snowmobile operator for the well-known risks associated with snowmobile operation on unfamiliar terrain and while operating in close proximity to other snowmobiles.

**A. Denial of Judgment as a Matter of Law Is Reviewed De Novo and the Existence of a Legal Duty Is a Question of Law.**

McFarland moved for judgment as a matter of law (JMOL), asserting he was not negligent as a matter of law based on the doctrine of primary assumption of the risk. The trial court, with no explanation, denied McFarland's motion.<sup>4</sup> (Add. 15). The Court of Appeals affirmed. (Add. 1). This Court reviews the trial court's denial of JMOL de novo and applies the same standard as the district court. Bahr v. Boise Cascade Corp., 766 N.W.2d 910, 919 (Minn. 2009).

JMOL is appropriate when a jury verdict has no reasonable support in fact or is contrary to law. Diesen v. Hessburg, 455 N.W.2d 446, 452 (Minn. 1990). Under that standard, this Court views the evidence in a light most favorable to the prevailing party, which in this case is Daly. Id.

The existence of a legal duty is a question of law. Larson v. Larson, 373 N.W.2d 287, 289 (Minn. 1985); see also Louis v. Louis, 636 N.W.2d 314, 321 n.8 (Minn. 2001), citing Larson, 373 N.W.2d at 289. (The question of whether a condition or activity was known for purposes of determining whether a duty was owed is generally a question for the court to determine as a matter of law.)

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<sup>4</sup> McFarland had also sought to submit primary assumption of the risk to the jury, which was denied. (Defendant's Memorandum of Law on Primary Assumption of Risk Jury Instructions, dated March 9, 2010; Defendant's Memorandum of Law in Support of Motion for Amended Findings/New Trial and JNOV, pp. 12-14, dated April 21, 2010).

**B. This Court Has Recognized Primary Assumption of the Risk and It Has Been Applied by This Court and the Court of Appeals to Various Sporting/Recreational Activities.**

With the advent of comparative negligence, this Court considered the role of assumption of the risk in its primary and secondary sense and distinguished the two in Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826, 827 (1971). Since Springrose, this Court held primary assumption of the risk can be applied to baseball, hockey, ice skating, roller skating and golf. In Springrose, 192 N.W.2d at 827, this Court cited Aldes v. St. Paul Ball Club, Inc., 251 Minn. 440, 88 N.W.2d 94 (1958), as illustrative of circumstances where primary assumption of the risk applies.

In Aldes, a boy sustained injuries when he was hit by a baseball that got away from one of the players during infield practice. The plaintiff had been asked by one of the ushers in the later innings if he wanted to sit with the usher in one of the first base box seats which was not screened in. Plaintiff's original seat was also not screened in. The facts established that the plaintiff was familiar with baseball, and that he knew that misdirected baseballs could land in the box seats. Id. at 96.

This Court said that “[i]t is clear that, had the minor plaintiff been struck while sitting in the seat for which he paid and from which he viewed most of the game, neither he nor his father would be entitled to recover.” Id. Spectators occupying seats that are not screened assume the risk incurred by using them. Id. However, this Court said that the fact that the plaintiff accepted the usher's invitation to sit in a different seat did not mean that he assumed the risk of injury: “A patron assumes only the risk of injury from

hazards inherent in the sport, not the risk of injury from the proprietor's negligence." Id. at 97. The invitation exposed the plaintiff to a greater risk than he had accepted when he purchased the ticket and, given the boy's young age and the unexpected invitation, "could all have combined to deprive this youngster of the sound judgment which he might otherwise have exercised." Id.

In Wagner, 396 N.W.2d 223, this Court addressed primary assumption of the risk in the context of a roller skating accident, followed a year later by Grisim v. TapeMark Charity Pro-Am Golf Tournament, 415 N.W.2d 874 (Minn. 1987), an errant golf ball case. In Wagner, the trial court assumed that primary assumption of the risk principles applied to a roller skating accident. The jury found the defendant was not negligent and that the plaintiff was 100% negligent. One of the issues was whether the trial court should have instructed the jury on primary assumption of the risk. 396 N.W.2d at 225.

The facts in that case were in dispute. The plaintiff's version was she slipped and fell on a concave part of a metal entrance ramp to the roller rink. Defendant disputed any claims based on improper maintenance and supervision of the ramp and argued plaintiff had simply lost her balance while trying to avoid a child who was skating toward her. Id. at 225. This Court began its analysis of the primary assumption of the risk issue by noting that it applies "only where the parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks" and that the defendant has no duty to protect the plaintiff against those risks. Id. at 226, citing Olson, 216 N.W.2d at 127. Therefore, if the plaintiff's injury arose from one of those risks, the defendant would not

be negligent. Id. Primary assumption of the risk relates to the issue of whether the defendant owes a duty to the plaintiff. The Court there noted the impact of the factual dispute:

If the accident happened simply because plaintiff, concerned about other skaters, lost her balance and fell while exiting, defendant owed no duty to prevent her fall, or, to put it another way, plaintiff had assumed a primary risk of roller skating.

Id.

This Court cited to Moe v. Steenberg, 275 Minn. 448, 147 N.W.2d 587, 589 (1966), and states one of the instances “where primary assumption of the risk applies” is in cases involving patrons of inherently dangerous sporting events” such as “skating.” 396 N.W.2d at 229.

In Moe, this Court held that assumption of risk could properly apply to a collision between ice skaters. 147 N.W.2d at 450. Skaters do not assume every risk arising from the negligent acts or omissions of other skaters, such as where the conduct of the other skaters is so reckless or inept as to be wholly unanticipated. Id. at 451. But primary assumption of the risk can apply where the plaintiff, who had only limited figure skating experience, fell and then was tripped over by defendant skater who was skating backwards in close proximity to her. Id. at 449, 451.

In Grisim, plaintiff, a spectator at a charity golf tournament, was hit in the left eye by a shot hooked by an amateur golfer who was playing in the tournament. 415 N.W.2d at 875. The plaintiff decided to sit under a tree to the left of the green after noticing the

bleachers were crowded. Plaintiff sued the tournament sponsor and organizer and the golfer who hit the errant shot. Id. This Court held that plaintiff's claim against the golfer was barred by the doctrine of primary assumption of the risk. Id. at 876.

The Court of Appeals has applied primary assumption of the risk to a spectator injured while watching a snowmobile race. Jussila v. United States Snowmobile Assoc., 556 N.W.2d 234 (Minn. Ct. App. 1996), *rev. denied*. There the Court of Appeals concluded that "a snowmobile takes on a more dangerous character when operated on a race track by competitors attempting to win races by attaining high speeds." Id. at 237. And it has applied the doctrine to a baseball spectator hit by a baseball while returning from the restroom. Alwin v. St. Paul Saints Baseball Club, Inc., 672 N.W.2d 570 (Minn. Ct. App. 2003).

The Minnesota Court of Appeals has also added to the sports/recreational activities in which primary assumption of the risk may be applied. In Schneider ex rel. Schneider v. Erickson, 654 N.W.2d 144 (Minn. Ct. App. 2002), the Court of Appeals affirmed summary judgment to a defendant who shot the plaintiff in the eye during a paintball game when the plaintiff was not wearing protective eyewear. Three teenagers participated, playing by loose rules that included no shots to the head or groin and no shots at a person who ran out of paintballs. During a break in the game, the plaintiff and another participant took off their eye protection because it was getting dark and difficult to see. The defendant knew that the others had taken off their eye protection. The plaintiff shot the defendant and paused to reload, at which time the defendant shot a

paintball, hitting the plaintiff's eye. The defendant testified that he aimed at the plaintiff's shoulder and chest. Both the plaintiff and the defendant knew that the paintball guns were not completely accurate, particularly when the carbon dioxide cartridge powering the gun is not fresh.

In Schneider, the Court of Appeals referenced the general proposition that “[b]ecause participants in sports enter into relationships in which they assume well-known inherent risks, they consent to relieve other participants of their duty of care with regard to those risks. Id. at 151. The Court of Appeals affirmed the trial court's determination as a matter of law that plaintiff's lawsuit was barred by the doctrine of primary assumption of the risk.

Since Schneider, the Court of Appeals has applied primary assumption of the risk to downhill skiers who collide. Peterson v. Donahue, 733 N.W.2d 790 (Minn. Ct. App. 2007), *rev. denied*. It has applied the doctrine where a student was hurt while playing pillow polo, a game similar to floor hockey that utilizes a softball and sticks with pillows attached to the end. Heistand v. Luker, 2009 WL 2447423 (Minn. Ct. App. 2009), *rev. denied*. (A. 45). And it has also applied the doctrine to a cheerleader who fell while attempting a pyramid stunt. Vistad v. Bd. of Regents of the Univ. of Minnesota, 2005 WL 1514633 at \*4 (Minn. Ct. App. 2005). (A. 40).

**C. This Court Has Not Applied Primary Assumption of the Risk to Injuries Arising out of Snowmobiling.**

This Court refused to apply primary assumption of the risk to bar the plaintiff's recovery for injuries sustained while a passenger on a snowmobile being driven by the defendant. Olson, 216 N.W.2d 124. There the Court reiterated that primary assumption of the risk applies "only where the parties have voluntarily entered a relationship in which plaintiff assumes well-known incidental risks." Id. at 127. The defendant has no duty to protect the plaintiff as to those risks, and "if the plaintiff's injury arises from an incidental risk, the defendant is not negligent." Id. The Court also reiterated Springrose's range of assumption of risk cases, while adding hockey games to the list. Id. at 128, citing Modoc v. City of Eveleth, 224 Minn. 556, 29 N.W.2d 453 (1947) (no difference between baseball and hockey so far as liability for flying baseballs and pucks is involved and plaintiff assumed risks inherent to the playing of a hockey game).

With respect to an injury to a guest-passenger on a snowmobile, this Court held the incidental risks associated with snowmobiling are not so well known as to require the application of assumption of risk to snowmobile passengers. This Court also stated that tipping or rolling is a hazard of the activity, but it can be successfully avoided and further stated a "snowmobile, carefully operated, is no more hazardous than an automobile, train or taxi." Id.

Three months after Olson, in Carpenter v. Mattison, 300 Minn. 273, 219 N.W.2d 625 (1974), this Court addressed a case where plaintiff was injured as a result of

defendant's snowmobile striking plaintiff's stopped snowmobile. Id. at 628. This Court rejected any argument as to primary assumption of the risk based on Olson. Id. at 629.

**D. Primary Assumption of the Risk Should Be Applied to Snowmobiling.**

It is McFarland's position that when a plaintiff participates in a sporting activity, including the sporting activity of snowmobiling, like Daly did here, he primarily assumed the risks inherent to that activity. Wagner, 396 N.W.2d at 226. Here the terrain, the skill and experience of the participants and the equipment utilized all play a significant role in the participants' enjoyment of the sport. Snowmobiling as a group, riding in close formation at speeds in excess of 50 mph, all contributed to Daly's enjoyment of the sport. But when Daly chose to so participate, he undertook the inherent risk that because of the uneven terrain, obstacles hidden by snow cover, changing snow conditions and the actions of his fellow snowmobilers in response thereto, there could be loss of control and/or collision possibilities between snowmobiles, leading to personal injuries.

As the California Court of Appeals held in applying primary assumption of the risk to a collision between two motorcyclists engaged in the sport of off-roading, "the sport of off-roading involves inherent risks that the participants in this recreational activity may be involved in inadvertent motor vehicle collisions and may suffer injury or death."

Distefano v. Forester, 102 Cal. Rptr. 2d 813, 816 (Cal. Ct. App. 2001).

In ruling on the application of primary assumption of the risk to the facts of that case, the appellate court there focused its inquiry first on the objective nature of the subject sporting activity, off-roading, and the parties' general relationship to that activity.

Id. at 823. Examining the sport of off-roading, the appellate court concluded “inherent risks include the risk that coparticipants ascending a blind hill in motor vehicles from opposite directions may not be able to see one another in time to avoid a collision.” Id. at 822. “The accident occurred in an unincorporated area . . . and consists of natural terrain with blind hills, inherently uneven areas and vegetation . . . . [T]here are dirt tracks that constantly change as a result of vehicular activity and forces of nature.” Id.

The appellate court next examined whether there was evidence that the defendant intentionally injured the plaintiff or engaged in conduct that was so reckless as to be totally outside the range of the ordinary activity involved in the sport of off-roading. Id. at 823. There the record showed that the plaintiff did not argue that defendant intentionally injured him. Nor did he allege that defendant’s conduct was intentional or reckless. The court held “a participant who is injured in a sporting activity may not sue another participant for mere negligence.” Id.

The California courts have also applied primary assumption of the risk to the sport of personal watercraft riding and long distance recreational group bike riding. Whelihan v. Espinoza, 2 Cal. Rptr. 3d 883 (Cal. Ct. App. 2003), *rev. denied* (recognizing that jet skiing is an active sport that poses a significant risk of injury, particularly when it is done — as it often is — with other jet skiers in order to add to the exhilaration of the sport by racing, jumping the wakes of the other jet skiers or nearby boats, or in other respects making the sporting activity more challenging and entertaining); Moser v. Ratinoff, 130 Cal. Rptr. 2d 198, 206 (Cal. Ct. App. 2003), *rev. denied* (applying primary assumption of

the risk doctrine to long distance recreational group bicycle rides. There the court concluded that one cyclist riding alongside another cyclist and swerving into the other, causing the plaintiff to fall and sustain injuries, is a risk that is inherent in long distance recreational group bicycle rides.).

The holding in these cases was consistent with other case law authority in California that has, like Minnesota, applied assumption of the risk to such activities as ice skating. See Staten v. Super. Ct., 53 Cal. Rptr. 2d 657, 660 (Cal. App. 1996) (figure skater had no duty to check her route before beginning a backward spiral because the risk of being cut by the blade of a backward-moving skater was inherent in the sport of figure skating, citing Moe v. Steenberg, 275 Minn. 448, 147 N.W.2d 587 (1966)).

In Olson, this Court refused to apply primary assumption of the risk to the relationship between a driver and a passenger of a snowmobile, stating a snowmobile, carefully operated, is no more hazardous than an automobile, train or taxi. This case, unlike Olson, does not involve a snowmobile driver and his passenger, nor does it, like Carpenter, involve a stopped snowmobile. This case involves four snowmobile enthusiasts who chose to ride down a bean field in close formation. And whatever the record in Olson, the record here is contrary to this Court's 1974 pronouncements of snowmobiles' inherent safety. Both automobiles and snowmobiles have changed since Olson and Carpenter were decided in 1974. Automobiles have safety features such as improved driver and passenger safety restraints, front and side air bags, safety glass and force-absorbing bumpers. Snowmobiles do not have these safety features.

Modern snowmobiles, such as the snowmobiles the parties were riding on the day of the accident, have more horsepower and greater acceleration than snowmobiles did in the 1970s. Driving a snowmobile poses hazards not encountered when driving an automobile or motorcycle, such as uneven terrain. As Daly admits, and there is no evidence of record to the contrary, driving a snowmobile is more hazardous than driving an automobile or even a motorcycle.<sup>5</sup>

Primary assumption of the risk occurs when a plaintiff voluntarily participates in a sporting or recreational activity involving certain inherent risks. An errantly thrown ball in baseball or a carelessly extended elbow in basketball are inherent risks of those sports. Collisions with other skaters in group skating sessions are likewise inherent in the activity of figure skating.

There is no basis to exclude the sporting activity of snowmobiling from the primary assumption of the risk doctrine on the facts presented here. See Blount v. Town of West Turin, 759 N.Y.S.2d 851 (N.Y. Sup. Ct. 2003) (“the sport or recreation of snowmobiling contains certain inherent risks that may be caused by variations in the terrain or weather conditions. This is particularly true when the claimed offending object is a snow pile or accumulation of ice on the trail.”); N.H. Rev. Stat. § 215-C:55(II) (“risks inherent in the sport of snowmobile operation include variations in terrain . . . surface or subsurface snow or ice conditions . . . and collisions with other operators or persons.”).

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<sup>5</sup> It is difficult to make any comparison between a snowmobile and a train.

Daly is a very experienced snowmobile operator and had been riding individually and in groups for years. One of the inherent risks of snowmobiling is that snowmobiles encounter variations in terrain. The Court of Appeals recognized that a person not riding on a groomed trail could run into “snow drifts.” (Add. 6). Objects obscured by snow are likewise hazards inherent to the activity of snowmobiling. Daly, in fact, some 15-20 years before the accident, had been injured in a group ride when he struck a culvert and was thrown from his snowmobile. There was a very real possibility that any of the riders in the group could encounter unexpected changes in the terrain which would impact his ability to control his snowmobile and therefore impact the safety of those around him. One of the hazards of group riding is the hazard of collision with one another. Nonetheless, Daly decided to ride in close formation with the others down a bean field at speeds in excess of 60 miles per hour, thereby directly putting himself at risk. Daly himself admits there was no reckless or intentional misconduct on the part of McFarland. Primary assumption of the risk applies.

The Court of Appeals’ statements rejecting primary assumption of the risk are not in accord with the doctrine. (Add. 4). A voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of and flow from such participation. It is not necessary that the injured plaintiff must have foreseen the exact manner in which his injury occurred, as the Court of Appeals appears to suggest, in order for primary assumption of the risk to apply. (Id.)

Based on the uncontroverted evidence as applied to the doctrine of primary assumption of the risk, McFarland is entitled to judgment as a matter of law. McFarland requests that the judgment in favor of Daly be reversed and that the Court order the trial court to enter a judgment of dismissal in McFarland's favor.

**II. THE TRIAL COURT IMPROPERLY INFRINGED ON THE JURY'S FACTFINDING FUNCTION WHEN THE TRIAL COURT CHANGED THE JURY'S ANSWER TO THE COMPARATIVE FAULT QUESTION TO ZERO WITHOUT AN EXPRESS DETERMINATION THAT THE EVIDENCE MANDATES THAT THE COURT FIND THE PARTY WAS NOT CAUSALLY NEGLIGENT AS A MATTER OF LAW.**

If this Court concludes McFarland is not entitled to judgment as a matter of law based on the doctrine of primary assumption of the risk, McFarland is nonetheless entitled to a new trial. One of the grounds is based on the jury's inconsistent answers to the special verdict questions.

**A. This Court Reviews De Novo the Trial Court's Decision to Change the Answer to the Jury's Special Verdict.**

The Special Verdict form used, which was the form advocated by Daly, instructed the jury to answer the comparative negligence question if it answered "yes" to the negligence Questions 1 and 3. (A. 13; Add. 19). The jury found that McFarland was negligent in the operation of his snowmobile (Question 1) and such negligence was a direct cause of the accident (Question 2). The jury found that Daly was negligent in the operation of his snowmobile (Question 3), but in answer to Question 4 found Daly's negligence was not a direct cause of the accident. (Add. 19). It then nonetheless

attributed 30% of the direct causal negligence to Daly (Question 5). (Add. 20). The Special Verdict form states:

5. Taking all of the negligence that contributed as a direct cause of the accident as 100%, what percentage of negligence do you attribute to:

Zachary John McFarland	70%
Christopher John Daly	<u>30%</u>
TOTAL	100%

(Add. 20).

The jury inconsistently found Daly's negligence was not a direct cause (Question 4) and a direct cause (Question 5). (Add. 19-20). Recognizing the inconsistency in the verdict after the jury had been released, Daly put before the trial court a finding of fact which states: "Accordingly, although the jury completed responses to the comparative fault question, as instructed by the Special Verdict form, the Court finds that no fault comparison was legally required or necessary and that no fault reduction would be appropriate." (Add. 17). The trial court, without allowing a response from McFarland, immediately signed the proposed order containing that finding, which order also contains Daly's counsel's signature. (Add. 16-18).

The trial court did not explain, in response to McFarland's post-trial motion, on what evidence it held the causation question answer is dispositive and not the comparative negligence question answer, when both questions utilize the same "direct cause of the accident" language. (Add. 15). McFarland asserted that based on the evidence of record the court must instead change Special Verdict Question No. 4 to "yes"

and retain the jury's answer to the apportionment question. In the alternative, McFarland asserted he was entitled to a new trial. The trial court, without explanation, denied McFarland's motion. (Add. 15).

The Court of Appeals majority affirms the trial court's decision. It does so based on a "liberal construction" of the special verdict form. (Add. 7). The Court of Appeals states the inconsistent verdict was caused by the special verdict form used and the trial court's instruction to the jury. (Add. 7-8). The Court of Appeals speculates that "the jury may have concluded that was required to weigh the relative degree of all negligence regardless of whether that negligence was a direct cause of the accident." (Add. 8). The dissenting judge states that since he would find McFarland entitled to a new trial on the emergency rule instruction, that moots "the third issue, which involves the district court's interpretation of the jury's inconsistent answers to the special verdict interrogatories" and cites to this Court's decision in Orwick v. Belshan, 304 Minn. 338, 231 N.W.2d 90, 95 (1975). Following this Court's decision in Orwick, McFarland asserts he is entitled to a new trial.

**B. This Court Reviews De Novo the Trial Court's Decision to Change the Answer to the Special Verdict Question.**

A jury's answer to special interrogatories are binding on the court. The trial court retains the same authority to change an answer to a special verdict question as it does to grant judgment as a matter of law: when the evidence requires the change as a matter of

law. Orwick, 231 N.W.2d at 94. Thus, when a jury finds that a party's negligence was not a cause of his injuries but, in comparing the negligence,

attributes a portion of the total causal negligence to that party, and the evidence establishes as a matter of law that his negligence was a proximate cause of his injuries, the court should . . . set aside the answer to the question which found that the plaintiff's negligence was not causal and insert an affirmative answer.

Id. at 94-95.

When a district court resolves inconsistent findings by deciding a fact question as a matter of law, this Court's review is de novo. See Haugen v. Int'l Transport, Inc., 379 N.W.2d 529, 531 (Minn. 1986). Where the special verdict answers are inconsistent and if the Court determines there is not sufficient evidence to change the answer to either special verdict question as a matter of law, the case must be remanded for a new trial. Carufel v. Steven, 293 N.W.2d 47, 49 (Minn. 1980); Wojan v. Igl, 259 Wis. 511, 49 N.W.2d 420, 422 (1951) (when jury found no causation but apportioned fault, the verdict was inconsistent and a new trial would be ordered); Bonin v. Town West, Inc., 896 F.2d 1260, 1263 (10th Cir. 1990) (same).

Normally, contributory negligence and proximate cause are questions of fact for the jury where reasonable minds may differ as to what constitutes ordinary care and proximate causal connection based upon the evidence presented. Schrader v. Kriesel, 232 Minn. 238, 45 N.W.2d 395, 397 (1950). The trial court here never explained on what

evidence it held, as a matter of law, that the answer to the causation question (Question 4) is dispositive and not the answer to the comparative negligence question (Question 5).

The Court of Appeals affirms the lower court, stating that the court “liberally” construes the verdict. There can be no “liberal” construction of the verdict when there are patently inconsistent answers to the same direct causation question. The cases cited by the Court of Appeals — Kelly v. City of Minneapolis, 598 N.W.2d 657, 662-63 (Minn. 1999), and Dunn v. Nat’l Beverage Corp., 745 N.W.2d 549, 555 (Minn. 2008) — do not involve inconsistent answers to the direct cause question. Kelly, 598 N.W.3d at 663 (jury found defendants intentionally inflicted emotional distress, but found no malice); Dunn, 745 N.W.3d at 555-56 (jury found damages attributable to breach of contract and not for the franchise act violation). A “liberal” standard cannot possibly be employed here because the verdict answers to direct causation cannot stand together. The jury, by its verdict, found Daly’s negligence was a direct cause of the accident and it was not a direct cause of the accident. One cannot change one of the jury’s inconsistent answers by assuming the other answer is correct. Olson v. City of Austin, 386 N.W.2d 815, 817 (Minn. Ct. App. 1986).

The test applied is whether the evidence establishes as a matter of law that Daly’s negligence was not a direct cause of the accident. Orwick, 231 N.W.2d at 343. The test is not, as the Court of Appeals articulates, what the appellate court speculates a jury could reasonably have concluded, since the jury answered the same question inconsistently. As this Court held in Meinke v. Lewandowski, 306 Minn. 406, 237 N.W.2d 387, 392-93

(1975), a “judge’s assumption that a change in [jury’s] response to the apportionment question rather than to the causality question would reflect the jury’s true understanding of the case was without any foundation.”

The evidence does not support attributing no direct cause to Daly as a matter of law. If McFarland was somehow negligent for what Daly describes as a “freak accident” which Daly testified McFarland could not have avoided, Daly must also be causally negligent. (T. 237-38). After all, Daly chose to operate his snowmobile in close proximity to McFarland and the others, which, as he admits, caused him to lose control. (T. 170, 237-38). Ironically, in one of the cases cited to the Court of Appeals by Daly, Isker v. Gardner, 360 N.W.2d 468 (Minn. Ct. App. 1985), *rev. denied*, the Court of Appeals concluded it was appropriate to attribute 17% of the fault to a snowmobile passenger who was thrown from the snowmobile when it went airborne and whose hand became wedged between the track and the seat. Id. at 469. It certainly stands to reason that on the evidence presented a jury could find an experienced snowmobiler such as Daly, who was thrown while operating his own snowmobile, 30% at fault for his injuries under the facts of this case.

As the record reflects, Daly was well aware through his extensive snowmobiling experience that a snowmobiler may encounter an unexpected obstacle. He also knew that could cause even the most experienced snowmobiler to lose control. Despite that known risk, Daly voluntarily encountered the risk by riding in close formation and proximity to others down the field. By choosing to operate his snowmobile in such close proximity to

others, Daly admitted he severely restricted his ability to control his own machine and ultimately lost control because of it, leading to his injuries. Daly testified:

I remember seeing the track coming at me and I was trying to turn out of it but I didn't want to turn too hard or too fast because I didn't know where [Forsberg] or [Engelkes] was over to the right of me so I didn't want to crash into them, too, on top of it so I tried to turn the best I could, the collision happened, and my hand must have slipped off because it broke my dimmer — my light dimmer switch on the left hand side of my snowmobile, and that's when I think I lost complete control and fell off because I was turning . . . .

(T. 170).

Under these facts, which the Court of Appeals opinion does not acknowledge, it does not follow that Daly can be negligent but that his negligence is not causal of his injuries, as the lower courts have ruled as a matter of law.

The Court of Appeals states there was testimony about “excessive speed for the conditions.” (Add. 8). But if McFarland's speed was unsafe, so was the speed of Daly and the others. Daly did not slow down because of any concern for conditions of the bean field or the weather. He slowed down only because he did not want to lead through the ditch. Whether McFarland's speed was excessive does not address Daly's causal fault. The Court of Appeals, like the trial court, cannot on this record conclude as a matter of law Daly's negligence was not also the direct cause of the accident. A new trial must be ordered.

### **III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY ON THE EMERGENCY RULE.**

#### **A. Failure to Instruct the Jury on the Emergency Rule Was an Abuse of Discretion.**

This Court evaluates a trial court's refusal to give a jury instruction for an abuse of discretion. State v. Yang, 774 N.W.2d 539, 559 (Minn. 2009). A party is entitled to a specific instruction if evidence exists at trial to support the instruction. Id.; Cornfeldt v. Tongen, 262 N.W.2d 684, 698 (Minn. 1977). A court need not, however, give a requested instruction if the substance is already contained in other jury instructions. Yang, 774 N.W.2d at 551. Here the substance of the emergency rule instruction is not contained in another jury instruction and the trial court abused its discretion in denying McFarland's request that the jury be instructed on the emergency rule, CIVJIG 25.16. McFarland is entitled to a new trial.

#### **B. McFarland Was Entitled to Have the Jury Instructed Per CIVJIG 25.16.**

An emergency rule instruction "should always be given where it is consistent with the theory of one of the parties to the action and where the evidence submitted by such party would sustain a finding that he had been confronted with a sudden peril or emergency and acted under its stress." Gran v. Dasovic, 275 Minn. 415, 147 N.W.2d 576, 579 (1966). While a snowmobile operator owes a duty to exercise ordinary or reasonable care, as this Court has recognized, the emergency rule provides an exception to that general rule. Sanders v. Gilbertson, 224 Minn. 546, 29 N.W.2d 357, 359-60 (1947). As this Court stated in Sanders, a person confronted with a sudden peril through

no fault of his own is not to be charged with the “wisdom of hindsight.” Id. A driver will not be found negligent for failing to choose the best or safest course of action. Id.

The district court must give the emergency instruction in all cases where the jury could find that the defendant’s pre-emergency conduct was not negligent. The instruction should be refused only in those cases where the defendant’s pre-emergency conduct can be said to constitute negligence as a matter of law. “It is not enough [to preclude the instruction] that there is some evidence from which the jury could find that the defendant’s pre-emergency conduct was negligent.” W.G.O. v. Crandall, 2001 WL 314916 at \*9 (Minn. Ct. App. 2001) (Hanson, J. concurring and dissenting) (A. 32-35), *rev’d on other grounds*, 640 N.W.2d 344 (Minn. 2002), but recognizing at 640 N.W.2d at 348 n.7 that Judge Hanson’s dissent is correct statement of the law and quoting Minder v. Peterson, 254 Minn. 82, 93 N.W.2d 699, 705 (1958). See also 4 Minn. Prac., Jury Instr. Guides--Civil CIVJIG 25.16 (5th ed.) (acknowledging Judge Hanson’s concurring and dissenting opinion in Crandall was correct statement of the emergency rule). (A. 42).

The cases that have affirmed the refusal to give the emergency instruction have concluded that the evidence of the negligence of defendant’s pre-emergency conduct was so clear as to be tantamount to negligence as a matter of law. Crandall, 2001 WL 314916 at \*9, and this Court’s cases cited therein. (A. 32-33). As then-Judge Hanson explained in Crandall, if the Court were to allow the trial court to prejudge the fact question whether the defendant was negligent, it would “unfairly preclude the jury from considering the

emergency rule even where the jury might have found that the defendant's pre-emergency actions were not negligent." Id., citing Minder, 93 N.W.2d at 705.

So the question before the Court is whether the evidence in this case justified the conclusion that McFarland's pre-emergency conduct was negligent as a matter of law, so as to justify the denial of the emergency instruction. In so reviewing, the facts are to be viewed most favorably to McFarland. Here the trial court never found that McFarland's pre-collision conduct was negligent as a matter of law.

In fact, the trial court, in denying Daly partial summary judgment, had held that the evidence would support a determination of no negligence on McFarland. (A. 3-4). The trial court nonetheless at trial inconsistently prejudged the evidence, concluding as a matter of law that "I don't think there is any emergency," which the trial court defined to be limited to "a deer leaping out on the road or a — or something, you know, appearing that shouldn't or couldn't have been immediately apparent." (T. 472). The trial court concluded the fact "he hit a snow drift" was not sufficient. (T. 472-73). The trial court did not find that McFarland's pre-collision conduct was negligent as a matter of law.

The Court of Appeals' majority opinion states that the emergency rule instruction was properly denied, focusing on the snow drift as presenting the unanticipated emergency. (Add. 6). But McFarland's snow drift comments were made in response to the trial court's snow drift comments. They cannot be viewed as the sole basis for the requested instruction, as the Court of Appeals concludes. (T. 472-73; Add. 6). Even as to the snow drift as the emergency, the trial court responded, "And that may be a compelling

argument that you're able to make to the jury. You're just not going to be able to say that the Judge is going to instruct you." (T. 473). By the trial court's very comments, the trial court recognized the instruction was consistent with McFarland's "theory of the case" and that McFarland had evidence to support it.

Moreover, and as the dissent properly recognized, the jury could have found the accident was related to McFarland's split second emergency decision to push away his airborne snowmobile. (Add. 11-12). That is exactly what McFarland argued. (Defendant's Memorandum of Law in Support of Motion for Amended Findings, New Trial, and JNOV, p. 10) ("One of Defendant's theories of the case was the Defendant was presented with a hazardous condition when his snowmobile wheelied and rotated . . . Defendant had to abandon his sled to preserve his life.")

Daly offered evidence at trial that his injuries were a result of McFarland's attempts to escape from his tumbling snowmobile, and such evidence demonstrates a basis for application of the emergency rule. (T. 173). Daly, at trial, agreed that McFarland "didn't have a choice but to abandon his sled" and that Daly "thought [the airborne snowmobile] would've probably killed [McFarland]." (T. 237). Daly also testified that he believed this was an accident and there was nothing McFarland could have done to avoid it. (T. 238). Therefore, McFarland's attorney argued to the jury that "[w]hen [McFarland] hits the drift[,] I don't think there is any question in anybody's mind that after the sled went up[,] he had to get off. I mean, he had to get off. It wasn't an option. Wasn't like he was given a choice. He had to get off." (T. 515). But the jury

was not instructed on the emergency rule and no other instruction gave the jury guidance in evaluating the effect of McFarland's midair emergency decision.

The failure to give the emergency rule instruction constitutes prejudicial error. The absence of an instruction on the emergency rule left the jury without guidance in evaluating the effect of McFarland's midair emergency decision. Only the emergency rule instruction encompasses the principle that a party may be relieved of liability for the consequences of the party's chosen means of escaping the hazards of an emergency. It was the province of the jury, not the judge, to decide if there was an emergency and, if there was, to determine the attendant liabilities. McFarland is entitled to a new trial.

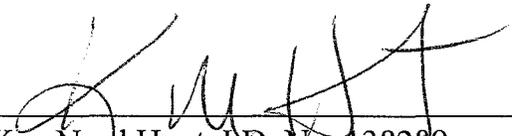
**CONCLUSION**

Appellant McFarland requests that the judgment be reversed and the Court order the trial court to enter judgment in favor of McFarland. In the alternative, McFarland requests a new trial be ordered.

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Dated: June 1, 2011

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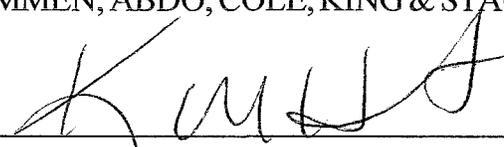
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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 11,342 words. This brief was prepared using Word Perfect 12.

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