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State of Minnesota
In Supreme Court

Christopher John Daly,

Respondent,

v.

Zachary John McFarland,

Petitioner.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PETITIONER/APPELLANT ZACHARY JOHN McFARLAND

Kay Nord Hunt (I.D. No. 138289)
LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Michael T. O'Rourke (I.D. No. 0298530)
ERICKSON, ZIERKE,
KUDERER & MADSEN, P.A.
114 West Second Street
Fairmont, MN 56031
(507) 238-4711

Attorneys for Petitioner
Zachary John McFarland

William O. Bongard (I.D. No. 133826)
SIEBEN, GROSE, VON HOLTUM
& CAREY, LTD.
900 Midwest Plaza
800 Marquette Avenue
Minneapolis, MN 55402
(612) 333-4500

Attorneys for Respondent
Christopher John Daly

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I. RESPONSE TO RESPONDENT DALY'S STATEMENT OF THE FACTS.

Respondent/Plaintiff Christopher John Daly (Daly) generally does not take issue with Appellant/Defendant Zachary John McFarland's (McFarland) Statement of the Facts. There are, however, a number of statements made by Daly in his Statement of Facts which are not accurate or in accord with the record and when viewed in accord with the standard of review.

Daly asserts that the "testimony varied as to the distance between the snowmobilers and how fast they were traveling" as they traversed the bean field. (Respondent's Brief, p. 5). The testimony of record is that Daly, McFarland and Neil Forsberg (Forsberg), with Jeff Engelkes (Engelkes) holding back, rode down the bean field more or less side by side at the same speed. (T. 389). Forsberg testified:

> Q. What kind of speed, in your recollection – maybe I should back up. Did everybody stay together – when I say everybody, the three of you – did the three of you stay together as you proceeded across the bean field?
>
> A. Yes.
>
> Q. Were you more or less in a row?
>
> A. Side by side, not in a row.
>
> Q. Got ya. Were you more or less side by side the whole time?
>
> A. Yes.
>
> Q. Was there any variation?
>
> A. No, it was pretty much the same.

(T. 389).

The testimony of record is that the snowmobile participants estimated the distance between the snowmobiles, measured from the center of a snowmobile to the snowmobile next to it, to be in a range of 10 to 20 feet as they traversed the field. (T. 236, 281, 311). Daly himself estimated the distance was 15 feet between the sleds. (T. 236). Daly also estimated that he operated his snowmobile at 60-65 miles per hour as he traversed the bean field. (T. 234). McFarland traveled at no greater rate of speed. (T. 283).

Daly did testify that when they took off down the field in a row he was "out ahead of everybody." He did not know how far ahead, but said it was "by a little ways." (T. 166). And it was only as Daly neared the end of the field that he slowed down with the specific intent to let someone else take the lead as they left their side-by-side formation and entered the ditch. (Id.) No one crossed in front of another person's path as they rode down that field. (T. 319).

Daly, as he slowed, was aware that McFarland passed him on the left. (T. 171). Daly did not claim that McFarland could not pass him on the left unless he so signaled, as Daly implies in his Respondent's brief at page 5. McFarland also testified that he understood Daly knew where he was when he passed on the left:

> Q. Mr. McFarland, did [Daly] look back at you?
>
> A. I believe he looked to his left when he as he – let off or when he let off [the throttle].
>
> Q. What did you interpret that to mean?
>
> A. Well, that he knew I was there and then – and I was going to take the lead.

Q. Did you expect that he knew you were there?

A. Yes.

(T. 325).

According to Daly, he did not even try to observe the other riders or their positions until he saw McFarland go airborne. (T. 167, 170).[1] When he saw McFarland go airborne, Daly states he "didn't want to turn too hard or too fast" because he did not know where Forsberg and Engelkes were to his right. (T. 170).

Daly's statement to this Court that "as McFarland was accelerating past Daly, he hit one of the hard drifts and lost control of his snowmobile" is inaccurate. The undisputed fact of record is once McFarland "got up to [Daly] [he] let off [the throttle] to slow down as well." (T. 323). McFarland was not accelerating. (Id.) Both McFarland and Daly slowed their snowmobiles not by braking but by letting off the throttle, and then the clutch slows down the snowmobile. (T. 171, 284, 323). Accordingly, there would be no brake lights. (T. 171-72).

Daly had no estimate as to McFarland's speed when McFarland passed Daly. Daly could only testify that McFarland was going faster than Daly when he passed him because Daly was slowing – i.e., "off the throttle." (T. 171-72). McFarland thought it possible that his snowmobile decelerated at the same rate that Daly had decelerated. (T. 324). Snowmobiles decelerate quickly. (T. 235-36, 323-24).

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[1] Daly's statement on page 5 of his brief citing to T. 167, implying that as he went down the field he was aware of the riders to his right, is inaccurate.

There is also no testimony of record that McFarland hit "one of the hard drifts," as stated on page 5 of Respondents' brief. Daly testified "I wasn't sure what [McFarland] hit because the snowmobile just shot straight up in the air like this and he was holding on – still trying to hold on to it." (T. 170). Pages 276 and 284 of the transcript, also cited by Daly for that proposition, do not state McFarland hit a hard drift.

Daly also testified 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). According to Daly, he believed this was an accident that McFarland could not have avoided. (T. 237).

It is true that Daly's expert, Kenneth Drevnick, testified that the speed McFarland was traveling played a role in McFarland's inability to control his snowmobile. What Daly does not inform the Court is that Mr. Drevnick admitted that he could not testify as to the speed at which McFarland was traveling.

> Q. In this case there were no field measurements or recordings taken.
>
> A. No, unfortunately.
>
> Q. There was no – there was no total mapping or mapping undertaken at the time.
>
> A. No.
>
> Q. How, if at all, does that affect your ability to render an opinion?
>
> A. Well, the physical evidence that could have been measured of course is lost, and so I can't tell you – I can't give you a speed.

(T. 354).

There is also testimony of record that speed is not the determinative factor in how high a vehicle vaults in the air when it encounters a fixed object. (T. 457-58).

Mr. Drevnick also opined that McFarland's snowmobile tumbled over Daly's, although Mr. Drevnick admitted he did not have McFarland's snowmobile by which to make such comparisons. (T. 348-49, 377). In contrast, Daly himself testified he does not believe he was struck by McFarland's snowmobile. (T. 173).

Daly cites to the testimony of McFarland's expert, William Elkin. Elkin disagreed with Daly's counsel's assertion that McFarland was traveling at a speed that was not safe. (T. 450). Elkin explained that a rider in McFarland's position was justified in leaving his snowmobile. (T. 443). Safe snowmobilers can get injured while snowmobiling and injuries can occur at slow speeds. (T. 443). Even at slow speeds, one can hit an unseen obstacle and be thrown off the snowmobile. (T. 444).

II. PRIMARY ASSUMPTION OF THE RISK SHOULD APPLY TO THE SPORTING RECREATIONAL ACTIVITY OF SNOWMOBILING.

Primary assumption of the risk occurs when a plaintiff voluntarily participates in a sporting or recreational activity involving certain inherent risks and he is injured by those risks. Most recently, and while this case has been pending, the Minnesota Court of Appeals applied primary assumption of the risk as a matter of law where the plaintiff sustained injuries when she crashed into a tree while riding on a sled being pulled by a pickup on a snow-covered road. Gilland v. Clobes, 2011 WL 2437501 (Minn. Ct. App.

2011) (Supplemental Appendix [S.A.] 1). In so concluding, the Minnesota Court of Appeals stated:

> For anyone living in the rural Midwest, road hazards and obstructions are an obvious risk of riding a sled being pulled behind a vehicle along a snow-covered roadway.

Id. at *3. (S.A. 3).

Nonetheless, the same rule and analysis has not been applied to recreational snowmobiling.

It is McFarland's position that in a sporting/recreational injury case such as this, a plaintiff is not entitled to recover 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); Marchetti v. Kalish, 559 N.E.2d 699, 700-02 (Ohio 1990). Since the undisputed facts establish there was no such reckless or intentional misconduct on the part of McFarland, he is entitled to judgment as a matter of law.

Daly for the first time cites to Iepson v. Noren, 308 N.W.2d 812 (Minn. 1981). Iepson, however, did not involve joint participants in a sporting or recreational activity. Instead, it involved a collision between a motorbike and a pickup truck. Id. at 813.

The facts involving the Iepson accident, and as recognized by this Court, were in great dispute. Id. at 814-15. Under one version of the facts, two boys drove a pickup truck into the woods. Their testimony, and their reasons for wanting to go into the woods and what they intended to do there, was internally inconsistent and was contradicted by the statement made by one of them to the police officer soon after the accident. Id. at

814. One version was that they were supposedly searching for a certain pile of logs. They stopped and turned off the lights on the truck, but left the engine running. Id. at 814. One of the boys then left the truck to find a "special pile of logs" even though it was dark and he made the search without truck lights. Id. at 814.

The boys then chatted in the truck while they parked approximately 50 yards south of a campsite where local youths often gathered. Id. at 815. Both testified "they heard nothing and saw nothing except, for an instant, there was a blur just in front of the truck and an engine roar, and then the sound of an impact on the passenger side of the truck as the collision occurred." Id. at 815. Appellant, 16-year-old Iepson, riding a motorbike, collided with the truck. Id.

In Iepson's version, Iepson decided to ride the motorbike, but found its light would not go on, but decided to ride it home without the light. Id. According to Iepson, "he saw a blob appear in front of him, traveling toward him; too late he realized it was a truck moving toward him. He tried to avoid it, but collided with it." Id. at 815. It was under those facts that this Court held that the criteria set out for primary assumption of the risk did not apply to Iepson's alleged negligent conduct. Id. at 815-16.

In contrast to the facts in Iepson, here we have four experienced snowmobilers who were jointly engaged in the recreational sporting activity of snowmobiling. While claiming they were not racing or intentionally jumping drifts, the undisputed fact is these four men decided to head down a bean field side by side 10-20 feet apart at speeds of 60-

65 miles per hour.[2] Daly asserts this is "a case of normal snowmobile operation" and "Daly encountered known dangers associated with driving his snowmobile in a bean field." (Respondent's Brief, p. 17).

There is no reason to exempt what occurred here from the primary assumption of risk analysis. As Daly testified, snowmobiling is more hazardous than driving a car or riding a motorcycle because it rides on uneven, snow-covered terrain that hides obstacles from view. (T. 210, 213-16). Elkin, an accident reconstruction expert and an avid snowmobiler, concurred. (T. 425). There is no contradictory testimony. There is no testimony that snowmobiles are safer today than in the 1970's. The undisputed fact is they have "gotten a lot faster" with adjustable suspensions that make the fronts lighter. (T. 154). Snowmobiles do not have seatbelts. (T. 443-44).[3]

No one can dispute that one of the inherent risks of snowmobiling is that snowmobiles encounter variations in terrain which include obstructions hidden from view by the snow. Encountering such hidden objects or change in terrain can cause both sudden and unexpected maneuvers by the snowmobile operator made necessary by those conditions.

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[2] Primary assumption of risk should not be precluded as a matter of law simply because the activity involves snowmobiles. The same analysis should apply if, for example, these four participants had chosen to ride their dirt bikes or drive their cars at high speeds down a field in close formation and the same result occurred.

[3] McFarland only testified that the addition of studs which a snowmobiler can opt to add can decrease stopping distance. (T. 289). He did not testify, as Daly asserts at page 16 of his brief, that this is a recent safety modification. (Id.)

There was a very real possibility that any of the riders in the group could encounter conditions which would impact his ability to control his snowmobile and, therefore, impact those around him. (T. 433-36). That is one of the hazards of group riding. (Id.) Daly chose to ride in close formation with the others down a bean field at speeds in excess of 60 miles per hour. Daly admits there was no reckless or intentional misconduct on the part of McFarland. Primary assumption of the risk applies.

III. THE ISSUE ON APPEAL IS THE TRIAL COURT'S CHANGE TO THE JURY'S ANSWER TO THE SPECIAL VERDICT COMPARATIVE FAULT QUESTION AND THE TRIAL COURT'S ERROR IN SO CHANGING.

On appeal, McFarland does not challenge the special verdict form used. He does challenge the trial court's change to the jury's answer on comparative fault. That issue, as the Court of Appeals recognized, is properly before this Court. (Addendum to Brief of Petitioner [Add.] 7).

A. Daly Did Not Seek Review by This Court.

Daly now asserts that the Court of Appeals should not have reviewed McFarland's challenge on appeal to the trial court's change to the answer to the jury's special verdict question. (Respondent's Brief, p. 18). Daly's argument, which was made to and rejected by the Court of Appeals, is without merit. (See Respondent's Court of Appeals Brief, pp. 21-22, and Court of Appeals Opinion at Add. 7-8). If Daly wished to assert such a position before this Court, he needed to file a petition for further review or a petition for cross-review. Northwest Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche, 535

N.W.2d 612, 613 n.1 (Minn. 1995). Having failed to do so, Daly is not in a position to challenge the Court of Appeals' review of this issue.

B. The Issue of the Trial Court's Change in the Jury's Special Verdict Answer Is Before This Court.

As the record reflects, upon receipt of the jury's verdict, the trial court changed the jury's special verdict answer to the comparative fault question number 5. (Add. 17, 20). It did not provide McFarland an opportunity to respond to Daly's proposed findings of fact and conclusions of law before so ordering, and signed it upon receipt. (Appendix to Respondent's Brief in the Court of Appeals, p. 10; Add. 16-18). The first opportunity that McFarland had to address the trial court's decision in that regard was by post-trial motion. (Appendix to Brief of Petitioner [A.] 11). There, McFarland asserted that based on the evidence of record, the trial court committed error. (Id.) By McFarland's post-trial motions, McFarland preserved this issue for appeal. Daly's assertion that McFarland has somehow waived the issue on appeal is without basis in the law or in the record.

C. The Trial Court Submitted the Special Verdict Form Proposed by Daly.

McFarland does not understand why Daly refers to the apportionment question on the special verdict form as "clerical error." Contrary to Daly's assertion on page 9 of Respondent's brief, there was no clerical error in the apportionment of negligence question submitted to the jury. This situation is not governed under Minn. R. Civ. P. 60.01, which governs true clerical mistakes. In the Special Verdict Form submitted to the jury, Question No. 5 on comparative fault as submitted is identical to the Proposed

Special Verdict Form presented by Daly and adopted by the trial court. (Add. 13; Add. 19). By the trial court's choice of the special verdict form and as proposed by Daly, it gave the jury the causation question twice. The jury gave inconsistent answers to that question.

Even if one calls the error a "clerical error," that does not grant the trial court the ability to change the jury's verdict absent a conclusion that the evidence mandates as a matter of law a determination that Daly's negligence was not causal of his accident. All the trial court has stated on the matter is the words placed before it by Daly's counsel: "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). There has been no explanation offered by the trial court as to how, on this record, one could conclude Daly's negligence was not causal of his injuries as a matter of law.

D. The Court Can Only Change the Jury's Answer if the Evidence Mandates the Change as a Matter of Law.

As previously stated, by the trial court's choice of special verdict form it gave the jury the causation question twice. The jury, by its answers, purposefully contradicted itself. The jury found Daly's negligence was not a direct cause (Question No. 4) and a direct cause (Question No. 5). (Add. 19-20). That is the inconsistency at issue in this case. The trial court cannot resolve this inconsistency by holding the answer to Question

No. 4 was the true answer and not the answer to Question No. 5 by a so-called liberal construction of the verdict, as Daly argues to this Court.

This case is not a situation where the jury simply finds a party was at fault but that the fault was not a proximate cause of the accident, as also discussed in Haugen v. Int'l Transport, Inc., 379 N.W.2d 529, 531 (Minn. 1986), and quoted by Daly at page 17 of his brief. As explained in 57B Am. Jur. 2d Negligence § 1088 (2d ed. 2011), in that situation:

> [A] jury's finding that a party was at fault but that the fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause. Also, it is not necessarily inconsistent for a jury to find that an injury occurred but that the defendant was not negligent in causing the injury.

Instead, and as here, the jury assessed comparative fault after finding a person's negligence was not the proximate cause. The court in Haugen stated in that situation "the inconsistency in the special verdict answers can be identified as a matter of law." 379 N.W.2d at 531. As explained in 57B Am. Jur. 2d Negligence § 1088:

> A jury's verdict which assesses fault to a person after finding the person's negligence was not a proximate cause is an inconsistent verdict requiring a reversal.

In accord: Moszer v. Witt, 622 N.W.2d 223, 229 (N.D. 2001) ("A jury verdict which assesses fault to a person after finding the person's negligence was not a proximate cause is a 'clearly inconsistent and perverse' verdict"); Westfall v. Kottke, 328 N.W.2d 481, 489 (Wis. 1983) (in a case where the jury by its verdict found that defendant's negligence

was not causal, yet finding plaintiff 90% negligent and defendant 10% negligent, "[w]e conclude and hold that the inconsistency on the face of the verdict was irreconcilable, that having submitted the question of negligence in respect to both parties to the jury, it was inappropriate as a matter of hindsight to resolve the question of negligence or of cause in respect to either party as a matter of law").

The court has authority to change an inconsistent answer to a special verdict question under this situation only where the evidence mandates the change as a matter of law. Orwick v. Belshan, 304 Minn. 338, 231 N.W.2d 90, 94 (1975).[4] "The test applied, be it on the trial or appellate level, is whether or not the evidence in the case establishes as a matter of law that a jury's answer to a question must be changed." Id. To uphold the trial court's ruling, this Court must conclude the evidence required, as a matter of law, that the jury find Daly's negligence was not the direct cause of his accident. Id. The evidence does not so support.

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[4] To McFarland's knowledge, in every reported case in Minnesota when a jury finds that a party's negligence was not a direct cause but thereafter on the comparative negligence question attributes a portion of the total comparative negligence to that party, until this case, the court had changed the direct cause question to "yes" and left the comparative fault apportionment in place. Orwick, 231 N.W.2d at 94-95; Hyland Courts Town Home Owners Ass'n v. BEI Exterior Maint. Corp., 2006 WL 1806175 at *3 (Minn. Ct. App. 2006) (S.A. 7); Koob v. Salad, 2009 WL 2926878 at *2 (Minn. Ct. App. 2009) (S.A. 11); Unterburger v. Snow Co., Inc.., 630 F.2d 599, 605 (8th Cir. 1980) (applying Minnesota law). In the alternative, the court has granted a new trial. Betz v. Nelson, 367 N.W.2d 922, 925-26 (Minn. Ct. App. 1985), *rev. dismissed.* McFarland has found no case, and Daly has cited none to this Court, where the trial court did what was ordered in this case.

E. The Record Evidence Does Not Support the Trial Court's Change as a Matter of Law.

On this record, Daly is not entitled to assert to this Court that the "only evidence of Daly's negligence was Daly's open admission regarding his use of an iPod while riding his snowmobile." (Respondent's Brief, p. 26). 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. Daly chose to operate his snowmobile in close proximity to McFarland and the others, which he, as he admits, caused him to lose control, resulting in his injuries. (T. 170, 237-38). Based on the facts of record, it does not follow that Daly can be negligent but that his negligence is not also causal of his injuries, which the Court would have to rule as a matter of law in order to affirm the trial court.[5]

IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY ON THE EMERGENCY RULE.

A. McFarland Was Entitled to the Emergency Rule Instruction.

The standard in Minnesota is that the district court must give the emergency instruction in all cases where requested where the jury could find that the pre-emergency conduct was not negligent. W.G.O. v. Crandall, 2001 WL 314916 at *9 (Minn. Ct. App. 2001) (A. 33) (Hanson, J. concurring and dissenting), *rev'd on other grounds*, W.G.O. v.

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[5] As this Court has stated, it would have been better if the trial court had noted before the jury was discharged the inconsistent verdict and asked the jury to resume deliberations. Orwick, 367 N.W.2d at 925. Unfortunately, the trial court did not so note, leaving this Court with the situation presented in Orwick.

Crandall, 640 N.W.2d 344 (Minn. 2002), but recognizing at 640 N.W.2d at 348 n.7 that Judge Hanson's dissent is a correct statement of the law, quoting Minder v. Peterson, 254 Minn. 82, 93 N.W.2d 699, 705 (1958). The court is also to give the instruction if the evidence is conflicting as to whether the emergency was brought about by the negligence of the party seeking to invoke the doctrine. The instruction should be refused only where the party'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 the defendant's pre-emergency conduct was negligent." W.G.O., 2001 WL 314916 at *9. (A. 33).

The essential element involving the emergency doctrine is confrontation of a sudden peril requiring an instinctive reaction. The emergency doctrine, if the facts allow, applies with equal force to the plaintiff seeking to absolve himself from fault as to one defending himself against the charge of negligence. The rationale for the rule arises from the perception of human nature that "a prudent person, when brought face to face with an unexpected danger, may fail to use the best judgment, may omit some precaution that otherwise might have been taken, and may not choose the best available method of meeting the dangers of the situation." 57A Am. Jur. 2d Negligence § 200 (2010). Stated another way:

> The application of the emergency rule rests upon the psychological fact that the time which elapses between the creation of the danger and the impact is too short under the particular circumstances to allow an intelligent or deliberate choice of action in response to the realization of danger . . . .

Gage v. Seal, 154 N.W.2d 354 (Wis. 1967), quoting Cook v. Thomas, 131 N.W.2d 299, 302 (Wis. 1964).

Without the specific emergency instruction, "the duties set out in the standard comparative negligence instructions would be immutable." Henson v. Klein, 319 S.W.3d 413, 420-21 (Ky. 2010). "They would not permit the jury to base its finding of fault on whether it believed a party's conduct was a reasonable response to an emergency situation because the jury would not know that a qualifying emergency event 'alters the duties' required of the affected party." Id. As this Court stated, the emergency rule "requires a jury to consider the fact of sudden peril as a circumstance in determining the reasonableness of the person's response thereto." Trudeau v. SINA Contracting Co., 241 Minn. 79, 62 N.W.2d 492, 496 (1954). And as Judge Harten aptly stated in his dissent: "But 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." (Add. 12).

Contrary to Daly's understanding and argument, McFarland is not asking this Court to review the district court's denial of partial summary judgment to Daly. McFarland agrees with the trial court's denial to Daly of summary judgment. McFarland is simply asking this Court to accept, as the trial court did pre-trial, that a jury could find on this record McFarland was not negligent. There is testimony of record that, for example, a snow drift with a hard lip would be very difficult for a rider to identify as a

hazard.[6] (T. 445). There is also testimony of record, as Judge Harten in his dissent acknowledges, that "[t]he jury could find that this collision was related to [McFarland's] split-second emergency decision to push away his airborne snowmobile." (Add. 11).

The district court is obligated to give the emergency instruction in all cases where the jury could find the defendant's pre-emergency conduct was not negligent. Daly's assertion that "McFarland was the only rider who failed to travel at a safe speed" is contrary to the record, as Judge Harten acknowledges in his dissent. (Add. 11). If McFarland's speed was unsafe, so was the speed of Daly and the others. (Id.) 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. Daly's assertion that McFarland was driving too fast is argument, and the record evidence does not establish that McFarland's pre-emergency conduct was negligent as a matter of law. McFarland presented evidence that he made an instinctive choice when confronted by a sudden emergency. He was entitled under Minnesota law to the emergency instruction.

B. The Emergency Rule Instruction Should Be Retained.

Daly, for the first time before this Court, asserts that the emergency rule instruction should be abolished by this Court. Such an argument was not raised below and is an impermissible shift of theory on appeal. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988). As this Court is aware, the emergency rule is a longstanding principle of law in

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[6] Unfortunately, it was never identified what hazard was encountered by McFarland that caused his snowmobile to go airborne.

this jurisdiction. It is true that a few jurisdictions have abolished the emergency rule instruction generally or only in automobile accident cases. Jeffrey F. Ghent, Modern Status of Sudden Emergency Doctrine, 10 A.L.R. 5th 680 (1963). It is to those jurisdictions that Daly cites to this Court at pages 35-36 of its brief. There are a number of recent cases explicitly supporting the retention or continued viability of the doctrine. Id. at § 5[a].

As the Kentucky Supreme Court recently recognized in Henson, 319 S.W.3d at 420-21, the emergency rule instruction is necessary when a statutory duty is incorporated into the jury instructions as a "specific duty." The Kentucky Supreme Court explained:

> The general duty to exercise ordinary care for one's own safety and the safety of others is universally present and never changes, although the conduct that constitutes a violation of the general duty may depend on the circumstances. But in the modern world of litigation, most aspects of conduct and interaction are governed by statutes and regulations that prescribe specific duties. A negligence claim resting exclusively on the general duty of ordinary care is rare indeed. When a statutory duty is supported by evidence, it must be incorporated into a jury instruction as a "specific duty."

Id. (internal cites omitted).

The Kentucky Supreme Court explained that in that situation:

> Where one's ability to conform to a specific duty is arguably affected by the presence of a sudden and unexpected peril, the jury is not adequately or fairly informed of what the substantive law requires unless the specific duty is qualified with a sudden emergency instruction.

Id.

In accord, Anderson v. Eikeland, 266 Minn. 61, 123 N.W.2d 316, 320 (1963), *reh'g denied* (where evidence justified instructing the jury on statutory duty to yield right of way, the "court should have instructed concerning the emergency rule so that the jury could judge the conduct of either or both drivers by that rule if facts were found which warranted its application"); Vasconez v. Mills, 651 N.W.2d 48, 54 (Iowa 2002) (recognizing doctrine allows a factfinder to excuse a party's failure to obey statutory law when confronted with an emergency not of his own making); Totsky v. Riteway Bus Service, Inc., 607 N.W.2d 637, 645 (Wis. 2000) (violation of statute can be excused through application of the emergency doctrine); Freed v. Salas, 780 N.W.2d 844, 864 (Mich. Ct. App. 2009) (emergency rule provides a basis to be excused of a statutory violation in regard to events that occur after the discovery of the emergency).

Here, the trial court instructed the jury, pursuant to Daly's request, as follows:

> A person has certain legal duties that are written into law as statutes. I'm going to read a law to you.
>
> Minnesota Statutes 84.87, Subdivision 2, Operation Generally. It shall be unlawful for any person to drive or operate any snowmobile in the following unsafe or harassing ways: (1) at a rate of speed greater than reasonable or proper under all of the surrounding circumstances; (2) in a negligent manner so as to endanger the person or property of another or to cause injury or damage thereto.
>
> If I read a law such as that, it does not automatically mean that the law has been broken. That decision is up to you. If the law has been broken, then you must decide if it was a direct cause of the accident.

(T. 487-88).

What the jury was not instructed was the jury could also judge the conduct by the emergency rule. Trudeau, 62 N.W.2d at 496; see Compton v. Pletch, 561 N.E.2d 803 (Ind. Ct. App. 1990) (emphasizing the emergency rule doctrine was a vital tool in explaining to the jury the standard of conduct in determining fault and that explains why many comparative fault jurisdictions had chosen to retain the doctrine). The failure to so instruct constitutes prejudicial error.

Contrary to Daly's general assertion to the Court, and despite a recognition of some shortcomings of the emergency doctrine, many courts have expressly decided to retain it. For example, in Young v. Clark, 814 P.2d 364, 367-69 (Colo. 1991), the Colorado Supreme Court declined to abolish or curtail the use of the emergency doctrine, dismissing arguments that the doctrine is confusing, finding instead that a properly worded instruction serves to clarify issues for the jury's benefit. Id. at 368.

The Colorado Supreme Court further found the doctrine to be consistent with the state's comparative negligence scheme.

> Consistent with this apportionment scheme, "[t]he sudden emergency instruction informs the jury . . . how it is to allocate fault and apportion damages when the conduct of the person in question is that of an 'ordinarily prudent person' when faced with an emergency instruction." Compton v. Pletch, 561 N.E.2d 803, 807 (Ind. App. 1990). Significantly, the doctrine explains to the jury the standard of conduct expected of defendants and plaintiffs who act under the stress of an emergency situation. Finding no friction between the comparative negligence scheme of allocating fault and the sudden emergency doctrine, we conclude that abolishing the doctrine on this ground is unwarranted.

Id. at 368 (emphasis in the original)

Likewise, in Ebach v. Ralston, 510 N.W.2d 604, 610 (N.D. 1994), the North Dakota Supreme Court concluded:

> Carefully drafted instructions about these [emergency] situations direct a jury to assess fault for deviations from the negligence standard of ordinary care under emergency circumstances and are consistent with the assessment of fault under the comparative negligence. (Citation omitted).

Some jurisdictions appear to have abolished the instruction only in automobile cases. See Finley v. Wiley, 246 A.2d 715, 719 (N.J. 1968) ("[w]e entertain grave doubt whether a sudden emergency charge should ever be given in an ordinary automobile accident case."); Simonson v. White, 713 P.2d 983, 990 (Mont. 1986) (barring it in auto cases).

The doctrine, however, has maintained its vitality in modern recreational accident cases. See Henson, 319 S.W.3d at 423 (in applying it to a collision of personal watercrafts, concluding there was no indication that Kentucky trial courts and juries, and more than a century of experience with the sudden emergency doctrine, have experienced any difficulty in understanding or applying it); Reed v. Reed, 153 N.W.2d 356, 358 (Neb. 1967) (whether defendant's conduct in motorboat collision was excusable under sudden emergency doctrine was question for jury); Del Vecchio v. Lund, 293 N.W.2d 474, 477 (S.D. 1980) (operator of motorboat that struck water skier would be entitled to sudden emergency instruction); Coyne v. Peace, 863 A.2d 885, 889 (Me. 2004) (recognizing the continued vitality of the emergency doctrine and holding jury instruction on emergency doctrine was warranted in a snowmobile collision).

The emergency rule instruction should be retained and the refusal to so instruct the jury prejudiced McFarland, entitling him 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.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: July 15, 2011

BY _____

Kay Nord Hunt, I.D. No. 138289
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

ERICKSON, ZIERKE, KUDERER & MADSEN, P.A.
Michael T. O'Rourke, I.D. No. 0298530
114 West Second Street
Fairmont, MN 56031
(507) 238-4711

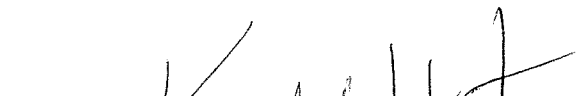
Attorneys for Petitioner Zachary John McFarland

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,841 words. This brief was prepared using Word Perfect 10.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: July 15, 2011

BY 

Kay Nord Hunt, I.D. No. 138289
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

ERICKSON, ZIERKE, KUDERER & MADSEN, P.A.
Michael T. O'Rourke, I.D. No. 0298530
114 West Second Street
Fairmont, MN 56031
(507) 238-4711

Attorneys for Petitioner Zachary John McFarland