CASE NO. A11-1719

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State of Minnesota
In Court of Appeals

KARI RENSWICK,

Plaintiff/Respondent,

vs.

JASON WENZEL,

Defendant/Appellant.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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STATEMENT OF THE LEGAL ISSUES

I. WHETHER A NEW TRIAL SHOULD BE GRANTED PURSUANT TO MINN. R. CIV. P. 59.01?

A. Did the trial court err in denying Wenzel's motion *in limine* to exclude Respondent's claim for future pain and disability and by submitting the issue of future pain and disability damages to the jury when there is no legal or factual basis for such an award?

1. The issue was raised at trial by Wenzel's motion *in limine* and his post-trial motion. (App. 31, 107-109.)

2. The trial court denied Wenzel's motion *in limine* and post-trial motion and held Respondent's testimony established future pain and disability is more likely than not to occur. (App. 96-99, 142-54.)

3. Wenzel preserved the issue for appeal by bringing a post-trial motion pursuant to Minn. R. Civ. P. 59.01.

4. Derrick v. St. Paul C. R. Co., 252 Minn. 102 (1958); Pietrzak v. Eggen, 295 N.W.2d 504 (Minn. 1980); Pagett v. Northern Electric Supply Co., 283 Minn. 228 (1969).

B. Did the trial court err in refusing to instruct the jury and submit special verdict interrogatories regarding primary assumption of the risk?

1. The issue was raised at trial by Wenzel's proposed jury instructions, special verdict interrogatories, and his post-trial motion. (App. 82-90, 107-09.)

2. The trial court denied Wenzel's request for a jury instruction and special verdict interrogatories. The court also denied Wenzel's post-trial motion and held primary assumption of the risk is not applicable to the facts in this case. (App. 142-54.)

3. Wenzel preserved the issue for appeal by submitting evidence to support primary assumption of the risk at trial, by submitting a proposed jury instruction and special verdict interrogatories, and by bringing a post-trial motion pursuant to Minn. R. Civ. P. 59.01.

4. Louis v. Louis, 636 N.W.2d 314 (Minn. 2001); Wagner v. Thomas J. Obert Enterprises, 396 N.W.2d 223 (Minn. 1986); Griffiths v. Lovelette Transfer Co., Inc., 313 N.W.2d 602 (Minn. 1981).

C. Did the trial court err in refusing to instruct the jury that consumption of marijuana and methamphetamine is negligence per se?

1. The issue was raised at trial by Wenzel's proposed jury instructions and special verdict interrogatories and his post-trial motion. (App. 82-90, 107-09.)

2. The trial court denied Wenzel's request for a jury instruction and special verdict interrogatories. The court also denied Wenzel's post-trial motion and held the criminal statute does not establish a standard of conduct to measure civil liability for negligence. (App. 142-54.)

3. Wenzel preserved the issue for appeal by submitting evidence of Respondent's statutory violations at trial, by submitting a proposed jury instruction and special verdict interrogatories, and by bringing a post-trial motion pursuant to Minn. R. Civ. P. 59.01.

4. Alderman's Inc. v. Shanks, 536 N.W.2d 4 (Minn. 1995); Mechler v. McMahon, 184 Minn. 476 (1931); Holmquist v. Miller, 352 N.W.2d 47, 51 (Minn. Ct. App. 1984); Minn. Stat. § § 152.021-025.

II. WHETHER JUDGMENT AS A MATTER OF LAW SHOULD BE GRANTED PURSUANT TO MINN. R. CIV. P. 50.01?

A. Is Wenzel entitled to judgment as a matter of law dismissing Respondent's claim for future pain and disability because there is no factual or legal support for the claim?

1. The issue was raised at trial by Wenzel's motion *in limine* and his post-trial motion. (App. 31, 107-109.)

2. The trial court denied Wenzel's motion *in limine* and post-trial motion and held Respondent's testimony established future pain and disability is more likely than not to occur. (App. 96-99, 142-54.)

3. Wenzel preserved the issue for appeal by bringing a post-trial motion pursuant to Minn. R. Civ. P. 50.01. (App. 107-09, 142-54.)

4. Derrick v. St. Paul C. R. Co., 252 Minn. 102 (1958); Pietrzak v. Eggen, 295 N.W.2d 504 (Minn. 1980); Pagett v. Northern Electric Supply Co., 283 Minn. 228 (1969).

B. Is Wenzel entitled to judgment as a matter of law when Respondent's claim is barred by the doctrine of primary assumption of the risk?

1. The issue was raised by Wenzel's Motion for Summary Judgment and his post-trial motion. (App. 24-30, 107-09, 142-54.)

2. The trial court denied Wenzel's Motion for Summary Judgment and Motion for Judgment as a Matter of Law. (Id.)

3. Wenzel preserved the issue for appeal by making a Motion for Summary Judgment and a Motion for Judgment as a Matter of Law. (Id.)

4. Andren v. White-Rodgers Co., Div. of Emerson Electric Co., 465 N.W.2d 102 (Minn. Ct. App. 1991); Peterson v. Donahue, 733 N.W.2d 790 (Minn. Ct. App. 2007); Olson v. Hansen, 216 N.W.2d 124 (Minn. 1974); Schroeder v. Jesco, Inc., 209 N.W.2d 414, 417 (Minn. 1973).

C. Is Wenzel entitled to judgment as a matter of law when he owed no duty of care to Respondent and when the alleged defective condition was open and obvious?

1. The issue was raised by Wenzel's Motion for Summary Judgment and his post-trial motion. (App. 24-30, 107-09, 142-54.)

2. The trial court denied Wenzel's Motion for Summary Judgment and post-trial motion and held the dangerous condition of the open stairway was not open and obvious to Respondent. (Id.)

3. Wenzel preserved the issue for appeal by making a Motion for Summary Judgment and a Motion for Judgment as a Matter of Law. (Id.)

4. Baber v. Dill, 531 N.W.2d 493 (Minn. 1995); Louis v. Louis, 636 N.W.2d 314 (Minn. 2001); Munoz v. Applebaum's Food Market, 196 N.W.2d 921 (Minn. 1972); Carlson v. Rand, 146 N.W.2d 190 (Minn. 1966).

D. Is Wenzel entitled to judgment as a matter of law dismissing Respondent's claim when there is no evidence Wenzel was negligent?

1. The issue was raised by Wenzel's Motion for Summary Judgment and his post-trial motion. (App. 24-30, 107-09, 142-54.)

2. The trial court denied Wenzel's Motion for Summary Judgment and post-trial motion and held Wenzel may have been negligent in not keeping the entryway sufficiently lighted. (Id.)

3. Wenzel preserved the issue for appeal by bringing a Motion for Summary Judgment and bringing a post-trial motion pursuant to Minn. R. Civ. P. 50.01. (Id.)

4. Elias v. City of St. Paul, 350 N.W.2d 442 (Minn. Ct. App. 1984), *review denied* (Minn. Oct. 1, 1984); Bernloehr v. Cent. Livestock Order Buying Co., 296 Minn. 222 (1973); Gilbertson v. Leininger, 599 N.W.2d 127 (Minn.1999); Sauer v. State Farm Mut. Auto. Ins. Co., 379 N.W.2d 213 (Minn. App. 1985), *review denied* (Minn. Feb. 19, 1986).

III. WHETHER THE JUDGMENT IN RESPONDENT'S FAVOR IS SUBJECT TO COLLATERAL SOURCE REDUCTION?

A. Are Medicare and medical assistance payments collateral sources subject to offset under Minn. Stat. § 548.251, subd. 1?

1. The issue was raised in Wenzel's post-trial motion. (App. 107-15, 124-141.)

2. The trial court denied Wenzel's post-trial motion and held Medicare and medical assistance payments are not collateral sources subject to offset. (App. 142-54.)

3. Wenzel preserved the issue for appeal by bringing a post-trial motion for determination of collateral sources. (App. 107-15.)

4. Minn. Stat. § 548.251; Mikulay v. Dial Corp., 1990 WL 57530 (Minn. Ct. App. 1990); Swanson v. Brewster, 784 N.W.2d 264 (Minn. 2010).

STATEMENT OF THE CASE

Respondent Kari Renswick (hereinafter "Respondent") commenced this personal injury/premises liability action in Winona County District Court on October 1, 2009, alleging she sustained injuries after she fell down stairs in the rear entryway of Appellant Jason Wenzel's (hereinafter "Wenzel") personal residence on December 31, 2008. (App. 15-19.) Respondent claims Wenzel negligently failed to maintain a safe entryway into the rear of his home, failed to warn of the open stairwell's proximity to the entry, failed to maintain adequate lighting in the entryway, and failed to place a guard, gate or door at the entry to the stairwell. (Id.)

The case was tried to a jury May 24-26, 2011, and District Court Judge Nancy L. Buytendorp presided. (App. 116-23.) Wenzel brought a motion *in limine* to exclude Respondent's claim for future pain and disability because it had no legal or factual support. (App. 31-32.) The trial court denied Wenzel's motion. (App. 95-99.)

On May 26, 2011, the jury returned a Special Verdict finding each party was 50% at fault. It determined the gross damage award should be $190,313.66. Specifically, the jury awarded Respondent $1,500 for past wage loss, $10,000 for past embarrassment and emotional distress, $40,000 for past pain and disability and $90,000 for future pain and disability. The stipulated face value of the medical specials was $48,813.66. (App. 116-123.) The amount paid by Medicare was $7,983.05. Respondent was awarded $16,423.78 for medical expenses she did not incur. (App. 155-60.)

Wenzel brought post-trial motions. (App. 107-09.) On August 9, 2011, the trial court denied Wenzel's motions for Judgment as a Matter of Law or New Trial. The trial court also denied Wenzel's motion to limit the medical special damage award to the amount claimed by public assistance lien holders. (App. 142-54.)

STATEMENT OF THE FACTS

In September 2008, Wenzel purchased the property located in Winona, Minnesota, and moved in with his fiancée, Chelsea Denzer. (T. 35, 65, 227.) Chelsea's son, and Wenzel's daughter, also moved in. (T. 227.)

Wenzel's garage is detached from the residence. (T. 42; Trial Exh. 101, 102.) A concrete sidewalk connects the garage to the rear entryway of the residence. (T. 48; Trial Exh. P10.) Located inside the rear entryway are stairs leading to the basement. (Trial Exh. 102-03.)

An exterior light is located above the door leading from outside the residence to the rear entryway. (T. 51; Trial Exh. P11.) A motion floodlight is located on the outside of the garage and it illuminates the sidewalk and rear entryway. (T. 61.) Both of these lights illuminate the rear entryway very well. (T. 70.)

On December 31, 2008, both the exterior door to the rear entryway and its attached storm door had glass windows. (T. 230-31.) When the back porch light was on, it illuminated the floor of the entryway and the stairs leading from the entryway to the

basement. (T. 231-32.) There was no need for additional light inside the entryway when the porch light was on. (T. 232.)

At all times relevant herein, the rear entryway completely complied with the applicable building code. (T. 244.) There is no building requirement for a warning in the entryway. (T. 244.) There is no building requirement for lighting to illuminate the open basement stairwell and there is no building code requirement for a light directly above the entryway. (T. 244.) There is no building code requirement to place a guard or gate at the top of the open stairway to the basement. (T. 244.) The rear entryway at Wenzel's residence is safe, within the standard construction industry practices, and complies with the applicable building code. (T. 245.)

On December 31, 2008, Wenzel held a New Year's Eve party in his detached garage. (T. 42.) The exterior light above the door leading inside to the rear entryway of the residence and the floodlight outside the garage were on. (T. 62, 71, 221, 228.)

Wenzel's friends, Jason Voelker, Dan Michalowski, and Danny and Brian Donahue, attended the party. (T. 43, 76, 104, 219.) When they arrived, Voelker and Michalowski sat at a table in the garage and played cards with Wenzel. (T. 43.) Chelsea, who was pregnant at the time, stopped in the garage around 7:00 p.m. for a few minutes and then went into the house until about 8:30 p.m. when she returned to the garage. (T. 228.)

When Chelsea first went out to the garage, the rear porch light and the garage floodlight were on. (T. 228.) The light above the stove in the kitchen was also on. (T. 229.) When she returned to the garage the second time, Chelsea closed the kitchen door

because she did not expect anyone to be in the house. (T. 229.) It was Chelsea's standard practice to close the kitchen door. (T. 229.) When Chelsea returned to the garage the second time, the light above the kitchen stove was on and the back porch light was on. (T. 230.)

Danny and Brian Donahue arrived at Wenzel's residence between 6:00 and 7:00 p.m. (T. 219.) When the Donahues first arrived at Wenzel's, the floodlight outside the garage was on and it illuminated the residence. (T. 221.) Danny Donahue also observed the rear porch light was on. (T. 221; Trial Exh. P11.)

Respondent arrived at Wenzel's between 7:30 and 8:00 p.m. and sat down to play cards with Wenzel, Voelker, and Michalowski. (T. 43, 151, 187.) Chelsea and the Donahues were also in the garage when Respondent arrived. (T. 43, 222, 232.)

When she observed Respondent in the garage, it appeared to Chelsea that Respondent was under the influence of something. (T. 233.)

Michalowski observed that Respondent seemed "out of it" and "dazed." (T. 78.) He "could definitely tell" Respondent was "off balance and under the influence of something". (T. 84.)

Voelker, who was married to Respondent between 2000 and 2004, believed Respondent was under the influence that evening because she had red eyes and was stumbling more than she normally did. (T. 122.)

Donahue also observed Respondent when she arrived at Wenzel's. (T. 223.) It appeared to Donahue that Respondent was under the influence of something because she had glossy eyes. (T. 223.)

Wenzel, Michalowski, and Voelker observed Respondent consume one and a half beers, and Respondent admitted she consumed one and a half beers, while she sat and played cards. (T. 43, 76, 109, 153.)

On that date Respondent, who was diagnosed with multiple sclerosis in 1994, was taking a number of prescribed medications, including Acebutolol for her heart, Baclofen for muscle relaxation, Citalopram for depression, Hydrocodone for pain, Fentanyl for pain, and Provigil to help fatigue. (T. 133, 136-39.) Respondent smokes marijuana on a daily basis. (T. 190.) Respondent also has chronic shoulder pain and her legs get really heavy and become tingly. (T. 189.)

Prior to arriving at Wenzel's residence on New Year's Eve, Respondent consumed a number of medications, including Baclofen, Oxybutynin, Citalopram, Acebutolol, Duragesic, and Hydrocodone. (T. 187-88.) Respondent also consumed two bowls of marijuana prior to going over to Wenzel's garage. (T. 189.)

After playing cards for a while, Respondent stood up and left the garage. (T. 154.) She intended to go inside Wenzel's residence to use the bathroom. (T. 154-55.) Respondent knew where the bathroom was located because three to four weeks earlier Voelker had escorted her through the rear entryway and into Wenzel's residence to show her the bathroom. (T. 146, 154-55.) When she entered the house with Voelker, it was dark outside. (T. 146, 185.) Respondent did not see any dangerous conditions in the entryway and she was not concerned with the lighting conditions in the entryway. (T. 186.) Respondent did not see anything that caused her any safety concerns in the entryway and she did not sense any danger. (T. 186.)

After she left the garage on December 31, 2008, Respondent walked on the sidewalk leading to the rear entryway. (T. 155.) The sidewalk was illuminated by the floodlight on the garage. (T. 155.) When she opened the storm door leading to the rear entryway, Respondent could see the kitchen door handle. (T. 192.)

As she moved forward, Respondent was trying to be careful and she was not concerned about the lack of light in the entryway. (T. 192.) She was not concerned that it was dark. (T. 192-93.) She did not think she needed additional light in the entryway. (T. 193.) She does not know whether she was in a hurry as she proceeded through the entryway. (T. 193.) Regardless, Respondent never thought the entryway was unsafe and she did not believe she needed anyone to accompany her through the entryway. (T. 193, 196.) She felt safe as she proceeded forward. (T. 161.)

Respondent moved forward in the entryway and grabbed the kitchen door handle with her right hand. (T. 157-58.) As she held the kitchen door handle with her right hand, Respondent brought her left foot forward. (T. 158.) Respondent shifted her weight to the left, lost her balance and fell down the stairwell. (T. 158, 196.) Respondent fell because she lost her balance. (T. 196.) She did not slip or trip on anything in the entryway. (T. 196.)

After she fell, Respondent made her way upstairs and back to the garage where she knocked on the door. (T. 159-60.) Wenzel had not seen Respondent get up from the table and leave the garage. (T. 66.) He did not hear Respondent announce her departure or say where she was going. (T. 66.) In fact, Wenzel was not aware of the fact that Respondent had left the garage. (T. 66.) Similarly, Chelsea did not know Respondent

had gone into the residence until Respondent came back and knocked on the garage door after her fall. (T. 233.)

Respondent's urine was tested after she arrived at the hospital in Winona. (T. 216; Trial Exh. 4, 5.) The sample tested positive for hydrocodone, methamphetamine, amphetamine, and marijuana. (T. 216; Trial Exh. 4, 5; Trial Exh. 3.) Respondent admits the hospital records establishing the existence of these illegal substances in her system are authentic. (Trial Exh. 4, 5.) Although Respondent admits to prior meth use, she claims she "has no idea" how the methamphetamine got into her system on December 31, 2008. (T. 174.) Despite this claim, there is no medical treatment basis for the presence of meth in Respondent's system on December 31, 2008. (Trial Exh. 3, p. 14.)

Dr. Apple, Wenzel's expert toxicologist, expressed his opinion that the combination of the prescription drugs, alcohol, marijuana, and methamphetamine consumed by Respondent impaired her thinking, balance, ability to walk properly, and to navigate from point A to point B. (Trial Exh. 3, pg. 22.) Respondent did not refute Dr. Apple's opinions.

As a result of her fall, Respondent sustained fractures in both wrists. (Trial Exh. 1, p. 10.) Respondent treated with Dr. Charles H. Hayden of Gunderson Lutheran in La Cross, Wisconsin. (Trial Exh. 1, p. 7; T. 165.) Dr. Hayden performed surgery on Respondent's left wrist on January 7, 2008, and on her right wrist on January 14, 2008. (Trial Exh. 1, p. 15, 19.) By March 11, 2009, Dr. Hayden released Respondent to work without restrictions. (Trial Exh. 1, p. 31.) At the time of the accident, Respondent worked at a school cafeteria. (T. 170-71.)

Dr. Hayden last treated Respondent on February 15, 2010. (Trial Exh. 1, p. 25.) No restrictions were placed on Respondent at that time and Respondent did not seek further treatment with Dr. Hayden. (Trial Exh. 1, p. 34.) Respondent admits Dr. Hayden told her she needed no additional treatment following her wrist surgeries. (T. 169.) Respondent further admits no doctor has placed any restrictions on her as a result of the accident. (T. 198.)

Dr. Hayden, Respondent's expert witness, expressly declined to offer an opinion to a reasonable degree of medical certainty as to whether Respondent will have any future impairment as a result of the December 31, 2008 accident. (Trial Ex. 1, p. 34.) In fact, he testified Respondent "may or she may not" have future pain and disability. (Trial Ex. 1, pp. 27, 30-31, 33-34.) Respondent offered no other evidence regarding future disability or impairment.

All of Respondent's medical bills were paid by Medicare at a discounted rate. Respondent does not owe any money for her medical treatment.

ARGUMENT

I. A NEW TRIAL SHOULD BE GRANTED PURSUANT TO MINN. R. CIV. P. 59.01.

A new trial is proper because the trial court (1) erred in submitting the issue of future pain and disability to the jury when there is no legal or factual basis for such an award; (2) erred in refusing to instruct the jury and submit special verdict interrogatories regarding primary assumption of risk; and (3) erred in refusing to instruct the jury that

consumption of marijuana and methamphetamine is negligence per se. The trial court's denial of Wenzel's motion for a new trial should be reversed and the case retried.

On review the appellate court considers whether the trial court exercised reasonable discretion in denying a motion for new trial. Koenig v. Ludowese, 308 Minn. 380, 383, 243 N.W.2d 29, 30 (1976). Motions for a new trial are governed by Rule 59.01 of the Minnesota Rules of Civil Procedure, which provides "a new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes: (a) irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial;... (e) Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice; (f) Errors of law occurring at the trial, and objected to at the time or, if no objection need have been made pursuant to Rules 46 and 51, plainly assigned in the notice of motion; (g) The verdict, decision, or report is not justified by the evidence, or is contrary to law; but, unless it be so expressly stated in the order granting a new trial, it shall not be presumed, on appeal, to have been made on the ground that the verdict, decision, or report was not justified by the evidence." Minn. R. Civ. P. 59.01.

The applicable test for granting a new trial on the basis the evidence does not justify the verdict is whether "the verdict is so contrary to the preponderance of the evidence as to imply that the jury failed to consider all the evidence, or acted under some mistake * * *." Id. at 687 (quoting LaValle v. Aqualand Pool Co., Inc., 257 N.W.2d 324, 328 (Minn.1977)).

Additionally, a new trial should be granted when an issue is submitted to the jury on an erroneous instruction or on a prejudicially restrictive theory. Keefer v. Al Johnson Const. Co., 292 Minn. 91, 103, 193 N.W.2d 305, 312 (1971) (citing 14 Dunnell, Dig. (3 ed.) § 7170). If jury instructions destroy the substantial correctness of the charge as a whole, cause a miscarriage of justice, or result in substantial prejudice, the error requires a new trial. Bolander v. Bolander, 703 N.W.2d 529, 539 (Minn. Ct. App. 2005) (citing Morlock v. St. Paul Guardian Ins. Co., 650 N.W.2d 154, 159 (Minn. 2002)).

A new trial may also be ordered under Rule 59.01(a) for irregularities in the proceedings of the court, jury, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial. Minn. R. Civ. P. 59.01(a). An irregularity is a failure to adhere to a prescribed rule or method of procedure, a failure to conform to the practice of the court, or an act or omission that does not amount to misconduct or an error in a ruling on a matter of law. In re Begley's Estate, 178 Minn. 141, 142-43 (1929).

Finally, a new trial may be granted where several small errors, each independently inadequate to require a new trial, can cumulatively result in sufficient prejudice as to require a new trial. Larson v. Belzer Clinic, 292 Minn. 301, 307, 195 N.W.2d 416, 419 (1972).

A. The trial court erred in denying Wenzel's motion *in limine* and in submitting Respondent's claim for future pain and disability to the jury because there is no proper legal or factual basis for this award.

The trial court erred in denying Wenzel's motion *in limine* to exclude Respondent's claim for future pain and disability. There is no legal or factual basis for

such an award. The trial court further erred in denying Wenzel's motion for a new trial because the jury's award was based upon speculation and conjecture.

A plaintiff must prove damages for future pain and suffering by a reasonable medical certainty. Derrick v. St. Paul C. R. Co., 252 Minn. 102, 108-109 (1958) (citing Gau v. J. Borgerding & Co., 175 Minn. 150 (1928) (holding the burden of showing the extent of plaintiff's disability with reasonable certainty rested upon plaintiff)). This burden ensures there is no recovery for damages which are remote, speculative, or conjectural. Pietrzak v. Eggen, 295 N.W.2d 504, 507 (Minn. 1980). Future damages may be recovered only if they are reasonably certain to occur. Pagett v. Northern Electric Supply Co., 283 Minn. 228, 238 (1969) (citing Carpenter v. Nelson, 257 Minn. 424 (1960)).

"The opinion of a medical expert based upon his examination of an injured claimant, as well as upon his knowledge of like injuries generally, to the effect that in all probability there will be a future recurrence of a present disability would seem to meet the requirement of reasonable certainty." Derrick, 252 Minn. at 108-109 (noting plaintiff's medical expert established reasonable certainty of a future disability and "it is clear from the sum total of his testimony that he was reasonably certain there would be a recurrence here") (citing Cameron v. Evans, 241 Minn. 200, 203 (1954) (noting before a person may recover for permanent injuries it must appear to a reasonable certainty that there will be permanent injury); and Hiber v. St. Paul, 219 Minn. 87 (1944)). Medical expert testimony meets the required test of certainty. Derrick, 252 Minn. at 109.

Here, Respondent did not identify any medical expert witnesses or provide any expert reports establishing future pain and disability. To the contrary, Dr. Hayden, Respondent's orthopedic surgeon, expressly declined to offer an opinion to a reasonable degree of medical certainty as to whether Respondent will have any future impairment as a result of the December 31, 2008, accident. (Trial Exh. 1, p. 34.) In fact, he held out the possibility she would **not** have future pain or disability. Dr. Hayden testified, as follows:

> Q. Okay. So the, the – just because she's got that hardware in her hands, doesn't necessarily mean that she's going to be incapacitated in any way?
>
> A. Correct.
>
> .....
>
> Q. You don't have an opinion, I take it as you sit here, as to whether or not she has any physical restrictions for either – any activities, either occupational or otherwise?
>
> A. **No, I don't have an opinion one way or the other. She may or she may not**, but I, I won't, I won't extend my discussion to that area.
>
> .....
>
> Q. All right. And it's my understanding that you are not expressing an opinion to a reasonable degree of medical certainty as to whether or not she will have any impairment in the future?
>
> A. Correct.

(Trial Exh. 1, p. 27, 30-31, 33-34.) (Bold supplied.) Respondent offered no other medical testimony to support her claim for future damages.

Based on Dr. Hayden's testimony Wenzel brought a motion *in limine* to exclude Respondent's claim for future pain and disability.[1] The trial court denied the motion *in limine* and denied the post-trial motion relating to this issue asserting since Respondent still had physical complaints at trial, there was a sufficient basis for the jury to presume she would have future pain and disability. (App. 149-50.)

The trial court misconstrued the standard for recovery of future pain and disability in Minnesota for personal injury claims. The mere fact that Respondent had fractured wrists does not establish she will have future pain and disability. Allowing this claim to go forward caused the jury to rely solely on speculation and conjecture, especially in light of Dr. Hayden's testimony that Respondent may have *no future pain or disability.* (Trial Exh. 1, p. 30-31, 33-34.) The issue is not whether Respondent properly sustained her burden of proof as to injuries and damages sustained from the time of the accident to the time of trial. Rather, the issue is to what extent Respondent will suffer future pain and disability *after trial* as a result of those injuries. The trial court did not exercise reasonable discretion in denying Wenzel's motion for a new trial.

B. The trial court erred in refusing to submit the issue of primary assumption of risk to the jury.

The trial court did not exercise reasonable discretion in denying Wenzel's motion for a new trial because the jury should have been asked to address the affirmative defense of primary assumption of risk. Primary assumption of risk applies "only where parties

[1] Respondent brought a counter-motion to continue the trial so she could obtain the proper expert opinion regarding future pain and disability. (App. 57.) The court's ruling on this issue rendered that motion moot.

have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks. As to these risks, the defendant has no duty to protect the plaintiff and, thus, if the plaintiff's injury arises from an incidental risk, the defendant is not negligent." Wagner v. Thomas J. Obert Enterprises, 396 N.W.2d 223, 226 (Minn. 1986) (quoting Olson v. Hansen, 299 Minn. 39, 44 (1974)).

There are several cases in Minnesota where the issue of primary assumption of risk was addressed by a jury. In Wagner, a case involving a roller skating accident, one of the issues before the supreme court was whether the trial court properly instructed the jury on primary assumption of the risk. 396 N.W.2d at 225. The facts surrounding plaintiff's fall were in dispute. Id. at 226. Plaintiff claimed she slipped and fell on a concave portion of the metal entrance ramp. Id. Defendant denied liability for improper maintenance and supervision, and argued plaintiff lost her balance while trying to avoid a child skating toward her. Id. The supreme court noted the following regarding the importance of the factual dispute:

> Here there were two versions of how plaintiff's accident happened. 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. On the other hand, if the fall occurred as plaintiff testified at trial, defendant owed her a duty of care which was breached and this negligence would be compared with plaintiff's contributory negligence, if any. Which legal principles would govern depended on which version of the facts was found by the jury.

Id. In holding an instruction on primary assumption of the risk was proper, the supreme court further noted "[s]imply because the existence of primary assumption of risk

depended on resolution of a fact issue did not mean that primary assumption of risk should not have been submitted to the jury; instead, quite the contrary." Id.

Similarly, the issue before the supreme court in Louis v. Louis, a case involving a swimming pool accident where plaintiff was injured while going down a water slide headfirst, was whether defendant owed a duty to plaintiff. 636 N.W.2d 314. The trial court denied defendant's summary judgment motion based on primary assumption of risk because there were genuine issues of material fact on the question, but granted defendant summary judgment on the basis no duty was owed. Id. at 317. The court of appeals upheld the denial of summary judgment on primary assumption of the risk, but reversed summary judgment on the duty issue. Id. at 318.

The supreme court remanded to the trial court to determine whether the anticipated harm to plaintiff from using a waterslide to perform a headfirst belly slide was a harm either known to him or one he reasonably should have been expected to know. Id. at 322. The court further instructed the trial court, as follows:

> If the district court concludes that the danger was neither known nor obvious as a matter of law, it must hold that appellant was not relieved of his duty to use reasonable care for the safety of respondent. If the court concludes that the danger was either known or obvious as a matter of law, it must then decide whether appellant should nevertheless have anticipated the harm despite its known or obvious danger. *Lastly, if the court finds that appellant owed respondent a duty, the jury should then be allowed to decide the primary assumption of risk question since the court has already held that a genuine issue of material fact exists as to this issue.*

Id. (emphasis added).

The supreme court in Griffiths v. Lovelette Transfer Co., Inc. also discussed submission of primary assumption of the risk to the jury. 313 N.W.2d 602 (Minn. 1981).

There, the trial court determined defendant owed a duty to plaintiff as a matter of law. Id. at 605. The trial court also determined as a matter of law the risk of injury was not reasonably apparent to plaintiff and he should not have anticipated the danger. Id. The supreme court affirmed the trial court and noted "[i]f the trial court had not decided this issue as a matter of law this question could have been submitted to the jury for a factual determination in a special verdict along with other factual determinations relating to negligence, causation, and contributory negligence." Id.

Prior to trial Wenzel moved for summary judgment asserting the case should be dismissed because it is barred by the law of primary assumption of risk. In denying the motion for summary judgment on this basis the trial court analyzed the issue as follows:

> In this case, the evidence is not conclusive that [Respondent] had knowledge of the risk of the entryway to [Wenzel's] home. As assumption of risk is based on subjective knowledge and appreciation of the risk, whether [Respondent] did actually have such knowledge and appreciated the risk is question for the fact finder. Since it is unclear whether [Respondent] had knowledge of the risk, it cannot be said that she consented to [Wenzel's] negligence and agreed to relieve him of his duty of care. **As the facts are disputed and more than one conclusion could be drawn, this is a matter for consideration of a jury**.

(App. 30.) (emphasis added.)

Wenzel requested the jury be instructed regarding primary assumption of risk and answer interrogatories on the special verdict specifically addressing this defense. (App. 82-90.) At trial the court denied the request with no explanation. When the matter was addressed again in a post-trial motion the trial court concluded, "[p]rimary assumption of risk does not apply to the facts of this case." (App. 153.) It reasoned, "[Respondent] did not know or appreciate the risk of falling and injuring herself because she did not know

of the possible danger or harm that would come from entering a dimly-lit area and had no actual knowledge of the basement staircase." (App. 151.)

The facts surrounding liability submitted with respect to the summary judgment motion and the testimony at trial did not differ in any material respect. The trial court initially concluded there was a question of fact regarding primary assumption of risk and reversed itself without explanation at trial. Now the court claims primary assumption of risk is not available as a defense in this case because it believes the claim must involve an "inherently dangerous activity". (App. 150-51.) That is not accurate. Primary assumption of risk is available as a defense if a claimant encounters "[w]ell-known, incidental risks." Wagner, *supra.* There is no subjective determination by the court as to how inherently dangerous an activity is. In any event, it appears entering an entryway and falling down a flight of stairs is a dangerous activity based on Respondent's claims in this case.

The court also concluded the doctrine would not apply because a person would not understand the risk of entering a dimly-lit area and Respondent had no actual knowledge of a basement staircase in the area. That argument is not supported in fact or law.

Setting aside the fact that ordinary common sense dictates there is risk in entering a dimly-lit area, there was ample evidence Respondent was aware of or should have been aware of the existence of a stairway. Contrary to Respondent's claim and the court's conclusion, there was evidence in the case that the rear entry was well lit and the lighting was activated at the time of the fall. (T. 51, 61-62, 70-71, 221, 228-32; Ex. P11.) Respondent had been through that same entryway at night three to four weeks earlier. (T.

146-86.) She further assumed the risk of injury by negotiating the entryway under the influence of a pot, meth, alcohol and prescription drugs that impaired her motor skills. (Ex. 3, pg. 22.)

The trial court may have reached its own conclusion as to what happened and it is inconsistent with the defense position. However, the defense theory of the case meets the requirements for, at a minimum, a jury to consider whether the elements of primary assumption of risk were met in this case. The trial court's refusal to instruct the jury and pose special verdict interrogatories is reversible error and requires a new trial.

C. The trial court erred in refusing to instruct the jury that consumption of marijuana and methamphetamine is negligence per se.

The trial court did not exercise reasonable discretion when it refused to instruct the jury that Respondent's use of marijuana and methamphetamine could be negligence per se. It is well-established in Minnesota that violations of regulations or ordinances adopted pursuant to statutory authority can result in negligence per se. Alderman's Inc. v. Shanks, 536 N.W.2d 4, 7 (Minn. 1995) (citations omitted). The Minnesota Supreme Court has held the following:

> It is well settled that breach of a statute gives rise to negligence per se if the persons harmed by that violation are within the intended protection of the statute and the harm suffered is of the type the legislation was intended to prevent. The statute or ordinance imposes a fixed duty of care, so its breach constitutes conclusive evidence of negligence.

Id. at 8 (quoting Pacific Indemnity Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 558-59 (Minn. 1977)).

Generally, the rule provides the violation of a statute that imposes a standard of conduct designed to protect the injured party is negligence per se unless the statute or ordinance designates a breach is only prima facie evidence of negligence. Id. (citing Butler v. Engel, 243 Minn. 317, 322 (1954)). If the injured party is within the intended protection of the statute and the harm suffered is of the type the legislation was intended to prevent, the court must instruct the jury that a violation of the statute is negligence per se and the failure to so instruct is reversible error. Id. at 9.

The Minnesota Supreme Court has repeatedly held "a defendant's violation of a duty imposed by a statute or ordinance proximately resulting in injury to one for whose benefit such law was enacted results in liability, irrespective of such conduct as would constitute negligence, in the absence of such law." Mechler v. McMahon, 184 Minn. 476, 478 (1931) (citations omitted). The same rule is logically applicable to a plaintiff as to a defendant, and the "test is not whether the injured party is a plaintiff or defendant, but rather whether the statute was passed for the protection of the injured party." Id. at 479. "The accepted rule now is that a breach of statute by the plaintiff is to stand on the same footing as a violation by the defendant." *Prosser and Keeton on Torts*, 5th Ed. § 36 (citing Mechler, 184 Minn. at 479).

In Minnesota, the violation of a criminal statute is negligence per se. Holmquist v. Miller, 352 N.W.2d 47, 51 (Minn. Ct. App. 1984) (superseded by statute on other grounds by Wollan v. Jahnz, 656 N.W.2d 416 (Minn. Ct. App. 2003) (citing Zerby v. Warren, 297 Minn. 134, 210 N.W.2d 58 (1973). Negligence per se is a form of ordinary negligence resulting from the violation of a statute. Anderson v. State, 693 N.W.2d 181,

189 (Minn. 2005) (citing Seim v. Garavalia, 306 N.W.2d 806 (Minn. 1981)). As negligence per se substitutes a statutory standard of care for the ordinary prudent person, the violation of a statute is conclusive evidence of duty and breach. Gradjelick v. Hance, 646 N.W.2d 225, 231 n.3 (Minn. 2002).

"Negligence per se is merely ordinary negligence, whose existence is established by proof of the violation, but which once proved does not differ in its legal consequences from negligence at common law." Seim v. Garavalia, 306 N.W.2d 806 (Minn. 1981) (quoting *Prosser, Contributory Negligence as a Defense to Violation of a Statute*, 32 Minn. L. Rev. 105, 111-12 (1948); Dohm v. R.N. Cardozo & Brother, 165 Minn. 193, 196 (1925) (noting in certain cases violation of a statute results in liability irrespective of such conduct as would constitute negligence in the absence of a statute). The Minnesota Supreme Court has reasoned, as follows:

> Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. * * * The only difference is that in the one case the measure of legal duty is to be determined upon common-law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence, or, in other words, negligence per se. * * * All that the statute does is to establish a fixed standard by which the fact of negligence may be determined.

Osborne v. McMasters, 40 Minn. 103, 105 (1889).

Finally, both marijuana and methamphetamine are controlled substances pursuant to Minnesota's drugs and controlled substances statute. Minn. Stat. § 152.02. Pursuant to the statute, the sale and possession of methamphetamine and marijuana are crimes. Minn. Stat. § § 152.021-025.

Here, the trial court did not exercise reasonable discretion in denying Wenzel's motion for a new trial because the jury should have been instructed Respondent's violation of Minn. Stat. § 152.021-025 was negligence per se absent justification or excuse. In denying Wenzel's motion for a new trial, the trial court relied on Larson v. Dunn and asserted that "[a] criminal statute does not give rise to a civil cause of action unless that statute expressly or by clear implication so provides." 460 N.W.2d 39, 47 (Minn. 1990).

The court's decision in Larson, a child custody case, is not applicable to this premises liability action. There the issue was whether Minnesota should adopt the tort of intentional interference with custodial rights. Id. at 44. In declining to adopt the tort, the court noted the legislature made child abduction by the noncustodial parent a crime and adopted the Uniform Child Custody Jurisdiction Act. Id. at 47. In a footnote, the court stated "a criminal statute does not *automatically* give rise to a civil cause of action unless the statute expressly or by clear implication so provides." Id. at 47, n. 4 (emphasis added).

The Larson court did not address the issue of whether the violation of a criminal statute gives rise to negligence per se. It is the law in Minnesota that violations of regulations or ordinances adopted pursuant to statutory authority result in negligence per se if the injured party is within the intended protection of the statute and the harm suffered is of the type the legislation was intended to prevent. Alderman's Inc., 536 N.W.2d at 9. Moreover, the trial court's failure to instruct the jury that a violation of the statute is negligence per se is reversible error. Id.

Here, Wenzel sought a jury instruction and special verdict interrogatories regarding whether Respondent's consumption of marijuana and methamphetamine, a violation of Minnesota's controlled substances statute, was negligence per se. The trial court erred in refusing to instruct the jury and pose special interrogatories because the purpose of the controlled substances statute is to protect persons, including Respondent, from the harm associated with the consumption of illegal drugs.

Respondent admitted she smoked a "couple of bowls" of marijuana prior to going over to Wenzel's house on December 31, 2008, and she also admitted methamphetamine and marijuana were present in her system the night of the accident. (T. 189; Trial Exh. 4, 5.)

Importantly, in Dr. Apple's opinion, the combination of Respondent's prescribed medication use along with the concomitant use of alcohol, marijuana and methamphetamine more likely than not led to her impairment and played a substantial role in the accident. (Trial Exh. 3, p. 22.) As noted by Dr. Apple, marijuana and methamphetamine use is illegal in Minnesota. (Trial Exh. 3, p. 47.)

Pursuant to Minnesota's controlled substances statute, Respondent had a legal duty not to possess or use marijuana or methamphetamine. Respondent's admitted violation of Minnesota's controlled substance statutes is negligence per se and the jury should have been so instructed. The trial court's refusal to instruct the jury was erroneous and requires a new trial.

II. JUDGMENT AS A MATTER OF LAW SHOULD BE GRANTED PURSUANT TO MINN. R. CIV. P. 50.01.

The trial court's denial of a motion for judgment as a matter of law is reviewed de novo. Bahr v. Boise Cascade Corp., 766 N.W.2d 910, 919 (Minn. 2009). Rule 50.01 of the Minnesota Rules of Civil Procedure provides "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may decide the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." Minn. R. Civ. P. 50.01.

JMOL is properly granted when the evidence is insufficient as a matter of law to present a fact question for the jury. Kaiser-Bauer v. Mullan, 609 N.W.2d 905, 910 (Minn. Ct. App. 2000) (citing Wall v. Fairview Hosp. & Healthcare Servs., 584 N.W.2d 395, 405 (1998). JMOL should be granted when the court would be obligated to set aside a contrary verdict by the jury as being manifestly against the entire evidence because reasonable persons could draw only one conclusion from the evidence presented. DLH, Inc. v. Russ, 566 N.W.2d 60, 70 (Minn. 1997). In applying this standard, the court must consider all the evidence, including that favoring the verdict, view the evidence in the light most favorable to the verdict, and refrain from weighing the evidence or judging the credibility of the witnesses. MacBeth v. Mondry, 392 N.W.2d 24, 26 (Minn. Ct. App. 1986) (citing Lamb v. Jordan, 333 N.W.2d 852, 855 (Minn. 1983))

A court is not precluded from entering JMOL if a conflict in evidence consists of very minor matters. Peterson v. Truelson, 249 Minn. 530, 536 (1957); Kath v. Kath, 238 Minn. 120, 125-26 (1952). A court may also enter JMOL if no question of fact exists to submit to the jury and any verdict, other than the one directed, would be erroneous as a matter of law. Wall v. Fairview Hosp. & Healthcare Services, 584 N.W.2d 395, 405 (Minn. 1998); Zinnel v. Berghius Constr. Co., 274 N.W.2d 495, 498 (Minn. 1979).

Additionally, when all of the evidence will sustain "two or more inconsistent inferences so that one inference does not reasonably preponderate over the others," the court must direct a verdict because plaintiff has not sustained her burden of proof. Wall, 584 N.W.2d at 405-06 (quoting E.H. Renner & Sons v. Primus, Inc., 295 Minn. 240, 243 (1973).

Here, the trial court erred in denying Wenzel's motion for judgment as a matter of law pursuant to Minn. R. Civ. P. 50.01. Wenzel is entitled to JMOL for the following reasons: (1) there is no evidence to support an award of damages for future pain and disability; (2) Respondent assumed the risk of injury; (3) Wenzel did not owe a duty of care to Respondent and the condition was open and obvious; and (4) Respondent failed to establish a negligent act by Wenzel.

A. Wenzel is entitled to JMOL because there is no evidence to support an award of damages for future pain and disability.

As discussed above, a plaintiff has the burden of establishing future pain and disability to a reasonable medical certainty and this burden ensures there is no recovery

for damages which are remote, speculative, or conjectural. Pietrzak v. Eggen, 295 N.W.2d 504, 507 (Minn. 1980).

Here, Respondent did not identify any medical expert witnesses or provide any expert reports establishing future pain and disability. To the contrary, Dr. Hayden refused to offer an opinion on Respondent's claim for future damages. (Trial Exh. 1, p. 34.) He testified he does not have an opinion one way or the other and Respondent "may or she may not" have future pain and disability, but he would not express an opinion as to whether Respondent will have any future impairment. (Trial Exh. 1, p. 31.)

In denying the motion for JMOL, the trial court solely relied on Respondent's self-serving testimony regarding her pain and disability as of the date of trial. (App. 151-52.) As noted by the MacBeth court, when applying the JMOL standard, the court must refrain from weighing the evidence or judging the credibility of the witnesses. MacBeth, 392 N.W.2d at 26.

Again, the issue is not whether Respondent had pain up to the date of trial, but whether she will have pain and disability in the future. There is no evidence to sustain the jury's award of future pain and disability, especially in light of Dr. Hayden's testimony that Respondent may *not* have any future issues. The jury's award is based upon speculation and conjecture. Damages based upon a jury's guess are not allowed. Wenzel's motion for JMOL should be granted.

B. Wenzel is entitled to JMOL because Respondent assumed the risk of injury.

Wenzel's motion for JMOL should be granted and Respondent's claims dismissed. Even if Wenzel owed a duty, it was relieved by Respondent's primary assumption of the risk. For this reason, the trial court erred in denying Wenzel's motion for JMOL.

The doctrine of primary assumption of the risk defines the limits of a defendant's duty to the plaintiff. Andren v. White-Rodgers Co., Div. of Emerson Electric Co., 465 N.W.2d 102, 104-105 (Minn. Ct. App. 1991) (citing Armstrong v. Mailand, 284 N.W.2d 343, 349 (Minn. 1979)). The doctrine requires a person who voluntarily assumes a risk (1) knows of the risk, (2) appreciates the risk, and (3) has a chance to avoid the risk." Peterson v. Donahue, 733 N.W.2d 790, 792 (Minn. Ct. App. 2007) (citing Andren v. White-Rodgers Co., 465 N.W.2d 102, 104-05 (Minn. App. 1991), *review denied* (Minn. March 27, 1991)).

Primary assumption of the risk completely bars a plaintiff's recovery because "[b]y voluntarily entering into a situation where the defendant's negligence is obvious, the plaintiff accepts and consents to it and agrees 'to undertake to look out for himself and relieve the defendant of the duty.'" Andren, 465 N.W.2d at 105 (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts,* § 68, at 485 (5th ed. 1984)).

The doctrine applies when a plaintiff voluntarily "assumes well-known, incidental risks" of a certain activity. Olson v. Hansen, 216 N.W.2d 124, 127 (Minn. 1974). Related to those risks, a defendant cannot be found negligent for plaintiff's injury

because the defendant had no duty to protect plaintiff. Id.; Swagger v. City of Crystal, 379 N.W.2d 183, 185 (Minn. Ct. App. 1985), *pet. for rev. denied* (Minn. Feb. 19, 1986) (concluding patrons of baseball games assume the risk of injury from thrown or batted balls when they sit in unprotected seats). When the facts are undisputed and reasonable minds can draw only one conclusion, assumption of the risk is a question of law for the court. Schroeder v. Jesco, Inc., 209 N.W.2d 414, 417 (Minn. 1973).

Here, JMOL should be granted in Wenzel's favor because Respondent assumed the risk of injury when she voluntarily proceeded forward into an unfamiliar and dark entryway. Prior to December 31, 2008, Respondent had gone through the rear entryway and into Wenzel's house at least once at night. (T. 146, 154-55.) When she went through the entryway prior to her fall, Respondent did not notice any dangerous conditions or anything that concerned her, including the lighting conditions. (T. 186.)

On December 31, 2008, Respondent consumed numerous medications, illegal drugs, and alcohol. (T. 187-89.) Despite this chemical combination Respondent did not ask someone to accompany her through the entryway and she had no concerns about mixing alcohol, medication, marijuana, and methamphetamine. (T. 189-90.)

As she went into the rear entryway, Respondent felt there was sufficient lighting in the rear entryway for her to safely proceed into the kitchen and there was enough light in the entryway for her to grab the kitchen door handle. (T. 192-93.) Respondent was being careful and as she was feeling for the kitchen door handle, she observed light shining in from outside that illuminated the kitchen door handle. (T. 192.) Respondent did not

think she needed additional light or anyone to accompany her because she felt safe enough to proceed through the entryway. (T. 193, 196.)

Respondent claims when she proceeded through the entryway, she "didn't know that there was anything to be worried about" and she "didn't know the step was there." (T. 193, 196.) Respondent claims had there been additional light in the entryway, the stairway would have been visible to her and the accident would not have happened.

Based on Respondent's admissions, she knew and appreciated the risk of falling and injuring herself, yet she chose to proceed through a allegedly dimly-lit and unfamiliar entryway. Despite her consumption of numerous chemicals and her knowledge of the lighting conditions, Respondent proceeded through the entryway without any assistance and without thinking to ask for help or look for additional light.

Respondent's admission that she did not even think to look for a light switch and she thought the area was safe and sufficiently illuminated evidence her choice to proceed in light of the known risk of falling in a dimly lit, unfamiliar entryway. Respondent's testimony establishes she knew and appreciated the risk of falling and injuring herself, yet she chose to encounter the risk. For this reason, Wenzel is entitled to JMOL.

C. Wenzel is entitled to JMOL because he did not owe a duty of care to Respondent and the condition was open and obvious.

Wenzel owed no duty of care to Respondent and the condition in the entryway was open and obvious. The trial court erred in denying Wenzel's motion for JMOL. To maintain a negligence action an injured plaintiff must show (1) defendant owed her a legal duty; (2) defendant breached that duty; and (3) the breach was the proximate cause

of plaintiff's injuries. Boitz v. Preblich, 405 N.W.2d 907, 912 (Minn. Ct. App. 1987) (upholding summary judgment where appellant's injuries were not a foreseeable consequence of respondents' actions or inactions). A negligence claim may be premised on either a person's acts or failure to act, but negligence arises from a person's failure to act only when that person owes a duty to the injured party. Foss v. Kincade, 746 N.W.2d 912, 915 (Minn. Ct. App. 2008) (citing Restatement (Second) Torts § 284).

A landowner has a duty to use reasonable care for the safety of persons invited on the premises. Bisher v. Homart Dev. Co., 328 N.W.2d 731, 733 (Minn. 1983). The Minnesota Supreme Court has stated the following with respect to a landowner's duty:

> Breach of duty such as to constitute negligence in the keeping of the premises reasonably safe is not proved by the mere occurrence of an accident. Negligence must be predicated on what should have been reasonably anticipated, not merely on what happened [citation omitted]. The duty is to guard, not against all possible consequences, but only against those which are reasonably to be anticipated in the normal course of events.

Id. (quoting Johnson v. Evanski, 221 Minn. 323 at 326 (1946)).

A landowner's duty to use reasonable care for the safety of all entrants is not absolute. Baber v. Dill, 531 N.W.2d 493, 496 (Minn. 1995); Louis v. Louis, 636 N.W.2d 314, 319 (Minn. 2001). Specifically, a landowner has no duty to warn or protect persons from hazardous conditions that are open and obvious. Wiseman v. Northern Pac. Ry. Co., 214 Minn. 101, 107 (1943).

The Minnesota Supreme Court adopted the following rule regarding open and obvious conditions:

> A possessor of land is not liable to his invitee for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Baber, 531 N.W.2d at 496 (quoting Restatement (Second) of Torts § 343A (1965)). Pursuant to the rule a landowner has no duty to an invitee where the anticipated harm involves dangers so obvious that no warning is necessary. Id. at 496 (citations omitted).

Additionally, an individual entering property has a duty to exercise reasonable care and "observe that which is obvious to the ordinarily prudent person." Carlson v. Rand, 146 N.W.2d 190, 194 (Minn. 1966) (quoting Tonne v. Becker Grain & Lumber Co., 139 N.W.2d 797 (Minn. 1966)). A danger is obvious if it is visible. Lawrence v. Hollerich, 394 N.W.2d 853, 855 (Minn. Ct. App. 1986).

Whether a danger is open or obvious depends on an objective determination of whether a person would reasonably have seen the danger, not the subjective consideration of whether the person actually perceived and appreciated the danger. Munoz v. Applebaum's Food Market, 196 N.W.2d 921, 922 (Minn. 1972) (holding the store owner owed no duty to plaintiff who slipped on a pool of water in plain sight that she would have seen had she been looking).

"[T]he question is not whether the injured party actually saw the danger, but whether it was in fact visible." Louis, 636 N.W.2d at 321 (citing Munoz v. Applebaum's Food Market, Inc., 293 Minn. 433, 434 (1972)). Thus, a landowner's duty is eliminated

if the danger is so known and obvious since "no one needs notice of what he knows or reasonably may be expected to know." Id. at 322 (citations omitted). A plaintiff is required to exercise some degree of common sense. Snilsberg v. Lake Washington Club, 614 N.W.2d 738, 744 (Minn. Ct. App. 2000), *review denied* (Minn. Oct. 17, 2000).

Here, Wenzel is entitled to JMOL dismissing Respondent's claims because the evidence at trial establishes the condition in the entryway was open and obvious. As noted by the court in Baber, a landowner has no duty to warn an invitee where the anticipated harm involves dangers so obvious that no warning is necessary. 531 N.W.2d at 496.

The dangers involved in entering a dark and unfamiliar entryway after consumption of alcohol, methamphetamine, marijuana, and prescription medications are so obvious that no warning by Wenzel to Respondent was necessary. Respondent knew the condition in the entryway was dangerous because she claimed the entryway was dark and there was insufficient lighting to illuminate the stairway.

Contrary to the trial court's finding in its order denying Wenzel's motion for JMOL, the issue is whether Respondent knew of the *dangerous condition presented by the entryway*, not whether she had specific knowledge of the open stairway. Respondent claims it was the insufficient lighting that presented the dangerous condition because she did not know an open stairway existed in the entryway. (T. 193, 196.) Given the lack of lighting in the unfamiliar entryway, Respondent could have either located the light switch in the stairway to provide further illumination or gone back to the garage and asked

someone to accompany her. By simply adding more light, Respondent would have been able to determine whether there was any added danger in the entryway.

Similarly, the evidence establishes the dangerous condition in the entryway, i.e., the lack of sufficient lighting, was obvious. The test for whether a condition is obvious is objective. Louis, 636 N.W.2d at 321. "[T]he question is not whether the injured party actually saw the danger, but *whether it was in fact visible*." Id. (citing Munoz v. Applebaum's Food Market, Inc., 293 Minn. 433, 434 (1972) (emphasis supplied).

Respondent testified the lighting in the entryway was insufficient to illuminate the open stairwell and, therefore, she "didn't know that there was anything to be worried about." (T. 193.) As noted by the court in Louis, no one needs noticed of what he knows or reasonably may be expected to know. Id. at 322 (citations omitted). Importantly, the law requires Respondent to exercise some degree of common sense. Snilsberg, 614 N.W.2d at 744. The dangerous condition presented by the unlit and unfamiliar entryway was open and obvious and Wenzel had no duty to warn Respondent. Wenzel's motion for JMOL should be granted dismissing Respondent's claim.

D. Wenzel is entitled to JMOL because Respondent failed to identify a negligent act by Wenzel.

The trial court erred in failing to grant Wenzel's motion for to JMOL because there is no evidence he was negligent. JMOL is appropriate on a negligence theory when the plaintiff fails to offer proof of defendant's negligence or causation. Cummins v. Klenk, 474 N.W.2d 443, 444 (Minn. Ct. App. 1991) (upholding trial court's directed verdict when plaintiff failed to prove defendant did not observe the care which a

reasonably prudent person would have exercised in the discharge of official duties of a like nature under like circumstances). JMOL on the issue of negligence is also justified where different minds can reasonably arrive at but one result. Danielson v. Johnson, 366 N.W.2d 309, 313 (Minn. Ct. App. 1985) (citations omitted).

To avoid JMOL on a negligence claim, a plaintiff must prove: (1) the defendant owed a legal duty to the plaintiff; (2) the defendant breached that duty; (3) *that breach was the proximate cause of plaintiff's injury*; and (4) damages. Gilbertson v. Leininger, 599 N.W.2d 127, 130 (Minn. 1999) (emphasis added). "Where the evidence shows that a purported theory of causation is no more plausible than another theory, the [plaintiff] has not established a prima facie case, and a directed verdict is proper." Sauer v. State Farm Mut. Auto. Ins. Co., 379 N.W.2d 213, 215 (Minn. App. 1985), *review denied* (Minn. Feb. 19, 1986) (citing Zinnel v. Berghuis Const. Co., 274 N.W.2d 495, 499 (Minn. 1979)).

Although a prima facie case may be established by circumstantial evidence, it cannot be founded upon speculation and conjecture about causation. Id. (citing Elias v. City of St. Paul, 350 N.W.2d 442, 444 (Minn. Ct. App. 1984), *review denied* (Minn. Oct. 1, 1984) (upholding JMOL and noting "while it is true that civil damages may be recovered where the proof is circumstantial if the evidence meets the legal quantum of proof, mere proof of the happening of the accident or proof that death or injury was the result of the act of another, without proof of negligence or its causal relation to the result complained of, is not sufficient")).

Here, Wenzel's motion for JMOL should be granted because Respondent's negligence claim is based upon speculation and conjecture. Respondent failed to

establish that any act by Wenzel *caused* her to fall. Wenzel's theory, and the evidence presented to support his theory that Respondent's negligence alone caused her injuries, is more plausible than Respondent's claim that Wenzel was at fault.

III. THE COLLATERAL SOURCE STATUTE BARS PLAINTIFF FROM RECEIVING A WINDFALL.

The trial court erred in awarding Respondent damages for medical expenses beyond those paid by Medicare and Medical Assistance. Statutory construction and the application of statutes to undisputed facts present questions of law, which the appellate court reviews de novo. Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn. 1998); O'Malley v. Ulland Bros., 549 N.W.2d 889, 892 (Minn. 1996).

The trial court concluded that 50% of the difference between the gross amount of the medical expenses ($48,813.66) and the amount paid by medical assistance ($7,983.05) does not constitute a collateral source. As a result Respondent was awarded $16,423.78 for medical expenses even though she never paid a premium, no health care provider billed her for that amount, and that money is not owing to any provider as a matter of law. The court's ruling misconstrues Minnesota's collateral source statute.

In 1986 the legislature passed a statute to govern the determination of collateral sources and prevent some double recoveries by plaintiffs. Swanson v. Brewster, 784 N.W.2d 264, 269 (Minn. 2010) (holding a plaintiff's personal injury award should be reduced by any negotiated-discounted amounts, which are "collateral sources"). The collateral sources statute essentially provides "a plaintiff cannot recover money damages

from the defendant if the plaintiff has already received compensation from certain third parties or entities." Id. (citing Minn. Stat. § 548.251).

"Collateral sources" means "payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to:

> (1) a federal, state, or local income disability or Workers' Compensation Act; or other public program providing medical expenses, disability payments, or similar benefits;
>
> (2) health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments;
>
> (3) a contract or agreement of a group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care services; or
>
> (4) a contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability, except benefits received from a private disability insurance policy where the premiums were wholly paid for by the plaintiff."

Minn. Stat. § 548.251, subd. 3.

The application of this statute has been addressed by District Court judges since the holding in Swanson v. Brewster and has previously been considered by the Minnesota Court of Appeals in Mikulay v. Dial Corp., 1990 WL 57530 (Minn. Ct. App. 1990). (App. 161-63.) Wenzel adopts the analysis of Judge Jay D. Carlson in Johnson v. Mid-American Auction Co., Inc., Todd County District Court File No. 77-CV-09-1164 (Dec. 20, 2010). (App. 124-34.)

In Johnson, the court addressed the issue of whether a Medicare negotiated discount is excepted from the collateral source offset. In concluding Medicare negotiated discounts are subject to the collateral source offset the court first concluded the statute is ambiguous with respect to how it treats Medicare. (App. 131.) It concluded that "Medicare benefits can reasonably be interpreted as both payments made pursuant to the United States Social Security Act and payments made pursuant to a public program providing medical expenses, as well as a form of health insurance for the elderly. The statute is ambiguous as to the treatment of Medicare."[2] (App. 131.) It reasoned that allowing a plaintiff to recover the Medicare "gap" contravenes the basic purpose of the law to avoid double recoveries. (Id.)

It also relied on the holding in the Mikulay decision that a Medicare negotiated discount is a collateral source. The Mikulay court properly reasoned that "allowing [the plaintiff] to receive the medical services at no cost and recover the cost of the services from [the defendant] would result in a double recovery and contravene the purpose of the statute." (App. 163.)

The tort system is not intended to award a plaintiff fictitious money. Respondent should not be awarded medical expense damages for a debt that was never incurred and never owed.

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[2] Wenzel is aware that defense counsel in Johnson argued Medicare is unambiguously a collateral source. (App. 130.)

CONCLUSION

Based upon the foregoing discussion, Appellant Jason Wenzel's Motion for a New Trial should be granted pursuant to Minn. R. Civ. P. 59.01. Alternatively, Appellant's Motion for Judgment as a Matter of Law should be granted pursuant to Minn. R. Civ. P. 50.01. Finally, Respondent Kari Renswick's damage award should be reduced by the amount of collateral sources, including Medicare negotiated-discounts, she received.

Dated: October 27, 2011.

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STATE OF MINNESOTA
IN COURT OF APPEALS

JASON WENZEL,

Appellant,

vs.

KARI RENSWICK,

Respondent.

CASE NO. A11-1719

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 13,033 words. This brief was prepared using Microsoft Office Word 2010.

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