

STATE OF MINNESOTA
IN COURT OF APPEALS

No.: A11-1719

Kari Renswick,

Respondent,

vs.

Jason Wenzel,

Appellant.

RESPONDENT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES vi

ISSUES 1

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 6

 1. Plaintiff was the Defendant’s social guest at a garage party and was hurt when she fell down an unlit stairwell in the home’s entryway in her attempt to enter the home 6

 2. Plaintiff was unaware of the hazard posed by the unlit and invisible stairs 8

 3. Plaintiff sustained fractures to both wrists requiring a total of three surgeries 8

 4. Plaintiff suffered from torn tendons and ligaments as well as broken bones and this caused her ongoing pain and the need for medical care .. 13

ARGUMENT 15

 I. The Trial Court did not Abuse its Discretion in denying JMOL when Evidence Supported an Award for the Plaintiff’s Future Pain and Disability 15

 A. The Trial Court denied JMOL and Upheld the Future Damages Award 15

 B. JMOL Standard Requires Affirmance if the Verdict is Sustainable on “any reasonable theory of the evidence.” 15

 C. A Future Pain and Suffering Award can be Premised on Plaintiff’s Testimony of Ongoing Discomfort from an Injury 15

 D. Here the Trial Court Found the Evidence was not Speculative ... 17

E.	The Trial Court Ruling should be Affirmed	18
II.	The Trial Court did not Abuse its Discretion in Electing not to Instruct or Submit a Special Interrogatory to the Jury on the Defense of Primary Assumption of Risk	18
A.	The Trial Court did not Submit an Instruction or Verdict Question on Primary Assumption of Risk	18
B.	Abuse of Discretion Standard applies to Jury Instructions	18
C.	A Trial Court does not Abuse its Discretion when it Declines to Instruct on Primary Assumption of Risk	19
D.	Here, there are no “well-known, incidental risks” to Entering a Home’s Entryway, and Certainly not the “known” Risk of Falling Down a Hidden Stairwell	20
E.	The Trial Court Ruling should be Affirmed	21
III.	The Trial Court did not Err in Declining to Instruct the Jury that the Consumption of Drugs by the Plaintiff was Negligence <i>per se</i>	21
A.	The Trial Court Declined to Instruct the Jury on Drug Consumption	21
B.	Jury Instructions are reviewed for “Abuse of Discretion”	21
C.	Negligence <i>per se</i> requires the Violation of a Statute to Clearly Create a Civil Cause of Action to a Class of Persons including the one who seeks to Assert it	21
D.	There was no Indication that Statutes Proscribing Marijuana Use were Intended to Protect Property Owners from Slip and Fall Claims	23
E.	The Trial Court Ruling should be Affirmed	24
IV.	The Trial Court did not Abuse its Discretion in denying JMOL or New Trial on the Jury’s Award of Future Pain and Disability	25

A.	The Trial Court Denied Post-Trial relief on the Jury’s Award of Future Pain	25
B.	Standard of Review looks to any Evidence in the Record to Support the Verdict	25
C.	Future Pain and Disability Awards require only Testimony of an Injury with Ongoing Symptoms	26
D.	Here, there was Evidence of an Injury with Ongoing Pain and Disability	26
E.	The Trial Court Ruling should be Affirmed	28
V.	The Trial Court did not Err by Declining to Direct a Verdict on Primary Assumption of Risk	28
A.	The Trial Court Declined to Direct a Verdict on Primary Assumption of Risk	28
B.	Primary Assumption of Risk is Inapplicable when the Risk that Matures is not the Risk that was Assumed	29
C.	Here, the Trial Court noted that “[e]ntering the back door to a residential home is not the type of inherently dangerous activity to which primary assumption of risk applies”	30
D.	Courts Generally do not Instruct Juries on Primary Assumption of Risk	31
E.	The Trial Court Ruling should be Affirmed	32
VI.	Trial Court did not Err by Submitting Fact Issue of Hazard’s “Open and Obvious” Nature to the Jury for Resolution	32
A.	Trial Court Submitted the “Open and Obvious” Issue to the Jury	32
B.	The Supreme Court has held that the “Open and Obvious” Issue is for the Jury	33

C.	Property Owner has a Duty to Find, Correct and Warn of Even “Open and Obvious” Dangers when it may “Anticipate Harm” . . .	33
D.	Here, the Trial Court noted the Evidence Supported the Conclusion that the Hazard of an Unguarded Stairwell was not “Open and Obvious” as it was Concealed by the Absence of Lighting and would be Unexpected, so near a Door, thus Concealing the Risk even if the Hazard were Detected	36
E.	The Trial Court Ruling should be Affirmed	37
VII.	The Trial Court did not Abuse its Discretion in Submitting Comparative Fault to the Jury	38
A.	The Trial Court Submitted Comparative Fault to the Jury	38
B.	Comparative Fault is a Jury Question	38
C.	Negligence is the Lack of Due Care	39
D.	Here the Trial Court concluded that “Plaintiff produced evidence during trial that defendant may have been negligent in not keeping the entryway sufficiently lighted.”	39
E.	The Trial Court Ruling should be Affirmed	40
VIII.	The trial Court did not Err in its Calculation of Collateral Source Offsets	43
A.	The Trial Court Declined to Off-Set Medicare Benefits from the Jury’s Award	43
B.	<i>De Novo</i> Standard of Review Applies to Questions of Law	43
C.	The Plain Language of Minn. Stat. § 548.251, subd. 1 says it is Inapplicable to Benefits Paid by Social Security, and Medicare is such a Benefit	44

1.	<i>Swanson v. Brewster</i> held that only enumerated types of payments were considered collateral sources that are to be off-set an award	44
2.	The Statute unambiguously says it is inapplicable to benefits paid under the Social Security Act	46
3.	Courts construing Minnesota’s collateral source statute or similar laws have held that the statute excludes any type of social security benefit from being off-set an award	46
D.	Here, the Trial Court Carefully Reflected on the Statute in Making its Ruling	47
E.	The Trial Court Ruling should be Affirmed	48
CONCLUSION		49

TABLE OF AUTHORITIES

RULES AND STATUTES

42 U.S.C. § 1395c	4, 43, 47, 49
42 U.S.C. § 1395(y)(b)	4, 46, 49
MINN.R.CIV.P. 59.01	25
MINN.R.CIV.P. 59.01(g)	25
MINN. STAT. § 548.251, subd. 1	4, 43, 44, 46, 49
MINN. STAT. §604.01, subd. 1a	29
MINN. STAT. § 645.08	43
MINN. STAT. § 645.16	43
Ore. Rev. Stat. § 31.580(1)(d)	4, 46, 47

CASES

<i>Adee v. Evanson</i> , 281 N.W.2d 177 (Minn.1979)	3, 34
<i>Aides v. St. Paul Ball Club, Inc.</i> , 251 Minn. 440, 88 N.W.2d 94 (1958)	29
<i>Baber v. Dill</i> , 531 N.W.2d 493, 496 (Minn. 1995)	40
<i>Becker v. Mayo Foundation</i> , 737 N.W.2d 200, 207 (Minn. 2007)	22
<i>Block v. Target Stores, Inc.</i> , 458 N.W.2d 705, 712 (Minn. App. 1990), <i>review denied</i> (Minn., Sept. 28, 1990)	38

<i>Bonniwell v. St. Paul Union Stockyards Co.</i> , 271 Minn. 233, 238, 135 N.W.2d 499, 502 (1965)	33
<i>Bruegger v. Faribault County Sheriff's Dep't</i> , 497 N.W.2d 260, 262 (Minn.1993)	22
<i>Carpenter v. Nelson</i> , 257 Minn. 424, 428, 101 N.W.2d 918, 921 (1960)	17
<i>Clifford v. Geritom Med., Inc.</i> , 681 N.W.2d 680, 686 (Minn. 2004)	25
<i>Cooter & Gell v. Hartmarx Corp.</i> , 496 U.S. 384, 405, 110 S. Ct. 2447, 2461 (1990)	19
<i>Dornberg v. St. Paul City Railway</i> , 253 Minn. 52, 91 N.W.2d 178 (1958)	17
<i>Duchene v. Wolstan</i> , 258 N.W.2d 601 (Minn.1977)	17
<i>Dunshree v. Douglas</i> , 255 N.W.2d 42, 47 (Minn. 1977)	2
<i>Flom v. Flom</i> , 291 N.W.2d 914, 916 (Minn. 1980)	3, 38
<i>Frumkin v. Mayo Clinic</i> , 965 F.2d 620, 628 (8 th Cir. 1992)	4, 46
<i>Ginsberg v. Williams</i> , 270 Minn. 474, 485, 135 N.W.2d 213, 221 (1965)	25
<i>Hans Hagen Homes, Inc. v. City of Minnetrista</i> , 728 N.W.2d 536, 539 (Minn. 2007)	43
<i>Hartman v. National Heater Co.</i> , 240 Minn. 264, 60 N.W.2d 804 (1953)	39

<i>Haugen v. Int’l Transp., Inc.</i> , 379 N.W.2d 529, 531 (Minn.1986)	26
<i>Hilligoss v. Cargill, Inc.</i> , 649 N.W.2d 142, 147 (Minn. 2002)	1, 18, 21, 32
<i>ILHC of Eagan, LLC v. County of Dakota</i> , 693 N.W.2d 412, 419 (Minn. 2005)	43
<i>Imlay v. City of Lake Crystal</i> , 453 N.W.2d 326, 331 (Minn. 1990)	45
<i>In re Paternity of J.M.V.</i> , 656 N.W.2d 558, 562 (Minn. App. 2003)	18
<i>Johnson v. Mid-American Auction Co., Inc.</i> , Todd County District Court File No. 77-CV-09-1164 (Dec. 20, 2010)	48
<i>Lamb v. Jordan</i> , 333 N.W.2d 852, 855 (Minn.1983)	25
<i>Larson v. Dunn</i> , 460 N.W.2d 39, 47, n. 4 (Minn. 1990)	22
<i>LaValle v. Aqualand Pool Co., Inc.</i> , 257 N.W.2d 324, 328 (Minn. 1977)	26
<i>Lieberman v. Korsh</i> , 264 Minn. 234, 119 N.W.2d 180 (1962)	24
<i>Lindstrom v. Yellow Taxi Co.</i> , 298 Minn. 224, 214 N.W.2d 672 (1974)	1, 18, 24
<i>Louis v. Louis</i> , 636 N.W.2d 314, 321-22 (Minn. 2001)	3, 33, 35, 37
<i>Luke v. City of Anoka</i> , 277 Minn. 1, 151 N. W.2d 429 (1967)	39

<i>Malzahn v. Am. Family Mutual Ins. Co.,</i> Sherburne County District Court File No. 77-CV-10-1666 (Mar. 24, 2011)	48
<i>Meistrich v. Casino Arena Attractions, Inc.,</i> 31 N.J. 44,54-55, 155 A.2d 90, 96 (1959)	20
<i>Moe v. Steenberg,</i> 275 Minn. 448,450-51,147 N.W.2d 587, 589 (1966)	30
<i>Molde v. Citimortgage, Inc.,</i> 781 N.W.2d 36, 39 (Minn. App. 2010)	43
<i>Montgomery Ward & Co. v. County of Hennepin,</i> 450 N.W.2d 299, 306 (Minn. 1990)	19
<i>Mueller v. Sigmond,</i> 486 N.W.2d 841 (Minn. App. 1992), review denied (Minn., Aug. 27, 1992)	2, 22
<i>Nhep v. Roisen,</i> 446 N.W.2d 425, 427 (Minn. App. 1989), review denied (Minn., Dec. 1, 1989)	2, 24
<i>Olmanson v. LeSueur County,</i> 693 N.W.2d 876, 881 (Minn. 2005)	3, 33, 34
<i>Olson v. Hansen,</i> 299 Minn. 39,44,216 N.W.2d 124, 127 (1974)	29
<i>Pagett v. Northern Electric Supply Co.,</i> 283 Minn. 228, 237-38 167 N.W.2d 58, 65 (1969)	1, 16, 26
<i>Peterson v. Minneapolis Street Ry.,</i> 226 Minn. 27, 31 N.W.2d 905 (1948)	39
<i>Pietila v. Congdon,</i> 362 N.W.2d 328, 332-33 (Minn.1985)	33
<i>Pietrzak v. Eggen,</i> 295 N. W.2d 504, 507 (Minn. 1980)	1, 17

<i>Pouliot v. Fitzsimmons</i> , 582 N.W.2d 221, 224 (Minn. 1998)	1, 2, 15, 26
<i>Rinn v. Minnesota State Agricultural</i> , 611 N.W.2d 361, 363 (Minn. App. 2000)	35
<i>Rosenberg v. Heritage Renovations, LLC</i> , 685 N.W.2d 320, 327 (Minn. 2004)	45
<i>Ruskamp v. Ferknes</i> , 261 N. W.2d 612 (Minn.1978)	39
<i>Schneider v. Erickson</i> , 654 N.W.2d 144, 148 (Minn. App. 2002)	28
<i>Scott v. Ind. Sch. Dist. No. 709</i> , 256 N.W.2d 485, 488 (Minn. 1977)	2, 22
<i>Sefkow v. Sefkow</i> , 427 N.W.2d 203, 210 (Minn. 1988)	19
<i>Silbaugh v. Silbaugh</i> , 543 N.W.2d 639, 641 (Minn. 1996)	19
<i>Smith v. American States Ins. Co.</i> , 586 N.W.2d 784, 786 (Minn. App. 1998), <i>review denied</i> (Minn., Feb. 18, 1999)	45
<i>Snilsberg v. Lake Washington Club</i> , 614 N.W.2d 738, 743-44 (Minn. App. 2000)	28
<i>Springrose v. Willmore</i> , 292 Minn. at 24, 192 N.W.2d at 827 (1971)	29
<i>Sutherland v. Barron</i> , 570 N.W.2d 1, 7 (Minn. 1997)	34
<i>Swagger v. City of Crystal</i> , 379 N. W.2d 183 (Minn..App.1985), <i>review denied</i> , (Minn. Feb. 19, 1986)	29

<i>Swanson v. Brewster</i> , 784 N.W.2d 264, 269 (Minn. 2010)	44-48
<i>Tezak v. Bachke</i> , 698 N.W.2d 37, 41 (Minn. App. 2005), review denied (Minn., Aug. 24, 2005)	45
<i>Thompson v. Hill</i> , 366 N.W.2d 628, 631 (Minn. App.1985)	3, 30
<i>Transamerica Mortgage Advisors, Inc. v. Lewis</i> , 444 U.S. 11, 19 (1979)	22
<i>Ver Kuilen v. Ver Kuilen</i> , 578 N.W.2d 790, 792 (Minn. App. 1998)	19
<i>Wagner v. Thomas J. Obert Enterprises</i> , 384 N.W.2d 477, 482 (Minn. App. 1986)	1, 3, 19, 20, 30, 31
<i>Webster v. St. Paul City Ry.</i> , 241 Minn. 515, 517, 64 N.W.2d 82, 84 (1954)	3, 38, 39
<i>White v. Jubitz</i> , 219 P.3d 566, 576 (Ore. 2009)	4, 47

OTHER AUTHORITIES

73 AM.JUR.2D, <i>Statutes</i> , § 191 (2001)	45
Kionka, <i>Implied Assumption of Risk: Does It Survive Comparative Fault?</i> , 1982 S.ILL.U.L.J. 371, 377	19
MINN. DIST. JUDGES ASS’N, 4A MINNESOTA JURY INSTRUCTION GUIDES -- CIVIL, CIVJIG CIVJIG 28.15	32
MINN. DIST. JUDGES ASS’N, 4A MINNESOTA JURY INSTRUCTION GUIDES -- CIVIL, CIVJIG 28.30, at 222 (5 th ed. 2006)	20, 31, 32

RESTATEMENT (SECOND) OF TORTS,
§ 343, Comment d (2d ed. 1965) 34

RESTATEMENT (SECOND) OF TORTS
§ 343A (1965) 34, 37

RESTATEMENT (SECOND) OF TORTS
§ 343A (1965), Comment *f*. 35

ISSUES

1. Whether the trial court abused its discretion in denying JMOL when evidence supported an award for the plaintiff's future pain and disability ?

The trial court held in the negative. The trial judge determined that the evidence justified the jury's finding and "was not based on speculation or conjecture," *Order & Memorandum* at 10, (ADD-010), as "the jury's verdict for future pain and disability was supported by Plaintiff's testimony that she still suffered from pain related to the accident as of the trial." *Order & Memorandum* at 8, (ADD-008).

Apposite Authority: *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (jury's verdict must not be set aside "if it can be sustained on any reasonable theory of the evidence."); *Pietrzak v. Eggen*, 295 N. W.2d 504, 507 (Minn. 1980)(plaintiff need not prove damages are "absolutely" certain, but merely "reasonably certain"); *Pagett v. Northern Electric Supply Co.*, 283 Minn. 228, 237-38 167 N.W.2d 58, 65 (1969) (medical testimony of the existence of injury combined with plaintiff's testimony about ongoing pain supports submission of future pain and disability claim to a jury).

2. Whether the trial court abused its discretion in electing not to instruct or submit a special interrogatory to the jury on the defense of primary assumption of risk?

The trial court held in the negative. The trial judge declined to instruct or submit a special verdict question on primary assumption of risk. *Order & Memorandum* at 9 (ADD-009).

Apposite Authority: *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002)("An instruction that is so misleading that it renders incorrect the instruction as a whole will be reversible error, but a jury instruction may not be attacked successfully by lifting a single sentence or word from its context. Where instructions overall fairly and correctly state the applicable law, appellant is not entitled to a new trial."); *Lindstrom v. Yellow Taxi Co.*, 298 Minn. 224, 214 N.W.2d 672 (1974) (standard of review is abuse of discretion and requires movant to show actual prejudice from the alleged error); *Wagner v. Thomas J. Obert Enterprises*, 384 N.W.2d 477, 482 (Minn. App. 1986)("We also believe that an instruction on assumption of risk in both its primary and secondary sense confuses the jury. . . . [I]t would seem preferable not to give such an instruction, and to leave such matters to the arguments of counsel. At best, such a cautionary instruction would probably tell the jury what it already knew. At worst, and more likely, it would be a source of confusion and potential error.").

3. Whether the trial court committed an error of law in declining to instruct the jury that the consumption of drugs by the plaintiff was negligence *per se*?

The trial court held in the negative. The trial judge declined to instruct that drug consumption made plaintiff negligent as a matter of law. *Order & Memorandum* at 9 (ADD-009).

Apposite Authority: *Scott v. Ind. Sch. Dist. No. 709*, 256 N.W.2d 485, 488 (1977) (for a statute to create a fixed standard of conduct by which the fact of negligence may be determined *per se*, the statute's purpose must be: (a) "to protect a class of persons which includes the one whose interest is invaded," (b) "to protect the particular interest which is invaded," (c) "to protect that interest against the kind of harm which has resulted," and (d) "to protect that interest against the particular hazard from which the harm results."); *Mueller v. Sigmond*, 486 N.W.2d 841 (Minn. App. 1992), *review denied* (Minn., Aug. 27, 1992) (trial court has discretion to admit or exclude evidence of a party's impairment at the time of the accident based on weighing probative and prejudicial impact and will not be reversed unless "clearly erroneous."); *Nhep v. Roisen*, 446 N.W.2d 425, 427 (Minn. App. 1989), *review denied* (Minn., Dec. 1, 1989) (upholding trial court's exercise of discretion in ruling that evidence of intoxication was "slightly probative as impeachment of her ability to recall the details of the accident," and that probative value of the evidence was outweighed by the prejudicial value).

4. Whether the trial court abused its discretion in denying JMOL or new trial on the issue of whether the jury's award of future pain and disability was supported by the evidence?

The trial court held in the negative. The trial judge determined that the evidence justified the jury's finding and "was not based on speculation or conjecture," *Order & Memorandum* at 10, (ADD-010), as "the jury's verdict for future pain and disability was supported by Plaintiff's testimony that she still suffered from pain related to the accident as of the trial." *Order & Memorandum* at 8, (ADD-008).

Apposite Authority: *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (jury's verdict must not be set aside "if it can be sustained on any reasonable theory of the evidence."); *Dunshee v. Douglas*, 255 N.W.2d 42, 47 (Minn. 1977) (medical doctor is qualified to opine that problems experienced from an injury will present the likelihood of ongoing symptoms or the risk of a future harm).

5. Whether the trial court committed an error of law by failing to direct a verdict on primary assumption of risk?

The trial court held in the negative. The trial judge submitted the question of comparative fault to the jury. *Order & Memorandum* at 5-6, (ADD-005 to -006).

Apposite Authority: *Wagner v. Thomas J. Obert Enterprises*, 384 N.W.2d 477, 480-81 (Minn. App. 1986)(ruling primary assumption of risk inapplicable as while the plaintiff “assumed certain risks inherent in roller-skating,[the property owner] still had a duty to keep the premises safe and to supervise other roller skaters.”); *Thompson v. Hill*, 366 N.W.2d 628, 631 (Minn. App.1985)(ruling primary assumption of risk inapplicable as while deceased assumed certain risks when his vehicle’s driver proceeded onto the ice of a frozen river, the driver was not relieved of his duties to use reasonable care in driving on it).

6. Whether the trial court committed an error of law in submitting the “open and obvious” defense to the jury?

The trial court held in the negative. The trial judge submitted the issue to the jury for resolution as a comparative fault question as “[a] condition is not obvious unless both the condition and the risk are apparent to and would be recognized by a reasonable man in the position of the visitor, exercising ordinary perception, intelligence and judgment.” *Order & Memorandum* at 4, (ADD-004).

Apposite Authority: *Olmanson v. LeSueur County*, 693 N.W.2d 876, 881 (Minn. 2005)(“Generally, whether a condition presents a known or obvious danger is a question of fact.”); *Louis v. Louis*, 636 N.W.2d 314, 321-22 (Minn. 2001)(holding that summary judgment was not appropriate because whether the danger posed by a swimming pool was known or obvious was a fact question); *Adee v. Evanson*, 281 N.W.2d 177 (Minn.1979) (granting a new trial on the issue of liability where the original jury instructions omitted language imposing liability on the landowner if harm could be anticipated despite the obviousness of danger).

7. Whether the trial court abused its discretion in submitting comparative fault to the jury?

The trial court held in the negative. The trial judge submitted the negligence of both parties to the jury. *Order and Memorandum* at 5-6, (ADD-005 to -006).

Apposite Authority: *Flom v. Flom*, 291 N.W.2d 914, 916 (Minn. 1980), quoting *Webster v. St. Paul City Ry.*, 241 Minn. 515, 517, 64 N.W.2d 82, 84 (1954)(“The issue of negligence is normally for the jury and must be upheld unless the reviewing court, viewing ‘the evidence in the light most favorable to the verdict’ and drawing ‘every reasonable inference in support of the verdict,’ finds the verdict ‘to be manifestly and palpably contrary to the evidence as

a whole.’’).

8. Whether the trial court committed an error of law in its calculation of collateral source offsets?

The trial court held in the negative. The trial judge ruled that Medicare payments - - a form of social security benefit under 42 U.S.C. § 1395c - - are excluded from collateral source treatment under § 548.251, subd. 1, which bars “ payments made pursuant to the United States Social Security Act . . .” from being offset a personal injury award). *Order & Memorandum* at 12, (ADD-012).

Apposite Authority: MINN. STAT. § 548.251, subd. 1 (“payments made pursuant to the United States Social Security Act” are not collateral sources); 42 U.S.C. § 1395(y)(b) (Medicare is part of Title XVIII of the 1965 Social Security Act); *Frumkin v. Mayo Clinic*, 965 F.2d 620, 628 (8th Cir. 1992)(reference in Minnesota’s collateral-source statute to “payments made pursuant to the Social Security Act,” included any disability benefit and not just retirement benefits); *White v. Jubitz*, 219 P.3d 566, 576 (Ore. 2009) (Ore. Rev. Stat. § 31.580(1)(d) provides an exception from collateral source off-set treatment for “federal social security benefits” and since “Medicare benefits are . . . ‘established as part of the Social Security Act’” the exclusion from collateral source off-set treatment encompasses “the benefits provided by all social security programs including Medicare.”).

STATEMENT OF THE CASE

Plaintiff was a permissive entrant on Defendant's property to attend a New Years Eve party, and she went to use the bathroom in the home when she unexpectedly encountered an unlit stairwell in the entryway to the home and fell, receiving multiple fractures to both wrists that required three surgeries and installation of medical hardware.

Defendant asserted as defenses that (1) he owed no duty of care because the hidden stairs were "open and obvious" even though not visible to anyone and unknown to the Plaintiff, (2) Plaintiff was barred from suit by the doctrine of "primary assumption of risk," (3) Plaintiff was comparatively at fault as a matter of law because she had consumed marijuana, (4) Plaintiff was barred from claiming future pain and disability compensation because there was insufficient evidence to support such an award, and (5) Plaintiff's award should be reduced by the "collateral source" of Medicare medical benefits she had been paid under the Social Security Act. The trial court declined to rule for Defendant on any of these issues and entered judgment on a jury's award finding both Plaintiff and Defendant 50% causally at fault.

When Defendant sought post-trial relief, the trial court, Hon. Nancy L. Buytendorp of Winona County District Court, denied all motions and the Defendant timely appealed.

STATEMENT OF FACTS

1. **Plaintiff was the Defendant's social guest at a garage party and was hurt when she fell down an unlit stairwell in the home's entryway in her attempt to enter the home.**

On the date of the injury, December 31, 2008, the Defendant Jason Wenzel considered the Plaintiff Kari Renswick to be "a welcome guest" at his home,¹ as he held a New Year's Eve party at his garage,² where Defendant, the Plaintiff and two other guests sat at a table to play cards,³ as defendant's wife Chelsea watched.⁴ Defendant observed that Plaintiff consumed about one and one-half of the beers he furnished her,⁵ and felt she was not intoxicated from the alcohol,⁶ but based on his experience with Plaintiff, the defendant knew her to be "a frequent marijuana user," because it helped to control her pre-existing Multiple Sclerosis,⁷ and he assumed she had thus been under the influence of marijuana during her visit to his home,⁸ though she did nothing that made her appear unusual or different than

¹ Tr. at 41, f. 1-4.

² *Id.*; Tr. at 42, f. 21-23.

³ Tr. at 42, f. 24 - 43, f. 1; *Id.* at 43, f. 7-9 (Jason Voelker and Dan Michaelowski) .

⁴ Tr. at 43, f. 10-12.

⁵ Tr. at 43, f. 22-24.

⁶ Tr. at 44, f. 3-5.

⁷ Tr. at 44, f. 13-17.

⁸ Tr. at 44, f. 10-12 ("no surprise").

normal.⁹

Plaintiff then got up and announced she needed to use the bathroom after at time,¹⁰ and in order to gain access to the facilities in the house, she left “the garage through the service door,”¹¹ and “walked up the back sidewalk to the house” from the detached garage,¹² then “walked up the back steps” of the home,¹³ that were illuminated by a “flood light from the garage,”¹⁴ that “[s]hined off the snow” on the sidewalk,¹⁵ and provided “enough light . . . to see . . . to get to the house.”¹⁶

She “opened the door, . . . stepped in with [her] right foot, reached [for] the handle” of the inside door to the kitchen from the darkened inner vestibule,¹⁷ and “brought [her] left foot around . . . and when [she] shifted [her] weight to grab the door handle, [she] tumbled . . . to [her] left . . . falling and reaching out,” but she “tumbled down the steps and . . .

⁹ Tr. at 44, f. 21-25.

¹⁰ Tr. at 154, f. 14-23 (“We were playing cards and I said I had to go to the bathroom”).

¹¹ Tr. at 155, f. 4.

¹² Tr. at 155, f. 5.

¹³ Tr. at 155, f. 9.

¹⁴ Tr. at 155, f. 12.

¹⁵ Tr. at 155, f. 15.

¹⁶ Tr. at 155, f. 16-18.

¹⁷ Tr. at 156, f. 1-2.

smacked [her] face on the wall” at the bottom of the stairs to the basement.¹⁸

2. Plaintiff was unaware of the hazard posed by the unlit and invisible stairs.

The entryway was dark except for the inside kitchen “door handle shining,” as the outside light was the only illumination of the entryway, making the entryway and even the kitchen door dark.¹⁹ She was “unaware that there was a danger to be concerned about” in the darkness, represented by unlit basement stairs.²⁰

3. Plaintiff sustained fractures to both wrists requiring a total of three surgeries

Dr. Hayden is an orthopedic surgeon²¹ from the Gunderson Clinic in LaCrosse, Wisconsin,²² who treated the Plaintiff Kari Renswick,²³ and performed surgery²⁴ as well as a reduction²⁵ of both a displaced fracture of her left wrist²⁶ and surgery on a non-displaced fracture of her right wrist.²⁷ In his specialty practice as an orthopedic surgeon, Dr. Hayden routinely “takes

¹⁸ Tr. at 156, f. 3-9.

¹⁹ Tr. at 156, f. 16-25.

²⁰ Tr. at 161, f. 16-18.

²¹ Dr. Hayden Transcript at 5, f. 7.

²² Dr. Hayden Transcript at 5, f. 4-5.

²³ Dr. Hayden Transcript at 7, f.15-17.

²⁴ Dr. Hayden Transcript at 16, f. 1-2.

²⁵ Dr. Hayden Transcript at 13, f.2-3.

²⁶ Dr. Hayden Transcript at 12, f. 24-25.

²⁷ Dr. Hayden Transcript at 12, f.11-16; 20, f. 8-10.

care of conditions and injuries to the musculoskeletal system, bones, joints, ligaments, tendons, outside of the head and the back.”²⁸ Within his group of 10 orthopedic surgeons,²⁹ his field of sub-specialty involves “hand and wrist surgery.”³⁰ In addition to his education, he is certified as a member of both the American Association of Orthopedic Surgeons and the American Society for Surgery of the Hand,³¹ and in his practice he sees 70 patients and does 10-15 surgeries each week.³²

When Plaintiff was brought to the Gunderson Lutheran emergency department, the general surgeons at the trauma service there called Dr. Hayden in to consult about Ms. Renswick’s care,³³ because of the other surgeons’ judgment that his specialty was needed “in the management of [her] wrist injuries,”³⁴ and Dr. Hayden immediately took x-rays that “showed that she had a fracture of both wrists.”³⁵ Both wrists involved complete fractures of “the distal radius, which is the end of the forearm bone,”³⁶ or where the lower arm meets

²⁸ Dr. Hayden Transcript at 5, f. 15-18.

²⁹ Dr. Hayden Transcript at 6, f. 14.

³⁰ Dr. Hayden Transcript at 6, f. 18.

³¹ Dr. Hayden Transcript at 6, f. 20-22.

³² Dr. Hayden Transcript at 7, f. 7-14.

³³ Dr. Hayden Transcript at 7, f. 21-25.

³⁴ Dr. Hayden Transcript at 8, f. 1.

³⁵ Dr. Hayden Transcript at 10, f. 11-13.

³⁶ Dr. Hayden Transcript at 10, f. 13-16.

the wrist on the thumb-side of each arm. While the right arm fracture “was adequately aligned,”³⁷ the fracture on the left “was grossly displaced”³⁸ or “bent,”³⁹ and the break extended down “into the joint” of the wrist.⁴⁰ The injury on the left “had to [be] straighten[ed] . . . right then and there, because it was so displaced,” and Dr. Hayden anesthetized her arm and manipulated the broken segments back into alignment and then splinted it.⁴¹

Thereafter, because her left wrist fracture “went into the joint,” Dr. Hayden realized immediately that just “setting . . . it was not enough,”⁴² as if he just placed the wrist in a “cast, the break would heal, but it would heal in a deformed position, giving her [a] high likelihood of . . . problems.”⁴³ He therefore ordered a further specialized diagnostic test in the form of a CT scan that same evening,⁴⁴ and thus got “multiple . . . computer-generated . . . pictures showing cross-sections of [the] bone in various planes” of observation . . . to

³⁷ Dr. Hayden Transcript at 10, f. 16-17.

³⁸ Dr. Hayden Transcript at 10, f. 17-18.

³⁹ Dr. Hayden Transcript at 10, f. 23.

⁴⁰ Dr. Hayden Transcript at 10, f. 17-19.

⁴¹ Dr. Hayden Transcript at 12, f. 23 - 13, f. 4.

⁴² Dr. Hayden Transcript at 14, f. 1-3.

⁴³ Dr. Hayden Transcript at 14, f. 4-6.

⁴⁴ Dr. Hayden Transcript at 14, f. 8-16.

create a three-dimensional picture of what the break look[ed] like.”⁴⁵ Based on the CT scan pictures showing “exactly where the pieces [of bone] are,” he was able to develop “a plan of how . . . to get it back together” and where to install surgical “plates so it stays aligned.”⁴⁶

Dr. Hayden then took Ms. Renswickr back to surgery on January 7, 2009, and performed an “open reduction and internal fixation of the left distal radius,”⁴⁷ by “mak[ing] an incision on the palm side of the wrist and [one in] the back side of the wrist . . . and push[ing] the . . . bones back into place . . . and then . . . put[ting] in some plates and . . . screws and pins that hold [the plate] in position . . . then . . . clos[ing] the wound[s] and . . . put[ting] a splint on it.”⁴⁸ This resulted in insertion of two plates - - one on the palm side and one on the back side of the radius bone “with screws and pins holding the bone in place.”⁴⁹

Dr. Hayden followed up with her a week later on January 14, 2009, with another x-ray to verify that the bones of both fractured wrists were still in proper alignment,⁵⁰ and while these showed the left to be in proper alignment with the plates and screws, the x-ray on the 14th “showed that [the bone] had shifted in position . . . [as] wrist fractures are notorious for

⁴⁵ Dr. Hayden Transcript at 14, f. 18-24.

⁴⁶ Dr. Hayden Transcript at 15, f. 7-8.

⁴⁷ Dr. Hayden Transcript at 16, f. 4-5.

⁴⁸ Dr. Hayden Transcript at 16, f. 6-13.

⁴⁹ Dr. Hayden Transcript at 17, f. 1-9.

⁵⁰ Dr. Hayden Transcript at 17, f. 22-25.

doing”⁵¹ The right wrist fracture was seen to have “bent back and was out of shape [as] . . . the bone itself had shifted out of position internally,”⁵² in that “it was broken from the original injury [but] . . . then it just gradually bent relative to the arm bone,”⁵³ requiring a further CT scan on the right,⁵⁴ followed by surgery that was “pretty much the same thing on her right as we [had previously done] on the left.”⁵⁵ This kept her in casts and a splint for another “six weeks.”⁵⁶

“After she had healed, she developed some pain on the palm surface of the left hand” caused by “irritation of . . . the tendons that bend your fingers” by one of the plates in the left wrist, and so Dr. Hayden did a third surgery on February 2, 2010, to remove one of the plates by opening her skin and drilling out the screws and leveraging off the plate to remove it from her body, as the broken pieces of bone had reconnected by that time.⁵⁷ He then saw her again on February 15, about two weeks after the third surgery to check on her healing.⁵⁸

⁵¹ Dr. Hayden Transcript at 19, f. 4-9. “It’s nothing a patient does or doesn’t do, the normal joint forces [that exist] can deform the bone.” Dr. Hayden Transcript at 19, f. 9-11.

⁵² Dr. Hayden Transcript at 19, f. 18-20.

⁵³ Dr. Hayden Transcript at 19, f. 24 - 20, f. 2.

⁵⁴ Dr. Hayden Transcript at 20, f. 7.

⁵⁵ Dr. Hayden Transcript at 20, f. 7-14.

⁵⁶ Dr. Hayden Transcript at 20, f. 20-25.

⁵⁷ Dr. Hayden Transcript at 21, f. 15-24.

⁵⁸ Dr. Hayden Transcript at 25, f. 7.

4. Plaintiff suffered from torn tendons and ligaments as well as broken bones and this caused her ongoing pain and the need for medical care

In injuries of this type, Dr. Hayden explained that “[y]ou always tear some tendons,” and in her case in addition to the bi-lateral radius fractures, she also had “a piece of bone that was broken off” the ulna bone - - or the other lower arm bone on the pinky side of the wrist,⁵⁹ and when her radius bone broke, the “ligament . . . that goes from one bone to the other” exerted enough force to “literally pull[] that little piece of bone off” and “those ligaments [we]re damaged to some degree” as well.⁶⁰

Dr. Hayden explained that all the medical bills generated for this care were reasonable, necessary and related to the accident.⁶¹ He said he had no opinion about whether she’d have any ongoing physical restrictions,⁶² but that she “would need to see an occupational therapist or anybody that had skills in rehabbing somebody who’s had hand surgery.”⁶³ He noted that after his care ended, “she expressed . . . an interest in getting back to work, and patients . . . require some sort of doctor’s note before an employer will let . . . them back,” so he assisted her in that effort.⁶⁴

⁵⁹ Dr. Hayden Transcript at 27, f. 13-16.

⁶⁰ Dr. Hayden Transcript at 27, f. 17-23.

⁶¹ Dr. Hayden Transcript at 30, 19-20.

⁶² Dr. Hayden Transcript at 31, f. 4-5.

⁶³ Dr. Hayden Transcript at 37, f. 11-15.

⁶⁴ Dr. Hayden Transcript at 36, f. 9-16.

Just as Dr. Hayden had noted she continued to have pain in the left wrist particularly,⁶⁵
Ms. Renswick herself testified that she remained in pain to the day of the trial.⁶⁶

⁶⁵ Dr. Hayden Transcript at 21, f. 15-24.

⁶⁶ Tr. 169, f. 13-14.

ARGUMENT

I. The Trial Court did not Abuse its Discretion in denying JMOL when Evidence Supported an Award for the Plaintiff's Future Pain and Disability

A. The Trial Court denied JMOL and Upheld the Future Damages Award

The trial judge determined that the evidence justified the jury's finding and "was not based on speculation or conjecture," *Order & Memorandum* at 10, (ADD-010), as "the jury's verdict for future pain and disability was supported by Plaintiff's testimony that she still suffered from pain related to the accident as of the trial." *Order & Memorandum* at 8, (ADD-008).

B. JMOL Standard Requires Affirmance if the Verdict is Sustainable on "any reasonable theory of the evidence."

A jury's verdict must not be set aside "if it can be sustained on any reasonable theory of the evidence." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998).

C. A Future Pain and Suffering Award can be Premised on Plaintiff's Testimony of Ongoing Discomfort from an Injury

Here, the Defendant-Appellant argued that there was no factual or evidentiary basis for the award of future pain and disability, as the Plaintiff's orthopedic surgeon had declined to offer an opinion on Plaintiff's future pain.⁶⁷

Expert opinion on whether someone will have the subjective symptom of pain is unnecessary, as future pain and suffering can be supported based on medical evidence that

⁶⁷ Dr. Hayden Transcript at 31, f. 4-5 (no opinion either way).

the plaintiff has sustained an injury that produces pain, and the plaintiff's testimony that their pain has continued. See *Pagett v. Northern Electric Supply Co.*, 283 Minn. 228, 237-38 167 N.W.2d 58, 65 (1969). In *Pagett*, the court held that the issue of future pain and disability was properly submitted to the jury for resolution when there was medical testimony that some of the plaintiff's after-accident symptoms matched what would be suspected for the type of injuries he sustained in falling down an unguarded opening on the defendant's property, and some symptoms did not, as the plaintiff's pre-accident and post-accident health condition were described by the plaintiff who testified that afterward he had "pain in his lower back, left hip, and the upper part of his left leg, which continued to the time of trial." *Id.* at 230, 167 N.W.2d at 61. The court said:

There was testimony that prior to the accident plaintiff was in so-called "excellent" physical condition and had not suffered any previous difficulty with his leg or back. After the accident plaintiff experienced great difficulty and discomfort in walking, and from about [the time of the accident] to the date of trial he used a cane; he had difficulty sleeping; he could do no lifting; and he was unable to stand or sit for any prolonged period of time. The jury could also observe that plaintiff experienced difficulty walking in the courtroom and had to be assisted on and off the witness stand.

Id. at 237-38, 167 N.W.2d at 65.

Courts follow the rule that a claimant need not prove damages are "absolutely certain" to occur, but merely "reasonably certain" to occur:

In a civil action the plaintiff has the burden of proving future damages to a reasonable certainty. This rule insures that there is no recovery for damages which are remote, speculative, or conjectural. However, it is not necessary that the evidence be unequivocal or that it establish future damages to an absolute certainty. Instead, the plaintiff must prove the reasonable certainty of future

damages by a fair preponderance of the evidence. In short, the plaintiff is entitled to an instruction on future damages if he or she has shown that such damage is more likely to occur than not to occur.

Pietrzak v. Eggen, 295 N. W.2d 504, 507 (Minn. 1980), citing *Duchene v. Wolstan*, 258 N.W.2d 601 (Minn.1977); *Dornberg v. St. Paul City Railway*, 253 Minn. 52, 91 N.W.2d 178 (1958).

Future damages may be awarded in the absence of medical evidence based on a showing that a plaintiff is not fully recovered at the time of trial:

In the case of future damages--it being impossible to establish absolute certainty--most courts, including this one, have long followed the rule that recovery may be had if they are "reasonably certain" to occur. This rule, however, has nothing to do with the degree of proof in the sense of the required quality or quantum of evidence necessary to establish the fact. It simply means that the ultimate fact which the plaintiff has the burden of proving is future damages reasonably certain to occur as a result of the original injury. It is still sufficient if the existence of this fact is proved by only a fair preponderance of the evidence.

Carpenter v. Nelson, 257 Minn. 424, 428, 101 N.W.2d 918, 921 (1960) (footnote omitted).

D. Here the Trial Court Found the Evidence was not Speculative

The trial judge determined that the evidence justified the jury's finding and "was not based on speculation or conjecture," *Order & Memorandum* at 10, (ADD-010), as "the jury's verdict for future pain and disability was supported by Plaintiff's testimony that she still suffered from pain related to the accident as of the trial." *Order & Memorandum* at 8, (ADD-008). This is wholly consistent with the standard of proof required by the law.

E. The Trial Court Ruling should be Affirmed

Since the record supported the Plaintiff's complaints of ongoing pain in the area of the injury, and as her doctor had testified that pain in the area was a natural consequence of the serious fracture injuries she had sustained, there was evidence that justified submission of the issue of future pain and disability to the jury.

II. The Trial Court did not Abuse its Discretion in Electing not to Instruct or Submit a Special Interrogatory to the Jury on the Defense of Primary Assumption of Risk

A. The Trial Court did not Submit an Instruction or Verdict Question on Primary Assumption of Risk

The trial judge declined to instruct or submit a special verdict question on primary assumption of risk. *Order & Memorandum* at 9, (ADD-009). He reasoned that “[p]rimary assumption of risk does not apply to the facts of this case. *Id.* Obviously to instruct about an inapplicable defense would have been error, whereas withholding that instruction is not.

B. Abuse of Discretion Standard applies to Jury Instructions

“Where instructions overall fairly and correctly state the applicable law, appellant is not entitled to a new trial.” *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). Appellate courts review instructions for an “abuse of discretion.” *Lindstrom v. Yellow Taxi Co.*, 298 Minn. 224, 214 N.W.2d 672 (1974).

An abuse of discretion occurs when the district court “resolves the matter in a manner that is against logic and the facts on the record,” *In re Paternity of J.M.V.*, 656 N.W.2d 558, 562 (Minn. App. 2003), or when the court makes “findings unsupported by the evidence,”

Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996), or “when the judge improperly applies the law to the facts.” *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998), citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Under [the abuse-of-discretion] standard, a matter will not be disturbed on appeal unless the trial court abused its discretion, exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law.

Montgomery Ward & Co. v. County of Hennepin, 450 N.W.2d 299, 306 (Minn. 1990) (citations omitted); see *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 2461 (1990) (“A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . .”).

C. A Trial Court does not Abuse its Discretion when it Declines to Instruct on Primary Assumption of Risk

As was noted earlier in this Brief, the trial court was correct in ruling that “secondary” rather than “primary” assumption of risk applied, but even if primary assumption of risk did apply, the courts have held it not to be error to decline to instruct on the doctrine given its potential to confuse the jury:

We also believe that an instruction on assumption of risk in both its primary and secondary sense confuses the jury. . . . [I]t would seem preferable not to give such an instruction, and to leave such matters to the arguments of counsel. At best, such a cautionary instruction would probably tell the jury what it already knew. At worst, and more likely, it would be a source of confusion and potential error.

Wagner v. Thomas J. Obert Enterprises, 384 N.W.2d 477, 482 (Minn. App. 1986), citing Kionka, *Implied Assumption of Risk: Does It Survive Comparative Fault?*, 1982 S.ILL.U.L.J.

371, 377 (footnotes omitted), and *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44,54-55, 155 A.2d 90, 96 (1959) (“[I]t seems too much to expect a jury to grasp the issues when assumption of risk is advanced in both of its senses.”). The *Wagner* court said:

In the present case, we think it likely that the jury was not able to differentiate between the well-known, inherent risks of roller-skating, which relieve respondent of any duty (primary assumption of risk), and Wagner’s attempt to exit the rink across a defective metal ramp or through an unsupervised crowd of skaters in poor lighting conditions (secondary assumption of risk). We therefore hold that under the facts of this case, the instruction on primary assumption of risk given by the trial court confused the jury and constituted reversible error. On remand for a new trial, the trial court should instruct the jury on secondary assumption of risk and should exclude an instruction on primary assumption of risk.

384 N.W.2d at 482.

D. Here, there are no “well-known, incidental risks” to Entering a Home’s Entryway, and Certainly not the “known” Risk of Falling Down a Hidden Stairwell

Everyone who enters a ballfield recognizes the risk of being struck by a ball, but not everyone who enters a home assumes that doing so may mean that they will fall down a hidden staircase. As the trial court noted, “[e]ntering a back door to a residential home is not the type of inherently dangerous activity to which primary assumption of risk applies.”

Order and Memorandum at 7 (ADD-007).

As was noted earlier in this Brief, the CIVJIG recommends no instruction on “primary assumption of risk.”⁶⁸

⁶⁸ MINN. DIST. JUDGES ASS’N, 4A MINNESOTA JURY INSTRUCTION GUIDES -- CIVIL, CIVJIG 28.30, at 222 (5th ed. 2006).

E. The Trial Court Ruling should be Affirmed

Since the evidence was that the hazard of the hidden stairway was not a known risk to the Plaintiff, she could not assume the risk of falling down it. Instructing the jury that such a risk existed and would relieve the Defendant-Appellant of any duty of care to Plaintiff would thus have been error. It was therefore well within the trial court's discretion not to instruct the jury on primary assumption of risk.

III. The Trial Court did not Err in Declining to Instruct the Jury that the Consumption of Drugs by the Plaintiff was Negligence *per se*

A. The Trial Court Declined to Instruct the Jury on Drug Consumption

The trial judge declined to instruct that drug consumption made plaintiff negligent as a matter of law, *Order & Memorandum* at 9 (ADD-009), noting that while the “violation of a statute that imposes a standard of conduct designed to protect . . . a particular class of persons is negligence *per se*,” that a “criminal statute does not give rise to a civil cause of action unless that statute expressly or by clear implication so provides.” *Id.* (ADD-009).

B. Jury Instructions are reviewed for “Abuse of Discretion”

“The district court has broad discretion in determining jury instructions and we will not reverse in the absence of abuse of discretion.” *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002).

C. Negligence *per se* requires the Violation of a Statute to Clearly Create a Civil Cause of Action to a Class of Persons including the one who seeks to Assert it

“A statute does not give rise to a civil cause of action unless the language of the

statute is explicit or it can be determined by clear implication.” *Becker v. Mayo Foundation*, 737 N.W.2d 200, 207 (Minn. 2007), *citing Larson v. Dunn*, 460 N.W.2d 39, 47, n. 4 (Minn. 1990). “[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.” *Id.*, *quoting Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). “Principles of judicial restraint preclude us from creating a new statutory cause of action that does not exist at common law where the legislature has not either by the statute’s express terms or by implication provided for civil tort liability.” *Id.*, *quoting Bruegger v. Faribault County Sheriff’s Dep’t*, 497 N.W.2d 260, 262 (Minn.1993) (holding that the Crime Victims Reparations Act does not create a private cause of action against law enforcement agencies that fail to inform crime victims of their right to seek reparations).

For a statute to create a fixed standard of conduct by which the fact of negligence may be determined *per se*, the statute’s purpose must be: (a) “to protect a class of persons which includes the one whose interest is invaded,” (b) “to protect the particular interest which is invaded,” (c) “to protect that interest against the kind of harm which has resulted,” and (d) “to protect that interest against the particular hazard from which the harm results.” *Scott v. Ind. Sch. Dist. No. 709*, 256 N.W.2d 485, 488 (Minn. 1977); *see Mueller v. Sigmond*, 486 N.W.2d 841 (Minn. App. 1992), *review denied* (Minn., Aug. 27, 1992)(trial court has discretion to admit or exclude evidence of a party’s impairment at the time of the accident based on weighing probative and prejudicial impact and will be not reversed unless “clearly

erroneous.”).

D. There was no Indication that Statutes Proscribing Marijuana Use were Intended to Protect Property Owners from Slip and Fall Claims

There was no evidence that criminal statutes that proscribe the consumption of marijuana were intended to benefit property owners by allowing them to assert it as an affirmative defense of comparative fault against entrants to their property.

Here, the Defendant also acknowledged being aware that the Plaintiff used marijuana to ease her Multiple Sclerosis,⁶⁹ and he assumed she had thus been under the influence of marijuana during her visit to his home,⁷⁰ though she did nothing that made her appear unusual or different than normal.⁷¹ To instruct the jurors that Plaintiff was negligent as a matter of law because she had marijuana in her system would have thus been error, but as the trial court pointed out, the jury was still able to weigh the role of this use as “relevant regarding the conduct of a reasonable person” as they considered Plaintiff’s comparative fault, which they assessed at 50 %:

The jury was given an opportunity to consider Plaintiff’s controlled substance use or possession, as they heard testimony directly from Plaintiff admitting her violation, as well as testimony that drug use was a substantial factor in the accident.

Order and Memorandum at 9 (ADD-009).

⁶⁹ Tr. at 44, f. 13-17.

⁷⁰ Tr. at 44, f. 10-12 (“no surprise”).

⁷¹ Tr. at 44, f. 21-25.

Part of the discretion exercised by the trial court is in the potential prejudicial effect of a given ruling. *See, e.g., Nhep v. Roisen*, 446 N.W.2d 425, 427 (Minn. App. 1989), *review denied* (Minn., Dec. 1, 1989) (upholding trial court’s exercise of discretion in ruling that evidence of intoxication was “slightly probative as impeachment of her ability to recall the details of the accident,” and that probative value of the evidence was outweighed by the prejudicial value).

To make a statutory violation more than “evidence of negligence” and into a “standard of conduct” would have a potentially prejudicial impact even if marijuana use did establish negligence *per se*. Since demonstration of an “abuse of discretion” in selection of jury instructions requires the movant to establish “actual prejudice” from the court’s decision,⁷² and since the Defendant was allowed to still argue that Plaintiff was comparatively at fault, and in fact the jury assigned 50% of the blame for the incident on her, the Defendant-Appellant will be unable to point to any prejudice from the trial court’s discretionary ruling.

E. The Trial Court Ruling should be Affirmed

Since the trial court allowed the Defendant to argue Plaintiff’s comparative fault based on evidence of her marijuana use, there was no prejudice to Defendant in not also gaining a jury instruction on negligence *per se*, particularly since there was no showing that the legislature intended for violation of that criminal statute to create a civil cause of action

⁷² *See Lindstrom v. Yellow Taxi Co.*, 298 Minn. 224, 214 N.W.2d 672 (1974); *Lieberman v. Korsh*, 264 Minn. 234, 119 N.W.2d 180 (1962).

or defense.

IV. The Trial Court did not Abuse its Discretion in denying JMOL or New Trial on the Jury's Award of Future Pain and Disability

A. The Trial Court Denied Post-Trial relief on the Jury's Award of Future Pain

The trial judge determined that the evidence justified the jury's finding and "was not based on speculation or conjecture," *Order & Memorandum* at 10, (ADD-010), as "the jury's verdict for future pain and disability was supported by Plaintiff's testimony that she still suffered from pain related to the accident as of the trial." *Order & Memorandum* at 8, (ADD-008).

B. Standard of Review looks to any Evidence in the Record to Support the Verdict

"Minnesota Rule of Civil Procedure 59.01 establishes the causes for which a court may grant a new trial and limits the grounds for a new trial to those causes." *Clifford v. Geritom Med., Inc.*, 681 N.W.2d 680, 686 (Minn. 2004), *citing Ginsberg v. Williams*, 270 Minn. 474, 485, 135 N.W.2d 213, 221 (1965). When a new trial motion is made on the basis that "[t]he verdict . . . is not justified by the evidence," under Minn.R.Civ.P. 59.01(g), it "vest[s] the broadest possible discretionary power in the trial court." *Id.* at 687, quoting *Ginsberg*, 270 Minn. at 484, 135 N.W.2d at 220.

"Whether the verdict is justified by the evidence presents a factual question and the district court may properly weigh the evidence." *Id.*, *citing Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn.1983). "A district court is in a better position than an appellate court to

assess whether the evidence justifies the verdict and [the appellate court will] usually defer to that court's exercise of the authority to grant a new trial." *Id.*, citing *Haugen v. Int'l Transp., Inc.*, 379 N.W.2d 529, 531 (Minn.1986). An appellate court will "not reverse a district court's grant of a motion for a new trial absent a clear abuse of discretion." *Id.*, citing *LaValle v. Aqualand Pool Co., Inc.*, 257 N.W.2d 324, 328 (Minn. 1977). The same standard applies to the denial of a JMOL. *See Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (jury's verdict must not be set aside "if it can be sustained on any reasonable theory of the evidence.").

C. Future Pain and Disability Awards require only Testimony of an Injury with Ongoing Symptoms

As was noted in an earlier section of this Brief, medical testimony of the existence of injury combined with plaintiff's testimony about ongoing pain supports submission of future pain and disability claim to a jury. *Pagett v. Northern Electric Supply Co.*, 283 Minn. 228, 237-38 167 N.W.2d 58, 65 (1969).

D. Here, there was Evidence of an Injury with Ongoing Pain and Disability

This evidence was in the record, with Dr. Hayden testifying that "[a]fter she had healed, she developed some pain on the palm surface of the left hand" caused by "irritation of . . . the tendons that bend your fingers" by one of the plates in the left wrist, and so he did a third surgery on February 2, 2010, to remove one of the plates by opening her skin and drilling out the screws and leveraging off the plate to remove it from her body, as the broken

pieces of bone had reconnected by that time.⁷³ In injuries of this type, Dr. Hayden explained that “[y]ou always tear some tendons,” and in her case in addition to the bi-lateral radius fractures, she also had “a piece of bone that was broken off” the ulna bone - - or the other lower arm bone on the pinky side of the wrist,⁷⁴ and when her radius bone broke, the “ligament . . . that goes from one bone to the other” exerted enough force to “literally pull[] that little piece of bone off” and “those ligaments [we]re damaged to some degree” as well.⁷⁵ He explained that all the medical bills generated for this care were reasonable, necessary and related to the accident.⁷⁶ He said he had no opinion about whether she’d have any ongoing physical restrictions,⁷⁷ but that she “would need to see an occupational therapist or anybody that had skills in rehabbing somebody who’s had hand surgery.”⁷⁸ Just as Dr. Hayden had noted that Ms. Renswick continued to have pain in the left wrist particularly,⁷⁹ Plaintiff herself testified that she remained in pain to the day of the trial.⁸⁰

⁷³ Dr. Hayden Transcript at 21, f. 15-24.

⁷⁴ Dr. Hayden Transcript at 27, f. 13-16.

⁷⁵ Dr. Hayden Transcript at 27, f. 17-23.

⁷⁶ Dr. Hayden Transcript at 30, 19-20.

⁷⁷ Dr. Hayden Transcript at 31, f. 4-5.

⁷⁸ Dr. Hayden Transcript at 37, f. 11-15.

⁷⁹ Dr. Hayden Transcript at 21, f. 15-24.

⁸⁰ Tr. 169, f. 13-14.

E. The Trial Court Ruling should be Affirmed

Since the standard of review looks at whether there was any evidence to support a finding that the Plaintiff - - who had badly fractured both wrists, requiring three surgeries - - had ongoing pain and disability, and the record contains such evidence, the trial court did not abuse its discretion in denying the new trial or JMOL motions.

V. The Trial Court did not Err by Declining to Direct a Verdict on Primary Assumption of Risk

A. The Trial Court Declined to Direct a Verdict on Primary Assumption of Risk

The trial judge submitted the question of comparative fault to the jury, *Order & Memorandum* at 5-6, (ADD-005 to -006), noting that “[p]rimary assumption of risk is not applicable to the facts of this case [as it] is proved if the plaintiff had knowledge of the risk, had an appreciation of the risk, and voluntarily chose to take the risk when faced with a choice of avoiding it,”⁸¹ and arises when the “defendant’s negligence is obvious by his conduct [and] the plaintiff consents to the defendant’s negligence and agrees to relieve the defendant of the duty” that would otherwise be owed to her. *Id.* (ADD-006), *citing Snilsberg v. Lake Washington Club*, 614 N.W.2d 738, 743-44 (Minn. App. 2000).

Whereas “primary” assumption of risk “completely bars a plaintiff’s recovery because it negates a defendant’s duty of care,” *id.* at 6 (ADD-006), *citing Schneider v. Erickson*, 654

⁸¹ *Order and Memorandum* at 6 (ADD-006), *citing Snilsberg v. Lake Washington Club*, 614 N.W.2d 738, 746 (Minn. App. 2000).

N.W.2d 144, 148 (Minn. App. 2002), merely proceeding in the presence of a danger is “secondary assumption of risk” that the statutes mandate be apportioned by a jury as comparative fault, *see* Minn. Stat. §604.01, subd. 1a (“fault” to be compared by a jury includes “unreasonable assumption of risk not constituting an express consent or primary assumption of risk”).

B. Primary Assumption of Risk is Inapplicable when the Risk that Matures is not the Risk that was Assumed

“Primary assumption of risk is applicable where parties have voluntarily entered a relationship in which the plaintiff assumes well-known, incidental risks. As to those risks, the defendant does not have a duty to protect the plaintiff.” *Olson v. Hansen*, 299 Minn. 39,44,216 N.W.2d 124, 127 (1974).

The classes of cases involving an implied primary assumption of risk are “not many.” *Springrose v. Willmore*, 292 Minn. at 24, 192 N.W.2d at 827 (1971). The doctrine may be applicable to the situation of a baseball club owner who offers spectators a choice between screened and unscreened seats. *See Aides v. St. Paul Ball Club, Inc.*, 251 Minn. 440, 88 N.W.2d 94 (1958). If a spectator chooses to sit in an unscreened seat and is struck and injured by a ball, the spectator would generally not be entitled to recover from the club owner. *Id.* at 441-42, 88 N.W.2d at 96. In such a situation, there is no duty on the part of the club owner, assuming the owner provided a sufficient number of screened seats. *See Swagger v. City of Crystal*, 379 N. W.2d 183 (Minn..App.1985), *review denied*, (Minn. Feb. 19, 1986) (affirming trial court’s JNOV on basis of primary assumption of risk against spectator injured

at softball game where there was some protected seating).

Even where the doctrine is applicable, however, a person assumes only those risks that are inherent in the activity and does not assume every risk arising from the negligence of others. *See Moe v. Steenberg*, 275 Minn. 448, 450-51, 147 N.W.2d 587, 589 (1966). In *Wagner v. Obert*, plaintiff fell at a roller skating rink when she moved in an attempt to avoid hitting a child, and the court held that “this fact situation does not support an instruction on primary assumption of risk. Respondent had a duty to properly supervise the rink and the exits, especially during a program change when respondent knew there would be many skaters crowding the exits,” 384 N.W.2d at 481, and thus while the plaintiff “assumed certain risks inherent in rollerskating, [the property owner] still had a duty to keep the premises safe and to supervise other roller skaters.” *Id.* In *Thompson v. Hill*, 366 N.W.2d 628 (Minn. App. 1985), the deceased drowned when the vehicle in which he and the defendant-driver were riding broke through the ice on a river and the court held that primary assumption of risk did not apply even though the deceased assumed certain risks when he and the driver proceeded onto the ice, as the driver was not relieved of his duties to use reasonable care in driving. *Id.* at 631.

C. Here, the Trial Court noted that “[e]ntering the back door to a residential home is not the type of inherently dangerous activity to which primary assumption of risk applies”

As noted by the trial court, “[e]ntering the back door to a residential home is not the type of inherently dangerous activity to which primary assumption of risk applies.” *Order*

and Memorandum at 7 (ADD-007). The trial court observed that,

Plaintiff 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. Because she did not know and appreciate the risk of the harm, she could not have voluntarily chosen to take that risk. Plaintiff was therefore not barred from recovery under this theory and a jury instruction or special verdict interrogatory on the same would have been inappropriate.

Id. at 7 (ADD-007). Indeed, the JURY INSTRUCTION GUIDE recommends no instruction.⁸²

D. Courts Generally do not Instruct Juries on Primary Assumption of Risk

The reason courts are hesitant to instruct jury's on primary assumption of risk is the potential for confusion, as was explained in the case of *Wagner v. Thomas J. Obert Enterprises*, 3854 N.W.2d 477 (Minn. App. 1986), in which a patron at an ice rink slipped and fell:

we think it likely that the jury was not able to differentiate between the well-known, inherent risks of roller-skating, which relieve respondent of any duty (primary assumption of risk), and Wagner's attempt to exit the rink across a defective metal ramp or through an unsupervised crowd of skaters in poor lighting conditions (secondary assumption of risk). We therefore hold that under the facts of this case, the instruction on primary assumption of risk given by the trial court confused the jury and constituted reversible error. On remand for a new trial, the trial court should instruct the jury on secondary assumption of risk and should exclude an instruction on primary assumption of risk.

Id. at 482. The instruction for "secondary assumption of risk" is "merge[d] . . . under the

⁸² MINN. DIST. JUDGES ASS'N, 4A MINNESOTA JURY INSTRUCTION GUIDES - - CIVIL, CIVJIG 28.30, at 222 (5th ed. 2006)("The Committee recommends no instruction.").

Comparative Fault Act . . . [which] includes secondary assumption of risk,”⁸³ and thus becomes merely the standard comparative fault instruction of CIVJIG 28.15, which was given by the trial court.

E. The Trial Court Ruling should be Affirmed

The trial court’s decision that the case did not involve “primary” but rather “secondary” assumption of risk, and its decision to instruct the jury accordingly should be affirmed. A district court has broad discretion in determining jury instructions, and the appellate court reviews the jury instructions for an abuse of discretion, *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). “Where instructions overall fairly and correctly state the applicable law, appellant is not entitled to a new trial.” *Id.* (quotation and citation omitted).

VI. Trial Court did not Err by Submitting Fact Issue of Hazard’s “Open and Obvious” Nature to the Jury for Resolution

A. Trial Court Submitted the “Open and Obvious” Issue to the Jury

The trial judge submitted the issue or the “open and obvious” nature of the hazard to the jury for resolution as a comparative fault question, having determined that “[a] condition is not obvious unless both the condition and the risk are apparent to and would be recognized by a reasonable man in the position of the visitor, exercising ordinary perception, intelligence and judgment.” *Order & Memorandum* at 4, (ADD-004).

⁸³MINN. DIST. JUDGES ASS’N, 4A MINNESOTA JURY INSTRUCTION GUIDES - - CIVIL, CIVJIG 28.25, at 220 (5th ed. 2006).

B. The Supreme Court has held that the “Open and Obvious” Issue is for the Jury

The Minnesota Supreme Court has held that “whether a condition presents a known or obvious danger is a question of fact.” *Olmanson v. LeSueur County*, 693 N.W.2d 876, 881 (Minn. 2005) (whether culvert struck by plaintiff’s snowmobile was “open and obvious” was for a jury to decide); *Louis v. Louis*, 636 N.W.2d 314, 318-22 (Minn. 2001).

In *Louis*, the Supreme Court held the question of obviousness to be for a jury, ruling a summary judgment to be improper because the question of whether the danger posed by a swimming pool was known or obvious was a fact question for the jury and not one for summary disposition by the district court. *Louis, supra*, 636 N.W.2d at 321-22. While the plaintiff in *Louis* was aware that diving into a pool could be hazardous, the extent of the danger or risk posed by sliding head first down a slide was found not to be so evident as to permit a judicial declaration of obviousness.

C. Property Owner has a Duty to Find, Correct and Warn of Even “Open and Obvious” Dangers when it may “Anticipate Harm”

“The landowner’s duty of reasonable care includes an ongoing duty to inspect and maintain property to ensure entrants on the landowner’s land are not exposed to unreasonable risks of harm.” *Olmanson*, 693 N.W.2d at 880-81, citing *Pietila v. Congdon*, 362 N.W.2d 328, 332-33 (Minn.1985). “If dangerous conditions are discoverable through reasonable efforts, the landowner must either repair the conditions or provide invited entrants with adequate warnings.” *Id.* at 881, citing *Bonniwell v. St. Paul Union Stockyards Co.*, 271

Minn. 233, 238, 135 N.W.2d 499, 502 (1965). “An entrant ‘is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein.’” *Id.* at 881, *quoting* RESTATEMENT (SECOND) OF TORTS, § 343, Comment d (2d ed. 1965). A property owner has a duty “to use reasonable care for the safety” of visitors to the possessor’s premises. *Sutherland v. Barron*, 570 N.W.2d 1, 7 (Minn. 1997).

Minnesota has adopted the RESTATEMENT (SECOND) OF TORTS § 343A (1965), which explains when a possessor of property must warn of even “open and obvious” hazards:

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.

Id. (emphasis added.) In *Olmanson v. LeSueur County*, 693 N.W.2d 876, 881 (Minn. 2005) the Minnesota Supreme Court said that “[w]hether the possessor could anticipate the danger is also a fact question.” *Id.*, 693 N.W.2d at 881, *citing* *Adee v. Evanson*, 281 N.W.2d 177 (Minn. 1979).

Additional insight into the role of the court and jury may be gained from Comment *f* of the RESTATEMENT:

There are . . . cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes . . . to take . . . reasonable steps to protect [an entrant] . . . , against the known

or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor had reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.

RESTATEMENT (SECOND) OF TORTS § 343A (1965), Comment *f*.

The legal test in Minnesota is that if the

court concludes that the danger was neither known nor obvious as a matter of law, it must hold that [the land owner] was *not relieved of his duty* to use reasonable care for the safety of [his visitor]. If the court concludes that the danger was either known or obvious as a matter of law, it must then decide whether [the land owner] should nevertheless have anticipated the harm despite its known or obvious danger. Lastly, if the court finds that [the land owner] owed [his visitor] 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.

Louis v. Louis, 636 N.W.2d 314, 322 (Minn. 2001) (emphasis added) (footnote omitted).

Both the *hazard* or the dangerous condition *and* the *risk* of injury or chance that the hazard will result in harm to the entrant must exist for a condition to be “open and obvious.”

In *Rinn v. Minnesota State Agricultural*, 611 N.W.2d 361, 363 (Minn. App. 2000), the Plaintiff attended a horse show held in a coliseum, and as she descended down the steps to the viewing area, she noticed a puddle located on the steps, and - - thinking the obvious *hazard* of the puddle posed no real *risk* - - she chose to step into the puddle to continue down the steps, and fell. *Id.* at 363. The Court held that the nature of a puddle on a staircase may be “open,” but the risk it posed was not “obvious” and thus the matter should go to a jury to

resolve the question of the plaintiff's comparative fault in proceeding to encounter the hazard.

D. Here, the Trial Court noted the Evidence Supported the Conclusion that the Hazard of an Unguarded Stairwell was not "Open and Obvious" as it was Concealed by the Absence of Lighting and would be Unexpected, so near a Door, thus Concealing the Risk even if the Hazard were Detected

Here, the trial court noted that:

Defendant argues that Plaintiff knew the entryway was dark and there was insufficient lighting to illuminate the stairway, and this lack of lighting created the dangerous condition. Defendant also argues that the lack of sufficient lighting was obvious and Plaintiff was required to exercise some degree of common sense, specifically not proceeding forward in a dark and unfamiliar entryway. Defendant argues that a reasonable person would know that proceeding forward in a dark and unfamiliar entryway is dangerous.

There was evidence, however, that Plaintiff had no knowledge or appreciation of the dangerous condition presented by the back entryway. Plaintiff testified that she felt there was sufficient lighting to illuminate the door knob on the interior door leading into the kitchen. She knew which way to go in order to enter the house and find the bathroom. While she knew the entryway was somewhat dark, she did not know that there was a stairwell nearby that would render the situation dangerous. Had she known that the entryway was dangerous due to the stairwell and appreciated the probability and gravity of the threatened harm, she would not have felt that it was sufficiently illuminated. . . . Without the presence of the open stairwell, a dimly-lit entryway on its own would not necessarily present a dangerous condition.

Order and Memorandum (Aug. 9, 2011), at 3-4 (ADD-003 to - 004). Thus, the submission of the issue of Plaintiff's comparative negligence to the jury in light of genuine issues about whether both the hazard and the risk were known, was consistent with Minnesota law. As the trial court observed, "[a] condition is not obvious unless both the condition and the risk

are apparent to and would be recognized by a reasonable man in the position of the visitor, exercising ordinary perception, intelligence and judgment.” *Id.* at 4 (ADD-004), *citing Louis 636 N.W.2d* at 321.

Here, the danger associated with the rear entryway was not in plain view. The test for what constitutes an “obvious” danger is an objective test and the danger posed by the entryway involved the close proximity of an open staircase immediately by the back door, which was not visible at the time of Plaintiff’s fall due to lack of lighting.

Id. at 4-5 (ADD-004 to -005). “The dangerous condition on Defendant’s property was not open and obvious. He was not relieved of his duty to use reasonable care for the safety of Plaintiff. as an entrant on his premises, from that dangerous condition and the jury’s finding that he breached that duty was properly supported by the evidence.” *Id.* at 5 (ADD-005).

E. The Trial Court Ruling should be Affirmed

Since the Defendant owed a duty of care to maintain the condition of his premises in a reasonably safe condition and the hazard of an unguarded stairwell was concealed by an unlit entryway, the Plaintiff was not in a position - - as someone unfamiliar with the condition - - to appreciate both the hazard and the risk, and the presence of inadequate lighting of the hazard was such as to create for the Defendant, the “anticipat[ion of] the harm” even if the Plaintiff had “knowledge” of it, under the test of Restatement § 343A. The fact the jury found causal fault against both Plaintiff and defendant suggests they properly balanced the reasonableness of the Defendant possessor’s action in maintaining a hazardous condition and the reasonableness of Plaintiff proceeding forward in the dark.

VII. The Trial Court did not Abuse its Discretion in Submitting Comparative Fault to the Jury

A. The Trial Court Submitted Comparative Fault to the Jury

The trial judge submitted the negligence of both parties to the jury. *Order and Memorandum* at 5-6, (ADD-005 to -006). Its justification was that there was evidence of negligence and a breach of the duty of reasonable care by each side: “The dangerous condition on Defendant’s property was not open and obvious. He was not relieved of his duty to use reasonable care for the safety of Plaintiff, as an entrant on his premises from that dangerous condition and the jury’s finding that he breached that duty was properly supported by the evidence.” *Id.* at 5 (ADD-005).

B. Comparative Fault is a Jury Question.

A jury’s allocation of comparative fault is not to be reversed when evidence - - such as that noted by the trial court to exist here - - is present to support the jury’s determination, as “[q]uestions of negligence and proximate cause are generally factual matters for a jury to decide” *Block v. Target Stores, Inc.*, 458 N.W.2d 705, 712 (Minn. App. 1990), *review denied* (Minn., Sept. 28, 1990).

“The issue of negligence is normally for the jury and must be upheld unless the reviewing court, viewing ‘the evidence in the light most favorable to the verdict’ and drawing ‘every reasonable inference in support of the verdict,’ finds the verdict ‘to be manifestly and palpably contrary to the evidence as a whole.’” *Flom v. Flom*, 291 N.W.2d 914, 916 (Minn. 1980), *quoting Webster v. St. Paul City Ry.*, 241 Minn. 515, 517, 64

N.W.2d 82, 84 (1954).

C. Negligence is the Lack of Due Care

Negligence is the failure to exercise such care as persons of ordinary prudence usually exercise under such circumstances. *Hartman v. National Heater Co.*, 240 Minn. 264, 60 N.W.2d 804 (1953); *Peterson v. Minneapolis Street Ry.*, 226 Minn. 27, 31 N.W.2d 905 (1948). However, an action or omission is not negligence if the harm that resulted from it could not be reasonably anticipated or foreseen. *Luke v. City of Anoka*, 277 Minn. 1, 151 N.W.2d 429 (1967). The issue of negligence is normally for the jury and must be upheld unless the reviewing court, viewing “the evidence in the light most favorable to the verdict” and drawing “every reasonable inference in support of the verdict,” finds the verdict “to be manifestly and palpably contrary to the evidence as a whole.” *Webster v. St. Paul City Ry.*, 241 Minn. 515, 517, 64 N.W.2d 82,84 (1954); *Accord, Ruskamp v. Ferknes*, 261 N. W.2d 612 (Minn.1978).

D. Here the Trial Court concluded that “Plaintiff produced evidence during trial that defendant may have been negligent in not keeping the entryway sufficiently lighted.”

“Defendant argue[d] Plaintiff failed to prove a negligent act by Defendant or that any such act caused her injuries. Defendant argues the facts established several possible causes for Plaintiff’s injury, but none of these include a negligent act by Defendant.” *Order and Memorandum*, at 5 (ADD-005). “Plaintiff produced evidence during trial that Defendant may have been negligent in not keeping the entryway sufficiently lighted [and a] landowner

has a duty to use reasonable care for the safety of all entrants.” *Id.*, citing *Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995).

Here, “Plaintiff presented testimony that Defendant and his wife did not allow the door between the kitchen and the back door to remain open due to the close proximity of the basement stairs and concerns and concerns for their children’s safety. Plaintiff also demonstrated that immediately after the accident Defendant and his wife questioned one another about whether they had left the light on in the entryway.” *Id.* (ADD-005). “While other causes for Plaintiff’s injury may exist, this does not eliminate proof of a negligent act by Defendant. The jury’s verdict properly reflected its apportionment of negligence on the part of both Defendant and Plaintiff and was supported by the evidence at trial.” *Id.* at 5-6 (ADD-005 to -006).

E. The Trial Court Ruling should be Affirmed

Since a legal duty exists on the part of a possessor of property to make that property reasonably safe, and assure that hazards are eliminated or that a warning about them is given, and since the jury could readily conclude that the lack of illumination of the close proximity of the stairs to the door in the entryway was negligent, it was proper for the trial court to submit the issue of negligence to the jury, and that apportionment should not be disturbed.

On the date of the injury, December 31, 2008, the Defendant Jason Wenzel considered the Plaintiff Kari Renswick to be “a welcome guest” at his home,⁸⁴ as he held a New Year’s

⁸⁴ Tr. at 41, f. 1-4.

Eve party at his garage,⁸⁵ where Defendant, the Plaintiff and two other guests sat at a table to play cards,⁸⁶ as defendant's wife Chelsea watched.⁸⁷ Defendant observed that Plaintiff consumed about one and one-half of the beers he furnished her,⁸⁸ and felt she was not intoxicated from the alcohol,⁸⁹ but based on his experience with Plaintiff, the defendant knew her to be "a frequent marijuana user," because it helped to control her pre-existing Multiple Sclerosis,⁹⁰ and he assumed she had thus been under the influence of marijuana during her visit to his home,⁹¹ though she did nothing that made her appear unusual or different than normal.⁹²

Plaintiff then got up and announced she needed to use the bathroom after at time,⁹³ and in order to gain access to the facilities in the house, she left "the garage through the

⁸⁵ *Id.*; Tr. at 42, f. 21-23.

⁸⁶ Tr. at 42, f. 24 - 43, f. 1; *Id.* at 43, f. 7-9 (Jason Voelker and Dan Michaelowski).

⁸⁷ Tr. at 43, f. 10-12.

⁸⁸ Tr. at 43, f. 22-24.

⁸⁹ Tr. at 44, f. 3-5.

⁹⁰ Tr. at 44, f. 13-17.

⁹¹ Tr. at 44, f. 10-12 ("no surprise").

⁹² Tr. at 44, f. 21-25.

⁹³ Tr. at 154, f. 14-23 ("We were playing cards and I said I had to go to the bathroom").

service door,”⁹⁴ and “walked up the back sidewalk to the house” from the detached garage,”⁹⁵ then “walked up the back steps” of the home,⁹⁶ that were illuminated by a “flood light from the garage,”⁹⁷ that “[s]hined off the snow” on the sidewalk,”⁹⁸ and provided “enough light . . .to see . . . to get to the house.”⁹⁹

She “opened the door, . . . stepped in with [her] right foot, reached [for] the handle” of the inside door to the kitchen from the darkened inner vestibule,¹⁰⁰ and “brought [her] left foot around . . . and when [she] shifted [her] weight to grab the door handle, [she] tumbled . . . to [her] left . . . falling and reaching out,” but she “tumbled down the steps and . . . smacked [her] face on the wall” at the bottom of the stairs to the basement.¹⁰¹

The entryway was dark except for the inside kitchen “door handle shining,” as the outside light was the only illumination of the entryway, making the entryway and even the kitchen door dark.¹⁰² She was “unaware that there was a danger to be concerned about” in

⁹⁴ Tr. at 155, f. 4.

⁹⁵ Tr. at 155, f. 5.

⁹⁶ Tr. at 155, f. 9.

⁹⁷ Tr. at 155, f. 12.

⁹⁸ Tr. at 155, f. 15.

⁹⁹ Tr. at 155, f. 16-18.

¹⁰⁰ Tr. at 156, f. 1-2.

¹⁰¹ Tr. at 156, f. 3-9.

¹⁰² Tr. at 156, f. 16-25.

the darkness, represented by unlit basement stairs.¹⁰³

Her decision to proceed and the Defendant's decision to leave the stairs unlit, were issues of comparative fault for the jury to apportion and should be affirmed.

VIII. The trial Court did not Err in its Calculation of Collateral Source Offsets

A. The Trial Court Declined to Off-Set Medicare Benefits from the Jury's Award

The trial judge ruled that Medicare payments - - a form of social security benefit under 42 U.S.C. § 1395c - - are excluded from collateral source treatment under § 548.251, subd. 1, which bars "payments made pursuant to the United States Social Security Act . . ." from being offset a personal injury award). *Order & Memorandum* at 12, (ADD-012).

B. De Novo Standard of Review Applies to Questions of Law

An appellate court reviews *de novo* any question of statutory interpretation. *Molde v. Citimortgage, Inc.*, 781 N.W.2d 36, 39 (Minn. App. 2010). Words and phrases are interpreted according to their common meaning. *See* Minn. Stat. § 645.08 (2010); *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005).

"Where the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and we apply the statute's plain meaning." *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007); *see also* Minn. Stat. § 645.16 (2010) (directing that, when the language of a

¹⁰³ Tr. at 161, f. 16-18.

statute is “clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit”).

C. The Plain Language of Minn. Stat. § 548.251, subd. 1 says it is Inapplicable to Benefits Paid by Social Security, and Medicare is such a Benefit

Appellant’s brief emphasizes the need for sound “public policy” to support any construction of statutory language. Both a trial court and an appellate court sitting in review, however, do not make policy, but rather are constrained to enforce the “plain meaning” of a statute, as was outlined above. The issue for the trial court was whether the collateral source statute required the set-off from the Plaintiff’s jury award of amounts she had received from Medicare. Most importantly, the Collateral Source Statute does not make all forms of “collateral” payment into collateral sources that must be off-set an award, but only the ones enumerated in the statute, and courts must enforce the language as written rather than strive to effectuate some “public policy” as variance with the plain language of the law they are charged with interpreting. Here, fortunately, we have guidance from the Minnesota Supreme Court about the meaning of the Collateral Source Statute.

1. *Swanson v. Brewster* held that only enumerated types of payments were considered collateral sources that are to be off-set an award

“In 1986, the Minnesota Legislature passed the collateral-source statute in order to prevent *some* double recoveries by plaintiffs.” *Swanson v. Brewster*, 784 N.W.2d 264, 269 (Minn. 2010) (emphasis added). Importantly, “[w]hile a primary purpose of the collateral source statute is to prevent double recoveries by a plaintiff, the statute does not prohibit

double recoveries in all instances.” *Smith v. American States Ins. Co.*, 586 N.W.2d 784, 786 (Minn. App. 1998), *review denied* (Minn., Feb. 18, 1999) (emphasis added), *citing Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990). Thus, while “the collateral-source statute abrogated the common-law collateral-source rule in some situations,” *Tezak v. Bachke*, 698 N.W.2d 37, 41 (Minn. App. 2005) (emphasis added), *review denied* (Minn., Aug. 24, 2005), it is important to note that “when benefits are not subject to the collateral-source statute, the common-law collateral-source rule still applies.” *Id.* (emphasis added), *citing Smith v. American States Ins. Co.*, 586 N.W.2d 784, 786 (Minn. App. 1998), *review denied* (Minn., Feb. 18, 1999). This is because, “[g]enerally, statutes in derogation of the common law are to be strictly construed,” *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 327 (Minn. 2004), and “it is not presumed that the legislature intended to abrogate or modify a rule of the common law on the subject any further than that which is expressly declared or clearly indicated.” *Id.* at 328, *quoting 73 AM.JUR.2D, Statutes*, § 191 (2001).

The collateral-source statute thus applies when the statute says it applies and does not apply where the statute is silent as to its application. While *Swanson* applied the statute to the “foregiveness of debt” by a health insurer under an advance discount medical fee schedule,¹⁰⁴ *Swanson* retained the basic rule that where the collateral source statute is silent

¹⁰⁴ “[W]e conclude that the negotiated discount is unambiguously a collateral source for purposes of the collateral source statute.” *Swanson, supra*, 784 N.W.2d at 276. “Though the legislature specifically excluded some traditional collateral-source benefits,

or otherwise expressly excludes collateral source treatment, the default principle is to the common-law collateral-source rule of allowing a double recovery to the plaintiff. *Swanson, supra*, 784 N.W.2d at 269.

2. The Statute unambiguously says it is inapplicable to benefits paid under the Social Security Act

The Minnesota Collateral Source Statute says that “payments made pursuant to the United States Social Security Act” are not collateral sources. MINN. STAT. § 548.251, subd.

1. Under the Social Security Act, 42 U.S.C. § 1395(y)(b), Medicare is established as part of Title XVIII of the 1965 Social Security Act.

3. Courts construing Minnesota’s collateral source statute or similar laws have held that the statute excludes any type of social security benefit from being off-set an award

In *Frumkin v. Mayo Clinic*, 965 F.2d 620, 628 (8th Cir. 1992), the Eighth Circuit considered the specific language of Minnesota’s Collateral Source Statute at issue in this case, and said that the law’s reference in Minnesota’s collateral-source statute to “payments made pursuant to the Social Security Act,” included any disability benefit and not just retirement benefits.

Oregon has a very similar collateral source statute - - Ore. Rev. Stat. § 31.580(1)(d) -

such as gifts from family members, from the statute’s definition of collateral sources . . . it specifically included payments made to a plaintiff pursuant to the plaintiff’s health insurance policies The plain language of the statute demonstrates that while the legislature intended to maintain the common-law collateral-source rule in instances of familial gifts, the legislature intended to abrogate the rule in instances of coverage of the plaintiff’s health insurance.” *Id.* at 278.

- that provides an exception from collateral source off-set treatment for “federal social security benefits.” In *White v. Jubitz*, 219 P.3d 566, 576 (Ore. 2009), the Oregon Supreme Court said that § 31.580(1)(d) provides an exception from collateral source off-set treatment for “federal social security benefits” and since “Medicare benefits are . . . ‘established as part of the Social Security Act’” the exclusion from collateral source off-set treatment encompasses “the benefits provided by all social security programs including Medicare.”

The result here is thus plain: the Medicare payments are not subject to collateral source off-set treatment.¹⁰⁵

D. Here, the Trial Court Carefully Reflected on the Statute in Making its Ruling

The trial court noted that,

Medicare is a medical insurance program for the “aged and disabled” govern by the federal Social Security Act. 42 U.S.C. § 1395c. The plain language of the statute excludes payments made pursuant to the United States Social Security Act as collateral sources. The Court does not find the statute to be ambiguous in this regard.

No precedential case law exists to guide this Court in determining whether Medicare and Medical Assistance payments are collateral sources. Defendant cites *Swanson v. Brewster* for the proposition that negotiated discount amounts are now considered collateral sources and Plaintiff’s damage

¹⁰⁵ Since, under *Swanson*, the forgiveness of debt from “write downs” of medical bills negotiated by a health insurer is a form of “payment” under the Collateral Source Statute, both the principal amount of the what was actually paid by Medicare, and the “write down” of the medical bills through previously negotiated discounts by Medicare would be “payments” made pursuant to the Social Security Act, and the full value of Medicare “payments” would thus be excluded from off-set treatment under *Swanson*’s interpretation of the statute.

award must be reduced by such amounts she received. While the *Swanson* Court does interpret the collateral source statute, it do not address whether payments received by Medicare are considered collateral sources. Plaintiff and Defendant each bring to the Court's attention a trial court decision in support of their respective positions. *See Johnson v. Mid-American Auction Co., Inc.*, Todd County District Court File No. 77-CV-09-1164 (Dec. 20, 2010) (finding Medicare payments are considered collateral source to be offset against Plaintiff's award); *see Malzahn v. Am. Family Mutual Ins. Co.*, Sherburne County District Court File No. 77-CV-10-1666 (Mar. 24, 2011) (holding payments made by Medicare are not collateral sources). The Court declines to agree with the Todd County decision, as the decision in that case was based on a finding that Minnesota's collateral source statute is ambiguous, whereas this Court finds the statute to be unambiguous on its face.

The plain language of the statute specifically excludes payments made pursuant to the United States Social Security Act without restriction. Payments made or discounted by Medicare are not subject to the statutory collateral source. offset. *See Malzahn.*

Order and Memorandum at 12 (ADD-012)(emphasis added).

Since the *Swanson* court held that the Collateral Statute was not ambiguous, 784 N.W.2d at 274-75, any decision that is premised on an ambiguity in the law necessarily fails aborning. The plain language of the statute says that benefits paid under the Social Security Act are not to be off-set as collateral sources, and Medicare is such a benefit. Thus, no part of a Medicare payment should be off-set.

E. The Trial Court Ruling should be Affirmed

Since the plain meaning of an unambiguous statute excludes Medicare payments from collateral source treatment, the trial court's ruling that declined to off-set Medicare payments is correct and the decision should be affirmed.

CONCLUSION

The majority of the issues raised by Appellant relate to the adequacy of the facts to support the verdict and the discretion exercised by the trial court in its evidentiary rulings and the crafting of jury instructions and a special verdict, all of which are reviewed under an abuse of discretion standard of review or the JMOL standard of review, in which the facts are evaluated in a light most favorable to the verdict. All such issues are resolved with a determination that the trial court did not commit a “clear abuse of discretion” and must be affirmed on this appeal.

The collateral source issue involves statutory construction of a law that the Minnesota Supreme Court has ruled to be unambiguous. Here, the trial court ruled that the prior Medicare payments made to the Plaintiff were not subject to collateral source deduction from the verdict as they were a form of social security benefit under 42 U.S.C. § 1395c, and are thus excluded from collateral source treatment under § 548.251, subd. 1, which bars “payments made pursuant to the United States Social Security Act . . .” from being offset a personal injury award. *Order & Memorandum* at 12 (ADD-012). Apposite authority supportive of the trial court’s ruling is contained in MINN. STAT. § 548.251, subd. 1 (“payments made pursuant to the United States Social Security Act” are not collateral sources); as well as 42 U.S.C. § 1395(y)(b) (Medicare is part of Title XVIII of the 1965 Social Security Act). Prior case law construction of both the Minnesota statute and of nearly identical statutes supports this construction. The trial court should thus be affirmed in all

respects.

Respectfully submitted,

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional front. The length of this brief is 1,183 lines and 13,587 words. This brief was prepared using Corel WordPerfect Office X4.

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