

NO. A12-0885

3

State of Minnesota  
In Court of Appeals

Ryan T. Grady,

*Appellant,*

vs.

Green Acres, Inc.,

*Respondent.*

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

Nathan H. Bjerke (#026670X)  
TSR INJURY LAW  
7760 France Avenue South  
Suite 820  
Bloomington, MN 55435  
(952) 832-5800

*Attorney for Appellant*

Jeanette M. Bazis  
Jenny Grassman-Pines  
GREENE ESPEL P.L.L.P.  
200 South Sixth Street, Suite 1200  
Minneapolis, MN 55402  
(612) 373-0830

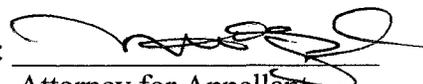
*Attorneys for Respondent*

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).

**CERTIFICATE OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01 Subd. 1 and 3, for a brief produced with proportional font. The length of the brief is 515 lines and 6,027 words. This brief was prepared using Microsoft Word 2003.

Dated: 8-16-12

By:   
Attorney for Appellant  
Nathan H. Bjerke (#026670X)  
TSR Injury Law  
7760 France Ave. S., St. 820  
Bloomington, MN 55435  
(952) 832-5800

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....5

STATEMENT OF THE LEGAL ISSUE .....7

STATEMENT OF THE CASE .....8

STATEMENT OF THE FACTS .....10

ARGUMENT.....17

    I.    STANDARD OF REVIEW.....17

    II.   THE DISTRICT COURT ERRED IN DETERMINING THAT THE  
          DOCTRINE OF PRIMARY ASSUMPTION OF RISK RELIEVED  
          GREEN ACRES OF ITS DUTY TO MANAGE ITS SNOWTUBING  
          HILL IN A REASONABLY SAFE MANNER.....18

        a.   Primary Assumption of Risk .....18

        b.   Elements of Primary Assumption of the Risk .....19

        c.   Primary Assumption of Risk Does Not Excuse Negligence For  
              Mismanagement Of A Facility .....20

        d.   The District Court Misapplied the Law and Made Improper Factual  
              Determinations that Should Have Been Left to the Jury.....21

            i.   A Jury Should be Allowed to Determine Whether Grady’s Injury  
                Was Caused by an Inherent Risk of Snow Tubing or Whether he was  
                Injured by Green Acres’ Mismanagement of its Facility .....21

            ii.  Resolving Factual Disputes in Favor of Grady, He Did Not Have  
                Knowledge and Appreciation of the Risk That Lead to his Injury.....23

            iii. Grady Did Not Consent To The Heightened Risks Created By  
                Green Acres’ Mismanagement Of The Facility. ....28

            iv.  The Minnesota Supreme Court has Never Held that an Expanded  
                Risk Be “New” or “Sudden” .....29

CONCLUSION.....33

APPELLANT’S ADDENDUM.....34

APPELLANT’S APPENDIX.....35

## TABLE OF AUTHORITIES

### CASES

|   |                       |
|---|-----------------------|
| <i>Bjerke v. Johnson</i><br>742 N.W.2d 660, 669 (Minn.2007).....  | 18                    |
| <i>Bundy, et al. v. Holmquist</i><br>669 N.W.2d 627 (Minn. Ct. App. 2003).....                            | 16                    |
| <i>Daly v. McFarland</i><br>812 N.W.2d 113 (2012) .....   | 17, 21                |
| <i>Fabio v. Bellomo</i><br>504 N.W.2d 759 (Minn. 1993).....   | 16, 33                |
| <i>Ferguson v. Northern States Power Co.</i><br>307 Minn. 26, 34, 239 N.W.2d 190, 194 (1976).....         | 23, 27                |
| <i>Hubred v. Control Data Corp.</i><br>442 N.W.2d 308, 310 (Minn. 1989).....                              | 16                    |
| <i>Illinois Farmers Ins. Co. v. Tapemark Co.</i><br>273 N.W.2d 630, 634 (Minn.1978).....                  | 16                    |
| <i>Johnson v. Amphitheatre Corp.</i><br>206 Minn. 282, 288 N.W. 386 (1939).....                           | 19                    |
| <i>Jussila v. U.S. Snowmobile Ass'n.</i><br>556 N.W.2d. 234, 235-36 (Minn. Ct. App. 1996).....            | 29, 30, 31            |
| <i>Louis v. Louis</i><br>636 N.W.2d 314, 321(Minn. 2001).....   | 17, 22, 23, 27        |
| <i>Moe v. Steenberg</i><br>275 Minn. 448, 450-51, 147 N.W.2d 587, 589 (1966).....                         | 6, 19, 21, 27, 28, 30 |
| <i>Offerdahl v. University of Minnesota Hospitals and Clinic</i><br>426 N.W.2d 425, 427 (Minn. 1988)..... | 16                    |
| <i>Olmanson v. LeSueur County</i><br>693 N.W.2d 876, 881 (Minn. 2005).....                                | 23, 27                |

|   |            |
|---|------------|
| <i>Olson v. Hansen</i><br>299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974).....                     | 18         |
| <i>Prior Lake Am. V. Mader</i><br>642 N.W.2d 729 (Minn. 2002).....                              | 16         |
| <i>Renswick v. Wenzel</i><br>2012 WL 3082282, *5 (Minn. Ct. Apps. 2012).....                    | 6, 24      |
| <i>Roll 'R' Way Rinks, Inc. v. Smith</i><br>218 Va. 321 , 237 S.E.2d 157 (1977).....            | 19         |
| <i>Rusciano v. State Farm Mut. Auto. Ins.</i><br>445 N.W.2d 271, (Minn. Ct. App. 1989).....     | 30         |
| <i>Schneider ex rel Schneider v. Erickson</i><br>654 N.W.2d 144, 148 (Minn. Ct. App. 2002)..... | 16, 17, 18 |
| <i>Springrose v. Willmore</i><br>292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971).....              | 17         |
| <i>State by Cooper v. French</i><br>490 N.W.2d (Minn. 1990).....                                | 16         |
| <i>Wagner v. Thomas J. Obert Enterprises</i><br>396 N.W.2d 223, 226 (Minn. 1986).....           | 18         |
| <i>Willmar Poultry Co. v. Carus Chem. Co.</i><br>378 N.W.2d 830, 835 (Minn. Ct. App. 1985)..... | 17         |
| <b>Statutes</b>   |            |
| Minn.R.Civ.P. 56.03 .....   | 16         |

## STATEMENT OF THE LEGAL ISSUE

- I. DID THE DISTRICT COURT IMPROPERLY WEIGH EVIDENCE AND MISAPPLY THE LAW WHEN IT GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BASED ON ITS PRIMARY ASSUMPTION OF THE RISK DEFENSE?

The district court concluded that the doctrine of primary assumption of risk bars Plaintiff's claim in its entirety.

### Apposite Cases:

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

*Johnson v. Ampitheatre Corp.*, 206 Minn. 282, 288 N.W. 386 (1939)

*Renswick v. Wenzel*, 2012 WL 3082282 (Minn. Ct. Apps. 2012)

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

## STATEMENT OF THE CASE

This is an appeal from a final judgment resulting from the ruling of the Honorable Mary E. Hannon, Judge of District Court of the Tenth Judicial District.

Respondents, Green Acres, Inc., owns a snow tubing hill in Lake Elmo, Minnesota that is open to the public as a for-profit company. During a visit to Respondent's snow tubing hill, Appellant was injured during a collision with another patron at the bottom of Respondent's "family hill". Grady sued Green Acres, Inc. for negligent design, maintenance, supervision, and operation of the snow tubing hill, and negligent staffing and training of personnel.

Respondent motioned the court for summary judgment based on Grady's purported knowledge and appreciation of the purported inherent risk of collision between a snow tuber and someone walking at the bottom of the hill at Green Acres such that Grady's claim would be barred by the primary assumption of risk doctrine. The Honorable Mary E. Hannon granted summary judgment to Green Acres. Judge Hannon held 1) that colliding with another snow tuber at the bottom of a hill is an inherent risk of snow tubing; 2) Grady had knowledge of the risk of colliding with another snow tuber at the bottom of the hill; 3) Grady appreciated the risk of colliding with another snow tuber at the bottom of the hill; 4) Grady had the choice to avoid the risk, but voluntarily chose to take the risk; and 5) Green Acres decisions not to employ snow tubing lanes, personnel at the top and bottom of the hill to instruct patrons when it was and wasn't safe to tube down the hill, or a protected walk-way back to the tow rope at the bottom of the hill like

almost every other facility in the area had done did not increase the risk to Grady;  
and therefore, 6.) the doctrine of primary assumption of risk bars Grady's claim in  
its entirety.

## STATEMENT OF THE FACTS

- 1. Before the incident of December 26, 2009, Grady had very little prior experience with snow tubing**

Green Acres deposed Grady when he was 20 years old, (APP-83), two years after his December 26, 2009, snow tubing accident at Green Acres. Grady had last visited Green Acres about a decade earlier, while on an elementary school visit with his scout troop (APP-84), such that he did not “really remember” much about the visit as it was “a long time ago.” (APP-84).

- 2. Other places Mr. Grady visited had designated lanes and adequate safety personnel to protect patrons**

Grady had one other life experience with snow tubing at Trollhaugen (APP-84). Although Grady testified this was when he was in high school (APP-85), the following date-stamped photograph of he and two friends (Grady is in the middle) shows he was there on December 27, 2005 when Grady was in middle school.



From this trip, Grady recalled that Trollhaugen did have designated lanes that were 1-2 feet wider than the inner tubes, for the safe separation of patrons (APP-85), and that Trollhaugen also had “safety people standing and then there were little like paths cut through the lanes so that you could like walk through and get to the end, or get to the -- get to the side that brought you back up to the top.” (APP-85).

While visiting Afton Alps for snowboarding, he saw that they too had designated lanes for snow tubing. (APP-88).

**3. Green Acres manages its facility differently, and did not have lanes or adequate safety personnel at the time of the accident**

Green Acres does not have designated lanes (APP-89; APP-95). Likewise, Green Acres did not manage its tow operators in a way that required the operators let tubers know when it was safe to go down the hill. (APP-101; APP-104). In this respect, Green Acres was managed differently than the other two locations with which Grady was familiar - Trollhaugen and Afton Alps - and his decade old experience with Green Acres was such that he simply could not remember what safety protocols it had in effect when he was back in elementary school and had last visited. Other witnesses have established that designated lanes are also used at Elm Creek, Buck Hill, and Afton Alps (APP-97), and in fact Green Acres designated Corporate witness Richie Springborn had only been to one other facility in the last five years that, like Green Acres, does not have designated lanes to protect snow tubers - Badlands in Hudson, Wisconsin. (APP-97).

**4. Grady had other general experiences with snow recreational events, but not snow tubing**

Grady had been sledding in peoples' back yards perhaps 20 times during his life (APP-85), and had taken a snowboarding lesson at Afton Alps beginning in the fourth grade (APP-86), but the accident was his third life occasion to snow tube.

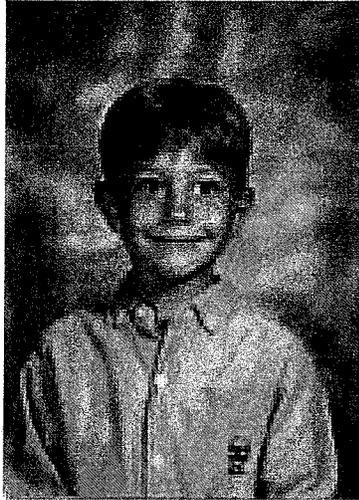
**5. Grady had a general awareness that those engaged in recreational snow activity could fall and be hurt slipping on the snow, but he had no personal experience with colliding with another patron**

When snowboarding at Trollhaugen in 2007, he slipped on the ice and fell and broke his arm (APP-87), but his only prior injury did not occur by striking someone else or being struck by another snow boarder. (APP-87).

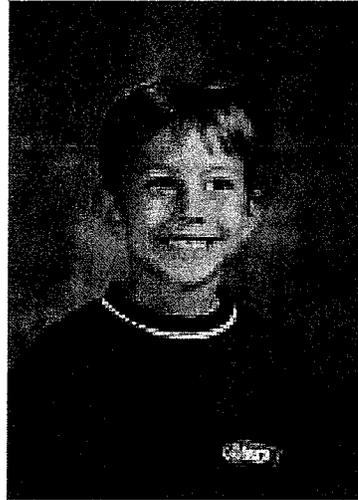
**6. Grady had a general awareness that snow tubers can collide, but not that collisions could cause serious injury while snow tubing**

While he had forgotten the matter completely on the night of his injury, Mr. Grady later recalled that on the occasion of his first snow tubing visit - coincidentally to Green Acres - a "little girl got hit . . . at the bottom [of the run] when she was . . . either walking or running at the bottom" and that the collision was by another "person on a tube," but he did not know whether that person was injured (APP-84; ADD-16).

To put Mr. Grady's age when on his prior visit to Green Acres in perspective, below are his first through fourth grade school pictures.



First Grade



Second Grade



Third Grade



Fourth Grade

**7. Green Acres' failure to use designated lanes and safety personnel has resulted in 200 injuries in the last five years**

At Green Acres on the day of Grady's accident, there was no one "monitoring people who would go down the hill at all" (APP-96-97). Green Acres had no employees at the top "telling people when it was safe for them to go down the hill," (APP-96), nor any safety employee at "the top of the hill" other than "the

tow rope operator, but he was in like a shack,” (APP-99), and there was only one person at the bottom of the run, and he was just collecting tubes and checking lift tickets for those intending to slide again, not directing the movement of patrons who had completed their runs. (APP-99).

In the last five seasons, Green Acres has recorded more than 200 injuries when tubers collided at the bottom of the family hill. (APP-25). Only if the group of patrons is between two and two hundred fifty people, “...they would have, you know, more than likely two [people] on the bottom, two on top.” (APP-101). Grady, of course, did not know or appreciate that others had been injured at the bottom of Green Acres’ “family hill” when tubers and other patrons collided, let alone the number, frequency or severity of these collisions. (ADD-17).

Interestingly, Grady was the second patron to be struck in a collision that day, as a 12 year-old girl had been struck twice about 4 o’clock in the afternoon. (APP-102). While Green Acres employees have wondered about the overall safety of their approach, they have expressed the view that they lack authority to do anything about it. (APP-105).

**8. Grady is injured in the run out area at the bottom of the family hill**

December 26, 2009 was cold and icy because it had rained the day before. (APP-88). Early that evening, Grady met up with two friends, Green and Brownson. (APP-88). The friends decided to go snow tubing at Green Acres. They did not drink or use any kind of drugs. (APP-89).

Grady, the only one in the group who had turned 18, signed waivers for his two friends and himself with permission from the Green Acres attendant at the chalet. (APP-89). The three grabbed tubes and headed up the tow rope to the top of the “family hill”. (APP-90). Once he reached the top of the hill, Grady saw a Green Acres attendant in the operator’s “box” at the top of the tow rope and two more Green Acres employees at the bottom of the hill. (APP-90). The employees at the bottom of the hill were standing together. (APP-90). The employees at the bottom of the hill were supposed to make sure tubers at the bottom were getting up and walking quickly to the two rope. (APP-101). Grady correctly believed the employees at the bottom of the hill were there to keep people safe. (ADD-17). Grady did not see any other tubers collide at the bottom of the hill. (ADD-17).

At the top of the hill, Grady recalls seeing another group of people to his left. (APP-90). He does not remember them going down the hill before him. (APP-90). Because he had not been to Green Acres tubing since he was in grade school, the hill was icy, he was heavier and his tube bigger, Grady did not appreciate how fast he would go down the hill. (ADD-17). Before he started down and as he proceeded down the hill, Grady does not recall seeing other tubers in front of him. (APP-90).

Green, testified that he, Grady and Brownson started down the hill to the right – or tow rope side – of the two attendants at the bottom of the hill because the other group was off to the left of the two attendants. (APP-86-87). As Green

went down the hill, his tube unexpectedly veered to his left, towards the two attendants at the bottom of the hill. (APP-86-87). Green avoided the attendants not because they took notice of him and moved, but because he was able to use his hands to steer to his right and slow down. (APP-86-87).

Grady collided – presumably with another tuber from the other group – at the bottom of the hill in the run out area who was walking or standing. (APP-106). The left side of Grady's face received the brunt of the force, shattering several bones and injuring his brain.

## ARGUMENT

### I. STANDARD OF REVIEW

Whether summary judgment was properly granted is a question of law, which is reviewed de novo. *Prior Lake Am. V. Mader*, 642 N.W.2d 729 (Minn. 2002). In doing so, “the reviewing court determines 1) whether there are any genuine issues of material fact; and 2) whether the trial court erred in its application of the law.” Minn.R.Civ.P. 56.03; *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989); *State by Cooper v. French*, 490 N.W.2d (Minn. 1990). See *Offerdahl v. University of Minnesota Hospitals and Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). Summary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented. *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn.1978).

The court of appeals views the facts in the light most favorable to the party against whom judgment was granted and accepts as true the facts presented by that party. *Fabio v. Bellomo*, 504 N.W.2d 759 (Minn. 1993).

Whether the plaintiff, either primarily or secondarily, assumed the risks giving rise to his or her injuries is generally a question for the trier of fact. *Schneider ex rel Schneider v. Erickson*, 654 N.W.2d 144, 148 (Minn. Ct. App. 2002); see also *Bundy, et al. v. Holmquist*, 669 N.W.2d 627 (Minn. Ct. App. 2003) (reversing the District Court’s grant of summary judgment in favor of Defendant

where there were questions of material fact as to whether the plaintiff had knowledge of the risk she purportedly assumed); *Willmar Poultry Co. v. Carus Chem. Co.*, 378 N.W.2d 830, 835 (Minn. Ct. App. 1985) (affirming denial summary judgment for defendant when there was conflicting evidence regarding the plaintiff's awareness of the risks involved, despite plaintiffs' past experience with the product); *Louis v. Louis*, 636 N.W.2d 314 (Minn. 2001) (affirming denial of summary judgment for defendant when there was conflicting evidence about whether plaintiff knew of the involved harm).

**II. THE DISTRICT COURT ERRED IN DETERMINING THAT THE DOCTRINE OF PRIMARY ASSUMPTION OF RISK RELIEVED GREEN ACRES OF ITS DUTY TO MANAGE ITS SNOWTUBING HILL IN A REASONABLY SAFE MANNER.**

**a. Primary Assumption of Risk**

Minnesota recognizes two types of assumption of the risk: primary and secondary. *Schneider*, 654 N.W.2d at 148. Secondary assumption is a form of comparative negligence which means the fact finder may apportion fault between the plaintiff and the defendant. *Id.*

Secondary assumption of the risk completely bars a plaintiff's claim because it negates the defendant's duty of care to the plaintiff. *Daly v. McFarland*, 812 N.W.2d 113, 119 (2012), citing *Springrose v. Willmore*, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971) ("Primary assumption of risk, express or implied, relates to the initial issue of whether a defendant was negligent at all—

that is, whether the defendant had any duty to protect the plaintiff from a risk of harm.”). “Primary assumption of the risk completely negates a defendant’s negligence.” *Daly*, 812 N.W.2d at 119, citing *Bjerke v. Johnson*, 742 N.W.2d 660, 669 (Minn.2007). “Primary assumption of risk applies ‘only where parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks. As to these risks, the defendant has no duty to protect the plaintiff and, thus, if the plaintiff’s injury arises from the incidental risk, the defendant is not negligent.” *Wagner v. Thomas J. Obert Enterprises*, 396 N.W.2d 223, 226 (Minn. 1986), quoting *Olson v. Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974).

Here, Green Acres agrees it owed Grady and all of its patrons a duty to provide a safe snow tubing hill – the question is whether the doctrine of primary assumption of the risk negated that duty.

#### **b. Elements of Primary Assumption of the Risk**

The basic elements of both primary and secondary assumption of the risk are the same: the defendant must show the plaintiff had (a) knowledge of the risk; (b) an appreciation of the risk; and (c) a chance to avoid the risk but voluntarily consented to it. *Schneider*, 654 N.W.2d at 149. To show that the plaintiff primarily assumed the risk, the defendant must show that the plaintiff consented to the inherent risk that caused the injury, thus relieving the defendant of its duty. *Id.*

**c. Primary Assumption of Risk Does Not Excuse Negligence For Mismanagement Of A Facility**

In *Wagner v. Thomas J. Obert Enterprises*, 396 N.W.2d 223, 226 (Minn. 1986) - a roller skating case - and in *Moe v. Steenberg*, 275 Minn. 448, 450-51, 147 N.W.2d 587, 589 (1966) - an ice skating case - the Minnesota Supreme Court ruled held that the patron of such recreational facilities “assumes the ordinary, necessary, obvious risks that are incidental to roller-skating, including the risk of falling and colliding with other skaters due to lack of skill or clumsiness.” *Wagner*, 396 N.W.2d at 226, *see Moe*, 275 Minn. at 451, 147 N.W.2d at 589.

Most importantly:

[t]he doctrine of primary assumption of risk does not, however, relieve the rink management of its duty to safely supervise skating activities or to maintain the premises in a safe condition. Negligent maintenance and supervision of a skating rink are not inherent risks of the sport itself.

*Wagner*, 396 N.W.2d at 226 (emphasis added), *citing, Roll 'R' Way Rinks, Inc. v. Smith*, 218 Va. 321 , 237 S.E.2d 157 (1977) (roller skater fell while attempting to cross steel transition ramp from rink floor to carpet; jury could find rink owner negligent in not making a permanent repair of the ramp plate thereby leaving the premises unsafe), *and Johnson v. Amphitheatre Corp.*, 206 Minn. 282, 288 N.W. 386 (1939) (when roller-skating patron was struck by boys skating unauthorized in the lobby, accident was due not to inherent risk of roller-skating but to management’s negligent supervision of its premises).

For over 70 years, Minnesota law has rejected primary assumption of risk in the presence of a fact issue over whether management of patron's interaction resulted in a collision, and no modern authority exists to alter that long-held rule of law.

**d. The District Court Misapplied the Law and Made Improper Factual Determinations that Should Have Been Left to the Jury**

In concluding Grady's case was barred by primary assumption of the risk, the District Court – contrary to long-standing Minnesota law – did not resolve all factual disputes in favor of Mr. Grady as the non-moving party and circumvented to jury's fact finding role.

**i. A Jury Should be Allowed to Determine Whether Grady's Injury Was Caused by an Inherent Risk of Snow Tubing or Whether he was Injured by Green Acres' Mismanagement of its Facility**

It is ordinarily for the jury to determine whether particular risks are inherent to an activity. *Moe v. Steenberg*, 275 Minn. 448, 147 N.W.2d 587, 589 (Minn. 1966). The fact that a sport or recreational activity involves some inherent risk of injury does not mean a defendant is relieved of its duty to act reasonably. For example, The Minnesota Supreme Court recently confirmed that snowmobiling is not an inherently dangerous activity to which primary assumption of the risk applies because hazards like tipping or rolling could “be successfully avoided.” *Daly v. McFarland*, 812 N.W.2d 113 (Minn. 2012).

Here, there is ample evidence in the record for a reasonable jury to determine that snow tubing is not inherently dangerous in the context of Mr. Grady's injury because the collision at the bottom of the hill could have been avoided by employing lanes, attendants at the top and bottom of the hill communicating about when it was safe to go down the hill, and a protected walkway back to the tow rope. The District Court was presented with evidence that almost every other snow tubing facility in the area uses lanes. (APP-95-96); (APP-101; APP-104.)

Certainly, there are risks inherent in snow-tubing that cannot be remedied by lanes, attendants or protected walk-ways at the bottom of the hill leading back to the tow rope. These include things like falling off of a tube as it travels down the hill or slipping on the snow and ice on the hill. But resolving factual disputes and drawing inferences in Grady's favor, a reasonable jury could certainly conclude the collision between Grady and another tuber at the bottom of the hill was not an inherent risk of snow-tubing, but a risk created by Green Acres decisions not to employ lanes, attendants to assure tubers do not proceed down the hill until the bottom of the run is clear and a protected walkway back to the tow rope. The district court erred in making a contrary factual finding.

**ii. Resolving Factual Disputes in Favor of Grady, He Did Not Have Knowledge and Appreciation of the Risk That Lead to his Injury**

There is scarce appellate court guidance concerning the difference between “knowledge” and “appreciation” in the context of primary assumption of the risk. Minnesota law concerning knowledge and appreciation in the context of the similar “open and obvious” defense does, however, provide guidance.

As recently as ten years ago, the Minnesota Supreme Court ruled 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.’” *Louis v. Louis*, 636 N.W.2d 314, 321(Minn. 2001)(emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS, § 343A, Comment *b* (1965)). *Louis* involved a man diving into a shallow pool and sustaining a spinal cord injury who admitted he had a general knowledge that diving into shallow pools could pose that risk, but that here he did not appreciate that the pool involved was too shallow, and the court ruled a fact issue existed which required a jury’s decision.

In *Louis*, the Court noted that condition or activity must not only be known to exist, it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. The Court, citing the Restatement, instructed:

The word “known” denotes not only knowledge of the existence of the condition or activity itself, but also appreciation for the danger it involves.

Thus, the condition or activity must not only be known to exist, **but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated.**”

*Id.* (Emphasis added.) The Court remanded the matter back to the trial court to determine whether the plaintiff appreciated the probability and gravity of the threatened harm. *Id.*

In 2005, the Minnesota Supreme Court expressed the same view in *Olmanson v. LeSueur County*, 693 N.W.2d 876, 881 (Minn. 2005), declaring that “whether a condition presents a known or obvious danger is a question of fact.” *Olmanson* involved a snowmobiler who collided with a culvert, recognizing that a culvert posed an obvious hazard, but that whether striking it would pose a foreseeable risk of harm was a jury question that required denial of summary judgment.

These decisions follow the Supreme Court’s earlier ruling in *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 34, 239 N.W.2d 190, 194 (1976), in which a young man was shocked by a power line while trimming trees when a branch he had cut fell onto a power line and the court said that to support a finding of assumption of risk a defendant must show more than that the boy was aware of the hazard, but also the gravity of the risk it posed.

This Court recently made clear that there is a significant difference between knowledge and appreciation of a potential hazard in the context of primary assumption of the risk. In *Renswick v. Wenzel*, 2012 WL 3082282, \*5 (Minn. Ct. App. 2012), this Court held the district court did not err as a matter of law by

affirming the district court's refusal to instruct the jury on primary assumption of risk. The Plaintiff in *Renswick* was a guest at the defendant's home and detached garage during a New Year's Eve party. *Id.* at \*1. The plaintiff needed to use the bathroom in the house and walked into a back door that led to an entryway with a door to the right going to the kitchen and a doorframe leading to the basement stairs. *Id.* at \*1. The door to the basement stairway had been removed and there was direct access from the entryway to the basement stairs. *Id.* There was no dedicated light for the entryway and the defendant's wife had closed the door to the kitchen which normally would have allowed some light into the entryway. *Id.* at \*2. The plaintiff had previously visited the home and was aware she would have to pass through the kitchen door to reach the bathroom but stated that even though she had been on the landing before, she was not aware of the open staircase on the landing. *Id.* The plaintiff reached for the door knob to the kitchen while her foot entered the stairway and fell down the stairs, sustaining serious injuries. *Id.* The plaintiff tested positive for intoxicants including alcohol, methamphetamine, amphetamine, and marijuana. *Id.* The defendant appealed the district court's order denying the defendant an order of judgment in his favor or a new trial. *Id.* at \*3. The defendant argued that the danger was open and obvious and the plaintiff primarily assumed the risk of injury because the plaintiff, having been in this entryway before, knew of and appreciated the risks and had a chance to avoid it. *Id.* The plaintiff claimed the defendant negligently failed to maintain a safe entryway or to warn her of the dangers associated with a stairway leading to a

basement. *Id.* at \*3. Even though it was undisputed that the Plaintiff had knowledge of the entryway, This Court held it was not err for the district court to deny Defendants' request for a jury instruction and questions of primary assumption of the risk.

This is important for Grady's case because it demonstrates the difference between knowledge and appreciation of a risk: the record establishes that while Mr. Grady knew about certain risks inherent in snow-tubing, he did not appreciate the risk of being seriously injured by a collision with a tuber in the run-out area at the bottom of the Green Acres hill. (ADD-16-17.)

Viewing the facts in the light most favorable to Grady, the record establishes:

- The night he was injured, Grady did not remember his trip to Green Acres as a grade school aged child. (APP-84; ADD-16-17);
- It was only after speaking with Mr. Green after the accident that Grady remembered that when he was at Green Acres with his scout troop, a little girl was at the bottom of the hill was knocked down by another tuber. But he does not know whether that little girl was injured, let alone whether she was injured badly enough to require medical attention. (ADD-16);
- On the night of his injury, Grady did not appreciate how fast he would go down the hill. (ADD-17);
- On the night of his injury, Grady was injured on his first trip down the hill and did not see any other collisions. (ADD-17);
- Grady has no memory of seeing other people on the hill before he went down and thus, could not have known of or appreciated the risk of colliding with another tuber at the bottom of the hill. (APP-89-90);

- At the time of his injury, Grady did not know that there were three to five collisions at the bottom of the hill every day that Green Acres was open (ADD-17) Likewise, at the time of his injury, Grady did not know that there were more than 100 collisions at the bottom of the hill in the three seasons before his accident. (ADD-17) Thus, Grady did not appreciate the probability of a collision at the bottom of the hill; and
- At the time of his injury, Grady did not know that many people had been hurt badly enough in collisions in the bottom of the hill to require emergency medical care, some being taken away by ambulance. (ADD-17) Thus, he did not appreciate the gravity of harm that could result if he was involved in a collision at the bottom of the hill. (ADD-17.)

Further, Grady believed that Green Acres had made sure conditions were safe for he and other customers before selling lift tickets. (ADD-17). Grady also believed the attendants at the bottom of the hill were there to keep people safe. (ADD-17). But a jury could conclude from Mr. Green's testimony that the attendants – who apparently did not see Green tubing down the hill towards them – were not doing their job. (APP-30.)

Taken together and viewed in the light most favorable to Grady, these facts not only create factual issues, but establish that Grady did not appreciate the danger created by Green Acres' mismanagement of its family snow tube hill. The evidentiary record presents genuine issues about whether the incident occurred due to a lack of safe management of the facility – when most other facilities have both designated lanes to separate tubers from collision and adequate safety personnel to assure that patrons at the bottom of the run are not struck by descending tubers. In this sense, the case is much like *Wagner* and *Moe*. Moreover genuine issues are presented about whether Grady appreciated the risk of both the probability and

gravity of harm that befell him. In the latter sense, this case is much like *Louis*, *Olmanson* and *Ferguson*. There is no reason to ignore or overturn these well-established Supreme Court precedents.

Given the record, the district court could not have found that Grady knew and appreciated the risk of collisions at the bottom of the hill Green Acres created by not having lanes, not using its attendants properly and not having a protected walk-way to the tow rope without weighing and assessing the credibility of the evidence. Minnesota law is clear that this is reversible error.

**iii. Grady Did Not Consent To The Heightened Risks Created By Green Acres' Mismanagement Of The Facility**

Fundamentally, if Mr. Grady did not appreciate the risk that lead to his injury, how could he have consented to accept that risk? The same factual issues concerning Grady's (lack of) appreciation of the risks that lead to his injury preclude a finding that he consented to those same risks.

In determining Grady consented to these expanded risks, The District Court improperly focused on Green Acres' signage and an exculpatory clause contained in a waiver – none of which Mr. Grady read. In fact, the District Court noted on pages 12 and 13 of its Order:

Most obviously, Plaintiff signed the liability waiver, thereby allowing him to participate in this inherently dangerous sport, and subjecting himself to all the inherent risks of snow tubing. One can hardly ask for a simpler demonstration of consent to relieve another of the duty of care than a written liability waiver.

Green Acres motion, however, was not based on the exculpatory clause. Imputing the information contained on the signs and exculpatory to Mr. Grady is misplaced because Mr. Grady did not read the signs or the waiver and as such, he could not have consented to information he did not read. (APP-89-90.) Further, the notion that once a defendant warns about a danger, it is relieved of any duty to a consumer is dangerous. Take, for example, a manufacturer's duty in a product liability setting. A manufacturer cannot shed its duty to produce a reasonably safe product simply by slapping a warning on the product disclosing its dangers. The same must be true here.

**iv. The Minnesota Supreme Court has Never Held that an Expanded Risk Be “New” or “Sudden”**

While The Minnesota Supreme Court has held primary assumption of the risk does not protect a property owner from risks created by negligent management of a facility (*See, Wagner*, 396 N.W.2d at 226, and *Moe*, 147 N.W.2d at 589, discussed above), it has never required that the enlarged risk must arise after the plaintiff has manifested consent. In that respect, the *Jussila* case and the *Rusciano* cases discussed in the District Court's Order create confusion and inconsistency in Minnesota law. The Supreme Court's holdings should be followed. Even if, however, the *Jussila* “limited time” element applied to Grady's case, there are still factual issues for the jury to decide.

*Jussila* involved a spectator at a snowmobile race who was injured when a snowmobile left the race track and hit him. *Jussila v. U.S. Snowmobile Ass'n.*, 556 N.W.2d. 234, 235-36 (Minn. Ct. App. 1996). At the time of his injury, Mr. Jussila chose to stand in an area with limited protection for spectators rather than sitting in the well-protected grandstand. *Id.* at 235-36. Mr. Jussila was a longtime recreational snowmobiler and had attended racing at the same track two or three times before. *Id.* at 236. The day he was injured, Mr. Jussila watched the races for over two and a half hours while sitting on a snow pile at the north end of the track. *Id.* During those two and a half hours, Mr. Jussila saw two separate snowmobiles in two separate races leave the track, causing spectators to move quickly to get out of the way to avoid injury. *Id.* After one of those incidents, Mr. Jussila commented to another man, “[w]here are we going to go if one comes up the snow bank or up the hill?” *Id.* Mr. Jussila then went to an area of the track south of the well-protected grandstand area and was walking between a parked trailer and a track when a snowmobile in the race left the track and hit him. *Id.* Jussila argued the Defendant was negligent for allowing spectators into some of the less protected areas and for the manner in which it installed barriers around the track. *Id.* The Court of Appeals affirmed the District Court’s grant of summary judgment based on primary assumption of the risk. *Id.* at 237.

The Court found the enlargement of the risk presented by the Defendants was not controlling because the risk existed when Jussila chose to walk and stand

on the south end of the race track. The Court, analyzing *Rusciano v. State Farm Mut. Auto. Ins.*, 445 N.W.2d 271, (Minn. Ct. App. 1989), stated *Rusciano* was distinguishable because the Defendants' alleged negligence in *Jussila* did not create a "new risk to which [Jussila] had only limited time to react." *Id.* at 237. The *Jussila* Court read a new requirement into the enlargement of risk analysis that belies the holdings of the *Wagner*, *Moe*, and *Snilsberg* opinions, all of which held summary judgment was not appropriate under the new or expanded risk analysis. Neither *Wagner* nor *Snilsberg* imposed -- or even discussed -- a requirement that the enlarged risk be new or one to which the Plaintiff had only limited time to react. Thus, the district court's analysis of the "limited time to react" muddies the water and conflicts with Minnesota Supreme Court opinions.

But even if The Court were to apply the "limited time to react" analysis, there is at minimum a factual dispute about whether the Green Acres' attendants who were at the bottom of the hill, talking to each other and apparently not paying attention to the tubers, presented a new risk, by their inattention and failure to clear tubers from the bottom of the hill, to which Mr. Grady had limited time to react. Based on Green's testimony, a reasonable jury could conclude the attendants at the bottom of the hill were not paying attention, were not standing in a proper place, and failed to clear patrons from the bottom of the run, thereby creating a new or enlarged risk to which Mr. Grady had only limited time to react as he was tubing down the icy hill. (APP-30.)

Last, the facts concerning knowledge and appreciation in this are very different from *Jussila*. Specifically:

- Mr. Jussila was an experienced snowmobile rider while Mr. Grady had only been snowtubing two times before, both as a child;
- Mr. Jussila had been watching snowmobile races at the track for over two and a half hours when he was injured while Mr. Grady had just arrived at Green Acres and was injured on his first trip down the hill;
- Mr. Jussila had seen two snowmobiles leave the track that same day while Mr. Grady did not see any other collisions the night he was injured; and
- Mr. Jussila knew there were places to observe the race that were better protected but decided to stand in a less protected area while Mr. Geske had no such option at Green Acres.

Thus, while there are factual issues concerning whether Mr. Grady had knowledge and appreciation of the risks he faced, there were no such issues with Mr. Jussila.

Following the guidance of the Minnesota Supreme Court, there is no requirement that the risk created by mismanaging a facility create a “new” or “sudden” risk. But even if this were required, the record demonstrates material issues of fact on whether the Green Acres’ attendants at the bottom of the hill were inattentive, thereby creating a “new” risk.

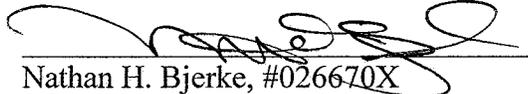
**CONCLUSION**

A district court's role in deciding summary judgment motions is not to weigh the facts or assess credibility, but to determine if factual issues exist. *Fabio v. Bellomo*, 504 N.W.2d 759 (Minn. 1993). Grady respectfully submits that the district court based its grant of summary judgment on improper factual conclusions that could only come from weighing the evidence and thus, the grant of summary judgment should be reversed.

Respectfully submitted,

Dated: \_\_\_\_\_

8-16-12



Nathan H. Bjerke, #026670X

**TSR INJURY LAW**

7760 France Ave. S., Ste. 820

Bloomington, MN 55435

(952) 832-5800

**ATTORNEY FOR PLAINTIFF**