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Case No. A12-0085

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**State of Minnesota**  
**In Court of Appeals**

**RYAN T. GRADY,**

*Plaintiff/Appellant,*

v.

**GREEN ACRES, INC.,**

*Defendant/Respondent.*

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**RESPONDENT'S BRIEF**

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## STATEMENT OF THE ISSUES

I. When the evidence conclusively established that the Appellant—an avid winter sportsman—knew and appreciated the inherent risk of colliding with other snow tubers but decided to go snow tubing on Respondent Green Acres' snow-tubing hill despite that inherent risk, did the District Court err by ruling that primary assumption of risk bars Appellant's claim against Respondent?

The District Court concluded that primary assumption of risk barred Appellant's claim and granted summary judgment in Respondent's favor.

*Peterson ex rel. Peterson v. Donahue*, 733 N.W.2d 790, 792 (Minn. App. 2007), *rev. denied* (Minn. Aug. 21, 2007)

*Snilsberg v. Lake Wash. Club*, 614 N.W.2d 738, 746 (Minn. App. 2000), *rev. denied* (Minn. Oct. 17, 2000).

*Schneider ex rel. Schneider*, 654 N.W.2d 144, 152 (Minn. App. 2002)

*Moe v. Steenberg*, 275 Minn. 448, 450, 147 N.W.2d 587, 589 (1966).

## STATEMENT OF THE CASE

Appellant sued Respondent Green Acres, Inc. (“Green Acres”) for gross negligence after he was injured while snow tubing at a hill owned and operated by Green Acres in Lake Elmo, Minnesota. Appellant was a very experienced snow boarder who had also gone sledding at least 20 times and snow tubing twice before his injury at Green Acres. He alleges that he was injured when he collided with another tuber who was walking at the bottom of the “family hill.” He alleges that his injuries were proximately caused by Green Acres’ failure to have lanes on its snow-tubing hill, failure to have employees at the top of the hill telling tubers when it is safe to go down, and failure to have a designated walkway back to the rope tow. But based on Appellant’s past experience with winter sports generally and snow tubing in particular, he knew and appreciated the risk of colliding with another tuber who was walking at the bottom of the snow-tubing hill. In fact, on a previous occasion, when Appellant went snow tubing at Green Acres, he saw just such a collision:

Q: So you saw a person on a tube run into a little girl who was walking at the bottom of the hill; is that right?

A: Yes.

(R. App.<sup>1</sup> 8 (Grady Dep. Tr.)) Indeed, well before Appellant went to Green Acres on December 26, 2009, he knew and appreciated the possibility that a snow tuber at Green Acres could collide with someone who was walking at the bottom of the hill:

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<sup>1</sup> Respondent’s Appendix will be cited as “R. App.” Appellant’s Appendix will be cited as “A. App.” Appellant’s Addendum will be cited as “A. Add.”

Q: So that day [when Plaintiff previously went snow tubing at Green Acres], you knew there was a possibility that someone who was walking back on the bottom of the hill could get hit by someone who was in a tube, right?

A: Yes.

(R. App. 9 (Grady Dep. Tr.))

Based on Appellant's prior knowledge and appreciation of the risk of collision, and his decision to snow tube at Green Acres regardless of that risk, Green Acres filed a motion for summary judgment, arguing that the primary assumption of risk doctrine barred Appellant's claim. The Honorable Mary E. Hannon, Judge of the District Court of the Tenth Judicial District, agreed and granted summary judgment in Green Acres' favor. In particular, the District Court concluded that (1) "colliding with other snow tubers is an inherent risk of snow tubing" (A. Add. 9 (Order)); (2) Appellant had actual knowledge of the potential risk of collision, and "[e]ven if there were no evidence that Plaintiff had actual knowledge of the risk of colliding with another snow tuber, his familiarity with the danger of collisions in other downhill winter sports was such that he must have had knowledge of the danger of collisions in snow tubing" (*id.* at 10); (3) Appellant appreciated the risk of collision (*id.* at 11); (4) Appellant voluntarily chose to snow tube at Green Acres in spite of the risks (*id.* at 12-13); and (5) Green Acres did not enlarge the risks to Appellant through its maintenance and operation of the snow-tubing hill (*id.* at 13-14).

Appellant appeals from the District Court's summary judgment decision. That decision is based on well-established case law and undisputed facts, and should be affirmed.

## STATEMENT OF FACTS

### A. Background Regarding Green Acres

Green Acres, a family owned and operated business, has been operating a snow-tubing hill at its current Lake Elmo, Minnesota site since it opened in the early 1970s. (R. App. 58-61, 63-66 (Springborn Dep. Tr.)) Green Acres is open to the public and serves families, school groups, and youth groups. (R. App. 82 (Thoennes Dep. Tr.))

Green Acres has two hills: the family hill and the big hill. (R. App. 82-83 (Thoennes Dep. Tr.)) The family hill is the smaller of the two hills. (R. App. 136-37 (Dimmick Aff. ¶ 9).) The family hill has a large run out at the bottom of the hill. (*Id.*) The hill is wider at the bottom than at the top and does not have lanes. (R. App. 74 (Springborn Dep. Tr.))

Green Acres posts signs regarding its rules throughout the facility. (R. App. 135 (Dimmick Aff. ¶ 2).) In the parking lot, three signs include information about Green Acres' hours and rules, a liability waiver, and the fact that snow tubing can be dangerous. (R. App. 135 (Dimmick Aff. ¶¶ 2-4); R. App. 139-40.) A sign in the parking area is emblazoned with the following warning:

**TUBE SLIDING CAN BE DANGEROUS.**

**GREEN ACRES IS NOT RESPONSIBLE  
FOR ANY INJURIES OR LOST ARTICLES.**

**TUBERS ASSUME ALL RISKS  
AND TAKE FULL RESPONSIBILITY FOR  
ANY INJURIES OR LOST ARTICLES.**

(R. App. 140.) The family hill is visible from Green Acres' parking lot. (R. App. 31 (Grady Dep. Tr.).)

On the weekends, Green Acres offers snow tubing in two-hour sessions. (R. App. 137 (Dimmick Aff. ¶ 10).) In the chalet, Green Acres customers purchase a ticket for a two-hour snow-tubing session, which customers must wear. (*Id.*) The adult ticket includes the following cautionary language:

The holder of this ticket is VOLUNTARILY PARTICIPATING in this activity, acknowledges that snow tubing is a POTENTIALLY DANGEROUS activity, and agrees to ASSUME ALL RISK of bodily injury, death, and/or property damage sustained by me . . . incidental to snow tubing, including being struck by other tubers, tubes, or patrons.

(R. App. 145 (emphasis added).)

Green Acres also requires all snow tubers to sign a liability release. (R. App. 136 (Dimmick Aff. ¶ 7).) The release discharges Green Acres of causes of action and liability due to Green Acres' negligence:

I hereby agree that in consideration of Green Acres allowing my participation in this activity and use of its facilities, under the terms set forth herein, I, the rider, for myself . . . do agree to hold harmless, release and discharge Green Acres, Inc. . . . of and from all claims, demands, causes of action and legal liability, whether the same be known or unknown, anticipated or unanticipated, due to Green Acres, Inc.'s . . . ordinary negligence.

(R. App. 143.) By signing the release, the tuber agrees not to bring claims, demands, or causes of action against Green Acres for any losses due to bodily injury, death, or property damages sustained by the tuber, "in relation to the premises and/or operations of Green Acres, Inc. to include riding, handling or otherwise being near a snow tube or rope tow owned by or in the care, custody and control of Green Acres, Inc." (*Id.*)

In the chalet, a large four-foot by eight-foot sign sets out Green Acres' rules and warns of the hazards of snow tubing:

Snow Tubing is a *hazardous sport with inherent dangers and risks* and . . . injuries are a common ordinary occurrence. Injuries may occur on grounds, hill, tows or snow tubes. Risks include, but are not limited to: Speed, changing weather, surface conditions, falls, *collisions with other snow tubers*, lack of directional and speed control as well as other forms of natural and man-made objects.

(R. App. 136 (Dimmick Aff. ¶ 6); R. App. 142 (emphasis added).) One of Green Acres' rules—listed on the large sign inside the chalet—is that tubers must move away quickly once they reach the bottom of the hill: “When you reach the bottom of the hill, move away quickly and always watch for other tubers coming down the hill.” (*Id.*)

After tubers purchase a lift ticket, they may go to the rope tow and begin tubing. (R. App. 137 (Dimmick Aff. ¶ 11).) The tubers pick up their tubes at the bottom of the hill, next to the rope tow. (*Id.*) The rope tow is on the side of the family hill closest to the chalet. (*Id.*) A Green Acres rope tow operator stands at the bottom of the family hill and helps tubers use the rope tow. (R. App. 85-86 (Thoennes Dep. Tr.)) A second tow operator is often at the bottom of the hill, directing tubers to move out of the way quickly after they have reached the bottom of the hill. (*Id.*) Once the tubers reach the top of the hill, they exit the rope tow and walk across the top of the hill to begin tubing. (R. App. 137 (Dimmick Aff. ¶ 11).) A third tow operator works at the top of the hill, either inside a shack at the top of the rope tow or next to it. (R. App. 83-84 (Thoennes Dep. Tr.)) On busy days, a fourth rope tow operator will stand at the top of the family hill, closer to the middle. (R. App. 86 (Thoennes Dep. Tr.); R. App. 86 (Lucksinger Dep. Tr.)) Once in a

while, a fifth operator will be added at the bottom of the hill. (R. App. 86 (Thoennes Dep. Tr.)) All of the tow operators are in touch with each other and employees in the chalet through two-way radios. (R. App. 86 (Thoennes Dep. Tr.))

At the beginning of each session, Green Acres stops the rope tow and announces the rules over a loudspeaker that can be heard on the family hill. (R. App. 137 (Dimmick Aff. ¶ 12).) After the rules have been read, tubers may go down the hill. (*Id.*) Tubers may go up the rope tow and tube down the hill as many times as they wish during the tubing session, unless the tow operators have stopped the rope tow. (*Id.*) Tubers may also take breaks inside the chalet, where Green Acres sells hot chocolate and snacks, and where the Green Acres rules and warning about the risks of snow tubing are prominently posted. (*Id.*)

Green Acres at one time considered whether to add lanes to its hills, weighing the pros and cons of the decision. (R. App. 74-77 (Springborn Dep. Tr.)) Green Acres ultimately decided not to include lanes because it perceived a potential danger associated with lanes that it did not perceive without lanes, because its hill was wider at the bottom than the top, and because it believed that its hill was safe. (*Id.*) Namely, after visiting and observing other snow tubing hills with lanes, Green Acres foresaw a risk of tubers' heads and legs hitting the sides of the snow berms that create the lanes. (R. App. 68-73, 76 (Springborn Dep. Tr.))

Green Acres employees do not direct tubers on when to go down the family hill. (R. App. 87 (Thoennes Dep. Tr.)) Instead, tubers choose when to go down the hill on their own. (*See id.*) Tubers then walk back to the rope tow. There is not a specific area in

which tubers must walk back to the rope tow; instead, the tow operators instruct the tubers to walk to the end of the run out and then walk over to the rope. (R. App. 94 (Lucksinger Dep. Tr.)) There is not a barricade or barrier in that area. (R. App. 94 (Lucksinger Dep. Tr.))

Green Acres has an Emergency Medical Technician (EMT) on staff, who administers first aid to Green Acres customers. (R. App. 138 (Dimmick Aff. ¶ 13).) Customers can get medical attention inside Green Acres' chalet. (*Id.*) The EMT is in radio contact with the tow operators. (*Id.*) In the event of an emergency, the EMT will leave the chalet and provide medical attention to anyone at Green Acres who needs it. (*Id.*) Green Acres requires its EMT to write up a report for every customer to whom he or she provides any kind of medical assistance. (*Id.*)

**B. Appellant's Background and Extensive Experience With Winter Sports**

At the time the District Court considered Appellant's summary judgment motion, Appellant Ryan T. Grady was a 20-year-old sophomore at Michigan Technological University ("Michigan Tech"). (R. App. 5-6 (Grady Dep. Tr.)) He was enrolled in the Mechanical Engineering program. (R. App. 6.) Appellant graduated from high school with a 3.74 GPA, where he took advanced placement classes. (R. App. 47-48.) His permanent residence is in Stillwater, Minnesota, where he lives with his mother. (R. App. 5.)

While growing up in Minnesota, Appellant participated in at least three winter sports: snow tubing, on two occasions; sledding, on at least 20 occasions; and snowboarding, multiple times each winter beginning around fourth grade. (R. App. 12-13, 17; *see also* R. App. 101 (Interrogatory Response No. 6 (Set I)).)

Appellant went snow tubing for the first time at Green Acres when he was in elementary school. (R. App. 8 (Grady Dep. Tr.)) On that trip, Appellant saw a snow tuber collide with a little girl who was walking or running at the bottom of the hill. (*Id.*) There were no lanes on the hill (R. App. 7); no designated walkway back to the rope tow (*id.*); and no employee at the top of the hill telling tubers when they could go down. (*Id.*) Appellant was unable to steer himself on his snow tube. (R. App. 16-17.) Appellant could not remember at his deposition whether he could stop himself quickly or slow the snow tube down. (R. App. 17.)

The second time Appellant went snow tubing was at Trollhaugen, when he was in high school. (R. App. 9-10 (Grady Dep. Tr.)) At that time, Trollhaugen had lanes (R. App. 10); a designated walkway for tubers to walk back to the rope tow (*id.*); and employees at the top of the hill, telling tubers when to go down. (R. App. 11-12.)

When Appellant went sledding, he usually sledded on a round or rectangular plastic sled. (R. App. 13 (Grady Dep. Tr.)) At each of the locations where Appellant went sledding, there were no lanes on the hills, no designated areas at the bottom of the hill for walking, and no one at the top of the hill telling him and other sledders when it was safe to go down. (R. App. 16.) Appellant testified that on the round plastic sleds, he was not able to steer himself or stop quickly, but that he was able to slow himself down by putting his hands and feet out. (R. App. 15.) Appellant also testified that he had “probably” run into someone while he was sledding. (R. App. 14.) To avoid such a collision, Appellant knew to avoid starting down the hill on his sled while someone was in the way. He explained that he would “[t]ry not to start in the first place, like while they’re in the way, or I guess

try to put your hands down or your feet down to stop yourself.” (*Id.*) He also said that, to avoid hitting someone, he had “probably” jumped off the sled and yelled, “Watch out.” (*Id.*)

Appellant has been snowboarding since fourth grade and agreed that he is a “very experienced snowboarder.” (R. App. 20 (Grady Dep. Tr.)) He has snowboarded at sites in Minnesota, Michigan, California, Wisconsin, and Montana. (R. App. 101 (Interrog. Resp. No. 6 (Set I)).) On a snowboard, Appellant is able to turn and stop himself, which he described as important so you can “avoid getting hurt” and “to control yourself.” (R. App. 20 (Grady Dep. Tr.)) He stated that when snowboarding, you could get hurt in various ways: “[y]ou could fall, run into a tree or a building or someone else.” (R. App. 21.)

When asked to compare whether snow tubing was more like sledding or snowboarding, Appellant stated that it was more like sledding. (R. App. 42.)

**C. Appellant’s Decision to Go Snow Tubing at Green Acres on December 26, 2009 and the Conditions that Day**

The evening of December 26, 2009, Appellant (then 18 years old) and two friends decided to go snow tubing. Having no reason to believe that Green Acres had added lanes since his last time tubing there, Appellant chose to go to Green Acres because it was the closest snow-tubing hill. (R. App. 27-29 (Grady Dep. Tr.)) His mother was not happy to hear that he and his friends were going snow tubing, and she told him to “[b]e careful.” (R. App. 29.) When he and his friends arrived at Green Acres, Appellant could see that Green Acres did not have lanes on the family hill. (R. App. 31-32, 37, 41.) He does not remember seeing any signs posted. (R. App. 32-34, 44-45.) He purchased a ticket and

signed the liability waiver. (R. App. 34-36.) He wore wrist guards to protect his wrist from hitting something. (R. App. 37-38.)

The day of the accident was cold and icy. (R. App. 26 (Grady Dep. Tr.)) It was “very icy” on the tubing hill. (R. App. 40-41.) Appellant remembers seeing one Green Acres employee at the top of the hill and two employees at the bottom of the hill. (R. App. 38.) At the top of the hill, Appellant was standing such that the rope tow was to his right as he looked down hill and a group of tubers was to his left. (R. App. 39.) Appellant does not remember whether there was anyone at the top of the hill telling him when to go down. (R. App. 41.) There were two employees at the top of the hill; one monitoring the tow rope and the other standing at the top of the hill, at about the midpoint. (R. App. 112 (Green Dep. Tr.)) Two Green Acres employees also were stationed at the middle of the bottom of the hill. (R. App. 110-11.)

When they were ready to go down the hill, and there was no one on the hill in front of them (R. App. 113-14 (Green Dep. Tr.)), Appellant and his two friends, Brownson and Green, made a running start and jumped into their tubes headfirst, with their stomachs on the tubes. (R. App. 40 (Grady Dep. Tr.)); R. App. 113 (Green Dep. Tr.) Brownson went down the hill, came to a stop in the run-off area at the bottom of the hill, and hurried back to the rope tow. (R. App. 124-25 (Brownson Dep. Tr.)) As Green approached the bottom of the hill, he saw that he was in danger of colliding with one of the tow operators at the bottom of the hill. (R. App. 114 (Green Dep. Tr.)) To avoid colliding with him, Green put his hands and feet down, and moved himself to the right and stopped. (*Id.*) In his deposition, Green did not testify regarding the tow

operators' response to the potential collision, but he did state that he did not collide with the tow operators.

Q: And why did you go to the right of them [the tow operators]?

A: I guess because the bigger group was going to the left of them.

Q: Were you trying to avoid running into the -- those two who were standing down there?

A: I was when I started going down. I was actually going pretty much straight for them so I put my hands down to try and stop and slow down to avoid hitting them.

Q: And were you successful in avoiding hitting them?

A: Yes.

(*Id.*) Green got up from his tube, saw that Brownson was running back to the rope tow, and followed him. (R. App. 115.)

Appellant has alleged that he “struck another snow-tuber who walked in front of his path” (Compl. ¶ 13), and that his “face collided with the tuber who was walking.” (*Id.* ¶ 14.) Appellant, however, does not recall what happened after he jumped into the tube and started down the hill; he does not remember what occurred at the bottom of the hill. (R. App. 43 (Grady Dep. Tr.)) Nor did Appellant’s two friends see Appellant’s accident. (R. App. 114 (Green Dep. Tr.)); R. App. 126 (Brownson Dep. Tr.)) Both Green and Brownson were on the hill, either on the rope tow or at the top, when Green Acres shut down the rope tow and stopped all tubing. (R. App. 116 (Green Dep. Tr.)); R. App. 127 (Brownson Dep. Tr.)) They did not know that Appellant had been injured until they walked back down to the bottom of the hill and saw Appellant, who was being attended to

by first responders. (R. App. 116-18 (Green Dep. Tr.)) Appellant was conscious and he had a facial injury. (R. App. 128 (Brownson Dep. Tr.)); R. App. 118 (Green Dep. Tr.)

None of Green Acres' employees remember seeing Appellant's accident. (*See, e.g.*, R. App. 130 (Heuer Dep. Tr.); R. App. 88-89 (Thoennes Dep. Tr.)); R. App. 96-97 (Luck singer Dep. Tr.); R. App. 78-80 (Springborn Dep. Tr.)) Scott Luck singer, who was at the bottom of the hill, saw a group of tubers get up after coming down the hill. (R. App. 97 (Luck singer Dep. Tr.)) One tuber—Appellant—remained in his tube. (*Id.*) Luck singer blew his whistle to get that tuber's attention so the tuber would get up and move out of the way. (R. App. 97-98.) When the tuber did not respond, Luck singer ran over to him and radioed the top of the hill to have them stop the rope tow and tubing. (R. App. 98.) The tuber told Luck singer that the side of his leg hurt. (*Id.*) Luck singer radioed for first aid. (*Id.*) Part-owner Richie Springborn and Green Acres' EMT attended to the tuber and Luck singer went back to watching the hill. (*Id.*) The EMT called an ambulance and other Green Acres employees assisted with putting the tuber onto a backboard. (R. App. 138 (Dimmick Aff. ¶ 14.)) The Green Acres First Aid Report states that Appellant had a left-eye injury, probable concussion, and loss of consciousness, and describes the medical treatment that Green Acres provided before the ambulance arrived. (R. App. 146-47.)

#### **D. Appellant's Lawsuit Against Green Acres**

On March 17, 2011, Appellant filed and served a lawsuit against Green Acres related to his December 26, 2009, injury allegedly sustained when he collided with another tuber walking at the bottom of the hill. Attempting to avoid the liability waiver he signed, Appellant alleges that Green Acres was *grossly* negligent in its design,

maintenance, supervision, and operation of the snow-tubing hill, as well as in its staffing and training of the personnel overseeing the hill's operation. (Compl. ¶¶ 17-18.) In particular, Appellant alleges that Green Acres was grossly negligent by virtue of the following:

- Green Acres did not have designated lanes on its snow-tubing hills;
- Green Acres did not have an attendant at the top of each lane and the bottom of each lane to assure that tubers would not start down the hill until the bottom of the hill was safe and clear of other tubers;
- Green Acres did not have a designated walking area or lane for tubers at the bottom of the hill to get back to the rope tow without interfering with or potentially being hit by tubers coming down the hill;
- The problems created “an especially dangerous situation” the night of the incident because of the icy conditions; and
- Green Acres knew that the manner in which it was operating its snow-tubing hills was dangerous and injuring people but did nothing.

(R. App. 131-34 (Interrog. Resp. (Set II)); R. App. 49-56 (Grady Dep. Tr.)) In the context of Appellant's summary judgment motion, he also alleged that the Green Acres employees at the bottom of the hill were “not paying attention” and “not doing their job.” (Appellant's Br. at 27, 31; Hearing Tr. at 26.) Appellant alleges that Green Acres' gross negligence proximately caused his injuries. (Compl. ¶¶ 13-14.)

**E. Green Acres' Summary Judgment Motion**

On December 8, 2011, Green Acres filed a summary judgment motion, arguing that primary assumption of risk precluded Appellant's claim. After considering the parties' written and oral argument, the District Court agreed with Green Acres, granting summary judgment in Green Acres' favor. Indeed, as the Court stated, "it seems to this court that the choice to slide down an icy snowhill face-first evinces not only a willingness to relieve others of their obligation for your safety, but to leave your safety largely to chance."

(A. Add. 13 (Order).)

## SUMMARY OF THE ARGUMENT

Appellant's claim is barred by the primary assumption of risk doctrine. He plainly knew and appreciated the inherent risk of colliding with other tubers while snow tubing, yet decided to snow tube at Green Acres despite that risk. The District Court properly granted summary judgment in Green Acres' favor.

### I. STANDARD OF REVIEW

This Court reviews the District Court's summary judgment decision de novo, determining whether there are any genuine issues of material fact and whether the District Court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990); *see also* Minn. R. Civ. P. 56.03. The non-moving party must establish a genuine issue of fact through "substantial evidence" in order to defeat summary judgment. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). Mere speculation, without concrete evidence, is not enough to avoid summary judgment. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993).

### II. THE DISTRICT COURT DID NOT ERR BECAUSE THE EVIDENCE IN THE RECORD IS CONCLUSIVE THAT PRIMARY ASSUMPTION OF RISK BARS APPELLANT'S CLAIM.

The risk of colliding with another snow tuber is a known and inherent risk of snow tubing. Moreover, the undisputed evidence establishes that Plaintiff knew and appreciated the risk of colliding with other snow tubers—and in particular other tubers who were walking at the bottom of the hill. He decided to go snow tubing the day of his injury regardless of those risks. As such, this Court should uphold the district court's decision to grant summary judgment.

**A. Primary Assumption of Risk Bars Claims Arising from the Inherent Risks of Sports.**

Primary assumption of risk is a complete defense to any negligence claim: “The defendant has no duty to protect the plaintiff from the well-known, incidental risks assumed, and the defendant is not negligent if any injury to the plaintiff arises from an incidental risk.” *Peterson ex rel. Peterson v. Donahue*, 733 N.W.2d 790, 792 (Minn. App. 2007), *rev. denied* (Minn. App. Aug. 21, 2007) (internal quotation omitted); *see also Olson v. Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974) (“[I]f the plaintiff’s injury arises from an incidental risk, the defendant is not negligent.”). A plaintiff has undertaken primary assumption of risk when, with knowledge and appreciation of the risk, the plaintiff voluntarily engages in that risk rather than avoiding it. *Donahue*, 733 N.W.2d at 792.

Minnesota case law is clear that a plaintiff cannot succeed on a negligence claim when he participates in a sport with inherent risks. *Moe v. Steenberg*, 275 Minn. 448, 450, 147 N.W.2d 587, 589 (1966). The plaintiff assumes those risks that are “ordinary, necessary, and obvious, or can reasonably be anticipated as incidental to the sport.” *Id.* Whether the risks giving rise to a plaintiff’s injuries are inherent to the sporting activity is appropriate for summary judgment when the evidence is conclusive. *See id.* A district court may decide the applicability of primary assumption of risk as a matter of law when reasonable people can draw only one conclusion from undisputed facts. *Donahue*, 733 N.W.2d at 791-92 (citing *Snilsberg v. Lake Washington Club*, 614 N.W.2d 738, 744 (Minn. App. 2000), *rev. denied* (Minn. Oct. 17, 2000)).

**B. Colliding With Other Tubers is a Risk Inherent in Snow Tubing.**

Contrary to Appellant's erroneous assertion, the District Court did not err by concluding that colliding with another tuber is a risk inherent in snow tubing. This Court has previously concluded, as a matter of law, that collisions between downhill skiers are inherent in skiing. *Donahue*, 733 N.W.2d at 793. Snow tubing involves the same inherent risk.

Appellant erroneously suggests that snow tubing does not involve a risk of collision by relying on *Daly v. McFarland*, 812 N.W.2d 113 (Minn. 2012), a case involving a two-snowmobile accident. But *Daly* is easily distinguished. Reaffirming two prior cases, the *Daly* Court declined to apply primary assumption of risk to snowmobiling, in part, by analogizing a snow mobile to a car: "A snowmobile, carefully operated, is no more hazardous than an automobile, train, or taxi." *Daly*, 12 N.W.2d at 120 (quoting *Olson v. Hansen*, 216 N.W.2d 124, 129 (1974)). The court noted that the primary assumption of risk doctrine "commonly applies to participants and spectators of inherently dangerous sports." *Id.* The court declined to overturn the two prior cases, thus distinguishing snowmobiling from the inherently dangerous sports such as ice skating, auto racing, and hockey. *Id.* at 120-21.

Here, unlike a snowmobiler in *Daly*, a snow tuber is not intended to, nor can he, steer or control his tube. Snow tubing is more similar to skiing than it is to snowmobiling. In both snow tubing and skiing, participants slide down a snowy (and in some cases icy) hill. In fact, in snow tubing a participant has *less control* over where he and his tube go than a skier (or snowboarder) has because a tuber cannot necessarily steer or stop himself,

but a skier (or snowboarder) can. (*See, e.g.*, R. App. 16-17, 20 (Grady Dep. Tr.)) Collisions are thus *inherently more likely* in the context of snow tubing than they are in skiing. Therefore, as in *Donohue*, and unlike in *Daly*, this Court can and should conclude that the risk of collision with other tubers is inherent in snow tubing as a matter of law.

Furthermore, the evidence in the record conclusively establishes that collisions are an inherent risk in snow tubing. Collisions occur on the snow-tubing hill. (*See, e.g.*, R. App. 8-9 (Grady Dep. Tr.); R. App. 84 (Thoennes Dep. Tr.)) Green Acres' tickets, signs, and website explain to snow-tubing participants in great detail the risks inherent in snow tubing, including the risk of colliding with another tuber. The large sign inside Green Acres' chalet specifically points out the risk of collisions between tubers:

Snow Tubing is a hazardous sport with inherent dangers and risks and . . . injuries are a common ordinary occurrence. Injuries may occur on grounds, hill, tows or snow tubes. Risks include, but are not limited to: Speed, changing weather, surface conditions, falls, collisions with other snow tubers, lack of directional and speed control as well as other forms of natural and man-made objects.

(R. App. 142.) The Lift Ticket repeats the same warning:

The holder of this ticket is VOLUNTARILY PARTICIPATING in this activity, acknowledges that snow tubing is a POTENTIALLY DANGEROUS activity, and agrees to ASSUME ALL RISK of bodily injury, death, and/or property damage sustained by me . . . incidental to snow tubing, including being struck by other tubers, tubes, or patrons.

(R. App. 145.) Even Green Acres' website identifies the specific risk of collisions:

Snow Tubing is a hazardous sport with inherent dangers and risks and that injuries are a common ordinary occurrence. Injuries may occur on grounds, hills, tows or snow tubes. Risks include, but are not limited to: Speed, changing weather, surface conditions, falls, *collisions with other snow tubers*, lack of directional and speed control as well as other forms of natural and man-made objects.

(R. App. 144.) At least one sign at Green Acres states that “TUBE SLIDING CAN BE DANGEROUS.” (R. App. 140.) Furthermore, common sense and logic compel that when sliding down a hill on a tube that one cannot steer or stop, snow tubers place themselves in danger of colliding with other tubers on the hill or at the bottom of the hill.

This Court should reject Appellant’s assertion that a jury must decide whether the risk is inherent. As a preliminary matter, Appellant’s assertion that “[t]he District Court was presented with evidence that almost every other snow tubing facility in the area uses lanes” is misleading and incorrect. The record shows that four facilities in the area employ lanes, and three do not:

Snow-tubing facilities with lanes <sup>2</sup>	Snow-tubing facilities without lanes <sup>3</sup>
Trollhaugen	Eko Bakken
Elm Creek	Badlands
Afton Alps	Green Acres
Buck Hill	

There is *no evidence whatsoever* in the record to establish Appellant’s unsupported assertion that the risk of collision can be avoided by the use of lanes and a designated walkway, or attendants directing patrons when to go down the hill. (Appellant’s Br. at 22.) Likewise, there is no evidence to support Appellant’s bald assertion that Green Acres

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<sup>2</sup> R. App. 10 (Trollhaugen) (Grady Dep. Tr.); R. App. 69 (Elm Creek), 71 (Afton), 72 (Buck Hill) (Springborn Dep. Tr.).

<sup>3</sup> R. App. 17-18 (Green Acres), 72-73 (Eko Bakken, Badlands) (Springborn Dep. Tr.).

“created” the risk of collision by deciding not to use lanes, attendants at the top of the hill, or a protected walkway. (*Id.*) Appellant, for instance, has offered no evidence regarding the comparative collision or injury rates at other facilities, nor any expert testimony.<sup>4</sup> But even if he had, such evidence would not change the simple fact that snow-tube collisions are an inherent risk in the sport.

In short, Appellant’s mere speculation, and lack of concrete evidence, support the District Court’s conclusion that collisions are inherent in snow tubing. *Hangsleben*, 505 N.W.2d at 328. The District Court did not err by concluding that the risk of collision with other tubers is inherent in snow tubing.

**C. Appellant Had Knowledge and Appreciation of the Risk of Colliding With Another Snow Tuber.**

The evidence in the record conclusively established that Appellant knew and appreciated the risk of colliding with another snow tuber. (A. Add. 9-11 (Order).) Under Minnesota law, Appellant must have actual—not just constructive—knowledge of the particular risk at issue. *See Snilsberg v. Lake Wash. Club*, 614 N.W.2d 738, 746 (Minn.

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<sup>4</sup> Furthermore, the First Aid reports on which Appellant relies are not because Plaintiff has not and cannot establish that the accidents resulting in those reports were substantially similar to the accident in which Appellant was involved. *See Colby v. Gibbons*, 276 N.W.2d 170, 176 (Minn. 1979). Additionally, while the First Aid reports are appropriately considered part of the record on this appeal (because Appellant incorporated them as part of his summary judgment opposition in the District Court), Appellant also included in his appendix his Memorandum in Support of his Motion to Amend to Add Punitive Damages. The motion to amend to add punitive damages is not before this Court, nor is it part of this appeal. Indeed, the District Court did not grant or deny that motion since it was moot once the court granted summary judgment in Green Acres’ favor. Furthermore, as set forth in Green Acres’ Opposition to Plaintiff’s Motion to Amend to Add Punitive Damages, Appellant made many assertions in his memorandum on that motion that were wholly unsupported by the record. As such, this Court should not consider that portion of Appellant’s appendix.

App. 2000), *rev. denied* (Minn. Oct. 17, 2000). But Appellant cannot avoid the application of primary assumption of risk here simply because he refused to state in his deposition that he knew of the risk of colliding with another tuber while snow tubing: "Where the facts are such that plaintiff must have had knowledge, the situation is equivalent to actual knowledge." *Parr v. Hammes*, 303 Minn. 333, 338, 228 N.W.2d 234, 238 (1975) (quoting *Conen v. Buckman Bldg. Corp.*, 278 Minn. 193, 204, 153 N.W.2d 329, 337 (1967)). Here, the facts establish both that Appellant had actual knowledge and also that he must have had knowledge of the risk of colliding with another snow tuber.

**1. Appellant had actual knowledge of the risk of colliding with another snow tuber.**

Appellant admitted that before the date of his injury, he had actual knowledge of the risk of collisions between a snow tuber and a person walking at the bottom of the snow-tubing hill. In fact, Appellant himself observed a collision between a snow tuber and a person walking at the bottom of the Green Acres snow-tubing hill on a previous occasion at Green Acres. On that day, Appellant saw a little girl get hit by another snow tuber when the girl was walking or running at the bottom of the hill:

Q: So you saw a person on a tube run into a little girl who was walking at the bottom of the hill; is that right?

A: Yes.

(R. App. 8 (Grady Dep. Tr.)) Appellant knew that there was a possibility that someone who was walking at the bottom of the hill could get hit by someone who was in a tube:

Q: So that day, you knew there was a possibility that someone who was walking back on the bottom of the hill could get hit by someone who was in a tube, right?

A: Yes.

(R. App. 9 (Grady Dep. Tr.))

A case from another jurisdiction—New York—supports the conclusion that the Appellant had actual knowledge of the risk of collision because he had tubed at same location before the date of his injury. In *Berdecia v. County of Orange*, the plaintiff sued the defendant for injuries she sustained at a snow-tubing facility that the defendant owned and operated. No. 2233/2005, 836 N.Y.S.2d 496, at \*1 (N.Y. Sup. Ct. Oct. 27, 2006) (A. App. 55-57). She alleged that she was pushed by an attendant, which caused her tube to spin, and she hit an ice wall and fractured her ankle. *Id.* The court noted that the plaintiff had previously partaken in snow tubing at the same facility, and completed three previous runs without incident. *Id.* at \*3. In all of those runs, the plaintiff had been pushed by an employee down the hill. *Id.* “Nonetheless, [the plaintiff] still voluntarily presented herself for that fourth run.” *Id.* Granting summary judgment in the defendant’s favor, the court concluded that the plaintiff had voluntarily assumed the risk inherent in her snow tube run, given her skills, background, and experience. *Id.*

As in *Berdecia*, Appellant had previously gone snow tubing at Green Acres. His first time at Green Acres, the hill did not have lanes (R. App. 7 (Grady Dep. Tr.)); there was not a designated walkway back to the rope tow (*id.*); and there were not Green Acres employees at the top of the hill, telling Appellant when it was okay to go down the hill. (*Id.*) On that occasion and under those conditions, Appellant knew and had seen that a snow tuber on the hill could collide with another snow tuber who was walking at the

bottom of the hill. (R. App. 8 (Grady Dep. Tr.)) The evidence establishes that Appellant knew of the risk of colliding with another tuber.

**2. Even if Appellant did not have actual knowledge, Appellant must have had knowledge of the risk.**

Furthermore, the record establishes that Appellant must have had knowledge of the risk of colliding with another snow tuber. Appellant admitted that he had actual knowledge of the potential for collisions with other participants in sledding, which is virtually identical to snow tubing. Appellant has been sledding 20 times, in friends' backyards and parks. (R. App. 13 (Grady Dep. Tr.)) He estimated that the hills were between 20 and 40 yards long. (R. App. 13-14.) He acknowledged that, when sledding, he has probably collided with other sledders. (R. App. 14.) He also admitted that he decides when to go down a sledding hill by looking down the hill and avoids collisions by making sure that no one is in the way:

Q: When you -- when you've gone sledding, how do you decide when to go down the hill?

A: When it looks clear enough to go down and -- and when there's like no one in the way, I guess.

Q: Okay, and why do you wait for -- for no one to be in the way or for it to be clear enough to go down?

A: So I can make it all the way down and I don't run into anybody.

(*Id.*) He also admitted that he could further avoid collisions with other sledders by dragging his hands or feet, yelling, "Watch out," or jumping off of the sled. (*Id.*) Appellant plainly had actual knowledge of the risk of collisions while sledding, which—aside from what one uses to go down the hill—is identical to snow tubing.

Appellant also admitted that he had actual knowledge of the risks of colliding with others when snowboarding. Appellant considers himself to be a very experienced snowboarder. (R. App. 20 (Grady Dep. Tr.)) Based on that experience, Appellant is aware of the risk of colliding with other people when snowboarding:

Q: Okay, and how could you get hurt when you're snowboarding?

A: You could fall, run into a tree or a building or someone else.

(R. App. 21.) Appellant conceded the risk of colliding with someone else while snowboarding even though he is able to steer or stop himself on a snowboard. (R. App. 20-21.) Appellant thus had actual knowledge of the risk of colliding with another boarder while snowboarding, a winter sport that differs from snow tubing insofar as the participant going down the hill can steer and stop himself. Because Appellant had actual knowledge of the risk of collisions with other snowboarders and sledders, he must have known about risk of colliding with another tuber while snow tubing.

Furthermore, the fact that Appellant wore wrist guards the evening of the accident in case he hit his arm (R. App. 37 (Grady Dep. Tr.)), shows that he was generally aware that snow tubing involved a potential risk of injury. Also, his mother was not happy to hear that he was going snow tubing that evening and told him to "be careful," because there was a chance Appellant would get hurt. (R. App. 29-30 (Grady Dep. Tr.)) The evidence thus establishes conclusively that Appellant must have known of the risk of injury. *Cf. Seidl v. Trollhaugen*, 305 Minn. 506, 509, 232 N.W.2d 236, 240-41 (1975) (upholding the district court's decision not to instruct the jury on primary assumption of

risk when the defendant had *no evidence* of the plaintiff's knowledge of the particular risk underlying the negligence claim—colliding with another skier).

**3. Appellant appreciated the risk of colliding with another snow tuber.**

In addition to knowing that snow tubing involved the risk of colliding with another tuber, Appellant plainly appreciated that risk. In addition to his extensive winter sports background, on the day of Appellant's injury, he had multiple opportunities to view the conditions on the hill. Appellant saw, from the moment he arrived at Green Acres, that the tubing hill did not have lanes. (R. App. 31-32 (Grady Dep. Tr.)) At that time, he observed tubers sliding down the hill. (*Id.*) From the rope tow, he again observed that the hill did not have lanes. (R. App. 37.) He also had the opportunity to observe the number of employees on the hill. (R. App. 38.) He could also see that only two Green Acres employees were standing at the bottom of the snow-tubing hill. (*Id.*) And he could see that another group of tubers was next to him on the hill. (R. App. 39.) He also knew that he could choose when to go down the hill, and in fact did so. (R. App. 40.) Armed with knowledge of the risk of colliding with another snow tuber, and seeing that he was going to slide down an open hill with another group of tubers, Appellant plainly appreciated the risk of colliding with them.

As in his summary judgment briefing, Appellant improperly depends on and describes three cases—*Louis v. Louis*, 636 N.W.2d 314 (Minn. 2001), *Olmanson v. LeSueur County*, 693 N.W.2d 876 (Minn. 2005), and *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 239 N.W.2d 190 (1976)—to argue that Appellant had to appreciate the

probability and gravity of the potential harm for the primary assumption of risk doctrine to apply. (Appellant's Br. at 23-24.) But in each of those cases, the Minnesota Supreme Court analyzed whether the defendant owed plaintiff a duty, not whether primary assumption of risk applied.

In *Louis v. Louis*, the court addressed whether the defendant owed the plaintiff a duty, as is evident by the court's *first sentence*: "This case involves a landowner's contention that there is no duty of care owed to someone invited onto his land unless a special relationship exists between the landowner and the entrant." 363 N.W.2d at 316. Indeed, the court explained that the *only* issue before it was whether a duty existed: "The sole issue brought before this court is whether appellant owed a duty of care to the respondent." *Id.* at 318; *see also id.* at 318 n.2 ("Appellant did not petition this court for review of the district court's determination that the doctrine of primary assumption of risk did not bar respondent's claim.").

The *Louis* court addressed whether the defendant was entitled to summary judgment on the grounds that he owed no duty to the plaintiff. *Id.* at 329. The court was clear that it first had to analyze the question of whether a duty applied before the district court could analyze primary assumption of risk: "This legal determination must be made before a court considers assumption of risk. If no duty existed, there is no need to determine whether respondent assumed the risk, thus relieving appellant of the duty." *Id.* at 321 (internal citation omitted). It was in that context—determining whether defendant owed plaintiff a duty—that the court explained that the danger had to be known or obvious, and that the probability and gravity of the harm had to be appreciated:

Appellant *would not have owed a duty*, and hence not been liable for any physical harm caused to respondent, if the danger associated with doing a headfirst belly slide was either known or obvious unless appellant should have anticipated the harm despite its known or obvious nature.

*Id.* (emphasis added). The court remanded the case to the district court to determine whether defendant owed plaintiff a duty; that is, whether the respondent knew that the slide was dangerous, and appreciated the probability and gravity of the threatened harm.

*Id.* As such, none of the language the court used to discuss whether a duty existed is relevant to whether primary assumption of risk is applicable.

As with the *Louis* case, the Minnesota Supreme Court addressed only a defendant's duty—not whether primary assumption of risk applied—in *Olmanson v. LeSueur County*: “In this case we are asked to decide whether the 10-year statute of repose provision in Minn. Stat. § 541.051, subd. 1(a) (2004) applies to claims for negligence based on a landowner's common-law duty to inspect and maintain the premises.” 693 N.W.2d at 878. In fact, the phrase “primary assumption of risk” does not appear anywhere in the *Olmanson* decision. Thus, when the court concluded that “whether a condition presents a known or obvious danger is a question of fact”—cited by Appellant (Appellant's Br. at 24)—its conclusion was applicable only to the question of whether a duty applies, not to whether primary assumption of risk applies.

Finally, as with both *Louis* and *Olmanson*, *Ferguson v. Northern States Power Co.* did not address the applicability of primary assumption of risk. Instead, the court's analysis focused on how comparative fault should be analyzed in the context of risks associated with the transmission of high-voltage electricity. 239 N.W.2d at 194. And as

with *Olmanson*, the phrase “primary assumption of risk” appears nowhere in the *Ferguson* decision, and the only mention of that doctrine appears in the court’s statement that the jury found that neither of the plaintiffs had assumed the risk. *Id.* at 193. The court did not review the jury’s finding on assumption of risk and instead addressed only the questions of the degree of care required in the case and contributory negligence.<sup>5</sup> *Id.* at 193-96. Appellant’s statement, therefore, that “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 is posed” (Appellant’s Mem. at 24) is a misleading description of *Ferguson* and finds no support in that case whatsoever. As such, *Ferguson*, *Louis*, and *Olmanson* are inapposite and the District Court properly excluded them from consideration. (A. Add. 11 n.3 (Order).)

*Renswick v. Wenzel*, 819 N.W.2d 198 (Minn. App. July 30, 2012), is also distinguishable. Contrary to Appellant’s assertion, the *Renswick* court did not specifically address the distinction between knowledge and appreciation. Central to the *Renswick* decision was that the case did *not* involve an inherently dangerous sport; instead, it involved an individual who was injured in a dark stairwell at a party at someone’s home. *Id.* at 202-04. After noting that most primary assumption of risk cases “involve[] a

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<sup>5</sup> The fact that the court analyzed contributory negligence further emphasizes that the court was not addressing primary assumption of risk. As Appellant correctly pointed out in his brief, primary assumption of risk applies when the plaintiff assumes well-known, incidental risks, and absolves the defendant of any duty it may have; secondary assumption of risk, on the other hand, is a form of contributory negligence subject to a jury’s apportionment of fault, and may be raised only when the plaintiff has voluntarily chosen to encounter a known and appreciated danger caused by the defendant’s negligence. *Wagner v. Thomas J. Obert Enters.*, 396 N.W.2d 223, 226 (Minn. 1986); *see also* Appellant’s Br. at 18-19.

sporting event that has inherently dangerous features apparent to anyone on their common-sense assessment of risk,” this Court declined to extend the doctrine outside the sporting context:

Wenzel’s call for broad application of the doctrine here cannot scale the wall of cases calling for limited application. . . . Wenzel cites to no authority even suggesting that a district court can, let alone must, apply the doctrine to a reveler’s entry into a darkened home known to have a basement.

*Id.* at 205-06. This Court did *not* base its decision on the distinction between knowledge and appreciation of a risk. In contrast to *Renswick*, this case does not extend the primary assumption of risk doctrine; it falls squarely within the line of cases involving participation in an inherently dangerous sport.

Furthermore, Appellant’s claim that he did not know and appreciate the risk of collisions because he assumed that Green Acres “had made sure conditions were safe” is wholly undermined by the evidence in the record. As explained above, Appellant was aware of each of the conditions upon which his claims rest. Moreover, Green Acres warned Appellant, and all customers, of the risks associated with snow tubing and made clear that it could not eliminate those risks. Multiple and very large signs were posted the day of Appellant’s injury explaining Green Acres’ rules and the risks associated with snow tubing. (R. App. 139-42.) Appellant received and signed a liability release (R. App. 143), and received a lift ticket with the strong cautionary language:

The holder of this ticket is VOLUNTARILY PARTICIPATING in this activity, acknowledges that snow tubing as a POTENTIALLY DANGEROUS activity, and agrees to ASSUME ALL RISK of bodily injury, death, and/or property damage sustained by me . . . incidental to snow tubing, including being struck by other tubers, tubes, or patrons.

(R. App. 145) Appellant did not read the liability waiver because, in his own words, “I don’t remember. I guess I just wanted to get out on the hill.” (R. App. 35.) Appellant cannot now claim that because he did not read all of the warnings and liability waiver, he was unaware of the inherent risks associated with snow tubing.<sup>6</sup>

**D. Appellant Voluntarily Undertook the Risk of Colliding With Another Tuber When He Chose to Slide Down Green Acres’ Snow-Tubing Hill.**

With knowledge and appreciation of the risk of colliding with another tuber, Appellant chose to go snow tubing at Green Acres and to slide down the icy hill head first. As the District Court properly concluded, the consent called for by primary assumption of risk can be implied merely by a plaintiff’s willing participation in an inherently dangerous sport. (A. Add. 13 (Order) (citing *Schneider*, 654 N.W.2d at 151; *Snilsberg*, 614 N.W.2d 738, 746 (Minn. App. 2000); *Andren v. White-Rogers Co., a Div. of Emerson Elec. Co.*, 465 N.W.2d 102, 105-06 (Minn. App. 1991).)

Once Appellant arrived at Green Acres, he had multiple opportunities to observe the hill and decide whether to engage in snow tubing. Armed with his knowledge, Appellant “ran and jumped in [the tube]” or “held [his tube] and jumped forward onto it,”

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<sup>6</sup> Appellant’s claim that it is dangerous to relieve a defendant of a duty when it has warned of the danger must be rejected. Indeed, that is the exact standard Minnesota courts use to determine whether and the extent of a duty for landowners in relation to their invitees. *See, e.g., Renswick v. Wenzel*, 819 N.W.2d at 207 (“Landowners generally owe entrants to their property a duty of reasonable care for their safety. This includes the ongoing duty to inspect and maintain the property free of unreasonable risks of harm, and, concerning a dangerous condition discoverable with reasonable effort, the landowner must either repair the condition or warn invited entrants of its existence.”) (internal citations omitted). Furthermore, for the purposes of its summary judgment motion, Green Acres assumed that it had a duty, and thus neither this Court nor the District Court need to address Green Acres’ duty.

and slid down the hill face first. (R. App. 40 (Grady Dep. Tr.)) As the District Court properly concluded, “the choice to slide down an icy snow hill face-first evinces not only a willingness to relieve others of their obligation for your safety, but to leave your safety largely to chance.” (A. Add. 13 (Order).)

**E. No Evidence in the Record Supports Appellant’s Claim that Green Acres Enlarged the Risk, Created a New Risk, or Mismanaged Its Facility.**

Throughout his brief, Appellant erroneously argues that Green Acres mismanaged its snow-tubing hill, creating heightened or new risks, by failing to have lanes and a designated walkway back to the rope tow, by staffing its snow-tubing hill without employees at the top of the hill telling patrons when to go down, and by employees at the bottom of the hill who were “apparently not paying attention to the tubers. Under the relevant case law, Green Acres did not enlarge the risk to Appellant or create a new risk.

**1. The District Court applied the appropriate test for determining whether Green Acres enlarged the risk to Plaintiff.**

The District Court applied the proper test to analyze whether Green Acres increased the risk to Appellant, concluding that none of the faults that Appellant assigned to Green Acres were “new risks” to which Appellant had insufficient time to react. This Court has twice held that to establish that a defendant enlarged a risk, the plaintiff must show that the defendant created a new risk to which the plaintiff had only limited time to react. *See Schneider ex rel. Schneider*, 654 N.W.2d 144, 152 (Minn. App. 2002); *Jusilla v. U.S. Snowmobile Ass’n*, 556 N.W.2d 234, 237 (Minn. App. 1996). This Court based its analysis in both *Jusilla* and *Schneider* on its holding in *Rusciano v. State Farm Mut. Auto*

*Ins. Co.*, 445 N.W.2d 271 (Minn. App. 1989). In *Rusciano*, this Court concluded that although the plaintiff assumed the risk of being injured by an oncoming car when he stepped in front of it, he did not assume the enlarged risk of the driver's improper conduct of accelerating and failing to brake. *Id.* at 272-73.

The *Jusilla* court clarified the *Rusciano* holding, noting that the defendant had enlarged the risk in *Rusciano* by creating a *new* risk to which the plaintiff had a limited time to react. 556 N.W.2d at 237. This Court then applied that standard to the facts before it in *Jusilla*, in which a patron at a snowmobiling event was injured when he stood in an area that was not protected by the fence with a steel barrier rail that protected the grandstand. *Id.* at 235-37, 238. This Court determined that primary assumption of risk applied and that the defendant had *not* expanded the risk to the plaintiff, and the Minnesota Supreme Court declined review. *Id.*

This Court reaffirmed the *Jusilla* holding in *Schneider*, a case in which a plaintiff was injured while playing paint ball. 654 N.W.2d at 151-52. There, the plaintiff argued that the defendant enlarged the risk that the plaintiff would be hit in the eye with a paintball when the defendant failed to take the necessary precautions to comply with the no-head-shots rule. *Id.* This Court concluded that the defendant "created no additional risks to appellant that were not in existence prior to the appellant taking off his eye protection," because there was no evidence in the record that the defendant's actions in shooting the plaintiff in the eye were analogous to the defendant's actions in *Rusciano*, "when he presented a new and enlarged risk to the plaintiff by accelerating his automobile." *Id.* at 152. Based on *Rusciano*, *Jusilla*, and *Schneider*, a plaintiff must show

that the defendant created a new risk to which he had limited time to react. Appellant has not done so.

**2. Appellant has presented no evidence that Green Acres created a new risk to which Appellant had limited time to react.**

Here, as in *Jusilla* and *Schneider*, Appellant has presented no evidence that Green Acres created a new risk to which Appellant had limited time to react. As the District Court concluded, Appellant had ample notice of the two physical conditions about which he now complains: the lack of lanes and the lack of a designated walkway back to the rope tow. When Plaintiff arrived at Green Acres the day of his injury, even before he purchased his ticket, he saw that there were no lanes on the hill. (R. App. 31-32 (Grady Dep. Tr.)) He again saw that there were no lanes when he was at the bottom of the hill, before going up the rope tow (R. App. 37), and when he was at the top of the hill before tubing down. (R. App. 41.)

Appellant also had ample notice of the fact that employees were not at the top of the hill telling him when to go down. Nor did he produce any evidence that he had a limited amount of time to react to those risks. Indeed, just as in both *Jusilla* and *Schneider*, each of those conditions existed *before* Appellant acted. Appellant himself chose when to go down the hill. (R. App. 39-40 (Grady Dep. Tr.)) He could have chosen not to slide down the hill at any time before he instead chose to jump on the tube head-first.

Finally, Appellant argues that the evidence shows that Green Acres' employees were "not paying attention," which enlarged the risk to Appellant. Appellant's argument fails for two reasons. First, Appellant has not presented any evidence that Green Acres'

employees were not paying attention. The only evidence that he can and has pointed to is (1) that the employees were “probably within three feet of each other” and talking while Appellant and his friends were at the bottom of the snow-tubing hill (R. App. 110-111 (Green Dep. Tr.)), (2) that they were “standing together” when Appellant and his friends were at the top of the hill (R. App. 38 (Grady Dep. Tr.)), and (3) that one of Appellant’s friends steered clear of one of the employees on his way down the hill. (R. App. 114 (Green Dep. Tr.)) That evidence simply does not support Appellants’ claim that Green Acres mismanaged the facility or even that those employees were not doing their jobs. The testimony relied on by Appellant does not call into question the employees’ actions and, instead, constitutes mere speculation. Appellant simply cannot support his claim of mismanagement.

Even if Appellant could somehow establish that the employees’ standing together or Appellant’s friend steering away to avoid a collision with an employee was mismanagement (which he cannot), those risks were not new and Appellant had sufficient time to respond to them. Appellant himself testified that, before he decided to tube down the hill, he saw the employees standing together. (R. App. 38.) At that time, he could have chosen not to slide down the hill. He did not do so. Similarly, Appellant’s friend—not Appellant—avoided the collision with the employee. And Appellant does not allege that he collided with an employee (and the employee testimony confirms he did not). The employee thus did not create a new risk to which Appellant had limited time to respond.

**3. Even if this Court does not apply the “new risk with limited time to react” standard, Appellant has not presented any evidence that Green Acres enlarged Appellant’s risk.**

Even under the cases that Appellant cites that do not explicitly reference the “new risk with limited time to react” standard, Appellant cannot establish that Green Acres expanded the risk. Indeed, in each of those cases, the court focused on whether the plaintiff was aware of the conduct that it argued was negligent, and thus whether the plaintiff could consent to that conduct.

For example, in *Wagner*, the Minnesota Supreme Court analyzed whether the primary assumption of risk doctrine had been appropriately submitted to the jury in a negligence action brought by a patron against a roller-skating facility. 396 N.W.2d at 225. The court emphasized that the parties had presented two distinct versions of the facts surrounding the incident. *Id.* According to the plaintiff, she wanted to step over a metal threshold but the lighting was too dark for her to see; she stepped over the threshold and fell, and then observed that the threshold had a concave, dished contour. *Id.* The defendant, on the other hand, presented evidence that the plaintiff had simply lost her balance while trying to avoid a child. *Id.*

The court concluded that the question of primary assumption of risk was properly submitted to the jury. *Id.* at 226-27. But the court based that decision on the fact that two sets of facts existed about how the accident happened. *Id.* at 226. Notably, the court explained that if the accident had occurred because the plaintiff lost her balance trying to avoid other skaters, primary assumption of risk would apply. *Id.* On the other hand, if the plaintiff fell because it was too dark and she could not see a problem with the metal

threshold, as the plaintiff had testified, the defendant owed the plaintiff a duty of care that was breached, which would be compared with the plaintiff's contributory negligence, if any. *Id.* Because there were two different factual versions of the plaintiff's accident and because the question of which legal principles governed depended on which version of the facts was found by the jury, the court concluded that the question of primary assumption of risk and secondary assumption of risk (and thus negligence and contributory negligence) were properly submitted to the jury. *Id.* at 226-27. Here, there is no similar factual question. Any "problems" that Appellant now identifies were apparent when he chose to slide down the hill.

*Snilsberg* provides another example of how knowledge and consent interact in the context of primary assumption of risk. In *Snilsberg*, the plaintiff sued the owner of an improved lakefront with three docks after she was paralyzed from the neck down diving off of the shortest dock into shallow water to go skinny dipping. 614 N.W.2d 748, 741 (Minn. App. 2000), *rev. denied* (Minn. Oct. 17, 2000). Plaintiff also sued one of the owner's employees, who provided alcohol to her on the night of the accident. *Id.* Plaintiff claimed that the defendant owner had negligently maintained and operated the lakefront area. *See id.* at 743. The court concluded that primary assumption of risk applied because the plaintiff was an experienced swimmer and diver. *Id.* at 746. The court explained that anyone with the plaintiff's experience would know the danger of diving into a dark lake, and that she knew and appreciated the risk of diving into shallow water. *Id.* She was also aware of the shallow water around the dock, and chose to dive into the water, rather than jump or not enter at all. *Id.* Because of those factors, the court upheld the district court's

grant of summary judgment based on primary assumption of risk as to the defendant owner. *Id.*

But the court declined to apply primary assumption of risk for the defendant employee, who had provided the plaintiff with alcohol before her accident. *Id.* at 746-47. The court emphasized that the plaintiff attributed her lack of good judgment in diving off the dock to her alcohol consumption and her haste to enter the water after disrobing. *Id.* at 746. The court concluded that “such evidence could provide a basis for a jury to find that the defendant enhanced or enlarged the inherent risk of diving from the dock at night by giving alcohol to his under-aged guest.” *Id.*

Here, Green Acres is akin to the defendant owner in *Snilsberg*, not the defendant employee. The risks associated with tubing down the hill at Green Acres were apparent to Appellant, just as the risks attendant to diving off the shorter dock was apparent to the plaintiff. In contrast, no facts suggest that Green Acres made it more difficult for Appellant to exercise good judgment or consent to the risks that were apparent to him, as was the case with the employee defendant in *Snilsberg*.

Finally, the *Moe* court did not address an expanded risk created by a facility owner, but did comment on the interplay between knowledge and consent. In *Moe*, the plaintiff sued the defendant after they collided with each other while ice skating. 275 Minn. 448, 449, 147 N.W.2d, 587, 588 (1966). The court concluded that primary assumption of risk was properly submitted to the jury. *Id.* at 451, 589. In reaching that conclusion, the court explained that “one who skates does not assume every risk arising from the negligent acts or omissions of others. The conduct of other skaters may be so reckless or inept as to be

wholly unanticipated.” Here Appellant has not introduced any evidence from which a jury could conclude that Green Acres’ conduct was so reckless or inept as to be wholly unanticipated. Indeed, the evidence shows that Appellant was well aware of each and every condition about which he now complains.

### CONCLUSION

For all of the foregoing reasons, this Court should affirm the District Court’s grant of summary judgment in Green Acres’ favor.

Dated: September 17, 2012

**GREENE ESPEL PLLP**

A handwritten signature in cursive script, appearing to read "Jeanette M. Bazis", is written over a horizontal line. A checkmark is visible to the left of the signature.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2003, which reports that the brief contains 11,246 words.

  
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Jeanette M. Bazis