

Case No. A13-104

State of Minnesota
In Court of Appeals

Kurt Eischen and JoAnn Eischen,

Appellants,

vs.

Crystal Valley Cooperative,

Respondent,

vs.

Dan Eischen,

Respondent.

**RESPONDENT CRYSTAL VALLEY COOPERATIVE'S
RESPONSIVE BRIEF AND APPENDIX**

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

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STATEMENT OF LEGAL ISSUES

I. WHETHER THE TRIAL COURT PROPERLY APPLIED THE DOCTRINE OF PRIMARY ASSUMPTION OF THE RISK TO BAR APPELLANTS' PERSONAL INJURY CLAIMS AGAINST RESPONDENT CRYSTAL VALLEY COOPERATIVE.

Application of primary assumption of the risk was the sole issue raised to the trial court by Respondent Crystal Valley Cooperative (hereafter "Crystal Valley") in its summary judgment motion. A.22.

The trial court, Honorable Bradley C. Walker presiding, dismissed Appellants Kurt and JoAnn Eischen's (hereinafter "the Eischens") claims under the doctrine of primary assumption of the risk. ADD.13.

This issue was preserved for appeal because it was briefed and argued to the trial court and the trial court entered its summary judgment order based on the doctrine of primary assumption of the risk. ADD.13.

Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979)

Wickoren v. Ranch, 1993 WL 173862 (Minn. Ct. App. 1993)

Daly v. McFarland, 812 N.W.2d 113 (Minn. 2012)

Bakhos v. Driver, 275 N.W.2d 594 (Minn. 1979)

STATEMENT OF CASE

This is an action for personal injuries suffered by Appellant Kurt Eischen (hereafter “Kurt Eischen”). A.3-4. All claims were dismissed upon Crystal Valley’s summary judgment motion by Honorable Bradley C. Walker, Blue Earth County District Court, Mankato, Minnesota, on the basis of primary assumption of the risk. ADD.2-14. The Eischens alleged negligence against Crystal Valley for its role in helping to get its sprayer unstuck from the mud in the Eischens’ farm field. A.3-4. Respondent Dan Eischen (hereafter “Dan Eischen”) was brought in as a third-party defendant by Crystal Valley on contribution and indemnity claims because he was the one operating the tractor which was being used to pull the sprayer out of the mud at the time of the injury at issue. A.10-11.

In dismissing the Eischens’ claims the district court relied, *inter alia*, on the facts that (1) Kurt Eischen admitted in sworn testimony that he knew pulling stuck farm equipment out of the mud can be dangerous, (2) Kurt Eischen admitted in sworn testimony that he knew being between the two pieces of stuck equipment when towing starts is the “absolute worst place you can be,” and (3) Kurt Eischen admitted in sworn testimony that he was between the two pieces of stuck equipment when the chain broke and he suffered his injury. A.5-7.

Because, as discussed *infra*, the issue of primary assumption of the risk relates to the question of whether a duty was owed in the first place, it precedes any analysis of potential breach of duty or causation in a negligence action. Thus, Crystal Valley now asks this Court to affirm the district court’s application of the doctrine, while at the same

time setting aside any discussion by the trial court or the Eischens of issues relating to the potential breach of any duty or causation.

STATEMENT OF FACTS

This case involves negligence claims brought against Crystal Valley for injuries sustained by Kurt Eischen in his farm field in Comfrey, Minnesota on July 1, 2010. A.3-4. The Eischens' claims against Crystal Valley relate to an incident in which Crystal Valley's self-propelled nitrogen fertilizer sprayer (also referred to as a "nitro sprayer") became stuck in the mud in one of the Eischens' corn fields and needed to be towed out. *Id.* As discussed in more detail, below, the chain and rope combination which was being used to tow the sprayer broke and whipped into Kurt Eischen's leg, causing injury.

A. Incident at Issue

1. Sprayer Towing Incident Prior to Kurt Eischen's Injury

Crystal Valley's sprayer actually got stuck in the mud twice on the day in question, with the injuries to Kurt Eischen occurring during the second incident. The first incident resulted in a successful towing of the sprayer onto dry ground. In recounting the events of the day in question, it is prudent to begin with some background. The Eischens had set up a fertilizer program with Crystal Valley earlier in 2010. A.135. The first half of 2010 was a very wet year. A.134. Because the field where the accident occurred was late in getting sprayed with nitrogen, Crystal Valley contacted Kurt Eischen wanting to scout the field on the day of the accident to see if it was ready to be sprayed. A.135. Because of the wet conditions, scouting fields was something all farmers were generally doing at this point in 2010. A.134. After Crystal Valley contacted him, Kurt Eischen

inspected the field with three Crystal Valley employees. A.135. The four walked the field and noticed that a notoriously wet part of the field was dry. A.136. Crystal Valley determined the field was ready to be sprayed and Kurt Eischen did not disagree. *Id.*

After it was determined the field was able to be sprayed, Crystal Valley employee Daryl Sonnabend¹ (hereinafter “Sonnabend”) took Crystal Valley’s sprayer out to the Eischens’ farm sometime after noon on the date of the accident, July 1, 2010. A.98. He traveled to the farm with another Crystal Valley employee, Anthony Elg² (hereinafter “Elg”). *Id.* Sonnabend started spraying on the north side of the Eischens’ field. *Id.* At some point, the sprayer got stuck in the field as Sonnabend was spraying. A.99-100. He called Elg for help. A.100. According to Kurt Eischen, nobody had any reason to know that the spot where the sprayer actually ended up getting stuck was going to be a problem area. A.137.

Elg and another Crystal Valley employee Nikolas Samuelson³ (hereinafter “Samuelson”) walked to the stuck sprayer. A.100. Kurt Eischen then came on a four-wheeler, followed by his son Dan Eischen with the tractor that would be used for towing. *Id.* At the time of this accident in 2010 Dan Eischen and his two brothers, Matt and Russ, were involved in the farming operation with Kurt Eischen. A.127. The group did business as Eischen & Sons. *Id.*

¹ Daryl Sonnabend has worked for Crystal Valley for 28 years. A.88 He has been a custom applicator for those 28 years at the Darfur, Minnesota location. *Id.* He has also known Kurt Eischen for those 28 years. A.98.

² Anthony Elg is the plant operator of the Darfur, Minnesota location of Crystal Valley. A.112.

³ Nik Samuelson is a custom applicator for Crystal Valley. A.198.

The Eischens are wrong to suggest in their Brief that Kurt Eischen's son Matt was acting in his capacity as a Crystal Valley employee when he called his father to ask that a tractor be brought to the field to help get the sprayer unstuck. Appellants' Brief, p. 6. Instead, according to the following undisputed testimony, Matt Eischen was acting only as a co-owner of the crops which were being sprayed on that day. For instance, after Elg saw the sprayer get stuck he recalls calling "either Matt or Kurt Eischen, one or the other, because that field was fifty-fifty split, and they were both customers at that time." A.118. According to Kurt Eischen's testimony, Elg is correct in his understanding of this field being rented by Kurt and his son Matt on a 50-50 basis, with the profits from the grain being split equally between the two. A.139. Kurt Eischen's other sons, Dan and Russ, were simply paid salary for their work on the field. *Id.* Kurt Eischen remembers that he first learned of Crystal Valley's stuck sprayer when Matt called him. *Id.* Kurt also confirmed in his testimony that it was his understanding that his son Matt – despite being a Crystal Valley employee at the time – was only involved with the field in question on the day of the accident as a co-owner of the crops on the field. A.140. In fact, Matt Eischen was not even working out of the Darfur, Minnesota location of Crystal Valley; the office which had undertaken the spraying of the field. *Id.*

Kurt and Dan Eischen brought with them a tow rope which was used during the towing operation that day. A.140-141. Dan Eischen backed down the rows of corn with the tractor. A-100. Elg and Samuelson brought two tow chains. *Id.* Elg and Kurt Eischen hooked the chains to the Eischens' tow strap in between the two machines.

A.118. Kurt Eischen acknowledged at his deposition that it is often difficult when towing

stuck farm equipment to get the two pieces of equipment close enough to use “just a rope or just a chain or just a cable[,]” and that in such a situation “[t]here’s just no other way to do it” but to use more than one of those items. A.133. After the chains and rope were connected to the tractor and sprayer, Kurt Eischen waved for Dan Eischen to go ahead:

Q. All right. Who signals Dan to start to go?

A. I don't recall.

...

Q. Okay. But nobody's yelling up to him, anything like that?

A. Somebody must have directed him to get going. I don't know if it was me or Tony, both of us. It could have been.

Q. I'll tell you Dan's recollection, and it matches the Crystal Valley guys, was that you signaled for him to go.

A. Okay.

Q. Is there any reason to argue with that?

A. No.

Q. Okay. And that you just kind of gave him one of these, with your hand forward and back, to go.

A. Okay.

Q. Does that make sense?

A. Yes.

Q. All right. Once you're standing there and he gets -- Dan gets the signal, however it is, to move ahead and he snugs stuff up, what does Dan do?

A. Well, after I wave for him to go ahead, then he pulled it out.

Q. Okay. Does Dan stop the tractor, though, once he's snugged up, and give you an opportunity to get out of the way?

A. I think he does.

Q. That's what he testified to, and does that match your memory?

A. Yes.

A.142-143 (emphasis in original). Kurt Eischen gave this initial signal for his son Dan to move the tractor as he (Kurt) stood “[r]ight in between the tractor and the sprayer.”

A.183. Dan Eischen successfully pulled the sprayer out of the mud with his tractor and took it about 40 to 50 feet. A.103; A.119.

2. Second Towing Incident and Kurt Eischen's Injury

Soon after driving the sprayer again under its own power, Sonnabend and the sprayer got stuck in the mud a second time. A.106. Because Dan Eischen had not even exited the field yet in the tractor, he simply reversed the tractor to tow the sprayer out again. A.107. The chains and tow strap were used as before, with Kurt Eischen and Elg again joining the chains and the rope. A.107; A.119; A.144; A.207. Then – according to Sonnabend as he looked down from the cab of the sprayer – “[a]s soon as Kurt [Eischen] hooked the chain to the rope, he raised his hand for Dan [Eischen] to go, and Dan left right away. And Tony [Elg] walked off -- he run off to the side.” A.107. Kurt Eischen was “[s]tanding right next to” the chain and rope when he gave his son Dan the signal to go. *Id.* Dan Eischen also testified that his father gave him the signal to move ahead while standing next to the rope/chain:

Q. They get things hooked up. What's the next thing that happens?

A. Signals to me to take the slack out.

Q. Who signals to you?

A. Dad did.

Q. All right. When you say “signals,” what does he do?

A. He just signals, “move ahead.”

Q. All right. You motioned with your left hand forward, back and forth?

A. Yes.

Q. Where is he standing when he gives that signal?

A. Right at the connection point between the rope and the chain.

A.185-186 (emphasis in original). Thus, by standing “[r]ight at the connection point between the rope and chain” when the signal was given, Kurt Eischen was in the same position as when he gave the signal the first time the sprayer was pulled out of the mud that day. A.186. Two other Crystal Valley employees on site, Samuelson and Jeffrey Fischer, also recalled seeing Kurt Eischen signal for Dan Eischen to go ahead before he had moved away from the rope/chain. A.40-41, 42; A.208.

Dan Eischen took off with the tractor right away after Kurt Eischen’s signal.

A.107. Dan Eischen agreed that the first thing he did upon his dad’s signal was to start pulling ahead. A.186. According to Kurt Eischen, prior to Dan exerting force the sprayer was stuck and not moving. A.146. The chain broke just as the rope/chain combination got tight, and the chain whiplashed and hit Kurt Eischen in the leg, causing the injuries he now complains of in this lawsuit. A.107, 108; A.186. On this attempt, according to Sonnabend, Dan Eischen “[j]ust took off” and started moving the tractor forward “way sooner than he did the first time” upon being signaled by Kurt Eischen and, as compared to the first attempt, had much less ground to cover with the tractor before the chain/rope was fully tightened. A.107. The chain broke as Kurt Eischen was still standing at the connection point of the rope and chain. A.187. In Kurt Eischen’s own words, the following occurred after the chains and rope were connected:

Well, that’s when I told Dan he had to snug it up again to make sure everything stayed hooked, which he did. And then I turned to walk away, and it snapped.

A.144. Kurt Eischen later in his deposition specified that he “signal[ed]” to Dan Eischen to start moving the tractor:

Q. Before Dan starts to drive away, you signal him to go, is that right, the second time?

A. Yes.

A.149 (emphasis in original). Kurt Eischen also testified that the chain of events was as follows:

Q. Okay. I just looked to see where I -- we'd left off in the chronology, and you said that you had signaled Dan, he moved ahead, snugged everything up, and you turned to walk away, and that's when it snapped.

A. Correct.

Q. All right. Was Dan continuing to move forward as you turn and walk away?

A. I don't recall.

Q. Do you know, had he come to a complete stop?

A. I don't recall.

A.144 (emphasis in original). The chain break and Kurt Eischen's injury all happened after Elg had turned around and was moving away from the rope/chain that he and Kurt Eischen connected. A.119. Samuelson, who was standing at the front left tire of the Miller Nitro sprayer when Kurt Eischen signaled, had actually turned around and started running away from the machines just before the chain broke because, as he described, "there was movement, and from my knowledge of chains, stuff in -- you know, bad things can happen." A.208-209.

B. Towing Farm Equipment out of the Mud Carries Well-Known Incidental Risks and is done as Part of an Inherently Dangerous Profession

Prior to his injury, Kurt Eischen knew and fully appreciated that towing stuck farm equipment out of the mud is a dangerous and risky activity. He admits that being stuck is something every farmer deals with. A.130. At his deposition, Kurt Eischen testified to

having the following specific knowledge before he was injured in 2010:

Q. Okay. We talked about -- again, talked about this at length with Dan yesterday, and he generally agreed with me, I think, that -- pretty common knowledge out in the farming community that pulling out stuck equipment from fields isn't the safest thing you guys have to do.

A. Correct.

Q. You knew that summer of 2010, you knew that before then, you know that today; right?

A. Correct.

Q. I think you'll agree with me that it's pretty common knowledge that when you're pulling something out of a field that's stuck, equipment can get damaged; right?

A. Correct.

Q. And people can get hurt; right?

A. Yes.

Q. And again, you knew that today, you knew it in the summer of 2010, you knew it before then; right?

A. Yes.

A.131 (emphasis in original). Kurt Eischen also admitted having the following knowledge from at least one owner's manual:

Q. Do you remember, with any of the equipment you own, seeing in manuals, owner's manuals, anything along those lines about towing, pulling, et cetera, any of that equipment?

A. Yes.

Q. What do you recall seeing?

A. In the manual, that if -- a warning that if you do pull something, there's always the risk.

Id. (emphasis in original).

Dan Eischen similarly agreed that it is "pretty common knowledge among farming people that pulling equipment can be a dangerous thing". A.168. He also knew people can get hurt severely while pulling equipment. *Id.*

When asked specifically about how to pull out stuck equipment, Kurt Eischen testified as follows:

Q. ... If -- when you're pulling out a piece of stuck equipment, obviously you've got a driver in each piece of equipment; right?

A. Correct.

Q. You're likely also going to need more help than that. You've got other people in the field with you; right?

A. Correct.

Q. Where do you want to have those people positioned when that towing starts?

A. Far away.

Q. You certainly don't want them between the two pieces of equipment, do you?

A. Correct.

Q. In fact, that's probably the absolute worst place you can be; right?

A. Yes.^[4]

Q. And it's the absolute worst place you can be because, if something gives way, those are the people that are the most likely to get hurt; right?

A. Correct, yes.

Q. I'm assuming you knew before this happened to you that if you're caught in that spot between those two people -- or two pieces of equipment, excuse me, you can get hurt pretty severely.

A. Yes.

A.132 (underline emphasis added; boldface in original).

In fact, Kurt Eischen was so confident in his knowledge of the towing process that he admitted neither he nor his sons needed instruction from anyone at Crystal Valley:

Q. ... What, over the years, had you talked to or told your boys about pulling out equipment?

A. Always to keep safety in mind.

Q. At this point, I think -- I apologize, I think Dan said he's
25.

A. Correct.

Q. Matt's your oldest?

A. Correct.

⁴ This particular piece of testimony, among other facts presented herein, was omitted from the Eischen's purported summary of Kurt Eischen's knowledge prior to his injury in July 2010. See Appellants' Brief, pp. 11-12.

Q. Any question in your mind, prior to the date of your incident, all your boys knew what they were supposed to be doing if they had a piece of equipment stuck in a field?

A. I would say yes.

Q. They didn't need anybody from Crystal Valley telling them how to do it, did they?

A. No.

Q. You certainly didn't need anybody from Crystal Valley telling you how to do it, did you?

A. No.

Q. You didn't need anybody – didn't need a neighbor across the road telling you how to do it; right?

A. No, but they do sometimes.

A.138 (emphasis in original). Kurt Eischen further understood that farm equipment can break a tow chain regardless of its size:

Q. ... Is it a fair statement that pulling stuck equipment out safely is as much about the method that you use to do it as it is the equipment you use to do it?

A. I would say yes.

Q. Would you agree with me that whether it's a 3/8-inch chain or a 5/8-inch chain, the size of equipment available to producers today is capable of breaking those chains?

A. Yes.

Q. Would you also agree with me, sir, that if it's a tow rope, it is capable – the equipment used today is capable of exerting enough force on that tow rope to either damage the equipment that the tow rope is attached to or even the tow rope itself?

A. Yes.

Q. I think the fact of the matter is, as I said to your son Dan, it's almost a mathematical problem, isn't it?

A. Yeah.

Q. Stuck piece of equipment weighs so much, the piece of equipment it's pulling it with can exert so much force, at some point you're going to be able to overcome whatever it is that's hooking those two pieces of equipment together; right?

A. Correct.

Q. And that goes back to our point that that's how equipment gets wrecked and people can get hurt; right?

A. Correct.

Q. And that's all stuff you knew summer in the [sic] 2010, you know today, you knew before that; right?

A. Correct.

A.138.

Proving the point that proper method is just as important as proper equipment when towing stuck farm equipment, Elg testified that after Kurt Eischen had been injured and cared for medically, the sprayer was again successfully towed out of the mud using the exact same rope and chains that had been used when the injury occurred. A.119. Elg said that on this final attempt, "Dan [Eischen] pulled very nice and slow and the sprayer come right out." *Id.*

C. Facts which go to the Issue of Breach or Causation are Irrelevant when Deciding whether Primary Assumption of the Risk Applies.

The Eischens' Brief to this Court – and even parts of the trial court's order – contains some discussion of facts which are irrelevant to the sole issue at hand of whether the doctrine of primary assumption of the risk bars the Eischens' claims. Examples of such irrelevant facts and issues include:

- Discussion in the Eischens' Brief of Crystal Valley's alleged failure to properly train employee Sonnabend. Appellants' Brief, p. 5.
- The entirety of the opinions of the Eischens' expert, Robert A. Aherin, Ph.D.. These opinions relate entirely to Crystal Valley's alleged breach of a duty of care which would not exist in the first place if primary assumption of the risk applies to this case. *See* Appellants' Brief, pp. 9-10; *see also* District Court Order at ADD.9.

- Elg’s testimony regarding his knowledge of towing procedures and training on such procedures by Crystal Valley. Appellants’ Brief, pp. 10-11.
- Appellants’ inclusion in its statement of issues the question of whether there is substantial evidence of Crystal Valley’s failure of reasonable care. Appellants’ Brief, pp. 1-2 (citing District Court Order at ADD.11).

These facts would only be relevant to an analysis of breach or causation in the negligence context; or perhaps an analysis of secondary assumption of the risk. But because these issues were not raised in Crystal Valley’s summary judgment motion and were not the basis of the trial court’s order, they should be set aside by this Court in its analysis of primary assumption of the risk.

ARGUMENT

I. STANDARD OF REVIEW

Appellate courts are courts of review and their jurisdiction is limited to questions actually decided by a trial court. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 68 (Minn. 1979). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. “A nonmoving party cannot defeat a summary judgment motion with unverified and conclusory allegations or by postulating evidence that might be developed at trial.” *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002). When reviewing the dismissal of claims pursuant to Minn. R.

Civ. P. 56, this Court reviews de novo “whether a genuine issue of material fact exists”

and “whether the district court erred in its application of the law.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

II. APPELLANTS’ CLAIMS ARE BARRED BY THE DOCTRINE OF PRIMARY ASSUMPTION OF THE RISK

A. Primary Assumption of the Risk Negates a Defendant’s Duty of Care to the Plaintiff.

Generally, “[t]he application of primary assumption of the risk requires that a person who voluntarily takes the risk (1) knows of the risk, (2) appreciates the risk, and (3) has a chance to avoid the risk.” *Peterson ex rel. Peterson v. Donahue*, 733 N.W.2d 790, 792 (Minn. Ct. App. 2007). “Application of the doctrine requires actual, rather than constructive, knowledge.” *Snilsberg v. Lake Wash. Club*, 614 N.W.2d 738, 746 (Minn. Ct. App. 2000). The Minnesota Supreme Court recently reiterated the law on primary assumption of the risk as follows:

The doctrine of 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 an incidental risk, the defendant is not negligent.’” *Wagner v. Thomas J. Obert Enters.*, 396 N.W.2d 223, 226 (Minn. 1986) (quoting *Olson v. Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974)); see also *Armstrong v. Mailand*, 284 N.W.2d 343, 351 (Minn. 1979) (“[Primary assumption of risk’s] application is dependent upon the plaintiff’s manifestation of consent, express or implied, to relieve the defendant of a duty. Its application is not dependent upon the wisdom or reasonableness of the plaintiff’s consent.”).

Daly v. McFarland, 812 N.W.2d 113, 119-120 (Minn. 2012). The *Daly* court also stated, “When applicable, the primary assumption of risk doctrine completely bars a plaintiff’s claim because it negates the defendant’s duty of care to the plaintiff.” *Id.* at 119 (citing

Springrose v. Willmore, 192 N.W.2d 826, 827 (Minn. 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.”)). The case law thus makes clear that an analysis of primary assumption of the risk focuses almost solely on what knowledge the claimant had at the time of his or her injury.

B. The Doctrine of Primary Assumption of the Risk applies to the Specific Facts of the Instant Matter.

The Eischens grossly mischaracterize the record by suggesting that “it is undisputed that Respondent CVC owed Appellant Kurt Eischen a duty of reasonable care.” Appellants’ Brief, p. 14 (citing A-36). Instead, the document on which Appellants rely in making this claim (Crystal Valley’s Memorandum in Support of Summary Judgment) merely argues that through his actions, Kurt Eischen “expressly consented to relieve Crystal Valley of any duty of care which it may have owed to him.” A.36 (emphasis added). In fact, the case law on primary assumption of the risk discussed above clarifies that the application of the doctrine “relieves” a defendant of a duty of care. *See Armstrong*, 284 N.W.2d at 351. Thus – by definition – by arguing that primary assumption of the risk applies, Crystal Valley is saying that it owed no duty of care. *See also* Tr. 21 (in which Crystal Valley’s attorney argues that “[t]he Court has to determine whether a duty existed to Mr. Eischen at all, again based on what he knew and knew at the time he voluntarily chose to assist in the process knowing full well pieces of equipment can get damaged and people can get hurt.”). This Court should decide that no

such duty existed because primary assumption of the risk precludes a finding of negligence on Crystal Valley for the following reasons.

1. Kurt Eischen's Signal to Dan Eischen Constituted His Manifestation of Consent to Relieve Crystal Valley of any Duty because he Assumed Known and Appreciated Risks.

Recall that “[Primary assumption of the risk’s] application is dependent upon the plaintiff’s manifestation of consent, express or implied, to relieve the defendant of a duty.” *Armstrong*, 284 N.W.2d at 351. “Its application is not dependent upon the wisdom or reasonableness of the plaintiff’s consent.” *Id.* In *Armstrong*, the Minnesota Supreme Court applied the doctrine of primary assumption of the risk to preclude wrongful death claims by next of kin of three West St. Paul firefighters who were killed while fighting a fire near a liquid propane storage tank which eventually exploded. *Id.* at 352-53. The court in *Armstrong* reasoned that the risk of explosion was known to the firefighters and that by fighting the fire near the LP tank the firefighters manifested their consent to relieve the defendant (the manufacturer of an allegedly-defective valve on the tank) of any duty. *Id.* The *Armstrong* court noted that several of the decedents’ fellow firefighters testified that they and the decedents knew that the particular type of explosion which occurred (a boiling liquid expanding vapor explosion, or “BLEVE”) was a risk at every LP gas storage tank fire. *Id.* at 347.

In this case, as in *Armstrong*, Kurt Eischen knew the risks of his actions. More specifically, he knew the risks of standing near the tow chains while Crystal Valley’s sprayer was being towed out of the mud; yet he chose to stay in the zone of danger. Just as the firefighters in *Armstrong* knew that the area near the LP tank was dangerous in the

event of an explosion – a somewhat predictable event – Kurt Eischen knew, according to his sworn testimony, that towing stuck farm equipment out of the mud was dangerous and that the area between the two vehicles is the absolute worst place to be. Despite this, Kurt Eischen gave his son Dan the signal to begin moving the tractor too soon and at nobody else's request. By giving his hand signal before leaving the area he knew to be dangerous, Kurt Eischen expressly manifested a consent to relieve Crystal Valley of any duty which it might have owed him relating to the types of ropes/chains being used or the actions of any of its employees up until that time. There can be no question of fact that this hand signal was given while Kurt Eischen was still in a dangerous position next to the tow chains: the testimony of Kurt Eischen, Dan Eischen and all of the Crystal Valley workers in the field that day put Kurt Eischen next to the tow chain at the time he signaled. If Kurt Eischen had simply left the area he knew to be dangerous before giving Dan Eischen the hand signal, this incident and his injuries would not have occurred. There is no plausible reason that Kurt Eischen could not have left the area of the tow chain/rope before giving the signal and watched from a safe distance to see if the rope-chain connection remained true as Dan Eischen started to move the tractor forward and take up the slack. Because the manifestation of consent requirement has been met here, primary assumption of the risk should bar the Eischens' claims in their entirety.

2. The *Bakhos v. Driver* Case is Factually Distinguishable but Supports Application of Primary Assumption of the Risk in the Instant Matter.

Despite being factually distinguishable, the Minnesota Supreme Court case of *Bakhos v. Driver*, 275 N.W.2d 594 (Minn. 1979) is worthy of comment because, by

presenting a case in which the plaintiff did not manifest a consent to relieve the defendant of a duty, *Bakhos* reveals why the application of primary assumption of the risk would be proper in the instant matter. *Bakhos* involved injury suffered by the plaintiff upon falling from a tree he was helping to trim. *Id.* at 595. Specifically, the plaintiff in *Bakhos* had climbed a ladder into a tree to cut off a limb with a power saw while the defendant, among others, pulled on a rope which was attached to the limb to prevent “binding.” *Id.* The defendant was alleged to have been negligent in pulling on the limb while the plaintiff was in a position of danger. *Id.* The *Bakhos* court, in determining assumption of the risk did not apply, specifically focused on the fact that the plaintiff “did not voluntarily choose to expose himself to the risk of the negligent actions of the defendant which caused the fall.” *Id.*

Bakhos is distinguishable from this case because it did not involve any action by the plaintiff which is comparable to Kurt Eischen’s hand signal here. In other words, the plaintiff in *Bakhos* never took any act which constituted an implied or express manifestation of consent to relieve the defendant of any duty. In this case, although Kurt Eischen was in the zone of danger between the tractor and sprayer as he connected the tow chains to the tow rope, there was not yet any danger until power was applied to the tractor’s wheels and the towing process began. It was Kurt Eischen alone who gave the hand signal and determined when that moment arrived. Instead of moving to a safer area before signaling to Dan Eischen, Kurt Eischen placed himself in danger by signaling too early and in doing so assumed the risk of injury to those located between two pieces of farm equipment; risks he admitted to knowing full well at the time. In contrast, there is

no indication that the plaintiff in *Bakhos* gave any signal or instruction for the defendant and others to guide their pulling of the rope attached to the tree limb. It was simply alleged that the plaintiff's act of climbing the tree was his manifestation of consent. *Id.* But the *Bakhos* court properly distinguished such an act (which can otherwise contribute to plaintiff's share of fault) from one which constitutes a manifestation of consent. *Id.* The court found no basis for a finding that the plaintiff in *Bakhos* completely consented to relieve the defendant of any duty to act in a reasonable manner while holding the rope.

Bakhos is also distinguishable because the defendant in that case (who was pulling on the rope) is not akin to Crystal Valley in the instant matter, but is instead symbolic of Dan Eischen; the third-party defendant who was pulling on the chain/rope with the tractor. Because this case is more akin to *Armstrong* than *Bakhos*, and because Kurt Eischen's actions meet the requirements of primary assumption of the risk, this Court should uphold the application of primary assumption of the risk to dismiss the Eischens' claims in their entirety.

3. The Eischens' Attempt to Distinguish Towing to Take the Slack up and Towing with "Real Pressure" is a Moot Point as both are Part of the Same Inherently Dangerous Activity.

The Eischens in their Brief rely entirely on the allegations that Kurt Eischen only intended to remain between the pieces of stuck equipment while Dan Eischen took slack out of the tow rope, or in other words before "real pressure" was applied to the ropes. *See, e.g.*, Appellants' Brief, pp. 2, 14. But this particular fact has no significance to the application of primary assumption of the risk in this case. Taking slack out of the rope is a necessary part of the same activity that Kurt Eischen admitted was risky and dangerous;

that is, pulling stuck farm equipment out of the mud. Whatever Kurt Eischen's intentions were, they do not change the fact that he remained between the two pieces of stuck equipment when power was applied to the tractors wheels and force was applied to the tow rope/chain, or, in other words, when towing began. *See* A.145. And it was Kurt Eischen himself, by giving a hand signal, who voluntarily determined when that moment arrived. Kurt Eischen here knew that "when the towing starts" people need to be positioned "[f]ar away." A.132 (emphasis added). This is not a case where Kurt Eischen has said anything about people only needing to be far away when the towing is in "full swing," or something of the like. Kurt Eischen in this case was between the pieces of equipment and next to the tow rope/chain when the towing started; or, as he admitted, "probably the absolute worst place you can be . . ." at that moment. *Id.*

The Eischens' Brief also misstates the testimony of Dan Eischen on this point. On page 8 of their Brief, the Eischens claim that Dan Eischen testified that at the time the chain broke he had not yet started "putting real pressure" on the tow rope. Appellants' Brief, p. 8 (citing A.187). But Dan Eischen at that point in his deposition said nothing of not "putting real pressure" on the ropes. Instead, he testified that before the chain broke, he had put enough pressure on the rope/chain to lift it off the ground and make it so "everything is tight". A.187. In fact, he had put so much pressure on the rope/chain that despite the fact he did not see the chain break, he heard it break and felt the tractor release when it broke. A.187.

On this topic, the Eischens also misapply the rule which says that a person, within reasonable limits, can assume that others will act with due care. *See* Appellants' Brief, p.

19. This rule is misapplied because the Eischens focus on the conduct of the wrong party. Instead of focusing on Crystal Valley, the focus must instead be on Dan Eischen. At the point in time Kurt Eischen gave the hand signal to Dan Eischen to move forward, the only potential party whose conduct would fall under the rule is Dan Eischen – a party in no way affiliated with Crystal Valley. In other words, upon Kurt Eischen’s signal, Dan Eischen was the only one moving a piece of equipment and was in full control of the force applied to the tow rope/chain. It is important to recall that Kurt Eischen admitted in his deposition that safety while towing is as much about the method of towing as it is about the equipment, and that regardless of chain size, the size of farm equipment available to farmers today is capable of breaking those chains. A.138. This rule of assuming a party acts with due care would only be relevant to a motion brought by Dan Eischen under primary assumption of the risk; an issue which was not raised in the trial court.

4. The Eischens’ Suggestion that Kurt Eischen could not have Predicted the Exact Scenario which Played out too Narrowly Interprets the Facts of this Case.

The Eischens suggest that primary assumption of the risk cannot be applied where the exact chain of events causing injury is not prophesied by the injured person. *See* Appellants’ Brief, pp. 15-16. The Eischens say that the doctrine could only apply here if Kurt Eischen knew specifically that he would be injured by a rope that stretched under load, recoiled, and caused a steel chain to propel toward his leg after the chain broke. *Id.* at 16. However, it should go without saying that the exact chain of events of any accident can never be predicted, regardless of whether it is an accident which would be

subject to the doctrine of primary assumption of the risk. All that is required under the case law discussed *supra* is that a claimant know and appreciate that a particular situation in which he places him- or herself can result in injury. Such a standard is obviously satisfied here based on Kurt Eischen's admissions relating to the risks inherent in standing between equipment during towing. The Eischens' argument on this topic would be the same as trying to say that the primary assumption of the risk doctrine would not apply to a case brought by a spectator along the first base line at a baseball game who was injured by an overthrown ball, when the spectator may have only considered before the game the possibility of being hit by a batted ball while sitting in the same seat. But, in such a case it is unfathomable that a court would differentiate between such events with the same outcome. The exact chain of events is not determinative of the outcome in this hypothetical, nor would it be here. Instead, the outcome is determined by the risk of possible injury which is assumed when placing oneself in a particular location under particular circumstances. Kurt Eischen here put himself in what he admitted to be the absolute worst location during a towing exercise and knew the risks of being there – regardless of whether he could predict the exact chain of events which caused his injury.

C. This Court should determine that Primary Assumption of the Risk can apply to the Towing Activity on the Day in Question.

When discussing the types of cases to which the doctrine of primary assumption of the risk commonly applies, the Minnesota Supreme Court in *Daly* stated:

In addition, the primary assumption of risk doctrine is limited to certain types of circumstances. *See Wagner*, 396 N.W.2d at 226. The doctrine commonly applies to participants and spectators of inherently dangerous sports. *See Id.* (“One of the few instances

where primary assumption of risk applies is in cases involving patrons of inherently dangerous sporting events.”); *see also* *Grisim v. TapeMark Charity Pro-Am Golf Tournament*, 415 N.W.2d 874, 876 (Minn. 1987) (relieving amateur golfers of duty of care towards spectators); *Rieger v. Zackoski*, 321 N.W.2d 16, 23–24 (Minn. 1982) (relieving duty of care towards patrons at the track during a sanctioned auto race); *Moe v. Steenberg*, 275 Minn. 448, 450, 147 N.W.2d 587, 589 (1966) (relieving defendant of duty of care in ice skating collisions); *Modoc v. City of Eveleth*, 224 Minn. 556, 563, 29 N.W.2d 453, 457 (1947) (barring claims by spectators at a hockey game).

Daly v. McFarland, 812 N.W.2d 113, 120 (Minn. 2012).⁵ In other words, the Minnesota Supreme Court has identified spectators at golf, hockey and auto racing events as being in such an inherently dangerous situation that primary assumption of the risk can apply to bar their claims of injury if struck by a golf ball, hockey puck or parts of a race car.

But, as demonstrated *infra*, farming and general use of a tractor in a farm setting is statistically far more dangerous than spectating at sporting events. The following discussion is intended to establish that the activity at issue in this case carries enough risk that it should be classified with those cases to which primary assumption of the risk has previously been applied in this State. To be clear, though, Crystal Valley is not asking this Court to determine that primary assumption of the risk should apply to all lawsuits involving farming or the use of a tractor – or even the general activity of pulling stuck farm equipment out of the mud. Crystal Valley is merely asking this Court to determine that the doctrine applies to the specific facts of this case, based primarily on the unwavering testimony from Kurt Eischen himself that (1) he well knew the risks of what

⁵ Since *Daly* was decided, this Court has upheld the dismissal of claims against a snow tubing operation under primary assumption of the risk. *Grady v. Green Acres, Inc.*, 826 N.W.2d 547 (Minn. Ct. App. 2013).

he was doing, (2) he fully appreciated the risks, and (3) he put himself in harm's way regardless of the risks. In other words, Crystal Valley asks this Court to apply the doctrine only to the extent it was applied by the trial court:

This Court concludes that removing a stuck farm vehicle from a field by a farmer who has spent his whole life engaging in farm activity is another such instance where primary assumption of risk is applicable.

ADD.12.

Crystal Valley is not asking for a broader application of the doctrine because it is willing to agree for purposes of this appeal that farming in general and the general use of a tractor can be done relatively safely. This is consistent with the *Daly* court's analysis of operation of a snowmobile. *See Daly*, 812 N.W.2d at 122 (refusing to overturn two 1974 cases in which the Minnesota Supreme Court chose not to apply the doctrine of primary assumption of the risk to snowmobiling) (citing, *inter alia*, *Olson v. Hansen*, 216 N.W.2d 124, 128 (Minn. 1974) ("A snowmobile, carefully operated, is no more hazardous than an automobile, train, or taxi.")). To remain consistent with *Daly*, Crystal Valley is not seeking a decision by this Court that all injury claims arising from use of a farm tractor are barred by the doctrine of primary assumption of the risk. But the Eischens' argument that "specifically, towing a stuck farm implement from the mud" can be done safely (*see* Appellants' Brief, p. 23) is not supported in the record and is directly contrary to the sworn testimony of each of the persons in Kurt Eischen's farm field regarding the dangers of pulling stuck farm equipment from the mud – including the testimony of Kurt Eischen himself. This argument by the Eischens that towing stuck equipment does not

have inherent dangers thus constitutes nothing more than attempted attorney testimony and should be disregarded.

1. Towing Stuck Farm Equipment out of a Muddy Field is More Dangerous and Risky than the Activities Identified by the Minnesota Supreme Court as being so Inherently Dangerous so as to invoke the Doctrine of Primary Assumption of the Risk.

Available data does not support the notion that spectators at sporting events – especially those discussed in *Daly* – are faced with more inherent dangers than a farmer towing stuck equipment out of the mud. Because of the unfortunate death of a young girl at a National Hockey League (“NHL”) game in 2002, much focus was placed at that time on the safety of spectators at sporting events. Sports Illustrated columnist Michael Farber studied the history of death and injuries to spectators at several different types of major sporting events in preparation for his story entitled “Put Up The Net”; a column in response to the death mentioned above of 13-year-old spectator, Brittanie Cecil, at a NHL game in March 2002. See Michael Farber, *Put Up The Net*, Sports Illustrated, April 1, 2002, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1025417/index.htm> (viewed March 28, 2013). The article was written before widespread use of nets above each end of ice rinks during hockey games, and thus the injury statistics discussed therein came from hockey arenas with no such nets. The statistics gathered by Mr. Farber, when compared to injury and death statistics among farm workers, reveal that farming – and, more specifically, use of tractors – has much more inherent danger than spectating at sporting events. Among the statistics Mr. Farber set forth in his article were the following:

- Washington, D.C. emergency room physician David Milzman presented a paper to the Society for Academic Emergency Medicine reporting that in 127 NHL matches over three seasons in the late 1990s, 122 fans were attended to by first aid stations in the arena for puck injuries; 55 of whom were sent to emergency rooms. The most serious injury reported was to a two-year-old who suffered a severe bruise on the chest. Four eye injuries were reported, but none resulted in loss of vision. Also, ninety of the injuries required stitches. *Id.*
- Dr. Milzman's findings showed a greater rate of injury as compared to the report by then-NHL executive vice president, Bill Daly, who told Mr. Farber that an average of 200 NHL fans were injured by pucks each season in the roughly 1,200 games played each year in the five years preceding the article in 2002. *Id.*
- Auto racing had produced the most fan fatalities in the United States since 1990. The Charlotte Observer reported that over that span from 1990 to 2002, 29 fans were killed and at least 70 were injured. *Id.*
- The baseball Hall of Fame reported that four fans had died after being struck by batted balls; only one of which occurred in the major leagues. *Id.*
- The Professional Golfers Association ("PGA") reported that no gallery member at a Tour event had ever been killed by an errant golf ball, though on average one spectator per tournament is struck. *Id.*

- The death of Brittanie Cecil in March 2002 was the fourth among hockey spectators at any level since 1979. Two others died in small Canadian rinks and one was killed during an exhibition match in Spokane, Washington. *Id.*

Brittanie Cecil remains the only NHL fan ever fatally injured while watching a game. Mike Wagner, *Brittanie's legacy*, The Columbus Dispatch, August 2, 2011, available at <http://www.dispatch.com/content/stories/local/2010/03/21/brittanies-legacy.html> (viewed March 28, 2013).

Compared to spectating at sporting events – even the most dangerous of sports – farming is far more dangerous statistically:

- In 2010 alone, 476 farmers and farm workers died from a work-related injury in the United States. *Agricultural Safety*, Centers for Disease Control and Prevention Website, at <http://www.cdc.gov/niosh/topics/aginjury/> (viewed March 28, 2013).
- Between 1992 and 2009, 9,479 farmers and farm workers died from a work-related injury in the United States. *Id.*
- Every day, about 243 agricultural workers suffer lost-work-time injury; 5% of which result in permanent impairment. *Id.*
- In 2009 there were 280 agricultural deaths caused by vehicular accidents. *Vehicle Hazards*, United States Department of Labor Occupational Safety & Health Administration Website, at <http://www.osha.gov/dsg/topics/agriculturaloperations/vehiclehazards.html> (viewed March 28, 2013).

- Farm tractors are involved in most farm fatalities and injuries. *Id.*
- Farm tractors accounted for the deaths of 2,165 people between 1992 and 2001. *Id.*
- Tractor incidents remain the leading source of death and injury on farms. *Id.*
- Although tractor overturns are the leading cause of death on farms (accounting for an average of more than 90 deaths per year from 1992 to 2009), the Occupational Safety & Health Administration (“OSHA”) has said that dangers also exist from improperly hitching a tractor. *Id.*; *see also Agricultural Safety*, cited *supra*.

Based on the above statistics, this Court should conclude that farming – and more specifically working with a tractor – carries far more inherent danger than any of the sports spectating events which have been identified by the Minnesota Supreme Court as being the types of cases most common for application of the doctrine of primary assumption of the risk. Recall that sports specifically identified by the *Daly* court as being inherently dangerous include golf, hockey and auto racing. *See Daly*, 812 N.W.2d at 120 (citations omitted). According to the above statistics, those sports collectively from 1990 to 2002 caused the death of no more than 33 spectators in the United States and Canada; most of which were spectating at an auto race. But from 1992 to 2009, farming caused the death of more than 9,400 people in this country alone. And farm tractors alone caused the deaths of more than 2,100 people between 1992 and 2001. By

these figures, farm tractors from roughly the early 1990s to early 2000s caused the deaths of about 63 times as many people as did auto racing, golf and hockey combined.

The unique facts of the instant matter, coupled with the relative dangers of the activity at issue when compared with the risks faced by spectators at sporting events, require application of the doctrine. This case is about Kurt Eischen placing himself in a situation which was very similar to the inherently dangerous activities of watching a sporting event at which an object can strike spectators. Just like a person who sits in a precarious spot along the first base line at a baseball game, Kurt Eischen here placed himself in a location which exposed him to the known – and very real – inherent risk of being struck by an object which could injure him. The doctrine should be applied.

2. Kurt Eischen and others Involved on the Date of the Accident have Testified that their Activity was Inherently Dangerous.

Even without the above analysis of the dangers of farming and use of tractors, Kurt Eischen's testimony of the dangers of towing farm equipment by itself is sufficient basis for this Court to apply primary assumption of the risk. Without even looking to injury statistics of the specific activity which it was asked to consider, the Minnesota Court of Appeals has previously applied the doctrine of primary assumption of the risk based on the plaintiff's admission that a certain activity was dangerous, and that such dangers were known by the plaintiff before the injury. *See Wickoren v. Ranch*, 1993 WL 173862 (Minn. Ct. App. 1993)(unpublished opinion attached at RA.1). *Wickoren* dealt with a fall from a horse during a ride at a public ranch. The court's rationale for applying the primary assumption of the risk doctrine was the following:

Wickoren clearly assumed the risk of injury in this case. Wickoren admitted in her deposition that she knew riding a horse could be dangerous and that she could fall off and injure herself. Wickoren had previous experience riding a horse, and the decision to ride a horse that day was completely voluntary. In summary, Wickoren had knowledge of the risk, appreciated the risk, and had a choice to avoid the risk but voluntarily chose to chance the risk.

RA.2.

The same analysis should apply here. Kurt Eischen here admitted in his deposition that he knew standing between the two pieces of equipment when towing started was dangerous and that he could be pretty severely injured. Kurt Eischen had previous experience with towing and testified that nobody – especially Crystal Valley employees – needed to tell him how it should be done. His decision to remain between the pieces of equipment when he gave the hand signal for Dan Eischen to start towing was completely voluntary. Kurt Eischen had knowledge of the risk, appreciated the risk, and had a choice to avoid the risk but voluntarily chose to chance the risk. The risks which Kurt Eischen knew and appreciated were specific to the act of remaining between two pieces of farm equipment while one was towing the other out of the mud.

3. Primary Assumption of the Risk has been applied by Minnesota Courts to Factual Scenarios unrelated to Sports.

Although the Minnesota Supreme Court in *Daly* said that the doctrine of primary assumption of the risk is “commonly” applied to participants and spectators of inherently dangerous sports, the doctrine has been applied in Minnesota to non-sports related cases.

Two such examples are:

- *Armstrong v. Mailand*, 284 N.W.2d 343 (Minn. 1979), discussed *supra*, in which the doctrine barred claims by next of kin of firefighters who were killed by an exploding propane tank while fighting a fire; and
- *Wolf v. Don Dingmann Construction, Inc.*, 2011 WL 9169 (Minn. Ct. App. 2011) (review denied March 15, 2011)(unpublished case attached at RA.3), in which the doctrine barred claims by a homeowner who fell through a 42-by-42-inch hole he knew existed in a part of his home which was under construction at the time.

Because the doctrine is not solely applied to sports-related cases, there is nothing in the applicable case law which would prevent this Court from applying primary assumption of the risk to this specific instance of towing a stuck sprayer out of the mud.

III. THE TRIAL COURT’S ANALYSIS AND RATIONALE SHOULD BE FOLLOWED BY THIS COURT BECAUSE IT EXHIBITS PROPER UNDERSTANDING OF THE FACTS AND ISSUES.

Although the trial court’s order is not afforded deference in a de novo review such as this, the rationale it sets forth is compelling and focuses on the proper issues. The trial court correctly focused on the issue of what dangers were known and appreciated by Kurt Eischen when he stood between the two pieces of farm equipment on the day in question and gave his son the signal to start putting power to the tractor tires. The trial court’s understanding of the proper issues is further exemplified in the exchange that Judge Walker had with counsel for both parties found on pages 23 through 27 of the Transcript. Specifically, Judge Walker properly weeded through the issues relating to the Eischens’

argument that improper equipment was provided by Crystal Valley. Judge Walker

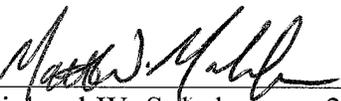
properly identified that “assumption of risk would be a question whether or not you were using a – a tow-rope, a cable, a rubber band, or a huge gigantic chain that they use to moor aircraft carriers. Would it not?” Tr. 23. This Court should adopt the analysis and rationale of the trial court in this matter.

CONCLUSION

For the above reasons and those presented at the oral argument on these matters, Respondent Crystal Valley Cooperative respectfully requests that this Court affirm the district court’s summary judgment in favor of Respondent Crystal Valley Cooperative and against Appellants Kurt and JoAnn Eischen.

Dated this 3rd day of April, 2013.

RAJKOWSKI HANSMEIER, LTD.

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