

State of Minnesota
In Supreme Court

KEVIN KELLY, as Trustee for the heirs and next-of-kin
of KELLY ANN KELLY, Deceased,

Appellants,

vs.

JASON ELLEFSON,

Respondent,

STEVE EIDEMILLER,

Defendant,

and

SUPREME TRANSPORT SERVICES, L.L.C., DAVID L. WHITE,
DIANA WHITE, and D.L. ENTERPRISES, INC.,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Where a plaintiff settles with one defendant before trial and contradicts his claims against that party at trial; may plaintiff's amended complaint, expert-interrogatory answers or expert's affidavit asserting claims against the settling defendant come into evidence substantively either:
 - a. Based on Minnesota's common law admissions doctrine;
 - b. Based on the party admissions rule of Minn.R.Evid. 801(d)(2);
 - c. Under the catch-all exception to the hearsay rule of Minn.R.Evid. 803(24); or
 - d. As a result of application of the doctrine of judicial estoppel?

The Trial Court: excluded the evidence without explanation.

Court of Appeals: held the evidence was admissible under Minnesota's common law admissions doctrine or as an adoptive admission under Minn.R.Evid.801(d)(2) but only to prove fault on the Plaintiff's decedent.

Four most apposite cases:

- (1) *Carlson v. Fredsall*, 228 Minn. 461, 37 N.W.2d 744 (Minn. 1949)
- (2) *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980)
- (3) *State v. Ortlepp*, 363 N.W.2d 39 (Minn. 1985)
- (4) *New Hampshire v. Maine*, 532 U.S. 742 (2001)

INTRODUCTION

An intoxicated, speeding, inattentive driver slams into the side of a semi-tractor and his passenger is killed. Her husband's amended complaint asserts fault on several parties, including the bar where the driver was served. Expert-interrogatory answers identify the basis for the claim against the bar. When the bar seeks summary judgment, the husband resists using an expert affidavit detailing the basis for the bar's liability. The trial court denies the motion.

After settling with the bar, however, the husband disavows the evidence he developed of the bar's fault and argues the contrary. Further, he objects to admission of his amended complaint, expert-interrogatory answers and expert affidavit on the grounds that they are hearsay. The trial court excludes them. Fault is assessed 60% on the semi operator and 40% on the drunk driver.

The Court of Appeals orders a new trial for many reasons,¹ including exclusion of this evidence. This Court accepts review on the admissibility of the amended complaint, expert-interrogatory answers and expert affidavit. The evidence is admissible under any of the following theories: (1) the common law of party admissions; (2) the definition of non-hearsay of Minn.R.Evid. 801(d)(2); (3) the catch-all exception to hearsay of Minn.R.Evid. 803(24); or (4) the doctrine of judicial estoppel. The evidence should be admitted to prove the fault of the bar.

¹ *Kelly v. Ellefson*, No. A04-615, 2005 WL 525548, 2005 Minn. App. LEXIS 235 (Minn.Ct.App. Mar. 8, 2005)(App. 64-9). Because the Court of Appeals found several grounds to order a new trial, this case will be returned for a new trial.

STATEMENT OF THE CASE

Statement of Facts

The accident happened on March 22, 2002. (II 218-9).² At 3:30 p.m. that day, Jason Ellefson left work and went to a bar where he admitted to drinking two bottles of Corona beer. (III 268; III 274). Around 5:00 p.m., Ellefson headed to another bar, Lido's Café, Inc. (III 268-79). He was joined there by several co-workers, including Kelly Ann Kelly ("Kelly"), Corbin Ellefson (his brother), Steve Eidemiller and Erica Eastep. (*Id.*). Ellefson admitted to consuming 3-4 Michelob Golden Light beers at Lido's. (III 275; III 277). Ellefson was not a heavy drinker. (III 307). He was 5'9" and 240 pounds. (III 321).

Around 8:00 p.m. a group of Ellefson's co-workers decided to leave Lido's. (III 278-9). Ellefson admitted he had a "buzz on" (III 307) but still drove his vehicle with Kelly in the front seat and Katherine Martinson and Corbin Ellefson in back. (III 222-24, 280). Erica Eastep and Eidemiller each drove themselves. (III 12-13; III 193).

The three vehicles traveled on County Road C in Roseville, a four-lane road with a speed limit of 45 mph. (II 219; II 220; II 222; II 244; III 286-7; exhibits 1A and 85). There are stop lights at the intersections of County Road C and both Fairview and Cleveland. (II 220).

² All transcript references will be denominated with the volume number followed by the page number.

Approaching the light at Fairview, the vehicles were lined up in one lane in this order: Eidemiller, Eastep and Ellefson. (III 194). At the light, however, Ellefson pulled into the right lane alongside Eidemiller. (III 15; III 194; III 205; III 282). He did so even though he intended to make a left-hand turn at Cleveland. (II 220; III 20; III 287).

Although Eidemiller and Ellefson denied it, there was evidence that they were gesturing to each other at the stop light and that they took off from the light at high speed, racing. (III 15; III 51; III 205; III 232-4; III 247-9; III 285; IV 465). Witnesses put their top speeds at various ranges between 52 and 65 mph. (II 247; III 23; III 234; III 295-7; III 313).

As they charged down County Road C, Ellefson gained on Eidemiller and then Eidemiller removed his foot from the accelerator. (III 20; III 53). Shortly thereafter, Eidemiller saw a semi starting to pull out of the Indianhead lot onto County Road C. (III 21-3). The semi was far off but well lit. (III 54). The front of the semi was in the left westbound lane of County Road C. (III 56). Eidemiller eased off the gas peddle, applied his brakes and coasted easily to a stop. (III 53-5). He stopped about 300 feet west of the accident site. (III 56).

By contrast, Ellefson continued along County Road C at high speed. (III 57-8; III 298). He was not looking ahead but to the side. (III 298). Ellefson's passengers screamed. (III 239; III 299). He looked ahead and saw the semi. (III 299-300). He slammed his brakes, leaving 84.5 feet of skid marks. (II 222; III

119-20; III 165; III 300). Estimates of the time that elapsed while Ellefson was looking over his left shoulder varied between 3 and 5 seconds. (III 240; III 319).

Meanwhile, the driver of the semi, David White, had pulled up to County Road C from a driveway. (II 220-22; III 388-89; IV 392-3). He checked for traffic and testified he saw vehicles stopped at the light at Fairview. (IV 393-4). He pulled onto County Road C, making a hard cut to the right. (IV 394). He moved slowly in low gear. (IV 396). As he did so, Ellefson's vehicle struck the side of his trailer. (IV 398).

A police officer and bystander at the scene both smelled alcohol on Ellefson's breath. (II 227; II 262). Ellefson submitted to blood testing at the hospital. (II 233-34). The testing protocol was followed exactly. (II 234-5). It showed a BAC of .12. (II 235; III 307). Ellefson did not contest the test's legitimacy. (III 309-10). He stipulated at trial that his blood alcohol was .12 approximately two hours after the accident. (IV 335-36).

Procedural History

Plaintiff³ sued Ellefson, Eidemiller, White, his trucking company and related entities (collectively "Supreme").⁴ Plaintiff alleged all three were

³ Plaintiff is Kevin Kelly. He is Kelly's husband and the trustee for her heirs and next-of-kin.

⁴ David White and Diana "Lynn" White are a husband and wife commercial driving team. (IV 362; IV 364-5; IV 370). They were driving for Supreme Transport, Services L.L.C. as independent contractors under the name D. L. (David, Lynn) Enterprises. (IV 264-5; IV 362; IV 371; IV 386; VI 105-6). As noted, throughout this brief these parties will be referred to as "Supreme."

negligent. (App. 1-4).⁵ Supreme answered the complaint and cross-claimed against Eidemiller and Ellefson. (Resp. App. 1). Plaintiff then amended his complaint to add a Civil Damage Act claim under Minn. Stat. §340A.801 against Lido's for serving Ellefson when he was obviously intoxicated. (Resp. App. 5).⁶ Plaintiff alleged the following:

XXI.

Defendant Lido Café, Inc. is a licensed liquor establishment and at all relevant times to the above-referenced action, engaged in the sale of intoxicating beverages in Roseville, Ramsey County, Minnesota.

XXII.

On information and belief, on or about the evening of March 22, 2002, Defendant Jason Ellefson was illegally sold, bartered or given intoxicating beverages, in violation of various provisions of the Minnesota Civil Damages Act, Minn. Stat. §340A, *et seq.* and that as a direct and proximate result of such violations, Defendant Ellefson became obviously intoxicated.

XXIII.

On or about March 22, 2002, Defendant Lido Café, Inc., through its employees, agents or representatives, illegally sold alcoholic beverages to Defendant Ellefson, when he was a patron of Lido Café, Inc.'s bar and obviously intoxicated, in violation of, but not limited to Minn. Stat. §340A.502.

XXIV.

During the evening hours of March 22, 2002, after being illegally sold, bartered, or given intoxicating beverages, by reason of his intoxication, the vehicle driven by Jason Ellefson was involved

⁵ Plaintiff's Appendix will be denominated as App. ____ while Supreme's Appendix will be Resp. App. ____.

⁶ The amended complaint in Plaintiff's Appendix is out of sequence because pages 1-8 (App. 31-38) are separated from page 9 (App. 54). Supreme has attached the entire amended complaint in sequence at Resp. App. 1-9.

in a collision with the tractor-trailer driven by Defendants David and Diana White, causing the wrongful death of Kelly Ann Kelly.

XXV.

As a result and proximate result of Lido Café, Inc.'s violations of the previously mentioned violations of law, Defendant Ellefson was caused to lose control of the vehicle he was operating, which resulted in the wrongful death of Kelly Ann Kelly.

XXVI.

Defendant Lido Café, Inc. is liable for the acts and omissions of its employees, agents, and representatives by and through the respondeat superior doctrine.

XXVII.

As a direct and proximate result of Defendant Lid Café, Inc.'s negligence and carelessness, in serving Defendant Jason Ellefson intoxicating beverages, Kelly Ann Kelly sustained severe injuries, causing her death.

(Resp. App. 5).

Plaintiff's amended complaint contained the certification required by Minn. Stat. §549.211.⁷ Supreme answered the amended complaint and cross-claimed against all co-defendants, including Lido's. (App. 5-7; II 162).

⁷ In pertinent part, Minn. Stat. §549.211, subd.2 provides:

By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

* * * *

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

On May 5, 2003, Plaintiff answered Lido's interrogatories. (App. 41-53). Plaintiff identified Dr. Richard Jensen as a likely expert and explained the basis for the claim against Lido's as:

Lido served Ellefson alcoholic drinks for approximately three hours resulting in a blood alcohol content in excess of the legal limit to operate a car. Ellefson admits he was an inexperienced drinker and the quantity of beverages in combination with Ellefson's level of intoxication should have been obvious to employees of Lido.

(App. 46; 49-50). Plaintiff signed the answers and his counsel certified the answers were in compliance with Minn.R.Civ.P. 26.07. (App. 53).

Plaintiff provided supplemental answers to expert interrogatories ("expert-interrogatory answers") on May 15, 2003. (App. 23-8). He again identified Dr. Richard E. Jensen as his expert on obvious intoxication and detailed Dr. Jensen's opinions as follows:

- (1) Jason Ellefson would have consumed approximately 7.2 fluid ounces of [pure] ethyl alcohol on March 22, 2002 to demonstrate a blood alcohol concentration of 0.12 grams per 100 milliliters of blood on a sample drawn on March 22, 2002 at 10:22 pm. This quantity of pure ethyl alcohol would represent the ethyl alcohol found in two Corona beers and twelve (12) Miller Golden Light beers. Therefore, the amount of alcohol beverage consumptions is grossly understated.
- (2) Jason Ellefson would have been demonstrating a blood alcohol concentration of approximately 0.12 to 0.13 grams of ethyl alcohol per 100 milliliters of blood at the time he was

The text of the required acknowledgement reads: "The parties upon whose behalf this pleading is submitted, by and through the undersigned, hereby acknowledge that sanctions may be imposed for a violation of Minn. Stat. §549.211." (Resp. App. at 13).

last served in Lido's at approximately 7:45 pm on March 22, 2002.

- (3) At a blood alcohol concentration of 0.12 to 0.13 grams of ethyl alcohol per 100 milliliters of blood Jason Ellefson, as an occasional user of alcoholic [beverages], would have been displaying obvious signs of intoxication recognizable by a person employing usual powers of observation when last served at Lido's at approximately 7:45 pm. These signs may include, but not be limited to, slurred speech, unsteady walk or gait, swaying while standing, behavioral changes and personality changes.
- (4) Jason Ellefson would have been displaying a blood alcohol concentration of approximately 0.13 to 0.14 at the time of his accident at 8:13 pm on March 22, 2002. At a blood alcohol concentration of 0.13 to 0.14 grams of ethyl alcohol per 100 milliliters of blood, Jason Ellefson would have been impaired in his operation of his motor vehicle. The alcohol consumed in Lido's caused Jason Ellefson's intoxication and caused or contributed to his accident on March 22, 2002.

(App. 25-6). Once again, Plaintiff's counsel certified that these answers were consistent with Minn.R.Civ.P. 26.07. (App. 27).

Believing Dr. Jensen's opinion was inadequate to sustain a claim under the Civil Damage Act, Lido's brought a motion for summary judgment or for a *Frye-Mack*⁸ hearing on July 1, 2003. (I 7-28). Lido's argued there were several eyewitnesses to the festivities at Lido's and they all claimed Ellefson did not appear obviously intoxicated when last served. (I 4-9). Furthermore, Lido's

⁸ *Frye-Mack* is shorthand for the two-pronged standard for admissibility of novel scientific evidence as established in *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923) and *State v. Mack*, 292 N.W.2d 764 (Minn. 1980). This is the standard applicable in Minnesota. *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000).

asserted that Dr. Jensen's opinion lacked foundation and could not overcome the eyewitness evidence. (I 9-11).

In resisting the motion, Plaintiff submitted an affidavit from Dr. Jensen's dated June 16, 2003 which provided:

1. That he holds a doctorate degree in analytical chemistry, is the owner of Forensic Associates, Inc. in Minneapolis, a forensic toxicology consulting firm, and is the Director of Alcohol Toxicology at MedTox Laboratories, Inc. in St. Paul.
2. That he has qualified and testified as an expert witness in 38 states, including Minnesota, on issues of chemical testing and interpretation of test results. That he has testified regarding the effects of BAC on behavior.
3. That he has reviewed the following information with respect to the above-captioned matter:
 - Traffic Accident Report regarding the accident of March 22, 2002;
 - Bureau of Criminal Apprehension Laboratory report of alcohol analysis of Jason Ellefson;
 - Jason Ellefson's deposition transcript.

* * * *

5. That based on my review of the information, Jason Ellefson would have consumed approximately 7.2 fluid ounces of pure ethyl alcohol on March 22, 2002 to demonstrate a blood alcohol concentration (BAC) of 0.12 grams per 100 milliliters of blood on a sample draw on March 22, 2002 at 10:22 p.m.
6. That this quantity of pure ethyl alcohol would represent the ethyl alcohol contained in two (2) Corona beers and twelve (12) Miller Golden Lite beers.
7. That Jason Ellefson would have been demonstrating a BAC of approximately 0.12 to 0.13 grams of ethyl alcohol per 100 milliliters of blood at the time he was last served at Lido at approximately 7:45 p.m. on March 22, 2002.

8. That according [sic] several established scientific studies and publications, the majority of inexperienced or occasional users of alcohol with a BAC at or about .12 to .13 display obvious signs of intoxication. See e.g. Mediolegal Aspects of Alcohol Ch. 14 (with references) (James Garriot ed, 3rd ed). Such signs may include, but not be limited to, slurred speech, unsteady walk or gait, swaying while standing, behavioral changes, and personality changes.
9. That at a BAC of 0.12 to 0.13 grams of ethyl alcohol per 100 milliliters of blood, Jason Ellefson, an inexperienced and occasional user of alcoholic beverages, would have been displaying signs of intoxication recognizable by a person employing usual and reasonable powers of observation when last served at Lido at 7:45 p.m. on March 22, 2002.

(App. 56-8).

In the accompanying legal memorandum, Plaintiff's counsel argued that Dr. Jensen was well qualified to offer an opinion and that his opinion, in conjunction with other circumstantial evidence was more than sufficient to withstand a motion for summary judgment. (Resp. App. 14). Further, Plaintiff's counsel argued vigorously that Dr. Jensen's testimony was supported by his expertise, training and experience and was fully admissible. (*Id.*). Plaintiff countered Lido's evidence of eyewitness testimony by challenging the credibility of their testimony. (*Id.*). Plaintiff's counsel's oral argument reiterated all of the above. (I 13-22).

The trial court orally denied the motion for summary judgment but did not rule on the *Frye-Mack* request. (II 115).

Before trial began Plaintiff submitted a trial memorandum outlining his claims. Plaintiff argued the following concerning Lido's:

Pursuant to Minnesota's Civil Liability Act, Lido Café is liable for damages resulting from the crash that killed Kelly Kelly because Lido's served alcohol to an obviously intoxicated Ellefson prior to the accident. *See* Minn. Stat. §340A.801. Ellefson's blood alcohol content was nearly .15 at the time he left Lido's. It is undisputed that he was served 12-14 beers at Lido's.

(Resp. App. 28). At the same time, Plaintiff submitted a memorandum in opposition to Lido's motion *in limine* to exclude the testimony of Dr. Jensen on the grounds of lack of foundation or to compel a *Frye-Mack* hearing. (Resp. App. 28). In that memorandum, Plaintiff again asserted the reliability of Dr. Jensen's opinion. (*Id.*).

Before a jury was impaneled, Lido's renewed its summary judgment motion and *Frye-Mack* request in conjunction with its motion *in limine* to exclude Dr. Jensen's testimony. (II 110-13; II 115-6; II 129-31). Plaintiff's counsel responded that the summary judgment motion was improper, as no new evidence had been presented to alter the prior ruling. (II 113-14). Concerning the renewed *Frye-Mack* challenge, Plaintiff's counsel argued:

Doctor Jensen's [sic] opinions have factual support, they are legally admissible, the area and science of toxicology is well-established, it is not junk science. He's testified in 38 states regarding the effects of drinking. The testimony is based on the blood alcohol test results and the depositions and the facts. That's the same factual basis that Dr. Appel has. Minnesota courts have long recognized toxicology as an accepted area of expert testimony and whether a toxicologist routinely testified whether a person would be displaying signs of intoxication. Lido's has not cited one case where a toxicologist has been excluded.

We are not in federal court. The Frye-Mack hearing goes to novel scientific evidence, and toxicology I don't think falls within that. * * * [T]hey are asking for a Frye-Mack hearing to find out whether toxicology is a recognized science area or is it junk science. There is no reason for a Frye-Mack hearing on that issue. There is nothing novel about this. There is nothing unusual. There is no reason to hold a Frye-Mack hearing. And we have addressed whether Dr. Jenson [sic] has sufficient grounds to give his opinion.

(II 113-4). The trial court orally denied the renewed summary judgment motion/motion *in limine* and declined the *Frye-Mack* request. (II 132).

Lido's then settled with Plaintiff on a *Pierringer*⁹ basis in exchange for \$425,000. (II 137-40).¹⁰ By operation of the *Pierringer* agreement, Plaintiff assumed the risk of any fault that would be attributed to Lido's. (II 139-40).¹¹

After the *Pierringer* was announced, Plaintiff's entire approach to the case changed. Plaintiff immediately moved to strike Lido's from the special verdict form. (II 140; II 158-9; II 161). Supreme responded that it had a cross-claim for contribution against Lido's and following a *Pierringer* settlement, the fault of all contributing entities must be included on the verdict form and there was evidence that established Lido's fault. (II 149-50; II 160; II 162). Supreme's evidence in support of Lido's fault was Plaintiff's amended complaint, expert-interrogatory

⁹ *Pierringer v. Hoger*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963) adopted this form of settlement agreement and it was expressly approved *Frey v. Snelgrove*, 269 N.W.2d 918, 921-23 (Minn. 1978).

¹⁰ Eidemiller also settled with Plaintiff on the eve of trial on the basis of a confidential *Pierringer* settlement. (II 37-8).

¹¹ See generally, Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 Wm. Mitchell L. Rev. 1 (1977).

answers and expert affidavit. (II 149-51; II 159-66). Supreme argued all three documents were admissions that could be admitted under the common law rule from *Carlson*¹² and *Lines*¹³ or under the doctrine of judicial estoppel.¹⁴ (II 149-51; II 159-61).

Plaintiff countered that the *Carlson* line of authority applied only to verified complaints and was inapplicable in a notice-pleading context. (II 162-3). Ellefson claimed that even if the documents could come in as an admission of the Plaintiff, they could not be an admission against him. (II 152).¹⁵ Ellefson did not make any formal objection on the basis of Minn.R.Evid. 403 nor did he claim impairment of his right to cross-examination.

Ignoring the evidence issue, the trial court simply ruled: "I'm going to grant the motion to tank 'em [Lido's] and they are not going to be on the verdict form." (II 166; IV 450). Apparently, the trial court was under the misimpression that once a party settles, its fault is out of the case. (II 42).

Later, the parties re-visited the admissibility of these documents when Supreme urged that they were still relevant to whether Kelly was negligent for

¹² *Carlson v. Fredsall*, 228 Minn. 461, 37 N.W.2d 744 (1949).

¹³ *Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978).

¹⁴ In support of the doctrine of judicial estoppel, Supreme cited *Hooper v. Surick*, 552 N.W.2d 31 (Minn.Ct.App. 1996) and *Held v. Mitsubishi Aircraft Int'l, Inc.* 372 F. Supp. 369 (D. Minn. 1987). (II 150-51).

¹⁵ Later, Ellefson suggested that a solution to the perceived problem of the use of the admissions would be to give a limiting instruction to clarify that they were only to be used against the Plaintiff, not Ellefson. (IV 515).

getting into Ellefson's vehicle when he was intoxicated.¹⁶ (IV 353-59). Supreme again urged these documents could be read to the jury as non-hearsay admissions under the common law rule of *Carlson* or based on the catch-all exception to the hearsay rule from Minn.R.Evid. 803(24). (*Id.*). Plaintiff simply countered that the documents were hearsay and could not be admitted. (IV 355). Ellefson made no objection. The trial court excluded the evidence without explanation. (IV 359).

Contrary to the position Plaintiff had advocated before the *Pierringer* was consummated, Plaintiff argued during trial that Ellefson was not served while obviously intoxicated. In his opening statement, for instance, Plaintiff argued that: "all [Ellefson's co-workers], all the bartenders and servers, will tell you that Jason Ellefson did not appear intoxicated. . . . No slurring, no stumbling, no loud or unusual behavior." (II 197).

Consistent with this opening, Plaintiff elicited the following testimony from Eidemiller:

Q: Do you recall that [Ellefson] asked you if you want to go – Jason Ellefson asked you if you wanted to go over to Joe Senser's and throw darts?

A: I think so.

Q: And when you talked to Jason he appeared to be normal?

A: Yes.

¹⁶ Even with Lido's off the special verdict form, Ellefson's intoxication was still relevant to Kelly's contributory fault. Supreme was entitled to show Ellefson was showing signs of intoxication that would have been evident to Kelly. *Nelson v. Nelson*, 283 N.W.2d 375, 377 (Minn. 1979).

Q: And he appeared to be more relaxed than at work but you didn't notice that he was intoxicated or anything?

A: Yes, he was relaxed. Didn't appear intoxicated at all.

Q: Didn't have bloodshot eyes?

A: No.

Q: Wasn't loud or anything like that?

A: No.

(III 13).

Likewise, Plaintiff educed testimony from Eastep that she had no concerns about Ellefson being intoxicated while at Lido's. (III 193). Martinson admitted to Plaintiff's counsel she had no indication Ellefson was intoxicated while the group was preparing to leave Lido's. (III 230). Ellefson, himself, testified under questioning by Plaintiff's counsel that he was not affected while at Lido's and that the Lido's employees did not cut him off. (III 277-78).

In his closing summation, Plaintiff's counsel argued that he did not think drinking played a part in the accident.

I don't know if the drinking played a part or not. One would think it does, but I can't help but think if by Supreme's version that [Ellefson's] not looking for six-and-a-half seconds, I can't look down to pick up a cup of coffee without moving a lane or starting to wander out of my lane, and yet they're claiming for six-and-a-half seconds he was so drunk, and yet he stayed right in this lane. It doesn't make sense.

I would suggest people, that you answer the Special Verdict Form in that regard and make this 50/50, 60/40, 65/35. You can and should argue on who bears the greater responsibility. I know that drinking,

at least I light up thinking boy, darn, that always seems to be a factor. But here I don't know.

(VI 85)(Emphasis added).

The jury attributed 60% of the fault to Supreme and 40% to Ellefson. Supreme brought a post-trial motion raising, among other things, the error in excluding these documents. (App. 9). The trial court rejected the motion without comment on this issue. (App. 59-60).

The Court of Appeals ruled that these documents were adoptive admissions under Minn.R.Evid. 801(d)(2) or under the *Carlson* common law rule. (App. 67). The Court of Appeals determined that exclusion of this evidence was prejudicial error. (*Id.*). However, the Court of Appeals noted that the evidence could only come in to prove Kelly's fault. (*Id.*).

ARGUMENT

I. UNDER MINNESOTA COMMON LAW A PARTY'S COMPLAINT THAT IS INCONSISTENT WITH HIS POSITION AT TRIAL IS ADMISSIBLE.

A. Minnesota's Rule on the Admissibility of Complaints has Developed to Conform with Modern Pleading Rules.

Under Minnesota's common law of evidence, it is well-settled that pleadings are admissible substantively as admissions against a party. The adoption of notice pleading resulted in only minor modifications of this rule – none of which are applicable here. However, to understand this law in context, a brief chronological review of this Court's decisions on admissions is helpful.

As early as 1884 this Court held that a complaint signed by an attorney, even if superseded or amended, could be introduced into evidence as an admission as substantive proof of the matter to which it related. *Vogel v. Osborne*, 32 Minn. 167, 20 N.W. 129 (1884). The complaint did not establish a conclusive fact but, like all evidence, was subject to explanation. *Id.* at 168, 20 N.W. at 129. A complaint was presumed to be authorized by the party unless the party protested that the allegations were made without the party's knowledge or direction. *Id.* This Court acknowledged that: "[t]o introduce such evidence when a party has changed front is a common practice, and we have no doubt a correct one." *Id.* at 168, 20 N.W. at 129. In *Vogel*, the admissibility of complaints was based on two notions: that the party spoke through his attorney, making it fair to impute the statements to him, and that the party could be forced by his opponent to confront and explain his own inconsistencies.

Subsequently, this Court addressed the situation where, after the original complaint is filed, a defendant dies and plaintiff changes course, deciding to sue another defendant under a different theory. *Carpenter v. Tri-State Telephone & Telegraph Co.*, 169 Minn. 287, 211 N.W. 463 (1926); *Bakkensen v. Minneapolis St. Ry. Co.*, 184 Minn. 274, 238 N.W. 489 (1931). In these cases, this Court held that a previous complaint against a now dismissed party was admissible as an admission, thereby extending *Vogel* to situations where a party sought to use the admission to attribute fault to an absent party with no interest in the litigation.

This Court commented further on the issue of the admissibility of complaints in *Hork v. Minneapolis St. Ry. Co.*, 193 Minn. 366, 258 N.W. 576 (1935). The *Hork* decision addressed how complaints could be used at trial. *Id.* It held that counsel could always read portions of his adversary's complaint to the extent it contained admissions, regardless of whether the document itself had been admitted into evidence. *Id.* at 368-69, 258 N.W. at 577. *Hork* clarified that statements in complaints could not be used by the party making them, but otherwise the statements could be read for any legitimate use. Speaking to the evidentiary value of admissions in complaints, this Court stated:

Admissions, if material, are always admissible. Sometimes they have controlling weight with a trier of facts. There can be no more solemn admissions than those made by a pleading, the very purpose of which is so to state the pleader's claims that they may be submitted to a judicial tribunal for final determination.

Id. at 369, 258 N.W. at 577.

In 1949, this Court sought to clarify its previous holdings on the question of the admissibility of complaints in *Carlson v. Fredsall*, 228 Minn. 461, 37 N.W.2d 744 (1949). *Carlson* concerned an automobile accident in which plaintiff sued four defendants. *Id.* One defendant sought to admit plaintiff's original complaint that alleged fault on the part of only two defendants to prove a different version of the accident. This Court made clear that *Vogel* was still in force, holding that statements in a pleading are admissible as admissions against the party who made them. *Id.* at 472, 37 N.W. 2d at 751. Pleadings are presumptively authorized by parties even though signed by counsel. *Id.* at 470, 37 N.W.2d at 750. This Court

stated, “[a] party should not be permitted to avoid the consequences of charges and statements in a complaint by so simple an expedient as stating categorically that he did not verify the complaint.” *Id.* at 473, 37 N.W.2d at 751. The amended or superseded pleadings were admissible as admissions where the pleader was taking a litigation position different from the one it took in the pleading. *Id.* It was “highly prejudicial” to exclude evidence that, if believed by the jury, could have relieved a defendant from liability. *Id.* at 473, 37 N.W.2d at 751.

Once again, the important considerations were: 1) the authority of the attorney to speak on the plaintiff’s behalf; and 2) the inconsistency between the pleading and the current litigation position. *Id.* at 473, 37 N.W.2d 751. The jury was entitled to hear the version of the accident previously advocated by the plaintiff in a complaint even if it was amended or superseded. Accordingly, *Carlson* stands for the proposition that a pleading that shows that a party previously pointed the finger in the direction of different defendants will be admitted against that party.

Although Minnesota’s notice pleading rule became effective in 1952,¹⁷ this Court never saw fit to make any major changes in its admissions doctrine. On the contrary, fully aware of the modern pleading rules expressed in Minn.R.Civ.P.

¹⁷ *Anderson v. Rengachary*, 608 N.W.2d 843, 852 n.9 (Minn. 2000) (Gilbertson, J., concurring in part and dissenting in part)(citing *Pirsig on Minnesota Pleading* § 1, 21-23 (4th ed. 1956))(noting that Minnesota became a notice pleading state in 1952 with the adoption of the current version of Minn.R.Civ.P. 8.01).

8.01, this Court, made only minor refinements in the admissions doctrine in response.

For example, in 1954, two years after notice pleading was adopted in Minnesota, this Court reaffirmed its holding from *Carlson* that a party's pleadings are admissible if they are inconsistent with the party's current litigation position. *Wilson Storage & Transfer Co. v. Geurkink*, 242 Minn. 60, 64-67, 64 N.W.2d 9, 14-15 (1954). However, in *Wilson*, this Court modified *Carlson* to accommodate the new liberal pleading rules. *Id.* at 67, 64 N.W.2d at 15. In *Wilson*, the plaintiff added a new defendant to its complaint after the original defendant cross-claimed. The jury found that the new defendant was exclusively at fault and awarded damages to both plaintiff and the original defendant. *Id.* The new defendant sought to admit plaintiff's first complaint that specifically alleged *only* the original defendant had proximately caused all of plaintiff's damage. *Id.* at 66, 64 N.W.2d at 12-13. The Court did not want to discourage the proper use of the new notice pleading rules which enable a party to freely amend and join parties upon discovering new information. Thus, it held that the trial court had not erred in excluding the original complaint as an admission.

Later, when Minnesota had been a notice pleading state for twenty-six years, this Court again reaffirmed the rule from *Carlson* but declined to extend its admissions doctrine to statements of the case. *Lines v. Ryan*, 272 N.W.2d 896,

902 n. 4 (Minn. 1978).¹⁸ In *Lines*, this Court noted in dicta that a pretrial statement of the case, filed pursuant to the special rules of the Fourth Judicial District, might not carry with it the same implied authority of the attorney to make admissions on the client's behalf as a complaint.¹⁹ *Id.* The Court did not elaborate further on which documents, other than a complaint, would constitute admissible pleadings.

In 1992, this Court carved out an exception to its rule regarding the admissibility of pleadings as admissions. *In re Petition for Disciplinary Action Against Perry*, 494 N.W.2d 290 (Minn. 1992).²⁰ There this Court was presented with a case where an attorney took inconsistent positions in different suits on the question whether he misused trust funds that he shared with his mother. *Id.* at 293. This Court held that complaints from prior lawsuits that are inconsistent with a litigant's position at trial were still admissible as admissions. *Id.* at 293-4. This Court was persuaded, however, that alternative or inconsistent statements in the same pleading should not be used as admissions because such a practice would discourage use of the liberal pleading rules. *Id.* at 294. In considering this issue this Court stated:

While hypothetical and inconsistent pleadings within the same action should not be used as admissions in other lawsuits, pleadings

¹⁸ This Court's awareness of the liberal pleading rules is clear, since this Court discussed them elsewhere in the opinion. *Id.* at 901 n. 3.

¹⁹ Portions of the statement of the case were read to the jury, but the document itself was not admitted into evidence. *Lines* at 901.

²⁰ This case was tried after the adoption of both notice pleading and the Minnesota Rules of Evidence.

that do not fall within these categories may be admitted as admissions in subsequent lawsuits if they are within the established bounds of relevancy. Respondent did not make inconsistent pleadings outside the instant action. They are fully consistent with themselves and with each other. Consequently, because respondent's pleadings were neither hypothetical nor inconsistent, the pleadings made in the other actions in which respondent was involved are admissible in this disciplinary action.

Id. at 294. *Perry* does not limit the admissibility of pleadings to statements regarding the pleader's own behavior as is suggested by Plaintiff.

It is clear that the Minnesota common law regarding admissions is robust despite the change in the pleading rules. By the time it decided *Wilson, Lines* and *Perry* this Court was fully aware of the new pleading rules and plainly did not think they necessitated a wholesale change in the admissions doctrine. On the contrary, this Court modified its previous holdings to comport with the liberal pleading rules in ways it thought necessary. Plaintiff's contention that *Carlson* "has no precedential value in this case" due to Minnesota's adoption of notice pleading is meritless.

Moreover, the adoption of the Minnesota Rules of Evidence in 1977 did not affect this Court's precedent. The Minnesota Rules of Evidence were meant to be consistent with existing Minnesota law on evidence, unless otherwise indicated. *See* Minn.R.Evid. Preliminary Comment. Therefore, although most of the precedent on the admissibility of pleadings predates the adoption of the Minnesota

Rules of Evidence,²¹ this does not affect the precedential value of the Minnesota common law decisions admitting pleadings as admissions.

In short, relevant statements in abandoned pleadings are admissible substantively as admissions against the pleader, even where they allege the fault of dismissed parties, except where the statements were made hypothetically or alternatively. The court may also exclude an earlier complaint when a later complaint merely adds a party defendant based on new information.

B. The Minnesota Rule on the Admissibility of Complaints is Consistent with Most Other Jurisdictions.

This Court is not alone in holding that pleadings, as a matter of common law, are admissible in evidence as admissions. Numerous other courts have held that pleadings are admissible as admissions of the party.²² Some courts, including

²¹ *Lines v. Ryan* at 902 n. 6.

²² For a detailed discussion of the rule in various jurisdictions see Sherman J. Clark, *To Thine Own Self be True: Enforcing Candor in Pleading Through the Party Admissions Doctrine*, 49 Hastings L.J. 565 (1998)(hereafter “Clark, *Candor in Pleading*”). Specific cases of interest include: *Dreier v. The Upjohn Co.*, 196 Conn. 242, 492 A.2d 164 (1985)(holding that all statements in pleadings can be admitted as admissions regardless of whether they are part of alternative causes of action or statements of a conclusory nature); *Pankow v. Mitchell*, 737 S.W.2d 293, 296 (Tenn.Ct.App. 1987); *Outer Banks Contractors, Inc. v Forbes*, 302 N.C. 599, 276 S.E.2d 375 (1981)(holding that pleadings including a stipulation order were admissible); *Roth v. Roth*, 45 Ill. 2d 19, 256 N.E.2d 838, 840 (1970); *Bledsoe v. Northside Supply & Devel. Co.*, 429 S.W.2d 727, 730 (Mo. 1968)(admissions in an abandoned pleading are admissible in evidence to be weighed by trier-of-fact); *Hardy v. Raines*, 228 Ark. 648, 310 S.W.2d 494, 497 (1958)(complaint admissible against party so long as he had knowledge of its contents); *Kunlig Jarnvasggtirelsen v. Dexter & Carpenter, Inc.*, 32 F.2d 195 (2d Cir. 1929)(holding that a pleading, whether amended or withdrawn, is admissible as an admission); *Baltimore, O. & C.R. Co. v. Evarts*, 112 Ind. 533, 14 N.E. 369 (1887)

this Court, have even extended the admissions doctrine to pleadings from prior litigation. *In re Petition for Disciplinary Action Against Perry*, 494 N.W.2d 290 (Minn. 1992); *See McCormick on Evidence* §257 (5th ed. 1999)(“A party’s pleading in one case, may generally be used as an evidentiary admission in other litigation.”). Like Minnesota, other courts have admitted pleadings generally but carved out exceptions for statements that pertain to alternative or hypothetical forms of pleading. *Id.*²³ Some courts go further than Minnesota by making a blanket rule on the admissibility of complaints that includes hypothetical and alternative statements. *Enquip, Inc. v. Smith-McDonald*, 655 F.2d 115, 118 (7th Cir. 1981)(noting the importance of allowing a party to explain his prior complaint); *Dreier v. Upjohn Co.*, 196 Conn. 242, 492 A.2d 164, 167 (1985). The reasoning behind the broader rule is that the nature of these statements goes to their weight rather than their admissibility. These statements can be explained to the jury which might significantly detract from their probative force.

(holding that a paragraph of a complaint that has been withdrawn by dismissal may be introduced into evidence by the defendant).

23 Plaintiff misleads this Court by quoting the McCormick treatise out of context. [Plaintiff’s Brf. p. 14.] The quoted statement, “It can be readily appreciated that pleadings of this nature are directed primarily to giving notice and lack the essential character of an admission,” relates to alternative and hypothetical forms of pleading and not pleadings generally. The full quotation reads, “The modern equivalent of the common law system is the use of alternative and hypothetical forms of statement of claims and defenses, regardless of consistency. It can be readily appreciated that pleadings of this nature are directed primarily to giving notice and lack the essential character of an admission.” *Id.* (Emphasis added).

Here, the relevance of the amended complaint is beyond question. Plaintiff added a claim against Lido's in his amended complaint. This claim twice survived Lido's summary judgment motions. In addition, the expert affidavit supporting the complaint was found unworthy of a *Frye-Mack* hearing. In other words, the trial court reached the legal conclusion that there was a question for the jury as to Lido's fault and the expert's opinion had sufficient scientific reliability. Minn.R.Civ.P. 56.03, Minn.R.Civ.P. 56.05.

Additionally, the fact that Plaintiff settled with Lido's on a *Pierringer* basis heightens the relevance of the statements in the amended complaint. Under the *Pierringer* settlement, Plaintiff effectively stepped into the shoes of Lido's and agreed to assume whatever comparative fault the jury might allocate to Lido's. See Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 Wm Mitchell L. Rev. 3 (1977). Lido's, then, in one sense, remained a "defendant" although it was not present and had no further interest in the outcome of the litigation. Lido's fault would have been before the jury if not for Plaintiff's strategic about-face on the subject of obvious intoxication.

Once Plaintiff settled with Lidos, he objected to the admission of the amended complaint as hearsay. The trial court clearly erred in its application of Minnesota law and should have admitted the complaint as substantive evidence of both Kelly's and Lido's fault. The jury was entitled to hear of Plaintiff's previous theory that Lido's bar was at fault for serving Ellefson when he was obviously intoxicated. According to well-settled Minnesota precedent, the fact that Lido's

was dismissed from the action should have had no effect on the trial court's evidentiary ruling.²⁴ It was proper to admit the amended complaint to show that Plaintiff had previously claimed other parties were at fault.

Moreover, there was no reason to exclude the amended complaint on the basis of inconsistent or hypothetical claims. The claim against Lido's was not brought in the alternative and was fully consistent with the rest of the claims enumerated in the amended complaint. The only inconsistency was between the amended complaint and Plaintiff's position at trial. This is the very inconsistency that the Minnesota common law doctrine of admissions addresses. Plaintiff's argument concerning the unfairness of admitting hypothetical or inconsistent pleadings is not relevant here and poses no impediment to application of the admissions doctrine. This Court should affirm the Court of Appeals and hold that the amended complaint was admissible under the common law admissions doctrine.

C. The Minnesota Rule on the Admissibility of Complaints as Admissions Encourages Candor and is Consistent with Modern Pleading Practice.

Not only is Minnesota's rule on the admissibility of complaints well-settled, it is good policy. Plaintiff's amended complaint and all other papers filed

²⁴ The Court of Appeals erred as well when it held that the pleadings could be used to prove the fault of Kelly only. This Court's precedent demonstrates that a valid use of an admission in a complaint is to shift fault from one defendant to another, not just to the pleader. *See Carlson v. Fredsall* 228 Minn. 461, 37 N.W.2d 744 (1949).

with the court are subject to the candor requirements of Rule 11. Minn.R.Civ.P. 11.02. No statements signed by the litigant or his attorney can be made without “information and belief formed after reasonable inquiry” and all statements must be well grounded in fact and law. Minn.R.Civ.P. 11.02.

Additionally, parties in Minnesota are subject to the obligations of Minn. Stat. §549.211 and Plaintiff understood this by signing the acknowledgment required by that statute. (Resp. App. 13). Thus, although Minn.R.Civ.P. 8.05 allows significant liberality in pleading, this is not *carte blanche* to bring claims with no basis. *Id.* (“all statements shall be made subject to the obligations set forth in Rule 11”).

The Supreme Court of Connecticut considered the issue of the admissibility of statements in a superseded complaint in which plaintiff brought a malpractice action against her doctor as well as a drug manufacturer. *Dreier*, 196 Conn. 242, 492 A.2d 164, 166. She later amended her complaint to withdraw her claim against the drug manufacturer. *Id.* The trial court admitted the earlier complaint as substantive evidence tending to prove that the doctor was not at fault for the injury to plaintiff. *Id.* The Supreme Court of Connecticut affirmed, holding that notice pleading should not change the rule regarding the admissibility of complaints because, “[w]hile alternative and inconsistent pleading is permitted, it would be an abuse of such permission for a plaintiff to make an assertion in a complaint that he does not reasonably believe to be the truth.” *Id.* at 167. The court also did not limit its holding to factual statements in the complaint.

Allegations of a conclusory nature were also held admissible, although the conclusory nature of the statement might affect its weight as evidence. *Id.* at 169. Thus, the Supreme Court of Connecticut acknowledged that a jury is entitled to hear how a litigant has changed its position regarding the fault of the parties.

Although Plaintiff argues here that treating the statements in complaints as admissions frustrates liberal pleading rules, just the opposite is the case. It is appropriate to make a litigant confront his statements where the statements themselves must meet a minimum threshold of honesty. To deny the admissibility of statements in a complaint would improperly extend the effect of our liberal pleading rules far beyond the policies supporting them. If a litigant wishes to offer an explanation about his admitted statements, he is free to do so, just as he is with any other piece of evidence. Furthermore, it is absurd for a party to assert, as Plaintiff does here, that a claim that survived a summary judgment motion is too speculative for the jury to hear.

Further, the admissions doctrine may be absolutely necessary to insure honesty and candor in pleading. *See Clark, Candor in Pleading, supra* (arguing that “the policies underlying a regime of liberal pleading recommend, if not demand, that most such statements be admissible”). A litigant’s knowledge that he or she can be confronted about statements made in a complaint will supplement Rule 11’s admonition that claims must be not be frivolous or brought for an improper purpose. Indeed, Rule 8 was designed to make litigation less a matter of gamesmanship and more a matter of fair and honest resolution of disputes. *Id.* at

589. As Professor Clark observes, “parties with most reason to fear being confronted with their own pleadings are those who have misused the liberal pleading rules by introducing baseless claims or by pretending to have a level of certainty they did not possess.” *Id.* at 584.

D. The Minnesota Admissions Doctrine Does Not Create Bad Policy

Plaintiff makes several policy arguments claiming that the Minnesota admissions doctrine is unfair: 1) if the amended complaint is admissible against him, he will be forced to discredit his own expert; 2) defendants should not be able to free-ride by using a plaintiff’s evidence; 3) use of the admissions doctrine discourages settlement. These are unpersuasive.

Firstly, there is no prohibition on discrediting one’s own witness. It happens in many contexts. Secondly, litigants have other ways of minimizing the effect that an admission would have, short of discrediting their own expert. They can explain the context for the complaint. For example, if the complaint was filed or amended at the last minute to preserve rights, plaintiffs could explain this to the jury. Most obviously, plaintiffs could try to convince the jury that the settling defendant was, in fact, the less at fault tortfeasor, thereby neutralizing the evidentiary force of the admission. This would not demonstrate any inconsistency on the part of the plaintiff nor make him look foolish to the jury.

Likewise, Plaintiff’s protestations that Supreme should not have been able to “ride his coattails” puts considerations of tactics over truth-seeking. The party admissions doctrine is designed to protect against the very sort of tactic that

Plaintiff used at trial. *See U.S. v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984)(stating a party “cannot advance one version of the facts in its pleadings, conclude that its interest would be better served by a different version, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories”). Furthermore, the value to Supreme of Plaintiff’s admission goes beyond its probative value. As the admissions doctrine contemplates, it is important to expose that the evidence was Plaintiff’s as part of his earlier position. *See Collins v. Wayne Corp.*, 621 F.2d 777, 781 (5th Cir. 1980) (holding that it was error to admit defendant’s expert’s deposition without allowing the jury to hear that the expert was hired by defendants); *Dugan v. EMS Helicopter, Inc.*, 915 F.2d 1428, 1435 (10th Cir. 1990)(part of importance of admission is party’s former belief that more than one party was at fault); *Williams v. Union Carbide Corp.*, 790 F.2d 552, 556 (6th Cir.), *cert. denied*, 479 U.S. 992 (1986).

Hence, that a defendant might use an admission and obtain evidence of the plaintiff’s creation is not a reason to reject the admissions doctrine. It is not coattailing to inform the jury that plaintiff once believed something different from the theory he or she argues at trial. It is simply evidence. Furthermore, the court’s interest in efficiency is not served when every party must employ his or her own expert unnecessarily.

Plaintiff’s third policy argument, that application of the admissions doctrine will discourage settlement, is unpersuasive. Minnesota’s preference for settling

cases is predicated on the notion that society benefits when parties resolve their differences without resorting to a trial. See *Weikert v. Blomster*, 213 Minn. 373, 375, 6 N.W.2d 798, 799 (1942). In a multi-party situation where one party settles on a *Pierringer* basis, this policy is not effectuated by partial settlement. A jury will still be called to resolve the liability of the non-settling defendant(s). There is very little, if any, of the sort of savings that is contemplated by a policy favoring settlement. On the contrary, a settlement with one party that effectively eliminates valuable evidence from the case only confuses the issues, complicates matters for the jury, and interferes with the truth-seeking process. A coherent version of the story becomes impossible if all of Plaintiff's admissions disappear with the settling party.

Additionally, if the use of admissions were to inhibit settlement, it seems likely this would have already occurred. The fact that it has been 27 years since *Lines v. Ryan* was decided and yet during that time period numerous *Pierringer* settlements have been accomplished²⁵ proves parties are not deterred from settling by the prospect that pleadings can be used as admissions.

Even if the admissions doctrine will cause plaintiffs to think twice about settling with one party in a multi-party case, this is a minor tax on that choice.

²⁵ This Court has commented on numerous occasions on the use of *Pierringer* agreements since *Lines*. *Schneider v. Buckman*, 433 N.W.2d 98, 101 (Minn. 1988); *Reedon of Faribault, Inc. v. Fidelity and Guaranty Ins. Underwriters, Inc.*, 418 N.W.2d 488 (Minn. 1988); *Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794 (Minn. 1987); *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289 (Minn. 1986); *Wolner v. Mahaska Indus., Inc.*, 325 N.W.2d 39 (Minn. 1982).

The plaintiff has gained the advantage of obtaining a partial recovery, and this should be weighed against the risks. *Pierringer* releases contemplate that the settling tortfeasor will be on the verdict form. *Lines*, 272 N.W. 2d 896 (Minn. 1978). Therefore, the plaintiff is already in the position to weigh the risks and benefits of settlement. The plaintiff will take care to assure that the recovery from the settling defendant is substantial enough to justify the risk that the jury may assign a large amount of fault to that defendant based on admissions.

In this case, Plaintiff's objection to the admission succeeded in creating an evidentiary vacuum and distorting the facts of the accident. Before settling, Plaintiff argued vigorously that Lido's was at fault in the accident. However, once he recovered from Lido's, Plaintiff denied obvious intoxication. During his opening statement, Plaintiff's attorney stated, "all [Ellefson's co-workers], all the bartenders and servers, will tell you that Jason Ellefson did not appear intoxicated." Thereafter, during the testimony, Plaintiff's counsel elicited testimony that Ellefson did not appear to be impaired by his drinking while at Lido's from four different witnesses. In his closing Plaintiff's counsel claimed that he did not think that drinking was a factor.

By seeking to exclude all evidence of Lido's fault, Plaintiff enabled the jury to assign 100% of the fault to the remaining parties. The court's interest in honesty and candor cannot be sacrificed in order to facilitate the result that the trial court produced in this case. Plaintiff should only be able to recover what he can recover while proceeding candidly and honestly, without advocating different

versions of the facts. Most importantly, the jury is entitled to hear a coherent account of the facts that led to the harm. The Minnesota rule on the admissibility of pleadings creates the proper incentives and should be reaffirmed.

E. The Logic of Minnesota's Common Law on the Admissibility of Pleadings Extends to Expert Affidavits and Interrogatories.

Admittedly, there is some unclarity in Minnesota law as to the breadth of the rule on the admissibility of pleadings. Although this Court's precedent contemplates that pleadings other than complaints should also be treated as admissions,²⁶ there is little if any law on this issue. However, the rationale supporting the admission of a party's complaint is even stronger for expert-interrogatory answers and expert affidavits.

Expert-interrogatory answers and expert affidavits carry with them even greater indicia of reliability than a complaint. They are generally made when the litigation has developed further. The expert-interrogatory answers are subject to a rule identical in all respects to Rule 11. See Minn. R.Civ. P. 26.07 Advisory Committee Notes – 1985. The same duty of candor is required in discovery responses and complaints. *Id.* The expert affidavit is a statement made under

²⁶ This Court stated in *Carlson*, “[i]t may be that where the statements are made under oath they are entitled to greater weight than otherwise, but it should not affect the admissibility of the statements as an admission.” *Carlson* at 473. This suggests that admissible pleadings might include affidavits or other pleadings and that the argument for their admissibility might be stronger than it is for complaints. Likewise, in *Lines* this Court did not say that the admissions doctrine was limited to complaints. It held that the doctrine did not extend to statements of the case, but otherwise left open the question of what other pleadings might come under the admissions doctrine. *Lines* at 902 n. 4.

oath, giving it an even greater degree of reliability. It is even more reasonable to hold a party responsible for his expert disclosures than his complaint where the expert responses were developed at a more advanced stage of the litigation and carry equal or greater reliability.

Additionally, the expert-interrogatory answers are statements made by the attorney as to what an expert is prepared to say at trial. Minn.R.Civ.P. 26.02(d)(1)(A). They are no less attributable to the party than are complaints. This accounts for the statement just below the caption on Plaintiff's expert-interrogatory answers: "The Plaintiffs above named supplement their discovery to Defendants' Expert Witness Interrogatories . . . as follows." (App. 23)(Emphasis added). Likewise, the expert affidavit is created pursuant to a trial strategy that client and attorney are presumed to prepare together. Furthermore, Plaintiff's attorney, in his representational capacity, advocated the expert affidavit before the trial court in opposition to Lido's motion for summary judgment. The expert disclosures are attributable to Plaintiff and should be admitted as admissions along with the complaint.

II. UNDER THE MINNESOTA RULES OF EVIDENCE AN AMENDED COMPLAINT, EXPERT-INTERROGATORY ANSWERS AND EXPERT AFFIDAVIT ARE ADMISSIBLE AS ADMISSIONS OF A PARTY OPPONENT.

The Minnesota Rules of Evidence were enacted in 1977. Minn.R.Evid. West, p. 407, *Minnesota Rules of Court* (2005). They were based on the Federal Rules of Evidence and this Court may look to federal case law for guidance. *State*

v. *Amos*, 658 N.W.2d 201, 204 (Minn. 2003). Under the rules, hearsay can be excluded at trial if it does not fall into one of the exceptions. Minn.R.Evid. 802. However, admissions occupy a place all their own and are deemed non-hearsay. Minn.R.Evid. 801(d)(2). There is no requirement that the admitted statement be from personal knowledge. Minn.R.Evid. 801(d)(2) Committee Comment- 1989. Even opinion evidence can come in as an admission. *Id.* The basis for their admission is grounded in principles of estoppel. A party who makes a statement cannot deny that his own statement is untrustworthy. *McCormick on Evidence*, §254 (5th ed. 1999). Admissions can come into evidence substantively. *Id.* The only conceivable restriction on the admissibility of an admission is relevance. Minn.R.Evid. 402.

Rule 801(d)(2) tracks the common law decisions of this Court quite closely by requiring that: 1) the statement demonstrate inconsistency with the party's position taken at trial; and 2) the statement be connected to the party in some way. Minn.R.Evid. 801(d)(2). The rule states that a statement is not hearsay but is instead an admission if: "[t]he statement is offered against a party" and is attributed to the party in one of the following ways:

- (A) the party's own statement, in either an individual or a representative capacity, or
- (B) a statement of which the party has manifested an adoption of belief in its truth, or
- (C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a coconspirator of the party.

Id.

A. The Statements in the Amended Complaint, Expert-Interrogatory Answers and Expert Affidavit are All Attributable to the Plaintiff.

Rule 801(d)(2) describes a number of ways that statements of an attorney can be attributed to a party. For instance subparts (A), (B), (C), and (D) of Rule 801(d)(2) all describe the attorney-client relationship. *Hanson v. Waller*, 888 F.2d 806, 814 (11th Cir. 1989)(attorney as agent); *U.S. v. Kattar*, 840 F.2d 118, 131 (1st Cir. 1988)(both B and D apply to attorneys); *U.S. v. McKeon*, 738 F.2d 26, 34 (2d Cir. 1984)(B & C). This conforms to the long-standing common law rule that an attorney is presumptively authorized to speak for the party. *Oscanyan v. Arms Co.*, 103 U.S. 261 (1880)(holding that party was bound by statements made by attorney in opening statement to jury); *Carlson v. Fredsall*, 228 Minn. 461, 37 N.W.2d 744, 751 (1949); *McCormick on Evidence*, §257, 259 (5th ed. 1999).

There is little question that Plaintiff's attorney was authorized to draft the complaint on his behalf as an agent or in a representative capacity. Plaintiff does not dispute this. However, Plaintiff argues, "it would not be appropriate to impute the out-of-court statement of a trustee with no personal knowledge of the alleged facts to his deceased wife." [Plaintiff's Brf. at 22]. Firstly, admissions do not require personal knowledge as a condition of admissibility. *McCormick on*

Evidence, §255. Secondly, Plaintiff's argument assumes that Kelly is the party rather than Plaintiff. If this were so, plaintiffs in wrongful death cases would be immune from the admissions doctrine or Minn. R. Evid. 801(d)(2) based on the fact that all statements made during the lawsuit are attributable to a deceased person who is no longer capable of making or adopting statements. This cannot be the intention of the rule on admissions of a party opponent. The party, for our purposes, must be Plaintiff Kevin Kelly as trustee who had direct contact with his attorneys and was capable of authorizing them to speak on his behalf. *Williams v. Union Carbide Corp.*, 790 F.2d 552, 555 (6th Cir. 1986)(holding complaints attributable to clients because "the hiring of an attorney and the filing of a lawsuit are generally done with considerable thought and care."). *See also* Fed.R.Evid 801(d)(2)(C) Advisory Committee Note: "No authority is required for the proposition that a statement authorized by a party to be made should have the status of an admission by the party."

Subdivisions B, C, or D of Minn.R.Evid. 801(d)(2) cover the expert disclosures in this case. In general, where a party has submitted evidence to the court as part of its own case, that party has manifested his belief in the truth of the statements and the statements are admissible under Rule 801(d)(2)(B). Courts take seriously a party's act of submitting a third-party's statements to the court as support for the party's position. *See e.g., U.S v. Kattar*, 840 F.2d 118, 131 (1st Cir. 1988)(holding that the Justice Department in a criminal case adopted the attorney's briefs when "it submitted them to other federal courts to show the truth

of the matter contained therein.”). Likewise, the admission of an affidavit of a police officer in a criminal prosecution is adopted by the government in a criminal prosecution. *U.S. v. Warren*, 42 F.3d 647, 310 U.S.App.D.C. 1, 9 (D.C. Cir. 1994); *U.S. v. Morgan*, 581 F.2d 933, 189 U.S.App.D.C. 155 (D.C. Cir. 1978). Statements made in open court have also been considered to be adopted by a party. *U.S. v. McKeon*, 738 F.2d 26, 33-34 (2d Cir. 1984). Discovery responses are considered to be adopted by the party on whose behalf they are made. *Buckley v. Airshield Corp.*, 116 F. Supp.2d 658, 668-69 (D. Md. 2000).

The expert-interrogatory answers were adopted by Plaintiff and submitted as his explanation of his theory of liability in response to discovery demands. The answers were certified by his attorney under Minn.R.Civ.P. 26.07. The expert affidavit was attached to Plaintiff’s memorandum filed in opposition to Lido’s motion for summary judgment. In addition, Plaintiff’s counsel argued the validity of the affidavit in court.

Furthermore, there is no reason to suppose that Plaintiff disavowed any of these expert statements. *See McKeon* at 34 (presuming that defendant manifested his belief in differing versions of the truth where there was no reason to believe that defendant did not participate in his own defense regarding the content of the expert testimony). On the contrary, Plaintiff, himself, signed answers to general interrogatories indicating that he would take the position of obvious intoxication using Dr. Jensen as a probable expert. [App. 50].

The expert evidence is also attributable to Plaintiff under the agency theory set out in subdivision C of Rule 801(d)(2). *Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir. 1980). In *Collins*, the court considered whether the deposition taken of defendant's expert by plaintiff was admissible as an admission under Fed.R.Evid. 801(d)(2)(C). The court held that the expert was defendant's agent since defendant employed the expert to investigate, formulate an opinion and explain it. *Id.* In giving a deposition the expert was still acting within the scope of his employment by defendants. *Id.* The trial court allowed its admission into evidence but prohibited the plaintiff from mentioning to the jury the expert was employed by defendant. *Id.* at 780. Plaintiff opted not to offer the evidence in the manner dictated by the court. *Id.* at 781. The Fifth Circuit held the trial court erred because the plaintiff should have been allowed to attribute the testimony to defendant and permit the latter to explain why the testimony was not consistent with the position at trial. *Id.* at 782.

B. The Amended Complaint, Expert-Interrogatory Answers and Expert Affidavit Where All Offered Against the Plaintiff Within the Meaning of Rule 801(d)(2).

Plaintiff argues that the documents in question do not satisfy Rule 801(d)(2) because they are not offered against him but rather against Lido's. The Court of Appeals seems to have agreed that the evidence could only have come in to prove the contributory fault of Kelly. However, both Plaintiff and the Court of Appeals have misconstrued the "against a party" requirement of the admission

rule. The rule is not nearly so narrow and allows a party's statements to come into evidence so long as they are inconsistent with a party's position taken at trial.

Rule 801(d)(2) requires that the admission be offered against a party but this is only designed to exclude the introduction of self-serving statements made by the party making the statement. *U.S. v. Palow*, 777 F.2d 52, 56 (5th Cir. 1985)(citing Wigmore, *Evidence* §1048, p. 5 (Chadbourn rev. 1972)). Thus, when the statement is offered by the same party who made it, it is not an admission, and does not come into evidence.²⁷ To satisfy the "against a party" prong of Rule 801(d)(2), the party's statement need only be inconsistent with the *position* he took at trial. Wigmore, *Evidence* §1048 ("anything said by a party-opponent may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony").

The rule does not limit admissions to a party's statements about his own behavior. Statements about another's behavior, so long as they are in conflict with the party's theory at trial, are admissions. *See e.g. Williams v. Union Carbide Corp.*, 790 F.2d 552 (6th Cir. 1986)(plaintiffs complaint in another lawsuit concerning the same injuries was an admission under 801(d)(2) because he had previously asserted another theory of the cause of his injuries); *Collins* at 781 (defendant's expert's deposition placing more fault on other parties should have been admissible as an admission).

²⁷ If the statement was made at a trial or hearing, however, it could come in under Minn.R.Evid 801(d)(1).

Thus, a party's statement that he formerly placed fault on a party that he is now holding blameless is admitted. *Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428, 1431-1434 (10th Cir. 1990). In *Dugan*, for example, plaintiffs brought two wrongful death actions, one in federal and one in state court. The Tenth Circuit considered whether a complaint filed in state court against different defendants for the same injuries could come in as admissions under Rule 801(d)(2). *Id.* Because the plaintiffs had strenuously maintained the innocence of parties against whom they filed a suit in state court, their complaint in state court was inconsistent and therefore an admission. *Id.* at 1434. Therefore, *Dugan* stands for the proposition that a party's statement allocating fault differently from what he advocated at trial is an admission under Rule 801(d)(2).

Here, Plaintiff clearly advocated two differing versions of the accident: one in which Lido's caused Ellefson's obvious intoxication and another in which Ellefson was not served while obviously intoxicated. Plaintiff filed briefs in opposition to Lido's summary judgment motion that claimed Lido's served Ellefson when he was obviously intoxicated. Yet, Plaintiff took an entirely different approach at trial. Plaintiff's prior statements of Lido's fault, thus, satisfied the admissions rule of Minn.R.Evid. 801(d)(2).

C. There is No Unfair Prejudice to Ellefson From the Admissions.

Respondent Ellefson makes the additional argument that the amended complaint, and expert-interrogatory answers and expert affidavit should be excluded due to their prejudicial effect on him under Minn.R.Evid. 403. First,

Ellefson did not appeal to this issue to this Court and his brief need not be addressed due to his tardy objection to the Court of Appeals' decision. Additionally, Ellefson's contention that the prejudice to him is so great that it should be excluded is illogical. It was only due to an erroneous windfall to Ellefson, the removal of Lido's from the special verdict form, that the question of obvious intoxication evaporated from the case. Had the trial court made a correct ruling on this issue, Ellefson would have had to defend against obvious intoxication. He was plainly was prepared to do so. Ellefson was not entitled to the highly unusual turn of events that occurred in this trial and cannot claim unfair prejudice would result in the next trial.

The Court of Appeals held that the following errors were made concerning Ellefson's state of intoxication:

- (1) the trial court erred in refusing to give the jury instruction that driving with an alcohol concentration of .10 or more is a crime under Minn. Stat §169A.20, subd. 1(5)(2002). [App. 66]
- (2) the trial court erred by preventing Supreme from eliciting testimony from its expert toxicologist, Van Berkomp, that Ellefson would have likely consumed 12-14 beers in order to reach his blood alcohol concentration of .12 and that he would have been obviously intoxicated while still being served by Lido's. [App. 68].
- (3) the trial court erred by omitting Lido's name from the special verdict form because Van Berkomp's testimony alone was sufficient for Lido's fault to be submitted to the jury. [App. 67-8].

Considering the volume of evidence that will be admitted at a new trial, very little extra harm would come to Ellefson by the admission of the amended complaint

and the expert evidence under Minn.R.Evid. 801(d)(2). The jury will hear evidence from an expert on the subject of Ellefson's obvious intoxication, and Ellefson will presumably try to minimize its impact on him in whatever way he can. The jury will hear that Ellefson's blood alcohol concentration made his driving a crime. It will also hear that he exhibited impulsive behavior by racing. In short, the other evidence of both intoxication and obvious intoxication that will be admitted at the new trial cannot have any unfairly prejudicial effect on Ellefson.

Ellefson also claims that admission plaintiff's admissions violates his right to cross-examine a witness. Ellefson did not preserve this issue. Additionally, Ellefson does not explain why the non-appearance of Jensen in the courtroom would be harmful to him. It is possible that Dr. Jensen, if present, would be able to elaborate and explain his opinions, lending them more credence. Supreme only asked to read portions of Dr. Jensen's opinion to the jury. Jensen's live testimony stood to damage Ellefson much more. Ellefson's claims of impairment of cross-examination are unpersuasive.

Most importantly, the damage to Ellefson, if any, created by the admission of Plaintiff's amended complaint and expert evidence is best assessed at the time of the new trial. No such assessment was made in this case as the trial court excluded the evidence without explanation. Any further issues of unfair prejudice to Ellefson can only be determined in light of all the evidence admitted at next trial. Ellefson's claims of unfair prejudice should not affect this Court's resolution of the admissions doctrine.

III. THE AMENDED COMPLAINT, EXPERT-INTERROGATORY ANSWERS AND EXPERT AFFIDAVIT ARE ADMISSIBLE UNDER THE CATCH-ALL EXCEPTION TO THE HEARSAY RULE OF MINN.R.EVID. 803(24).

Minnesota Rule of Evidence 803(24) also permits the admission of the amended complaint, expert-interrogatory answers and expert's affidavit. The catch-all exception to the hearsay rule is designed to create exceptions to hearsay for evidence that has indicia of trustworthiness akin to the other enumerated hearsay exceptions. The catch-all exception is in the rules to allow for judicial expansion of exceptions to hearsay. Minn.R.Evid. 803(24)(Committee Comments – 1989). The pertinent elements of Minn.R.Evid. 803(24) are: (1) the statement offered is evidence of a material fact; (2) it is more probative on the point than other evidence available through reasonable efforts; and (3) the evidence rules general purposes and the interests of justice will best be served by admitting it. *Id.*

This Court has allowed admission of hearsay evidence based on Rule 803(24) as applied to prior statements of a witness implicating the defendant in a crime. *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn.1985). The Court has also approved admission of a prior statement by a child-complainant to an investigating police officer under the catch-all exception of Rule 803(24). *State v. Edwards*, 485 N.W.2d 911, 915-17 (Minn. 1992).

Federal and state courts have applied Rule 803(24) to allow the admission of prior affidavits. *See Bohler-Uddeholm Am. Inc. v. Ellwood Group Inc.*, 247 F.3d 79 (3d Cir. 2001); *Herdman v. Smith*, 707 F.2d 839 (5th Cir. 1983); *FTC v.*

Kitco of Nevada, Inc., 612 F.Supp. 1282 (D. Minn. 1985); *State v. Weaver*, 554 N.W.2d 240 (Iowa 1996); *McLeod v. Allstate Ins. Co.*, 789 So.2d 806 (Miss. 2001). In *Weaver*, for example, affidavits of three witnesses who spoke with the declarant in a coffee shop about the circumstances of her daughter's head injury were allowed in a post-conviction proceeding to challenge the factual basis for the murder conviction.

Likewise, courts have applied Rule 803(24) to allow the admission of answers to interrogatories. See *Calderon v. Presidio Valley Farmers Assoc.*, 863 F. 2d 384 (5th Cir. 1989); *Roe v. Mobile Co. Appointing Bd.*, 904 F. Supp. 1315 (S.D. Ala. 1995).

Supreme offered the documents in question to prove obvious intoxication, the same material fact Plaintiff originally offered it to prove. The documents' probativeness is obvious. For example, Dr. Jensen's opinion that Ellefson would have been showing signs of obvious intoxication makes proof of that fact more likely. The affidavit was the best evidence available to Supreme on this issue, since it was the evidence Plaintiff used to defeat Lido's motions. The indicia of trustworthiness include that Dr. Jensen's opinions survived two *Frye-Mack* challenges and the statement was made under oath.

If the documents were hearsay, they should nevertheless have been admitted under the catch-all exception as particularly trustworthy evidence. This Court should permit the admission on this ground.

IV. UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL PLAINTIFF IS PRECLUDED FROM OBJECTING TO THE ADMISSION OF HIS AMENDED COMPLAINT, EXPERT-INTERROGATORY ANSWERS AND EXPERT AFFIDAVIT.

The final reason supporting admissibility of the amended complaint, expert-interrogatory answers and expert affidavit is that Plaintiff is judicially estopped to object to their admission. Supreme raised this argument at trial and on appeal but neither court addressed it. Supreme contends before this Court that Minnesota should formally adopt the doctrine of judicial estoppel and that this case is a proper one for application of that doctrine where Plaintiff has taken clearly inconsistent positions before the court. To do otherwise is to allow Plaintiff to play fast and loose with the judicial system.

Judicial estoppel, or the doctrine against the assertion of inconsistent positions, prevents a litigant from asserting a position inconsistent with one that he or she has asserted previously in the same or some earlier proceeding. *See generally*, Ashley S. Deeks, Comment, *Raising the Cost of Lying: Rethinking Erie for Judicial Estoppel*, 64 U.Chi.L.Rev. 873 (1997)(hereafter Deeks, *Rising the Cost*); Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw.U.L.Rev. 1244 (1986)(hereafter Boyers, *Precluding Inconsistent Statements*). “The doctrine of judicial estoppel forbids a party from assuming inconsistent or contradictory positions during the course of a lawsuit.” *State v. Profit*, 591 N.W.2d 451, 462 (Minn.1999)(quoting 31 C.J.S. *Estoppel and Waiver* §139).

In three cases decided since 1999, this Court has noted the existence of the doctrine but declined to adopt it in the particular case. The Court has offered no reason for this reluctance. See *Illinois Farmers Ins. Co. v. Glass Service Co., Inc.*, 683 N.W.2d 792, 800-01 (Minn. 2004); *State v. Larson*, 605 N.W.2d 706, 713 n.11 (Minn. 2000); *Profit*, 591 N.W.2d at 462. The Court of Appeals, on the other hand, has applied the doctrine in at least three published decisions.²⁸

The highest courts in a majority of other states have adopted versions of the doctrine of judicial estoppel.²⁹ The United States Supreme Court has also adopted the doctrine. See *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001).

²⁸ *Bauer v. Blackduck Ambulance Assoc.*, 614, N.W.2d 747, 749-50 (Minn.Ct.App. 2000); *Hooper v. Zurich Am. Ins. Co.*, 552 N.W.2d 31, 36 (Minn.Ct.App. 1996); *Port Authority v. Harstad*, 531 N.W.2d 496, 500 (Minn.Ct.App. 1995), *rev. denied* (Minn. June 14, 1995).

²⁹

- AL *Selma Foundry & Supply Co., Inc. v. Peoples Bank & Trust Co.*, 598 So. 2d 844 (Ala. 1992)
- AZ *In re Estate of Cohen*, 105 Ariz. 337, 464 P. 2d 620 (1970)
- AR *Muncrief v. Green*, 251 Ark. 580, 473 S.W.2d 907 (1971)
- CA *Aguilar v. Lerner*, 32 Cal 4th 974, 12 Cal Rptr. 3d 287 (2004)
- CO *Estate of Burford v. Burford*, 935 P.2d 943 (Colo. 1997)
- D.C. *Donovan v. United States Post Office*, 530 F. Supp. 894 (D.D.C. 1981)
- HI *Roxas v. Marcos*, 89 Hawai'i 91, 969 P.2d 1209 (1998)
- GA *Kaiser v. Kaiser*, 195 Ga. 774, 25 S.E.2d 665 (1993)
- ID *Loomis v. Church*, 76 Idaho 87, 277 P.2d 561 (1954)
- IN *Tobin v. McClellan*, 225 Ind. 335, 73 N.E.2d 679 (1947)
- IA *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163 (Iowa 2003)
- KS *McClintock v. McCall*, 214 Kan. 764, 522 P.2d 343 (1974)
- MA *Paixao v. Paixao*, 429 Mass. 307, 708 N.E.2d 91 (1999)
- MS *In re Municipal Boundaries of City of Southaven*, 864 So. 2d 912 (2003)
- MI *Lichon v. American Universal Ins. Co.*, 435 Mich. 408, 459 N.W.2d 288 (1990)
- MO *Edwards v. Dunham*, 346 S.W.2d 90 (Mo. 1961)

In *New Hampshire v. Maine*, the United States Supreme Court explained the doctrine as follows:

Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. . . . This rule, known as judicial estoppel, generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.

New Hampshire, 532 U.S. at 749 (internal citations omitted)(emphasis added).

The doctrine is founded on the notion of protecting the judicial system from the risk of litigants engaging in self-serving contradiction. Deeks, *Raising the Cost* at 873. The doctrine is said to protect the “sanctity of the oath” and to

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- MT *Cowan v. Cowan*, 320 Mont. 332, 87 P.3d 443 (2004)
NB *Vowers & Sons, Inc. v. Strashein*, 254 Neb. 506, 576 N.W.2d 817 (1998)
NH *In re: Pack Monadnock*, 147 N.H. 419, 790 A.2d 876 (2002)
NJ *State, Dept. of Law & Public Safety v. Gonzalez*, 142 N.J. 618, 667 A.2d 684 (1995)
NC *Whitacre Partnership v. Biosignia, Inc.*, 591 S.E.2d 870 (N.C. 2004)
OK *Parker v. Elam*, 829 P.2d 677 (Okla. 1992)
PA *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 566 Pa. 494, 781 A.2d 1189 (2001)
SC *Cothan v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004)
SD *Watertown Concrete Prods, Inc. v. Foster*, 2001 S.D. 79, 630 N.W.2d 108 (2001)
TN *Marcos v. Marcos*, 993 S.W.2d 596 (Tenn. 1999)
TX *Long v. Knox*, 155 Tex. 581, 291 S.W.2d 292 (1956)
WV *West Virginia Department of Transportation v. Robertson*, 2005 WL 1124401, 2005 W. Va. LEXIS 28, ___ S.E.2d ___ (2005) (Resp. App. 39)
WI *Salveson v. Douglas Co.*, 245 Wis. 2d 497, 630 N.W.2d 182 (2001)
WY *Matter of Paternity of SDM*, 882 P.2d 1217 (Wyo. 1994)

preserve the integrity of the judicial process. Boyers, *Precluding Inconsistent Statements*.

Given the strong support in other jurisdictions for the doctrine and given the important public policies the doctrine protects, it is proper for this Court to adopt the doctrine for Minnesota. Doing so would be fully consistent with this Court's strong preference for maintaining the integrity of the judicial system. *See e.g., Baker v. Ploetz*, 616 N.W.2d 263, 272 (Minn. 2000) (approving enhanced civil damages where an attorney commits fraud within the context of a judicial proceeding as this punishes for the negative impact on the "integrity of the judicial system"). *See also In re Miera*, 426 N.W.2d 850, 858 (Minn. 1988)(disciplining judge in order to protect the integrity of the judicial system).

Assuming that this Court joins the majority and adopts the doctrine, the proper articulation of the test must be decided. Some courts require that the prior inconsistent position be adopted by a court before judicial estoppel will apply. *See generally, Boyers, Precluding Inconsistent Statements* at 1255-58 (referring to this test as the prior success rule). Other courts do not require prior adoption of the position by a court. *Id.* at 1254-55 (referring to this as the absolute rule). The Court of Appeals has suggested that prior success should not be a requirement. *See Bauer*, 614 N.W.2d at 749-50 (applying judicial estoppel even though party had not prevailed in court with initial position). *But see Boyers, Precluding Inconsistent Statements* at 1270 (arguing that the better choice is the prior success

rule because it best balances the truth-seeking process with the integrity of the judicial system).

Another requirement for most courts, including this Court as expressed in dicta in *Profit*, is that the later position adopted by a litigant must be “clearly inconsistent” with its prior position. *State v. Profit*, 591 N.W.2d at 462. The United States Supreme Court has noted that judicial estoppel is not reducible to a clear formula. *New Hampshire v. Maine*, 532 U.S. at 750.

Bearing these conditions in mind, Supreme proposes the following test:

- (1) The same party has taken two positions;
- (2) The positions were taken in judicial or quasi-judicial administrative proceedings;
- (3) The party doing so was successful in asserting the first position (*i.e.* the tribunal adopted the position or accepted it as true);
- (4) The two positions are totally inconsistent; and
- (5) The first position was not made inadvertently or because of mistake, fraud or duress.

Under this test, Plaintiff should be prevented from objecting to admission of the documents because he has previously adopted them and used them to succeed before the trial court. Plaintiff adopted the position expressed in his amended complaint and expert evidence that Lido’s was at fault. Plaintiff also argued the admissibility and reliability of the affidavit. Plaintiff maintained this position during much of the pretrial development of this case. The court adopted Plaintiff’s position by denying the summary judgment motions.

After settling with Lido's, Plaintiff argued that none of this evidence could be used as it was hearsay or irrelevant. This enabled Plaintiff to maintain the "clearly inconsistent" position that Ellefson was not served while obviously intoxicated.

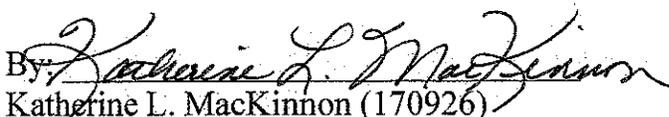
Plaintiff cannot be allowed to take inconsistent positions as the exigencies of the moment dictate. Parties should be held to the positions they advocate to the court so that the integrity of the judicial system is preserved. This is an excellent case for adoption of the doctrine of judicial estoppel and Supreme respectfully requests that this Court do so.

CONCLUSION

For the reasons expressed above, Supreme respectfully asks this Court to hold that the amended complaint, expert-interrogatory answers and expert affidavit may be admitted as substantive evidence of Lido's fault.

Respectfully submitted,

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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) (with amendments effective July 1, 2007).