

CASE NO. A06-1007

State of Minnesota
In Court of Appeals

OFFICE OF
APPELLATE COURTS

JUL 19 2006

FILED

ERIN J. OSBORNE, Individually and as Parent and
Natural Guardian of ALEXIA RAY OSBORNE RILEY,
MICHAEL R. RILEY, SR., MARIE A. RILEY AND KELLEY M. RILEY,

Appellants,

vs.

TWIN TOWN BOWL, INC., d/b/a JERRY DUTLER BOWL,

*Respondent.***APPELLANTS' BRIEF AND APPENDIX**

LAW OFFICE OF
KENNETH R. WHITE, P.C.
Kenneth R. White, Esq. (#141525)
325 S. Broad Street
Suite 203
Mankato, Minnesota 56001
(507) 345-8811

Attorney for Appellants

TOMSCHE, SONNESYN
& TOMSCHE, P.A.
Steven E. Tomsche, Esq. (#190561)
610 Ottawa Avenue North
Minneapolis, Minnesota 55422
(763) 521-4499

Attorney for Respondent

TABLE OF CONTENTS

Table of Contentsi

Table of Authorities ii

Legal Issues 1

Statement of the Case..... 1

Statement of Facts2

Argument.....4

 1. The trial court failed to consider the dispositive issue and impermissibly weighed
 the evidence.4

 2. The trial court erred in granting summary judgment where the evidence established
 that Riley jumped due to the influence of alcohol.6

 a. The evidence is sufficient to raise a fact question of causation.6

 b. The decisions upon which the trial court relied can be readily
 distinguished.11

Conclusion.....15

Appendix Index16

TABLE OF AUTHORITIES

MINNESOTA DECISIONS

<u>Ascheman v. Village of Hancock</u> , 254 N.W.2d 382 (Minn. 1977)	10
<u>DLH, Inc. v. Russ</u> , 566 N.W.2d 60 (Minn. 1997)	1, 4
<u>Dellwo v. Peterson</u> , 259 Minn. 452, 107 N.W.2d 859 (1961).....	1, 6, 7
<u>Fette v. Peterson</u> , 404 N.W.2d 862 (Minn. App. 1987).....	9, 10
<u>Flom v. Flom</u> , 291 N.W.2d 914 (Minn. 1980).....	6
<u>Harden v. Seventh Rib, Inc.</u> , 311 Minn. 27, 247 N.W.2d 42 (1976).....	10
<u>Hartwig v. Loyal Order of Moose, Brainerd Lodge No. 1246</u> , 253 Minn. 347, 91 N.W.2d 794 (1958).....	6
<u>Kryzer v. Champlin America Legion No. 600</u> , 494 N.W.2d 35 (Minn. 1992).....	1, 6, 11, 12, 13
<u>Kuiwinski v. Palm Garden Bar</u> , 392 N.W.2d 899 (Minn. App. 1986)	12
<u>Kunza v. Pantze</u> , 527 N.W.2d 846 (Minn. App. 1995)	12, 13
<u>Kunza v. Pantze</u> , 531 N.W.2d 839 (Minn. 1995)	12
<u>Lubbers v. Anderson</u> , 539 N.W.2d 398 (Minn. 1995).....	1, 7
<u>McMurray v. Twin City Motor Bus Co.</u> , 178 Minn. 561, 228 N.W. 154 (1929)	1, 5
<u>Peterson v. Bendix Home Systems, Inc.</u> , 313 N.W.2d 50 (Minn. 1982).....	1, 5
<u>Ponticas v. K.M.S. Investments, Inc.</u> , 331 N.W.2d 907 (Minn. 1983).....	1, 7, 8
<u>Republican National Life Insurance Co. v. Lorraine Realty Co.</u> , 279 N.W.2d 349 (Minn. 1979)	4
<u>Sworski v. Coleman</u> , 208 Minn. 43, 293 N.W.2d 297 (1940).....	8
<u>Thiele v. Stich</u> , 425 N.W.2d 580 (Minn. 1982).....	6

Willhite v. Cass County Board of Supervisors, 692 N.W.2d 92 (Minn. App. 2005).....7

MINNESOTA UNPUBLISHED DECISIONS

Blank v. Golden Eagle, Ltd., 1996 WL. 745223 (Minn. App. Dec. 31, 1996).....10

Brockman v. Beacon Sports Bar & Grill, 2002 WL. 31012602 (Minn. App. Sept. 10, 2002).....7

House v. Saloka, 1992 WL. 358699 (Minn. App. Nov. 25, 1992).....7

J.B. v. Mounds Vista, Inc., 2001 WL. 1606804 (Minn. App. Dec. 18, 2001).....12

MINNESOTA STATUTES

Minn. Stat. § 340A.8016

LEGAL ISSUES

1. Did the trial court err in weighing the evidence rather than determining if a factual dispute exists?

The trial court held some of the evidence was of minimal evidentiary value.

Most apposite cases and statutes: DLH, Inc. v. Russ, 566 N.W.2d 60 (Minn. 1997); Peterson v. Bendix Home Systems, Inc., 313 N.W.2d 50 (Minn. 1982); McMurray v. Twin City Motor Bus Co., 178 Minn. 561, 228 N.W. 154 (1929).

2. Do the available evidence and the inferences from that evidence raise an issue of fact regarding proximate cause where the evidence demonstrates the decedent died while under the influence of alcohol and attempting to avoid arrest?

The trial court held no issue of probable cause existed.

Most apposite cases and statutes: Lubbers v. Anderson, 539 N.W.2d 398 (Minn. 1995); Kryzer v. Champlin Am. Legion No. 600, 494 N.W.2d 35 (Minn. 1992); Ponticas v. K.M.S. Investments, Inc., 331 N.W.2d 907 (Minn. 1983); Dellwo v. Peterson, 259 Minn. 452, 107 N.W.2d 859 (1961).

STATEMENT OF THE CASE

This matter comes before this Court on appeal from the grant of summary judgment in this dram shop action. The facts material to the decision were not significantly disputed. Despite the evidence connecting the illegal sale to the decision by Michael Riley, Jr. to jump into the flood swollen Minnesota River to avoid arrest, the trial court granted summary judgment.

On April 11, 2003, the Plaintiffs, the family, girlfriend and daughter of Michael Riley, Jr., brought this action against Twin Town Bowl, asserting a dram shop claim. (Appellant's Appendix, page A2; AA2). The Complaint alleged that Michael Riley, Jr. was served alcoholic beverages while obviously intoxicated and, as a result of that

intoxication, he attempted to avoid arrest by jumping into the flood swollen Minnesota River. He was unable to swim the river and drowned. (AA2-3). Twin Town Bowl answered, denying liability. (AA4).

Twin Town Bowl brought a Motion to Dismiss, asserting that the Complaint failed to state a cause of action because of a lack of proof of causation. Following a hearing, the trial court, the Honorable Kurt D. Johnson presiding, denied the Motion. (AA8).

The parties then undertook some discovery focused on the causation issue. Upon completion of that discovery, Twin Town Bowl brought a summary judgment motion on the same basis as the motion to dismiss. Following a hearing, the trial court granted summary judgment. (AA24).

This timely appeal followed. (AA1).

STATEMENT OF THE FACTS

On August 19, 2001, Michael Riley, Jr., went out drinking with friends including at Twin Town Bowl. (AA25). Upon leaving, Riley was observed driving 74 miles per hour in a 50 mile per hour zone on Highway 169. Trooper Kevin McDonald of the Minnesota State Patrol activated his lights and siren in an effort to get Riley to pull over. (AA25). Riley did not stop immediately, but instead continued his aggressive driving. Riley took the Highway 14 exit ramp and once on the Highway 14 Bridge over the Minnesota River, he pulled over on the Bridge. (AA26).

Once stopped, Trooper McDonald approached Riley's vehicle. There, he smelled alcohol and suspected Riley was driving while intoxicated. (AA26). Trooper McDonald

had Riley get out of the vehicle to administer some field sobriety tests. (AA26). Riley failed all of the field sobriety tests and the Trooper administered a PBT which read .18. (AA26). Trooper MacDonald placed him under arrest for driving under the influence. (AA26).

Instead of handcuffing him, the Trooper turned and requested Riley to follow. (AA26). Riley did not and instead the Trooper heard him exclaim, "I'm out of here." (AA26). By the time Trooper McDonald turned, all he could see was Riley jumping into the river. (AA26). His body was not recovered for several months. (AA26).

The Plaintiffs secured a report from an expert to address Michael Riley, Jr.'s psychological condition and whether the intoxication contributed to his decision. (George Komaridis, Ph.D., report of February 1, 2005; AA14). Dr. Komaridis had treated Riley in the past and had access to his medical and psychological records. (AA14). In the conclusion of the report, Dr. Komaridis opines that "Mr. Riley's alcohol inebriation played a substantial part in bringing about his decision to jump into the river, and he almost certainly would not have done so if sober." (AA20). Dr. Komaridis further identified some of the effects of alcohol on Riley – specifically including his view that Riley was inebriated and "possibly in a blackout state with the grandiose belief that he had the physical capacity to overcome the cold swift currents of the Minnesota River and escape arrest by swimming to the other shore." (AA20).

ARGUMENT

Summary judgment is a “blunt instrument” which should only be granted where no fact issue exists for trial. Republican Nat’l Life Ins. Co. v. Lorraine Realty Co., 279 N.W.2d 349 (Minn. 1979). The Supreme Court recently explained the standard for summary judgment in Minnesota as follows:

Accordingly, we hold that there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.

DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). The Court noted a number of Minnesota decisions as well as the U.S. Supreme Court “trilogy” concerning the federal standard for summary judgment, noting that the language of the U.S. Supreme Court and the Minnesota Court differed, but the import was the same. A trial court is not to weigh the evidence, but also “is not required to ignore its conclusions that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented.” DLH, 566 N.W.2d at 70. Where different conclusions may be drawn, therefore, summary judgment should not be granted. Applying this standard, the trial court erred in granting summary judgment.

1. The trial court failed to consider the dispositive issue and impermissibly weighed the evidence.

A review of the trial court’s Order demonstrates that the trial court proceeded to evaluate the evidence, not to determine if a factual dispute existed. First, the trial court asserts that the Court would “infer from the scant facts on point that Riley jumped to

escape, not to kill himself.” (AA27). The relevance of this distinction is not discussed by the trial court. In fact, it has no relevance. Whether Riley was attempting to escape, to kill himself, or to engage in some other activity, the issue relevant to this dram shop action is whether his intoxication was a cause of that direct decision. Thus, the trial court failed to consider the proper issue in this case – the claim that Riley’s decision to jump off the bridge was infected by the level of intoxication he achieved at Twin Town Bowl.

Second, the trial court then proceeded to weigh the evidence. In a footnote, the trial court addresses the significance of the report of Dr. Komaridis, stating that it is “of minimal evidentiary value,” and then refusing to base any inference of Riley’s conduct on that report. (AA27). While the trial court may believe the report to be of “minimal” value, that is not the role of a judge at the summary judgment stage of the proceedings. The value to be assigned evidence is the unique province of the jury. *See Peterson v. Bendix Home Systems, Inc.*, 313 N.W.2d 50, 56 (Minn. 1982) (weight to give to expert opinion is the unique province of the jury); *McMurray v. Twin City Motor Bus Co.*, 178 Minn. 561, 562, 228 N.W. 154, 154 (1929) (weighing of the evidence is the unique province of the jury).

By undertaking the process of evaluating the evidence and weighing the probative value of that evidence, the trial court exceeded its limited role in deciding a summary judgment motion. This Court should reverse and direct the trial court to allow the jury to hear the evidence and undertake its role – the evaluation and weighing of the evidence.

2. The trial court erred in granting summary judgment where the evidence established that Riley jumped due to the influence of alcohol.

In order to state a claim under the dram shop statute, Minn. Stat. § 340A.801, a plaintiff must prove four elements:

1. The defendant unlawfully furnished intoxicating beverages;
2. The illegal sale caused or contributed to intoxication;
3. The intoxication was a cause of the plaintiff's damages; and
4. The plaintiffs suffered damages.

Hartwig v. Loyal Order of Moose, Brainerd Lodge No. 1246, 253 Minn. 347, 346, 91 N.W.2d 794, 801 (1958). Here, the Defendant acknowledged, for the purposes of its motion in the trial court, that the first, second and fourth elements are met. It is solely the third element, causation, which formed the basis for the dispute before the trial court and thus on appeal. See Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1982) (appellate courts will only consider issues raised and addressed below).

- a. The evidence is sufficient to raise a fact question of causation.

The causation element in a dram shop action is one of proximate cause. Kryzer v. Champlin Am. Legion No. 600, 494 N.W.2d 35, 37 (Minn. 1992). Proximate cause is a cause which was "a substantial factor in bringing about the injury." Flom v. Flom, 291 N.W.2d 914, 917 (Minn. 1980). "Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow." Dellwo v. Peterson, 259 Minn. 452, 454-55, 107 N.W.2d 859, 861-62 (1961). As a result, "[i]t is enough to

say that negligence is tested by foresight but proximate cause is determined by hindsight.”
Dellwo, 259 Minn. at 456, 107 N.W.2d at 862. Such an approach applies in a dram shop
setting as well. Brockman v. Beacon Sports Bar & Grill, 2002 WL 31012602 *2 (Minn.
App. Sept. 10, 2002).

The Supreme Court has further stated:

For negligence to be the proximate cause of an injury, it must appear
that if the act is one which the party ought, in the exercise of
ordinary care, to have anticipated was likely to result in injury to
others, then he is liable for any injury proximately resulting from it,
even though he could not anticipate the particular injury which did
happen.

Ponticas v. K.M.S. Investments, Inc., 331 N.W.2d 907, 915 (Minn. 1983).

Generally, proximate cause is an issue for the jury. Lubbers v. Anderson, 539
N.W.2d 398, 402 (Minn. 1995); Willhite v. Cass County Bd. of Supervisors, 692 N.W.2d
92, 98 (Minn. App. 2005) (reversing a grant of summary judgment based upon failure to
show proximate cause). The issue here, therefore, is whether the evidence is sufficient to
allow a jury to conclude that the illegal sale was the proximate cause of Riley’s decision
to jump into the Minnesota River. Clearly, such is the case.

The dram shop statute exists to compensate persons harmed by intoxicated persons
precisely because of the impact of alcohol on the decision making process. People who
are drunk make bad decisions and act in an inappropriate manner. As a result, society
seeks to limit that harmful behavior by placing a burden on bar owners to avoid providing
alcohol to obviously intoxicated persons. House v. Saloka, 1992 WL 358699 (Minn.
App. Nov. 25, 1992).

Riley was served intoxicating beverages at Twin Town Bowl. As a result, he became intoxicated. When he operated a motor vehicle, he did so in such a bad fashion as to lead a state trooper to pull him over and administer field sobriety tests. When Riley failed those tests, he was placed under arrest. Rather than follow the officer to the squad car, Riley jumped into the Minnesota River in an apparent attempt to avoid arrest, a step he would not have taken had he not been intoxicated. He was unable to swim the river and drowned. The illegal sale thus leads, in an “unbroken sequence”, to his death by drowning. In looking at the facts from a hindsight perspective, the unbroken nature of the causation chain is apparent – Riley jumped into the river because he was intoxicated and wished to avoid arrest; the arrest followed from his driving under the influence; the driving under the influence followed from the illegal sale at Twin Town Bowl. As a result, a jury could find proximate cause. *See Sworski v. Coleman*, 208 Minn. 43, 293 N.W.2d 297 (1940) (affirming a jury verdict despite proximate causation challenge where person became intoxicated, was arrested and died in jail).

Considered in a different way, under the Ponticas approach, Twin Town Bowl could anticipate that an intoxicated person, leaving the establishment and getting in a motor vehicle, might be seen by police. As a result of that observation, the police might attempt to stop the vehicle. Injury might result during an ensuing chase. Even if the driver stopped when spotted by the police, the Bar could further anticipate that some harm might occur. The individual might attempt to flee on foot and be injured in that pursuit. While the precise nature of that harm might not be anticipated, that is not a legally

relevant issue. Harm from being an intoxicated person on the road, pursued by the police, was certainly a harm that the Defendant could and should anticipate.

Significantly, the Defendant in its memorandum in the trial court acknowledged that exactly such a sequence, up to the point of the attempted escape, would create a fact issue of causation. The Defendant stated that: “This would be a different case if Riley had been so drunk that he simply fell off the bridge into the swollen Minnesota River.” (Defendant’s Memorandum, page 8; AA46). The Defendant’s analysis, at its core, thus appears to be that since Riley made the decision to jump, no matter how influenced by alcohol, his heirs cannot recover – “Therefore because Riley intentionally jumped into the river, in an apparent escape attempt, Riley’s intoxication did not cause his death, as a matter of law.” (Defendant’s Memorandum, page 8; AA46). The trial court adopted this analysis, stating “Riley’s choice to jump from the bridge is too remote from his intoxication to suffice for proximate cause.” (AA29).

This basic argument has been rejected by the courts. Although not expressly stated in this way, the argument is really an intervening cause argument. That is, since Riley made the decision to jump, as opposed to simply falling, his intoxication was not the cause of his death. In a dram shop action, as a strict liability action, superseding cause analysis has no application. In Fette v. Peterson, 404 N.W.2d 862 (Minn. App. 1987), the court addressed a claim that the jury should have been instructed on superseding cause. Fette was killed when his vehicle was struck by another vehicle operated by Peterson, who was intoxicated. “Peterson mistakenly thought that a stop sign at the intersection

was a green light. Peterson ran the stop sign at a high rate of speed colliding with Fette's vehicle." Fette, 404 N.W.2d at 864. The heirs sued Peterson and the bar where Peterson drank. The bar sought an instruction on superseding cause. In rejecting the claim, the court noted that a dram shop action was a strict liability claim and so no original negligent act occurred. Fette, 404 N.W.2d at 864. The court further noted that to allow an intervening cause instruction would effectively emasculate the statute since the conduct of the intoxicated person would be an intervening cause in almost every case. Fette, 404 N.W.2d at 864-65.

Similarly here, Riley's "voluntary decision" or "choice" to jump does not break the causal chain between the illegal sale and his death. Riley's decision is not legally different than the "voluntary decision" of an intoxicated person to drive or to operate a vehicle in a particular manner, such as to ignore the red light in Fette. Each decides to undertake an action which causes harm to innocent third parties. Yet, claims against bars arising from single vehicle accidents have been successfully pursued on many occasions. *See* Ascherman v. Village of Hancock, 254 N.W.2d 382 (Minn. 1977) (liquor vendor could not join intoxicated person in action brought by his wife and daughter, following a one-vehicle accident, since no common liability existed and to do so would frustrate the purposes of the dram shop statute); Harden v. Seventh Rib, Inc., 311 Minn. 27, 247 N.W.2d 42 (1976) (affirming a jury verdict in a family's claim brought against a bar following a single vehicle accident); Blank v. Golden Eagle, Ltd., 1996 WL 745223

(Minn. App. Dec. 31, 1996) (family's action against bar could go forward where father decided to ride in pickup truck bed, rather than the cab, and fell out).

Thus, the relevant issue is whether Riley's decision was brought about by the alcohol he consumed. Based upon the evidence submitted, precisely such a conclusion may be reached. Riley had previously talked to others about swimming the river to escape if he was confronted with an arrest situation. He drove quite a distance before stopping for Trooper McDonald, stopping on a bridge over the river. He jumped into the river after being told he was under arrest and being told to get into a squad car. Dr. Komaridis opines that the alcohol consumption triggered that decision.

The evidence and reasonable inferences, therefore, are sufficient to create an issue of material fact for a jury to resolve. The trial court's decision to grant summary judgment should be reversed and the case remanded for trial.

- b. The decisions upon which the trial court relied can be readily distinguished.

The trial court relied upon two decisions involving a proximate cause analysis in a dram shop setting. An analysis of those cases and their facts in relation to the facts known here demonstrates that each is readily distinguished from the facts here.

In Kryzer, the plaintiff was injured when she became intoxicated and a bouncer attempted to remove her from the bar. She sustained an injury in that interaction. The Supreme Court held that her intoxication was only the "occasion for her ejection," but not the cause of her injury. Kryzer, 494 N.W.2d at 37. This decision was based upon the allegation in the Complaint "that it was the act of the club employee in ejecting her which

caused the injury.” Kryzer, 494 N.W.2d at 37. The complaint simply failed to allege “any causal connection between the intoxication and the injury.” Kryzer, 494 N.W.2d at 38.

Here, on the other hand, the evidence shows the requisite causal connection. As noted above, Riley’s intoxication led directly to his decisions when confronted by the police officer. His death did not occur due to the intervention of some third party, such as a bouncer, causing an injury. Instead, the intoxication so impacted his judgment and reactions that he decided to undertake an extremely risky maneuver, swimming the flood-swollen Minnesota River.¹ See J.B. v. Mounds Vista, Inc., 2001 WL 1606804 *3 (Minn. App. Dec. 18, 2001) (complaint sufficient where plaintiff alleged she was sexually assaulted by the intoxicated person to whom illegal sale was made). Kryzer is thus readily factually distinguished.

Second, the trial court placed reliance on Kunza v. Pantze, 531 N.W.2d 839 (Minn. 1995), where the Supreme Court overruled a Court of Appeals decision, Kunza v. Pantze, 527 N.W.2d 846 (Minn. App. 1995), in a single sentence order, citing Kryzer. In Kunza, the plaintiff was drinking with her husband at a bar. They left together and started to drive away, with Pantze driving even though obviously intoxicated. At some point during the trip, they argued and Pantze allegedly began to physically abuse Kunza. As they approached a red light, Kunza prepared to jump out of the vehicle, but Pantze did not stop. When she exited the vehicle, she sustained significant injuries. Kunza sued the bar,

¹ Riley’s fault, if any, in making that decision, does not go to the jury. Kuiwinski v. Palm Garden Bar, 392 N.W.2d 899 (Minn. App. 1986).

alleging that the bar caused the intoxication and that the intoxication caused her injuries. Kunza, 527 N.W.2d at 847-48. The Court of Appeals held that the evidence could establish proximate cause since Kunza was attempting to avoid the direct consequences of Pantze's wrongful conduct, "even though [Kunza's] own actions may have been the immediate cause of those injuries." Kunza, 527 N.W.2d at 850. The Supreme Court reversed, simply citing Kryzer, and offering no explanation.

A review of the facts here, and the facts in Kunza, demonstrates the distinct and important differences. In Kunza, the Plaintiff was not intoxicated or the person to whom the alleged illegal sale occurred. Instead, she was asserting the intoxication of a third person led to his actions, which forced her to make a decision. Here, on the other hand, the claim is for the death of the intoxicated person, Michael Riley, Jr., and the decisions he made under the influence of that intoxication.

In Kunza, the plaintiff had to acknowledge that her own actions were the immediate cause of her injuries – she decided to exit the vehicle with no evidence that the decision was influenced in any way by her own intoxicated state. And, she did not seek to recover for the injuries from the beating. Here, on the other hand, the evidence creates a jury question about whether Riley's decision to jump was influenced by his state of intoxication.

Finally, nothing in the Kunza opinion describes how the bar could anticipate that the Plaintiff would get into a car with a drunk driver and sustain injury when she attempted to jump from that vehicle when the intoxicated person began to beat her. Here,

on the other hand, each step of the chain of events could have been anticipated by the bar, even though the precise nature of that harm might not have been anticipated.

The trial court, in considering these decisions, ignores these material factual distinctions. As a result, that court found that “the causal connection is also more attenuated” here than in those cases. As demonstrated above, however, this determination flows from the failure of the trial court to consider the unique facts of those cases and the basis for liability. Neither of those cases asserted that the injury flowed from the intoxicated state of the actor who caused the harm.

Here, in direct contrast, the evidence demonstrates the existence of a fact issue over whether Riley made the decision to jump under the influence of alcohol and because of his intoxicated state. The Plaintiff’s expert has so opined. In addition, that same expert has offered the general, and generally undisputed, opinion that consumption of alcohol modifies a person’s behaviors, assessment of risk and decision-making process. To ignore that opinion, and that widely known assessment of the impact of alcohol is part of the fundamental flaw here. The Plaintiffs have met their burden sufficiently to defeat a summary judgment motion here and should be given the opportunity to prove their case to a jury.

As a result, this Court should reverse the trial court’s judgment and remand the case for trial.

CONCLUSION

This matter is before this Court on appeal from the grant of summary judgment. The Motion, and the trial court's decision, was based solely upon the assertion that the evidence failed to show proximate cause as a matter of law. A review of the relevant case law, and the specific facts of this case, demonstrates a jury issue on causation. The trial court should be reversed and the case remanded for trial.

Dated this 18 day of July 2006.



Kenneth R. White, No. 141525
LAW OFFICE OF KENNETH R. WHITE, P.C.
Attorney for Appellants
325 South Broad Street, Suite 203
Mankato MN 56001
507/345-8811

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).