
NO. A10-1184

State of Minnesota
 In Supreme Court

Christopher John Daly,

Respondent,

v.

Zachary John McFarland,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF ISSUES

1. Minnesota courts do not apply primary assumption of risk to snowmobile-operation cases. Unlike participants and spectators of recreational activities to which primary assumption of risk applies, snowmobile operators do not consent to relieve other snowmobilers of their continuous duty of care.

Should snowmobile operation be added to the category of recreational activities to which primary assumption of risk applies?

This issue was presented in Appellant's Rule 50.02 motion for judgment as a matter of law and Respondent's response to that motion. The district court denied Appellant's request for a primary assumption of risk instruction and denied Appellant's motion for judgment as a matter of law where Appellant argued that Respondent assumed the risk of operating his snowmobile for recreational purposes. The Court of Appeals affirmed.

Apposite Authorities:

Olson v. Hanson, 299 Minn. 39, 216 N.W.2d 124 (1974)

Iepson v. Noren, 308 N.W.2d 812 (Minn. 1981)

Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971)

2. To preserve an issue for appeal, a party must object and move for a new trial. When a party fails to object to a special verdict form prior to submission to the jury, he waives subsequent objection to it. McFarland agreed to the Special Verdict Form and did not object to it.

Although the Court of Appeals correctly affirmed the district court, did the Court of Appeals err by reviewing the Special Verdict Form?

This issue was presented in Respondent's brief to the Court of Appeals. The Court of Appeals reviewed the Special Verdict Form and affirmed.

Minn. R. Civ. P. 59.01

Sauter v. Wasemiller, 389 N.W.2d 200 (Minn. 1983)

Martineau v. Nelson, 311 Minn. 392, 247 N.W.2d 409 (1976)

3. A verdict will not be set aside unless it is contrary to the evidence; and inconsistencies in a special verdict form are to be reconciled in any manner consistent with the evidence. The jury heard substantial evidence that McFarland's speed and failure to keep a proper lookout played a significant role in causing Daly's injury.

Is the inconsistency on the court's Special Verdict Form reconciled by evidence that McFarland's negligence was the direct cause of the accident and Daly's was not?

This issue was presented in Appellant's Rule 50.02 motion for judgment as a matter of law and Respondent's response to that motion. The Court of Appeals affirmed.

Apposite Authorities:

Hauenstein v. Loctite Corp., 347 N.W.2d 272 (Minn. 1984)

Meinke v. Lewandowski, 306 Minn. 406, 237 N.W.2d 387 (1975)

Orwick v. Belshan, 304 Minn. 338, 231 N.W.2d 90 (1975)

4. The party seeking to invoke the Emergency Rule Doctrine must show that his own negligence did not create or contribute to the emergency situation of which he complains. The record supports the district court's finding that there was no emergency and if there was McFarland created the emergency of which he complained by driving too fast for conditions and failing to keep a proper lookout.

Did the district court abuse its discretion in denying Appellant's request for an emergency rule instruction? Alternatively, should this Court abandon the emergency rule instruction?

This issue was presented in Appellant's Rule 50.02 motion for judgment as a matter of law and Respondent's response to that motion. The Court of Appeals affirmed.

Apposite Authorities:

Bahr v. Boise Cascade Corp., 766 N.W.2d 910 (Minn. 2009)

4 Minnesota Practice, CIVJIG 25.16

10 A.L.R. Modern Status of Sudden Emergency Doctrine 680

STATEMENT OF THE CASE

This action arose after Respondent Christopher Daly was severely injured in a snowmobile collision with Appellant Zachary McFarland in January of 2007. (Appellant's Appendix "A." 5.) Daly commenced the underlying action against McFarland on November 19, 2007. (A. 5.) McFarland denied liability. (A. 7.)

Once discovery was nearly complete, Daly sought summary judgment for a determination, as a matter of law, that McFarland was negligent and that his negligence was the direct cause of Daly's injury. The district court denied Daly's motion and the parties proceeded to trial. (A. 1.) McFarland did not seek review of the district court's denial of the summary judgment motion on appeal. (McFarland's Notice of Appeal and Statement of the Case to Court of Appeals.)

The case was tried to a jury, the Honorable Timothy K. Connell presiding, on March 17 – 19, 2010. McFarland moved for a directed verdict on the second day of trial. (T. 380.) Daly moved for a directed verdict on the third day. (T. 464.) The trial court denied both motions. (T. 380, 465.)

Both parties submitted Proposed Special Verdict Forms. (A. 13-17.) McFarland proposed an instruction on primary assumption of risk. (A. 15.) Since the court had already rejected McFarland's request for an instruction on primary assumption of risk, the court rejected that form and revised Daly's proposed form. (T. 478.) Counsel for both parties approved the court's Special Verdict Form. (T. 478.)

After deliberating for only two and a half hours, the jury returned a verdict in favor of Daly. (T. 551.) The jury found that that while Daly was negligent, his negligence was not a direct cause of the collision on January 20th, 2007. (T. 552.)

McFarland brought post-trial motions, which the court denied. (A. 11.) McFarland appealed from that denial. (Notice of Appeal and Statement of the Case to Court of Appeals.) The Court of Appeals Affirmed. (Appellant's Addendum "Add." 1.)

STATEMENT OF FACTS

The evidence is stated in the light most favorable to the verdict.

A. January 20, 2007

On January 20, 2007, four long-time friends, Jeff Engelkes, Neil Forsberg, Appellant Zach McFarland, and Respondent Christopher Daly met at Engelkes's snowmobile shop outside of Slayton, Minnesota and planned to ride to Worthington. (T. 147-50, 152-53, 158-59, 161-62, 266-71, 324, 326-27, 381-82.) They were experienced snowmobilers who had ridden together several times before. (*Id.*) Due to the poor conditions, this was the first possible ride of the winter. (T. 161.)

It was partly cloudy and windy that day with gusts up to thirty-five miles per hour (T. 164-65. 285-86.) The wind and snowmobiles caused blowing and drifting snow and visibility problems. (T. 165, 286-87, 394-5, 412-413.) At times the group had to adjust their speed for conditions and drifts they encountered on the ride. (T. 168-69, 225-26, 238, 272, 279-80, 291, 306-09, 384, 390, 396-98, 415.) McFarland testified that at slower speeds of forty to forty-five miles per hour a snowmobile would go right through

a soft drift, but at faster speeds, when a snowmobiler hits a harder drift “you get a little wheelie or air depending on how you hit it.” (T. 308-09, 327.)

B. The Bean Field

When the group came upon a bean field, they stopped for a short break then spread out to cross the field. (T. 166, 228, 236, 273, 281, 311, 384.) Testimony varied as to the distance between the snowmobilers and how fast they were traveling. Daly estimated that they attained top speeds of sixty-five and that he and McFarland were approximately fifteen feet apart. (T. 167, 236.)

When Daly started to cross the field he looked down his lane and about five feet on each side to make sure that he did not hit anything. (T. 166, 232, 274.) He was aware of McFarland behind and to his left and Forsberg behind and to the right. (T. 167.) Daly looked to his left and then slowed to approximately forty-five or fifty as he approached the middle to end of the field. (T. 166, 171, 275, 321, 325.)

C. McFarland Lost Control of His Snowmobile.

When Daly slowed, McFarland did not maintain his distance behind Daly but decided to pass and take the lead. (T. 170, 172, 274, 280, 282-83, 321.) Daly did not signal to McFarland to pass him. (T. 280, 293, 325.) As McFarland was accelerating past Daly, he hit one of the hard drifts and lost control of his snowmobile. (T. 170, 276, 284.) Daly saw McFarland’s snowmobile shoot straight up into the air. (T. 170, 173, 275-76, 390, 399.) McFarland’s feet were dangling in the air as he was trying to hold on but was unable to regain control. (T. 170, 173, 276-78, 394.) Eventually, McFarland realized he could not control where the snowmobile was going to land, and fearing that it

would fall back and crush him, he pushed it away. (T. 277-78, 299-300.) This scene was playing out within feet of Daly; but Daly was scared to turn out of the falling snowmobile's path because he was afraid that he would collide with the other riders. (T. 170.)

McFarland's snowmobile—now without a driver—tumbled to the right and flipped backwards towards Daly. (T. 170, 371, 377.) Daly fell from his snowmobile flipping and rolling until his leg jammed into the frozen ground and stopped him. (T. 170-71.) Daly's leg jammed with enough force to push the ball of his hip joint through the back of his hip socket taking a piece of bone with it. (T. 264; Respondent's Appendix "RA" 1-7.)

D. The Experts' Testimony at Trial

At trial, each party called an expert witness to testify. Daly's expert, Kenneth Drevnick, testified that the speed McFarland was traveling played a significant role in McFarland's inability to control his snowmobile, the height his snowmobile reached as it vaulted off the drift, and the distance it traveled before it hit the ground. (T. 362, 367-68, 371.) Drevnick also testified that McFarland's snowmobile tumbled through the air before colliding with Daly. (T. 371, 377.)

McFarland's expert, William Elkin, testified that, as an instructor of the Minnesota Adult Snowmobile Certification Course, he taught the state law that when there is no posted speed limit, such as in an open field, snowmobile riders must maintain a "safe speed." (T. 450.) "Safe speed" is defined as "a speed that allows the operator to maintain control and stop in time to avoid collision." (T. 450.) Elkin testified that

snowmobile safety requires the driver to take necessary action to maintain control. (T. 451.) He also testified that McFarland lost control of his sled to the point where McFarland was in danger of losing his own life or in danger of serious, permanent personal injury. (T. 447.)

E. The Emergency Rule and Reasonable Care

Prior to instructing the jury, the judge met with counsel in chambers to discuss the jury instructions. (T. 466-81.) McFarland requested an instruction on the Emergency Rule. (T. 472.) The judge declined to give an Emergency Rule instruction:

I don't think there is any emergency which I would . . . define as a deer leaping out on the road . . . or something . . . appearing that shouldn't or couldn't have been immediately apparent . . . the fact that he hit a snow drift and went – where the snow drift was visible and he . . . made a judgment that we've heard all kinds of testimony about, about the height and everything . . . I don't think the emergency rule applies.

(T. 472-73.) Although the judge did not instruct the jury as to the specific emergency rule instruction, the judge allowed defense counsel to compare the drift to a deer jumping out on the road. (T. 473.) Defense counsel used the deer analogy to illustrate reasonable care and negligence in an emergency situation. (T. 506-529.)

The judge instructed the jury that “reasonable care is the care a reasonable person would use in the same or similar circumstances. Negligence is the failure to use reasonable care. Ask yourself what a reasonable person would have done in these circumstances. . . .” (T. 487.)

F. The Special Verdict Form, Negligence, and Direct Cause

The judge also reviewed the instructions on direct cause and negligence and went over the court's Special Verdict Form with both attorneys in chambers. (T. 475, 478.) The judge discussed the modification to questions one and three that had been made to the Special Verdict Form. (T. 478.) Both parties agreed that the court's Special Verdict Form was acceptable. (T. 478.) Regarding the Special Verdict Form, the jury was instructed as follows:

You will be asked to answer yes or no to some questions in the verdict form. The greater weight of the evidence must support a "yes" answer. The means that all of the evidence, regardless of which party produced it, must lead you to believe that the claim is more likely true than not true. Greater weight of the evidence does not necessarily mean the greater number of witnesses or the greater volume of evidence. Any believable evidence may be enough to prove that a claim is more likely true than not.

(T. 486-87.) The judge read the entire verdict form to the jury prior to closing arguments.

(T. 493; Add. at 19-20.) Regarding Question 5 the judge instructed:

Question 5, if they were both negligent or – it doesn't matter – what amount of negligence of 100 percent do you attribute to the defendant and the plaintiff?

(T. 494.) Neither party objected to the court's Special Verdict Form. (T. 494-95.)

The judge also instructed the jury regarding negligence and read Minn. Stat. § 84.87, subd. 2, which states:

It shall be unlawful for any person to drive or operate any snowmobile in the following unsafe or harassing ways: (1) at a rate of speed greater than reasonable or proper under all the surrounding circumstances; (2) in a negligent manner so as to endanger the person or property of another or to cause injury or damage thereto.

(T. 487-88.) Regarding direct cause the judge instructed the jury that “a direct cause is a cause that had a substantial part in bringing about the accident and injury.” (T. 488.) After instructing the jury, the judge asked both parties’ attorneys if there were any additions or corrections to the instructions. (T. 494.) Neither attorney had any additions or corrections to the instructions or Special Verdict Form. (T. 494-95.)

G. The Jury’s Findings and Court’s Order

The jury found that McFarland was seventy percent negligent in the operation of his snowmobile and that his negligence was a direct cause of Daly’s injuries. (T. 551-52; Add. 20.) The jury found that Daly was thirty percent negligent but that Daly’s negligence was not the direct cause of his injuries. (T. 552; Add. 20.) The apportionment of negligence reflected a clerical error on the Special Verdict Form in that the jury was asked to determine each party’s “percentage of negligence” if they found that both or either party was negligent. (Add. 19-20, Question 5.) The Special Verdict Form should have asked the jury to apportion negligence only if they found that both parties’ negligence was a direct cause of the accident. (A. 42.) In other words, if the jury found that one of the party’s negligence was not a direct cause of the accident (as was the case here) then there would be no legal reason for the jury to apportion the negligence that contributed as a direct cause. It was only because of the clerical error on the court’s Special Verdict Form that the jury did so. The remaining questions on the form reflected the amount of damages the jury found reasonable and the damages to which the parties’ had previously agreed. (T. 552-53; Add. 19-20.)

The court acknowledged the clerical error in the Special Verdict Form in its Order but held that although the jury made a comparative fault determination, “no fault comparison was legally required or necessary and that no fault reduction would be appropriate.” (Add. 16-17.)

H. The Court of Appeals Affirmed

The Court of Appeals, viewing the evidence in the light most favorable to Daly, and citing well-established case law that primary assumption of risk does not apply to snowmobile operation, held that primary assumption of risk did not apply to this case. (Add. 2.) Regarding the Special Verdict Form, the court recognized the confusion caused by 1) an “improperly drafted special verdict form” and 2) the judge’s instruction to apportion the parties’ negligence at Question 5. (Add. 8.) Given the trial testimony and “the duty to liberally construe the special verdict form” the court held that the district court did not abuse its discretion by reconciling the special verdict answers. (Add. 8.)

The Court of Appeals also affirmed the trial court’s decision not to provide an emergency rule instruction: “If we were to accept appellant’s view of the emergency rule, ordinary negligence principles would be superseded; every act of negligence could be excused by a claim that the tortfeasor did not recognize the danger of his actions.” (Add. 6.) The court recognized the trial court’s instruction on reasonable care and that “appellant was permitted to argue at length that the snow drift presented an unanticipated emergency.” (Add. 6.)

The Court of Appeals dissent illustrates the problems that can arise with the emergency rule instruction. It was based on the district court’s denial of Daly’s motion

for partial summary judgment and the “rule-management directive” in the *W.G.O.* dissent. (Add. 10.) According to the dissent, the emergency rule instruction should have been given because, based on the district court’s statement in denying Daly’s pretrial motion for partial summary judgment, the district court did not find that appellant’s pre-collision conduct was negligent as a matter of law. (Add. 11.)

ANALYSIS

I. PRIMARY ASSUMPTION OF RISK DOES NOT APPLY TO SNOWMOBILE-OPERATION CASES.

A. Standards of Review

McFarland appeals the Court of Appeals order affirming the district court’s denial of McFarland’s motion for judgment-as-a-matter-of-law (JMOL) or in the alternative, motion for a new trial. (Add. 15; A. 11.) This Court applies de novo review to the district court’s denial of a Rule 50 JMOL motion. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). JMOL is not warranted if “reasonable jurors could differ on the conclusions to be drawn from the record.” Judgment as a matter of law is proper when a jury verdict has no reasonable support in fact or is contrary to the law. *In re Shigellosis Litig.*, 647 N.W.2d 1, 9 (Minn. Ct. App. 2002). “Unless the evidence is practically conclusive against the verdict, [this court] will not set the verdict aside.” *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (quotation omitted). “The evidence must be considered in the light most favorable to the prevailing party” and this Court must not set aside the verdict “if it can be sustained on any reasonable theory of the evidence.” *Id.*

Similarly, this court will not disturb the district court's denial of a new trial absent a clear abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). “[T]he verdict must stand unless it is manifestly and palpably contrary to the evidence, viewed in a light most favorable to the verdict.” *ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 110 (Minn. Ct. App. 1992), *review denied* (Minn. Apr. 29, 1992).

McFarland argued he was entitled to a new trial because the trial court failed to instruct the jury on primary assumption of risk. (A. 11.) The district court followed well-established Minnesota law and denied McFarland's motion for JMOL or in the alternative new trial. (A. 1.) Likewise, the Court of Appeals held that, under the facts of the case, viewed in the light most favorable to Daly, “the district court did not err in refusing to grant JMOL.” (Add. 3-4.)

B. Unlike participants and spectators in recreational activities, snowmobilers do not consent to relieve other snowmobilers of their continuous duty to use reasonable care.

Minnesota recognizes two types of assumption of risk—secondary and primary. *Andren v. White-Rogers Co.*, 465 N.W.2d 102, 104 (Minn. Ct. App. 1991). In snowmobile operation cases, such as this, as well as in automobile and motorcycle cases, Minnesota courts apply secondary rather than primary assumption of risk. *See generally Olson v. Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 127-28 (1974); *Iepson v. Noren*, 308 N.W.2d 812, 815-16 (1981).

Secondary assumption of the risk is a form of contributory negligence. *Andren*, 465 N.W.2d at 104. It applies when a defendant creates a hazard that the plaintiff knows

of, appreciates, and voluntarily encounters, but the defendant is not relieved of his duty of care with respect to the hazard. *Id.* In other words, secondary assumption of the risk is not a complete bar to a plaintiff's recovery. *Springrose v. Willmore*, 292 Minn. 23, 24-25; 192 N.W.2d at 827. Instead, the finder of fact apportions the relative fault of the plaintiff and defendant under the comparative-negligence statute. *Id.*

Primary assumption of the risk is a complete bar to a plaintiff's recovery. *Armstrong v. Mailand*, 284 N.W.2d 343, 348 (Minn. 1979). The basic elements of primary assumption of the risk are the same as secondary assumption of the risk; plaintiff knows, appreciates and voluntarily encounters the risk. *Schneider ex rel. Schneider v. Erickson*, 654 N.W.2d 144, 148-49 (Minn. Ct. App. 2002). But primary assumption of risk applies where "the plaintiff consents to look out for himself and relieve the defendant of his duty." *Id.* A defendant has no duty to protect the plaintiff from those risks, "and, thus, if the plaintiff's injury arises from incidental risks, the defendant is not negligent." *Olson*, 299 Minn. at 44, 216 N.W.2d at 127-28.

Minnesota courts rarely apply primary assumption of risk. *Springrose*, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971); *Swagger v. City of Crystal*, 379 N.W.2d 183, 185-86 (Minn. Ct. App. 1985). It is most commonly applied in the context of sporting events where the spectator or participant has primarily assumed the risk associated with an inherently risky activity and has consented to relieve the defendant of the duty of care. *See, e.g., Grisim v. TapeMark Charity Pro-Am Golf Tournament*, 415 N.W.2d 874, 876 (Minn. 1987) (spectator at golf tournament assumed risk of being hit with golf ball); *Modoc v. City of Eveleth*, 224 Minn. 556, 564, 29 N.W.2d 453, 457 (1947) (spectator at

hockey game assumed risk of being hit with hockey puck); *Brisson v. Minneapolis Baseball & Athletic Ass'n*, 185 Minn. 507, 510, 240 N.W. 903, 904 (1932) (spectator at baseball game assumed risk of being hit by foul ball); *Jussila v. U.S. Snowmobile Ass'n*, 556 N.W.2d 234, 237-38 (Minn. Ct. App. 1996) (spectator at snowmobile race assumed risk of being hit by a snowmobile), *review denied* (Minn. Jan. 29, 1997).

Unlike in the recreational activities in the cases cited above, the ordinary operation of an automobile or other motorized mode of transportation, including snowmobiling, does not involve consent to relieve other drivers of their continuous duty to use reasonable care. For example, Minnesota courts have refused to apply primary assumption of risk to automobile and motorcycle cases because “a driver of a motor vehicle is under a continuous duty to exercise reasonable care by maintaining a proper lookout and to keep his vehicle under reasonable control.” *Rusciano v. State Farm*, 445 N.W.2d 271, 273 (Minn. Ct. App. 1989); *see also Thompson v. Hill*, 366 N.W.2d 628, 631 (Minn. Ct. App. 1985) (holding driver not relieved of duty to operate vehicle with reasonable care even when passenger assumed some risks).

This Court has previously held that primary assumption of risk did not apply to an experienced motorbike rider who rode on a wooded trail at dusk with no headlight. *Iepson*, 308 N.W.2d at 814. Holding that the criteria for primary assumption of the risk had not been met, this Court stated:

There must first of all, of course, be some manifestation of consent to relieve the defendant of the obligation of reasonable conduct. It is not every deliberate encountering of a known danger which is reasonably to be interpreted as evidence of such consent.

Id. at 815. Although the motorbike rider encountered the known danger of driving through the woods on a motor bike with no headlight, this Court held that he did not relieve the driver and owner of the truck with which he collided of “their obligation to act with due care.” *Id.* at 816. Thus, “the continued existence of this duty makes the defense of primary assumption of risk inapplicable to this case.” *Id.*

Similarly, Minnesota courts do not apply the primary assumption of risk doctrine to the ordinary operation of snowmobiles because “a snowmobile, carefully operated, is no more hazardous than an automobile, train, or taxi.” *Olson*, 299 Minn. at 46, 216 N.W.2d at 127-28; *see also Carpenter v. Mattison*, 300 Minn. 273, 278, 219 N.W.2d 625, 629 (1974) (“[T]he operation of a snowmobile does not involve primary assumption of risk.”); *Lubbers v. Anderson*, 524 N.W.2d 735, 738 (Minn. Ct. App. 1994) (“Primary assumption of the risk does not apply to snowmobile driving because a ‘snowmobile, carefully operated, is no more hazardous than an automobile, train, or taxi.’”), *rev’d on other grounds*, 539 N.W.2d 398 (Minn. 1995); *Isker v. Gardner*, 360 N.W.2d 468, 470 (Minn. Ct. App. 1985) (holding it was inappropriate to give a jury instruction on primary assumption of risk in snowmobile case), *review denied* (Minn. April 15, 1985).

The *Olson* court held that snowmobile operation is in the same category as automobile operation because a snowmobile is not a dangerous instrumentality per se:

We also reject the view that a snowmobile is a dangerous instrumentality per se. Despite being a relatively neoteric form of recreation and transportation, snowmobiling is no more beclouded in mystery and danger than aviation.

Olson, 299 Minn. at 44, 216 N.W.2d at 128.

McFarland is asking this Court to move snowmobile operation out of its current category with trains, taxis, and automobiles and into the same category as hockey, paintball, cheerleading, and other activities to which Minnesota courts have applied primary assumption of risk. (App. Br. at 27-31.) McFarland argues that since this Court's 1974 holdings in *Olson* and *Carpenter* (that snowmobiles are not more dangerous than automobiles) automobiles have become safer and snowmobiles have become less safe. (App. Br. at 29-30.) This is simply not true. Snowmobiles, like automobiles, also have more advanced safety features than they did in the 1970s. In fact, McFarland testified that some of the modifications currently made to snowmobiles actually increase safety. (T. 289.) Also, contrary to McFarland's argument regarding the conditions that snowmobile operators encounter (App. Br. at 19, 27, 30-32), drivers of automobiles and motorcycles—especially in Minnesota—also encounter unpredictable weather, drifts, and uneven terrain in the form of road construction and potholes. These drivers also face the additional safety hazard of having a far greater number of vehicles on the road than a snowmobiler would ever encounter and often at greater speeds.

More importantly, the inherent risks of operating a snowmobile are more similar to the inherent risks of operating an automobile or motorcycle than to the risks associated with hockey and the other previously-referenced recreational activities. A snowmobile operator, just like an automobile driver or a motorcycle driver, is under a continuous duty to use reasonable care.¹

¹ Snowmobile operators are under a statutory duty to use reasonable care. "It shall be unlawful for any person to drive or operate any snowmobile in the following unsafe or

Further, this is a case of normal snowmobile operation. The friends were not racing each other across the bean field or intentionally jumping drifts. (T. 166, 234-35.) Thus, this case is distinguishable from the California cases McFarland cites. (App. Br. at 28-29.) This case is also distinguishable from *Jusilla* where the Minnesota Court of Appeals applied primary assumption of risk to a spectator at a snowmobile race. *Jusilla*, 556 N.W.2d at 237-38.

Although Daly encountered known dangers associated with driving his snowmobile in a bean field, McFarland had a continuous duty to operate his snowmobile with reasonable care. Just like the motorbike driver in *Iepson*, who did not consent to relieve the driver of the truck with which he collided of his duty of care, Daly did not consent to relieve McFarland of his duty of continuous care. The continued existence of McFarland's duty makes the defense of primary assumption of the risk inapplicable to this case. Therefore, this Court should affirm the district court and the Court of Appeals and hold that under the facts of this case, as viewed in the light most favorable to Daly, primary assumption of risk does not apply.

II. THE COURT OF APPEALS ERRED BY REVIEWING THE SPECIAL VERDICT FORM WHEN MCFARLAND HAD NOT PRESERVED THAT ISSUE FOR APPELLATE REVIEW.

To preserve an issue for appellate review, “counsel-*in addition to* taking the other requisite steps, *including making timely objections*-must move the trial court for a new

harassing ways: (1) at a rate of speed greater than reasonable or proper under all the surrounding circumstances; (2) in a negligent manner so as to endanger the person or property of another or to cause injury or damage thereto.” Minn. Stat. § 84.87, subd. 2.

trial pursuant to Minn. R. Civ. P. 59.01.” *Sauter v. Wasemiller*, 389 N.W.2d 200, 202 (Minn. 1986) (emphasis added). Here, although McFarland brought a motion for a new trial, he failed to object to the Special Verdict Form. In fact, he agreed to the form. (T. 475, 478, 493.) Since McFarland failed to preserve this issue, the Court of Appeals should have affirmed the district court without review.

In addition to failing to preserve appellate review, by failing to object to the Court’s Special Verdict Form, McFarland waived any objection to it. Errors stemming from the form of the special verdict are waived if not objected to “prior to submission to the jury.” *Martineau v. Nelson*, 311 Minn. 92, 104, 247 N.W.2d 409, 416 (1976). A party’s failure to object to the form of a special verdict question, prior to the time the question is submitted to the jury, constitutes a waiver of any objection that party may have. *Estate of Hartz v. Nelson*, 437 N.W.2d 749, 752 (Minn. Ct. App. 1989); *see also Thielbar v. Juenke*, 291 Minn. 129, 137, 189 N.W.2d 493, 498 (1971) (holding same); *Covey v. Detroit Lakes Printing Co.*, 490 N.W.2d 138, 142-43 (Minn. Ct. App. 1992) (holding trial court did not abuse its discretion by using the special verdict form where “appellants made no objection to the submission of the special verdict form”).

McFarland waived any objection to the trial court’s Special Verdict Form by failing to object (and even agreeing to it) both in chambers and after the judge read the form to the jury prior to the jury’s deliberations. (T. 475, 478, 493.) Because McFarland did not object to the court’s Special Verdict Form before the court submitted it to the jury, McFarland has waived this issue. Thus, Daly respectfully requests that this Court affirm the Court of Appeals without further review of the Special Verdict Form.

III. ALTERNATIVELY, THE SPECIAL VERDICT FORM IS CONSISTENT WITH THE EVIDENCE THAT MCFARLAND'S NEGLIGENCE WAS A DIRECT CAUSE OF THE ACCIDENT AND DALY'S WAS NOT.

A. Standard of Review

Application of the standard of review for special verdict forms requires clarification in this case. McFarland correctly cites *Haugen* as stating, "When a district court resolves inconsistent findings by deciding a fact question as a matter of law, this Court's review is de novo." (App. Br. at 35) (citing *Haugen v. Int'l Transp., Inc.*, 379 N.W.2d 529, 531 (Minn. 1986)). The *Haugen* court stated:

[W]e note that some, but not all, determinations that jury findings are inconsistent involve errors of law. For example, when a jury finds that one defendant in a negligence action did not cause the plaintiff's damages but then apportions a percentage of liability to that defendant, the inconsistency in the special verdict answers can be identified as a matter of law.

Haugen, 379 N.W.2d at 531. There is no dispute that is similar to what occurred here. The jury found that Daly did not cause his injuries but still apportioned a percentage of liability to him. (Add. at 19-20.) What occurred here is also similar to the next part of the *Haugen* opinion in which this Court stated:

However, where the jury concludes that a defendant was negligent but that the negligence was not a direct cause of plaintiff's injuries, . . . , determining whether the special verdict answers are inconsistent generally does not involve a question of law. Determining whether an explanation exists that reconciles the answers depends in significant part upon the credibility of witnesses and the probative force and character of the evidence introduced, factors often not adequately portrayed in the record and generally within the discretion of the trial court.

Haugen, 379 N.W.2d at 531. This is also similar to what occurred here. The jury found that Daly was negligent but that his negligence was not a direct cause of his injuries. (Add. at 19-20.) Under *Haugen*, the standard of review depends on whether this Court

reviews the inconsistency between Question 4 (Daly's negligence was not a direct cause) and Question 5 (apportionment of direct cause) or the inconsistency between Question 3 (Daly was negligent) and Question 4 (Daly's negligence was not a direct cause).

In post-trial motions, McFarland argued that the answer to Question 4 should be changed to "Yes." (App. Br. at 33-34; A. 11.) On appeal, McFarland claims that the Court changed the answer to Question 5. (App. Br. at 32.) Thus, review of the previously-requested and the alleged change would necessarily require a potentially confusing application of both of the *Haugen* scenarios.

Fortunately, this confusion is eliminated because McFarland moved for a new trial, which limits the standard of review:

Review of a trial court's decision to deny a motion for a new trial is limited. Where a motion is based upon the claim that a jury awarded excessive damages based upon passion or prejudice, an appellate court must defer to the trial court's broad discretion and should reverse its denial of the motion for new trial only where there has been an abuse of that discretion. . . . The same standard of review is applicable where the motion for a new trial is based upon a claim that the verdict is unsupported by the evidence.

Cafferty v. Monson, 360 N.W.2d 414, 417 (Minn. Ct. App. 1985) (internal citation omitted) (citing *Conover v. N. States Power Co.*, 313 N.W.2d 397, 408 (Minn. 1981) (appellate court should defer to presiding trial court, which is given the "*broadest possible discretionary power*") (emphasis added)).

In addition, the district court has broad discretion with regard to the form and substance of the special verdict form. *Gravley v. Sea Gull Marine, Inc.*, 269 N.W.2d 896, 900 (Minn. 1978). An appellate court reviews challenges to the formulation and language of the special verdict under an abuse of discretion standard. *Sabasko v.*

Fletcher, 359 N.W.2d 339, 343 (Minn. Ct. App. 1984). The special verdict form is proper where the questions fairly and adequately cover the issues raised by the pleadings and evidence. *Hill v. Okay Constr. Co.*, 312 Minn. 324, 340, 252 N.W.2d 107, 118 (1977). Since McFarland claims that the verdict is not supported by the evidence and takes issue with the form and substance of the Special Verdict Form, this Court should review this issue under an abuse-of-discretion standard.

B. The inconsistent answer on the Special Verdict Form does not require a new trial in this case because only McFarland’s negligence was the proximate cause of Daly’s injuries.

If this Court elects to review the Special Verdict Form, as the Court of Appeals did, despite McFarland’s agreeing to it and failing to object to it, this Court should affirm because Daly’s negligence was not the cause of the collision, his damages should not be reduced, and McFarland is not entitled to a new trial.

Special verdict forms are to be liberally construed to give effect to the intention of the jury. *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662 (Minn. 1999). An answer to a special verdict question will only be set aside if it is perverse and palpably contrary to the evidence. *Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 76 (Minn. 1981). A special verdict form should not be set aside if it “can be reconciled in any reasonable manner consistent with the evidence and its fair inferences.” *Reese v. Henke*, 277 Minn. 151, 155, 152 N.W.2d 63, 66 (1967) (emphasis added). As this Court has stated, “[t]he Seventh Amendment to the United States Constitution requires us to view this case in a way that reconciles, if possible, the jury’s answers to special interrogatories.” *Covey*, 490 N.W.2d at 142-43; see also *Hauenstein*, 347 N.W.2d 272,

275 (Minn. 1985) (“If the answers to special verdict questions can be reconciled *on any theory*, the verdict will not be disturbed.”); *Olson v. Alexandria Indep. Sch. Dist. No. 206*, 680 N.W.2d 583, 587 (Minn. Ct. App. 2004) (“When answers to special verdict questions are correctly declared inconsistent, they are to be reconciled in any reasonable manner consistent with the evidence and its fair inferences.”). This Court makes that determination on a case by case basis. *Orwick*, 304 Minn. at 344, 231 N.W.2d at 95 (looking to the evidence in that case to determine if the verdict should be set aside).

The test, in cases such as this where there are causation questions on the Special Verdict Form, is whether the evidence established as a matter of law that the plaintiff’s negligence was the proximate cause of his injuries. *Id.*; *Meinke v. Lewandowski*, 306 Minn. 406, 237 N.W.2d 387 (1975). In *Orwick*, the special verdict form was almost exactly like the form used in this case. *Id.* at 342, 231 N.W.2d at 94. The *Orwick* jury was first asked whether the defendant was negligent *Id.* The jury said that he was. *Id.* The jury was then asked if the defendant’s negligence was the proximate cause of plaintiff’s injury. *Id.* Again the jury said yes. *Id.* The jury was then asked the same two questions about the plaintiff. *Id.* The jury answered that the plaintiff was negligent but that the plaintiff’s negligence was not the proximate cause of his own injuries. *Id.* Similar to this case, even though the jury had determined that the plaintiff’s negligence was not the proximate cause of his injuries, the jury still attributed to the plaintiff 22% of the negligence that contributed to the plaintiff’s injuries. *See Id.*

This Court identified the issue in *Orwick* as whether, under the facts of that case, “a finding by a jury that a party’s negligence is not a proximate cause of an accident and

a later finding, on the issue of comparative negligence, that such negligence contributed to cause the accident are *so irreconcilable or inconsistent* as to require a new trial.” *Id.* at 342-43, 231 N.W.2d at 94. Regarding the inconsistency in the form, this Court stated:

As returned by the jury, there was an obvious inconsistency in the answers . . . The negligence on the part of plaintiff . . . could not at the same time be a contributing cause of the accident . . . and not be a proximate cause of the accident. The trial court, however, stated in its order for judgment that it was adopting the answers contained in the special verdict. . . . In so doing, *the trial court did not act to reconcile the inconsistency in the answers* to questions 4 and 5-it simply ignored the answer to question 5. We do not know what prompted the trial court’s order for judgment, for no memorandum accompanied that order or the order from which this appeal was taken.

Id. at 342, 231 N.W.2d at 94 (emphasis added).

The *Orwick* court held that where the jury finds that a party’s negligence was not a proximate cause of his own injuries, but attributes a portion of the total causal negligence to that party, “*and the evidence established as a matter of law that his negligence was a proximate cause of his injuries*, the court should . . . set aside the answer to the question which found that the plaintiff’s negligence was not causal and insert an affirmative answer.” *Id.* at 344, 231 N.W.2d at 94-95 (emphasis added). This Court concluded that the evidence in *Orwick* established, as a matter of law, that the plaintiff’s negligence was a proximate cause of his own injuries. *Id.* Thus, this Court remanded with instructions to set aside the answer to the question that found that the plaintiff’s negligence was not causal and insert an affirmative answer. *Id.* at 344, 231 N.W.2d at 95 (emphasis added).

Six months after *Orwick*, this Court clarified the *Orwick* holding in *Meinke*. In that case, the appellant argued that “a new trial *must* be granted in every case where a

jury returns inconsistent answers.” *Id.* at 411, 231 N.W.2d at 392 (emphasis added).

Citing *Orwick* this Court disagreed:

Because our examination of the problems presented by inconsistent verdicts in this case and others indicates that the adoption of any specific rules would thwart the interests of justice by precluding flexibility to choose a resolution tailored to the circumstances of each case, we decline to adopt the rule urged by plaintiff— that a new trial Must be granted in every case where a jury returns inconsistent answers. Rather, we choose to restate and clarify the established general principles governing a judge’s handling of inconsistent answers to special verdicts, and to evaluate the judge’s action in the present case in light of those principles.

Id. at 411-12, 237 N.W.2d at 391 (emphasis in original) (footnote citing *Orwick* omitted).

The *Meinke* court then listed the options available to the trial court judge faced with an inconsistent verdict: “(1) render judgment against the party having the burden of proof; (2) order a new trial; or (3) send the jury back for further deliberations.” *Id.* at 412, 237 N.W.2d at 391. “Another well-entrenched rule in Minnesota and other jurisdictions is that the trial judge has a responsibility to attempt, if at all possible, to harmonize inconsistent responses in a special verdict . . . by exercising their own powers of interpretation.” *Id.* Because there was an incomplete record in *Meinke*, this Court was not able to “direct that one of the answers be changed as a matter of law, as we did in *Orwick.*” *Id.* at 413, 237 N.W.2d at 392. The court held that the district court abused its discretion by reinstructing the jury. *Id.*

1. This case is distinguishable from *Orwick* and *Meinke*.

McFarland claims that a new trial “must be ordered’ because as an experienced snowmobiler, Daly knew that he could encounter unexpected obstacles while riding “in close formation and proximity to others down the field.” (App. Br. at 37.) First, Daly’s

experience and expectations go more to the primary assumption of the risk argument, which is addressed above. Second, the excerpt from the transcript as quoted on page 38 of McFarland's brief illustrates Daly's panic at seeing McFarland vault into the air and bail off his snowmobile, and McFarland's snowmobile fall from the sky toward him. It was not the close proximity to the other riders that caused Daly's injuries. The injuries were caused by McFarland first failing to observe a drift, then hitting it so fast that he vaulted high into the air, his sled tipped backward, and he had to abandon it or risk it crushing him to death. McFarland's abandoned snowmobile then tumbled through the air toward Daly. (T. 170, 275-78.)

McFarland also complains that defense counsel did not get to sign off on the judge's Order. (App. Br. 3, 16.) The same judge who signed the Order heard counsel's arguments, judged the credibility of the witnesses, and observed the jury's reactions to the testimony. McFarland cites no authority that requires a district court judge to seek permission from counsel before issuing an order. When faced with the inconsistency on the Special Verdict Form, the trial court exercised his powers of interpretation and reconciled the inconsistent answer by choosing to disregard the comparative fault question. This option was supported by the evidence and within the trial court's discretion.

Here, unlike in *Meinke*, there is a complete record. Also, unlike in *Orwick* the record here shows that the evidence establishes that any negligence the jury may have attributed to Daly was not the proximate cause of his injuries.

The court's Special Verdict Form first asked the jury to determine the parties' negligence and then asked whether that negligence was "a direct cause of the accident on January 20, 2007." (Add. 19.) The jury had been instructed that "a direct cause is a cause that had a substantial part in bringing about the accident and injury." (T. 488.) The jury determined that both parties were negligent but that only McFarland's negligence was a direct cause of the accident. (Add. 19-20.)

The jury heard substantial evidence that McFarland's speed played a substantial part in bringing about Daly's injuries including testimony from Kenneth Drevnick regarding "vaulting" a phenomenon that occurs as a snowmobile strikes a ramped object at a set speed. (T. 362, 367-68, 371.) Drevnick's testimony indicated that vaulting was more likely to occur at higher speeds. (T. 362, 367-68, 371.) In other words, the other snowmobilers, who encountered drifts but did not lose control and vault into the air, were by definition, traveling at lower and safer speeds than McFarland.

McFarland's own expert, William Elkin, testified that a safe speed is the speed at which a snowmobiler is able to maintain control and stop in time to avoid a collision. (T. 450.) McFarland's testimony indicated that he was ahead of the group going approximately fifty miles per hour when he hit the drift. (T. 276.) He failed to observe the drift in time and therefore failed to alter his course or change his speed to safely travel around or over the drift. This evidence shows that McFarland's negligence was the substantial cause of the collision.

The only evidence of Daly's negligence was Daly's open admission regarding his use of an iPod while riding his snowmobile. (T. 163.) The jury apportioned thirty percent

of the negligence to Daly. The jury may have concluded that this prevented him from hearing other snowmobiles as they rode together across the field. But the jury also heard testimony that Daly slowed down as he crossed the bean field, knew his friends were behind him and to his left and right, and saw McFarland pass him, hit a drift, and vault into the air. (T. 170, 173, 275-76.)

The inconsistency in the Special Verdict Form was in an additional question. Although the jury had already determined that Daly's negligence was not a direct cause of the accident, they were asked to determine the percentage of each party's negligence that contributed as a direct cause. (Add. 19-20; T. 494.) Here, liberally construing the court's Special Verdict Form to give effect to the jury's intention and based on the evidence the jury weighed at trial, this answer could reasonably be reconciled—the jury was apportioning the “percentage of negligence” of each party without intending to affect the direct cause determination.

Further, Daly's music was not the cause of McFarland's loss of control. McFarland lost control of his snowmobile because McFarland was traveling at an unsafe speed, in a drifted field under poor conditions. Because of McFarland's negligence, the accident would have occurred whether or not Daly was wearing an iPod.

Thus, unlike in *Orwick*, here the evidence did not require the district court to insert an affirmative answer to question 4 on the Special Verdict Form. (Add. 19.) Therefore, the district court did not err. The district court was following the “well-entrenched rule in Minnesota and other jurisdictions . . . that the trial judge has a responsibility to attempt, if

at all possible, to harmonize inconsistent responses in a special verdict . . . by exercising their own powers of interpretation.” See *Meinke*, 306 Minn. at 412, 237 N.W.2d at 391.

Also, unlike in *Orwick*, here the district court provided a memorandum outlining the reasons for not inserting an affirmative answer. The district court’s memorandum states, “Accordingly, although the jury completed responses to the comparative fault question, as instructed by the Special Verdict form, the Court finds that no fault comparison was legally required or necessary and that no fault reduction would be appropriate.” (Add. 17.)

The Court of Appeals, affirmed stating, “The jury could reasonably have concluded that respondent was negligent for listening to an iPod but that this did not, in the end, directly cause the accident, which occurred when [McFarland’s] snowmobile launched into the air.” (Add. 8.) The evidence is consistent with the Court of Appeals holding.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MCFARLAND’S REQUEST FOR AN EMERGENCY RULE INSTRUCTION BECAUSE MCFARLAND CREATED THE EMERGENCY OF WHICH HE COMPLAINED AND DEFENDANT WAS ALLOWED TO ARGUE THAT THE DRIFT PRESENTED AN EMERGENCY.

A. Standard of Review

The decision of whether or not to give a requested jury instruction lies within the broad discretion of the trial court. *Sandborg v. Blue Earth County*, 601 N.W.2d 722, 724 (Minn. Ct. App. 1997). The district court’s failure to give a particular instruction is reversible error only if the omission is an error with respect to fundamental law. *Anderson v. Ohm*, 258 N.W.2d 114, 118 (Minn. 1977). “District courts are allowed

considerable latitude in selecting language used in the jury charge and determining the propriety of a specific instruction.” *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002). This Court reviews the jury instructions for an abuse of that discretion. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002).

B. Scope of Review

In support of his argument that the trial court should have given an emergency rule instruction, McFarland cites to the district court’s denial of partial summary judgment. (App. Br. at 41.) The district court’s denial of Daly’s partial summary judgment motion is beyond this Court’s scope of review. *See Bahr*, 766 N.W.2d at 918-919 (holding the district court’s conclusion at the summary judgment stage becomes moot once the jury reaches a verdict on that issue). *See generally* 19 James Wm. Moore et al., *Moore’s Federal Practice* § 205.08[2] (3d ed. 2009) (“[R]eview of a denial of a directed verdict or judgment as a matter of law motion obviates the need for review of a denial of a pre-trial summary judgment motion.”).

In *Bahr*, this Court clarified the scope of appellate review following a summary judgment determination. 766 N.W.2d at 917-18. (“The scope of review question implicated in this case is whether the denial of a motion for summary judgment is reviewable on appeal after judgment is entered on a jury verdict.”). In that case, Bahr filed a defamation suit against his co-worker, his supervisor, and his workplace based on statements made at his workplace. *Id.* at 917. Application of qualified privilege turned on whether the statements were made with actual malice. *Id.* Defendants moved for summary judgment, which the trial court denied. *Id.* At the close of evidence,

Defendants moved for JMOL, which the trial court also denied “and found sufficient evidence to create a fact question for the jury as to the existence of actual malice.” *Id.* The jury found in favor of Bahr against his workplace and co-worker but found that his supervisor had not made any defamatory statements. *Id.* Defendants made post-trial motions, which were also denied. *Id.* The court of appeals reversed. *Id.* (“The court of appeals held that the district court erred in submitting to the jury the question of actual malice as to [the co-worker and the workplace].”). This Court granted review. *Id.*

Regarding whether this Court should review the trial court’s determination on actual malice at the summary judgment phase, this Court stated:

Where a trial has been held and the parties have been given a full and fair opportunity to litigate their claims, it makes no sense whatever to reverse a judgment on a verdict where the trial evidence was sufficient merely because at summary judgment it was not.

Id. at 918 (internal citations and omissions omitted). Thereafter, this Court did not rely on the trial court’s denial of defendant’s summary judgment motion when analyzing whether there were genuine issues of material fact relative to actual malice. *Id.*

Here, McFarland argues that his pre-emergency conduct was not negligent as a matter of law because the trial court denied Daly’s motion for summary judgment and held that the issue of whether McFarland was negligent was a question for the jury. (App. Br. at 41, A. 4.) Under *Bahr*, McFarland cannot rely on the trial court’s summary judgment holding because the trial court’s holding at the summary judgment level is not reviewable on appeal. Thus, just as in *Bahr*, this Court should not consider the summary judgment determination when reviewing the propriety of an emergency rule instruction in

this case; an ample trial record affirmatively supports the jury verdict, including expanded testimony of multiple lay witnesses, law enforcement, reconstruction, and other expert witness testimony.

C. If there was an emergency here, McFarland caused it by going too fast for the conditions.

The record supports the district court’s finding that there was no emergency—like a deer leaping out on the road—here. As the Court of Appeals held, McFarland encountered an eight to ten inch drift, a known hazard inherent to normal snowmobile operation. (Add. 6.) Even if the drift—or even the chain of events that followed after McFarland hit the drift—does constitute an emergency, McFarland caused the emergency by failing to keep a proper lookout and going too fast for the conditions in the bean field.²

The emergency rule instruction provides:

If there was an emergency *that a person did not cause*, that person is not negligent if he or she acted in a way a reasonable person would have acted.

In deciding if he or she acted reasonably consider:

1. The circumstances of the emergency; and
2. What the person did or did not do

4 *Minnesota Practice*, CIVJIG 25.16. The party seeking to invoke the emergency rule must “show that his own negligence did not create or contribute to the emergency situation.” *Siegler v. Conner*, 396 N.W.2d 612, 615 (Minn. Ct. App. 1986); *see also*

² The other snowmobilers in the same field slowed down when encountering drifts so they could maintain control of their snowmobiles. Forsberg stated that the conditions in the field were “crappy” due to the rough snow and visibility problems. He testified that he was scared he would be thrown from his sled if he hit one of the hard drifts. (T. 396.)

Thielbar, 291 Minn. at 134, 189 N.W.2d at 497 (1971) (holding that “whatever may have existed in the way of a sudden emergency occurred either because of defendant’s speed or his failure to keep a proper lookout”); *Mathews v. Mills*, 288 Minn. 16, 24-25, 178 N.W.2d 841, 846 (1970) (holding trial court properly refused to give emergency instruction where defendant failed to keep proper lookout and failed to avoid collision); *Daugherty v. May Bros. Co.*, 265 Minn. 310, 319, 121 N.W.2d 594, 600 (1963) (affirming refusal to give emergency instruction where defendant was negligent due to his improper speed and failure to keep proper lookout); *Kachman v. Blosberg*, 251 Minn. 224, 235-36, 87 N.W.2d 687, 696 (1958) (affirming refusal to give emergency instruction where defendant failed to keep proper lookout and failed to brake in time to avoid being “overtaken by the emergency of which he now complains”).

Here, the evidence shows that pre-emergency McFarland was driving his snowmobile too fast to keep a proper lookout for drifts and too fast to avoid hitting a drift. McFarland was the only rider who failed to travel at a speed safe enough to maintain control of his snowmobile. If McFarland had driven more slowly, the emergency would have been avoided. McFarland created the emergency by going too fast for the conditions. Thus, the district court’s failure to instruct on the Emergency Rule was not an abuse of discretion.

Further, although the emergency rule instruction was not given because the judge determined that there was not an “emergency” such as a deer leaping out, the judge still allowed defense counsel to compare the drift to a deer and instructed the jury on negligence and reasonable care. (T. 471-73, 506-529.) Therefore even without the

emergency rule instruction, the jury was able to weigh whether McFarland acted in a reasonable manner when faced with the drift. Thus, any error in not providing the instruction was harmless.

D. Limiting the scope of review, as required by *Bahr*, prevents McFarland from exhuming the summary judgment denial to show that the trial court was required to give the Emergency Rule Instruction.

To support his argument that he was entitled to have the jury instructed on the emergency rule, McFarland primarily relies on the dissent in *W.G.O. v. Crandall*. (App. Br. at 39-40; A. 25.) The *W.G.O.* dissent limits the district court's broad discretion and attempts to define a crucial aspect of CIVJIG 25.16 – that a person did not cause the emergency he confronted.

My reading of the case law suggests that there are clear objective boundaries on the district court's discretion, though in some cases they are applied without explanation. Those boundaries are these: the district court must give the emergency instruction in all cases where the jury *could find* that the defendant's pre-emergency conduct was *not* negligent, and the instruction should be refused only in those cases where the defendant's pre-emergency conduct can be said to constitute negligence as a matter of law. It is not enough that there is some evidence from which the jury could find that the defendant's pre-emergency conduct was negligent. The refusal to give the emergency instruction in such a case would require the district court to prejudge the fact question whether the defendant was negligent and would unfairly preclude the jury from considering the emergency rule even where the jury might have found that the defendant's pre-emergency actions were *not* negligent.

W.G.O., ex rel. A.W.O. v. Crandall, No. C2-00-1266, 2001 WL 314916 at *9 (Minn. Ct. App. Apr. 3, 2001) (emphasis in the original) (Hanson, J., dissenting), *rev'd sub nom. W.G.O. ex rel. Guardian of A.W.O. v. Crandall*, 640 N.W.2d 344 (Minn. 2002).

This dissent is inconsistent with other Minnesota caselaw in at least two ways. First, the mandate that “the district court *must* give the emergency rule in *all* cases” where prescribed conditions apply is at odds with the long-standing law that the district court has broad discretion in determining which instructions the jury will receive. *See e.g., Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). Second, refusing the instruction only when a judge determines that a defendant’s pre-emergency actions were negligent as a matter of law invites the scenario (prohibited under *Bahr*) where a summary judgment denial is reviewed on appeal to show that an element does not exist as a matter of law.

McFarland’s theory on how to apply the *W.G.O.* dissent illustrates how these inconsistencies play out in this case. McFarland theory is that the district court must give the emergency rule instruction where the district court found that a defendant’s pre-emergency conduct was not negligent at the summary judgment stage. (App. Br. at 40.) If this was correct, then any time a summary judgment was denied on the issue of negligence, the emergency rule instruction would be given automatically. This would completely eliminate the trial court’s discretion and would require review on appeal of any summary judgment denial involving negligence.

To avoid inconsistency under *Bahr* and retain the trial court’s discretion, Daly respectfully requests that this Court defer to the trial court in its determination that a particular defendant did or did not create the emergency. For purposes of the emergency rule instruction, that determination should be made after all of the evidence has been adduced at trial. Any previous summary judgment denials should have no bearing on that determination. As stated above, applying that clarification here, the evidence adduced at

trial shows that McFarland's speed and failure to watch for drifts caused the emergency of which he now complains. Therefore it was proper for the trial court to refuse the emergency rule instruction.

E. The Emergency Rule Instruction should be abandoned.

While the district court correctly refused the emergency rule instruction, and the court of appeal correctly affirmed in this case, the potential confusion and inconsistency in applying the emergency rule require consideration. The problems in applying the emergency rule instruction, as illustrated above, are not unique to this case or to this jurisdiction. Several jurisdictions have abandoned the emergency rule instruction because it tends to confuse the jury regarding which standard of care applies in an emergency situation and how it factors into a comparative fault analysis. *See generally* 10 A.L.R. 5th *Modern Status of Sudden Emergency Doctrine* 680. For example, the Mississippi Supreme Court has stated:

The hazard of relying on the doctrine of "sudden emergency" is the tendency to elevate its principles above what is required to be proven in a negligence action. . . . Also it tends to confuse the principle of comparative negligence that is well ingrained in the jurisprudence of this State. . . . In this Court's opinion, the same rules of negligence should apply to all circumstances in a negligence action and these rules of procedure adequately provide for instructions on negligence.

Knapp v. Stanford, 392 So. 2d 196, 198 (Miss. 1980); *see also Simonson v. White*, 713 P.2d 983, 989 (Mont. 1986) ("The instruction adds nothing to the law of negligence and serves only to leave an impression in the minds of the jurors that a driver is somehow excused from the ordinary standard of care because an emergency existed."); *Bjorndal v. Weitman*, 184 P.3d 1115, 1120 (Or. 2008) ("The emergency instruction is erroneous

because it introduces into the liability determination additional concepts that are not part of the ordinary negligence standard.”); *Gagnon v. Crane*, 498 A.2d 718, 721 (N.H. 1985) (“The danger of misleading or confusing the jury generally outweighs any benefit which the jury might derive from employment of the sudden emergency instruction. Again, the ordinary rules of negligence, properly and sufficiently explained, afford an adequate guide by which to appraise conduct.”).

Even jurisdictions that no longer recommend the instruction do not prevent defendants from arguing that a party was acting as a reasonable person would have under the circumstances:

The comments to NJI2d 3.09 suggest that such an instruction is nothing more than a specific statement of the general rule that the standard of care is that care a reasonably careful person would exercise under similar circumstances. Those comments go on to explain that under such a general instruction relating to the standard of care, the circumstance of an emergency may be argued to the jury regardless of whether a specific instruction on sudden emergency is given.

The problem with giving the sudden emergency instruction is that it singles out one aspect of the general standard of care and may give it, the doctrine of sudden emergency, undue emphasis and may unduly emphasize one party’s argument regarding a certain part of the standard of care.

McClymont v. Morgan, 470 N.W.2d 768, 771-72 (Neb. 1991).

Here, the Court of Appeals recognized that even without the instruction, defendant was still able to argue what a reasonable person would do under the circumstances: “Further, despite the district court’s denial of appellant’s proposed instruction, appellant was permitted to argue at length that the snow drift presented an unanticipated emergency.” (Add. 6.) Not only does this show that any error in not allowing the

instruction was harmless, it also shows that the actual emergency rule instruction is superfluous.

Minnesota's emergency rule instruction states:

If there was an emergency that a person did not cause, that person is not negligent if he or she acted in a way a reasonable person would have acted. In deciding if he or she acted reasonably consider:

- 1 The circumstances of the emergency; and
- 2 What the person did or did not do.

4 Minnesota Practice, CIVJIG 25.16 (5th ed.). This is nearly identical to the definitions of reasonable care and negligence:

Definition of "reasonable care"

Reasonable care is the care a reasonable person would use in the same or similar circumstances.

Definition of "negligence"

Negligence is the failure to use reasonable care.

Ask yourself what a reasonable person would have done in these circumstances.

4 Minnesota Practice CIVJIG 25.10 (5th ed.).

The only difference is the requirement that the person complaining of the emergency did not create it. That difference also creates confusion when a jury is faced with determining contributory negligence. Similarly-situated parties, whose negligence the jury is to apportion under principles of comparative negligence, are put to a slightly different test. In other words, the party facing the emergency has an additional layer of analysis because the jury has to determine if his actions caused the emergency.

The Use Note to CIVJIG 25.16 states that it is a particularized application of the reasonable care rule. (A. 42.) It is not clear what the emergency rule adds to the analysis that the reasonable care instruction does not already cover. McFarland argues that “the substance of the emergency rule instruction is not contained in another jury instruction . . .” (App. Br. 39.) But the substance of the emergency rule is in the definition of reasonable care and negligence – both of which were given in this case. The emergency rule would not have added anything to this case—or any case.

The Court of Appeals dissent in this case illustrates yet another source of confusion (or debate) regarding what constitutes an emergency, when the emergency started, or which link in the chain of events constituted the actual emergency. The dissent stated, “The jury could find that this collision was related to Appellant’s split-second emergency decision to push away his airborne snowmobile. The absence of an instruction on the emergency rule would leave the jury without guidance in evaluation the effect of appellant’s mid-air emergency decision.” (Add. 12.) But this argument ignores the driving conduct itself: McFarland was going too fast to observe or even avoid the drift that sent him vaulting out of control high into the air on his snowmobile. McFarland’s failure to keep a proper lookout and maintain control of his snowmobile and his excessive speed, combined with poor visibility and snowmobiling conditions set into motion the vaulting and snowmobile abandonment that lead directly to Daly’s injuries.

While in this case the trial court correctly refused the emergency rule instruction, the instruction adds nothing but confusion to the instructions already in place in most negligence cases. It is unnecessary and causes confusion especially given that parties are

allowed to argue comparative fault and “emergency” conditions fully, even without an emergency rule instruction. Therefore, this Court should strongly consider joining other jurisdictions that have abandoned the emergency rule instruction.

CONCLUSION

Under well-established Minnesota law, primary assumption of risk does not apply to snowmobile operation cases. Daly was operating a snowmobile for recreational purposes and did not consent to relieve McFarland of McFarland’s continuous duty of care. The district court and Court of Appeals were following the law of this state. Thus, Daly respectfully requests that this Court affirm and hold that under the facts of this case, as viewed in the light most favorable to Daly, primary assumption of risk does not apply.

Likewise, the district court did not abuse its discretion in denying McFarland’s motion for a new trial based on an apparent clerical error in the court’s Special Verdict Form. First, McFarland waived this issue by failing to object to the form prior to submission to the jury. Alternatively, any inconsistency in the court’s Special Verdict Form is reconciled by evidence that McFarland’s negligence was a direct cause of the accident and Daly’s was not. Thus, the district court and Court of Appeals should be affirmed, the award should not be reduced, and McFarland is not entitled to a new trial.

The Court of Appeals also correctly held the district court properly refused the emergency rule instruction in this case because there was no emergency here. Even if there was an emergency, McFarland created it by failing to keep a proper lookout and going too fast for the conditions in the bean field. Further, any error in refusing the instruction was harmless in this case because McFarland was allowed to analogize at

great length that the drift that sent McFarland vaulting into the air was an emergency like a deer leaping out in front of McFarland. Thus, Daly respectfully requests that this Court affirm the Court of Appeals.

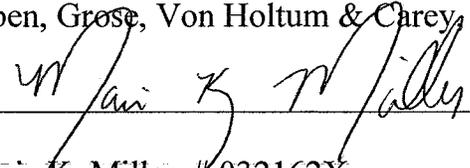
Finally, although the district court properly refused the emergency rule instruction in this case, it is confusing and difficult to apply. It adds nothing more to instructions on negligence and reasonable care and puts similarly-situated parties on different levels in the comparative fault analysis. Finally, as was the case here, determining which link in the chain of events constitutes the “emergency” is potentially confusing and could lead to inconsistent results. Therefore, Daly respectfully requests that this Court strongly consider abandoning the emergency rule instruction in favor of the well-accepted standard negligence instruction, which still permits the parties to fully argue “emergency”, reasonable care, and comparative fault.

Respectfully submitted,

DATED: June 30, 2011

Sieben, Grose, Von Holtum & Carey, LTD.

By



A handwritten signature in black ink, appearing to read "Marcia K. Miller", is written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

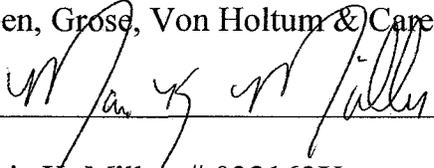
I hereby certify that this brief conforms to Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced using the following font:
Proportional serif font, 13-point or larger. The length of this brief is 11,530 words. This brief was prepared using Microsoft Word 2003.

Respectfully submitted,

DATED: June 30, 2011

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