

Nos. A031635 and A040205

State of Minnesota
 In Supreme Court

Kelci Stringer, individually, and as Personal Representative of the
 Estate of Korey Stringer, and as Trustee for the Heirs and
 Next-of-Kin of Korey Stringer, and Kodie Stringer, a Minor,
 through his Parent and Natural Guardian, Kelci Stringer,
 and Cathy Reed-Stringer and James Stringer,

Appellants,

vs.

Minnesota Vikings Football Club, LLC, and Fred Zamberletti
 and Chuck Barta and Paul Osterman and

Respondents,

and

Dennis Green and Michael Tice, and W. David Knowles, M.D.
 and Mankato Clinic, Ltd., and Sheldon Burns, M.D., and
 David Fischer, M.D., and Orthopaedic Consultants, P.A., and
 Edina Family Physicians, a professional association, and Johns Does 6
 through 30, Natural Persons or Entities Whose Names or
 Identities are Unknown to Plaintiff,

Defendants.

APPELLANTS' REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. RESPONDENTS MISSTATE THE APPELLATE STANDARD FOR REVIEWING A SUMMARY JUDGMENT, AND THE RECORD.....	1
A. The Correct Standard Of Review.....	1
B. Appellant Has Accurately Portrayed The Contents Of The Record	2
C. Respondents Have Not Accurately Portrayed The Record.....	4
II. RESPONDENTS PRESENT A FLAWED ANALYSIS OF PERSONAL DUTY.....	11
A. A “Personal Duty” Exists When A Co-Employee Personally Participates In Conduct Directed Toward The Injured Employee	12
B. Respondents’ Presentation Of “Personal Duty” Is Selective And Distorted.....	14
C. Osterman And Zamberletti Were Discharging Personal Duties When They Committed Acts Of Gross Negligence.....	17
D. Co-Employee Liability Is Part Of A System Of Workers’ Compensation Law That Recognizes The Interplay Between Limited Employer Liability And The Responsibility Of Third Parties.....	19
III. RESPONDENTS PRESENT A FLAWED ANALYSIS OF “GROSS NEGLIGENCE” AND THE RECORD IN THIS CASE	21
A. The Correct Legal Definition Of “Gross Negligence”	21
B. The Record Is More Than Adequate To Support Kelci Stringer’s Gross Negligence Claim	22
CONCLUSION	26

TABLE OF AUTHORITIES

CASES

Behr v. Soth, 170 Minn. 278, 212 N.W. 461 (1927)	12, 14, 15
Dawley v. Thisius, 304 Minn. 453, 231 N.W.2d 555 (1975)	passim
Lambertson v. Cincinnati Welding Corp., 312 Minn. 114, 257 N.W.2d 679 (1977)	20
Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954)	20
Prior Lake Am. v. Mader, 642 N.W.2d 729 (Minn. 2002)	20
Pulju v. Metro. Prop. & Cas. Co., 535 N.W.2d 608 (Minn. 1995)	15
Stringer v. Minn. Vikings Football Club, 686 N.W. 2d 545 (Minn. Ct. App. 2004).....	18, 22
Teffeteller v. Univ. of Minn., 645 N.W.2d 420 (Minn. 2002)	25
Truesdale v. Friedman, 267 Minn. 402, 127 N.W.2d 277 (1964)	1
Vlahos v. R & I Constr. of Bloomington, Inc., 676 N.W.2d 672 (Minn. 2004)	15
Wicken v. Morris, 527 N.W.2d 95 (Minn. 1995)	passim
Willis v. County of Sherburne, 555 N.W.2d 277 (Minn. 1996)	15

STATUTES

Minn. Stat. § 176.061, subd. 5(c)	13, 20, 21
Minn. Stat. § 645.17(4)	20

ARGUMENT

Respondents' position is simply stated – in Minnesota one co-employee can be held liable for injuring or causing the death of another *only for* (1) direct acts (2) that are totally outside the defendant's job description, and (3) that reflect a complete lack of care. But this is not a correct statement of what the law is, or should be. This Court has stated the controlling legal principles for both legal issues presented here – personal duty and gross negligence. Applying that law to the facts of this case results in a clear issue for a jury to decide concerning the liability of the Respondents.

I. RESPONDENTS MISSTATE THE APPELLATE STANDARD FOR REVIEWING A SUMMARY JUDGMENT, AND THE RECORD

A. The Correct Standard Of Review

Respondents' assertion that "[a] statement of facts must include evidence that undercuts a party's position as well as that which supports it" (Resp. Br. at 3) is wholly inapplicable here. The case relied upon, Truesdale v. Friedman, 267 Minn. 402, 127 N.W.2d 277 (1964), involved an appeal following a jury verdict, where the Court considers the totality of the evidence in assessing evidentiary sufficiency. But in an appeal from a summary judgment, the appealing party is entitled to have the Court consider only the evidence favoring her claims, view that evidence in a light most favorable to her, and draw all reasonable inferences in support of her claims. (See App. Br. at 24-25.)

Respondents either misapprehend the correct standard, or have chosen to disregard it. Respondents have instead presented the evidence in a light most favorable to them,

and have drawn inferences from that evidence to support their position. But they are not entitled to do so. Only Kelci Stringer, as the appealing party, may advance such a view of the evidence.

B. Appellant Has Accurately Portrayed The Contents Of The Record

Kelci Stringer presented the Court with a detailed and fully supported statement of facts in her opening brief. The Court will judge for itself the fidelity with which she portrayed the record. A few comments in response to Respondents' criticisms regarding Kelci Stringer's opening brief are warranted, however.

- At page 3 of Respondents' Brief, they criticize the charts at Appellant's Brief, pages 37-42, claiming they contain facts not found in the record. But the titles of the charts clearly state that they reflect both facts in the record and reasonable inferences from them. A party challenging a summary judgment is entitled to do that very thing.
- Respondents' criticisms of Kelci Stringer's citations to the record are unfounded. For example, they assert that the statement "The collapse of an athlete usually is a sign of advanced heat stroke requiring immediate evaluation for cause" (App. Br. at 4) "appears to have been created for this brief" and that "neither of the experts plaintiffs cite makes any such dramatic and surprising statement." (Resp. Br. at 4.) At the record pages cited in Appellant's Brief,

Dr. William Roberts states in his affidavit that the collapse of an athlete should trigger an evaluation for cause, and the article written by Respondents' own expert, Dr. Randy Eichner, says collapse is an advanced feature of heat stroke. It is difficult to imagine more direct support for the statement in Appellant's Brief.

- Respondents challenge the statement in Appellant's Brief that Stringer lay on the ground for "up to five minutes" following his collapse. Respondents insist McFarland testified he took the photograph of Stringer on the ground (AA469)¹ "almost immediately upon Stringer lying down" and "Matt Birk shooed McFarland away from the scene immediately after McFarland took photo 4-K" (Resp. Br. at 13.) McFarland testified he took photo 4-K probably a minute, but possibly as much as a minute and a half after Stringer's collapse (SA30; RA141) and Stringer lay on the field for "about five minutes" after collapsing. (AA180.) Furthermore, McFarland never testified how much time passed between photo 4-K and Matt Birk shooing him away.
- Respondents challenge Kelci Stringer's statement that, upon getting up from his collapse, Stringer stumbled – they prefer "slipped" – and appeared uncoordinated while performing the "Big Bertha" drills.

¹ References to "AA" are to Appellant's Appendix filed with her opening brief; references to "SA" are to the Supplemental Appendix filed with this brief.

Respondents suggest Stringer “simply got to his feet and returned to the drills” and there was nothing “unusual” about how he performed them. (Resp. Br. at 13.) Leaving aside Respondents’ hair-splitting between “stumble” and “slip,” there was evidence that, when Stringer got up after collapsing, he was noticeably incapable of performing the Big Bertha drills properly. Fellow lineman Cory Withrow testified Stringer was supposed to hit Big Bertha “[t]en times in a row,” but hit it only once, then “swung it out of his way” and proceeded directly to the trailer. (AA252.)

These examples are presented to do more than score debating points. They show starkly the significant differences in perspective held by the parties; but on an appeal from summary judgment, it is the perspective of the appealing party, supported by the record, which carries the day.

C. Respondents Have Not Accurately Portrayed The Record

Respondents do more than unjustifiably critique Kelci Stringer’s statement of the facts. They also present a version of the facts that fails to focus on the salient evidence, and in many cases is just plain wrong.

At this stage of the litigation, the material facts are fairly narrow. On July 30 and 31, the Vikings practiced in life-threatening heat, a fact no one contests. It is undisputed that Stringer suffered significant heat-related illness both days²; on July 31, he became

² Respondents’ own expert, Dr. Eichner, has written, “a prime time for heat stroke is the day after an exhausting and dehydrating day in the heat.” (AA451.)

critically ill; and he did not receive care sufficient to prevent his death. The material fact disputes concern whether the co-employees' failure to provide Stringer with any meaningful care as he became progressively ill amounted to gross negligence. Kelci Stringer has presented a detailed and fully supported statement of the facts in the record addressing those issues. (*See App. Br. at 3-22, 36-44.*)

Respondents' counter-statement of facts is not so focused. Respondents initially expound on the excellence of the Vikings' training facilities and player care practices. These "facts," however, are largely immaterial, as they relate to claims and parties long gone from the case³, and even if true, failed to prevent the onset of Stringer' fatal illness. Respondents also use vague and misleading descriptions of events to slant the evidence in their favor, creating the impression there are no material factual issues for a jury to resolve, when in fact there are. For example:

- Respondents describe Stringer's collapse on the practice field as "lying down." (Resp. Br. at 12-13.) Photographer McFarland, who observed it, testified Stringer "collapsed on the field." (SA30.)
- Respondents insist "Stringer got up from that position within seconds of [Osterman and Kearney] arriving to attend to him," citing

³ Kelci Stringer initially asserted numerous claims against numerous defendants, some of whom were not Vikings employees subject to the Workers' Compensation Act. Her Complaint described conduct by other defendants that could be described as administrative (*e.g.*, the failure of a non-Vikings employee to furnish required heat protocols). Kelci Stringer now presents only one claim (gross negligence) against two co-employees (Osterman and Zamberletti) for their own personal actions, which were directed toward and affected only one employee (Stringer).

Osterman's testimony at page 187. (Resp. Br. at 13.) Nowhere in that testimony did Osterman indicate how long it took Stringer to get up after his collapse; he described Stringer moving from his back to "one knee." (RA192.)

- Respondents repeatedly state (Resp. Br. at 11-13) that players and coaches standing nearby did not notice Stringer's symptoms of serious illness, even when he collapsed. However, McFarland testified that, when he took photo 4-K, "I knew there was something serious going on with Korey" and within minutes he told his companion Stringer was "in trouble." (RA146-47.)
- Conspicuously missing from Respondents' recitation of the events inside the trailer (Resp. Br. at 15-16) are any references to time, particularly the *lapse of time* between Osterman's acts. Respondents omit time references in describing Stringer's heat stroke episode, despite the injunction of their own expert, Dr. Eichner, that time is critical because "[i]n heat stroke, every minute counts." (AA453.) The passage of time without any meaningful treatment of Stringer goes to the very heart of this case.
- Respondents inaccurately characterize Stringer's behavior in the trailer on July 30 and July 31 (Resp. Br. at 16) as "the same." On July 30, when Osterman asked Stringer how he was, Stringer expressed frustration about having to leave practice early and be in

the trailer. (RA186.) When Osterman asked Stringer how he was on July 31, Stringer never responded. (AA222.) The usually talkative Stringer was largely silent before becoming comatose and never expressed any inclination to leave the trailer. (Id.) Unlike the previous day, his behavior was incommunicative, detached, stuporous, and apathetic, all symptoms of serious heat illness. (AA452-53.)

- Respondents claim that, after Stringer became non-responsive in the trailer, Osterman “continued to monitor his vitals . . . while waiting for Zamberletti to arrive.” (Resp. Br. at 16.) This significantly exaggerates Osterman’s actions. Osterman was asked, “other than checking his pulse once, as you said, and noticing that he was still breathing, . . . [d]id you do anything else to monitor his vitals?” He responded, “No.” (AA225.) Even the notion Osterman “checked” Stringer’s pulse and that this could count as “care” is dubious: Osterman testified he never determined Stringer’s pulse rate because he never bothered counting the beats per minute. (AA224.)
- Respondents claim Osterman “continued to . . . apply ice towels while waiting for Zamberletti to arrive.” (Resp. Br. at 16.) The record actually shows that Osterman was not certain whether he tried to apply an ice towel to Stringer before or after he became comatose (AA223), but he implied it was afterward (Id.) Whether he applied

it before or after coma ultimately makes little difference, however, given Osterman's recollection that, as soon as he touched the towel to Stringer's forehead, Stringer pushed it away. (AA222 ("The only thing that I can remember about ice towels is I remember putting one on his forehead and that's when he kind of pushed it away. . . . Q . . . [Y]ou just let him push it away; is that right? A. Correct. Do you recall anywhere else on his body you applied these ice towels? A. No, I don't.").)

In addition to using misleading descriptions of the events, Respondents also draw unwarranted inferences in their favor. For example:

- To excuse Osterman's nonchalance, they note Stringer's skin was "cool and moist." (Resp. Br. at 35.) If Osterman was looking for hot, dry skin, he was looking for the wrong symptoms. Classic symptoms of heat stroke include collapse, an elevated temperature (normally 104-105°F in the early stages, 106-107°F or higher in the advanced stages), panting like a dog, heavy sweating even after activity has ceased, an altered mental status characterized by apathy, incoordination, confusion, belligerence, or irrational or bizarre behavior. (AA418; AA452-53; AA323.) Stringer exhibited all of these classic symptoms. A jury reasonably could conclude Osterman's failure to recognize *any* of them as heat stroke symptoms was gross negligence.

- Respondents offer contradictory accounts regarding Zamberletti's assessment of Stringer for heat stroke. They say Zamberletti considered and did not rule out heat stroke. (Resp. Br. at 18.) But they later imply he dismissed it because Stringer's skin was wet. (Id. at 31.) Respondents' own expert, Dr. Eichner, has written that "wet skin" accompanied by "collapse," "stupor," and "coma" – all of which Stringer was exhibiting when Zamberletti entered the trailer – are "[a]dvanced features" of heat stroke. (AA453.)⁴ In assessing whether Zamberletti was grossly negligent for, among other reasons, abruptly dismissing heat stroke, a jury also could consider the undisputed fact that eleven Vikings players suffered heat illness on July 31, but no Vikings player was felled by a bug bite, fainting spell, or seizure, Zamberletti's alternative (and incorrect) diagnoses.
- Respondents argue there is "medical literature" that "circumstantially" supports Osterman's account Stringer was "fine" and "mentally coherent" one minute and comatose from heat stroke the next. (Resp. Br at 34.) The record actually contains directly contrary evidence. In his supplemental affidavit, para. 2, Dr. Roberts stated: "[A] review of the evidence does not support the

⁴ See "Hot: Field Management of Exertional Hyperthermia and Heat Stroke," attachment to 2d Supp. Aff. of William Roberts Regarding Expert Qualifications (skin appearance in exertional heat stroke is "sweating and wet," and rarely dry in athletes). (SA9-28.)

suggestion that Korey Stringer was asymptomatic until he became unconscious, but rather that the signs and symptoms of exertional heat stroke were not recognized Korey Stringer exhibited a large number of signs and symptoms consistent with exertional heat illness, even before he entered the trailer with Paul Osterman, such that an evaluation for exertional heat stroke should have been initiated by the on site medical providers. . . .” Thus, a jury reasonably could reject Respondents’ characterization of Stringer’s heat stroke as “precipitous.” (SA1-2.)

- Respondents say four times that Osterman asked Stringer how he was doing, but Stringer never responded. (Resp. Br. at 14, 15, 33, 34.) Respondents’ “spin” is that this showed Osterman’s attentiveness. They pass off Stringer’s non-responsiveness as normal because he was “never talkative with the athletic trainers.” (Id. at 15.) But a jury reasonably could reach the opposite conclusion – that the usually talkative Stringer’s non-responsiveness and silence for at least a half-hour (he did not respond earlier to his teammate Cory Withrow either) were signs of detachment and disorientation characteristic of heat stroke and Osterman’s failure to attach significance to these symptoms or even to question Stringer to gauge his orientation constituted gross negligence.

- Respondents also repeatedly assert that, while Osterman was sitting alone with Stringer in the trailer, he was making visual observations or assessments of his condition. (Resp. Br. at 15, 16, 34, 35.) That may be the inference Respondents wish a jury would draw, but on review of a summary judgment, Kelci Stringer is entitled to the opposite inference – that the fact the monumentally unobservant Osterman sat alone with her husband for roughly 45 minutes noticing nothing unusual while the patient in his charge lapsed into a fatal coma shows the magnitude of his neglect.

These examples highlight the disputed facts and differing inferences that may be drawn from even uncontested facts. Resolving factual disputes, and drawing inferences from the evidence is what a jury does, not an appellate court. On appeal, the legal claims of the parties are examined in the context of the facts viewed in a light most favorable to the appealing party, in this case, Kelci Stringer.

II. RESPONDENTS PRESENT A FLAWED ANALYSIS OF PERSONAL DUTY

The liability prescribed by the Workers' Compensation Act for fellow employees is nowhere near as narrow as Respondents assert. The legislative language, existing case law, and public policy do not limit liability to claims based upon conduct totally apart from the employee's job duties. Kelci Stringer's claims are completely consistent with the letter and spirit of the law, and fit well within the established contours of Minnesota workers' compensation law.

A. A “Personal Duty” Exists When A Co-Employee Personally Participates In Conduct Directed Toward The Injured Employee

Workers compensation immunity applies to the employer but not “a party other than the employer.” Behr v. Soth, 170 Minn. 278, 283, 212 N.W. 461, 463 (1927). In Behr, this Court recognized that a co-employee is distinct from the employer and thus subject to suit by an injured employee. The Court upheld the right of an employee (an assistant fire chief) to sue his co-employee (the fire chief) for injuries resulting from the latter’s negligence (an automobile collision), which occurred while both were engaged in their work-related duties (rushing to a fire in separate vehicles).

In Dawley v. Thisius, 304 Minn. 453, 455, 231 N.W.2d 555, 557 (1975), the Court reaffirmed Behr, even as applied to “a corporate officer, general supervisor, or foreman.” In Dawley, the plaintiff’s husband died after falling into a tank of caustic detergent. The widow sued the plant’s general manager for negligently failing to provide a safe place to work. While recognizing that under Behr a co-employee could be held liable for negligently causing injury to another employee, the Court added:

This does not mean, however, that the right of one employee to recover damages from another employee for personal injuries received in the course of employment is totally unaffected by the policy behind the workmen’s compensation statute.

The acts of negligence for which a co-employee may be held liable must be acts constituting direct negligence toward the plaintiff, tortious acts in which he participated, or which he specifically directed others to do. . . . A co-employee may be held liable when, through personal fault as opposed to vicarious fault, he breaches a duty owed to plaintiff. Personal liability, however, will not be imposed on a co-employee because of his general administrative responsibility for some function of his employment

without more. He must have a personal duty towards the injured plaintiff, breach of which has caused plaintiff's damages. . .

Dawley, 304 Minn. at 455-56, 231 N.W.2d at 557 (emphasis added) (citations omitted.) "Personal duty" requires "direct negligence toward the plaintiff." In addition, the alleged "duty to provide a safe place to work" which the plaintiff advanced in Dawley was the employer's non-delegable duty. Since there was no evidence that the co-employee in Dawley had engaged in direct negligent acts toward the decedent, the Court held the plaintiff could not establish that the defendant owed her husband a personal duty. Id. at 456, 231 N.W.2d at 558.

In 1978, the Minnesota Legislature codified co-employee liability. Minn. Stat. § 176.061, subd. 5(c) requires an employee suing a "coemployee working for the same employer" to establish that "the injury resulted from the gross negligence of the coemployee or was intentionally inflicted by the coemployee." The statute did not purport to modify the personal duty rule articulated in Dawley.

This Court next addressed "personal duty" in Wicken v. Morris, 527 N.W.2d 95 (Minn. 1995). Two employees died when blasting materials they were burning exploded. Their widows sued the plant production manager, Fields, who had obtained a burning permit from the Department of Natural Resources. Applying Dawley and section 176.061, subd. 5(c), Wicken held a plaintiff suing a co-employee must demonstrate that the co-employee's gross negligence or intentional misconduct in performing a personal duty caused the injury or death. The plaintiffs in Wicken asserted that, by failing to disclose to the DNR that the blasting material would be burned, Fields violated a personal

duty to the decedents. Quoting Dawley's description of "personal duty," the Court stated:

The personal duty to co-employees contemplated in Dawley is no different than the duty any individual owes another arising from normal daily social contact – the duty to refrain from conduct that might reasonably be foreseen to cause injury to another. . .

Fields' application for the DNR permit does not fall within this category of personal duty because it was not an action directed toward his co-employees as required by Dawley, 304 Minn. at 455, 231 N.W.2d at 557. Rather, the permit application was an administrative activity required as an integral part of Fields' employment obligations.

Wicken, 527 N.W.2d at 98-99 (citation omitted).

Behr, Dawley, and Wicken demonstrate clearly the distinction between (1) actions taken by an employee that have broad and general impact on all fellow employees, and (2) direct, personal actions that a particular employee takes with respect to a particular co-employee. The former are not actionable under the Workers' Compensation Act, because they truly are the acts of the employer, who is strictly liable for limited compensation benefits regardless of fault; the latter are actionable if perpetrated in a grossly negligent manner.

B. Respondents' Presentation Of "Personal Duty" Is Selective And Distorted

Respondents do not dispute that each of them engaged in direct conduct toward Stringer on July 31, 2001. They contend they cannot be liable for that conduct, however, because they performed those acts as part of their job. Respondents contend a co-employee should be immune from liability for gross negligence as long as he committed it while performing some – *any* – function of his employment. They are wrong, as Behr

illustrates. A fire chief clearly has general administrative responsibilities. There was also no question the fire chief was performing his usual job responsibilities at the time of his negligence. In fact, plaintiff argued that the chief “was doing an act wholly personal to himself outside the scope of his employment” when the collision occurred, but the Court rejected that, stating his alleged negligence “was incident to his employment – was solely because thereof.” Behr, 170 Minn. at 281-82, 212 N.W.2d at 462.

Had it been this Court’s view that a culpable employee performing his usual job responsibilities could not be liable for directly injuring a fellow employee, Behr would have said so. And in Dawley and Wicken, the Court would not have gone to such lengths to distinguish between actions that give rise to personal liability and those that do not, if the distinction merely rested on whether the culpable employee was performing his job duties.

Respondents selectively and inaccurately quote from cited authority to present a “rule of law” this Court has never articulated.⁵ For example, Respondents state at page 1

⁵ In addition to distorting key language from Wicken and Dawley, Respondents heavily rely on a number of court of appeals decisions to support their case. (See Resp. Br. at 40-41.) But decisions of the court of appeals do not establish the law in this State. Pulju v. Metro. Prop. & Cas. Co., 535 N.W.2d 608, 608 (Minn. 1995). Until the Supreme Court expressly adopts a court of appeals’ decision, even one where further review is denied, that decision “does not represent a definitive statement of the law of Minnesota.” Willis v. County of Sherburne, 555 N.W.2d 277, 282 (Minn. 1996). This Court also has emphasized the limited value of unpublished opinions. The Court “stress[ed] that unpublished opinions of the court of appeals are not precedential. The danger of miscitation is great because unpublished decisions rarely contain a full recitation of the facts. Unpublished decisions should not be cited by the district courts as binding precedent.” Vlahos v. R & I Constr. of Bloomington, Inc., 676 N.W.2d 672, 676 n.3 (Minn. 2004) (citations omitted). This Court’s decisions provide the controlling and persuasive authority by which the case must be decided.

of their brief that “a general administrative duty for some function of *the employer*” (emphasis added) is not a personal duty, citing Wicken. But Wicken, quoting Dawley, actually used the words “*his* general administrative responsibility for some function of *his* employment.” Wicken, 527 N.W.2d at 98. (emphasis added) Respondents’ seemingly slight revision of the Dawley/Wicken definition obscures what the Court was really attempting to articulate – the distinction between *different* duties of an employee, some general and administrative affecting many employees, and some specific and direct with respect to a particular employee.

Respondents distort Wicken again at page 19 of their brief, saying that the decision forbids co-employee liability unless the plaintiff can establish “that the co-employee owed a personal (*as opposed to employment*) duty to the plaintiff.” (Emphasis added.) Suggesting Wicken excluded every employment-related responsibility from “personal duty” is a far cry from what Wicken actually said – that “personal liability” cannot be imposed on a co-employee “because of his *general administrative responsibility* for some function of his employment without more.” Wicken, 527 N.W.2d at 98 (emphasis added.)

Respondents’ distortion of the definition of personal duty continues at page 22 of their brief. Citing Wicken, 527 N.W.2d at 99, they add this parenthetical: “(noting that permitting co-employee liability for carrying out work responsibilities ‘would eviscerate the fundamental purpose of the workers’ compensation law.’)” But at the cited page, the Court did not warn against allowing an employee’s “work responsibilities” to be the basis of co-employee liability; rather, it said “permitting co-employee liability *when harm*

results however indirectly from the carrying out of administrative obligations incident to work responsibilities would eviscerate the fundamental purpose of the workers' compensation laws." (Emphasis added.) Again, Respondents leave out the italicized words, highlighting their continued failure to acknowledge that work-related responsibility can, in fact, be the basis of co-employee liability.

By emphasizing the word "administrative" in Dawley and Wicken, the Court made it clear that "personal duty" does not turn on whether the co-employee was performing *any* work when the gross negligence occurred, as Respondents contend. Instead, the inquiry is whether the work he was then performing could be characterized as "his general administrative responsibility for some function of his employment" as opposed to some other job responsibility that related directly and personally to a fellow employee.

C. Osterman And Zamberletti Were Discharging Personal Duties When They Committed Acts Of Gross Negligence

The court of appeals appreciated the significant difference between the direct, personal claims asserted by Kelci Stringer against Respondents in this case, and the general claims that were asserted in Dawley and Wicken.

When the facts are taken in the light most favorable to appellants, respondents Osterman and Zamberletti both observed Stringer's heat exhaustion on July 30, but they did not take further action. When Stringer exhibited symptoms of heat stroke on July 31, neither recognized these symptoms or took action to treat them properly.

Osterman and Zamberletti both were directly engaged in the care and treatment of Stringer. Because their actions did not involve general workplace safety or the removal of workplace hazards, their actions were not pursuant to their employer's nondelegable duty to provide a safe workplace. We, therefore, hold that Osterman and Zamberletti had a personal duty to Stringer.

Stringer v. Minn. Vikings Football Club, 686 N.W. 2d 545, 550-51 (Minn. Ct. App. 2004). While not binding on this Court, the court of appeals' conclusion on the duty issue was clearly correct.

Kelci Stringer's gross negligence claims are not predicated on failures of a "general administrative" nature. "General administrative responsibilities" are job functions that, by definition, have broad impact on the workplace. Actions directed toward and affecting only one employee, as in this case, do not fit that definition.

In an oppressively hot training camp setting, "general administrative" responsibilities of an athletic trainer for a professional football team might include procuring enough water and Gatorade for the entire team, staying abreast of weather forecasts and warnings and informing the coaches, making recommendations to coaches concerning practice times and duration and uniform configurations given the heat, measuring the temperature and humidity on the field before and during practice, and ensuring that athletic trainers and interns have the proper training, equipment, and supplies to protect and treat players practicing in extreme heat.

The record indicates Respondents had no "general administrative duties" that impacted Stringer as he lay ill. Coach Dennis Green, who supervised the team's athletic trainers (SA36), could not identify any administrative responsibility Osterman or Zamberletti had during the 2001 training camp. (SA37.) Even assuming evidence existed that Osterman and Zamberletti had "general administrative responsibility for some function of his employment" on July 31, no such responsibility is relevant here.

Furthermore, Respondents did not play some detached and general role in events leading to Stringer's fatal illness. Each was an on-the-scene, direct, personal, hands-on participant in conduct that substantially contributed to Stringer's death. During the late morning of July 31, Stringer was in their presence exhibiting obvious signs of life-threatening heat illness that demanded immediate and effective care and attention. Osterman and Zamberletti each owed a particularized duty of care directly to Stringer that was dictated by the specific condition he was in, the foreseeable risks his condition created, and the added danger that their grossly negligent acts and omissions created.

For Osterman, his duty arose when he found Stringer ill on the field and personally steered him into the trailer, where Stringer grew even sicker due to Osterman's gross lack of care. For Zamberletti, his duty arose when he found Stringer comatose in the trailer and, failing to secure a history from Osterman, plowed ahead with dangerous, contraindicated therapy (bagging) that further harmed Stringer and delayed summoning an ambulance. Because Respondents' grossly negligent acts and omissions were directed only toward Stringer, each breached a personal duty under Minnesota law.

D. Co-Employee Liability Is Part Of A System Of Workers' Compensation Law That Recognizes The Interplay Between Limited Employer Liability And The Responsibility Of Third Parties

The Legislature and this Court have recognized there are workable, not impossible, limits on injured workers' rights to seek compensation from third parties whose fault has caused their injuries. Thus, this Court has recognized the right of an injured employee to sue a third-party tortfeasor even though such a claim might give rise

to contribution liability on the part of the employer. Lambertson v. Cincinnati Welding Corp., 312 Minn. 114, 257 N.W.2d 679 (1977). The Court also has allowed third parties who are legally responsible for injuries suffered by an employee to seek indemnity from the employer, notwithstanding the employer's workers compensation immunity. Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954).

Respondents suggest that "public policy" demands a narrow standard for personal duty, so the floodgates are not opened to tort litigation over work-related injuries. When the Legislature adopted § 176.061, subd. 5(c), codifying co-employee liability, it was certainly aware of the test for personal duty already established in Dawley. Because it took no action to alter that standard, the Legislature evidently was satisfied that heightening the degree of negligence required would suffice to prevent a flood of litigation from undermining the workers compensation system. See Minn. Stat. § 645.17(4) (2004); Prior Lake Am. v. Mader, 642 N.W.2d 729, 737 (Minn. 2002) (citations omitted) (words and phrases which have acquired an established meaning by judicial construction are deemed to be used in the same sense in a subsequent statute relating to the same subject matter).

When the Court reaffirmed the personal duty definition in Wicken, it recognized – as it had twenty years earlier in Dawley – that if the standard is too easily satisfied, co-employee liability could become a surrogate for employer liability, which would eviscerate the workers compensation system. Wicken, 527 N.W.2d at 99. At the same time, the Court recognized that there would be circumstances when a third party other

than the employer, including a fellow employee, could and should be subject to legal liability for the consequences of wrongful conduct.

The Legislature has made the same judgment. Minn. Stat. § 176.061, subd. 5(c) states the employee's injury must be inflicted by a "coemployee working for the same employer." The very fact that this liability applies only to a "coemployee working for the same employer" evinces the Legislature's recognition that persons who injure a co-worker while performing their job responsibilities for a common employer are subject to liability.

Both the Minnesota Legislature and this Court have determined that the established definition for personal duty meets the demands of Minnesota public policy. Respondents' claim that the bar must now be raised to satisfy their self-serving policy concerns is irrelevant. If that bar is to be raised, the Minnesota Legislature must change the language of § 176.061, subd. 5(c).

III. RESPONDENTS PRESENT A FLAWED ANALYSIS OF "GROSS NEGLIGENCE" AND THE RECORD IN THIS CASE

A. The Correct Legal Definition Of "Gross Negligence"

In her opening brief, Kelci Stringer fully articulated the correct standard of gross negligence under Minnesota law. (*See* App. Brief at 26-36.) Only a few additional comments are required in reply to Respondents' assertions regarding the proper legal standard.

Gross negligence is not willful wrongdoing, but a species of negligence, greater than ordinary negligence, but still negligence. Even though Respondents admit there are

“alternative descriptions” of gross negligence (Resp. Br. at 22), they assert that “all these phrasings state the same basic rule,” and then proceed to analyze the facts only under the “absence of even slight care” phrasing. (*Id.* at 26.)⁶ If “absence of even slight care,” “very great negligence,” and “negligence in the highest degree” mean the same thing, why do Respondents refuse to analyze whether the facts show “very great negligence” or “negligence in the highest degree”? Why is their analysis limited to whether the facts show the “absence of even slight care”? The answer is that unless that narrow and limited legal standard is employed, a jury question clearly exists on this record.

B. The Record Is More Than Adequate To Support Kelci Stringer’s Gross Negligence Claim

When there is conflicting evidence from which differing inferences can be drawn, whether particular conduct constitutes gross negligence is a question answered not by courts, but by juries. As shown in the opening pages of this brief, far from presenting the “full picture” (Resp. Br. at 30), Respondents’ factual recitation would be more fitting for a final argument to a jury than an appeal from a summary judgment. The issue on appeal is not whether Kelci Stringer should prevail on her gross negligence claim as a matter of law, but whether she presented sufficient evidence that, if accepted by a jury, would support a finding of gross negligence. She clearly did.

⁶ The court of appeals concluded that Kelci Stringer could not prove gross negligence without evidence that defendants acted “in a manner ‘equivalent to a willful and intentional wrong.’” *Stringer*, 686 N.W.2d at 552. Apparently conceding that this was error, Respondents shrug off the court of appeals’ reasoning as a “minor and isolated inconsistency.” (Resp. Br. at 25.)

A jury reasonably could disregard all the unprovable thoughts Osterman now claims were going through his mind at the time (*e.g.*, why he now says he didn't notice Stringer's pallor, so evident in photo 4-K, the "assessment" he now claims he was making while "observing" Stringer) and the "spin" by which Respondents try to justify his treatment of Stringer (*e.g.*, the "precipitous" course of Stringer's heat stroke), and could conclude that all Osterman *did* for Stringer in the critical period before he became comatose was extremely limited, and wholly ineffective.

- Instead of immersing Stringer in an ice pool specially set up for cooling players at the nearby Taylor Center, Osterman led him to the air-conditioned trailer, where he was exposed to only cool ambient air for roughly 35-45 minutes. Plaintiffs' experts opined, without contradiction, that the most that ambient air could have reduced Stringer's core body temperature (108.8°F when taken at 12:35) was .02°F per minute of exposure (AA447), less than one degree over the entire time in the trailer. Given the experts' unchallenged estimate that Stringer's core body temperature reached as high as 110°F, exposing him to the ambient air hardly counts as "care."
- Osterman gave Stringer water, from which he drank a couple sips. Given that Stringer received massive amounts of fluid (19.6 liters) in the unsuccessful effort to save his life (SA39), giving him a couple sips of water in the trailer constituted no meaningful "care."

- Osterman may have tried, without success, to place a single ice towel on Stringer's forehead before Stringer became completely comatose, but did nothing else to lower Stringer's critical body temperature.

A jury reasonably could find that these meaningless and wholly ineffectual efforts by Osterman did nothing to help Stringer in that critical period, and that there is enough evidence to support a finding he was grossly negligent.

Similarly, a jury reasonably could disregard all the unprovable thoughts Zamberletti now claims were going through his mind at the time (*e.g.*, his asserted belief that Stringer was merely suffering hyperventilation) and the "spin" by which Respondents try to justify his treatment of Stringer (*e.g.*, that he employed a "classic response to manage hyperventilation," Resp. Br. at 31). Instead, the jury could conclude that Zamberletti was responsible for:

- Cutting off oxygen to Stringer's already oxygen-deprived, dying brain.
- Unnecessary delays in summoning an ambulance (calling Dr. Knowles and the PR van instead) under circumstances where Respondents' expert says "every minute counts."

A jury reasonably could find that Zamberletti's conduct in the critical period when he took charge of Stringer's "care" is enough evidence to support a finding he, too, was grossly negligent.

Gross negligence, like ordinary negligence, is measured by an objective standard.⁷ A jury would not be required to view and interpret the abundant evidence of Stringer's heat stroke symptoms – e.g., collapse, panting like a dog, heavy sweating long after activity had ceased, his altered mental status – with the same obliviousness and insouciance that Osterman did when confronted with those symptoms on July 31. The fact Osterman, who claimed to be a healthcare professional, stood by as Stringer lapsed helplessly into a coma militates in favor of, not against, finding he was grossly negligent, given the overwhelming expert opinion offered by Kelci Stringer.

Respondents also failed to offer the opinion of a single expert who validates their actions in evaluating and treating Stringer. Their only response to the overwhelming expert opinion marshaled against them is the claim that it is all “conclusory.” (Resp. Br. at 29.) Kelci Stringer's many expert affidavits contain specific, well-reasoned, scientifically supported criticisms of Respondents' actions that comport fully with Minnesota law. See Teffeteller v. Univ. of Minn., 645 N.W.2d 420 (Minn. 2002) (discussing standard for adequacy of expert affidavits). In every respect, the expert

⁷ Respondents stress their motivations to aid Stringer, including his importance to the team and his friendship with Zamberletti. (Resp. Br. at 21.) However, their subjective motivations are irrelevant under the objective standard. Kelci Stringer need only show their actions constituted gross negligence, not that they harbored malevolent intent toward her husband. A surgeon who amputates a patient's wrong leg could be found grossly negligent, despite intending to help the patient. That “Zamberletti plainly intended the use of the bag to help Korey Stringer” (Resp. Br. at 31) would not preclude a finding that Zamberletti, a health care provider, acted in a grossly negligent manner by smothering the already suffocating Stringer.

affidavits filed by Kelci Stringer in this case are more than adequate because the experts review the facts and specifically analyze those facts under the applicable standard of care.

CONCLUSION

Over seventy-five years ago, this Court recognized that fellow employees are not the employer, and that they may be liable to a co-worker if their culpable conduct causes harm. This Court has articulated principles by which the legal liability of the co-employee could be distinguished from the legal responsibility of the employer. Fellow employees may be liable when they are acting directly and personally toward a co-employee; they are not subject to liability when they are performing general administrative activities on behalf of the employer, which have widespread impact on other employees, and which are not directed personally and specifically at the injured employee. Here, each Respondent owed a personal duty to Korey Stringer, and the breach of that duty forms a proper basis for the claims asserted in this case.

Neither the law nor the record in this case supports summary judgment on the issue of gross negligence. This Court has defined gross negligence as very great negligence. Using Respondents' extremely narrow definition of gross negligence, even the most minimal, misguided, or ill-conceived effort to help Stringer would be legally sufficient; trifling care (Osterman touching the comatose Stringer on the forehead with an cold towel) and grossly contraindicated actions (Zamberletti bagging the already oxygen-starved Stringer) would not be gross negligence. That is not the law, nor should it be. Kelci Stringer has provided the Court with extensive evidence that absent the Respondents' very great negligence there was no reason for Korey Stringer to die.

Kelci Stringer presented a viable legal claim against Respondents, and supported it with ample evidence. Her claim should proceed to trial before a jury, which will make the final judgment regarding responsibility for Korey Stringer's death.

Respectfully submitted,

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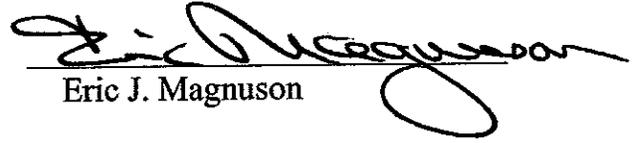
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CERTIFICATION

This Brief is 6,798 words in length and was prepared using Microsoft Word.


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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).