**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-1184**

Christopher John Daly,
Respondent,

vs.

Zachary John McFarland,
Appellant.

**Filed January 25, 2011**
**Affirmed**
**Klaphake, Judge**
**Concurring in part, dissenting in part, Harten, Judge***

Nobles County District Court
File No. 53-CV-08-117

William O. Bongard, Marcia K. Miller, Sieben, Grose, Von Holtum & Carey Ltd., Minneapolis, Minnesota (for respondent)

Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg P.A., Minneapolis, Minnesota; and

Michael T. O'Rourke, Erickson, Zierke, Kuderer & Madsen P.A., Fairmont, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Klaphake, Judge; and Harten, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## U N P U B L I S H E D  O P I N I O N

**KLAPHAKE**, Judge

This negligence action arose out of injuries sustained by respondent Christopher John Daly while snowmobiling with appellant Zachary John McFarland and two other friends. Appellant argues that the district court erred in (1) denying his motion for judgment as a matter of law (JMOL) based on respondent's assumption of risk; (2) declining to instruct the jury on the emergency rule; and (3) reconciling the jury's inconsistent responses to the special verdict interrogatories.

Because we conclude that the district court (1) properly denied appellant's JMOL motion; (2) did not abuse its discretion by declining to instruct the jury on the emergency rule; and (3) did not abuse its discretion by reconciling the jury's special verdict, we affirm.

## D E C I S I O N

*Denial of JMOL*

We review the district court's decision denying a motion for JMOL de novo, as a question of law. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). The district court may grant a motion for JMOL if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Minn. R. Civ. P. 50.01(a). The district court should not grant JMOL if "reasonable jurors could differ on the conclusions to be drawn from the record." *Bahr*, 766 N.W.2d at 919. We view the evidence in the light most favorable to the prevailing party. *Id.*

Appellant argues that JMOL is appropriate based on the doctrine of primary assumption of risk. Primary assumption of risk applies "where parties have voluntarily entered a relationship in which [the] plaintiff assumes well-known, incidental risks." *Olson v. Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974). When applicable, primary assumption of risk bars a plaintiff's claim because it negates the defendant's duty of care to the plaintiff. *Verberkmoes v. Lutsen Mountains Corp.*, 844 F. Supp. 1356, 1358 (D. Minn. 1994) (applying Minnesota law).

Generally, the doctrine of primary assumption of risk is limited to participation in inherently dangerous activities. *Wagner v. Thomas J. Obert Enters.*, 396 N.W.2d 223, 226 (Minn. 1986). "The application of primary assumption of . . . risk requires that a person who voluntarily takes the risk (1) knows of the risk, (2) appreciates the risk, and (3) has a chance to avoid the risk." *Peterson v. Donahue*, 733 N.W.2d 790, 792 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). The person assuming the risk must have actual knowledge of the risk, not just constructive knowledge. *Snilsberg v. Lake Wash. Club*, 614 N.W.2d 738, 746 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000).

In *Olson*, the Minnesota Supreme Court refused to apply primary assumption of risk to a snowmobile passenger. 299 Minn. at 41, 44, 216 N.W.2d at 126, 128. The court observed that "[a] snowmobile, carefully operated, is no more hazardous than an automobile, train, or taxi." *Id.* at 44, 216 N.W.2d at 128. *Olson* rejected the driver's view "that tipping or rolling is a natural incident of the sport of snowmobiling," reasoning that, while tipping or rolling "may be a hazard in the activity[,] . . . it is one that

can be successfully avoided." *Id.* The supreme court reiterated this position in *Carpenter v. Mattison* as it relates to a snowmobile operator, stating that "the operation of a snowmobile does not involve primary assumption of risk." 300 Minn. 273, 277, 219 N.W.2d 625, 629 (1974).

Here, both parties and appellant's expert testified that collision is a hazard of group snowmobiling, but one that can be successfully avoided; trial testimony showed that the group took measures to avoid the risk of collisions, such as spacing and having a plan for returning to ditch riding. Appellant's snowmobile performed a wholly unanticipated maneuver; there was no evidence suggesting that respondent knew that it was likely to happen or that he had observed similar accidents while snowmobiling. Under these facts, we cannot conclude that primary assumption of risk is applicable in this case. Accordingly, the district court did not err in refusing to grant JMOL.

*Emergency Rule Instruction*

A district court has broad discretion in determining jury instructions. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). We will not reverse absent an abuse of that discretion. *Id.* "Where the instructions overall fairly and correctly state the applicable law, [the] appellant is not entitled to a new trial." *Id.*

The emergency rule provides that

> one suddenly confronted by a peril, through no fault of his own, who, in the attempt to escape, does not choose the best or safest way, should not be held negligent because of such choice, unless it was so hazardous that the ordinarily prudent person would not have made it under similar conditions.

*Johnson v. Townsend*, 195 Minn. 107, 110, 261 N.W. 859, 861 (1935). "An instruction on this theory should be given upon request by a party where the evidence would sustain a finding that one of the persons whose negligence will be submitted to the jury had been confronted with a sudden peril or emergency and acted under its stress." *Byrns v. St. Louis Cnty.*, 295 N.W.2d 517, 519 (Minn. 1980). The instruction should not be given "if the emergency was negligently created by [the] defendant or if [the] defendant has failed in the application of due care to avoid it." *Mathews v. Mills*, 288 Minn. 16, 24-25, 178 N.W.2d 841, 846 (1970). Similarly, if "it can be said as a matter of law that [the] defendant's pre-emergency conduct was negligent," the instruction should not be given. *W.G.O. v. Crandall*, 640 N.W.2d 344, 348 (Minn. 2002). "[O]therwise, it should be left to the jury to decide whether to apply the doctrine based upon its resolution of the disputed facts." *Id.* at 348-49.

Inherent in the concept of the emergency rule is a sudden confrontation with an unanticipated peril and an attempt to escape from that peril. *See Johnson*, 195 Minn. at 110, 261 N.W. at 861 ("one *suddenly* confronted by a peril, through no fault of his own, who, in the *attempt to escape*, does not choose the best or safest way" (emphasis added)); *see also Schiro v. Raymond*, 237 Minn. 271, 274-75, 54 N.W.2d 329, 332 (1952) (stating that "the emergency-rule doctrine operates only to permit the jury to find that conduct which might otherwise be found negligent is reasonable in light of the emergency").

Here, appellant was not confronted with a sudden emergency, and respondent's injuries were not caused by appellant's attempt to escape that emergency. Appellant testified that he had been attentive and did not recall seeing any hazardous condition.

Appellant's expert testified that snowmobiling presents greater risks than travel by car or motorcycle because of the varied terrain and that a person not riding on a groomed trail would "run into snow drifts just about any place that [he] r[o]de." As an experienced rider, appellant would be well aware of these risks. Further, the expert testified that an experienced rider would not be thrown or upset by a drift of eight to ten inches. The facts here do not show an emergency but rather the existence of known hazards inherent to the activity of recreational snowmobiling. Had respondent offered evidence that his injuries were a result of appellant's attempts to escape from his tumbling snowmobile, such evidence might demonstrate a basis for application of the emergency rule. But the emergency that appellant cites is the presence of the snow drift. That was the sole basis for appellant's request at the instructions conference. Accordingly, the district court was justified in determining that the existence of the small drift simply was not an emergency. 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.

The district court has broad discretion in its choice of jury instructions, if the instructions on the whole fairly and correctly state the applicable law. *Hilligoss*, 649 N.W.2d at 147. The district court instructed the jury on reasonable care; "[t]he emergency rule is simply a particularized application of the reasonable care rule." 4 *Minnesota Practice*, CIVJIG 25.16 use note (2006). 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. Under these circumstances, we

conclude that the district court did not abuse its discretion by refusing to instruct the jury on the emergency rule.

*Special Verdict Responses*

We will set aside a jury's answer to a special verdict form only if no reasonable person could find as did the jury. *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 734 (Minn. 1997). "[A] special verdict form is to be liberally construed to give effect to the intention of the jury and on appellate review it is the court's responsibility to harmonize all findings if at all possible." *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662-63 (Minn. 1999). We will affirm the jury's verdict if the special verdict answers reasonably can be reconciled with the evidence and inferences drawn from the evidence. *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008).

Appellant argues that the special verdict answers are irreconcilable because the jury found that (1) respondent was negligent in the operation of his snowmobile and (2) respondent's negligence was not a direct cause of the accident but (3) 30% of the negligence that was a direct cause of the accident could be attributed to respondent. The district court reasoned that, because the jury had concluded that respondent was negligent, but that his negligence was not a direct cause of the accident, the jury was not compelled to answer the comparative fault question, and that therefore "no fault comparison was legally required and that no fault deduction would be appropriate." Notably, the cause of the confusion here is the improperly drafted special verdict form, which directed the jury to answer the comparative fault questions based on its previous answers to the questions of whether each party was negligent, and not to the questions of

whether each party's negligence was a direct cause of the accident. Neither party objected to this special verdict form.

Compounding the confusion caused by the special verdict form, the district court instructed the jury, without objection, that the comparative fault question must be answered "if they were both negligent or – it doesn't matter – what amount of negligence of 100 percent do you attribute to [appellant] and [respondent]?" The jury's assignment of a percentage of negligence could reflect no more than its attempt to follow the district court's directive; the jury may have concluded that it was required to weigh the relative degree of all negligence regardless of whether that negligence was a direct cause of the accident.

Based on trial testimony, the jury's assignment of negligence to both parties is not contradictory; trial evidence included testimony about excessive speed for the conditions and respondent's use of an iPod while driving. 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 appellant's snowmobile launched into the air.

Given the duty to liberally construe the special verdict form to give effect to the jury's intention, we cannot conclude that the district court abused its discretion by reconciling the special verdict answers in this manner.

**Affirmed.**

**HARTEN**, Judge (concurring in part, dissenting in part)

I concur in the majority's conclusion on the first issue—that appellant did not assume the risk of snowmobile collision. *See Olson v. Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 128 (1974). "[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. 18 Dec. 1987). "This court, as an error correcting court, is without authority to change the law." *Lake George Park, L.L.C. v. IBM Mid-Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1988), *review denied* (Minn. 17 June 1998).

But I dissent from the majority's holding on the second issue because I conclude that the district court abused its discretion in denying appellant's legitimate request for a jury instruction on the emergency rule.

In common parlance, an emergency is "[a] serious situation or occurrence that happens unexpectedly and demands immediate action." *The American Heritage Dictionary* 602 (3d ed. 1992). The emergency rule provides:

> [O]ne suddenly confronted by a peril, through no fault of his own, who, in the attempt to escape, does not choose the best or safest way, should not be held negligent because of such choice, unless it was so hazardous that the ordinarily prudent person would not have made it under similar conditions.

*Johnson v. Townsend*, 195 Minn. 107, 110, 261 N.W. 859, 861 (1935).

The proper administration of the emergency rule is set out in caselaw. "An instruction on [the emergency rule] *should be given upon request by a party* where the evidence would sustain a finding that one of the persons whose negligence will be

submitted to the jury had been confronted with a sudden peril or emergency and acted under its stress." *Byrns v. St. Louis Cnty.*, 295 N.W.2d 517, 519 (Minn. 1980) (emphasis added). And the instruction should not be given "if the emergency was negligently created by [the] defendant or if [the] defendant has failed in the application of due care to avoid it." *Mathews v. Mills*, 288 Minn. 16, 24-25, 178 N.W.2d 841, 846 (1970). Similarly, "[if] it can be said as a matter of law that [the] defendant's pre-emergency contact was negligent," the instruction should not be given. *W.G.O. v. Crandall*, 640 N.W.2d 344, 348 (Minn. 2002). "[O]therwise, it should be left to the jury to decide whether to apply the doctrine based upon its resolution of the disputed facts." *Id.* at 348-49.

In *W.G.O.*, the supreme court specifically approved a statement articulated by the dissenting judge of the court of appeals regarding the correct use of the emergency rule. *Id.* at 348-49, 349 n.7. That statement is: **"[T]he 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."** *W.G.O. v. Crandall*, No. C2-00-266, 2001 WL 314916, at *9 (Minn. App. 3 Apr. 2001) (Hanson, J., concurring in part and dissenting in part) (boldface added), *rev'd on other grounds*, 640 N.W.2d 344 (Minn. 2002). This rule-management directive was in effect at all times material in the litigation of the instant case. In denying appellant's motion for an emergency rule instruction, the district court found that the snow drift was visible but was unlike "a deer leaping out on

the road." The district court did not find, nor do I conclude, that appellant's pre-collision conduct was negligent as a matter of law.[1] Nevertheless, the district court refused appellant's request that the emergency rule instruction be given despite the approved boundaries of the rule stated in *W.G.O. See* 640 N.W.2d at 348-49, 349 n.7.

As appellant points out in his reply brief, respondent's "assertion that [appellant] was driving too fast is argument and the record evidence does not establish that [appellant's] pre-emergency conduct was negligent as a matter of law." While respondent's expert testified that speed was the predominant factor in determining the height appellant's snowmobile vaulted, appellant's expert testified that speed was not determinative and focused on the angle of liftoff. Moreover, there is no evidence suggesting that appellant was traveling at an unreasonable speed. While the majority states that "trial evidence included testimony about excessive speed for the conditions," all four riders testified that they were traveling at approximately the same speed and each of them considered that speed safe for the conditions. None of them observed the snow drift prior to the accident.

The jury heard evidence that, if believed, supported the occurrence of a collision between appellant's and respondent's snowmobiles. 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

[1] In denying respondent's pretrial motion for partial summary judgment, the district court stated that "there is evidence, which if believed, would allow for a finder of fact to conclude the speed [appellant] was traveling was reasonable and that [appellant's] operation of his snowmobile was not negligent."

the jury without guidance in evaluating the effect of appellant's mid-air emergency decision. And the effects of that unguided jury evaluation could have influenced the jury's finding on appellant's liability.[2]

The majority's reliance on routine negligence instructions as effective substitutes for the emergency rule instruction contravenes *W.G.O.*'s detailed directions. In an effort to show that the district court's refusal to give the emergency rule instruction was harmless, the majority holds that "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." But only the emergency rule instruction encompasses the principle that a party may be relieved of liability for the consequences of the party's chosen means of escaping the hazards of an emergency. Once again, here it was the province of the jury, not the district court judge (or appellate judges), to decide if there was an emergency, and, if there was, to determine the attendant liabilities.

[2] The majority concedes that "[h]ad respondent offered evidence that his injuries were a result of appellant's attempts to escape from his tumbling snowmobile, such evidence might demonstrate a basis for application of the emergency rule." At trial, respondent agreed that appellant "didn't have a choice but to abandon his sled" and that respondent "th[ought] [the airborne snowmobile] would've probably killed [appellant]." Respondent also testified that he believed this was an accident and that there was nothing that appellant could have done to avoid it. Appellant's attorney argued to the jury that "[w]hen [appellant] hits the drift[,] I don't think there's any question in anybody's mind that after the sled went up[,] he had to get off. I mean, he had to get off. It wasn't an option. Wasn't like he was given a choice. He had to get off." If appellant's control of his snowmobile in flight were not at issue, his attorney would not point to it in final argument. *See* Minn. R. Civ. P. 15.02 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

Finally, the majority cautions that "ordinary negligence principles would be superseded" and "every act of negligence could be excused" if appellant's view of the emergency rule were accepted. This type of warning invites a decision-maker to avoid the future "horribles" emanating from a decision favoring one's opponent and is sometimes used by attorneys to support impassioned arguments to a jury. It is commonly recognized as gross hyperbole.

Appellant's entitlement to a new trial on issue two moots the third issue, which involves the district court's interpretation of the jury's inconsistent answers to the special verdict interrogatories. In passing, I note that juries should answer a comparative negligence question "only where by their answers to previous questions they have found *causative* negligence *on the part of two or more persons*." *Orwick v. Belshan*, 304 Minn. 338, 345, 231 N.W.2d 90, 95 (1975) (emphasis added).