This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0058

Patrick Simondet, et al.,
Appellants,

vs.

Robert Enga, et al.,
Respondents.

Filed September 16, 2019
Reversed and remanded
Florey, Judge

Sherburne County District Court
File No. 71-CV-17-6

Michael L. Weiner, Gregory T. Yaeger, Yaeger & Weiner, P.L.C., Minneapolis, Minnesota (for appellants)

Stephen M. Warner, Mark S. Brown, Bradley L. Idelkope, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Reyes, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

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

FLOREY, Judge

This case arises out of a vehicle collision between respondent Robert Enga (Enga) and appellant Patrick Simondet. Following the accident, a jury trial was held on appellants' claims of negligence and loss of consortium against respondents Enga and his employer,

M & K Repair, Inc. (M & K).[1] The jury found that Enga was negligent, but that his negligence was not a direct cause of the accident. Accordingly, the district court entered judgment in favor of respondents. Because we conclude that there was insufficient evidence to establish that Enga was confronted with an emergency, and the jury's verdict cannot be reconciled with the evidence presented, we reverse and remand for a new trial.

FACTS

On a morning in September 2014, Enga ran a stop sign and collided with a vehicle driven by Simondet. Enga had been transporting asphalt for use in road-construction projects and was driving a Freightliner semi-rig owned by his employer, M & K. He was one of several truck drivers that was on the road hauling asphalt to and from different locations. Just prior to the collision, Enga had been traveling westbound on County Road 16—a route he was familiar with and had traveled several times already that morning.

Because of his familiarity with the route, Enga was aware that a stop sign was located on County Road 16, just before the road intersects with Highway 25, and that there were warnings leading up to the stop sign. When Enga was approximately half a mile from the stop sign, he began to downshift in anticipation of the intersection. Enga failed, however, to stop at the intersection, and, consequently, collided with Simondet's vehicle. Simondet, who was traveling southbound on Highway 25, had the right of way and no stop signs.

[1] Appellant Patrick Simondet was alone in his vehicle at the time of the crash. The claim of his wife, appellant Mary Simondet, is for her loss of consortium. All further "Simondet" references regarding driving conduct and injuries will refer to Patrick Simondet, but the legal issues apply equally to Mary Simondet's consortium claim.

Enga later testified that his reason for failing to stop was because a foreign object—dust, dirt, or sand—unexpectedly flew into his eye. He explained that he had been driving with the driver's-side window down and believed that dust, dirt, or sand—kicked up from the trucks traveling in the opposite direction—had bounced off his side mirror and struck him in his left eye, thereby momentarily distracting him from the road. Enga removed his glasses, rubbed at his eye, and, just as he saw that his vehicle was directly in front of the stop sign, slammed on his breaks. The semi-rig skidded about 120 feet before colliding into Simondet's vehicle. Enga testified that, had he hit the brakes immediately after the matter hit his eye, he probably would have been able to stop in time.

Because of a grove of trees located in the northeast quadrant of the intersection, Simondet's view of the semi-rig was blocked until about 190 feet prior to the centerline of Highway 25. Upon impact with Enga's truck, Simondet's vehicle accelerated sideways at approximately 23 miles per hour (mph). Simondet sustained a blow to the head and was taken by ambulance to an emergency trauma center.

Appellants filed suit against respondents for damages sustained as a result of the accident. Appellants claimed negligence and loss of consortium. Appellants also moved the court to prevent respondents from discussing the emergency rule at trial.

A motion hearing was held to address the parties' motions in limine. At the motion hearing, respondents, in effect, conceded to negligence, barring application of the emergency rule. Specifically, respondents' counsel stated, "We realize that if an emergency—if the response to the emergency wasn't reasonable, then we're at fault. We understand that." The district court denied appellants' motion to prohibit respondents from

discussing the emergency rule in voir dire and its opening statement, but reserved its ruling as to whether the rule would be included in the jury instructions.

A jury trial was held in June 2018. Simondet and Enga both testified, as did several expert witnesses, including an accident reconstructionist and medical experts. Appellants moved for judgment as a matter of law, and, alternatively, to exclude from the jury instructions an instruction on the emergency rule. The district court denied both motions.

The jury found Enga negligent, but that his negligence was not a direct cause of the accident. In terms of damages, the jury found that $48,427.07 for "[p]ast health care expenses" would "fairly and adequately compensate [appellant] Patrick Simondet for damages directly caused by the accident." The jury awarded no amount for past pain and suffering, nor any amount for future damages.

The district court entered judgment in favor of respondents. The district court found that appellants failed to meet their burden to prove Enga's negligence was a direct cause of the accident, and that, consistent with the jury's special verdict, appellants were not entitled to recover any amount of damages.

Appellants filed a motion for a new trial and amended findings. The district court denied appellants' motion, and appellants, thereafter, appealed.

D E C I S I O N

As a preliminary matter, the parties do not dispute that Enga was negligent. Rather, the issue on appeal is whether the district court erred by instructing the jury on the emergency rule. Appellants contend that, because the evidence did not support a

conclusion that an emergency existed, the district court abused its discretion by including the emergency rule in the jury instructions. Appellants seek a new trial.

"The district court has discretion to decide whether to grant a new trial, and we will not disturb the decision absent a clear abuse of that discretion." *Russell v. Johnson*, 608 N.W.2d 895, 899 (Minn. App. 2000), *review denied* (Minn. June 27, 2000). In addition, the district court is afforded considerable latitude in determining jury instructions. *Id.* at 898; *see also Daly v. McFarland*, 812 N.W.2d 113, 122 (Minn. 2012). If the instruction is supported by evidence produced at trial, a party is generally entitled to the instruction. *See Daly*, 812 N.W.2d at 122. And, where the jury instruction fairly and accurately states the applicable law, we generally will not reverse the district court's denial of a new trial. *Id.* However, if the jury instruction was erroneous and "such error was prejudicial to the objecting party" or "its effect cannot be determined," we must remand for a new trial. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018) (quotation omitted).

The jury was given the emergency-rule instruction from 4 *Minnesota Practice*, CIVJIG 25.16 (2014). The 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.

CIVJIG 25.16.

The emergency rule, as expressed in CIVJIG 25.16, is based on the supreme court's decision in *Johnson v. Townsend*, 261 N.W. 859 (Minn. 1935). *See* CIVJIG 25.16 authorities. The supreme court held:

> [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, 261 N.W. at 861. The instruction should generally be given "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 County*, 295 N.W.2d 517, 519 (Minn. 1980). "The essential requirement underlying the emergency rule is confrontation of a sudden peril requiring an instinctive reaction." *Daly*, 812 N.W.2d at 123.

The emergency rule "is an established rule of negligence law in Minnesota." *Shastid v. Shue*, 77 N.W.2d 273, 280 (Minn. 1956). It is "a particular application of the reasonable care test and operates only to relieve a driver from liability for errors in judgment which the ordinarily prudent [person] might make under similar circumstances." *Brady v. Kroll*, 70 N.W.2d 354, 358 (Minn. 1955). Despite facing a sudden, unexpected emergency, a driver remains obligated to put forth a "reasonable effort to avoid a collision, and whether he uses reasonable care commensurate with the sudden peril with which he is confronted is ordinarily a question of fact for the jury." *Id.* However, whether a situation constitutes an emergency is a question of law for the court. *See Daly*, 812 N.W.2d at 123 (concluding caselaw supported the district court's determination that the presence of snowdrift was not an emergency).

Appellants contend that the emergency rule was inapplicable to the case. They argue that, by driving with his windows rolled down on a road traveled by other trucks

hauling asphalt, Enga created or contributed to the circumstances that caused something to get in his eye, thereby barring him from claiming the protection of the rule. Further, they contend that Enga's failure to stop at the stop sign, which he knew was there, did not constitute an instinctive reaction to a sudden peril. Moreover, appellants argue that getting struck in one eye with dust, dirt, or sand, while having full vision in the other eye and the ability to brake a vehicle, does not constitute an emergency under Minnesota law. Although respondents insist that, "[f]or any motorist, being temporarily blinded in one eye by a foreign object that was also causing considerable irritation would constitute a sudden emergency," they fail to cite any authority to support this proposition.

We agree with appellants that the situation with which Enga was confronted did not constitute an emergency. Although somewhat factually distinguishable, the supreme court's decision in *Daly* is instructive. Following a snowmobiling accident, plaintiff Daly sued defendant McFarland for injuries he sustained. *Id.* at 117. Daly and McFarland were snowmobiling in a group with two others, all four of whom were experienced snowmobile drivers. *Id.* As the group approached a ditch, Daly slowed down, and as McFarland passed him, McFarland's snowmobile hit a drift and vaulted into the air. *Id.* To avoid injury, McFarland pushed the snowmobile away from his body, flipping it in Daly's direction. *Id.* Daly tried to avoid the snowmobile, but the two snowmobiles collided, causing Daly to fall and suffer injuries. *Id.*

Daly sued McFarland, arguing that the accident occurred as a result of McFarland's excessive and negligent speed. *Id.* McFarland argued that Daly was negligent for wearing headphones and failing to pay attention. *Id.* at 118. The jury found both Daly and

McFarland negligent, but that Daly's negligence was not a direct cause of the accident. *Id.* On appeal before the supreme court, McFarland argued, among other claims, that the jury should have been given an instruction on the emergency rule. *Id.* at 119. The supreme court was not persuaded. *Id.* at 124.

The supreme court concluded, "A snowdrift that McFarland described as a normal hazard of snowmobiling and in the normal range of snowdrifts did not create an emergency situation here." *Id.* at 123-24. The supreme court explained, "McFarland never saw the drift as hazardous before impact, so any emergency that did occur as a result of his speed was caused by his own driving and thus was not subject to an emergency rule instruction." *Id.* at 124.

Like McFarland's awareness of the snowdrifts, Enga was "aware that other trucks as they pass . . . can kick up dust and dirt." At trial, he affirmed that he was "well aware" that, as he was "driving back and forth on County Road 16," he was "passing trucks" that "were kicking up dust and dirt." He further affirmed that he "knew that if [he] kept [his] window down to let in fresh air, [he] [was] also going to be letting in that dust and dirt every time [he] passed a truck." Like McFarland, who testified that "in his 20 years of riding he had never had a snowmobile react to a drift as it did during this accident," Enga also testified that, in his years of truck-driving, he "had never been hit like that before." *Id.* at 118.

Our decision in *Barnes v. Dees* is factually similar to the case before us and, albeit unpublished, instructive on the matter. No. A06-240, 2007 WL 3541 (Minn. App. Jan. 2, 2007), *review denied* (Minn. Mar. 20, 2007). Plaintiff Barnes sued defendant Dees for

damages resulting from a vehicle collision. *Id.* at *1. Dees ran a red light and collided with Barnes, who was entering the intersection on a green light. *Id.* At trial, Dees testified that he was familiar with the route he was traveling, that just before the intersection, he started to sneeze and continued to sneeze several times as he maintained his speed of 30 mph, and that, when he stopped sneezing, he was blinded by the sun, and, as soon as he observed the red light, he applied his brakes, but, nevertheless, slid into the intersection where he collided with Barnes's vehicle. *Id.* Over Barnes's objection, the district court instructed the jury on the emergency rule. *Id.* The jury found that Dees was not negligent. *Id.*

On appeal, Barnes argued that the district court abused its discretion when it instructed the jury on the emergency rule. *Id.* at *2. We agreed, and reversed and remanded for a new trial. *Id.* at *3-4. We concluded that "none of the Minnesota cases dealing with the emergency rule have involved sneezing or a comparable physical problem," and, further, the evidence did not support a finding that "sneezing deprived Dees of time for thought or the opportunity to weigh alternative courses of action or required him to act speedily by impulse or instinct." *Id.* at *3. Accordingly, we concluded that the evidence, when viewed in the light most favorable to Dees, did not "give rise to a jury question regarding whether sneezing constituted a sudden peril that deprived Dees of the opportunity to decelerate or brake." *Id.* We reversed and remanded to the district court for a new trial on the issue of liability, absent the emergency-rule instruction. *Id.* at *4.

At oral argument before this court, respondents' counsel argued that *Barnes* is distinguishable because, in that case, Dees's testimony established that he had ample time

to react before reaching the intersection. Respondents' counsel argued that, unlike Dees, Enga was deprived of any time to think because he was a mere 450 feet away from the stop sign at the time the matter struck his eye. Respondents' counsel argued that *Heerman v. Burke*, 266 F.2d 935 (8th Cir. 1959), is more analogous to the situation here.

First, counsel's argument that Enga was deprived of ample time is unsupported by Enga's testimony that, had he hit the brakes immediately after the matter hit his eye, he probably would have been able to stop in time. Second, respondents did not brief this issue. Indeed, nowhere in respondents' appellate brief do they cite to either *Barnes* or *Heerman*. At oral argument, respondents' counsel conceded that they did not argue *Heerman* in their brief, that they did not refute appellants' reliance on *Barnes*, and, further, that they did not cite to any authority to support the proposition that getting sand in one eye constitutes an emergency. Generally, a party who inadequately briefs an issue waives it. *Brodsky v. Brodsky*, 733 N.W.2d 471, 479 (Minn. App. 2007). Nevertheless, we are not persuaded by respondents' substantive argument.

In *Heerman*, the plaintiff brought suit against the defendant for injuries sustained while riding as a passenger in a vehicle driven by the defendant. 266 F.2d at 936. As the two were driving together, a wasp flew into the defendant's shirt sleeve and stung him in the armpit. *Id.* The defendant, who had his foot on the brake at the time he was stung, brought the vehicle to an immediate stop, which caused the car to veer off to the edge of the road. *Id.* "The combination of a sudden stop and the veering off to the right apparently resulted in [the] plaintiff being thrown forward and injured." *Id.* at 936-37.

Following a jury verdict finding in favor of the plaintiff, the defendant appealed, alleging that the district court erred in denying his request to have the jury instructed on the emergency rule. *Id.* at 936, 938. The defendant argued that, while driving with due care and at a proper speed, a wasp entered his sleeve and "his natural, instinctive reaction was to try to contain it, stop the car and then remove the insect from his sleeve." *Id.* at 937. However, argued the defendant, while he was slowing down, "the wasp gave him a sharp, sudden and very intense sting which startled, surprised and shocked him and caused him to involuntarily apply the brakes fairly hard and bring the car to a stop quicker than [he] had intended." *Id.* (internal quotations omitted). The defendant argued "that the wasp's entering his sleeve created an emergency for which he was not responsible and resulted in great mental stress or excitement." *Id.*

The Eighth Circuit agreed. *Id.* at 940. Quoting language from a state court of appeals, the circuit court stated that the emergency rule

> is a principle in the law of negligence recognizing that, where a motorist is confronted with a sudden emergency, not created in whole or in part by his own negligence, he should not be held to the same accuracy of judgment as would be required if he had time for calm deliberation and that, if he exercises such care as a very careful and prudent person would have exercised under the same circumstances, he should not be convicted for an error in judgment or miscalculation as to space, even though it might appear subsequently that a wiser and safer course could have been pursued.

Id. at 939 (quotation omitted). The Eighth Circuit reversed and remanded for a new trial wherein the jury would be instructed on the emergency rule. *Id.* at 940.

The situation confronted by Enga is not analogous to a wasp sting. While we are mindful that a piece of dirt or sand may have caused Enga to experience some pain or discomfort in one of his eyes, the circumstance cannot be described as confrontation with a "sudden peril requiring an instinctive reaction." *Daly*, 812 N.W.2d at 123; *see also Byrns*, 295 N.W.2d at 519. Respondents conceded that Enga was capable of seeing out of his other eye, and there is no evidence to suggest he was unable to use his legs to brake.

While not comparable to a wasp sting, getting struck in one eye with a piece of dirt or sand is also distinguishable from other situations that the Minnesota courts have held constitute an emergency. *See, e.g.*, *Minder v. Peterson*, 93 N.W.2d 699, 705 (Minn. 1958) (concluding "no knowledge of the defective condition of the brakes until [driver] was about 165 feet from the intersection" constituted an emergency); *Lee v. Smith*, 92 N.W.2d 117, 120 (Minn. 1958) (concluding a driver's collision with a truck stopped on the highway without adequate warning lights on a rainy night justified submitting the emergency rule to the jury); *see also Daly*, 812 N.W.2d at 123 (concluding district court's characterization of an emergency "as akin to a deer jumping into the road" was proper); *Raden v. Estate of Tvedt*, No. A16-1525, 2017 WL 1210161, at *1 (Minn. App. Apr. 3, 2017) (affirming district court's emergency-rule instruction where evidence showed that defendant, who collided with plaintiff's vehicle, had suffered a first-time seizure while driving), *review denied* (Minn. June 28, 2017).

In sum, the district court erred in instructing the jury on the emergency rule. And, as we explain next, because the jury's verdict regarding causation and damages is palpably

contrary to the evidence, the effect of the erroneous instruction "cannot be determined." *Christie*, 911 N.W.2d at 838.

Generally, "where a jury has found negligence without causation," appellate courts are reluctant "to second-guess the verdict." *George v. Estate of Baker*, 724 N.W.2d 1, 6 (Minn. 2006). However, where a jury's answer to a special-verdict question "is perverse and palpably contrary to the evidence and no reasonable mind could find as did the jury," the verdict must be set aside. *Russell*, 608 N.W.2d at 899 (quotation omitted); *see also ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 110 (Minn. App. 1992) (stating "the verdict must stand unless it is manifestly and palpably contrary to the evidence"), *review denied* (Minn. Apr. 29, 1992).

While we are generally disinclined to disturb a jury's answer to special-verdict questions, we conclude that, based on the lack of evidence that the collision was caused by anything other than Enga's failure to stop at the intersection, the jury's verdict cannot stand. Unlike a case where "the jury could reasonably have found [the defendant] negligent without causation for a variety of reasons," in the matter before us, respondents presented no other reasonable explanation for the collision. *See George*, 724 N.W.2d at 7 (concluding that, because there was evidence in the record to support the jury's finding of no causation, the verdict "was potentially reasonable"). The only evidence of causation that was presented to the jury was Enga's failure to stop at the stop sign. Thus, the jury's finding that Enga was negligent, but that his negligence was not a direct cause of the accident, is contrary to the evidence and constitutes an irreconcilable verdict.

In addition to the finding on causation, the jury's findings on damages further demonstrate that a new trial is warranted. For example, while the jury awarded Simondet $48,427.07 for past health-care expenses "directly caused by the accident," it awarded none for pain and suffering, despite evidence showing that much of the accrued medical expenses were to treat pain resulting from Simondet's accident-related injuries. The jury's findings on damages are irreconcilable and contrary to the evidence.

In sum, we conclude that there was insufficient evidence to establish that Enga was confronted with an emergency; thus, it was error for the district court to instruct the jury on the emergency rule. *Daly*, 812 N.W.2d at 122. And, because its effect on the jury's findings on causation and damages cannot be determined and the jury's verdict was palpably contrary to the evidence, we must reverse and remand for a new trial, wherein the jury will be asked to weigh the reasonableness of Enga's conduct, absent the emergency-rule instruction. *See Christie*, 911 N.W.2d at 838.

Reversed and remanded.