

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER SMITH,

Plaintiff-Appellant,

v

MALLARY SATTLER,

Defendant-Appellee.

UNPUBLISHED
September 20, 2012

No. 305790
Kent Circuit Court
LC No. 10-013155-NO

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Because we conclude that the trial court correctly applied the reckless misconduct standard and correctly determined that there was no genuine issue of material fact, we affirm.

This case arises out of injuries plaintiff suffered during a tobogganing accident. On January 15, 2010, plaintiff and defendant and some of their friends went sledding and tobogganing at a public hill in Newaygo County. Eventually, plaintiff, defendant, defendant's mother, and one of their friends climbed onto a toboggan and proceeded together down the hill. Defendant was in the front of the toboggan; plaintiff was immediately behind her. Shortly after they began their toboggan ride, the toboggan veered toward a fence on the right side of the hill. The riders were unable to stop the toboggan, and it crashed into a fence post. Plaintiff, who put her feet into the snow in an effort to slow the speed of the toboggan, broke her left foot in the crash. She brought this action for damages against defendant.

Defendant moved for summary disposition, and after hearing oral argument, the trial court determined that because plaintiff and defendant were coparticipants in a recreational activity, defendant could only be held liable for reckless conduct, not negligence. Thereafter, it granted defendant's motion for summary disposition because it found that there was no genuine issue of material fact concerning whether defendant acted recklessly.

On appeal, plaintiff argues that the trial court incorrectly applied the reckless misconduct standard of care. A question involving the applicable standard of care is a question of law that this Court reviews de novo. *Sherry v East Suburban Football League*, 292 Mich App 23, 27; 807 NW2d 859 (2011). While the ordinary standard of care in tort cases is negligence, we apply

a recklessness standard when the plaintiff and defendant are coparticipants in a recreational activity. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 89; 597 NW2d 517 (1999).

In *Ritchie-Gamester*, the Michigan Supreme Court addressed the “reality” associated with engaging in recreational activities. *Id.* at 86. In particular, the Court discussed the risks of participation, including risks created by coparticipants. *Id.* at 86-89. Ultimately, the Court concluded that those who participate in recreational activities should not face liability for mere negligent behavior. *Id.* at 89. Instead of negligence as the standard of care, the Court ruled that an injured plaintiff must demonstrate that the defendant acted recklessly in causing the plaintiff’s injuries. *Id.* (“We . . . adopt reckless misconduct as the minimum standard of care for coparticipants in ‘recreational activities.’”). The Court stressed that the standard applies to all recreational activities. *Id.* at 89 n 9.

Here, it is not disputed that tobogganing is a recreational activity. Therefore, the application of the reckless misconduct standard of *Ritchie-Gamester* by the trial court would seem to be appropriate. However, plaintiff asks us to find that the reckless misconduct standard does not apply because she contends that defendant, as the driver of the toboggan, did not know how to properly steer the toboggan. On that basis, plaintiff maintains that although she may have expected or anticipated certain risks when she boarded the toboggan, she did not anticipate that defendant would not know how to operate the toboggan.

We reject plaintiff’s contention that the reckless misconduct standard does not apply in this case. First, we note that one of the risks inherently present in tobogganing is that the toboggan can veer off course and crash. Indeed, we find it reasonable for riders of a toboggan to anticipate that the toboggan may crash or deviate from its intended path when they are propelled down an icy hill on a toboggan. Second, we observe that plaintiff assumes that a toboggan can be steered by the person in the front position. However, the photograph of the toboggan used in this case that was submitted to the trial court reveals that like all toboggans, the one here does not have a steering mechanism. Moreover, plaintiff submitted no proof regarding how a toboggan can be steered.¹ Finally and most importantly, we reject plaintiff’s contention that the “steering” skill level of defendant, while riding in the front position of the toboggan, or lack thereof, requires us to deviate from the reckless misconduct standard. As noted in *Ritchie-Gamester*, “reasonable participants recognize that skill levels . . . vary” *Id.* at 94. Thus, because participants in recreational activities anticipate that their coparticipants may not have the requisite skills to participate in the activity, defendant can only be found liable if she acted recklessly. *Id.*, see also *Behar v Fox*, 249 Mich App 314, 318; 642 NW2d 426 (2001) (recognizing that participants in recreational activities expect varying skill levels from their coparticipants).

In the alternative, plaintiff argues that even if the reckless misconduct standard applies, summary disposition was inappropriate.

¹ In support of her allegations regarding defendant’s failure to steer the toboggan, plaintiff relies only on her affidavit, where she stated that she personally believed a toboggan was steerable.

We review de novo the trial court's decision to grant summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Under MCR 2.116(C)(10), "[s]ummary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law."² *Id.*

Applying the reckless misconduct standard to the case at bar, we find that summary disposition under MCR 2.116(C)(10) in favor of defendant was appropriate because there was no genuine issue of material fact concerning whether defendant acted recklessly.

In the context of recreational activities, this Court finds reckless behavior only where one is not simply more careless than one who is only guilty of negligence. His conduct must be such as to put him in the class with the wilful [sic] doer of wrong. The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that, instead of affirmatively wishing to injure another, he is merely willing to do so. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not. [*Behar*, 249 Mich at 319 (quotation omitted).]

There is no genuine issue of material fact concerning whether defendant acted recklessly because there is no evidence that she acted with indifference toward whether she injured plaintiff. At most, the evidence demonstrates that defendant was an inexperienced toboggan rider. The fact that defendant chose to ride in the front position of the toboggan despite the fact that she was not a skilled toboggan rider does not demonstrate that defendant was reckless. See *Ritchie-Gamester*, 461 Mich at 90, 94 (noting that the skill level of participants in recreational activities varies and holding that carelessness is not sufficient to satisfy the recklessness standard); see also *Behar*, 249 Mich App at 318, 320 (noting that participants in recreational activities expect varying skill levels from their coparticipants, and a defendant's careless actions do not demonstrate a complete indifference toward the risk of injury). Accordingly, because plaintiff failed to produce evidence that defendant acted without regard for whether she would injure plaintiff, summary disposition was appropriate. *Id.*

Lastly, we reject plaintiff's contention that summary disposition was premature because discovery had not been completed at the time of the trial court's order. "Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). However, the party contending that summary disposition is premature because of incomplete discovery is not entitled to relief without

² While defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) and the trial court stated that summary disposition was appropriate under both grounds, we will review the trial court's grant of summary disposition under MCR 2.116(C)(10) because the record demonstrates that the trial court considered evidence outside the pleadings. *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

providing “some independent evidence that a factual dispute exists.” *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004). (Quotation omitted). Because plaintiff fails to allege how further discovery will produce independent evidence that a factual dispute exists let alone provide independent evidence of such a dispute, summary disposition was not premature. *Id.*

Affirmed.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens