STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2223

Lisa Marie Gilland,
Appellant,

vs.

Michelle Ann Clobes, et al.,
Defendants,

Holly Christine Bruns,
Respondent.

Filed June 20, 2011
Affirmed
Minge, Judge

Sibley County District Court
File No. 72-CV-09-180, 72-CV-10-67

Renee C. Rubish, Jorun Groe Meierding, Maschka, Riedy & Ries, Mankato, Minnesota (for appellant)

Steven L. Viltoft, LaBore, Giuliani, Cosgriff & Viltoft, Ltd., Hopkins, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Minge, Judge; and Worke, Judge.

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

MINGE, Judge

Appellant challenges the grant of summary judgment in favor of respondent, arguing that the district court erred by finding that appellant primarily assumed the risk of

injury. Appellant sustained significant injuries when she crashed into a tree while riding on a sled being pulled down a snow-covered road. She brought suit against respondent, alleging that respondent negligently failed to warn her of potential dangers or protect her from such dangers. Because a reasonable person of appellant's age and experience would know of and appreciate the risk of striking a roadside obstruction, like a tree, while engaged in such an activity and because appellant had an opportunity to avoid that risk but voluntarily chose to assume it, we affirm.

FACTS

In February 2007, appellant Lisa Gilland and two friends, Holly Bruns and Michelle Clobes, all university students, decided to go sledding on snow-covered gravel roads near Brookings, South Dakota, using a pick-up truck to tow their sled. They agreed to have one person sit in the bed of the pick-up to watch the person riding on the sled and communicate to the driver through a series of knocks that represented "speed up," "slow down," and "stop." They also agreed to stop if they encountered an on-coming vehicle.

Clobes first rode the sled, followed by Bruns. Gilland drove for both women. The women drove at a speed of 20-30 miles per hour. During her ride, Bruns signaled that she wanted to stop after only a few minutes. She advised the others that the snow blew in her face and that she could not see ahead of her. In addition, she expressed concern that it was not safe to continue given the growing darkness. Clobes agreed with Bruns and added other potential dangers; namely, that the sled may go in the ditch or strike an object. During this discussion, both Clobes and Bruns suggested Gilland postpone her

turn on the sled until another day, and they noted that they should wear a helmet as a safety precaution.

Despite the discussion, Gilland insisted on having her turn on the sled. While Gilland rode on the sled, Clobes drove, and Bruns sat in the bed to watch Gilland. Gilland's ride ended when the sled went off the edge of the road toward the ditch, striking a tree. Gilland sustained significant injuries as a result of the crash.

Gilland brought suit against Bruns, Clobes, and Clobes's father, Mark, who was the owner of the pick-up involved in the accident. After discovery, including depositions, the defendants moved for summary judgment. Discovery indicated that Bruns did not see the sled go off the edge of the road or see the tree before Gilland crashed, and that Bruns did not signal Clobes to slow down or ask her to stop the pick-up until after the collision. Mark Clobes was granted summary judgment, dismissing him from the lawsuit. Prior to a decision on the others' motions, Michelle Clobes settled with Gilland. The district court granted Bruns's motion for summary judgment based on a determination that Gilland assumed the risk of her injuries. Gilland appeals.

D E C I S I O N

We review de novo the district court's decision to grant summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). Summary judgment shall be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. Under Minnesota law, "there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v Russ*, 566 N.W.2d 60, 71 (Minn. 1997); *see also Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986) (the nonmoving party has the burden to "provide the court with specific facts indicating that there is a genuine issue of fact").

In analyzing the expression "genuine issue of material fact," the Seventh Circuit observed:

> [A] summary judgment motion is like a trial motion for a directed verdict [in] that "genuine" allows some quantitative determination of the sufficiency of the evidence. The trial court still cannot resolve factual disputes that could go to a jury at trial, but *weak factual claims can be weeded out through summary judgment motions. The existence of a triable issue is no longer sufficient to survive a motion for summary judgment. Instead the triable issue must be evaluated in its factual context which suggests that the test for summary judgment is whether sufficient evidence exists in the pre-trial record to allow the non-moving party to survive a motion for directed verdict.*

Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 476 (7th Cir. 1988) (citations omitted) (emphasis added). Caselaw indicates that summary judgment should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322,

61 S. Ct. 2548, 2552 (1986), *cited in Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989).

I. Duty of Care

The threshold consideration in determining whether Gilland assumed the risk of injury is whether Bruns owed Gilland a duty of care. *See Baber v. Dill*, 531 N.W.2d 493, 495 (Minn. 1995) (stating that "[i]f no duty exists there is no need to determine whether a person assumed the risk thus relieving the defendant of the duty"). Whether Bruns, as the communication link between driver Clobes and sledder Gilland, undertook to warn Gilland of any obstacles and to protect her from such obstacles in the path of the sled is doubtful. However, because this issue was not raised on appeal by either party, we shall proceed with our analysis assuming that Bruns owed Gilland such a duty of care and focusing our review on whether Gilland assumed the risk of injury.

II. Assumption of Risk

Gilland argues that the district court erred by concluding that she assumed the risk of hitting a tree and therefore relieved Bruns of any duty of care. Minnesota recognizes two types of assumption of risk: primary and secondary.[1] *Snilsberg v. Lake Wash. Club*, 614 N.W.2d 738, 743 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000). Primary assumption of risk applies when "parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks." *Id.* (quotation omitted). "The defendant

[1] Although the accident occurred in South Dakota, the litigation is occurring in Minnesota and all the parties agree or have acquiesced to the application of Minnesota law. In addition, the district court applied Minnesota law. We therefore consider the case under Minnesota substantive law and do not address any choice-of-law matter.

has no duty to protect the plaintiff from the well-known, incidental risks assumed, and the defendant is not negligent if any injury to the plaintiff arises from an incidental risk." *Id.* Primary assumption of risk acts as a complete bar to a plaintiff's recovery. *Schneider v. Erickson*, 654 N.W.2d 144, 148 (Minn. App. 2002). In contrast, secondary assumption of risk constitutes a form of contributory negligence that apportions fault between the parties. *Id.*

To determine whether Gilland primarily assumed the risk of injury, we must consider whether Gilland (1) knew of the risk; (2) appreciated the risk; and (3) had a chance to avoid the risk. *See Peterson v. Donahue*, 733 N.W.2d 790, 792 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). Each factor will be addressed in turn.

1. Knowledge

Gilland argues that she was unaware that trees came up to the edge of any of the rural roads that she and her friends were using and therefore did not have knowledge of the risk of crashing into a tree. Generally, the person assuming the risk must have actual, not constructive, knowledge. *Parr v. Hamnes*, 303 Minn. 333, 338, 228 N.W.2d 234, 237-38 (1975). But actual knowledge of obvious, normal, or ordinary risks is imputed to a person as a matter of common sense. *Id.* at 339, 228 N.W.2d at 238; *see also Brisson v. Minneapolis Baseball & Athletic Ass'n*, 185 Minn. 507, 509-10, 240 N.W. 903, 904 (Minn. 1932) (finding a spectator at a baseball game, despite limited experience with the sport, assumed the risk of being hit by a foul ball because "no adult of reasonable intelligence . . . could fail to realize that he would be injured if he was struck by a . . . ball . . . nor could he fail to realize that foul balls were likely to be directed toward where he

was sitting"); *Snilsberg*, 614 N.W.2d at 746 (concluding plaintiff assumed the risk of injury when she dove into dark water of unknown depth because she was an experienced diver, knew the danger of diving into shallow water, and should have recognized that water of unknown depth carried the same risks).

Gilland's arguments assume that the risk in question was the presence of the particular tree she hit. This analysis of the "knowledge" factor is too restrictive. Gilland admitted in her deposition that, prior to the accident, she and her friends had agreed they should wear a helmet when they ride on a sled behind a vehicle. In addition, both Clobes and Bruns testified that they warned Gilland of the low visibility and safety risks inherent in not being able to see or steer while riding on the sled. Finally, and most importantly, at the time of the accident, Gilland was a twenty-year-old university student who had grown up on a farm, held a driver's license, and had driven on numerous rural roadways. Despite Gilland's unfamiliarity with this specific roadway, the presence of roadside obstructions such as mailboxes, road signs, trees, utility poles, culverts, debris, uneven road surface, and other hazards is a matter of common knowledge for anyone of Gilland's age, background, and driving experience. The risk in question is not just of a particular, unanticipated tree by the road. Gilland cannot claim that, because she had not seen any trees along the road, she did not have knowledge of the risk of crashing into an obstruction. For anyone living in the rural Midwest, road hazards and obstructions are an obvious risk of riding a sled being pulled behind a vehicle along a snow-covered roadway. Such knowledge is imputed to Gilland.

2. Appreciation

Gilland argues that she could not have appreciated the risk if she did not know of the risk of the particular tree she struck. In addition to knowledge, the defense of primary assumption of risk requires that the injured claimant recognize that the risk is dangerous, and that the claimant appreciate "the probability and gravity of the threatened harm." Restatement (Second) of Torts § 343A cmt. (1965) (cited in *Louis v. Louis*, 636 N.W.2d 314, 321 (Minn. 2001)). However, as with knowledge, appreciation of a risk may be imputed if the risk is so obvious, normal, or ordinary as to be a matter of common sense. *See Snilsberg*, 614 N.W.2d at 746.

Gilland argues that, because she saw Clobes and Bruns ride the sled safely, she did not appreciate the risk of crashing into a tree and sustaining injury. Gilland points to Minnesota caselaw for legal support of this claim. In *Johnson v. S. Minn. Mach. Sales, Inc.*, this court refused to apply primary assumption of risk where an 18-year-old plaintiff witnessed his foreman operate a table saw without injury but sustained significant injury when using it in the same manner as his instructor. 442 N.W.2d 843, 848 (Minn. App. 1989), *review denied* (Minn. Sept. 21, 1989). In carefully examining the district court's decision, we noted that the foreman had greater experience in the area and trained the plaintiff to use the saw in a negligent manner. *Id.* at 845–46. In that context, we did not allow the defendants to use primary assumption of risk to bar Johnson's recovery. *Id.* at 848. Here, however, there is no evidence that Bruns had more experience riding a sled pulled behind a pick-up or that she was in a position to train Gilland how to ride a sled.

Gilland's observation of her friends sledding behind the pick-up without incident does not negate her ability to appreciate the dangerousness of the activity.

Gilland participated in arranging an inherently flawed system of communication that did not adequately protect one another from harm. Among other problems, the driver could not communicate with the person in the back of the pick-up to signal conditions on the road, and nobody was watching for obstructions along the side of the road that could pose an immediate threat for the person riding on the sled. Therefore, although Gilland may have participated in an inherently dangerous activity without fear of harm or repercussion, her ignorance of the tree or inexperience with the particular road did not preclude her from appreciating the risks inherent in riding a sled pulled behind a pick-up down a snow-covered gravel road.

3. Opportunity to Avoid

The final factor is whether Gilland had an opportunity to avoid the risk. *See Peterson*, 733 N.W.2d at 792. The uncontroverted evidence indicates that Gilland was warned about the dangers of riding. Both Clobes and Bruns testified that they had trouble seeing and suggested waiting until the next day. All three women testified that they discussed the advisability of wearing a helmet, presumably to reduce the risk of injury inherent with riding a sled pulled behind a pick-up traveling at 20-30 miles per hour. Despite these warnings, Gilland insisted on taking her turn riding the sled, and in doing so, she effectively declined the opportunity to avoid and voluntarily assumed the risk of striking a roadside obstruction, thereby relieving Bruns of any legal duty of care.

In sum, we conclude that the district court did not err in granting summary judgment for Bruns.

Affirmed.

Dated: