

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 14, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP534-FT

Cir. Ct. No. 2007CV574

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

HEIDI L. HELDT,

PLAINTIFF-APPELLANT,

v.

HAUCK POWER SPORTS, INC. AND AUTO-OWNERS INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

MATTHEW M. NELMS AND STATE FARM FIRE AND CASUALTY COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Barron County:
JAMES D. BABBITT, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Heidi Heldt appeals a summary judgment dismissing her negligence claims against Hauck Power Sports, Inc., and its insurer.¹ Heldt argues summary judgment was improper because there are disputed issues of material fact concerning her negligence allegations. We agree. We therefore reverse and remand for further proceedings.

BACKGROUND

¶2 Heldt was injured while a passenger on a Yamaha Rhino that Matthew Nelms was test-driving on Hauck's premises. Hauck is a Yamaha dealer that sells, among other things, the Rhino. The Rhino is an off-road vehicle, but it differs from traditional all terrain vehicles (ATVs) in certain respects. For instance, the machines have different safety mechanisms; Rhinos have a roll bar and seat belts, ATVs do not. They also handle differently; Rhinos behave more like a car than traditional ATVs. Although Nelms had operated ATVs previously, this was his first time driving a Rhino.

¶3 Before driving the vehicle, a Hauck employee provided helmets, told Nelms how to turn the Rhino on, and directed him to a test field. Nelms told the employee he knew what he was doing and the employee gave no further instructions. Shortly after beginning the test drive, Nelms rolled the Rhino while attempting to make a left turn. Heldt was injured when the Rhino pinned her right leg under the vehicle and her left arm under the roll bar. She was not wearing a seat belt.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version.

¶4 Heldt sued, alleging Hauck was negligent because it failed to: (1) instruct Nelms on how to properly corner the Rhino, (2) provide a suitable place to operate the Rhino, and (3) advise about the availability of seatbelts. With respect to the first allegation, Heldt contended that even an experienced ATV operator would need instructions on how to corner a Rhino because its handling differs from traditional ATVs, and would also need to be informed that a differential locking mechanism, when engaged, makes turning more difficult. Hauck moved for summary judgment, arguing these allegations were not supported by the record.

¶5 The circuit court concluded there was no evidence the accident was caused by the terrain or that Heldt's injuries would have been prevented or mitigated had she worn her seatbelt. It also concluded general information on cornering was common sense to anyone who had experience operating a car or an ATV, and that Hauck therefore had no duty to instruct Nelms on this information. It further concluded Hauck had no duty to warn Nelms about the differential lock because Hauck did not learn until after the accident about any issues related to cornering the Rhino with the lock engaged. The court then granted summary judgment in favor of Hauck.

DISCUSSION

¶6 Whether summary judgment is appropriate is a question of law we review independently. *City of Janesville v. CC Midwest, Inc.*, 2007 WI 93, ¶13, 302 Wis. 2d 599, 734 N.W.2d 428. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶7 A person is negligent if he or she, “without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.” *Gritzner v. Michael R.*, 2000 WI 68, ¶22, 235 Wis. 2d 781, 611 N.W.2d 906 (quoting WIS JI—CIVIL 1005). As a general rule, this is a question of fact to be decided by a jury. *Ceplina v. South Milw. Sch. Bd.*, 73 Wis. 2d 338, 342, 243 N.W.2d 183 (1976). Therefore, for a court to grant summary judgment on a negligence claim, it “must be able to say that no properly instructed, reasonable jury could find, based upon the facts presented, that the defendants failed to exercise ordinary care.” *Id.*

¶8 Heldt argues summary judgment was improper because there are disputed issues of material fact regarding Hauck’s alleged negligence. We reject Heldt’s argument concerning the differential lock, the availability of seatbelts, and the suitability of the test course. There is no evidence the differential lock was engaged, the seatbelts would have prevented Heldt’s injury, or the terrain contributed to the accident. However, we agree with Heldt that there is a disputed issue of material fact about whether Hauck was negligent for failing to instruct Nelms on proper cornering.

¶9 The circuit court concluded the fundamental aspects of how to safely corner a Rhino are within the knowledge of an experienced ATV rider or car driver. Heldt presented evidence that it is precisely experienced ATV drivers who need special instructions to safely operate a Rhino because the two types of machines handle differently. She submitted an affidavit from an engineer, Dennis Skogen, detailing these differences:

During movement through a turn, an ATV and motorcycle will tend to slide rather than overturn. On the contrary,

given the inherent characteristics of a Rhino (higher center of gravity, higher roll center, narrow track width, and stiff suspension), the Rhino will tend to tip over before sliding while cornering, especially at higher speeds.

Hauck, however, presented evidence that Rhinos are easier to operate than ATVs and argued that anyone experienced with driving a car would know how to safely turn in a Rhino.

¶10 Because there is a disputed factual issue about whether a reasonable driver would require special instructions on how to corner a Rhino, we cannot say that “no properly instructed, reasonable jury could find, based upon the facts presented,” that Hauck exercised ordinary care when it permitted Nelms to operate the Rhino without instructions on proper cornering. *See id.* Summary judgment was therefore improper.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

