

CASE NO. A06-1824

State of Minnesota
In Court of Appeals

OFFICE OF
APPELLATE

NOV 22 2006

FILED

NEAL PETERSON, A Minor, By and Through His Parent
And Natural Guardian, WANDA PETERSON, et al.,

Appellants,

vs.

DAVID DONAHUE,

Respondent.

APPELLANTS' REPLY BRIEF

McCULLOUGH, SMITH,
WILLIAMS & CYR, P.A.
D. Patrick McCullough, Esq.
Attorney Reg. No. 69978
905 Parkway Drive
Saint Paul, Minnesota 55117
(651) 772-3446

Attorney for Appellants

COUSINEAU McGUIRE
Susan D. Thurmer, Esq.
Attorney Reg. No. 122543
1550 Utica Avenue South
Suite 600
Minneapolis, Minnesota 55416
(952) 525-6945

Attorney for Respondent

REPLY ARGUMENT

I. APPELLANTS' LETTER BRIEF IS IN FULL COMPLIANCE WITH THE FORM PRESCRIBED BY THE MINNESOTA RULES OF CIVIL APPELLATE PROCEDURE.

Although Appellants do not feel that arguing whether the parties' briefs conform to the form requirements prescribed by the Minnesota Rules of Civil Appellate Procedure is significantly relevant to the Court of Appeals review of the trial court's decision in this matter or the dispositive issues in this case, Appellants are compelled, nonetheless, to briefly respond to Respondent's allegations of improper form. Appellants were unable to find any rule dictating the length of the short letter argument to be submitted in reliance upon trial court memoranda pursuant to Rule 128.01 Subd. 2 of the Minnesota Rules of Civil Appellate Procedure. As such, Appellants sought advice from the Clerk of Appellate Courts and were informed that the 45 page length limit of Rule 132.01 Subd. 3 dictates the length of all submissions whether formal or informal principle briefs or short letter arguments. Appellants further submitted a certificate that the short letter argument complies with the word count and line count limitations as required by Rule 132.01 Subd. 3. (See Appellants' Appendix at A-76).

In addition, because Appellants had elected to rely upon their prior trial court memoranda pursuant to Rule 128.01, Subd. 2, counsel for Appellants interpreted the rule to require that only Appellants' trial court submissions need

be attached in the Appendix. Respondents had chosen to complete and submit a formal brief as their argument rather than relying on their previously submitted trial court memoranda. As such, Appellants did not interpret the rule to require them to incur the additional cost in reproducing Respondent's trial court submissions, especially given that the Court of Appeals always has access to the entire record for reference or examination.

Rule 130.01, Subd. 1 of the Minnesota Rules of Civil Appellate Procedure provides that:

The record shall not be printed... The appendix shall be separately and consecutively numbered and shall contain the following portions of the record; a) the relevant pleadings; b) the relevant written motions and orders; c) the verdict or the findings of fact, conclusions of law and order for judgment; d) the relevant post trial motions and orders; e) any memorandum opinions; f) if the trial court's instructions are challenged on appeal, the instructions, any portion of the transcript containing a discussion of the instructions and any relevant requests for instructions; g) any judgments; h) the notice of appeal; and i) if the constitutionality of a statute is challenged, proof of compliance with Rule 144; and j) the index to the documents contained in the appendix. **The parties shall have regard for the fact that the entire record is always available to the appellate court for reference or examination and shall not engage in unnecessary reproduction.**

Nowhere do the rules require that "all relevant trial court submissions" be contained in the appendix as argued by the Respondent. Appellants are unsure as to why Respondent cited Rule 128.02 Subd. 2 as authority for this argument, in light of the fact that Rule 128.02, Subd. 2 proscribes the proper

form of the Brief of Respondent. Moreover, it appears that by reproducing numerous deposition excerpts and letters between counsel and Judge Gregory G. Galler, Respondent has failed to follow the requirements of Rule 130.01, Subd. 1, by unnecessarily reproducing these documents. Furthermore, Appellants have also not received nor seen any certificate of compliance attached to Respondent's brief, as required by Rule 132.01, Subd. 3. Appellants can only assume that Respondent has neglected to follow this rule as well. Appellants, however, believe that such violations were unintentional on the part of Respondent. As such, Appellants do not wish to belay the issue but rather will spend the remainder of this Reply Brief in response to Respondent's legal arguments.

II. BECAUSE SKIING IS NEITHER AN ORGANIZED SPORT, REQUIRING A RELATIONSHIP BETWEEN THE PARTIES, NOR AN INHERENTLY DANGEROUS ACTIVITY, DISMISSAL OF APPELLANTS' NEGLIGENCE CLAIMS AS A MATTER OF LAW BASED UPON THE DOCTRINE OF PRIMARY ASSUMPTION OF RISK IS INAPPROPRIATE.

Respondent cites Schneider v. Schneider, for the proposition that the doctrine of primary assumption of risk is premised on the theory that by "voluntarily entering into a situation where there are well-known, incidental risks, the plaintiff consents to look out for himself and relieve the defendant of his duty." 654 N.W.2d 144, 148 (Minn. Ct. App. 2002). The court in Schneider further held, however, that "primary assumption of the risk applies when a party **voluntarily enters into a relationship** in which the plaintiff

assumes well-known, incidental risks.” (emphasis added) Id. (citing Olson v. Hansen, 216 N.W.2d 124, 127 (Minn. 1974)). The court went on to add that, “Whether a party has primarily assumed the risk is usually a question for the jury, unless the evidence is conclusive.” Id. (citing Hollinbeck v. Downey, 261 Minn. 481, 486, 113 N.W.2d 9, 13 (1962)).

In this case, skiing is not the type of organized sporting event where one party enters into a relationship with the other, thereby relieving the defendant of his duty. Therefore, this case is distinguishable from those cases cited by Respondent regarding co-participants engaged in a game of paintball or softball. See, Resp. Brief at 8 (citing Gnetz v. Coppersmith, No. C8-89-1862, 1990 WL 13400 (Minn. Ct. App. Feb. 20, 1990); Schneider v. Schneider, 654 N.W.2d 148.) Furthermore, as Respondent notes, the majority of cases regarding the doctrine of assumption of risk involve injuries to spectators of inherently dangerous sporting events or have been asserted by a sports participant against the hosting facility. Resp. Brief at 8-9. This is because “the classes of cases involving an implied primary assumption of risk are not many.” Springrose v. Willmore, 192 N.W.2d 826, 827 (Minn. 1971). Specifically, in Minnesota, primary assumption of the risk has been most often applied to inherently dangerous sporting events. See, Swagger v. City of Crystal, 379 N.W.2d 183 (Minn. Ct. App. 1985).

Here, Appellants are not making a claim against the ski resort, with whom they did enter into a relationship by way of their ski pass and corresponding signed releases, nor has any Minnesota case held that skiing is an inherently dangerous sport, as noted by Appellants in their Supplemental Response to Defendant's Reply Memorandum. (See Appellants Appendix at A-42.)

In addition to citing these distinguishable cases, Respondent cited the case of Moe v. Steenberg, involving an action by an ice skater against another ice skater, for the proposition that Minnesota has applied the doctrine of primary assumption of risk in a case similar in facts to the present case. 275 Minn. 448, 450, 147 N.W.2d 587,589 (1966). It is important to note, however, that unlike the present summary judgment motion, the court in Moe v. Steenberg, was reviewing whether the trial court erred in submitting the defense of assumption of risk to the jury. The court in Moe v. Steenberg, held that, "it is the general rule that one who participates in a sport assumes the risks which are inherent in it, and it is ordinarily for the jury to determine what those risks are." Id. The court further elaborated that, "one who skates does not assume every risk arising from the negligent acts or omissions of others." Id. at 451, 589. So too, in this case, it is for a jury to decide whether Appellant, Neal Peterson, while admittedly knowing that skier v. skier collisions

are possible, voluntarily assumed the enlarged risk of Respondent's negligence in violating the Skier Responsibility Code and in entering a ski hill without first looking up hill for oncoming skiers.

Respondent also cites Siedl v. Trollhaugen, Inc. as authority for the application of the primary assumption of risk when the plaintiff has knowledge of the specific risk of being hit on the slopes by other skiers. 232 N.W.2d 236, 240-41 (Minn. 1975). Respondent's reliance on Siedl v. Trollhaugen is without merit. Similar to Moe v. Steenberg, the case in Siedl v. Trollhaugen involved a review of a trial judge's decision to submit the issue of negligence to a jury strictly on a comparative negligence basis rather than submitting an instruction on assumption of the risk. Rather than standing for the proposition that a negligence claim, such as Appellants, should be dismissed as a matter of law, as Respondent incorrectly argues, both of these cases indicate that, in like circumstances, **the issue of assumption of risk is an appropriate instruction to the jury.**

In the case presently before the Court, Appellants are not arguing that assumption of risk should not be submitted to a jury, to the contrary Appellants argue that assumption of the risk is a genuine issue of fact that must be determined by a jury and not as a matter of law. Therefore, Appellants ask that the Court of Appeals find that Respondent's negligence and Appellants'

assumption of the risk present genuine issues of material fact to be submitted to a jury, just as they were in the cases of Moe v. Steenberg and Seidl v. Trollhaugen, and reverse the district court's grant of summary judgment and remand the matter to the district court for trial.

Finally, because there are no Minnesota cases applying the doctrine of primary assumption of risk in a skiing case, Respondent attempted to persuade the Court to apply the doctrine of primary assumption of risk as a matter of law in cases where skiers have asserted negligence claims against other skiers by citing the California case of Cheong v. Antablin, 946 P.2d 817 (Cal. 1997). However, Respondent failed to acknowledge the numerous other outside jurisdictional cases that have explicitly held that the doctrine of assumption of risk does not apply to a skier v. skier case, which were previously cited by the Appellants in their original Responsive Memorandum of Law in Opposition to Summary Judgment. (See Appellants' Appendix at A-25). For example in Novak v. Virene, the court specifically held that skiing was not a contact sport. 586 N.E.2d 578 (Ill. Ct. App. 1991). Thus, the court held that there was no limited contact rule which would allow a defendant to argue that, absent recklessness, a skier collision was a risk assumed when skiing. Id. Similarly, in Martin v. Luther, the court held that "while a participant in a sporting event generally assumes the risks inherent in the sport he does not assume the risk

of another participant's negligent play which enhances the risk." 642 N.Y.S.2d 728 (N.Y. App. Div. 1996). Such decision was affirmed in Duncan v. Kelly, where the court found that, although an individual who participates in downhill skiing assumes the usual risks inherent in that activity, including the risk of personal injury caused by other persons using the facilities, *another skier's negligence, or reckless or intentional conduct, is not within the range of risks that are assumed.* (emphasis added) 671 N.Y.S.2d 841 (N.Y. App. Div. 1998); see also, Morgan v. State, 685 N.E.2d 202 (N.Y. 1997); and Kaufman v. Hunter Mtn. Ski Bowl, 691 N.E.2d 632 (N.Y. 1998).

As these cases have held, another skier's negligence is not within the range of risks that are assumed by a skier. Contrary to Respondent's argument that there is "no evidence in this matter that Donahue did anything to increase the inherent risk to Appellant of sustaining injury by colliding with another skier near a crossover area," there is ample evidence that a jury could use to determine that Respondent acted negligently. This area was not merely a neutral "crossover area" or intersection for skier's to utilize, but Respondent, David Donahue entered a ski trail, specifically the bunny hill with primarily young children located on it, from an opening that was blind to oncoming downhill skiers. Respondent openly admitted that he failed to look for oncoming skiers prior to entering the trail in violation of the Skier's

Responsibility Code and regardless of his visual impairment in his right eye. These actions and omissions are genuine issues of material fact that should be submitted to a jury to determine whether indeed Appellant, Neal Peterson, voluntarily assumed the risk of these negligent acts and omissions and/or whether these acts and omissions increased the risk to Appellant, Neal Peterson.

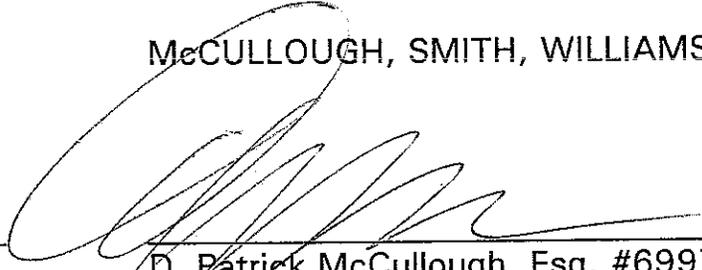
CONCLUSION

Because the doctrine of primary assumption of risk is an issue to be submitted to a jury, and because there are genuine issues of material fact regarding Respondent's negligence in increasing the risk to Appellant, Neal Peterson, Appellants respectfully request that the Court of Appeals reverse the trial court's grant of summary judgment and remand this matter to the district court for trial.

Respectfully submitted,

McCULLOUGH, SMITH, WILLIAMS & CYR, P.A.

Dated: 11/22/06



D. Patrick McCullough, Esq. #69978
Attorney for Appellants
905 Parkway Dr.
St. Paul, MN 55117-3198
(651)772-3446.

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CERTIFICATE OF
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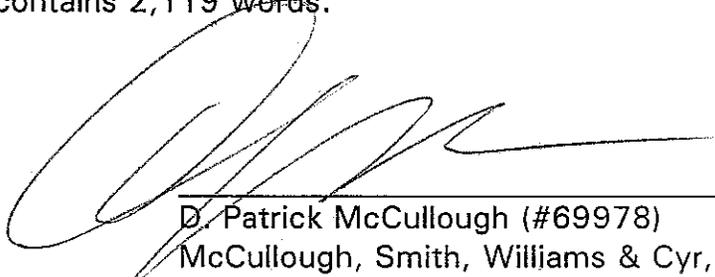
David Donahue,

Respondent.

TO: CLERK OF APPELLATE COURTS, 305 Minnesota Judicial Center, 25 Rev.
Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155.

Pursuant to Rule 132.01 Subd. 3, of the Minnesota Rules of Civil Appellate Procedure, the undersigned hereby certifies that the Appellants' Reply Brief complies with the word count limitation. Appellants' Reply Brief was typed using Microsoft® Word 2002, from Microsoft® Office XP. The Brief complies with the typeface requirements of the rule in that a proportional font is used, namely Univers, 13-pt. font and Appellants' Reply Brief contains 2,119 words.

Dated: 11/22/06



Patrick McCullough (#69978)
McCullough, Smith, Williams & Cyr, P.A.
Attorney for Appellants
905 Parkway Dr.
St. Paul, MN 55117-3198
(651)772-3446