

NO. A06-1824

State of Minnesota
In Court of Appeals

Neal Peterson, a Minor, By and Through His
Parent and Natural Guardian, Wanda Peterson;
Donald Peterson and Wanda Peterson, individually,
Appellants,

vs.

David Donahue,
Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
LEGAL ISSUE PRESENTED	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT	5
I. Standard of Review.....	5
II. Appellants’ Letter Brief Does Not Comply with the Form Prescribed in the Minnesota Rules of Civil Appellate Procedure.	5
III. The District Court Properly Concluded that the Doctrine of Primary Assumption of Risk Bars Appellants’ Negligence Claims Against Respondent Donahue.	6
CONCLUSION	14
APPENDIX	15

TABLE OF AUTHORITIES

Page

CASES:

Andren v. White-Rodgers Co., 465 N.W.2d 102 (Minn. App. 1991),
pet. for rev. denied (Minn. Mar. 27, 1991) 7

Armstrong v. Mailand, 248 N.W.2d 343 (Minn. 1979) 6

Bebo v. Delander, 632 N.W.2d 732 (Minn. App. 2001), *pet. for rev.*
denied (Minn. Oct. 16, 2001) 5

DLH, Inc. v. Russ, 566 N.W.2d 60 (Minn. 1997) 5

Gnetz v. Coppersmith, 1990 WL 13400 (Minn. App.) 1, 8-10, 13

Grisim v. TapeMark Charity Pro-Am Golf Tournament, 415 N.W.2d 874
(Minn. 1987) 7

Jussila v. United States Snowmobile Assoc., 556 N.W.2d 234
(Minn. App. 1997), *pet. for rev. denied* (Minn. Jan. 29, 1997) 1, 10, 11

L.M. v. Karlson, 646 N.W.2d 537 (Minn. App. 2002) 5

Moe v. Steenberg, 275 Minn.448, 147 N.W.2d 587 (1966) 1, 8, 10, 13

Olson v. Hansen, 299 Minn. 39, 216 N.W.2d 124 (1974) 7

Rusciano v. State Farm Mut. Auto. Ins. Co., 445 N.W.2d 271
(Minn. App. 1989) 10, 11

Schneider v. Schneider, 654 N.W.2d 144 (Minn. App. 2002) 6, 8

Seidl v. Trollhaugen, Inc., 305 Minn. 506, 232 N.W.2d 236 (1975) 8

Snilsberg v. Lake Washington Club, 614 N.W.2d 738 (Minn. App. 2000),
pet. for rev. denied (Minn. Oct. 17, 2000) 9

Star Centers, Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72
(Minn. 2002) 5

Verberkmoes v. Lutsen Mountains Corp., 844 F. Supp. 1356
(D. Minn. 1994) 1, 7, 8, 13

EXTRAJURISDICTIONAL CASES:

Cheong v. Antablin, 946 P.2d 817 (Cal 1997) 8

RULES:

Minnesota Rule of Civil Appellate Procedure 128.02, subdivision 1 6
Minnesota Rule of Civil Appellate Procedure 128.02, subdivision 2 6
Minnesota Rule of Civil Appellate Procedure 132.01, subdivision 1 5

OTHER:

Michael K. Steenson, *The Role of Primary Assumption of Risk in Civil Litigation in Minnesota*, 30 Wm. Mitchell L. Rev. 115 (2003) 6

LEGAL ISSUE PRESENTED

Given Plaintiffs' Own Deposition Testimony that Plaintiff Neal Peterson Knew Sustaining Injury in a Collision with Another Skier to be a Risk Inherent to the Sport of Skiing, Was Defendant David Donahue Entitled to Dismissal of Plaintiffs' Negligence Claims as a Matter of Law Based Upon the Doctrine of Primary Assumption of Risk?

The district court ruled in the affirmative, granting Defendant David Donahue's motion for summary judgment.

Apposite Cases

Verberkmoes v. Lutsen Mountains Corp., 844 F. Supp. 1356 (D. Minn. 1994).

Moe v. Steenberg, 275 Minn.448, 147 N.W.2d 587 (1966).

Jussila v. United States Snowmobile Assoc., 556 N.W.2d 234 (Minn. App. 1997), *pet. for rev. denied* (Minn. Jan. 29, 1997).

Gnetz v. Coppersmith, 1990 WL 13400 (Minn. App.).

STATEMENT OF THE CASE

This action arises from a skiing accident on February 26, 2000, at Afton Alps in Washington County, Minnesota, when Plaintiff Neal Peterson (a minor) collided with Defendant David Donahue. Peterson subsequently brought a negligence claim against Donahue by and through his mother Wanda Peterson, with Wanda Peterson and Neal's father Donald Peterson also asserting individual claims.

After conducting discovery, Defendant Donahue moved for summary judgment, seeking dismissal based upon the doctrine of primary assumption of risk or, in the alternative, to exclude the testimony of Plaintiffs' expert Steven C. Harris. The Honorable Gregory G. Galler, Judge of District Court for Washington County, heard Donahue's motion on May 12, 2006.

On August 8, 2006, Judge Galler issued an Order and Memorandum granting Defendant Donahue's motion for summary judgment, with judgment being entered that day. On September 26, 2006, Plaintiffs filed their Notice of Appeal from that final judgment.

STATEMENT OF FACTS

On February 26, 2000, Appellant Neal Peterson collided with Respondent David Donahue while skiing at Afton Alps. (A. 2).¹ Although Appellant² has no memory of the accident, it is undisputed that the collision took place as Donahue was leaving a crossover area³ and entering the Nancy's Nursery ski run. (A.7-8; RA.2).

At the time of the accident, Appellant was eleven years old (in the sixth grade)⁴ and had been skiing since age two. In fact, he was an advanced skier who had been skiing competitively for the past four years. (A.7; RA.2-3). The morning of February 20, 2000, Appellant competed in a championship slalom race at Afton Alps as a member of the Wild Mountain Developmental ("D") Team. (RA.4-5). Donahue – also an experienced skier – was at Afton Alps that day to watch his children race. (A.7). While skiing during a break between the morning and afternoon races, Appellant crashed into Donahue near the crossover connecting the trails known as Johanna's Pass and Nancy's Nursery. (A.7-9). As a result of Appellant colliding into him, Donahue was knocked out of his skis to a distance some 10-12 feet from the point of impact. (RA.12, 12b).

¹ All citations to "A. ___" refer to Appellants' Appendix.

² While "Appellants" refers to Appellants Neal Peterson, Wanda Peterson, and Donald Peterson, the term "Appellant" refers only to Appellant Neal Peterson.

³ According to Appellant, the "crossover" refers to the bottom hill area where skiers cross between the runs in order to go to the chalet or to the parking lot. (RA.10). All citations to "RA. ___" refer to Respondent's Appendix.

⁴ Respondent was 43 years old at the time of the accident. (A.7).

Claiming Appellant suffered permanent injury from the collision with Donahue, Appellants commenced this negligence action against Donahue in August 2005. (A.4). During the discovery phase of this litigation, Appellant admitted that while skiing on February 26, 2000, he had been aware of the well-known risks that skiers can fall, collide with other skiers, and sustain injury while skiing. (RA.6, 7, 9, 19). Appellant further testified to having previously injured his knee while skiing. (RA.7).

In her deposition testimony, Appellant Wanda Peterson confirmed that at the time of the accident, Appellant knew that sustaining injury in a collision with another skier was a risk inherent to the sport of skiing. (RA.48). In addition, Appellant's father (Appellant Donald Peterson) testified to having previously discussed the specific dangers posed by crossover areas with Appellant. (RA.50-51, 21-22, 50-51).

On May 12, 2006, the district court heard Donahue's motion for summary judgment. Ruling that the doctrine of primary assumption of risk bars Appellants' claim, the district court granted Donahue's motion and entered a judgment dismissing the action on August 8, 2006. This appeal followed.

ARGUMENT

I. Standard of Review.

On appeal from summary judgment, the court reviews *de novo* “whether there are any genuine issues of material fact and whether the district court erred in its application of the law.” *Star Centers, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

The party opposing summary judgment may not rely upon “mere averments,” but must offer substantial evidence of a genuine issue of material fact. *L.M. v. Karlson*, 646 N.W.2d 537, 542 (Minn. App. 2002) (quoting *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69-71 (Minn. 1997)). A fact is material if it affects the outcome of a case. *E.g., Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001), *pet. for rev. denied* (Minn. Oct. 16, 2001).

II. Appellants’ Letter Brief Does Not Comply with the Form Prescribed in the Minnesota Rules of Civil Appellate Procedure.

Appellants’ submission – designated as a “letter argument” in its title as well as in Appellants’ Statement of the Case – is fifteen pages long, four of which are single-spaced.⁵ However, the rules of civil appellate procedure provide for the submission of a letter brief in lieu of a formal brief as follows:

If counsel elects, in the statement of the case, to rely upon memoranda submitted to the trial court supplemented by a **short letter argument** the submission shall be covered and may be informally bound by stapling. **The trial court submissions and decision shall be attached as the appendix.**

⁵ Rule 132.01, subdivision 1, of the Minnesota Rules of Civil Appellate Procedure specifies that briefs should be double-spaced with the exception of “tables of contents, tables of authorities, statements of issues, headings and footnotes.”

Minn. R. Civ. App. P. 128.02, subd. 2 (emphasis added). In addition to disregarding the directive that letter arguments be short, Appellants have failed to attach all relevant trial court submissions to their appendix. In contravention of Rule 128.02, subdivision 2, Appellants neglected to include in their appendix Donahue's memorandum in support of summary judgment.⁶ It would appear that Appellants have attempted to submit an informal brief pursuant to Rule 128.02, subdivision 1, without seeking the permission of this Court as required under that Rule.

III. The District Court Properly Concluded that the Doctrine of Primary Assumption of Risk Bars Appellants' Negligence Claims Against Respondent Donahue.

The district court properly dismissed Appellants' claims based on the doctrine of primary assumption of risk. Under Minnesota law, primary assumption of risk is a complete bar to a plaintiff's recovery. *Schneider v. Schneider*, 654 N.W.2d 144, 148 (Minn. App. 2002) (citing *Armstrong v. Mailand*, 248 N.W.2d 343, 348 (Minn. 1979)). 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." *Schneider*, 654 N.W.2d 148 (citation omitted); accord Michael K. Steenson, *The Role of Primary Assumption of Risk in Civil*

⁶ Accordingly, Respondent Donahue has attached to the Appendix of Respondent's Brief the following documents that were submitted to the district court: (1) Defendant's Memorandum of Law in Support of Summary Judgment Motion and Motion to Exclude Expert Testimony (RA.13-31); and (2) Defendant's Reply to Plaintiffs' Memorandum of Law in Opposition to Defendant's Summary Judgment Motion and Motion to Exclude Expert Testimony (RA.32-46).

Litigation in Minnesota, 30 Wm. Mitchell L. Rev. 115, 155 (2003) (“Primary assumption of risk turns on the plaintiff’s knowledge and appreciation and voluntary acceptance of a risk as well as consent to inherent risks.”).

Primary assumption of risk applies where parties:

have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks. As to those risks, the defendant has no duty to protect the plaintiff and, thus, if plaintiff’s injury arises from an incidental risk, the defendant is not negligent.

Olson v. Hansen, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974). In essence, primary assumption of risk “amounts to a denial that the defendant had any duty to protect plaintiff from the well-known, inherent risks of an activity.” *Verberkmoes v. Lutsen Mountains Corp.*, 844 F. Supp. 1356, 1358 (D. Minn. 1994) (citing *Olson*, 299 Minn. at 44, 216 N.W.2d at 127). More precisely, primary assumption of risk applies where the following three elements are met: (1) the plaintiff had knowledge of the risk; (2) the plaintiff had an appreciation of the risk; and (3) the plaintiff voluntarily chose to take the risk. *See, e.g., Andren v. White-Rodgers Co.*, 465 N.W.2d 102, 104-05 (Minn. App. 1991), *pet. for rev. denied* (Minn. Mar. 27, 1991).

Minnesota courts have clearly held that the doctrine of primary assumption of risk applies to “negligence claims arising from sporting accidents.” *Verberkmoes*, 844 F. Supp. at 1358-59 (recognizing the District of Vermont’s application of the doctrine to the sport of skiing). And although many assumption of risk cases have involved injuries to spectators of inherently dangerous sporting events (*see, e.g., Grisim v. TapeMark Charity Pro-Am Golf*

Tournament, 415 N.W.2d 874 (Minn. 1987)) or have been asserted by a sports participant against the hosting facility (e.g., *Verberkmoes*), in *Moe v. Steenberg*, the Minnesota Supreme Court applied the doctrine to an action by an ice skater against a co-participant. 275 Minn. 448, 450, 147 N.W.2d 587, 589 (1966) (approving application of doctrine to claim by skater against fellow skater who had fallen on her). Likewise, this doctrine was applied in an action against a co-participant for injuries sustained while engaged in a game of paintball. See *Schneider*, 654 N.W.2d at 151 (“Because participants in sports enter into relationships in which they assume well-known inherent risks, they consent to relieve other participants of their duty of care with regard to those risks.”). Notably, courts in other jurisdictions have applied primary assumption of risk in cases where skiers have asserted negligence claims against other skiers. See, e.g., *Cheong v. Antablin*, 946 P.2d 817 (Cal 1997).⁷

Relying on *Moe*, the Minnesota Court of Appeals has more recently affirmed application of the doctrine to a case involving co-participants in a sporting activity. See *Gnetz v. Coppersmith*, 1990 WL 13400 (Minn. App.).⁸ In *Gnetz*, a pitcher sought damages for injuries incurred when struck in the eye by a softball thrown from first base to third base during warmups between innings of a softball game. The court affirmed dismissal of that

⁷ Moreover, in *Seidl v. Trollhaugen, Inc.*, the Minnesota Supreme Court indicated that application of the doctrine would have been appropriate in that skiing action had the defendant presented evidence “as to plaintiff’s knowledge of the specific risk of being hit on the slopes by other skiers.” 305 Minn. 506, 509, 232 N.W.2d 236, 240-41 (1975).

⁸ In compliance with section 480A.08(3) of the Minnesota Statutes, a copy of this unpublished decision is included in Respondent’s Appendix. (RA.52-53).

action based upon primary assumption of risk because the plaintiff testified during his deposition that he had seen pitchers hit by balls thrown by their own teammates and that he knew players threw balls from first to third base during between-inning warmups. *Id.* at *2 (concluding pitcher's participation in the game and in the warmups "supports the conclusion that he assumed the risk of injury from a wildly thrown ball").

In any event, regardless of whether a claim is against the owner of a sports facility or against a co-participant in a given sport, the focus is on whether the plaintiff accepted well-known, inherent risks – not on the defendant's conduct; in fact, the doctrine of primary assumption of risk relieves a defendant of his duty of care where a plaintiff's injuries arise from well-known, incidental risks. *See, e.g., Snilsberg v. Lake Washington Club*, 614 N.W.2d 738, 744 (Minn. App. 2000) ("defendant is not negligent if any injury to the plaintiff arises from an incidental risk"), *pet. for rev. denied* (Minn. Oct. 17, 2000).

In the present case, Appellants' depositions establish the elements of primary assumption of risk. As noted above, Appellant Neal Peterson – an advanced skier despite his age – testified that he was well-aware of the following risks inherent to skiing: falling, colliding with other skiers, and sustaining injury from falling and/or colliding with other skiers. Appellant Wanda Peterson further acknowledged in her testimony that at the time of the February 26, 2000 accident, Neal knew sustaining injury in a collision with another skier to be a risk inherent to the sport of skiing. Significantly, Appellant Donald Peterson further testified that Neal was aware of the particular danger of colliding in crossover areas.

In short, Appellants' depositions establish as a matter of law that when Appellant crashed into Respondent Donahue near the crossover, he was aware of the specific risks presented by crossover areas and the particular risk of sustaining injury by colliding with another skier; nonetheless, Appellant chose to ski the slopes at Afton Alps that day between the morning and the afternoon races. Accordingly, Appellants' numerous pages in their letter argument detailing Appellant's and Respondent's respective ski runs and their relative positions at the time of the collision are completely irrelevant to **the dispositive issue in this case – whether Appellant was aware of the risk inherent in skiing of sustaining injury in a collision with another skier.** The record unequivocally shows Appellant was aware of the inherent risks of injury while skiing – as well as of the particular dangers posed by crossover areas and the presence of other skiers on the slopes. Thus, the district court properly applied the doctrine of primary assumption of risk, and its dismissal of this action should be affirmed.

Appellants' argument that the doctrine of primary assumption of risk is unavailable in this case because Donahue enlarged the risk is without merit. Under Minnesota law, the doctrine of primary assumption of risk does not apply where a defendant has enlarged the risk inherent in the activity by creating a **new, unanticipated risk** or by engaging in malicious or reckless conduct. *Jussila v. United States Snowmobile Assoc.*, 556 N.W.2d 234, 237 (Minn. App. 1997), *pet. for rev. denied* (Minn. Jan. 29, 1997); *Moe*, 275 Minn. at 451, 147 N.W.2d at 589 (“The conduct of other skaters may be so reckless . . . as to be wholly unanticipated.”); *Gnetz*, 1990 WL 13400 at *2. In *Rusciano v. State Farm Mut. Auto. Ins.*

Co., for example, the Minnesota Court of Appeals held the defendant enlarged the risk by accelerating his vehicle upon seeing the plaintiff standing in front of him in an alley. 445 N.W.2d 271, 273 (Minn. App. 1989). Unlike *Rusciano*, 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. Moreover, the record is also devoid of any evidence that Donahue engaged in any willful or malicious conduct.

Appellants' other arguments for reversal also lack merit. First, Appellants wrongly assert that the district court usurped the function of the jury by making credibility determinations and by ruling there was insufficient evidence of negligence. (See Appellants' Letter Argument, pp. 3-5, 13-15.) In granting Donahue's motion for summary judgment, the district court neither made any credibility determinations nor any findings whatsoever with respect to Donahue's alleged negligence. Instead, the district court determined that all three Appellants' depositions provided conclusive evidence that Appellant Neal Peterson appreciated and chose to accept the risks inherent in skiing. That is, Appellants' own testimony permitted the district court to properly conclude that the doctrine of primary assumption of risk precludes Appellants' claims against Donahue. See *Jussila*, 556 N.W.2d at 236 ("A court may determine the applicability of the doctrine as a matter of law when reasonable people can draw only one conclusion from undisputed facts."). Here, it is undisputed that Appellant Peterson was aware of the inherent risk in his chosen sport of sustaining injury by colliding with another skier.

Appellants further argue reversal is warranted because the district court declined during the summary judgment hearing to view Appellants' "visual aids." This assertion is without merit. The proffered visual aids consisted of maps of the trails at Afton Alps as well as of the ski runs purportedly taken by Neal Peterson and David Donahue just prior to their collision. (See Appellants' Letter Argument, p.4; A.62-63). Prior to the hearing, in their memorandum in opposition to Donahue's summary judgment motion, Appellants extensively briefed the purported relative position of the two skiers before and at the time of impact. (A.7-14). With their opposition papers, Appellants submitted to the district court a trail map as well as aerial photographs of the Afton Alps ski area. (A.13). Thus, visual aids were, in fact, submitted to the district court prior to the hearing of Donahue's summary judgment motion. Moreover, at the May 12, 2006 hearing, the district court indicated explicitly as well as through its questioning of the parties that it had carefully reviewed the parties' submissions prior to the hearing. (A.60-64).⁹ Thus, while the respective positions of the two skiers is irrelevant to the dispositive issue in this case – whether by skiing at Afton Alps on February 26, 2000, Appellant Neal Peterson assumed the risk that he could sustain injury in a collision with another skier, there is simply no basis for concluding that the district court's

⁹ In fact, Appellants were even afforded the opportunity to submit a response to Donahue's Reply Memorandum **after** the May 12, 2006 hearing of Donahue's summary judgment motion based on Appellants' contention that Donahue's Reply Memorandum was untimely (although served on May 9, 2006) because it was not served a full seventy-two hours prior to the hearing. (RA.54-55). However, Appellants' post-hearing memorandum does not even address the matter of the court declining to view poster-sized visual aids at the summary judgment hearing. (A.41-50).

decision on this issue was in any way influenced by the fact that it did not view “visual aids” during the hearing of the motion.

Finally, Appellants contend primary assumption of risk is inapplicable here because “[t]o hold otherwise would allow primary assumption of risk to apply in every motor vehicle accident simply because drivers are aware that accidents can happen.” (Appellants’ Letter Argument, p. 13.) This assertion ignores the fact that while Minnesota courts have not applied the doctrine to traffic accidents, as demonstrated in the numerous cases cited above (*Verberkmoes*, *Moes*, and *Gnetz*, for example), Minnesota courts have clearly held that the doctrine of primary assumption of risk applies to “negligence claims arising from sporting accidents.” *E.g.*, *Verberkmoes*, 844 F. Supp. at 1358-59.

Because the record unequivocally shows that Appellant knew and appreciated the risk inherent to skiing of colliding with another skier, the district court did not err in dismissing this action under the doctrine of primary assumption of risk. Therefore, Respondent David Donahue respectfully requests that this Court affirm the district court’s grant of summary judgment.

CONCLUSION

Appellants' deposition testimony establishes as a matter of law that Appellant Neal Peterson was aware of, appreciated, and chose to accept the risk inherent to skiing of sustaining injury by colliding with another skier. Therefore, Respondent David Donahue respectfully requests that this Court affirm the district court's grant of summary judgment on the basis that the doctrine of primary assumption of risk bars Appellants' claims.

Respectfully submitted,

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Dated: November 17, 2006

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).