STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2094

Tyler Heistand,
Appellant,

vs.

Jeffrey Luker,
Respondent.

Filed August 11, 2009
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-08-6797

Bruce W. Larson, Charles A. Beckjord, Law Offices of Bruce W. Larson, 746 Mill Street, Wayzata, MN 55391 (for appellant)

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Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Johnson, Judge.

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

PETERSON, Judge

In this appeal from the district court's dismissal, on summary judgment, of appellant's negligence claims arising out of an injury suffered while participating in a

high-school gym class, appellant argues that the district court erred when it concluded that the doctrine of assumption of the risk applied to bar appellant's claim. We affirm.

FACTS

This action arose out of an accident that occurred during a high-school gym class, in which appellant Tyler Heistand suffered an eye injury. Appellant and respondent Jeffrey Luker, both high-school seniors, were enrolled in team sports plus, an elective physical-education class. Although team sports plus can be applied toward mandatory physical-education requirements, appellant had already completed the mandatory physical-education requirements.

The accident occurred during a game of pillow polo, which is similar to floor hockey in that players use a stick to swing at a ball and try to make a goal. The ball is soft, like a Nerf ball, and about six inches in diameter. The stick is a straight, hollow plastic tube with a fluffy pillow duct-taped to one end. The tubing is similar but stronger than that used to make hula hoops. Some of the sticks had knobs at the top, and others did not.

In a deposition, Kristine Nelson, the physical-education instructor, testified that pillow polo had been played in Eden Prairie gym classes since she became employed in the school district in 1984. Before beginning a game of pillow polo, Nelson typically instructed the students to use the stick only to hit the ball, not for hitting or body checking people, but did not instruct them as to how hard they should swing the stick. Nelson also instructed the students to hold onto their sticks. Nelson testified that it was appropriate

and expected that students would swing the stick as hard as they could at the ball. Nelson acknowledged that players typically play harder near the end of the game.

In depositions, appellant, respondent, and Nelson all testified that players sometimes lost control of sticks during games of pillow polo. Nelson could not estimate how often it happened, and respondent recalled only one specific incident earlier in the game during which appellant was injured. Appellant testified:

> Q I'm trying to get as accurate an estimate as possible as to the number of times [that you saw someone lose control of a stick]. Can you estimate the number of times that you had seen it?
> A Maybe two to three people per class period but it would – it would be a low velocity kind of – just letting go of their stick or dropping it.
> Q When you say low velocity, are you saying that the people that had lost their sticks had lost even when they were swinging at less than full strength?
> A Oh, definitely.
> Q It just slipped out of their hands?
> A Yes.

Appellant tesified that he had seen sticks over which players lost control hit walls and that he understood that a person could be injured if hit by a stick over which a player had lost control.

Appellant was injured near the end of the game, as Nelson was counting down the final ten seconds. Respondent testified that he made contact with the ball on a turnaround shot and then saw that his stick was no longer in his hands. Respondent did not know what caused the stick to leave his hands. At the hearing on respondent's summary-judgment motion, appellant conceded that respondent's "actions were not reckless, malicious, or intentional conduct, but merely negligent."

Noting appellant's testimony that he had seen students lose control of sticks two or three times during each class in which pillow polo was played and that he was aware of the dangers inherent in such sporting events, the district court concluded that appellant had assumed the risk of injury as a sporting event participant and granted summary judgment for respondent on that basis.

D E C I S I O N

On appeal from summary judgment, we review the record to "determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). We view the evidence in the record "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of material fact exists if the evidence would "permit reasonable persons to draw different conclusions." *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002).

"[P]rimary assumption of the risk acts as a complete bar to a plaintiff's recovery." *Schneider ex rel. Schneider v. Erickson*, 654 N.W.2d 144, 148 (Minn. App. 2002). Primary assumption of the risk applies where parties have voluntarily entered "a relationship in which the plaintiff assumes well-known, incidental risks." *Id.* "[T]he applicability of primary assumption of the risk may be decided by the court as a matter of law when reasonable people can draw only one conclusion from the undisputed facts." *Snilsberg v. Lake Washington Club*, 614 N.W. 2d 738, 744 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000).

The application of primary assumption of the risk requires that a person who voluntarily takes the risk (1) knew of the risk, (2) appreciated the risk, and (3) had a chance to avoid the risk. *Andren v. White-Rodgers Co.*, 465 N.W. 2d 102, 104-05 (Minn. App. 1991), *review denied* (Minn. Mar. 27, 1991); *see also Moe v. Steenberg,* 275 Minn. 448, 450-51, 147 N.W. 2d 587, 589 (1966) (applying assumption of risk to ice skating); *Schneider,* 654 N.W. 2d at 151 (applying assumption of risk to paintball).

Appellant argues that no reasonable person would expect to be seriously injured when playing pillow polo. Appellant's focus on the seriousness of the injury is incorrect. The risk in this case was the risk of being hit by a stick over which a player had lost control.

In a case involving a collision between two skiers, this court explained:

> Appellant does not argue that he did not know of the risk of colliding with another skier, appreciate that risk, or have a chance to avoid the risk. He had been skiing for years and was a member of a ski racing team at the time of the accident. During his deposition, he was asked, "[I]t's a known risk that you can collide with another skier?" and answered, "Yes." He also answered, "Yes" when asked if he "knew before this day [of the accident] that falls or collisions and accidents and injuries are something that can happen with skiing[.]" Appellant relies on *Seidl v. Trollhaugen, Inc.*, 305 Minn. 506, 232 N.W.2d 236 (1975), but that case is readily distinguishable: it declined to apply assumption of the risk between skiers because the defendant did not "introduce evidence as to plaintiff's knowledge of the specific risk of being hit on the slopes by other skiers." *Id.* at 509, 232 N.W.2d at 240-41.

Peterson ex rel. Peterson v. Donahue, 733 N.W.2d 790, 792 (Minn. App. 2007) (affirming summary judgment for defendant), *review denied* (Minn. Aug. 21, 2007).

Here, as in *Peterson*, conclusive evidence showed that appellant understood the risk of being hit by a stick over which a player had lost control during a game of pillow polo. Appellant testified that players lost control of their sticks two or three times per class period. Appellant also testified that he understood that if a player were hit by one of those sticks, the stick could cause injury.

Appellant argues that he did not consent to the risk because the team sports plus class fulfilled a graduation requirement. But appellant testified that he had already completed the mandatory physical-education requirements when he enrolled in the team sports plus class. Appellant also suggests that his age at the time of the accident, 17, should bar application of assumption of the risk. But the *Peterson* court applied the doctrine to an 11-year-old skier. *Id.*

The district court did not err in concluding that, as a matter of law, this action is barred by the doctrine of assumption of the risk and in granting summary judgment for respondent.[1] Because this action is barred by assumption of the risk, we need not address the alternative bases relied on by the district court to support the summary judgment for respondent.

Affirmed.

[1]Appellant cites several commentators who have criticized the assumption-of-the-risk doctrine. It is not the role of this court to overturn supreme court precedent. *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998); *see Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them.").