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Recent Minnesota Supreme Court rulings continue to limit defenses to negligence claims

By Tal A. Bakke and Shari R. Albrecht

The Minnesota Supreme Court issued two rulings on January 23, 2019, that continue a trend of limiting defenses to negligence actions. In the two cases, *Soderberg v. Anderson,* 922 N.W.2d 200 (Minn. 2019), and *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185 (Minn. 2019), the Supreme Court twice declined to extend the doctrine of primary assumption of risk and took a broad view of foreseeability.

Soderberg v. Anderson

The law of the Bold North is that watching hockey, playing hockey, or figure skating is more "inherently dangerous" than downhill skiing or snowmobiling. That is the Minnesota Supreme Court's holding in the recent case of *Soderberg v. Anderson,* 922 N.W.2d 200 (Minn. 2019), in which the Court refused to apply the doctrine of primary implied assumption of risk to a claim involving a collision on a ski hill.

Julie Soderberg, a ski instructor at Spirit Mountain near Duluth, Minnesota, was teaching a lesson to a six-year-old on an "easiest"-level ski run when Lucas Anderson, an experienced snowboarder, struck her from behind. Anderson had been performing an aerial trick and had begun from a position in which he could not see where he would be landing. Soderberg was badly injured.

The district court granted summary judgment to Anderson based on the doctrine of implied primary assumption of risk, a doctrine that "precludes liability for negligence [and] negates the defendant's duty of care to the plaintiff . . . where parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks." 922 N.W.2d at 203. The Court of Appeals had previously applied the doctrine of implied primary assumption of risk to a collision between skiers in Peterson ex rel. *Peterson v. Donohue*, 733 N.W.2d 790 (Minn. App. 2007), *rev. denied* (Minn. Aug. 21, 2007).

In *Soderberg*, 906 N.W.2d 889 (Minn. App. 2018), the Court of Appeals reversed the district court because it found material issues of fact as to whether the defendant's behavior had "enlarged the inherent risk of skiing" and whether the ski instructor "appreciated the inherent risk that she could be crushed from above in a slow-skiing area." *Id.* at 894.

The Supreme Court affirmed the appeals court, but on different grounds – it held that the doctrine of implied primary assumption of risk should not apply to collisions between skiers at all, overruling the Peterson precedent. The Supreme Court's opinion, written by Justice Lillehaug, was unanimous.

The Supreme Court provided three bases for its holding. First, the Court found that injuries from collisions between skiers are not "inherent" in the sport, citing to conduct standards at Spirit Mountain and elsewhere that state that "common sense and personal awareness" can reduce the "elements of risk." The Court did

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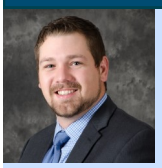
Firm Announcement



On April 2, 2019, **Tal A. Bakke** was admitted to the Iowa State Bar.

Recent Minnesota Supreme Court Employment Law and Workers' Compensation Decisions

In *Bruton v. Smithfield Foods, Inc.*, 923 NW2d 661 (2019), the Minnesota Supreme held that workers' compensation employers and insurers cannot use short term disability benefits to offset temporary total disability benefits, unless the short term disability policy specifically precludes the employee from receiving both, and the disability provider must file a motion to intervene.

In *Daniel v. City of Minneapolis,* 923 NW2d 637 (2019), the Minnesota Supreme Court held that the Minnesota Workers' Compensation Act does not bar claims for discrimination under the Minnesota Human Rights Act for disabilities caused by a work injury.

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not want to create a rule that would "benefit those who ski negligently." 922 N.W.2d at 205.

Second, the Court noted that the doctrine of primary assumption of risk is "not favored" and should not be extended. The Court noted a nationwide trend in that direction, as well as its own companion case of *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185 (Minn. 2019), discussed below. The *Soderberg* Court had requested briefing on the question of whether to abolish the doctrine entirely but ultimately concluded that it still has "a role—limited as it may be" in the areas where it has previously been applied, such as watching hockey, playing hockey or figure skating. *Id.* at 205-06.

Third, the Court was "not persuaded" that its ruling would deter Minnesotans from "vigorously participating" in downhill skiing and snowboarding. *Id.* at 206.

As the Court itself notes, the *Soderberg* ruling is part of a nationwide trend toward eliminating the doctrine of primary assumption of risk. Notably, the Supreme Court did not adopt the reasoning of the appellate court: while the Court of Appeals would have allowed an examination of the facts to determine whether an exception to the doctrine should apply, the Supreme Court outright held that it should never apply to recreational downhill skiing and snowboarding.

Henson v. Uptown Drink

Maxwell Henson, an off-duty employee of Uptown Drink, was fatally injured on March 23, 2011 after assisting Uptown Drink employees in ejecting two intoxicated bar patrons, Nicholas Anderson and Jason Sunby. *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 188. (Minn. 2019). Prior to the incident, Anderson and Sunby had been drinking for approximately two hours. Anderson had left Sunby at the bar to interact with others in the bar while Sunby continued to drink. At approximately 9:29 p.m., Sunby slipped off the bar stool entirely and then turned to speak to patrons seated at the bar to his left. The patrons moved away from Sunby and told a bartender that Sunby needed to leave because he was drunk and out of line. At 9:34 p.m., the bartender took Sunby's glass and told him to leave, and Sunby then engaged in "physical jostling" with the other patrons. *Id.*

At 9:36 p.m., the Uptown Drink manager escorted Anderson to Sunby; Anderson and Sunby talked while Sunby struggled to put on his coat. Both men appeared to be swaying. At 9:37:45 p.m., as Anderson moved toward the exit, Sunby attempted to punch the bar manager but missed and tumbled into the bar. The manager got Sunby on his feet and the bartender grabbed Sunby from behind. At the same time, Anderson grabbed the manager from behind and Henson pulled Anderson off of the manager. Henson and the manager pulled Anderson toward the exit while the bartender followed with Sunby. Sunby and the bartender exited the bar approximately 30 seconds later. *Id.* at 188-89. When Henson, Anderson, and the manager reached the front door of the bar, all three tripped and fell onto the sidewalk. Henson hit his head, was knocked unconscious, and died six days later. *Id.* at 189.

Henson's estate filed suit, alleging claims of innkeeper negligence and violations of the dram shop act. The district court granted Uptown Drink's motion for summary judgment, holding that the negligence claims were barred by the doctrine of implied primary assumption of risk, and that the dram shop claim failed for want of proximate cause. The Court of Appeals reversed. The Minnesota Supreme Court affirmed the Court of Appeals and held (1) the doctrine of implied primary assumption of the risk does not apply and (2) that the question of foreseeability was for the jury.[1]

As discussed above, the doctrine of primary assumption of risk arises when parties voluntarily enter a relationship in which plaintiff assumes "well-known, incidental risks." In Henson, the Minnesota Supreme Court ultimately held that the doctrine of implied primary assumption of risk does not apply. *Id.* at 190-91. The Court offered little analysis, but rather categorically denied extension of the doctrine to claims arising out of the operation and patronage of a bar. *Id.* at 191. The Court relied on its prior limitations of the doctrine to certain circumstances "largely in the arena of participants and spectators of inherently dangerous sports" and reasoned that "the operation and patronage of bars is not—and should not be—a contact sport." *Id.* (internal quotations and citations omitted). The Court further noted that it had previously declined to extend the doctrine to other areas including the operation of snowmobiles and to recreational downhill skiing and snowboarding. *Id.* (citing *Daly v. McFarland*, 812 N.W.2d 113, 121 (Minn. 2012); *Soderberg*, (discussed *supra*)).

While the Court declined to extend the doctrine of primary assumption of risk, it did recognize that a bar owner's liability is not unlimited but

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rather is "marked" by the four elements of innkeeper negligence, "especially foreseeability." 922 N.W.2d at 191. Given the current Court's evolving view that foreseeability is a question for the jury rather than the Court, it is not clear how much the element of foreseeability will actually "mark" bar owners' liability in similar claims. See, e.g., *Fenrich v. The Blake Sch.*, 920 N.W.2d 195, 205 (Minn. 2018) (holding the issue of foreseeability was a question for the jury based on the facts before the court); *Senogles v. Carlson*, 902 N.W.2d 38, 47 (Minn. 2017) (same); *Montemayor v. Sebright Prod., Inc.,* 898 N.W.2d 623, 628 (Minn. 2017) (same).

In the context of innkeeper negligence, "foreseeability of injury to a patron by reason of the intoxication or vicious propensities of another individual" is required to establish duty. *Schwingler v. Doebel*, 309 N.W.2d 760, 762 (Minn. 1981). The *Henson* Court divided the element of foreseeability, as it relates to injuries arising out of bar incidents, into two categories: (1) incidents that were sudden and unforeseeable, and therefore a bar was not liable; and, (2) incidents in which the bar was on notice that patrons were intoxicated and could lead to trouble where the bar could be liable. 922 N.W.2d at 192 (citing *Boone v. Martinez*, 567 N.W.2d 508, 511 (Minn. 1997) (holding a fight was sudden and unforeseeable and therefore the bar was not liable); *Klingbeil v. Truesdell*, 256 Minn. 360, 98 N.W.2d 134 (1959) (holding there was evidence that bar patrons were intoxicated to the point that the bar manager should have been on notice that their conduct could lead to trouble)).

In *Henson*, the Court held that there was sufficient evidence to create a disputed issue of material fact or disputed reasonable inferences from undisputed facts. *Id.* at 193. The Court reasoned that the conduct of Anderson and Sunby had come to the attention of Uptown Drink employees by 9:24 p.m. and that there was already a problem at 9:34 p.m. when Sunby was in an altercation with other patrons. *Id.* at 192. Further, the Court noted that the manager had intervened by 9:36 p.m., but that there was already sufficient evidence of "obvious intoxication and problematic interactions" to put the bar on notice at that time. *Id.* at 192. Thus, the Court determined that foreseeability must be decided by the fact-finder because the incident here was not sudden and unforeseeable. *Id.*

Conclusion

In both *Soderberg* and *Henson*, the Supreme Court declined to apply the doctrine of primary assumption of risk, in each case allowing tort claims to proceed after a district court had granted summary judgment to the defendant. Although the Supreme Court has not overruled its own precedent applying implied primary assumption of risk in other contexts, the *Soderberg* and *Henson* cases make it explicitly clear that the Court intends to apply the doctrine narrowly. The ruling regarding foreseeability in *Henson* is not surprising in light of the Court's previous decisions in *Fenrich, Senogles, and Montemayor*, but *Henson* further establishes that foreseeability, and, by extension, duty, is becoming less a question of law for courts to decide and more a question of fact for juries.

[1]The Court also held that Anderson and Sunby's intoxication was sufficient to prevent summary judgment dismissal of Plaintiff's dram shop claim on the issue of proximate cause. *Uptown*, 922 N.W.2d at 194.

Congratulations

Joseph E. Flynn, **Pat J. Skoglund** and **Vicki A. Hruby** obtained an order from the Eighth Circuit, reversing the District Court, and granting the officers summary judgment on the §1983 excessive force and wrongful death claims brought by Cherie Hanson against the City of Mankato and its officers arising out of the death of her son, Andrew Layton. Layton violently resisted arrest, kicking at officers and thrashing side-to-side. Six officers, working together, handcuffed him and placed him in leg restraints before calling the paramedics. Paramedics arrived on scene and assessed Layton, determined he was not experiencing a medical emergency, and could be safely transported to jail. Despite paramedics' continual monitoring of Layton's medical condition, he went into cardiac arrest and died five days later. The U.S. District Court found fact issues precluded summary judgment. The officers appealed. The Eighth Circuit reversed the District Court's denial of summary judgment, finding "the officers' use of force did not violate clearly established law nor did their actions on the scene exhibit deliberate indifference to medical needs." *Hanson as Trustee for Layton v. Best, et al.*, 915 F.3d 543 (8th Cir. 2019).

Congratulations—continued

In *Potter v. City of Mantorville, et. al.*, **Tal A. Bakke** successfully obtained summary judgment dismissal of negligence claims against a small business owner in rural southern Minnesota. The Plaintiffs in *Potter* sued numerous Defendants claiming the Defendants were responsible for water in Plaintiffs' basement because a neighbor had made changes to the topography of his land. Plaintiffs argued that the changes in topography of the neighbor's land caused more water to drain onto Plaintiffs' property and into their basement. On summary judgment we argued Plaintiffs' claims failed because they could not establish that any work completed on the neighbor's property caused more water to flow onto Plaintiffs' property and into their basement. The Court agreed and dismissed Plaintiffs' claims because Plaintiffs could not establish their claimed injury was proximately caused by the work. That Plaintiffs' expert opinions, based on an undisputed survey of the land, was insufficient to defeat summary judgment. Following summary judgment dismissal, the Court ordered Plaintiffs to pay all Defendants' costs, including the expense of six defense experts.

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About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

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