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Supreme Court, Appellate Division, Third Department, New York.
Steffen John HAIDER, Appellant,
v.
Benedykt J. ZADROZNY et al., Appellants,
and
Kathy A. Zinssar, Respondent.
April 2, 2009.

Background: Individual, who was struck and injured by a snowmobile while riding at night on a saucer attached by a water ski tow rope to another snowmobile, brought personal injury action against both drivers, as well as the owner of the snowmobile he was riding behind. The Supreme Court, Saratoga County, Williams, J., granted the summary judgment motion of the driver of the snowmobile that struck the individual. Plaintiff and the other defendants appealed.

Holding: The Supreme Court, Appellate Division, Rose, J., held that fact issues existed as to whether the snowmobile driver could have observed and avoided the individual.

Reversed.

West Headnotes

[1] Judgment 228 ⚷181(33)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort Cases in General. Most Cited Cases
Triable issues of fact existed as to whether snowmobile driver that struck and injured individual, who was riding at night on a saucer attached by a water ski tow rope to another snowmobile, could have observed and avoided that individual, precluding summary judgment in individual's personal injury action against the driver.

[2] Automobiles 48A ⚷205

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak202 Contributory Negligence
48Ak205 k. Knowledge of Danger. Most Cited Cases

Negligence 272 ⚷565

272 Negligence
272XVI Defenses and Mitigating Circumstances
272k550 Assumption of Risk
272k565 k. Sports, Games and Recreation. Most Cited Cases
While it is true that the doctrine of primary assumption of risk completely bars recovery to one who is injured during his or her voluntary participation in a sport or recreational activity such as riding upon or being towed behind a snowmobile, participants do not consent to conduct that is reckless, intentional or so negligent as to create an unreasonably increased risk.

****215** Conway & Kirby, L.L.P., Latham (Elizabeth A. Graziane of counsel), for Steffen John Haider, appellant.

Boeggeman, George & Corde, P.C., Albany (Cynthia Dolan of counsel), for Benedykt J. Zadrozny and another, appellants.

Pennock, Breedlove & Noll, L.L.P., Clifton Park (Carrie M. Noll of counsel), for respondent.

Before: PETERS, J.P., ROSE, LAHTINEN, KANE and STEIN, JJ.

****216** ROSE, J.

***1077** Appeal from an order of the Supreme Court

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(Williams, J.), entered December 13, 2007 in Saratoga County, which granted defendant Kathy A. Zinssar's motion for summary judgment dismissing the complaint and cross claim against her.

While riding at night on a saucer attached by a water ski tow ***1078** rope to a snowmobile driven by defendant Benedykt J. Zadrozny Jr. and owned by defendant Benedykt J. Zadrozny Sr. (hereinafter collectively referred to as defendants), plaintiff was struck and injured by a snowmobile driven by defendant Kathy A. Zinssar. Alleging that Zinssar had been negligent in driving her snowmobile too fast, passing too close to defendants' snowmobile, and failing to observe and avoid plaintiff, plaintiff commenced this action. When Zinssar moved for summary judgment dismissing the complaint and defendants' cross claim against her, Supreme Court granted the motion. Plaintiff and defendants now appeal.

[1] Viewing the evidence most favorably to the nonmoving parties (*see Secore v. Allen,* 27 A.D.3d 825, 828-829, 811 N.Y.S.2d 170 [2006]; *Greco v. Boyce,* 262 A.D.2d 734, 734, 691 N.Y.S.2d 599 [1999]), we find triable questions of fact as to whether Zinssar could have observed and avoided plaintiff. Although Zinssar was not required to foresee that defendants would violate the law by using a rope to tow someone behind their snowmobile (*see* PRHPL 25.03[8]), there is evidence in the record that there was sufficient illumination from the moon and snowmobile headlamps for the drivers to be able to see 200 or more yards ahead. Like the operator of a motor vehicle, Zinssar "was bound to see what by the proper use of her senses she might have seen" (*Weigand v. United Traction Co.,* 221 N.Y. 39, 42, 116 N.E. 345 [1917]; *see Fernet v. Morvillo,* 30 A.D.3d 670, 672, 815 N.Y.S.2d 795 [2006]). Thus, if the circumstances were such that Zinssar should have observed plaintiff, then the accident would be a reasonably foreseeable risk and she would have had a duty to avoid striking him, if it were possible to do so (*see e.g. Di Ponzio v. Riordan,* 89 N.Y.2d 578, 583, 657 N.Y.S.2d 377, 679 N.E.2d 616 [1997]; *Kemper v. Arnow,* 18 A.D.3d 939, 940-941, 795 N.Y.S.2d 138 [2005], *lv. denied* 5 N.Y.3d 708, 803 N.Y.S.2d 28, 836 N.E.2d 1151 [2005]). Accordingly, the conflicting evidence as to the parties' respective speeds, angles of approach, proximity and sight distances immediately before the accident present questions of fact as to whether Zinssar could have seen plaintiff and avoided him.

As for Zinssar's contention that plaintiff's unexpected appearance in her path presented an emergency, "[s]ummary judgment in an emergency case is only proper where there are no factual questions concerning the reasonableness of the driver's actions under the circumstances or whether the driver could have done something to avoid the collision" (*Quinones v. Community Action Commn. to Help the Economy, Inc.,* 46 A.D.3d 1326, 1326, 849 N.Y.S.2d 320 [2007]; *see Caristo v. Sanzone,* 96 N.Y.2d 172, 174-175, 726 N.Y.S.2d 334, 750 N.E.2d 36 [2001]; *Schlanger v. Doe,* 53 A.D.3d 827, 828, 861 N.Y.S.2d 499 [2008]; PJI 2:14). Here, the disputed factual issues bear on whether Zinssar's conduct contributed to the emergency and whether she reacted ***1079** as a reasonable person would under the circumstances (*see Aloi v. County of Tompkins,* 52 A.D.3d 1092, 1094, 861 N.Y.S.2d 805 [2008]).

[2] Finally, while it is true that the doctrine of primary assumption of risk completely bars recovery to one who is injured during his or her voluntary participation in a sport or recreational activity such as riding upon or being towed behind a snowmobile, "participants do not consent to conduct that is reckless, intentional or ****217** so negligent as to create an unreasonably increased risk" (*Pantalone v. Talcott,* 52 A.D.3d 1148, 1149, 861 N.Y.S.2d 166 [2008]; *see Huneau v. Maple Ski Ridge, Inc.,* 17 A.D.3d 848, 849, 794 N.Y.S.2d 460 [2005]; *Connor v. Tee Bar Corp.,* 302 A.D.2d 729, 730, 755 N.Y.S.2d 489 [2003]). Again, the disputed factual issues bear on whether Zinssar was driving in a manner that unreasonably increased the risk of in-

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jury to plaintiff, and summary judgment should have been denied (*see Morgan v. Ski Roundtop,* 290 A.D.2d 618, 620, 736 N.Y.S.2d 135 [2002]; *Rios v. Town of Colonie,* 256 A.D.2d 900, 901, 682 N.Y.S.2d 272 [1998]).

ORDERED that the order is reversed, on the law, with one bill of costs, and motion denied.

PETERS, J.P., LAHTINEN, KANE and STEIN, JJ., concur.
N.Y.A.D. 3 Dept.,2009.
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61 A.D.3d 1077, 876 N.Y.S.2d 215, 2009 N.Y. Slip Op. 02513

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