

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

Martin Ozog and Amanda Ozog v. Western New York Motocross
Association and Palmyra Racing Association

Ozog · No. CA 12-00489 · Decided November 9, 2012

SUMMARY

The New York Supreme Court, Appellate Division, Fourth Department, affirmed the denial of defendants’ motion for summary judgment in a personal injury action arising from a motocross accident. The court held that plaintiffs raised an issue of fact as to whether an improperly trained or negligent flag person presented a risk outside those inherent in motocross racing, and declined to consider a proximate-cause argument raised for the first time in reply papers.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
WRITING FOR THE COURT	Centra, J.P.; Fahey, J.; Peradotto, J.; Carni, J.; Sconiers, J.
JURISDICTION	New York
DECIDED	November 9, 2012
DOCKET	CA 12-00489
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order denying their motion for summary judgment dismissing a personal injury complaint.
STANDARD OF REVIEW	On a motion for summary judgment, the moving party must first establish entitlement to judgment as a matter of law; the opposing party may defeat the motion by raising a triable issue of fact.
PRECEDENTIAL VALUE	Published appellate memorandum
PARTIES	Western New York Motocross Association, Palmyra Racing Association v. Martin Ozog, Amanda Ozog

TOPICS

- assumption of risk
- summary judgment
- negligence
- proximate cause
- appellate procedure

PRACTICE AREAS

tort law

personal injury

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether defendants were entitled to summary judgment based on the argument that plaintiff assumed the risk of his injury.
2. Whether plaintiffs raised a triable issue of fact as to whether an improperly trained or negligent flag person presented a risk inherent in motocross racing.
3. Whether defendants' argument that their negligence was not a proximate cause of plaintiff's injuries was properly before the appellate court when first raised in reply papers.

HOLDINGS

1. Although defendants met their initial burden by establishing that plaintiff assumed the risk of his injury, plaintiffs raised a triable issue of fact sufficient to defeat summary judgment.
2. Defendants' contention that any negligence attributable to them was not a proximate cause of plaintiff's injuries was not properly before the court because it was raised for the first time in defendants' reply papers.

KEY QUOTATIONS

“Although defendants met their initial burden on the motion by establishing that plaintiff assumed the risk of his injury, we conclude that plaintiffs raised an issue of fact sufficient to defeat the motion.”

“Plaintiffs thereby raised an issue of fact whether an allegedly improperly trained or negligent flag person is a risk inherent in the sport of motocross racing”

FACTUAL BACKGROUND

Martin Ozog, an experienced motocross driver, was injured while participating in a motocross race organized and sponsored by the defendants. He alleged that one or more racers collided with him after he was thrown from his motocross vehicle. Plaintiffs presented evidence that the flag person near the accident location was either improperly trained or failed to appropriately warn oncoming racers that Ozog had fallen and remained on the track.

PROCEDURAL HISTORY

Martin Ozog and Amanda Ozog commenced a personal injury action arising from injuries Martin sustained during a motocross race organized and sponsored by defendants. Supreme Court, Wayne County, denied defendants' motion for summary judgment. The Appellate Division unanimously affirmed that order without costs.

DISPOSITION

affirmed

CASES CITED

- Zuckerman v City of New York, 49 NY2d 557, 562
- Owen v R.J.S. Safety Equip., 79 NY2d 967, 969-970
- Rosati v Hunt Racing, Inc., 13 AD3d 1129, 1130
- Farnham v Meder, 45 AD3d 1315, 1316
- Whitley v Buffalo Mun. Hous. Auth., 34 AD3d 1368, 1369

OPINION

PER CURIAM.

SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Fourth Judicial Department 1036 CA 12-00489 PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ. MARTIN OZOG AND AMANDA OZOG, PLAINTIFFS-RESPONDENTS, V MEMORANDUM AND ORDER WESTERN NEW YORK MOTOCROSS ASSOCIATION AND PALMYRA RACING ASSOCIATION, DEFENDANTS-APPELLANTS. GOLDBERG SEGALLA, LLP, SYRACUSE (KENNETH M. ALWEIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JULIA M. HILLIKER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS. Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered June 21, 2011 in a personal injury action.

The order denied the motion of defendants for summary judgment. It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs. Memorandum: Martin Ozog (plaintiff), an experienced motocross driver, commenced this action seeking damages for injuries that he sustained while he was participating in a motocross race organized and sponsored by defendants.

According to plaintiff, he was injured when one or more race participants collided with him on the track after he was thrown from his motocross vehicle. Supreme Court properly denied defendants' motion for summary judgment dismissing the complaint.

Although defendants met their initial burden on the motion by establishing that plaintiff assumed the risk of his injury, we conclude that plaintiffs raised an issue of fact sufficient to defeat the motion (see generally Zuckerman v City of New York, 49 NY2d 557, 562). Plaintiffs presented evidence that the flag person at the location where plaintiff was injured either was not trained properly or did not act appropriately to warn oncoming racers that plaintiff had fallen from his vehicle and was on the track.

Plaintiffs thereby raised an issue of fact whether an allegedly improperly trained or negligent flag person is a risk inherent in the sport of motocross racing (see *Owen v R.J.S. Safety Equip.*, 79 NY2d 967, 969-970; *Rosati v Hunt Racing, Inc.*, 13 AD3d 1129, 1130). Defendants' further contention that any negligence attributable to them was not a proximate cause of plaintiff's injuries is raised for the first time in defendants' reply papers and thus is not -2- 1036 CA 12-00489 properly before us (see *Farnham v Meder*, 45 AD3d 1315, 1316; *Whitley v Buffalo Mun.*

Hous. Auth., 34 AD3d 1368, 1369). Entered: November 9, 2012 Frances E. Cafarell Clerk of the Court