

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**KEVIN P. SHELHAMER, Personal
Representative of the Estate of Rebecca Jo
Shelhamer, Deceased,**
Plaintiff,

vs.

**KRISTIN SHIELDS and PATTY
SHIELDS,**
Defendants.

Case No. CI02-39

**ORDER ON MOTIONS
FOR SUMMARY JUDGMENT**

DATE OF HEARING: October 6, 2003.

DATE OF RENDITION: November 12, 2003.

DATE OF ENTRY: See court clerk's file-stamp date.

APPEARANCES:

For plaintiffs: William A. Wieland without plaintiff.

For defendants: C.J. Gatz without defendants.

SUBJECT OF ORDER: (1) plaintiff's motion for summary judgment on limited issues filed July 14, 2003, and, (2) defendant's motion for summary judgment filed July 30, 2003.

PROCEEDINGS: See journal entry rendered following hearing.

FINDINGS: The court finds and concludes that:

1. In *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002), the Nebraska Supreme Court restated the familiar principles applicable to motions for summary judgment:

a. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

b. In considering a summary judgment motion, the court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

d. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

e. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

f. After the moving party makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

2. This court must not weigh the evidence or consider which party the court considers more likely to prevail at trial. This court must, at this stage, merely determine whether a genuine issue of fact exists, and not how such factual issues should be determined. A mere inference favorable to the nonmoving party is sufficient to defeat a summary judgment motion.

3. The denial of a motion for summary judgment does not reflect upon the strength of a party's claim. As the Supreme Court observed in *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000), the overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to a judgment as a matter of law.

4. Regarding the defendants' motion, viewed in the light most favorable to the plaintiffs, a genuine issue exists as to a material fact or facts or as to the ultimate inferences that may be drawn from those facts. The defendants' motion must be denied.

5. Regarding the plaintiff's motion, except as to paragraph 5 of the motion, the court is not convinced by the record that there is no genuine issue of material fact or the ultimate inferences to be drawn from those facts.

6. Paragraph 5 of the plaintiff's motion seeks summary judgment on the defense of assumption of risk. On that matter, this court does find that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the plaintiff is entitled to judgment as a matter of law. Paragraph 5 of the plaintiff's motion should be granted and the remainder denied.

7. The deadline for filing of pretrial motions has expired and the only pretrial motion filed by either party has been disposed by this order. The matter should be set for final pretrial conference.

ORDER:

IT IS THEREFORE ORDERED that:

1. The defendants' motion for summary judgment is denied.
2. The plaintiff's motion for summary judgment is granted to the extent that the court determines as a matter of law that the defense of assumption of risk does not apply. In all other respects, the plaintiffs' motion for summary judgment is denied.
3. The final pretrial conference is rescheduled for **Monday, December 22, 2003, at 1:45 p.m.**, or as soon thereafter as the same may be heard. The pretrial conference will be held in the District Judge's chambers, Holt County Courthouse, O'Neill, Nebraska. All other provisions of the prior progression order(s) remain fully effective.
4. For the assistance of counsel, the court advises that the scheduling at 1:45 p.m. means that this case is the fourth case scheduled for pretrial conference on that afternoon and that if the prior cases actually proceed to pretrial on that date the actual pretrial conference time may be considerably later.

Signed in chambers at **Ainsworth**, Nebraska, on **November 12, 2003**;
DEEMED ENTERED upon file stamp date by court clerk.

If checked, the court clerk shall:

Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.

Note the decision on the trial docket as: [date of filing] **Signed “Order on Motions for Summary Judgment” entered; pretrial conference scheduled for [date from order] at [time from order].**
Done on _____, 20____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge