

alternatively hold that plaintiff, an experienced hunter who had acknowledged in writing the dangers of the terrain, assumed the risk of injury and thus is barred from recovery.

I

The defendants, David Skewes and Sherry Skewes, husband and wife, operated a business in Ideal, South Dakota, called Hollybrook Farms, where customers paid to hunt wild pheasant. On October 30, 1999, the plaintiff, Carl N. Poston, was injured on the defendants' premises while being driven to a hunting site when the vehicle in which he was a passenger struck a dry ditch or depression in the ground. The vehicle hit the ditch first with its front wheels, causing those in the vehicle to bounce up, and then with its back wheels, causing another bump. The plaintiff struck the overhead roof and injured his back. The plaintiff's son-in-law, a dental surgeon who saw the ditch immediately after the accident, described it as three or four feet wide and eighteen inches to two feet deep, and testified that "[i]t looked like an erosion type ditch." (Tr. at 1-136.)

Although they operated the business in South Dakota, Mr. and Mrs. Skewes are residents of Virginia. The plaintiff is a resident of Tennessee, and thus the court has subject matter jurisdiction based on diversity of citizenship and amount in controversy,

see 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2001), and personal jurisdiction over the defendants, even though the events in the case all occurred in South Dakota.

The vehicle in question, a Chevrolet Suburban used in the hunting business, was being driven at the time by Pam Hitt, a neighbor of Mr. and Mrs. Skewes. In order to reach the hunting site, it was necessary to drive across flat and grassy open fields, and no one was aware of the existence of the ditch until the accident occurred. On an earlier visit to the Skewes' farm, Poston had signed a written document in which he agreed to assume the risk of injury while hunting.

After the accident, Poston filed suit in this court against Mr. and Mrs. Skewes, but not against the driver, Pam Hitt. On April 30 and May 1, 2001, the case was tried before a jury. At the close of the plaintiff's evidence, and again at the close of all of the evidence, the defendants unsuccessfully moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. The jury returned a verdict of \$300,000 in favor of the plaintiff. Thereafter, the defendants timely renewed their motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) and, in addition, alternatively moved for a new trial pursuant to Rules 50 and 59. The motions have been briefed and are ripe for decision. I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

The defendants contend, inter alia, that they are entitled to judgment as a matter of law because: (1) the evidence was insufficient to establish that Pam Hitt had been negligent in her operation of the vehicle, even assuming that she had been the agent of the defendants; (2) there was insufficient evidence that the defendants had been negligent by failing to keep their premises in a condition reasonably safe for the plaintiff's use or in failing to warn of the hazard; and (3) in any event, the plaintiff assumed the risk of injury.

II

A district court may grant a motion for judgment as a matter of law if “there is no legally sufficient evidentiary basis for a reasonable jury to find” for the party that was successful at trial. Fed. R. Civ. P. 50(a), (b). “The evidence must be construed in the light most favorable to the party against whom the motion is made, giving that party the benefit of all inferences.” *Szedlock v. Tenet*, 139 F. Supp. 2d 725, 729 (E.D. Va. 2001) (citing *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 259 (4th Cir. 2001)). In renewed motions for verdict as a matter of law under rule 50(b), “there must be a minimum of judicial interference with the jury.” *Cooper v. Lee County Bd. of Supervisors*, 7 F. Supp. 2d 780, 783 (W.D. Va. 1998) (citation omitted). Thus, the moving party “bears

a ‘heavy burden’ in establishing that the evidence is insufficient to uphold the jury’s verdict.” *Id.* (quoting *Price v. City of Charlotte*, 93 F.3d 1241, 1249 (4th Cir. 1996)).

A federal court exercising diversity jurisdiction must apply the law of the state in which it sits, *see Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938), including that state’s choice of law rules, *see Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941). In tort actions like this one, Virginia applies the substantive law of the place of the wrong. *See Jones v. R.S. Jones & Assoc.*, 431 S.E.2d 33, 34 (Va. 1993). Accordingly, I must apply South Dakota law in my consideration of the rights and duties of the parties.

III

Based on the evidence at trial, I find as a matter of law that the defendants’ driver did not negligently cause the accident.¹

South Dakota negligence law is unremarkable. “The three necessary elements of actionable negligence are: (1) A duty on the part of the defendant; (2) a failure to perform that duty; and (3) an injury to the plaintiff resulting from such a failure.”

¹ Because her husband and a regular guide were away, Mrs. Skewes asked her neighbor, Pam Hitt, to drive the group of hunters, including the plaintiff, to the hunting site. Hitt had never driven for the defendants’ before. While the defendants deny that Hitt was their agent or employee, I find that there was sufficient evidence for the jury to determine that the defendants had the right to control the way Hitt performed this work and thus she was their agent, even though she acted voluntarily and without compensation.

Stevens v. Wood Sawmill, Inc., 426 N.W.2d 13, 14 (S.D. 1988). The failure of duty by the defendant must be shown to have been the proximate cause of the plaintiff's injury. See *Froke v. Watertown Gas Co.*, 298 N.W. 450, 451 (S.D. 1941).

On the day in question, the group of hunters, called "blockers, flankers and drivers," got into two vehicles to travel from the farmhouse to the "strips," or hunting sites. (Tr. at 1-38.) Mrs. Skewes drove the hunters called drivers and flankers in a pickup truck and Pam Hitt drove the blockers, including the plaintiff. The plaintiff sat in the passenger side of the front seat. They traveled down a public road to a portion of the defendants' land called the "south farm." (Tr. at 1-42.) The plaintiff, who had visited the Skewes' farm many times before, and had driven the defendants' vehicles to hunting sites in this field himself, directed Hitt to turn through a gate into a field. The hunters hunted the first "strip" and then loaded back into the vehicles. Bob Lovell sat on the left side of the back seat of the Suburban, Lawrence Scoggins sat in the middle of the back seat, Clyde Craddock sat on the right side of the back seat, and Betty Davis Smith sat in the "way back" seat.

The groups then headed toward the next "strip." Hitt drove the Suburban across the field toward the next hunting site. The witnesses all gave similar descriptions of the field. Craddock testified that the field had sage grass about four feet high that grew in spotty patches, "not solid like wheat." (Tr. at 1-99.) He explained that this grass had

been purposefully left to grow because it attracts birds. Scroggins said that the grass had been three feet high and that nothing in the field appeared hazardous to him. According to Lovell, the grass had been four to five feet high. Hitt stated that the grass had been about three feet high. Smith testified that the grass had been two to three feet high.

As the group traveled across the field, the plaintiff talked to the passengers in the back, and never saw the ditch before the accident. Neither did any of the other occupants of the vehicle.

Scroggins noticed, as they were traveling across the field, “that the way the hill was formed that there might be . . . a drainage, or something, coming down the side of the hill.” (Tr. at 2-44.) However, he had not said anything to Hitt because “I [had] started to say you’d better watch because there may be, and about that time she hit [the ditch].” (*Id.*) Scroggins, like the others, did not see the ditch prior to the accident.

Lovell testified that there had been a “row of weeds, or brush, or buck bushes” that Hitt had driven through, but the ditch had not been visible prior to the accident. He did not voice any objections to Hitt about her driving. Hitt testified that she had not seen any gaps in the grass and that there had been no indication of a ditch. According to Smith, the ditch had not been visible prior to the accident.

The witnesses also had little divergence in their testimony about Hitt's speed or her driving. Craddock testified that Hitt had been driving at fifteen to twenty miles per hour. He remembered that Hitt had not been going very fast, that nothing about her driving had alarmed him and that he had not voiced any objections about it. Scroggins said that Hitt had driven "perfect as far as I was concerned." (Tr. at 2-49.) Craddock thought that Hitt had been looking at the plaintiff as the Suburban "broached the ditch," but Scroggins said that Hitt had been looking forward. (Tr. at 1-101, 2-53.)

Lovell testified that Hitt had "not [been] driving fast, no reckless driving at all." (Tr. at 2-91.) He elaborated that "[w]e [had been] going real slow. . . . [M]aybe fifteen miles an hour. You never drive fast through these fields. You try to be quiet and not make any commotion, and noise, or distraction for the birds." (Tr. at 2-101.) Hitt herself testified that she had been traveling at less than ten miles per hour.

The question before me is whether there is a sufficient evidentiary basis for a reasonable jury, giving the plaintiff the benefit of all inferences, to find that Pam Hitt negligently caused the accident. I conclude that as a matter of law that Pam Hitt was not guilty of negligence that proximately produced the injury to the plaintiff.

No witness saw the ditch before the accident. None of the witnesses complained of Hitt's driving or told Hitt to modify the method or speed of her driving. Giving the

plaintiff the benefit of all inferences, the only controverted testimony is that of Craddock and Scroggins.

Craddock testified that Hitt had been looking at the plaintiff when they “broached the ditch.” Even if true, however, there is no evidence that the ditch was within the vision of a reasonably prudent driver.

Craddock also was allowed to testify that based on his examination of the scene after the accident, the ditch could be seen from twenty or twenty-five feet away. He described this testimony as a “calculated guess” (Tr. at 1-110) but even assuming that it is correct, it still does not show that Hitt was guilty of actionable negligence. Had a reasonably prudent driver seen the ditch from that distance, there is no evidence that the Suburban could have been stopped in time to avoid the ditch. Thus, Craddock’s testimony does not establish that Hitt’s conduct caused the accident.

Scroggins noticed a possible drainage area where two hills came together. However, he also testified that he had not had time to say anything to warn Hitt of any danger. There is no evidence that a reasonably prudent person keeping a lookout ahead would have recognized a hazard under these circumstances. Furthermore, there is no evidence that a person who had recognized a drainage area as a hazard, when traveling at a safe speed, could have stopped the Suburban in time to avoid the ditch. While under South Dakota law, a driver has the duty to keep a proper lookout and keep her

vehicle under sufficient control as to be able to stop within the range of her vision, *see Winburn v. Vander Vorst*, 59 N.W.2d 819, 820 (S.D. 1953), those principles do not require a driver “to anticipate the presence of [an obstruction in the path of the vehicle] prior to the time it was discernible to a reasonably prudent person in [the driver’s] position.” *Id*; *see Safeco Ins. Co. of Am. v. City of Watertown, S.D.*, 529 F. Supp. 1220, 1233-34 (D.S.D. 1981) (reviewing South Dakota law on the duty to maintain a proper lookout).

The facts at trial clearly show that this unfortunate accident happened because of the presence of an unexpected obstruction, hidden by vegetation. The plaintiff simply did not present facts showing that any negligent act or omission by the driver proximately caused the result. Since, as a matter of law, Hitt was not negligent in causing the accident, the defendants are not vicariously liable for her conduct.

IV

The defendants also argue that they are entitled to judgment as a matter of law because there was insufficient evidence to show that the defendants were negligent for failing to warn of the ditch or by providing a safe place to travel across the field.²

² Under South Dakota law, an owner of land owes no duty of care to keep the land safe for persons using the land for outdoor recreation purposes, where the use of the land is “without charge.” *See S.D. Codified Laws § 20-9-14* (Michie 1995). The defendants here normally charged a hunter

The jury was charged on the applicable duty of care as follows:

An owner of premises has the duty to an invitee:

1. To use ordinary care to have the premises in a reasonably safe condition for an invitee's use consistent with the invitation, but an occupant does not guarantee an invitee's safety; and

2. To use ordinary care to warn an invitee of any unsafe condition which the occupant knows or, by the use of ordinary care, should know about, unless the unsafe condition is open and obvious to a person using ordinary care for his own safety.

If the owner fails to perform either or both of these duties, then he is negligent.

(Instruction 22.)

The plaintiff contends that the evidence supports a jury finding of the defendants' negligence because they did not discover and warn of the ditch or otherwise provide an unobstructed way of travel across the field.

No one saw the ditch prior to the accident or knows how long it had existed. The defendants' property consisted of over two thousand acres, and the "south farm" section, where the accident happened, contained one hundred sixty acres. David

\$900 to stay four nights and hunt three days at their farm. Because the plaintiff recruited groups of hunters to hunt on the farm, he was not required to pay a fee for his visit, provided that he obtained fifteen other hunters. Accordingly, I determined that the plaintiff paid a fee within the meaning of the statute by providing hunters in exchange for his room, board and hunting privileges. Therefore, the plaintiff was an invitee and the defendants did owe the plaintiff a duty of care.

Skewes testified that “we had been all around [the field where the accident happened], we had looked at it, but we had not driven through it.” (Tr. at 2-237.) No evidence was introduced as to any standards in the wild game hunting business requiring inspection of the fields or that require marked or paved roads between hunting sites.

In addition, there is no evidence establishing the length of time that the ditch had been present in the field. Even had the field been inspected at some time prior to the accident, or a way marked through the field, there is no evidence that erosion thereafter might not have produced a hazard. It thus follows that the defendants may not be charged with constructive knowledge that the ditch was present. Without direct or constructive knowledge of a dangerous condition that the defendants failed to discover, the defendants have not breached a duty of ordinary care to keep the premises in a reasonably safe condition for the plaintiff. *See Norris v. Chicago, Milwaukee, St. Paul and Pac. R.R.*, 51 N.W.2d 792, 793 (S.D. 1952) (“It is necessary that it be established that the possessor [of land] had knowledge of the presence of the dangerous condition of his premises or that the condition existed for such a period of time as to justify the inference that he had knowledge of its existence.”).

The defendants assert that the plaintiff assumed the risk of his injury as evidenced by the written document signed by him as well as by knowledge that he had obtained from his previously hunting experiences, both on the Skewes' farm and elsewhere. I agree, and find that the defense of assumption of the risk alternatively defeats the plaintiff's action.

Assumption of the risk is an affirmative defense to negligence. *See Mack v. Kranz Farms, Inc.*, 548 N.W.2d 812, 814 (S.D. 1996). To prevail on this defense, a defendant must establish that the plaintiff: "(1) had actual or constructive knowledge of the risk; (2) appreciated its character; and (3) voluntarily accepted the risk, with time, knowledge, and experience to make an intelligent choice." *Goepfort v. Filler*, 536 N.W.2d 140, 142 (S.D. 1997). "Ordinarily, questions of . . . assumption of the risk are for the jury, provided that there is evidence to support them." *Ballard v. Happy Jack's Supper Club*, 425 N.W.2d 385, 389 (S.D. 1988) "It is only where the essential elements are conclusively established that the plaintiff may be charged with assumption of the risk as a matter of law." *Stanholtz v. Modica*, 264 N.W.2d 514, 518 (S.D. 1978). Therefore, if the defendants have conclusively established the elements of assumption of the risk, they are entitled to judgment as a matter of law.

The writing signed by the plaintiff in October 1998, the year before the accident, stated in part as follows:

I further understand and accept that hunting . . . or otherwise moving about Hollybrook Farms . . . may require traversing plowed or cultivated fields . . . [or] ditches I further understand and accept that these activities may cause . . . bodily injury . . . or other ailments and injuries. I am willing to fully assume all risks of injury associated with these activities. I further understand and accept that Hollybrook Farms poses certain natural dangers. The terrain poses hidden dangers and obvious dangers of which I am aware I further understand and accept that I may come into contact with . . . holes in the ground and other obstructions or hazards which may or may not be easily seen. I am willing to fully assume the risk of any injury . . . that I may receive or contract from . . . potential dangers present at Hollybrook Farms. I voluntarily choose to participate in the activities at Hollybrook Farms in spite of these named risks and other unnamed risks which are inherent in these activities, and I voluntarily assume all risk of loss, damage or injury.

I HAVE READ THE FOREGOING ASSUMPTION OF RISK, I FULLY UNDERSTAND ITS CONTENT AND AGREE TO ABIDE BY ITS TERMS.

(Defs.' Ex. 13.)³ The plaintiff signed another assumption of the risk agreement when he returned to the Skewes' farm to hunt in 2000, the year after the accident. (Tr. at 1-89.)

³ The actual document signed by the plaintiff also purported to release Mr. and Mrs. Skewes from any claims of future negligence, but I ruled prior to trial that the enforcement of a such a release in a Virginia court was contrary to public policy. See *Hiett v. Lake Barcroft Cmty. Ass'n*, 418 S.E.2d 894, 896 (Va. 1992). The defendants were allowed to introduce as evidence before the jury a redacted version of the document, leaving out the language relating to release of negligence.

The plaintiff further admitted in his trial testimony that he was aware prior to the 1999 accident that to hunt on the Skewes' farm he would have to move about off-road, crossing fields in a vehicle and that ditches were common in the fields. The plaintiff, who was seventy-two years old at the time of the accident and is a life-long hunter, had hunted at the Skewes' farm ten to twelve times before the accident in 1999, as well as hundreds of other farms over the years. On two previous occasions, once in McMinnville, Tennessee, and once near Nashville, he had been injured while hunting on farms when he fell in ditches.

While the plaintiff had not seen this particular ditch before, he agreed that he had knowledge that ditches existed in the fields at the farm and that in order to hunt he would have to travel across these fields in a vehicle. In fact, he had driven across this same field on an earlier hunting trip, although he had crossed at a different place and had not seen any ditch.

Under the evidence, it is clear that the plaintiff voluntarily accepted the risk of injury from all aspects of hunting on the farm, including traveling in the vehicle across the unmarked fields, where the nature of the terrain posed a natural hazard. Even if the jury could reasonably find that Pam Hitt was negligent in failing to see the ditch, or if the defendants could have taken additional steps to locate potential obstacles in the fields, the plaintiff well knew of the risks and accepted them. He had the necessary

knowledge, experience, and opportunity to make an intelligent choice in this regard, and his decision to proceed with the hunt in the manner in which it was conducted, under all of the circumstances, bars his claim for damages.

VI

The defendants have also moved for a new trial pursuant to Federal Rule of Civil Procedure 59. When a renewed motion for judgment is granted, the court is required to determine whether the motion for a new trial should be granted if the judgment is thereafter vacated or reversed. *See* Fed. R. Civ. P. 50(c); *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 288 (4th Cir. 1998).

The defendants assert that their motion for a new trial should be granted because the court erred on several rulings concerning jury instructions and evidentiary matters. Specifically, the defendants argue that the court should not have instructed the jury regarding a duty to warn and should have instructed the jury on contributory negligence, the fellow servant doctrine, and pre-existing condition.

As to evidentiary matters, the defendants argue that testimony by Craddock regarding the visibility of the ditch, as well as Scroggins' testimony regarding the presence of a drainage area, were inadmissible expert evidence. In addition, the defendants contend that they should have been allowed to cross-examine the plaintiff

about whether he was an employee of the defendants. Lastly, the defendants assert that the court should not have allowed the jury to consider evidence of the plaintiff's "drop foot" as an element of damages.

These matters were raised at trial and for the reasons stated on the record at the time, I find that no error was committed and thus the motion for a new trial should be denied.

DATED: November 20, 2001

United States District Judge