STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA S. CLEWELL,

Plaintiff-Appellant,

v

CABERFAE SKIING COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 30, 2000

No. 217988
Wexford Circuit Court
LC No. 97-013272-NI

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff, who was injured after falling from a ski lift at defendant's ski resort, appeals by right from an order granting summary disposition to defendant in this negligence case. The trial court held that plaintiff's claim was barred by the ski area safety act (SASA), MCL 408.321 *et seq*.; MSA 18.483(1) *et seq*. We affirm in part and reverse and remand in part.

Defendant moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). The court did not indicate under which rule it granted the motion. Because the court based its ruling on defendant's alleged immunity under the SASA, however, we presume that the court granted summary disposition under MCR 2.116(C)(7). We review a grant of summary disposition under MCR 2.116(C)(7) de novo. *Stanton v Battle Creek*, 237 Mich App 366, 374; 603 NW2d 285 (1999). "We review the affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construe the pleadings in favor of the plaintiff." *Id*. "Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate . . . [and w]here no material facts are in dispute, whether the claim is statutorily barred is a question of law." *Kent v Alpine Valley Ski Area, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 210293, issued 5/5/2000, slip op, p 3).

The evidence in this case showed that after riding a chair lift to the top of a ski hill at defendant's resort, plaintiff's arm became entangled in the chair on which she had been sitting. Plaintiff could not or did not extricate herself, and the lift then dragged her back towards the bottom of the hill, with plaintiff clinging to the chair with her arms. Eventually, plaintiff fell, suffering fractured vertebrae. In her complaint, plaintiff alleged that defendant was negligent by failing to (1) maintain the chair lift in a

reasonably safe condition, (2) adequately supervise the chair lift, and (3) warn plaintiff regarding the lack of supervision of the chair lift.

The SASA provides, in relevant part:

> Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow and ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment. [MCL 408.342(2); MSA 18.483(22)(2).]

This provision of the SASA has most often been used to bar claims resulting from a skier's collision with people or objects while skiing down a slope. See *Grieb v Alpine Valley Ski Area, Inc*, 155 Mich App 484, 485-486; 400 NW2d 635 (1986) (plaintiff injured when struck by another skier), *Schmitz v Cannonsburg Skiing Corp*, 170 Mich App 692, 693, 695-696; 428 NW2d 742 (1988), (plaintiff's decedent killed when skiing into a tree on the slope), *Barr v Mt Brighton, Inc*, 215 Mich App 512, 514, 522; 546 NW2d 273 (1996), (plaintiff injured when skiing into a cluster of trees on the slope), and *McCormick v Go Forward Operating Ltd Partnership*, 235 Mich App 551, 553, 555; 599 NW2d 513 (1999) (plaintiff injured while trying to avoid a skier who had fallen in the path of the skiers leaving the ski lift).

In *Kent, supra*, slip op at 2, 6, however, this court affirmed the trial court's grant of summary disposition after the plaintiff, in attempting to get on a chair lift, became entangled in the lift and was dragged. In his complaint, the plaintiff argued that the defendants were negligent by (1) failing to direct plaintiff to a slower chair lift, (2) failing to slow or stop the chair before loading, (3) failing to stop the lift as soon as the "mis-load" occurred, (4) using a chair lift with "an excessive range of motion about its axis," and (5) using a chair lift unequipped with an adequate stop button. *Id*., slip op at 2. The *Kent* panel ruled as follows:

> . . . [T]he language of the statue itself establishes that plaintiff's injury comes within the immunity provisions. The statute says that collisions with ski lift towers and their components constitute a danger which is obvious and necessary and which the skier accepts. Also, . . . when, as here, injuries occur as a result of any of the statutorily enumerated dangers, the reasonableness of the skier's or the operator's conduct is rendered irrelevant. The cause of plaintiff's injury was the collision with the chair lift. There are no restrictions placed on the immunity for injuries arising from collisions with ski towers and their components, and the trial court did not err in granting summary disposition to defendants. [*Id*., slip op at 6.]

Kent, then, holds that injuries resulting from any collision with a ski lift tower or component are not actionable, regardless of the plaintiff's claims of negligence. We are bound to follow the rule of law

established in *Kent*. See MCR 7.215(H)(1). Accordingly, we affirm the trial court's decision to dismiss plaintiff's claim that the chair lift was improperly constructed and that the entanglement of her arm (her "collision" with the lift) resulted from this improper construction.[1]

We do not believe, however, that *Kent* mandates a complete dismissal of plaintiff's suit, because plaintiff's action was based, in part, on dangers not specifically enumerated in the SASA and therefore not covered by the above-quoted passage from *Kent*. Indeed, plaintiff presented evidence that her fall – and therefore her broken vertebrae – resulted from defendant's failure to have an operator near the shut-off switch or its failure to have a properly-working safety gate to stop a skier who did not disengage from the chair lift at the proper location.[2] In other words, even if plaintiff, under *Kent*, assumed the risk that she would become entangled in an allegedly negligently-maintained chair lift, she did not assume the risk that neither a properly-maintained shut-off switch nor an attentive operator would be able to stop the lift after her entanglement. At the very least, there was a question of fact regarding whether plaintiff could have safely disembarked from the chair lift and thereby avoided fracturing her vertebrae if a shut-off switch had engaged or if an attentive operator had been present.

We understand that the plaintiff in *Kent* also alleged negligence in the defendants' failure to stop the chair as soon as the "mis-load" in that case occurred. See *Kent, supra*, slip op at 2. However, the *Kent* opinion does not make clear whether the plaintiff's injuries in that case resulted solely from his collision with the chair lift or whether they also resulted from his fall from the chair lift. The opinion states only that "[p]laintiff slipped off the chair, but his left arm became entangled in the seat post, broke 'immediately,' and plaintiff was dragged a number of feet before he fell off." We cannot know with certainty whether the *Kent* panel barred the plaintiff's "failure to stop the lift after the mis-load" argument (1) because the plaintiff's injuries resulted solely from the initial collision (barred by the SASA) and not from the subsequent fall, or (2) because the panel felt that a subsequent injury stemming in any way from the initial collision with the chair lift was barred by the SASA. In the face of this uncertainty, we do not believe that *Kent* sets forth a clear rule of law regarding whether the SASA bars a claim based on a failure to stop a chair lift after a user becomes entangled in it. Therefore, *Kent* does not mandate that we affirm the trial court's dismissal of plaintiff's "failure to stop" argument. Accordingly, we hold that plaintiff may proceed with this argument.[3]

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[1] Plaintiff argues that her negligent-construction-resulting-in-entanglement claim is viable because she presented evidence that defendant violated a provision of the American National Standard for Passenger Tramways (ANSI Standards) regarding ski lift disembarking distances. However, under the current state of the law, an ANSI violation does not provide an exception to immunity under the SASA. See *McCormick, supra* at 556. While *Kent, supra*, slip op at 6, n 5, suggests that an ANSI violation *should* perhaps provide such an exception, it does so only as non-binding dicta.

[2] We reject defendant's contention that plaintiff admitted to purposefully avoiding the safety gate, as it is not supported by a full reading of the evidence.

[3] We do not agree with defendant's arguments that plaintiff's claims in this regard were barred by the simple tool doctrine or by the open and obvious doctrine. Her claims did not involve a simple tool, and the risk of danger from defendant's failure to stop the lift was not open and obvious. Nor do we agree

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

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that plaintiff failed to make a prima facie case of common law negligence. Indeed, plaintiff presented sufficient evidence of duty, breach, causation, and damages regarding her "failure to stop" claim. Finally, we reject defendant's argument – which it did not support by citations to the record or to case law – that plaintiff signed a release that served to bar her claims.