

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT R. ANDERSON and CHRISTINE M.
ANDERSON, as Next Friends of ROBERT C.
ANDERSON, a Minor,

UNPUBLISHED
March 26, 2002

Plaintiff-Appellees,

v

PINE KNOB SKI RESORT, INC.,

No. 227832
Oakland Circuit Court
LC No. 99-016011-NO

Defendant-Appellant.

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Robert C. Anderson, a minor, “caught an edge” while skiing to the finish line at a high school ski race held on defendant’s race hill. Anderson lost his balance and veered off course, hitting the finish or timing shack that was placed by the finish line. As a result, he sustained numerous injuries and filed suit against defendant for negligence. Defendant moved for summary disposition, arguing that the claim was barred by the Ski Area Safety Act of 1962 (SASA), MCL 408.321 *et seq.*, or, in the alternative, that summary disposition was warranted by the open and obvious hazard doctrine. The trial court denied summary disposition, finding that the action was not barred by the assumption of the risk provisions of the SASA and that there was a question of fact about whether the finish or timing shack was placed too close to the finish line of the race hill. Defendant appeals by leave granted. We affirm.

We review de novo decisions on motions for summary disposition. *Lockridge v State Farm Mutual Auto Ins*, 240 Mich App 507, 511; 618 NW2d 49 (2000). Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). Because the trial court looked beyond the pleadings when ruling on the motion, it is apparent that the ruling was based on MCR 2.116(C)(10). See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 515 n 1; 629 NW2d 384 (2001).

Motions under MCR 2.116(C)(10) test the factual support of the plaintiff’s claim. The court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of any material fact exists to warrant a trial. Both this Court and the trial court must resolve all reasonable inferences in the nonmoving party’s favor. [*Lockridge, supra* at 511 (citations omitted).]

Defendant argues that summary disposition was warranted under the SASA.

The propriety of summary disposition under the SASA must be determined in conjunction with the rules of statutory construction. A fundamental rule of statutory construction is to ascertain the purpose and intent of the Legislature in enacting the provision. Statutory language should be construed reasonably and the purpose of the statute should be kept in mind. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted and courts must apply the statute as written.

The title of the SASA provides that the act was enacted, among other reasons, “to provide for the safety of skiers, spectators, and the public using ski areas,” “to provide for certain presumptions relative to liability for an injury or damage sustained by skiers” and “to provide for liability for damages which result from a violation of this act.” Before the 1981 amendment, ski areas in Michigan were held to the “prudent man” negligence standard . . .

Soon thereafter, the Legislature . . . “intent on promoting safety, reducing litigation and stabilizing the economic conditions in the ski resort industry,” became concerned with making the skier, rather than the ski area operator, bear the burden of damages from injuries. This would “help reduce the number of lawsuits . . . [thereby] stabiliz[ing] the constantly increasing insurance costs for ski area operators, which have been passed on to skiing enthusiasts through price hikes for ski lift tickets, rental equipment, waxing services, etc. [*Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736-738; 613 NW2d 383 (citations omitted).]

The provisions of the SASA on which defendant relies to argue that it is entitled to summary disposition are MCL 408.341, MCL 408.342 and MCL 408.344. MCL 408.341 provides:

(1) A skier shall conduct himself or herself within the limits of his or her individual ability and shall not act or ski in a manner that may contribute to his or her injury or to the injury of any other person. A skier shall be the sole judge of his or her ability to negotiate a track, trail, or slope. . . .

MCL 408.344 provides, in relevant part, that a skier who violates the SASA is liable for that portion of loss or damage resulting from the violation.

We disagree with defendant that the minor plaintiff violated MCL 408.341(1) by skiing beyond his ability and control. Viewed most favorably to plaintiffs, the evidence did not indicate that he conducted himself outside of the limits of his abilities. Rather, he was an experienced, competitive skier who lost control only after “catching an edge,” which is something any skier can do at any time. At best there was a question of fact with regard to whether he skied in a manner that caused or contributed to his injuries. There is no authority, and defendant points to none, that would support a conclusion that every time a skier makes a mistake or loses balance, he has skied in violation of MCL 408.341 and is solely liable for his injuries. Further, the plain

language of MCL 408.341 indicates that the skier is the sole judge of his ability to negotiate the track or trail.

MCL 408.342 provides:

(1) While in a ski area, each skier shall do all the following:

(a) Maintain reasonable control of his or her speed and course at all times.

(b) Stay clear of snow-grooming vehicles and equipment in the ski area.

(c) Heed all posted signs and warnings.

(d) Ski only in ski areas which are marked as open for skiing on the trail board. . . .

(2) 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 or 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.

“The issue regarding whether a particular set of circumstances falls within the risks and dangers enumerated in subsection 22(2) of the SASA is a question of law.” *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 293; 618 NW2d 98 (2000).

Defendant makes several arguments with regard to the aforementioned statute, none of which have merit.

First, defendant argues that the minor plaintiff lost control of his speed and course in violation of MCL 408.243(1) and thus, pursuant to MCL 408.344, is responsible for his own injuries. The language of MCL 408.342(1), in conjunction with MCL 408.344, suggests “a comparative negligence” principle. *Kent, supra* at 739. Thus, while the minor plaintiff’s actions with regard to his control at the end of the race course may be an issue, they do not support that summary disposition should be granted.

Under many circumstances, the question of whether the skier or ski area operator has violated the statute would be measured by a negligence standard. For example, *the question of whether a skier had maintained reasonable control of his speed and course as directed by MCL 408.342(1); MSA 18.483(22)(1) would usually be a question for the trier of fact.* In such case, common-law negligence principles of “reasonable under the circumstances” and comparative negligence would be applicable. [*Schmitz v Cannonsburg Skiing Corp*, 170 Mich App 692, 695; 428 NW2d 742 (1988) (emphasis added).]

Next, defendant extensively argues that plaintiffs’ case is barred because the injuries resulted from a mishap with the terrain, snow, or ice, which are enumerated dangers for which

the minor plaintiff assumed the risk. MCL 408.342(2). Where injuries occur because of a statutorily enumerated danger, the reasonableness of the skier's conduct is irrelevant. *Kent, supra* at 743. We first note that the plain language of the statute does not comport with defendant's argument that all mishaps arising from or precipitated by contact with snow, ice, or terrain are encompassed by MCL 408.342(2). The plain language states that surface and subsurface snow and ice conditions, as well as variations in terrain, are specifically enumerated dangers for which skiers assume the risk. The injuries in this case did not result from variations in terrain or from surface or subsurface snow and ice conditions. The evidence indicates that the minor plaintiff's ski made an unintended contact with snow, i.e., "caught an edge," which caused him to lose balance and veer off course. The injuries were the result of the minor plaintiff's collision with the timing shack after he veered off course. We agree with the trial court that the collision with the timing shack caused the injuries. We also note that there was no evidence that the minor plaintiff even "caught an edge" because of a variation in terrain or a condition of the surface or subsurface ice and snow. Indeed, while catching an edge is the unintended contact of the ski with snow, it can be caused by events unrelated to the snow or ice, i.e., a loss of balance.

Defendant argues, in the alternative, that the timing shack was an obvious and necessary danger of the sport of skiing and thus, is a danger for which the skier assumed responsibility under MCL 408.342(2). This argument has no merit. In *Schmitz, supra* at 695-696, this Court stated:

[I]t is clear from the plain and unambiguous wording of § 22(2) that the Legislature intended to place the burden of certain risks or dangers on skiers, rather than ski resort operators. Significantly, the list of "obvious and necessary" risks assumed by a skier under the statute involves those things resulting from natural phenomena, such as snow conditions or the terrain itself; natural obstacles, such as trees and rocks; and types of equipment that are inherent parts of a ski area, such as lift towers and other such structures or snow making or grooming equipment when properly marked. These are all conditions that are inherent to the sport of skiing. It is safe to say that, generally, if the "dangers" listed in the statute do not exist, there is no skiing. Therefore, it is logical to construe this section of the statute as an assumption of the risk clause that renders the reasonableness of the skiers' or the ski area operators behavior irrelevant. By the mere act of skiing, the skier accepts the risk that he may be injured in a manner described by the statute. The skier must accept these dangers as a matter of law.

The timing shack was not a natural phenomena or a natural obstacle. Rather, it was a structure placed on the ski run by defendant. It is not enumerated in the list of "obvious and necessary" risks assumed by a skier. The non-natural "obvious and necessary" risks that are enumerated are all items or conditions without which there could be no skiing, e.g., snow machines, chair lifts, tow ropes, etc. In this case, the timing shack was not "obvious and necessary" to the sport of skiing. Without the timing shack, there could have been skiing and, in fact, ski racing. The timing shack was not an obvious *and necessary* hazard as contemplated by the SASA. As such, the collision with the timing shack, unlike the collisions reported in the myriad of cases cited by defendant, is not encompassed by the SASA. The SASA does not operate to bar plaintiffs' negligence claim.

Defendant next argues that the open and obvious danger doctrine nevertheless precludes plaintiffs' action. Recently, in *Lugo, supra* at 517, our Supreme Court summarized the general rules of the open and obvious doctrine as it pertains to invitees:

[T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.

The Court indicated that the critical question is

whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e. whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Id.* at 517-518.]

The relevant inquiry is whether the possessor should anticipate harm despite the invitee's knowledge of the danger. *Id.* at 516. To avoid summary disposition, there must be evidence to create a genuine issue of material fact about the existence of a "special aspect" to the open and obvious danger, which created an unreasonable risk of harm. *Id.* at 517. The level of care used by the plaintiff, i.e., his own negligence, is "irrelevant to whether the condition created or allowed to continue by the possessor of the premises is unreasonably dangerous." *Id.* at 522 n 5.

The test to determine if a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Abke v Vandenberg*, 239 Mich App 359, 361-362; 608 NW2d 73 (2000) (citation omitted). Here, there is no question that, by the minor plaintiff's admission, that of his parents, and those of coaches and other witnesses, the timing shack was open and obvious. It was visible to all people on the race hill and was specifically known to the minor plaintiff. Therefore, defendant did not have a duty to warn plaintiff, its invitee, of the open and obvious danger. Although there was no duty to warn because the timing shack and its placement were open and obvious, defendant may still be charged with a duty to exercise reasonable care to protect from the unreasonable risk of harm posed by that open and obvious condition. *Lugo, supra* at 517; *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). See also *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). In making its argument on appeal, defendant completely ignores this aspect of the open and obvious doctrine.

In this case, there was a question of fact with regard to whether the timing shack created an unreasonable risk of harm. The special aspect at issue is the placement of the timing shack near the finish line of a high school ski race. There was evidence that defendant anticipated collisions with the timing shack because it routinely placed padding in the front of the shack for the protection of the racers. There was evidence, however, that the rest of the timing shack, including the front corners, was not padded. There was also evidence that "catching an edge" or falling off balance is something that any skier can do at any time on the course and that it can cause diversion from the intended path. There was evidence that when a skier catches an edge and moves off course, there needs to be clearance distance to avoid collision. There was

evidence that the clearance distance from the edge of the finish line to the timing shack was only between eight and twenty feet. There was evidence that the timing shack did not need to be as close to the finish lines as it was placed. Based on the testimony presented to the trial court, there is a question of fact about whether defendant could have anticipated the unreasonable risk of harm or severity of harm that the placement of the timing shack presented to the ski racers, who could lose their balance near the finish line. Summary disposition was properly denied.

Affirmed.

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot