# S T A T E  O F  M I C H I G A N

# C O U R T  O F  A P P E A L S

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RAMZI AJO,

Plaintiff-Appellant,

v

MT. HOLLY RESORT, INC.,

Defendant-Appellee.

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UNPUBLISHED
February 9, 2006

No. 254088
Oakland Circuit Court
LC No. 03-051361-NO

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Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

In this case arising from a skiing accident, plaintiff appeals as of right a circuit court order granting defendant's motion for summary disposition of plaintiff's claims of negligence and liability under the Ski Area Safety Act of 1962 (SASA), MCL 408.321 *et seq*., and denying plaintiff's motion for summary disposition. We affirm.

Both parties moved for summary disposition pursuant to MCR 2.116(C)(10).[1] This Court reviews de novo a circuit court's summary disposition ruling. *Dressel v Ameribank*, 469 Mich 557, 561; 664 NW2d 151 (2003). In reviewing a motion premised on subrule (C)(10), this Court considers in the light most favorable to the nonmoving party the entire record, including all relevant pleadings, admissions, affidavits, depositions and other evidence submitted by the parties. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*.

The record in this case undisputedly reflects that at the time of plaintiff's accident in March 2003, plaintiff had extensive experience as a skier, having skied around the country and abroad since a young age. Plaintiff also described himself as an accomplished or above average snowboarder. Before the accident, plaintiff had skied and snowboarded at Mt. Holly, where the accident occurred, on about a dozen occasions. During the week before the accident, plaintiff

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[1] Although defendant also sought summary disposition under MCR 2.116(C)(8), the record reflects that the circuit court considered materials beyond the pleadings. *Gibson v Neelis*, 227 Mich App 187, 189-190; 575 NW2d 313 (1997).

skied or snowboarded on the same Mt. Holly slope where his accident later occurred. Plaintiff felt "fairly familiar" with Mt. Holly, and believed he had seen and read signs there setting forth the Skier Responsibility Code.

Plaintiff estimated that on March 7, 2003, he arrived at Mt. Holly around 6:00 p.m. or 7:00 p.m., and that his accident occurred between 8:30 p.m. and 9:00 p.m. According to plaintiff, he had perfect eyesight and could see in the clear conditions that the Mt. Holly slopes appeared nicely groomed and "fairly lit up." The mishap took place on a "black diamond," or expert level, slope named the "Mogul Mania." Plaintiff recounted his accident as follows: "I was going down the hill and basically doing what I do on all hills, just carving back and forth, and I was in the middle of a turn, . . . I shifted my weight and lost balance," "veered off course a little bit and hit the post" holding up an orange-netted snow fence. The collision broke plaintiff's pelvis and left tibia, and caused other injuries.

Plaintiff conceded that he previously had seen the orange-netted snow fence, and that on the night of the accident, he had no difficulty seeing the fence before he encountered it. Mark Tibbitts, the general manager at Mt. Holly who was "in charge of . . . all ski area operations; . . . the safety aspects, the maintenance aspects," testified in his deposition that he daily walked the slopes checking their grooming state and signage. Tibbitts estimated that the 6 x 8 post plaintiff struck had been in place since at least 1997.[2] Tibbitts explained that the bright orange-netted fence, which was located a couple of feet from the groomed trail edges, served two purposes: (1) separating the easier "White Lightning" slope from the black diamond "Mogul Mania" slope, and (2) serving "as a warning that there is [sic] snow-making facilities that might not be visible if you are on the path to Mogul Mania." With respect to the function of warning of snow making equipment, Tibbitts further described as follows:

> . . . The . . . hydrant and the snow box [used to manufacture the snow] are marked with the sign from the normal direction of skiing. The upper area that we are fencing, the fence is there because we want that to be considered not the normal direction of skiing and—and *the trees that we have planted in that area actually serve as sort of a height—a hidden barrier to being able to see these particular facilities and so the fence is there to mark, or warn that* this could—that they could . . . *if the fence were not there, they could ski through the trees, surprise, there is the snow making [equipment]*. [Emphasis added.]

Tibbitts opined that during the evening hours when plaintiff crashed into the fencing, "there is sufficient light there to be able to determine that fencing is there."

The provision of the SASA governing the outcome of this case provides as follows:

> (1) While in a ski area, each skier shall do all of the following:
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> (a) Maintain reasonable control of his or her speed and course at all times.

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[2] "Four-by-four posts" held up the remainder of the orange-netted fence.

(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 described in section 6a(e).

(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. [MCL 408.342 (emphasis added).]

The Supreme Court recently summarized that subsection 22(2) specifies "that skiers have the responsibility to ski under control, as well as to heed signs and warnings and avoid snow-grooming vehicles and equipment," and "that, by skiing, skiers are held to have accepted certain types of risks from dangers that inhere in the sport as long as those dangers are 'obvious and necessary.'" *Anderson v Pine Knob Ski Resort, Inc*, 469 Mich 20, 24; 664 NW2d 756 (2003).

The parties dispute whether the instant fence hazard meets each of the requisite assumption of risk elements; i.e., that the risk inheres in skiing or snowboarding, and that the risk was necessary and obvious. In granting defendants summary disposition, the circuit court found that the fence qualified as necessary and obvious, but the court did not explicitly consider whether the fence inhered in the sports of skiing or snowboarding. We nonetheless may consider this question for the first time on appeal because the decision whether certain facts qualify as inherent, necessary and obvious constitutes a legal question, and the facts necessary to resolve these questions appear in the record. *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 293; 618 NW2d 98 (2000).

In *Anderson*, *supra* at 25-26, the Supreme Court considered as follows whether the timing shack with which the plaintiff collided fell within the scope of "the dangers assumed by plaintiff as he engaged in ski racing at Pine Knob":

> There is no disputed issue of fact in this matter that in ski racing, timing, as it determines who is the winner, is necessary. Moreover, there is no dispute that for the timing equipment to function, it is necessary that it be protected from the elements. This protection was afforded by the shack that all also agree was obvious in its placement at the end of the run. We have then a hazard of the same sort as the ski towers and snow-making and grooming machines to which the statute refers us. As with the towers and equipment, this hazard inheres in the sport of skiing. The placement of the timing shack is thus a danger that skiers such as Anderson are held to have accepted as a matter of law.

The Supreme Court concluded that the defendant was entitled to summary disposition pursuant to MCR 2.116(C)(10). *Anderson*, *supra* at 25-29.

The analysis of the risk posed by the orange netted-fence in this case parallels the Supreme Court's analysis of the timing shack hazard in *Anderson*. Here, the testimony of Tibbitts indisputably establishes that for skiing and snowboarding in Michigan, snow making equipment is necessary. Tibbitts further testified that the orange netted-fence placed at the scene of plaintiff's accident was necessary to warn skiers of the existence of the snow making equipment (a snow gun, an electrical installation, hydrants and water lines) behind the fencing, especially given that tree growth in the area otherwise obscured the equipment from skiers and snowboarders headed down the Mogul Mania slope.[3] A review of the deposition testimony and photographs of the slope where the accident occurred reflects that the bright orange-netted fence appears obvious to approaching skiers and snowboarders, and plaintiff admitted having no interference with his vision and that he saw the fence.

Because of the existence and tree-obscured location of the snow making equipment where the accident occurred, "[w]e have then a hazard [the orange netted-fence employed as a warning] of the same sort as the ski towers and snow-making and grooming machines to which the statute refers us. As with the towers and equipment, this hazard inheres in the sport of skiing." *Anderson*, *supra* at 25-26. In other words, just as the Supreme Court determined that timing equipment inhered in and was necessary to the sport of ski racing, and therefore, so did the shack necessary to house the timing equipment, in this case, the snow making equipment inheres in and is necessary to skiing and snowboarding, and therefore, so is the orange-netted fence required in this case to warn approaching Mogul Mania skiers of the presence of the otherwise obscured snow making equipment. The placement of the orange-netted fence "is thus a danger that skiers such as [plaintiff] are held to have accepted as a matter of law." *Id*. at 26.

Plaintiff seeks to deflect the focus of our analysis from the orange-netted fence to the lone 6 x 8 wood post that he struck. To the extent the fence constitutes a necessary warning of and guide around the snow making equipment, which inheres in skiing and snowboarding activities, the unrebutted testimony of Tibbitts established that the fence requires sturdy posts to support it. Therefore, plaintiff cannot distinguish analysis of the orange-netted fence from consideration of the 6 x 8 post supporting the fence; they are one and the same.

Although plaintiff has suggested that padding should have covered the wood post he struck, or that the post he struck should have been made of a more forgiving material, and perhaps should have been collapsible, we need not consider these suggestions when analyzing subsection 22(2) of the SASA. Once a court determines that the hazard encountered qualifies as inherent in skiing, necessary and obvious, the liability analysis concludes without further reference to the reasonableness of the defendant's actions. As the Supreme Court explained in *Anderson*, *supra* at 26,

> . . . [W]e reject the argument of the plaintiff, which was adopted by the Court of Appeals, that, while some sort of protection of the timing equipment may have been required, the shack was larger and more unforgiving than other imaginable,

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[3] As already alluded to, Tibbitts also explained that the orange-netted fence served to separate the expert-level slope from one of lesser difficulty.

> alternative timing-equipment protection might have been. We find nothing in the language of the statute that allows us to consider factors of this sort. Once hazards fall within the covered category, only if they are unnecessary or not obvious is the ski operator liable.
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> To adopt the standard plaintiff urges would deprive the statute of the certainty the Legislature wished to create concerning liability risks. Under plaintiff's standard, after any accident, rather than immunity should suit be brought, the ski-area operator would be engaged in the same inquiry that would have been undertaken if there had been no statute ever enacted. This would mean that, in a given case, decisions regarding the reasonableness of the placement of lift towers or snow groomers, for example, would be placed before a jury or judicial fact-finder. *Yet it is just this process that the grant of immunity was designed to obviate*. In short, the Legislature has indicated that matters of this sort are to be removed from the common-law arena, and it simply falls to us to enforce the statute as written. This we have done. [Emphasis added.]

See also *McGoldrick*, *supra* at 294-295 (explaining that because the "plaintiff's decedent's injury arose from his collision with a component of a ski lift tower," which fell "within the immunity provision of the statute," "[t]he padding, lighting, and other conditions of the tension pole as stated by plaintiff are irrelevant"); *Schmitz v Cannonsburg Skiing Corp*, 170 Mich App 692, 696; 428 NW2d 742 (1988) (characterizing MCL 408.342(2) as "an assumption of risk clause that renders the reasonableness of the skiers' or ski area operator's behavior irrelevant").[4]

Affirmed.

/s/ Alton T. Davis
/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper

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[4] The question whether defendant's placement of the orange-netted fence comported with administrative rules also qualifies as irrelevant to the liability analysis. In *McCormick v Go Forward Operating Ltd Partnership*, 235 Mich App 551, 555-556; 599 NW2d 513 (1999), this Court rejected the plaintiff's reliance on the defendant's alleged violation of a standard adopted by the Ski Area Safety Board, explaining that "the SASA does not provide for the adoption of safety standards by outside agencies, nor does it provide for an exception to immunity for violation of any such standards."