STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW BARRETT,

Plaintiff-Appellee,

v

MT. BRIGHTON, INC.,

Defendant-Appellant.

UNPUBLISHED
January 11, 2002

No. 222777
Livingston Circuit Court
LC No. 97-016219-NO

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

This negligence action is on remand from the Supreme Court for consideration as on leave granted. *Barrett v Mt Brighton, Inc*, 461 Mich 882; 603 NW2d 636 (1999). Plaintiff brought suit under the Ski Area Safety Act [hereinafter "the Act"]. MCL 408.321 *et seq.* Defendant appeals from an order of the trial court denying its motion for summary disposition. In the remand order, our Supreme Court directed us to "consider whether defendant owed plaintiff a duty under [the Act] . . . to warn skiers of the presence of a snowboarding rail." The Court also directed that we should "consider whether a snowboarding rail is an inherent part of a ski area and whether plaintiff assumed the risk of its presence." We affirm.

Plaintiff was skiing on defendant's premises on the evening of February 5, 1997, when he struck a snowboard rail and fractured his ankle. Visibility that night was clear. The snowboard rail, which was about six inches wide, twenty feet long, and bright yellow in color, had been in that location since 1994. It ranged in height from several inches to twelve to fourteen inches above the snow line. At the time of plaintiff's accident, the area in which the rail was located was not posted as an area intended for use exclusively by snowboarders. Defendant's general manager averred that although the area was generally off limits to skiers, skiers did occasionally use the area. In his deposition, plaintiff stated that he had never skied anywhere other than at Mt. Brighton, and that he had never snowboarded there. Plaintiff averred that he had not seen the rail until seconds before he struck it.

Defendant moved for summary disposition pursuant to MCR 2.16(C)(8) and (C)(10). Defendant argued that because a snowboard rail was an obvious structure that served a purpose or function with respect to skiing, plaintiff's action was barred by the assumption of risk provision of the Act. MCL 408.342(2). In denying the motion, the court observed that "there is an issue of fact as to whether or not this was properly marked. . . . [P]roper marking appears to this Court to be essential under the rules and the statutes."

The Act's assumption of risk clause reads as follows:

> 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 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).]

In *Schmitz v Cannonsburg Skiing Corp*, 170 Mich App 692, 696; 428 NW2d 742 (1988), this Court made the following observations about this provision:

> 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 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 risk clause that renders the reasonableness of the skiers' or the ski operator's 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 statutory scheme establishes a balance between a ski operator's responsibilities and a skier's responsibilities in the area of safety. *Grieb v Alpine Valley Ski Area, Inc.*, 155 Mich App 484, 488-489; 400 NW2d 653 (1986). The assumption of risk clause indicates that skiers will assume the risk associated with the "open and obvious" dangers that are inherent to the sport. As the *Schmitz* Court observed, the Act's assumption of risk clause identifies two broad categories of open and obvious dangers that are inherent to the sport of skiing. One category consists of natural phenomena, and the other category consists of certain specific man-made equipment and fixtures, as well as skiers themselves. The first question we must address is whether a snowboarding rail is the type of fixture contemplated by the statutory scheme.

We do not believe that a snowboarding rail is the type of man-made fixture that the assumption of risk clause contemplates. A snowboarding rail does not transport skiers or snowboarders[1] to the start of a run or trail like a ski lift tower and its components. See *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 293-294; 618 NW2d 98 (2000). A

[1] We do not mean to imply that a snowboarder is not a skier under the Act. In fact, pursuant to the definition of skier set forth in MCL 408.322(g), a snowboarder would be considered a skier under the statutory scheme.

snowboarding rail does not by itself or in combination with other apparatus make or groom snow.[2] Rather, snowboarders use a snowboarding rail to perform particular snowboarding tricks.

Even though a snowboarding rail does not fall within the enumerated dangers, we nonetheless must consider whether it is an inherent part of a ski area. We conclude that it is not. While a snowboarding rail might make the course more enjoyable and challenging for a snowboarder, it is not an essential characteristic anymore than a man-made ski jump is an essential characteristic of a ski course. In fact, the record shows that snowboarders used defendant's facilities for years before the snowboarding rail was installed. Accordingly, we conclude that under the statutory scheme, a skier is not required to accept the danger associated with snowboard rails as a matter of law.

We do not believe, however, that at the time of plaintiff's accident, defendant was required by either the Act or the rules promulgated there under to warn of the presence of the snowboarding rail.[3] At the time, it appears that the statutory scheme had not caught up to the changes that had occurred in the sport since its enactment. This does not absolve a ski operator of all responsibility, however. The operator still has a duty to act for the safety of the public using its facilities.

Finally, we conclude that given the characteristics of this snowboarding rail, a jury should decide whether the danger posed by the rail was open and obvious. The rail was described as being yellow, six inches wide, twenty feet long, and extending anywhere from several inches to approximately one foot above the ground. We believe a jury question exists on whether this fixture, in the place where it was located for the time it had been there, was well known, visible, or discernable by casual inspection. *Glittenberg v Doughboy Recreational Industries, Inc*, 436 Mich 673, 695; 462 NW2d 348 (1990).

We affirm the trial court's denial of defendant's motion for summary disposition.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

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[2] It is also not a naturally occurring variation in the terrain of a skiing area.

[3] We note that since plaintiff's accident, new rules have been promulgated by the safety board that require a ski operator to mark the entrances to snowboarding parks and to indicate the presence of snowboarding halfpipes. 1999 AACS, R 408.81