STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW BARRETT, Plaintiff-Appellee,	UNPUBLISHED June 3, 2004
v	No. 222777 Livingston Circuit Court
MT. BRIGHTON, INC., Defendant-Appellant.	LC No. 97-016219-NO ON REMAND

Before: Cavanagh, P.J., and Zahra and Meter, JJ.

PER CURIAM.

This case is on remand from the Supreme Court following defendant's filing of an application for leave to appeal our opinion of January 11, 2002. Our Supreme Court has directed us to reconsider this matter in light of *Anderson v Pine Knob Ski Resort, Inc*, 469 Mich 20; 664 NW2d 756 (2003) and the applicable statutory standards contained within the Ski Area Safety Act (SASA), MCL 408.321 *et seq*., including MCL 408.342(2). We are further directed to consider the applicability of MCL 408.326a(d) and 408.344. After reconsideration, we again affirm.

On the evening of February 5, 1997, plaintiff was alpine skiing at Mt. Brighton when he struck a snowboard rail that was located in a skiing area intended for use exclusively by snowboarders but not so restricted or posted. Visibility that night was clear, the snowboard rail was bright yellow and situated above the snow line, but plaintiff did not see it until seconds before striking it. Plaintiff brought this negligence action against defendant and defendant moved for summary disposition on the ground that it was immune under MCL 408.342(2) because plaintiff assumed the risk, essentially, by skiing. The trial court denied the motion and defendant sought leave to appeal. We denied leave. Defendant filed for leave to appeal to our Supreme Court which remanded the case to us to consider as on leave granted. We affirmed. Defendant sought leave to appeal and our Supreme Court remanded the case to us for reconsideration. We will revisit the case again.

The first issue here is whether the snowboard rail was a danger that inheres in the sport of skiing that was obvious and necessary such that plaintiff's action was barred by the SASA, in particular MCL 408.342(2), the assumption of risk provision. Defendant argues that the snowboard rail was a manmade alteration to the terrain that constituted an inherent danger in the sport of skiing which was (1) necessary since it was used by snowboarders to perform acrobatic

maneuvers, and (2) obvious since it posed a risk that would have been known to be confronted by reasonable skiers. Plaintiff, on the other hand, argues that the snowboard rail did not constitute an inherent danger to the sport of skiing because alpine skiers do not use such rails and this particular rail was not obvious to such a skier, including plaintiff. The issue, then, is whether a snowboard rail poses a danger that "inheres" in the sport of skiing—snowboard, alpine, adaptive, or any other variation of "skiing." Our Supreme Court has directed us to *Anderson*, *supra*, which is where we will begin the analysis.

The plaintiff in *Anderson*, *supra*, was a member of his high school's varsity ski team and was participating in an interscholastic giant-slalom competition when he lost his balance on the racecourse and collided with a shack that housed the race timing equipment. *Id*. at 22. The plaintiff filed a negligence suit against the ski area operator which then sought summary disposition on the ground that the SASA granted it immunity. Our Supreme Court framed the issue as "whether the timing shack was within the dangers assumed by plaintiff as he engaged in ski racing at Pine Knob." *Id*. at 25. The issue was analyzed as follows:

> 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. [*Id*. at 25-26.]

Turning to the case before this Court, and following the *Anderson* Court's analysis, we consider whether the snowboard rail was within the dangers assumed by plaintiff as he engaged in alpine skiing at Mt. Brighton. Here, there is no disputed issue of fact that in alpine skiing, snowboard rails, used by snowboarders to perform acrobatic maneuvers, are not necessary. The disputed issue is really one of law—whether alpine, snowboard, adaptive, cross-country, or any other variation of snow skiing are distinguishable with regard to the types and nature of risks these particular skiers are deemed to have assumed. In light of the *Anderson* Court's emphasis on the type of skiing that the plaintiff was engaged in—ski **racing**—at the time he confronted the danger—timing equipment—we conclude that such a distinction is appropriate. A snowboard rail constitutes a danger a skier assumes while engaged in snowboarding, but an alpine skier should not be deemed to have assumed such risk since snowboard rails are not inherent in or necessary to the sport of downhill skiing.

Although snowboarders and downhillers are both considered skiers under MCL 408.322(g), the sport of skiing that they engage in is quite different. As defendant has explained in its brief on appeal, the risks, equipment, and nature of potential injuries associated with snowboarding are very different from those associated with alpine skiing. This conceptual construct is made more obvious when considered with respect to the sport of ice skating. There is more than one type of sport associated with ice skating—figure skating, free or open skating, speed skating, and hockey. Some of the risks, equipment, and nature of potential injuries associated with each sport of ice skating are universal—such as falling, skates, and a broken

ankle, respectively—but some are very unique to the particular type of ice skating in which the skater is engaged. Although an ice skater engaged in a game of hockey assumes the risk of being struck in the eye by a hockey puck, a figure skater would not be expected to assume such risk merely because he is ice skating.

This result is also consistent with the plain language of MCL 408.342(2) which provides that "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." Accordingly, a person who participates in the sport of ski racing, as in *Anderson*, *supra*, accepts the dangers that inhere in the sport of ski racing, like the timing equipment that was obvious and necessary. A person who participates in the sport of alpine skiing accepts the dangers that inhere in the sport of alpine skiing insofar as the dangers are obvious and necessary. A person who participates in the sport of snowboard skiing accepts the dangers that inhere in the sport of snowboarding, such as the dangers associated with halfpipes and snowboard rails, insofar as the dangers are obvious and necessary. A person who participates in adaptive or cross-country skiing accepts the dangers that inhere in those types of skiing insofar as the dangers are obvious and necessary. The dangers that each of these types of skiers are confronted with during their skiing experience are not all the same, and some are, in fact, very unique—as was the timing shack in *Anderson* and as the snowboard rail would be to a snowboarder. An alpine skier, however, would not expect to be confronted with a snowboard rail in the course of alpine skiing. Defendant's reliance on *Shukoski v Indianhead Mountain Resort, Inc*, 166 F3d 848 (CA 6, 1999) for the proposition that snowboarders assume the risks associated with snowboard slopes is not persuasive since here the plaintiff was not a snowboarder.

There are, of course, dangers that every type of skier is confronted with by the very nature of skiing and the environment in which the sport is situated. MCL 408.342(2) has set forth some examples of those dangers as follows: "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." These examples illustrate that dangers that "inhere in that sport" can be natural and unnatural but the commonality in all of them is that, for the most part, as stated in *Schmitz v Cannonsburg Skiing Corp*, 170 Mich App 692, 696; 428 NW2d 742 (1988), "if the 'dangers' listed in the statute do not exist, there is no skiing." Terrain, snow and ice conditions, and other forms of natural growth and debris are not uniform but can be unpredictable and change over time depending on the weather and other circumstances; nonetheless, these natural dangers are reasonably to be expected. Similarly, because of how skiing is accomplished and what it involves, objects like ski lifts and associated components used to transport skiers to the top of the slopes, snow making and grooming equipment used to create the environment in which to ski, and other skiers, are "unnatural" types of dangers that should reasonably be expected by all skiers. Certain dangers are just "part and parcel" of the sport, no different than the expected danger of falling during the course of skiing. A downhill skier, however, should not be expected to encounter a snowboard rail during the course of downhill skiing.

Our analysis is also consistent with the "foreseeability test for determining tort liability" discussed by our Supreme Court in *Anderson*, *supra* at 28. As we have been reminded, our legal forebears set forth the common-law test for tort liability as "'was-this-foreseeable-to-a-

reasonable-person-in-this-defendant's-position' standard." Here, it was not foreseeable to a reasonable alpine skier that he would be confronted with a snowboard rail during the course of alpine skiing. Or, stated another way, it was foreseeable that defendant's placement of a snowboard rail in a location freely accessible to alpine skiers, and completely unrestricted, may create a serious risk of harm to alpine skiers like plaintiff, and that plaintiff's collision with, and injuries from, that snowboard rail were foreseeable to a reasonable ski area operator. It should be noted here that the area in which plaintiff was injured was not designated as a snowboard skiing area, consequently, whether such notice would have changed the foreseeability analysis is not relevant in this case.[1] In sum, plaintiff cannot be deemed to have assumed the risk of skiing into a snowboard rail while alpine skiing in an area unrestricted in any way and, thus, MCL 408.342(2) is inapplicable and does not establish a complete defense.

Next, pursuant to our Supreme Court's directive, we consider whether MCL 408.326a(d) and 408.344 are applicable to the facts of this case. First, MCL 408.344 provides,

> A skier or passenger who violates this act, or an operator who violates this act shall be liable for that portion of the loss or damage resulting from that violation.

Accordingly, we turn to the statutory provision of the SASA that sets forth the duties of a ski area operator, MCL 408.326a, to determine whether defendant may be held liable for the placement of the snowboard rail. MCL 408.326a provides:

> Each ski area operator shall, with respect to operation of a ski area, do all of the following:
>
> (a) Equip each snow-grooming vehicle and any other authorized vehicle, except a snowmobile, with a flashing or rotating yellow light . . . .
>
> (b) Mark with a visible sign or other warning device the location of any hydrant or similar fixture or equipment used in snow-making operations located on a ski run, as prescribed by rules promulgated under section 20(3).
>
> (c) Mark the top of or entrance to each ski run, slope, and trail to be used by skiers for the purpose of skiing, with an appropriate symbol indicating the relative degree of difficulty of the run, slope, or trail, using a symbols code prescribed by rules promulgated under section 20(3).
>
> (d) Mark the top of or entrance to each ski run, slope, and trail which is closed to skiing, with an appropriate symbol indicating that the run, slope, or trail is closed, as prescribed by rules promulgated under section 20(3).
>
> (e) Maintain 1 or more trail boards at prominent locations in each ski area displaying that area's network of ski runs, slopes, and trails and the relative

[1] Since plaintiff's accident, new rules have been promulgated which require a ski operator to mark the entrances to snowboarding parks and halfpipes with signs stating "most difficult area, obstacles and hazards exist, proceed at your own risk." 1999 AACS, R 408.81.

degree of difficulty of each ski run, slope, and trail, using the symbols code required under subdivision (c) and containing a key to that code, and indicating which runs, slopes, and trails are open or closed to skiing.

(f) Place or cause to be placed, if snow-grooming or snowmaking operations are being performed on a ski run, slope, or trail while the run, slope or trail is open to the public, a conspicuous notice at or near the top of or entrance to the run, slope, or trail indicating that those operations are being performed.

(g) Post the duties of skiers and passengers as prescribed in sections 21 and 22 and the duties, obligations, and liabilities of operators as prescribed in this section in and around the ski area in conspicuous places open to the public.

(h) Maintain the stability and legibility of all required signs, symbols, and posted notices.

First, as directed by our Supreme Court, we consider subsection d. Since there is no evidence that the area in which plaintiff encountered the snowboard rail was "closed to skiing," there is no violation. Similarly, subsections a, b, f, g, and h do not appear to have been violated. But, subsections c and e require further consideration. According to the deposition testimony of defendant's general manager, James Bruhn, the area in which plaintiff's injuries occurred was a snowboard park for snowboarders and included a halfpipe, as well as the snowboard rail. Bruhn testified that the area was off-limits to alpine skiers and, when detected in the area, alpine skiers were told to leave either by snowboarders, the ski patrol, or through an announcement made over the personal address system. Bruhn also testified that the area was not posted with any signage to inform alpine skiers to stay out of the area, or to warn of the presence of the snowboard rail.

Pursuant to MCL 408.326a(c) and (e), this snowboard skiing area should have, at least, been marked with an appropriate symbol indicating the relative degree of difficulty of the skiing area which, according to the recently enacted 1999 AACS, R 408.81, would be characterized as "most difficult" compared to the other possible designations of "easiest" and "more difficult." Defendant's failure to do so constitutes a violation of the SASA which resulted in plaintiff (1) skiing into the snowboarding area, without notice or warning of the snowboard rail, (2) colliding with the snowboard rail, and (3) sustaining injuries. See MCL 408.344; see, also, *Lamp v Reynolds*, 249 Mich App 591, 599-601; 645 NW2d 311 (2002). In light of these statutory violations, as well as the failure of defendant's assumption of risk defense, the trial court properly denied defendant's motion for summary disposition.

The ultimate resolution of this case is consistent with the purpose of the SASA legislation—to remedy "a problem with respect to the inherent dangers of skiing and the need for promoting safety, coupled with the uncertain and potentially enormous ski area operators' liability." *Grieb v Alpine Valley Ski Area, Inc*, 155 Mich App 484, 488; 400 NW2d 653 (1986). This delicate balance is sustained by recognizing that, although skiers are deemed to have assumed the risk of most dangers confronted on the slopes, ski area operators are not granted a license by the SASA to disregard skier safety, through the grant of total immunity, when skiers have not been given the opportunity to choose to gamble with their own safety after proper notice or warning. The virtue of this position is aptly illustrated by this case; defendant knew

that alpine skiers were skiing in the restricted area, whether by accident or choice, and yet did next to nothing to prevent or even warn of the potential and reasonably unexpected danger. Skiers should not be deemed to have assumed the risk of any and all dangers that may be encountered during the course of skiing merely because they have chosen to engage in the sport.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Patrick M. Meter