STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

JAMES ERB,

Plaintiff,

vs

File No. 93-5932-NO
HON. PHILIP E. RODGERS, JR.

SHANTY CREEK MANAGEMENT, INC.,

Defendant.
/

L. Kent Walton (P25123)
Attorney for Plaintiff

Margaret A. Costello (P41868)
Attorney for Defendant

DECISION AND ORDER

Defendant submitted a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10) asserting that Plaintiff's claims are barred by the Ski Area Safety Act. MCL 408.321 et seq; MSA 18.483(1) et seq, and that there are no genuine issues of material fact. Defendant further asserts that there exists a valid release of liability signed by Plaintiff which contains an express assumption of risk clause.

Plaintiff timely responded to this Court's Pre-Hearing Order and requests that the Court deny Defendant's motion arguing that a question of material fact remains. Plaintiff, in his Answer to Defendant's Motion for Summary Disposition, asserts that the Ski Area Safety Act, MCL 408.321 et seq; MSA 18.483(1) et seq does not give Defendant immunity from any duty owed to Plaintiff. Additionally, Plaintiff stated, in his Answer to the Motion, that the release he signed when he rented ski boots at the ski shop has no bearing on the facts of this case. Plaintiff does not seek rescission or invalidation of the release. Rather, Plaintiff argues that the release pertains only to liability related to rental equipment.

Plaintiff's action is one for personal injury sustained while

he was skiing on Defendant's premises on January 20, 1990. Plaintiff sustained a broken leg when he fell while attempting to access a beginning hill known as "Greenway" from the lower end of two merging intermediate slopes known as Helm's Gate and Bag Shot Row. Specifically, as stated on page 12 of his brief filed in response to this motion, "Plaintiff's injuries consisted of a severely comminuted fracture of the middle and distal third, right femur, requiring open reduction with internal fixation via an intermedullary rod with interlock-type nail."

Plaintiff claims he encountered icy conditions and fell due to what he described as an unexpected, unmarked "drop-off" between the beginning and intermediate sections; Plaintiff holds Shanty Creek responsible for injuries he suffered in the fall because the ski area enterprise did not block off the specific area where he fell. Plaintiff specifically maintains that fencing was present in an area just uphill from the accident site and that if this fencing had been extended downhill to where he fell, the accident would have been prevented. Additionally, Plaintiff claims that the surrounding area is comprised of beginning and intermediate slopes and this "drop-off" should have been labeled indicating a greater degree of difficulty. Plaintiff relies on statutory requirements that ski operators must mark closed ski runs, slopes and trails to establish the duty which he claims Defendant breached by not marking the "unnamed run" where the accident occurred.

Many facts are undisputed. Plaintiff and a friend had gone to Shanty Creek for a day of skiing. Upon arriving, Plaintiff rented a pair of ski boots from the ski shop. In keeping with the ski shop's policy, Plaintiff signed their release form. In deposition, Plaintiff stated he considered himself to be an intermediate level downhill skier. Not only had he skied at several resorts in the area, he had skied all of the slopes at Shanty Creek with the exception of Greenway, a beginning slope. Plaintiff's friend, a beginning skier, set out to ski Greenway after a few preliminary instructions from Plaintiff.

After skiing for a brief period of time, Plaintiff became

concerned for his friend and decided to check on his progress. Plaintiff, in his Answers to the First Set of Interrogatories, provided the following description of how he fell.

> "I skied down Helm's Gate to a point where it merges with Bag Shot Row. I then approached what I found out later was an unnamed drop off. This area was icy at the top. It appeared to continue on as a gently rolling slope. I suddenly went airborne and did not land on anything until I hit the bottom of the drop off where I landed on grassy, icy, frozen ground." (Defendant's brief, p 4)

Plaintiff further claims that the snow gave the "drop off" a flatter or more gradual appearance than it actually had. He claimed he did not have an adequate perspective to judge the steepness of the incline.

Plaintiff, in deposition testified that:

> It was icy, so instead of stopping and falling, I decided --- because I don't like to fall when I ski, I was going to continue down and come down here and wait for him here. And instead of a gentle rolling slope, it was a drop-off." (Plaintiff's brief p.7)

Additionally, Plaintiff asserts that the Defendant "designed and constructed the drop-off such that it was not a natural phenomenon, but was created by the ski area operator." (Plaintiff's brief, p 18) This Court finds no merit in this assertion. No affidavits or documents were submitted which show that the incline or so called "drop-off" is anything other than a natural variation in terrain.

The issues, then, become whether the Plaintiff's claims are barred by the Ski Area Safety Act, and whether Plaintiff knowingly released Defendant from liability by signing the rental agreement and release form when he rented the ski boots.

The Court has reviewed the motion and response brief together with the depositions, admissions, affidavits and other documentary

evidence submitted by the parties in making its determination on the motion. Pursuant to the applicable standard of review and for the reasons set forth ahead, Defendant's motion is hereby granted.

The standard of review for a (C)(8) motion is set forth in Mitchell v General Motors Acceptance Corp. 176 Mich App 23 (1989).

> A motion for summary disposition brought under MCR 2.116 (C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. Beaudin v Michigan Bell Telephone Co, 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. NuVision v Dunscombe, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [Roberts v Pinkins, 171 Mich App 648, 651; 430 NW2d 808 (1988).]

The standard of review for a (C)(10) motion is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741 (1989).

> A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer, 389 Mich 363, 371-372; 207 NW2d 316 (1973).
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> The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac

> General Hospital, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372.

The Michigan Supreme Court has recently commented upon the variation in analysis required with respect to these rules in Radtke v Everett, 442 Mich 368 (1993) where it wrote as follows:

> MCR 2.116(C)(8) permits summary disposition when the "opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8), therefore, determines whether the opposing party's pleadings allege a prima facie case. Marrocco v Randlett, 431 Mich 700, 707; 433 NW2d 68 (1988). Hence, the court "does not act as a fact finder, " but "accepts as true all well-pleaded facts." Abel v Eli Lilly & Co, 418 Mich 311, 324; 343 NW2d 164 (1984). Only if the allegations fail to state a legal claim will summary disposition pursuant to MCR 2.116 (C)(8) be valid. Macenas v Village of Michiana, 433 Mich 380, 387; 446 NW2d 102 (1989).
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> While MCR 2.116 (c)(8) tests the legal sufficiency of the pleadings, MCR 2.116 (C)(10) tests the factual basis underlying a plaintiff's claim. Velmer v Barage Area Schools, 430 Mich 385, 389-390; 424 NW2d 770 (1988). MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A court reviewing such a motion, therefore, must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party. Steven v McLouth Steel, 433 Mich 365, 370; 446 NW2d 95 (1989).

Taking Plaintiff's factual allegations as true and giving the benefit of all reasonable doubt to the non-movant Plaintiff, the Court is satisfied that the record does not leave open a material factual issue for trial. MCR 2.116 (C)(10). The Ski Area Safety Act places the risk of participating in the sport of skiing upon

the skier for those dangers which are "obvious and necessary." The Act limits a Plaintiff's claim for damages incurred while actively participating in this sport. Section 22(2) of the Act states:

> 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 sports, 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. (Emphasis added)

To avoid summary judgment Plaintiff must show that factual issue exists in support of his claim that Defendant breached its duty to properly maintain the subject ski slopes. MCL 408.3262; MSA 18.483(6a) sets forth, in relevant part, the duties of the Ski Area Operator in the following subsections of the act:

> (c) Mark the top of or entrance to each ski run, to be used by skiers, indicating the relative degree of difficulty of the run.
>
> (d) Mark the top of or entrance to each ski run, which is closed to skiing, with an appropriate symbol indicating that the run is closed.
>
> (e) Maintain 1 or more trail boards at prominent locations in each ski area displaying that area's network of ski runs, and the relative degree of difficulty of each run.

The Court agrees with Defendant's well-reasoned argument that Defendant Shanty Creek does not have a duty to physically close or mark areas which are not designated ski slopes. The Court in the instant case finds that it is not the intent of the Act to have the ski area operator mark every possible location where a person could conceivably ski. Instead it is the responsibility of the skier to

ski only on those slopes which are designated on the "trail board" as open for skiing and appropriately labeled for degree of difficulty. As stated in MCL 408.342(d); MSA 18.483(22)(d), it is a skiers duty to "ski only in those areas which are marked as open for skiing on the trail board."

The evidence which has been presented to this Court demonstrates that Plaintiff was skiing in an area between two marked slopes, an area not intended for skiing. Further, Plaintiff testified that he misjudged the steepness of this incline due to snow conditions. The Court follows the holding in Schmitz v Cannonburg, 170 Mich App 692, 695; 428 NW2d 742, (1988) on the issue of negligence.

> It is clear from the plain and unambiguous wording of Sec. 22 (2) that the Legislature intended to place the burden of certain risk or danger on skiers rather than ski resort operators. Significantly, the list of "obvious and necessary" risks assumed by a skier under the statue involves those things resulting from natural phenomenon, such as snow conditions or the terrain itself.

The Court, then, moves on to Defendant's claim that this action should be dismissed based on an express assumption of risk clause contained in the release which Plaintiff signed when he rented ski boots.

The release of liability form signed and initialed by Plaintiff includes the following language in Paragraph nos. 4, 5 and 6:

> I agree that I will release the ski shop from any and all responsibility or liability for injuries or damages to the user of the equipment listed on this form, or to any other person. I agree NOT to make a claim against or sue this ski shop for injuries or damages relating to skiing

an/or the use of this equipment. (Please initial _____)

I hereby agree to accept the terms and conditions of this contract. This document constitutes the final and entire agreement between this ski shop and the undersigned. The ski shop, itself, provides NO WARRANTIES, express or implied, and this ski equipment is accepted "as is".

I have carefully read this agreement and release of liability and fully understand its contents. I am aware that this is a release of liability and a contract between myself and this ski shop and I sign it of my own free will. (Emphasis added)

This Court finds that this release pertains only to liability related to rental equipment and is clearly a contract between Plaintiff and the ski shop. As Plaintiff referenced in his brief on page 12, it is not clear from Exhibit 6 (a copy of the rental agreement) who owned or operated this ski shop. As such, this release has no bearing on the facts of this case.

Defendant's Motion for Summary Disposition is granted. MCR 2.116(C)(10).

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS
Circuit Court Judge

Dated: 12/27/93