STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and Circuit Court for the County of Livingston)

MATTHEW BARRETT,

Plaintiff-Appellee,

-vs-

MT. BRIGHTON INCORPORATED,
a Michigan corporation,

Defendant-Appellant.

_____/

Supreme Court No: 126544
Court of Appeals No: 222777
L.C. No: 97-16219-NO

126544

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SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANT-APPELLANT MT. BRIGHTON, INC.

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STATEMENT OF ISSUE PRESENTED

AS A MATTER OF LAW, IS A SNOWBOARD RAIL UTILIZED BY SNOWBOARD SKIERS TO PERFORM ACROBATIC MANEUVERS AN INHERENT, NECESSARY AND OBVIOUS DANGER OF THE SPORT OF SKIING ASSUMED BY ALL SKIERS UPON A SNOWBOARD COURSE UNDER §22(2) OF THE SKI AREA SAFETY ACT?

Defendant-Appellant says "Yes."

Plaintiff-Appellee says "No."

The trial court and Court of Appeals said "No."

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SUPPLEMENTAL ARGUMENTS

1. Introductory Matter: The interpretation and application of § 22(2) is an issue of law to be resolved by the Court.

It is well settled that an issue of statutory interpretation is one of law to be determined by the Court and is reviewed *de novo*. Oakland County Board of Road Commissioners v M.P. & C.G.A., 456 Mich 590, 610; 575 NW2d 751 (1998), Colbert v Conybeare Law Office, 239 Mich App 608, 614; 609 NW2d 208 (2000). Consistently, the Michigan Supreme Court and Court of Appeals have held that the issue regarding whether a particular set of circumstances falls within the risks and dangers enumerated in § 22(2) of the Act is a question of law. Anderson v Pine Knob, 469 Mich 20, 23 (2003); McGoldrick v Holiday Amusements, Inc, 242 Mich App 286, 293 (2000); Schmitz v Cannonsburg Skiing Corp., 170 Mich App 692, 696 (1988).

2. The snowboard rail is a manmade alteration to the terrain which constitutes an inherent danger of the sport as a matter of law.

Section 22(2) sets forth a nonexclusive list of dangers of the sport of skiing which are inherent as a matter of law. Defendant, in its current Application, argued extensively that, as a matter of law, an alpine skier who intentionally traverses into a snowboard trail or park must assume those risks inherent in snowboard skiing as well as alpine skiing. This is because, as recently acknowledged, snowboard and alpine skiers share the same slopes and there is no requirement that each skier participate in the others' type of skiing to be a co-participant in the sport. Mastro v Petrick, 112 Cal Rptr 185, 191 (Cal. Ct. App 2001). See also Thomas H. Crews v Seven Springs Mtn, 2005 Pa Super 138, fn 8 (2005) [skier collided with drunken snowboarder; "we perceive no significant difference between skiing and snowboarding for

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purposes of our (assumption of risk) analysis"]. Included within those risks are "injuries which can result from variations in terrain" whether natural or manmade. MCL 408.342(2).

The United States Court of Appeals for the Sixth Circuit has indeed concluded that manmade changes in snowboard slopes constitute a "variation in terrain," the danger of which is assumed by the skier under § 22(2).

More specifically, in Shukoski v Ritchie, 166 F3d 848 (6th Cir 1999), the snowboard slope contained "three clearly visible crescent-shaped mounds of snow" that had been artificially modified "to create ramps, banks, jumps and other features designed to accommodate snowboarders." 166 F3d at 849, 852. Affirming the grant of summary judgment of the Plaintiff's claims of negligent design and placement of the mounds, the Sixth Circuit held that the manmade creation of ramps, jumps and other modifications of the slope constitute a "variation in terrain" -- a danger inherent in the sport as a matter of law. 166 F3d at 852. No distinction was made between a natural variation in terrain and the manmade modifications designed for acrobatic stunts. Id.

Shukoski applied the plain language of § 22(2), which broadly states that "variations in terrain" is a risk inherent in the sport as a matter of law. The statute makes no distinction between natural and manmade variations or modifications.

Even Plaintiff's own expert witness in this action described the subject rail as an elevation of the terrain, consistent with its inclusion within § 22(2):

> The grade of the hill and the vicinity of where the rail had been located was approximately 20% with the falline slightly to the left. To the left of the piperail was a halfpipe for snowboarders. The trails accessible from the top of the Black and Red are labeled as more difficult. The halfpipe and piperail were features of a snowboard park.

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> Photographs show that the piperail was a feature which could be used in the performance of snowboarding tricks similar to tricks performed by skateboarders and in-line skaters on railings. The pipe appears to have been more or less parallel to the falline, and elevated roughly 18 inches (when Barrett's accident happened) above the ground by posts, having an extension on the uphill side that slants down to ground level. The pipe appears to have been roughly 6 inches in diameter and 20 feet long. The height of the pipe above the snow would have been variable and dependent upon the depth of the snowcover. The piperail was yellow.
>
> (See: written report of Helge Lien, pp 1-2, attached hereto as Exhibit B to Defendant's Application for Leave to Appeal).

Plaintiff's expert's own description of the rail supports that the rail constitutes an artificial variation in the terrain of the slope which was an inherent danger of the sport as a matter of law. Compare Shukoski, supra. By statutory mandate, Plaintiff assumed the risk of that danger and his action is barred as a matter of law. Whether it was natural or manmade, the alteration was an inherent risk of the sport. Compare Shukoski, supra.

3. An "obvious" and "necessary" danger need not be a danger which is essential to the existence of the sport or the course.

Reemphasizing the operative statutory language:

> 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.
>
> MCL 408.342(2), supra.

In Schmitz supra, the Michigan Court of Appeals described the characteristics of "obvious and necessary" risks assumed by a skier under the statute:

> The list of "obvious and necessary" risks assumed by a skier under the statute involves those things resulting from natural phenomenon, such as snow conditions or the terrain itself... These are all conditions that are inherent to the sport of skiing. It is safe to say, generally, if the 'dangers' listed in the statute do

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> not exist, there is no skiing.... The skier must accept these dangers as a matter of law.
>
> 170 Mich App at 696, fn 1.

Citing Schmitz, Plaintiff now argues that the snowboard rail was not encompassed by § 22(2) because it was not essential to the existence of the sport (e.g., snowboard skiing). **Schmitz's and Plaintiff's interpretation of the statute is erroneous as a matter of law and the Michigan Supreme Court should now grant affirmative appellate relief in a manner necessary to clarify the required interpretation of the statute.**

There is nothing in the statutory language or legislative history which substantiates an intent to limit application of § 22(2) to risks or characteristics which are essential to the existence of the sport such that, without those characteristics, the sport in its entirety could not exist. Indeed, many of the nonexclusive inherent dangers designated in the statute are not essential to the existence of the sport. The sport may exist even without the statutorily assumed risks of "bare spots, rocks, trees, and other natural growth or debris." Nor are subsurface ice conditions essential to the existence of the sport. By reasoning to the contrary, the Schmitz Court and the Plaintiff herein misinterpret the statutory provision as a matter of law.

A more reasonable and common sense application of the statutory terms in this specific context was set forth by the Superior Court of Pennsylvania in Crews, supra. Crews held that an "inherent" risk of the sport of skiing "is one that cannot be removed without altering the fundamental nature of" the sport. Crews, supra. Similarly, under analogous standards in Wyoming, a risk is not inherent to the sport if it is a risk that participants do not desire to confront and is "uncharacteristic" to the activity. Sapone v Grand Targhee, Inc, 308 F3d 1096, 1103-04 (10th Cir 2002). In California, a snowboard jump is "an essential component of the

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sporting activity itself and cannot be removed "without altering the nature of the sport." Vine v Bear Valley, 118 Cal App 4th 577, 597-598 (2004). In this regard, the snowboard rail is no different than natural moguls and other natural alterations in terrain. **As even the most recent majority of the Court of Appeals panel below acknowledged, the rail was certainly an inherent and integral part of the course for snowboarders notwithstanding that it merely enhances the sport.** The fundamental nature of snowboarding would change drastically by eliminating the mechanisms for acrobatic maneuvers. Shukoski, supra; Vine, supra. Just as manmade "moguls" are not necessary to the existence of the sport of skiing, but are nonetheless an obvious and necessary danger, so too are snowboard rails, ski jumps, half pipes, ramps and other modifications of the slope.

At a minimum, leave to appeal must be granted to clarify the controlling standards to determine the existence of a "necessary" danger inherent in the sport.

4. A condition need not be subjectively, plainly visible in order to be an "obvious," inherent risk of the sport.

Plaintiff now erroneously argues that the rail did not present an "obvious" risk because it was not plainly visible to him. The Michigan Supreme Court has already held in both Anderson v Pine Knob, 469 Mich 20, 27; 664 NW2d 756 (2003) and in these proceedings that the common law "open and obvious" danger standards do not apply to determine whether a risk is "obvious and necessary." (Order 10/8/03, docket no. 120922).

Plaintiff's argument here is also contrary to McGoldrick, supra, where the Court of Appeals rejected that the condition causing the risk need be readily visible in order to constitute an inherent risk of the sport:

> Although plaintiff emphasizes that the tension pole was unpadded, **not readily visible**, and obsolete, the statute does not

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> place any restrictions in stating that immunity is granted for injuries arising from collisions with ski lift towers and their components. Compare *McCormick*, *supra*, at 554 & n 2, where this Court distinguished between restrictions being placed on immunity for injuries arising from collisions with snow making and snow grooming equipment, which subsection 22(2) of the SASA clearly required that such equipment be properly marked or plainly visible in order for immunity to apply, and no restrictions being placed on immunity for injuries arising from collisions with other skiers.
>
> 242 Mich App at 296.

Even the Court of Appeals' Opinion below on second remand agreed that the rail presented a necessary and obvious risk assumed by snowboard skiers even though Plaintiff asserted that the rail was not visibly apparent to him. (Court of Appeals Opinion, 6/3/04, p. 3 attached as Exhibit K to Defendant's Application).

Other Courts applying the "obvious and necessary" language of ski statutes likewise reject that a physical object need be plainly visible to the claimant in order for its danger to constitute an "obvious," inherent risk. For example, in Sklar v Okemo Mountain, Inc, 877 F Supp 85 (D.C. Conn 1995), the United States District Court defined the word "obvious" as describing the nature of the general risk itself:

> To avoid confusing the jury, we found it necessary to instruct the jury that 'you must determine whether the risk of collisions between skiers is obvious or widely known by reasonable people familiar with skiing and ski areas.'
>
> 877 F Supp at 88, fn 1 [applying Vermont sports injury statute].

The risks presented by snowboard rails are plainly obvious to the reasonable skier knowingly on a snowboard trail. It is irrelevant that Plaintiff did not visibly observe the rail at issue. Plaintiff certainly understood that he was voluntarily on a snowboard trail which

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contained rails, half pipes and other objects inherent to the sport. Plaintiff assumed these risks as a matter of law.

The plain language of the statute moreover designates only two specific risks which must be properly marked and thus plainly visible in order to constitute an obvious and necessary danger: "plainly visible snow making or snow grooming equipment." No other portions of the statute articulate a "plainly visible" element of the associated danger or risk. In fact, a number of the risks designated by the statute as "obvious and necessary" as a matter of law are not conditions plainly visible by their very nature, including variations in terrain, subsurface snow, bare spots, rocks and other forms of growth or debris.

Whether or not the snowboard rail constituted a "variation in terrain," it nonetheless presented a risk which was known by objectively reasonable skiers. As a matter of law, the risk was encompassed by § 22(2) of the Act.

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SUPPLEMENTAL ARGUMENT II

DEFENDANT DID NOT VIOLATE MCL 408.326(a) BY POSTING INADEQUATE WARNINGS AT THE ENTRANCE OF THE SUBJECT SKI SLOPE ON WHICH PLAINTIFF WAS INJURED AND THIS ISSUE IS NONETHELESS IMPROPERLY PRESERVED FOR SUPREME COURT REVIEW.

A. Preservation of Issue

Succinctly, Plaintiff has not preserved any cause of action premised upon alleged inadequate warnings that the subject ski slope was closed to all but those who were snowboarders and was otherwise graded as "most difficult." A copy of Plaintiff's Complaint is attached as Exhibit H to Defendant's Application for Leave to Appeal.

Paragraph 6 of the Complaint details the alleged negligence of the Defendant in the manner in which it maintained the snowboard ski run. Paragraph 6 exclusively alleges that Defendant negligently maintained the ski run to assure that the subject rail would be visible to the Plaintiff from the angle at which he entered the trail. The only allegation of failure to warn is moreover set forth in ¶ 6 (i) as follows:

> Defendant failed to give patrons and invitees and this Plaintiff any notice of the danger then existing and arising from the hidden unnatural obstacles placed on said ski runs.
>
> Complaint, ¶ 6(i).

Likewise, a review of the trial court level summary disposition briefs and hearing transcripts substantiates the absence of any claims premised upon the alleged failure to properly mark the difficult-level of the snowboard trail. Again, the only claim of negligent warnings was identified by Plaintiff at the summary disposition hearing as involving the lack of notice of the existence of the rail:

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> There were no signs to indicate that this rail was present. This is an undisputed fact based upon Mr. Bruen's testimony.
>
> Tr 8/31/98, p 15, attached as Exhibit C to Defendant's Application for Leave to Appeal.

In denying Defendant's Motion for Summary Disposition, the trial court held that Plaintiff has presented a factual issue regarding whether the snowboard rail was properly marked, but did not discuss any potential other warning failures:

> But I'm going to deny your motion for summary disposition, and would do so on the basis that there is an issue of fact as to whether or not this was properly marked. Properly -- proper marking appears to this court to be essential under the rules and the statutes. And I think there is a fact question as to whether or not a rail, which at its highest point is 14 inches above the surface, is properly marked for those who engage in what I'll call traditional skiing, as opposed to snowboarding…
>
> Id, pp 32-33.

The issue of the marking of the difficulty level trails, as opposed to the marking of rails, was first raised *sua sponte* by the Michigan Court of Appeals notwithstanding that it was not alleged in the Complaint or otherwise briefed during the summary disposition proceedings. The warnings issue should therefore be held as improperly preserved for appellate review.

B. Supplemental Discussion

In 1998, MCL 408.326(a) described the following limited statutory duties to warn on the part of ski-resort operators:

> (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

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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 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.

MCL 408.326(a)(c)-(e) (1998).

Significantly, none of these three paragraphs require Defendant to mark any part of the subject ski slope as being closed to all but those who were snowboarders. Rather, ¶ (d) of this statute requires only a marking of those trails which are "closed to skiing." The statute does not require any warnings in favor of alpine skiers on a snowboard trail. Rather, as has been established, the term "skiing" encompasses all forms of skiing allowed on the course, alpine, snowboard or otherwise. So long as the trail was open to snowboard skiing, it was not "closed to skiing."

In a similar vain, as dissenting Michigan Court of Appeals Judge Zahra observed, the record in the trial court was devoid of any evidence that Defendant violated the statutory duties to warn of the relative degree of difficulty of each ski trail. (See: Exhibit K to Defendant's Application for Leave to Appeal). Yet, even Plaintiff's expert witness stated in his written expert report that "the trails assessable from the top of the Black and Red are labeled as more difficult" (EXHIBIT B, p 1).

Finally, Plaintiff's admitted subjective knowledge that he had previously skied on the snowboard trail and had purposely traversed onto that trail knowing it to contain snowboard conditions and features would negate the existence of proximate cause of any of Defendant's alleged violations of statutory duties to warn as a matter of law. Indeed, all notices and

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descriptions of the level of difficulty of the snowboard trail pertained to snowboard skiing. Plaintiff knew that the run contained artificial conditions associated with snowboard skiing and chose to utilize that trail notwithstanding his perception of its difficulty level.

Simply put, it is undisputed that Plaintiff voluntarily encountered the snowboard trail with knowledge of its difficulty and risks associated with its artificial conditions as a matter of law. His assumptions of those risks were not in any manner influenced by any alleged inadequate warnings regarding the degree of difficulty of the slope.

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CONCLUSION

For the foregoing reasons, Defendant-Appellant Mt. Brighton, Inc., respectfully requests that this Honorable Court either peremptorily reverse or grant leave to appeal from the Michigan Court of Appeals' decision January 11, 2002.

Respectfully submitted,

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