STATE OF MICHIGAN

COURT OF APPEALS

CHERYLE A. ROUND, as Personal Representative of the ESTATE OF CHARLES R. ROUND,

Plaintiff/Counterdefendant-Appellee,

v

TRINIDAD RESORT & CLUB, LLC,

Defendant/Counterplaintiff-Appellant.

FOR PUBLICATION
December 14, 2023
9:30 a.m.

No. 357849
Antrim County Circuit Court
LC No. 20-009218-NO

ON REMAND

Before: CAVANAGH, P.J., and GARRETT and YATES, JJ.

CAVANAGH, P.J.

This matter is on remand from the Michigan Supreme Court "to address whether the plaintiff pled in her complaint any common-law claims and, if so, whether the enactment of the Ski Area Safety Act, MCL 408.321, *et seq.*, abrogated those common-law claims." *Round v Trinidad Resort & Club, LLC*, 511 Mich 1046; 992 NW2d 282 (2023). We hold that, although inartfully pleaded, one could conclude that plaintiff pled a premises liability claim, but plaintiff's claim is abrogated by the Ski Area Safety Act (SASA); thus, we again remand this matter to the trial court for entry of an order granting defendant's motion for summary disposition and dismissing this case.

I. BACKGROUND FACTS

Our previous opinion set forth the background facts as follows:

> On December 21, 2019, plaintiff's decedent, Charles R. Round, died after allegedly sustaining fatal injuries when he collided with snow-making equipment at Schuss Mountain, a ski area owned and operated by defendant. At the time, Round was participating in an event called the Tannenbaum Blitzen parade whereby volunteer skiers ski down an unlit hill—known as Kingdom Come—at night while carrying lighted torches, eventually getting to the bottom of the hill to light the ski resort's Christmas tree. Round was leading the parade of skiers—as

> he had for several years—when he suddenly veered to his left and skied beyond the edge of the ski run. A ski lift was located on the edge of the ski run and, underneath the ski lift, were four permanent snow-making machines installed at various points up the hill. At about the half-way point of the ski hill, Round crossed into this area, collided with a snow-making machine, and sustained severe injuries that proved fatal. [*Round v Trinidad Resort & Club, LLC*, unpublished per curiam opinion of the Court of Appeals, issued September 15, 2022 (Docket No. 357849), pp 1-2.]

On June 24, 2020, Round's wife, Cheryle A. Round, filed this legal action. Following the paragraphs stating her factual allegations, plaintiff labeled her "cause of action" as "negligence" and stated:

> 38. Defendant owed Plaintiff's decedent a duty of reasonable care and compliance with the Michigan Ski Area Safety Act, Mich. Comp. Laws § 408.321, *et seq*. (the "SASA").
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> 39. Defendant breached its duty of reasonable care and compliance with the SASA in its negligent operation of the Schuss Mountain Ski Area in the following manner:
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> a. Failing to ensure that the snow-making equipment was properly marked or plainly visible to skiers;
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> b. Failing to properly light the ski area during the event;
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> c. Failing to mark the snow-making machine with a visible sign or other warning device to warn approaching skiers;
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> d. Failing to construct or maintain physical barriers to prevent skiers from colliding with the snow-making machine; and
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> e. Failing to install protective padding around the snow-making machine to prevent serious injuries from collisions.
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> 40. As a direct and proximate result of Defendant's negligent acts, omissions, reckless disregard, and violations of its statutory duties under the SASA, Plaintiff's decedent died from his collision with the snow-making machine.

Subsequently, defendant asserted in its affirmative defenses, in relevant part, that defendant was immune and plaintiff's case was barred by the SASA. Defendant also filed a counterclaim alleging breach of contract, indemnification, and other claims based on the release Round had signed.

Plaintiff eventually filed a motion for partial summary disposition as to defendant's defense of immunity under the SASA. Plaintiff argued that her decedent collided with a snow-making machine that was neither properly marked nor plainly visible during the nighttime event; thus, the SASA did not presume—as set forth under MCL 408.342(2)—that her decedent assumed the risk of being injured in this situation. Defendant responded to plaintiff's motion arguing, in relevant part, that plaintiff's decedent assumed the risk of skiing, and further, defendant owed no duty to

mark or make plainly visible the snow-making machine at issue because it was 10 feet tall and was not located on the ski run. The trial court granted plaintiff's motion holding, in relevant part, that "the injury causing hazard (e.g. the snow-making equipment) was neither properly marked nor plainly visible, [and thus], the Decedent cannot be said to have assumed the inherent risk of the hazard and recovery is not precluded by SASA."

Defendant subsequently filed a motion for summary disposition, arguing that it strictly complied with its duties mandated by the SASA. In relevant part, defendant argued that it had no duty under the SASA to light, mark, or pad the snow-making machine at issue because the snow-making machine was located off of the ski run; it was nine feet away from the groomed edge of the ski run known as Kingdom Come. Plaintiff responded to defendant's motion for summary disposition arguing that the snow-making machine was located on the skiable portion of the trail. The trial court denied defendant's motion holding, in relevant part, that it was a question for the jury as to whether the snow-making equipment was on the ski run.

Defendant sought leave to appeal, arguing that the snow-making equipment at issue here was not located on a ski run, and thus, defendant owed no duty to mark the snow-making equipment and could not be held liable for the ski accident. This Court granted leave to appeal. *Round v Trinidad Resort & Club, LLC*, unpublished order of the Court of Appeals, entered September 1, 2021 (Docket No. 357849).

On appeal, defendant argued that the trial court erred in not granting its motion for summary disposition because the snow-making equipment at issue was not located on a ski run; thus, defendant had no duty to place a warning sign on that equipment, MCL 408.326a(b), and defendant could not be held liable for plaintiff's decedent's accident. We agreed, holding that the snow-making equipment was not located on a ski run, and thus, defendant had no duty to mark that equipment with a warning device and was not in violation of the SASA. Accordingly, we reversed the trial court's decision denying defendant's motion for summary disposition and remanded for entry of an order dismissing the case.

Plaintiff sought leave to our Supreme Court, arguing in part that this Court ignored her common-law claims and implicitly concluded that the SASA preempted common-law claims. The Supreme Court did not address either claim; instead, it remanded the case for us "to address whether the plaintiff pled in her complaint any common-law claims and, if so, whether the enactment of the Ski Area Safety Act, MCL 408.321, *et seq*., abrogated those common-law claims." *Round*, 511 Mich at 1046.

II. SUPPLEMENTAL BRIEFING ON REMAND

On remand, we directed the parties the file supplemental briefs addressing whether plaintiff pled any common-law claims in her complaint and, if so, whether the SASA abrogated those claims. *Round v Trinidad Resort & Club, LLC*, unpublished order of the Court of Appeals, entered August 8, 2023 (Docket No. 357849).

A. PLAINTIFF'S SUPPLEMENTAL BRIEF

Plaintiff argues that she advanced "common-law theories of negligence, premises liability, and gross negligence, as well as a statutory violation under the SASA." The alleged statutory violation was defendant's failure to mark the snow-making equipment. However, plaintiff argues, she also alleged that defendant negligently failed to: (1) properly light the ski area; (2) construct barriers to prevent skiers from colliding with the snow-making machine at issue; (3) install protective padding around that snow-making machine; and (4) provide an adequate emergency response after the accident.[1] Plaintiff argues that the SASA does not "completely abrogate[] the common law as it pertains to injuries sustained at ski areas." Instead, the SASA only grants immunity with regard to "hazards inherent in skiing that are both obvious and necessary to the sport." It is only in those instances that skiers are deemed to assume the risk of injury. The SASA sets forth a list of specific duties a ski resort owes to a skier—irrespective of the common law—and may only be liable under the SASA if the ski resort violates one of those duties. The same is true with regard to skiers, i.e., skiers owe specific duties and may be liable if a duty is violated; thus, the SASA "displaces the common law to some extent." But the common law is not displaced in its entirety by the SASA because (1) such a Legislative intent is not clear and uncertain; and (2) if the duties enumerated in MCL 408.326a are deemed exclusive, the skier assumption-of-risk provision, MCL 408.342(2), would be rendered surplusage because § 326a does not include any duty to protect skiers from the dangers listed in § 342(2). Plaintiff argues that the "only 'immunity' offered under the SASA is set forth in MCL 408.342(2) and MCL 408.326a simply imposes a handful of narrow duties on ski area operators to supplement common law negligence principles." Thus, the common law of negligence, premises liability, and gross negligence remain in force at ski areas. Plaintiff argues that our Supreme Court in *Anderson v Pine Knob Ski Resort, Inc*, 469 Mich 20, 26-28; 664 NW2d 756 (2003), basically held that "the SASA preempts common law when the assumption-of-risk provision applies." Accordingly, plaintiff argues, her claims based on the common law were erroneously dismissed by this Court.

B. DEFENDANT'S SUPPLEMENTAL BRIEF

Defendant argues that plaintiff did not plead any common-law claims in her complaint but even if she did, the SASA preempts the common law and provides the sole source of duties owed by defendant. Defendant argues that plaintiff is attempting to add new common-law allegations that were not pled in her complaint which is improper and must be rejected. In fact, defendant argues, plaintiff only pled violations of the SASA which were properly considered on appeal and rejected. However, even if plaintiff had pled common-law claims, defendant argues, the SASA "removes matters like this case, where an expert skier is injured while colliding with an off-run, fixed snow-making machine, from the common-law arena of negligence." Defendant argues that the Legislative purpose of enacting the SASA was precisely to provide immunity for ski-area operators from personal injury lawsuits by skiers injured by dangers inherent in the sport of skiing. The SASA assigns duties and responsibilities to both skiers and ski-area operators to appropriately balance the risks associated with skiing and thereby preempts the common law of torts. Moreover, defendant argues, several cases recognized that the SASA preempts the common law of

[1] Contrary to her argument, plaintiff did not allege in her complaint that defendant failed to provide an adequate emergency response after the accident.

negligence, including *Anderson*, 469 Mich at 26-27, *Richie-Gamester v City of Berkeley*, 461 Mich 73, 85 n 7; 597 NW2d 517 (1999), and *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 742-743; 613 NW2d 383 (2000). And in this case, where the cause of plaintiff's decedent's injuries was among the dangers considered to be inherent in the sport of skiing, the SASA clearly preempts premises liability law. Further, because the snow-making machine at issue was not located on a ski run, defendant owed no duty to plaintiff's decedent under the SASA in that regard, and thus, no duty was breached. Accordingly, plaintiff's case was properly dismissed and this Court should affirm its prior opinion.

III. ANALYSIS ON REMAND

As stated above, in her complaint plaintiff titled her "cause of action" as "negligence," and then stated:

> 38. Defendant owed Plaintiff's decedent a duty of reasonable care and compliance with the Michigan Ski Area Safety Act, Mich. Comp. Laws § 408.321, *et seq*. (the "SASA").
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> 39. Defendant breached its duty of reasonable care and compliance with the SASA in its negligent operation of the Schuss Mountain Ski Area in the following manner:
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> a. Failing to ensure that the snow-making equipment was properly marked or plainly visible to skiers;
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> b. Failing to properly light the ski area during the event;
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> c. Failing to mark the snow-making machine with a visible sign or other warning device to warn approaching skiers;
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> d. Failing to construct or maintain physical barriers to prevent skiers from colliding with the snow-making machine; and
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> e. Failing to install protective padding around the snow-making machine to prevent serious injuries from collisions.
>
> 40. As a direct and proximate result of Defendant's negligent acts, omissions, reckless disregard, and violations of its statutory duties under the SASA, Plaintiff's decedent died from his collision with the snow-making machine.

Accordingly, paragraph 38 alleges that defendant owed plaintiff's decedent "a duty of reasonable care" and—although not specifically stated in her complaint—plaintiff argues on appeal that defendant's duty of reasonable care arose under the common law as well as statutory law, the SASA. Defendant denies that plaintiff pleaded any claims arising under the common law. MCR 2.111(B)(1) requires that the pleader make "specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]" We tend to agree with defendant that plaintiff's complaint did not reasonably inform defendant that plaintiff was asserting a common-law claim. Certainly, plaintiff should have more clearly stated that she was raising a premises liability action as well as a claim under the SASA. More specifically,

plaintiff claims that her decedent sustained injuries while skiing because of colliding with a snow-making machine that was not marked, barricaded, or padded, in an improperly lighted area. These are allegedly dangerous conditions on defendant's property. Therefore—and again not stated by plaintiff in her complaint—any alleged duty owed to plaintiff's decedent by defendant under the common law would arise from defendant's duty as an owner, possessor, or occupier of land; accordingly, the action would sound in premises liability and not ordinary negligence. See *James v Alberts*, 464 Mich 12, 18-19, 626 NW2d 158 (2001); *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012).

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The duty owed to a visitor by a landowner depends on whether the visitor was a trespasser, licensee, or invitee at the time of the injury. *Hoffner v Lanctoe*, 492 Mich 450, 460 n 8; 821 NW2d 88 (2012); see also *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013). Plaintiff's complaint failed to address the alleged status of plaintiff's decedent at the time he was injured. If she had done so, defendant may have been reasonably informed that plaintiff was also asserting a premises liability action. Although plaintiff's complaint was quite unclear as to the assertion of a common-law negligence claim, we will assume for purposes of this remand that it is possible one might have gleaned that plaintiff raised such a claim from the allegation that defendant owed plaintiff's decedent "a duty of reasonable care." But, in any case, plaintiff's premises liability action as allegedly pleaded is barred by the SASA. That is, to the extent that plaintiff pleaded a premises liability action based on the allegedly dangerous conditions in the Schuss Mountain Ski Area—specifically, the snow-making machine and the improper lighting conditions according to paragraph 39 of plaintiff's complaint—her negligence action is abrogated by the SASA.

As explained in our prior opinion, *Round*, unpub op at 4-5:

> The SASA was enacted in 1962 "in an effort to provide some immunity for ski-area operators from personal-injury suits by injured skiers." *Anderson*, 469 Mich at 23. It delineates duties applicable to ski-area operators and to skiers. As to the duties imposed on skiers, and their acceptance of the associated risks of skiing, MCL 408.342 of the SASA provides, in part:
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> > (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.
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> This provision has been referred to as an "assumption-of-risk provision," and means that a skier has assumed the risk of being injured by these and similar dangers as inherent in the sport of skiing. *Rusnak v Walker*, 273 Mich App 299, 301, 304; 729 NW2d 542 (2007). Thus, when a skier's injury arises from one of

> these dangers considered to be inherent in the sport of skiing, the ski-area operator is immune from liability unless the ski-area operator violated a specific duty imposed by the SASA that resulted in injury. *Id*. at 304-305, 313-314; see also *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 742-744; 613 NW2d 383 (2000).

Because we are now directed by our Supreme Court to determine whether the immunity granted to ski-area operators by the SASA extends to the premises liability claim allegedly asserted by plaintiff here—arising from the allegedly dangerous snow-making machine that was *not* located on the ski run at issue and the allegedly poor lighting condition existing at the time plaintiff's decedent was skiing down a hill known as Kingdom Come in a nighttime skiing event—we examine the history of the SASA.

This Court in *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 737; 613 NW2d 383 (2000), explained the history of the SASA as follow:

> The title of the SASA provides that the act was enacted, among other reasons, "to provide for the safety of skiers, spectators, and the public using ski areas," "to provide for certain presumptions relative to liability for an injury or damage sustained by skiers" and "to provide for liability for damages which result from a violation of this act." 1962 PA 199, amended by 1981 PA 86. Before the 1981 amendment, ski areas in Michigan were held to the "prudent man" negligence standard as stated in *Marietta v Cliffs Ridge, Inc*, 385 Mich 364, 369; 189 NW2d 208 (1971) (see Mikko, *Skiing with the Ski Area Safety Act*, 78 Mich BJ 438, 439 [May 1999]).

The 1981 amendment was the result of the "Legislature's intent of promoting safety, reducing litigation and stabilizing the economic conditions in the ski resort industry." *Grieb v Alpine Valley Ski Area, Inc*, 155 Mich App 484, 487; 400 NW2d 653 (1986), citing Senate Legislative Analysis, SB49, Second Analysis, April 17, 1981. As this Court recognized in *Schmitz v Cannonsburg Skiing Corp*, 170 Mich App 692; 428 NW2d 742 (1988), "the Senate Analysis also speaks of the Legislature's concern with making the skier, rather than the ski area operator, bear the burden of damages from injuries:

> "By clearly defining the extent to which skiers and ski area operators are liable for damages and injuries sustained in skiing accidents, the bill would help reduce the number of lawsuits in which skiers recover large sums of money for injuries that are primarily their own fault. This, in turn, should stabilize the constantly increasing insurance costs for ski area operators, which have been passed on to skiing enthusiasts through price hikes for ski lift tickets, rental equipment, waxing services, etc." " [*Id*. at 695, quoting Senate Legislative Analysis SB49, April 17, 1981.]

As this Court noted in *Kent*, 240 Mich App at 739:

> Having reviewed the legislative history of both the act and the amendment, this Court noted that "[t]he Legislature perceived 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 operator's liability." *Grieb*, [155 Mich App] at 488. To solve the problem, the Legislature established rules to set out the respective responsibilities of both ski operators and skiers in the area of safety and decided that all skiers assume the obvious and necessary dangers of skiing. *Id.* at 489.

The rules and responsibilities are detailed in several statutes. See, e.g., MCL 408.326a (detailing certain ski area operator duties); MCL 408.341 and MCL 408.342(1) (detailing certain skier duties); MCL 408.342(2) (a provision for assumption of risks by skiers); and MCL 408.344 (a provision for skiers' and operators' liability for damages).

In this case, plaintiff's decedent allegedly sustained injuries while skiing, i.e., in a skiing accident. Plaintiff's decedent did not sustain injuries while, for example, walking on the premises or because of faulty ski equipment he rented from defendant. Instead, plaintiff sustained injuries while skiing, allegedly because of dangerous conditions on defendant's ski hill. While ski-area operators may not be absolutely immune from all liability that may arise from the operation of their business, we conclude that the SASA abrogated premises liability claims against ski-area operators arising from injuries sustained by skiers while participating in the sport of skiing. In other words, the SASA preempts such common-law negligence claims. This conclusion is especially applicable in this case where plaintiff's decedent's injuries arose from the obvious and necessary dangers that inhere in the sport of skiing. See MCL 408.342(2). As our Supreme Court recognized in *Anderson*, 469 Mich at 23, the Legislature "enacted the SASA in an effort to provide some immunity for ski-area operators from personal-injury suits by injured skiers." And while a skier does not assume the risk that the ski-area operator will violate its duties prescribed under the SASA—and thus a ski-area operator could be liable for such violation—a skier does assume the risk of dangers that inhere in the sport of skiing that are obvious and necessary.[2] See MCL 408.342(2). It is clear from the statutory scheme, legislative history, and case law that the sole basis for liability of ski-area operators for injuries sustained by skiers while participating in the sport of skiing is derived from the SASA. As our Supreme Court also noted in *Anderson*, 469 Mich at 26, "the Legislature has indicated that matters of this sort are to be removed from the common-law arena" because the SASA preempted the common law in this regard, *id*. at 26-27 n 2.[3] In this way, the Legislature has statutorily limited the liability of ski-area operators by balancing the risks assumed by the skier with the responsibilities of the ski-area operator in an effort to promote skier safety. See, e.g., *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 295; 618 NW2d 98 (2000), quoting *Grieb*, 155 Mich App at 488-489.

Here, plaintiff alleged that her decedent confronted a snow-making machine and improper lighting conditions while skiing in a nighttime event. The SASA was enacted to preclude precisely this type of lawsuit. When a skier chooses to ski at night, that skier assumes the risks inherent in skiing at night, including that the lighting conditions might not be optimal. This is an obvious and

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[2] A skier, however, does not assume the risk from a danger that is unnecessary or not obvious, and thus, a ski-area operator could be held liable in that regard. See *Anderson*, 469 Mich at 26.

[3] Our Supreme Court in *Richie-Gamester*, 461 Mich at 85 & n 7, also recognized that the Legislature modified the common law of torts through the enactment of the SASA.

necessary danger of nighttime skiing. And as we stated in our previous opinion, plaintiff's decedent confronted the snow-making machine at issue when he skied well off of the ski run. That is, the snow-making machine was not located on the ski run, i.e., "on the path or route expected to be used for skiing down Kingdom Come." *Round*, unpub op at 6. When a skier intentionally or inadvertently skies off the path or route dedicated to be used for skiing down a particular hill, that skier assumes the risks of doing so, including that snow-making equipment, ski lift structures, and other potential hazards may be confronted. Under those circumstances, the danger of a collision occurring is inherent in the sport of skiing and is obvious and necessary. As we stated in our previous opinion, a ski-area operator is not an absolute insurer of safety and is not charged by law with the impossible task of making its entire facility "accident proof." *Id*. at 8. Accordingly, to the extent that plaintiff pled a premises liability claim arising from injuries her decedent sustained when he collided with snow-making equipment located off of the ski run during his participation in a nighttime skiing event such claim is abrogated by the SASA. Therefore, we again remand this matter to the trial court for entry of an order granting defendant's motion for summary disposition and dismissing this case.

Remanded for entry of an order granting defendant's motion for summary disposition and dismissing this case. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kristina Robinson Garrett
/s/ Christopher P. Yates