In the Supreme Court

Appeal from the Court of Appeals
[Janet T. Neff, E. Thomas Fitzgerald, Michael J. Talbot]

ROBERT R. ANDERSON and CHRISTINE M. ANDERSON, as Next Friends of ROBERT C. ANDERSON, a Minor,

Plaintiffs - Appellees

v

SC: 121587
COA: 227832
Oakland CC: 99-016011-NO

PINE KNOB SKI RESORT, INC.,

Defendant - Appellant.

Brief on Appeal of Defendant - Appellant

Oral Argument Requested

Robert L. Bunting (P24212)
Attorney for Defendant - Appellant
P.O. Box 7
Oxford, MI 48371
(248) 628-5150

RECEIVED
DEC 17 2002
CORBIN DAVIS
CLERK SUPREME COURT

TABLE OF CONTENTS

Page

Index of Authorities v

Statement of the Basis of Jurisdiction 1

Statement of the Questions Involved 2

I. Statement of Standard of Review 3

II. Statement of Relevant and Controlling Facts 4

III. Statement of the Procedural Facts 6

IV. Summary of the Argument as Required by MCR 7.306(B) 8

V. Legal Argument 10

A. The Michigan Court of Appeals Erred When it Affirmed The Trial Court's Order Denying Defendant's Motion For Summary Disposition Where The Plaintiff's Injury Resulted From an Enumerated Danger Under MCL 408.342(2) Which Bars the Plaintiff's Claims as a Matter of Law. 10

1. The Legislative Intent of The Ski Safety Act is to Decrease and Expressly Limit the Liability of Ski Areas and Tremendous Costs of Litigation Arising Out of an Inherently Dangerous Voluntary Sport by Proactively and Expressly Allocating Certain Liabilities to the Skiers 11

2. The Plain Meaning of The Ski Safety Act Controls 12

3. The Principle of "Ejusdem Generis" Applies When Examining MCL 408.342(2) 13

B. MCL 408.342(2) Creates an Express Assumption of the Risk Provision Which Bars the Plaintiffs' Recovery in This Case as a Matter of Law 13

1. The Plaintiff Was a Skier at the Time He Suffered His Alleged Injury 14

2. The Plaintiff Admits That His Injuries Resulted From Snow, Ice Or A Variation In The Terrain And These Admitted Facts Are Confirmed On The Record By The Trial Court 17

C. Existing and Controlling Michigan Case Law Makes it Clear that the Plaintiffs' Claim is Barred by the Ski Safety Act at MCL 408.342(2). 25

1. In **McGoldrick** v **Holiday Amusements, Inc.**, 242 Mich App 286; 618 NW2d 98 (2000) The Michigan Court of Appeals Confirmed That a Collision With an Enumerated Danger Bars a Plaintiff Skier's Claim. 27

2. In **Kidwell** v **Wakefield Properties**, Unpublished Opinion, 946 F2d 895 (6th Cir 1991) the 6th Circuit Confirmed That Where a Plaintiff Suffers an Injury Resulting From an Obvious And Necessary Danger Under The Ski Safety Act, The Plaintiff's Claim is Barred as a Matter of Law. 27

3. In **Kent** v **Alpine Valley**, 240 Mich App 731; 613 NW2d 383 (2000) The Michigan Court of Appeals Again Confirms That Where a Plaintiff Suffers an Injury Resulting From an Enumerated Danger The Plaintiff's Claim is Barred as a Matter of Law 29

4. In **McCormick** v **Go Forward Operating Limited Partnership**, 235 Mich App 551; 599 NW2d 513 (1999) the Michigan Court of Appeals Confirmed That Where a Plaintiff's Injury Results From an Enumerated Danger the Plaintiff's Claim is Barred as a Matter of Law. 31

5. In **Shukoski** v **Indianhead Mountain Resort, Inc.**, 166 F3d 848 (6th Cir, Feb. 4, 1999) the 6th Circuit Again Confirms That Where a Plaintiff's Injury Results From Snow, Ice or a Variation in Terrain the Plaintiff's Claim is Barred as a Matter of Law. 31

6. In **Grieb** v **Alpine Valley Ski Area, Inc.**, 155 Mich App 484; 400 NW2d 653 (1986) The Michigan Court of Appeals Again Confirms That Where a Plaintiff Suffers an Injury Resulting From an Enumerated Danger the Plaintiff's Claim is Barred as a Matter of Law. 32

7. In **Schmitz** v **Cannonsburg**, 170 Mich App 692; 428 NW2d 742 (1988) the Michigan Court of Appeals Ruled That Where a Plaintiff's Injury Results From a Danger Under The Ski Safety Act The Ski Area Operator's Behavior is Irrelevant. 33

8. In **Knox** v **Mt. Brighton Ski Area**, Unpublished Opinion, Per Curiam of the Court of Appeals, Decided [March 1, 1996] (Docket No. 173553) the Michigan Court of Appeals Ruled That a Plaintiffs Claim Can be Barred by The Ski Safety Act Even When The Injury Did Not Result From an Enumerated Danger 34

D. The Court of Appeal's Opinion Conflicts With And Violates The Rules of Statutory Construction 35

E. The Principles Of Common Law Premises Liability Are Part of the Ski Safety Act. 37

F. The Open and Obvious Doctrine Also Bars Plaintiffs' Claims As a Matter of Law. 42

VI. Conclusions and Relief Requested 47

INDEX OF AUTHORITIES

CASES

Page

Anderson v **Pine Knob**,
unpublished opinion per curiam of the Court of Appeals, decided
[March 26, 2002] (Docket No. 227832) 1, 8, 17, 19, 25

Barr v **Mt. Brighton**,
215 Mich App 512; 546 NW2d 273 (1995) 39, 40

Bazan v **Crystal Enterprises, Inc.**,
unpublished opinion per curiam of the Court of Appeals,
decided [October 11, 2002](Docket #234646) 22

Benejam v **Detroit, Tigers Inc.**,
246 Mich App 645; 635 NW2d 219, 225 fn9 (2001) 46

Burden v **Elias Bros. Big Boy Restaurants**,
240 Mich App 723; 613 NW2d 378 (2000) 3

Grieb v **Alpine Valley Ski Area, Inc.**,
155 Mich App 484; 400 NW2d 653, 655 (1986) 12, 32, 33, 39

Joyce v **Rubin**,
249 Mich App 231; 642 NW2d 360, 366 (2002) 45, 46

Karl v **Bryant Air Conditioning**,
416 Mich 558; 331 NW2d 456 (1982) 12

Kent v **Alpine Valley**,
240 Mich App 731; 613 NW2d 383 (2000) 29, 30, 39, 40

Kidwell v **Wakefield Properties,**
unpublished opinion of the 6th Circuit Court of Appeals,
decided [October 16, 1991] 946 F2d 895 (6th Cir 1991) 24, 25, 27, 28, 29

Knox v **Mt. Brighton Ski Area**,
unpublished opinion per curiam of the Court of Appeals,
decided [March 1, 1996] (Docket No. 173553) 34, 35

Lugo v **Ameritech**,
464 Mich 512; 629 NW2d 384 2001 . . . . . 42, 43, 44

Maiden v **Rozwood**,
461 Mich 109; 597 NW2d 817 (1999) 3

McCormick v **Go Forward Operating Limited Partnership**,
235 Mich App 551; 599 NW2d 513 (1999) 31

McGoldrick v **Holiday Amusements, Inc.**,
242 Mich App 286; 618 NW2d 98 (2000) 27

Moll v **Abbott Laboratories**,
444 Mich 1; 506 NW2d 816, 829 (1993) 4

Murphy v **Steeplechase Amusement Co.**,
250 NY 479, 483 (1929) 46

People v **Lee**,
447 Mich 552; 526 NW2d 882, 885 (1984) 38

Pohutski v **City of Allen Park**,
465 Mich 675 ; 641 NW2d 219 (2002) 11, 36, 38, 47

Poletown Neighborhood Council v **City of Detroit**,
410 Mich 616; 304 NW2d 455 (1981) 13

Radtke v **Everett**,
442 Mich 368; 501 NW2d 155 (1993) 3

Schmitz v **Cannonsburg Skiing Corp.**,
170 Mich App 692; 428 NW2d 742 (1988) 11, 21, 33, 34,40, 41

Shukoski v **Indianhead Mountain Resort, Inc.**,
166 F3d 848 (6th Cir 1999) 15, 31, 32

Sumpter v **Kosinksi**,
165 Mich App 784; 419 NW2d 463 (1988) 3

Statutes

MCL 408.321 8
MCL 408.322(g) 14
MCL 408.323 41
MCL 408.326a 41
MCL 408.329 41
MCL 408.332 41
MCL 408.336 41
MCL 408.340 41
MCL 408.341 . . . . . 40, 42
MCL 408.342(1) 40, 41, 42
MCL 408.342(2) . . . . . 1, 8, 9, 10, 13, 14, 21,22 - 26, 33,34, 35,37, 39, 40, 42, 47
MCL 408.344 . . . . . 9, 40, 42

Court Rules

MCR 2.116(C)(8) 3
MCR 2.116(C)(10) 3
MCR 7.302(B) 8
MCR 7.302(F)(1) 1
MCR 7.306 8

Other Authorities

Senate Legislative Analysis, SB49, April 17, 1981 12

STATEMENT OF THE BASIS OF JURISDICTION

On October 30, 2002, this Michigan Supreme Court, pursuant to MCR 7.302(F)(1), issued an Order granting the Defendant - Appellant, Pine Knob's ("Defendant") application for leave to appeal from the March 26, 2002 decision of the Court of Appeals, **Anderson** v **Pine Knob**, unpublished opinion per curiam of the Court of Appeals decided, [March 26, 2002] (Docket No. 227832).

The Order of this Michigan Supreme Court directed that the parties are to include, among the issues to be briefed, the role, if any, of the principles of common law premises liability in claims arising under the Ski Area Safety Act and whether the Plaintiffs' claim is barred by MCL 408.342(2). This Michigan Supreme Court's Order provides as follows:

> "On order of the Court, the application for leave to appeal from the March 26, 2002 decision of the Court of Appeals is considered, and it is GRANTED. The parties are directed to include among the issues to be briefed (1) the role, if any, of principles of common law premises liability in claims arising under the Ski Area Safety Act, MCL 408.321 et seq., and (2) whether this claim is barred by MCL 408.342(2)." (**Appendix at p. 119a**)

STATEMENT OF THE QUESTIONS INVOLVED

I. DID THE MICHIGAN COURT OF APPEALS ERR WHEN IT AFFIRMED THE TRIAL COURT'S ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION WHERE THE PLAINTIFF'S INJURY RESULTED FROM AN ENUMERATED DANGER UNDER MCL 408.342(2) WHICH BARS THE PLAINTIFFS' CLAIMS AS A MATTER OF LAW?

Plaintiff/Appellee says:	"No."
Defendant/Appellant says:	"Yes."
Court of Appeals says:	"No."
Trial Court says:	The Trial Court Failed to Answer this Question.

II. ARE THE PRINCIPLES OF COMMON LAW PREMISES LIABILITY INCORPORATED INTO, AND CONTROLLED BY THE SKI SAFETY ACT?

Plaintiff/Appellee says:	"No."
Defendant/Appellant says:	"Yes."
Court of Appeals says:	The Court of Appeals Failed to Answer This Question.
Trial Court says:	The Trial Court Failed to Answer this Question.

I. STATEMENT OF STANDARD OF REVIEW

A denial of summary disposition *is reviewed de novo*. **Burden** v **Elias Bros. Big Boy Restaurants**, 240 Mich App 723, 725; 613 NW2d 378 (2000); **Maiden** v **Rozwood**, 461 Mich 109; 597 NW2d 817 (1999).

A Motion for Summary Disposition under MCR 2.116(C)(8) is granted on the pleadings alone in cases where the plaintiff's claim is unenforceable as a matter of law. **Sumpter** v **Kosinski**, 165 Mich App 784; 419 NW2d 463 (1988).

A Motion for Summary Disposition under MCR 2.116(C)(10) is granted where there is no issue of material fact and judgment in favor of the moving party is appropriate as a matter of law. **Radtke** v **Everett**, 442 Mich 368, 374; 501 NW2d 155 (1993). The party opposing a Motion for Summary Disposition made under MCR 2.116(C)(10) cannot rely on their pleadings alone:

> "When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading," (**Maiden** v **Rozwood**, 461 Mich 109; 597 NW2d 817, 823 (1999).)

A court reviewing a motion brought under MCR 2.116(C)(10) examines the substantive evidence offered by the party opposing the motion. A court may not deny the Motion for Summary Disposition by simply stating that there is a possibility that the claim will be supported at trial. A mere "promise" is insufficient.

> "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." (**Maiden**, at p. 824.)

Furthermore this Michigan Supreme Court has ruled that summary disposition is a favored remedy which promotes the preservation of judicial resources. (**Moll** v **Abbott Laboratories**, 444 Mich 1; 506 NW2d 816, 829 (1993).)

II. STATEMENT OF RELEVANT AND CONTROLLING FACTS

At the time of the incident, the Plaintiff - Appellee, Robert C. Anderson ("Plaintiff") was a skier with over 10 years of skiing experience. (**Appendix at p. 31a**) The Plaintiff skied since he was a young boy, including many resorts out West. (**Appendix at p. 31a**) The Plaintiff is a "veteran" member of the Detroit County Day ("Country Day") Varsity ski racing team. (**Appendix at p. 32a and 34a)** Country Day is a member of the South East Michigan Ski League "SEMSL". (**Appendix at p. 17a**) The Plaintiff continued -- after the incident -- to ski and race on the Country Day Varsity ski team. (**Appendix at p. 65a**)

On January 5, 1999, the Plaintiff came to the Defendant's ski area, as he had many times before, to actively compete in a SEMSL scheduled ski race. (**Appendix at p. 33a**) The Plaintiff admits that he skied at the Defendant's ski area on at least thirty (30) prior occasions. (**Appendix at p. 35a**) The Plaintiff arrived at the ski area around 5:00 p.m. and met his teammates. (**Appendix at p. 33a**) On January 5, 1999, the race course was setup by the High School ski coaches and inspected by the participating skiers and school coaches prior to the scheduled race. (**Appendix** at p. 46a) **The Defendant had no role in setting up the ski race course or conducting the actual race**. The setting of the race course is the express responsibility of the designated SEMSL ski coach assigned to the task that day. (**Appendix at p. 50a**)

The race course, including the position of the finish line and poles, is set for each race by a designated school ski coach and the positioning of the course -- including the finish line area -- is based on multiple factors such as ski conditions, the type of race, weather, ability of the skiers, etc. (**Appendix at p. 47a, 54a**) The race course, the finish line and the timing structure used to time the racers are all visible from the top of the ski hill and the skiers are coached to keep their eyes up and look down the ski hill at all times. (**Appendix at p. 56a)**The timing structure has always been in the same location. (**Appendix at p. 47a, 49a, 52a**,) The timing equipment is a necessary part of the SEMSL race because of the ski race competition. The timing structure houses weather sensitive computerized timing devices which are owned by the SEMSL ski league -- not the Defendant. (**Appendix at p. 47a**) The timing structure itself is built from donated wood by a group of volunteers on behalf of the SEMSL ski league. (**Appendix at p. 47a, 48a**) The SEMSL coaches have the discretion to set the finish line poles at any location at the bottom of the hill which has approximately 100 - 150 feet of open, unobstructed area. (**Appendix at p. 48a, 55a**)

On January 5, 1999, the Plaintiff went to the top of the race hill and did a practice run skiing successfully down the race course. (**Appendix at p. 36a**) The Plaintiff returned to the top of the same hill and raced down against a teammate as part of the SEMSL competition. **As the Plaintiff neared the bottom of the run during his race, he was in a full racing tuck, and he admittedly "caught an edge" with his ski on the snow, the ice or the terrain, lost his balance, skied out of control and off of his intended course, fell to the ground and then slid into the timing structure located**

off of the race course. (**Appendix at p. 39a**)The testimony is uncontroverted that the ski conditions on January 5, 1999 were good, the timing structure was visible, had a yellow caution sign on it, and the only reason for the collision with the timing structure is the Plaintiff's loss of control because of his **admitted** mishap with snow, ice and terrain. (**Appendix at p. 39a, 43a**) Even the Plaintiff's parents testified that the timing structure was in plain view on January 5, 1999 and was always present during the ski races they attended. (**Appendix at p. 58a, 64a**) Thomas Halsey, the SEMSL ski coach for Cranbrook High School, is a disinterested eye witness. In a sworn Affidavit, Thomas Halsey states that the Plaintiff was "skating" to the finish line which is a frowned upon practice in ski racing which has the effect of achieving more speed. Halsey further states that the Plaintiff lost his balance when he decided to "skate" and one of his skis caught an edge on the snow, ice or terrain, resulting in his change of his course. (**Appendix at p. 48a**) The Plaintiff was immediately assisted by the ski coaches, his own parents, the ski patrol and the local EMS who were called by several parents. (**Appendix at p. 48a**)

III. STATEMENT OF THE PROCEDURAL FACTS

On July 8, 1999, the Plaintiff filed his complaint in this matter. After full and complete discovery, the Defendant filed its Motion for Summary Disposition on March 1, 2000. On May 24, 2000, the Trial Court denied the Defendant's Motion for Summary Disposition and an Order was entered on June 5, 2000. (**Appendix at p. 108a**)

At oral argument on the Defendant's Motion for Summary Disposition and based on the Briefs submitted, including all relevant exhibits, pleadings, testimony, and admissions, the Trial Court first made an express finding -- on the record -- that the Plaintiff was skiing down a race course when his ski caught an edge of snow, ice or terrain. First, the Trial Court expressly concluded that the Plaintiff fell, and then "slid" into a "race timing shed".

> **"Now, the facts as I understand them are fairly simple. The plaintiffs' minor was a member of his high school skiing team. And while he was skiing down a race course at the defendant's ski resort, his ski caught on an edge of snow, ice, or terrain. He fell and slid into a race timing shed."** (Trial Court Transcript at p. 4) (Emphasis Added.)(**Appendix at p. 97a**)

Second, the Trial Court ruled that a skier, like Plaintiff, is obligated by law to maintain reasonable control of his course and speed at all times as set forth by statute at MCL 408.342(1)(a).

> **"Now, 408.342(1)(a) provides that while in a ski area, a skier shall maintain reasonable control of his speed and course at all times. And 408.342 provides -- and I want to read it 'cause I think it's important here:"** (Trial Court Transcript at p. 5) (Emphasis Added.)(**Appendix at p.98a**)

Third, the Trial Court ruled that the timing structure was obvious and that the Plaintiff admitted to seeing it.

> **"Now, there's no doubt the shack was obvious, and the plaintiffs' minor saw it. And he admitted so at deposition."** (Trial Court Transcript at p. 8)(Emphasis Added.)(**Appendix at p. 101a)**

Despite the controlling rulings set forth above, the Trial Court denied the Defendant's Motion for Summary Disposition. (**Appendix at p. 108a**)

On June 14, 2000, the Defendant filed its Application for Leave for Interlocutory Appeal with the Michigan Court of Appeals and a Motion with the Trial Court for a stay of proceedings pending the interlocutory appeal. On July 5, 2000, the Trial Court denied the Defendant's Motion for Stay Pending Interlocutory Appeal.

On September 13, 2000, the Court of Appeals issued an Order granting the Defendant's Application for Leave for Interlocutory Appeal and further granting a stay pending the interlocutory appeal. On March 26, 2002, the Court of Appeals affirmed the Trial Court's June 5, 2000 Order denying Defendant's Motion for Summary Disposition.

> "The trial court denied summary disposition, finding that the action was not barred by the assumption of the risk provisions of the SASA and that there was a question of fact about whether the finish or timing shack was placed too close to the finish line of the race hill. . . .We affirm." (**Anderson** v **Pine Knob Ski Resort, Inc**., unpublished opinion per curiam of the Court of Appeals, decided [March 26, 2002] (Docket No. 227832) ("Decision") (**Appendix at p. 110a-115a**)

On April 30, 2002, the Michigan Court of Appeals denied Defendant's Motion for Re-hearing. (**Appendix at p. 116a**) On May 21, 2002, the Defendant filed its Application for Leave to Appeal to the Michigan Supreme Court Pursuant to MCR 7.302(B). On October 30, 2002 this Michigan Supreme Court issued an Order granting the Defendants Application for Leave to Appeal. (**Appendix at p. 119a**)

IV. SUMMARY OF THE ARGUMENT AS REQUIRED BY MCR 7.306(B)

The Plaintiffs' claims are first barred by the Ski Area Safety Act, MCL 408.321 et. seq. ("Ski Safety Act"). The Ski Safety Act, at MCL 408.342(2), **expressly** bars claims for injuries "which can result from" certain types of dangers pre-determined by the Michigan

legislature to be inherent to the sport of skiing and subject, therefore, to a complete assumption of the risk by the skier as a matter of law.

> "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." (MCL 408.342.) (**Appendix at p. 7a**) (Emphasis Added.)

Here, the Plaintiff admittedly had a mishap which "can result from" snow, ice and terrain when he "caught an edge" with his ski. (Both the Trial Court and the Court of Appeals confirm this fact.) Snow, ice and terrain are "expressly" enumerated dangers under the Ski Safety Act for which the Plaintiff assumes the risk as a matter of law. Because the Plaintiff's injury is the direct result of the snow, ice or the terrain, the Plaintiff's claim is barred as a matter of law under MCL 408.342(2).

Second, the language in the Ski Safety Act provides that the Ski Safety Act is designed to **prescribe the duties of ski area operators and skiers**. The Ski Safety Act expressly dictates the duties of skiers and ski area operators. If a claim is not expressly barred by MCL 408.342(2), then a Court looks to the balance of the Ski Safety Act, including the prescribed duties and the comparative negligence principles expressly set forth at MCL 408.344, under the plain language of the Ski Safety Act. Under the statutory scheme, if the ski area operator or skier violated their "prescribed" duties under the Ski Safety Act, then they are liable for that portion of the loss or damage arising out of their

violation. Under the statutory scheme, if there is no violation by the ski area operator, then there is no liability allocated to the ski area operator. Here, the record is clear that the Defendant did not violate the Ski Safety Act. In fact, no such violation is pled by the Plaintiffs. To the contrary, the record is clear and the relevant facts are confirmed by both the Trial Court, the Michigan Court of Appeals and the Plaintiff himself, that the Plaintiff failed to maintain his course and speed, failed to ski within his control, lost his control, veered off his intended course, fell, and then collided with the timing structure. These factors are undisputed and confirmed by every reviewing court.

Third, even if this Court were to find that principles of common law premises liability play a role independent of the Ski Safety Act, the Plaintiffs' claims are barred by the doctrine of open and obvious. The timing structure which the Plaintiff came into contact with after his mishap with snow, ice and terrain was an open and obvious structure specifically known by the Plaintiff. Michigan case law is clear that where an alleged danger is open and obvious, there is no duty. Here, the timing structure was admittedly open and obvious as confirmed by all of the record testimony and all of the fact determinations made by the Trial Court and the Michigan Court of Appeals. Under common law, the Plaintiffs' claims are barred accordingly.

V. LEGAL ARGUMENT

A. The Michigan Court of Appeals Erred When it Affirmed The Trial Court's Order Denying Defendant's Motion For Summary Disposition Where The Plaintiff's Injury Resulted From an Enumerated Danger Under MCL 408.342(2) Which Bars the Plaintiff's Claims as a Matter of Law.

Standard of Review = De Novo

1. **The Legislative Intent of The Ski Safety Act is to Decrease And Expressly Limit The Liability of Ski Areas and Tremendous Costs of Litigation Arising Out of An Inherently Dangerous Voluntary Sport by Proactively And Expressly Allocating Certain Liabilities to The Skiers.**

The intent of the Ski Safety Act is clear and unambiguous. When interpreting statutes, Michigan courts first determine the purpose and the intent of the statute starting with the statutory language itself.

> **"When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute."** (**Pohutski v. City of Allen Park,** 465 Mich 675 ; 641 NW2d 219, 226 (2002)) (Emphasis Added)

The Ski Safety Act is designed and expressly intended to allocate -- proactively – certain risks to the **skier** rather than the ski area operators. By way of example, the burden to ski within ones ability and the mandate to maintain course and speed within that ability falls squarely on the skier. The Ski Safety Act creates a controlling assumption of risk provision which operates to bar claims for injuries which can result from dangers listed, or similar to those listed, in the statute. This is confirmed by the Michigan Court of Appeals.

> "However, it is clear from the plain and unambiguous wording of section 22(2) that the **legislature intended to place the burden of certain risks or dangers on skiers, rather than ski resort operators."** (**Schmitz** v **Cannonsburg Skiing Corp.**, 170 Mich App 692, 695; 428 NW2d 742 (1988).) (Emphasis Added.)

In fact, Senate Legislative Analysis, SB49, April 17, 1981, sets forth the specific intent of the legislature. In part, the intent is to define the extent to which skiers and ski area operators are liable for skiing accidents and to protect ski area operators from the burden of personal injury lawsuits for mishaps which are the fault of skiers:

> "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." (Senate Legislative Analysis SB 49) (Emphasis Added.) (**Appendix at p. 10a**)

The clarity of this statute, and its intent, was confirmed by the Michigan Court of Appeals in **Grieb** v **Alpine Valley Ski Area, Inc**., 155 Mich App 484; 400 NW2d 653, 655 (1986).

> **"The purposes of the legislation include safety, reduction in litigation and economic stabilization of an industry which substantially contributes to Michigan's economy."** (**Grieb,** 400 NW2d at p. 655.) (Emphasis Added)

The language of the controlling Ski Safety Act is clear and its intent is focused.

2. The Plain Meaning of The Ski Safety Act Controls.

When interpreting clear and unambiguous statutes, a common sense reading applies.

> "Where the language used is clear and the meaning of the words chosen is unambiguous, **a common sense reading** of the provision will suffice, and no interpretation is necessary." (**Karl** v **Bryant Air Conditioning**, 416 Mich 558, 567; 331 NW2d 456 (1982).) (Emphasis Added.)

Thus, Michigan courts view statutes with a common sense reasoning given a lack of ambiguity.

3. The Principle of "Ejusdem Generis" Applies When Examining MCL 408.342(2).

The doctrine of ejusdem generis is a recognized principle of statutory construction which states that if a general term is followed by specific terms, the general term will be limited and further defined by the more specific terms which follow:

> "Moreover, under the principle of ejusdem generis, where a statute contains a **general term supplementing a more specific enumeration, the general term will not be construed to refer to objects not of like kind but those enumerated."** (Poletown Neighborhood Council v City of Detroit, 410 Mich 616, 634; 304 NW2d 455 (1981).) (Emphasis Added.)

At MCL 408.342(2), the Ski Safety Act expressly states that skiers accept, as a matter of law, certain "dangers". The Ski Safety Act then lists, by way of examples, the dangers accepted and assumed by skiers. Under the principle of ejusdem generis, the general term "danger" is further defined by example dangers, which are listed in the statute. (See MCL 408.342(2) as discussed below.) These enumerated dangers include all mishaps arising from snow, ice and variations in terrain. Likewise, the listed dangers include rocks, trees and debris. The Plaintiff's admitted mishap resulting from snow, ice or a variation in terrain expressly bars his recovery because these dangers are not only inherent to the sport, but are also pre-determined by the Ski Safety Act to be "assumed" by the skier as a matter of law.

B. MCL 408.342(2) Creates an Express Assumption of The Risk Provision Which Bars The Plaintiffs' Recovery in This Case as a Matter of Law.

The Ski Safety Act sets forth, in part, the statutory and pre-determined allocation of liability at issue in this case:

"(1) While in a ski area, each skier shall do all of the following:

(a) Maintain reasonable control of his or her **speed** and **course** at all times...

(c) Heed all posted signs and warnings...

(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."(MCL 408.342.) (Emphasis Added.) **(Appendix at p. 7a)**

As a result, each skier in Michigan accepts -- as a matter of law -- the "dangers" related to snow, ice and variations in terrain.

1. The Plaintiff Was a Skier at The Time He Suffered His Alleged Injury.

The Ski Safety Act defines a skier as someone having skis on in a ski area.

"(g) "Skier" means a person wearing skis * * * or utilizing a device that attaches to at least 1 foot or the lower torso for the purpose of sliding on a slope. The device slides on the snow or other surface of a slope and is capable of being maneuvered and controlled by the person using the device. Skier includes a person not wearing skis or a skiing device while the person is in a ski area for the purpose of skiing. (MCL 408.322(g).)

Moreover, the U.S. Court of Appeals for the 6th Circuit interpreted the Ski Safety Act and found that application of the Ski Safety Act does not require that a skier be engaged in the specific act of skiing in order to be considered a "skier" under the Ski Safety Act.

> "Thus, as Defendants note, if a skier walking from the ski lodge to his equipment were to suffer serious injuries from a fall due to icy conditions, he would not be able to recover from the ski resort for his injuries because such a fall is well within the scope of the inherent risks of skiing. **The Act prohibits recovery even though the injured party was not actively skiing or even wearing skiing equipment."** (**Shukoski** v **Indianhead Mountain Resort, Inc.**, 166 F3d 848, 852 (6th Cir 1999).) (Emphasis Added.)

Here, the Plaintiff admits to having skis on and participating in the sport of skiing by racing down the ski hill when he suffered his injury:

> "A. On my second run? Okay. I started obviously at the top of the hill. I went through the course, the set course, and at approximately the last gate I lost my balance. All my weight was on my right leg. I was in the tuck position because it was the last -- like I said before, like it was the last gate, and as I was -- because I lost my balance I kind of caught an edge. That's a ski term. I was directed to the right, just a little off to the right and the building was -
>
> Q. From catching the edge it forced you to the right; is that what you're saying?
>
> A. Because I lost my balance, yes. Well, I went more right than I would have liked, yes, obviously. And at that point I saw the building and smacked into the building."
> (Plaintiff Robert C. Anderson's Dep at p. 49, 50.) **(Appendix at p. 38a, 39a)**

Furthermore, the Plaintiff, in his responses to the Defendant's Requests for Admissions, admits that at the time of his injury, he is a "skier" as defined by MCL 408.322(g), had on skis, and was at the Defendant's ski area for the purpose of skiing.

> "1. Please admit that Plaintiff, Robert C. Anderson, at the time of his injury on January 5, 1999, was a skier as defined in the Michigan Ski Area Safety Act at MCL 408.322(g).

> **RESPONSE: Plaintiffs admit that Robert C. Anderson was a "skier" as that term is defined by MCL §408.322(g) at the time of his accident.**
>
> 2. Please admit that Plaintiff, Robert C. Anderson, at the time of his injury on January 5, 1999, had on skis.
>
> **RESPONSE: Plaintiffs admit that Robert C. Anderson was wearing skis at the time he was injured by colliding with the unpadded and inadequately protected shack.**
>
> 3. Please admit that Plaintiff, Robert C. Anderson, was at Pine Knob Ski Resort area for the purpose of skiing on January 5, 1999.
>
> **RESPONSE: Plaintiffs admit that Robert C. Anderson was at the Pine Knob Ski Resort on January 5, 1999 with the purpose of participating in a high school ski race on the hill provided by Pine Knob Ski Resort for that purpose.**
>
> 4. Please admit that Plaintiff, Robert C. Anderson, was at the Pine Knob Ski Resort area with the intent of skiing on January 5, 1999.
>
> **RESPONSE: Plaintiffs admit that Robert C. Anderson was at the Pine Knob Ski Resort on January 5, 1999 with the intent to participate in a high school ski race on the hill provided by Pine Knob Ski Resort for that purpose."** (Plaintiffs' Responses to Defendant's Requests for Admissions) (Emphasis Added.)(**Appendix at p. 66a, 67a**)

In fact, the Trial Court made an express finding that the facts were "fairly simple" and that the Plaintiff was "skiing" down a race course when he suffered his alleged injury:

> "And while he was skiing down a race course at the defendant's ski resort, his ski caught on an edge of snow, ice, or terrain." (Trial Court Transcript at p. 4) (**Appendix** at p. 97a)

The Court of Appeals similarly found that the Plaintiff was in the act of skiing when he suffered his injury.

> "Robert C. Anderson, a minor, "caught an edge" while skiing to the finish line at a high school ski race held on defendant's race hill." (**Anderson,** at p. 1.) (**Appendix** at p. 110a)

As a result, the Plaintiff is a "skier" for purposes of applying the Ski Safety Act.

2. The Plaintiff Admits That His Injuries Resulted From Snow, Ice or a Variation in The Terrain and These Admitted Facts Are Confirmed on the Record by the Trial Court.

The underlying record evidence and testimony is uncontroverted that the Plaintiff's alleged injury resulted from a mishap with snow, ice, or a variation in terrain as specifically governed and controlled by the Ski Safety Act.

First, the Plaintiff testified that his ski caught an edge on the snow, ice or terrain:

> Q. So tell me what happened when you did the second race.
>
> A. On my second run? Okay. I started obviously at the top of the hill. I went through the course, the set course, and at approximately the last gate I lost my balance. All my weight was on my right leg. I was in the tuck position because it was the last -- like I said before, like it was the last gate, and as I was -- because I lost my balance I kind of caught an edge. That's a ski term. I was directed to the right, just a little off to the right and the building was --
>
> Q. From catching the edge it forced you to the right; is that what you're saying?
>
> A. Because I lost my balance, yes. Well, I went more right than I would have liked, yes, obviously. And at that point I saw the building and smacked into the building. (Plaintiff Robert C. Anderson's Dep at pp 49-50) (Emphasis Added) (**Appendix at p. 38a, 39a**)

Second, the Plaintiffs' Response Brief to the Defendant's Motion for Summary Disposition confirms that the Plaintiff's injury arises out of a catching of a ski edge on snow,

ice and/or a variation in terrain.

> "Unfortunately, as Bobby proceeded through the finish, he 'caught an edge' and was pulled to the right. Catching an edge is not an unusual occurrence and a skier who catches an edge can often recover his balance." (Plaintiffs' Response Brief to Defendant's Motion for Summary Disposition at p. 4.) (**Appendix at p. 87a**)

Third, the Plaintiffs' Response to Defendant's Supplemental Authority confirms that the Plaintiff's injury arises out of a catching of a ski edge on snow, ice and/or a variation in terrain.

> "**Bobby was racing, a very controlled form of skiing, on a designated race course, that he was trained to ski on.** Bobby's 'catching an edge" causing him to veer off course is commonplace, routine, and not negligent at all in the context of ski racing." (Plaintiff's Response to Defendant's Supplemental Authority at p. 3.) (**Appendix at p. 90a**)

Fourth, independent eyewitness Thomas Halsey confirms, under oath, that Plaintiff's injury arises out of a catching of a ski edge on snow, ice and/or a variation in terrain.

> "9.That I saw Robert C. Anderson attempt to 'skate' as he was heading for the finish poles. Skating is an inappropriate technique and causes a shift of balance on the skis. This imbalance caused an unintended contact with the snow, resulting in Robert C. Anderson's severe change in course to the right which caused his collision." (Halsey Affidavit at Paragraph 9) (Emphasis Added) (**Appendix** at p. 48a)

Fifth, the Plaintiff admits in his responses to Defendants' Requests for Admission that he caught an edge at the finish area of the hill and suffered injury as a result.

> "53. Please admit that Plaintiff, Robert C. Anderson, moments prior to his alleged injury on January 5, 1999, lost his balance.

> RESPONSE: **Plaintiffs admit that Robert C. Anderson lost his balance at the last gate and caught edge while passing through the finish area at the bottom of the race hill provided by Pine Knob Ski Resort for the high school ski race and his momentum carried him into the unpadded and inadequately protected shack located approximately 15 feet from the finish line.** (Plaintiffs' Responses to Defendant's Requests for Admissions No. 53.) (**Appendix** at p. 78a)

Sixth, Plaintiff's own father, an eyewitness, confirmed that the Plaintiff's injury resulted from his catching of an edge which veered him off into the timing structure.

> "I believe the way he explained it to me is he – on the final turn – at some point on the course he caught an edge, which veered him off into the shack." (Plaintiff Robert R. Anderson's Dep at p. 38) (**Appendix at p. 60a**)

Seventh, the Trial Court determined that the facts are "simple" in that the Plaintiff's injury resulted from his catching an edge on snow, ice and/or a variation in terrain.

> "And while he was skiing down a race course at the defendant's ski resort, his ski caught on an edge of snow, ice, or terrain. He fell and he slid into a race timing shed." (Trial Court Tr. at p. 4.) (**Appendix** at p. 97a)

Eighth, the Court of Appeals determined that the Plaintiff's mishap resulted from snow, ice or a variation in terrain.

> "Robert C. Anderson, a minor, "caught an edge" while skiing to the finish line at a high school ski race held on defendant's race hill." (**Anderson** at p. 1.) (**Appendix at p. 110a**)

Indeed, the record is uncontroverted that the Plaintiff's mishap is the result of snow, ice or terrain. Moreover, these controlling facts are affirmatively pled in the Plaintiffs' Complaint (which was never amended), where the Plaintiff pleads that he encountered the snow, ice or terrain first. Thereafter, the Plaintiff pleads that he lost control, veered to the right, fell,

and eventually collided with the timing structure which was off the intended course. Thus, the collision with the timing structure, as pled by the Plaintiff, occurred after the loss of control and during the course of the Plaintiff's fall.

> "10. **While negotiating the race course at a high rate of speed, Robert C. Anderson lost control near the end of the course, causing him to fall.** During the course of his fall, Robert C. Anderson collided with the timing shack, which was located only ten to fifteen feet away from the course." (Plaintiff's Complaint at ¶10.) (Emphasis Added.)(**Appendix at p. 24a, 25a**)

As a matter of law, the Plaintiff assumed the risk of any injury that might "result from" variations in terrain and snow and ice conditions. In fact, the Plaintiff admits to accepting that risk in his responses to Defendants' Requests for Admissions.

> "30. Please admit that pursuant to the Michigan Ski Area Safety Act, MCL 408.342(2), Plaintiff, Robert C. Anderson, on January 5, 1999, assumed the risk of injury associated with collisions with snow, ice, and other terrain.
>
> RESPONSE: **Denied as stated. Plaintiffs admit that pursuant to MCL §408.342(2), Robert C. Anderson accepted the risk of injury that might result from variations in terrain, surface or subsurface snow or ice conditions and other forms of natural growth or debris.**" (Plaintiffs' Responses to Defendant's Requests for Admissions No. 30.) (Emphasis Added) (**Appendix at p. 73a)**

Under existing and controlling Michigan law, if a skier sustains an injury under these facts, the "reasonableness" of the ski area operator's behavior is irrelevant. Thus, everything that happened after the catching of the edge on snow, ice or terrain, or the "fall" as pled by the Plaintiff, is irrelevant as a matter of law.

> "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 the risk clause that renders the reasonableness of the skiers' or the ski area 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." (**Schmitz** v **Cannonsburg**, 170 Mich App 692; 428 NW2d 742, 743 (1988).) (Emphasis Added.)

The Plaintiffs' claims are barred by the Ski Safety Act. The Trial Court erred in not granting Summary Disposition to the Defendant in this matter and the Michigan Court of Appeals erred in affirming the Trial Court and denying the Defendant's Motion for Rehearing.

In its Opinion, the Michigan Court of Appeals ruled, improperly, that the Plaintiff's actual injuries did not result from his catching of an edge on ice and snow and losing control, but instead resulted from his ultimate collision with a timing structure which is not an enumerated danger listed in MCL 408.342(2). The Michigan Court of Appeals wholly ignored the admitted mishap with the snow, ice and terrain and looked, instead, to where the Plaintiff ended up after he lost his control and after he admittedly veered off of his intended course skating in a tuck racing position for maximum speed to win the race. In its ruling, the Michigan Court of Appeals shifted proximate cause to the timing structure despite the uncontroverted testimony concerning the actual cause of this mishap. This type of dual proximate causation was recently addressed by the Michigan Court of Appeals in a situation directly involving the Ski Safety Act.

On October 11, 2002, the Michigan Court of Appeals, in **Bazan** v **Crystal Enterprises, Inc**., unpublished opinion per curiam of the Court of Appeals, decided [October 11, 2002](Docket #234646) ruled that merely because a plaintiff's injuries resulted from two proximate causes, one of which was an enumerated danger under the Ski Safety Act at MCL 408.342(2) and one of which was not, the plaintiff's claim is still barred. The facts of **Bazan** are instructive on the issue. In **Bazan**, the plaintiff skier was injured when she was disembarking from a chairlift and had a collision with a fallen skier. The plaintiff brought suit claiming that the ski lift operator was negligent in not stopping the lift so as to prevent the plaintiff's collision with the fallen skier. The trial court granted the defendant's motion for summary disposition finding that the Ski Safety Act barred the plaintiff's claim. On appeal, the plaintiff argued that her claim was not barred by the Ski Safety Act because her injury had two proximate causes. Specifically, the **Bazan** plaintiff argued that her injury not only resulted from her collision with a fallen skier but also from the ski lift operator's failure to stop the lift. The Michigan Court of Appeals, however, rejected this argument and ruled that the defendant ski area operator remained "immune" under the Ski Safety Act.

> "According to this authority plaintiff's argument that the present case differs because her injuries had at least two proximate causes, both the fallen skiers (for which plaintiffs acknowledge immunity) and Inbrunone's failure to stop the chairlift (for which plaintiffs claim liability) is unsuccessful...therefore in this case, defendants are immune by law under the SASA and their summary disposition motion was properly granted." (**Bazan** at p.2) (**Appendix at p. 117a**)

Here, the Plaintiff makes a similar argument and seeks to ignore the facts relating to the snow, ice and terrain and focus only on where the Plaintiff stopped after the controlling mishap. Here, the Plaintiff first, caught his ski on snow, ice and/or a variation

in terrain and the Plaintiffs' claims are accordingly barred regardless of his ultimate collision with the timing structure. Thus, the analysis of the timing structure is moot.

If this Michigan Supreme Court rejects the admissions and the uncontroverted testimony and finds that the Plaintiff's mishap had no relation to snow, ice or a variation in terrain, the Plaintiffs' claims remain barred. MCL 408.342(2) provides that **injuries** "which can result from" obvious and necessary dangers are barred as a matter of law. The list of dangers provided in MCL 408.342(2) is not -- by its own wording -- an exhaustive list. The timing structure, as admitted, was both obvious and necessary. The structure itself was approximately 10' x 10' and visible. In fact, there was orange and blue padding on front of the timing structure, which made it even more visible and a large caution sign on it facing uphill. Joseph F. Kosik, Jr., a SEMSL ski coach for Rochester Adams High School, was on the ski hill at the time of the accident.

> Q. Isn't that on reason why the thing is padded?
>
> A. That' probably one reason why there are pads in front. That's also for **visibility**.
>
> Q. Visibility? These **orange and blue pads**, you think they provide visibility at 4:00 o'clock in the afternoon to a racer coming down a slalom course?
>
> A. **Yes. You see the bright colors on the snow** over other stuff, yes. (JFK Dep. at p. 30) (Emphasis Added.) **(Appendix at p. 46a)**

Moreover, the Plaintiff admitted in his deposition that he had no trouble with visibility and had actually inspected the course before the race on January 5, 1999 to "make sure there's no unexpected surprises".

Q. Well, **did you have any trouble with visibility**?

A. **No**. (Pl's Dep. at p. 35.) (Emphasis Added)

* * *

A. No, on the - just the hill next to the course. I also inspected the courses that we were about to race.

Q. You wanted to know what you had to do, right?

A. Yes. You want to know - you have to make - you want to plan out your course, when you're going to turn, where you're going to turn, **make sure there's no unexpected surprises**, stuff like that. (Plf's Dep. at p. 40) (Emphasis Added)(**Appendix at p. 36a**)

Thus, the timing structure was not only obvious – but well known to the Plaintiff.

This leaves the issue of "necessary". The United States Court of Appeals for the 6th Circuit has set forth a definition for the term "necessary" as that word is used in the Ski Safety Act at MCL 408.342(2). In **Kidwell** v **Wakefield Properties**, unpublished opinion of the 6th Circuit Court of Appeals, decided [October 16, 1991], 946 F2d 895 (6th Cir 1991) the United States Court of Appeals for the 6th Circuit, ruled that if a structure serves some purpose or function with respect to skiing and is similar to those listed, it meets the "necessary" requirement.

> "If a structure serves some purpose or function with respect to skiing and is similar to those listed, it meets the 'necessary' requirement." (**Kidwell**, at p. 2) **(Appendix at p. 12a**)

Here, the timing structure did serve a defined purpose or function related to skiing.

Joseph F. Kosik Jr., the SEMSL ski coach for Rochester Adams testified that the shed was used for timing and was completely necessary.

Q. So the purpose of the hut is to provide a location for some race officials?

A. **They're a necessity** for running a smooth race. (JFK Dep. at p. 29.) (Emphasis Added) **(Appendix at p. 45a)**

This timing structure housed the race officials and the equipment they used for timing the race. Without the equipment and the officials, the race times are not recorded. As a result, the timing structure did serve a purpose related to skiing.

Furthermore, the timing structure is similar to the structures listed at MCL 408.342 (2). Here, the timing structure, much like a ski lift and its components which are listed at MCL 408.342(2), is an admittedly manmade structure placed off the ski race course and used to house the weather sensitive timing equipment. In fact, the timing structure can be easily compared to the finish line poles used in **Kidwell** which were found to be similar to the structures listed in MCL 408.342(2). Here, the timing structure, like the finish line poles in **Kidwell**, was designed and used to facilitate ski racing and was located at the bottom of a ski run off of the ski racecourse. As a result, the timing structure was **necessary** for purposes of MCL 408.342(2).

Because the timing structure was both obvious and necessary, Plaintiff's collision with it bars his claim pursuant to MCL 408.342(2).

C. Existing and Controlling Michigan Case Law Makes it Clear That the Plaintiffs' Claim is Barred by the Ski Safety Act at MCL 408.342(2).

Existing Michigan case law clearly establishes that the Plaintiffs' claims are barred as a matter of law. The Michigan Court of Appeal's Opinion, **Anderson** v **Pine Knob Ski Resort, Inc**., unpublished opinion per curiam of the Court of Appeals, decided [March 26, 2002] (Docket No. 227832) **(Appendix at p. 110a)**(is an aberration from the wealth of

Michigan case law ruling that where a plaintiff skier suffers an injury resulting from an enumerated danger under the Ski Safety Act, the plaintiff skier's claim is barred as a matter of law.

Contrary to this law, this one panel of the Michigan Court of Appeals improperly used and applied traditional notions of tort liability to render the Ski Safety Act moot. In doing so, the Michigan Court of Appeals ignored the legislative intent that injuries "which can result from" snow, ice or terrain are barred. Indeed, when, what and how the Plaintiff ultimately made contact with the timing structure is irrelevant because the "resulting from" mishap is an enumerated danger under MCL 408.342(2). The Michigan Court of Appeals Opinion wholly ignores the plain language and now "rewrites" the Ski Safety Act to require - - somehow - - that <u>every</u> part of the mishap be linked to an enumerated danger. This means that every time a skier has a mishap with snow, ice or terrain, the legislative exemptions provided for in MCL 408.342(2) only apply if every subsequent event <u>also</u> involves enumerated dangers. This redrafting of the Ski Safety Act is wrong and not the role of the Michigan Court of Appeals.

As detailed below, Courts examining the Ski Safety Act have consistently ruled that where a plaintiff skier's injuries result from an enumerated danger, the defendant ski area operator's behavior is irrelevant and the Plaintiffs' claims are barred as a matter of law. The Michigan Court of Appeal's Opinion in this case conflicts with well established and existing case law and has the result of rewriting the Ski Safety Act in a manner contrary to its plain language, its legislative intent and its purpose.

1. **In McGoldrick v Holiday Amusements, Inc., 242 Mich App 286; 618 NW2d 98 (2000) The Michigan Court of Appeals Confirmed That a Collision With an Enumerated Danger Bars a Plaintiff Skier's Claim.**

In **McGoldrick**, the plaintiff, was an experienced skier, and was racing a friend down a ski hill and attempting to poke his friend with his ski pole. While racing down the ski hill and exceeding his ability, the plaintiff collided with a tension pole for a ski lift. The trial court granted summary disposition for the defendant ski area operator under the Ski Safety Act. The case was appealed to the Court of Appeals and affirmed.

The Michigan Court of Appeals ruled that the Plaintiff's injury comes within the immunity provision of the Ski Safety Act, thus barring his claim as a matter of law.[1]

> **"The clear language of the SASA establishes that Plaintiff's injury comes within the immunity provisions.** The statute plainly states that a collision with "ski lift towers and their components" comes within the dangers that are necessary and obvious." (**McGoldrick,** 618 NW2d at p. 102) (Emphasis Added.)

McGoldrick, like Plaintiff at issue here, was racing down a ski hill when he suffered an injury resulting from an enumerated danger. The Plaintiffs' claims are similarly barred.

2. **In Kidwell v Wakefield Properties, Unpublished Opinion, 946 F2d 895 (6th Cir 1991) the 6th Circuit Confirmed That Where a Plaintiff Suffers an Injury Resulting From an Obvious and Necessary Danger Under the Ski Safety Act, The Plaintiff's Claim is Barred as a Matter of L**

the **Kidwell** plaintiffs veered out of control and into the finish line poles. The **Kidwell** plaintiffs suffered serious injuries as a result of their collisions with the poles and filed suit against the defendant ski hill for negligence in controlling the downhill course. The defendant ski hill filed and prevailed on a motion for summary judgment. The **Kidwell** plaintiffs appealed. The 6th Circuit examined the Ski Safety Act and affirmed the grant of summary judgment. The 6th Circuit first ruled that the poles the plaintiffs collided with were obvious even though not expressly listed in the Ski Safety Act.

> "There is no question that the poles demarcating the finish lines were obvious. . . . In cases where the manner of injury is not specifically mentioned in the Act, the court must look to see whether the danger is similar to those mentioned and thus covered by the 'including, but not limited to' language of the statute. In this case, we agree with the District Court that the language of the statute covers the danger on which the plaintiff's claims are based and affirm the District Court's grant of summary judgment." (**Kidwell** at p. 5.) (**Appendix at p. 12a**)

The 6th Circuit also ruled that the ski race finish line poles fit the definition of "necessary" as it appears under the Ski Safety Act.

> "In this case, we agree with the District Court that the language of the statute covers the dangers on which the plaintiff's claims are based and AFFIRM the District Court's grant of summary judgment." (**Kidwell** at p. 3.) (**Appendix at p. 13a**)

While the **Kidwell** plaintiffs argued that the finish poles were not necessary and that other means of marking the finish line could have been used, the 6th Circuit ruled that the Ski Safety Act does not require an operator to determine which ski equipment is the least risky.

> **"We do not think that the statute intended to place responsibility on the ski area operators to determine which ski equipment is the least risky and to only use that equipment."** (**Kidwell** at p. 3.) (Emphasis Added)(**Appendix at p. 13a**)

The 6th Circuit Court also confirmed the intent of the Ski Safety Act.

> **"The Act was designed to reduce the liability of ski area operators by making skiers liable for obvious risks of harm from skiing and to encourage skiers to accept responsibility for their safety."** (**Kidwell** at p. 3.) (Emphasis Added) **(Appendix at p. 13a**)

The record facts and rulings in **Kidwell** are directly on point. Here, the Plaintiff was participating in an organized high school ski race when he caught an edge on the snow, ice or terrain, lost control, veered off his intended course and then collided with a timing structure. Just like the **Kidwell** plaintiffs, the Plaintiff herein alleges that the finish structure is not necessary and that some other safer possibility existed. However, as the 6th Circuit eloquently stated, the Ski Safety Act is not designed to require that ski operators only use the least risky skiing equipment. Moreover, the Plaintiff herein admits that the snow, ice or terrain first caused his fall as he caught an edge while skiing out of control which renders any analysis of the timing structure irrelevant. The Plaintiffs claim is barred by MCL 408.342(2).

3. In Kent v Alpine Valley, 240 Mich App 731; 613 NW2d 383 (2000) the Michigan Court of Appeals Again Confirms That Where a Plaintiff Suffers an Injury Resulting From an Enumerated Danger the Plaintiff's Claim is Barred as a Matter of Law .

In **Kent**, the plaintiff was injured in the ski lift loading area when he collided with the chair attached to the ski lift mechanism -- an enumerated danger under MCL 408.342(2). In **Kent**, the Michigan Court of Appeals confirmed that the Ski Safety Act, by its own title,

sets forth certain presumptions of liability. In examining the legislative intent, of the Ski Safety Act, the **Kent** Court noted that the 1981 amendments expressly added provisions to the statute to carry out its intent which is, in part, to make skiers, rather than ski area operators, liable for damages from injuries.

> "Soon thereafter, the Legislature (moved perhaps by Justice Black's violent non fit injuria dissent), "intent [on] promoting safety, reducing litigation and stabilizing the economic conditions in the ski resort industry," **Grieb**, supra at 487, 400 N.W.2d 653, became concerned with making the skier, rather than the ski area operator, bear the burden of damages from injuries. **Schmitz** v **Cannonsburg Skiing Corp**., 170 Mich. App. 692, 695, 428 N.W.2d 742 (1988), quoting from the Senate Legislative Analysis, SB 49, April 17, 1981. This would "help reduce the number of lawsuits ... [thereby] stabiliz[ing] 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." **(Kent**, 613 NW2d at p. 387.) (Emphasis Added.)

Here, the Plaintiff's injury is the admitted result of an enumerated danger -- snow, ice and/or a variation in terrain. Here, the Michigan Court of Appeals failure to reverse the Trial Court's Order Denying the Defendant's Motion for Summary Disposition runs directly counter to the Ski Safety Act, its legislative intent and its own opinion in **Kent**.[2] The Plaintiffs' claims are barred by MCL 408.342(2).

---

[2]In **Kent** the plaintiff filed an application for leave to appeal with this Michigan Supreme Court which was denied by Order dated March 21, 2001.

4. **In McCormick v Go Forward Operating Limited Partnership, 235 Mich App 551; 599 NW2d 513 (1999) the Michigan Court of Appeals Confirmed That Where a Plaintiff's Injury Results From an Enumerated Danger the Plaintiff's Claim is Barred as a Matter of Law.**

In **McCormick**, the plaintiff was skiing with a friend and was using a chair lift. Another skier fell on the chair lift exit path and the plaintiff injured herself as she attempted to avoid a collision. The Trial Court applied the Ski Safety Act and granted summary disposition to the defendant.

The plaintiff appealed, first arguing that the Ski Safety Act does not apply. The Michigan Court of Appeals disagreed, stating the Ski Safety Act bars recovery for collisions with other skiers -- or attempts to avoid such collisions.

> "That is, by statutory definition, **any collision with another skier constitutes a necessary and obvious danger for which Defendant is immune**. In short, the location of the collision or fallen skier is irrelevant." (**McCormick**, 599 NW2d at p. 515.) (Emphasis Added.)

The facts in **McCormick** involve an attempt to avoid a collision with an enumerated danger -- another skier. Here, the Plaintiff admittedly had a mishap with an inherent and enumerated danger -- snow, ice and a variation in terrain. Thus, this incident is strictly governed by MCL 408.342(2) and is barred accordingly.

5. **In Shukoski v Indianhead Mountain Resort, Inc., 166 F3d 848 (6th Cir, Feb. 4, 1999) The 6th Circuit Again Confirms That Where a Plaintiff's Injury Results From Snow, Ice or a Variation in Terrain the Plaintiff's Claim is Barred as a Matter of Law.**

In **Shukoski**, the Court of Appeals for the 6th Circuit was presented with a skier who was injured on a Michigan ski hill. The skier was using a snowboard and was injured due to snow, ice and a variation in terrain. The U.S. Court of Appeals applied the Ski Safety

Act and ruled that the Ski Safety Act barred the Plaintiff's claim.

> "Accordingly, we find that Michigan's Ski Area Safety Act precludes any recovery by the Plaintiff for injuries sustained while snowboard skiing on the Defendant's premises and that the lower court properly granted judgment in Defendant's favor as a matter of law. We thus affirm the judgment of the district court. (**Shukoski** at p. 852.)

Here, the facts are identical to those presented in **Shukoski** because the Plaintiff, like **Shukoski**, was skiing, lost control because of snow, ice and/or a variation in terrain, and was ultimately injured. As a result, Plaintiffs' claims are barred by MCL 408.342(2).

6. In Grieb v Alpine Valley Ski Area, Inc., 155 Mich App 484; 400 NW2d 653 (1986) the Michigan Court of Appeals Again Confirms That Where a Plaintiff Suffers an Injury Resulting From an Enumerated Danger the Plaintiff's Claim is Barred as a Matter of Law.

In **Grieb**, the plaintiff was a skier who brought an action against the defendant ski resort for personal injuries resulting from her collision with another skier. The Michigan Court of Appeals ruled that the trial court properly granted the defendant's motion for summary disposition because a collision with another skier is an obvious danger assumed by the plaintiff-skier.

> "We have reviewed the above statutory section and find that it clearly and unambiguously provides that an injury resulting from a collision with another skier is an obvious and necessary danger assumed by skiers." (**Grieb**, 400 NW2d at p. 655.)

The **Grieb** Court reviewed the Ski Safety Act and found that it unambiguously provides that an injury resulting from a collision with a skier is an obvious and necessary danger. (Indeed, the Grieb court implicitly ruled that other skiers are obvious and necessary.)

> "We have reviewed the above statutory section and find that it clearly and unambiguously provides that an injury resulting from a collision with another skier is an obvious and necessary danger assumed by skiers.
>
> The statute says that a skier accepts the obvious and necessary dangers of the sport. The statute goes on to list examples of obvious and necessary dangers. One example is a collision with another skier. Our interpretation is supported by the words "Those dangers include, but are not limited to ... collisions ... with other skiers...." Further, this construction is consistent with the Legislature's intent of promoting safety, reducing litigation and stabilizing the economic conditions in the ski resort industry. Senate Legislative Analysis, SB49, Second Analysis, April 17, 1981. (**Grieb**, 400 NW2d at p. 655.)

The decision in **Grieb** clearly supports a finding of no liability in this case. The Michigan Court of Appeals took the time in **Grieb** to acknowledge and apply the legislative intent as a controlling part of its decision. Here, a mishap with snow, ice or terrain is a listed danger just like the collision with another skier in **Grieb**. As a result, recovery is strictly barred as a matter of law. The Plaintiffs' claims are barred by MCL 408.342(2).

7. **In Schmitz v Cannonsburg, 170 Mich App 692; 428 NW2d 742 (1988) the Michigan Court of Appeals Ruled That Where a Plaintiff's Injury Results From a Danger Under the Ski Safety Act the Ski Area Operator's Behavior is Irrelevant**

In **Schmitz**, the Michigan Court of Appeals analyzed the Ski Safety Act and ruled that the Michigan Legislature intended to place the risks of certain dangers of skiing on the skiers and not ski area operators. As a result, the Michigan Court of Appeals in **Schmitz** ruled that where a plaintiff skier suffers an injury as a result of an enumerated danger under the Ski Safety Act, the ski area operator's behavior is rendered irrelevant.

> **"However, it is clear from the plain and unambiguous wording of Sec 22(2) that the Legislature intended to place the burden of certain risks or dangers on skiers, rather than ski resort operators."** (Emphasis Added.) (**Schmitz**, 170 Mich App at p. 695.)
>
> "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 the risk clause that renders the reasonableness of the skiers' or the ski area 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." (**Schmitz**, 170 Mich App at p. 696.) (Emphasis Added.)

Here, the Michigan Court of Appeals Opinion directly conflicts with **Schmitz.** The Plaintiffs' claims are barred by MCL 408.342(2).

8. **In Knox v Mt. Brighton Ski Area, Unpublished Opinion, Per Curiam of the Court of Appeals, Decided [March 1, 1996] (Docket No. 173553) the Michigan Court of Appeals Ruled That a Plaintiff's Claim Can be Barred by the Ski Safety Act Even When the Injury Did Not Result From an Enumerated Danger.**

In **Knox**, the Michigan Court of Appeals affirmed the state district court's decision to grant summary disposition in favor of the defendant, Mt. Brighton.[3]

> "We conclude that the circuit court erred in reversing the district court's order granting summary disposition for defendant." (**Knox** at p. 3.)(**Appendix at p. 16a**)

The **Knox** court ruled that the legislature intended to place the risk of skiing on the skier in connection with the listed dangers in MCL 408.342(2):

---

[3] In **Knox**, the plaintiff was injured when she skied into a fence.

> "It is clear from the plain and unambiguous language of MCL 408.342(2); MSA 18.483(22)(2) that the Legislature intended to place the burden of certain "obvious and necessary" dangers inherent to the sport of skiing on skiers, not ski area operators. As a matter of law, a skier accepts the risk that he or she may be injured in a manner that falls within the scope of MCL 408.342(2); MSA 18.483(22)(2). See **Barr**, **supra** at 3; **Schmitz**, supra at 696."(**Knox** at p. 2.) (Emphasis Added.) (**Appendix at p. 15a**)

The Michigan Court of Appeals in **Knox** ruled that a collision with a fence on a ski hill falls within the scope of MCL 408.342(2) even though a fence is not one of the listed inherent dangers. Thus, the Knox court implicitly ruled that although not listed, a fence is an obvious and necessary danger for purposes of MCL 408.342(2). Here, the Plaintiff's injury actually did result from an enumerated danger -- snow, ice and a variation in terrain. The Plaintiffs claim is barred by MCL 408.342(2).

D. The Court of Appeal's Opinion Conflicts With and Violates the Rules of Statutory Construction.

In this case, the Michigan Court of Appeals' interpretation of the Ski Safety Act violates the basic rules of statutory construction because the Michigan Court of Appeals avoids the plain meaning and renders language contained in the statute surplusage and nugatory. Specifically, the Michigan Court of Appeals' interpretation avoids and renders nugatory the language contained in the Ski Safety Act which provides that skiers assume the risk of dangers which "can result from variations in terrain; surface or subsurface snow or ice conditions". This type of interpretation is strictly prohibited by this Michigan Supreme Court.

On April 2, 2002, the Michigan Supreme Court rendered its Opinion in **Pohutski** v **City of Allen Park**, 465 Mich 675 ; 641 NW2d 219 (2002) which provides, in relevant part, a controlling analysis of the rules of statutory construction. In **Pohutski**, the Michigan Supreme Court ruled that, when faced with a question of statutory interpretation, the Court's obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute.

> "**When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute.**" (**Pohutski,** 641 NW2d at p. 226.) (Emphasis Added)

In **Pohutski,** this Michigan Supreme Court also ruled that when interpreting a statute, every word is used for a purpose and a Michigan court cannot assume that the Michigan Legislature inadvertently made use of one word or phrase instead of another.

> "When parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. 'The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another.' **Robinson** v **Detroit**, 462 Mich 439, 459; 613 NW2d 307 (2000)" (**Pohutski**, 641 NW2d at p. 226)

Most importantly, a court in Michigan must take care to avoid a construction of a statute that renders "any part" of the statute surplusage or nugatory.

> "Similarly, we should take care to avoid a construction that renders any part of the statute surplusage or nugatory." (**Pohutski**, 641 NW2d at p. 226.)

Based on the above, the Michigan Court of Appeals, in applying the Ski Safety Act to the uncontroverted facts presented, **must** presume that every word contained within the Ski Safety Act is used for a purpose and the Michigan Court of Appeals **must** give effect

to every clause and sentence contained within the Ski Safety Act. The Ski Safety Act unambiguously provides, in part, 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. **Those dangers include**, but are not limited to, **injuries which can result from variations in terrain; surface or subsurface snow or ice conditions" (MCL 408.342(2).) (Appendix at p. 7a)**

Here, the Michigan Court of Appeals' interpretation of the Ski Safety Act violates the most basic rules of statutory construction by failing to give effect to the language "can result from". Here, the Plaintiff's injury involves an admitted and witnessed mishap that "can result from" snow, ice or terrain. Stated clearly, the Plaintiff's injury "resulted from snow" (catching an edge on the snow) and his claim is barred by the plain language of the Ski Safety Act. Any other interpretation violates the rules of statutory interpretation by rendering the phrase "resulting from" nugatory and conflicting with innumerable controlling and prior decisions of the Michigan Court of Appeals.

E. The Principles of Common Law Premises Liability are Part of the Ski Safety Act.

In its Order Dated October 30, 2002, this Michigan Supreme Court specifically directed that the Defendant explain the role, **if any,** of common law premises liability in claims arising under the Ski Safety Act.

> "On order of the Court, the application for leave to appeal from the March 26, 2002 decision of the Court of Appeals is considered, and it is GRANTED. **The parties are directed to include among the issues to be briefed (1) the role, if any, of principles of common law premises liability in claims arising under the Ski Area Safety Act**, MCL 408.321 et seq.," **(Appendix at p. 119a)**(Emphasis Added)

According to this Michigan Supreme Court's ruling in **Pohutski,** a Court, when faced with questions of statutory interpretation, must give effect to the Legislatures intent by examining the words contained in the statute.

> "**When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute.**" (**Pohutski,** 641 NW2d at p. 226.) (Emphasis Added)

Here, the language in the Ski Safety Act first provides that the Ski Safety Act is designed to **prescribe the duties of ski area operators and skiers**.

> "An act to provide for the inspection, licensing, and regulations of ski areas and ski lifts; 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; **to prescribe the duties of skiers and ski area operators**; to create a ski area safety board; to provide for the disposition of revenues; to provide for liability for damages which result from a violation of this act; to provide civil fines for certain violations of this act; and to provide criminal penalties for certain violations of this act." (Ski Safety Act Preamble) (Emphasis Added) (**Appendix at p. 4a**)

Because the Ski Safety Act does not provide a definition for the term "prescribe" we look to the dictionary for a definition. (See: **People** v **Lee**, 447 Mich 552; 526 NW2d 882, 885 (1984).) Webster's Ninth New Collegiate dictionary provides that the term "prescribe" means to lay down a rule or dictate.

> "**Prescribe . . . to lay down a rule: DICTATE**" (Webster's Ninth New Collegiate Dictionary) (Emphasis Added)

Thus, the Ski Safety Act expressly dictates the duties of skiers and ski area operators.

Despite its rulings in this case, the Michigan Court of Appeals has previously confirmed

the fact that the Ski Safety Act prescribes the duties and responsibilities of ski operators and skiers in the area of safety by using the phrase "set out".

> "Given these competing interests, the legislature decided to establish rules in order to regulate the ski operators and to set out ski operators' and skiers' responsibilities in the area of safety." (**Grieb**, 400 NW2d at p. 656)

The Ski Safety Act is clear that each person who participates in the sport of skiing accepts the risk of injuries resulting 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.

> "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." (MCL 408.342.) (Emphasis Added.) (**Appendix at p. 7a**)

As a result, when an injury "can result from" one of the dangers under MCL 408.342(2), common law premises liability is not triggered because there is no duty at issue. The statutory language of MCL 408.342(2) creates an express assumption of the risk for which there is no liability as a matter of law. The question of duty is moot under MCL 408.342(2). In fact, the Michigan Court of Appeals in **Kent** v **Alpine Valley**, 240 Mich App 731; 613 NW2d 383 (2000), ruled that MCL 408.342(2) is a stand alone bar to recovery and noted, that according to Justice Markman's opinion in **Barr**, the Ski Safety

Act does not condition application of the assumption of risk provisions on compliance with other sections of the act. (**Barr** v **Mt. Brighton**, 215 Mich App 512; 546 NW2d 273 (1995).)

> "Writing for this Court, Judge, now Justice, Markman found that the act does not condition application of the assumption of risk provision on compliance with other sections of the act; that, by the mere act of skiing, the plaintiff assumed the risk that he would be injured colliding with a tree, which is a danger enumerated by the statute" (**Kent**, 613 Nw2d at 388.)

However, if an injury or damage results from a mishap beyond the scope of MCL 408.342(2), then a reviewing court looks to the balance of the Ski Safety Act. The balance of the Ski Safety Act includes MCL 408.344 which expressly provides that 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".

> "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." (MCL 408.344) **(Appendix at p. 8a)**

According to the Michigan Court of Appeals, MCL 408.344 and MCL 408.342(1) sets forth a comparative negligence principle.

> This contention is supported by the language of MCL 408.342(1)...which states that a skier must 'maintain reasonable control of his or her speed in course at all times.' Plaintiff's contention is further supported by MCL 408.344...which states that skier or ski area operator who violates the Act is 'liable for the portion of loss or damage resulting from that violation' and would suggest a comparative negligence principle such as that..." (**Schmitz** v **Cannonsburg Skiing Corporation**, 170 Mich App 692; 428 NW2d 742, 743 (1988).

Next, when examining the admitted and record facts under MCL 408.344, the only

violation of the Ski Safety Act is Plaintiffs violation of MCL 408.341 by not skiing within his ability as required by MCL 408.341 and MCL 408.342(1).

> (1) A skier shall conduct himself or herself within the limits of his or her individual ability and shall not act or ski in a manner that may contribute to his or her injury or to the injury of any other person..."(MCL 408.341(1).) **(Appendix at p. 7a)**

> "(1) While in a ski area, each skier shall do all of the following: (a) Maintain reasonable control of his or her speed and course at all times. ..." (MCL 408.342(1).) **(Appendix at p. 7a)**

There is no violation of the Ski Safety Act by the Defendant at issue here. As a ski area operator, the Michigan Legislature set forth the Defendant's duties at MCL 408.326a. Here, the Plaintiffs fail to plead any allegation in their complaint that the Defendant violated MCL 408.326a or any other provision of the Ski Safety Act.

When examined wholly with full effect to each provision, the Ski Safety Act sets up a scheme of codified negligence.[4] The Ski Safety Act is a broad statute governing the skier and the ski area operator's behavior at a ski area. For example, the Ski Safety Act provides for the creation of a ski area safety board consisting of 7 members, including two (2) Michigan skiers to represent the public. (MCL 408.323) The Ski Safety Act provides for the duties of ski area operators. (MCL 408.326a) The Ski Safety Act provides for the annual inspection and permitting of all ski lifts. (MCL 408.329) The Ski Safety Act provides for the reporting and filing of all plans for the construction and alteration of any ski lift. (MCL 408.332) The Ski Safety Act provides for the necessary application fees for

---

[4]"Plaintiff contends that the language of the Ski Area Safety Act sets up a scheme of codified negligence...we have no quarrel with Plaintiffs' interpretation of the act as far as it goes." (**Schmitz**, 428 NW2d at p. 743, 744)

ski lifts. (MCL 408.336) The Ski Safety Act provides for possible criminal penalties for violations of the act. (MCL 408.340) The Ski Safety Act provides for the duties and the conduct of skiers. (MCL 408.341) The Ski Safety Act provides for a skiers assumption of risk for dangers. (MCL 408.342) The Ski Safety Act provides that skiers and ski area operators shall be liable for that portion of the loss or damage resulting from a violation of the act. (MCL 408.344). Indeed, the Ski Safety Act is deliberately broad and does set up a system of codified negligence.

If a skier fails to maintain reasonable control of his/her speed and course as directed by MCL 408.342(1), common law negligence principles of 'reasonable' under the circumstances and comparative negligence are applicable. However, if this skier suffers an injury which can "result from" an obvious and necessary danger enumerated under MCL 408.342(2), then the skier's claim is barred as a matter of law and the question of duty is moot. In other words, any claim of negligence brought by a skier is completely controlled by the dictates of the Ski Safety Act. Here, the Ski Safety Act at MCL 408.342(2) bars the Plaintiffs' Claims.

F. The Open and Obvious Doctrine Also Bars Plaintiffs' Claims As a Matter of Law.

The Ski Safety Act expressly "prescribes" the duties of ski area operators and skiers. However, if this Michigan Supreme Court finds that common law premises liability applies, beyond the terms of the Ski Safety Act, then the open and obvious doctrine bars the Plaintiffs' claim as a matter of law.

This Michigan Supreme Court recently re-affirmed the open and obvious doctrine in **Lugo** v **Ameritech**, 464 Mich 512; 629 NW2d 384 2001, where this Michigan Supreme

Court ruled that in general a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm.

> "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." (**Lugo** at p. 386)

However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them an invitor owes no duty to protect or warn the invitee.

> "However, this duty does not generally encompass removal of open and obvious dangers:
> [W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee."(**Lugo** at p. 386)
>
> "Accordingly, the open and obvious doctrine should not be viewed as some type of "exception" to the duty generally owed invitees, but rather as an integral part of the definition of that duty." (**Lugo** at p. 386)

Simply put, a premises possessor is not required to protect an invitee from open and obvious dangers.

> "In sum, the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." (**Lugo** at p. 386)

Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm will serve to remove that condition from the open and obvious danger doctrine.

> "In *519 sum, only those special aspects that give rise to a uniquely high likelihood **388 of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine."(**Lugo** at p. 386)

Here, the danger posed by the timing shed was open and obvious under the common law of Michigan. Here, the Plaintiff admits to knowing of the timing structure and having complete and individual knowledge of its existence. **(Appendix at p. 35a, 36a, 39a, 43a)** Furthermore, the timing structure did not provide an unreasonable dangerous risk. The risk posed by the timing structure was not unavoidable. Unlike the example provided in **Lugo** where a hallway of a building is flooded with standing water and offers the only exit, there was no directed path here which provided only one destination. In fact, just the opposite is true. Here, the ski race was set up by the SEMSL coaches and inspected by the coaches and skiers as a whole. The gates on the ski hill were placed and positioned to lead the ski racers to a finish line. The timing structure was not in that prepared course and the Plaintiff testified that after he lost his control and fell, he veered sharply to the right. It is this "off the course" incident that put the Plaintiff into contact with the timing structure. Here, as stated above, other routes were available to the Plaintiff. He was not directed into the path of the timing structure. This Supreme Court ruled in **Lugo** that the key is whether there is an extremely high risk of severe harm in circumstances where there is no sensible reason for such an inordinate risk.

> "However, we believe that it would be unreasonable for us to fail to recognize that unusual open and obvious conditions could exist that are unreasonably dangerous because they present an extremely high risk of severe harm to an invitee who fails to avoid the risk in circumstances where there is **no sensible reason for such an inordinate risk of severe harm to be presented."** (**Lugo**)

Here, there is no evidence that there was an extremely high risk of a collision with the timing structure. Plaintiff provided no evidence indicating that there was a high likelihood of harm. In fact, the Plaintiff testified that he had skied at Defendants ski area before without contacting the timing structure and that he was well aware of the presence of the timing structure. **(Appendix at p. 35a, 36a, 39a, 43a)** The Plaintiffs failure to demonstrate that there was a high likelihood of harm is critical because in **Joyce** v **Rubin**, 249 Mich App 231; 642 NW2d 360, 366 (2002) the Michigan Court of Appeals has already ruled that the open and obvious doctrine bars claims where there is no evidence establishing an extremely high risk of injury.

> "**Though Joyce says that she had no choice but to traverse the slippery walkway to the front door, she presents no evidence that the condition and surrounding circumstances would "give rise to a uniquely high likelihood of harm" or that it was an unavoidable risk**." (**Joyce** v. **Rubin**, 249 Mich App 231; 642 NW2d 360, 366 (2002).) (Emphasis Added)
>
> "Further, no evidence suggests that the condition was so unreasonably dangerous that it would create a risk of death or severe injury. Unrebutted evidence shows that there was no significant buildup of ice or snow. Indeed, Joyce testified that there was simply a "light" layer on the sidewalk. In other words, the common condition in this case was neither remarkable nor unavoidable and clearly does not represent the kind of "**uniquely dangerous" condition that would warrant removing this case from the open and obvious danger doctrine**, particularly because Joyce clearly appreciated the risk of harm and, nevertheless, chose to encounter the condition." (**Joyce** v **Rubin**, 249 Mich App 231; 642 NW2d 360, 366 (2002).) (Emphasis Added)

Just like the scenario in **Joyce**, the Plaintiff in this case clearly appreciated the risk of harm no matter how small and nevertheless chose to encounter the condition by racing down the hill. [5] The common and consistent location of the timing structure does not represent the kind of "uniquely dangerous" condition that would warrant removing this case from the open and obvious danger doctrine particularly because the Plaintiff clearly voluntarily chose to encounter the condition by participating in the ski race.[6] The timing structure was open and obvious. If applied, the Plaintiffs' claims are barred by the open and obvious doctrine.

---

[5]Furthermore, there was a sensible reason for having the timing structure in its location; because it was necessary in order to conduct the ski race as confirmed by the Affidavit of Thomas Halsey. (**Appendix at p. 47a**)

[6]Here, the inherent risk of skiing is catching an edge on snow, ice or terrain and colliding with a naturally occurring or manmade structure. Thus, there is no breach of duty. As Justice Cardozo wrote long ago and confirmed today:

> "One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. . . The timorous may stay at home." (**Murphy** v **Steeplechase Amusement Co.**, 250 NY 479, 483 (1929).)
>
> "Similarly, Felgner, supra, while generally abrogating the assumption of risk doctrine as an affirmative defense available to a negligent defendant, also recognized that because 'certain risks of accident attend all outdoor sports', ... there is no breach of duty giving rise to liability when those inherent risks become reality as in "the ordinary instance of a batted ball flying into unscreened stands.' Felgner, supra, (**Benejam** v **Detroit, Tigers Inc**., 246 Mich App 645; 635 NW2d 219, 225 fn9 (2001).)

VI. CONCLUSIONS AND RELIEF REQUESTED

This case involves a racing skier and an admitted mishap with terrain, snow and ice. As matter of law, the analysis ends there. MCL 408.342(2) bars recovery because it operates as a complete assumption of the risk rendering the Defendant's behavior irrelevant. The Court of Appeal's Opinion wholly departs from the controlling law, and wrongfully injects a new and improper reading of MCL 408.342(2). The Plaintiff testified under oath that he was skiing, caught the edge of his ski on the snow while skiing, lost his balance, and then veered off his course. This is the only relevant event in this case. Anything that "can result from" snow, ice or terrain is barred from recovery. Any other ruling is contrary to law, contrary and conflicting with current Court of Appeals case law and renders the statutory language of the Ski Safety Act nugatory.

Moreover, the Plaintiffs' claims are barred by the common law doctrine of open and obvious. The timing structure is an open and obvious hazard specifically known by the Plaintiff. Michigan case law is clear that where a danger is open and obvious there is no duty to warn. This controlling rule of law applies here.

WHEREFORE, the Defendant respectfully request that this Honorable Michigan Supreme Court:

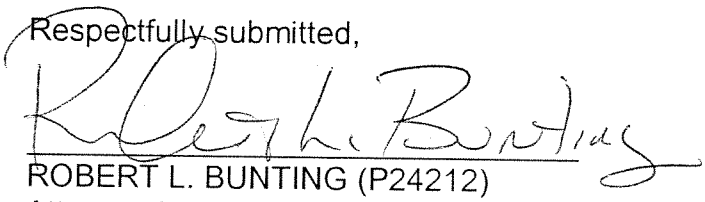
I. Enter an Order reversing the Court of Appeals Opinion affirming the Trial Court's Denial of Defendant's Motion for Summary Disposition Dismissing the Case; or

II. Enter an Order granting the Defendant's Motion for Summary Disposition; and

III. Enter an Order granting such other relief as this Court deems just, equitable and appropriate.

Respectfully submitted,

Dated: December 17, 2002

By: 

ROBERT L. BUNTING (P24212)
Attorney for Defendant/Appellant

Dated: December 17, 2002

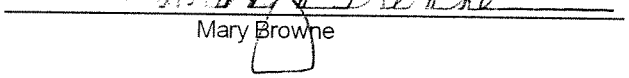
By:

ROBERT CHARLES DAVIS (P40155)
Co-Counsel and Of Counsel to
Robert L. Bunting

PROOF OF SERVICE

I served **Defendant/Appellant, Pine Knob Ski Resort, Inc.'s Brief on Appeal** upon the attorneys of record and/or parties in this case on **December 17, 2002** by:

✗ U.S. Mail
❑ Hand Delivered
❑ Express Mail Private
❑ Fax
❑ Messenger
❑ Other:



Mary Browne

J:\Listman\Bunting-Pine Knob\Michigan Supreme Court Brief on Appeal.wpd