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In Skiing and Snowboarding, if an Alleged Defect Is Not a "Necessary Danger" to the Sport, It's No Defense

By: Justin A. Grimske **May 9, 2017**

On April 4, 2017, the Michigan Supreme Court stuck to its original decision and allowed a negligence lawsuit to continue by again rejecting an appeal from a ski resort in a lawsuit wherein a snowboarder sustained a severe head injury as a result of a fall. *Rhoda v. Peter E. O'Dovero, Inc*, No. 153661 2017 WL 1272344 (Mich April 4, 2017).

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Rhoda was decided solely under the Ski Area Safety Act of 1962 ("SASA"). However, there are many other non-ski area cases involving recreational activities which have similar common law defenses regarding the duties owed in such activities. It is unclear as to what applicability the *Rhoda* decision will have to those defenses at this time.

In 2010, Trevor Rhoda's conservator brought a negligence action alleging that Marquette Mountain failed to properly close a snowboard rail and warn of its danger. Marquette Mountain is a ski resort that features a terrain park for its guests. Prior to the date of loss, the facility had designed and erected a snowboarding rail in anticipation for an upcoming competition. However, the day before the scheduled event, the resort realized that the rail's separate sections were not completely welded together, resulting in a dangerous two inch gap separating the two parts. Marquette Mountain attempted to prevent snowboarders from accessing the rail by erecting crossed red poles in the shape of an "X" at its top. Despite the crossed poles, Rhoda and others rode the defective rail. On Rhoda's last ride he caught the gap of the rail, fell and struck his head causing a severe brain injury.

The trial court granted motion for summary disposition in favor of Marquette Mountain finding that the rail's hazardous condition was open and obvious and that the crossed bamboo poles had properly closed the feature.

The Michigan Court of Appeals, however, reversed and ultimately held that Marquette Mountain cannot escape all liability. In so holding, the Court of Appeals looked to Michigan's Ski Area Safety Act of 1962 (SASA), MCL 408.321 et seq., an act that delineates the distinct duties applicable to ski area operators and skiers, and held that "[t]he two red poles in an 'X' formation did not suffice to close that run as they did not contain a regulatory symbol and the word "closed," as required by the act." The Court of Appeals also held that Rhoda did not assume the risk of the defective rail as the rail's gap was not a necessary danger of the

sport. The Court reasoned that a snowboarder would be precluded from suit only when a danger qualifies as *both* obvious and necessary. The court found that no evidence supports that the danger presented by the defective rail *necessarily inheres* the sport of snowboarding. The Court reasoned that if the Plaintiff had fallen off of an 'intact' snowboard rail there would be no case. However, this danger arose from Defendant's failure to connect two segments of the rail together, thereby creating a new and different hazard that unnecessarily increased the risks of riding a snowboarding rail.

Marquette Mountain filed leave to appeal the appellate Court's ruling. On January 13, 2017, the Michigan Supreme Court, despite Chief Justice Markman's dissent, rejected the appeal. Marquette Mountain filed a motion for reconsideration, which was *again* denied by the Michigan Supreme Court on April 4, 2017.

As illustrated above, the assumption-of-risk doctrine embodied in MCL 408.342(2) suggests that snowboarders accept *only* those risks that are intrinsic to the sport. By participating, a snowboarder impliedly consents to those risks. When a guest consents to snowboard at a ski area, the guest impliedly relieves the ski operator of any duty to remove risks such as those posed by out-of-control skiers. Snowboarders must anticipate such dangers when they strap on their boots. The same cannot be said for defective equipment like the rail illustrated above.

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