

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 20CV204C

GREG GOLFOMITSOS

v.

WACHUSETT MOUNTAIN ASSOCIATES, INC.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO
DISMISS

This case arises out of a skiing accident that took place on March 1, 2019 at the Wachusett Mountain ski area operated by the defendant, Wachusett Mountain Associates, Inc. ("Wachusett"). The plaintiff alleges that he "suffered severe injuries when he was caused to fall due to the presence of ice on a ski trail on the Defendant's premises." According to the complaint, the fall "was caused by the Defendant's negligent failure to close the trail on which Plaintiff was injured, as Defendant knew or should have known the same was not safe for skiers to traverse." Wachusett moves to dismiss the complaint pursuant to Mass. R. Civ. P. 12(b)(6), arguing it is exempt from liability for negligence under the Massachusetts Ski Safety Act ("Act"), G. L. c. 143, § 71H-71S. The court **ALLOWS** the motion.¹

Whether a duty of care exists is a question of law and is an appropriate subject of a motion to dismiss pursuant to rule 12(b)(6). *Leavitt v. Brockton Hosp.*, 454 Mass. 37, 40 (2009). Here, Wachusett's duty to the plaintiff is defined by the Act, the purpose of which is "to define and restrict the responsibility and liability of ski area operators to skiers injured by risks inherent in the sport of skiing." *McHerron v. Jiminy Peak, Inc.*, 422 Mass. 678, 679 (1996). Pursuant to § 71N of the Act, a ski area operator is "responsible for the maintenance and operation of ski areas under its control in a reasonably safe condition or manner, provided, however that ski

¹ The court did not consider the plaintiff's affidavit attached to his opposition to the defendant's motion to dismiss. Typically, a Rule 12(b)(6) motion is limited to the allegations made within the four corners of the complaint, unless the court converts it into a motion for summary judgment. See Mass. R. Civ. P. 12(b)(6). Here, the plaintiff's affidavit is insufficient to trigger the conversion provision of Rule 12(b)(6).

10

area operators *shall not be liable for damages to persons or property, while skiing, which arise out of the risks inherent in the sport of skiing.*" [emphasis supplied].

With respect to such inherent risks, § 71O provides, in relevant part:

A skier shall be presumed to know of certain unavoidable risks inherent in the sport of skiing, which shall include, but not be limited to, variations in terrain, surface or subsurface snow, *ice conditions* or bare spots, and *shall assume the risk of injury or loss caused by such inherent risks.* [emphasis supplied].

Our courts agree that ski area operators have no duty to prevent the skier's injuries under the Act if the plaintiff is injured as a result of the specific skiing risks, such as the risk of ice conditions. See e.g., *McHerron*, 422 Mass. at 680 (ski area operators not liable for injuries or loss caused by bare spots in the snow); *Saldarini v. Wachusett Mountain Ski Area, Inc.*, 422 Mass. 683, 684 (1996) ("[R]ecovery is barred as a matter of law for injury resulting from a risk specifically enumerated in § 71O as an unavoidable risk inherent in the sport of skiing"); *Spinale v. Pam F. Inc.*, 1995 Mas.. App. Div. 140, 141-142 (plaintiff, an experienced skier, injured after accident on ice, not entitled to recover). As recognized by the *Saldarini* court, "no reasonable mind could fail to immediately conclude that ice is a necessary and obvious danger of skiing . . . No improvements in grooming technique have been able to eliminate ice from the New England ski slopes, however, often described as 'frozen granular' and 'eastern hardpack.'" 422 Mass. at 684 (internal quotations and citation omitted). Consistent with the above, Wachusett had no duty to remedy the ice on the ski trail where the plaintiff was injured as it is an assumed risk inherent in the sport of skiing.

In his opposition, the plaintiff claims that the Act does not absolve Wachusett of liability because his cause of action is not premised solely on his having encountered icy conditions and fallen; rather, his injuries were "a direct and proximate result of the negligence of the Defendant, through its agents, servants and/or employees[.]" Specifically, he claims that Wachusett's employees exercised poor judgment in failing to close and block from use by skiers the trail upon which the plaintiff was injured. In support of his position, he relies on *Tilley v. Brodie Mountain Ski Area*, 412 Mass. 1009, 1010 (1992) (rescript). His reliance is misplaced; *Tilley* did not involve an application of the inherent risk exemption under § 7N that is at issue here. That case involved a ski area operator's *respondeat superior* liability for a collision between the ski area operator's agent and a patron; the court held that the agent had a duty to avoid the collision

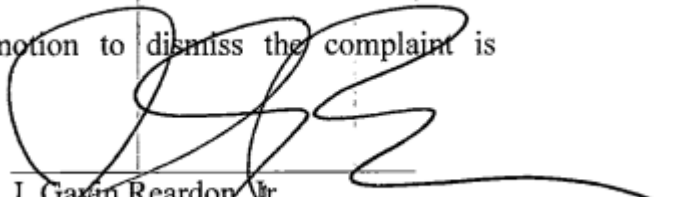
and was liable for any resulting injury. The shifting of liability to the ski operator was appropriate because it controlled the conduct of the ski patrollers through its "selection, training, and supervision" procedures. *Tilley*, 412 Mass. at 1010. Here, just like in *Saldarini*, the basis for the plaintiff's claim is a naturally-occurring condition, i.e. ice, an inherent risk which neither Wachusett nor its agents created.

In light of the above, the negligence claim against Wachusett does not survive the motion to dismiss.

ORDER

For the foregoing reasons, the defendant's motion to dismiss the complaint is **ALLOWED.**

Date: July 20, 2020



J. Gavin Reardon, Jr.
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2085CV204

GREG GOLFOMITSOS

vs.

WACHUSETT MOUNTAIN ASSOCIATES, INC., ET AL.

**MEMORANDUM OF DECISION AND ORDER ON INDIVIDUAL DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

This personal injury/ski operator liability case is before the court on a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6).

A motion to dismiss the corporate defendant, Wachusett Mountain Associates, Inc. ("Wachusett"), was granted by the court (Reardon, J.) on July 20, 2020, based upon G. L. c. 143, §§ 71H – 71S ("The Massachusetts Ski Safety Act"). After this motion had been filed but before it had been ruled on, the court (Sullivan, S., J.) granted a motion to allow the plaintiff to amend the complaint adding six individual employees of Wachusett. The individual defendants now seek to dismiss all claims against them, based on the same statutory language and case law.

The issue of statutory immunity is properly before the court on this motion to dismiss, accepting as true all facts in the facts alleged in the amended complaint and taking reasonable inferences from the amended complaint in the light most favorable to the plaintiff. See *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 625 n.7 (2008).

The crux of the plaintiff's amended complaint is that these individual employees failed to properly inspect and close the trail on which the plaintiff was injured while skiing, because it was too icy to be safe for skiing. The statute addresses this question directly. While the operator owed a "general duty ... to maintain and operate its ski area in a reasonably safe condition or manner" under G. L. c. 143, § 71N, there is an "exception to their general duty" under § 71O, which "expressly limit[s]" that duty and "negates operator liability for damages arising out of risks inherent in the sport of skiing." *McHerron v. Jiminy Peak, Inc.*, 422 Mass 678, 680-681

Entered and Copies Mailed 10/15/2020

16 *

(1996). Icy conditions are deemed to be risks inherent in the sport of skiing, according to the statutory language: “A skier shall be presumed to know of the existence of certain unavoidable risks inherent in the sport of skiing, which shall include, but not be limited to, . . . ice conditions . . . , and shall assume the risk of injury or loss caused by such inherent risks.” G. L. c. 143, § 71O. See also *Saldarini v. Wachusett Mountain Ski Area, Inc.*, 422 Mass. 683, 684 (1996) (“[R]ecovery is barred as a matter of law for injury resulting from a risk specifically enumerated in § 71O as an unavoidable risk inherent in the sport of skiing.”)

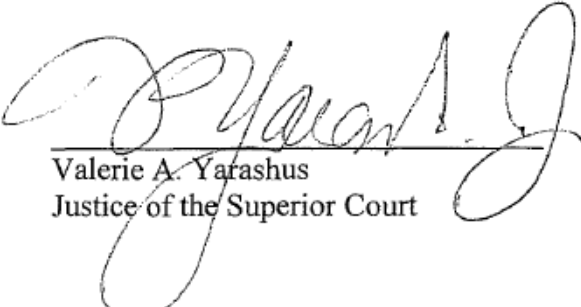
This court concurs that the rescript opinion *Tilley v. Brodie Mountain Ski Area*, 412 Mass. 1009, 1010 (2009) is distinguishable. In that case, the employee of the ski area operator was a skier who collided with another skier, which is addressed in another part of the statute; the case was not based on negligent maintenance as to the opening or closing of a ski trail with icy conditions.

The issue of whether individual employees can be held liable as defendants under this statute is addressed in the “Definitions” section of the act. G. L. c. 143, § 71I, defines “[s]ki area operator” as “the owner or operator of a ski area, including . . . the employees, agents, officers or delegated representatives of such owner or operator,” Individual employees are therefore afforded the same protection from liability as the corporate ski operator.


Moreover, this is consistent with the prior court ruling of July 20, 2020: “Here, just like in *Saldarini*, the basis for the plaintiff’s claim is a naturally-occurring condition, i.e. ice, an inherent risk which neither Wachusett nor its agents created.” (Emphasis added).

ORDER

For the reasons outlined above, the individual defendants’ motion to dismiss the amended complaint is **ALLOWED**.


Valerie A. Yarashus
Justice of the Superior Court

DATED: October 14, 2020

JUDGMENT ON MOTION TO DISMISS		Trial Court of Massachusetts The Superior Court	
DOCKET NUMBER 2085CV00204		Dennis P. McManus, Clerk of Courts	
CASE NAME Golfomitsos, Greg vs. Wachusett Mountain Associates, Inc. et al		COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608	
JUDGMENT FOR THE FOLLOWING DEFENDANT(S) Ciavola, Gerry Dowd, John Gardell, Geoffrey Hendrick, John C Murphy, Chris McDonald, Kevin			
JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S) Golfomitsos, Greg			
<p>This action came on before the Court, Hon. Valerie A Yarashus, presiding, and upon review of the motion to dismiss pursuant to Mass. R.Civ.P. 12(b),</p> <p>It is ORDERED AND ADJUDGED:</p> <p>that the complaint of the Plaintiff, Greg Golfomitsos, is hereby dismissed against the above named Defendants.</p>			
DATE JUDGMENT ENTERED 10/15/2020	CLERK OF COURTS/ ASST. CLERK X <i>Jeanne Oer</i>		

Date/Time Printed: 10-15-2020 11:03:45

SCV083\ 03/2016

Entered and Copies Mailed 10/15/2020