At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on September 24, 2019.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

LAUREN DOWD-SHEDLOCK,

Plaintiffs,

v.

TOGGENBURG SKI CENTER, INC.,

Defendants.

DECISION AND ORDER ON MOTION

Index No.: 2016EF5568
RJI No.: 33-19-0338

APPEARANCES: **JAY G. WILLIAMS, III, ESQ., OF FELT EVANS, LLP**
For Plaintiff

STEVEN M. ZWEIG, ESQ., OF ZWEIG LAW, P.C.
For Defendant

Plaintiff moves for summary judgment on the issue of liability in her complaint and alternatively moves for dismissal of the defendant's affirmative defenses of assumption of risk and comparative negligence.[1] The complaint alleges that plaintiff was a customer at defendant Toggenburg Ski Center on January 24, 2014 with her three year old niece. She was assisting her niece on a beginner's trail, which had a tow rope consisting of a rope pulling tow, with handles which hang perpendicular to the ground. As plaintiff waited with her niece to be towed up the hill, a tow handle which had turned and was parallel to the ground struck plaintiff in the back of

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[1] Plaintiff also indicates in her notice of motion that she seeks dismissal of the affirmative defense of failure to mitigate damages, but both counsel agreed at oral argument that the issue was not under review.

the knee. Plaintiff alleges that the defendant was negligent in failing to properly warn users of the tow rope and the associated dangers.

As the proponent of the motion for summary judgment, plaintiff is required to establish that the defendant was negligent as a matter of law and the burden is on the plaintiff to submit evidence sufficient to show that the defendant created a dangerous condition over and above the usual dangers inherent in the sport of downhill skiing. *See, Miller v. Holiday Valley, Inc.*, 85 AD3d 1706 (4th Dept. 2011). Plaintiff relies upon the deposition testimony of Ed Waite, defendant's employee, to show that the beginner's hill is roughly 400 feet overall in length with one tow rope for that hill. Waite testified that there is a small operator shack at the bottom of the hill and an employee is assigned to sit in the shack, operate the lift and observe the skiers. According to Waite, signs were required to be mounted on cones that say "load here" and that the operator was to make sure that the skiers were loading in the proper place and to tell skiers if they were using the tow improperly. He also testified that to use the lift, the skier is to stand at the designated loading area and look over his or her shoulder and grab the handle when it passes by. According to Waite, the lift is a tow rope running between two wheels; the handles hang from the rope, which are 12 to 16 inches long and are solid plastic. He further testified that while the pawl handles should be perpendicular to the ground, sometimes they swing into a horizontal position. The operator was expected to watch the lift at all times and for that reason there is never an occasion where the lift operator should leave the building, according to Waite.

Plaintiff also points to her own testimony that she arrived at 10:30 a.m. and the incident occurred around 11:00 a.m. She testified that when they arrived, the tow rope was not operating and she told the person at the front desk that the reason they were there was to teach her young

niece how to ski and an employee turned on the tow rope. The accident occurred during plaintiff and her niece's third run up the hill. According to plaintiff, she went up the lift with her niece between her legs, claiming that she had been previously instructed to do this with a young child by one of defendant's employees. She testified there was no attendant on the slope where they were skiing and no sign where plaintiff should load. Nor were there instructions on how to use the tow rope. Plaintiff believed that there were approximately ten people on the hill, four of whom were her family members. Plaintiff further testified that she waited to position her niece while the handles went by. The handles were hanging down perpendicular to the ground but one of them swung into a horizontal position and struck her directly in the left leg, causing her to fall. Plaintiff provides affidavits from seven family members to corroborate her account.

Plaintiff also points to the defendant's lift log, which describes the incident as "injury due to paddles spinning. Ski patrol came, tightened line, fixed 12:10." Plaintiff argues that defendant knew the handles could turn horizontally and was aware of the potentially dangerous condition. Plaintiff further alleges that defendant failed to warn her of the potential danger, provide proper and adequate assistance for customers using the tow rope, properly train and supervise its employees and properly tighten the rope which caused the handles to swing in a horizontal position.

Plaintiff is not entitled to summary judgment here inasmuch as she has failed in the first instance to establish through admissible submissions that she has met her burden. Assuming arguendo that she has met that burden, defendant has raised an issue of fact in opposition. Plaintiff is correct that while there is undoubtedly a risk of injury inherent in using a tow rope or riding a chairlift at a ski resort, it is not of such magnitude to eliminate all duty of care and

thereby insulate the owner from claims of negligent supervision and training of a lift operator or negligent maintenance and operation of the lift itself since such negligence may unduly enhance the level of risk assumed. *See, Morgan v. Ski Roundup*, 290 AD2d 618 (2002); *see also, Morgan v. State of New York*, 90 NY2d 471 (1997).

Plaintiff has presented prima facie evidence that defendant was responsible for assigning a lift operator to delineate where skiers were to load for the tow rope and to watch skiers to make sure they were skiing and using the lift appropriately. She has also demonstrated that the handles could turn horizontally, with a potential for a skier to be struck. Plaintiff claims that her allegation that the handle swung because the tow rope was not properly tightened is established by the fact that the rope was immediately tightened thereafter. This is without merit, however, inasmuch as subsequent repairs is inadmissible to prove negligence. *See, Stolowski v. 234 East 178th Street, LLC*, 89 AD3d 549 (1st Dept. 2011). Plaintiff concedes that the issue of proximate cause is generally a question of fact for the jury. She however contends that it is undisputed that she was not told where to load, was subsequently struck by the handle and that defendant violated its own policy by failing to tell skiers where to load. Plaintiff offers no expert affidavit to support these claims.

Defendant has demonstrated that factual disputes exist through, *inter alia*, its affidavit of Waite, its manager, upon whose deposition testimony plaintiff relies. Defendant also provides an affidavit from Brian Heon. Waite has worked as the outside operations manager over three years before the date of the accident, during which time he was responsible for overseeing lift operations and lift maintenance. He details the practice lift operators follow each day before opening the subject tow rope to the public. Waite's affidavit establishes the custom and habit

evidence to show that the directions for loading and other signs were posted at the time of the accident and that a lift operator was stationed in the lift shack at the bottom of the hill. Evidence of a deliberate repetitive practice by employees of a business is admissible to prove employees followed the deliberate repetitive practice on the date of the accident. *See, Rozier v. BTNH, Inc.*, 166 AD3d 516 (4th Dept. 2018). Habit evidence is appropriate where the proof demonstrates a deliberate and repetitive practice by the person who is in complete control of the circumstances. *See, Halleran v. Virginia Chems*, 41 NY2d 386 NY 2d 627 (2007). Waite describes the components of the lift as a rope in a loop which runs around bull wheels at the top and bottom of the lift and is powered, in this case, by an electric motor at the bottom of the lift. Handles are attached to the wire rope at regular intervals. The bull wheels have rubber liners which guide the rope and handles around the bull wheel; as the handles pass around the wheel at the bottom and top they move from a vertical to horizontal position and then return to a vertical position as they leave the wheel. According to Waite, it is normal for there to be some roll to the rope as it passes through and exits the rubber liner in the wheel and it is normal for there to be some swing to the handles as they exit the liner. He also notes that the lift was inspected each year by the Department of Labor, including two months prior to plaintiff's accident, when he was present and that it passed inspection. He further states that the small building at the base has posted signs concerning the use of the lift and provides copies and describes the operator's responsibilities concerning the completion of a safety check of the entire lift prior to opening, identifies the operator that day and her completed log. He also notes that prior to opening, an employee follows the same procedures of placing orange cones and signs along the lift that state say "wait here", "load here", "stay in tow path", "prepare to unload" and "unload here."

According to Waite, the location of the signs depends on the weather and snow conditions. After the assigned operator places the cones and signs, she turns on the lift and watches the lift operate for two to three complete revolutions to make sure it works properly and then makes sure the handles are spaced evenly along the wire rope and checks the safety circuits at the top and bottom to make sure the lift stops when the safety circuits are operated. Waite also states that it is defendant's practice to operate the lift only when an operator is present at the operator's station in the lift shack at the bottom of the run. He also notes that based on where the accident occurred the lift could have only been stopped if the lift operator activated the stop button. Thus, the Waite affidavit alone is sufficient to establish at a minimum a question of fact as to whether the lift was properly inspected before it opened to the public on the date of the accident, whether an operator was in the building at the base of the lift and weather the "load here" sign was posted at the base.

The additional affidavit of Brian Heon, indicates that he has worked for several years as a lift manager overseeing twenty lifts, including day to day operations. He is the Vice Chairman of NTSB/ANSI B77.1 which publishes standards for passenger tramways, including lifts like the handle tow that is at issue here. He is also a member of the National Ski Areas Association and has been an instructor. He is familiar with the type of handle tow in question. He likewise describes the lift in great detail, noting that handle tows are commonly used by ski areas throughout the United States to provide skiers access to primarily beginner terrain. Based on his review of the lift log relating to the task performed by the operator before the subject lift opened to the public on the date of the accident, it was operating appropriately. He indicates that the handles on a properly inspected and maintained handle tow do not always remain perpendicular

to the snow surface as they travel between the upper and lower wheels, as the handles can naturally sway because they move from the vertical to the horizontal position when they enter the rubber sleeve lining of the bull wheel and remain horizontal as the wire rope to which they are attached moves around the wheel in the rubber sleeve and move from the horizontal to the vertical position when they exit the sleeve lining of the bull wheel. In his opinion, the fact that the handle which plaintiff claims grabbed her behind her knee, may not have been perpendicular to the snow surface and may have been horizontal, does not constitute a defect in the handle tow or evidence of an improper inspection. He also notes that handles at the loading area and elsewhere on the rope between the two wheels can be caused to swing from a skier dropping the handle as they unload at the top, a skier falling as they ride up or a skier skiing outside the designated path. Inasmuch as the defendant has raised issues of fact, the plaintiff's motion for summary judgment on the complaint is denied.

Plaintiff's motion in the alternative to dismiss the defendant's affirmative defenses of assumption of risk and comparative negligence is likewise denied as defendant has provided sufficient evidence to establish a question of fact as to whether plaintiff assumed the risk of her injury and was comparatively negligent. Under the primary doctrine of assumption of risk a person who voluntarily participates in a sporting activity generally consents by his or her own participation to those injury causing events, conditions and risks that are inherent in that activity. *See, Cotty v. Town of South Hampton*, 64 AD3d 251 (4th Dept. 2009). As a general matter, an experienced skier assumes the risk caused by, *inter alia,* variations in terrain and weather conditions that are incidental to the furnishing of a ski area. *See, Sontag v. Holiday Valley, Inc.*, 38 AD3d 1350 (4th Dept. 2007); *see also, Painter v. Peek'n Peak Recreation*, 2 AD3d 1289 (4th

Dept. 2003). Riding a ski lift carries a certain amount of risk and it is beyond dispute that there is an inherent risk of injury to participants in downhill skiing. *See, Morgan v. Ski Roundup*, 290 AD2d 618 (3rd Dept. 2002). There is also risk of injury in entering, riding and exiting from a chairlift. *See, Morgan, supra; see also, DeLacy v. Catamount Development Corp.*, 302 AD2d 735 (3rd Dept. 2003). The same applies to the use of a tow rope. Plaintiff admitted that she used the handle tow while she was growing up and learning to ski. She knew the handles could sway and that she could fall while using the handle tow and get hurt. She admitted at her deposition she had fallen while using the tow rope before the date of the accident, was aware of the size and despite the knowledge that the handles could sway she submitted no evidence showing she was standing far enough away from the cable to avoid being struck. An issue of fact has likewise been created for the same reasons with respect to the plaintiff's comparative negligence.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the plaintiff's motion for summary judgment on the issue of liability is denied, and it is further

ORDERED, that the plaintiff's motion in the alternative for dismissal of the affirmative defenses of assumption of the risk and comparative negligence is denied.

ENTER

Dated: September 26, 2019
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Plaintiff's Notice of Motion, dated August 6, 2019.

2. Affirmation of Jay G. Williams, III, Esq. in support of plaintiff's motion, dated August 6, 2019, and attached exhibits.

3. Plaintiff's Memorandum of Law in support of motion, dated August 8, 2019.

4. Affirmation of Steven M. Zweig, Esq. in opposition to plaintiff's motion, dated September 17, 2019, and attached exhibits.

5. Affidavit of Brian Heon, dated September 16, 2019.

6. Affidavit of Eric Waite, dated September 17, 2019, and attached exhibits.

7. Defendant's Memorandum of Law in opposition, dated September 17, 2019.

8. Reply Affirmation of Jay G. Williams, III, Esq., dated September 20, 2019, and attached exhibits.