Superior Court of New Jersey

Appellate Division

Docket No. A-000058-25

MARTIN MCGUINNISS AND JAMIE MCGUINNISS, HIS SPOUSE, *Plaintiffs-Respondents*, vs. SKI CAMPGAW MANAGEMENT, LLC, SKI BLUE HILLS MANAGEMENT, LLC, CAMPGAW MOUNTAIN SKI AREA, COUNTY OF BERGEN, *Defendants-Appellants*, *(For Continuation of Caption See Inside Cover)*	:	CIVIL ACTION ON GRANT OF MOTION FOR LEAVE TO APPEAL FROM THE INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DOCKET NO.: BER-L-005138-22 Sat Below: HON. LINA P. CORRISTON, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS

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JOHN DOES 1-10 (FICTITIOUS NAMES REPRESENTING UNKNOWN INDIVIDUALS), AND/OR XYZ CORPS. 1-10 (FICTITIOUS NAMES REPRESENTING UNKNOWN CORPORATIONS, PARTNERSHIPS AND/OR LIMITED LIABILITY COMPANIES OR OTHER TYPES OF LEGAL ENTITIES)	:
Defendants.	:

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PRELIMINARY STATEMENT

Plaintiffs allege personal injury damages as a result of Martin McGuinniss' fall from a snow tube at the ski area owned and operated by Defendant, Ski Campgaw Management, LLC in Bergen County, New Jersey on December 29, 2020. Defendant Ski Campgaw Management, LLC operates a snow tubing facility at its ski area and offers the public the opportunity to use the premises for snow tubing for consideration. Plaintiffs purchased snow tubing tickets and signed Snow Tubing Agreements.

Defendants appeal the trial court's March 28, 2025, order denying defendants' motion for summary judgment as to Counts One, Two, Three and Six of the Complaint. In denying the motion, the trial court held that the common law applied rather than the New Jersey Ski Act, N.J.S.A. 5:13-1 et seq., ("Ski Statute"). Defendants argue that this holding was an error and that clear precedent from the New Jersey Supreme Court requires a finding as a matter of law that the Ski Statute applies and displaces the common law. The trial court decision upends established standards and the principle of assumption of risk for all pending cases filed in New Jersey relating to snowboarding, snow tubing, Sno-Go and other activities offered by New Jersey ski area operators on its skiable terrain to the public for consideration.

Second, Defendants appeal the trial court's denial of summary judgment given the Plaintiffs' failure to show that Defendant, Ski Campgaw Management, LLC had reasonable notice of and an opportunity to remove the allegedly dangerous condition alleged pursuant to N.J.S.A. 5:13-3 (d).

Third, Defendants appeal the trial court's denial of summary judgment given that there is no dispute that the deceleration mat which is the focus of the Plaintiffs' allegation is equipment necessary for the ordinary operation of the ski area and thus is exempt from liability under N.J.S.A. 5:13-3(b)(3).

Fourth, Defendants appeal the trial court's denial of summary judgment given the Plaintiffs failure to provide qualified expert testimony to demonstrate a violation by Defendants of N.J.S.A. 5:13-3(a). Plaintiffs retained a person to provide an opinion, but that person, Mark DiNola, intentionally did not review or apply the provisions of the Ski Statute. There is no dispute therefore that Plaintiffs cannot produce an opinion relating the facts to the applicable standards of the Ski Statute.

Finally, and in the alternative, the trial court erred by not granting the Defendants' motion for summary judgment under the common law as Plaintiffs signed an express assumption of risks contract which included specific and detailed warnings, and which included an exculpatory release. There is no dispute that both Plaintiffs signed the Snow Tubing Agreement. If the Ski

Statute does not apply as a matter of law, which Defendants dispute, then the Plaintiffs' claims must be dismissed based upon the Snow Tubing Agreement's exculpatory clause.

STATEMENT OF PROCEDURAL HISTORY

On September 22, 2022, Plaintiffs filed a Complaint against the Defendants alleging common law negligence based upon Plaintiffs injuries sustained while snow tubing at Ski Campgaw's ski area on or about December 29, 2020. (Da10). On November 3, 2022, Defendants filed an Answer and Separate Defenses. (Da20). On November 7, 2022, Plaintiffs filed a Stipulation of Dismissal Without Prejudice as to Defendants County of Bergen and Ski Blue Hills Management, LLC. (Da31). On March 28, 2025, the trial court granted the motion for summary judgment of Defendants seeking the dismissal of Count Four of the Complaint as to Bergen County and dismissed the Complaint as to Ski Blue Hills Management, LLC. (Da1).

The parties conducted discovery and the plaintiff, Martin McGuinnis, was deposed on January 10, 2024. (Da108). The plaintiff Jamie McGuinnis was deposed on the same date. (Da131). The plaintiffs served a report dated September 6, 2024, of Mark DiNola. (Da161). Defendants served the liability expert report of Mark St. J. Petrozzi, ARM, dated October 18, 2024. (Da140).

In response to a motion to preclude and a motion for summary judgment filed by Defendants, the trial court conducted an Evidentiary Rule 104 Hearing on March 7, 2025 (1T[1]), relative to the testimony of Plaintiff's liability expert,

[1] 1T refers to Transcript of Rule 104 Hearing, dated March 7, 2025;

Mark DiNola. On March 28, 2025, the trial court entered an order granting in part and denying in part the motion of Ski Campgaw to preclude and exclude portions of the anticipated testimony of plaintiff's expert. (Da3). In part, the trial court precluded Mr. DiNola from testimony at trial that there was deficient training of the defendant's staff or employees; he was also precluded from giving any opinion testimony at trial about or referring to the New Jersey Ski Statute or its application to this case.

On March 28, 2025, the trial court entered an Order and placed the Reasons on the record in response to the motion for summary judgment filed by the Defendants. (Da3). The transcript of the oral argument and Reasons for Decision were previously ordered and provided to the Appellate Division. (See Da386, 2T.) The trial court granted summary judgment and dismissed the County of Bergen and Ski Blue Hills Management, LLC. (Da1).

On April 17, 2025, Defendants filed a Motion for Leave to Appeal and Appendix. On April 28, 2025, Plaintiffs filed a Responding Brief. On May 12, 2025, an Order was entered denying the Defendants' Motion for Leave to Appeal. On June 6, 2025, Defendants filed a Motion for Leave to Appeal and Appendix with the New Jersey Supreme Court. On July 18, 2025, Plaintiffs filed their Amended Brief in Opposition to Motion for Leave to Appeal. On

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2T refers to Summary Judgment Motion Transcript, dated March 28, 2025.

September 9, 2025, the New Jersey Supreme Court entered an Order Granting Leave to Appeal and Remand to the Appellate Division. On September 9, 2025, A Peremptory Scheduling Order was filed. On September 10, 2025, Defendants filed a Motion to Stay Proceeding in the Law Division. On September 26, 2025, an Order was filed Granting Defendants' Motion to Stay Proceedings.

STATEMENT OF FACTS

Plaintiff, Martin McGuinniss is an adult individual who is a resident of the State of New York. (Da10; Da20). On December 29, 2020, Mr. McGuinniss and his wife, Jamie McGuinniss, traveled to Mahwah, New Jersey to the Ski Campgaw Ski Area owned and operated by the defendant Ski Campgaw Management, LLC (hereinafter "Ski Campgaw") with their two children. (Da114, Plaintiff deposition at T22:18-T23:5; Da116, Plaintiff deposition at T29:2-T31:18). Ski Campgaw operates a ski area which for consideration permits patrons engage in the sport of downhill skiing, snowboarding and snowtubing. The plaintiffs purchased tickets to snow tube. (Da107; Da116, Plaintiff deposition at T29:2-T31:18). It is undisputed that Mr. McGuinniss read and signed a tubing agreement at the time of the purchase of the tickets. The agreement stated:

> I understand and acknowledge that **SNOW TUBING IS AN INHERENTLY DANGEROUS ACTIVITY.** By participating in this Activity and signing this agreement: I ACKNOWLEDGE AND ACCEPT THAT CERTAIN INHERENT RISKS EXIST WHEN PARTICIPATING IN SNOW TUBING and that **I MAY SUFFER SERIOUS, IF NOT FATAL, INJURIES** as a result. I additionally **AGREE NOT TO SUE FOR INJURIES SUSTAINED** and admit that my participation is completely voluntary.
>
> II. **SNOWTUBING IS A DANGEROUS ACTIVITY.**
> I understand that part of the thrill, excitement, and risk of snow tubing is that the snow tubes all end up in common run-out area at

various speeds, and it is my responsibility to try and avoid hitting or being hit by another snow-tuber. However, even in doing so, there still remains the risk of collision, as well as other risks.

I hereby agree to **REPORT ANY INJURY** to myself to a Campgaw Mtn. snow tubing attendant.

I hereby acknowledge that some snow tubing risks that I may encounter and factors that my effect my snow tubing experience include but are not limited to, the following:

- Variations in the steepness and configuration of the snow-tubing shoots and in the run-out area
- Variations in the surface upon which snow tubing is conducted -which can vary from wet, slushy, conditions to hard, packed and icy conditions and anything in between
- The placement of fences and/or barriers at or along portions of the snow tubing area as well as an **ABSENCE OF FENCES AND/OR BARRIERS** along the length of the run, that might have otherwise reduced or prevented injury
- Changes in the speed at which snow tubes travel – such changed may depend on factors such as: surface conditions, participants' weight, and/or the interlinking and collision of snow tubes on runs
- The chance that **PARTICIPANTS MAY BE EJECTED FROM THEIR TUBES** or otherwise fall out of their tubes
- The chance that **PARTICIPANTS MAY WIND UP IN ANOTHER RUN, OR EVEN ENTIRELY OFF OF THE RUNOUT HILL-** the ride may or may not conclude in the general run-out area
- **PARTICIPANTS MAY COLLIDE WITH**: other snow tubing participants, snow tube, facility attendants, observing patrons or others who are generally on the premises, and/or fixed objects (these are merely examples) – fixed objects may include obstacles or structures that are a part of the snow tubing facility itself or located temporarily on the facility's premises, **REGARDLESS OF THE LOCATION OF THE SNOW-TUBING AREA . . .**

> I have read the foregoing and agree and understand that snow tubing is a purely voluntary and recreational activity, and I agree that I WILL NOT SNOW TUBE AT THIS FACILITY IF I AM UNWILLING TO ACCEPT THE RISKS outlined above, or any others that are inherent in the participation of snow tubing, or if I am unwilling to acknowledge that these inherent risks PRECLUDE ME FROM BRINGING SUIT for any injuries that may result from such activity. . .

See Da107.

On his third run down the snow tubing lanes, Mr. McGuinniss fell from his snow tube and sustained a shoulder injury. (Da94, Plaintiff Martin McGuinniss' answer to Form A interrogatory number 2; Da118-Da120, Plaintiff Martin McGuinniss' deposition at ; T38:12-16; T43:7-T45:16; T46:14-21.) He has alleged that a piece of equipment that is used in the normal operation of the ski area to slow the speed of snow tubes, a rubber deceleration mat, caused him to fall out of the snow tube. (Da94, Plaintiff Martin McGuinniss' answer to Form A interrogatory number 2; Da118-Da120, Plaintiff Martin McGuinniss' deposition at ; T38:12-16; T43:7-T45:16; T46:14-21.)

Plaintiff testified in his deposition and the court found below that prior to his final run he did not make any observations of other tubers having difficulty going down the lane he went down on his final run. (Da118 Plaintiff Martin McGuinniss' deposition at ; T38:12-16.) There is no evidence as to when or how long the alleged "bunched up" mat condition existed in that lane prior to plaintiff's injury. See Da119-120, plaintiff deposition at T44:6 – T45:6. Indeed,

plaintiff himself testified that he was unable to observe the alleged condition until he was 20 to 30 feet from it. See Da118-Da120, plaintiff deposition at T37:5-25; T43:7 – T45:16; T46:21. Moreover, prior to his final run Plaintiff did not see any other tubers being flipped or ejected from their tubes. See T2, 3/28/25 MSJ transcript at T34:L12-14. It was also established below that deceleration mats are ordinarily used in the operation of snow tubing facilities. See T2, 3/28/25 MSJ transcript at T34:L14-15.

Mr. McGuinniss was the sole fact witness who was presented as to the mechanism of the fall and as to the alleged presence of a hazard. (Da121; T49:1-T49:18). Mrs. McGuinniss was in the lodge with one of their children and their oldest child was with friends at some unknown location at the time of the alleged incident. (Da120; T48:12-T48:25). Mr. McGuinniss did not report the incident or the alleged condition to any employee of Ski Campgaw. (Da120; T48:4-T48:11). He did not describe to his wife what occurred, only that he was injured and needed to get medical assistance. (Da121; T49:1-T49:18.)

Mr. McGuinniss did not tell his wife that he was injured because of a "bunched up" mat nor did he describe to her how the incident occurred. (Da121; T49:1-T49:18.) He did not point out the alleged condition to any Ski Campgaw employee. (Da120; T48:4-T48:11). It was not until the following day that Mr.

McGuinniss drove from New York back to Ski Campgaw when he reported the incident. At T48:4-T48:11 (Da120) he admitted:

Q Other than that conversation with the individual at the bottom of the tubing run, did you have any conversation with anybody else from Campgaw --
A No.
Q -- about that incident or your injury?
A Not that day, no.

Further, at T51:4-L7 and L13-19 (Da121):

Q Now, from the time that you were injured until the time you went back the next day, did you speak to an attorney?
A That day. It was the following day.

Q So, the question I'm asking you is not what you discussed. I don't need to know what attorney it was. But I just want to know if, from the time you were injured on the 29th, prior to getting there on the 30th, did you talk to an attorney?
A Yes.

LEGAL ARGUMENT
POINT I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT. (Da1)

A. The standard governing review of decisions on motions for summary judgment. (Da1)

It is well settled that the appellate courts are to review de novo the grant or denial of a motion for summary judgment. Town of Kearny v. Brandt, 214 N.J. 76, 91-92 (2013); citing Coyne v. State Dept. of Transp., 182 N.J. 481, 491 (2005). Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46–2(c). The judge must decide whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). On appellate review, the "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Like appellate review of the grant or denial of a summary judgment motion, appellate review of the lower court's statutory interpretation is also de novo. New Jersey Coalition of Automotive Retailers, Inc. v. Ford Motor Company, 261 N.J. 348, 357-358 (2025); ("In construing a statute, our review is de novo." Est. of Spill ex rel. Spill v. Markovitz, 260 N.J. 146, 155 (2025). The Court in New Jersey Coalition of Automotive Retailers, Inc. made this point clear, finding that de novo review:

> includes interpreting the statute's explanation of who may bring the cause of action it creates in analyzing "[w]hether a party has standing to pursue a claim." See Cherokee LCP Land, LLC v. City of Linden Plan. Bd., 234 N.J. 403, 414, 416-17, 191 A.3d 597 (2018) (determining whether plaintiffs fell into the statutorily created class of "interested parties" entitled to bring a claim). We therefore proceed "without deference to the trial court's findings." Est. of Jones, 259 N.J. at 594, 328 A.3d 923. "[T]he Legislature's intent is paramount to a court's analysis," and we look to the plain language of the statutory text to determine that intent. Id. at 595, 328 A.3d 923. "We ascribe to the statutory words their ordinary meaning and significance and read them in context with related provisions so as to give sense to the legislation as a whole." Fuster v. Township of Chatham, 259 N.J. 533, 547, 328 A.3d 894 (2025) (quoting DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039 (2005)).

Defendants-Appellants appeal from the trial court's order denying our motion for summary judgment, and from its ruling that the New Jersey Ski Statute, N.J.S.A. 5:13-1 et seq., does not apply to the facts of this case.

B. The Applicability of the New Jersey Ski Statute. (Da1)

There is no dispute that defendant Ski Campgaw opened its premises to the public to practice the winter sport of snow tubing and accepted consideration for the privilege of practicing the sport in question. There also is no dispute that the plaintiff, Martin McGuinniss paid consideration to Ski Campgaw solely for the purpose of being permitted to snow tube at the snow tubing area at Ski Campgaw. In a 1996 opinion the Supreme Court (Justice Stein) provided clear direction as to the scope of the New Jersey Ski Statute in Brett, et al. v. Great American Recreation, Inc., 144 N.J. 479 (1996)(Five tobogganers sustained injury on a closed ski trail). In 2013 the Supreme Court (Justice Hoens) adopted and continued the clear direction of the Supreme Court as to under what circumstances the New Jersey Ski Statute should apply in Angland v. Mountain Creek Resort, Inc., et al., 213 N.J. 573 (2013) (Establishing that the standard of care in a skier-skier collision is recklessness under the common law and discussing the application of the Ski Statute as to the claims of the decedent against the ski area operator).

Notwithstanding this precedent and direction that is almost thirty years old, the trial court in denying a motion for summary judgment filed by Defendants-Appellants and held that the New Jersey Ski Statute does not apply to snow tubing at Ski Campgaw. More specifically, the trial court stated:

T49

With regard to the applicability of the ski statute, Defendant argues without citing any legislative history, clear statutory language or supporting common law, that the ski statute applies to the within accident. Defendant's argument that Plaintiff as a snow tuber falls within the definition of skier pursuant to the ski statute is considered as a conclusory statement. Further, Plaintiff convincingly argues that the mechanics of snowtubing is fundamentally different from skiing or sledding. As I mentioned earlier, there's no skiing, there's no steering mechanism on a snow tube and no ability to control one's speed. And snowtubing is a family friendly activity that doesn't really require any skill. And that's what Plaintiff has argued and the Court adopts the argument of the Plaintiff in this regard.

T50

The Court also notes that in the case cited by the Defendants, Brett v. Great American Recreation, the Court found that New Jersey expressly limits the class of persons whose relationship is controlled by the ski statute to the skier who is on the land of another to practice a winter sport. And the operator who accepts payment for the privilege of practicing the sport in question. The Court finds that at a very minimum arguable that snowtubing, unlike skiing or even snow boarding is not a sport, and therefore not contemplated by the ski statute. That's just parenthetically. And in the absence of any legislative history and a clear indication in the controlling statute, and the common law as to the application of the ski statute to snowtubing, the Court cannot provide and will not provide the Plaintiffs with an advisory opinion. The Court notes if the legislator intended to include the snowtubing in the ski statute it would have enacted an appropriate amendment since the statute was adopted in 1979, so more than 45 years ago. And nothing has been changed since then.

See T2, 3/28/25 MSJ transcript at T49-T50.

The Supreme Court precedent and direction as to the scope and applicability of the New Jersey Ski Statute was brought to the trial court's attention in defendant's summary judgment motion. The trial court concluded without proper reliance on or application of the Supreme Court cases in Brett or Angland, that snow tubing was not expressly mentioned in the Ski Statute and therefore the Ski Statute does not apply to this activity offered at a number of ski areas in New Jersey. This was error which should be properly corrected by this court.

C. The trial court erred in concluding that snow tubing is governed by the common law rather than the New Jersey Ski Statute. (Da1)

There is no dispute that Mr. McGuinniss and his family traveled from their home in New York State and entered the premises of Defendants in Mahwah, New Jersey for the sole purpose of enjoying the winter sport of snow tubing. There is no dispute that Defendants-Appellants permitted the public to pay consideration to enter its premises and to participate in snow tubing. Members of the public were free to purchase a lift ticket and to ski on the trails of Ski Campgaw or alternatively, they were free to purchase tickets to snow tube on the snow tubing hill. There is no dispute that the Plaintiffs purchased tickets in order to partake in the recreational activity of snow tubing offered by Ski Campgaw at its ski area.

New Jersey's Ski Statute, N.J.S.A. 5:13-1, et. seq., was passed in response to the increasing cost of liability insurance for ski area operators and the threat to the availability of such insurance. N.J.S.A. 5:13-1, *Assembly Judiciary, Law, Public Safety and Defense Committee Statement*. In the opening section of the act, the Legislature stated

> That the sport of skiing is practiced by a large number of citizens of this State and also attracts to this State large numbers of non-residents, significantly contributing to the economy of this State and, therefore, the allocation of risks and costs of skiing are an important matter of public policy. N.J.S.A. 5:13-1a

The Ski Statute, and many others like it in jurisdictions with ski industries across the country, was enacted in the wake of the decision in Sunday vs. Stratton Corp., 390 A. 2nd 398 (Vt. 1978), which held that the doctrine of assumption of risk would no longer operate as a complete bar to a skier's suit against a ski area operator, in view of Vermont's passage of a comparative negligence statute. N.J.S.A. 5:13-1, *Assembly Judiciary, Law, Public Safety and Defense Committee Statement*.

Justice Stein in Brett, et al. v. Great American Recreation, Inc., 144 N.J. 479 (1996) discussed the applicability of the Ski Statute to a group of five persons who took a toboggan onto a closed ski trail at what was then Vernon Valley Great Gorge Ski Area in Vernon Township, N.J. The unfortunate five tobogganers were significantly injured when the toboggan traveled down the trail, over a flat area at the base of the trail and then launched over a snow

fence, landing in a parking area after striking a light pole and other items located off of the trail. The Court concluded that the ski area did not accept consideration for the public to toboggan and there was no dispute that the ski area and the trail were closed when the five plaintiffs entered to toboggan. However, the Court concluded that the Ski Statute should be applied to the Brett issues because at trial and in the Appellate Division the defendant argued that the Ski Statute should be applied to plaintiff's claims and the plaintiffs themselves did not contest that the Ski Statute applied.

Justice Stein held in Brett at 496-498, that

> Both the duties imposed, and the underlying public policy make clear that the Ski Statute's codification of rights and remedies applies only between parties defined as skiers or ski-area operators. N.J.S.A. 5:13-2(c) provides that a skier is "a person utilizing the ski area for recreational purposes such as skiing or operating toboggans, sleds or similar vehicles, and including anyone accompanying the person. Skier also includes any person in such ski area who is an invitee, whether or not said person pays consideration."
>
> . . .
>
> Comparison with other statutes suggests that our ***Legislature intended to reach a broader class of persons than those states that regulate only persons who ski***, [emphasis supplied] but less encompassing than those that bring virtually anyone who ventures within the ski area under their assumption-of-inherent-risk regime. Our statute provides:
>
> "Operator" means a person or entity who owns, manages, controls or directs the operation of an area where individuals come to ski, whether alpine, touring or otherwise, or operate skimobiles,

toboggans, sleds or similar vehicles ***and pay money or tender other valuable consideration for the privilege of participating in said activities*** **.**... [N.J.S.A. 5:13-2(a) (emphasis added).]

Other ski statutes generally do not define a ski-area operator on the basis of whether persons pay consideration to use the ski area. Our Legislature apparently intended to limit the class of operators, and thus the reach of the law, to persons in the business of providing a place to engage in one of the prescribed types of winter sports and defined their duties and responsibilities only in relation to persons who engage in those sports and pay for the privilege of doing so. Indeed, the statutory duties of ski-area operators apparently would be irrelevant to persons who use portions of the ski area for activities such as hiking or rock climbing. Nor may such persons be said to assume risks, inherent or otherwise, greater than those assumed by any other member of the public. The clear implication is that an entity is an operator with respect to persons who practice a particular winter sport only when the entity accepts a consideration for providing a location for that specific sporting activity. (We need not resolve the statute's application to a person who evades payment of the required fee but practices the specific sport for which the entity ordinarily receives compensation.)

That interpretation of the Ski Statute obviously applies as well to persons engaging in one of the winter sports listed in the statute even though it is not one of the sports for which the operator accepts a consideration. A business that charges a fee to use its cross-country ski trails is an operator with regard to cross-country skiers, but it is not an operator to others who may drive on its premises on motorized skimobiles, skate on its frozen lakes, or even slide down its hills on toboggans.

In our view, the Legislature did not intend to impose a statutory duty on operators to post trail signs or remove hazards for sports foreign to the operator's business purpose. Similarly, no special assumption-of-risk immunity was provided to protect operators from suits filed by persons engaging in sports for which the operator receives no payment. Thus, if an operator accepts consideration only for downhill skiing, then only downhill skiers are "skiers" under the statute. [5] We recognize that the Ski Statute also provides that the

> term "skier" includes "any person in such ski area who is an invitee, whether or not said person pays consideration." N.J.S.A. 5:13-2(c). However, apart from that exception, New Jersey expressly limits the class of persons whose relationship is controlled by the Ski Statute to the "skier" who is on the land of another to practice a winter sport, and the "operator" who accepts payment for the privilege of practicing the sport in question. To hold that the Ski Statute governs the relationship between an operator of an area devoted to one sport, and a non-paying, non-invitee who practices a different sport, would frustrate that legislative scheme.

The Supreme Court addressed the New Jersey Ski Statute again in 2013 in Angland v. Mountain Creek Resort, Inc., et al., 213 N.J. 573 (2013). Justice Hoens reviewed the Ski Statute to determine whether it applied to a skier-skier collision claim or whether the common law recklessness standard should be applied as in other recreational type of claims. Plaintiff Robert Angland was an expert skier who was on a beginner's level trail. Defendant Robert Brownlee was a snowboarder downhill from Mr. Angland. An unknown skier in a "puffy brown coat" lost control and veered suddenly in front of Mr. Brownlee. Mr. Brownlee turned to skier's left into the path of Mr. Angland. Experts opined that this was a sudden move and Mr. Brownlee's elbow came into contact with Mr. Angland's face. Mr. Angland at speed skied off trail and struck his head on the sharp edge of a concrete bridge. He died several weeks after the incident.

Justice Hoens referenced a 2010 case, Hubner v. Spring Valley Equestrian Ctr., 203 N.J. 184, 198-202, 1 A.3d 618 (2010) in which the Court

explored the legislative history of the New Jersey Ski Statute in detail. In analysis of the issues before the Court in Angland, the Court held at page 585:

> Seen, then, in its historical context, the Ski Act was designed to serve a specific purpose. It operates to fix duties of skiers and ski resort operators in order to regulate their conduct in the context of creating certainty in the claims that arise between them. It does so in order to delineate the allocation of risk and thereby to ensure that the ski area operators are able to secure insurance that will respond to the claims that the statute permits. The Ski Act, as the legislative history demonstrates, therefore has as its particular purpose the allocation of responsibility between operators and skiers so as to ensure the continued viability of the ski resort industry; it was not designed to govern claims as between participants who engage in recreational activities at ski resorts.

The Angland Court concluded that the Ski Statute applied when a participant of one of the activities offered at the ski area sued the ski area operator, and not when one participant sued another participant, such as the collision between Mr. Angland and Mr. Brownlee. At page 588 the Angland Court stated:

> We did not hold that the Ski Act applies to claims made by one participant against another; instead, we addressed claims by tobogganers against a resort that claimed it owed them no duty because they were trespassers. Brett, supra, 144 N.J. at 493-94, 677 A.2d 705. As a prelude to addressing the tobogganers' claim against the resort, this Court discussed the Ski Act generally. Although we used apparently expansive terms like "pre-empt[]" to describe its scope, we limited our focus by observing that the Ski Act's pre-emption is of "the law of ski-area operators' liability." Id. at 502, 677 A.2d 705. Carefully read, the language is strictly tied to the intent of the Legislature in the context of the concern the statute was designed to address. We concluded that the "Legislature

> intended completely to displace the common law" but only "where the Ski Statute properly applies." Ibid. And we used the term "pre-empt[]" only in relationship to the liability of resort operators. Ibid. We therefore did not conclude in Brett that the Ski Act completely displaced the common law in all circumstances, but only that it did when a skier makes a claim against a resort.
>
> We find nothing in the legislative history or in the language of the Ski Act to suggest that the Legislature intended to do anything other than what it identified to be the statute's purpose. The plain language of the statute, the legislative history, and the overall context of the circumstances that gave rise to the statute's enactment make clear that the focus was on creating certainty in respect of claims brought by participants against operators of ski resorts.

The effect however of the trial court's decision here that the Ski Statute does not apply to snow tubing creates uncertainty in the law and for the operators and participants in snow tubing. The trial court construed the definitions and provisions of the New Jersey Ski Statute narrowly, agreeing with the Plaintiffs' argument that the Ski Statute's emphasis on ski lifts, slopes and trails—features more aligned with skiing than tubing—suggests its scope was not intended to extend to all snow-based recreation. This conclusion, unsupported by any case law in New Jersey or any legislative history of the Ski Act, wholly ignores the breadth of the applicable definitions in the statute itself. Moreover, it wholly ignores the dictates of the Supreme Court in Brett and Angland in which the Court made it clear that the Act applies to claims between a patron that pays

consideration to participate in a winter activity, and the operator that provides the facility for that recreational activity.

Mr. McGuinniss purchased a ticket to snow tube from Ski Campgaw and Ski Campgaw offered snow tubing for consideration to the public. In Brett, the ski area did not offer tickets to toboggan at its premises. Ski Campgaw did offer tickets for the public to participate in snow tubing. N.J.S.A. 5:13-2 "Definitions" states as follows:

> c. "Skier" means ***a person utilizing the ski area for recreational purposes*** such as skiing or operating toboggans, sleds ***or similar vehicles***, and including anyone accompanying the person. ***Skier also includes any person in such ski area who is an invitee***, whether or not said person pays consideration.
>
> (emphasis supplied)

N.J.S.A. 5:13-2 "Definitions" states

> a. "Operator" means a person or entity who owns, manages, controls or directs the operation of an area where individuals come to ski, whether alpine, touring or otherwise, or operate skimobiles, toboggans, sleds **or similar vehicles** and **pay money or tender other valuable consideration for the privilege of participating in said activities**, and includes an agency of this State, political subdivisions thereof or instrumentality of said entities, or any individual or entity acting on behalf of an operator for all or part of such activities.
>
> b. "Ski area" includes all of the real and personal property, under the control of the operator or on the premises of the operator which are being occupied, by license, lease, fee simple or otherwise, including but not limited to all passenger tramways, designated trails, slopes and other areas utilized for skiing, operating toboggans, sleds, or similar vehicles during the skiing season.

(emphasis supplied).

When interpreting the language of a statute, a reviewing court "aims to effectuate the Legislature's intent." Conforti v. County. of Ocean, 255 N.J. 142, 163 (2023) (quoting W.S. v. Hildreth, 252 N.J. 506, 518 (2023)). Because "[t]here is no more persuasive evidence of legislative intent than the words by which the Legislature undertook to express its purpose," courts "first look to the plain language of the statute." Ibid. (alteration in original) (quoting Perez v. Zagami, LLC, 218 N.J. 202, 209-10 (2014)). A court must "ascribe[] to the statutory words their ordinary meaning and significance and read them in context with related provisions so as to give sense to the legislation as a whole." Ibid. (alterations in original) (quoting Hildreth, 252 N.J. at 518). The plain language of the definitions makes it abundantly clear that Plaintiff-Mr. McGuinniss, is a skier as defined, and Ski Campgaw is an operator as defined. Plaintiffs indisputably paid money or other consideration for the privilege of participating in the snow tubing activity offered at Ski Campgaw's ski area. The Plaintiffs' clams then, are between a "skier" and an "operator" as defined in the statute. See N.J.S.A. 5:13-2 (a) and (c). Accordingly, the trial court erred in concluding that snow tubing is governed by the common law rather than by the Ski Statute based upon the plain language of the Ski Statute and based upon the clear direction from the Supreme Court. See Brett, et al. v. Great American Recreation, Inc., 144 N.J. 479 (1996).

POINT II

SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED AS THERE IS NO PROOF THAT DEFENDANTS HAD REASONABLE NOTICE AND AN OPPORTUNITY TO REMOVE THE ALLEGEDLY HAZARDOUS CONDITION. (Da1)

Defendants appeal the trial court's denial of summary judgment given the Plaintiffs' failure to show that Defendant, Ski Campgaw Management, LLC had reasonable notice of and an opportunity to remove the allegedly dangerous condition alleged pursuant to N.J.S.A. 5:13-3 (d). Whether the analysis is under the common law relating to premises owners or under the New Jersey Ski Act, N.J.S.A. 5:13-3 (d), it is clear that the Plaintiffs cannot meet their burden of proof to show that Ski Campgaw had reasonable notice of and an opportunity to remove the allegedly dangerous condition complained of by the Plaintiffs. As a result, the trial court erred in failing to grant Defendants' motion for summary judgment.

Plaintiffs cannot meet their burden of proof and cannot show that the provisions of N.J.S.A. 5:13-3(d) do not bar their claims. That section of the N.J. Ski Statute states:

N.J.S.A. 5:13-3

> d. No operator shall be liable to any skier unless said operator has knowledge of the failure to comply with the duty imposed by this section or unless said operator should have reasonably known of such condition and having such knowledge has had a reasonable time in

> which to correct any condition or comply with any duty set forth in this section.

The factual foundation of plaintiffs' case relies entirely on the testimony of the plaintiff, Martin McGuinniss. There are no facts in the record to establish when the allegedly "bunched up" condition of the deceleration mat was created or how long it existed such that Ski Campgaw had notice and an opportunity to remedy the condition, as required. Indeed, plaintiff testified that he was not able to observe the condition until he was just 20 feet away from it. See Da120, Plaintiff Martin McGuinniss' deposition at T46:14-21.

Ski Campgaw had no notice of the alleged "bunched up" condition of one of the deceleration mats that Plaintiffs claim caused Mr. McGuinniss to fall off his snow tube. Falling off of a snow tube is one of the risks of snow tubing contained in the Snow Tubing Agreement signed by the Plaintiffs. Plaintiff-Mr. McGuinniss testified at his deposition that many riders went on the lane before him and that he was aware of others who rode after him. He had gone down the snow tube lanes three or four times before the incident. He testified that he could not observe the condition until he was approximately twenty (20) feet from it in the tubing lane. Not only is there an absence of proof supporting a conclusion that Ski Campgaw was on notice of the alleged condition prior to the

incident, it is undisputed that at no time on the day of the incident did Mr. McGuinniss report the incident or complain about the alleged condition.

Mr. McGuinniss did not remain in the area of the fall off of the tube. He walked down the hill. When a Ski Campgaw employee approached him, he did not state to that person that a hazard existed. He did not point out a condition that could pose a hazard to others. He walked past the Ski Campgaw employee into the lodge. One is left to assume that he did not believe that the condition posed a hazard for the patrons who were using the lane after him. There is no proof that any other person either before or after Mr. McGuinniss' run encountered any hazardous condition.

Ski Campgaw had already provided to Mr. McGuinniss a detailed express warning of the hazards of engaging in the sport of downhill snow tubing. The Campgaw Mountain Snow Tubing Agreement (the "Snow Tubing Agreement") was read and signed by Mr. McGuinniss prior to participating in the sport and was marked as Exhibit Camp-X on 3-18-24. See Da107. The Agreement starts:

CAMPGAW MOUNTAIN SNOW TUBING AGREEMENT
ACKNOWLEDGMENT OF DANGEROUS ACTIVITY AND AGREEMENT NOT TO SUE

I understand and acknowledge that
SNOW TUBING IS AN IHERENTLY DANGEROUS ACTIVITY
By participating in this activity and signing this agreement:
I ACKNOWLEDGE AND ACCEPT THAT CERTAIN INHERENT RISKS EXIST WHEN PARTICIPATING IN SNOW TUBING and that
I MAY SUFFER SERIOUS, IF NOT FATAL, INJURIES as a result.

I additionally **AGREE NOT TO SUE FOR INJURIES SUSTAINED** and admit that my participation is completely voluntary.

See Da107 (emphasis in original).

The Snow Tubing Agreement listed some of the risks of harm and injury that may be encountered in participation in the sport. See Da107. It stated in relevant part:

> II. **SNOWTUBING IS A DANGEROUS ACTIVITY.**
> I understand that part of the thrill, excitement, and risk of snow tubing is that the snow tubes all end up in common run-out area at various speeds, and it is my responsibility to try and avoid hitting or being hit by another snow-tuber. However, even in doing so, there still remains the risk of collision, as well as other risks.
>
> I hereby agree to **REPORT ANY INJURY** to myself to a Campgaw Mtn. snow tubing attendant.
>
> I hereby acknowledge that some snow tubing risks that I may encounter and factors that my effect my snow tubing experience include but are not limited to, the following:
>
> - Variations in the steepness and configuration of the snow-tubing shoots and in the run-out area
> - Variations in the surface upon which snow tubing is conducted -which can vary from wet, slushy, conditions to hard, packed and icy conditions and anything in between
> - The placement of fences and/or barriers at or along portions of the snow tubing area as well as an **ABSENCE OF FENCES AND/OR BARRIERS** along the length of the run, that might have otherwise reduced or prevented injury
> - Changes in the speed at which snow tubes travel – such changed may depend on factors such as: surface conditions, participants' weight, and/or the interlinking and collision of snow tubes on runs
> - The chance that **PARTICIPANTS MAY BE EJECTED FROM THEIR TUBES** or otherwise fall out of their tubes

> - The chance that **PARTICIPANTS MAY WIND UP IN ANOTHER RUN, OR EVEN ENTIRELY OFF OF THE RUNOUT HILL-** the ride may or may not conclude in the general run-out area
> - **PARTICIPANTS MAY COLLIDE WITH**: other snow tubing participants, snow tube, facility attendants, observing patrons or others who are generally on the premises, and/or fixed objects (these are merely examples) – fixed objects may include obstacles or structures that are a part of the snow tubing facility itself or located temporarily on the facility's premises, **REGARDLESS OF THE LOCATION OF THE SNOW-TUBING AREA . . .**
>
> I have read the foregoing and agree and understand that snow tubing is a purely voluntary and recreational activity, and I agree that I WILL NOT SNOW TUBE AT THIS FACILITY IF I AM UNWILLING TO ACCEPT THE RISKS outlined above, or any others that are inherent in the participation of snow tubing, or if I am unwilling to acknowledge that these inherent risks PRECLUDE ME FROM BRINGING SUIT for any injuries that may result from such activity. . .

See Da107 (emphasis in original).

Mr. McGuinniss therefore was provided with express warnings relating to the variations in terrain, steepness, configuration of the snow tubing lanes. He was warned that participants may be ejected from their tubes and sustain serious injury. He admits that he was instructed to always hold onto the handles of the snow tube. Mr. McGuinniss signed the Snowtubing Agreement which in effect was an express assumption of risks agreement. He expressly admitted at his deposition that he read and understood all of these warnings prior to engaging in the activity offered by Campgaw.

It is well settled that a landowner must exercise reasonable care for an invitee's safety. This includes making reasonable inspections of its property and taking such steps as are necessary to correct or give warning of hazardous conditions or defects known to the landowner. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 434 (1993). The landowner is liable to an invitee for failing to correct or warn of defects that, by the exercise of reasonable care, should have been discovered. Ibid.

To succeed on a premises liability claim, plaintiff must establish that the property in question was in a defective condition, that the existence of the condition was known (or should have been known) to Ski Campgaw, ***and*** that after it knew or should have known about the problem, Ski Campgaw failed to act reasonably under the circumstances. Prioleau v. Kentucky Fried Chicken, Inc., 223 N.J. 245, 257-58 (2015); See also *Restatement (Second) of Torts § 343 (1965).* In this case, there is nothing in the record to indicate, with any specificity, how long the alleged bunched up mat existed. Nor is there anything in the record that would suggest that Ski Campgaw had actual or constructive notice of the alleged condition and thereafter failed to act.

It is undisputed that there is no evidence in this case to establish how long the "bunched up" mat in question was present in the area where Mr. McGuinniss states he encountered it. Nor is there any evidence that Ski Campgaw had actual

or constructive knowledge of the condition of the area prior to plaintiff's alleged contact with it. In fact, plaintiff himself was unable to observe the alleged condition until he was some twenty (20) feet from it in the lane. There are no proofs to show the duration, precise location or the nature or appearance of the alleged condition. Further, the Plaintiffs did not have their proposed liability expert, Mark DiNola, review N.J.S.A. 5:13-3 (d) and apply the facts to the Ski Statute. The Plaintiffs have no proofs to rebut the application of N.J.S.A. 5:13-3 (d).

Plaintiffs cannot establish that Ski Campgaw had the requisite notice ***and*** an opportunity to remedy the alleged condition prior to Plaintiff-Mr. McGuinniss encountering it. There is no evidence in this case that the condition existed for any length of time prior to Plaintiff-Mr. McGuinniss' alleged encounter with it with his snow tube. There is likewise no evidence to suggest that Ski Campgaw knew or should have known about the alleged condition. Therefore, the Plaintiffs cannot satisfy their burden to establish liability on the part of Ski Campgaw in this matter, and summary judgment was warranted. The trial court erred in not granting summary judgment on this basis.

POINT III

THERE IS NO DISPUTE THAT DECELERATION MATS ARE EQUIPMENT USED IN THE ORDINARY OPERATION OF THE SKI AREA AND THERE IS NO EXPERT TESTIMONY NOR ANY CLAIM THAT DEFENDANTS VIOLATED A DUTY UNDER THE SKI STATUTE. (Da1, Da3)

Defendants appeal the trial court's denial of summary judgment given that there is no dispute that the deceleration mat which is the focus of the Plaintiffs' allegation is equipment necessary for the ordinary operation of the ski area and thus is exempt from liability under N.J.S.A. 5:13-3(b)(3). Further, there is no dispute that the Plaintiffs have not presented a liability expert who reviewed the Ski Statute, applied the facts of this case to the Ski Statute and then expressed an opinion that the Defendants violated the provisions of N.J.S.A. 5:13-3 (a). As a result, the trial court erred in failing to grant Defendants' motion for summary judgment.

N.J.S.A. 5:13-3(b)(3) provides in pertinent part:

> b. No operator shall be responsible to any skier or other person because of its failure to comply with any provisions of subsection 3.a. if such failure was caused by:
>
> 3. … ***the location of man-made facilities and equipment necessary for the ordinary operation of the ski area,*** such as … equipment utilized in connection with the maintenance of trails, buildings or other facilities used in connection with skiing. [Emphasis added].

There is no dispute that the deceleration mat in question is equipment used in the ordinary operation and maintenance of the ski area. Indeed, plaintiff's expert, Mark DiNola, expressly admitted this in his deposition. He testified at deposition at T38:3-10 as follows:

3 Q Would you agree with me that some of
4 the things that are used in the operation of a snow
5 tubing facility would include netting; deceleration
6 mats; rope?
7 A Yes.
8 Q And they're used in the normal
9 operation of the snow tubing facility?
10 A They can be.

See Da47.

Further, Campgaw's Tubing Manager, Jason Mitchell, also testified that deceleration mats such as the one in question here are equipment ordinarily used in the operation and maintenance of Campgaw and other ski areas. See Da221; Mithcell deposition at T47:17-T48:25; Da254 Mitchell deposition at T85:2-9.

Under the New Jersey Ski Statute, ski area operators are immune from liability for injuries resulting from the location of equipment ordinarily used in the operation of the ski area. It is admitted that the deceleration mats are equipment ordinarily used in the operation of a ski area. The qualification under N.J.S.A. 5:13-3 (b)(3) is "(3) Subject to the provisions of subsection 3.a.(3)."

N.J.S.A. 5:13-3(a)(3) provides in pertinent part:

a. It shall be the responsibility of the operator to the extent practicable, to:
(3) Remove as soon as practicable obvious, man-made hazards.

However, there is no dispute that the Plaintiffs' liability expert, Mark DiNola, did not provide any opinions relating to the application of the facts of this case to the Ski Statute. Mr. DiNola issued a report dated September 6, 2024. (Da161). Discovery proceeded and ended. In his report, there are no opinions issued relating to the application of the New Jersey Ski Statute. Mr. DiNola did not refer to, apply or analyze the Ski Statute in rendering his opinions in this matter. He freely admits this in his deposition taken on October 28, 2024:

Q Now, I read your report. I don't see that you made any reference to the New Jersey ski Act in your report. Am I right?
A That I didn't reference the New Jersey skiing and safety act in a tubing case in New Jersey? Yeah, no, I didn't refer to the safety in skiing act.

See DiNola deposition at T95:21 – T96:2. (Da61)

Q No. The question is there is nothing in your report that -- there are no opinions in your report that Ski Campgaw violated the New Jersey ski act.
A There is nothing in my report that states that, correct.

See DiNola deposition at T99:15-20. . (Da62)

Accordingly, Plaintiffs have failed to show that there was a violation of N.J.S.A. 5:13-3(a)(3) by Defendants. Plaintiffs and their expert have admitted that deceleration mats are "equipment ordinarily used in the operation of a ski area" as set forth in N.J.S.A. 5:13-3(b)(3). The trial court erred therefore in failing to grant the Defendants' motion for summary judgment.

POINT IV

PLAINTIFFS CANNOT SHOW, AND PLAINTIFFS' EXPERT HAS NOT ALLEGED, ANY VIOLATION OF THE N.J. SKI STATUTE AND SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (Da3)

The plaintiff's liability expert, Mark DiNola, has failed to show any violation of the New Jersey Ski Statute in his report dated September 6, 2024. The Plaintiffs have failed to show that N.J.S.A. 5:13-3(d) does not apply to preclude his claims. By operation of the Ski Statute, Martin McGuinniss is deemed to have assumed the risks of the sport of snow tubing and his action should be precluded.

A. Plaintiffs made a conscience decision not to have Mr. DiNola include any analysis or mention of the ski statute in his report and testimony. (Da3)

Mr. DiNola did not mention the New Jersey Ski Statute, N.J.S.A. 5:13-1 et seq. in his report. (Da161, DiNola report; Da61, DiNola deposition at T95:21 – T96:2; Da62, DiNola deposition at T99:15-20.) He admitted in his deposition that this was a purposeful omission. Accordingly, Plaintiffs in general and Mr.

DiNola specifically should properly be precluded from the use of any expert testimony at trial relating to the New Jersey Ski Statute and the trial court erred in failing to grant Defendants' motion for summary judgment.

At his October 28, 2024, deposition, Mr. DiNola testified as follows:

Q Now, I read your report. I don't see that you made any reference to the New Jersey ski act in your report. Am I right?
A That I didn't reference the New Jersey skiing and safety act in a tubing case in New Jersey? Yeah, no, I didn't refer to the safety in skiing act.

See DiNola 10-28-24 Deposition at T96:17 – T97:2. (Da61)

Q You didn't do any analysis as to whether the facts of this case fall within the parameters of the New Jersey ski act?
A Yeah, I did.
Q Whoa. Stop. Did you say, yeah, you did?
A I didn't include it in my report because I didn't rely upon it. I don't think the skiers' statute in the state of New Jersey has anything to do with this case.
Q So you omitted it from your report?
A I didn't omit anything. I didn't rely upon it in forming my opinions in the case because there is – as far as I am aware, there is no case law that states in the state of New Jersey that the ski safety act applies to tubing.

See DiNola 10-28-24 Deposition at P95L21-P96L02. (Da61).

In the four corners of your report dated September 6th, 2024, there is no mention at all of the New Jersey ski act.

A There is not.
Q Page 6 and 7, you list 23 items. "I reviewed and completed the following activities which related specifically to this matter," 23 of them. One of them is not – you didn't list the ski act at all.
A I'd have to look.
Q Do you want me to put it up on the screen?
A Let me look. No, I did not list it.
Q And you did that deliberately. Is that fair?
A I don't know if it was deliberate. I didn't include it because I didn't think it applied.
Q Well, what I mean by "deliberate," Mark, is it's not a mistake. It's not, "Oh, darn it. I didn't write that down. You're right. I should have put that in."
A No. My research into the matter led me to believe that the State of New Jersey does not – the safety in skiing act does not – has not been applied to the activity of commercial snow tubing.

See DiNola 10-28-24 Deposition at P97L20-P98L19. (Da61-Da62).

Q No. The question is there is nothing in your report that – there are no opinions in your report that Ski Campgaw violated the New Jersey ski act.
A There is nothing in my report that states that, correct.

See DiNola 10-28-24 Deposition at P99L15-P99L20. (Da62).

Mr. DiNola has determined that he did not wish to evaluate whether or how the New Jersey Ski Statute applied to this case. He did not provide any analysis of the duties for either a ski area operator or for a skier as defined. He

ignored the application of assumption of risk and of the inherent risks of the sport. Mr. DiNola as an expert and the Plaintiffs have waived the ability to argue that it does apply and to support that argument with an expert's testimony.

Plaintiffs have failed to show that N.J.S.A. 5:13-3(d) does not apply to preclude their claims. By operation of the New Jersey Ski Statute, Martin McGuinniss is deemed to have assumed the risks of the sport of snow tubing and his action should be precluded. Moreover, the Tubing Agreement constitutes an express assumption of risks contract which should bar the claims of the Plaintiffs.

This is a snow tubing case involving the question of whether the Defendant ski area violated those duties set forth in the New Jersey Ski Statute; whether falling off of a snow tube is an inherent risk of the sport and whether the Plaintiffs' claims should be dismissed as an inherent risk. Expert testimony is necessary in order for the Plaintiffs to proceed. Aside from the question of whether Mr. DiNola is a qualified snow tubing operations expert, it is clear that absent an expert, Plaintiffs cannot meet their prima facie burden of proof. As stated in Townsend:

> A "plaintiff bears the burden of establishing those elements `by some competent proof.'" Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (citing Buckelew v. Grossbard, 87 N.J. 512, 525 (1981); Overby v. Union Laundry Co., 28 N.J. Super. 100, 104 (App. Div. 1953), aff'd o.b., 14 N.J. 526 (1954)). Proximate cause consists of "`any cause which in the natural and continuous sequence,

> unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred.'" Conklin v. Hannoch Weisman, 145 N.J. 395, 418 (1996) (quoting Fernandez v. Baruch, 96 N.J. Super. 125, 140 (App. Div. 1967), rev'd on other grounds, 52 N.J. 127 (1968)); Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 322 (App. Div.), certif. denied, 146 N.J. 569 (1996).

Here, Plaintiffs must prove by a preponderance of the evidence that Ski Campgaw violated a duty under the Ski Statute, that N.J.S.A. 5:13-3(d) does not bar the claim and that Mr. McGuinniss' comparative negligence in violating his own statutory duties was not a proximate cause of the accident and Plaintiffs' injury. Plaintiffs do not have facts to support such a claim. Mr. McGuinniss does not have facts to support that a violation of the duties of a ski area operator under the New Jersey Ski Statute occurred. The claim must fail, and the trial court erred in failing to grant Defendants' motion for summary judgment.

POINT V

ALTERNATIVELY, THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF THE EXCULPATORY AGREEMENT SIGNED BY PLAINTIFFS. (Da1)

If as Plaintiffs argue, the court finds that the Ski Statute does not apply, then the Plaintiffs' claims are barred by their acceptance of the Snow Tubing Agreement which includes an exculpatory agreement. Mr. McGuinniss freely admits and there is no dispute that as an adult individual, he read, understood, and signed a CAMPGAW MOUNTAIN SNOW TUBING AGREEMENT which included not only warnings about snow tubing, but included an exculpatory release in favor of Ski Campgaw.

The Tubing Agreement states in pertinent part:

> I understand and acknowledge that **SNOW TUBING IS AN INHERENTLY DANGEROUS ACTIVITY.** By participating in this Activity and signing this agreement: I ACKNOWLEDGE AND ACCEPT THAT CERTAIN INHERENT RISKS EXIST WHEN PARTICIPATING IN SNOW TUBING and that **I MAY SUFFER SERIOUS, IF NOT FATAL, INJURIES** as a result. I additionally **AGREE NOT TO SUE FOR INJURIES SUSTAINED** and admit that my participation is completely voluntary.
>
> II. **SNOWTUBING IS A DANGEROUS ACTIVITY.**
> I understand that part of the thrill, excitement, and risk of snow tubing is that the snow tubes all end up in common run-out area at various speeds, and it is my responsibility to try and avoid hitting or being hit by another snow-tuber. However, even in doing so, there still remains the risk of collision, as well as other risks.

I hereby agree to REPORT ANY INJURY to myself to a Campgaw Mtn. snow tubing attendant.

I hereby acknowledge that some tubing risks that I may encounter and factors that my effect my snow tubing experience include but are not limited to, the following:

- Variations in the steepness and configuration of the snow-tubing shoots and in the run-out area
- Variations in the surface upon which snow tubing is conducted -which can vary from wet, slushy, conditions to hard, packed and icy conditions and anything in between
- The placement of fences and/or barriers at or along portions of the snow tubing area as well as an **ABSENCE OF FENCES AND/OR BARRIERS** along the length of the run, that might have otherwise reduced or prevented injury
- Changes in the speed at which snow tubes travel – such changed may depend on factors such as: surface conditions, participants' weight, and/or the interlinking and collision of snow tubes on runs
- The chance that **PARTICIPANTS MAY BE EJECTED FROM THEIR TUBES** or otherwise fall out of their tubes
- The chance that **PARTICIPANTS MAY WIND UP IN ANOTHER RUN, OR EVEN ENTIRELY OFF OF THE RUNOUT HILL-** the ride may or may not conclude in the general run-out area
- **PARTICIPANTS MAY COLLIDE WITH**: other snow tubing participants, snow tube, facility attendants, observing patrons or others who are generally on the premises, and/or fixed objects (these are merely examples) – fixed objects may include obstacles or structures that are a part of the snow tubing facility itself or located temporarily on the facility's premises, **REGARDLESS OF THE LOCATION OF THE SNOW-TUBING AREA . . .**

I have read the foregoing and agree and understand that snow tubing is a purely voluntary and recreational activity, and I agree that I WILL NOT SNOW TUBE AT THIS FACILITY IF I AM UNWILLING TO ACCEPT THE RISKS outlined above, or any others that are inherent in the participation of snow tubing, or if I

> am unwilling to acknowledge that these inherent risks PRECLUDE ME FROM BRINGING SUIT for any injuries that may result from such activity. . .

See Da107, Tubing Agreement**;** Da116 Plaintiff deposition at T29:12 – T31:18.

At his deposition, Mr. McGuinniss testified he had an opportunity to read the Agreement, and that he understood and appreciated the warnings and terms of the Agreement:

0030
So, you see a document up here. It says Campgaw Mountain Snow Tubing Agreement.
A Yes.
Q Does it look like the form that you were provided to fill out when you got there that day?
A Yes.
Q Did you read it before you signed it?
A Yes.
Q And I know it's a little be faint. I can try to zoom in.
A No. I could see it.
Q So, on top here it looks like that's your name, right?
A Yes.
Q Is that your handwriting, can you tell?
A Yes.
Q And the date is December 29th, right? That's the date that this happened?
A Yes.
Q And on the bottom left here, Signature, does that look like your signature?
A Yeah.
Q Now, you read this. Did you
0031

appreciate the warnings that were on here? In other words, it's telling you that snow tubing is an inherently dangerous activity?
A Yes.
Q And you read that? You understood that?
A Yes.
Q Did you read some of the other warnings here in Section 2 about tubing?
A Yes.
Q One of them indicates that there's a chance that participants may be ejected from their tubes. Did you read that?
A Yes.
Q And, before you started that day, did you have an understanding that that was a possibility?
A Yes.

See Da107, Tubing Agreement**;** Da116 Plaintiff deposition at T29:12 – T31:18.

By executing the Tubing Agreement, plaintiff acknowledged that snow tubing "**IS AN INHERENTLY DANGEROUS ACTIVITY**" that could result in "**SERIOUS, IF NOT FATAL, INJURIES."** See Da107. (emphasis in original.) Plaintiff not only expressly acknowledged the inherently dangerous nature of the activity, but he also expressly agreed "**NOT TO SUE FOR INJURIES SUSTAINED."** See Da107 (emphasis in original.) Plaintiff further agreed not to use the snow tubing facility

> "…**IF I AM UNWILLING TO ACCEPT THE RISKS** outlined above, or any others that are inherent in the participation of snow tubing, or if I am unwilling to acknowledge that these inherent risks **PRECLUDE**

> **FROM ME BRINGING SUIT** for any injuries that may result from such activity."

See Da107. (emphasis in original.)

It is a well settled principle in New Jersey law that contracts will be enforced as written. Vasquez v. Glassboro Serv. Ass'n., Inc., 83 N.J. 86, 98-100 (1980). Ordinarily, courts will not rewrite contracts to favor a party, for the purpose of giving that party a better bargain. Relief is not available merely because enforcement of the contract causes oppression, improvidence, or unprofitability, or because it produces hardship to one of the parties. Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 223 (2005). A court may not "'abrogate the terms of a contract unless there is a settled equitable principle, such as fraud, mistake, or accident, allowing for such intervention.'" Id. at 223-24 (quoting Dunkin' Donuts of America, Inc. v. Middletown Donut Corp., 100 N.J. 166, 183-84 (1985)). There is not a single piece of evidence in this case that plaintiff's execution of the Tubing Agreement was done with any coercion, duress, fraud or sharp practices. Each of the contracting parties received something of value, and there is nothing that offends public policy by requiring the adult plaintiff to honor the agreement he freely and voluntarily entered into here. See Raroha v. Earle Fin. Corp., 47 N.J. 229, 234 (1966) (holding that in the absence of fraud, misrepresentation or overreaching by the releasee, in the absence of a showing that the releasor was

suffering from an incapacity affecting his ability to understand the meaning of the release and in the absence of any other equitable ground, it is the law of this State that the release is binding and that the releasor will be held to the terms of the bargain he willingly and knowingly entered). Accordingly, as Plaintiffs expressly acknowledged the inherently dangerous nature of the activity and expressly agreed not to sue for injuries resulting from these inherent risks, the trial court erred in failing to grant Defendants' motion for summary judgment.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this court grant Defendants' motion for summary judgment as to Counts One, Two, Three and Six of the Complaint and find that the New Jersey Ski Statute applies to snow tubing cases in New Jersey.

Respectfully submitted,
HUESTON MCNULTY, P.C.
Samuel J. McNulty
By: _____
SAMUEL J. MCNULTY, ESQ.

Dated: October 9, 2025

MARTIN MCGUINNISS and JAMIE MCGUINNISS, his spouse, Plaintiffs-Respondents, v. SKI CAMPGAW MANAGEMENT, LLC, SKI BLUE HILLS MANAGEMENT, LLC, CAMPGAW MOUNTAIN SKI AREA, COUNTY OF BERGEN, John Does 1-10 (fictitious names representing unknown individuals) and/or XYZ Corps. 1-10 (fictitious names representing unknown corporations, partnerships and/or Limited Liability Companies or other types of legal entities), Defendants-Appellants.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO. A-000058-25** CIVIL ACTION On Appeal by Leave Granted from the Law Division, Bergen County Docket No. BER-L-005138-22 Sat Below: Hon. Lina P. Corriston, J.S.C.

BRIEF OF PLAINTIFFS-RESPONDENTS IN OPPOSITION TO THE APPEAL

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PRELIMINARY STATEMENT

Plaintiff, Martin McGuinniss, was severely injured while riding a snow tube at Campgaw Mountain Ski Area. The ski area is owned and operated by defendant, Ski Campgaw Management, LLC. While riding a snow tube, Mr. McGuinniss's tube came to an abrupt and complete stop on a bunched-up rubber mat in his tubing lane. The abrupt stop caused Mr. McGuinniss to be catapulted off, landing on his left shoulder and causing a displaced fracture of his left collarbone.

The mat's stated purpose was to decelerate arriving tubes gradually, in conjunction with other mats, bringing the rider to a slow controlled stop. Because this mat was bunched up like an accordion rather than properly laid out, it had a significantly different impact, causing the tube to stop abruptly and launching the rider, Mr. McGuinniss, onto the frozen ground.

The record reveals that defendants, Ski Campgaw Management, LLC, and Campgaw Mountain Ski Area (collectively "Campgaw"), had an obligation to maintain the snow tubing ride and to reposition or to replace any mats that were dislodged or irregular. There was ample constructive notice of the bunched-up mat, as per Campgaw's policies and procedures, and an abundance of prior incidents of injury arising from encounters with displaced or mislaid mats. Moreover, the Campgaw snow tube employees "always" had their eyes on the lanes and were deliberately arranged to monitor constantly the lanes and the

deceleration mats. There was forty-five seconds to a minute between runs for them to observe and to maintain the run, including the mats, by defendants' own procedures. The employees also had the authority and ability to stop use of a lane if they needed more time to correct a hazardous condition.

Plaintiffs, Martin McGuinniss and his wife, Jamie McGuinniss, filed suit, alleging that defendants breached their common law duty to provide a safe snow tubing environment. Campgaw's motion for summary judgment was denied because of genuine issues of disputed material facts regarding Campgaw's breach of duty.

On appeal, defendants contend that the New Jersey Ski Statute, N.J.S.A. 5:13-1 to -12 (Ski Statute), entitles them to immunity for any and all snow tubing injuries on their property The statute, however, makes no mention of snow tubing. Defendants also claim that the trial court overruled New Jersey Supreme Court precedent, but the cases they cite also make no reference to riding a snow tube. Pursuant to actual Supreme Court precedent, New Jersey expressly limits the class of persons whose relationship is controlled by the Ski Statute to the "skier" who is on the land of another to practice a winter sport, and the "operator" who accepts payment for the privilege of practicing the sport in question.

The Ski Statute exists because those participating in a "sport," and paying the resort operator a fee to do so on the operator's premises, are deemed to assume

the risk of controlling themselves. If they are injured by others, they have recourse, as found in Angland v. Mountain Creek Resort, Inc., 213 N.J. 573 (2013). If the operator fails in its statutory responsibilities or is grossly negligent, the skier has recourse under an express provision of the Ski Statute. The critical difference is that the skier is practicing a sport and is responsible for controlling how they practice it as between them and the operator. Here, there is no control. A snow tuber is a rider, no more in control or practicing a sport than a patron on a roller coaster or a water slide. The ride is in control, not the rider, and so it is appropriate to have recourse under the common law if the operator of the ride is negligent.

Given the absence of snow tubing from the express language of the Ski Statute and the inherent difference in the activities – a sport requiring skill versus a ride permitting of none – the activity of snow tubing is not included within the scope of the Ski Statute. Consistent with the legislative intent and the express language of the immunity statute, which must be narrowly construed, plaintiffs' claim is not subject to the Ski Statute but rather is to be determined based on common law principles of negligence. If the Ski Statute is to be applied to snow tubing, it should be amended by the Legislature to include snow tubing. Unless and until that occurs, the plain language of the statute indicates a legislative intent that snow tube rides are not covered.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

Plaintiff accepts the procedural history set forth in appellants' brief, noting only that the matters subsequent to the issuance of the trial court's Order denying summary judgment are without any citation to the record or appendix. Also, appellants' motions for leave to file an interlocutory appeal to the Appellate Division and to the Supreme Court do not raise or reference appellants' Point V regarding an alternative basis for relief. Pa1-8. Because that issue was not raised, it has been waived and is not within the scope of the remand ordered by the Supreme Court.

COUNTERSTATEMENT OF FACTS

In December 2020, defendant, Ski Campgaw Management, LLC, was the owner and operator of a snow tubing facility on property located in Mahwah, New Jersey. Da81. The property is also known as Campgaw Mountain Ski Area and includes separate facilities for skiing and snowboarding. Da214 at 18:17-21 and 19:8-10. On December 29, 2020, plaintiff, Martin McGuinniss, plaintiff, Jamie McGuinniss, and their children traveled to Campgaw to ride snow tubes. Da82; Da115 at 25:15-20. Mr. McGuinniss had not previously gone to a commercial snow tubing facility as an adult. Da114 at 21:17-24. Mr. McGuinniss has never been skiing. Da114 at 22:15-17. Mr. McGuinniss had never been to Campgaw prior to December 29, 2020. Da114 at 23:9-11.

Despite having no prior experience, Mr. McGuinniss received no training or instructions from the Campgaw staff at the tubing facility other than what lane to go to. Da117 at 35:14-36:17. "They're just basically rushing. Once the next person is up they'll tell you to go to that lane. They just basically point and you go." Da117 at 36:11-13.

Mr. McGuinniss had traveled down different lanes two or three times prior to the ride causing his injuries. On those rides, he went down seated on the tube and stayed on his tube the whole ride. Da119 at 43:7-18. On the snow tube ride causing his injuries, Mr. McGuinniss was in the third lane from the right. Da119 at 42:17-43:6. This ride was his first time down that lane that day. Da118 at 37:5-25. He went down the run riding face down, i.e., laying on his belly. Da119 at 43:19-21. Mr. McGuinniss was permitted by Campgaw to go down on the tube seated or on his belly. Da119 at 44:1-5. Prior to his final run, Mr. McGuinniss did not observe the patron going down the lane in which he was about to ride. Da119 at 44:13-20; Da120 at 45:3-6. "They told me to go to that lane and if there was somebody in front of me I just don't recall." Da119-20 at 44:25-45:2.

As Mr. McGuinniss rapidly approached the end of the run he noticed that the first mat in his lane, closest to the top of the hill, was bunched up. Da120 at 45:9-16. "I go up. They tell me to go to a lane. I went down head first. As I was going down, I noticed the mat was bunched up and it was too late." Da120 at 45:9-12.

When his tube hit the mat, the tube stopped abruptly, Mr. McGuinniss was catapulted off, and he landed on his left shoulder. Da120 at 45:7-24 and 46:11-13 and 46:22-47:3.

In December 2020, Jason Mitchell was in charge of snow tubing operations at Campgaw as the snow tubing director. Da214 at 18:4-7; Da 215 at 23:18-22. Campgaw had a ski area and a separate area for tubing lanes. Da214 at 18:17-21 and 19:8-10. Tubing does not take place on the trails and lifts used by skiers and snowboarders. There is a separate gated area with approximately ten to fifteen lanes on which the patrons ride the snow tubes. Da214 at 19:8-10; Da217 at 33:15-23. There were Campgaw attendants at the top of the hill and at the bottom of the hill. Da217 at 33:17-20. All runs are visible to the snow tubing attendants. Da218 at 34:3-11. That is, the deceleration mats can be seen from the top (start) of the run and from the bottom (end) of the run. Ibid. There are also attendants at the entrance gate to the tube ride area, at the tube storage area, and patrolling around the entire area. Da217-18 at 33:21-34:9; Da221 at 46:17-47:1.

According to Mr. Mitchell, they all had been trained and had an obligation to speak up if they saw an issue. Da218 at 34:3-11; Da221 at 46:17-47:13. "All attendants that are visible to all of the lanes have a responsibility to speak up. If they see something, to say something." Da221 at 47:6-8.

There was an obligation of all snow tubing employees to monitor the deceleration mats continuously. Da265 at 130:17-20; Da218 at 35:19 ("A. All the time, eyes always on the hill."). An attendant at the top of the hill could see the mats at the bottom of the hill and use a walkie-talkie to radio an attendant at the bottom of the runs if there was an issue with a mat. Da218 at 35:11-19. The attendants' eyes were to be at all times on the ride. Da218 at 35:19 and 37:11-14.

According to Mr. Mitchell, the snow tubing director, if there was an issue with a lane, a snow tube rider should not be released down the lane until the issue had been resolved. Da218 at 36:14-24 ("A. I don't know if it's written in the script, but it is a – it's definitely known through training that all eyes are on your lanes if there's any issues not to send.").

> [Y]our testimony, so I understand, is that if there's a condition that is noticed down the tubing lanes that is unsafe, that all operations should cease prior to the resumption of the tubing in that lane? Is that your testimony?
>
> A. They do cease, yes, until any issue is fixed.
>
> [Da220 at 44:21-45:2.]

Tubing operations were never to proceed until the ride was clear and the runs were safe and ready. Da219-20 at 41:25-42:20 and 44:20-45:2.

The deceleration mats were used to slow down tubes at the end of the run. Da221 at 48:5-8. They are intended when used properly to bring the tubes to a slow controlled stop. Da221 at 48:18-25. According to Mr. Mitchell, a rider could

dislodge a deceleration mat. Da256 at 94:11-23; Da257 at 98:8-17. The Campgaw attendants would have forty-five (45) seconds to a minute to fix any displaced mat. Da256 at 94:5-22. All dislodged mats were to be fixed immediately as part of Campgaw's safety protocol. Da265 at 130:21-131:2. In the alternative, the attendants had the authority to hold patrons from going down that lane until the mat was fixed. According to testimony of Campgaw staff, they do it all the time. Da256 at 95:1-5. Any attendant can signal to hold a single lane at any time. "We do it all time. 'Hold lane 1.' * * * 'Hold lane 1, send the rest.'" Da256 at 95:1-9.

In the two winter seasons prior to December 2020, Campgaw's records revealed over forty-five (45) incidents where patrons riding snow tubes struck deceleration mats that resulted in an incident significant enough to result in a report on Campgaw's "Winter Incident Report Form." Da173; Da340-85. Despite notice of the numerous prior incidents involving the deceleration mats, no investigation was conducted regarding how to avoid injuries arising from the use of the mats or any changes in procedures. Da173.

LEGAL ARGUMENT

POINT I

THE ORDER DENYING SUMMARY JUDGMENT WAS CORRECT.

A. Standard of Review.

In reviewing an order granting or denying summary judgment, an appellate court uses the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); see Templo Fuente De Vida Corp. V. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) ("we review the trial court's grant of summary judgment de novo under the same standard as the trial court," and we accord "no special deference to the legal determinations of the trial court"). The court must not decide issues of fact; it must decide only whether any such issues exist. Brill v. Guardian Life. Ins. Co., 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954); R. 4:46-5.

Summary judgment should not be granted where the decision of such a motion would constitute what is in effect a trial by pleadings and affidavits involving issues of fact. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211-12 (App. Div. 1987). Summary judgment is not a substitute for a full plenary trial. United Advertising Corp. v. Metuchen, 35 N.J. 193, 195-96 (1961).

Accordingly, summary judgment should be denied unless the right thereto appears so clearly as to leave no room for controversy. Sisselman, 215 N.J. Super. at 212.

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)." Brill, 142 N.J. at 538. Moreover, courts are "not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

"[T]he standards of decision governing the granting or denial of Summary Judgment emphasize that a party opposing the Motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact." Judson, 17 N.J. at 74. A movant's burden is to exclude **any** reasonable doubt as to the existence of genuine issue of material fact, and all inferences of doubt are to be drawn against the movant in favor of the opponent of the motion. In connection with the Court's analysis of the matters

presented on such a motion, all inferences are drawn against the movant in favor of the party opposing the motion and such a motion should be granted with great caution. Boule v. Bor. of Bradley Beach, 42 N.J. Super. 159 (App. Div. 1956). The papers supporting the motion should be closely scrutinized and the opposing papers are indulgently treated. Kugler v. Tiller, 127 N.J. Super. 468, 476 (App. Div. 1974). In reviewing the moving papers and papers in opposition, the judge must consider the papers "most favorably for the party opposing the motion and all doubts are resolved against the movant. If there is the slightest doubt as to the facts, the motion should be denied." Friedman v. Friendly Ice Cream Co., 133 N.J. Super. 333, 337 (App. Div. 1975); United Advertising Corp., 35 N.J. at 195-196. In fact, the burden is on the party moving for summary judgment to show the clear absence of a genuine issue of material fact. Monmouth Lumber Co. v. Indemnity Ins. Co. of N. Am., 21 N.J. 439, 440 (1956). Additionally, the movant has the burden of excluding any reasonable doubts, and all inferences which emote from such doubts are to be resolved in favor of the opponent of the motion. United Advertising Corp., 35 N.J. at 196; Frank Rizzo, Inc. v. Alatsas, 27 N.J. 400 (1958).

Under the holding of Brill, 142 N.J. 520, our Supreme Court set forth the following test:

> [W]hen deciding a motion for summary judgment under R. 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light

> most favorable to the non-moving party inconsideration of the applicable evidentiary standard, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. This assessment of the evidence is to be conducted in the same manner as that required under R. 4:46-2.
>
> [142 N.J. at 538.]

B. Discussion.

As set forth above in the Counter Statement of Facts, there is ample evidence from which a jury could find for plaintiffs. Summary judgment was not appropriate here as there clearly exists genuine issues of material fact sufficient to overcome defendants' motion. Specifically, the testimony of Campgaw employees established a duty to monitor, to control and to maintain the tubing lanes in safe condition. If there were any issues, they were to be remedied before the next rider was released or the lane should be placed on hold until the problem could be eliminated. That did not happen.

For purposes of the motion, Mr. McGuinniss's testimony must be accepted as true. There was an improperly placed deceleration mat waiting in his path as he rode down his assigned lane on the snow tube. To the extent that Campgaw claims that they had no actual notice, a jury will have to decide whether that is true. At a minimum, there was constructive notice.

Campgaw's snow-tube facility director testified that multiple attendants were to have eyes on the lanes at all times. If there was an issue – and injuries

from bunched up mats was a known hazard based on the forty-five reported incidents in the prior two years – one or more attendants should have noticed it and taken action. A jury could certainly find that defendants breached their duty to observe and to correct the dangerous condition and also that the breach of duty proximately caused Mr. McGuinniss to be injured.

On summary judgment, defendants essentially tried to blame Mr. McGuinniss and to challenge his credibility. He did not report the incident until the next day, so he must be lying about what happened. He saw the dangerous mat as he hurtled down the icy lane but failed to avoid it. Issues of fact and credibility cannot be resolved on summary judgment, especially in favor of the movant. Summary judgment was properly denied.

POINT II

THE NEW JERSEY SKI STATUTE DOES NOT APPLY TO RIDING A SNOW TUBE.

There is simply no controlling case law or legislative history indicating that riding snow tubes down bermed lanes under the constant supervision of trained attendants is covered under the New Jersey Ski Statute. The Ski Statute was enacted in 1979. It makes no mention of riding snow tubes. The statute was amended once, in 2011, to add a requirement for minors engaged in the activity of downhill skiing or operation of snowboards to wear helmets. N.J.S.A. 5:13-12. The plain language of the statute has never been amended to include or to make

any reference to snow tubing. In fact, the express limitation of the amendment to minors "engaged in the activity of downhill skiing or operation of snowboards" shows the clear legislative intent that those stated activities were covered by the statute. By omission, snow tubing is not covered by the statute. If it were, the Legislature would surely make minors wear helmets for that activity as well.

New Jersey law requires that immunity from tort liability be narrowly construed. Renz v. Penn Central Corp., 87 N.J. 437, 457-58 (1981); Harrison v. Middlesex Water Co., 80 N.J. 391, 401 (1979); Welch v. Engineers, Inc., 202 N.J. Super. 387, 397 (App. Div. 1985). "We must assume that the Legislature is mindful that immunity from liability for the negligent infliction of injury upon others is not favored in the law. It leaves unredressed injury and loss resulting from wrongful conduct." Harrison, 80 N.J. at 401. "Statutes * * * granting immunity from tort liability, should be given narrow range." Ibid.; see Renz, 87 N.J. at 457 ("In confronting this question we must give full weight to the maxim of statutory construction that the railroad immunity act is, like all immunity statutes, to be strictly and narrowly construed.").

Interestingly, the Landowner Liability Act at issue in Harrison was subsequently amended by the Legislature expressly to require that the statute be liberally construed. N.J.S.A. 2A:42A-5.1. There is no such language in the Ski Statute. The Legislature is presumed to understand the existing common law and

to be clear and precise when enacting a change as a matter of competing public policies, i.e., preserving availability of ski opportunities versus compensating citizens injured by the negligence of others. Absent express language in the statute, riders of snow tubes are not included within the coverage of the Ski Statute.

The Ski Statute exists primarily for the purpose of providing ski area operators with protection against liability based on risks "which are essentially impractical or impossible for [them] to eliminate." Reisman v. Great Am. Recreation, Inc., 266 N.J. Super 87, 95 (App. Div. 1993); N.J.S.A. 5:13-1(b). "A danger that may feasibly be removed, however, is not an inherent danger." Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 500-501 (2013); N.J.S.A. 5:13-3(a) (operator is responsible to remove as soon as practicable obvious, man-made hazards). The statute references throughout the "ability" of skiers and their responsibility to "maintain control of [their] speed and course at all times." N.J.S.A. 5:13-4(c) and (d). "Each skier is assumed to know the range of his ability, and it shall be the duty of each skier to conduct himself within the limits of such ability, to maintain control of his speed and course at all times while skiing." Id. 5:13-5.

Those considerations are not the same for the rider of a snow tube. Snow tubing is a fundamentally different activity than sledding or skiing as a tube rider

generally has no control over the speed or course nor any mechanical breaking method. Snow tubes are not sufficiently similar to toboggans or sleds —traditional devices with runners or flat bases designed for directional control —since tubes are inflatable and lack steering mechanisms. Also, the ride is separate from ski trails, slopes and lifts and constantly monitored and controlled. Unlike skiing, all tubes are provided and maintained by the operator. Riders are directed by trained staff which lane to use and when to commence the ride. One lane; one tube; one rider. The assumptions on which the Ski Statute relies to impose responsibility on skiers do not apply to a rider of a snow tube.

Notably, defendants moved for summary judgment on the argument that snow tubing falls under the Ski Statute before in Tam Leslie v. Ski Campgaw Management, LLC, Docket No. BER-L-000199-20. The matter was fully briefed and argued, and summary judgment was denied. There was no appeal after final judgment because the case settled.

The Ski Statute was enacted in 1979 primarily to address the risks and liabilities associated with alpine skiing, a sport that dominated ski areas at the time. Many skiers would continuously interact and cross paths, with little or no ability of the ski operator to police those interactions. Riding snow tubes, a more modern and skill-less activity, was not contemplated by the Legislature. The statute's emphasis on ski lifts, slopes, trails and abilities to maintain control — features

aligned with skiing but not with tube riding — suggests its scope was not intended to extend to all snow-based recreation.

The inherent risks outlined in the statute (e.g., collisions with objects, falls from lifts, or changes in snow conditions) are tailored to skiing and snowboarding, which involve greater speed, control, technical skill and extended outdoor terrain. Snow tubing, marketed as a family-friendly activity with minimal ability required, presents a different risk profile – primarily involving controlled descents in designated lanes or runs, in a separately gated environment under constant supervision and control. Campgaw treated snow tubing as a distinct activity from skiing, with a gated area, ticketing, monitoring and safety protocols that differ from ski operations. Multiple attendants directed patrons when to go, where to go, when to hold back. The attendants were instructed to place a lane out of service immediately if there was an issue. The snow tube area is a restricted environment far different from the great outdoors used for skiing, where slopes and trails can be patrolled but not constantly controlled.

Other states have broader language in their ski codes. For instance, Colorado defines a skier as "any person using a ski area for the purpose of skiing, which includes, without limitation, sliding downhill or jumping on snow or ice on skis, a toboggan, a sled, a tube, a snowbike, a snowboard, or any other device; or for the purpose of using any of the facilities of the ski area, including but not

limited to ski slopes and trails." Colo. Rev. Stat 33-44-103(8). New Hampshire defines a skier as "a person utilizing the ski area under the control of a ski area operator for ski, snowboard, and snow tube recreation and competition." N.H. Rev. Stat. Ann. 225-A:2(IX). As Justice Stein noted in Brett v. Great American Recreation, Inc., 144 N.J. 479 (1996), "[c]omparison with other statutes suggests that our Legislature intended to reach a broader class of persons than those states that regulate only persons who ski, but less encompassing than those that bring virtually anyone who ventures within the ski area under their assumption-of-inherent-risk regime." Id. at 496. Defendants' proposed extrapolation of the Ski Statute would effectively expand immunity from recovery in the exact manner that the Brett Court rejected. Id. at 500-01 ("A danger that may feasibly be removed, however, is not an inherent danger."); see N.J.S.A. 5:13-3(a) (operator is responsible to remove as soon as practicable obvious, man-made hazards).

Defendants' self-serving argument that they had a reasonable expectation that they could blame Mr. McGuinniss for his injury is not rooted in any caselaw. They claim that Mr. McGuinniss didn't avoid the dangerous mat; that Mr. McGuinniss failed to control his course and speed; that Mr. McGuinniss didn't report his injury right away; and that Mr. McGuinniss assumed all the risk, including defendants' negligence and/or gross negligence. That is defendants' argument, and it is untenable. Mr. McGuinniss was along for the ride. Defendants

were in control. Immunity statutes are to be strictly construed, and there is no caselaw on which defendants can rely to support a reasonable expectation that they had a right to defend this claim by blaming Mr. McGuinniss for their failures.

Defendants claim that the denial of summary judgment has overturned Supreme Court precedents and is an affront to the concept of *stare decisis*. The cases that they cite, however, say nothing about riding snow tubes. Brett involved tobogganers who trespassed onto the defendant's ski trail and were injured. The parties agreed before the trial court that the Ski Statute applied. The Supreme Court concluded that the common law governed the claim but upheld the application of the Ski Statute based on invited error and a lack of prejudice. 144 N.J. at 508. The Brett Court upheld the jury verdict for the plaintiffs and the Appellate Division's conclusion that if the risk of injury was foreseeable, the defendant owed the plaintiffs a non-delegable duty of care under the common law. Id. at 509-10. That holding does not support Campgaw's core claim that the Ski Statute applies to snow tube riders.

Angland v. Mountain Creek Resort, Inc., 213 N.J. 573 (2013), involved a claim arising from a skier-on-skier collision. The Angland Court rejected the defendant's claims, including the ski-operator amicus curiae, that the Ski Statute applied to claims of a skier against another skier. Id. at 589 (Ski Statute "did not

address claims that might be brought as between participants in the sport of skiing"). That holding also has no application to the facts presented here.

Defendants relied below on Murray v. Great Gorge Resort, Inc., 360 N.J. Super. 395 (Law Div. 2003), which was cited favorably in Angland for the proposition that the Ski Statute may apply to claims of snowboarders against ski operators. See Angland, 213 N.J. at 591. Murray also fails to support defendants' cause. First, although the court found that snowboarders are governed by the Ski Statute, 360 N.J. Super. at 400, the court denied summary judgment because the "Ski Statute does not immunize ski area operators from civil liability when injuries result from an inherent risk of the sport of skiing or snowboarding." Id. at 402. Whether the defendant violated its statutory duties to the plaintiff involved resolution of genuine issues of material fact that could not be decided on summary judgment. Second, the basis for finding that snowboarders are governed by the Ski Statute was that the "plaintiff paid for the privilege to enjoy snowboarding on defendant's ski slopes and trails **and he was exposed to the identical risks as traditional down-hill skiers**." Id. at 400 (emphasis supplied). That is not true for a rider of a snow tube, who does not use the same trails or slopes, is not exposed to risks beyond the operator's control, and is riding in a separately gated, controlled and maintained environment subject to the direction and supervision of the operator's staff.

If riding a snow tube is intended to be subsumed under the Ski Statute, there is a simple way for the Legislature to do so. This Court should leave that policy decision to be addressed in the proper forum. Because the Ski Statute, by its own language, does not apply to riding snow tubes, defendants' demand for summary judgment was properly denied.

POINT III

EVEN IF THE SKI STATUTE APPLIES, CAMPGAW IS NOT IMMUNE FROM LIABILITY.

Under N.J.S.A. 5:13-3, entitled "Responsibility of operator," Campgaw had an obligation to "(3) Remove as soon as practicable obvious, man-made hazards." N.J.S.A. 5:13-3(a)(3). As set forth above, Campgaw was aware of dozens of prior incidents and injuries involving the deceleration mats in the two years prior to Mr. McGuinniss's incident, even when used as intended. Mr. McGuinniss's injuries were caused when a mat was allowed to remain bunched up in the lane and on the berm while the lane was in use. Purportedly, all eyes of all the attendants were specifically trained and obligated to observe the lanes continuously and to prevent a patron from riding in an unsafe lane. Even if the Ski Statute applies, a reasonable jury could still find that Campgaw breached its duty and proximately caused Mr. McGuinniss's injuries.

Although defendants claim that the lack of expert testimony precludes plaintiffs' causes of action if the Ski Statute applies to riders of snow tubes, the

issues involving the Ski Statute can be evaluated and decided by the jurors based on their "common knowledge." The doctrine of common knowledge applies to a case in which the experience possessed by lay persons, without the explanation of experts, would enable a jury to determine that a defendant acted without reasonable care. Estate of Chin v. St. Barnabas Med. Ctr., 160 N.J. 454, 470 (1999). In Rosenberg by Rosenberg v. Cahill, 99 N.J. 318, 325-326 (1985), the New Jersey Supreme Court noted that: "The most appropriate application of the common knowledge doctrine involves situations where the carelessness of the defendant is readily apparent to anyone of average intelligence and ordinary experience."

The case at bar is not a matter of professional malpractice where an Affidavit of Merit, expert reports and expert testimony would be presumed a necessity. To the contrary, the dangerous condition of the "bunched up mat," that it is man made and should be obvious to those who are specifically charged with the responsibility to observe and to maintain the lanes and mats, is within the comprehension of a juror without expert testimony. The Ski Statute does not change the jury's ability to assess the material facts. As noted by the Brett Court, the liability determinations are not so dissimilar under the common law and the Ski Statute. Brett, 144 N.J. at 510 ("We have already noted the parallels between the analyses of liability under the Ski Statute and under general principles of negligence. The same facts are relevant under both standards."). "We believe that the trial court

properly left to the jury the question of whether an obvious, man-made hazard existed, given the fact-intensive nature of this issue and its relation to the balancing of fault." Id. at 505.

Given the circumstances presented here, the basic concepts, theories and proofs on which plaintiffs' case rests are common knowledge and not beyond the ken of the average juror. As such, if this Court determines that the Ski Statute applies to riders of snow tubes even with the stark differences in the activities and absent any reference in the statute, plaintiffs may still prove their case before a jury without the need of expert testimony based on the plain language of the statute.

POINT IV

UNDER THE COMMON LAW, DEFENDANTS' LIABILITY REMAINS TO BE DETERMINED BY A JURY.

In Alloway v. Bradlees, Inc., 157 N.J. 221 (1999), the Court held that "the imposition of a duty of reasonable care is 'both fact-specific and principled,' and must satisfy 'an abiding sense of basic fairness under all of the circumstances in light of consideration of public policy.'" Id. at 230 (internal citations omitted). In determining whether a duty exists under general negligence principles, courts should consider the foreseeability of the risk of injury and weigh the following additional factors: "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed

solution." Ibid. (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993)). In ultimately imposing a duty on the defendant in Alloway, the Court ruled that "[a] reasonable jury weighing the evidence in plaintiff's favor could determine the existence of facts that, based on the foreseeability of the risk of injury, the relationship of the parties, and the opportunity to take corrective measures, would support the determination that there was a duty of care owed to plaintiff that was breached by defendant." Id. at 240.

Applying those principles of general negligence to this case favors imposing a duty on defendants and a breach of that duty based on the record before this Court. The first factor, the foreseeability of the risk, is clearly present. Campgaw had forty-five similar incidents in the two-year period before Mr. McGuinniss was hurt. Da340-85. Campgaw was aware of the danger of the mats and for that very reason trained its employees to be observing, correcting and maintaining the ride at all times. A reasonable inference is that a defect in the lane in which Mr. McGuinniss rode was both foreseeable and foreseen by Campgaw. Unfortunately, Campgaw failed to observe and to correct the hazard or take the lane offline.

With respect to the relationship of the parties, the Court in Alloway found that [t]he relationship of the parties * * * created both the opportunity and capacity on the part of * * * [the defendant] to exercise authority and control over the equipment * * * if safety concerns were implicated." Id. at 233. Campgaw does

not dispute that it had control of the facility and of the patrons. If there was an issue, they could "hold lane 1." "They do it all the time." Campgaw undeniably had the ability to exercise authority and control over the snow tubing operations and riders. It failed to do so.

With regard to the nature of the attendant risk, as between rider and operator, only the operator has the ability to eliminate the risk. Mr. McGuinniss is a rider. He does not control the ride. He is directed where to go, when to go and how to go. He does not have the skill of a skier or snowboarder who is charged under the Ski Statute with the responsibility to "maintain control of his speed and course at all times." See N.J.S.A. 5:13-4(c). Campgaw had the opportunity and obligation to avoid or to eliminate the risk and failed to do so.

Finally, in light of the specifics facts of this case, public policy dictates the imposition of a duty on Campgaw. Courts are "required to draw on notions of fairness, common sense, and morality in order to fix the limits of liability as a matter of public policy." Hopkins, 132 N.J. at 443. The default duty is that a party should act reasonably under the totality of the circumstances. Ibid. Campgaw seeks to place all responsibility on Mr. McGuinniss. Its central premise on appeal is that it has a right under the law not just to blame Mr. McGuinniss for Campgaw's failures, to assert that he assumed all risks of the ride, but to eliminate comparative negligence from the analysis.

Not only would it be wholly unfair for Campgaw to have no responsibility for the safety of its snow tube ride, it essentially would absolve Campgaw from ignoring its own training, manuals and safety protocols, and its failure to comply with its own self-imposed duty – based on recognition of a known risk – to prevent patrons from using the ride while in an unsafe condition. Campgaw's failures are the very type of conduct that is "evidence of negligence that is sufficient to overcome a motion for summary judgment." Alloway, 159 N.J. at 240-41.

Whether that conduct was reasonable under general notions of fairness as a matter of public policy is a fact-specific inquiry that must be presented to a jury.

POINT V

WHETHER DEFENDANTS HAD CONSTRUCTIVE NOTICE OF THE HAZARDOUS CONDITION IS A DISPUTED ISSUE OF MATERIAL FACT.

Under the common law, the mere existence of a dangerous condition is not sufficient to establish constructive notice. Defendants alternatively claim that they had no notice that the mat was not laid out correctly so they could not be liable if the condition resulted in injury. That argument disregards the concept that an owner of property shall be deemed aware of defects that are known or that should be known based on a reasonable inspection. The determination of whether a breach has occurred is a jury question. See Filipowicz v. Diletto, 350 N.J. Super.

552, 561 (App. Div. 2002). "It is the function of the jury to determine the condition of the property and the reasonableness of defendant's care." Ibid.

Defendants here do not dispute that Mr. McGuinniss was a business invitee. "Business owners owe to invitees a duty of reasonable or due care to provide a safe environment for doing that which is within the scope of the invitation." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). "The duty of due care to a business invitee includes an affirmative duty to inspect the premises and `requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe.'" Troupe v. Burlington Coat Factory Warehouse Corp., 443 N.J. Super. 596, 601 (App. Div. 2016) (quoting Nisivoccia, 175 N.J. at 563).

"Ordinarily, an injured plaintiff * * * must prove * * * the defendant[s] had actual or constructive knowledge of the dangerous condition that caused the accident." Ibid. However, notice is not required if the injured plaintiff can establish that the defendants created the dangerous condition. Craggan v. Ikea USA, 332 N.J. Super. 53, 61 (App. Div. 2000). In New Jersey negligence cases, liability can depend not just on what a party actually knew, but also on what they reasonably should have known. That principle, constructive notice, holds that individuals or entities cannot evade responsibility by ignoring risks that reasonable

care would have revealed. The law essentially assigns knowledge to a party if diligence would have uncovered the hazard.

Defendants had a duty to ensure that the snow tube ride was fit for its intended purpose and had a duty to maintain that ride in a safe condition before making it available for use by others. The duty to inspect is part and parcel of what is commonly understood as a duty to "maintain." E.g., Meier v. D'Ambose, 419 N.J. Super. 439, 449 (App. Div.), certif. denied, 208 N.J. 370 (2011) (noting that a duty to maintain a furnace encompassed a duty to conduct "periodic inspections"). Even under the Ski Statute, a facility operator may be found liable if "said operator has knowledge of the failure to comply with the duty imposed by this section or unless said operator should have reasonably known of such condition and having such knowledge has had a reasonable time in which to correct any condition or comply with any duty." N.J.S.A. 5:13-3(d).

In the specific confines of this case, there is a question of fact for the jury to decide whether or not forty-five (45) seconds to a minute was a sufficient time for defendants to discover and to remedy the dangerous condition – or temporarily place the run out of service until it could be made safe – based on defendants' own standards, training and practices.

Model Jury Charges (Civil), 5.20F, " Invitee – Defined and General Duty Owed (rev. Dec. 1988), states:

> An invitee is one who is permitted to enter or remain on land (or premises) for a purpose of the owner/occupier. The invitee enters by invitation, expressed or implied. The owner/occupier of the land (or premises) who by invitation, expressed or implied, induced persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purposes embraced in the invitation. Thus, the owner/occupier must exercise reasonable care for the invitee's safety.
>
> The owner/occupier must take such steps as are reasonable and prudent to correct or give warning of hazardous conditions or defects actually known to the owner/occupier (or the owner's/occupier's employees), and of hazardous conditions or defects which the owner/occupier (or the owner's/occupier's employees) by the exercise of reasonable care, could discover.
>
> The basic duty of a proprietor of premises to which the public is invited for business purposes of the proprietor is to exercise reasonable care to see that one who enters the premises upon that invitation has a reasonably safe place to do that which is within the scope of the invitation.

By defendants' own admissions, all Campgaw employees had an obligation to observe the placement of the deceleration mats constantly and consistently, which were a man-made created condition. The only evidence in this case is that the first mat in lane 3 before Mr. McGuinniss went down his run was "bunched up." That was either a **created condition** by the improper placement of the mat by a Campgaw employee before the run or the mat was left uncorrected after a prior run by another snow tube rider.

"A defendant has constructive notice when the condition existed 'for such a length of time as reasonably to have resulted in knowledge and correction had the

defendant been reasonably diligent.'" Troupe v. Burlington Coat Factory Warehouse Corp., 443 N.J. Super. 596, 602 (App. Div. 2016) (quoting Parmenter v. Jarvis Drug Stores, Inc., 48 N.J. Super 507, 510 (App. Div. 1957)). Clearly, defendants' practice of releasing riders in those intervals suggests that defendants believed the time frame was sufficient and reasonable. A reasonable jury could well agree.

To be reasonably diligent in fixing a displaced mat, the Campgaw employees had two options, (1) fix it within the forty-five (45) second to one minute time frame or (2) shut down the lane until the dangerous condition could be remedied. For purposes of this application, the "bunched up mat" existed as all evidence must be inferred in favor of the non-moving party. A reasonable jury can infer constructive notice of the unsafe condition as Campgaw could have discovered the "bunched up mat" through reasonable care if they had been diligent. That evidence is sufficient to present a material fact question reserved for a jury. As such, the motion for summary judgment on the issue of "notice" to address the dangerous condition was properly denied.

POINT VI

THE SNOW TUBING AGREEMENT DOES NOT BAR MR. MCGUINNISS'S RECOVERY.

A. The Issue of the Agreement Was Not Preserved.

The issue of the tubing agreement was not raised in the application for discretionary review and has been waived. Neither defendants' motion for leave to appeal to the Appellate Division nor their motion for leave to appeal to the Supreme Court raised the alternate relief of waiver pursuant to the snow tubing agreement. See Pa1-7. Defendants identified two questions presented to the Supreme Court. Did the decision below violate the doctrine of *stare decisis* and did the trial court err by finding that the Ski Statute did not apply to riding a snow tube. Pa7. The Supreme Court granted leave to appeal and remanded for consideration of those issues on the merits. Pa8.

Failure to include an issue or issues in the notice of petition or motion for discretionary review may be considered a waiver as to the issue(s). Hirsch v. State Bd. of Med. Examiners, 128 N.J. 160 (1992) (declining to rule on certain arguments of appellant in part because they first were raised after petition for certification had been granted); see In re D.H., 204 N.J. 7, 15 n.5 (2010) (issue that was not one of questions presented and accepted on certification "should be deemed abandoned"). Pursuant to Rule 2:8-1(a), the brief supporting a motion for leave to appeal must address both the reasons why the court should grant leave to appeal and "argument on the merits of the issues sought to be appealed." R. 2:8-1(a). Failure to brief an issue may be considered a waiver. See, e.g., Villa v. Short, 195 N.J. 15, 22 n.1 (2008) (refusing to reach issue first raised in supplemental brief

after discretionary review granted); State v. McGraw, 129 N.J. 68, 81 (1992) (same).

Notably, defendants also failed to file a Case Information Statement in accordance with Rule 2:5-1(f)(4). Failure to do so deprives this Court, respondents and the lower tribunal the notice required under the Rules of Court, specifically notice of the issues to be raised on appeal and the opportunity for the lower tribunal to supplement its findings of fact or conclusions of law. In light of those failures, the issues to be addressed on the merits should be confined to those briefed to the Supreme Court on defendants' motion for leave. Pa7-8.

B. The Agreement Is Silent as to Unfixed Objects.

Plaintiffs concede that the one-sided tubing agreement informs in general terms that riding a snow tube is an inherently dangerous activity. However, while the tubing agreement warns about colliding with other people, tubes and fixed objects, it is silent as to warning and waiving claims concerning unfixed, movable, changeable, variable or loose objects within defendants' control. In this case, Mr. McGuinniss was injured when his tube abruptly came to a complete stop after coming into contact with a bunched-up mat, an unfixed, man-made object. Cf. N.J.S.A. 5:13-3(a)(3) (ski operator is responsible to "remove as soon as practicable obvious, man-made hazards"). It was never explained to Mr. McGuinniss that a device that was allegedly intended to assist in a safe, gradual, controlled stop

could, if neglected by defendants, have the opposite effect, i.e., launching him onto the hard ground and fracturing his collarbone.

C. The Agreement Does Not Protect Against Gross Negligence.

Campgaw's snow tube director, Jason Mitchell, testified that there were five or less incidents with regards to the snow tube lanes every year. Da211 at 8:13-9:14. In fact, however, Campgaw's own records show that there were more than **forty-five (45) incidents**, specifically with regard to the deceleration mats, in just the two seasons prior to the subject incident. Da340-85. Despite that notice of a significant, recurring hazardous condition, there was no annual review and no reassessment of practices and procedures. The record is devoid of any steps taken by Campgaw to alleviate the problems caused by the deceleration mats.

Three years prior to Mr. McGuinniss being propelled onto the frozen surface while riding on a snow tube, another patron struck a deceleration mat on the berm and was ejected from her tube. As a result of that incident, she alleged a traumatic brain injury and subdural hematoma and underwent at least three surgical procedures including a craniectomy and cranioplasty. Tam Leslie v. Ski Campgaw Management, LLC, Docket No. BER-L-000199-20. Nonetheless, no changes were made to the practices and procedures at Campgaw.

Mr. Mitchell testified that there were snow tube attendants at the top of the hill and the bottom of the hill, with walkie talkies, as well as at the tube return area

and patrolling the tubing area generally, all with the responsibility always to have their eyes on the hill. See *supra* at 6-7. They were not to send a patron down the hill unless the lane was fully safe. Nevertheless, Mr. McGuinniss was permitted to ride his tube down a lane that had an observable, bunched up mat.

"Gross negligence refers to a person's conduct where an act or failure to act creates an unreasonable risk of harm to another because of the person's failure to exercise slight care or diligence." Model Jury Charge (Civil), 5.12, "Gross Negligence" (rev. Mar. 2019). Gross negligence is conduct that comes somewhere between "simple" negligence and the intentional infliction of harm, or "willful misconduct." Ivy Hill Park Section III v. Smirnova, 362 N.J. Super. 421, 425 (Law Div. 2003); see Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344 (2016). Campgaw, which was on actual notice of issues regarding their implementation of deceleration mats, including a devastating prior injury to another patron, engaged in gross negligence when they failed to address or even to review that systemic, recurring issue.

In Steinberg, the Supreme Court held that when a business fails to exercise slight diligence or care that such behavior constitutes gross negligence that is not protected by liability waivers signed by business invitees. 226 N.J. at 365. In that matter, the lower court held in favor of the defendant, a water park, that gross negligence did not occur as a matter of law. Id. at 348. The Steinberg Court

reversed and remanded for further proceeding, holding that a reasonable jury could find that gross negligence occurred given the facts of the record. Id. at 368.

Notably, in Steinberg, the plaintiff, who had signed a liability waiver, argued that he was given inadequate instruction as a first-time rider on how to position his body and the specific way to hold the ropes on the ride. Id. at 353. In the present matter, Mr. McGuinniss, as a first-time rider, was permitted to go down the tubing lane with virtually no instruction. He was told go there, go down. He was permitted to ride on his stomach, even though plaintiff's liability expert cited evidence that going down in a seated position is safer than going down face-first on your belly. Da57 at 80:13-81:10. Because a reasonable jury could find gross negligence as against Campgaw on the present record, summary judgment was properly denied.

CONCLUSION

For the foregoing reasons, the denial of summary judgment was correct on the record presented. The Ski Statute does not apply expressly or by extension in the absence of legislative action. Even if it did, there remain genuine issues of material fact that require submission to a jury. N.J. Const. art. I, ¶9 ("The right of trial by jury shall remain inviolate."). When the facts and evidence are looked at in a light most favorable to plaintiffs, the denial of summary judgment should be affirmed.

Respectfully submitted,

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Dated: October 30, 2025