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*House of Representatives*
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

July 20, 1993

**Testimony in Support of House Bill 1277, the Equine Liability Bill**

PA House of Representatives' Judiciary Committee - Subcommittee on Courts

House Bill 1277 is good for your district.

The total equine inventory in Pennsylvania, as of June 1, 1990, was 170,000 head. The largest numbers of equine animals were concentrated in the southeast and southwest regions of Pennsylvania. The southeast had the highest population with 48,800 head, including Berks, Bucks, Chester, Delaware, Lancaster, Lebanon, Montgomery, and Philadelphia counties. The southwest, including Allegheny, Fayette Greene, Somerset, Washington, and Westmoreland counties, was second highest with 23,900. This legislation will benefit someone in everyone's legislative district.

House Bill 1277 is good for Pennsylvania.

The economic value of the equine industry in Pennsylvania is great. Total value of equine-related land, fencing, and facilities was over $2.9 billion in 1990, with an additional $370 million inventory of equine-related equipment and supplies. Taxes paid by equine owners totaled over $15 million. Pennsylvania equine owners made a total of approximately $428 million in equine-related expenditure in 1990. Pennsylvania employed 7,500 paid residents on equine farms. Labor services paid in non-cash form, such as in exchange for riding lessons totaled nearly $2 million. There is no doubt that the industry is important to the state's economy, providing employment, generating tax dollars and building assets.

House Bill 1277 is good for small business.

This legislation was suggested to me by my constituent, Martha Wilson, who was frustrated in her attempts to open a riding school in Pennsylvania because of the lack of availability and/or the high cost of liability coverage in this Commonwealth. This legislation has passed the test in other states and is currently law in very similar language in Massachusetts and Colorado. Other states are considering similar legislation as well. We must act now to keep Pennsylvania's equine industry competitive with other states.

House Bill 1277 is legally sound.

It must be recognized that there are inherent risks involved in equine activities. Equines are animals, not machines, and so operate with a natural level of unpredictability. Although the phrase "inherent risk" appears from time to time in court opinions and statutes, it does not appear to be specifically defined as a precise legal term of art in any Pennsylvania statute or court decision and is not defined in Black's Law Dictionary.

Perhaps the most plausible interpretation of "inherent risk" is that it best applies to those dangers which flow innately and naturally from the very nature of an activity or a product as distinguished from dangers which result from a product defect or from carelessness. Examples of what I would regard as "inherent risks" would include such matters as the following: An injury resulting from a fall is an inherent risk of walking on ice; lung cancer is an inherent risk of smoking tobacco; a head injury from a fast ball is an inherent risk of batting in a baseball game; and being injured in a fall from a horse is an inherent risk of horseback riding. The inherent risks of some activities or products are so dangerous that the law treats them as an ultrahazardous activity and imposes strict liability in the event of damage arising out of the occurrence of that risk. An example of such an ultrahazardous activity includes blasting operations. By way of contrast, the inherent risks of certain other activities or products are such that, when coupled with the presence of other legal criteria, they create a lack of duty and/or an assumption of risk defense to a tort action sounding in negligence or products liability.

Although there is little discussion of "inherent risk" in our Pennsylvania cases, at least one court opinion from another state has discussed this term in some detail. In Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991), the Utah Supreme Court had occasion to construe a Utah statute giving ski resorts a limited degree of liability protection against injuries arising out of the "inherent risks" of skiing. In considering this statute, the Utah court observed (Id. at 1044, 1045, 1046, 1047):

> ...It is clear that sections 78-27-51 to -54 protect ski area operators from suits initiated by their patrons who seek recovery for injuries caused by an inherent risk of skiing. The statute, however, does not purport to grant ski area operators complete immunity from all negligence claims initiated by skiers...
>
> ...Inasmuch as the purpose of the statute is to 'clarify the law,' not to radically alter ski resort liability, it is necessary to briefly examine the relevant law at the time the statute was enacted. Although there is a limited Utah case law on point, when the statute was enacted the majority of jurisdictions employed the doctrine of primary assumption of risk in limiting ski resorts' liability for injuries their patrons received while skiing. Terms utilized in the statute such as "inherent risk of skiing" and "assumes the risk" are the same terms relied upon in such cases. This language suggests that the statute is meant to achieve the same results achieved under the doctrine of primary assumption of risk. In fact, commentators suggest that the statute was passed in reaction to a perceived erosion in the

protection ski area operators traditionally enjoyed under the common law doctrine of primary assumption of risk.
...The inherent risks of skiing are those dangers that skiers wish to confront as essential characteristics of the sport of skiing or hazards that cannot be eliminated by the exercise of ordinary care on the part of the ski area operator.

As noted above, the purpose of the statute is to prohibit suits seeking recovery for injuries caused by an inherent risk of skiing. The term 'inherent risk of skiing,' using the ordinary and accepted meaning of the term 'inherent,' refers to those risks that are essential characteristics of skiing -- risks that are so integrally related to skiing that the sport cannot be undertaken without confronting these risks. Generally, these risks can be divided into two categories. The first category of risks consists of those risks, such as steep grades, powder, and mogul runs, which skiers wish to confront as an essential characteristic of skiing...

The second category of risks consists of those hazards which no one wishes to confront but cannot be alleviated by the use of reasonable care on the part of a ski resort. It is without question that skiing is a dangerous activity. Hazards may exist in locations where they are not readily discoverable. Weather and snow conditions can suddenly change and, without warning, create new hazards where no hazard previously existed. Hence, it is clearly foreseeable that a skier, without skiing recklessly, may momentarily lose control or fall in an unexpected manner. Ski area operators cannot alleviate these risks, and under sections 78-27-51 to -54, they are not liable for injuries caused by such risks. The only duty ski area operators have in regard to these risks is the requirement set out in section 78-27-54 that they warn their patrons, in the manner prescribed in the statute, of the general dangers patrons must confront when participating in the sport of skiing. This does not mean, however, that a ski area operator is under no duty to use ordinary care to protect its patrons. In fact, if an injury was caused by an unnecessary hazard that could have been eliminated by the use of ordinary care, such a hazard is not, in the ordinary sense of the term, an inherent risk of skiing and would fall outside of sections 78-27-51 to -54.

In my judgement, the Utah Court's explanation of the "inherent risk" concept could apply to a broad array of activities and products above and beyond its statutory application to the sport of skiing in this particular case.

It is interesting to note that Pennsylvania also has a statute containing a similar protection for the operators of ski resorts which makes explicit reference to the "inherent risks" of downhill skiing. In this regard, Section 7102(c) of the Judicial Code states that "[i]t is recognized that as in some other sports, there are inherent risks in the sport of downhill skiing." (Emphasis added) As was the case with the Utah statute, the Pennsylvania law was crafted to protect the assumption of risk doctrine against erosion by the comparative negligence doctrine (which watered down the contributory negligence defense to certain tort actions). In fact, Pennsylvania' protection for

downhill skiing operations was enacted as an amendment to our comparative negligence statute. Unlike the Utah Law, however, the Pennsylvania statute does not define "inherent risk".

Thus, Section 7102(c) of Pennsylvania's Judicial Code employs the "inherent risk" concept to preserve the assumption of risk defense in certain cases involving the sport of downhill skiing.

While the term "inherent risk" could broadly apply to any number of legal issues, it appears to me as though a particularly common and apt usage for this term is as a component of any lack of legal duty and/or the existence of any assumption of risk defense with respect to tort actions predicated on negligence claims or products liability claims.

Pennsylvania courts have traditionally recognized the doctrine of assumption of risk as a defense against negligence lawsuits. In Mucowski v. Clark, 590 A.2d 348 (Pa. Super. 1991), the Superior Court briefly summarized the features of the assumption of risk doctrine as follows:

> Voluntary assumption of the risk involves a subjective awareness of the risk inherent in an activity and a willingness to accept it. . . A plaintiff has voluntarily assumed the risk where he fully understands it and voluntarily chooses to encounter it. . . For a danger to be known it must not only be known to exist, but it must also be recognized as being dangerous. . . A plaintiff's knowledge and understanding of the risk, of course, may be shown by circumstantial evidence. . . However, ' [w]hether the plaintiff knows of the existence of the risk, or whether he understands and appreciates its magnitude...is a question of fact, usually to be determined by the jury under prior instructions from the court. The court may itself determine the issue only where reasonable men could not differ as to the conclusion. . .[emphasis supplied].

Mucowski involved a lawsuit stemming from a head injury caused by a dive into 4 feet of water from a railing standing 3 1/2 feet above the edge of a swimming pool. The plaintiff was an engineering student and senior at Drexel University who had used this pool on prior occasions. The Mucowski court refused to dismiss the case, on a motion for summary judgement, based on the assumption of risk defense, because of the court's view that the plaintiff's denial that he understood the risk created a sufficient question for the jury to resolve at trial rather than for a judge to decide before trial. However, the assumption of risk defense remained an appropriate one to be considered at trial under the facts of this case.

A couple of other cases further illustrate the use of this doctrine in product liability cases. For more information, see Ott v. Unclaimed Freight Co., 577 A.2d 894 (Pa. Super. 1990) and Jordan by Jordan v. K-Mart Corp., 611 A.2d 1328 (Pa. Super. 1992). In Jordan, the court observed that colliding with a tree is a risk inherent in the use of a sled and that the manufacturer had no duty to modify the design of the sled or to provide a warning against the risk of this type of incident.

Conclusion

I wish to thank the Judiciary Committee and especially the Subcommittee on Courts for hearing our testimony in support of House Bill 1277. I believe that my fellow testifiers have presented strong evidence for this bill. Horses are everywhere in Pennsylvania. Equines are a vital part of our economy. Without the vital changes in equine liability proposed in this legislation, we risk limiting business entry into the equine field, the diminishment of a great form of recreation and therapy, and losing out in interstate competition with states that do or will have equine liability laws in place now or in the future. I believe we have shown a sound legal basis for this kind of reform in Pennsylvania law and elsewhere. I hope our testimony here today has earned your support for this bill. Please, let's pass the Equine Liability Bill. Every legislator in this room today has many, many constituents who will thank you for it.

If I can ever be of further service to you on this issue, please do not hesitate to contact me.

In my view, the trial court, faced with a difficult issue, reached a correct and courageous conclusion. I would affirm the trial court. If the defendant goes to trial on the information in this case, the result is virtually foreordained.


**Margaret CLOVER and Richard S. Clover, Plaintiffs and Appellants,**

**v.**

**SNOWBIRD SKI RESORT, dba Plaza Restaurant, a Utah corporation; and Chris Zulliger, Defendants and Appellees.**

No. 890070.

Supreme Court of Utah.

March 1, 1991.

Guest brought action against ski resort to recover for injuries sustained in skiing accident allegedly caused by resort employee. The Third District Court, Salt Lake County, James S. Sawaya, J., entered summary judgment against guest, and she appealed. The Supreme Court, Hall, C.J., held that: (1) material fact issues existed in connection with guest's respondeat superior, negligent design and maintenance, and negligent supervision claims, and (2) inherent risk of skiing statute did not foreclose claim based on resort's negligent design and maintenance.

Reversed and remanded for further proceedings.

**1. Appeal and Error ⇐934(1)**

When reviewing order granting summary judgment, facts are to be liberally construed in favor of parties opposing motion, and those parties are to be given benefit of all inferences which might reasonably be drawn from evidence; determination of whether facts viewed under such standard justify entry of judgment is question of law, and reviewing court accords trial court's conclusions of law no deference, but reviews them for correctness. Rules Civ.Proc., Rule 56(c).

**2. Master and Servant ⇐300**

Under doctrine of respondeat superior, employers are held vicariously liable for torts their employees commit when employees are acting within scope of their employment.

**3. Master and Servant ⇐332(2)**

Question of whether employee is acting within scope of employment is question of fact; however, in situations where activity is so clearly within or without scope of employment that reasonable minds cannot differ, it lies within prerogative of trial court to decide issue as a matter of law.

**4. Judgment ⇐181(33)**

Material fact issue existed as to whether chef employed by ski resort was acting within scope of his employment at time of skiing accident, which occurred after chef had checked on one of resort's restaurants as requested, precluding summary judgment for resort on accident victim's claim under doctrine of respondeat superior. Rules Civ.Proc., Rule 56(c).

**5. Master and Servant ⇐302(1)**

Under "dual purpose doctrine," if employee's actions are motivated by dual purpose of benefiting employer and serving some personal interest, employee's actions will usually be considered to be within scope of employment.

See publication Words and Phrases for other judicial constructions and definitions.

**6. Master and Servant ⇐302(1)**

In determining whether employee was acting with scope of his employment under doctrine of respondeat superior, focus is not on whether employee's conduct was foreseeable by employer.

**7. Master and Servant ⇐302(2)**

Workers' compensation premises rule, employees who have fixed hours and places of work will usually be considered to be

acting outside scope of employment when travelling to and from work but within scope of employment while travelling to and from work when they are on their employer's premises, does not apply to third-party tort-feasor claims.

**8. Theaters and Shows ⇐6(19)**

Fact that injury is occasioned by one or more of dangers listed in inherent risk of skiing statute's definition of "inherent risk of skiing" does not foreclose claim against operator of ski area based on operator's negligence; list of dangers is nonexclusive and relates to dangers that are integral aspects of sport of skiing, and definition is intended to ensure that operators provide skiers with sufficient notice of risks they face when participating in sport of skiing as well as operators' liability in connection with such risks. U.C.A.1953, 78–27–51 to 78–27–54, 78–27–52(1), 78–27–54.

See publication Words and Phrases for other judicial constructions and definitions.

**9. Statutes ⇐188**

Terms of statute should be interpreted in accord with their usual and accepted meanings.

**10. Statutes ⇐205**

Statute should not be construed in piecemeal fashion, but as comprehensive whole.

**11. Statutes ⇐222**

In construing statute that deals with tort claims, it is proper to interpret statute in accord with relevant tort law.

**12. Statutes ⇐181(1)**

In dealing with unclear statute, court renders interpretations that will best promote protection of the public.

**13. Judgment ⇐181(33)**

Material fact issues existed in connection with accident victim's claims against ski resort for negligent design and maintenance, precluding summary judgment for resort. Rules Civ.Proc., Rule 56(c).

**14. Master and Servant ⇐303**

Regardless of whether employer can be held vicariously liable for employee's actions under doctrine of respondeat superior, employer may be directly liable for its own negligence in hiring or supervising employees.

**15. Judgment ⇐181(33)**

Material fact issues existed in connection with accident victim's claim that ski resort was negligent in supervising employee who purportedly caused victim's skiing injuries, precluding summary judgment for resort. Rules Civ.Proc., Rule 56(c).

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Richard D. Burbidge, Stephen B. Mitchell, Peter L. Rognlie, Salt Lake City, for plaintiffs and appellants.

Jay E. Jensen, Todd S. Winegar, Salt Lake City, for defendants and appellees.

HALL, Chief Justice:

Plaintiff Margaret Clover sought to recover damages for injuries sustained as the result of a ski accident in which Chris Zulliger, an employee of defendant Snowbird Corporation ("Snowbird"), collided with her. From the entry of summary judgment in favor of defendants, Clover appeals.

Many of the facts underlying Clover's claims are in dispute. Review of an order granting summary judgment requires that the facts be viewed in a light most favorable to the party opposing summary judgment.[1] At the time of the accident, Chris Zulliger was employed by Snowbird as a chef at the Plaza Restaurant. Zulliger was supervised by his father, Hans Zulliger, who was the head chef at both the Plaza, which was located at the base of the resort, and the Mid-Gad Restaurant, which was located halfway to the top of the mountain. Zulliger was instructed by his father to make periodic trips to the Mid-Gad to monitor its operations. Prior to the accident, the Zulligers had made several inspection trips to the restaurant. On at least one occasion, Zulliger was paid for such a trip.

1. *Culp Constr. Co. v. Buildmart Mall*, 795 P.2d 650, 651 (Utah 1990).

He also had several conversations with Peter Mandler, the manager of the Plaza and Mid–Gad Restaurants, during which Mandler directed him to make periodic stops at the Mid–Gad to monitor operations.

On December 5, 1985, the date of the accident, Zulliger was scheduled to begin work at the Plaza Restaurant at 3 p.m. Prior to beginning work, he had planned to go skiing with Barney Norman, who was also employed as a chef at the Plaza. Snowbird preferred that their employees know how to ski because it made it easier for them to get to and from work. As part of the compensation for their employment, both Zulliger and Norman received season ski passes. On the morning of the accident, Mandler asked Zulliger to inspect the operation of the Mid–Gad prior to beginning work at the Plaza.

Zulliger and Norman stopped at the Mid–Gad in the middle of their first run. At the restaurant, they had a snack, inspected the kitchen, and talked to the personnel for approximately fifteen to twenty minutes. Zulliger and Norman then skied four runs before heading down the mountain to begin work. On their final run, Zulliger and Norman took a route that was often taken by Snowbird employees to travel from the top of the mountain to the Plaza. About midway down the mountain, at a point above the Mid–Gad, Zulliger decided to take a jump off a crest on the side of an intermediate run. He had taken this jump many times before. A skier moving relatively quickly is able to become airborne at that point because of the steep drop off on the downhill side of the crest. Due to this drop off, it is impossible for skiers above the crest to see skiers below the crest. The jump was well known to Snowbird. In fact, the Snowbird ski patrol often instructed people not to jump off the crest. There was also a sign instructing skiers to ski slowly at this point in the run. Zulliger, however, ignored the sign and skied over the crest at a significant speed. Clover, who had just entered the same ski run from a point below the crest, either had stopped or was traveling slowly below the crest. When Zulliger went over the jump, he collided with Clover, who was hit in the head and severely injured.

Clover brought claims against Zulliger and Snowbird, alleging that (1) Zulliger's reckless skiing was a proximate cause of her injuries, (2) Snowbird is liable for Zulliger's negligence because at the time of the collision, he was acting within the scope of his employment, (3) Snowbird negligently designed and maintained its ski runs, and (4) Snowbird breached its duty to adequately supervise its employees. Zulliger settled separately with Clover. Under two separate motions for summary judgment, the trial judge dismissed Clover's claims against Snowbird for the following reasons: (1) as a matter of law, Zulliger was not acting within the scope of his employment at the time of the collision, (2) Utah's Inherent Risk of Skiing Statute, Utah Code Ann. §§ 78–27–51 to –54 (Supp.1986), bars plaintiff's claim of negligent design and maintenance, and (3) an employer does not have a duty to supervise an employee who is acting outside the scope of employment.

## I. STANDARD OF REVIEW

[1] Summary judgment is proper in cases where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.[2] In cases where the facts are in dispute, summary judgment is only granted when, viewing the facts in a light most favorable to the party opposing summary judgment, the moving party is entitled to judgment. Therefore, when reviewing an order granting summary judgment, the facts are to be liberally construed "in favor of the parties opposing the motion, and those parties are to be given the benefit of all inferences which might reasonably be drawn from the evidence." [3] The determination of whether

2. Utah R.Civ.P. 56(c); *see, e.g., Utah State Coalition of Senior Citizens v. Utah Power & Light Co.*, 776 P.2d 632, 634 (Utah 1989).

3. *Payne ex rel. Payne v. Myers*, 743 P.2d 186, 187–88 (Utah 1987); *see also, e.g., Owens v. Garfield*, 784 P.2d 1187, 1188 (Utah 1989).

the facts, viewed in this light, justify the entry of judgment is a question of law. We accord the trial court's conclusions of law no deference, but review them for correctness.[4]

## II. SCOPE OF EMPLOYMENT

[2, 3] Under the doctrine of respondeat superior, employers are held vicariously liable for the torts their employees commit when the employees are acting within the scope of their employment.[5] Clover's respondeat superior claim was dismissed on the ground that as a matter of law, Zulliger's actions at the time of the accident were not within the scope of his employment. In a recent case, *Birkner v. Salt Lake County*,[6] this court addressed the issue of what types of acts fall within the scope of employment. In *Birkner*, we stated that acts within the scope of employment are " 'those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.' "[7] The question of whether an employee is acting within the scope of employment is a question of fact. The scope of employment issue must be submitted to a jury "whenever reasonable minds may differ as to whether the [employee] was at a certain time involved wholly or partly in the performance of his [employer's] business or within the scope of employment."[8] In situations where the activity is so clearly within or without the scope of employment that reasonable minds cannot differ, it lies within the prerogative of the trial judge to decide the issue as a matter of law.[9]

In *Birkner*, we observed that the Utah cases that have addressed the issue of whether an employee's actions, as a matter of law, are within or without the scope of employment have focused on three criteria.[10] "First, an employee's conduct must be of the general kind the employee is employed to perform.... In other words, the employee must be about the employer's business and the duties assigned by the employer, as opposed to being wholly involved in a personal endeavor."[11] Second, the employee's conduct must occur substantially within the hours and ordinary spatial boundaries of the employment.[12] "Third, the employee's conduct must be motivated at least in part, by the purpose of serving the employer's interest."[13] Under specific factual situations, such as when the employee's conduct serves a dual purpose[14] or when the employee takes a personal detour in the course of carrying out his employer's directions,[15] this court

4. *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636 (Utah 1989); *Bonham v. Morgan*, 788 P.2d 497, 499 (Utah 1989).

5. *See* W. Keeton, *Prosser and Keeton on the Law of Torts* § 70, at 502 (5th ed. 1984). *See generally, e.g., Whitehead v. Variable Annuity Life Ins.*, 801 P.2d 934, 935 (Utah 1989); *Birkner v. Salt Lake County*, 771 P.2d 1053, 1056–59 (Utah 1989).

6. 771 P.2d 1053 (Utah 1989).

7. *Birkner v. Salt Lake County*, 771 P.2d at 1056 (quoting W. Keeton, *Prosser and Keeton on the Law of Torts* § 70, at 502 (5th ed. 1984)).

8. *Carter v. Bessey*, 97 Utah 427, 93 P.2d 490, 493 (1939).

9. *Birkner v. Salt Lake County*, 771 P.2d at 1057.

10. *See* Restatement (Second) of Agency § 228 (1958); W. Keeton, *Prosser and Keeton on the Law of Torts* § 70, at 502 (5th ed. 1984).

11. *Birkner v. Salt Lake County*, 771 P.2d 1053, 1056–57 (Utah 1989); *see also Keller v. Gunn Supply Co.*, 62 Utah 501, 220 P. 1063, 1064 (1923).

12. *Birkner v. Salt Lake County*, 771 P.2d at 1057; *see also Cannon v. Goodyear Tire & Rubber Co.*, 60 Utah 346, 208 P. 519, 520–21 (1922).

13. *Birkner v. Salt Lake County*, 771 P.2d at 1057; *see also, e.g., Whitehead v. Variable Annuity Life Ins.*, 801 P.2d at 936; *Stone v. Hurst Lumber Co.*, 15 Utah 2d 49, 386 P.2d 910, 911 (1963); *Combes v. Montgomery Ward & Co.*, 119 Utah 407, 228 P.2d 272, 274 (1951).

14. *See Whitehead v. Variable Annuity Life Ins.*, 801 P.2d at 937 (applying the dual purpose rule); *see infra* notes 18–23 and accompanying text.

15. *See, e.g., Carter v. Bessey*, 93 P.2d at 492–93 (applying the substantial deviation test); *see infra* notes 24–31 and accompanying text.

has occasionally used variations of this approach. These variations, however, are not departures from the criteria advanced in *Birkner*. Rather, they are methods of applying the criteria in specific factual situations.

[4] In applying the *Birkner* criteria to the facts in the instant case, it is important to note that if Zulliger had returned to the Plaza Restaurant immediately after he inspected the operations at the Mid–Gad Restaurant, there would be ample evidence to support the conclusion that on his return trip Zulliger's actions were within the scope of his employment. There is evidence that it was part of Zulliger's job to monitor the operations at the Mid–Gad and that he was directed to monitor the operations on the day of the accident. There is also evidence that Snowbird intended Zulliger to use the ski lifts and the ski runs on his trips to the Mid–Gad. It is clear, therefore, that Zulliger's actions could be considered to "be of the general kind that the employee is employed to perform." [16] It is also clear that there would be evidence that Zulliger's actions occurred within the hours and normal spatial boundaries of his employment. Zulliger was expected to monitor the operations at the Mid–Gad during the time the lifts were operating and when he was not working as a chef at the Plaza. Furthermore, throughout the trip he would have been on his employer's premises. Finally, it is clear that Zulliger's actions in monitoring the operations at the Mid–Gad, per his employer's instructions, could be considered "motivated, at least in part, by the purpose of serving the employer's interest." [17]

[5] The difficulty, of course, arises from the fact that Zulliger did not return to the Plaza after he finished inspecting the facilities at the Mid–Gad. Rather, he skied four more runs and rode the lift to the top of the mountain before he began his return to the base. Snowbird claims that this fact shows that Zulliger's primary purpose for skiing on the day of the accident was for his own pleasure and that therefore, as a matter of law, he was not acting within the scope of his employment. In support of this proposition, Snowbird cites *Whitehead v. Variable Annuity Life Insurance.*[18] *Whitehead* concerned the dual purpose doctrine. Under this doctrine, if an employee's actions are motivated by the dual purpose of benefiting the employer and serving some personal interest, the actions will usually be considered within the scope of employment.[19] However, if the primary motivation for the activity is personal, "even though there may be some transaction of business or performance of duty merely incidental or adjunctive thereto, the [person] should not be deemed to be in the scope of his employment." [20] In situations where the scope of employment issue concerns an employee's trip, a useful test in determining if the transaction of business is purely incidental to a personal motive is "whether the trip is one which would have required the employer to send another employee over the same route or to perform the same function if the trip had not been made." [21]

In *Whitehead*, we held that an employee's commute home was not within the scope of employment, notwithstanding the plaintiff's contention that because the employee planned to make business calls from his house, there was a dual purpose for the commute.[22] In so holding, we noted that the business calls could have been made as easily from any other place as from the employee's home.[23] The instant case is distinguishable from *Whitehead* in that the activity of inspecting the Mid–Gad necessitates travel to the restaurant. Furthermore, there is evidence that the manager of

16. *Birkner v. Salt Lake County*, 771 P.2d at 1057.

17. *Id.*

18. 801 P.2d 934 (Utah 1989).

19. *Id.* at 937.

20. *Id.* (citing *Martinson v. W–M Ins. Agency*, 606 P.2d 256, 285 (Utah 1980)).

21. *Id.*

22. *Id.*

23. *Id.*

both the Mid–Gad and the Plaza wanted an employee to inspect the restaurant and report back by 3 p.m. If Zulliger had not inspected the restaurant, it would have been necessary to send a second employee to accomplish the same purpose. Furthermore, the second employee would have most likely used the ski lifts and ski runs in traveling to and from the restaurant.

There is ample evidence that there was a predominant business purpose for Zulliger's trip to the Mid–Gad. Therefore, this case is better analyzed under our decisions dealing with situations where an employee has taken a personal detour in the process of carrying out his duties. This court has decided several cases in which employees deviated from their duties for wholly personal reasons and then, after resuming their duties, were involved in accidents.[24] In situations where the detour was such a substantial diversion from the employee's duties that it constituted an abandonment of employment, we held that the employee, as a matter of law, was acting outside the scope of employment.[25] However, in situations where reasonable minds could differ on whether the detour constituted a slight deviation from the employee's duties or an abandonment of employment, we have left the question for the jury.[26]

Under the circumstances of the instant case, it is entirely possible for a jury to reasonably believe that at the time of the accident, Zulliger had resumed his employment and that Zulliger's deviation was not substantial enough to constitute a total abandonment of employment. First, a jury could reasonably believe that by beginning his return to the base of the mountain to begin his duties as a chef and to report to Mandler concerning his observations at the Mid–Gad, Zulliger had resumed his employment. In past cases, in holding that the actions of an employee were within the scope of employment, we have relied on the fact that the employee had resumed the duties of employment prior to the time of the accident.[27] This is an important factor because if the employee has resumed the duties of employment, the employee is then "about the employer's business" and the employee's actions will be "motivated, at least in part, by the purpose of serving the employer's interest." [28] The fact that due to Zulliger's deviation, the accident occurred at a spot above the Mid–Gad does not disturb this analysis. In situations where accidents have occurred substantially within the normal spatial boundaries of employment, we have held that employees may be within the scope of employment if, after a personal detour, they return to their duties and an accident occurs.[29]

Second, a jury could reasonably believe that Zulliger's actions in taking four ski runs and returning to the top of the mountain do not constitute a complete abandonment of employment. It is important to note that by taking these ski runs, Zulliger was not disregarding his employer's directions. In *Cannon v. Goodyear Tire & Rubber Co.*,[30] wherein we held that the employee's actions were a substantial departure from the course of employment, we focused on the fact that the employee's actions were in direct conflict with the employer's directions and policy.[31] In the instant case, far from directing its employees not to ski at the resort, Snowbird issued its employees season ski passes as part of their compensation.

These two factors, along with other circumstances—such as, throughout the day Zulliger was on Snowbird's property, there

24. *See Carter v. Bessey*, 93 P.2d at 491–93; *Burton v. La Duke*, 61 Utah 78, 210 P. 978, 979–82 (Utah 1922); *Cannon v. Goodyear Tire & Rubber Co.*, 208 P. at 519–22.

25. *Compare Cannon v. Goodyear Tire & Rubber Co.*, 208 P. at 521 (substantial deviation from employment) *with Burton v. La Duke*, 210 P. at 981–82 (distinguishing *Cannon*).

26. *See Carter v. Bessey*, 93 P.2d at 493; *Burton v. La Duke*, 210 P. at 981.

27. *See Burton v. La Duke*, 210 P. at 979–81.

28. *See id.* 210 P. at 981; *see also Birkner v. Salt Lake County*, 771 P.2d at 1057.

29. *Burton v. La Duke*, 210 P. at 981.

30. 60 Utah 346, 208 P. 519 (1922).

31. *See id.* 208 P. at 520–21.

was no specific time set for inspecting the restaurant, and the act of skiing was the method used by Snowbird employees to travel among the different locations of the resort—constitute sufficient evidence for a jury to conclude that Zulliger, at the time of the accident, was acting within the scope of his employment.

[6] Although we have held that Zulliger's actions were not, as a matter of law, outside the scope of his employment under the *Birkner* analysis, it is important to note that Clover also argues that Zulliger's conduct is within the scope of employment under two alternative theories. First, she urges this court to adopt a position taken by some jurisdictions that focuses, not on whether the employee's conduct is motivated by serving the employer's interest, but on whether the employee's conduct is foreseeable.[32] Such an approach constitutes a significant departure from the *Birkner* analysis.

[7] Second, Clover urges this court to apply the premises rule, a rule developed in workers' compensation cases,[33] to third-party tort-feasor claims. Under this rule, employees who have fixed hours and places of work will usually be considered to be acting outside of the scope of employment when they are traveling to and from work. However, they will be considered to be in the course of employment while traveling to and from work when they are on their employer's premises.[34] In this instance, we decline to adopt such an approach. It is to be noted that the policies behind workers' compensation law differ from the policies behind respondeat superior claims.[35] Furthermore, the premises rule departs from the analysis in *Birkner* in that it focuses entirely upon the second criterion discussed in *Birkner*, the hours and ordinary spatial boundaries of the employment, to the exclusion of the first and third criteria. Situations like the instant case, where the employee has other reasons aside from traveling to work to be on the employer's premises, demonstrate the need for a more flexible and intricate analysis in respondeat superior cases. In fact, it is not entirely clear that the premises rule would apply in a workers' compensation case if the only connection an employee had with work was that the employee, after some recreational skiing, was returning to work on the employer's ski runs.[36] We therefore, in this instance, decline to adopt these approaches.

## III. NEGLIGENT DESIGN AND MAINTENANCE

[8] The trial court dismissed Clover's negligent design and maintenance claim on the ground that such a claim is barred by Utah's Inherent Risk of Skiing Statute, Utah Code Ann. §§ 78–27–51 to –54 (Supp. 1986). This ruling was based on the trial court's findings that "Clover was injured as a result of a collision with another skier, and/or the variation of steepness in terrain." Apparently, the trial court reasoned that regardless of a ski resort's culpability, the resort is not liable for an injury occasioned by one or more of the dangers listed in section 78–27–52(1). This reasoning, however, is based on an incorrect interpretation of sections 78–27–51 to –54.

Utah Code Ann. §§ 78–27–51 and –52(1)[37] read in part:

32. *See Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir.1968); *Hinman v. Westinghouse Elec. Co.*, 2 Cal.3d 956, 471 P.2d 988, 990, 88 Cal.Rptr. 188, 190 (1970).

33. *See Soldier Creek Coal v. Bailey*, 709 P.2d 1165, 1166 (Utah 1985).

34. 1 A. Larson, *The Law of Workmen's Compensation* § 15.11 (1990).

35. *See id.* at § 15.15 (rationale for expansions of the premises rule different than rationale of respondeat superior).

36. *See Pypers v. Workmen's Compensation Appeal Bd.*, 105 Pa.Cmwlth. 448, 524 A.2d 1046, 1049 (1987) (when employee remains on premises for party, injury received while leaving not compensable).

37. The Passenger Tramway Act, Utah Code Ann. § 63–11–37 (Supp.1986), also provides protections to ski area operators. This statute allows actions to recover for injuries caused by unnecessary hazards in design, construction, and operation of tramways but not for injuries caused by "the hazards inherent in the sports of mountaineering, skiing and hiking." The protections ski area operators possess under section 63–11–

Inherent risks of skiing—Public policy

The Legislature finds that the sport of skiing is practiced by a large number of residents of Utah and attracts a large number of nonresidents, significantly contributing to the economy of this state.

It further finds that few insurance carriers are willing to provide liability insurance protection to ski area operators and that the premiums charged by those carriers have risen sharply in recent years due to confusion as to whether a skier assumes the risks inherent in the sport of skiing. It is the purpose of this act, therefore, to clarify the law in relation to skiing injuries and the risks inherent in that sport, and to establish as a matter of law that certain risks are inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks.

Inherent risk of skiing—Definitions

As used in this act:

(1) "Inherent risk of skiing" means those dangers or conditions which are an integral part of the sport of skiing, including, but not limited to: changing weather conditions, variations or steepness in terrain; snow or ice conditions; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, impact with lift towers and other structures and their components; collisions with other skiers; and a skier's failure to ski within his own ability.

Section 78–27–53 states that notwithstanding anything to the contrary in Utah's comparative fault statute, a skier cannot recover from a ski area operator for an injury caused by an inherent risk of skiing. Section 78–27–54 requires ski area operators to "post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing and the limitations on liability of ski area operators as defined in this act."

It is clear that sections 78–27–51 to –54 protect ski area operators from suits initiated by their patrons who seek recovery for injuries caused by an inherent risk of skiing. The statute, however, does not purport to grant ski area operators complete immunity from all negligence claims initiated by skiers. While the general parameters of the act are clear, application of the statute to specific circumstances is less certain. In the instant case, both parties urge different interpretations of the act. Snowbird claims that any injury occasioned by one or more of the dangers listed in section 78–27–52(1) is barred by the statute because, as a matter of law, such an accident is caused by an inherent risk of skiing. Clover, on the other hand, argues that a ski area operator's negligence is not an inherent risk of skiing and that if the resort's negligence causes a collision between skiers, a suit arising from that collision is not barred by sections 78–27–51 to –54.

Although the trial court apparently agreed with Snowbird, we decline to adopt such an interpretation.[38] The basis of Snowbird's argument is that the language of section 78–27–52(1) stating that "'[i]nherent risk of skiing' means those dangers or conditions which are an integral part of the sport of skiing, including but not limited to: ... collision with other skiers" must be read as defining all collisions between skiers as inherent risks. The wording of the statute does not compel such a reading. To the contrary, the dangers listed in section 78–27–52(1) are modified by the term "integral part of the sport of skiing." Therefore, ski area operators are protected from suits to recover for injuries caused by one or more of the dangers listed in section 78–27–52(1) only to the extent that those dangers, under the facts of each case, are integral aspects of the sport of skiing. Indeed, the list of

37 are not more expansive than the protections they possess under sections 78–27–51 to –54. Therefore, a separate analysis of section 63–11–37 is unnecessary in this context.

38. Because we interpret Utah Code Ann. §§ 78–27–51 to –54 as not prohibiting legitimate negligence claims, we do not reach Clover's argument that the statute violates article I, sections 1 and 11 of the Utah Constitution and the 14th amendment of the federal constitution.

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dangers in section 78–27–52(1) is expressly nonexclusive. The statute, therefore, contemplates that the determination of whether a risk is inherent be made on a case-by-case basis, using the entire statute, not solely the list provided in section 78–27–52(1).

Furthermore, when the act is read in its entirety, no portion thereof is rendered meaningless. When reading section 78–27–52(1) in connection with section 78–27–54, it becomes clear that the relevance of section 78–27–52(1) is in insuring that ski area operators provide skiers with sufficient notice of the risks they face when participating in the sport of skiing, as well as ski area operators' liability in connection with these risks. It should also be noted that the interpretation urged by Snowbird would result in a wide range of absurd consequences.[39] For example, if a skier loses control and falls by reason of the negligence of an operator, recovery for injury would depend on whether, in the fall, the skier collides with a danger listed in section 78–27–52(1). Such a result is entirely arbitrary.

[9–12] To the extent that the wording of section 78–27–52(1) creates uncertainty regarding the specific application of the act, that confusion should be resolved through the use of the rules of statutory construction. A rule of construction which this court has commonly applied is that the terms of a statute should be interpreted in accord with their usual and accepted meanings.[40] Another rule is that a statute should not be construed in a piecemeal fashion but as a comprehensive whole.[41] Furthermore, "[i]f there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective, and to harmonize its provisions in accordance with its intent and purpose." [42] In cases such as this, where a statement of the statute's purpose is codified in the statute, this method of construction is particularly appropriate. It is also proper in construing a statute which deals with tort claims to interpret the statute in accord with relevant tort law. Finally, in dealing with an unclear statute, this court renders interpretations that will "best promote the protection of the public." [43]

In construing the statute in this manner, a helpful first step is to note that sections 78–27–51 to –54 limit the liability of ski area operators by defining the duty they owe to their patrons. The express purpose of the statute, codified in section 78–27–51, is "to clarify the law in relation to skiing injuries and the risk inherent in the sport ... and to establish [that] ... no person shall recover from a ski operator for injuries resulting from those inherent risks." Inasmuch as the purpose of the statute is to "clarify the law," not to radically alter ski resort liability, it is necessary to briefly examine the relevant law at the time the statute was enacted. Although there is limited Utah case law on point, when the statute was enacted the majority of jurisdictions employed the doctrine of primary assumption of risk in limiting ski resorts' liability for injuries their patrons received while skiing.[44] Terms utilized in the statute such as "inherent risk of skiing" and "assumes the risk" are the same terms relied upon in such cases. This language suggests that the statute is meant to achieve the same results achieved under the doctrine of primary assumption of risk.

39. When dealing with unclear statutes, this court renders interpretations that will avoid "absurd consequences." *Curtis v. Harmon Electronics*, 575 P.2d 1044, 1046 (Utah 1978).

40. *Utah County v. Orem City*, 699 P.2d 707, 708 (Utah 1985).

41. *Peay v. Board of Ed. of Provo City Schools*, 14 Utah 2d 63, 377 P.2d 490, 492 (Utah 1962).

42. *Osuala v. Aetna Life & Casualty*, 608 P.2d 242, 243 (Utah 1980) (footnotes omitted).

43. *Curtis v. Harmon Electronics*, 575 P.2d at 1046.

44. *See, e.g., Wright v. Mt. Mansfield Lift*, 96 F.Supp. 786, 791 (D.Vt.1951); *see also* Feuerhelm, *From Wright to Sunday and Beyond: Is the Law Keeping Up With the Skiers?*, 1985 Utah L.Rev. 885; Comment, *Utah's Inherent Risk of Skiing Act: Avalanche from Capitol Hill*, 1980 Utah L.Rev. 355 (authored by W. Faber).

In fact, commentators suggest that the statute was passed in reaction to a perceived erosion in the protection ski area operators traditionally enjoyed under the common law doctrine of primary assumption of risk.[45]

As we have noted in the past, the single term "assumption of risk" has been used to refer to several different, and occasionally overlapping, concepts.[46] One concept, primary assumption of risk, is simply "an alternative expression for the proposition that the defendant was not negligent, that is, there was no duty owed or there was no breach of an existing duty."[47] This suggests that the statute, in clarifying the "confusion as to whether a skier assumes the risks inherent in the sport of skiing," operates to define the duty ski resorts owe to their patrons.

Section 78–27–53 also supports the notion that the ski statute operates to define the duty of a ski resort. This section exempts injuries caused by the inherent risks of skiing from the operation of Utah's comparative fault statute, which was enacted to avoid the harsh results of the all-or-nothing nature of the former law by limiting a party's liability by the degree of that party's fault.[48] Comparative principles have been applied in cases dealing with contributory negligence,[49] secondary assumption of risk,[50] and strict liability.[51] Exempting suits concerning injuries caused by an inherent risk of skiing from the comparative fault statute is consistent with the assertion that the ski area operators are not at fault in such situations—that is, ski area operators have no duty to protect a skier from the inherent risks of skiing.

Finally, it is to be noted that without a duty, there can be no negligence. Such an interpretation, therefore, harmonizes the express purpose of the statute, protecting ski area operators from suits arising out of injuries caused by the inherent risks of skiing, with the fact that the statute does not purport to abrogate a skier's traditional right to recover for injuries caused by ski area operators' negligence.

A similar analysis leads to the conclusion that the duties sections 78–27–51 to –54 impose on ski resorts are the duty to use reasonable care for the protection of its patrons[52] and, under section 78–27–54, the duty to warn its patrons of the inherent risks of skiing. Beyond the general warning prescribed by section 78–27–54, however, a ski area operator is under no duty to protect its patrons from the inherent risks of skiing. The inherent risks of skiing are those dangers that skiers wish to confront as essential characteristics of the sport of skiing or hazards that cannot be

45. *See* Feuerheim, *supra* note 44; Comment, *supra* note 44. In fact, Snowbird in its brief and at oral argument contended that the statute was intended to reassert the doctrine of primary assumption of risk as it relates to ski accident cases.

46. *See, e.g., Moore v. Burton Lumber & Hardware,* 631 P.2d 865, 869–71 (Utah 1981); *Jacobsen Constr. v. Structo–Lite Eng'g,* 619 P.2d 306, 309–12 (Utah 1980). In contract law, the term is used in connection with provisions in which one party "expressly contracts not to sue for injury or loss which may thereafter be occasioned by the acts of another." *Jacobsen Constr. v. Structo–Lite Eng'g,* 619 P.2d at 310. In the law of torts, the term has been used to describe two different concepts. In its most common context, secondary assumption of risk, the term refers to the unreasonable encounter of a known and appreciated risk. Secondary assumption of risk is, in reality, an aspect of contributory negligence. Primary assumption of risk involves relationships where the defendant owes no duty of care to the plaintiff. *Id.*

47. *Jacobsen Constr. v. Structo–Lite Eng'g,* 619 P.2d at 310.

48. *See* Utah Code Ann. §§ 78–27–37 to –43 (Supp.1986); *Moore v. Burton Lumber & Hardware,* 631 P.2d at 870.

49. *Acculog, Inc. v. Peterson,* 692 P.2d 728, 730 (Utah 1984).

50. *Moore v. Burton Lumber & Hardware,* 631 P.2d at 869–71.

51. *Mulherin v. Ingersoll–Rand,* 628 P.2d 1301, 1303 (Utah 1981).

52. Ski area operators which invite skiers onto their property for business purposes owe a duty of reasonable care for the protection of their patrons. *See Stevens v. Salt Lake County,* 25 Utah 2d 168, 478 P.2d 496, 498 (Utah 1970); *see also Wright v. Mt. Mansfield Lift Inc.,* 96 F.Supp. 786 (D.Vt.1951).

eliminated by the exercise of ordinary care on the part of the ski area operator.

As noted above, the purpose of the statute is to prohibit suits seeking recovery for injuries caused by an inherent risk of skiing. The term "inherent risk of skiing," using the ordinary and accepted meaning of the term "inherent," refers to those risks that are essential characteristics of skiing—risks that are so integrally related to skiing that the sport cannot be undertaken without confronting these risks. Generally, these risks can be divided into two categories. The first category of risks consists of those risks, such as steep grades, powder, and mogul runs, which skiers wish to confront as an essential characteristic of skiing. Under sections 78–27–51 to –54, a ski area operator is under no duty to make all of its runs as safe as possible by eliminating the type of dangers that skiers wish to confront as an integral part of skiing.[53]

The second category of risks consists of those hazards which no one wishes to confront but cannot be alleviated by the use of reasonable care on the part of a ski resort. It is without question that skiing is a dangerous activity. Hazards may exist in locations where they are not readily discoverable. Weather and snow conditions can suddenly change and without warning, create new hazards where no hazard previously existed. Hence, it is clearly foreseeable that a skier, without skiing recklessly, may momentarily lose control or fall in an unexpected manner. Ski area operators cannot alleviate these risks, and under sections 78–27–51 to –54, they are not liable for injuries caused by such risks. The only duty ski area operators have in regard to these risks is the requirement set out in section 78–27–54 that they warn their patrons, in the manner prescribed in the statute, of the general dangers patrons must confront when participating in the sport of skiing. This does not mean, however, that a ski area operator is under no duty to use ordinary care to protect its patrons. In fact, if an injury was caused by an unnecessary hazard that could have been eliminated by the use of ordinary care, such a hazard is not, in the ordinary sense of the term, an inherent risk of skiing and would fall outside of sections 78–27–51 to –54.

This definition of a ski area operator's duty is consistent with the approach used by the majority of jurisdictions in ski accident cases prior to the time the statute was adopted.[54] At the time the statute was enacted, the landmark case in the area was *Wright v. Mt. Mansfield Lift Inc.*[55] In *Wright*, a skier who was injured in a collision with a snow-covered stump was denied recovery under the doctrine of primary assumption of risk. The court held that although a ski resort has a duty to advise its patrons of specific hazards "which reasonable prudence would have foreseen and corrected," [56] the resort was under no duty to protect its patrons from those dangers that are inherent in the sport to the extent that those dangers are obvious and necessary.[57] Specifically, the court held that the existence of the stump was not reasonably foreseeable and was the type of general hazard that was obvious to the plaintiff.[58] This approach is consistent with the definition of duty derived from the use of the ordinary meaning of the terms of the statute. The prerequisite that a risk be necessary is consistent with the ordinary meaning of the term inherent. Similarly, the prerequisite that the risk be obvious is consistent with the requirement of section 78–27–54 that ski area operators warn of the inherent risk of skiing. This approach, therefore, fulfills the express purpose of the

53. Ski area operators, however, should use reasonable care to inform their patrons of the degree of difficulty of their runs.

54. *See supra* notes 44–45 and accompanying text.

55. 96 F.Supp. 786 (D.Vt.1951).

56. *Id.* at 790.

57. *See id.* at 790–92.

58. *See id.* In fact, the *Wright* court found that in 1951, requiring a ski resort to be aware of the type of hazard that caused the injury "would be to demand the impossible." *Id.* at 791. In contrast in this case, Clover claims that Snowbird had actual knowledge of the danger that caused her injury.

statute, "clarifying the law in relation to skiing injuries."

[13] Having established the proper interpretation of sections 78-27-51 to -54, the next step is to determine whether, given this interpretation, there is a genuine issue of material fact in regard to Clover's claim. First, the existence of a blind jump with a landing area located at a point where skiers enter the run is not an essential characteristic of an intermediate run. Therefore, Clover may recover if she can prove that Snowbird could have prevented the accident through the use of ordinary care. It is to be noted that Clover's negligent design and maintenance claim is not based solely on the allegation that Snowbird allowed conditions to exist on an intermediate hill which caused blind spots and allowed skiers to jump. Rather, Clover presents evidence that Snowbird was aware that its patrons regularly took the jump, that the jump created an unreasonable hazard to skiers below the jump, and that Snowbird did not take reasonable measures to eliminate the hazard. This evidence is sufficient to raise a genuine issue of material fact in regard to Clover's negligent design and maintenance claim.

## IV. NEGLIGENT SUPERVISION

[14, 15] The trial court dismissed Clover's negligent supervision claim on the ground that an employer does not have a duty to supervise an employee whose actions are outside the scope of employment. Although we have held that Zulliger's actions were not, as a matter of law, outside the scope of employment, it is important to note that the trial court misstated the law. Regardless of whether an employer can be held vicariously liable for its employee's actions under the doctrine of respondeat superior, an employer may be directly liable for its own negligence in hiring or supervising employees.[59] In the instant case, Clover claims that Snowbird was negligent in not supervising its employees in regard to the practice of reckless skiing. In support of this contention, Clover provides evidence that Snowbird furnished its employees with ski passes as partial compensation for employment, was aware of the dangerous condition created by the jump, and was aware that its employees often took the jump, but did not take any measures to alleviate the danger. This evidence is sufficient to raise a genuine issue of material fact in regard to Clover's negligent supervision claim.

In light of the genuine issues of material fact in regard to each of Clover's claims, summary judgment was inappropriate.

Reversed and remanded for further proceedings.

HOWE, Associate C.J., STEWART and DURHAM, JJ., and JACKSON, Court of Appeals Judge, concur.

ZIMMERMAN, J., having disqualified himself, does not participate herein; JACKSON, Court of Appeals Judge, sat.

59. *See, e.g., Birkner v. Salt Lake County*, 771 P.2d 1053, 1059 (Utah 1989); *Stone v. Hurst Lumber Co.*, 15 Utah 2d 49, 386 P.2d 910, 911-12 (1963); *see also* W. Keeton, *Prosser and Keeton on the Law of Torts* § 70, at 501-02 (5th ed. 1984).

**STATE of Utah, Plaintiff and Appellee,**

**v.**

**Tony W. MATSAMAS, Defendant and Appellant.**

**No. 880048.**

Supreme Court of Utah.

March 6, 1991.

Defendant was convicted by jury of rape of a child and sodomy on a child before the Third District Court, Salt Lake County, Raymond S. Uno, J., and he appealed. The Supreme Court, Zimmerman, J., held that: (1) erroneous admission of hearsay testimony was not harmless error, and

its trucks were carrying; and, therefore, the dangers of unsupervised, overweight trucks were not present. As such, the deterrents for overweight and oversized trucks were not applicable. Appellant's alleged violation pertained only to a PennDOT safety regulation defining restricted periods of travel.

The judgment of sentence is reversed, and appellant is discharged.


**Steven MUCOWSKI, Appellant,**

**v.**

**Robert CLARK and Joan Clark and Hub Manufacturing Company and Lionel Leisure, Inc., t/a Kiddie City, Appellees.**

Superior Court of Pennsylvania.

Argued Nov. 9, 1990.
Filed May 2, 1991.

Swimmer brought suit to recover damages for injuries sustained when he dove into above ground pool. The Court of Common Pleas, Civil Division, Philadelphia County, No. 3525 June Term, 1985, Lehrer, J., entered summary judgment in favor of pool seller, and swimmer appealed. The Superior Court, No. 860 Philadelphia, 1990, Wieand, J., held that swimmer's conduct, rather than failure to warn of dangers of diving into shallow water from rim of pool, was legal cause of swimmer's injuries.

Affirmed.

Kelly, J., concurred in result.

**1. Negligence ⇐105**

Voluntary assumption of risk involves subjective awareness of risk inherent in an activity and willingness to accept it.

**2. Negligence ⇐105**

Plaintiff has voluntarily assumed risk where he fully understands it and voluntarily chooses to encounter it.

**3. Negligence ⇐105**

For danger to be known and voluntarily assumed, it must not only be known to exist, but it must also be recognized as being dangerous.

**4. Negligence ⇐135(3)**

Plaintiff's knowledge and understanding of risk may be shown by circumstantial evidence.

**5. Judgment ⇐181(33)**

Fact question as to whether swimmer understood risk which he encountered by diving head first into pool's shallow water precluded summary judgment on ground of voluntary assumption of the risk.

**6. Negligence ⇐52, 56(1.16)**

Legal cause of swimmer's injuries sustained from diving into shallow pool was swimmer's foolhardiness in attempting a head first dive into four feet of water from a railing which stood three and one-half feet above the edge of the pool; seller of pool had no duty to warn of risk of diving into pool from railing constructed by buyer, and absence of warning against diving head first into the pool from the rim thereof was not the legal cause of swimmer's injury.

**7. Products Liability ⇐60**

Seller of four-foot deep above ground swimming pool was not chargeable with notice of buyer's addition of three and one-half-foot high railing around the pool, from which swimmer dove and sustained injuries when he struck his head on the bottom of the pool; pool had not been sold as a diving pool and seller had not been consulted about erection of railing around pool.

**8. Products Liability ⇐60**

Four-feet deep above ground swimming pool was not constructed to accommodate dive from three and one-half-foot high railing erected by buyer, and therefore could not be said to have been defectively designed.

Paul N. Sandler, Philadelphia, for appellant.

Eileen M. Johnson, Philadelphia, for appellees.

Before WIEAND, KELLY and CERCONE, JJ.

WIEAND, Judge:

In this action to recover damages for injuries sustained by Steven Mucowski when he dived into an above ground swimming pool which had been sold by Lionel Leisure, Inc., t/a Kiddie City (Kiddie City), the trial court entered summary judgment in favor of the seller because Mucowski had assumed the risk of diving into a shallow pool. Mucowski appealed.

It was undisputed that the pool had been purchased by Robert and Joan Clark from Kiddie City and had been installed in 1981. It was fifteen (15) feet in diameter and four (4) feet deep. Around the rim of the pool, the owner had constructed a four (4) feet wide platform so that children could sit on the platform and put their feet in the water. Along the outer edge of the platform, the property owner had also constructed a railing which was intended to prevent persons on the platform from falling from it. This railing extended three and one-half (3½) feet above the platform, which was even with the top of the pool. The platform and railing were not a part of the pool which had been purchased from Kiddie City. They had been constructed by the property owner without any consultation with the seller.

On July 3, 1983, Mucowski was a guest at the home of Robert and Joan Clark and was using the pool. Mucowski was twenty-one (21) years of age, was five feet, ten inches (5' 10") in height, and was a senior engineering student at Drexel University. He was familiar with the pool, for he had used it on prior occasions. He had dived or jumped into the pool from the platform on the day of the accident and knew, from standing in the pool, that the water reached a point between his navel and his chest. After he had been in the pool awhile, Mucowski climbed onto the three and one-half (3½) feet high railing which surrounded the pool, intending to dive into the pool. He said that he had experienced difficulty keeping his balance on the railing, and when he dived head first into the pool he struck his head on the bottom of the pool, sustaining serious injury. He denied, in depositions, that he was aware of the danger of diving into shallow water.

Mucowski commenced an action to recover damages against the Clarks, Hub Manufacturing Company, the manufacturer of the swimming pool, and Kiddie City, the vendor. The claim against the manufacturer was settled, and the claim against the property owners was dismissed summarily on grounds that Mucowski had voluntarily assumed the risk. This summary judgment was affirmed on appeal. See: *Mucowski v. Clark*, 394 Pa.Super. 638, 569 A.2d 1389 (1989).

In his complaint against Kiddie City, the retail vendor, Mucowski alleged negligence and strict liability based on an alleged design defect and a failure to warn against the dangers of diving into shallow water. The trial court entered summary judgment in favor of Kiddie City, and Mucowski appealed.

A motion for summary judgment is properly granted when "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 and that the moving party is entitled to a judgment as a matter of law." Pa.R.C.P. 1035(b). See also: *Craddock v. Gross*, 350 Pa.Super. 575, 577–578, 504 A.2d 1300, 1301 (1986); *Berardi v. Johns–Manville Corp.*, 334 Pa. Super. 36, 38, 482 A.2d 1067, 1068–1069 (1984); *Thorsen v. Iron and Glass Bank*, 328 Pa.Super. 135, 140, 476 A.2d 928, 930 (1984). In reviewing an order granting summary judgment, we examine the record in the light most favorable to the non-moving party. *French v. United Parcel Service*, 377 Pa.Super. 366, 371, 547 A.2d 411, 414 (1988); *Thorsen v. Iron and Glass Bank, supra*, 328 Pa.Super. at 140–141, 476 A.2d at 930; *Chorba v. Davlisa Enterprises, Inc.*, 303 Pa.Super. 497, 500, 450

A.2d 36, 38 (1982). Summary judgment serves to eliminate the waste of time and resources of both litigants and the courts in cases where a trial would be a useless formality.

[1–4] Voluntary assumption of the risk involves a subjective awareness of the risk inherent in an activity and a willingness to accept it. *Berman v. Radnor Rolls, Inc.*, 374 Pa.Super. 118, 136, 542 A.2d 525, 533 (1988). A plaintiff has voluntarily assumed the risk where he fully understands it and voluntarily chooses to encounter it. *Fish v. Gosnell*, 316 Pa.Super. 565, 576–579, 463 A.2d 1042, 1048–1049 (1983). See also: *Ott v. Unclaimed Freight Co.*, 395 Pa.Super. 483, 493, 577 A.2d 894, 899 (1990); *Handschuh v. Albert Development*, 393 Pa.Super. 444, 448, 574 A.2d 693, 695 (1990). For a danger to be known it must not only be known to exist, but it must also be recognized as being dangerous. *Carrender v. Fitterer*, 503 Pa. 178, 185, 469 A.2d 120, 124 (1983). A plaintiff's knowledge and understanding of the risk, of course, may be shown by circumstantial evidence. *Weaver v. Clabaugh*, 255 Pa.Super. 532, 536, 388 A.2d 1094, 1096 (1978). However, "[w]hether the plaintiff knows of the existence of the risk, or whether he understands and appreciates its magnitude ... is a question of fact, usually to be determined by the jury under proper instructions from the court. The court may itself determine the issue only where reasonable men could not differ as to the conclusion." *Staymates v. ITT Holub Industries*, 364 Pa.Super. 37, 49, 527 A.2d 140, 146 (1987), Restatement (Second) of Torts § 496D, Comment e.

[5] In the instant case, there is an issue of fact concerning the plaintiff-appellant's knowledge and understanding of the risk of diving into four (4) feet of water from the railing around the pool. The evidence is clearly adequate to permit a finding that appellant, a senior engineering student who was familiar with the pool and the depth of the water therein, was cognizant of the risk and voluntarily chose to encounter it. On the other hand, appellant has himself denied an understanding of the risk which he encountered by diving head first into the pool's shallow water. A jury, to be sure, may find his testimony incredible, but it is nevertheless sufficient to prevent the court from finding as a matter of law that he subjectively understood the risk and voluntarily chose to encounter it. We conclude, therefore, that a summary judgment could not be entered summarily for appellee-vendor on grounds that the plaintiff-appellant had voluntarily assumed the risk of striking his head on the bottom when he dived into the pool.

We may affirm the summary judgment, however, if it was proper for any reason. See: *Kline v. Blue Shield of Pennsylvania*, 383 Pa.Super. 347, 351–352, 556 A.2d 1365, 1368 (1989); *Jones v. P.M.A. Ins. Co.*, 343 Pa.Super. 411, 413 n. 1, 495 A.2d 203, 204 n. 1 (1985) (appellate court may affirm action of trial court for reasons other than those given by trial court in support of order).

A review of the decided cases discloses that most courts have refused to allow recovery under similar circumstances. Thus, in *Hensley v. Muskin Corp.*, 65 Mich.App. 662, 238 N.W.2d 362 (1975), the Court held that the manufacturer, seller and owner of a four (4) feet deep backyard swimming pool had no duty to warn of the obvious danger of diving into the pool from a seven (7) feet high garage roof. The Court observed that the injured party had been a 28 year old man, with some swimming experience, who had helped assemble the pool and knew it was only four (4) feet deep. Therefore, a summary judgment in favor of the defendants was affirmed.

In *Dailey v. Major Pool Equipment Corp.*, 30 N.Y.2d 846, 335 N.Y.S.2d 89, 286 N.E.2d 471 (1972), the Court held that the manufacturer of a swimming pool was not liable for injuries sustained by a 15 year old guest of the purchaser of the pool, where the guest had struck his head while diving from a diving board installed by the purchaser. See also: *Telak v. Maszczenski*, 248 Md. 476, 237 A.2d 434 (1968); *Andrews v. Taylor*, 34 N.C.App. 706, 239 S.E.2d 630 (1977). And in *Belling v. Haugh's Pools, Ltd.*, 126 App.Div.2d 958,

511 N.Y.S.2d 732 (1987), *appeal denied*, 70 N.Y.2d 602, 518 N.Y.S.2d 1024, 512 N.E.2d 550 (1987), *reconsideration dismissed*, 70 N.Y.2d 748, 519 N.Y.S.2d 1035, 514 N.E.2d 393 (1987), a summary judgment in favor of a swimming pool manufacturer was upheld where the injured plaintiff had dived through an innertube floating in a four (4) feet, above ground pool after having been swimming for several hours on the day of the accident and after having assisted the owner in installing the pool. The court held that there was no duty on the manufacturer to warn of obvious dangers and that the vertical dive attempted by plaintiff involved an obvious risk, so that the proximate cause of the injury was plaintiff's own conduct in diving into water which was too shallow. See also: *Howard v. Poseidon Pools, Inc.*, 72 N.Y.2d 972, 534 N.Y.S.2d 360, 530 N.E.2d 1280 (1988).

Finally in *Colosimo v. May Department Store Co.*, 466 F.2d 1234 (3rd Cir.1972), the Court of Appeals for the Third Circuit reversed a jury's finding of liability and entered judgment n.o.v. in favor of the seller of the pool where an experienced, fifteen year old swimmer had been injured by diving head first into an above ground swimming pool which he knew to contain only three (3) feet of water. The absence of warnings regarding diving, the Court held, was not a substantial factor in causing plaintiff's injuries because he had been well aware of the risk of diving head first into shallow water. See also: *McCormick v. Custom Pools, Inc.*, 376 N.W.2d 471 (Minn. App.1985).

**[6]** These decisions, although not binding, are persuasive. The plaintiff-appellant in the instant case, knowing full well the depth of the water in the pool, climbed upon a railing which stood three and one-half (3½) feet above the edge of the pool and dived head first into four (4) feet of water. The risk in performing such a dive was obvious. It was the foolhardiness of attempting such a dive while appellant was having trouble maintaining his balance that was the legal cause of his injuries and not the absence of warnings pertaining to the risks attendant upon diving into shallow water from the rim of the pool.

It is true, of course, that ordinarily issues of legal causation are for the trier of the facts. Where only one conclusion may be drawn from the established facts, however, the question of legal cause may be decided as a matter of law. Here, the causation issue can be decided as a matter of law. It was the plaintiff-appellant's conduct, rather than any failure to warn of the dangers of diving into shallow water from the rim of the pool, which was the legal cause of his injuries.

[7, 8] The three and one-half (3½) feet high railing around the pool had been erected by the Clarks subsequent to their purchase of the pool. The pool had not been sold as a diving pool, and the railing had not been sold as part of the pool assembly or at any other time by Kiddie City. Indeed, the seller had not even been consulted about the erection of the railing around the pool. The railing had been constructed separately and independently of the original purchase. Under these circumstances, the seller was not chargeable with notice of the changes made by the purchaser. Therefore, it cannot be said that the pool was sold in a defective condition because of a failure to warn of the risk inherent in diving into shallow water from the three and one-half (3½) feet high railing erected by the purchaser. Similarly, it cannot be said that the pool was defectively designed because it was not constructed to accommodate such a dive.

Because the seller had no duty to warn of the risk in diving into the pool from the railing constructed by the purchaser and because the absence of a warning against diving head first into the pool from the rim thereof was not the legal cause of appellant's injury, the summary judgment in favor of the defendant-seller was proper.

Judgment affirmed.

KELLY, J., concurs in the result.

**Henrietta OTT, Appellant,**

**v.**

**UNCLAIMED FREIGHT CO., D & J Realty Company.**

**Superior Court of Pennsylvania.**

Submitted April 16, 1990.
Filed July 11, 1990.

Plaintiff who was injured when she slipped and fell on a patch of ice in a private parking lot brought suit against landlord which owned the lot, and tenant. The Court of Common Pleas of Philadelphia County, Civil Division, No. 574 December T., 1987, Lehrer, J., entered summary judgment in favor of defendants, and plaintiff appealed. The Superior Court, No. 02908 Philadelphia, 1989, Brosky, J., held that: (1) whether plaintiff was a trespasser or licensee when she entered parking lot, neither landlord nor tenant owed her any duty to keep parking lot free of snow and ice, and (2) even assuming that there was a duty to keep the parking lot free of snow and ice, plaintiff assumed the risk when she entered parking lot.

Affirmed.

1. **Negligence ⇐36**

Duty by possessor of land to the public to maintain sidewalks was not applicable to private parking lot, which was set back from public roadway.

2. **Landlord and Tenant ⇐164(1)**

Generally, a landlord out of possession is not liable for injuries sustained by persons on his or her property unless the landlord has retained the right to control the portion of the premises on which the injury occurred.

3. **Landlord and Tenant ⇐167(2)**

Landlord had no duty to plaintiff who was injured while walking across parking lot on the rented premises, where there was no evidence that landlord retained the right to control the parking lot; lease specifically provided that tenant was responsible for maintaining parking lot free of snow and ice.

4. **Landlord and Tenant ⇐167(2)**

Tenant in possession of premises owed no duty to trespassers to maintain parking lot on premises free of snow and ice.

5. **Landlord and Tenant ⇐167(8)**

Assuming that plaintiff who was injured when she slipped on snow and ice in parking lot was an invitee, tenant in possession owed no duty to her to keep the parking lot free of snow and ice, where condition of parking lot was known to plaintiff, and she was well aware of risks involved in attempting to cross the ice.

6. **Negligence ⇐105**

Generally, plaintiff will be found to have assumed the risk only where it has been sufficiently demonstrated that he fully understood the specific risk, and voluntarily chose to encounter it, under circumstances that manifested a willingness to accept it.

7. **Negligence ⇐105**

Plaintiff who was injured when she slipped on a patch of ice while walking across private parking lot assumed the risk of crossing the lot, where plaintiff fully understood that she could fall on the ice and sustain injury, but she voluntarily chose to cross parking lot, even though there was an alternative path available to her.

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Jeffrey M. Voluck, Philadelphia, for appellant.

Robert A. Selig, West Conshohocken, for Unclaimed Freight, appellee.

Maureen A. Mahoney, Philadelphia, for L & J, appellee.

Before McEWEN, OLSZEWSKI and BROSKY, JJ.

BROSKY, Judge.

This is an appeal from an order of the trial court which granted summary judgment in favor of appellees. Appellant presents the following two issues for re-

view: (1) whether a possessor of land owes a duty to individuals, who walk across a parking lot located on the land, to keep the lot free of snow and ice; and (2) whether the trial court erred in granting summary judgment in favor of appellees pursuant to the assumption of risk doctrine.

The relevant facts are as follows. On February 2, 1987, appellant, Henrietta Ott, parked her car and was on her way to the Frankford El (El).[1] Ott decided to take a shortcut, by walking first through a bank parking lot or driveway, and then through a parking lot controlled by appellees, Unclaimed Freight Co. (USF, Inc.)[2] and L & J Realty, Co. (L & J)[3]. According to Ott, this shortcut was used by other individuals. Although snow and ice were present on the surface of the parking lot and were readily apparent to Ott, she attempted to cross the parking lot. After proceeding over approximately one-third of the lot, Ott slipped and fell on a patch of ice. Ott sustained a broken wrist, dizzy spells, and neck and chest pains as a result of the fall, and commenced suit against USF and L & J to recover for these injuries. After taking Ott's deposition, appellees filed a motion for summary judgment. In granting summary judgment in favor of appellees, the trial court concluded that appellees owed no duty to Ott because she assumed the risk of crossing the ice-covered parking lot. For the reasons set forth below, we affirm the order of the trial court.

In reviewing the trial court's grant of summary judgment, we are guided by the following standard:

> Summary judgment may be entered only in those cases which are clear and free from doubt.... In passing on a motion for summary judgment, the court must examine the record in the light most favorable to the nonmoving party.... It is not the court's function to decide issues of fact but solely to determine if there is an issue of fact to be tried.... Any doubt must be resolved against the moving party.... The court, in ruling on a motion for summary judgment, must ignore controverted facts contained in the pleadings ... [and] restrict its review to the material authorized by Rule 1035 to be filed in support of and in opposition to the motion for summary judgment and *only* those allegations in the pleadings that are uncontroverted....

*Krause v. Great Lakes Holdings, Inc.*, 387 Pa.Super. 56, 63, 563 A.2d 1182, 1185 (1989), *allocatur denied*, 524 Pa. 629, 574 A.2d 70 (1990) (citations omitted) (emphasis in original).

[1] Ott first argues that appellees owed her a duty to keep their sidewalk in a safe condition. The facts of this case, however, do not involve a sidewalk which abuts a public roadway, rather a private parking lot, which is set back from the public roadway is at issue.[4] Therefore, the duty owed by a possessor of land to the public to maintain sidewalks, which are located on his or her property and which border a public roadway, is irrelevant to this case.

[2, 3] Initially we observe that appellee L & J owed no duty to Ott. "As a general rule, a landlord out of possession is not liable for injuries sustained by persons on his or her property unless the landlord has retained the right to control the portion of the premises on which the injury occurred." *Oswald v. Hausman*, 378 Pa.Super. 245, 255–256, 548 A.2d 594, 600 (1988). *See also* the Restatement (Second) of Torts § 356. There is no evidence that L & J retained the right to control the parking lot; rather,

1. The El is part of Philadelphia's mass transportation system.

2. When appellant initially filed her complaint, she incorrectly named USF, Inc. as Unclaimed Freight Co. To correct this error, counsel for USF and Ott stipulated to an amendment of the caption so that USF, Inc. would be the named defendant. For the purpose of this appeal, USF, Inc. will be referred to as USF.

3. The record indicates that L & J was the owner of the land on which the parking lot was located. A building was also located on this property, which was owned by L & J and was leased to USF and other tenants.

4. Ott testified in her deposition that she had to first cut through the Philadelphia National Bank (PNB) parking lot or driveway to get to USF's lot. *See* Deposition of Ott at p. 7.

the record demonstrates that USF was responsible for controlling and maintaining the parking lot. *See* clause (h) of Lease attached to the Answer and New Matter filed by L & J, which specifically provides that USF was responsible for maintaining the parking lot free of snow and ice. Under these circumstances, L & J owed no duty to Ott, and was therefore entitled to have summary judgment entered in its favor.

In view of our conclusion that L & J owed no duty to Ott, the remainder of our discussion will focus on whether USF, as a tenant in possession of the premises, owed a duty to Ott to maintain the parking lot free of snow and ice. With respect to this issue, the Pennsylvania Supreme Court has observed that "[t]he standard of care a possessor of land owes to one who enters upon the land depends upon whether the person entering is a trespasser, licensee or invitee." *Carrender v. Fitterer*, 503 Pa. 178, 184, 469 A.2d 120, 123 (1983). Thus, in order to ascertain what duty of care was owed to Ott, we must first determine whether Ott was a trespasser, licensee or invitee.[5]

The Restatement (Second) of Torts § 329 defines a trespasser as "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." *See also Oswald, supra*, 378 Pa.Super. 245, 253, 548 A.2d 594, 598 (1988). In contrast, a licensee is "a person who is privileged to enter or remain on land only by virtue of the possessor's consent." § 330 of the Restatement; *see also Oswald*, 378 Pa.Super. at 254, 548 A.2d at 599. Finally, an invitee is described as follows:

> (1) An invitee is either a public invitee or a business visitor.
>
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
>
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with the business dealings with the possessor of the land.

Restatement (Second) of Torts § 332. After reviewing the above definitions, it is evident that Ott cannot be classified as an invitee since the land was not held open for a public purpose and Ott was not invited to enter the land as a member of the general public. Similarly, Ott was not a business visitor who had direct or indirect business dealings with either USF or L & J. *See* § 332 and the comments thereto for examples of public invitees and business visitors. However, the question remains as to whether Ott was a trespasser or a licensee.

In this case, Ott testified that she frequently used the shortcut across USF's parking lot to get to the El. *See* Deposition of Ott at pp. 13–14, and 47. She further testified that other individuals used this route as a shortcut. *See id.* at p. 12. USF did not offer any evidence to rebut these statements. There was also no indication that USF posted a notice or otherwise objected to Ott or other persons cutting across the parking lot. Under these facts, we are unable to determine whether USF's consent to cross the property can be inferred.[6] *See* comments c and e to § 330

5. USF asserts that Ott was a trespasser. *See* Brief of USF at p. 4. It does not appear from the record that Ott denies this characterization. However, based on Ott's statements that she and other individuals used this route, it is at least arguable that Ott was a licensee.

6. This statement should not be construed to imply that Ott was in fact a licensee. In making this statement, we merely recognize that her status is questionable in view of the comments to the Restatement. *See e.g.*, comment e to § 330 which provides that consent may be expressed by acts, rather than words. As an illustration, comment e suggests that where a possessor permits individuals to cut across his or her property as a shortcut, the individuals who cross the property will be treated as licensees, and not trespassers, unless the possessor posts notice or otherwise manifests an objection. However, comment c to § 330 states that under certain circumstances, consent may not necessarily be inferred from a landowner's failure to object or post a warning. Thus, whether a possessor's conduct may be construed as consent, depends upon the particular facts and circumstances of each case. As such facts are not fully developed in this record, we cannot with certainty determine whether USF consented to Ott's use of its parking lot as a passageway. Our

of the Restatement. As a result, we will address the duty of care owed to both trespassers and licensees, respectively.

[4] Under Pennsylvania law, it is well settled that "[t]he duty owed to trespassers by a property owner is only to refrain from willful or wanton misconduct...." *Graham v. Sky Haven Coal, Inc.*, 386 Pa.Super. 598, 609 and 614, 563 A.2d 891, 896 and 899 (1989).

> Willful misconduct means that the actor desired to bring about the resultant harm, or was at least aware that it was substantially certain to ensue; this means that willful conduct requires *actual prior knowledge* of the trespasser's peril.... Wanton misconduct, by contrast, means that an actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences, and not a desire to bring them about; as such, actual prior knowledge of the particular injured person's peril is not required. It is enough that the actor realizes, or at least has knowledge of sufficient facts that would cause a reasonable man to realize, that a peril exists, for a sufficient time beforehand to give the actor a reasonable opportunity to take means to avoid the injured person's accident; the actor is wanton for recklessly disregarding the danger presented....

*Id.*, 386 Pa.Super. at 607 and 615, 563 A.2d at 895 and 891 (Brosky, J., concurring and dissenting opinion) (emphasis in original) (internal citations omitted).

In view of the above reasoning, if we assume that Ott is a trespasser, then Ott has the burden of proving that USF engaged in willful or wanton misconduct. As applied to this case, it appears that Ott would ask that we find USF's failure to remove snow and ice from their private parking lot willful and wanton. This we decline to do. The most typical example of willful or wanton misconduct is found where a landowner strings a piece of wire or cable over a roadway or path to prevent trespassers from driving over the land. In such cases, the unsuspecting trespassers have often sustained severe or fatal injuries. *See e.g., Graham, supra, Krivijanski v. Union Railroad Co.*, 357 Pa.Super. 196, 515 A.2d 933 (1986), and *Antonace v. Ferri Contracting Co., Inc.*, 320 Pa.Super. 519, 467 A.2d 833 (1983). When read together, these cases do not establish a duty on the part of the possessor to maintain the land; rather they stand for the proposition that the landowner may not intentionally erect structures or devices which will result in severe harm or a risk of death to the trespasser.

*Oswald, supra*, is more analogous to this case than the cases which involve cable or wire strung across a path or road. In *Oswald*, the plaintiff's decedent drove his vehicle off of the paved highway and proceeded down a private, snow-covered dirt lane until his vehicle became stuck. Plaintiff sought to impose liability on the defendant for failing to maintain the roadway in a reasonably safe condition for travel. On appeal, this court rejected Oswald's argument and declined to hold that the failure to remove snow from a private roadway was an example of willful or wanton misconduct.

For support, appellant relies on cases involving a landowner's duty to maintain sidewalks which border a public roadway, however, she has not referred us to any authority which would require a landowner to maintain his private parking lot free of ice and snow where individuals trespass across it. Accordingly, we see no reason to depart from the approach taken by this court in *Oswald*, and we decline to impose a duty upon a possessor to clear snow and ice from a parking lot for the benefit of trespassers. Because USF owed Ott no duty to remove the snow and ice, the trial

inability to precisely label Ott as a trespasser or licensee does not hamper our review of this case, however.

court correctly granted USF's motion for summary judgment.

[5] However, if we assume that Ott is a licensee, the duty of care is somewhat different. The Restatement (Second) of Torts § 342 describes the duty of care owed to licensees as follows:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved.

In addition, this court has observed that:

> [t]he liability of a possessor of land who invites or permits gratuitous licensees to enter his land, is not based upon his duty to maintain it in safe condition. It is based upon his duty to disclose to them the risk which they will encounter if they accept his invitation or permission. He is required to exercise reasonable care either to make the land as safe as it appears or to disclose the fact that is as dangerous as he knows it to be.

*Oswald, supra*, 378 Pa.Super. at 254, 548 A.2d at 599.

Application of this standard leads us to conclude that even if Ott is a licensee, USF owed no duty to Ott to keep the parking lot free of snow and ice. Ott stated in her deposition that she could see the ice and could distinguish the ice from the bare ground. *See* Deposition of Ott at pp. 8–10. More importantly, Ott testified that she knew that the ice was slippery and that she could slip and fall on the ice and be injured. *See id.* at p. 53. Therefore, based on Ott's own testimony, it is clear that Ott was aware of the hazard, but nevertheless proceeded to encounter it in spite of the fact that an alternative route was readily available to her. Because the condition of the parking lot was made known to Ott and because she was well aware of the risks involved in attempting to cross the ice, we hold that USF owed no duty to Ott, as a licensee, to remove the snow and ice, and therefore, the grant of summary judgment in favor of USF must be affirmed.

The second issue raised by appellant involves the question of whether summary judgment can be granted on the basis of the assumption of the risk defense. Appellant believes that her case should be submitted to the jury under the comparative negligence statute. As recognized by the Supreme Court, "[f]or fault to be apportioned under the comparative negligence statute, there must be two negligent acts: a breach of duty by the defendant to the plaintiff and a failure by the plaintiff to exercise care for his own protection." *Carrender*, 503 Pa. at 188, 469 A.2d at 125. The comparative negligence act is inapplicable to the facts of this case, however. As discussed above, we found that L & J, as a landlord out-of-possession, owed no duty to Ott. We further held that USF owed no duty to Ott, as either a trespasser or a licensee because the condition of the lot was known and obvious, and because Ott was aware of the risk involved in crossing the icy parking lot. Consequently, if appellees owed no duty to Ott, then *a fortiori* there can be no breach of duty.

If we assume, for the purpose of this discussion only, that appellees did owe a duty to appellant, then the question remains as to whether the assumption of the risk doctrine is applicable. At the present time, there seems to be a question as to whether this defense has been abolished. *See Rutter v. Northeastern Beaver County School District*, 496 Pa. 590, 614–616 n. 6, 437 A.2d 1198, 1210–1211 n. 6 (1981) (plurality opinion). However, a majority of the Pennsylvania Supreme Court has yet to directly address the issue of whether the assumption of the risk doctrine remains viable, and panels of this court have continued to apply the doctrine. *See e.g., Malinder v. Jenkins Elevator & Machine Co.*, 371 Pa.Super. 414, 538 A.2d 509 (1988),

*Berman v. Radnor Rolls, Inc.*, 374 Pa.Super. 118, 542 A.2d 525 (1988), *Johnson by Johnson v. Walker*, 376 Pa.Super. 302, 545 A.2d 947 (1988), *allocatur denied*, 522 Pa. 577, 559 A.2d 38 (1989), and *Howell v. Clyde*, 383 Pa.Super. 611, 557 A.2d 419 (1989).

[6, 7] Generally, a plaintiff will be found to have assumed the risk only where it has been sufficiently demonstrated that he or she "'fully understands' the specific risk, [and] 'voluntarily chooses' to encounter it, 'under circumstances that manifest a willingness to accept it'". *Berman, supra*, 374 Pa.Super. at 136, 542 A.2d at 533, quoting *Fish v. Gosnell*, 316 Pa.Super. 565, 576–579, 463 A.2d 1042, 1048–1049 (1983). Ott's deposition in this case more than sufficiently satisfies these requirements. When asked whether she knew if the ice was slippery, or that she could slip and fall and possibly be injured, Ott unequivocally answered "yes". *See* Deposition of Ott at p. 53. Ott further stated that although an alternative route was available, she chose to cross the parking lot because she felt that it was shorter. *Id.* at pp. 10 and 52. In view of this testimony, we must conclude that Ott fully understood that she could fall on the ice and sustain injury, and that she voluntarily chose to cross the parking lot, even though there was an alternative path available to her. Therefore, if it is assumed that appellees owed a duty to Ott and further assuming that the assumption of the risk defense still exists, we would find that Ott assumed the risk of crossing the parking lot.

In sum, we have found that regardless of whether Ott is treated as a trespasser or licensee, neither appellee owed no duty to remove the snow and ice from the parking lot. L & J owed no duty since it was a landlord who retained no right of control over the parking lot. USF also owed no duty to Ott, as either a trespasser or licensee because the condition of the lot was readily apparent and an alternative route was easily available. Further, we stated that if we were to assume that appellees owed a duty to appellant, then Ott assumed the risk of crossing the lot because she was aware that the ice existed and that she could be injured if she were to fall. Under these circumstances, appellees were entitled to summary judgment, and the order of the trial court must be affirmed.

Order affirmed.

WEST KEY NUMBER SYSTEM

**COMMONWEALTH of Pennsylvania**

**v.**

**Tonya D. LONG, Appellant.**

Superior Court of Pennsylvania.

Submitted June 7, 1990.
Filed July 13, 1990.

Defendant was convicted in the Court of Common Pleas, Montgomery County, Criminal Division, No. 1723–89, Brown, J., of speeding in school zone, and she appealed. The Superior Court, No. 03032 Philadelphia 1989, Tamilia, J., held that: (1) school zone speed sign could be placed in overhead position rather than posted on right-hand side of road, and (2) Department of Transportation Bureau of Traffic Engineering flashing warning device permit was prepared by public official and could be admitted under official statement exception to hearsay rule.

Affirmed.

**1. Statutes ⇐181(1, 2), 212.3**

In attempting to ascertain meaning of statute, court is required to consider intent of legislature and is permitted to examine practical consequences of particular interpretation and is to presume that legislature did not intend result that is absurd or unreasonable.

**2. Municipal Corporations ⇐703(4)**

School zone speed sign could be placed in overhead position rather than posted on

may, upon such terms and conditions as it deems just, including the filing of security,

(1) issue preliminary or special injunctions necessary to prevent the removal, disposition, alienation or encumbering of real or personal property ...; or

(2) order the seizure or attachment of real or personal property; or

(3) grant other appropriate relief.

Pa.R.C.P. 1920.43(a). The granting of such relief is an exercise of the trial court's equitable powers. *Jawork v. Jawork*, 378 Pa.Super. 89, 96, 548 A.2d 290, 293 (1988). This Court has held that "petitions for special relief are not limited to the period when an action is pending[,]" since "[i]t is easily conceivable that, after the final disposition of all matters in the divorce action, a party may need the assistance of the court in enforcing some portion of its order." *Id.* at 94 n. 6, 548 A.2d at 292 n. 6.

Although Wife did not attach the label "petition for special relief" to her motion to modify and accompanying petition, she asserted therein that Husband's refusal to list the marital residence at a reasonable price had, in effect, denied her the benefit of the equitable distribution scheme adopted by the court. We conclude, therefore, that Wife petitioned the court for special relief and that the court properly entertained her petition. The trial court's disposition thereof will not be reversed by this Court absent an abuse of discretion. *Id.* at 96, 548 A.2d at 293.

[2] Husband contends, first, that the evidence of record does not support the findings of fact upon which the master based his recommendation that Wife be awarded the marital residence and Husband the commercial lot. He asks that we reverse the order of December 5, 1991, and reinstate the order of September 28, 1990. Having reviewed the master's report as modified, we conclude that it is based on the evidence of record and that it provides an equitable resolution of the parties' dilemma. Although the solution recommended by the mast
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any property in all likelihood would only invite further litigation and costs" (Modification of Master's Report at 4). Accordingly, we conclude that the trial court did not abuse its discretion in adopting the master's recommendation as to the disposition of the real property owned by the parties.

[3] Husband's second claim, which occupies only one paragraph in his brief, is that the trial court's order that he pay all of the medical bills for the parties' hemophiliac sons "is clearly based upon conjecture by the Master as to what the special needs of the children are" (Brief for Appellant at 12). To the contrary, the record shows that the children require office visits which are not covered by Husband's Blue Cross/Blue Shield plan and for which Wife has difficulty paying. Given these facts, we conclude that the trial court did not abuse its discretion in modifying the order of child support.

Order affirmed.


**David A. JORDON, a Minor, By His Parents and Natural Guardians, Ronald L. JORDON and Charmaine P. Jordon, and Ronald L. Jordon and Charmaine P. Jordon, Appellants,**

**v.**

**The K-MART CORP. and the John Doe Corp.**

**v.**

**Kenneth L. CRUSE, Jr. and Janice L. Cruse.**

Superior Court of Pennsylvania.

Argued June 17, 1992.
Filed Aug. 26, 1992.

Child and parents brought products liability action against seller of sled. The

Court of Common Pleas of Northampton County, Civil Division, No. 1988-C-1040, Moran, J., granted seller summary judgment. Child and parents appealed. The Superior Court, No. 50 Philadelphia 1992, Rowley, President Judge, held that: (1) sled was not unreasonably dangerous, and (2) sled was not unreasonably dangerous due to lack of warnings or instructions.

Affirmed.

**1. Products Liability ⇐88**

Question of whether plastic sled was unreasonably dangerous so as to warrant placing risk of loss on seller was a question of law for trial court.

**2. Products Liability ⇐60**

Plastic sled was not unreasonably dangerous because of design defects; sledding involved degree of risk and even change in design to require brakes or steering would not remove risk inherent in the activity.

**3. Products Liability ⇐4**

Seller of product is not liable as insurer to user.

**4. Products Liability ⇐8**

Without a showing of defect, supplier of product has no liability to user.

**5. Products Liability ⇐14**

Dangerous product can be considered defective, for strict liability purposes, if it is distributed without sufficient warnings to notify ultimate user of dangers inherent in product.

**6. Products Liability ⇐87**

Determinations of whether product is "defective" due to inadequate warnings or no warnings are questions of law to be answered by trial judge.

**7. Products Liability ⇐60**

Dangers inherent in sledding with toboggan-like sled with limited steering capacity was one which ordinary ten-year-old child would recognize and appreciate as part of risk of sledding; thus, absence of warning labels or instructions did not make product unreasonably dangerous so as to hold seller strictly liable.

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Thomas L. Walters, Easton, for appellants.

Robert C. Brown, Jr., Easton, for K-Mart and John Doe Corp., appellees.

Before ROWLEY, President Judge, and HUDOCK and BROSKY, JJ.

ROWLEY, President Judge:

This appeal is taken from an order granting appellee, K-Mart Corporation, summary judgment. Appellants raise the following issues: (1) Did the trial court err in granting summary judgment to appellee by finding that as a matter of law the product involved was not unreasonably dangerous? and (2) Did the trial court err in determining that the sled was not unreasonably dangerous due to lack of warnings or instructions because the dangers inherent in the use of the product were obvious to the ultimate user and the plaintiff in this case? After a careful review of the record, we affirm the order granting summary judgment.

On February 16, 1986, appellant, David A. Jordon, a ten-year-old boy, was involved in a sledding accident when he lost control of his sled and hit a tree. The sled David was using was a plastic toboggan-like sled purchased from appellee, K-Mart, by Kenneth L. Cruse and Janice L. Cruse, appellees, aunt and uncle of David.

David and his parents sued appellee, as well as the unknown sled manufacturer, The John Doe Corporation, the landowners where the accident occurred, Cooper Industries, Inc., and Kenneth and Janice Cruse, who were caring for David when the accident occurred. Cooper Industries' motion for summary judgment was granted by the trial court on April 23, 1991, on the basis

that it was immune from liability under the Pennsylvania Recreational Use of Land and Water Act, 68 Pa.S. §§ 477–1 to 477–8. Appellants sued appellee, K–Mart, under the theories of negligence, strict liability, and breach of implied warranties of merchantability and fitness for a particular purpose. K–Mart moved for summary judgment which the trial court granted by its order of November 18, 1991. This timely appeal follows.

In reviewing a motion for summary judgment, the Court's function is to determine whether issues of triable fact exist. Summary judgment is only proper in cases free and clear of doubt. When reviewing summary judgment cases, the Court accepts as true all well-pleaded facts, giving the plaintiff the benefit of all reasonable inferences from those facts. *Zackhery By and Through Young v. Crystal Cave Co., Inc.*, 391 Pa.Super. 471, 474, 571 A.2d 464, 465 (1990).

[1, 2] Appellants first argue that the trial court erred in granting summary judgment by finding that as a matter of law the product involved, the plastic sled, was not unreasonably dangerous. Appellants contend the sled was defective and unreasonably dangerous because it contained design defects; (1) molded runners that rendered the sled unsteerable and (2) it lacked any independent steering or braking mechanisms. Specifically, appellants argue that the trial court should not have determined the threshold question of whether the product was unreasonably dangerous under *Azzarello* but should have allowed their cause of action for strict product liability for a design defect to be submitted to the finder of fact, allowing appellants to call expert witnesses to substantiate their claims.

[3, 4] The Pennsylvania Supreme Court in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), adopted and made a part of the substantive law of Pennsylvania, Section 402A of the Restatement (Second) of Torts, which makes a seller of products strictly liable for the physical harm caused by a product sold in a defective condition unreasonably dangerous to the user. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 94, 337 A.2d 893, 899 (1975). A seller of a product, however, is not liable as an insurer to the user. Without a showing of a defect, the supplier of a product has no liability under Section 402A. *Berkebile*, 462 Pa. at 94, 337 A.2d at 898. The Pennsylvania Supreme Court in *Azzarello v. Black Bros.*, 480 Pa. 547, 556, 391 A.2d 1020, 1025 (1978), held that while the fact finder may be competent in resolving a dispute as to the condition of a product, it is an entirely different question as to whether that condition of the product justifies placing liability upon the supplier. The Court held in *Azzarello* that whether the risk of loss is to be placed on the supplier is a question of law for the Court. The Court stated: "Should an ill-conceived design which exposes the user to the risk of harm entitle one injured by the product to recover? Should adequate warnings of the dangerous propensities of an article insulate one who suffers injuries from those propensities? When does the utility of a product outweigh the unavoidable danger it may pose? These are questions of law and their resolution depends upon social policy.... It is a judicial function to decide whether, under plaintiff's averment of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averment of the complaint. They do not fall within the orbit of a factual dispute which is properly assigned to the jury for resolution." 480 Pa. at 557–558, 391 A.2d at 1026.

In this instant case, the trial court, using the *Azzarello* threshold, held as a matter of law that the subject sled was not an unreasonably dangerous product as a result of a design defect. The trial court, citing social policy, meticulously weighed the relative risks and utility of the sled in question and the type of sled, a toboggan, to determine whether liability should be imposed. The Court found that like most

recreational activities, sledding involves a degree of risk and even changing the design to require brakes or steering would not remove the inherent risk in the activity. We agree with the trial court's analysis of social policy and hold that the trial court correctly applied the *Azzarello* threshold in determining the strict liability claim based on product design.

[5-7] Next appellants argue that the trial court erred in determining that the sled was not unreasonably dangerous due to lack of warnings because dangers inherent in the use of the sled were obvious to the ultimate user and specifically to the ten-year-old appellant in this case. Specifically, appellants contend that the sled was "unreasonably dangerous" because it was sold without specific instructions concerning its use and without warnings concerning the dangers of toboggan-type sleds. Under Pennsylvania law, it is well established that a dangerous product can be considered defective for strict liability purposes if it is distributed without sufficient warnings to notify the ultimate user of the dangers inherent in the product. *Mackowick v. Westinghouse Electric Corp.*, 525 Pa. 52, 55, 575 A.2d 100, 102 (1990). Comment j to § 402A of the Restatement (Second) of Torts, adopted by the Pennsylvania courts as noted above, states that the maker of an unreasonably dangerous product may be required to warn potential users of the product's dangerous propensities. Comment i to § 402A states the following guideline to use in determining whether a product is "unreasonably dangerous" and thus requires warnings: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Ellis v. Chicago Bridge and Iron Co.*, 376 Pa.Super. 220, 229, 545 A.2d 906, 911 (1988), *appeal denied, Ellis v. Atlantis Contractors, Inc.*, 524 Pa. 620, 571 A.2d 383 (1989). Thus it follows that if the product is one customarily used by children, the danger must be one which children would be likely to recognize and appreciate. 376 Pa.Super. at 229, 545 A.2d at 911. The determinations of whether a product is 'defective' due to inadequate warnings or, in this case, no warnings are questions of law to be answered by the trial judge. *Azzarello*, 480 Pa. at 558, 391 A.2d at 1026.

Here in this instant case, it is undisputed by appellee that no instructions for use and no warnings were included with the sled. The trial court found as a matter of law that the danger is one that an ordinary ten-year-old child would recognize and appreciate as part of the risk of sledding. The court held that the danger was not latent; it was a well-known part of sledding, namely that sleds in general are hard to steer and hard to stop and should not be used in areas where many stationary obstacles, such as trees, are present.

Appellants argue that the defect is latent because a ten-year-old boy would not understand that the existence of underside molded runners on the sled in question would prevent it from being steered. However, we agree with the trial court. The sled did not have a latent defect making it unsteerable. The record shows that the ten-year-old appellant had used the sled or one of the same design the previous day, making seven sledding runs down the same hill in approximately the same location. (R. 148). He described how he steered the sled by using the handles and leaning to the left or right to steer it. (R. 198). He admitted he had no problem steering the sled the day before while sledding. (R. 197). He also admitted having made six previous sledding runs the day of the accident in which he successfully steered the sled down the hill without hitting a tree. (R. 114). From the record, the ten-year-old appellant seems to be knowledgeable in the art of sledding and how to steer a toboggan-like sled and had previously used the sled successfully. We hold that the dangers inherent in sledding with a toboggan-like sled with limited steering capacity is one which an ordinary ten-year-old child

would recognize and appreciate as part of the risk of sledding. Thus the absence of warning labels or instructions for use do not make the product unreasonably dangerous to hold the supplier strictly liable.

For the reasons stated above, we affirm the trial court's order granting summary judgment to appellee, K–Mart.

Summary judgment affirmed.


**JAMES T. O'HARA, INC., Appellant,**

**v.**

**BOROUGH OF MOOSIC, Appellee.**

Commonwealth Court of Pennsylvania.

Submitted April 9, 1992.

Filed June 18, 1992.

Disappointed bidder for sewer construction contract petitioned for preliminary injunction restraining borough from awarding contract to lower bidder. The Court of Common Pleas, Lackawanna County, No. 91 EQ 60, James J. Walsh, President Judge, denied the petition, and bidder appealed. The Commonwealth Court, Friedman, J., held that bidder lacked standing to sue to enjoin contract award.

Affirmed.

**1. Public Contracts ⇐5**

Disappointed bidder on public contract has suffered no injury entitling redress in court.

**2. Municipal Corporations ⇐241, 993(2)**

Taxpayer's standing to enjoin improper award of public contract is not defeated merely because complaining taxpayer is also disappointed bidder.

**3. Municipal Corporations ⇐336(1), 993(2)**

Disappointed bidder lacked standing to challenge borough's award of sewer construction contract to lower bidder, even though bidder was state taxpayer and portion of product's funding was in form of loan from state, where bidder was not resident or taxpayer of borough.

**4. Municipal Corporations ⇐987**

Taxpayer standing requirement may be relaxed, where governmental activity might escape judicial review because other person, more immediately affected by actions, would be disinclined to complain.

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Paul J. Walker, for appellant.

John J. Brazil, Jr., for appellee.

Before COLINS and FRIEDMAN, JJ., and LORD, Senior Judge.

FRIEDMAN, Judge.

James O'Hara, Inc. (O'Hara), a disappointed bidder for the Borough of Moosic's sewer construction contract, appeals from an order of the Court of Common Pleas of Lackawanna County denying its petition for a preliminary injunction. By requesting this injunction, O'Hara sought to restrain the Borough from awarding the contract to either Michael F. Ronca & Sons, Inc. (Ronca) or Poppel, Inc., both of which submitted lower bids than O'Hara. The trial court held that O'Hara lacked standing to maintain this action. We affirm.

Approximately four or five years ago, the Pennsylvania Department of Environmental Resources (DER) issued a moratorium on building permits within the Borough of Moosic, to be lifted only after the Bor-