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LAW WEEK COLORADO

Ski Law Trends: 2016

BY JIM CHALAT, LINDA CHALAT & DANIEL SNARE
CHALAT HATTEN KOUPAL & BANKER

The Colorado Supreme Court will soon decide Salynda Fleury, individually and on behalf of Indyka Norris and Sage Norris, and as surviving spouse of Christopher Norris v. IntraWest Winter Park Operations Corp., 2014SC 224, argued Sept. 29, 2015. The court granted certiorari on the issue of:

Whether for purposes of the Ski Safety Act of 1979, codified at sections 33-44-101 to -114, C.R.S. (2014), the term "inherent dangers and risks of skiing," as defined in section 33-44-103(3.5), C.R.S. (2014), encompasses avalanches that occur within the bounds of a ski resort, in areas open to skiers at the time in question.

Colorado's $4.8 billion snowsports industry and the skiing and snowboarding public will feel far-reaching effects from the court's decision beyond the focal question before the court. Will the court adopt a statutory construction that adds in-bounds avalanches to the already extensive and specific list of hazards that can befall a skier and from which the ski area operator is altogether immune from liability? Or will the court narrowly construe the Ski Safety Act's inherent danger provisions and find the ski area operators might be liable, either under the Colorado Premises Liability Act or simple negligence, for an in-bounds avalanche injury or death? The court may also decide that the facts and circumstances of the fatal avalanche are in dispute. Precedent would support the court's decision to remand the case for trial, for a jury to decide whether this particular avalanche was or was not a statutory inherent danger of skiing.

Fleury will mark a tipping point for the court. Its guidance is necessary given inconsistent federal and state court decisions on two important ski safety issues: the standard of care of Colorado tramway/ski lift operations and on the enforceability against skiers of waivers in per se cases under the SSA, or snowmobile cases that look to the Colorado Snowmobile statute. (C.R.S. § 33-14-101, et seq. Compare, Raup v. Vail Summit Resorts, Inc., No. 15-CV-00641-WYD-NYW, 2016 WL 374463 (D. Colo. Feb. 1, 2016) with, Bayer v. Crested Butte Mountain Resort, Inc., 960 P.2d 70 (Colo. 1998). Compare, C.R.S. 33-14-101, et seq., Robinette v. Aspen Skiing Co., L.L.C., No. CIV.08CV00052 MSKMJ, 2009 WL 1108093 (D. Colo. Apr. 23, 2009) aff'd sub nom. Robinette v. Aspen Skiing Co., 363 F. App'x 547 (10th Cir. 2010)(season pass waiver bars claim against ski area's negligently driven snowmobile on an open slope) with, Harris v. Schreiber and Vail Summit Resorts, Inc. dba Keystone Resort, Summit County District Court, no. 2009CV133 (order dated December 21, 2009) (Colorado Snowmobile Act allows a claim for negligence per se, which cannot be waived under a season pass)).

The court's ski safety policy pronouncements traditionally favor the safety-oriented precepts articulated in the SSA's legislative declaration. Notwithstanding the inherent danger doctrine, it is in the state's interest "to establish reasonable safety standards for the operation of ski areas and for the skiers using them," according to Colorado Revised Statutes section 33-44-102.

The Fleury court can draw precedent from its decision in Graven v. Vail Associates. It held that a jury would have to resolve the inherent danger question. There, a skier fell down a precipice adjacent to a ski run. The court held that the accident did not result as matter of law from the inherent dangers and risks of skiing. The underlying safety question


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— whether the slope conditions were inherent dangers — was left to the determination of a local jury.

In 2004, the General Assembly changed the definition of inherent dangers and risks of skiing from "dangers or conditions which are an integral part of the sport of skiing," to "dangers or conditions that are part of the sport of skiing."

The statute thereby removed the phrase relied upon in Graven. The new language purportedly broadened the types of inherent risks covered by the SSA and decreased the liability of ski area operators. Nonetheless, in a ski case it is proper in a disputed case to tender an instruction to the jury based upon statutory inherent-danger language.

The SSA imposes on ski area operators per se duties of care in connection with their design, construction, maintenance and operation of ski lifts. The court held in Bayer that in addition to these statutory duties, ski area operators also owe the highest duty of care commensurate with a ski lift's practical operation, design, construction, maintenance and inspection. However, in Raup the federal district court has held that Bayer and the SSA were superseded by the Colorado Premises Liability Act. The district court wrote: "I agree with Vail that the Vigil and Lombard cases make clear that all common law claims involving landowner duties, including negligence and negligence per se claims, are abrogated by the Premises Liability Act which provides the exclusive remedy."

In Stamp v. Vail, the court held that the SSA did not abrogate claims for exemplary damages. However, the court also held that the SSA sets forth "the governing law concerning ski area liability: both with respect to operation of ski slopes and ski lifts." How to square Raup with Stamp, particularly those provisions calling for per se negligence claims under the Colorado Passenger Tramway Board regulations, is an unanswered question.

Now, in Fleury, the court is looking at an in-bounds avalanche. Compare, Mannhard v. Clear Creek Skiing Corp., in which a wrongful death action was brought against the operator of Loveland Basin by the widow of a skier. He was killed in an avalanche which he and two companions triggered. They were skiing out-of-bounds, just east of the present location of the No. 8 chair. Whereas in Fleury, the court will determine whether as a matter of law "the term inherent dangers and risks of skiing… encompasses avalanches that occur within the bounds of a ski resort… ." The Colorado Court of Appeals held that an avalanche is a product of weather and snow conditions and therefore "falls neatly" into the definition of inherent dangers found in the Ski Safety Act. The majority concluded that "inclusion of an avalanche as an inherent danger or risk of skiing is consistent with the General Assembly's intent, as evidenced by the evolution of the Act." In doing so, the court affirmed the well-respected Grand County District Court judge.

The court will need to articulate what standard controls any claim found to fall outside the inherent danger rule, and not governed by the SSA. Would Salynda Fleury be left with an action in negligence or claims under the Colorado Premises Liability Act C.R.S. §13-21-115? At oral argument, the court appeared concerned whether members of the public expect or assume the risk of an in-bounds avalanche when they are skiing on an open run, particularly


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in the context of the modern, commercial ski resort.

The decedent in the Fleury case is Christopher Norris. On Jan. 22, 2012, he was killed in a small avalanche on the Trestle ski run at Winter Park. Trestle was open for skiing. Over the previous days, heavy snows fell on top of an unstable and old snow pack. Warnings were broadcast by the Colorado Avalanche Information Center to avoid back country skiing because of the avalanche hazard.

Photos of the Trestle run, taken after the avalanche, along with detailed facts and circumstances concerning how Norris died at Winter Park on an open run are set forth in the lengthy post-accident report which is publicly available on the center's website: Logan, Spencer, "2012/01/22 - Colorado - Trestle Trees, Winter Park" Colorado Avalanche Information Center (Published 2012/01/31); http://avalanche.state.co.us/caic/acc/acc_report.php?acc_id=433&accfm=inv

From a pragmatic standpoint, to determine the issue, the court needs to understand the effect of its ruling. To what extent does the ski area operator have a duty to protect skiers from a hazard, which a reasonable person would not expect to find in the highly commercialized setting of a modern ski resort? And just exactly how would a skier independently mitigate or evaluate the imminent threat of an avalanche? Except by employing strategies that are exclusively within the purview of the ski area operator, such as the digging of snow pits or the use of explosives to test the stability of a layer in the snowpack.

On the other hand, as argued by defendant, and by amici, the mitigation of avalanche hazards is as much an art as a science. They argue that no ski area operator should be liable for the potentially unstable consequences of weather and snow, which are both mentioned in the Ski Safety Act as conditions within the inherent risks of skiing.

Fleury is not the first court case to arise from a skier death from an in-area avalanche. Both Utah and Wyoming have held that in-bound avalanches are not inherent risks of skiing as a matter of law under their respective skier safety statutes and interpretive opinions.

UTAH

On Dec. 23, 2007, a large inbounds avalanche buried Jesse Williams. Williams was a Grand Junction resident and Powderhorn volunteer ski patroller. He was skiing in-bounds on the Red Pines Chutes at the Canyons Resort in Summit County, Utah, near Park City. Williams was caught in the slide and killed. The Jesse Williams avalanche was the subject of a detailed Accident Report by the Utah Avalanche Center, available at https://utahavalanchecenter.org/avalanches/17453.

Williams' family sued American Skiing Company, which was the embattled owner and operator of the Canyons. The trial court determined that an in-bounds avalanche was not an inherent risk of skiing as a matter of law under Utah Code Annotated section 78B-4-404. Williams, et al., v. American Skiing Company Utah, Inc., Order Denying Defendant's Motion for Summary Judgment on Inherent Risk, Case No. 080500318 (Third Judicial District Court, Summit County, State of Utah, February 22, 2012). Relying upon Clover v. Snowbird Ski Resort and White v. Deseelhorst the trial court expressly held that "skiers do not wish to confront the risk


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of being buried in avalanches." The case proceeded to trial. Under Utah law, there is an element of subjectivity when determining whether a hazard is inherent or not to skiing.

On Nov. 19, 2013, the jury returned a verdict for Canyons. The instructions required the jury to answer: "Did the Canyons fail to use reasonable care in its efforts to eliminate or alleviate the avalanche risk to skiers in Red Pine Chutes prior to the accident?" The jury answered "no."

WYOMING

On Dec. 27, 2008, 31 year-old David Nodine was killed in an in-bounds avalanche while skiing on an open run known by locals as the "Toilet Bowl" at Jackson Hole Mountain Resort. During four days of heavy snow, amid avalanche mitigation efforts, the upper portion of the mountain, including Toilet Bowl, had been closed. The run opened at 9:36 a.m. Prior to Nodine's fatality, a snowboarder reported he was caught in a slide on the Toilet Bowl run. Ski patrol also documented another slide on the nearby Alta Chutes ski run. At 1:25 p.m., Nodine was caught in a large avalanche as the entire slope gave way. The Nodine slide was documented by avalanche.org.

Nodine's wife sued Jackson Hole Mountain Resort Corporation. On summary judgment, Jackson Hole argued that the in-bounds avalanche which killed Nodine was an inherent risk under the Wyoming Recreation Safety Act. The trial court held that the WRSA requires a fact intensive analysis of the particular circumstances of the injury, "What constitutes an 'inherent risk' in a given set of circumstances is a variable [under the WRSA] that the Wyoming Legislature included in the statute by design."

The evidence in Nodine established that there was a factual dispute regarding what level of information Jackson Hole management and the resort ski patrol had about the in-bounds avalanche risk on the day David Nodine died and what steps management and patrol had taken or failed to take given their knowledge about the avalanche danger. The trial court denied summary judgment. The parties settled prior to trial. Christine Nodine v. Jackson Hole Mountain Resort Corporation, District Court of Teton County Wyoming, Civil Action No. 15608, (February 5, 2013), Order Denying Defendant's Motion for Summary Judgment.).

The Williams and Nodine cases were decided under inherent danger statutes, which more closely resemble Colorado's pre-2004 version of the SSA. Nonetheless, the cases pivot upon the same ski safety policy considerations at play in the Fleury case. Both cases take the view that an in-bounds avalanche is a special circumstance that invokes close consideration of the particular facts, particularly whether the avalanche hazard was known and could have been mitigated, or in the exercise of reasonable care, whether the run should have been closed.

Was it merely weather and snow that killed Christopher Norris, or was his death caused by a disregard for hazards that Winter Park had the ability, information and standards to forecast and thus have closed Trestle, is the issue before the court, or potentially for a jury. •

— Jim Chalat, Linda Chalat and Daniel Snare are attorneys at Chalat Hatten Koupal & Banker, PC. Go to chalatlaw.com and skilaw.com for more information.