Agenda
Advisory Committee on
Model Civil Jury Instructions

December 12, 2011
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome and approval of minutes	Tab 1	John Young
Instructions on ski resort injuries	Tab 2	David Cutt Kevin Simon
Punitive damages	Tab 3	Frank Carney Rich Humphreys Paul Belnap Joe Joyce
Verdict form	Tab 4	Frank Carney
Harris v. ShopKo Stores, Inc., 2011 UT App 329 (fn 2). Instructions 2018 and 2019	Tab 5	Tim Shea

Committee Web Page: http://www.utcourts.gov/committees/muji/

Published Instructions: http://www.utcourts.gov/resources/muji/

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

January 9, 2012
February 13, 2012
March 12, 2012
April 9, 2012
May 14, 2012
June 11, 2012
September 10, 2012
October 9, 2012 (Tuesday)
November 13, 2012 (Tuesday)
December 10, 2012

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

November 14, 2011

4:00 p.m.

Present: John L. Young (chair); Honorable William W. Barrett, Jr.; Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Timothy M. Shea, Ryan M. Springer, Peter W. Summerill, Honorable Kate A. Toomey,. Also present: Kevin Simon

Excused: Honorable Deno Himonas, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, David E. West

Assistance/Membership from Litigation Section.

Mr. Young suggested that if a defense attorney were added to the committee, a plaintiff's lawyer also would need to be added. He does not think the committee needs to expand by two members at this time. He asked for the committee's input, and the consensus was not to expand the committee.

Instructions on ski resort injuries.

Mr. Shea summarized the status of the draft instructions. The committee had tentatively approved the draft, but had asked Mr. Cutt to review it with defense counsel. Mr. Cutt is not able to attend the meeting. Mr. Young confirmed that all of the members had received the email from Mr. Gainer Waldbillig. Mr. Simon said that he concurs with Mr. Waldbillig's opinion.

Mr. Simon said that because the statute was amended after Clover v. Snowbird and White v Deseelhorst, the statute should be given the effect of changing the law of those cases, which was to establish two categories of inherent risks of skiing, risks the skier wants to encounter and those the skier does not want to encounter. Mr. Simon said that the amended statute eliminates that distinction. Mr. Summerill asked whether there is anything in the amendment that is contrary to the earlier caselaw. Mr. Simon said there is nothing express in the statute, but the fact that the amendment came after the cases argues for the result. Mr. Simon said that the amendments added categories to the list of inherent risks.

Mr. Ferguson said that we simply do not know the status of the law of Clover v. Snowbird and White v Deseelhorst after the amended statute.

Mr. Young asked whether a statute can eliminate the ordinary standard of care. Mr. Simons said the statute does not do that. If a risk can be eliminated by exercising reasonable care, then there is a duty to do so.

Mr. Summerill suggested including CV 1112 on the two types of risks, but with a note explaining that the status of the law is uncertain after the amended statute. Mr. Simon

said that including the instruction would imply the committee's conclusion that the distinction remains part of Utah law. Mr. Simon suggested being silent on the topic and let MUJI 1 be used. Mr. Shea said that if the committee is uncertain about whether the distinction in types of risks is part of Utah law, they should nevertheless include an instruction that conforms to the statute because we are trying the move away from MUJI 1. Mr. Shea suggested adopting Instructions 1110 and 1111 and writing a committee note that the distinction in risks might survive the statutory amendment because the two do not conflict.

Mr. Carney suggested that Mr. Cutt, Mr. Simon and Mr. Waldbillig write a committee note for the committee to consider at the next meeting. Mr. Simon agreed.

The committee discussed whether the statute was an affirmative defense on which the defendant has the burden of proof. MUJI 1 is silent on the issue as are the two cases. The committee decided to omit Instruction1113 on the burden of proof. The judge will have to decide and can give a burden of proof instruction.

The committee amended CV 1110 to include snowboarders. The committee approved CV 1110 as amended and CV 1111 as drafted. Publication will be delayed until the committee can consider the proposed note.

Verdict form

Mr. Lund suggested removing the instruction that the jurors not deduct an amount due to plaintiff's negligence. Mr. Shea said that the concept is part of the current verdict form for negligence.

Professor Di Paolo suggested amending the introductory paragraph into a more easily read list. The committee agreed.

Mr. Lund suggested adding to the damages section an item for economic damages to the decedent's heir, namely, for loss of support. Mr. Carney said that the heirs would have to be distinguished because support for a 17-year old would be different from support for a 2-year old, and children will be different from a spouse. Mr. Carney said that the instruction on economic damages may need to be amended to include loss of support.

Mr. Shea will add the category of economic damages for an heir to the verdict form, and the committee will consider it at the next meeting.

Punitive damages

The committee amended CV 2026 to bracket each of the three types of conduct giving rise to punitive damages and add a committee note that the jury be instructed only on the types of conduct for which there is evidence. The committee amended CV 2027 to include the definition of "intentionally fraudulent" rather than merely link to the instruction in the committee note.

Several committee members said that the third type of conduct, “a knowing and reckless indifference toward the rights of others,” is a relatively low standard, and that plaintiffs might claim punitive damages in a regular negligence case. The text of the instruction is taken directly from the statute. The definition of those terms is taken from caselaw. **Ms. Blanch said she will research whether there is another definition for these terms.** The committee approved both instructions, pending Ms. Blanch’s research.

Professor Di Paola said that the word “vicarious” probably would be misinterpreted by jurors. The word is used only on the title, so the committee changed the title of CV 2028 to “Liability for the acts of agents.” Mr. Shea amended the instruction to better distinguish between the acts of the defendant’s agent for which the defendant might be liable, and the defendant’s managerial agent, who is acting on the defendant’s behalf. The committee suggested that the instructions could not be approved without Mr. Humpherys being present. The committee also suggested inviting Mr. Paul Belnap to participate.

The meeting ended at 6:00 p.m.

Tab 2

Approved by the committee and since removed from the website:

(1) ~~CV 1110. Recovery for injury to ski resort patrons.~~

~~[Name of defendant] claims that [he] is not liable for that part of [name of plaintiff]'s harm that was caused by one or more of the risks of skiing. To succeed on this claim, [name of defendant] must prove that [name of plaintiff]'s harm that was caused by [describe applicable conditions in Utah Code Section 78B-4-402(1)(a)-(h)].~~

Proposed:

(2) CV 1110. No liability for inherent risks of skiing.

No skier may recover from any ski area operator for injury resulting from any of the inherent risks of [skiing / snowboarding].

approved

(3) CV 1111. Inherent risks of skiing defined.

"Inherent risks of skiing" means those dangers or conditions which are an integral part of the sport of recreational, competitive, or professional skiing, and may include the following:

(1) changing weather conditions;

(2) snow or ice conditions as they exist or may change, such as hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, or machine-made snow;

(3) surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, streambeds, cliffs, trees, and other natural objects;

(4) variations or steepness in terrain, whether natural or as a result of slope design, snowmaking or grooming operations, and other terrain modifications such as terrain parks, and terrain features such as jumps, rails, fun boxes, and all other constructed and natural features such as half pipes, quarter pipes, or freestyle-bump terrain;

(5) impact with lift towers and other structures and their components such as signs, posts, fences or enclosures, hydrants, or water pipes;

(6) collisions with other skiers;

(7) participation in, or practicing or training for, competitions or special events; and

(8) the failure of a skier to ski within the skier's own ability.

approved

(4) CV 1112. Types of inherent risks of skiing.

There are two types of inherent risks of skiing :

The first are risks that skiers want to confront, like steep grades, powder, jumps and moguls. [Name of defendant] has no obligation to eliminate these types of risks.

The second are risks that skiers do not want to confront, such as bare spots, rocks, trees, and other natural objects, or impact with lift towers and other structures. Such risks are also inherent in skiing, but [name of defendant] must use reasonable care to eliminate risks of this second type.

~~**(5) CV 1113. Burden of proving inherent risks of skiing.**~~

~~[Name of defendant] has the burden of proving that the risk(s) in this case are "Inherent Risks of Skiing." If you find that [name of defendant] has met this burden, [name of plaintiff] has the burden of proving that the risk(s) in this case are of the second type and that [name of defendant] did not use reasonable care to eliminate them.~~

Memorandum

To: MUJI 2nd Committee

From: David Cutt

Date: December 2, 2011

Re: Proposed Instructions on Inherent Risk of Skiing

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1. There have been no Amendments to the Inherent Risk of Skiing Act that Indicate an Intent to Abrogate the Holdings in *Clover v. Snowbird* and *White v. Deseelhorst*

While the Inherent Risk of Skiing Act ("Act") has been amended since the Utah Supreme Court's holdings in *Clover v. Snowbird*, 808 P.2d 1037 (Utah 1991) and *White v. Deseelhorst*, 879 P.2d 1371 (Utah 1994), the amendments do not indicate an intent to abrogate the Supreme Court's interpretation of the statute. There is also no case law or any other authority indicating that the holdings in *Clover* and *White* are no longer a correct statement of the law.[1]

The *Clover* and *White* courts held that there are two categories of risks inherent in skiing: (1) those which skiers want to confront, such as steep grades, powder and moguls, and (2) those which skiers do not want to confront, such as rocks, bare spots, and lift towers. Ski resorts have no duty to eliminate the first category of risks, but have a duty to exercise reasonable care to eliminate risks of the second type.

While there are few cases addressing the question of when a statutory amendment abrogates a prior appellate court decision, the Utah Supreme Court explained that "[i]n the absence of express statutory language to the contrary, [it] do[es] not presume that the legislature .

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[1]The *Clover* case is attached as Exhibit A, and the *White* case is attached as Exhibit B.

. . intended to overrule the prior decisions of [the Utah Supreme Court]. . ." *Bradley v. Payson City Corp.*, 70 P.3d 47, 53 (Utah 2003) *citing Cole v. Jordan School Dist.*, 899 P.2d 776, 778 (Utah 1995) (noting that in the absence of express statutory language, the court will not assume the legislature intended to overrule an earlier decision of this court when it enacted a statutory amendment) (emphasis added). Thus, for an amended statute to overturn a prior appellate decision, the amendment likely needs to contain language expressly overruling or abrogating the decision.

The amendments to the Act contain no reference to *Clover* or *White* and do not support the argument that the amendments were intended to respond to *Clover* or *White*.

78B-4-401 - Public Policy

The first section of the Act, which states the policy behind the Act, has not been amended since 1979. (Current version of Section 401 is attached as Exhibit C)

78B-4-402 - Definitions

The definitions section of the Act was amended in 1993 and 2006. (Current version of Section 402 is attached as Exhibit D). The 1993 amendment was primarily semantic other than the addition of "nordic, freestyle, or other types of ski jumping, and snowboarding" to the definitions of "Skier" and "Ski area." (Version of Section 402 showing 1993 amendments is attached as Exhibit E)

The 2006 amendment to Section 402 made a variety of changes, but nothing in the amendments relates to the holdings in *Clover* or *White*. There are also no comments referencing

the *Clover* or *White* cases - which were 15 and 12 years old as of the 2006 amendments. (Version of Section 402 showing 2006 amendments is attached as Exhibit F)

78B-4-403 - Bar against claim or recovery from operator for injury from risks inherent in sport

The immunity section of the Act has not been amended since 1979. (Current version of Section 403 is attached as Exhibit G).

78B-4-404 - Trail boards listing inherent risks and limitations on liability

The final section of the Act, which requires ski resorts to post signs notifying patrons of the inherent risks of skiing and the resorts' lack of liability, has not been amended since 1979. (Current version of Section 404 is attached as Exhibit H).

2. There are no Cases Indicating that the Holdings in *Clover* and *White* are no Longer Good Law

Defense counsel assert that *Rothstein v. Snowbird*, 175 P.3d 560 (Utah2007), supports the argument that *Clover* and *White* are no longer good law.[2] The issue in *Rothstein* was whether a release signed by the plaintiff in connection with purchasing his seasons pass to Snowbird was void as contrary to public policy. The court held the release was void based on the policy statement contained in the first section of the Act. However, the *Rothstein* court did not interpret the Act, and did not make any statements indicating that *Clover* and *White* are no longer good law. Indeed, the case contains no reference to *Clover* or *White*.

[2]A copy of the *Rothstein* case is attached as Exhibit I.

3. The Act Creates an Affirmative Defense for which a Defendant Ski Resort has the Initial Burden of Proof

Because the Act creates an affirmative defense for which the defendant bears the burden of proof, CV 1113 is a correct statement of the law and should be approved by the Committee.

"[A]n affirmative defense is a defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *State v. Lynch*, 246 P.3d 525, 529 (Ut. Ct. App. 2011). (internal citations omitted).

Utah courts have repeatedly recognized that "as with any affirmative defense, defendants have the burden of proving every element necessary to establish" the defense. *Seale v. Gowans*, 923 P. 2d 1361, 1363 (Utah 1996); *see also Fox v. Brigham Young Univ.*, 176 P.3d 446, 452 fn. 3 (Ut. Ct. App. 2007) (noting that defendant's carry the burden of proving an affirmative defense); *Allen v. Sybase, Inc.*, 468 F.3d 642, 655-56 (10th Cir. 2006) (defendant who offers a statutorily created defense bears the burden of showing that the defense applies); *Loehrer v. McDonnel Douglas Corp.*, 98 F.3d 1056, 1060 (8th Cir. 1996) (noting that a defendant has the burden to show that statutory affirmative defenses apply).

The Act immunizes ski resorts from liability for certain injuries caused by an inherent risk of skiing. Thus, the Act creates an affirmative defense, and it is black letter law that the defendant has the burden of proof. The notion that the plaintiff bears the burden to prove a negative, *i.e.*, that the relevant hazard was not an inherent risk, is contrary to both logic and law.

A legitimate argument can be made that the defendant ski resort has the burden of proving every element necessary to avoid liability under the Act, including the element that the

hazard could not have not been eliminated through the use of reasonable care. However, placing the burden on ski resorts to prove a negative, *i.e.*, that the hazard could not have been eliminated by reasonable care, makes no more sense than requiring the plaintiff to prove that the hazard was not an inherent risk of skiing.

DATED this 2nd day of December, 2011.

EISENBERG, GILCHRIST & CUTT

David A. Cutt

Exhibit A

808 P.2d 1037

(Cite as: 808 P.2d 1037)

Supreme Court of Utah.

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.

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.

West Headnotes

[1] Appeal and Error 30 ⚿934(1)

30 Appeal and Error

30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases

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] Labor and Employment 231H ⚿3026

231H Labor and Employment

231HXVIII Rights and Liabilities as to Third Parties
231HXVIII(B) Acts of Employee
231HXVIII(B)1 In General
231Hk3026 k. Nature of Liability in General. Most Cited Cases
(Formerly 255k300 Master and Servant)

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] Labor and Employment 231H ⚿3105(7)

231H Labor and Employment

231HXVIII Rights and Liabilities as to Third Parties
231HXVIII(B) Acts of Employee
231HXVIII(B)2 Actions
231Hk3103 Trial
231Hk3105 Questions of Law or Fact
231Hk3105(6) Scope of Employment
231Hk3105(7) k. In General. Most Cited Cases
(Formerly 255k332(2) Master and Servant)

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 228 ⚿181(33)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort Cases in General. Most Cited Cases

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] Labor and Employment 231H ⚿3046(2)

231H Labor and Employment

231HXVIII Rights and Liabilities as to Third Parties
231HXVIII(B) Acts of Employee
231HXVIII(B)1 In General
231Hk3044 Scope of Employment
231Hk3046 Furtherance of Employer's Business
231Hk3046(2) k. Dual Purpose. Most Cited Cases

(Formerly 255k302(1) Master and Servant)

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.

[6] Labor and Employment 231H ⚿3045

231H Labor and Employment

231HXVIII Rights and Liabilities as to Third Parties
231HXVIII(B) Acts of Employee
231HXVIII(B)1 In General
231Hk3044 Scope of Employment
231Hk3045 k. In General. Most Cited Cases

(Formerly 255k302(1) Master and Servant)

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] Labor and Employment 231H ⚿3046(1)

231H Labor and Employment

231HXVIII Rights and Liabilities as to Third Parties
231HXVIII(B) Acts of Employee
231HXVIII(B)1 In General
231Hk3044 Scope of Employment
231Hk3046 Furtherance of Employer's Business
231Hk3046(1) k. In General. Most Cited Cases

(Formerly 255k302(2) Master and Servant)

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] Public Amusement and Entertainment 315T ⚿137

315T Public Amusement and Entertainment

315TIII Personal Injuries
315TIII(B) Defenses, Mitigating Circumstances and Statutory Limitations of Liability
315Tk133 Statutory Limitations of Liability
315Tk137 k. Skiing and Snowboarding. Most Cited Cases

(Formerly 376k6(19) Theaters and Shows)

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.

[9] Statutes 361 ⚿188

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
Terms of statute should be interpreted in accord with their usual and accepted meanings.

[10] Statutes 361 ⚿205

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases
Statute should not be construed in piecemeal fashion, but as comprehensive whole.

[11] Statutes 361 ⚿222

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k222 k. Construction with Reference to Common or Civil Law. Most Cited Cases
In construing statute that deals with tort claims, it is proper to interpret statute in accord with relevant tort law.

[12] Statutes 361 ⚿181(1)

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases
In dealing with unclear statute, court renders interpretations that will best promote protection of the public.

[13] Judgment 228 ⚿181(33)

228 Judgment

228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort Cases in General. Most Cited Cases
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] Labor and Employment 231H ⚿3040

231H Labor and Employment

231HXVIII Rights and Liabilities as to Third Parties
231HXVIII(B) Acts of Employee
231HXVIII(B)1 In General
231Hk3039 Negligent Hiring
231Hk3040 k. In General. Most Cited Cases
(Formerly 255k303 Master and Servant)
Labor and Employment 231H ⚿3043

231H Labor and Employment

231HXVIII Rights and Liabilities as to Third Parties
231HXVIII(B) Acts of Employee
231HXVIII(B)1 In General
231Hk3043 k. Negligent Supervision. Most Cited Cases
(Formerly 255k303 Master and Servant)
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 228 ⚿181(33)

228 Judgment

228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort Cases in General. Most Cited Cases

808 P.2d 1037

(Cite as: 808 P.2d 1037)

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).

*1038 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.[FN1] 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. *1039 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.

> FN1. *Culp Constr. Co. v. Buildmart Mall*, 795 P.2d 650, 651 (Utah 1990).

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 mid-way 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.[FN2] 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." [FN3] The determination of whether ***1040** 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.[FN4]

FN2. 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).

FN3. *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).

FN4. *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).

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.[FN5] 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*,[FN6] 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.' " [FN7] 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." [FN8] 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.[FN9]

FN5. *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).

FN6. 771 P.2d 1053 (Utah 1989).

FN7. *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)).

FN8. *Carter v. Bessey*, 97 Utah 427, 93 P.2d 490, 493 (1939).

FN9. *Birkner v. Salt Lake County*, 771 P.2d at 1057.

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.[FN10] "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." [FN11] Second, the employee's conduct must occur substantially within the

hours and ordinary spatial boundaries of the employment.[FN12] "Third, the employee's conduct must be motivated at least in part, by the purpose of serving the employer's interest." [FN13] Under specific factual situations, such as when the employee's conduct serves a dual purpose [FN14] or when the employee takes a personal detour in the course of carrying out his employer's directions, [FN15] this court ***1041** 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.

FN10. *See* Restatement (Second) of Agency § 228 (1958); W. Keeton, *Prosser and Keeton on the Law of Torts* § 70, at 502 (5th ed. 1984).

FN11. *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).

FN12. *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).

FN13. *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).

FN14. *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.

FN15. *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.

[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." [FN16] 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." [FN17]

FN16. *Birkner v. Salt Lake County,* 771 P.2d at 1057.

FN17. *Id.*

[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.* [FN18] *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.[FN19] 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." [FN20] 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." [FN21]

FN18. 801 P.2d 934 (Utah 1989).

FN19. *Id.* at 937.

FN20. *Id.* (citing *Martinson v. W–M Ins. Agency*, 606 P.2d 256, 285 (Utah 1980)).

FN21. *Id.*

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.[FN22] 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.[FN23] 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 ***1042** 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.

FN22. *Id.*

FN23. *Id.*

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. [FN24] 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.[FN25] 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. [FN26]

FN24. *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.

FN25. *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*).

FN26. *See Carter v. Bessey*, 93 P.2d at 493; *Burton v. La Duke*, 210 P. at 981.

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.[FN27] 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." [FN28] 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.[FN29]

FN27. *See* Burton v. La Duke, 210 P. at 979–81.

FN28. *See id.* 210 P. at 981; *see also* Birkner v. Salt Lake County, 771 P.2d at 1057.

FN29. *Burton v. La Duke,* 210 P. at 981.

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.,*[FN30] 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.[FN31] 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.

FN30. 60 Utah 346, 208 P. 519 (1922).

FN31. *See id.* 208 P. at 520–21.

These two factors, along with other circumstances—such as, throughout the day Zulliger was on Snowbird's property, there ***1043** 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.[FN32] Such an approach constitutes a significant departure from the *Birkner* analysis.

FN32. *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).

[7] Second, Clover urges this court to apply the premises rule, a rule developed in workers' compensation cases,[FN33] 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.[FN34] 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. [FN35] 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. [FN36] We therefore, in this instance, decline to adopt these approaches.

FN33. *See Soldier Creek Coal v. Bailey,* 709 P.2d 1165, 1166 (Utah 1985).

FN34. 1 A. Larson, *The Law of Workmen's Compensation* § 15.11 (1990).

FN35. *See id.* at § 15.15 (rationale for expansions of the premises rule different than rationale of respondeat superior).

FN36. *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).

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) [FN37] read in part:

FN37. 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 63–11–37 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.

***1044** 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.[FN38] 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 ***1045** 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).

> FN38. 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.

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.[FN39] 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.

> FN39. 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).

[9][10][11][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.[FN40] Another rule is that a statute should not be construed in a piecemeal fashion but as a comprehensive whole.[FN41] 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." [FN42] 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." [FN43]

> FN40. *Utah County v. Orem City*, 699 P.2d 707, 708 (Utah 1985).

> FN41. *Peay v. Board of Ed. of Provo City Schools*, 14 Utah 2d 63, 377 P.2d 490, 492 (Utah 1962).

FN42. *Osuala v. Aetna Life & Casualty*, 608 P.2d 242, 243 (Utah 1980) (footnotes omitted).

FN43. *Curtis v. Harmon Electronics*, 575 P.2d at 1046.

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.[FN44] 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. ***1046** 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.[FN45]

FN44. *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).

FN45. *See* Feuerhelm, *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.

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.[FN46] 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."[FN47] 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.

FN46. *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.*

FN47. *Jacobsen Constr. v. Structo–Lite Eng'g*, 619 P.2d at 310.

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.[FN48] Comparative principles have been applied in cases dealing with contributory negligence,[FN49] secondary assumption of risk, [FN50] and strict liability.[FN51] 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.

FN48. *See* Utah Code Ann. §§ 78–27–37 to –43 (Supp.1986); *Moore v. Burton Lumber & Hardware,* 631 P.2d at 870.

FN49. *Acculog, Inc. v. Peterson,* 692 P.2d 728, 730 (Utah 1984).

FN50. *Moore v. Burton Lumber & Hardware,* 631 P.2d at 869–71.

FN51. *Mulherin v. Ingersoll–Rand,* 628 P.2d 1301, 1303 (Utah 1981).

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 [FN52] 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 ***1047** eliminated by the exercise of ordinary care on the part of the ski area operator.

FN52. 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).

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.[FN53]

FN53. Ski area operators, however, should use reasonable care to inform their patrons of the degree of difficulty of their runs.

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.[FN54] At the time the statute was enacted, the landmark case in the area was *Wright v. Mt. Mansfield Lift Inc.*[FN55] 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," [FN56] 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.[FN57] 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.[FN58] 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 ***1048** statute, "clarifying the law in relation to skiing injuries."

FN54. *See supra* notes 44–45 and accompanying text.

FN55. 96 F.Supp. 786 (D.Vt.1951).

FN56. *Id.* at 790.

FN57. *See id.* at 790–92.

FN58. *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.

[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. [FN59] 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.

FN59. *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).

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.
Utah,1991.

Clover v. Snowbird Ski Resort
808 P.2d 1037
END OF DOCUMENT

Exhibit B

879 P.2d 1371

(Cite as: 879 P.2d 1371)

C

Supreme Court of Utah.

Corey WHITE, Plaintiff and Appellant,
v.
Gary L. DESEELHORST, NP Ski Corporation, LL Ski Corporation, and Bravo Ski Corporation dba Solitude Ski Resort Company, Defendants and Appellees.
No. 920328.

Aug. 16, 1994.

Skier brought negligence action against ski resort operator, alleging injuries due to operator's placement of "cat track." The Third District Court, Salt Lake County, Anne M. Stirba, J., granted summary judgment for operator, and skier appealed. The Supreme Court, Durham, J., held that: (1) issue of fact as to whether operator could have alleviated hazard of unmarked "cat track" on blind side of ridge through exercise of ordinary care precluded summary judgment, and (2) causation issue was not sufficiently developed to support summary judgment for operator.

Reversed and remanded.

Zimmerman, C.J., filed concurring opinion.

Russon, J., filed dissenting opinion.

West Headnotes

[1] Appeal and Error 30 ⚿863

30 Appeal and Error

30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In general. Most Cited Cases
Because summary judgment is granted as matter of law, Supreme Court reviews trial court's ruling for correctness. Rules Civ.Proc., Rule 56(c).

[2] Public Amusement and Entertainment 315T ⚿137

315T Public Amusement and Entertainment

315TIII Personal Injuries
315TIII(B) Defenses, Mitigating Circumstances and Statutory Limitations of Liability
315Tk133 Statutory Limitations of Liability
315Tk137 k. Skiing and snowboarding. Most Cited Cases
(Formerly 376k6(19) Theaters and Shows)
Statutory list of factors in definition of "inherent risks of skiing," for purpose of statute prohibiting negligence claims against ski area operators based upon such risks, is nonexclusive, and statute contemplates inclusion of hazards other than those specifically listed. U.C.A.1953, 78-27-52(1).

[3] Public Amusement and Entertainment 315T ⚿137

315T Public Amusement and Entertainment

315TIII Personal Injuries
315TIII(B) Defenses, Mitigating Circumstances and Statutory Limitations of Liability
315Tk133 Statutory Limitations of Liability
315Tk137 k. Skiing and snowboarding. Most Cited Cases
(Formerly 376k6(19) Theaters and Shows)
To determine whether inherent risks of skiing statute applies to bar negligence claim against ski resort operator, court must decide whether particular risk which allegedly caused injury was integral part or essential characteristic of sport of skiing; if not, statute does not apply. U.C.A.1953, 78-27-52(1), 78-27-53.

[4] Public Amusement and Entertainment 315T ⚿137

315T Public Amusement and Entertainment

315TIII Personal Injuries
315TIII(B) Defenses, Mitigating Circumstances and Statutory Limitations of Liability
315Tk133 Statutory Limitations of Liability
315Tk137 k. Skiing and snowboarding. Most Cited Cases
(Formerly 376k6(19) Theaters and Shows)
Inherent risks of skiing statute relieves ski resorts of any obligation to eliminate risks that skiers would "wish to confront," including steep grades, powder, and mogul runs. U.C.A.1953, 78-27-52(1).

[5] Public Amusement and Entertainment 315T ⚿95

315T Public Amusement and Entertainment

315TIII Personal Injuries
315TIII(A) In General
315Tk93 Skiing, Ice Skating and Winter Activities
315Tk95 k. Skiing and snowboarding. Most Cited Cases
(Formerly 376k6(11) Theaters and Shows)
Ski resorts have obligation to use reasonable care when informing skiers of ski run's degree of difficulty.

[6] Public Amusement and Entertainment 315T ⚿137

315T Public Amusement and Entertainment

315TIII Personal Injuries
315TIII(B) Defenses, Mitigating Circumstances and Statutory Limitations of Liability
315Tk133 Statutory Limitations of Liability
315Tk137 k. Skiing and snowboarding. Most Cited Cases
(Formerly 376k6(19), 376k6(11) Theaters and Shows)
If risks which skiers do not wish to confront, such as bare spots, forest growth, rocks, and structures, can be eliminated by reasonable care, such risks do not constitute "inherent risks of skiing" under statute precluding negligence claims against ski resort operators based on such risks; if risks cannot be eliminated by use of reasonable care, statute requires operator to warn patrons of risks. U.C.A.1953, 78-27-52(1), 78-27-53.

[7] Judgment 228 ⚿181(33)

228 Judgment

228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort cases in general. Most Cited Cases
Material issue of fact as to whether ski resort operator could have alleviated hazard of unmarked "cat track" on blind side of ridge through exercise of ordinary care precluded summary judgment for operator in negligence action by injured skier. U.C.A.1953, 78-27-53.

[8] Judgment 228 ⚿185.3(21)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(21) k. Torts. Most Cited Cases
Injured skier's negligence claim against ski resort operator was not barred by skier's alleged failure to make sufficient showing of causation, at summary judgment stage, where operator did not move for summary judgment on causation issue and record on causation was not fully developed.

[9] Appeal and Error 30 ⚿856(1)

30 Appeal and Error

30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k851 Theory and Grounds of Decision of Lower Court
30k856 Grounds for Sustaining Decision Not Considered
30k856(1) k. In general. Most Cited Cases

Supreme Court may affirm judgment on any ground, even one not relied upon by trial court.

*1372 Mitchell R. Jensen, John Farrell Fay, J. Craig Swapp, Jim Mouritsen, Salt Lake City, for plaintiff.

Jay E. Jensen, Robert K. Hilder, Salt Lake City, for defendants.

DURHAM, Justice:

Plaintiff Corey White appeals the Third District Court's grant of summary judgment in favor of defendant Solitude Ski Resort.[FN1] White contends that the trial court erroneously dismissed his negligence claim on the basis of Utah's inherent risks of skiing statute. Utah Code Ann. §§ 78-27-51 to -54. We reverse.

FN1. The named defendants are Gary L. Deseelhorst, NP Ski Corporation, LL Ski Corporation, and Bravo Ski Corporation dba Solitude Ski Resort Company. In this opinion, defendants are collectively referred to as "Solitude."

*1373 Because the trial court dismissed White's claim on summary judgment, we relate the facts and all reasonable inferences arising therefrom in the light most favorable to him. *Christensen v. Swenson*, 874 P.2d 125, 127 (Utah 1994). On April 22, 1988, White was injured in a skiing accident at Solitude Ski Resort. At the time of the accident, White was twenty-two years old and characterized himself as an advanced skier, although he was not skilled in ski jumping or mogul skiing. He generally skied three or more times per season and had already skied twice that winter. White was somewhat familiar with Solitude, having skied there roughly seven times in prior seasons.

On the day of the accident, White and a skiing companion arrived at Solitude around noon. The weather was warm, the skies were clear, and the snow was heavy and wet. Both White and his companion purchased a half-day lift ticket and then rode the Powder Horn lift to the top of the mountain. From there, they skied on a groomed trail to the top of the Paradise run. Paradise is an ungroomed, mogul-filled run that Solitude has designated "most difficult."

White and his companion began skiing down Paradise. White's companion had difficulty with the run, and it became apparent that she needed an easier route down the mountain. White skied to a point near the bottom of Paradise and directed her toward a gentler slope. He told her to meet him in a flat area near the bottom of the run.

White then began his final descent. He skied roughly thirty feet on a moderately steep slope toward a natural ridge or knoll. As he came over the ridge, he noticed a trail that cut directly across the Paradise run. He had been unable to see the trail earlier because it fell within a blind spot created by the ridge. The last thing White remembers is attempting to make an evasive maneuver to his left, apparently to avoid the trail.

The trail that White saw as he came over the ridge had been formed early in the season by novice skiers traversing the slope to negotiate an easier route down the mountain. To prevent it from becoming too rough, Solitude occasionally smoothed the trail with its snow grooming equipment. Such trails are commonly called "cat tracks."

Teresa Gates was skiing on the cat track as White came down Paradise. She testified that she heard someone on the trail above her and, as she looked up, saw White in the air roughly ten to fifteen feet ahead of her. She stated that he was upright and seemed to be in control as he passed over the cat track but gradually rotated backward as he flew through the air. White landed on his neck and upper back approximately fifty feet below the cat track. He fractured his spine and now suffers permanent total paralysis of his lower extremities.

In November 1988, White filed this negligence action against Solitude. White claims that Solitude negligently designed and maintained the cat track and that it failed to adequately warn skiers of the cat track's location. White supports his position with expert testimony indicating that the run was improperly designed and should have been marked. In his deposition, White's expert testified that ski industry safety standards require that ski resorts locate cat

tracks where they can be seen by skiers as they descend the mountain or, where this is not possible, that resorts adequately warn skiers of the cat track's location. Solitude's corps of experts strongly disagreed. They testified that the cat track was properly designed and that no warning of its location was necessary.[FN2]

> FN2. Solitude's experts further opined that the cause of the accident was White's excessive speed and failure to ski in control rather than the design of the cat track or its lack of warning signs. However, given the procedural posture of this case, we must accept White's version. White testified that he was not out of control when he skied over the ridge, and the testimony of his expert supports that position.

In June 1992, the trial court granted Solitude's motion for summary judgment. According to the trial court, White failed to raise a material issue concerning the appropriate standards for designing and maintaining*1374 ski runs. The court therefore concluded that White's accident resulted from an inherent risk of skiing and was barred by Utah's inherent risks of skiing statute. White appeals.

[1] The standard for reviewing a grant of summary judgment is well established. Summary judgment is proper when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R.Civ.P. 56(c); *Christensen,* 874 P.2d at 127; *Clover v. Snowbird Ski Resort,* 808 P. 2d 1037, 1039 (Utah 1991). Because summary judgment is granted as a matter of law, we review the trial court's ruling for correctness. *Christensen,* 874 P.2d at 127; *Hunsaker v. State,* 870 P.2d 893, 896 (Utah 1993).

We also note that summary judgment is generally inappropriate to resolve negligence claims and should be employed "only in the most clear-cut case." *Ingram v. Salt Lake City,* 733 P.2d 126, 126 (Utah 1987) (per curiam); *see also Dwiggins v. Morgan Jewelers,* 811 P.2d 182, 183 (Utah 1991); *Hunt v. Hurst,* 785 P.2d 414, 415 (Utah 1990); *Apache Tank Lines, Inc. v. Cheney,* 706 P.2d 614, 615 (Utah 1985) (per curiam); *Williams v. Melby,* 699 P.2d 723, 725 (Utah 1985); *Wycalis v. Guardian Title,* 780 P.2d 821, 825 (Utah Ct.App.1989), *cert. denied,* 789 P.2d 33 (Utah 1990). "Ordinarily, whether a defendant has breached the required standard of care is a question of fact for the jury." *Jackson v. Dabney,* 645 P.2d 613, 615 (Utah 1982); *see also Dwiggins,* 811 P.2d at 183. "Accordingly, summary judgment is inappropriate unless the applicable standard of care is 'fixed by law,' and reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances." *Wycalis,* 780 P.2d at 825 (citations omitted); *see also Butler v. Sports Haven Int'l,* 563 P.2d 1245, 1246 (Utah 1977).

We first examine the applicability of Utah's inherent risks of skiing statute. The statute provides that "no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing." Utah Code Ann. § 78-27-53.[FN3] The statute defines inherent risks of skiing as

> FN3. In 1993, the inherent risks of skiing statute was slightly modified. *See* Utah Code Ann. § 78-27-52 (Supp.1993). These modifications, however, are not relevant to the present case.

> 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.

Id. § 78-27-52(1).

[2][3] In *Clover v. Snowbird Ski Resort,* 808 P. 2d 1037 (Utah 1991), we explained that the statute grants only limited immunity; it "does not purport to grant ski area operators complete immunity from all negligence claims initiated by skiers." *Id.* at 1044. *Clover* also clarified the manner in which the statute is to be applied. Courts cannot determine that a risk is inherent in skiing simply by asking whether it happens to be one of those listed in section 78-27-52(1). That list is expressly nonexclusive and thus contemplates the inclusion of hazards other than those specifically set forth. In addition, any hazard, listed or unlisted, is limited by the phrase "integral part of the sport of skiing." Utah Code Ann. §

78-27-52(1). Accordingly, to determine whether the statute applies, we must decide whether the particular risk which allegedly caused White's injury was an integral part or essential characteristic of the sport of skiing. *See Clover,* 808 P. 2d at 1044, 1047; *see also* Paige Bigelow, Development, *Ski Resort Liability for Negligence Under Utah's Inherent Risks of Skiing Statute,* 1992 Utah L.Rev. 311, 317.

[4][5][6] As explained in *Clover,* risks that are inherent in skiing, or essential characteristics of skiing, can be divided into two categories.*1375 *Clover,* 808 P. 2d at 1047. The first consists of risks that skiers wish to confront while skiing, for example, steep grades, powder, and mogul runs. Under the statute, the ski resort is relieved of any obligation to eliminate these types of dangers. *Id.*[FN4] The second category includes risks that skiers do not wish to confront, such as "bare spots, forest growth, rocks, stumps, ... lift towers and other structures." Utah Code Ann. § 78-27-52(1). Such risks are also generally deemed inherent in skiing. If they can be eliminated by reasonable care, however, they are not considered an inherent risk and the statute does not apply. *Clover,* 808 P. 2d at 1047.[FN5] If the risk cannot be eliminated by the use of reasonable care, then the statute simply requires ski resorts to "warn their patrons, in the manner prescribed in the statute, of the general dangers patrons must confront when participating in the sport of skiing." *Id.*

FN4. Ski resorts do have an obligation to use reasonable care when informing skiers of a ski run's degree of difficulty. *Clover v. Snowbird Ski Resort,* 808 P. 2d 1037, 1047 n. 53 (Utah 1991). Nevertheless, claims that fall within this category of risks remain particularly amenable to resolution as a matter of law. In other words, a claim arising from a risk that skiers wish to confront is properly dismissed on a motion for summary judgment provided the resort has adequately informed skiers of the degree of difficulty of the ski run. This is consistent with the stated purpose of the statute, which is "to establish as a matter of law that certain risks are inherent in [the] sport." Utah Code Ann. § 78-27-51.

FN5. This requirement, along with our case-by-case construction of the statute, provides ski resorts and courts some flexibility in adapting to changes in technology that improve skiing safety. In discussing the importance of such flexibility, one commentator noted, "As methods of grooming and maintaining slopes improve[ ], certain risks 'inherent' in the sport at an early time [may be] eliminated." Wendy A. Faber, Comment, *Utah's Inherent Risks of Skiing Act: Avalanche from Capitol Hill,* 1980 Utah L.Rev. 355, 359-60.

[7] The risk at issue in this case falls into the second category outlined in *Clover.* An unmarked cat track on the blind side of a ridge is not the type of risk that a skier proceeding down the Paradise run would wish to confront. Rather, it is analogous to a bare spot, rock, or tree stump. The question then becomes whether Solitude could have alleviated this risk through the exercise of ordinary care. Because White's claim was dismissed on summary judgment, we must determine whether reasonable minds could disagree on this issue. If so, summary judgment on the basis of the inherent risks of skiing statute was inappropriate; if not, summary judgment was proper.

It is undisputed that cat tracks are a common and necessary feature at ski resorts. They allow novice skiers an easier route down the mountain and provide access to upper portions of the mountain for grooming machines and other maintenance equipment. Because cat tracks are so pervasive and important to the sport, it is unlikely that ski resorts could alleviate all of the possible harms that may result from them. Thus, in most cases they would constitute an inherent risk of skiing. White's claim, however, is exceedingly narrow. He contends that this particular cat track was in close proximity to a ridge on the Paradise run and that it fell within a blind spot created by that ridge. Based upon these unique physical characteristics, White's expert opined that Solitude could have eliminated the hazard by either locating the cat track elsewhere or placing warning signs along the cat track to alert skiers of its location. He claimed that his views represented "state-of-the-art methodology in the industry." Solitude's experts disagreed. In their opinion, situations such as this are common at ski resorts and warning signs

are not necessary. Both positions are tenable. Given this conflict, we cannot say as a matter of law that Solitude could not have alleviated this hazard through the exercise of ordinary care. Summary judgment was therefore inappropriate.[FN6]

> FN6. Our conclusion that reasonable minds may differ on whether Solitude could have eliminated the hazard does not, of course, forever preclude application of the inherent risks of skiing statute. If a fact finder ultimately concludes that the cat track was properly designed and that warning signs were unnecessary, White's claim would be barred.

[8] We next consider Solitude's argument that even if White's claim is not barred by *1376 the inherent risks of skiing statute, it should nonetheless be dismissed because he has failed to make a sufficient showing of causation, a prima facie element of negligence. Solitude claims that in order to recover, White must demonstrate that he actually hit the cat track, thereby causing his injuries. White's response is twofold. First, he contends there is evidence in the record that he hit the cat track. Second, he maintains that he need not prove he actually hit the cat track; instead, fear of hitting the cat track may have caused him to lose control and ultimately crash.

We agree with Solitude that there is little if any evidence in the record tending to prove either theory of causation. Solitude, however, did not move for summary judgment on this issue. Instead, Solitude argued only that White's claim was barred by the inherent risks of skiing statute. The trial court agreed and dismissed White's claim on that basis.

[9] Solitude correctly points out that we may affirm the judgment on any ground, even one not relied upon by the trial court. *See West v. Thomson Newspapers,* 872 P.2d 999, 1012 n. 22 (Utah 1994); *Higgins v. Salt Lake County,* 855 P.2d 231, 241 (Utah 1993); *Hill v. Seattle First Nat'l Bank,* 827 P.2d 241, 246 (Utah 1992). "However, any rationale for affirming a decision must find support in the record." *Hill,* 827 P.2d at 246. While the record as it presently stands contains little evidence of causation, it appears that there was not a sufficient opportunity for the record to be fully developed on this issue. Solitude moved for summary judgment solely on the basis of the inherent risks of skiing statute. In responding to Solitude's motion, White was not obligated to raise a material issue of fact on the separate issue of causation. Indeed, Solitude's motion failed to put White on notice that causation was at issue. White, therefore, may not have introduced all of the causation evidence available to him when the trial court ruled on Solitude's motion.

The record gives some indication that this was the case. Following the entry of judgment, White moved for relief from judgment or order pursuant to rule 60(b)(7) of the Utah Rules of Civil Procedure. In this motion, White squarely addressed the causation issue for the first time. He attached to his motion a written statement taken by Solitude's ski patrol in which a witness to the accident claims that he saw White hit a "ledge" and go out of control. This "ledge" may be a reference to the cat track in question. If so, there is at least one witness who saw White hit the cat track. While this evidence is slim and does not conclusively establish causation, it may be sufficient to controvert Solitude's claim that White never came in contact with the cat track.[FN7] Thus, while we agree that the record as it presently stands contains little evidence of causation, it appears that Solitude's motion did not put causation at issue, thereby preventing full development of the record. The record as it presently stands does not support dismissing White's claim for failure to demonstrate causation.

> FN7. We emphasize that in discussing this statement, we do not pass on its admissibility or reliability. Such decisions lie within the province of the trial court and trier of fact. Nevertheless, our reference to the document is appropriate to demonstrate that the record on causation may not have been fully developed. Ironically, Solitude urges us to disregard this document because it was not submitted to the trial court or made part of the record. In essence, Solitude asks us to affirm summary judgment on an issue not raised before the trial court and, at the same time, refuse to consider potentially relevant evidence because it was not presented to the trial court, apparently because Solitude failed to raise the

issue in its original motion.

In conclusion, although we have some doubt as to whether White will be able to convince a trier of fact that he should prevail, the procedural posture of this case requires that we resolve this doubt in White's favor. We therefore reverse the grant of summary judgment and remand to the trial court for *1377 further proceedings.[FN8]

FN8. In light of our disposition of this case, it is unnecessary to reach the constitutional issues raised by White.

STEWART, Associate C.J., and HOWE, J., concur.

ZIMMERMAN, Chief Justice, concurring:

I concur in the majority opinion. I may not agree with *Clover v. Snowbird Ski Resort*, 808 P. 2d 1037 (Utah 1991), a decision in which I did not participate, but it was decided by the highest court of this state and the construction it gave to the inherent risks of skiing statute is the law in Utah. No new facts relevant to the correctness of that decision have come to light since it was handed down. If the legislature disagrees with *Clover* ' s construction of the inherent risks of skiing statute, it can change it, but we should leave the matter where it lies. Justice Russon's suggestions to the contrary notwithstanding, this case cannot be legitimately analogized to *State v. Menzies.* The only basis Justice Russon offers for overruling *Clover* is that he disagrees with it. That certainly does not satisfy *Menzies'* careful requirements for overruling prior case law.

RUSSON, Justice, dissenting:

I respectfully dissent. The majority opinion contradicts the plain language of the inherent risks of skiing statute, Utah Code Ann. §§ 78-27-51 to -54 (1992), which clearly and unambiguously states that any danger or condition integral to the sport of skiing is "as a matter of law" an inherent risk of skiing and that no skier may recover from any ski area operator for injury resulting from any of the inherent risks of skiing.

Statutes should generally be construed according to their plain language. *Brinkerhoff v. Forsyth*, 779 P.2d 685, 686 (Utah 1989); *accord Allisen v. American Legion Post No. 134*, 763 P.2d 806, 809 (Utah 1988). Moreover, "[u]nambiguous language in the statute may not be interpreted to contradict its plain meaning." *Bonham v. Morgan*, 788 P.2d 497, 500 (Utah 1989). In accordance with these principles, when reviewing a statute, we "assume[ ] that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." *Savage Indus., Inc. v. Utah State Tax Comm'n*, 811 P.2d 664, 670 (Utah 1991). Put differently, "[w]e must be guided by the law as it is.... When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction." *Hanchett v. Burbidge*, 59 Utah 127, 135, 202 P. 377, 379-80 (1921). Thus, when "statutory language is plain and unambiguous, this Court will not look beyond the same to divine legislative intent." *Brinkerhoff*, 779 P.2d at 686; *accord Allisen*, 763 P.2d at 809.

The inherent risks of skiing statute is plain and unambiguous. It begins by clearly stating its purpose:

> It is the purpose of this act ... to clarify the law in relation to skiing injuries and the risks inherent in the sport, 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.

Utah Code Ann. § 78-27-51 (1992) (emphasis added). The clear intent of this section is to enumerate certain risks inherent in the dangerous sport of skiing and, *as a matter of law,* to prohibit skiers injured as a result of such risks from recovering from ski area operators.

In defining these inherent risks of skiing, the statute provides:

> "Inherent risks 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 *1378 growth, rocks, stumps, impacts with lift towers and other structures and their components; collisions with other skiers; and a skier's

failure to ski within his own ability.

Utah Code Ann. § 78-27-52(1) (1992). According to the unambiguous language of the statute as a whole, (1) any danger or condition integral to the sport of skiing is *as a matter of law* an inherent risk of skiing and (2) a skier cannot recover from ski area operators for injuries resulting from the inherent risks of skiing.

While the majority has correctly applied the law as set forth in *Clover v. Snowbird Ski Resort*, 808 P. 2d 1037 (Utah 1991), I believe that *Clover* is clearly wrong and constitutes nothing more than judicial legislation. It should be abandoned as precedent.[FN1] The inherent risks of skiing statute does not, as *Clover* and the majority state, categorize inherent risks, nor does it establish a "reasonable care" standard for certain types of inherent risks. To the contrary, it plainly states that "*no* skier may make *any* claim against, or recover from, *any* ski area operator for injury resulting from *any* of the inherent risks of skiing." Utah Code Ann. § 78-27-53 (1992) (emphasis added). Rather than misconstruing the plain language of the inherent risks of skiing statute in order to formulate a judicially prescribed result, this court should apply the plain language of that statute to the facts in this case and leave the possible infirmities of the statute for the legislature to remedy.[FN2]

FN1. Although I fully understand the principle of stare decisis and the necessity thereof, it should not be adhered to when the rule established by a case was originally erroneous and more good than harm will come from departing from precedent. *State v. Menzies*, 235 Utah Adv.Rep. 23, 25 & n. 3 --- P.2d ----, ---- & n. 3 (March 29, 1994). As Justice Felix Frankfurter aptly noted, "[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable...." *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940). In keeping with this rule, this court has "not hesitated ... to reverse case law when we are firmly convinced that we have erred earlier." *Staker v. Ainsworth*, 785 P.2d 417, 424 n. 5 (Utah 1990); *see, e.g., Menzies*, 235 Utah Adv.Rep. at 25; --- P.2d at ---- *State v. Hansen*, 734 P.2d 421, 427 (Utah 1986); *State v. Tuttle*, 713 P.2d 703, 704 (Utah 1985). *Clover* is just such a case.

FN2. While such an approach may occasionally result in decisions that seem harsh or unfair, it is for the legislature, not the judiciary, to remedy such results by amending or repealing the statute. Indeed, "[i]f the act is unjust, amendments to correct the inequities should be made by the legislature and not by judicial interpretation." *Masich v. United States Smelting, Ref. & Mining Co.*, 113 Utah 101, 126, 191 P.2d 612, 625, *appeal dismissed*, 335 U.S. 866, 69 S.Ct. 138, 93 L.Ed. 411 (1948); *see also Condemarin v. University Hosp.*, 775 P.2d 348, 377 (Utah 1989) (Hall, C.J., dissenting) ("[I]t is not our prerogative to question the wisdom, social desirability, or public policy underlying a given statute. Those are matters left exclusively to the legislature's judgment and determination."); *Utah Mfrs.' Ass'n v. Stewart*, 82 Utah 198, 204, 23 P.2d 229, 232 (1933) ("[F]airly debatable questions as to reasonableness, wisdom, or propriety [of legislative action] are not for the courts but for the Legislature."); *accord Salt Lake City v. Ohms*, No. 930580, slip op. at n. 14, 1994 WL 457292, 881 P.2d 844, ---- n. 14 (Utah August 18, 1994).

In the case before us, White was injured while skiing down Paradise ski trail, an ungroomed, mogul-filled run designated as "most difficult." The accident occurred in an area where Wanderer cat track crossed Paradise trail. It is undisputed that cat tracks are a common and necessary feature at ski resorts. Not only, as the majority notes, do they allow an easier way down the mountain for novice skiers and provide snow grooming equipment access to upper portions of the mountain, but they also are used by skilled skiers as routes from trail to trail. As such, they are integral to the sport of skiing.

Cat tracks, like moguls, lift towers, bare spots, rocks, changing weather, snow or ice conditions, variations or steepness in terrain, and surface or subsurface conditions, are often out of the skier's sight until immediately

approached. However, these are exactly the sort of risks that the statute contemplates in stating that "no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing." Utah Code Ann. § 78-27-53 (1992). Since White's injuries were a result of an "inherent risk[ ] of skiing," *1379section 78-27-53 bars his claim against defendants.

The trial court correctly granted summary judgment on the ground that all the facts indicated that White's conduct came within the inherent risks of skiing statute.[FN3] Thus, for the reasons stated above, I would affirm the trial court's grant of summary judgment. Accordingly, I dissent.[FN4]

FN3. Moreover, the constitutional argument made by White on appeal is not properly before this court. White first argued his constitutional argument to the trial court only after it had granted summary judgment in favor of defendants and he had filed his notice of appeal of that judgment, raising it in his motion for relief from summary judgment filed pursuant to Utah Rule of Civil Procedure 60(b). Although the trial court properly retained jurisdiction to hear White's 60(b) motion, *see White v. State*, 795 P.2d 648, 649-50 (Utah 1990); *Baker v. Western Sur. Co.*, 757 P.2d 878, 880 (Utah Ct.App.1988), its denial of that motion was never appealed. Therefore, it would be improper to address White's constitutional argument on this appeal.

FN4. In his concurring opinion, Chief Justice Zimmerman states that because *Clover* was decided by the highest court of this state, it is the law in Utah and thus "we should leave the matter where it lies." It should be noted, however, that although the Chief Justice advocates strict adherence to the doctrine of stare decisis in this case, this court has not hesitated to overrule prior precedent in other less-compelling cases. *See, e.g., Menzies,* 235 Utah Adv.Rep. at 25, --- P.2d at ---- (overruling twenty years of supreme court precedent, based in part on court's assertion that its "rule does not work very well"); *Hansen,* 734 P.2d at 427 (overruling supreme court precedent because it misconstrued statute and "the decision [was] a recent one"); *Tuttle,* 713 P.2d at 704 (overruling supreme court precedent because its reasoning was "unpersuasive").

In an apparent attempt to offer a solution to *Clover*'s misguided decision, the Chief Justice states that if the legislature disagrees with *Clover*'s interpretation of the inherent risks of skiing statute, then the legislature can amend the statute. However, given the unequivocal nature of the language "*no* skier may make *any* claim against, or recover from, *any* ski area operator for injury resulting from *any* of the inherent risks of skiing," Utah Code Ann. § 78-27-53 (1992) (emphasis added), no amendment by the legislature could make the statute any clearer than it is now.

The Chief Justice also asserts that the only basis I offer for overruling *Clover* is that I disagree with it. Of course I disagree with it; that is why I dissent. However, even a cursory review of my dissent reveals that it is firmly based on the fact that *Clover* contradicts the plain language of the statute.

Utah,1994.

White v. Deseelhorst
879 P.2d 1371
END OF DOCUMENT

Exhibit C

C

West's Utah Code Annotated Currentness

Title 78B. Judicial Code
Chapter 4. Limitations on Liability
Part 4. Inherent Risks of Skiing
→→ § 78B-4-401. 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, [FN1] therefore, to clarify the law in relation to skiing injuries and the risks inherent in that sport, 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.

CREDIT(S)

[FN1] Laws 1979, c. 166 enacted former §§ 78-27-51 to 78-27-54.

HISTORICAL AND STATUTORY NOTES

Prior Laws:

Laws 1979, c. 166, § 1.

C. 1953, § 78-27-51.

LAW REVIEW AND JOURNAL COMMENTARIES

The slope of Utah ski law. David S. Kottler, 23 Utah B.J. 10 (January/February 2010).

Utah's Inherent Risks of Skiing Act: Avalanche from Capitol Hill. Faber, 1980 Utah L. Rev. 355 (1980).

RESEARCH REFERENCES

Treatises and Practice Aids

American Law of Products Liability 3d § 102:3, Assumption of Risk; Inherent Risk.

NOTES OF DECISIONS

Purpose 1

Formerly cited as UT ST § 78-27-51

Release and indemnify agreements 2
1. Purpose

Central purpose of Inherent Risks of Skiing Act is to permit ski resort owners to purchase insurance at affordable rates, by clarifying those inherent risks of skiing to which liability will not attach; by protecting ski resorts from liability due to the inherent risks of skiing, Act allows resorts to take responsibility for noninherent risks, such as a resort's negligence, by purchasing insurance. Rothstein v. Snowbird Corp., 2007, 175 P.3d 560, 593 Utah Adv. Rep. 26, 2007 UT 96. Public Amusement And Entertainment 137

2. Release and indemnify agreements

Release and indemnify agreements signed by skier, waiving all claims against ski resort and assuming all risks of injury including risks created by resort's negligence, were unenforceable as contrary to public policy expressed in the Inherent Risks of Skiing Act, and thus did not bar skier's action against resort for injuries he suffered in collision with retaining wall that was allegedly hidden from view due to the resort's negligence. Rothstein v. Snowbird Corp., 2007, 175 P.3d 560, 593 Utah Adv. Rep. 26, 2007 UT 96. Public Amusement And Entertainment 131

U.C.A. 1953 § 78B-4-401, UT ST § 78B-4-401

Current through 2011 Second Special Session.

END OF DOCUMENT

Exhibit D

C

West's Utah Code Annotated Currentness

Title 78B. Judicial Code
Chapter 4. Limitations on Liability
Part 4. Inherent Risks of Skiing
§ 78B-4-402. Definitions

As used in this part [FN1]:

(1) "Inherent risks of skiing" means those dangers or conditions which are an integral part of the sport of recreational, competitive, or professional skiing, including, but not limited to:

(a) changing weather conditions;

(b) snow or ice conditions as they exist or may change, such as hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, or machine-made snow;

(c) surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, streambeds, cliffs, trees, and other natural objects;

(d) variations or steepness in terrain, whether natural or as a result of slope design, snowmaking or grooming operations, and other terrain modifications such as terrain parks, and terrain features such as jumps, rails, fun boxes, and all other constructed and natural features such as half pipes, quarter pipes, or freestyle-bump terrain;

(e) impact with lift towers and other structures and their components such as signs, posts, fences or enclosures, hydrants, or water pipes;

(f) collisions with other skiers;

(g) participation in, or practicing or training for, competitions or special events; and

(h) the failure of a skier to ski within the skier's own ability.

(2) "Injury" means any personal injury or property damage or loss.

(3) "Skier" means any person present in a ski area for the purpose of engaging in the sport of skiing, nordic, freestyle, or other types of ski jumping, using skis, sled, tube, snowboard, or any other device.

(4) "Ski area" means any area designated by a ski area operator to be used for skiing, nordic, freestyle, or other type of ski jumping, and snowboarding.

(5) "Ski area operator" means those persons, and their agents, officers, employees or representatives, who operate a ski area.

Formerly cited as UT ST § 78-27-52

CREDIT(S)

[FN1] Laws 1979, c. 166 enacted former §§ 78-27-51 to 78-27-54.

Prior Laws:

Laws 1979, c. 166, § 2.

Laws 1993, c. 86, § 1.

Laws 2006, c. 126, § 1.

C. 1953, § 78-27-52.

NOTES OF DECISIONS

1. Inherent risks

If risks which skiers do not wish to confront, such as bare spots, forest growth, rocks, and structures, can be eliminated by reasonable care, such risks do not constitute "inherent risks of skiing" under statute precluding negligence claims against ski resort operators based on such risks; if risks cannot be eliminated by use of reasonable care, statute requires operator to warn patrons of risks. U.C.A.1953, 78-27-52(1), 78-27-53. White v. Deseelhorst, 1994, 879 P.2d 1371. Public Amusement And Entertainment 137

Inherent risks of skiing statute relieves ski resorts of any obligation to eliminate risks that skiers would "wish to confront," including steep grades, powder, and mogul runs. U.C.A.1953, 78-27-52(1). White v. Deseelhorst, 1994, 879 P.2d 1371. Public Amusement And Entertainment 137

2. Nonspecified hazards

Statutory list of factors in definition of "inherent risks of skiing," for purpose of statute prohibiting negligence claims against ski area operators based upon such risks, is nonexclusive, and statute contemplates inclusion of hazards other than those specifically listed. U.C.A.1953, 78-27-52(1). White v. Deseelhorst, 1994, 879 P.2d 1371. Public Amusement And Entertainment 137

3. Risk causing injury

To determine whether inherent risks of skiing statute applies to bar negligence claim against ski resort operator, court must decide whether particular risk which allegedly caused injury was integral part or essential characteristic of sport of skiing; if not, statute does not apply. U.C.A.1953, 78-27-52(1), 78-27-53. White v. Deseelhorst, 1994, 879 P.2d 1371. Public Amusement And Entertainment 137

Exhibit E

1993 Utah Laws Ch. 86 (S.B. 249)

UTAH 1993 SESSION LAWS
50TH LEGISLATURE, 1993 GENERAL SESSION
1793

Additions are indicated by <<+ Text +>>; deletions by
<<- Text ->>. Changes in tables are made but not highlighted.

Ch. 86
S.B. 249
JUDICIAL CODE—INHERENT RISK OF SKIING—SKI JUMPING, SNOWBOARDING

AN ACT RELATING TO THE JUDICIAL CODE; EXTENDING PROTECTIONS REGARDING THE INHERENT RISK OF SKIING TO SKI JUMPING AND SNOWBOARDING.

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 78–27–52, Utah Code Annotated 1953, as enacted by Chapter 166, Laws of Utah 1979, is amended to read:

<< UT ST § 78–27–52 >>

78–27–52. Inherent risks of skiing—Definitions.

As used in this act:
(1) "Inherent risks of skiing" means those dangers or conditions which are an integral part of the <<-sport->> <<+sports+>> of skiing, <<+ snowboarding, and ski jumping,+>> including, but not limited to: changing weather conditions, variations or steepness in terrain; snow or ice conditions; surface or subsurface conditions such as bare sports, 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 <<+ or jump+>> within <<-his->> <<+the skier's+>> own ability.
(2) "Injury" means any personal injury or property damage or loss.
(3) "Skier" means any person present in a ski area for the purpose of engaging in the sport of skiing<<+, nordic, freestyle, or other types of ski jumping, and snowboarding+>>.
(4) "Ski area" means any area designated by a ski area operator to be used for skiing<<+, nordic, freestyle, or other type of ski jumping, and snowboarding+>>.
(5) "Ski area operator" means those persons, and their agents, officers, employees or representatives, who operate a ski area.

Approved March 12, 1993.

UT LEGIS 86 (1993)

UT LEGIS 86 (1993)

F

Exhibit F

2006 Utah Laws Ch. 126 (S.B. 135)

UTAH 2006 SESSION LAWS
56th LEGISLATURE, 2006 GENERAL SESSION
2155

Additions are indicated by **Text**; deletions by ~~Text~~. Changes in tables are made but not highlighted.

Ch. 126
S.B. 135
INHERENT RISK OF SKIING AMENDMENTS

This bill expands the definition of the inherent risk of skiing to include competitive and professional skiing and more fully describes the hazards associated with changing weather and snow conditions, surface and subsurface conditions, variations in different terrain, and the potential impact with towers and other structures. This bill defines skier as a person who, within a ski area, uses skis, sled, tube, snowboard, or any other device to engage in the sport of skiing; defines the sport of skiing to include participation in, or practicing or training for, competitions or special events; more fully describes the inherent hazards of changing weather and snow conditions by identifying different types of snow conditions such as hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, and machine-made snow; more fully describes the inherent hazards of surface and subsurface conditions by referencing cliffs, trees, streambeds, and other natural objects; and more fully describes variations and steepness in terrain to include snowmaking and grooming operations and terrain parks and features, such as jumps, rails, fun boxes, and other constructed and natural features, such as half pipes, quarter pipes, and freestyle-bump terrain.

Utah Code Sections Affected:

AMENDS:

78–27–52, as last amended by Chapter 86, Laws of Utah 1993

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 78–27–52 is amended to read:

<< UT ST § 78–27–52 >>

§ 78–27–52. Inherent risks of skiing—Definitions

As used in this act:
(1) "Inherent risks of skiing" means those dangers or conditions which are an integral part of the ~~sports of~~ **sport of recreational, competitive, or professional** skiing, ~~snowboarding, and ski jumping,~~ including, but not limited to:
(a) changing weather conditions~~, variations or steepness in terrain~~;

(b) snow or ice conditions~~;~~ **as they exist or may change, such as hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, or machine-made snow;**
(c) surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, **streambeds, cliffs, trees, and other natural objects;**
(d) variations or steepness in terrain, whether natural or as a result of slope design, snowmaking or grooming operations, and other terrain modifications such as terrain parks, and terrain features such as jumps, rails, fun boxes, and all other constructed and natural features such as half pipes, quarter pipes, or freestyle-bump terrain;
(e) impact with lift towers and other structures and their components~~;~~ **such as signs, posts, fences or enclosures, hydrants, or water pipes;**
(f) collisions with other skiers; ~~and a skier's failure to ski or jump~~
(g) participation in, or practicing or training for, competitions or special events; and
(h) the failure of a skier to ski within the skier's own ability.
(2) "Injury" means any personal injury or property damage or loss.
(3) "Skier" means any person present in a ski area for the purpose of engaging in the sport of skiing, nordic, freestyle, or other types of ski jumping, ~~and snowboarding~~ **using skis, sled, tube, snowboard, or any other device.**
(4) "Ski area" means any area designated by a ski area operator to be used for skiing, nordic, freestyle, or other type of ski jumping, and snowboarding.
(5) "Ski area operator" means those persons, and their agents, officers, employees or representatives, who operate a ski area.

Effective May 1, 2006.

Approved March 13, 2006

UT LEGIS 126 (2006)

UT LEGIS 126 (2006)

END OF DOCUMENT

Exhibit G

C

West's Utah Code Annotated Currentness

Title 78B. Judicial Code
Chapter 4. Limitations on Liability
Part 4. Inherent Risks of Skiing

→→ § 78B-4-403. Bar against claim or recovery from operator for injury from risks inherent in sport

Notwithstanding anything in Sections 78B-5-817 through 78B-5-823 to the contrary, no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing.

CREDIT(S)

HISTORICAL AND STATUTORY NOTES

Prior Laws:

Laws 1979, c. 166, § 3.

Laws 1986, c. 199, § 8.

C. 1953, § 78-27-53.

LAW REVIEW AND JOURNAL COMMENTARIES

Utah's Inherent Risks of Skiing Act: Avalanche from Capitol Hill. Faber, 1980 Utah L. Rev. 355 (1980).

LIBRARY REFERENCES

Public Amusement and Entertainment ⚿95, 127.

Westlaw Topic No. 315T.
C.J.S. Entertainment and Amusement; Sports §§ 99, 130 to 132.

NOTES OF DECISIONS

1. In general

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. Clover v. Snowbird Ski Resort, 1991, 808 P.2d 1037. Public Amusement And Entertainment 137

2. Reasonable care

If risks which skiers do not wish to confront, such as bare spots, forest growth, rocks, and structures, can be eliminated by reasonable care, such risks do not constitute "inherent risks of skiing" under statute precluding negligence claims against ski resort operators based on such risks; if risks cannot be eliminated by use of reasonable care, statute requires operator to warn patrons of risks. U.C.A.1953, 78-27-52(1), 78-27-53. White v. Deseelhorst, 1994, 879 P.2d 1371. Public Amusement And Entertainment 137

3. Breach of duty

Utah Inherent Risks of Skiing Act does not bar suit by ski resort operator's patron where operator has breached legal duty owed to patron; legitimate claims of negligence against ski resort are not prohibited by Act. U.C.A.1953, 78-27-52(1), 78-27-53, 78-27-54. Ghionis v. Deer Valley Resort Co., Ltd., 1993, 839 F.Supp. 789. Public Amusement And Entertainment 137

4. Determination of bar

To determine whether inherent risks of skiing statute applies to bar negligence claim against ski resort operator, court must decide whether particular risk which allegedly caused injury was integral part or essential characteristic of sport of skiing; if not, statute does not apply. U.C.A.1953, 78-27-52(1), 78-27-53. White v. Deseelhorst, 1994, 879 P.2d 1371. Public Amusement And Entertainment 137

5. Summary judgment

Material issue of fact as to whether ski resort operator could have alleviated hazard of unmarked "cat track" on blind side of ridge through exercise of ordinary care precluded summary judgment for operator in negligence action by injured skier. U.C.A.1953, 78-27-53. White v. Deseelhorst, 1994, 879 P.2d 1371. 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). Clover v. Snowbird Ski Resort, 1991, 808 P.2d 1037. 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). Clover v. Snowbird Ski Resort, 1991, 808 P.2d 1037. 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). Clover v. Snowbird Ski Resort, 1991, 808 P.2d 1037. Judgment 181(33)

U.C.A. 1953 § 78B-4-403, UT ST § 78B-4-403

Exhibit H

C

West's Utah Code Annotated Currentness

Title 78B. Judicial Code
Chapter 4. Limitations on Liability
Part 4. Inherent Risks of Skiing
→→ § 78B-4-404. Trail boards listing inherent risks and limitations on liability

Ski area operators shall 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 part.

CREDIT(S)

HISTORICAL AND STATUTORY NOTES

Prior Laws:

Laws 1979, c. 166, § 4.

C. 1953, § 78-27-54.

LIBRARY REFERENCES

Public Amusement and Entertainment ⚿95, 127.

Westlaw Topic No. 315T.
C.J.S. Entertainment and Amusement; Sports §§ 99, 130 to 132.

NOTES OF DECISIONS

Skiers in instructional programs 1

1. Skiers in instructional programs

Despite posted "trail boards," ski resort patron's claim against resort operator, that her ski instructor negligently failed to warn her about spring skiing conditions, was not barred by Utah Inherent Risks of Skiing Act, as duty owed by resort to students enrolled in its instructional program was significantly higher than duty owed to nonstudent patron. U.C.A.1953, 78-27-54. Ghionis v. Deer Valley Resort Co., Ltd., 1993, 839 F.Supp. 789. Public Amusement And Entertainment ⚿137

U.C.A. 1953 § 78B-4-404, UT ST § 78B-4-404

Current through 2011 Second Special Session.

Formerly cited as UT ST § 78-27-54

END OF DOCUMENT

Exhibit I

175 P.3d 560, 593 Utah Adv. Rep. 26, 2007 UT 96

(Cite as: 175 P.3d 560)

Supreme Court of Utah.

William ROTHSTEIN, Plaintiff and Appellant,
v.
SNOWBIRD CORPORATION, a Utah corporation, Defendant and Appellee.
No. 20060158.

Dec. 18, 2007.

Background: Skier brought action against ski resort after he was injured in collision with a retaining wall while skiing at resort. The Third District Court, Salt Lake, Anthony B. Quinn, J., entered summary judgment in favor of resort, and skier appealed.

Holding: The Supreme Court, Nehring, J., held that release and indemnify agreements signed by skier, waiving all claims against ski resort and assuming all risks of injury including risks created by resort's negligence, were unenforceable as contrary to public policy.

Vacated.

Wilkins, J., filed a dissenting opinion in which Durrant, J., joined.

West Headnotes

[1] Appeal and Error 30 ⚿934(1)

30 Appeal and Error

30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In general. Most Cited Cases
On review of a district court's grant of summary judgment, the Supreme Court reviews the facts and their reasonable inferences in a manner most favorable to the nonmoving party.

[2] Release 331 ⚿25

331 Release

331II Construction and Operation
331k25 k. General rules of construction. Most Cited Cases
Releases that are not sufficiently clear and unambiguous cannot be enforced.

[3] Release 331 ⚿1

331 Release

331I Requisites and Validity
331k1 k. Nature and requisites in general. Most Cited Cases
Release 331 ⚿23

331 Release

331I Requisites and Validity
331k23 k. Effect of invalidity. Most Cited Cases
Releases that offend public policy cannot be enforced.

[4] Public Amusement and Entertainment 315T ⚿131

315T Public Amusement and Entertainment

315TIII Personal Injuries
315TIII(B) Defenses, Mitigating Circumstances and Statutory Limitations of Liability
315Tk129 Pre-Injury Releases
315Tk131 k. Operation and effect of statutory provisions. Most Cited Cases
Release and indemnify agreements signed by skier, waiving all claims against ski resort and assuming all risks of injury including risks created by resort's negligence, were unenforceable as contrary to public policy expressed

in the Inherent Risks of Skiing Act, and thus did not bar skier's action against resort for injuries he suffered in collision with retaining wall that was allegedly hidden from view due to the resort's negligence. West's U.C.A. § 78–27–51.

[5] Public Amusement and Entertainment 315T ⇐137

315T Public Amusement and Entertainment

315TIII Personal Injuries

315TIII(B) Defenses, Mitigating Circumstances and Statutory Limitations of Liability

315Tk133 Statutory Limitations of Liability

315Tk137 k. Skiing and snowboarding. Most Cited Cases

Central purpose of Inherent Risks of Skiing Act is to permit ski resort owners to purchase insurance at affordable rates, by clarifying those inherent risks of skiing to which liability will not attach; by protecting ski resorts from liability due to the inherent risks of skiing, Act allows resorts to take responsibility for noninherent risks, such as a resort's negligence, by purchasing insurance. West's U.C.A. § 78–27–51.

***560** Jesse C. Trentadue, Salt Lake City, for plaintiff.

Gordon Strachan, Kevin J. Simon, Park City, for defendant.

NEHRING, Justice:

¶ 1 William Rothstein, an expert skier, sustained injuries when he collided with a retaining wall while skiing at Snowbird Ski Resort. He sued Snowbird, claiming the resort's***561** negligence caused his injuries. The district court granted Snowbird's motion for summary judgment and dismissed Mr. Rothstein's ordinary negligence claim. The district court agreed with Snowbird that Mr. Rothstein had surrendered his right to recover damages for Snowbird's ordinary negligence when he became a party to two agreements releasing Snowbird from liability for its acts of negligence. In this appeal, Mr. Rothstein challenges the enforceability of the releases and the district court's summary judgment based on them. We hold that the releases are contrary to the public policy of this state and are, therefore, unenforceable. Accordingly, we vacate the district court's grant of summary judgment in favor of Snowbird.

BACKGROUND

[1] ¶ 2 When we review a district court's grant of summary judgment, as in this case, we review the facts and their reasonable inferences in a manner most favorable to the nonmoving party. *See, e.g.*, *Progressive Cas. Ins. Co. v. Ewart*, 2007 UT 52, ¶ 2, 167 P.3d 1011. We present the facts surrounding Mr. Rothstein's injury in this light.

¶ 3 As he was descending Snowbird's Fluffy Bunny run, Mr. Rothstein collided with a retaining wall constructed of stacked railroad ties and embedded partially in the mountain. The collision left Mr. Rothstein with broken ribs, an injured kidney, a bruised heart, a damaged liver, and a collapsed lung. At the time of the accident, a light layer of snow camouflaged the retaining wall from Mr. Rothstein's view. As photographs and the alleged admission of a resort official suggest, the retaining wall was unmarked and no measures had been taken to alert skiers to its presence. Although Snowbird had placed a rope line with orange flagging near the wall, there remained a large gap between the end of the rope and a tree, which Mr. Rothstein incorrectly understood indicated an entrance to the Fluffy Bunny run. Mr. Rothstein filed suit against Snowbird for its ordinary and gross negligence.[FN1] Snowbird defended itself by asserting that Mr. Rothstein had waived his ability to sue Snowbird for its ordinary negligence when he purchased two resort passes that released the resort from liability for its ordinary negligence.

> FN1. Mr. Rothstein's initial complaint alleged only ordinary negligence. The district court permitted him to amend his complaint to incorporate a gross negligence claim after it had granted Snowbird's motion for summary judgment on Mr. Rothstein's ordinary negligence cause of action.

¶ 4 At the time he was injured, Mr. Rothstein held a season pass to Snowbird and a Seven Summits Club membership which entitled him to bypass lift lines for faster access to the slopes. In order to obtain these benefits, Mr. Rothstein signed two release and indemnify

agreements. The first agreement provided:

> I hereby *waive all of my claims,* including claims for personal injury, death and property damage, against Alta and Snowbird, their agents and employees. I *agree to assume* all risks of personal injury, death or property damage associated with skiing ... or *resulting from the fault of Alta or Snowbird, their agents or employees.* I *agree to hold harmless and indemnify* Alta and Snowbird ... from all of my claims, *including those caused by the negligence or other fault of Alta or Snowbird, their agents and employees*
>
> (emphasis in original). The second agreement stated:
>
> In consideration of my use of the Snowbird Corporation (Snowbird) ski area and facilities, I agree to *assume and accept all risks of injury to myself and my guests, including the inherent risk of skiing, the risks associated with the operation of the ski area and risks caused by the negligence of Snowbird,* its employees, or agents. I *release and agree to indemnify Snowbird,* all landowners of the ski area, and their employees and agents from all claims for injury or damage arising out of the operation of the ski area or my activities at Snowbird, whether such injury or damage arises from the risks of skiing or from any ***562** other cause *including the negligence of Snowbird, its employees and agents*
>
> (emphasis in original).

¶ 5 Citing the agreements, the district court granted summary judgment in favor of Snowbird on Mr. Rothstein's ordinary negligence claim. (Mr. Rothstein later voluntarily moved to dismiss his gross negligence claim without prejudice.) The issue before us is whether the district court correctly granted Snowbird summary judgment on Mr. Rothstein's ordinary negligence claim on the basis of the existence of the release and indemnify agreements.

DISCUSSION

[2][3] ¶ 6 Preinjury releases from liability for one's negligence pit two bedrock legal concepts against one another: the right to order one's relationship with another by contract and the obligation to answer in damages when one injures another by breaching a duty of care. *E.g., Berry v. Greater Park City Co.*, 2007 UT 87, ¶ 12, 171 P.3d 442. We have joined the majority of jurisdictions in permitting people to surrender their rights to recover in tort for the negligence of others. *Id.* ¶ 15. We have made it clear throughout our preinjury release jurisprudence, however, that contract cannot claim victory over tort in every instance. We have indicated that releases that are not sufficiently clear and unambiguous cannot be enforced. *Hawkins v. Peart*, 2001 UT 94, ¶ 9 n. 3, 37 P.3d 1062. We have also indicated that we would refuse to enforce releases that offend public policy. *Id.* ¶ 9. We do not explore the clarity with which Snowbird communicated to Mr. Rothstein its intention to release itself of liability for its negligence because we conclude that the releases offend the public policy of this state as articulated by the Legislature.

¶ 7 We first insisted that preinjury releases be compatible with public policy a century ago when we affirmed Christine Pugmire's jury verdict awarding her damages for injuries she sustained when a locomotive ran into the railroad car in which she lived and worked as a cook.[FN2] *Pugmire v. Or. Short Line R.R. Co.*, 33 Utah 27, 92 P. 762, 763, 767 (1907). Mrs. Pugmire had signed a release absolving the railroad from liability for any injuries she might sustain. We affirmed the trial court's refusal to instruct the jury that Mrs. Pugmire could be bound by the release, noting that such master-servant agreements "are held to be void ... [because] they are against public policy." *Id.* at 765.

> FN2. Mrs. Pugmire worked in the railroad car with her husband. The defendant railroad attempted to escape liability by claiming that only Mr. Pugmire was its employee. (Of course, this case predated the enactment of Utah's Workers' Compensation Act by a decade.) In testimony that stands out as an artifact of a bygone era of gender roles, a railroad witness sabotaged this defense when he told the jury that Mr. Pugmire's duties included cooking for the train crew. As it happened, Mr. Pugmire could not cook, but "it was taken for granted that [Mrs. Pugmire] could cook and would assist in the work; and that was why the wife was permitted to

> go." *Pugmire v. Or. Short Line R.R. Co.*, 33 Utah 27, 92 P. 762, 764 (1907) (internal quotation marks omitted).

¶ 8 By the time it was adopted within the Restatement of Torts in 1965, the principle that the interests of public policy could supplant the interests of contract had acquired universal acceptance. *See, e.g., Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 90, 75 S.Ct. 629, 99 L.Ed. 911 (1955); *Am. S.S. Co. v. Great Lakes Towing Co.*, 333 F.2d 426, 428–29 (7th Cir.1964); *Mohawk Drilling Co. v. McCullough Tool Co.*, 271 F.2d 627, 633 (10th Cir.1959); *Gilpin v. Abraham*, 218 F.Supp. 414, 415 (E.D.Pa.1963). Section 496B of the Restatement (Second) of Torts states, "A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy." [FN3] Restatement (Second) of Torts § 496B (1965).

> FN3. This section of the Restatement is titled "Express Assumption of the Risk." Courts are wise to exercise caution whenever they encounter the term assumption of the risk. To many, it is a concept that had been wholly discredited with the arrival of comparative negligence. We spoke to the perils of falling prey to this overgeneralization in *Fordham v. Oldroyd*, 2007 UT 74, ¶¶ 9–14, 171 P.3d 411. Express assumption of the risk of the type addressed in section 496B is another species of the doctrine that coexists with comparative negligence. In *Jacobsen Construction Co. v. Structo–Lite Engineering, Inc.*, we noted,
>
> > An express assumption of risk involves a contractual provision in which a party expressly contracts not to sue for injury or loss which may thereafter be occasioned by the acts of another. We not only follow suit by refraining to include this form of assumption of risk in our discussion, but furthermore fail to see a necessity for including this form within assumption of risk terminology.
>
> 619 P.2d 306, 310 (Utah 1980).

***563** ¶ 9 Our recent encounters with preinjury releases have uniformly reaffirmed the public policy exception to the general rule that preinjury releases are enforceable. *See, e.g., Hawkins*, 2001 UT 94, ¶ 1, 37 P.3d 1062 (holding invalid as contrary to public policy a waiver of liability and an indemnity provision that an equestrian group required individuals to sign before riding horses).

¶ 10 Despite our willingness to invoke public policy as the justification for refusing to enforce certain preinjury releases, we are mindful of the caution with which we must proceed when contemplating this analytic approach. Ascertaining when a preinjury release sufficiently offends public policy to warrant stripping the release of its enforceability can be difficult. As the example of preinjury releases for negligence amply illustrates, the quest to identify good public policy in a particular instance often requires a court to account for two or more conflicting policies, each laudable, but none of whose claims on the good can be fully honored. Extracting public policy from statutes can be no less challenging. Moreover, in most instances, our proper role when confronted with a statute should be restricted to interpreting its meaning and application as revealed through its text. To pluck a principle of public policy from the text of a statute and to ground a decision of this court on that principle is to invite judicial mischief. Like its cousin legislative history, public policy is a protean substance that is too often easily shaped to satisfy the preferences of a judge rather than the will of the people or the intentions of the Legislature. We aptly noted the risks of relying on public policy rationales when we stated that " 'the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as a basis for judicial determinations, if at all, only with the utmost circumspection.' " *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1043 (Utah 1989) (quoting *Patton v. United States*, 281 U.S. 276, 306, 50 S.Ct. 253, 74 L.Ed. 854 (1930)). When, however, the Legislature clearly articulates public policy, and the implications of that public policy are unmistakable, we have the duty to honor those expressions of policy in our rulings. Such is the case here.

[4] ¶ 11 Seldom does a statute address directly the public policy relevant to the precise legal issue confronting a court. Here, no statute or other legislative pronouncement of public policy answers squarely the question of whether a preinjury release of a ski resort operator's negligence executed by a recreational skier is enforceable. Few legislative expressions of public policy speak more clearly to an issue, however, than the public policy rationale for Utah's Inherent Risks of Skiing Act, Utah Code Ann. §§ 78–27–51 to –54 (2002 & Supp.2007), speaks to preinjury releases for negligence.

¶ 12 Our confidence in defining the public policy that the Act was created to serve is enhanced by the fortuitous fact that the Utah Legislature introduced the substantive text of the Act with a statement of public policy. Section 78–27–51 states:

> 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, 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, ***564** no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks.

¶ 13 Read in its most restrictive sense, section 78–27–51 simply announces that it is the public policy of Utah to bar skiers from recovering from ski area operators for injuries resulting from the inherent risks of skiing, as enumerated in the Act. So limited, this pronouncement explains nothing that one could not deduce from the text of the Act itself which by its terms codifies this policy. Of equal or greater significance are legislative findings and expressions of public policy that bear on why it is important to identify the inherent risks of skiing and insulate ski area operators from liability for injury caused by them.

¶ 14 According to the Legislature, it was necessary to immunize ski area operators from liability for injuries caused by inherent risks because they were otherwise being denied insurance coverage or finding coverage too expensive to purchase. *See id.* The Legislature found that the ski industry insurance crisis imperiling the economic viability of ski area operators was more than an inconvenient product of market forces. It had become a matter of public policy concern meriting the intervention of public policy because, in the words of the Legislature, "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." *Id.* Thus, the ski industry's prominent role in Utah's economy justified, in the view of the Legislature, governmental intervention to ameliorate the untoward effects of the free market.

[5] ¶ 15 The central purpose of the Act, then, was to permit ski area operators to purchase insurance at affordable rates. The insulation of ski area operators from liability for injuries caused by inherent risks of skiing was a means to that end. There is no evidence that, in the absence of a perceived insurance crisis, the Legislature would have interceded on behalf of ski area operators merely to clarify the scope of duties owed skiers who used the ski facilities. The Act is most clearly not, as Snowbird contends, intended to protect ski area operators by limiting their liability exposure generally. It is rather a statute that is intended to clarify those inherent risks of skiing to which liability will not attach so that ski resort operators may obtain insurance coverage to protect them from those risks that are not inherent to skiing.

¶ 16 By expressly designating a ski area operator's ability to acquire insurance at reasonable rates as the sole reason for bringing the Act into being, the Legislature authoritatively put to rest the question of whether ski area operators are at liberty to use preinjury releases to significantly pare back or even eliminate their need to purchase the very liability insurance the Act was designed to make affordable. They are not. The premise underlying legislative action to make insurance accessible to ski area operators is that once the Act made liability insurance

affordable, ski areas would buy it to blunt the economic effects brought on by standing accountable for their negligent acts. The bargain struck by the Act is both simple and obvious from its public policy provision: ski area operators would be freed from liability for inherent risks of skiing so that they could continue to shoulder responsibility for noninherent risks by purchasing insurance. By extracting a preinjury release from Mr. Rothstein for liability due to their negligent acts, Snowbird breached this public policy bargain.

¶ 17 There is little to recommend Snowbird's rejoinder to this interpretation of the public policy provision of the Act. Snowbird contends that the purpose of the Act is to immunize ski area operators from liability generally. Since releases of liability also serve this end, Snowbird argues such releases are wholly compatible with the Act. This reasoning fails to account for the Legislature's inescapable public policy focus on insurance and ignores the reality that the Act's core purpose is not to advance the cause of insulating ski area operators from their negligence, but rather to make them better able to insure themselves against the risk of loss occasioned by their negligence.

¶ 18 The cases cited by Snowbird from other states that statutorily insulate the providers*565 of recreational activities from liability for inherent risks and permit preinjury releases lose their persuasive appeal on close examination. *Street v. Darwin Ranch, Inc.*, 75 F.Supp.2d 1296 (D.Wyo.1999); *Clanton v. United States*, 686 N.E.2d 896 (Ind.Ct.App.1997). Neither Wyoming's Recreation Safety Act, Wyo. Stat. Ann. §§ 1–1–121 to –123 (1995), nor the relevant Indiana statute, Ind.Code § 14–22–10–2 (1995), that inform these cases contain public policy sections or discuss the issue of insurance. Although both statutes contemplate the lack of liability associated with a variety of recreational activities, neither contains the kind of resounding public policy pronouncement present in Utah's Act.

¶ 19 Likewise unavailing is Snowbird's assertion that the freedom to enter into a preinjury release must be preserved in the absence of express legislative disapproval. Were we to adopt this reasoning, we would call into question the legitimacy of the entire body of our preinjury release jurisprudence inasmuch as we have never declared a preinjury release unenforceable with the aid of an express statutory mandate to do so. Nor would we be likely to encounter such an occasion. In the face of an express legislative prohibition of a preinjury release, a public policy analysis would hardly be necessary. Moreover, the Act's expression of public policy does not lend itself to the need for an additional statement concerning the status of preinjury releases. The legislative goal expressed in the Act of easing the task of ski area operators to insure themselves against noninherent risks creates the presumption that ski area operators will confront those risks through insurance and not by extracting contractual releases from skiers. In this setting, the burden shifts to ski area operators to persuade the Legislature to expressly preserve their rights to obtain and enforce preinjury releases.

CONCLUSION

¶ 20 Consistent with our duty to honor the Legislature's unambiguous expressions of public policy, we hold that the release and indemnify agreements Mr. Rothstein signed per Snowbird's request are contrary to the public policy of this state and are, therefore, unenforceable. We vacate the district court's grant of summary judgment and remand for proceedings consistent with this opinion.

¶ 21 Chief Justice DURHAM and Justice PARRISH concur in Justice NEHRING'S opinion.

WILKINS, Associate Chief Justice, dissenting:

¶ 22 I conclude that the preinjury releases at issue in this appeal are not, in and of themselves, contrary to the public policy of this state. Accordingly, I respectfully dissent from the majority opinion.

¶ 23 I agree with the majority that the central purpose of Utah's Inherent Risks of Skiing Act is to facilitate affordable insurance rates for ski area operators because of their direct impact on and contribution to the Utah economy. *See* Utah Code Ann. § 78–27–51 (2002 & Supp. 2007). I also agree that, in drafting the public policy statement that precedes the substantive text of the Act, the Legislature clearly intended to clarify the law and proscribe lawsuits against ski area operators for those risks that are inherent in skiing. My conformity with the

majority opinion, however, ends there.

¶ 24 Grounding their reasoning in the "legislative findings and expressions of public policy [in the Act]," *supra* ¶ 13, the majority ultimately concludes that the Legislature has "authoritatively put to rest the question of whether ski area operators [may] use preinjury releases to significantly pare back or ... eliminate their need to purchase ... liability insurance.... They [may] not." *Supra* ¶ 16. In other words, the majority reasons that because encouraging affordable insurance rates is the primary objective of the Act, once ski area operators obtain that insurance they may do no more to protect themselves. Consequently, my colleagues conclude, it violates this express public policy for ski area operators to attempt to limit their liability by seeking preinjury releases from patrons. Extracting such releases, according to the majority, "breache[s the] public policy bargain" made by the Act. *Supra* ¶ 16. I disagree.

***566** ¶ 25 When deciding questions of statutory interpretation, we customarily look first to the plain language of a statute. It is also usual that we take note of words and phrases the Legislature did not include. *See* *Biddle v. Washington Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875 ("[O]missions in statutory language should be taken note of and given effect." (citation and internal quotation marks omitted)). Similarly, we have previously expressed the view that "[this] court has no power to rewrite a statute to make it conform to an intention *not expressed*." *Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 107 Utah 502, 155 P.2d 184, 185 (1945) (emphasis added).

¶ 26 In my view, the majority's interpretation improperly expands the plain language of the Act and infuses it with "intention not expressed" by the Legislature. *Id.* Section 78–27–51 simply proscribes lawsuits against ski area operators for those risks that are inherent to skiing. *See* Utah Code Ann. § 78–27–51. Nowhere does the text suggest that ski area operators may not contractually further limit their liability for risks that are not inherent to skiing. In fact, the text is silent about whether an individual may or may not sue a ski area operator on some other basis. Accordingly, this court should resist the temptation to add language or meaning to the Act where no hint of it exists in the text.

¶ 27 When the Legislature clearly identifies a public policy objective, we have a duty to honor it. We also have a duty, however, not to stray beyond the plain language of a statute, as I believe the majority has done here. I conclude that preinjury releases do not automatically violate the public policy of this state and that releases must be examined on an individual basis to determine whether they are enforceable under the applicable law. Where, as here, neither preinjury release executed by the plaintiff was a requirement to using the ski area but instead granted additional benefits and privileges to the skier, both parties should be free to enter into the agreement, or not, and expect it to be enforced by our courts as agreed. Accordingly, I would affirm the district court's grant of summary judgment in favor of Snowbird.

¶ 28 Justice DURRANT concurs in Associate Chief Justice WILKINS'S dissenting opinion.

Utah,2007.

Rothstein v. Snowbird Corp.
175 P.3d 560, 593 Utah Adv. Rep. 26, 2007 UT 96
END OF DOCUMENT

Tab 3

(1) CV 2026. Punitive damages. (Trial Phase One).

In addition to actual damages, [name of plaintiff] seeks to recover punitive damages. Punitive damages may be awarded only if:

(1) you award compensatory damages; and if

(2) it is proved by clear and convincing evidence that the acts or omissions of [name of defendant] were a result of:

> [(A) willful and malicious conduct; or]
>
> [(B) intentionally fraudulent conduct; or]
>
> [(C) conduct that manifests a knowing and reckless indifference toward the rights of others and a disregard of ~~the rights of others~~ those rights.]

In the Verdict form, you will be asked whether punitive damages should be awarded. If you answer that question "no," your deliberations on punitive damages are finished. If you answer the question "yes," you will decide the amount of punitive damages at a later time.

References

Utah Code Section 78B-8-201.

Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991).

MUJI 1st Instruction

27.20

Committee Notes

Use the bracketed paragraphs for which there is evidence.

Approved

(2) CV 2027. Definitions.

To prove that [name of defendant]'s conduct was "willful and malicious" [name of plaintiff] must prove by clear and convincing evidence that [name of defendant] intentionally acted or failed to do an act and that [name of defendant] knew that serious injury was a probable result.

To prove that [name of defendant]'s conduct was intentionally fraudulent, [name of plaintiff] must prove each of the following by clear and convincing evidence:

> (1) [name of defendant] made a false statement about an important fact; and
>
> (2) either [name of defendant] made the statement knowing it was false, or [he] made the statement recklessly and without regard for its truth; and

(3) [name of defendant] intended that [name of plaintiff] would rely on the statement; and

(4) [name of plaintiff] reasonably relied on the statement; and

(5) [name of plaintiff] suffered damages as a result of relying on the statement.

To prove that [name of defendant]'s conduct "manifests a knowing and reckless indifference toward the rights of others, and a disregard of ~~the rights of others~~ those rights," [name of plaintiff] must prove by clear and convincing evidence that [name of defendant] knew of a substantial risk and proceeded to act or failed to act while consciously ignoring that risk.

References

"willful and malicious"

Golding v. Ashley Cent. Irr. Co., 793 P.2d 897, 901 (Utah 1990).

Brown v. Frandsen, 426 P.2d 1021, 1022 (Utah 1967).

"knowing and reckless"

Daniels v. Gamma W. Brachytherapy, LLC, 2009 UT 66, ¶ 42, 221 P.3d 256, 269

For a definition of "intentionally fraudulent" see Instruction CV1801. Elements of fraud.

MUJI 1st Instruction

Committee Notes

In Ewell v. United States, 579 F.Supp. 1291 (D.Utah 1984), aff'd, 776 F.2d 246 (10th Cir.1985), the federal district court defined 'willful and malicious' based upon a prior holding of the Utah Supreme Court in Brown v. Frandsen, 426 P.2d 1021, 1022 (Utah 1967). The Utah Supreme Court then approved the definition adopted by the federal district court in Ewell. "[T]he standard quoted by the federal court from Brown v. Frandsen which incorporates the elements of knowledge of the dangerous condition and of the fact that serious injury is a probable result, and inaction in the face of such knowledge, is consistent with Utah case law... We, therefore, are inclined to adopt the interpretation of the term "willful or malicious." Golding v. Ashley Cent. Irr. Co., 793 P.2d 897, 901 (Utah 1990).

The definition of "willful and malicious" adopted by Brown v. Frandsen, 19 Utah 2d 116, 118, 426 P.2d 1021, 1022 (1967) and applied to Section 57-14-6 in Golding v. Ashley Cent. Irr. Co., 793 P.2d 897, 901 (Utah 1990): "Willful misconduct is the intentional doing of an act, or intentional failure to do an act, with knowledge that serious injury is a probable result."

Approved subject to Juli's research

(3) CV 2028 ~~Vicarious p~~Punitive damages ~~liability~~ for the acts of agents. (Trial Phase One).

You may find [name of defendant] liable for punitive damages resulting from the acts or conduct of ~~[his]~~ [name of defendant's agent] only if you find at least one of the following to be true:

(1) [name of defendant] ~~or a~~ [name of defendant's managerial agent] authorized the [name of defendant's agent]'s specific conduct that caused the injury and the manner in which that conduct was carried out; or

(2) ~~the~~ [name of defendant's agent] was unfit and [name of defendant] ~~or its~~ [name of defendant's managerial agent] was reckless in retaining ~~the~~ [name of defendant's agent]; or

(3) ~~the~~ [name of defendant's managerial agent] was employed in a managerial capacity and was acting within the scope of employment; or

(4) [name of defendant] ~~or a~~ [name of defendant's managerial agent] ratified or approved the [name of defendant's agent]'s specific conduct that caused the injury.

References

Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

Restatement (Second) of Torts § 909 (1977).

Restatement (Second) of Agency § 217C (1957).

MUJI 1st Instruction

25.20

Committee Notes

(4) CV 2029 Punitive damages as punishment. (Trial Phase Two).

You have previously found that punitive damages are proper in this case, and thus you may award ~~such sum as, in your judgment, would be~~ a reasonable and proper amount ~~as a punishment of~~ to punish [name of defendant] for ~~such wrongs~~ [describe conduct], and ~~as a wholesome warning~~ to warn others not to offend in ~~like manner~~ the same way. ~~If such punitive damages are given, y~~You should award ~~them~~ punitive damages with caution, and you should keep in mind that they are only for the purpose just mentioned ~~and not as the measure of actual damages~~.

References

MUJI 1st Instruction

27.20

Committee Notes

approved

(5) CV 2030 Amount of punitive damages. (Trial Phase Two).

In determining the amount of punitive damages, you should take into account these factors:

(1) the relative wealth of [name of defendant];

(2) the nature of the alleged misconduct;

(3) the facts and circumstances surrounding such conduct;

(4) the effect of the conduct on the lives of the consumers and others in Utah;

(5) the probability of future recurrence of the misconduct;

(6) the relationship of the parties; and

(7) the amount of actual damages awarded.

References

Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991).

MUJI 1st Instruction

Committee Notes

Tab 4

I have been trying to rewrite the wrongful death special verdict form, but have run into problems.

Unlike for general tort damages, the MUJI 2d instruction on wrongful death damages does not break it down into "economic" and "non-economic" damages. Rather, they are both mixed together into one instruction, CV 2013. (Attached.)

So that leaves us three options:

(1) Option 1

We can write the verdict form to simply mention "economic" and "non-economic" damages, and hope the jury figures it out.

Question (14) What amount fairly compensates [name of heir #1] for the non-economic damages arising out of the death of [name of decedent]?

Question (15) What amount fairly compensates [name of heir #1] for the economic damages arising out of the death of [name of decedent]?

(2) Option 2

We can write the verdict form to include definitions of the damages elements, as the existing draft does for non-economic damages.

Question (14) What amount fairly compensates [name of heir #1] for the loss of love, companionship, society, care, protection and affection of [name of decedent]?

Question (15) What amount fairly compensates [name of heir #1] for the loss of financial support, loss or reduction of inheritance, and other lost assistance or benefits arising out of the death of [name of decedent]?

(3) Option 3 (same as Option 1, but we rewrite CV 2013)

We can do as in #1, simply referencing economic" and "non-economic" damages, but revising CV2013 to make it more clear.

Question (14) What amount fairly compensates [name of heir #1] for the non-economic damages arising out of the death of [name of decedent]?

Question (15) What amount fairly compensates [name of heir #1] for the economic damages arising out of the death of [name of decedent]?

Frank

(4) CV2013 Wrongful death claim. Adult. Factors for deciding damages.

Damages include an amount that will compensate [name of plaintiff] for the loss suffered due to [name of decedent]'s death.

Calculate ~~the~~this amount based on all circumstances existing at the time of [name of decedent]'s death that establish [name of plaintiff]'s loss, including the ~~following:~~age, health and life expectancies of [name of decedent] and [name of plaintiff] immediately prior to the death.

You may calculate economic damages for:

(1) The loss of financial support, past and future, that [name of plaintiff] would likely have received, or been entitled to receive, from [name of decedent] had [name of decedent] lived.

~~(2) The loss of love, companionship, society, comfort, care, protection and affection which [name of plaintiff] has sustained and will sustain in the future.~~

~~(3) The age, health and life expectancies of [name of decedent] and [name of plaintiff] immediately prior to the death.~~

~~(4~~(2) The loss or reduction of inheritance from [name of decedent] [name of plaintiff] is likely to suffer because of [name of decedent]'s death.

(~~5~~3) Any other evidence of assistance or benefit that [name of plaintiff] would likely have received had [name of decedent] lived.

You may calculate non-economic damages for the loss of love, companionship, society, comfort, care, protection and affection which [name of plaintiff] has sustained and will sustain in the future.

[In determining this award, you are not to consider any pain or suffering of [name of decedent] prior to [his] death.]

Members of the jury:

Please answer the following questions in the order they are presented.

If you find that the issue has been proved by a preponderance of the evidence, answer "Yes," if not, answer "No."

At least six jurors must agree on the answer to all of the required questions, but they need not be the same six on each question. When six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and advise the bailiff that you have reached a verdict.

[Name of defendant A]

Question (1) Was [name of defendant A] at fault? (If you answer "Yes," answer Question (2). If you answer "No," answer Question (3).) ☐ Yes ☐ No

Question (2) Was [name of defendant A]'s fault a cause of [name of decedent]'s death? (Regardless of your answer, answer Question (3).) ☐ Yes ☐ No

---

[Name of defendant B]

Question (3) Was [name of defendant B] at fault? (If you answer "Yes," answer Question (4). If you answer "No," go to the next set of instructions.) ☐ Yes ☐ No

Question (4) Was [name of defendant B]'s fault a cause of [name of decedent]'s death? (Regardless of your answer, go to the next set of instructions.) ☐ Yes ☐ No

---

Next set of instructions: If both Questions (2) and (4) are unanswered or answered "No," stop here, have the foreperson sign the verdict form, and advise the bailiff. If either Question (2) or (4) is answered "Yes," answer Question (5).

[Name of decedent]

Question (5) Was [name of decedent] at fault? (If you answer "Yes," answer Question (6). If you answer "No," answer Question (7).) ☐ Yes ☐ No

Question (6) Was [name of decedent]'s fault a cause of [his] own death? (Regardless of your answer, answer Question (7).) ☐ Yes ☐ No

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[Name of third party]

Question (7) Was [name of third party] at fault? (If you answer "Yes," answer Question (8). If you answer "No," answer Questions (9)-(12).) ☐ Yes ☐ No

Question (8) Was [name of third party]'s fault a cause of [name of decedent]'s death? (Regardless of your answer, answer Questions (9)-(12).) ☐ Yes ☐ No

Comparative fault

Question (9) What percent of the fault that caused [name of decedent]'s death is attributable to [name of defendant A]. (If your answer to either (1) or (2) is "No," then enter zero.) _____ %

Question (10) What percent of the fault that caused [name of decedent]'s death is attributable to [name of defendant B]. (If your answer to either (3) or (4) is "No," then enter zero.) _____ %

Question (11) What percent of the fault that caused [name of decedent]'s death is attributable to [name of plaintiff]. (If your answer to either (5) or (6) is "No," then enter zero.) _____ %

Question (12) What percent of the fault that caused [name of decedent]'s death is attributable to [name of third party]. (If your answer to either (7) or (8) is "No," then enter zero.) _____ %

The total must equal 100% 100%

If [name of plaintiff]'s fault is 50% or more, stop here, have the foreperson sign the verdict form, and advise the bailiff. If [name of plaintiff]'s fault is less than 50%, answer Questions (13) and (14). Do not deduct from the damages any percentage of fault that you have assessed to [name of plaintiff]. The judge will make any necessary deductions later.

Damages: Survival Claim

Question (13) What amount fairly compensates the Estate of [name of decedent] for:

Medical Expenses…… $ _____

Funeral Expenses…… $ _____

Lost Wages…… $ _____

Other Economic Damages…… $ _____

Non-economic Damages…….. $ _____

Total…….. $ _____

Damages: Wrongful Death Claims

Question (14) What amount fairly compensates [name of heir #1] for the loss of love, companionship, society, care, protection and affection of [name of decedent] …… $ _____

Question (15) What amount fairly compensates [name of heir #2] for the loss of love, companionship, society, care, protection and affection of [name of decedent] …….. $ _____

When six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and advise the bailiff that you have reached a verdict.

_____ Sign here ► _____

Date Jury Foreperson

Committee Notes

The verdict form must be tailored to fit the circumstances of the case. Add or remove sections about parties as needed to account for different tortfeasors. Similarly, in the section on comparative fault, add or remove lines as needed to account for different tortfeasors. In the section on damages, add or remove lines as needed to describe the damages of each heir and of each decedent. Some damages for the estate may be authorized only if the decedent survives for a time after injury.

Tab 5

(1) CV2018 Aggravation of symptomatic pre-existing conditions.

A person who has a [physical, emotional, or mental] condition before the time of [describe event] is not entitled to recover damages for that condition or disability. However, the injured person is entitled to recover damages for any aggravation of the pre-existing condition that was caused by [name of defendant]'s fault, even if the person's pre-existing condition made [him] more vulnerable to physical [or emotional] harm than the average person. This is true even if another person may not have suffered any harm from the event at all.

When a pre-existing condition makes the damages from injuries greater than they would have been without the condition, it is your duty to try to determine what portion of the [specific harm] to [name of plaintiff] was caused by the pre-existing condition and what portion was caused by the [describe event].

If you are not able to make such an apportionment, then you must conclude that the entire [specific harm] to [name of plaintiff] was caused by [name of defendant]'s fault.

References

Robinson v. All-Star Delivery, 992 P.2d 969, 972 (Utah 1999).

Tingey v. Christensen, 1999 UT 68, 987 P.2d 588 (Utah 1999).

Brunson v. Strong, 17 Utah 2d 364, 412 P.2d 451 (1966).

Harris v. ShopKo Stores, Inc., 2011 UT App 329.

Florez v Schindler Elevator, 2010 UT App 254 (Absence of life expectancy evidence does not preclude award of future medical costs as damages.)

MUJI 1st Instruction

27.6.

Committee Notes

This instruction is not intended to suggest that the verdict form include a line-item allocation of what part of the harm can be apportioned to the pre-existing condition, and what part to the defendant's fault. That question is answered by the jury's award of damages and should not be confused with allocation of comparative fault.

(2) CV2019 Aggravation of dormant pre-existing condition.

A person who has a [physical, emotional, or mental] condition before the time of [describe event] is not entitled to recover damages for that pre-existing condition or disability.

However, if a person has a pre-existing condition that does not cause pain or disability, but [describe event] causes the person to suffer [describe the specific harm], then [he] may recover all damages caused by the event.

References

Harris v. ShopKo Stores, Inc., 2011 UT App 329.

Ortiz v. Geneva Rock Products, Inc., 939 P.2d 1213, (Utah App. 1997).

Turner v. General Adjustment Bureau, Inc., 832 P.2d 62, (Utah App. 1992).

Biswell v. Duncan, 742 P.2d 80 (Utah App. 1987).

MUJI 1st Instruction

27.7.

Committee Notes

Unlike Instruction CV2018, Aggravation of symptomatic pre-existing conditions, this instruction is designed for asymptomatic conditions that are aggravated by an injury.

(3) Suggested by Harris v. ShopKo Stores, Inc., 2011 UT App 329 (fn 2).

A person who has a latent, dormant or asymptomatic condition, or a condition to which the person is predisposed, may recover the full amount of damages that proximately result from injuries that aggravate the condition. In other words, when a latent condition does not cause pain, but that condition plus the injury brings on pain by aggravating the preexisting, dormant or asymptomatic condition, then it is the injury, not the dormant or asymptomatic condition, that is the proximate cause of pain and disability.