Agenda
Advisory Committee on
Model Civil Jury Instructions

January 9, 2012
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	Tim Shea
Verdict form (Click on "Published Instructions" to open your web browser. Click on "Civil Instructions," "Negligence," and CV 299. Then click on "Wrongful Death" and/or "Personal Injury."		Tim Shea
Harris v. ShopKo Stores, Inc., 2011 UT App 329 (fn 2). Instructions 2018 and 2019	Tab 3	Tim Shea
Vicarious liability instructions	Tab 4	John Lund Frank Carney Gary Johnson Paul Simmons

Committee Web Page

Published Instructions

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

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

December 12, 2011

4:00 p.m.

Present: John L. Young (chair); Honorable William W. Barrett, Jr.; Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Ryan M. Springer

Excused: Juli Blanch, Honorable Deno Himonas, Gary L. Johnson, John R. Lund, Paul M. Simmons, Peter W. Summerill, Honorable Kate A. Toomey, David E. West

Also present: Paul Belnap, David Cutt, Joseph Joyce; Kevin Simon, Stuart Schultz

Instructions on ski resort injuries.

Several committee members had not received the committee note submitted by Gainer Waldbillig. Mr. Cutt had submitted a memorandum, but not a committee note. Mr. Cutt and Mr. Simon remain divided on whether the legislative amendments to the inherent risk of skiing statutes abrogated the law of Clover v. Snowbird and White v Deseelhorst. Mr. Cutt and Mr. Simon agree that CV 1110 and CV 1111 are adequate. They also agree that, since there is no law on whether the inherent risk of skiing is an affirmative defense, CV 1113 on who has the burden of proof is speculative and should be omitted. Mr. Young said that CV 1112, which restates the law of Clover and White, is all that remains at issue. The committee took no action on CV 1112 at the last meeting.

Mr. Simon said that Rothstein v. Snowbird Corp., 2007 UT 96, supports the conclusion that the inherent risk of skiing statutes have completely regulated ski area liability. Mr. Cutt said that Rothstein was a pre-injury release case and not an inherent risk of skiing case. Mr. Cutt and Mr. Simon reported cases in which the trial court judge had and had not included an instruction based on Clover and White.

The committee will again consider the issue at the next meeting.

Punitive damages

Mr. Humpherys suggesting drafting the phase one instructions so that the phrase “punitive damages” is omitted because some parties and judges do not want to influence the jury until there has been a finding of willful or malicious misconduct. Mr. Humpherys said the jury should be advised why they are being asked whether the defendant’s wrongful conduct was malicious.

Mr. Joyce said that there should be no mention of punitive damages until the predicate for them has been established. Mr. Schultz reported Judge Nehring had presided at a trial in which counsel was not permitted to mention punitive damages. Mr. Humpherys is comfortable removing “punitive damages” from the phase one instructions, but is

concerned that jurors may inappropriately punish defendant in the calculation of compensatory damages. Mr. Belnap said it should be up to the judge whether to permit mentioning punitive damages.

Mr. Shea said that the phase one instructions could be re-drafted to omit any references to punitive damages, but there would be less context for the jury. They would ask, in essence, was the conduct willful and malicious, giving definitions for those terms.

The committee discussed ways to present the instructions, including the titles, without the phrase “punitive damages,” yet permit lawyers and judges to easily find them on the MUJI webpage.

Mr. Humpherys said that jurors should not be instructed on the legal limit to the ratio of punitive damages. If the jury award exceeds the maximum ratio, the judge can correct the amount after trial.

The committee discussed the definitions and how they might be given to the jury. Mr. Humpherys suggested simply quoting the statute. Mr. Humpherys said that part of CV 2030 is wrong.

Mr. Belnap, Mr. Humpherys and Mr. Joyce will form a workgroup to develop the punitive damages instructions. They might also invite Rich Mrazik and Karra Porter to join them. They will try to have instructions drafted for the February meeting.

Verdict form

Mr. Carney explained the three options he had described in his email. The committee favored listing the categories of economic damages on the verdict form. The committee approved the form as amended.

The meeting ended at 6:00 p.m.

Tab 2

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: MUJI Committee
From: Tim Shea
Date: January 3, 2012
Re: Inherent risks of skiing

From my research, I conclude that the amendments to the statute defining the inherent risks of skiing did not abrogate the law of *Clover v. Snowbird*, 808 P.2d 1037, (Utah 1991) and *White v. Deseelhorst*, 879 P.2d 13 (Utah 1994), and that the committee should give due consideration to instructions based on them.

(1) Statutory history

Laws of Utah 1979, chapter 166 enacted former Sections 78-27-51 through 78-27-54 limiting the liability of ski area operators for injuries caused by the inherent risks of skiing, defining an inherent risk and describing some examples.

In 1993 the legislature passed SB 249, amending the definitions to include snowboarding and ski jumping and different types of ski jumping. I have attached SB 249, which also shows the statute as originally enacted.

In 2006 the legislature passed SB 135, which, according to the bill's long title "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." I have attached SB 135.

In 2008, the legislature passed HB 78, which re-codified former Sections 78-27-51 to 78-27-54 as Sections 78B-4-401 through 78B-4-404. In keeping with the purpose of re-codification bills, HB 78 contained no substantive amendments.

(2) Analysis

In their communications, Mr. Simon and Mr. Waldbillig argued that by amending the inherent risk of skiing statutes the legislature intended to abrogate the holdings in *Clover* and *White*. The 2008 amendment re-codified the statutes; it contained a few technical changes, but no substantive amendments. The 1993 amendment added

snowboarding and ski jumping to the definitions. Because the injury in *Clover* (1991) involved a skier who collided with another while jumping, it is arguable that this amendment was intended to overturn *Clover*. But *Clover* was not decided on the grounds that a jumper is not a skier. Also, *White* (1994), which includes an analysis and result similar to *Clover*, was decided after the 1993 amendment.

The 2006 amendment was more substantive than the other two, but it contains nothing that would abrogate *Clover* and *White*. The bill added one new category to the list of inherent risks of skiing: "participation in, or practicing or training for, competitions or special events." And the bill expanded the definition of "skier" to include just about anyone in the resort area. All of the other amendments—as described in the bill's long title, as described in the provisions the sponsor chose to highlight, and in the text of the statute itself—served only to describe with more particularity the examples of inherent risks within the categories that had been in the statute since it was enacted in 1979.

There is nothing in the minutes of the Senate or House Judiciary Committee hearings on the bill to suggest the legislature intended to overturn *Clover* and *White*.

Mr. Simon and Mr. Waldbillig quote extensively from *Rothstein v. Snowbird Corp*., 2007 UT 96, 175 P.3d 560, for the proposition that "the intent of the Legislature … is to completely set forth a ski area's liability within the statute."

> 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.
>
> *Rothstein v. Snowbird Corp.*, 2007 UT 96, 175 P.3d 560, 564

Rothstein is a pre-injury release case and not an inherent risk case, so its application may be marginal in any event, but Mr. Simon and Mr. Waldbillig omit the sentence preceding the one that they quote, which is quite opposite their conclusion: "The Act is most clearly not … intended to protect ski area operators by limiting their liability exposure generally." *Id.*

White v. Deseelhorst, 879 P.2d 1371 (Utah 1994) applied *Clover*, but it added little to the statutory analysis. However, Justice Russon's strongly worded dissent offered the court the opportunity to overrule Clover, and this they did not do. In a concurring opinion, Justice Zimmerman invited the legislature to change the statute if they disagreed with the court. The legislature did not amend the statute for another 12 years, and, when they did, they left no record of an intent to overturn *Clover*.

Clover divided the inherent risks of skiing into categories: those risks the skier wants to confront and those the skier does not; those risks that can be eliminated by using reasonable care and those that cannot. Essentially, if the skier wants to confront the risk, there is an assumption of the risk; if the risk can be eliminated using reasonable care, the risk is not an essential characteristic of skiing. If those distinctions were valid before the 2006 amendments, they remain valid because the amendments did not address that principle.

(3) Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991)

Several quotes from *Clover* do more than I can to trace the logic and show the holding of the case:

> The statute ... does not purport to grant ski area operators complete immunity from all negligence claims initiated by skiers."
>
> *Id.* at 1044 (Utah 1991)
>
> [T]he 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."
>
> *Id.* at 1044-45.
>
> [W]ithout 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.
>
> *Id.* at 1046
>
> Beyond the general warning prescribed by section 78–27–54, … 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 eliminated by the exercise of ordinary care on the part of the ski area operator.
>
> *Id.* at 1046-47.
>
> 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.
>
> 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. … 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.
>
> *Id.* at 1047.

(4) Possible instructions

Clover defines what it means to be integral, and I've edited CV 1111 accordingly to include that in the definition.

> **CV 1111. Inherent risks of skiing defined.**
>
> "Inherent risks of skiing" means those dangers or conditions which are such an integral part of the sport of recreational, competitive, or professional skiing~~, and~~ that the sport cannot be undertaken without confronting these risks. These risks may include the following:
>
> ….
>
> **References**
>
> Utah Code Section 78B-4-402.
>
> Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1047 (Utah 1991).

Clover distinguishes risks the skier wants to confront from those the skier does not. However, the examples of risks of either type are problematic. Other than "jumps," the proposed examples in CV 1112 of risks of the first type were identified in the opinion, but these will depend on the skier's skill. Most beginners do not want to confront steep grades, powder or moguls.

The opinion did not list any examples of risks of the second type, although it did refer to "weather and snow conditions" as part of that discussion. But at least some of the proposed examples also will depend on the skier's skill. While no one wants to collide with a tree or a rock, many skiers do want to confront them.

It may be safer to leave the examples out of the instructions, and ask, in essence, does the evidence show that the plaintiff did or did not want to confront the risk that caused the injury?

In addition to distinguishing whether the skier wants to confront a risk, *Clover* distinguishes whether the risk can be eliminated by using ordinary care.

As a result of all this, I recommend something like following as CV 1112. The amendments use the most recent version of CV 1112 as the baseline. The proposed committee note also is new.

> **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~~ or that [name of defendant] cannot eliminate by using reasonable care. [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~~ and that [name of defendant] can eliminate by using reasonable care. Such risks are also inherent in skiing, but [name of defendant] must use reasonable care to eliminate risks of this second type.

References

Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1047 (Utah 1991).

Committee Note

Although Section 78B-4-402 lists several categories of inherent risks of skiing and several examples within each category, Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991) recognizes that the statutory list is not exclusive and further defines "inherent risk" as "those risks that are essential characteristics of skiing—risks that are so integrally related to skiing that the sport cannot be undertaken without confronting [them]." Id. at 1047.

Clover further differentiates among inherent risks, based on whether the skier wants to confront the risk and whether the risk can be eliminated using reasonable care. If the skier wants to confront the risk, there is an assumption of the risk; if the risk can be eliminated using reasonable care, the risk is not an essential characteristic of skiing. Sections 78B-4-401 through -404 protect a ski area operator from liability only for injuries caused by risks that the skier wants to confront and risks that cannot be eliminated by reasonable care.

"[W]ithout 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." Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1046 (Utah 1991).

I also recommend providing a burden of proof instruction, but doing so in the alternative, recognizing that the law on who has the burden of proof has not yet been settled in Utah.

CV 1113A. Burden of proof

[Name of plaintiff] claims that the risk causing [his] harm was not an inherent risk of skiing. To prove this claim, [name of plaintiff] must prove:

(1) that [he] did not want to confront this risk; and

(2) that [name of defendant] could have eliminated the risk by using reasonable care.

If you find that both are true, then the risk is not an inherent risk of skiing.

Committee Note

Neither the statutes nor the caselaw establish who has the burden of proving whether a risk is an inherent risk. If the court determines that the issue is an element of the cause of action which plaintiff must avoid, then the judge should instruct the jury with CV 1113A. If the court determines that the issue is an affirmative defense, then the judge should instruct the jury with CV 1113B.

CV 1113B. Burden of proof.

[Name of defendant] claims that the risk causing [name of plaintiff]'s harm was an inherent risk of skiing. To prove this claim, [name of defendant] must prove:

(1) that [name of plaintiff] wanted to confront the risk; or

(2) that [name of defendant] could not have eliminated the risk by using reasonable care.

If you find that either is true, the risk is an inherent risk of skiing.

Committee Note

Neither the statutes nor the caselaw establish who has the burden of proving whether a risk is an inherent risk. If the court determines that the issue is an element of the cause of action which plaintiff must avoid, then the judge should instruct the jury with CV 1113A. If the court determines that the issue is an affirmative defense, then the judge should instruct the jury with CV 1113B.

Encl. SB 249, 1993
SB 135, 2006
Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991)
Memorandum from Gainer Waldbillig

CHAPTER 86
S. B. No. 249
Passed March 1, 1993
Approved March 12, 1993
Effective May 3, 1993

INHERENT RISK OF SKIING

By Alarik Myrin

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

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:
78–27–52, AS ENACTED BY CHAPTER 166, LAWS OF UTAH 1979

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

Section 1. Section Amended.

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

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 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 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.

INHERENT RISK OF SKIING AMENDMENTS

2006 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Lyle W. Hillyard

House Sponsor: David Ure

Cosponsor: Carlene M. Walker

LONG TITLE

General Description:

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.

Highlighted Provisions:

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.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

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:

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.

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.

Attorneys and Law Firms

***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.

Opinion

HALL, Chief Justice:

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

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

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.[2] In cases where the facts are in dispute, summary judgment is only granted when, viewing the facts in a light most favorable to the party opposing summary judgment, the moving party is entitled to judgment. Therefore, when reviewing an order granting summary judgment, the facts are to be liberally construed "in favor of the parties opposing the motion, and those parties are to be given the benefit of all inferences which might reasonably be drawn from the evidence."[3] The determination of whether ***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.[4]

II. SCOPE OF EMPLOYMENT

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

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

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

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

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

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

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

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

These two factors, along with other circumstances—such as, throughout the day Zulliger was on Snowbird's property, there ***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.[32] Such an approach constitutes a significant departure from the *Birkner* analysis.

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

III. NEGLIGENT DESIGN AND MAINTENANCE

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

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

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

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

9 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.[40] Another rule is that a statute should not be construed in a piecemeal fashion but as a comprehensive whole.[41] Furthermore, "[i]f there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective, and to harmonize its provisions in accordance with its intent and purpose."[42] In cases such as this, where a statement of the statute's purpose is codified in the statute, this method of construction is particularly appropriate. It is also proper in construing a statute which deals with tort claims to interpret the statute in accord with relevant tort law. Finally, in dealing with an unclear statute, this court renders interpretations that will "best promote the protection of the public."[43]

In construing the statute in this manner, a helpful first step is to note that sections 78–27–51 to –54 limit the liability of ski area operators by defining the duty they owe to their patrons. The express purpose of the statute, codified in section 78–27–51, is "to clarify the law in relation to skiing injuries and the risk inherent in the sport ... and to establish [that] ... no person shall recover from a ski operator for injuries resulting from those inherent risks." Inasmuch as the purpose of the statute is to "clarify the law," not to radically alter ski resort liability, it is necessary to briefly examine the relevant law at the time the statute was enacted. Although there is limited Utah case law on point, when the statute was enacted the majority of jurisdictions employed the doctrine of primary assumption of risk in limiting ski resorts' liability for injuries their patrons received while skiing.[44] Terms utilized in the statute such as "inherent risk of skiing" and "assumes the risk" are the same terms relied upon in such cases. This language suggests that the statute is meant to achieve the same results achieved under the doctrine of primary assumption of risk. ***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.[45]

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

Section 78–27–53 also supports the notion that the ski statute operates to define the duty of a ski resort. This section exempts injuries caused by the inherent risks of skiing from the operation of Utah's comparative fault statute, which was enacted to avoid the harsh results of the all-or-nothing nature of the former law by limiting a party's liability by the degree of that party's fault.[48] Comparative principles have been applied in cases dealing with contributory negligence,[49] secondary assumption of risk,[50] and strict liability.[51] Exempting suits concerning injuries caused by an inherent risk of skiing from the comparative fault statute is consistent with the assertion that the ski area operators are not at

fault in such situations—that is, ski area operators have no duty to protect a skier from the inherent risks of skiing.

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

A similar analysis leads to the conclusion that the duties sections 78–27–51 to –54 impose on ski resorts are the duty to use reasonable care for the protection of its patrons[52] and, under section 78–27–54, the duty to warn its patrons of the inherent risks of skiing. Beyond the general warning prescribed by section 78–27–54, however, a ski area operator is under no duty to protect its patrons from the inherent risks of skiing. The inherent risks of skiing are those dangers that skiers wish to confront as essential characteristics of the sport of skiing or hazards that cannot be ***1047** eliminated by the exercise of ordinary care on the part of the ski area operator.

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

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

This definition of a ski area operator's duty is consistent with the approach used by the majority of jurisdictions in ski accident cases prior to the time the statute was adopted.[54] At the time the statute was enacted, the landmark case in the area was *Wright v. Mt. Mansfield Lift Inc.*[55] In *Wright*, a skier who was injured in a collision with a snow-covered stump was denied recovery under the doctrine of primary assumption of risk. The court held that although a ski resort has a duty to advise its patrons of specific hazards "which reasonable prudence would have foreseen and corrected,"[56] the resort was under no duty to protect its patrons from those dangers that are inherent in the sport to the extent that those dangers are obvious and necessary.[57] Specifically, the court held that the existence of the stump was not reasonably foreseeable and was the type of general hazard that was obvious to the plaintiff.[58] This approach is consistent with the definition of duty derived from the use of the ordinary meaning of the terms of the statute. The prerequisite that a risk be necessary is consistent with the ordinary meaning of the term inherent. Similarly, the prerequisite that the risk be obvious is consistent with the requirement of section 78–27–54 that ski area operators warn of the inherent risk of skiing. This approach, therefore, fulfills the express purpose of the ***1048** statute, "clarifying the law in relation to skiing injuries."

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

IV. NEGLIGENT SUPERVISION

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

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

Reversed and remanded for further proceedings.

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

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

Footnotes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 *Id.*

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

19 *Id.* at 937.

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

21 *Id.*

22 *Id.*

23 *Id.*

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

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

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

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

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

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

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

31 *See id.* 208 P. at 520–21.

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

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

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

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

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

37 The Passenger Tramway Act, Utah Code Ann. § 63–11–37 (Supp.1986), also provides protections to ski area operators. This statute allows actions to recover for injuries caused by unnecessary hazards in design, construction, and operation of tramways but not for injuries caused by "the hazards inherent in the sports of mountaineering, skiing and hiking." The protections ski area operators possess under section 63–11–37 are not more expansive than the protections they possess under sections 78–27–51 to –54. Therefore, a separate analysis of section 63–11–37 is unnecessary in this context.

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

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

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

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

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

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

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

45 *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.

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

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

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

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

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

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

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

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

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

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

56 *Id.* at 790.

57 *See id.* at 790–92.

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

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

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MEMORANDUM RE "INHERENT RISKS OF SKIING" JURY INSTRUCTIONS

To: John Young, Tim Shea and Francis Carney
Date: 12/21/2011
From: Gainer Waldbillig
Re: Ski Instructions

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1. The Utah Legislature has specifically, completely and expressly defined the nature of ski area liability and what are inherent risks of skiing.

2. The Utah Supreme Court upheld the Legislature's complete determination of that liability and the encompassing nature of the Statute.

3. Any jury instructions other than the statutory language itself will be contrary to the Statute, unwarranted and confusing to juries

In UTAH CODE ANN. 78B-4-401-404 (amended 2006), the Utah Legislature significantly amended Utah's Inherent Risk of Skiing Act by further enumerating the definition of "inherent risks of skiing" and adding additional specific types of inherent risks. (See section 78B-4-402). The amendment occurred over 10 years after both Clover and White decisions from the Utah Supreme Court. See White v. Deseelhorst, 879 P.2d 1371 (Utah 1994); Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991). The Legislature was certainly intending to clarify and extend the definition and to declare as a matter of law what those risks were. The purpose of the current version of the Inherent Risk of Skiing Act specifically and unambiguously states:

> 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, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks." UTAH CODE ANN. §78B-4-401. (Emphasis added).

The Utah Legislature has specifically and expressly defined what an "inherent risk of skiing" is by statute. The definition is as follows:

78B-4-402. Definitions.
As used in this part:
(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. (Emphasis added)

In addition, in the more recent Rothstein decision, the Utah Supreme Court repeatedly provided statements and conclusions concerning the intent of the Legislature contained in the statute–which is to completely set forth a ski area's liability within the statute. Rothstein v. Snowbird, 2007 UT 96, 175 P.3d 560. For example, the Rothstein Court states:

> 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." Rothstein at ¶ 15, 564.

> 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." Rothstein at ¶ 10, 563.

> 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. Rothstein at ¶ 16, 564.

Therefore, because the express intent and purpose of the statute is to establish as a matter of law that certain risks are inherent, use of additional instructions concerning the statute or the definition of inherent risks is unwarranted and misleading. Our Supreme Court has found that the statute is the final word on ski area liability. Further attempts at defining a statutory definition will lead to conflicting descriptions of the law and confusion for juries.

Gainer Waldbillig

Tab 3

(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~~ If a latent condition does not cause pain, but that condition plus the injury brings on pain by aggravating the ~~preexisting, dormant or asymptomatic~~ latent condition, then it is the injury, not the ~~dormant or asymptomatic~~ latent condition, that ~~is the proximate~~ causes ~~of~~ the pain ~~and disability~~.

Ortiz v. Geneva Rock Products

Tab 4

Vicarious Liability Instructions

(1) CV 2801. Corporation acts through its agents.

[Name of party] is a [corporation, partnership, joint venture] and acts or fails to act when [name of defendant]'s officers, employees, or agents act or fail to act while performing within the scope of their duties or authority.

References

"Corporations can only act through agents, be they officers or employees." Orlob v. Wasatch Management, 2001 UT App 28, ¶ 18, 33 P.3d 1078. See also Davis v. Payne & Day, Inc., 348 P.2d 337, 339 (Utah 1960)

"Under agency law, an agent cannot make its principal responsible for the agent's actions unless the agent is acting pursuant to either actual or apparent authority. Actual authority incorporates the concept of express and implied authority. Express authority exists whenever the principal directly states that its agent has the authority to perform a particular act on the principal's behalf. Implied authority. . . , embraces authority to do those acts which are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent." Zions First Nat. Bank v. Clark Clinic Corp., 762 P.2d 1090, 1094-95 (Utah 1988).

MUJI 1st Instruction

25.1.

Committee Notes

If the jury must decide whether the defendant is a corporation, partnership, or joint venture, then this instruction should not be given. Or phrased as "If you find that [name of defendant] is …."

(2) CV 2802. Liability of principal for authorized acts or acts within the scope of authority.

[Name of plaintiff] claims that [name of principal] is liable for [describe act or omission] by [name of officer/employee/agent]. To succeed on this claim, [name of plaintiff] must prove that:

(1) [name of defendant] authorized [name of officer/employee/agent] to act for it; or

(2) [name of officer/employee/agent]'s conduct was within the scope of [his] duties or authority.

References

"an agent's actual authority originates with expressive conduct by the principal toward the agent by which the principal manifests assent to action b the agent with legal consequence for the principal." Restatement (Third) of Agency § 3.01

“elements which go to show the existence of an employer-employee relationship. . . , are as follows . . . : “‘(1) Exercise of control over the details of the work, (2) payment of compensation, (3) power of appointment, (4) power of dismissal, and (5) for whose benefit the given work was done.’” Buhler v. Maddison, 176 P.2d 118, 273 (Utah 1947).

MUJI 1st Instruction

25.2.

Committee Notes

(3) CV 2804. Scope of actual authority.

[Name of plaintiff] claims that [name of principal] is liable for [describe act or omission] by [name of officer/employee/agent]. To succeed on this claim, [name of plaintiff] must prove that:

(1) [name of principal] granted [name of officer/employee/agent] the authority to [describe actual authority]; and

(2) [name of officer/employee/agent]’s conduct was necessary, usual, proper or incidental to the conduct that [name of principal] actually authorized.

References

Implied authority embraces authority to do those acts which are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent.

Zions First Nat. Bank v. Clark Clinic Corp., 762 P.2d 1090, 1094 (Utah 1988)

This authority may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question.

Zions First Nat. Bank v. Clark Clinic Corp., 762 P.2d 1090, 1095 (Utah 1988)

Whenever the performance of certain business is confided to an agent, such authority carries with it, by implication, authority to do collateral acts which are the natural and ordinary incidents of the main act or business authorized.

Bowen v. Olsen, 576 P.2d 862, 864 (Utah 1978)

As stated in Mechem on Agency, Section 1781: ‘Wherever the doing of a certain act or the transaction of a given affair or the performance of certain business is confided to an agent, the authority to so act will, in accordance with a general rule often referred to, carry with it by implication the authority to do all of the collateral acts which are the natural and ordinary incidents of the main act or business authorized. The speaking of words,-the making of statements, representations, declarations, admission, and the like,-may as easily be such an incident as the doing of any other sort of act.’

Further, ‘Since the authority for the doing of these incidental acts, however, springs from the authority to do the main act it must ordinarily end with it. The incidental thing must be a part of the main thing. It must occur before the main act is completely ended: it must take place while that is still going on.’

Park v. Moorman Mfg. Co., 121 Utah 339, 349, 241 P.2d 914, 919 (1952)

In this regard plaintiff relies upon a proposition of law that where a principal (defendants) entrusts a duty to his agent or employee, the latter is clothed with implied authority to do those things which are within the scope of assigned duties or reasonably and necessarily incident thereto.

B & R Supply Co. v. Bringhurst, 28 Utah 2d 442, 444, 503 P.2d 1216, 1217 (1972)

MUJI 1st Instruction

25.4.

Committee Notes

(4) CV 2803. Apparent authority.

Under development.

MUJI 1st Instruction

25.3.

Committee Notes

(5) CV 2805. Approval of conduct.

[Name of plaintiff] claims that [name of principal] is liable for [describe act or omission] by [name of third party] because [name of principal] approved of [name of third party]’s conduct after the fact. To succeed on this claim, [name of plaintiff] must prove that [name of principal] knew of [name of third party]’s conduct; and expressly or impliedly approved of it.

[Name of plaintiff] may prove that [name of principal] approved of [name of third party]’s conduct by any acts, words, or conduct, including silence, which, under the circumstances, indicate approval.

References

“It is well-established under Utah law that [s]ubsequent affirmance by a principal of a contract made on his behalf by one who had at the time neither actual nor apparent authority constitutes a ratification, which in general is as effectual as an original authorization.” Bullock v. Utah, Dep't of Transp., 966 P.2d 1215, 1218 (Utah

Ct.App.1998) (alteration in original) (citations and internal quotation marks omitted). “A principal may impliedly or expressly ratify an agreement made by an unauthorized agent.” Bradshaw v. McBride, 649 P.2d 74, 78 (Utah 1982).

“Ratification[,] like original authority[,] need not be express. Any conduct which indicates assent by the purported principal to become a party to the transaction[,] or which is justifiable only if there is ratification[,] is sufficient. Even silence with full knowledge of the facts may manifest affirmance and thus operate as a ratification. The person with whom the agent dealt will so obviously be deceived by assuming the professed agent was authorized to act as such, that the principal is under a duty to undeceive him.... So a purported principal may not be wilfully ignorant, nor may he purposely shut his eyes to means of information within his possession and control and thereby escape ratification if the circumstances are such that he could reasonably have been expected to dissent unless he were willing to be a party to the transaction.”

Moses v. Archie McFarland & Son, 119 Utah 602, 230 P.2d 571, 574 (1951) (quoting 1 Samuel Williston & George J. Thompson on Contracts 805 (Rev. Ed. 1936)).

“Ratification is premised upon the knowledge of all material facts and upon an express or implied intention on the part of the principal to ratify.” City Elec. v. Dean Evans Chrysler–Plymouth, 672 P.2d 89, 91 (Utah 1983); see also Zions First Nat'l Bank, 762 P.2d at 1098 (“Ratification requires the principal to have knowledge of all material facts and an intent to ratify.”). “A deliberate and valid ratification with full knowledge of all the material facts is binding and cannot afterward be revoked or recalled.” Zions First Nat'l Bank, 762 P.2d at 1098.

Franklin Credit Mgmt. Corp. v. Hanney, 2011 UT App 213

MUJI 1st Instruction

25.5.

Committee Notes

(6) CV2806. Scope of duties.

[Name of plaintiff] claims that [name of principal] is liable for [describe act or omission] by [name of officer/employee/agent]. To succeed on this claim, [name of plaintiff] must prove all of the following:

(1) [name of officer/employee/agent]’s conduct was of the general kind [he] was [employed/authorized] to do; in other words, [he] was doing [name of principal]’s work as opposed to being wholly involved in a personal matter; and

(2) [name of officer/employee/agent]’s conduct occurred substantially within working hours and within the normal work area; and

(3) [name of officer/employee/agent]'s conduct was motivated, at least in part, by the purpose of serving [name of principal]'s interest.

References

Helf v. Chevron U.S.A., Inc., 2009 UT 11, ¶ 48, 203 P.3d 962.

Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991).

Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989).

MUJI 1st Instruction

25.6.

Committee Notes