ATLA For The People
Law Reporter Spotlight

COUNSEL OVERCOMES ASSUMPTION OF RISK DEFENSE TO WIN RECOVERY FOR SKIER INJURED AT RESORT.

Hoar v. Great E. Resort Corp., Va., Albemarle County Cir. Ct., No. CL96-6712, June 21, 1997, *j.n.o.v.granted,* Aug. 11, 1997, *rev'd,* 506 S.E.2d 777 (Va. 1998).

In January 1992, Hoar and a friend, both experienced skiers, went skiing at the Massanutten Ski Resort in Virginia. Two days earlier, Massanutten had opened a new, advanced ski trail. This trail had been built using a "cut and fill" process—where the side of a mountain is cut away to form one side of a ski run and the excavated soil is used to fill in the opposite side. This process creates a steep drop-off on one side of the run.

As Hoar and his friend were skiing down the new trail, Hoar lost his balance and slid off the edge of the 30-foot drop-off. His friend found him at the bottom of the drop, unconscious and bleeding from his nose, mouth, and one of his ears.

Hoar, 36, suffered disabling brain damage and requires 24-hour attendant care. His past medical expenses totaled about $525,000. He had worked as a brick mason earning about $35,000 annually and is unable to return to work.

Believing the ski resort had been responsible for her husband's injuries, Hoar's wife, acting as his guardian, contacted ATLA member Patrick M. Regan, of Washington, D.C., to represent her in a suit against the ski resort. Assisting in the case were fellow ATLA members Jonathan E. Halperin, of Washington, D.C.; Bruce D. Rasmussen and Jennifer A. Jones, both of Charlottesville, Virginia; and James H. Chalat, of Denver, Colorado.

Plaintiff alleged the resort had failed to warn skiers about the drop-off. Although Massanutten had purchased bright orange warning barrier fencing for use along the drop-off, only the fence posts had been installed at the time of the tragedy. In addition, plaintiff alleged the cut-and-fill process had left a gap between the edge of the ski run and the tree line, eliminating a visual cue to skiers that the trail ended at the drop-off. As a result, plaintiff claimed, the drop-off was not apparent until skiers were three to five feet away from the edge.

At trial, counsel's biggest obstacle was the assumption of the risk defense. Massanutten presented several expert witnesses and employees to testify that skiing is an inherently dangerous activity. To illustrate its point, defendant presented a diagram of the ski resort, using red dots to show where people had been injured while skiing. The dots covered the entire diagram. In addition, defendant presented a blown-up copy of the "Skier's Code of Responsibility," which is printed on lift tickets, trail maps, and other resort literature. The code states that recreational skiers assume all risk of injury when skiing at the resort.

Counsel countered this defense by presenting the testimony of Richard Penniman, a ski area management expert from Truckee, California. He testified that although skiers assume certain risks, such as striking a tree, they do not assume all risks, such as hidden hazards. Penniman testified that a human-made hazard, such as the 30-foot drop-off, does not constitute an inherent risk of skiing, but a dangerous condition created by the resort.

The jury awarded about $6.17 million. Nevertheless, the trial court set aside the verdict and entered judgment for Massanutten, ruling, among other things, that without expert testimony on the industry's standard of care, a lay jury could not decide what would be an unreasonable risk.

In a unanimous decision, the Virginia Supreme Court reversed and reinstated the jury verdict. The state high court held that whether Massanutten was obligated to warn skiers of an unsafe condition that was not obvious was not a complicated or technical issue requiring specialized skill or knowledge. Rather, the question concerned matters of common knowledge that jurors are as competent to understand and decide as an expert witness.

Regan says the decision "represents a very significant victory for consumers who for years have had civil claims for injuries defeated by the skiing industry."

In addition to Penniman, plaintiff's experts included John A. Jane, neurosurgery, Charlottesville, Va., and Sharon Reavis, life care planning, Peder Melberg, vocational rehabilitation, and Gregory J. O'Shanick, neuropsychiatry, all of Richmond, Va.

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