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COURT OF APPEALS STATE OF COLORADO 2 East 14th Ave. Denver, CO 80203	
District Court of Summit County, Colorado Honorable Mark D. Thompson, Judge Case No. 13CV101, Division T Date of Ruling: October 21, 2014	
Appellant: **ANNE MARGARET HESFORD**, v. Appellee: **VAIL SUMMIT RESORTS, INC.**	▲ **Court Use Only** ▲
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AMENDED OPENING BRIEF

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 5,869 words. (9,500 max per C.A.R. 28(g)).

The brief complies with C.A.R. 28(k).

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority, and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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STATEMENT OF THE ISSUES

These are the issues that are addressed in this appeal:

1. Whether the Trial Court erred in granting summary judgment in favor of Defendant Vail Summit Resorts, Inc. on Plaintiff A. Margaret Hesford's Colorado Premises Liability Act claim, C.R.S. § 13-21-115.

STATEMENT OF THE CASE AND FACTS

This case arises from an incident in which Plaintiff-Appellant A. Margaret Hesford ("Ms. Hesford") slipped and fell on ice that had accumulated, and which Defendant Vail Summit Resorts, Inc. ("Vail") had failed to clear, at a bus stop for guests on Vail's property. Upon motion by Vail, and over Ms. Hesford's objection, the Trial Court granted summary judgment in favor of Vail on Ms. Hesford's Colorado Premises Liability Act Claim. CF, pp. 92-97 (order); CF, pp. 110-120 (preservation of the issue). Ms. Hesford is challenging that ruling.

A. Factual Background

At all relevant times, Vail owned and operated the Breckenridge Ski Resort in Breckenridge, Colorado. CF, p. 76, ¶ 5; CF, p. 527, ¶ 5. Vail leased from the Town of Breckenridge, Colorado a space known as the Airport Lot to use as free public parking for guests at the Breckenridge Ski Resort. CF, p. 77, ¶ 6; CF, p. 527, ¶ 6.

Vail provided a bus service, free of charge, to ferry guests from the Airport Lot to the Breckenridge Ski Resort. CF, p. 77, ¶¶ 7-8; CF, p. 527, ¶¶ 7-8. Vail designated an area as the place where guests would board the buses to the resort. CF, p. 77, ¶ 9; CF, p. 527, ¶ 9. Defendant placed a barricade (or a "fence") in the area where guests would board the bus. CF, p. 261, ll. 20-25. This scene is shown in photographs at CF, pp. 408-409. CF, p. 443, ll. 3-13; *see also* CF, p. 403 at Responses to Interrogatories ## 24-25.

Vail retained an independent contractor, Stan Miller, Inc. ("Stan Miller"), to perform snow removal operations at the Airport Lot. CF, p. 179, ll. 10-24. Stan Miller's services only included plowing the Airport Lot such that it was drivable. CF, p. 433, l. 22 – p. 434, l. 2. Every morning, a Stan Miller employee would check the snow depth at the Airport Lot. CF, p. 432, ll. 8-9. When the snow reached a certain depth, Stan Miller personnel would plow the Airport Lot. CF, p. 432, ll. 9-13.

As a result of plowing activities, snow would be piled up along the barricade at the bus boarding area in the Airport Lot, thereby creating the circumstances for ice to artificially accumulate at the bus boarding area. CF, p. 396, l. 8 – p. 397, l. 10. Neither Defendant nor Stan Miller, Inc. took these barricades down when the Airport Lot was plowed regularly during the course of the year. CF, p. 396, l. 13 – p. 397, l.

1. The result is that snow would pile up next to the barricade when the Airport Lot was plowed as is depicted at CF 408-409. CF, p. 395, ll. 10-20 (identifying the photographs at CF 408-409); CF, p. 397, ll. 6-10 (confirming that the photographs showed what the boarding area would look like after plowing). Stan Miller personnel did not de-ice the residual ice that accumulated at the boarding area as a consequence of plowing activities. CF, p. 398, ll. 2-8.

Vail did not request that Stan Miller perform any other services, such as de-icing the area where Vail's guests would board buses at the Airport Lot. CF, p. 448, ll. 11-17.

No personnel other than Stan Miller personnel performed any snow removal and ice removal operations at the Airport Lot. CF, p. 60, ll. 4-8.

Vail did post a warning sign at the entrance to the Airport Lot – not at the area where guests boarded the buses. CF, p. 154, ll. 4-12; *see also* CF, p. 487 (the sign).

Ms. Hesford came to ski at Breckenridge on December 7, 8, and 9, 2010. CF, p. 248, ll. 4-6. It snowed on December 7, 2010 with whiteout visibility. CF, p. 254, ll. 18-19. It was sunny and warm on December 8, 2010, such that the temperature gauge inside of Ms. Hesford's car showed that it was 72 degrees. CF, p. 254, l.22 – p. 255, l. 8. It snowed again on December 9, 2010. CF, p. 255, ll. 12-19. After it started snowing on December 9, 2010, Ms. Hesford went to the Airport Lot to park

her car and ski at the Breckenridge Ski Resort. CF, p. 255, l. 20 – p. 256, l. 1. She parked her car and put on her helmet, ski boots, and other ski equipment. CF, p. 261, ll. 7-15. She also put cat tracks on her boots. CF, p. 275, l. 23 – p. 276, l. 2. She then gathered her skis and poles and walked over to the area near the barricade where guests boarded the bus to the resort. CF, p. 261, ll. 16-23. Ms. Hesford noticed that the ground near the barricade was very uneven and snow covered. CF, p. 261, ll. 23-25.

When the bus arrived, Ms. Hesford stepped forward and lifted her skis to place them in the external ski racks on the bus. CF, p. 262, ll. 1-3; CF, p. 282, ll. 12-18. As she lifted her skis, she slipped on the ice below and fell, sustaining injuries. *Id*.

After she fell, Ms. Hesford could see that what she had slipped upon was a "substantial buildup" of ice that appeared to be have been around for several days.[1] CF, p. 291, l. 8 – p. 292, l. 6; *see also* p. 298, ll. 16-21; *see also* p. 301, ll. 9-17. There was no way for Ms. Hesford to get to the bus without traversing the ice that had accumulated at the bus boarding area. CF, p. 293, l. 23 – p. 294, l. 2; *see also* p. 297, ll. 9-13.

[1] Ms. Hesford further described this buildup of ice as being two or three inches of uneven ice. CF, p. 288, ll. 13-21; p. 289, ll.1-2.

Ms. Hesford never saw the warning sign that Vail posted. CF, p. 247, ll. 4-15; *see also* CF, p. 271, ll. 23-25. The Airport Lot had been mostly cleared of snow and ice on December 8, 2010. CF, p. 292, ll. 19-25. Accordingly, Ms. Hesford's expectation prior to the fall was that Vail would clear the bus boarding area of ice because they generally cleared the rest of the Airport Lot. CF, p. 300, ll. 9-11. Ms. Hesford's general observation after she fell was that Vail cleared the parking lot surface but they did not clear the area where people boarded the bus. CF, p. 301, ll. 15-21.

B. Proceedings in the Trial Court

Ms. Hesford filed suit against Vail on October 25, 2012. CF, p. 66. Upon motion by Vail, the Trial Court entered summary judgment in favor of Vail and against Ms. Hesford on all of Ms. Hesford's claims on October 21, 2014. CF, p. 89. The Trial Court found that no genuine issue of material fact existed regarding both 1) whether Vail breached the duty of reasonable care to Ms. Hesford, and 2) whether Vail knew or should have known about the ice upon which Ms. Hesford slipped. CF, pp. 92-97.

Ms. Hesford moved the Trial Court to reconsider its judgment pursuant to C.R.C.P. 59(d)(6). CF, p. 53. The Trial Court failed to rule upon Ms. Hesford's

motion to reconsider within the 63 days allowed pursuant to C.R.C.P. 59(j), thus the motion was automatically deemed denied. CF, p. 5.

Ms. Hesford's appeals the Trial Court's entry of summary judgment against Ms. Hesford on her Colorado Premises Liability Act Claim, C.R.S. § 13-21-115.

SUMMARY OF THE ARGUMENT

I. The Trial Court erred in granting summary judgment in favor of Vail on Ms. Hesford's Colorado Premises Liability Act Claim, C.R.S. § 13-21-115. Genuine issues of material fact existed concerning whether Vail breached a standard of reasonable care owed to Ms. Hesford and whether Vail had actual or constructive knowledge of the dangerous ice upon which Ms. Hesford slipped. For these reasons, the Court should reverse the judgment of the Trial Court.

   a. Ms. Hesford submitted sufficient evidence that Vail breached the duty of reasonable care owed by a landowner to an invitee.

      i. Vail's failure to clear natural accumulations of ice, by itself, can constitute a breach of the duty of reasonable care. Colorado law requires landowners, in discharging their duties

to customers/business-visitors, to exercise reasonable care to discovery perils.

ii. Even if a mere failure to clear natural accumulations of ice, without more, is insufficient to constitute a breach of the duty of reasonable care, Ms. Hesford presented sufficient evidence of Vail's misfeasance to create a genuine issue of material fact regarding whether Vail breached the duty of reasonable care. Evidence was offered suggesting that Vail's subcontractor contributed to the creation of the ice upon which Ms. Hesford slipped. Vail also contributed to the creation of the dangerous circumstances that led to Ms. Hesford's injury.

iii. Expert testimony concerning the applicable standard of care is unnecessary for cases such as this one, and requiring such testimony constitutes bad policy. No Colorado court has required expert testimony in circumstances such as these, and such a requirement is inconsistent with the goals of the Colorado Supreme Court.

iv. The fact that the incident occurred in an alpine environment does not discharge Vail's duty to exercise reasonable care to

protect invitees from ice hazards. Finding otherwise is inconsistent with Colorado law and other jurisdictions that have adopted Restatement (Second) Torts Section 343.

b. Ms. Hesford submitted sufficient evidence showing that Vail knew or should have known of the dangerous condition that injured Ms. Hesford. Both the weather conditions at the time of the subject incident and the plowing activities of Vail's snow removal contractor were sufficient to show that Vail had requisite notice of the ice on which Ms. Hesford slipped.

ARGUMENT

I. The Trial Court erred in granting summary judgment in favor of Vail on Ms. Hesford's Colorado Premises Liability Act Claim, C.R.S. § 13-21-115, thus the Court should reverse the judgment of the Trial Court.

The Colorado Premises Liability Act ("PLA") provides the exclusive remedy for persons who allege injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property. C.R.S. § 13-21-115(2). It is undisputed in this case that

Vail qualifies as a landowner as defined by the PLA and that Ms. Hesford was an invitee at the time of the subject incident.[2]

To prevail on her PLA claim, Ms. Hesford must prove that:

1. Plaintiff sustained damages;
2. Defendant knew about a danger on the property or, as a person using reasonable care, should have known about it;
3. Defendant failed to use reasonable care to protect against the danger on the property; and
4. Defendant's failure to use reasonable care was a cause of the Plaintiff's damages.

C.R.S. § 13-21-115(3)(c)(1); CO-JCIV 12:3.

The Trial Court erred in ruling that Ms. Hesford presented insufficient evidence to establish that, in the light most favorable to Ms. Hesford, 1) Vail failed to use reasonable care to protect Ms. Hesford from the accumulation of ice at the bus boarding area, and 2) that Vail knew or should have known about the ice upon which Ms. Hesford slipped and fell. Therefore, the Court should reverse the Trial Court's judgment and remand this case for further proceedings.

[2] For this reason, Ms. Hesford does not challenge the Trial Court's dismissal of the negligence claim.

A. Standard of Review and Issue Preservation Citation

Ms. Hesford is challenging the Trial Court's grant of summary judgment, over her objection, on Ms. Hesford's Colorado Premises Liability Act Claim, C.R.S. § 13-21-115. CF, pp. 92-97 (order); CF, pp. 110-120 (preservation of the issue).

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c).

Where summary judgment is requested, the moving party has an initial burden to demonstrate an absence of evidence in the record that supports the non-moving party's case. *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). Once the moving party has met this initial burden, however, the burden shifts to the non-moving party to establish that there is a triable issue of fact. *Id*.

When a deciding court reviews a motion for summary judgment, material allegations of the non-moving party's pleadings are to be read in the light most favorable to that party's position. *Parrish v. DeRemer*, 187 P.2d 597 (Colo. 1947). Review of a judgment granting a motion for summary judgment is *de novo*. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995).

B. Ms. Hesford submitted sufficient evidence to establish a triable issue of fact that Vail breached the duty of reasonable care.

The Trial Court erred in ruling that Ms. Hesford presented insufficient evidence that Vail breached the standard of reasonable care. In so ruling, the Trial Court failed to account for the heightened duties that business-landowners owe to their invitee-customers, which include taking action to remove natural accumulations of snow and ice. The Trial Court also overlooked evidence that Ms. Hesford presented showing that Vail's own activities directly contributed both to the formation of the ice upon which Ms. Hesford fell and other circumstances that resulted in the fall. Finally, the Trial Court mistakenly attributed too much importance both to the lack of expert testimony on the issue what constitutes reasonable care and to the fact that this incident occurred in an alpine environment.

1. Vail's failure to clear natural accumulations of ice, by itself, can be a basis for breach of the duty of reasonable care.

Failure to clear a natural accumulation of ice can be a basis for breach of the duty of reasonable care that a defendant owed an invitee. Stepping outside of the PLA, negligence jurisprudence has long differentiated between the duties owed in the contexts of "misfeasance" and "nonfeasance:"

> In determining whether a defendant owes a duty to a particular plaintiff, the law distinguishes between acting and failure to act, that is, misfeasance, which is active misconduct that injures others, and nonfeasance, which is a failure to take positive steps to protect others from harm. The reason for this distinction is that a misfeasant creates a risk of harm; while the nonfeasant, although not creating a risk of harm, merely fails to benefit the injured party by interfering in his or her affairs. Thus, because in misfeasance the actor has created a new risk, and in nonfeasance the actor has simply preserved the status quo, the situations in which nonfeasance leads to liability are more circumscribed than those for misfeasance.

Smit v. Anderson, 72 P.3d 369, 372 (Colo. 2002) (internal citations omitted).

In nonfeasance cases, the defendant only owes the plaintiff a duty of care if a special relationship exists between the defendant and plaintiff. *Montoya v. Connolly's Towing, Inc.*, 216 P.3d 98, 105 (Colo. App. 2008). Such special relationships include the common carrier/passenger, innkeeper/guest, employer/employee, landowner/invitee, parent/child, and hospital/patient relationships. *Lewis v. Emil Clayton Plumbing Co.*, 25 P.3d 1254, 1256 (Colo. App. 2000).

Historically, Colorado courts have recognized that defendants owe plaintiffs heightened duties with regards to clearing natural accumulations of ice in the context of the landowner/invitee relationship. The case of *King Soopers, Inc. v. Mitchell*, 342 P.2d 1006 (Colo. 1959) (en banc) is instructive on this point. In that case, the plaintiff was walking out of defendant's grocery store carrying a bag of groceries

when he slipped and fell on ice in the parking lot. *Id.* at 1007. Plaintiff testified that he noticed the icy condition of the parking lot when he first arrived. *Id*. As in the instant case, the patch of ice that plaintiff slipped upon was covered in snow such that plaintiff did not recognize the hazard while walking. *Id*. There was no evidence that the defendant had actual notice of the hazard in question. *Id*. However, there was testimony from the plaintiff and his wife during the day of the incident and the days immediately preceding the incident, establishing that there had been snowy, icy weather. *Id*. A weather report was also admitted into evidence showing snowfall and freezing temperatures during the entire period preceding the incident. *Id*. Defendant's store manager testified that snow was regularly cleared from sidewalks, but that no effort was made to clear the parking lot, nor were signs warning of danger posted. *Id*. At trial, the jury entered a verdict in favor of plaintiff. *Id*. Defendant moved for a directed verdict, which was denied. *Id.* at 1008.

The Colorado Supreme Court affirmed the judgment of the trial court. The Court made two critical observations regarding the duties that the defendant landowner owed the plaintiff invitee. First, business visitors are entitled to expect that the landowner will take reasonable care to discover dangerous conditions on the premises and either make them safe or warn them of the danger. *Id.* at 1009 (citing Restatement (Second) Torts § 343, cmt. a.). Second, Colorado jurisprudence

recognizes that **landowners, in discharging their duties to business visitors, are obligated to exercise reasonable care to discover perils**. *Id.* (citing *John Thompson Grocery Co. v. Phillips*, 125 P. 563 (Colo. App. 1912) (emphasis added). This duty of discovery is not satisfied by the simple expedient seemingly followed here of ignoring the hazard. *Id*. The Court elaborated:

> Much emphasis is given to the fact that the icy condition of the area was obvious. We fail to perceive the significance of this factor in the present circumstances. Where a grocery shopper must cross a super market parking lot heavily laden with goods purchased in order to board his automobile it is of little help to him to be aware of the presence of ice along the way. Under these circumstances the likelihood of injury is not lessened by his knowledge and the degree of care which he exercises.

Id.

For those reasons, the Court concluded that the trial court properly allowed the jury to determine defendant's negligence. *Id.* at 1010.

Given the factual parallels between Ms. Hesford's claims and the *King Soopers* plaintiff's claim, Ms. Hesford's claims should also be submitted to a jury. Instead of carrying groceries, Ms. Hesford was carrying her ski equipment, thus being similarly encumbered and prone to injury. CF, p. 261, ll. 16-23. Like the defendant in *King Soopers*, Vail made no attempt to discover and clear ice at and around the bus boarding area at the Airport Lot beyond retaining Stan Miller to plow the Airport Lot. CF, p. 448, ll. 11-17; CF, p. 398, ll. 2-8; CF, p. 60, ll. 4-8. As in

King Soopers, the ice upon which Ms. Hesford slipped was covered by snow such that it could not be seen before the fall. CF, p. 291, l. 8 – p. 292, l. 6; *see also* p. 298, ll. 16-21; *see also* p. 301, ll. 9-17. The only significant factual discrepancy is that Vail posted a warning sign at the entrance to the parking lot whereas the *King Soopers* defendant did not post a sign. CF, p. 154, ll. 4-12; *see also* CF, p. 487 (the sign). However, the posting of such a sign does not discharge Vail's duty of reasonable care as a matter of law. First, the sign was not posted near where Ms. Hesford fell; no sign was posted in the vicinity of where the bus stopped. Second, Ms. Hesford did not see it. CF, p. 247, ll. 4-15; *see also* CF, p. 271, ll. 23-25. Lastly, Ms. Hesford had no available path to board the bus without stepping on the ice upon which she fell. CF, p. 293, l. 23 – p. 294, l. 2; *see also* p. 297, ll. 9-13.

These facts, combined with the general nature of the sign (in that the sign did not warn of the specific ice upon which Ms. Hesford slipped), create a genuine issue of fact regarding whether the mere posting of the sign constitutes reasonable care. That issue must be decided by the jury.

2. Sufficient evidence exists showing that Vail breached the duty of reasonable care through its own misfeasance.

Even if the Court determines that a business owner's failure to clear natural accumulations of ice for its customers cannot constitute a breach of the duty of

reasonable care, the Court should still allow Ms. Hesford to present her claims to a jury. In short, the factual circumstances surrounding Ms. Hesford's claims are readily distinguishable from a mere slip and fall on a natural accumulation of ice case because Vail's conduct actively contributed to the subject incident in three ways.

First, there is evidence that the ice upon which Ms. Hesford fell was an artificial accumulation of ice created by Vail's contractor. Stan Miller's plowing activities resulted in snow being piled up along the barricades in the bus boarding area. CF, p. 395, ll. 10-20 (identifying the photographs at CF 408-409); CF, p. 397, ll. 6-10 (confirming that the photographs showed what the boarding area would look like after plowing). Ms. Hesford further described the ice that she slipped on as being a "substantial buildup of ice" that appeared to have been around for several days. CF, p. 291, l. 8 – p. 292, l. 6; *see also* p. 298, ll. 16-21; *see also* p. 301, ll. 9-17. Her description of the ice is entirely consistent with the melting and refreezing of the snow that Stan Miller inadvertently piled up in the bus boarding area.

Second, Vail created dangerously false expectations for its patrons, such as Ms. Hesford, by generally plowing the Airport Lot but failing to clear the ice from the bus boarding area. On December 8, the Airport Lot had been mostly cleared of snow and ice to the surface. CF, p. 292, ll. 19-25. Accordingly, Ms. Hesford's

expectation prior to the fall was that Vail would clear the bus boarding area of ice because they generally cleared the rest of the Airport Lot. CF, p. 300, ll. 9-11. Ms. Hesford's general observation after she fell was that Vail cleared the parking lot surface but they did not clear the area where people boarded the bus. CF, p. 301, ll. 15-21.

Finally, Vail negligently chose to have passengers board the bus in an area that was full of ice. CF, p. 77, ¶ 9; CF, p. 527, ¶ 9. In fact, there was no way for Ms. Hesford to get to the bus without traversing the ice that had accumulated at the bus boarding area. CF, p. 293, l. 23 – p. 294, l. 2; *see also* p. 297, ll. 9-13. As other courts have pointed out, business owners have a duty to provide a reasonably safe means of ingress and egress from their places of business. *Johnson v. Abbott Laboratories, Inc.*, 605 N.E.2d 1098, 1103 (Ill. App. 1992). Here, the bus was the point of ingress for Vail's customers arriving at the Airport Lot. By choosing this particular location to have Ms. Hesford board the bus on the day of the incident, Vail guaranteed that Ms. Hesford would have to traverse dangerous ice to board the bus, thereby denying her a reasonably safe route of ingress.

In summary, all of these circumstances demonstrate that Ms. Hesford's claim is not an instance of a plaintiff merely slipping on a natural accumulation of ice without any misfeasance by the defendant. To the contrary, Vail actively contributed

to the causation of the subject incident through its acts and omissions as described above. Therefore, even if the Court determines that Vail's mere failure to clear an allegedly natural accumulation of ice is an insufficient basis to submit Ms. Hesford's claim to the jury, then the Court should still find that Vail's alleged misconduct, when viewed in the light most favorable to Ms. Hesford, is such a sufficient basis.

3. Expert testimony is not – nor should be – required to establish breach of the standard of reasonable care in slip-and-fall-on-ice cases such as this instant case.

The Trial Court's ruling relied, at least in part, upon Ms. Hesford's failure to present evidence of "the existence of some other custom or practice in the industry" pertaining to the applicable standard of reasonable care for snow and ice removal. However, the Trial Court did not cite any authority for the proposition that such evidence is required in a case like this one.

Simply put, this not a case where expert testimony is needed on the issue of the standard of care. Expert testimony is admissible if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. C.R.E. 702. Typically, expert testimony is needed in cases involving highly specialized and technical standards of care, such as professional malpractice cases, where a jury of lay persons has no knowledge upon which to

determine whether a defendant did something wrong. *See e.g. Greene v. Thomas*, 662 P.2d 491 (Colo. App. 1982) (requiring expert testimony from a witness familiar with the applicable standard of care in medical malpractice cases). In stark contrast to those types of cases, this is a very simple case where Vail failed to take the allegedly common sense action of clearing ice at the area where its guests board its buses. No specialized knowledge is needed for a jury to determine whether Vail fulfilled its legal duty of reasonable care. Indeed, every prospective juror as a resident of Summit County will have confronted the issue of whether and how to mitigate the dangers posed by accumulations of snow and ice on their own properties – commercial or otherwise.

Moreover, *requiring* plaintiffs to present expert testimony on liability in this type of slip-and-fall case is strictly counter to the Colorado Supreme Court's goal of reducing the expense of litigation. For the past several years, the Colorado Supreme Court has been running the Civil Access Pilot Project ("CAPP"). *See* Chief Justice Directive 11-02. The Colorado Supreme Court released a document describing the genesis and goals of CAPP. CF, p. 383. The very first paragraph of the document states:

> Increasingly difficult economic times test the limits of individuals, businesses, and governments, as budgets are stretched often to a break point. More and more litigants are priced out of the civil justice system for dispute resolution, while judges have fewer and

> fewer resources to handle the claims that do make it to court…. The legal profession must search for ways to decrease the burden of civil litigation on both litigants and courts, increase access to judicial dispute resolution, and protect civil trial as a valuable institution. This was the impetus behind the creation of the Colorado Civil Access Pilot Project (CAPP) for certain business actions in district court.

Id.

CF, p. 383. One of the ways that CAPP reduces the cost of litigation is by limiting one of the most expensive components of litigation: expert discovery and testimony at trial. *See* PPR 10.1 – 10.3.

Consistent with the aims of CAPP, the Colorado Supreme Court has recently adopted amendments to the Colorado Rules of Civil Procedure. *See* Rule Change 2015(05). Perhaps the most significant of these amendments is the new limitation on the scope of discovery that requires application of the principle of "proportionality" in determining the scope of discovery that will be permitted. *See* C.R.C.P. 26(b)(1) (2015).

In summary, and particularly against this backdrop of the explicit goals of the Colorado Supreme Court, it would be bad policy for this Court to create a new requirement for expert testimony in simple slip-and-fall cases such as the one before the instant case.

4. The alpine climate does not discharge a landowner's duties to exercise reasonable care to protect invitees from ice hazards as a matter of law.

The Trial Court, at Vail's behest, reasoned that Vail cannot be held to have breached the duty of reasonable care as a matter of law because the subject incident involving ice occurred in an alpine environment during the winter time. However, Defendant provides no legal authority for this extraordinary claim. The implication of this reasoning is that alpine businesses are never liable to their patrons for slip-and-fall incidents on naturally accumulating ice. On its face, this is plainly inconsistent with Colorado case law. *See King Soopers*, 342 P.2d 1006.

Other jurisdictions that, like Colorado, have adopted the Restatement (Second) of Torts Section 343 and found that business owners can be liable to invitees for injuries occurring as a result of natural accumulations of ice have rejected this argument. For example, in a case where the plaintiff was injured when he slipped on a natural accumulation of ice in a parking lot at a grocery store, the Alaska Supreme Court noted:

> Alaska climatic conditions do not metamorphize all risks arising from ice and snow conditions into reasonable risks for the business invitee. Nor are we persuaded by [defendant's] policy argument that in Alaska it would result in unreasonable costs to the private-commercial possessor of land to require the possessor to clear ice and snow, or otherwise remedy conditions which amount to unreasonable risks of

> harm to business invitees. **The mere fact that snow and ice conditions prevail for many months throughout various locations in Alaska is not in and of itself sufficient rationale for the insulation of the possessor of land from liability to his business invitee.** Nor do such climatic conditions negate the possibility that the possessor should have anticipated harm to the business invitee despite the latter's personal knowledge of the dangerous snow and ice conditions or the general obviousness of such conditions.

Kremer v. Carr's Food Center, Inc., 462 P.2d 747, 752 (Ak. 1969).

The Court should adopt the reasoning of the *Kremer* court here. The notion that the alpine environment gives Vail a free pass from clearing natural accumulations of ice is untenable.

C. Ms. Hesford presented sufficient evidence such that a jury could determine that Vail knew or should have known about the dangerous condition that injured Ms. Hesford.

To prevail on a PLA claim, a plaintiff-invitee must prove that the defendant-landowner "knew about a danger on the property or, as a person using reasonable care, should have known about it." C.R.S. § 13-21-115(3)(c)(1); CO-JCIV 12:3. This knowledge standard is satisfied by either actual or constructive knowledge. *Lombard v. Colorado Outdoor Educ. Center, Inc.*, 187 P.3d 565, 571 (Colo. 2008). Constructive knowledge is defined as "**[k]nowledge that one** using reasonable care or diligence **should have**, and therefore that is attributed by law to a given person."

Id. (quoting *Black's Law Dictionary* 876 (7th ed.1999)). Thus, Colorado courts have consistently held that, as a matter of policy and public safety, it is entirely appropriate that the law impute certain knowledge to prevent individuals from denying knowledge or acting in a way so as to remain ignorant. *Id.* at 571-572. Again, Colorado courts have held that landowners have a duty of discovery when it comes to identifying and mitigating hazards on their property. *King Soopers*, 342 P.2d 1006.

Ms. Hesford presented sufficient evidence such that a jury could determine that Vail constructive knowledge of the ice upon which Ms. Hesford slipped. Ms. Hesford testified that it snowed on December 7, 2010 with whiteout visibility. CF, p. 254, ll. 18-19. She further testified that it was sunny and warm on December 8, 2010, and that the temperature gauge inside of her car showed that it was 72 degrees. CF, p. 254, l.22 –p. 255, l. 8. She also testified that it snowed again on December 9, 2010. CF, p. 255, l. 20 – p. 256, l. 1.She further testified that the ice upon which she slipped was a "substantial buildup" that appeared to be have been around for several days. CF, p. 291, l. 8 – p. 292, l. 6; *see also* p. 298, ll. 16-21; *see also* p. 301, ll. 9-17.

More importantly, the testimony from Stan Miller personnel establish something more akin to actual knowledge of the ice. Every morning, a Stan Miller

employee would check the snow depth at the Airport Lot. CF, p. 432, ll. 8-9. When the snow reached a certain depth, Stan Miller personnel would plow the Airport Lot. CF, p. 432, ll. 9-13. Furthermore, Stan Miller personnel verified that, as a result of plowing activities, snow would be piled up along the barricade at the bus boarding area in the Airport Lot, thereby creating the circumstances for ice to artificially accumulate at the bus boarding area where Ms. Hesford slipped. F, p. 396, l. 8 – p. 397, l. 10. This knowledge should be imputed to Vail. *See Jehly v. Brown*, 2014 COA 39, ¶ 17 (Colo. App. 2014) (knowledge of agent contractor is generally imputed to principle). Duties under the Colorado Premises Liability Act are non-delegable. *Jules v. Embassy Props., Inc.*, 905 P.2d 13 (Colo. App. 1995). It would be inconsistent with the goals of the Colorado Premises Liability Act for Vail to claim that it was unaware of the conditions at the Airport Lot by simply delegating its snow and ice removal duties to a contractor and then claiming ignorance of the contractor's actions thereafter.

In ruling that there was insufficient evidence that Vail had knowledge of the ice upon which Ms. Hesford slipped, the Trial Court relied upon the natural accumulation of snow on sidewalk cases. *See e.g. City and County of Denver v. Dugdale*, 256 P.2d 898 (Colo. 1953), *City of Boulder v. Niles*, 12 P. 632 (Colo. 1886). In this line of cases, the defendants did not owe plaintiffs the heightened

duties that business owners owe their patrons, which is the duty that Vail owed Ms. Hesford. In each case, the plaintiff sued the city for an allegedly unreasonable failure to clear public sidewalks. Each court noted that it would be unreasonable as a matter of public policy to require a municipality to be required to patrol its "many miles of sidewalk" to clear natural accumulations of ice and snow. *Dugdale*, 256 P.2d at 901. As such, these courts consciously raised the bar for the evidentiary showing that a plaintiff would have to make to find the municipality liable.

As is discussed above, business owners are obligated to exercise reasonable care to discover perils that exist and may endanger their patrons. *See King Soopers*, 342 P.2d 1006; *accord Lombard*, 187 P.3d 565. Based upon this principle, the *King Soopers* court concluded that evidence of weather conducive of producing ice, combined with the defendant's failure to take any action to discover and mitigate ice hazards in the parking lot, was sufficient to impute constructive notice of a dangerous condition upon the defendant. *King Soopers*, 342 P.2d at 1010. Similar evidence was presented here through the testimony of Ms. Hesford.

For all of these reasons, and looking at the evidence in the light most favorable to Ms. Hesford, sufficient evidence exists showing that Vail knew or should have known about the ice upon which Ms. Hesford slipped.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff-Appellant A. Margaret Hesford respectfully requests that this Court reverse the District Court's order granting summary judgment in favor of Defendant-Appellee Vail Summit Resorts, Inc. on Ms. Hesford's Colorado Premises Liability Act claim, and remand this case for further proceedings.

Respectfully submitted this 17th day of August, 2015.

CROSSE LAW LLC
Duly signed original on file at CROSSE LAW LLC

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CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 17th day of August, 2015, a true and complete copy of the foregoing **AMENDED OPENING BRIEF** was filed with the Court and served upon the below listed parties via ICCES addressed as follows:

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