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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Certiorari to the Colorado Court of Appeals Published Opinion: 2014 COA 13 (Feb. 13, 2014), by Hon. Fox, J., Navarro, J., concurs, and Jones, J., dissents. Case No.: 13CA0517 Grand County District Court Case No. 12CV132 Hon. Mary C. Hoak, Judge	▲COURT USE ONLY▲
Petitioner: Salynda E. Fleury, individually, on behalf of Indyka Norris and Sage Norris, and as surviving spouse of Christopher H. Norris, v. **Respondent**: IntraWest Winter Park Operations Corp.	**Supreme Court** **Case No.: 2014SC224**
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OPENING BRIEF

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

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 those rules.

Specifically I certify:

(a) This brief complies with C.A.R. 53(a) and C.A.R. 32 (a)(3) because it contains 8677 words, as determined using the word processor's word count function in compliance with the rule.

(b) This brief complies with C.A.R. 28(k) because it contains under separate heading a concise statement of the applicable standard of review, with citation to legal authority; and citation to the precise location in the record where the issue was raised and ruled upon, as required.

s/ James G. Heckbert

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I. ISSUE PRESENTED FOR REVIEW

In adopting the Ski Safety Act (SSA), the General Assembly established safety standards for and defined the rights, responsibilities, and liabilities of ski area operators and skiers. §33-44-101, *et. seq.*, C.R.S.[1] See *Graven v. Vail Associates*, 909 P.2d 514, 517 (Colo. 1995). The General Assembly chose to give ski area operators limited statutory immunity from suit for injuries to skiers, but only for injuries resulting solely from the "inherent dangers and risks of skiing." §33-44-112, C.R.S. In a legislative term of art, the SSA defines the "inherent dangers and risks of skiing" to include obstacles and conditions skiers should reasonably expect to encounter while skiing. §33-44-103(3.5), C.R.S. The General Assembly did not include the word "avalanche" in the list of inherent dangers and risks of skiing yet, in the decisions below, the district court and the court of appeals added avalanche to that list.

This Court granted certiorari review to consider the following issue:

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

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[1] Except as indicated, citations to the Colorado Revised Statutes refer to the 2014 revision.

Order, December 8, 2014. Ms. Fleury submits that it does not and that the Court should vacate the decision below.

II. STATEMENT OF THE CASE

A. Nature of the case

On January 22, 2012, an avalanche killed Christopher Norris while he skied in an area known as "Trestle Trees" inside the bounds of Winter Park Resort, a ski area operated by IntraWest Winter Park Operations Corporation (Winter Park). His surviving spouse, Salynda Fleury, sued Winter Park on behalf of herself and her children, for negligence, wrongful death and willful and wanton conduct. (ROA #002).

In her Complaint, Ms. Fleury alleged that, in light of avalanche warnings and its own experience, Winter Park knew the Trestle Trees area would likely experience dangerous avalanches should skiers enter the area under the existing conditions. Despite this knowledge, Winter Park chose not to close the Trestle Trees area or warn skiers of the high avalanche danger in the Trestle Trees area. (ROA #002 ¶¶ 17-31). Ms. Fleury also alleged that Christopher Norris could rightly assume the Trestle Trees area was safe from avalanche danger when Winter Park did not close the area. (*Id.* ¶ 32).

B. Course of Proceedings in the District Court.

After answering, (ROA #004), Winter Park moved for a determination of law and judgment on the pleadings, claiming immunity from liability under the SSA, arguing that an avalanche constitutes an inherent danger or risk of skiing.[2] (ROA #013). After briefing, the district court granted Winter Park's motion, finding the avalanche that killed Mr. Norris fell within the statutory definition of the "inherent dangers and risks of skiing" in §33-44-103(3.5), for which Winter Park had limited statutory immunity. (ROA #047). Ms. Fleury timely moved for reconsideration of the District Court's ruling. (ROA #050–055). The district court denied the motion on its merits, finding no authority upon which it could reconsider its prior ruling. (ROA #065).

C. Disposition in the Court of Appeals.

In a published 2-1 opinion, the court of appeals affirmed the dismissal of Ms. Fleury's wrongful death action. *Fleury v. IntraWest Winter Park Operations Corp.*, 2014 COA 13.

[2] Although Winter Park moved to dismiss the complaint pursuant to C.R.C.P. 12(b)(6), the district court decided the motion under C.R.C.P. 12(c). (ROA #047 at 2).

1. The Majority Opinion.

In the majority opinion, Judges Fox and Navarro affirmed the district court's dismissal. *Fleury* ¶¶1-23. According to the majority, the General Assembly typically uses "include" as a word of expansion before an illustrative list, so they read the definition in §33-44-103(3.5) expansively. *Id.* ¶11. The majority found that Ms. Fleury's "own allegations" attributed the fatal avalanche to "changing snow conditions (new snowfall) and existing snow conditions (weak and unstable snowpack) caused by weather and slope steepness (slope exceeding thirty degrees)." *Id.* ¶14. Thus, according to the majority, "avalanche falls neatly into the examples of dangers" in the SSA. *Id.* ¶15. Discussing part of the 2004 amendment to the statutory definition, the Court ruled that "inclusion of an avalanche as an inherent danger or risk of skiing is consistent with the General Assembly's intent, as evidenced by the evolution of the Act." *Id.* ¶19.

2. The Dissenting Opinion.

Judge Jones dissented. Because §33-44-103(3.5) "does not expressly or by clear implication include avalanches occurring on open, designated ski trails within its definition … the grant of immunity in §33-44-112, for injuries resulting from the inherent dangers and risks of skiing does not apply to [in-bounds avalanche] injuries." *Id.* ¶29. He reasoned that because the SSA grants "an

immunity from suit" in derogation of the common law, the Court must strictly construe the statute. *Id.* ¶37.

In Judge Jones's view, the majority's reading "contravenes the governing principles that a statute's grant of immunity must be strictly construed, may not be expanded by construction, and must appear expressly or by clear implication." *Id*. ¶38. Citing this Court's precedent, Judge Jones also noted that "the General Assembly has spoken with exactitude in defining the inherent dangers and risks of skiing, delineating with specificity the types of conditions and events which fall within that definition." *Id*. ¶39.

> It is not as if avalanches are unheard of occurrences in mountainous areas, or even on or near ski areas. And yet the General Assembly—despite formulating a lengthy definition identifying numerous specific conditions and events—did not expressly (or otherwise clearly) include avalanches. Given the exactitude with which the General Assembly has spoken, I do not believe it is appropriate for us to essentially add another event to the definition.

Id. ¶40.

Finally, Judge Jones pointed out that while other states have statutes nearly identical to Colorado's SSA, only Montana's statutory definition of the inherent dangers and risks of skiing adds "avalanches, except on open, designated ski trails." *Id.* ¶53, *citing* MONT. CODE ANN. §22-2-702(2)(c). This indicates Montana's General Assembly did not believe the other listed conditions included

avalanche, and that avalanches on open, designated trails are not inherent dangers or risks of skiing. *Fleury* ¶53. Thus, Judge Jones concluded, at the very least Colorado's statutory definition is ambiguous, and a court must resolve that ambiguity by concluding no immunity exists for injuries resulting from avalanches. *Id.*

III. STATEMENT OF RELEVANT FACTS

In the early afternoon on Sunday, January 22, 2012, while skiing in-bounds at Winter Park, an avalanche caught Christopher Norris in the Trestle Trees and killed him. At that time, Winter Park knew the Trestle Trees area would likely experience dangerous avalanches should skiers enter the area under the existing conditions, based on avalanche warnings issued before Mr. Norris' death.

On Saturday, January 21, 2012, at 6:24 A.M., about 36 hours before Mr. Norris died in the avalanche, the Colorado Avalanche Information Center issued an avalanche forecast and warning for the Front Range zone, which included Winter Park Resort, in effect through 12 o'clock noon, January 23, 2012. The warning, which informed backcountry users of specific backcountry avalanche dangers, stated, as follows:

> An avalanche warning is in effect for today. Natural and human triggered avalanches are very likely. Be careful near or below any slope over 30 degrees. You will be able to easily trigger avalanches on most aspects and elevations. Triggering

> avalanches from distances of 100 feet away or greater is likely. The largest avalanches will occur on slopes facing north through east through southeast near and above tree line. Widespread but smaller avalanches are likely on all other slopes.
>
> The Front Range will see an increase in winds and snowfall today. A cold front will hammer the zone about sunset tonight. Strong winds and periods of heavy snowfall later today all point to an increasing avalanche danger. **Backcountry users** should expect to find propagating cracks in the snowpack, natural avalanche activity, remote triggered avalanches, some from a long way away from where you stand, deep rumbling collapses, and an increasing possibility of human triggered avalanches. **This has the potential to be a fairly dangerous weekend for back county travelers.**
>
> * * *
>
> Reading through these recent observations it is pretty easy to see that we are starting to push into areas of higher avalanche danger. With today's storm with strong winds and periods of heavy snowfall lurking on the horizon, **backcountry travelers should anticipate an increasing avalanche danger for the weekend**.

(ROA #002, ¶ 9 (emphasis added)). While the forecast specifically warned of avalanche danger in backcountry areas to backcountry users and travelers, it did not mention ski areas. (*Id*.)

On Sunday, January 22, 2012, at 6:52 A.M., the Center issued another avalanche warning for the Front Range, including the Winter Park Resort, in effect through 12 o'clock P.M., January 24, 2012. The Center recommended that skiers avoid "avalanche terrain" in favor of skiing in "the safety of a ski area."

> Widespread dangerous avalanche conditions exist today. Triggering avalanches is likely on any snow-covered slope 30 degrees or steeper that did not slide during the natural cycle yesterday. The natural avalanche cycle has largely run its course, so I will drop the Avalanche Warning, but natural avalanches are still possible today. Triggering slides will be easy today, and some of them will be bigger than what we have seen so far this winter. Triggering avalanches remotely and from low angle or even flat terrain is likely. Be very wary near or below any avalanche terrain, and keep in mind that even small slides can bury and kill you.
>
> **Travel in the back country is not recommended today**. 4 to 6 inches fell overnight and another 2 to 4 inches will fall this morning. Strong west to southwest winds are drifting this snow onto northerly and easterly aspects. This weak snowpack will not be able to handle even this modest new load. Natural and human triggered avalanches are likely today. You will be able to remotely trigger slides from distances of 100 feet or greater and from flat areas. Some of these avalanches could be quite large. **Avoid avalanche terrain today, or enjoy the powder in the safety of the ski area**.

(*Id.* ¶ 10 (emphasis added)).

IV. STANDARD OF REVIEW AND PRESERVATION OF THE ISSUE

This Court reviews the construction of statutes *de novo*. *Stamp v. Vail Corp.*, 172 P.3d 437, 442 (Colo. 2007). When ruling on a C.R.C.P. 12(c) motion for judgment on the pleadings, courts must construe the allegations of the pleadings strictly against the movant, must consider the allegations of the opposing parties' pleadings as true, and should not grant the motion unless the pleadings themselves show that the matter can be determined upon the pleadings. *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 2012 CO 61, ¶¶ 16-17.

Ms. Fleury preserved the issue in her response and objection to the Motion to Dismiss or for Judgment on the Pleadings as well as in her motion for rehearing. (ROA #021, #022, #050 - #55, and #58– #61).

V. SUMMARY OF THE ARGUMENT

Contrary to the majority opinion, avalanche does not "fall neatly" into the list of inherent dangers and risks of skiing that the General Assembly identified in the SSA. The word "avalanche" does not appear in the statute, despite multiple iterations of the term "inherent dangers and risks of skiing" and the court of appeals should not have added it, neatly or otherwise.

The list of inherent dangers and risks of skiing specifically sets out those conditions for which the General Assembly thought ski area operators should have a limited immunity from liability. Courts are not free to pencil in additional inherent risks they deem worthy to include, either through adding risks to that finite list or by inferring additional unidentified risks of which the public has never been given notice pursuant to the signage and notice requirements of § 33-44-107(8), C.R.S.

Winter Park could have eliminated the risk of being swept away in an in-bounds avalanche at Winter Park Resort on January 22, 2012, by reasonable safety measures. Winter Park could have easily warned skiers that specific areas, such as the Trestle Trees, were closed due to that danger or warned of their propensity to avalanche. (ROA #002 ¶¶ 9, 10, 18-32). Winter Park chose not to do so and Mr. Norris died from an in-bounds avalanche in an area open to skiers.

Winter Park has defended this lawsuit on the theory that the SSA requires skiers to bear the risk of in-bounds avalanches on its slopes, and convinced the court of appeals to endorse that reading. In light of the breadth of the opinion, it is anyone's guess whether skiers now need to abate avalanche risks through self-help, or to obtain specialized avalanche awareness training and equip themselves

and their children with avalanche beacons and other specialized backcountry safety equipment.

Under the rule announced by the majority, any avalanche, even one caused by the ski area's negligence or recklessness, would be an inherent danger of skiing, for which the ski area may avoid liability. This is contrary to the common sense understanding of where dangerous avalanches occur and to the general sense that skiing in-bounds at a ski area eliminates the risk of being caught in an avalanche. *See e.g.*, CAIC warnings (ROA #002 ¶¶ 9, 10) (quoted in the Facts section, *supra*, at 6–8). It also runs contrary to the truth that ski area operators know their mountain's terrain, understand where and under what conditions avalanches are likely to occur in-bounds, and are required to abate the danger of avalanches using explosives, trail closures, and other techniques before skiers arrive to ski in the morning. Instead, the majority decision has now placed on skiers the burden of ensuring their own safety and that of their families.

There is a better way—the one intended from the statute's plain text, as supported by the legislative history. The conditions identified in §33-44-103(3.5), constitutes an exclusive list of conditions: if one of those conditions causes a skier to suffer an injury, then the ski area has a limited immunity from suit. Otherwise,

no immunity exists. If the General Assembly wishes to include avalanches within the inherent risks of skiing it may do so expressly.

VI. ARGUMENT

A. The SSA's definition of "inherent dangers and risks of skiing" does not include in-bounds avalanches in areas open to skiers.

Neither the SSA as originally enacted in 1979, nor the amendments of 1990 and 2004, completely immunize ski area operators for their negligent, reckless, or intentional acts. Rather, the SSA gives ski area operators a limited immunity from suit "for injury resulting from the inherent dangers and risks of skiing." §33-44-112.

In *Kumar v. Copper Mt. Resort*, 431 Fed. Appx. 736 (10th Cir. 2011), the court explained that under the SSA a ski area operator may be liable under one of two theories. First, if an injury does not result from an inherent danger or risk of skiing, it falls outside the scope of the SSA and is governed by common law negligence. *Id*. at 738. Second, if an injury results from a ski area's violation of the statutory duty imposed by the SSA, then the SSA does not provide immunity from suit. *Id*. However, if an injury results solely from an inherent danger or risk of skiing, ski areas have a limited immunity under the statute and cannot be sued. Thus, a proper interpretation of the statutory definition of the "inherent dangers

and risks of skiing" is critical to determining whether a skier can sue for his or her injuries or whether the statute abrogates that common law right.

1. When an unambiguous statute abrogates the common law, the Court must read it narrowly to find and apply its plain meaning.

Courts presume that the General Assembly intends a just and reasonable result when it enacts a statute, and a statutory construction that defeats the legislative intent will not be followed. §2-4-201(1)(c), C.R.S.; *Avicomm, Inc. v. Colo. Pub. Utils. Comm'n.*, 955 P.2d 1023, 1031 (Colo. 1998). When construing a statute, the Court's "primary purpose is to ascertain and effectuate the intent of the General Assembly." *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007). To find the General Assembly's intent, the Court first will look to the plain and ordinary meaning of the statutory language. *Id.* If the language is clear the Court will apply that meaning. *Id.*

This Court will not add words to a statute. *Id.* Nor will it "construe a statute in a manner that assumes the General Assembly made an omission; rather, the General Assembly's failure to include particular language is a statement of legislative intent." *Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010). The Court assumes "that the General Assembly meant what it clearly said." *Weinstein v. Colborne Foodbotics, LLC*, 2013 CO 33, ¶19. And the Court

will not strain the plain meaning of words in order to create an "imagined connection." *Preston v. Dupont*, 35 P.3d 433, 440 (Colo. 2001).

"Statutes in derogation of the common law must be strictly construed in favor of the person against whom their provisions are intended to be applied." *Preston*, 35 P.3d at 440. So if the General Assembly wishes to abrogate common law remedies it must manifest that intent "expressly or by clear implication." *Cooper v. People*, 973 P.2d 1234, 1239 (Colo. 1999) *legis. superseded on other grounds*; *Bayer v. Crested Butte Mt. Resort*, 960 P.2d 70, 74-75 (Colo. 1998). That is, the General Assembly does not intend by a statute to make any change in the common law beyond what it declares by its express terms. *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1021 (Colo. 2003). Thus, "unless the legislature clearly and unmistakably abrogates a remedy available at common law [this Court] will not infer it." *Id*. Consistent with *Cooper*, *Bayer*, *Hawes*, and *Preston*, this Court should strictly construe the SSA's immunity provisions in favor of a skier's common law rights and against the area operator.

2. The SSA prescribes the duties and liabilities of ski area operators and skiers.

The legislative purpose behind the SSA and the placement of the relevant provisions within the statutory scheme provide guidance for the Court in construing its provisions. The legislative declaration is often the best guide to the

General Assembly's intent. *Stamp*, 172 P.3d at 443.Accordingly, this Court's prior construction of the SSA relied in part on a statutory legislative declaration and on another legislative declaration included in the 1990 Session Laws, which shed light on the General Assembly's intent behind the SSA and the definition at issue here. *See Graven*, 909 P.2d at 517; *Stamp*, 172 P.3d at 443-44.

Since 1979, the SSA has recognized that "dangers … inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed." § 33-44-102, C.R.S.; *Graven*, 909 P.2d at 517. In recognition of these risks, the General Assembly established reasonable safety standards for and defined the relative rights, responsibilities, and liabilities of and between ski area operators and skiers. *Id.* The duties of ski area operators are found in §33-44-106, C.R.S. (signs); §33-44-107, C.R.S. (signs and notices); and §33-44-108, C.R.S. (additional duties). The duties of skiers are found in §33-44-109, C.R.S. Nothing in the SSA makes these duties exclusive to either the ski area operator or skiers, nor can it reasonably be inferred the listed duties are exclusive.

The 1979 version of the SSA noted the existence of "inherent dangers" of skiing but did not define them. *Graven*, 909 P.2d at 517. In a 1990 amendment, the General Assembly added the portion of the SSA pertinent here. As this Court has recognized, by doing so the General Assembly "intended to clarify the law

regarding the duties and responsibilities of skiers and ski area operators and to provide additional protection for ski area operators." *Graven*, 909 P.2d at 517-518, *citing* Ch. 256, §1, (non-statutory) Legislative Declaration, 1990 COLO. SESS. LAWS 1540. That 1990 amendment "introduce[d] and define[d] the phrase 'inherent dangers and risks of skiing,' and exclude[ed] such dangers and risks from the ski area operators' duty to warn and from the causes of injuries upon which a claim can be based." *Id.*, *citing* Ch. 256, §§ 2, 3, 7, §§ 33-44-103(10),[3] -107(2)(d), -112, 1990 COLO. SESS. LAWS 1540, 1541, 1543. The amendment added language that expressly limits the SSA's scope (as relevant here) to a list of "inherent dangers and risks of skiing." *Id.*

In 2004, the General Assembly amended its definition of "inherent dangers and risks of skiing." The amendment struck the word "integral," while it specifically added "cliffs and extreme terrain" to the list of surface or subsurface conditions and added "freestyle terrain and jumps" to the list of manmade variations of steepness and terrain. Ch. 341, §1 2004 COLO. SESS. LAWS 1383. Despite that level of specificity in its amendment, the General Assembly did not

[3] Note: Before publication, the Revisor of Statutes apparently renumbered §33-44-103(10) in the session law as §33-44-103(3.5) in the permanent statutes.

add “avalanche.” The General Assembly has not subsequently amended §33-44-103(3.5).

The Court may also consider the SSA’s legislative history to verify its construction, even when the statute is unambiguous. *Graven*, 909 P.2d at 517, n. 3 and 519, n. 5; *Welby Gardens v. Adams County Bd. of Equalization*, 71 P.3d 992, 995 (Colo. 2003) (even though Court found language unambiguous the Court considered the legislative history and found it supported the Court’s construction of the statute).

With that statutory history and legislative intent in mind, the plain meaning of “inherent dangers and risks of skiing” as a legislative term of art comes into focus.

3. The statute is not ambiguous and does not immunize ski area operators from suit for in-bounds avalanches in open areas.

The SSA does not immunize ski area operators from in-bounds avalanches that occur within areas open to skiers. “The legislature has carefully chosen how to let stand, supplement, or limit application of the common law in the arena of ski safety … .” *Bayer*, 960 P.2d at 76.

To begin, the plain language of the SSA defines “inherent dangers and risks of skiing.” In creating this statutory term of art, the General Assembly has cabined the scope of the words “inherent” and “danger” by listing specific types

of risks. The General Assembly did not include "avalanche" in the list of inherent risks of skiing, despite common knowledge of avalanche danger in the mountains. As Judge Jones observed in the dissent, "the General Assembly identified particular events which would fit within the statutory definition — collisions with natural objects, impacts with man-made objects, and collisions with other skiers." *Fleury* ¶47 (Jones, J., dissenting). But "[t]he event at issue here—an avalanche—is not among them." *Id.* (footnote omitted).

The Court should resist any urge to assume the General Assembly made such a glaring omission and should instead apply the statute as written. *Spec. Rests. Corp.*, 231 P.3d at 397. "Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." §2-4-101, C.R.S. A court must apply the words as written and should not reach to create an "imagined connection" between parts of the definition or infer a legislative abrogation of common law rights absent a clear expression of legislative intent. *Preston*, 35 P.3d at 440-41; *and see Hawes*, 65 P.3d at 1021.

Notwithstanding these rules, and without regard to the manner in which the General Assembly cabined the words "danger" and "inherent," the majority opinion resorted to a broader dictionary definition of the word "danger." *Fleury*

¶15. Much like the court of appeals did in *Graven,* the majority opinion here erred when it broadly construed the definition of "inherent dangers and risks of skiing" in §33-44-103(3.5), by "cobbling together three categories of covered dangers and risks" to reach a conclusion that expands the definition beyond what the General Assembly intended. *Fleury* ¶38 (dissent). After all, a ski area exists as a steep mountainous land form with old and new snow conditions caused by weather. The majority's construction renders the "inherent risks of skiing" limitless and in doing so, failed to follow this Court's directives regarding statutory construction, particularly where the statute abrogates common law causes of action. The statute's plain language reveals that the General Assembly did not intend to allow courts to expand the scope of the limited immunity. Rather, strictly construing subsection (3.5), the Court should find that the dynamic process of an avalanche cannot possibly be fabricated into an inherent risk of skiing from the list of conditions a skier should reasonably expect to encounter within the bounds of a ski area.

B. Courts do not add words or terms to expand a statute's meaning and they strain not to expand a list to include items unlike those the General Assembly included.

1. Courts will not pen new language in finite, enumerated lists, and typically will restrain their reading, favoring strict construction of statutes abrogating the common law.

When interpreting statutory lists, such as the "the inherent risks of skiing," this Court has long relied upon common law tools, such as the "negative implication cannon" and the cannons of *inclusion unius est exclusion alterius* and *noscitur a sociis* (a word is known by the company it keeps) to highlight the limits on judicial power to change statutory language. *See e.g.*, *Bedford v. Johnston*, 78 P.2d 373, 376 (Colo. 1938) ("under the legal doctrine of *noscitur a sociis* ... the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it."). Also, the "negative implication canon," bars courts from inserting additional language into finite lists, because "'when the legislature speaks with exactitude, [the Court] must construe the statute to mean the inclusion or specification of a particular set of conditions necessarily excludes others.'" *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004); *quoting Lunsford v. Western States Life Ins.*, 908 P.2d 79, 84 (Colo. 1995). Here, the degree of specificity in subsection (3.5), as adopted in 1990 and as amended in 2004 (adding additional specific terms), calls for application of this rule. *Fleury* ¶39

(dissent) (finding this rule applies here).

While this Court has at times expanded legislative lists, it does so with caution, carefully avoiding going beyond the limits the General Assembly set within the meaning of the statutory scheme as a whole. For instance, in *People v. Gross*, 830 P.2d 933, 936 (Colo. 1992), the Court held that the definition of "knife" in §18-12-101, C.R.S., included a screwdriver when the prosecution proved defendant's intent to use it as a weapon:

> 'Knife' means any dagger, dirk, knife, or stiletto with a blade over three and one-half inches in length, or any other dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds * * *.

Thus, the Court's reading did not go beyond the General Assembly's intent to include instruments capable of being used for a violent cutting, stabbing, or tearing attack.

In *Preston*, the Court considered whether the definition of noneconomic damages in §13-64-204, C.R.S., was limited to §§13-21-102.5(2)(a) and (2)(b), C.R.S., or also subject to §13-21-102.5(5), which excludes physical impairment and disfigurement damages from the noneconomic damages cap. *Preston*, 35 P.3d at 438-41. The Court reasoned that although the word "including" may generally be a word of enlargement, that conclusion alone does not end the inquiry. *Id.* There, the term did not signal unqualified expansion to encompass every possible

thing. *Id.* Instead, within the statutory scheme, the defendant's argument for expansion failed since it went beyond the General Assembly's intentions.

Similarly, in *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930, 944 (Colo. 1985), this Court held that the use of the words "including, but not limited to" did not make the term "valuable article" unconstitutionally vague, since the General Assembly limited what could fall within the definition to items of similar kind and quality. In *LaDuke v. CF & I Steel Corp.*, 785 P.2d 605, 610 (Colo. 1990), the Court rejected the defendant's attempt to expand the scope of a statute, stating the argument would have been more persuasive "'[i]f the list had been merely descriptive (e.g., if the list were preceded by the familiar phrase 'including but not limited to')."

2. Despite abundant controlling precedent to the contrary, the court of appeals inserted avalanches into the General Assembly's definition and expanded the SSA's otherwise limited immunity for ski area operators.

Despite the rules of construction in *Cooper*, *Bayer*, *Hawes*, and *Preston*, which require strict construction of the SSA, and notwithstanding the Court's admonitions in *Preston, Bedford*, *Vigil*, *Lunsford*, *Gross*, and *LaDuke*, which bar expanding finite, detailed lists of like items, the court of appeals majority added "avalanche" to the list of inherent risks of skiing and expanded the limited statutory immunity. This Court should not make that same error.

The court of appeals majority combined several items from the General Assembly's definition —"snow conditions as they exist or may change," "variations in steepness and terrain," and "changing weather conditions"— to find that "avalanche" falls "neatly" within the statute. In combining these three separate conditions (snow, grade, and weather), which skiers reasonably expect to occur on open areas within the ski resort, the court of appeals judicially amended the statute to add a new *dynamic event*, that no skier reasonably expects to have occur on open portions of an in-bounds ski trail.

Due to the very nature of the sport of skiing, every injury which occurs at a ski area has some implication of snow, steepness of grade and weather. Based upon the court of appeals' interpretation of the definition, every injury is now the result of the inherent risks of skiing. Is a skier collision with a recklessly driven snowmobile, as in *Stamp*, an inherent risk of skiing because the skier slipped and fell on the snow while trying to avoid the snowmobile, only to be run over while lying on the ground? It was not the intent of the General Assembly to grant unlimited immunity to ski area operators for negligent and reckless conduct when the conditions of snow, steepness of terrain and weather were only "implicated" in the injury. *Graven*, 909 P.2d at 519, 520-521.

Inferring the term "avalanche" as an inherent risk or danger would essentially immunize ski operators from any liability, leaving them free to recklessly create hazards without consequences. Inclusion of avalanche as an inherent risk of skiing would apply to any occurrence at a ski area. Is a skier expected to know that avalanche is an inherent risk, when she parks her car in the lot downhill from the ski run to finish her morning coffee and is engulfed by an avalanche carelessly caused by ski area employees?[4]

C. Even if the statute is ambiguous, avalanche does not fall within the definition for which there is limited immunity.

1. When a statute is ambiguous, the Court resorts to rules of statutory construction, legislative history, and other tools to determine and give meaning to the General Assembly's intent.

Even if the SSA is ambiguous, the Court should apply the most restrictive, narrow construction to meet the General Assembly's legislative purpose. The codified "legislative declaration" to the 1979 SSA, the uncodified Legislative

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[4] The term "skier" within the SSA includes anyone who is "using any of the facilities of a ski area" even though that person is not actually skiing. C.R.S. § 33-44-103(8). In February 2010, two Loveland Ski Area patrollers carelessly lit and threw an avalanche bomb which caused a massive avalanche slide into the Loveland parking lot, completely destroying a 1986 Honda Civic owned by one of the patrollers. Denver Post, October 16, 2012. (http://bit.ly/loveland_avalanche_bomb, last checked on 9/7/2013)(attached as **Appendix 4**).

Declaration to the 1990 Amendment, the legislative history of the 1990 Amendment adding subsection (3.5), and the statutory scheme as a whole supports reversal of the court of appeals' majority decision.

If a statute's "language is ambiguous or capable of more than one meaning," this Court construes the statute in light of the General Assembly's objective. *Stamp*, 172 P.3d at 443. In order to determine its meaning, the Court "may consider, among other factors, the consequences of a particular construction and the legislative declaration." *Id*. "Often the best guide to legislative intent is the context in which the statutory provisions appear and any accompanying statement of legislative policy, such as a legislative declaration." *Id.* When a statute is ambiguous this Court considers, among other aids, the statute's legislative history, the state of the law prior to its enactment, and the consequences of a particular construction. §2-4-203, C.R.S. When a statute is in derogation of the common law tort right and is also ambiguous, the ambiguity must be resolved in favor of a continuation of the common law right. *Farmers Group, Inc., v. Williams*, 805 P.2d 419, 424 (Colo. 1991) (there must be clear legislative intent to abrogate a common law tort right).

2. The SSA's "legislative declaration" limits its scope.

As set forth above, *see* section A2 *supra*, at 13-15, the General Assembly expressly intended to limit the scope of the SSA through its legislative declaration. *Stamp*, 172 P.3d at 443. In its 1979 legislative declaration, the General Assembly explained that the SSA's purpose is "to further define the legal responsibilities of ski area operators …; to define the responsibilities of skiers …; and to define the rights and liabilities existing between the skier and the ski area operator …" §33-44-102, C.R.S. The legislative scheme, as a whole, bears this out by prescribing specific duties of area operators and skiers. See e.g., §§33-44-104 – 112, C.R.S. The portion of the SSA pertinent here, limits its scope to a list of "inherent dangers and risks of skiing" where the General Assembly provided a defined, legislative term of art. §§33-44-103(3.5), 33-44-109, 33-44-112.

Broad expansion of those enumerated items, beyond their scope, would absolve the area operators of the duties prescribed elsewhere in the SSA, since such broad expansion would defeat the limited nature of the immunity from suit. Yet the court of appeals majority's addition of "avalanche" contravenes the General Assembly's expressed intention that the definition of "inherent danger and risk" be *limited* in scope. *Id*. That intention is in the legislative history and the statutory scheme as a whole.

Moreover, the legislative purpose found in §33-44-102 refers to the dangers of skiing as "dangers that inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed." Like the legislative statement of purpose, the Utah Supreme Court interpreted Utah's statutory definition of the inherent risks of skiing[5] as "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*." *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1046 (Utah 1991) (emphasis supplied).

3. The General Assembly chose to leave "avalanches" out of the definition, removed the expansive words from the definition before enacting it, and intended a narrow reading of the common and avoidable things it listed.

Even if the definition of the inherent dangers and risks of skiing is ambiguous, as Judge Jones suggested in his dissent the General Assembly intended the conditions within the list of inherent dangers and risks to be exclusive. Where a statute is ambiguous, courts may consider other indicators of legislative intent such as legislative history and the General Assembly's declaration of purpose. § 2-4-203, C.R.S. Judge Jones' conclusion that the

[5] Utah Code Ann. §78B-4-402(1) defines "inherent risks of skiing" with language which is nearly identical to that found in §33-44-103(3.5).

inherent risk definition is ambiguous gains traction when one considers the majority in *Graven* held that whether an injury was due to the inherent risks of skiing may not always be determined as a matter of law and should then be left to the jury. *Graven*, 909 P,2d at 520. Statutory language is ambiguous when it is susceptible of more than one reasonable interpretation. *Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010). In a similar manner, federal courts have on occasion left the determination of whether an injury resulted from the inherent dangers and risks of skiing to the jury. *Rowan v. Vail Holdings, Inc.*, 31 F.Supp.2d 889, 903 (D. Colo. 1998) (jury question whether skier's death due to inherent dangers of skiing); *Doering ex rel. Barrett v. Copper Mountain*, 259 F.3d 1202, 1214 (10th Cir. 2001) (whether collision with snow grooming equipment was an inherent risk of skiing was for the jury). Juries only determine issues where reasonable minds can differ. Juries do not determine the application of immunities. Allowing a jury to decide the interpretation of a statutory definition would infer the statute is ambiguous.

The majority reasoned that an avalanche fell within the statutory definition of inherent dangers and risks of skiing, because the General Assembly used the term "including" preceding the list of inherent dangers within §33-44-103(3.5). *Fleury* ¶11. The majority treated the word "including" as a term of extension or

enlargement, and then used that incorrect interpretation as an invitation to expand the definition of the inherent risks of skiing to include avalanches. *Id*. However, a review of the legislative history concerning the inclusion of "including" within the inherent risk definition reveals the General Assembly intentionally used "including" as a term of limitation rather than enlargement.

This Court may appropriately consider successive drafts of legislation to discern the legislative intent behind a statute. *People v. Summers*, 208 P.3d 251, 255 n.2 (Colo. 2009); *citing* Singer & Singer, *Sutherland Statutory Construction* 558-59 (7th ed. 2007). Contemporaneous statements of individual legislators provide the Court with insight into legislative intent. *Archer Daniels Midland Co. v. State*, 690 P.2d 177, 183-84 (Colo. 1984).

When first introduced, the 1990 Amendment contained an expansive definition of the "inherent dangers and risks of skiing":

> 'Inherent dangers and risks of skiing' means those dangers or conditions which are an integral part of the sport of skiing, *including, but not limited to,* changing weather conditions …

(ROA #053, p. 3 ll. 8–11 (emphasis added)). However, the House State Affairs Committee amended the bill's original, expansive language by removing the phrase "but not limited to" which had been included in the Senate's version of §33-44-103(3.5). (*Compare* original bill text ROA #057, p.3 ll. 10 to the enacted

statutory language in §33-44-103(3.5)). On March 13, 1990, the bill's sponsor moved to amend the bill's original language to clarify that the listed conditions constituted an *exclusive* list of the "inherent dangers and risks of skiing":

> REP. McINNIS: Mr. Chairman, would you like me to go through the amendments briefly?
>
> MR. CHAIRMAN: (inaudible).
>
> MR. McINNIS: I think you all have a copy in front of you. The first amendment is on page 3, line 10. We have stricken the words 'but not limited to,' so that it simply reads, 'the sport of skiing, including,' and then it goes on to say, 'changing weather conditions, snow conditions,' and so forth. This was requested by Rep. Paulson. *It's a slight narrowing of the amendment, and it's a clarification that the items that follow are the inherent risks and dangers that are being referred to.*

(ROA #051, tr. p. 35, ll. 6-18). (Emphasis added).

Colorado Ski Country USA, a ski area trade association, vigorously supported and testified in favor of Senate Bill 80. (Sen. State Vet. & Mil. Aff's. Cmte., ROA #55, tr. p. 4, ll. 4–5, pp. 11, ll. 8–12, ll. 13). In response to a question from a member of the House State Affairs Committee, a spokesperson for Colorado Ski Country, USA, explained the narrowing effect of amending the bill by striking "but not limited to," as follows:

> REP.(?): The first item, I don't understand why that – why Rep. Paulson wants that ['but not limited to'] out of there.
>
> REP. IRWIN: I do not speak to –.

> REP. (?): (inaudible) for that, that it can be added.
>
> REP. HAYES: Yeah. I think that Rep. Paulson's concern – this is Pancho Hayes again - I think his concern simply was that **he didn't want the Court expanding upon other items that weren't covered by the laundry list** that's under the definition of inherent risk. And frankly, we [Colorado Ski Country, USA] don't intend the Court to do that, and have no objection to removing that language.

(ROA #051**,** tr. p. 38, ll. 17-39:3) (emphasis supplied).[6]

Senator Bishop, the bill's Senate sponsor, also commented that the statutory definition of the inherent dangers and risks of skiing was intended to be complete as written:

> SEN. BISHOP:
>
> * * *
>
> We attempt to define inherent dangers and risks of skiing, and you can read through that as to what we're – what we're trying to define it as. We may need fine-tuning and we may not. We may be able to see that it is acceptable as it's – as it's written.

(ROA #055, tr. 4:4 - 5:22).

A Committee of Reference Report indicates the House State Affairs Committee adopted the amendment to the bill, which struck "but not limited to."

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[6] Note, in the transcript spokesman Pancho Hayes was initially misidentified as a Colorado Representative, but he corrected the misidentification on the record. (ROA #051, tr. 38:22).

(March 1990 H. Cmte. Ref. Rpt., stamped "Passed," ROA #054, p. 1 ll. 1-2). By amending the bill, the bill's sponsor and the General Assembly narrowed the statute's reach and made the list of inherent risks exclusive, rather than expansive. The dissenting Justices in *Graven* recognized this significant amendment and concluded the intentional substitution of "including" for "including but not limited to" showed the SSA "does not contain any language indicating that the statute contemplates inherent risks other than those specifically identified." *Graven*, 909 P.2d at 524. Clearly, the General Assembly may abrogate some common law claims related to a specific subject while allowing other common law principles related to the same subject to remain. *Lombard v. Colorado Outdoor Educ. Center Inc.*, 187 P.3d 565, 574-75 (Colo. 2008). (Premises liability statute abrogated common law claims and defenses but did not abrogate the common law principle that a violation of a statute is evidence of negligence).

Additionally, testimony from other witnesses who favored the bill, including Colorado Ski Country USA's spokesperson, demonstrates that the General Assembly did not intend for the language in this definition to be expansive, and intended it to include only things a skier would reasonably foresee and avoid. For instance, Colorado Ski Country USA's spokesman testified the bill defined "those dangers which any skier might reasonably expect to encounter" as

being “everything from ice, crust, other snow conditions … and other items that are enumerated in that list.” (ROA #55, tr. pp. 11, ll. 11 to 12, ll. 9). The spokesperson further stated: “I suggest to you that every single one of these items is something that those of you who ski, and for that matter those of you who don’t, if you did ski might reasonably expect to encounter when going down a ski slope.” (ROA #55, tr. p. 12, ll. 9–14). He then went on to give examples from the list and how a skier could avoid everything in the definition when skiing in control. (ROA #55, tr. p. 12–13).

Other witnesses who testified in favor of the bill reiterated that the list of inherent dangers included things a skier could avoid if the skier skied in control. (ROA #55, tr. pp. 16–19 (describing the ability to see obstacles in plain sight)). One explained, “A skier would normally expect to find and should expect to encounter certain conditions when he skis, **and those are set forth in this section**.” (ROA #55, tr. p. 21, ll. 8–22)(emphasis added). These statements show an intention not to make avalanches an inherent risk of skiing, since they are not an event or condition which one would reasonably expect to encounter on an open ski trail. In contrast, the inherent dangers listed in §33-44-103(3.5) are open and obvious surface conditions that a skier commonly and reasonably might expect to encounter on an in-bounds open ski trail, or reasonably expected subsurface

conditions like a stump or rock hidden beneath the snow.

Whether skiing in control or not, a skier on an in-bounds trail does not expect to encounter an avalanche. We know this because an inherent risk of skiing, including *arguendo,* an avalanche would mean that beginning skiers and children would require specialized avalanche survival training and equipment. Parents would have to pack shovels on their backs; equip themselves and their children with avalanche beacons in order to protect themselves. These safety measures, while expected practice in the backcountry, were never intended at ski areas by the General Assembly.

4. The 2004 amendment nine years after *Graven* did not dramatically expand the definition.

Following *Graven*, the General Assembly removed the word "integral" from §33-44-103(3.5). Ch. 341, §1 2004 COLO. SESS. LAWS 1383. That 2004 amendment changed the language of "those dangers or conditions which *are an integral part* of the sport of skiing" to "those dangers or conditions which *are a part* of the sport of skiing." Even without the word "integral," the SSA still requires the risk to fall within its definition of the "inherent dangers and risks of skiing." But this amendment did not change the fact that the Court does not generally expand an enumerated list to include items that are not of the same nature of the things the General Assembly listed. *Preston*, 35 P.3d at 438-441;

Exotic Coins, Inc., 699 P.2d at 944; *Bedford*, 78 P.2d at 376; *Lunsford*, 908 P.2d at 84; *Vigil*, 103 P.3d at 327; *LaDuke*, 785 P.2d at 610. Removal of "integral" also did not overcome the requirement that the Court must narrowly construe a list of factors abrogating a common law right. *See Vigil, Bayer, Preston, Hawes, et al.*

The removal of the term "integral" in 2004 was case-specific and directed to the Court's conclusion in Graven, which held that immunity for injuries resulting from the inherent dangers and risks of skiing applied only to injuries which occurred on skiable portions of a trial and not portions of the ski area that were not within skiable terrain. *Graven*, 909 at 519. By removing "integral" from the definition, the General Assembly intended to make clear that injuries resulting from the listed inherent risks and occurring on terrain adjacent to skiable terrain was included within the inherent risk definition.

The Court must presume the General Assembly was familiar with this Court's previous interpretation and the common law when it amended the section in 2004. *Cooper*, 973 P.2d at 1239. Here, in the pertinent portion of the 2004 amendment, the General Assembly did not clearly rewrite subsection (3.5)'s definition of the inherent dangers and risks of skiing after *Graven*. Instead, it struck the word "integral", added "cliffs and extreme terrain" to the list of surface

or subsurface conditions; and added "freestyle terrain and jumps" to the list of manmade variations of steepness and terrain. Ch. 341, §1 2004 COLO. SESS. LAWS 1383. It appears the General Assembly believed it necessary to add the specific terms "cliffs and extreme terrain" and "freestyle terrain and jumps" to the definition, rather than assume the then existing conditions such as "variations in steepness or terrain whether natural or as a result of slope design, snowmaking or grooming," already included those conditions. However, under the court of appeals majority interpretation, the terms "cliffs and extreme terrain" and "freestyle terrain and jumps" would have already been included within the definition as "variations in steepness or terrain whether natural or as a result of slope design, snowmaking or grooming." Therefore, the additional terms added in 2004 would seem unnecessary and superfluous. Yet no words within a statute are to be considered redundant or superfluous. *Lombard*, 187 P.3d at 571.

The General Assembly did not expressly state an intention to overrule the Court's precedent by the 2004 Amendment as it often does. *See, e.g.*, §13-21-115, C.R.S. (clearly stating intent to legislatively overrule *Gallegos v. Phipps*, 779 P.2d 856 (Colo. 1989)); §13-22-107 (directly overruling *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229 (Colo. 2002)); *and see*, *Loveland v. St. Vrain Valley Sch. Dist. Re-1j*, 2012 COA 112 ¶¶ 3–4 (General Assembly enacted the Colorado

Governmental Immunity Act, §§ 24-10-101 *et seq.*, C.R.S., to supersede decisions in *Evans v. Board of County Comm'rs*, 482 P.2d 968 (Colo. 1971), *Flournoy v. School Dist. No. 1*, 482 P.2d 966 (Colo. 1971), and *Proffitt v. State*, 482 P.2d 965 (Colo. 1971)).

5. The General Assembly's choice to vary its use of terms indicates its intention that the word including at issue here had a narrower meaning than its use of broader variations throughout the SSA.

Additionally, the General Assembly does not use language idly and courts presume the use of different terms signals a legislative intent to afford those terms different meanings. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1010 (Colo. 2008); *Carlson v. Ferris*, 85 P.3d 504, 509 (Colo. 2003). While a term may have a number of different meanings in the abstract, or standing alone, its intended meaning in a specific context will often become apparent from the context, or the greater statutory scheme, in which it is used. *People v. White*, 242 P.3d 1121, 1124 (Colo. 2010).

Here, the General Assembly chose to use the word "including" then eliminated "but not limited to" in its definition of inherent dangers and risks of skiing. It used the expansive variation "including but not limited to" later in the same definition when referring to variations in "steepness or terrain." §33-44-103(3.5). Thus, the continued use of only the single word "including" in this

section, which abrogates the common law by granting a narrow immunity from suit to area operators, indicates the General Assembly's intent to have courts narrowly construe the definition of the inherent dangers and risks of skiing.

6. Other provisions of the SSA also show that avalanche is not an inherent risk of skiing.

Ski area operators are required to advise the public of the listed inherent danger and risks of skiing contained in §33-44-103(3.5) on warning signs and ski lift tickets. §33-44-107(8)(b) and (c), C.R.S. Nothing in either §33-44-107(8)(c) or §33-44-103(3.5) informs the public that there are other dangers and risks, like an avalanche, of which the public should be aware.

7. Other States' SSAs support Ms. Fleury's reading of the Colorado SSA.

Other states which statutorily define the inherent risks and dangers of skiing and typically have avalanche danger, use language similar to that found in §33-44-103(3.5).[7] Only Montana's statute includes "avalanche" within its definition of the inherent dangers and risks of skiing; however, even under Montana's statute, an avalanche that occurs on an open, designated trail of a ski

[7] *See* ALASKA STAT. §05.45.200(3); IDAHO CODE ANN. §6-1106; ME. REV. STAT. ANN. §15217(1)(A); MICH. COMP. LAWS, §408.342(2); MONT. CODE ANN. §23-2-702(2); N.M. STAT. §24-15-10; OR. REV. STAT. §30.970(1); and UTAH CODE ANN. §78B-4-402(1).

area is not an inherent danger and risk of skiing. MONT. CODE ANN. §22-2-702(2)(c).

VII. CONCLUSION

The General Assembly's list of inherent risks puts everyone, skiers and ski area operators alike, on notice of what those risks are (and are not), until it adds another risk to the list, as it did in 2004. Skiers should not have to research the newest cases to decide what risks they are facing while on the slopes, particularly when they are supposed to be able to rely on the disclosures required on warning signs and ski lift tickets. Allowing courts to create new inherent risks on an *ad hoc* basis and then use it to deprive plaintiffs of a claim otherwise available to them, or at least not barred by the inherent risk statute, is wrong.

DATED March 9, 2015.

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VIII. LIST OF APPENDICES

1. 1979 Session Laws
2. 1990Session Laws
3. 2004 Session Laws
4. Meyer, John, "Loveland's Over the Rainbow was cleared by human-set avalanche," *Denver Post*, October 16, 2012.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this **OPENING BRIEF** was timely filed and served by ICCES, on March 9, 2015, upon:

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