DATE FILED: March 9, 2015 11:42 PM
FILING ID: EE0D8655BFAD8
CASE NUMBER: 2014SC224

SUPREME COURT, STATE OF COLORADO
2 East 14th Ave.
Denver, CO 80203
Telephone: (720) 625-5150

Colorado Court of Appeals No.: **13CA0517**
Published Opinion: **2014 COA 13** (Feb. 13, 2014), by Hon. Fox, J., Navarro, J., concurs, and Jones, J., dissents.

Grand County District Court No. **12CV132**
Hon. Mary C. Hoak, Judge

SALYNDA E. FLEURY, individually, on behalf of **INDYKA NORRIS AND SAGE NORRIS**, and as surviving spouse of **CHRISTOPHER H. NORRIS**

Petitioner,

v.

INTRAWEST WINTER PARK OPERATIONS CORP.,

Respondent.

Attorney for Amicus Curiae Colorado Trial Lawyers Association:
John F. Poor, #40395
Heideman Poor LLC
695 South Colorado Blvd., Suite 480
Denver, Colorado 80246
Phone No.: 303-975-6363
Fax No.: 720-465-7022
Email: John@heidemanlaw.net

▲**COURT USE ONLY**▲

Case No: 2014SC000224

BRIEF OF AMICUS CURIAE THE COLORADO TRIAL LAWYERS ASSOCIATION

CERTIFICATE OF COMPLIANCE

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:

Choose one:

☑It contains 6125 words (not to exceed 9,500 words).

☑It does not exceed 30 pages.

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

For the party raising the issue:

☑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 (R. , p.), 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.

/s/ John F. Poor
John F. Poor, #40395
Heideman Poor LLC
695 South Colorado Blvd., Suite 480
Denver, Colorado, 80246
Phone: 303-975-6363
Fax: 720-465-7022
Email: John@heidemanlaw.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

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.

II. STATEMENT OF INTEREST

The Colorado Trial Lawyers Association ("CTLA") consists of approximately 1,100 Colorado trial attorneys who represent claimants, particularly individuals, in a wide variety of litigation. The stated mission of the CTLA is to protect the rights of the individual, advance trial advocacy skills and promote high ethical standards and professionalism in the ongoing effort to preserve and improve the American system of jurisprudence. The organization is active in promoting fairness and equity in legislation, including the provisions of the Colorado Ski Safety Act of 1979 (the "Ski Safety Act" or the "Act") that are at issue in this case.

III. STATEMENT OF THE CASE

The CTLA incorporates by reference the Statement of the Case and factual recitations contained in the Opening Brief filed by Fleury. CTLA wishes to emphasize the following pertinent facts.

Christopher H. Norris ("Norris") died on January 22, 2012 in an inbounds avalanche while skiing at the Winter Park Resort, which was operated by Respondent IntraWest Winter Park Operations Corporation ("IntraWest"). Norris was skiing down a run known as the Trestle Trees/Topher's Trees ("Trestle Trees") when the avalanche occurred. The run was open to skiers at the time of the avalanche, and IntraWest posted no warning signs or other markings to alert skiers to potential avalanche danger. Approximately 36 hours prior, the Colorado Avalanche Information Center had issued a bulletin warning of significantly heightened backcountry avalanche danger. The bulletin contained no mention of any heightened risk of in-bounds avalanches, however. Subsequently, on the morning of January 22, the date that Norris was killed, the Center issued another bulletin specifically encouraging skiers to avoid "avalanche terrain" in favor of skiing within the "safety of a ski area."

Petitioners filed suit against IntraWest, contending that IntraWest either knew or should have known that an avalanche was likely to occur in the Trestle Trees run on the date in question, and that IntraWest's failure to either close the run or warn skiers of the avalanche danger caused Norris's death. IntraWest moved for a determination of law under C.R.C.P. 56(h) and for judgment on the pleadings pursuant to C.R.C.P. 12(c), contending that it was immune from suit

under the Ski Safety Act because the avalanche that killed Norris was among the "inherent dangers and risks of skiing" for which the Ski Safety Act confers immunity. *See* § 33-44-103(3.5) & § 33-44-112, C.R.S. The Ski Safety Act defines "inherent dangers and risks of skiing" as follows:

> "Inherent dangers and risks of skiing" means those dangers or conditions that are part of the sport of skiing, including changing weather conditions; snow conditions as they exist or may change, such as ice, hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, and machine-made snow; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, streambeds, cliffs, extreme terrain, and trees, or other natural objects, and collisions with such natural objects; impact with lift towers, signs, posts, fences or enclosures, hydrants, water pipes, or other man-made structures and their components; variations in steepness or terrain, whether natural or as a result of slope design, snowmaking or grooming operations, including but not limited to roads, freestyle terrain, jumps, and catwalks or other terrain modifications; collisions with other skiers; and the failure of skiers to ski within their own abilities. The term "inherent dangers and risks of skiing" does not include the negligence of a ski area operator as set forth in *section 33-44-104 (2)*. Nothing in this section shall be construed to limit the liability of the ski area operator for injury caused by the use or operation of ski lifts.

The trial court ruled in favor of IntraWest and dismissed Petitioners' claims with prejudice. A divided panel of the court of appeals affirmed. *See Fleury v. IntraWest Winter Park Operations Corp.*, 2014 COA 13. As pertinent here, the court held that avalanches were included among the "inherent dangers and risks of skiing" as defined by § 33-44-103(3.5), C.R.S. *Id.* ¶¶ 10-16. Second, the court

held that its construction of the statute is consistent with the legislative intent of the General Assembly which, according to the court, has "amended the [Ski Safety] Act to increasingly limit a ski area operator's liability for skiing-related injuries." *Id*. ¶ 17.

Judge Fox authored the majority opinion, which was joined by Judge Navarro. Judge Jones dissented. He noted, first, that statutes which confer immunity or otherwise limit remedies that would be available at common law must be strictly construed. *Id*. ¶¶ 37-38. Further, Judge Jones observed that the statutory definition of "inherent dangers and risks of skiing" was, in fact, quite extensive, and included a long list of enumerated risks that were included within its scope. *Id*. ¶ 39. The list did not include avalanches. Judge Jones reasoned that, at a minimum, the General Assembly's omission of avalanches from the list rendered the statute ambiguous as to whether the General Assembly intended for avalanches to be included in the definition. That the remainder of the definition was so specific suggested that the General Assembly had not meant for avalanches to be considered an inherent danger and risk of skiing. *Id*. ¶¶ 39-40. "Given the exactitude with which the General Assembly has spoken," Judge Jones wrote, "I do not believe it is appropriate for us to essentially add another event to the definition." *Id*. ¶ 40.

Third, Judge Jones observed that the majority essentially aggregated three separate enumerated risks in § 33-44-103(3.5), C.R.S.'s list of "inherent dangers and risks of skiing" in order to find that avalanches were included in the definition. Specifically, according to Judge Jones, the majority combined the categories of "changing weather conditions," "snow conditions as they exist or may change" and "variations in steepness or terrain" in order to bring avalanches within § 33-44-103(3.5)'s ambit. *Id*. ¶¶ 43-45. The majority did so, moreover, even though an "avalanche" is an event that (a) does not, by definition, necessarily involve snow, and (b) may be caused in part by changing weather conditions, snow conditions and terrain variations, but is not necessarily the result of any of these attributes. *Id*. ¶¶ 42-46.

Finally, Judge Jones examined the legislative history and similar statutes from other states. Based on this review, he concluded that the General Assembly intended only to include risks that are intrinsic to the sport of skiing within the statutory definition of "inherent dangers and risks of skiing." *Id*. ¶¶ 50-53. Judge Jones wrote, "In my view, avalanches are not 'intrinsic to the sport of skiing' on open, designated ski trails within ski areas. They stand in contrast to the conditions and events listed in subsection 33-44-103(3.5), all of which seem to me to be such as a reasonable skier would reasonably anticipate or expect." *Id*. ¶ 51.

This Court granted certiorari review.

IV. SUMMARY OF THE ARGUMENT

The Ski Safety Act of 1979, as amended, was and is designed to allocate the risk of accidents and injuries between ski area operators and patrons of ski resorts. The immunity-conferring provisions of the Ski Safety Act should receive a narrow construction under well-established principles of statutory construction. The General Assembly was likely aware of the danger that avalanches can pose for skiers when it enacted the definition of "inherent dangers and risks of skiing," which is codified at § 33-44-103(3.5), C.R.S. Yet the General Assembly declined to include in-bounds avalanches in the enumerated list of inherent dangers and risks. Public policy favors a construction of the Act that allocates the risk of in-bounds avalanches to ski area operators, not skiers. CTLA therefore respectfully requests that this Court reverse the decisions of the courts below, and hold that in-bounds avalanches are not among the "inherent dangers and risks of skiing" for which the Ski Safety Act confers immunity on ski area operators.

V. ARGUMENT

A. The Ski Safety Act of 1979, as amended, was and is designed to allocate the risk of accidents and injuries between ski area operators and patrons of ski resorts.

Recreational skiing is an enormously popular activity in the State of Colorado. According to Colorado Ski Country USA, a non-profit trade association representing the state's ski industry, statewide skier visits totaled an estimated 11,445,000 during the 2012-2013 season – an increase of nearly four percent over the previous season. *Colorado Ski Areas Report Visitation Increase in 2012/13 Season*, COLORADO SKI COUNTRY USA, http://www.coloradoski.com/media_manager/mm_collections/view/117 (last visited Mar. 9, 2015). In recognition of the importance of the ski industry in the State of Colorado, the General Assembly enacted the Ski Safety Act, § 33-44-101 *et seq.*, C.R.S., in 1979 in order to "establish reasonable safety standards and to define the relative rights and responsibilities of ski area operators and skiers." *Graven v. Vail Assocs.*, 909 P.2d 514, 517 (Colo. 1995), *partially abrogated by statute*, § 33-44-103(3.5), C.R.S., as stated in *Kumar v. Copper Mtn. Inc.*, 431 Fed. Appx. 736, 738 n.1 (10th Cir. 2011). The General Assembly included the following legislative declaration, which has remained unchanged in the body of the statute despite subsequent amendments to the substantive provisions of the Act:

> The general assembly hereby finds and declares that it is in the interest of the state of Colorado to establish reasonable safety standards for the operation of ski areas and for the skiers using them. Realizing the dangers that inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed, the purpose of this article is to . . . further define the legal responsibilities

> of ski area operators and their agents and employees; to define the responsibilities of skiers using such ski areas; and to define the rights and liabilities existing between the skier and the ski area operator and between skiers.

§ 33-44-102, C.R.S.

B. The immunity-conferring provisions of the Ski Safety Act should receive a narrow construction under well-established principles of statutory construction.

In numerous prior cases concerning a variety of statutory provisions, this Court has reiterated the principle that statutes enacted in derogation of the common law must be construed narrowly. *See, e.g., State v. Nieto*, 993 P.2d 493, 506 (Colo. 2000) (interpreting the Colorado Governmental Immunity Act); *see also Preston v. Dupont*, 35 P.3d 433, 440-41 (Colo. 2001) (applying the Colorado Health Care Availability Act). Accordingly, a reviewing court should not presume that a statute is intended to modify the common law except to the extent that the statute expressly provides. *Robinson v. Kerr*, 355 P.2d 117, 120 (Colo. 1960). This Court has further noted that statutes that do abrogate the common law must be construed strictly in favor of the person against whom their provisions are intended to be applied. *In re Estate of Randall*, 441 P.2d 153, 156 (Colo. 1968). While the General Assembly undeniably has the authority to abrogate common law remedies, this Court has instructed lower courts not to presume that a statute was intended to

abrogate the common law unless the General Assembly has clearly expressed its intent to do so. *Vaughan v. McMinn*, 945 P.2d 404, 408 (Colo. 1997).

Notwithstanding this Court's repeated instructions, the trial court and the court of appeals appeared to give a broad construction to § 33-44-103(3.5), C.R.S. in holding that avalanches are included among the "inherent dangers and risks of skiing." As noted above, the statutory definition includes an extensive list of conditions that constitute inherent dangers and risks of skiing,

including changing weather conditions; snow conditions as they exist or may change, such as ice, hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, and machine-made snow; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, streambeds, cliffs, extreme terrain, and trees, or other natural objects, and collisions with such natural objects; impact with lift towers, signs, posts, fences or enclosures, hydrants, water pipes, or other man-made structures and their components; variations in steepness or terrain, whether natural or as a result of slope design, snowmaking or grooming operations, including but not limited to roads, freestyle terrain, jumps, and catwalks or other terrain modifications; collisions with other skiers; and the failure of skiers to ski within their own abilities.

The risk of an inbounds avalanche is not, by the statute's plain terms, included within the definition of "inherent dangers and risks of skiing." Moreover, as Judge Jones noted in dissent in the court of appeals, the General Assembly identified one of the objectives of the Ski Safety Act as defining "the dangers that inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed . . . ." *Fleury*, 2014 COA 13, ¶ 50. As Judge Jones noted, the enumerated list of "dangers and risks" includes the kind of conditions that a recreational skier would ordinarily expect to encounter while at a ski area. *See id*. ¶ 51. These conditions, which include factors such as changing weather, variable snow conditions, bare spots, subsurface obstacles, man-made obstacles, varied terrain, terrain modifications, and collisions with other skiers, are both (a) routine aspects of the skiing experience inside a ski area, and (b) capable of causing a skier to fall, have an accident or sustain an injury if not handled appropriately. Judge Jones inferred that such risks "inhere" in skiing because they are "conditions and events . . . such as a reasonable skier would reasonably anticipate or expect" to encounter while at a ski area. *See id*. Importantly, cases applying the definition of "inherent dangers and risks of skiing" have generally found the definition to be applicable only when a skier's injury has resulted from an accident caused by one of these routine conditions. *See, e.g.*, *Kumar v. Copper*

Mt., Inc., 431 Fed. Appx. 736 (10th Cir. 2011) (skier injured after skiing off edge of unmarked cornice was injured by either snow conditions as they exist or change, or variations in steepness or terrain, or both); *Gifford v. Vail Resorts, Inc.*, 37 Fed. Appx. 486 (10th Cir. 2002) (court upheld jury finding that skier who died after falling in deep snow after skiing into or across a natural gully was killed by an inherent danger and risk of skiing); *Glover v. Vail Corp.*, 955 F. Supp. 105 (D. Colo. 1997) (skier injured in collision with ski area employee was injured by "collision with other skier" under § 33-44-103(3.5) & (8), the latter of which defined "skier" as "any person using a ski area for the purpose of skiing . . . .").

An inbounds avalanche on a trail that is open to the public, by contrast, is not the sort of condition that a reasonable skier would ordinarily expect to encounter while skiing within the boundaries of a ski area. Nor is it the kind of condition that an ordinary skier inside of a resort could be expected to anticipate, avoid or prevent. Moreover, while certain of the enumerated risks included in the statutory definition of "inherent dangers and risks of skiing" may contribute to ***causing*** an avalanche in some cases, an avalanche does not fit neatly into any of the inherent dangers and risks that the General Assembly chose to list in the statutory definition. *See Fleury*, 2014 COA 13, ¶¶ 42-46. As this Court has recognized, when the General Assembly speaks with exactitude on a subject, a

reviewing court should generally infer that the inclusion of a particular set of conditions signals the exclusion of others. *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004); *Lunsford v. W. States Life Ins.*, 908 P.2d 79, 84 (Colo. 1995). In light of this principle, it is significant that the General Assembly declined to include the terms "avalanche" or "in-bounds avalanche" anywhere among the long list of inherent dangers and risks of skiing that are otherwise enumerated in the statute.

CTLA therefore encourages this Court to adopt Judge Jones' reasoning and hold that an in-bounds avalanche is not included in the category of "inherent dangers and risks of skiing" for which the General Assembly intended to provide ski area operators with immunity.

C. The General Assembly was likely aware of the danger that avalanches can pose for skiers when it enacted the definition of "inherent dangers and risks of skiing" currently contained in § 33-44-103(3.5), C.R.S. Yet the General Assembly declined to include in-bounds avalanches in the enumerated list of inherent dangers and risks.

In addition to the above, circumstances existing at the time that the General Assembly originally enacted § 33-44-103(3.5), C.R.S. suggest that the General Assembly was likely aware of the risk that avalanches could pose for skiers. That the General Assembly nevertheless declined to include the term "avalanche"

anywhere in an otherwise extensive listing of inherent dangers and risks suggests that the omission was significant.

As noted previously, the Ski Safety Act as it was originally enacted in 1979 contained a legislative declaration, codified at § 33-44-102, C.R.S., which acknowledged that certain dangers that "inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed . . . ." However, the 1979 version of the Act did not define such inherent risks or dangers and did not immunize ski area operators against claims arising from the same. *See Graven*, 909 P.2d at 517.

In 1990, the General Assembly enacted a series of amendments to the Act. Among the amendments was the addition of a definition of "inherent dangers and risks of skiing" and the inclusion of a provision holding ski area operators immune from damages for injuries resulting from such inherent dangers and risks. *See Graven*, 909 P.2d at 517-18 (explaining the import of the 1990 amendments).[1] At

[1] The definition of "inherent dangers and risks of skiing" contained in the 1990 amendments was originally enacted as § 33-44-103(10), but was subsequently renumbered on revision as § 33-44-103(3.5) for ease of location. The original definition defined "inherent dangers and risks of skiing" as:

> Those dangers or conditions which are an integral part of the sport of skiing, including changing weather conditions; snow conditions as they exist or may change, such as ice, hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, and machine-

the time when the General Assembly was considering the abovementioned amendments to the Ski Safety Act, the risks that avalanches posed to backcountry skiers and other participants in mountain recreation was a prominent subject of news coverage in the State of Colorado. More specifically, on January 3, 1990, the

---

> made snow; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, streambeds, and trees, or other natural objects, and collisions with such natural objects; impact with lift towers, signs, posts, fences or enclosures, hydrants, water pipes, other man-made structures and their components; variations in steepness or terrain, whether natural or as a result of slope design, snowmaking or grooming operations, including but not limited to roads and catwalks or other terrain modifications; collisions with other skiers; and the failure of skiers to ski within their own abilities.

In *Graven*, this Court interpreted the above definition as requiring a determination of whether a particular injury-causing hazard was "an integral part of the sport of skiing" in order for the ski area operator to enjoy immunity from liability, even where the hazard in question was specifically enumerated in the statute. 909 P.2d at 519-21. In response, the General Assembly amended the definition in order to add to the list of inherent dangers and risks, and to remove the requirement that a risk or danger be "an integral part of the sport of skiing" for the ski area operator to be immune. *See Fleury*, 2014 COA 13, ¶ 18 (citing Ch. 341, sec. 1, § 33-44-103(3.5), 2004 Colo. Sess. Laws. 1393).

The 1990 amendments also contained a non-codified legislative declaration, which is attached as Appendix 2 to Petitioner's Opening Brief. The declaration noted the General Assembly's intention to "to establish as a matter of law that ***certain*** dangers and risks are inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski area operator for injuries resulting from those inherent dangers and risks." (Emphasis added). As detailed elsewhere in this Brief, in-bounds avalanches were not included among the enumerated list of inherent dangers and risks.

Rocky Mountain News noted that Colorado averaged four fatalities caused by avalanches each winter, and included a listing of such fatalities dating back to 1985. *See* Rocky Mtn. News Staff, *State Averages 4 Avalanche Deaths a Year*, ROCKY MTN. NEWS, Jan. 3, 1990, at 114. Most of these fatalities occurred in the backcountry. Further, according to the Rocky Mountain News, during the 39 winter seasons between 1950-51 and 1988-89, 345 avalanche fatalities had occurred in the United States. *See Avalanche Danger Increasing to High: State Leads U.S. in Slide Deaths*, ROCKY MTN. NEWS, Jan. 3, 1990, at 114. Of these 345 fatalities, 107, or 31%, had occurred in Colorado alone. *See id*. Colorado had thus recorded more than twice as many avalanche fatalities as any other state in the nation during that time period. News coverage throughout the latter half of the 1989-90 ski season continued to document a series of avalanches that caused injuries and/or fatalities for backcountry skiers. Pertinent examples of such coverage are included in Appendix A to this Brief. Importantly, despite the comparatively large number of avalanche deaths in Colorado, the overwhelming majority of avalanche-related injuries and fatalities have occurred ***outside*** of ski area boundaries. Indeed, as of January 2012, there had been only four in-bounds avalanche deaths in modern Colorado skiing history. *See* Jason Blevins, *Recent*

Colorado Deaths a Sad Reminder that Ski Resorts Not Immune to Avalanches, THE DENVER POST, Jan. 25, 2012, available at http://www.denverpost.com/ci_19815377.

When construing an otherwise ambiguous statute, the General Assembly has directed this Court to examine a number of different factors, including the objective that the legislature sought to attain, the circumstances under which the legislation was adopted, and the consequences of a particular construction. *See* § 2-4-203(1)(a), (b), (e), C.R.S.; *See also Woodsmall v. Regional Transp. Dist.*, 800 P.2d 63, 67 (Colo. 1990). In this instance, as the attached materials make clear, the General Assembly in 1990 was undoubtedly aware of the risks that avalanches posed for skiers and other mountain recreants. Yet, when drafting and subsequently enacting an otherwise expansive definition of "inherent dangers and risks of skiing" for which ski area operators should be immune from liability, the General Assembly elected not to include in-bounds avalanches among the enumerated risks. This suggests that the General Assembly did not intend for in-bounds avalanches to be included among the inherent risks for which ski area operators could never be held legally responsible. CTLA therefore encourages this Court to refrain from reaching beyond the plain language of the statute to include in-bounds avalanches among the inherent dangers and risks of skiing for which the Ski Safety Act confers immunity.

D. Public policy favors a construction of the Act that allocates the risk of in-bounds avalanches to ski area operators, not skiers.

Owing to the widespread availability of mountain recreation in this state and the growing popularity of snow sports, there has been much publicity over the last several years concerning the dangers that unstable snowpack and avalanches pose for skiers and snowboarders. In particular, observers have expressed concern about the growing number of skiers who venture beyond resort boundaries and either have accidents or become entangled in backcountry avalanches. *See, e.g.*, Jason Blevins, *Deaths and Rising Rescue Calls Beyond Ski-Area Boundaries Pose Dilemma for Resorts*, THE DENVER POST, Mar. 2, 2011, *available at* http://www.denverpost.com/ci_17515949. These skiers voluntarily depart the controlled environs of the ski area in search of unadulterated snow, which exposes them to greater risks compared with skiers who remain inside resort boundaries. *See id*. When avalanches and injuries do occur outside of area boundaries, ski patrol members from nearby resorts are frequently called away from their normal job duties in order to participate in backcountry rescues, resulting in significant operational burdens for ski area operators. *See id*. Ultimately, it has long been recognized that the most common victims of avalanches are "young thrill seekers willing to take risks to experience Colorado's famed powder skiing . . . ." *See* Gary Gerhardt, *Skiers Ignore Slide Risks*, Rocky Mtn. News, Jan. 4, 1990, at 10.

Furthermore, many such skiers become entangled in avalanches after venturing directly from ski areas to closed lands beyond ski area boundaries, in violation of § 33-44-109(11), C.R.S. ("No person shall knowingly enter upon public or private lands from an adjoining ski area when such land has been closed by its owner and so posted by the owner or by the ski area operator pursuant to section 33-44-107(6).")

Within ski area boundaries, by contrast, ski area operators have the necessary expertise and experience to identify terrain that is likely to be affected by an avalanche and take steps to minimize the risk. *See generally* Doug Albromeit, *Inbounds Incidents & Fatalities 2008/09*, THE AVALANCHE REVIEW, Feb. 2010, at 26, *available at* http://www.avalanche.org/moonstone/SnowMechanics/Inbounds%20articles.28.3.pdf. While "ski patrols will probably never be able to totally eliminate avalanche risk," *see id*. at 26, ski area operators are best positioned to undertake the research and development efforts that will make already highly effective avalanche mitigation techniques even more effective at identifying and eliminating avalanche dangers. *See id*. Recreational skiers who frequent ski areas, on the other hand, lack both the expertise and the equipment necessary to evaluate whether a particular slope is at risk for an avalanche on a given day.

The utility of placing the responsibility for avalanche mitigation on ski area operators rather than skiers is further illustrated by the particular processes that ski area operators routinely use in order to minimize the risk of in-bounds avalanches during the ski season. In general, avalanche prevention involves a combination of structural and non-structural measures. *See generally* Mears and Wilbur, *Engineering and Land Use Planning for Snow Avalanches: Avalanche Mitigation*, 2014, http://mearsandwilbur.com/avalanche_mit.html (last accessed March 9, 2015). Structural measures include the use of diversion structures, retarding structures and starting zone structures design to prevent avalanches from initiating in the first instance. *See id*. Non-structural measures, by contrast, involve avoidance through land use restrictions and, as pertinent here, artificial triggering. Artificial triggering typically requires ski patrol personnel to reach areas at risk for avalanche initiation and discharge explosives in order to "trigger" small slides, thereby preventing subsequent larger, uncontrolled avalanches. This process is aptly illustrated by a brief video, located at https://www.youtube.com/watch?v=0Y6wcES7lKA&feature=youtu.be, which demonstrates artificial triggering as performed the Big Mountain Ski Patrol at Whitefish resort. The video depicts ski patrol members skiing out early in the morning and discharging dynamite in areas of snow thought to be vulnerable to

breaking loose and causing an avalanche. Importantly, none of the abovementioned avalanche prevention techniques (***especially*** the use of short-term mitigation techniques such as artificial triggering) involve functions that a typical recreational skier can or should attempt to perform while on an open trail in a ski area that is accessible to the public.

Framed thusly, this case calls upon this Court to decide upon whom the General Assembly intended to confer ultimate responsibility for avoiding injury caused by in-bounds avalanches, and bear the risk that avoidance measures might fail: recreational skiers or ski area operators. CTLA submits that recreational skiers who choose to frequent ski areas and remain within resort boundaries are neither qualified nor capable of engaging in the long-term planning and the short term mitigation efforts necessary to (a) identify conditions that are likely to produce a heightened avalanche risk, and (b) limit the danger to themselves, their families, and their companions.[2] Ski area operators, by contrast, have extensive experience in anticipating conditions that are likely to lead to avalanches and in

[2] In *Manhard v. Clear Creek Skiing Corp.*, 682 P.2d 64, 66 (Colo. App. 1983), a division of the court of appeals wrote that "avalanche danger is a phenomenon of which the public is generally aware, and . . . conditions under which avalanches are likely to occur are easily recognized by most skiers so they can be avoided." However, *Manhard* involved a wrongful death claim against a ski area operator arising out of the death of a skier who was caught in an avalanche while skiing out-of-bounds. Thus, *Manhard* does not address the factual circumstances presented here and, in any event, is not binding on this Court.

taking steps to prevent avalanches from threatening ski area occupants. CTLA further submits that, absent a clear statement of intent by the General Assembly to include in-bounds avalanches among the category of "inherent dangers and risks of skiing" for which ski areas possess immunity, this Court should hold that such avalanches are not among the inherent dangers and risks, and should permit Fleury's wrongful death action to proceed.

Finally, it is important to note, again, the distinction between backcountry skiers and "heli-skiers," on one hand, and recreational skiers who remain within ski area boundaries, on the other. The former, as noted above, willingly venture outside of ski area boundaries (sometimes in explicit violation of Colorado law) in order to ski in powdered, un-groomed terrain and enjoy backcountry conditions that are often challenging and extreme. Such skiers thus tread voluntarily into uncontrolled conditions and knowingly incur additional risks, including a substantially heightened risk of being caught in an avalanche. *See, e.g.*, *West Coast Life Ins. Co. v. Hoar*, 505 F. Supp. 2d 734, 742 (D. Colo. 2007) (describing the risks of heli-skiing and noting that a heli-skier is approximately 18,702 times more likely to die in an avalanche than someone skiing within the boundaries of a ski resort), *aff'd* 558 F.3d 1151. In light of these heightened risks, backcountry skiers frequently equip themselves with specialized safety equipment (such as

shovels, avalanche beacons, probes, airbag backpacks, etc.) designed to maximize their chances of survival in the event that they or members of their group become entrapped in a backcountry avalanche. Recreational skiers who remain within resort boundaries, by contrast, neither assume the risk of being caught in an avalanche nor, in general, are properly prepared to maximize their chances of survival if an avalanche occurs.

CTLA submits that the General Assembly never intended to force recreational skiers recreating within ski area boundaries to bear 100% of the risk of being injured or killed in an in-bounds avalanche. Yet, the decisions of the courts below, if affirmed by this Court, would have precisely that effect. CTLA therefore encourages this Court to reverse the decisions of the courts below and hold that in-bounds avalanches are not among the "inherent dangers and risks of skiing" for which ski area operators are immune from liability.

E. CONCLUSION

CTLA respectfully requests that this Court reverse the decisions of the courts below, and hold that in-bounds avalanches are not among the "inherent dangers and risks of skiing" for which the Ski Safety Act confers immunity on ski area operators.

Respectfully submitted this 9th day of March, 2015.

/s/ John F. Poor

John F. Poor, #40395
Heideman Poor LLC
695 South Colorado Blvd., Suite 480
Denver, Colorado, 80246
Phone: 303-975-6363
Fax: 720-465-7022
Email: John@heidemanlaw.net

CERTIFICATE OF SERVICE

I certify that, on March 9, 2015, a true and correct copy of the foregoing was served via the ICCES File & Serve System on the following:

Peter W. Reitz
Kimberly A. Viergever
Brian A. Birenbach
RIETZ LAW FIRM, LLC
Attorneys for Respondent

James G. Heckbert
Diane Vaksdal Smith
Nelson P. Boyle
Burg Simpson Eldredge Hersh & Jardine, PC
Attorneys for Petitioners

/s/ John F. Poor