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Colorado Court of Appeals Case No. 13CA0517 Opinion by Judge Fox Navarro, J., concurs J. Jones, J., dissents	
Grand County District Court Case No. 2012CV132 The Honorable Mary C. Hoak, District Judge	
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.	Case No. 14SC224

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BRIEF OF AMICUS CURIAE COLORADO SKI COUNTRY USA, SUPPORTING AFFIRMANCE

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and 32. Specifically, the undersigned certifies that this brief contains [5,907] words.

s/ Jordan Lipp
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and Rules

Other Authorities

ISSUE 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.

INTEREST OF THE AMICUS CURIAE

Colorado Ski Country USA, Inc. ("CSCUSA"), is a trade association representing twenty-one ski resorts in Colorado, which are "ski area operators" under the Ski Safety Act of 1979. CSCUSA's members employ experts who work tirelessly to mitigate avalanche danger at Colorado ski resorts with avalanche terrain and to rescue skiers injured by avalanches at resorts and in the backcountry. Accordingly, CSCUSA has a vital interest in this appeal. In addition, CSCUSA and its members possess specialized knowledge of the nature and prevalence of avalanches that skiers can encounter in Colorado's mountains. Based on this knowledge, CSCUSA will explain how avalanche dangers persist within the bounds of ski resorts despite extensive prevention efforts. Moreover, as plaintiff cites legislative testimony from a CSCUSA representative, this brief is necessary for CSCUSA to explain why plaintiff's reliance on it is incorrect.

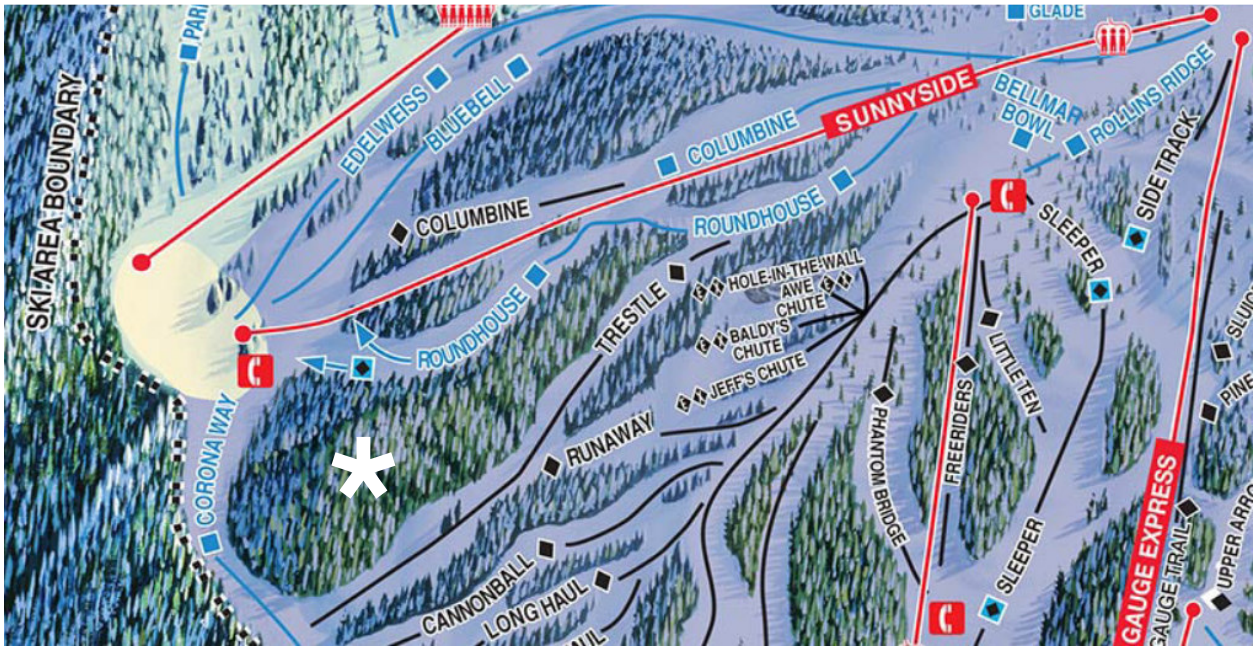
INTRODUCTION

People from all over the world come to Colorado for the thrill and excitement of skiing at high altitude in the great Rocky Mountains. Colorado's ski resorts are among the best and most popular in the world. "[S]ki tourism is important to Colorado's economy," *Stamp v. Vail Corp.*, 172 P.3d 437, 440 (Colo. 2007), generating over $4 billion of total economic impact. In light of skiing's popularity and inherent risks, the General Assembly has provided immunity for ski resorts from actions for injuries resulting from the inherent dangers of the sport.

Avalanches are natural phenomena that have always been a danger of winter recreation in Colorado's rugged mountains. Ski resorts work relentlessly to mitigate the risks of avalanches, and have been so successful that avalanches within the boundaries of resorts are rare. But the danger of avalanches cannot completely be eliminated. The danger persists on the steepest terrain at ski resorts, on trails and deep in the trees, and expert skiers can encounter avalanches as a part of the sport.

This case involves a skier who was skiing deep in the trees between two marked trails. As recited in the complaint, this avalanche occurred in an area

called "Trestle Trees, between the Trestle and Roundhouse trails." (R. 002, ¶ 12.)[1] The area consists of steep terrain accessible from a "most difficult"-level trail marked with a black diamond symbol. The location of Trestle Trees is shown with a white asterisk below:



This area is inside the ski resort's boundaries, where the inherent risks of the Act apply. § 33-44-103(6), C.R.S. (2014). Despite the efforts of ski resorts, the natural dangers of avalanches persist for skiers choosing to venture into such terrain.

[1] The record consists of a single .pdf portfolio on CD, which contains files labeled "000" through "071." References to the record in this brief refer first to the file number, then to the page or paragraph number within that file.

SUMMARY OF THE ARGUMENT

Section 33-44-103(3.5), contains three parts that by their plain language each lead to the conclusion that avalanches are an inherent danger and risk of skiing.

First, the General Assembly has defined inherent risks as "dangers or conditions that are part of the sport of skiing." § 33-44-103(3.5). There can be no question that avalanches are a danger that is a part of the sport of skiing. Though relatively uncommon in areas open to skiers within the bounds of a ski resort, the occurrence of avalanches cannot be eliminated. Avalanches thus persist as a danger of the sport in certain types of terrain within a ski area.

Second, the statute provides an illustrative list of dangers or conditions that are part of the sport of skiing. Avalanches are encompassed within those listed conditions. Specifically, the statute provides that "snow conditions as they exist or may change" are part of the sport. *Id.* An avalanche is precisely that—a changing snow condition (snow sliding downhill) that naturally occurs in Colorado's mountains. At the very least, avalanches result from a combination of three listed conditions: "changing weather conditions"; "snow conditions as they exist or may change"; and "variations in steepness or terrain." *Id.*

Third, the Act expressly enumerates three exceptions to the definition of inherent dangers and risks, and avalanches are not mentioned in any of these exceptions. Thus, the General Assembly intended to broadly include all dangers that are a part of the sport—including avalanches—and to exclude only the three circumstances it expressly set forth (i.e., violations of the Act causing injuries, injuries relating to ski lifts, and actions between skiers). Under each part of the statute, therefore, avalanches are an inherent danger and risk of skiing.

ARGUMENT

I. Avalanches Are a Risk that Is a Part of the Sport of Skiing.

Avalanches always have been a risk of skiing on steep terrain in Colorado's rugged Rocky Mountains, and despite extensive efforts by ski resorts, they cannot fully be controlled. Thus, avalanche danger is a part of the sport of skiing under section 33-44-103(3.5).

A. Avalanches of many sizes result from natural conditions existing on the most difficult and extreme terrain within ski resorts, often deep in the trees.

The Act defines the legal responsibilities of skiers and ski resorts. §§ 33-44-101 to -114, C.R.S. (2014); *Stamp*, 172 P.3d at 443. The Act applies to *all* terrain within the boundaries of a ski area, and the 2004 amendments clarified that "ski

slopes or trails" include "adjoining skiable terrain, including all their edges and features." § 33-44-103(6), (9).

Among other duties under the Act, ski resorts must designate the difficulty of each trail. § 33-44-107(2), C.R.S. (2014). Ski slopes and trails are categorized by difficulty as easiest (designated by a green circle), more difficult (designated by a blue square), most difficult (designated by a black diamond), and extreme (designated by two black diamonds). *Id.* In a corresponding requirement, skiers are required to ski within their abilities. § 33-44-109(1), C.R.S. (2014); *see also* § 33-44-103(3.5). The primary consideration guiding a ski resort to choose a particular category of difficulty is the steepness of the trail. Generally, more difficult (blue) terrain is approximately a 20-degree slope and most difficult (black) terrain is approximately a 30-degree slope. As discussed below, avalanches occur only on terrain that is steeper than 30 degrees—that is, the most difficult and extreme terrain in a ski resort.

An avalanche is a quantity of snow sliding down an inclined surface. American Avalanche Association, *Snow, Weather, and Avalanches: Observational Guidelines for Avalanche Programs in the United States* 79 (1st ed. 2004) [hereinafter *AAA Guidelines*], excerpts attached in Addendum 1. Avalanches are a "natural occurrence," resulting from "existing … natural conditions." *Mannhard v.*

Clear Creek Skiing Corp., 682 P.2d 64, 66 (Colo. App. 1983); *see also* David McClung & Peter Schaerer, *The Avalanche Handbook* 14 (3d ed. 2006) [hereinafter *Handbook*] (avalanches are a "natural hazard"), excerpts attached in Addendum 2. Avalanches vary greatly in size and intensity. Some avalanches are only a few feet long, and others rush down entire mountain sides and can destroy large structures.[2] Movies and the media tend to portray avalanches as walls of snow barreling down a mountain, but most avalanches at ski resorts are quite small. An avalanche occurs only when weather produces enough snow to slide, and the terrain is steeper than roughly 30 degrees. *See* Doug Abromeit, *Inbounds Incidents & Fatalities 2008/09*, The Avalanche Review, Feb. 2010, at 26, attached in Addendum 3; (R. 002, ¶ 9 (referencing slopes "over 30 degrees"), ¶ 10 (referencing slopes "30 degrees or steeper"), ¶ 22 (alleging avalanche occurred in an area "greater than 30 degrees.")). Accordingly, and contrary to plaintiff's argument, *e.g.*, Opening Br. 34, the greatest risks are encountered by only expert skiers choosing to ski on the most difficult and extreme terrain within a ski resort.

[2] Avalanches are rated by destructive potential from those that are "relatively harmless to people" to ones that could "gouge the landscape." *AAA Guidelines* 70.

B. Ski area operators undertake great effort to minimize the risk of avalanches, but the risk cannot be eliminated.

Plaintiff argues that skiers do not expect avalanches "on open portions of an in-bounds ski trail," presumably because she believes such avalanches are rare. Opening Br. 23. The thrust of plaintiff's argument appears to be that because ski resorts have succeeded at greatly *decreasing* the dangers of avalanches, avalanche risks are no longer a part of the sport of skiing within the bounds of a ski resort. It is true that resorts undertake extensive efforts to reduce the risks of avalanches, but those risks cannot fully be eliminated. Accordingly, even under plaintiff's incorrect formulation of the standard, avalanches are an inherent danger of skiing within the bounds of a ski resort. *See* Opening Br. 27 (citing *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1044 (Utah 1991) (asserting inherent risks are "hazards that cannot be eliminated by the exercise of ordinary care" by ski resorts)).

1. Colorado ski resorts perform intensive avalanche-mitigation work to reduce the risks of avalanches.

CSCUSA's members employ hundreds of individuals to reduce the risk of avalanches for the skiing public. These avalanche professionals—often ski patrollers— use numerous approaches and techniques to reduce the risks of avalanches. They wake up in the early hours of the morning, in dark and biting cold, to perform the work before guests arrive. These professionals risk their lives

to diminish avalanche risk by using explosives and traveling in unmitigated avalanche terrain.

Avalanche mitigation and testing work involves techniques such as:

- **Explosives.** Detonating explosives on the starting zones of potential avalanche terrain has three objectives: "[i] to release avalanches under controlled conditions, [ii] to reduce the expected size of eventual avalanches, and [iii] to test the instability of the snowpack." *Handbook*, *supra*, at 279. Professionals detonate explosives on steep ski terrain by both hand-placing charges and using artillery.
- **Boot packing.** Avalanche professionals walk through avalanche starting zones to prevent formation of dangerous snow layers. *Id.*
- **Ski stabilization.** Professionals "ski cut" the avalanche starting zones—which both releases small avalanches and packs the snow. *Id.*
- **Snow pits.** Avalanche professionals dig pits to assess the presence of dangerous snow layers.

Ski resorts usually close terrain while performing these tasks. After the work is completed and the risks of avalanche are determined to be low, professionals usually reopen the terrain, and subsequent ski traffic on these slopes helps minimize the risk of avalanches.

The scope of avalanche mitigation work performed by ski resorts is difficult to overstate. Colorado ski resorts use tens of thousands of pounds of explosives every year—more units than any other industry in the state, including mining. While ski patrollers employ numerous safety measures to reduce risks to themselves, their work nevertheless remains dangerous. Numerous avalanche professionals have died while performing avalanche mitigation work.[3]

2. Avalanches are complex and unpredictable, and the risks of avalanches cannot be eliminated.

The measures undertaken by ski resorts have significantly reduced the risks from avalanches within ski areas. For example, with well over 12 million skier visits per year and thousands of avalanche areas at Colorado ski resorts, there have been less than a handful of avalanche fatalities on open terrain over the last thirty years. CTLA Br. 15 (four in-bound avalanche deaths in modern Colorado skiing history); (*see also* R. 002, ¶ 15). Almost all avalanche fatalities involve only the small subset of skiers who venture onto terrain that is steep enough to produce an avalanche—estimated by one expert as 15 percent of all skiers. *Abromeit*, *supra*, at 26. Among that subset of skiers, and in one of the deadliest years on record, the risk of avalanche death was 1 out of 2.8 million. *Id.* By contrast, a heli-skier is

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[3] American Avalanche Association, *Memorial List*, *available at* http://www.americanavalancheassociation.org/mem_list.php.

approximately 18,702 times more likely to die in an avalanche than someone skiing at a resort. *W. Coast Life Ins. Co. v. Hoar*, 505 F. Supp. 2d 734, 742 (D. Colo. 2007), *aff'd*, 558 F.3d 1151 (10th Cir. 2009).

Avalanche professionals agree that the risk of avalanches cannot be reduced to zero. The leading treatise on avalanche safety and mitigation explains that avalanche risks cannot be eliminated:

> The erratic nature of avalanches, incomplete knowledge about their formation and dynamics, uncertainties about the effect of control measures, and cost make it impossible to apply protection with 100% security. For these reasons, *control measures minimize but do not eliminate the inherent residual risk.*

Handbook, *supra*, at 266-67 (emphasis added). As a leading figure from the United States Forest Service's National Avalanche Center wrote: "Conducting avalanche control including using explosives can reduce the avalanche risk to almost zero, but it cannot eliminate it." *Abromeit*, *supra*, at 26; *see also* Tony Daffern, *Avalanche Safety for Skiers & Climbers* 11 (2d ed. 1992) ("[N]o one can predict with certainty when or whether an avalanche will run."), excerpt attached in Addendum 4. Even the amicus brief supporting plaintiff acknowledges this fact, explaining that resorts "will probably never be able to totally eliminate avalanche risk." CTLA Br. 18.

The literature contains numerous examples of steep terrain at ski resorts avalanching *after* extensive mitigation measures. For example, ski patrol at a resort in Montana opened a steep run after performing "numerous pits, stability tests, and surface [explosive] blasts." Scott Savage, *Right Trigger, Right Place, Wrong Time*, The Avalanche Review, Feb. 2010, at 27, attached in Addendum 5. Over the following days, they continued to use explosives, and the trail saw over 2000 skier tracks. Then, eleven days after first opening the trail and while it was still open, an avalanche occurred. Fortunately, no one was injured. But this incident is a powerful example that despite mitigation efforts, the risk of avalanches persists as a part of the sport.[4]

Faced with the reality that avalanche danger cannot be eliminated, plaintiff suggests that ski resorts should be required to warn about avalanches or close terrain steep enough to avalanche. Opening Br. 10. First, this argument is outside the scope of the issue presented on certiorari review. Second, many ski resorts warn of the risk of avalanches—on trail maps, in season pass releases, and on posted signs. Third, the Act does not impose any duty to warn of avalanches.

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[4] Similarly, the Colorado Department of Transportation also undertakes extensive avalanche-mitigation measures, to reduce risks to vehicles on mountain roads. But because avalanches cannot fully be controlled, people driving on these roads are occasionally struck by avalanches. *See, e.g.*, http://avalanche.state.co.us/caic/acc/acc_co.php?accident=20070106.

Fleury v. IntraWest Winter Park Operations Corp., 2014 COA 13, ¶¶ 20-24; *accord Kumar v. Copper Mountain, Inc.*, 431 F. App'x 736, 739 (10th Cir. 2011) (ski resort liable for failure to warn "only when it violates the specific and detailed warning requirements of the SSA.").

If resorts were required to close all areas susceptible to avalanches, they would close a majority of the most difficult (black) terrain and virtually all of the extreme terrain in a ski resort, because an avalanche can occur on any slope greater than 30 degrees. This result is not what the General Assembly intended, *see* § 33-44-103(3.1) (defining open terrain to include slopes greater than 50 degrees), and not what Colorado skiers want. Accordingly, the Act places the minimal risk of avalanches on skiers. *See* § 33-44-102 (dangers "inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed").

C. Avalanche danger is unquestionably a part of the sport of skiing.

Section 33-44-103(3.5) "broadly defines" the inherent dangers and risks of skiing. *Stamp*, 172 P.3d at 444 n.8.[5] They are "those dangers or conditions *that are part of the sport of skiing*." § 33-44-103(3.5) (emphasis added). There can be no doubt that avalanches are a danger that is a part of the sport of skiing.

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[5] Plaintiff claims the statute should be read narrowly. Opening Br. 13-14; CTLA Br. 8-12. But this Court's prior decisions establish that the protections afforded by the Act are to be construed broadly. *Stamp*, 172 P.3d at 445.

1. Avalanches have always been a danger of the sport.

Avalanches are part of the natural mountain environment. The leading scientific treatise on avalanches classifies the risk posed by avalanches as inherent. *Handbook*, *supra*, at 267 (avalanche "control measures minimize but do not eliminate the inherent residual risk").

Since 1950, avalanches have been responsible for more deaths in Colorado than any other type of natural hazard. Colorado Avalanche Information Center, *History*, *available at* http://avalanche.state.co.us/about-us/. Skier deaths due to avalanches have been ongoing since the sport of skiing first took root in Colorado, over a hundred years ago. John W. Jenkins, *Colorado Avalanche Disasters* 159 (1st ed. 2001) (discussing the first recorded skier avalanche fatalities (in 1905) and early avalanche fatalities at ski resorts in the 1930s and 1940s), excerpt attached in Addendum 6. Even Colorado's professional hockey team is named the "Avalanche." Most importantly, plaintiff admits that "avalanche danger in the mountains" is "common knowledge." Opening Br. 18.

Colorado published case law likewise establishes the prevalence of avalanches. *Hoar*, 505 F. Supp. 2d at 741; *Mannhard*, 682 P.2d at 66. In one example, the court of appeals explained that skiers are familiar with the danger of avalanches:

> avalanche danger is a phenomenon of which the public is generally aware, and that conditions under which avalanches are likely to occur are easily recognized by most skiers so they can be avoided. These factors were fully known and appreciated by the [decedent] skier himself.

Mannhard, 682 P.2d at 66. There can be no question that avalanches are a part of the sport of skiing, and thus are an inherent risk under the statute.[6]

2. Any other construction requires this Court to add words to the statute.

Plaintiff suggests that avalanches are an inherent danger of skiing only in the backcountry, not within the bounds of a ski area. But the statutory language provides no such distinction. § 33-44-103(3.5). It encompasses all of the risks in the sport of skiing, and contains no limitation concerning the location or type of skiing involved in any particular case. *Id.* In addition, no court has ever held that such a distinction appears in the plain language of the statute.

To reach the conclusion urged by plaintiff, this Court would be required to add words to the statute. The dissent below illustrates the point. Without any explanation for why there should be additional limits on the definition of the sport of skiing, the dissent concluded that "avalanches are not '*intrinsic*' to 'the sport of

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[6] Plaintiff inappropriately attaches a newspaper account of a decades-old incident involving an explosive-triggered avalanche that buried an empty car in a parking lot below. The case before this Court does not involve any such circumstances and this Court's decision need not extend to them.

skiing' *on open, designated ski trails within ski areas*." *Fleury*, ¶ 51 (J. Jones, J., dissenting) (emphasis added). The italicized text, however, appears nowhere in the statute, and there is no statutory basis for the conclusion that the General Assembly intended to limit the scope of protection in the ways the dissent suggests.[7]

In any event, avalanches are a danger that is a part of the sport of skiing inside the bounds of a ski resort as well. Very few Colorado avalanche fatalities involve guests skiing on open terrain within ski resort boundaries. But unfortunately, some do. Skiers know about these incidents because they are heavily covered in the media. Even the dissent recognizes that skiers are aware of avalanches within ski areas:

> It is not as if avalanches are unheard of occurrences in mountainous areas, or *even on or near ski areas*.

Fleury, ¶ 40 (J. Jones, J., dissenting) (emphasis added). The risk of an in-bound avalanche is low, but it exists as a part of the sport of skiing.

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[7] Contrary to the dissent's reasoning, *Fleury*, ¶ 53, the Montana statute illustrates precisely this point. That statute carved out an exception to avalanches that occurred on "open, designated ski trails." Mont. Code Ann. § 23-2-702(2)(c) (2014), *superseded by* 2015 Montana Laws Ch. 59 (S.B. 164). If the Colorado General Assembly had intended to add the limitation plaintiff suggests, it could have done so expressly, like the Montana statute. Importantly, the Montana legislature has since changed the scope of this exception; it now encompasses only avalanches on "open machine-groomed ski trails." 2015 Montana Laws Ch. 59 (S.B. 164).

D. Colorado's public policy as expressed by the General Assembly is that ski resorts are immune from liability for risks that are inherent in the sport of skiing.

Because the statute is unambiguous, the Court need not address any extrinsic indications of legislative intent. Even if the Court were to address such considerations, it should reject the public policy arguments made by plaintiff and her amicus support. *See* Opening Br. 1, 34; CTLA Br. 17-22. They cite no policy statement by the General Assembly or any controlling legal authority to support their arguments. *See* CTLA Br. 17-22. That is because the General Assembly has expressly stated the opposite policy. It has determined that risks that are a part of the sport of skiing are borne by skiers, not ski area operators. §§ 33-44-109(1), -112. In the legislative declaration, the General Assembly recognized that there are "dangers that inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed." § 33-44-102. As discussed, CSCUSA's members employ exemplary safety measures to reduce the risk of avalanches, but the risk cannot be eliminated. Likewise, this Court has recognized that the Act is intended to "reduce for ski area operators the amount, unpredictability, and expense of litigation arising from skiing accidents." *Stamp*, 172 P.3d at 443; *see*

also Graven v. Vail Assocs., Inc., 909 P.2d 514, 518 n.3 (Colo. 1995), *abrogated by statute*, ch. 341, sec. 1, § 33-44-103(3.5), 2004 Colo. Sess. Laws. 1393.[8]

Plaintiff suggests that upholding the court of appeals' decision would cause resorts to decrease avalanche mitigation efforts. Opening Br. 10-11, 34. To the contrary, ski resorts employed avalanche mitigation measures long before the Act passed, they have continued their efforts (and improved them with advancements in science) throughout the Act's duration, and they will continue their efforts regardless of any future changes to the Act. CSCUSA members have long believed that avalanches are an inherent risk under the statute, and they have nonetheless engaged in extraordinary measures to minimize the risk. Moreover, ski resorts throughout the United States, Canada, South America, Asia, and Europe all engage in extensive mitigation work regardless of their varied exposure to tort liability. Resorts undertake these efforts for the sake of their guests and their business, not because of tort liability.

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[8] *Graven* was abrogated by the 2004 amendments to the Act, in three ways: (1) by removing the word "integral" from the statute; (2) by removing the old requirement of signage for "danger areas"; and (3) by including "adjoining skiable terrain, including all their edges and features" in the definition of "ski slopes or trails." *Compare Graven*, 909 P.2d at 518-20, *with* §§ 33-44-103(3.5), -107(2)(d), -103(9). Nonetheless, even under the pre-2004 standard of "integral" risks, avalanche danger was still an inherent risk as it cannot be eliminated by the exercise of ordinary care.

In addition, the Court should disregard plaintiff's overblown assertions that "beginning skiers and children would require specialized avalanche survival training and equipment." Opening Br. 34. In the rare event that avalanches occur at ski resorts, they happen on the most difficult and extreme terrain within ski resorts, not on green and blue runs. The General Assembly has stated its policy that the inherent risks of skiing are borne by skiers, and this Court must defer to that determination.

II. Avalanches Are Encompassed Within the Examples of Inherent Risks Listed in the Statute.

In addition to being a "part of the sport of skiing" under the plain language of the statute, avalanches are encompassed within the examples of inherent risks listed in the statute. Plaintiff's assertion that the statute's list is exclusive and therefore the absence of the word "avalanche" requires reversal in this case is contrary to Colorado law and must be rejected.

A. Avalanches fall within the statute's listed examples.

Avalanches are nothing more than masses of snow sliding downhill. As such, they are "snow conditions as they exist or may change." § 33-44-103(3.5). This sliding snow results from a specific combination of different types of snow formed in layers on the slopes of Colorado's rugged mountains. Accordingly,

avalanches are snow conditions as they exist or may change and thus an inherent danger of the sport.

Furthermore, most injuries from avalanches occur when a skier collides with snow and other natural objects during the avalanche. Such injuries thus result directly from "snow conditions" and "collisions with … natural objects" under the statute. *Id.*

At the very least, avalanches result from three listed conditions: "changing weather conditions"; "snow conditions as they exist or may change"; and "variations in steepness or terrain." *Id.* Plaintiff's complaint demonstrates that the injury in this case resulted from precisely these conditions:

Plaintiff's Complaint:	**Example Under § 33-44-103(3.5) :**
"storms deposited their snowfall" (R. 002, ¶ 20)	"changing weather conditions"
"existing snow base . . . was weak, unstable and in a condition known as 'rotten snow' " (R. 002, ¶ 20)	"snow conditions as they exist"

Plaintiff's Complaint:	**Example Under § 33-44-103(3.5) :**
"which created dangerous avalanche conditions due to the weakness, instability and poor condition of that pre-existing base." (R. 002, ¶ 20)	"snow conditions as they … may change"
"The area . . . [had] slopes greater than 30 degrees." (R. 002, ¶ 22.)	"variations in steepness or terrain"

These pleaded facts reflect the scientific nature of avalanches. Avalanches result from a combination of snowpack, weather, and terrain—called the "Avalanche Triangle":

Jill Fredston & Doug Fesler, *Snow Sense: A Guide to Evaluating Snow Avalanche Hazard* 12 (5th ed. 2011) ("Terrain is the foundation of avalanches, weather is the architect, and the snowpack is the winter's blueprint."), excerpts attached in Addendum 7. Each item in the triangle is expressly addressed in the statute's listed

examples. § 33-44-103(3.5). And, the statute expressly provides that ski resorts are not liable for injuries "resulting from" the inherent dangers of skiing. § 33-44-109(1), -112. Because avalanche injuries result from the listed dangers, avalanches are an inherent danger of skiing.

B. The list is illustrative, not exclusive.

Plaintiff tries to avoid the plain import of the statute by asserting that this list of examples is "exclusive," Opening Br. 11, and any item not appearing on it is not a danger inherent in the sport of skiing. This position is contrary to well established legal principles, common sense, and case law interpreting the inherent risks provision of the Act.

1. The word "including" is a word of enlargement, and has the same legal meaning as "including but not limited to."

This Court has repeatedly held that the term "including" is a word of extension and enlargement rather than limitation or enumeration. *Lyman v. Town of Bow Mar*, 533 P.2d 1129, 1133 (Colo. 1975); *see also S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1233 n.4 (Colo. 2011); *Preston v. Dupont*, 35 P.3d 433, 438 (Colo. 2001); *Graven*, 909 P.2d at 519 n.4; *Cherry Creek Sch. Dist. No. 5 v. Voelker*, 859 P.2d 805, 813 (Colo. 1993). The United States Supreme Court agrees: "the term 'including' is not one of all-embracing

definition, but connotes simply an illustrative application of the general principle." *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941).

Plaintiff tries to avoid this well-established principle by arguing that the term "including" differs from the term "including but not limited to," which the 1990 General Assembly decided not to use. Opening Br. 28-32, 37-38. But the terms "including" and "including but not limited to" are synonymous. Black's Law Dictionary explains that "some drafters use phrases such as *including without limitation* and *including but not limited to* – which mean the same thing" as the word "including." *Black's Law Dictionary* 880 (10th ed. 2014) (italics in original, underlined emphasis added); *accord Darvosh v. Lewis*, No. 13 C 04727, 2014 WL 4477363, at *4 (N.D. Ill. Sept. 5, 2014); *Pakravan v. Colvin*, No. 2:12CV472, 2013 WL 5701531, at *7 n.8 (E.D. Va. Oct. 18, 2013); *In re Zinke*, No. 88 CIV. 3628, 1989 WL 87370, at *1 n.2 (E.D.N.Y. July 27, 1989); *Rea v. Blue Shield of Cal.*, 172 Cal. Rptr. 3d 823, 837 (2014); *Beaver Dam Cmty. Hosps., Inc. v. City of Beaver Dam*, 2012 WI App 102, ¶ 15, 344 Wis. 2d 278, 822 N.W.2d 491.

If the General Assembly had intended to write an exclusive list, it knew how to do so. It could have used terms such as "meaning" or "namely" instead of "including." *See, e.g.*, *Black's Law Dictionary* 1182 (The term "namely" "indicates what is to be included by name. By contrast, *including* implies a partial

list and indicates that something is not listed."). Plaintiff thus asks this Court to "transmogrify the word 'include' into the word 'mean' "—something that it has expressly refused to do. *Lyman*, 533 P.2d at 1133.

2. Common sense dictates that the examples are illustrative.

Logic compels the same result. The General Assembly could not possibly list out every potential danger in the statute. If instead of listing "changing weather conditions," for example, the General Assembly had to list out: falling snow, sleet, graupel, hail, freezing rain, rain, fog, storms, cold-fronts, warm-fronts, low-pressure systems, high-pressure systems, winds, polar air masses, arctic air masses, lightning, etc.—the list would contain thousands if not tens of thousands of words.

Moreover, the General Assembly's express exclusions would be a nullity under plaintiff's reading of the statute. *People v. Null*, 233 P.3d 670, 679 (Colo. 2010) (This Court must "avoid interpretations that would render any words or phrases superfluous" in a statute.). The statute provides an express exclusion for the "use or operation of ski lifts," for example. § 33-44-103(3.5). But if the listed examples were exclusive, then ski lifts already would be excluded, and this additional language would be superfluous.

3. Courts construing this statute consistently hold that items not appearing on the list can be inherent risks of skiing.

The court of appeals determined that crashing "into a bump" is an inherent danger and risk under the Act, even though the word "bump" is not in the list of examples. *Cuny v. Vail Assocs., Inc.*, 902 P.2d 881, 882 (Colo. App. 1995). Likewise, the Tenth Circuit has held that colliding with "safety cones" on the side of an exit ramp at the top of a chairlift is an inherent danger of skiing, even though cones are not listed in the statute. *Peck v. Vail Assocs., Inc.*, 46 F.3d 1151 (10th Cir. 1995) (unpublished opinion). The Tenth Circuit reasoned that "safety cones are akin to fences or signs," which are enumerated examples under the Act. *Id.*

In another case, the Tenth Circuit held that a "cornice" fell within the statutory definition. *Kumar v. Copper Mountain, Inc.*, 431 F. App'x 736, 738 (10th Cir. 2011). The court explained, "[a]t a minimum [a cornice] either falls within the section relating to snow conditions as they exist or change, or the provision covering variations in steepness or terrain." *Id.* Like an avalanche, a cornice is created by a combination of weather, snow, and terrain. Fredston & Fesler, *supra*, at 7 ("Cornices form when *windblown snow* builds out horizontally at sharp *terrain breaks* such as ridgecrests and the sides of gullies.") (emphasis added).

C. Legislative history should not alter this Court's analysis.

While the Court should not address legislative history because the plain language of the statute is determinative, CSCUSA will answer plaintiff's assertion that one statement by its representative in 1990 somehow overcomes the established meaning of the phrase "including." *See* Opening Br. 29-34. Initially, as the dissent noted, "the legislative history is not enlightening." *Fleury*, ¶ 50. Rather, it is ambiguous and equivocal on virtually all issues.

Moreover, the cited CSCUSA representative's comment that he did not intend a court to expand on the list of examples, *see* Opening Br. 30, does not support plaintiff's position for three reasons. First, because avalanches fall within the listed examples, CSCUSA and its members have long believed that avalanches are inherent risks under the Act. Thus, CSCUSA felt no need to add them to the language of the statute. Second, the General Assembly could have chosen words such as "meaning" or "namely" to expressly narrow the definition, but it did not. Third, the 1990 amendments are not the amendments that currently define inherent risks; rather, the 2004 amendments that removed the "integral" requirement apply to this case.[9]

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[9] Plaintiff also attempts to use 1990 legislative discussions about skier expectations to read an "expectations" qualification into the statute. Opening Br. 32-33. But the statute contains no such language. § 33-44-103(3.5). In fact,

III. The Legislature Excluded Certain Specific Circumstances from the Definition of Inherent Risks, yet Did Not Exclude Avalanches, Demonstrating that Avalanches Are Inherent Risks.

After defining the inherent risks broadly, the General Assembly expressly and narrowly excluded only three dangers from that broad definition. First, section 33-44-103(3.5) provides that inherent risks do not include a ski resort's violation of any requirement of the Act that causes injury. *See* § 33-44-104(2). Second, the statute provides that an "injury caused by the use or operation of ski lifts" is excluded. § 33-44-103(3.5). Third, another provision of the Act states that "the risk of a skier/skier collision is neither an inherent risk nor a risk assumed by a skier *in an action by one skier against another*." § 33-44-109(1) (emphasis added).

Plaintiff, her amicus support, and even the dissent below repeatedly insist that the General Assembly was aware of the risk of avalanches when drafting the statute. Opening Br. 18; CTLA Br. at 16; *Fleury*, ¶ 40 (J. Jones, J., dissenting). They then reason that avalanches must not be an inherent risk because the General Assembly did not place the word "avalanche" in the illustrative list of inherent dangers. This observation, however, leads to the opposite conclusion.

CTLA representatives argued that the 1990 amendments would provide immunity for risks that skiers *would not expect*. (*E.g.*, R. 051, at 75:9-23, 77:9-21, 79:21-80:5.)

If the General Assembly was attuned to the risk of avalanches, but did not add the risk to the three expressed exclusions, then it must have intended to *include* the risk of avalanches as an inherent danger of the sport of skiing. *See Cain v. People*, 2014 CO 49, ¶ 13 ("[T]he General Assembly's inclusion of a single, specific, narrow exception … mean[s] that the General Assembly intended that there be no other exceptions to the rule ….''). This construction aligns with this Court's interpretation of the Act's structure—it absolves ski resorts of liability in general, and then "narrowly defin[es] the claims that *can* be brought against ski area operators by skiers who are injured while skiing." *Stamp*, 172 P.3d at 444 (emphasis added). Avalanches are not among the narrowly defined claims that can be asserted under the three expressed exceptions listed in the statute. Therefore, avalanches are an inherent risk of skiing under the Act.

CONCLUSION

CSCUSA urges the Court to affirm the court of appeals' judgment.

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Respectfully submitted,

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