SUPREME COURT, STATE OF COLORADO
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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

▲ COURT USE ONLY ▲

Sup. Ct. No.: 2014SC224

Petitioner: SALYNDRA 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 CORPORATION

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ANSWER BRIEF

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 those rules.

Specifically I certify:

This brief complies with C.A.R. 28 and C.A.R. 32 because it contains 9474 words, as determined using the word processor's word count function in compliance with the rule.

s/ Brian A. Birenbach

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STATEMENT OF ISSUE

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

STATEMENT OF CASE

I. Nature of case.

Alpine snow skiing cannot exist without snow. Though necessary to the sport, the inherent properties of snow in its many varieties pose dangers to skiers. One of the intrinsic properties of new snowfall on pitched mountain slopes is that it is not fixed in place, and can slide. Snow slides can envelop and trap skiers, resulting in injury or death.

This wrongful death case presents the issue whether the SSA immunizes ski area operators from injury and death claims resulting from in-bounds snow slides, i.e. avalanches. Avalanches in-bounds at Colorado ski areas can result from the intrinsic properties of snow in combination with weather and terrain

conditions that are natural to a high alpine mountain environment. This makes avalanches a rare but recognized danger that is part of the sport of skiing. The danger is rare because, in recognition of the danger, ski area operators take steps to mitigate and protect skiers from the snow conditions that are capable of producing avalanches. While those efforts are highly effective, they cannot completely eliminate the risk of avalanches in-bounds and the dangers they pose to skiers.

The General Assembly recognized that ski area operators cannot eliminate the dangers of skiing "regardless of any and all reasonable safety measures which can be employed." C.R.S. 33-44-102, when it chose to immunize area operators from "any claim" for injuries (or death) "resulting from inherent dangers and risks of skiing." C.R.S. 33-44-112 ("Section 112"). To achieve its aim of "narrowly" defining the claims that can be brought against area operators, the General Assembly "broadly" defined the "inherent dangers and risks of skiing" to mean "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

. . . powder . . .; [and] variations in steepness or terrain." C.R.S. 33-44-103(3.5).

As detailed below, answering the question posed by this Court, judgment in favor of Defendant Intrawest/Winter Park Operations Corp. ("Winter Park"), should be affirmed because:

- The general definition of "inherent dangers" i.e. "those dangers . . . that are part of the sport of skiing" encompasses avalanches.

- Since avalanches are just an effect, and occur as a consequence of the intrinsic properties of snow in combination with weather and terrain conditions, they fall within and are encompassed by the listed categories of dangers and conditions in Section 103(3.5).

- Plaintiff alleged that the avalanche here was caused by and therefore the effect of listed categories of dangers and conditions in Section 103(3.5).

II. Course of proceedings.

Plaintiff commenced this wrongful death action against Winter Park following the death of her husband. (ROA #2, ¶¶ 1-2.) The decedent suffered fatal injuries in a small but tragic "avalanche" while skiing, not on a designated cut trail, but in a treed area at the Winter Park Resort. (*Id.* at 12.) Winter Park moved for judgment on the pleadings. The district court granted the motion. (ROA #47, p. 3.)

The court of appeals, with one judge dissenting, affirmed the judgment in favor of Winter Park. *Fleury v. Intrawest/Winter Park Operations Corp.*, 2013 COA 13. The court looked to the plain language of the SSA, including the statutory definition of the term "inherent dangers and risks of skiing" as "those dangers or conditions that are part of the sport of skiing . . ." *Id.* at ¶ 10. The court observed that the "operative definition contains the word 'including' before listing nonexclusive examples" such as "changing weather; snow conditions as they exist or may change; . . . [and] variations in steepness or terrain." *Id.* at ¶¶ 10-11.

Though it found that inherent dangers are not "confined to the identified dangers" in the list, the court of appeals concluded that an avalanche "fits one or more of the statutory examples of inherent dangers and risks of skiing," observing that "even pursuant to [P]laintiff's own allegations, the avalanche resulted from changing snow conditions (new snowfall) and existing snow conditions (weak and unstable snowpack) caused by weather and slope steepness (slope exceeding thirty degrees)." *Id.* at ¶ 14.

III. Facts as alleged in Plaintiff's complaint.

Plaintiff purported to state claims for negligence and "willful and wanton conduct" in her complaint. Rather than allege that Winter Park did anything to create the avalanche danger or trigger the slide, Plaintiff made it a point to include allegations explaining how weather, snow, and terrain conditions produced the avalanche danger in the treed area where the decedent was skiing. (ROA #2, ¶¶ 16, 34.)

Plaintiff referred to forecasts of the Colorado Avalanche Information Center ("CAIC"). (*Id.* at ¶¶ 9-10.) The CAIC forecast for January 21, 2012 warned: "[t]he 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." (*Id.* at ¶ 9.)

The forecast for the day of the accident, January 22, 2012, described additional snowfall on a weak snowpack: "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." (*Id.* at ¶ 10.)

The forecasts for both days warned that the weather and snow conditions produced an avalanche danger on "any slope over 30 degrees." (*Id.* at ¶¶ 9, 10.)

The incident in suit occurred in a wooded area known as the "Trestle Trees," which was off of and between two designated cut runs. (*Id.* at ¶ 12.) As the basis for liability, Plaintiff alleged that Winter Park "knew or should have known of those slopes within the boundaries of the Winter Park Resort which could be prone to avalanche under the conditions existing on January 22, 2012." (*Id.* at ¶ 28.) Plaintiff emphasized that:

> Prior to the arrival of the snow storms described in the avalanche forecasts, . . . [Winter Park] knew or should have known that the existing snow base, upon which those storms deposited their snowfall, was weak, unstable and in a condition known as "rotten snow," which created dangerous avalanche conditions due to the weakness, instability and poor condition of that pre-existing snow base.

(*Id.* at 20.)

Referring to the snow and weather conditions, Plaintiff alleged Winter Park:

- "[N]egligently disregarded the forecasts and warnings regarding high avalanche danger." (*Id.* at ¶ 26.)

- Despite its knowledge of those conditions, it "did not close that part of the . . . [r]esort known as Trestle Trees . . . to skiers." (*Id.* at ¶ 27.)

- "[H]ad a duty to warn of those areas within its boundary which it knew… posed an avalanche hazard under the conditions existing on January 22, 2012" (*Id.* at ¶ 28.)

- "[N]egligently failed to warn [decedent] that the area in which he was caught in an avalanche was not safe for skiing." (*Id.* at ¶ 31.)

STANDARD OF REVIEW

Winter Park agrees that the interpretation of statutes presents a question of law subject to *de novo* review. *Spahmer v. Gullette*, 113 P.3d 158, 162 (Colo. 2006). This Court likewise reviews decisions granting judgment on the pleadings for failure to state a claim *de novo*. *See Brw, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 71 (Colo. 2004).

SUMMARY OF ARGUMENT

This case involves the construction of a defined term in a statute ("inherent dangers and risks of skiing"), and whether the term as defined encompasses the movement of snow alleged by Plaintiff in her complaint, which according to her, resulted from changing weather and snow conditions, and variations in steepness and terrain.

The issue of construction is straightforward and settled. Section 103(3.5) "broadly" defines "inherent dangers and risks of skiing" to mean "those dangers or conditions that are part of the sport of skiing" and then after the word "including" provides a list of categories of such dangers and conditions, including "weather conditions, snow conditions as they exist or may change such as . . . powder" and "variations in steepness and terrain" with two express exceptions. Thus, according to this Court's precedent, as plainly written, the Section 103(3.5) provides a general definition of "inherent dangers and risks of skiing" followed by a nonexclusive list of examples.

The definition of "inherent dangers" encompasses the avalanche alleged by Plaintiff. Given snow's intrinsic properties, avalanches are just one of the many perils posed by snow. Though they rarely occur in-bounds, avalanches are a recognized danger that is "part of the sport of skiing" on snow in the mountain environment of Colorado ski areas. The reason avalanches rarely occur in-bounds is because, as a known danger that is part of the sport, ski area operators take steps to mitigate and protect skiers from snow slides, but are unable to altogether eliminate the danger

through their "reasonable safety measures." C.R.S. 33-44-102. As a danger posed by snow that is part of the sport of skiing that ski areas mitigate but cannot completely eliminate, avalanches fit the definition of inherent dangers as defined in Section 103(3.5).

Further, the list of nonexclusive categories in Section 103(3.5) includes and encompasses both the avalanche alleged by plaintiff and the conditions that caused it. Sliding snow is a "snow condition[] as [it] exist[s] or changes[s]," and, given new snowfall's physical properties, one of the intrinsic perils of "powder." C.R.S. 33-44-103(3.5). Moreover, Plaintiff alleged that the avalanche resulted from "changing snow conditions (new snowfall) and existing snow conditions (weak and unstable snowpack) caused by weather and slope steepness (slope exceeding thirty degrees)," and that Winter Park failed to protect the decedent from these listed conditions that posed the avalanche danger. *Fleury*, ¶ 14.

ARGUMENT

I. The SSA "narrowly" defines the claims that can be brought against ski area operators.

Snow is an obvious and essential part of the sport of skiing and, by necessity, the sport takes place in a high alpine dynamic

mountain environment with changing and sometimes harsh winter weather conditions. The physical properties of snow in combination with changing weather and terrain conditions in the mountains cause many of the perils skiers face.

As discussed in this Section I, the General Assembly recognized that ski area operators cannot eliminate the many perils of skiing resulting from the physical properties of snow, changing weather, and terrain conditions. It therefore chose to immunize ski area operators from claims involving "those dangers . . . that are part of the sport," including all dangers resulting from snow, weather, and terrain conditions. In Section II, Winter Park will turn to the issue framed by this Court, and show that the definition of inherent dangers encompasses, without exception, all of the perilous effects of the physical properties of snow, changing weather, and terrain conditions. Those effects include avalanches.

A. The SSA bars skiers from making "any claim" for injuries resulting from the "inherent dangers and risks of skiing."

"[T]he ski industry is an important part of the Colorado economy." *Pizza v. Wolf Creek Development Corp.*, 711 P.2d 671, 679 (Colo. 1985). The General Assembly enacted the SSA amid

concern for costs faced by the ski industry resulting from "claims and litigation and the threat thereof." *Stamp v. Vail Corp.,* 172 P.3d 437, 443 (Colo. 2007)(*quoting* Ch. 256, Sec. 1, 1990 Colo. Sess. Laws 1540). Accordingly, the "broad purpose of the SSA" is to protect ski area operators from liability claims and "to reduce for ski area operators the amount, unpredictability, and expense of litigation arising from skiing accidents." *Id.* at 443, 446.

In passing the SSA, the General Assembly found that dangers inhere in the sport of skiing "regardless of any and all reasonable safety measures which can be employed." C.R.S. 33-44-102. The SSA therefore defines "the responsibilities of ski area operators; . . . the responsibilities of skiers using such ski areas; and . . . rights and liabilities existing between the skier and the ski area operator." *Id.* The General Assembly broadened the scope of the SSA's protections through two sets of amendments in 1990 and 2004. *Stamp*, 172 P.3d at 446.

Though plaintiff repeatedly refers to "limited immunity," (Pl.'s Br. p. 12), this Court observed that the SSA, through its several liability provisions, in fact, "narrowly" defines the claims injured skiers can bring against area operators. *Id.* at 443-444. The "SSA

broadly defines the term 'inherent dangers and risks of skiing,'" *Id.* at 444, n.8, and then provides that "[n]otwithstanding any judicial decision or any law or statute to the contrary . . . no skier may make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing." C.R.S. 33-44-112 ("Section 112"). Section 112 bars both injury and wrongful death claims. *Stamp*, 172 P.3d at 445. The SSA expressly exempts only two category of claims from the scope of this broad immunity provision: (1) claims for violations of provisions of the SSA; and (2) claims for injuries caused by the use or operation of ski lifts. C.R.S. 33-44-103(3.5), 104(1-2).

Winter Park recognizes that "statutes in derogation of the common law must be strictly construed, so that if the legislature wishes to abrogate rights that would be available at common law, it must manifest its intent either expressly or by clear implication." *Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1076 (Colo. 1992). By the enactment of the SSA, the General Assembly expressed its unmistakable intent to abrogate common law. C.R.S. 33-44-112 ("Notwithstanding any judicial decision or any law or statute to the contrary. . ."); C.R.S. 33-44-114 ("Insofar as any

provision of law or statute is inconsistent with the provisions of this article, this article controls.") Thus, this Court found "[t]he cumulative effect of these provisions gives the SSA primary control over litigation arising from skiing accidents . . . and the provisions of the SSA 'leave[] no doubt as to the legislative intent to set forth the governing law concerning ski area liability.'" *Stamp*, 172 P.3d at 444 (*quoting Bayer v. Crested Butte*, 960 P.2d 70, 84 (Colo. 1998)).

Because Section 112 is not a mere defense, but immunizes ski area operators from suit by prohibiting skiers from "mak[ing] . . . any claim," courts have found that area operators are entitled to dismissal of skier claims at either the pleading or summary judgment stage of litigation when it is alleged or shown that the skier injuries resulted from inherent dangers of skiing - - even in the face of evidence the area operator could have made conditions safer through warnings, trail closures, or otherwise. *See Kumar v. Copper Mtn.*, 431 Fed.Appx. 736, 738 (10th Cir. 2011)(summary judgment in case involving a skier's failure to negotiate an unmarked cornice); *Bazarewski v. The Vail Corp.*, 23 F.Supp.3d 1327, 1332 (D. Colo. 2014)(motion to dismiss for failure to state a claim in case involving tubing accident); *Johnson v. Bodenhausen,*

835 F.Supp.2d 1092, 1096 (D. Colo. 2011)(motion to dismiss for failure to state a claim in case involving a collision with a ski area employee).

B. The SSA "broadly" defines "inherent dangers and risks of skiing" to mean "those dangers or conditions that are part of the sport of skiing."

As framed by this Court, the issue here is whether the term "inherent dangers and risks of skiing" as defined in Section 103(3.5) encompasses avalanches that occur within the bounds of a ski area. Contrary to plaintiff's characterization of the scope of the definition as "cabined" and "narrow," this Court previously observed that Section 103(3.5) "broadly defines the term inherent dangers and risks of skiing." *Stamp*, 172 P.3d at 444, n.8. This observation comports with interpretive rules of construction.

The Court "adopt[s] the construction that best gives effect to the legislative scheme." *Slack v. Farmers Ins.*, 5 P.3d 280, 284 (Colo. 2000). Defined words in a statute must be construed according to the legislative definition. C.R.S. 2-4-101; *People v. Swain*, 959 P.2d 426, 429 (Colo. 1998). When the legislative language is unambiguous, this is done by giving "effect to the plain and ordinary meaning of the statute without resorting to other rules

of statutory construction." *Stamp*, 172 P.3d at 442-443. "Only when the statute is unclear or ambiguous" will this Court "look beyond the words of the statute to legislative history or rules of statutory construction." *People v. Goodale*, 78 P.3d 1103, 1107 (Colo. 2003).

Section 103(3.5)(as amended in 2004) is unambiguous and does not lend itself to alternative constructions. It "is written to be expansive and not limiting." *Preston v. Dupont*, 35 P.3d 433, 438 (Colo. 2001). Using open terminology, it provides a general definition for "inherent dangers and risks of skiing," and then sets forth a wide-ranging list of categories of such dangers and risks.

The general definition states "inherent dangers and risks of skiing means those dangers or conditions that are part of the sport of skiing." C.R.S. 33-44-103(3.5). The word "including" immediately follows the definition clause. Section 103(3.5) then lists numerous categories of 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

- Variations in steepness or terrain.

Id.

Section 103(3.5) contains two express exceptions for:

- "[N]egligence of a ski area operator as set forth in section 33-44-104(2)."
- "[I]njury caused by the use or operation of ski lifts."

Id.

C. Section 103(3.5) contains a nonexclusive list of categories of inherent dangers.

Plaintiff takes the position throughout the opening brief that the court of appeals improperly added avalanches to the list of

inherent dangers in Section 103(3.5), but this merely begs the question whether the list in Section 103(3.5) is nonexclusive or exclusive.[1] The plain language of Section 103(3.5) answers that question. The definition of a term as "including" certain things, is well settled, and does not restrict the meaning to those items specified," because the "word 'include' is ordinarily used as a word of extension or enlargement." *Preston*, 35 P.3d at 438 (*citing Cherry Creek Sch. Dist. #5 v. Voleker,* 859 P.2d 805, 813 (Colo. 1993)); *see also Southern Ute Indian Tribe v. King Consolidated Ditch Co.*, 250 P.3d 1226, 1233 n. 4 (Colo. 2011). "To hold otherwise would transmogrify the word 'include' into the word 'mean.'" *Lyman v. Town of Bow Mar*, 533 P.2d 1129, 1133 (Colo. 1975).

Section 103(3.5) is perfectly clear. It contains a general definition followed by the word "including" before listing categories of "dangers [and] conditions" that the legislature deemed to be "part of the sport of skiing," and setting forth only two exceptions. Accordingly, the plain meaning construction of Section 103(3.5)

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[1] It also begs the question whether the listed categories, including "powder," encompass the new snowfall that slid, resulting in the decedent's fatal injuries. Winter Park will address this issue in the following section.

does not limit the "inherent dangers and risks of skiing" to only the "specific categories listed." *Preston*, 35 P.3d at 438.

Significantly, construing Section 103(3.5) otherwise, would not only be contrary to its plain meaning, it would render the general definition with two express exceptions meaningless. *People v. Terry*, 791 P.2d 374, 376 (Colo. 1990)("[C]onstructions that would render meaningless a part of the statute should be avoided.") Had the legislature intended to list all of the "inherent dangers and risks of skiing," there would have been no need to generally define that term to mean "those dangers . . . that are part of the sport." Likewise, there would have been no need create exceptions to the general definition for "negligence . . . as set forth in section 33-44-104(2)," and "for injury caused by the use or operation of ski lifts." To give effect to the general definition chosen by the General Assembly and the express exceptions, the list of categories in Section 103(3.5) must be construed as nonexclusive. *Colorado General Assembly v. Lamm*, 700 P.2d 508, 517 (Colo. 1985)("When possible, every word of a statute must be given effect.")

Accordingly, in *Graven v. Vail Assoc., Inc.*, 909 P.2d 514, 518 n.4 (Colo. 1995), addressing the prior version of Section 103(3.5),

though it was "not necessary for the purposes of [the] opinion to determine definitively whether the list of dangers or risks that are inherent in the sport is exclusive," this Court made it a point to note that the "word 'include,' however, ordinarily signifies extension or enlargement and is not definitionally equivalent to the word 'mean.'" In accord with this Court's *dicta* in *Graven*, the court of appeals below, the Tenth Circuit, Court of Appeals, and the U.S. District Court, for the District of Colorado, have concluded that the list in Section 103(3.5) is nonexclusive. *Fleury*, ¶ 11; *Doering ex rel Barrett v. Copper Mtn.*, 259 F.3d 1202, 1214 (10th Cir. 2001); *Bazarewski*, 23 F.Supp.3d at 1331.

Plaintiff contends that Section 103(3.5) contains a "finite, detailed list," (Pl's Br., p. 22), and rests this competing construction not on the plain language, but on comments made in 1990 committee hearings by a state representative, a state senator, and a proponent of the legislation. (Pl.'s Br., pp. 30-31.) The comments include the statement by Rep. Scott McInnis, indicating that a proposed amendment to the original bill (SB 90-80), striking the words "but not limited to" was "a slight amendment, and it's a

clarification that the items that follow are inherent risks and dangers that are being referred to." (ROA #51, tr. p. 35 ll. 16-18.)[2]

This Court's interpretive rules do not allow for consideration of comments of individual legislators prior to a statute's passage when the language of a statute is unambiguous and speaks for itself as is the case here. The rule against looking to legislative history in the absence of an ambiguity is a longstanding one of American jurisprudence: "the intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is not room for construction." *U.S. v. Wiltberger*, 18 U.S. 76 (1820)(Marshal, C.J.); *see also Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-396 (1951)(Jackson, J., concurring)("[T]o select casual statements from floor debates, not

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[2] Plaintiff also refers to a statement by Sen. Tillman Bishop, the sponsor of SB 90-80, referring to Section 103(3.5) and indicating "we may be able to see that it is acceptable as it's – as it's written." (ROA #55, tr. 4:4 – 5:22.) Plaintiff's reliance on this statement is misplaced given its timing. Senator Bishop made this statement on January 30, 1990. (*Id.* at 2.) The house committee, however, did not recommend striking the language "but not limited to" from the SB 90-80 until March 13, 1990. (ROA #54, p. 1.) Thus, Plaintiff's suggestion that Senator Bishop's statement serves as evidence he intended the list in Section 103(3.5) to be exclusive is contrary to the timing of the statement.

always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.")

Thus, in *Preston*, this Court found comments of two legislators during a conference hearing about the meaning of a phrase not to be controlling over the phrase's ordinary meaning, commenting: "members of the General Assembly vote for many different reasons; we cannot presume to know that the members of the General Assembly voted to include the 102.5(5) physical impairment subsection because they accepted Representative Barry's misunderstanding of the meaning of the term compensatory damages." 35 P.3d 433, 440; *see also People v. Diaz*, 2015 CO 28, n.5 (Colo. 2015)(rejecting reliance on "ambiguous" legislative history, stating, "beyond noting the statute's obvious purpose . . . it is inappropriate for us to delve into legislative history."); *Hyland Hills Park & Recreation Dist. v. Denver Rio Grande W.R.R.Co.*, 864 P.2d 569, 574 (Colo. 1993)("[D]espite the ambiguous statements that comprise most of the legislative history, the plain meaning of the statute is dispositive.")

Here, Representative McInnis' misunderstanding of the effect of removing the language "but not limited to" from the 1990 amendments did not bind the other representatives and senators who voted to pass them, and the Governor who signed them into law. They voted on, and the Governor signed into law the amendments as written not as interpreted by Representative McInnis at a committee hearing of just one house of a bicameral legislature. The only thing that can be presumed by the votes in favor of the legislation is that the individual legislators were aware of this Court's precedent interpreting the word "including" as a term of enlargement rather than limitation. *People v. Hickman*, 988 P.2d 628, 636 (Colo. 1999)("It is to be presumed that a legislature is cognizant of and adopts the construction which prior judicial decisions have placed on particular language when such language is employed in subsequent legislation.") It cannot be presumed that they accepted the contradictory interpretation of their colleague Representative McInnis, or anyone else commenting or testifying at legislative hearings as part of a political process. *Preston*, 35 P.3d at 433, 440.

The legislative history of the 1990 amendments is not even the correct history because the General Assembly amended Section 103(3.5) in 2004. By the 2004 amendments, the General Assembly clarified that the clause following "dangers and conditions" is a defining clause by replacing the word "which" with "that." Ch. 341, Sec. 1, 2004 Colo. Sess. Laws 1383. (Pl.'s Br., Appx. 3.) It then expanded the general definition by striking the word "integral" which had served as a word of limitation. *Id.; see also Graven* 909 P.2d at 519-520 ("not all dangers that may be encountered on the ski slopes . . . are inherent and *integral* to the sport, and this determination cannot always be made as a matter of law.") It also added "cliffs," "extreme terrain," "freestyle terrain" and "jumps" to the list of the examples in Section 103(3.5). Ch. 341 Sec. 1, *supra* at 1383.

While it made several changes to Section 103(3.5), the 2004 General Assembly left intact its structure of providing a general definition followed by the word "including" before a list of examples and only two exceptions. In leaving this structure intact, it must be presumed that the General Assembly was aware of this Court's "previously expressed understanding" in *Graven* that the list of

examples are nonexclusive, and did not intend a construction contrary to the plain meaning. *People v. Martin*, 27 P.3d 846, 855 (Colo. 2001).

The purported intent of the legislature in 1990, as expressed in the legislative history from that year, says nothing about the intent of the legislature in 2004 when it amended Section 103(3.5). By striking the word "integral," the 2004 General Assembly plainly intended to expand the general definition of inherent dangers and risks from "those dangers and conditions which are an integral part of the sport" to "those dangers and conditions that are a part of the sport." *Fleury*, ¶ 18; *see also Kumar*, 431 Fed.Appx. at 738 n.1. An expanded general definition serves no purpose if it is then "cabined" by a list of exclusive dangers and conditions. Thus, to give effect to the intent of the 2004 legislature, Section 103(3.5) must be construed in accordance with its plain meaning.

Plaintiff downplays the significance of the removal of the word "integral" from the definition. She asserts that the removal of the word "integral" served 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."

(Pl.'s Br., p. 35.). While that was one aim of the amendments, it was not achieved by striking "integral" from Section 103(3.5). Rather, the General Assembly achieved that aim explicitly by expanding the definition of "ski slopes and trails" to include "adjoining skiable terrain, including all of their edges and features." C.R.S. 33-44-103(9); Ch. 341, Sec. 1, *supra* at 1383. Striking the word "integral" served the different purpose of ending the "inquiry concerning whether, based on the specific facts of the case, particular dangers are 'integral' parts of skiing" even in cases involving accidents on skiable terrain. *Gifford v. Vail Resorts*, 37 Fed.Appx. 486, 491 (10th Cir. 2002)(encounter with gully filled with deep snow on skiable terrain); *see also Doering*, 259 F.3d at 1208 (collision with grooming vehicle on skiable terrain).

While Plaintiff downplays the removal of the word integral, she makes much of the addition of four categories of dangers and conditions to the list in Section 103(3.5): "cliffs," "extreme terrain," "freestyle terrain" and "jumps." In her view, construing the list as nonexclusive renders these additions superfluous. (Pl.'s Br., p. 36.) However, to say that the 2004 additions are superfluous is to say that the entire list is superfluous. Cleary, it is not. The General

Assembly chose to generally define "inherent dangers and risks of skiing," and set out a list of nonexclusive categories of the dangers and conditions it deemed to be encompassed by the definition. The subsequent addition to the list, making clear that certain other categories fall within the ambit of the definition, is consistent with the plain meaning construction of Section 103(3.5).[3]

Plaintiff also argues the departure from the plain meaning is justified by the usage of the phrase "including, but not limited to" preceding another list elsewhere in Section 103(3.5)("[I]ncluding,

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[3] The court of appeals and Tenth Circuit observed that the 2004 amendments "partially abrogated" this Court's decision in *Graven*. *Kumar*, 431 Fed.Appx. at 738, n.1; *Fleury* at ¶ 18. Plaintiff questions this conclusion, stating the General Assembly did not "expressly state an intention to overrule the Court's precedent." (Pl.'s. Br., p. 36.) The *Graven* decision involved the application of the former "danger area" provision in the SSA (and not Section 112), which required ski area operators to designate "danger areas," but dangers areas did "not include areas presenting inherent dangers and risks of skiing." *Graven*, 909 P.2d at 515. This Court considered whether a steep precipice (i.e. cliff) off to the side of a cut trail was an inherent danger not subject to the marking requirement of the danger area provision. *Id.* After *Graven*, not only did the General Assembly strike the word "integral" from Section 103(3.5), add the word "cliffs" to the nonexclusive list, and amend the definition of "ski slopes and trails," but it also completely repealed the danger area provision. Thus, while the General assembly did not explicitly state that it was abrogating *Graven*, it either repealed or modified virtually all of the provisions of the SSA at issue in *Graven*.

but not limited to roads, . . . or other terrain modifications.") Plaintiff urges that the usage of the word "including" and the phrase "including, but not limited to" demonstrates that the legislature intended the terms to have different meanings. The General Assembly, however, also used the phrase "such as" preceding a third list in Section 103(3.5). ("[S]uch as ice, hard pack, . . .") The terms "including," "including, but not limited to," and "such as" all have the same meaning. *Black's Law Dictionary,* 880 (10th ed. 2014)("[S]ome drafters use phrases such as including without limitation and including but not limited – which mean the same thing" as "include"); *People v. Roggow*, 318 P.3d 446, 451 (Colo. 2013); *League of Women Voters of Colorado v. Davidson*, 23 P.3d 1266, 1277 (Colo. App. 2001). While courts afford different terms different meanings, *see e.g. Carlson v. Ferris*, 85 P.3d 504 (Colo. 2003)("safety belt system v. "fastened safety belt"), [t]he use of two different words or phrases, each of which expresses the same common meaning, does not render a statute internally inconsistent." *Howe v. People*, 496 P.2d 1040, 1042 (Colo. 1972). And, no interpretive rule requires courts to "strain" to give different

meanings to otherwise synonymous words and phrases. *Preston*, 35 P.3d at 440

Finally, Plaintiff points to canons of construction, and then cites to several inapposite cases. (Pl's. Br., pp., 20-22.) None of the canons or cases cited call for construction of a list as exclusive when it follows a general definition and the word "including." The construction of a statutory definition with this structure is settled: "including" is a term of enlargement, making the list that follows nonexclusive. *Preston*, 35 P.3d at 438.

II. The statutory definition of inherent dangers includes and encompasses avalanches.

A. An avalanche is a "danger[] . . . that [is] part of the sport of skiing."

"Inherent dangers and risks of skiing" is not a "legislative term of art," (Pl.'s Br., p. 17), but is a defined term and a "court must apply [its] definition." *Swain*, 959 P.2d at 429. In her brief, Plaintiff skirts the issue of whether the general definition in Section 103(3.5) encompasses avalanches. Plaintiff argues instead from the incorrect premise that the list in Section 103(3.5) is exclusive and therefore mentions the broad general definition in Section 103(3.5)

just once in her opening brief, and then only to acknowledge that the definition was amended in 2004. (Pl.'s Br., p. 34.)

Answering the question left unanswered by Plaintiff in her brief: the general definition in Section 103(3.5), "dangers . . . that are part of the sport of skiing," encompasses avalanches. Clearly, avalanches are a danger. "Danger" means "the state of being exposed to harm . . . : peril, risk." *Webster's Third New International Dictionary*, p. 573 (2002). *Id.* at 573. As avalanches expose skiers to harm, they fit the definition of danger.

Avalanches are also "part of the sport of skiing." Skiing in Colorado takes place in a high alpine mountain environment. Plaintiff acknowledges the "common knowledge of avalanche danger in the mountains." (Pl.'s Br., p. 18.) The amicus, Colorado Trial Lawyers Association ("CTLA"), refers to an article quoting the Associate Director of the Colorado Avalanche Information Center, who warned: "People should always be aware of avalanches and the potential in the Colorado Rockies . . . Colorado leads the rest of the United States in avalanche accidents, and that is due to the inherent snowpack and climate of Colorado." Karen Bailey, *Avalanche Danger Increasing to High Snow Pattern to Influence*

Entire Season, Rocky Mountain News, Jan. 3, 1990 (CTLA Br., Appx. A). Thus, in-bounds avalanches at ski areas, though "extremely rare," do occur. Jason Blevins, *Recent Colorado Deaths a Sad Reminder that Ski Resorts not Immune to Avalanches*, Denver Post, Jan. 25, 2012, available at http://www.denverpost.com/ci_17515949.

In-bounds avalanches rarely occur at ski areas for the very reason that they are a recognized danger that is "part of the sport of skiing." As a known danger, ski area operators take precautions to protect skiers from avalanches. In fact, as Plaintiff pointed out in her opposition to the motion below, Winter Park's Forest Service special use permit made it responsible for avalanche control and prevention within its ski area boundary. (ROA #21, pp. 2, 5.) In furtherance of this responsibility, Winter Park adopted an operating plan that included avalanche procedures with the "primary concern" being "delayed action avalanche caused by the combination of high wind, extreme temperature variations, and dry snow." (*Id.* at 6.) The plan called for Winter Park to perform "snow stability evaluation" and carry out "correct and proper control procedures," and referred to "[g]uidelines" established in the U.S.

Department of Agriculture Forest Service publication "Avalanche Handbook." (*Id.*)

Moreover, according to the references cited by CTLA, "conducting avalanche control including using explosives can reduce the avalanche risk to almost zero, but it cannot eliminate it" and "ski patrols will probably never be able to totally eliminate avalanche risk." Doug Albromeit, *Inbounds Incidents & Fatalities 2008/09*, the Avalanche Review, Feb. 2010, p. 26, available at http://www.avalanche.org/moonstone/SnowMechanics/Inbounds%20articles.28.3.pdf. "There is only one way to assure there will never be another avalanche fatality in an open area in a ski resort and that is to prohibit skiing on or beneath slopes steeper than about 30 degrees." *Id.* Thus, as a danger that can be effectively mitigated, but not eliminated, avalanches are the type of danger that led to the enactment of the SSA in the first instance. The General Assembly enacted the SSA in express recognition that ski area operators cannot eliminate the dangers of skiing "regardless of any and all reasonable safety measures which can be employed." C.R.S. 33-44-102.

Plaintiff understandably eschews the general definition in Section 103(3.5). A significant dissonance exists between the position that avalanches do not qualify as a "danger" that is "part of the sport of skiing" on the one hand, and the (1) "common knowledge of avalanche danger in the mountains" as a consequence of weather, snow and terrain conditions alleged in the complaint; (2) the Forest Service requirement for avalanche control and prevention; (3) the Winter Park operating plan containing "avalanche procedures;" and (4) the existence of Forest Service guidelines in an "Avalanche Handbook," on the other hand. All of the latter bespeak of a recognized danger that is part of a sport that takes place on snow in a dynamic mountain environment.

Recognizing that the conditions that produce the potential for snow to slide occur naturally, Plaintiff and CTLA draw a distinction between in-bounds and the backcountry. (Pl.'s Br., p. 34; CTLA Br., p. 9.) They urge that avalanches are a peril associated only

with skiing in the backcountry, but not in-bounds at a ski area. This distinction does not stand to reason.[4]

The force and fury of nature do not confine themselves to areas outside the bounds of a ski area. The intrinsic perils of new snowfall on an existing snow base in combination with weather and terrain conditions are the same in-bounds and in the backcountry. So to say that avalanches are inherent in the backcountry, is to acknowledge that they are a danger that is a part of skiing in-bounds at ski areas. The only difference between the backcountry and in-bounds are the efforts by ski area operators to reduce the dangers posed by those conditions that inhere in the mountain environment. The ability of the ski area operators to reduce or mitigate the many dangers attendant to the dynamic environment where skiing takes place, including the many perils posed by the physical properties of snow, does not make those dangers any less a part of the sport. C.R.S. 33-44-102.

[4] Section 103(3.5) also does not provide for this distinction. Inherent dangers are defined to include the dangers of skiing that are part of the "sport" without reference to where the sport takes place.

Regarding avalanches in particular, skiers skiing in-bounds on certain terrain under certain conditions expose themselves to the danger of avalanches and snow slides. *Inbounds Incidents & Fatalities 2008/09*, *supra* at 26. That is the very reason ski area operators make efforts to mitigate avalanche danger. To say that the danger of avalanches is not "part of the sport" is to ignore the efforts by ski area operators to mitigate that very danger.

B. An avalanche is a peril resulting from the listed categories of dangers and conditions in Section 103(3.5), including the intrinsic physical properties of snow.

It is unnecessary to reach the issue whether the categories of inherent dangers in Section 103(3.5) are exclusive or nonexclusive. With only the exceptions for area operator negligence pursuant to C.R.S. 33-44-104(2), and injury caused by the use of lifts, the plain language of Section 103(3.5) makes it clear that the General Assembly intended to bar all claims involving dangers, perils, events, and accidents caused by the listed categories. As an effect of the intrinsic characteristics of snow in combination with weather and terrain conditions, avalanches are among those events and are therefore included in, and encompassed by the listed categories.

To be certain, plaintiff alleged in her complaint that the avalanche at issue here was caused by new snowfall (i.e. powder) on top of a weak and unstable snowpack on a north-facing slope of greater than thirty degrees. As the court of appeals found, these allegations by Plaintiff established that the event of the avalanche resulted from dangers and conditions explicitly listed in Section 103(3.5): "changing snow conditions (new snowfall) and existing snow conditions (weak and unstable snowpack) caused by weather and slope steepness (slope exceeding thirty degrees). *Fleury at* ¶ 14.

In the same vein, "an avalanche itself is a danger resulting from certain conditions of snow, and the degree of danger is affected by "changing weather conditions" across "variation of steepness and terrain." *Id.* at ¶ 15.

The dissent below criticized the majority's reasoning on this issue, but in reaching its opposite conclusion, the dissent focused on the effect - - an avalanche - - in isolation, without consideration of the causes of the avalanche as alleged by plaintiff. For example, referring to the various conditions of snow listed in Section 103(3.5), the dissent observed that "these examples describe the types of snow by the snow's physical properties or source," and

then stated that "[a]n avalanche is not such a condition," and concluded that an avalanche is not an "event," embraced by the definition. *Id. at* ¶¶ 44, 47.

The flaw in the dissent's reasoning is that snow, in its various forms, standing alone, does not pose a danger to skiers. Snow only becomes dangerous upon some interaction with a skier, resulting in an injury producing event as a consequence of the snow's physical properties. The General Assembly did not restrict the scope of the immunity to particular events that can result from those physical properties.

The physical properties of ice include slipperiness. Certainly, the SSA bars claims involving the event of skiers losing control upon encountering ice. The physical properties of snow (in combination with weather), can result in the formation of cornices. *Kumar*, 431 Fed.Appx. at 737. The *Kumar* plaintiff failed to negotiate a cornice that had formed on an open trail. Though cornices are not listed in Section 103(3.5), the Tenth Circuit found that plaintiff's claims arising from this event were barred by Section 112, because "the cornice . . . falls within the statutory definition of an inherent danger. At a minimum, it either falls within the

sections relating to snow conditions as they exist or change, or the provision covering variations in steepness or terrain." *Id.* at 738.

Plaintiff and the dissent suggest that "snow conditions as they exist or may change" are only an inherent danger when they cause skier falls or collisions, but are not when they result in a snow slides and avalanches. However, the text of the SSA provides no basis for such a restriction on the scope of perils encompassed by Section 103(3.5). The language of Section 103(3) does not distinguish between the event of a skier's fall caused by the physical properties of ice or the formation of a cornice from the event of an avalanche caused by the physical properties of new snowfall on top of a weak and unstable snow base.

Significantly, the General Assembly included "powder" in the list of snow conditions. Though "powder" entices many skiers, as the legislature recognized, it is a danger that is part of the sport. The physical properties of powder snow that make it desirable to skiers, are also the ones that make it dangerous. Powder (i.e. new snowfall) is not fixed in place. Given Colorado's dry climate, new snowfall here is light and low in density, and therefore can be displaced, and move and slide in reaction to skier movement. The

displacement and movement of powder is capable of enveloping and trapping skiers, resulting in injury or death.

The decedent in *Gifford*, for example, following three days of snowfall totaling 3 feet, died of asphyxiation due to suffocation when he fell into deep snow in a gully that crossed a designated trail. 37 Fed.Appx. at 487. New snowfall also poses the danger of tree wells/snow immersion. *See* Jason Blevins, *Another Tree Well Death*, Denver Post Blog., Jan. 6, 2010, available at http://blogs.denverpost.com/sports/2010/01/06/. "A tree well/snow immersion suffocation accident can happen when a skier. . . falls – usually headfirst – into a tree well or deep loose snow and becomes immobilized and trapped under the snow and suffocates." *See* Tree Well and Snow Immersion Suffocation (SIS) Information : Home, available at http://www.deepsnowsafety.org/index.php/. When trapped under the snow "Breathing becomes difficult as the loose snow packs in around" the skier. *Id.* Plaintiff conceded below that the definition of inherent dangers and risks of skiing encompasses tree wells. (Pl.'s COA Reply Br., p. 17.)

The physical properties of powder that can cause a skier to become buried in a snow filled gully, or cause snow to collapse or

pack around a skier in a tree well, are the same physical properties that can cause an avalanche. The loose and uncompacted nature of powder allows it to move, be displaced, and slide upon an encounter with a skier. These are the dangers posed by powder, and the properties of powder that can cause new snowfall to slide when on top of a weak and unstable snowpack.

Just as the legislature chose to immunize ski area operators from perils and events resulting from slipperiness of "ice," it chose to immunize ski area operators from all of the other many perils and events that can result from the intrinsic physical properties of "snow," including "powder" on top of a weak and unstable snowpack. Because avalanches are among those perils (as plaintiff conceded in her complaint), Section 103(3.5) includes and encompasses avalanches.

C. Section 103(3.5) does not except avalanches from its purview.

Because the SSA provides no textual basis for distinguishing avalanches from other dangers, perils, events, and accidents that can result from "changing weather; snow conditions as they exist or may change; . . . and variations in steepness or terrain," Plaintiff's

complaint alleging that the decedent's fatal injuries resulted from changing weather (i.e. new snow and winds) in combination with the existing rotten and weak snow base on certain slopes, failed to state a viable claim against Winter Park. *See Johnson*, 835 F.Supp.2d at 1095.

In essence, Plaintiff's contrary position reduces to the argument that, although inherent dangers caused the avalanche, since the word "avalanche" does not appear in Section 103(3.5), the decedent's fatal injuries did not result from inherent dangers. As discussed above, the same or similar weather and snow conditions that can produce avalanches can pose other serious perils to skiers, which are not listed in Section 103(3.5)(e.g. cornices, tree wells, deep snow in a gully). To say that avalanches and those other perils are not inherent dangers even though they are caused by listed dangers that are part of the sport would "effectively frustrate the legislative intent" of the SSA "because it allows a skier who was injured by statutorily identified inherent risks to avoid" the application of Section 103(3.5) through "imaginative" pleading by either describing the risk or its effects in terms not found in the statutory definition. *Graven*, 909 P.2d at 524-526 (Erickson, J.

dissenting). This could not have been the intent of the General Assembly when it amended Section 103(3.5) and expanded the definition of inherent dangers in 2004 in the wake of the *Graven* decision.

Lacking a text based rule to distinguish between the many perils of snow and other dangers embraced by the specific categories of dangers and conditions listed in Section 103(3.5) from avalanches, Plaintiff insists that the "Court should find that the dynamic process of an avalanche cannot possibly be fabricated into an inherent risk of skiing . . . a skier should reasonably expect to encounter within the bounds of a ski area" and that 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." (Pl.s' Br., pp. 19, 20.) Plaintiff's position has several problems.

As a textual matter, the plain language of Section 103(3.5), does not allow for the consideration of the subjective expectations of skiers in the determination of whether a danger fits the definition. Rather, "[t]he proper scope of the inquiry should be on what constitutes 'part of the sport' of [skiing], as that inquiry defines

what may be expected by way of inherent dangers and risks." *Bazarewski*, 23 F.Supp.3d at 1331. Moreover, the expectations of skiers do not even serve as a basis for distinguishing between avalanches and the other examples of inherent dangers in Section 103(3.5). Many reasonable skiers may not anticipate or expect to encounter "streambeds, cliffs . . . [and] water pipes" on open designated trails, but all of those dangers and conditions are listed in Section 103(3.5).

Further, to the extent that avalanches are not expected in-bounds at ski areas, it is only because of the effective efforts at mitigation undertaken by ski area operators. Those efforts make the occurrence of in-bounds avalanches a rare event. But any expectation that ski area operators can eliminate the danger of in-bounds avalanches, is to expect the impossible. The SSA contains no language indicating that the General Assembly intended to exclude from the purview of Section 103(3.5) such dangers that can be effectively mitigated (and therefore unexpected), but not eliminated. On the contrary, the General Assembly enacted the SSA in recognition that ski area operators cannot eliminate the

many perils of skiing regardless of their reasonable efforts. C.R.S. 33-44-102.

Plaintiff also urges that Section 103(3.5) limits the dangers and conditions within its purview to static dangers and conditions that a skier "could avoid if the skier skied in control." (Pl.s' Br., p. 33.) This proposed limitation does not withstand scrutiny of Section 103(3.5). Indeed, the very first of the listed categories is "changing weather." The next is "snow conditions as they exist or may change." The list also includes "collisions with other skiers." Skiing in control does not allow skiers to avoid the many hazards resulting from changing weather (e.g. blinding white–out conditions caused by snowfall and winds), or avoid being struck from behind by an out-of-control skier. The inclusion of dynamic conditions and dangers in the Section 103(3.5)'s list contradicts Plaintiff's position that the General Assembly did not intend for the definition to encompass "dynamic events." To the contrary, skiing by its nature is a dynamic sport, takes place in a dynamic natural environment, and therefore, the definition of inherent dangers expressly encompasses dynamic conditions and events skiers cannot avoid by skiing in control.

Further, many skiers rather than avoid new snowfall seek out powder. While powder is a desirable condition of skiing, it also can be a dangerous one. Skiers who seek powder cannot avoid its intrinsic dangers by skiing in control.

Rather than the text of Section 103(3.5), plaintiff finds the basis for distinguishing between avalanches and other dangers and conditions that are part of the sport of skiing in the legislative history for the 1990 amendments. Those statements in which parties to the political process expressed their opinions about what the definition encompassed do not override the plain meaning of Section 103(3.5). *Preston*, 35 P.3d 433, 440. Moreover, the legislators and others expressed their opinions about a narrower definition of inherent dangers and risks of skiing, and did not have the occasion to opine about the broader definition enacted in 2004.

Plaintiff also incorrectly states that "ski area operators are required to advise the public of the listed inherent danger (sic) and risks of skiing contained" in Section 103(3.5) on warning signs and lift tickets, and then urges that avalanches are not an inherent danger because the list does not contain the word avalanche. (Pl.'s Br., p. 38.) C.R.S. 33-44-107(8)(b) and (c) do not require that ski

area operators inform skiers of the categories of dangers and conditions listed in Section 103(3.5). Rather, the required warning language is set forth in C.R.S. 33-44-107(8)(c). The mandatory warning is not coextensive with Section 103(3.5). For example, the warning language does not explicitly include "impact with lift towers, signs, posts, fences or enclosures, hydrants [and] water pipes," and does not include at all "cliffs," "extreme terrain," "freestyle terrain," and "jumps." Also, while the mandated warning includes "existing and changing snow conditions," it does not list all of the illustrative examples of such snow conditions (i.e. "ice, hard pack, . . ." Accordingly, C.R.S. 33-44-107(8)(b) and (c) do not evince any intent by the General Assembly to inform skiers of all the dangers and conditions encompassed by Section 103(3.5).

Finally, Plaintiff sounds the alarm about the effects a decision in favor of Winter Park will have on skier safety, evoking the image of children being "swept away" in slab avalanches on green or blue groomed runs. (Pl.'s Br., pp. 10-11, 34)("Beginning skiers and children would require specialized avalanche survival training and equipment.") Thus, in effect, Plaintiff is sounding the alarm based

on a scenario that did not occur here, and one that is unlikely ever to occur.

Indeed, the decedent was not skiing on a designated green or blue run or any run at all, but as alleged in the complaint in steep expert terrain in the trees between two runs. Plaintiff claims that Winter Park should have known that the terrain in the trees was prone to snow slides. As her own complaint makes clear, avalanches only occur on certain terrain with pitches of greater than 30 degrees. Thus, a decision in favor of Winter Park will not make the already rare occurrence of in-bounds avalanches at Colorado ski areas more widespread. The decision will not change the fact that avalanches only occur on certain steep terrain.

Nor will the decision change the fact that ski area operators will continue to engage in mitigation efforts on avalanche prone terrain to protect skiers, and therefore the occurrence of in-bounds avalanches will continue to be rare. Nonetheless, it will also remain the case that those highly effective efforts at mitigation will not be capable of altogether eliminating the avalanche danger at Colorado ski areas. While this should cause little concern for beginner skiers on blue and green groomed runs, skiers, such as decedent, who

venture into steep treed terrain on a powder day do expose themselves to the risk that the snow will slide. This will remain a risk of skiing regardless of the outcome of this case.

D. Section 103(3.5) encompasses in-bounds avalanches caused by "changing weather; snow conditions as they exist or may change; . . . and variations in steepness or terrain."

Pointing to the example of patroller's use of explosives causing a damage producing avalanche, Plaintiff raises the specter of an avalanche caused by ski area operator negligence. (Pl.'s Br., p. 24.) However, Plaintiff did not claim that Winter Park triggered the avalanche or otherwise launch a force or instrument of harm that resulted in the fatal injuries to the decedent.

Rather, Plaintiff alleged inaction (i.e. nonfeasance), in failing to protect the decedent from the conditions that created the risk of an avalanche. Thus, the facts of this case do not present the issue whether an avalanche triggered by a ski area operator's action (i.e. malfeasance) is an inherent danger and risk of skiing. Accordingly, judgment in favor of Winter Park can be affirmed without deciding whether all in-bounds avalanches, including ski area operator triggered avalanches, are a danger that is part of the sport of skiing.

A claim for negligence in the use of explosives is fundamentally different than a claim of inaction in failing to protect a skier from the naturally occurring and intrinsic snow conditions that are capable of producing avalanches. In the case of the use of explosives, or for that matter any other action on the part of a ski area operator capable of triggering snow to slide, the area operator is putting into motion a force over and above the dangers that are part of the sport. This stands in stark contrast to this case where Plaintiff alleged that the slide occurred as a consequence of the decedent's encounter with naturally occurring snow conditions without any involvement on the part of Winter Park. While Section 103(3.5) does not necessarily embrace perils resulting from the percussive force of an explosion, including snow slides, it does embrace perils arising directly from "changing weather; snow conditions as they exist or may change; . . . [and] variations in steepness or terrain." Thus, Section 103(3.5) includes and encompasses the avalanche alleged by Plaintiff, but that does not mean that ski area operators are afforded immunity should their own active negligence cause an avalanche.

CONCLUSION

Based on the foregoing, the judgment in favor of Winter Park should be affirmed.

Dated: May 11, 2015.

THE RIETZ LAW FIRM, LLC

s/ Brian a. Birenbach

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ATTORNEYS FOR
DEFENDANT-RESPONDENT

C.A.R. 28(f) Addendum of Statutes

C.R.S. 33-44-102. Legislative declaration.

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 supplement the passenger tramway safety provisions of part 7 of article 5 of title 25, C.R.S.; 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.

C.R.S. 33-44-103. Definitions.

(3.5) “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 manmade 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.

C.R.S. 33-44-112. Limitation on actions for injury resulting from inherent dangers and risks of skiing.

Notwithstanding any judicial decision or any other law or statute to the contrary, including but not limited to sections 13-21-111 and 13-21-111.7, C.R.S., no skier may make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of May 2014, a true and correct copy of the foregoing was electronically filed and served, via ICCES, to the Supreme Court and upon the following:

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Paralegal