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Certiorari to the Colorado Court of Appeals
Published Opinion:
2014 COA 13 (Feb. 13, 2014), by
Hon. Fox, J., Navarro, J., concurs, and Jones, J., dissents.
Case No.: 13CA0517
Grand County District Court Case No. 12CV132
Hon. Mary C. Hoak, Judge

▲COURT USE ONLY▲

Petitioner: Salynda E. Fleury, individually, on behalf of Indyka Norris and Sage Norris, and as surviving spouse of Christopher H. Norris,

v.

Respondent: IntraWest Winter Park Operations Corp.

Supreme Court
Case No.: 2014SC224

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REPLY BRIEF

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that this brief complies with all requirements of C.A.R. 28, and C.A.R. 32, including all formatting requirements set forth in those rules.

Specifically I certify:

This brief complies with C.A.R. 53(a) and C.A.R. 32 (a)(3) because it contains 4696 words, as determined using the word processor's word count function in compliance with the rule.

s/ James G. Heckbert

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I. SUMMARY OF ARGUMENT

An avalanche is not an "inherent danger and risk of skiing" like a rock or a tree or a patch of corn snow. It is an event. This Court should not pen "avalanche" into the Colorado Ski Safety Act (SSA). If the General Assembly wishes to add "avalanche" to its statutory term of art, it knows how to do so—just as it did in the 2004 amendment, when it added 4 discrete items to the phrase "variations in steepness or terrain."

Winter Park concedes that the SSA's immunity provision derogates the common law rights of citizens and guests of Colorado ski areas. (Ans.Br., p. 12). Therefore, the Court must interpret the immunity provision narrowly and strictly in favor of Salynda Fleury and her two children, and against a finding of immunity for Winter Park. This construction is not merely Plaintiff's desire; the law requires it.

Winter Park and the amici want any and all dangers and risks of the sport of skiing to be treated as "inherent dangers and risks of skiing." (*See, e.g.,* Ans.Br., pp. 29, 32). This is not now and never has been the law. In adopting and amending the definition of the "inherent dangers and risks of skiing" in § 33-44-103(3.5), C.R.S., the General Assembly has crafted an exclusive definition of those conditions which constitute the inherent dangers and risks of skiing. This immunity

provision is narrower than the broad, all-encompassing reading Winter Park's brief applies.

Winter Park's claim, that a ski area operator is only liable for the death of a skier when the ski area operator has either violated a specific statutory duty imposed by the SSA, or when the death is the result of a ski lift incident, (Ans.Br. pp. 12, 17-18, 34), is inconsistent with the statute. The General Assembly retained common law actions for the injury or death of a skier caused by ski area operator negligence rather than the inherent dangers and risks of skiing.

Finally, the amicus briefs in favor of Winter Park simply miss the target created by this Court's grant of *Certiorari*. Their discussions of numerous general defenses to the claims at issue may support Winter Park's possible defense to the claims in the next phase of this case, after remand. But they do not address whether the immunity provision includes all general risks or only those specifically listed.

Petitioner respectfully requests that the Court reverse the decisions of the Court of Appeals and trial court and remand for trial on the merits.

II. ARGUMENT

A. EVERY POSSIBLE RISK OF SKIING DOES NOT FALL WITHIN THE STATUTORY DEFINITION OF THE "INHERENT DANGERS AND RISKS OF SKIING."

1. This Court strictly construes immunities in derogation of common law rights against the person seeking immunity.

Winter Park's broad claim to immunity under the SSA violates the controlling rule of construction this Court has long followed. The Court strictly construes statutes that grant immunity from liability in derogation of common law rights in favor of the person against whom their provisions are intended to be applied. *Preston v. Dupont*, 35 P.3d 433, 440 (Colo. 2001). Further, the Court "does not look to whether the legislature specifically authorizes the continuance of preexisting common law remedies when it enacts a statute dealing with the same issue" but rather whether, "in express terms or by clear implication, [the statute] repeals or suspends the common-law right of action." *Farmers Group Inc. v. Williams*, 805 P.2d 419, 426 (Colo. 1991).

The law presumes the legislature knows of this rule of strict construction when it legislates in this area. *Common Sense Alliance v. Davidson*, 995 P.2d 748,

754 (Colo. 2000). This rule applies to ambiguous and unambiguous statutes alike. *Preston,* 35 P.3d at 438.[1]

2. Strictly construed, the statute does not include avalanches.

Winter Park tries to turn this controlling rule of statutory construction on its head, arguing the General Assembly intended the immunity provisions of the SSA should be "broadly" interpreted in favor of ski area operators (Ans.Br., pp. 2, 8, 12), based on *dicta* from *Stamp v. Vail*, 172 P.3d 437 (Colo. 2007).

In *Stamp,* the Court considered (1) whether the damages cap in the Wrongful Death Act or the SSA applied to a death resulting from the negligence of a ski area operator, and (2) whether a ski area operator is liable for punitive damages. *Stamp* did not define or decide the scope of the inherent risks of skiing, though Justice Bender generally referred to the history of the SSA, including a statement that the 1990 amendment "broadly defines the term 'inherent dangers and risks of skiing.'" *Id.*, at 444, n. 8.

While the 1990 amendments "were intended to clarify the law regarding the duties and responsibilities of skiers and ski area operators and to provide additional protection for ski area operators," *Graven v. Vail Assoc.*, 909 P.2d 514, 517 (Colo.

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[1] There is good reason for this, as one Court has recognized. "[I]mmunity fosters neglect and breeds irresponsibility, while liability promotes care and caution." *Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599, 603 (Mo. 1969).

1995), nothing there supports the judicial adoption of wholesale immunity for ski area operators. As this Court previously held, when considering the scope of the inherent dangers section, the legislative history of the 1990 amendments "is consistent with a more narrow construction of 'inherent dangers and risks of skiing.'" *Id.* at 519. Moreover, in *Graven* where the Court actually considered the scope of the inherent danger of "variations in steepness or terrain," the Court explained it did "not mean to suggest that all imaginable types of terrain changes located within a ski run will always fall within the statutory definition of 'variations in steepness or terrain' that are 'inherent dangers and risks of skiing.'" *Id.* at 519, n. 5.[2]

Despite this, Winter Park repeatedly but erroneously argues that §33-44-103(3.5) provides the ski area operator with unlimited immunity through the introductory phrase, "[i]nherent dangers and risks of skiing means those dangers or conditions that are a part of the sport of skiing." Winter Park labels this the "general definition" of the inherent dangers and risks of skiing. (Ans.Br., p. 29; *also* pp. 3, 8, 15, 17-18, 28-29, 32-34). Despite the limited immunity language,

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[2] As Justice Scalia stated in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. ___, Slip Op. at 5 (Docket No. 14-86, June 1, 2015), "[t]he problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe Title VII's silence as exactly that: silence."

Winter Park argues the mere interaction of a skier with snow is an inherent risk of skiing. Moreover, Winter Park claims a ski area operator is immune from liability for all deaths occurring while skiing, other than those caused by a violation of a statutory duty or ski lift incident, even though the ski area operator's negligence was a substantial cause of that death. (Ans.Br., pp. 29-30, 36). CSCUSA also argues the term is limitless (Amicus CSCUSA Brf., p.17-19), although CSCUSA asked for, authored, and lobbied for the definition as a statutory term of art. CSCUSA even agreed to the amendment limiting the inherent risks to those expressly listed in the definition. (ROA # 051 tr. p. 38:17-39:3).

This Court's rules of statutory construction prohibit an interpretation of a statute that leads to an absurd result or which reaches a result that the General Assembly clearly did not intend. *Young v. Brighton School Dist. 271*, 2014 CO 32, ¶11. Accordingly, this Court must examine the consequences of unlimited immunity for ski area operators that would result from adopting Winter Park's expansive "general definition" of inherent dangers and risks of the sport of skiing in place of the statute's narrower definition.

Certainly, the Court would have reached a wholly different result in *Stamp*, where 13 year-old Ashley Stamp died when an employee of Vail Mountain recklessly drove a company snowmobile at high speed so the snowmobile

catapulted through the air and struck her directly in the chest. *Stamp*, 172 P.3d at 441. Using Winter Park's definition, this would constitute an inherent risk of skiing, for which the ski area operator would be immune.

Indeed, according to Winter Park, a ski area operator's careless conduct is a risk that is "a part of the sport of skiing" and no liability may attach for any of its employee's careless acts. So if a ski area employee on a chair lift carelessly hits her skis together, and one of the skis releases from its binding, falls 40 feet, and severely injures a skier, the ski operator would be immune. Likewise, if a ski area employee recklessly drives a snowmobile onto a closed avalanche-prone trail and triggers an avalanche down upon skiers who are skiing on a green trail that traverses across that steep trail, the ski area operator would be immune. ("As avalanches expose skiers to harm, they fit the definition of danger." Ans.Br., p. 29.) Using Winter Park's definition, any avalanche caused by its employees is a danger which is part of the sport of skiing, and the ski area operator is not liable.

Winter Park tries to avoid recognition of these consequences of adopting its "general definition" for the inherent dangers and risks of skiing with a "parade of horribles." It claims the ski area operator would remain liable based on the ski area operator's "active negligence," as opposed to passive negligence. (Ans.Br., pp. 47-48). Thus, Winter Park would have the Court write in "avalanche" as an inherent

danger and risk, for which the operator is immune, but then except "active negligence" from that immunity. The statute contains none of this language.

If the General Assembly wishes to grant ski area operators sweeping immunity from liability, it may add clear language to the statute to express that intent.

3. Reading the list of inherent dangers and risks of skiing as exclusive follows the purpose and intent of the SSA.

Common law negligence actions against a ski area operator are unaffected where the injury results from the negligence of the operator and not from the inherent dangers of skiing. The SSA does not expressly abrogate all common law claims against a ski area operator. Rather, §33-44-112, C.R.S. only provides limited immunity "for injuries resulting from any of the inherent dangers and risks of skiing." If an injury *does not* result from an inherent risk or danger, as defined in §33-44-103(5), a common law action for negligence remains available to skiers.

In *Graven*, this Court held that when the negligence of a ski area operator is a substantial factor in causing injury to a skier, the operator may be liable, even though the inherent dangers of skiing may also be implicated in the injury. *Graven*, 909 P.2d at 520. Further, without considering injuries due to ski lifts, the Tenth Circuit Court of Appeals has also recognized the viability of common law negligence actions. In *Kumar v. Copper Mountain, Inc.*, that court observed:

> a ski area operator may be liable under one of two theories. First, a skier may recover if his injury did not result from an inherent danger or risk of skiing. Such a claim would fall outside the scope of the SSA and would be governed by common-law negligence principles. *See Graven v. Vail Assoc.*, 909 P.2d 514, 520 (1995), partially abrogated on other grounds by [C.R.S.] §33-44-112 [sic]. Second, a ski area may be liable because it violated a provision of the SSA and that violation resulted in injury.

431 Fed. Appx. 736, 738 (10th Cir. 2011).

Similarly, in *Bayer v. Crested Butte Mt. Resort*, 960 P.2d 70, 76 (Colo. 1998), this Court recognized the General Assembly "has carefully chosen how to let stand, supplement, or limit the application of the common law in the area of ski safety." The General Assembly limited ski area operator immunity only "for injury resulting from any of the inherent dangers and risks of skiing." §33-44-112 C.R.S.

Interpreting the list of the inherent dangers and risks strictly against Winter Park is also harmonious with the General Assembly's decision to allow common law negligence actions to remain where the death is not the result of the inherent dangers of skiing. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1046 (Utah 1991) (harmonizing Utah's Inherent Risk of Skiing Statute which protected ski area operators from suits for injuries caused by the inherent risks of skiing with the fact the statute did not abrogate a skier's traditional right to recover for injuries which were caused by the ski area operator's negligence). In addition, violations of the

ski area operator's duties imposed by the Act are negligence as a matter of law. Meanwhile, injuries due to lift accidents are excluded from immunity and the damage caps. §§ 33-44-103(3.5) and 113, C.R.S.

The legislative scheme may therefore be read to impose duties and responsibilities on both skiers and ski area operators and to allow a limited immunity to operators for injuries resulting from the inherent dangers. Meanwhile it retains common law negligence actions for injuries which do not result from the inherent dangers of skiing. Additional protection for skiers is also available where injuries result from a ski area operator's violation of its statutory duties, and for injuries resulting from ski lift operations. Accordingly, skiers' common law right of action for negligence remains and is cumulative with the additional statutory rights of action contained in the SSA. *Vaughn v. McMinn*, 945 P.2d 404, 408 (Colo. 1997).

B. THE LANGUAGE OF THE "INHERENT RISKS AND DANGERS" DEFINITION IN THE SSA DOES NOT MENTION OR IMPLY "DYNAMIC MOUNTAIN ENVIRONMENT," "INTRINSIC PERILS OF SNOW," OR ANY OTHER "DYNAMIC CONDITION."

Through a tortured semantic process, Winter Park inserts "avalanche" as an inherent danger of skiing, by combining the "intrinsic perils of snow" with references to "dynamic mountain environment," a "dynamic process" and "dynamic conditions". (*See e.g.* Ans.Br., pp. 1, 3, 8-9, 32-34, 39, 41, 43, 48). Yet,

nothing in the long and exclusive list of statutory dangers and risks refers to any of these conditions. Rather, the definition only mentions static, surface snow conditions: "ice, hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, and machine-made snow." §33-44-103(3.5).

All agree that "avalanche" does not appear in the SSA. Yet, Winter Park argues the danger of avalanche is included by reference to other static conditions, which a Court may combine to create the danger of avalanche. (Ans.Br., pp. 34-35.) The Court of Appeals agreed. *Fleury v. IntraWest Winter Park Operations Corp.,* 2014 COA 13, ¶14-15.

The Court will not add words to a statute. *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007). Neither will the Court strain the meaning of a word to create an "imagined connection." *Preston*, 35 P.3d at 440. Put differently, a word does not "mean just what I choose it to mean – nothing more nothing less." *Tenn. Valley. Auth. v. Hill*, 437 U.S. 153, 173, n. 18 (1978) (quoting from Lewis Carroll, *Through the Looking Glass*, in *The Complete Works of Lewis Carroll* 196 (1939)). Thus, Winter Park may not stretch the plain meaning of a list of general surface snow conditions to include the specific subsurface snow conditions that existed when this fatal avalanche occurred.

Ms. Fleury alleged in her complaint that Winter Park knew of the dangerous avalanche condition that day; Winter Park knew that it was foreseeable that anyone skiing the Trestle Trees would likely be caught in an avalanche; and Winter Park was negligent by failing to close the Trestle Trees area due to the high avalanche danger. But those allegations do not alter the statute. Nor do they change the fact that the General Assembly did not expressly, or by clear implication, include avalanche within the definition of the inherent dangers of skiing.

The Tenth Circuit's decision in *Kumar,* holding that a snow cornice was an inherent risk of skiing, even though the term "cornice" does not appear in the statutory list of inherent dangers, does not help Winter Park. *See* 431 Fed. Appx. at 738. The statutory list of inherent dangers and risks includes "wind pack." A snow cornice is created by windblown snow. (CCUSA Br., Addendum 7, "Cornices form when windblown snow builds out horizontally at sharp terrain breaks such as ridgecrests and sides of gullies."). Thus, a snow cornice is "wind pack."

Winter Park also asserts the General Assembly must have considered the "intrinsic physical properties of 'snow,' including 'powder' on top of a weak and unstable snowpack," when it created the list of the inherent dangers of skiing. (Ans.Br., p. 39). However, "subsurface snow conditions" do not appear in the statute. Instead, subsurface conditions in the list are limited to "forest growth,

rocks, stumps, streambeds …or other *natural objects*." §33-44-103(3.5) (emphasis supplied).

Additionally, the 2004 amendment also does not favor Winter Park. In that amendment, the General Assembly added four discrete dangers or risks to its list: "cliffs," "extreme terrain," "freestyle terrain," and "jumps." Under Winter Park's expansive and nonexclusive reading, these new conditions would already have been part of the list. Yet it appears obvious that the legislators did not believe the "variations in steepness or terrain" language expressly, or by clear implication included "cliffs," "extreme terrain," "freestyle terrain," and "jumps"—all of which could involve snow conditions, variations in terrain, and other discrete items on the list. These narrow additions show the General Assembly recognized that only those conditions expressly included within the statutory list are "the" inherent dangers and risks.

C. THE GENERAL ASSEMBLY EXPRESSED ITS INTENT THAT THE LIST OF INHERENT DANGERS REMAIN EXCLUSIVE AND NON-EXPANSIVE.

The General Assembly considered and adopted the current definition of the inherent dangers and risks of skiing during the 1990 session as a part of SB90-080. That section of the bill originally stated: "'Inherent dangers and risks of skiing' means those dangers or conditions which are an integral part of the sport of skiing, *including but not limited to*, changing weather conditions; … ." However,

members of the House Committee on State Affairs struck the "but not limited to" language, to ensure only those conditions specifically listed would be recognized as the inherent dangers and risks of skiing. The discussion of the purpose for the amendment, followed by the legislative action, cements the evidence of that intent.

Winter Park's brief misquotes Rep. McInnis, one of the bill's sponsors, by omitting the word "the" from his statement explaining the purpose of the committee's amendment changing "but not limited to" to "including." Winter Park quotes Rep. McInnis as stating the amendment was "a slight narrowing of the amendment, and it's a clarification that the items that follow *are inherent risks and dangers* that are being referred to." (*Compare* Ans. Br., pp. 19-20 to ROA #51, tr. p. 35 ll. 15-18.). What Rep. McInnis actually stated was that the amendment "was a slight narrowing of the amendment, and it's a clarification that the items that follow are **the** inherent risks and dangers that are being referred to." (*Id.*, emphasis added). Whether intentional or unintentional, Winter Park's error completely changes Rep. McInnis' explanation for the amendment, completely alters the amendment's purpose and scope, and dilutes the significance of his statement.

Under different circumstances this Court has previously observed that the term "including" "is **ordinarily** used as a word of extension or enlargement." *Preston*, 35 P.3d at 438 (emphasis added). However, here the legislature

deliberately used "including" as a term of limitation. Indeed, contrary to the amicis' positions here, when the CSCUSA representative agreed to the amendment limiting the inherent dangers and risks to the "laundry list that's under the definition of inherent risk," he echoed the concerns expressed by Rep. Paulson, who did not "want the Court expanding other items that weren't covered by" that list. (ROA #051, tr. 38, ll. 17-39:3).

Winter Park describes the legislative committee discussions as "casual statements" between legislators. (Ans.Br., pp. 20–21, citing *Preston*, 35 P.3d at 440). Yet that ignores the discrete and narrow purpose of striking "but not limited to" in amending the inherent dangers definition. As the Court in *Preston* explained, the legislative history actually reveals two legislators' mistaken understanding of the definition of the word "compensatory." *Preston*, 35 P.3d at 437. There, the Court concluded that isolated discussion between those two legislators amounted to only a mistaken understanding of one legislator. In contrast, here the legislative history reveals that the General Assembly amended the language after the amendment's author and CSCUSA explained the express purpose for the amendment. After hearing "but not limited to" was being stricken to narrow the definition, the committee voted to limit the scope of ski area operator immunity.

The legislative intent is shown through the members' distinct words and deliberate legislative conduct.

In *Graven* this Court put aside for another time the issue of whether the word "including" should be interpreted as a term of limitation or expansion. *Graven*, 909 P.2d at 518, n. 4. However, the *Graven* dissent reveals that at least three justices believed that based on the legislative history set out above, the word "including" limited the inherent dangers and risks of skiing to those conditions expressly listed in §33-44-103(3.5). *Id*. at 524, n. 8. (Erickson, J. *dissenting*).

D. AN AVALANCHE IS <u>NOT</u> AN INHERENT DANGER OF SKIING WHERE THE DANGER COULD HAVE BEEN ELIMINATED BY THE USE OF ALL REASONABLE SAFETY MEASURES.

Winter Park argues 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.'" (Ans.Br., p. 31). However, that phrase appears in the legislative declaration, § 33-44-102, C.R.S., not the list of inherent risks of skiing. It cannot change the defined statutory terms.

While this Court has not considered this argument, the Utah Supreme Court has rejected it. The Utah Inherent Risk of Skiing Statute, Utah Code Ann. §§ 78-27-51 *et seq.,* does not contain a legislative declaration describing the inherent risks as those which cannot be eliminated regardless of the use of any and all

reasonable safety measures. However, the Utah Supreme Court in *Clover* adopted similar language through its decision when it examined whether dangers are inherent to the sport of skiing when those dangers may be eliminated through the use of reasonable safety measures. *Clover*, 808 P.2d at 1047. ("In fact, if an injury was caused by an unnecessary hazard that could have been eliminated by the use of ordinary care, such a hazard is not, in the ordinary sense of the term, an inherent risk of skiing and would fall outside of the [Inherent Risk of Skiing Statute]").

While Winter Park claims an avalanche on an open ski trail is a condition which cannot be eliminated despite any and all reasonable safety measures, there is no evidence of that in this case. There is no evidence Winter Park did any avalanche mitigation work in the historic avalanche terrain of the Trestle Trees area that day. Winter Park could have eliminated the risk of avalanche on January20, 2012, the worst day for avalanches in Colorado ski area history, by either performing avalanche mitigation through bombing and ski cutting, or simply closing access to avalanche terrain, such as Trestle Trees, until the risk naturally abated.

The only reason Christopher Norris died at Winter Park was because Winter Park negligently failed to mitigate the risk through avalanche terrain bombing and ski cutting or, as could easily have been done before the avalanche, and which was

easily done after the avalanche - close access to the area. Consequently, since the risk of avalanche in the Trestle Trees area could have been eliminated on January20, 2012, by reasonable safety measures, the avalanche which claimed Christopher Norris was not an inherent risk of skiing. § 33-44-102. The Answer Brief, along with CSCUSA and the Association of Professional Patroller's (APP) amici briefs, describe the use of bombs and other measures required to make a ski slope safe and also say the skier must assume that risk—making a clear implication that the skier must resort to self–help since they claim the resort is immune from liability.

Yet Winter Park asserts avalanches, while rare, cannot be eliminated from in–bounds ski trails. (Ans.Brf., p. 29-31). However, except for the two deaths on the day Christopher Norris died, the references cited by Winter Park address out-of-bounds, *backcountry* avalanche danger and deaths, not dangers posed on open trails within ski area boundaries.[3] (*Id.*). The only evidence in this case regarding the prevalence of avalanche on open ski area trails is the allegation in the

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[3] The reference by Winter Park to a *Denver Post* article 17515949 (Ans.Br., p. 30) refers to two deaths which occurred when skiers left ski area boundaries in 2011, not to an article by Jason Blevins about the two deaths on January 20, 2012, one, a 13 year-old boy at Vail Mountain, and Christopher Norris at Winter Park. In like manner, the article in the appendix of the CTLA brief refers only to out-of-bounds avalanche deaths.

complaint that the last Colorado death caused by avalanche on an open ski area trail was in May 2005. (ROA #002, ¶15).

E. CONCLUDING THAT AVALANCHE IS NOT A STATUTORY INHERENT RISK DOES NOT MEAN SKI AREA OPERATORS ARE STRICTLY LIABLE FOR DEATHS RESULTING FROM AVALANCHE.

The APP argues that if the Court determines avalanche is not an inherent risk, ski area operators will be held to a standard to "ensure that any given slope will not avalanche" and to provide a "guaranteed avalanche safe state." (APP Amicus Br., pp. 7, 12). To the contrary, a ski area operator will not be strictly liable for avalanche deaths, but only when its negligence has caused the death of a skier. [4]

AAP also claims that if an avalanche is not an inherent risk, skiers will have a false sense of security while skiing open trails, or will be driven out-of-bounds "to less safe runs" due to the closure of unsafe in-bounds trails. (Amicus Brief at 7). Skiers have a right to believe an open trail is free from unusual hidden dangers known to the skier area operator and not known to the skier. APP admits ski areas

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[4] The District Court of Broomfield County, in *Ingalls v. The Vail Corp*, has ordered there is sufficient evidence of Vail's reckless conduct in the case of the avalanche death of 13 year-old Taft Conlin, at Vail Mountain on January 20, 2012, to permit the amendment of the complaint to add a claim for punitive damages. Order, September 16, 2014, Appendix 5.

know where avalanche terrain is located[5] and test for weak layers in snow. (Amicus Brief at 10, 15). Moreover, it is not good safety policy to leave a dangerous in-bounds trail open based on the claim you are preventing some skiers from going to similarly dangerous out-of-bounds terrain. Closing dangerous in-bounds avalanche terrain with a rope or sign neither puts ski patrol at risk nor gives skiers a false sense of security.

III. CONCLUSION

The SSA does not contain the word avalanche or immunize ski area operators from liability for injuries caused by avalanches on ski mountains. When the General Assembly wrote its definition, it chose to leave "avalanche" off the list. When it added specific inherent dangers in 2004, the General Assembly again chose not to insert "avalanche." If the General Assembly wishes to extend additional immunity to ski area operators, it may amend the statute. This Court should strictly construe the SSA and deny the Winter Park's invitation to expand the SSA's limited ski area operator immunity by combining several discrete items from the statute's finite list. This Court should find that an avalanche is not within

[5] APP claims avalanches will appear suddenly in areas which historically never avalanched before, citing: http://avalanche.state.co.us/forecasts/help/avalanche-problems. However, when one reads that authority the CAIC explains that particular terrain will be prone to avalanche; accordingly, one needs to avoid that terrain.

the statutory definition of inherent dangers and risks of skiing, and should reverse and remand for trial on the merits.

Respectfully submitted this 1st day of June, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this **REPLY BRIEF** was timely filed and served by ICCES e-transmittal, or regular U.S. Mail, Postage Prepaid, on June 1, 2015, upon:

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