

1997

Gary Ricci v. Charles Schoultz : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GARY RICCI,

Plaintiff, Appellant &
Cross-Appellee,

vs.

CHARLES SCHOULTZ, M.D.

Defendant, Appellee &
Cross-Appellant.

)
)
) **BRIEF OF APPELLEE AND**
) **CROSS-APPELLANT**
)

)
) Case No. 970189CA
)

) Priority No. 15
)
)

APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT
COURT, SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE HOMER F. WILKENS ON PRESIDING

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Cross-Appellant

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PARTIES TO THE PROCEEDING IN THE COURT BELOW

The caption of this case contains the names of all parties to the proceeding in the court below.

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to section 78-2a-3(2)(j) of the Utah Code.

ISSUES OF REVIEW

1. Was the trial court correct when it granted the defendant's motion for j.n.o.v. and ruled that there was no competent evidence to support the jury's finding that the defendant was negligent when he began to fall while skiing, and that defendant's negligence was the proximate cause of the plaintiff's injuries?

2. Did the trial court abuse its discretion when it conditionally granted defendant's motion for a new trial when the jury's verdict in favor of the plaintiff was against the great weight of the evidence?

3. Did the trial court err when it excluded the defendant's expert testimony concerning the application and interpretation of the Skier's Responsibility Code to the facts of this case?

STANDARDS OF REVIEW

1. On an appeal for the grant of a motion for j.n.o.v. the proper standard of review is the same standard as used by the trial court. Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060, 1066 (Utah 1996). In passing on a motion for a j.n.o.v. a trial court has no latitude and must be correct. Braithwaite v. West Valley City Corp., 921 P.2d 997, 999 (Utah 1996)(quotations omitted). Furthermore, "the trial court is justified in granting a j.n.o.v. only

if, after looking at the evidence and all of its reasonable inferences in a light most favorable to the nonmoving party, the trial court concludes that there is no competent evidence to support a verdict in the nonmoving party's favor." Id. Therefore, an appellate court "must review the record and determine whether there is any basis in the evidence, including reasonable inferences which could be drawn therefrom, to support the jury's determination. . . ." Id.

2. "A ruling on a motion for a new trial will not be disturbed on appeal except when there is a clear or manifest abuse of discretion." Braithwaite, 921 P.2d at 1001 (quoting Amoss v. Bennion, 517 P.2d 1008, 1010 (Utah 1973)). An appellate court presumes that the discretion of the trial court was properly exercised unless the record clearly shows the contrary. Goddard v. Hickman, 685 P.2d 530, 534-35 (Utah 1984). When a trial court grants a new trial based on insufficiency of the evidence, an appellate court will sustain a trial court's ruling when there is "substantial competent evidence which would support a verdict for the moving party." Braithwaite, 921 P.2d at 1001.

3. On an appeal of the trial court's exclusion of expert testimony, an appellate court reviews whether the trial court abused its discretion. Steffensen v. Smith's Management Corp., 862 P.2d 1342, 1347 (Utah 1993). The burden is on the complaining party to prove that there is a "reasonable likelihood that the verdict would have been different if the trial court had allowed the expert testimony." Id.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES OR RULES

Rule 50 of the Utah Rules of Civil Procedure governs motions for j.n.o.v. Rule 59 of the Utah Rules of Civil Procedure governs motions for new trials. The text of those rules is set out in Appellant's addendum. Provisions from the Skier's Responsibility Code that are relevant to this case are set forth in the addendum of this brief. Utah's "Inherent Risk of Skiing" statute, Utah Code Ann. § 78-27-51 *et. seq.* (1997), is also included in the addendum.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition of the Court Below

This case is an action to recover for personal injuries the plaintiff, Gary Ricci ("Ricci"), sustained because of ski a accident at Snowbird Ski Resort in Salt Lake County, Utah. Ricci alleged that the defendant, Charles Shoultz¹ ("Shoultz") was negligent when Shoultz, who was 20 feet in front and 10 feet to the left of Ricci, lost control of his skis and fell into Ricci's path as the two skiers were skiing on a run called "Anderson Hill." (R. 586-87, 605).

The case was tried to a jury on March 11, 12, and 13, 1996. (R. 150-51, 209). Prior to trial, the trial court excluded expert testimony by Snowbird employees regarding the cause of the accident and the application and interpretation of the Skier's Responsibility Code. (R. 442). The court only allowed testimony that the code was posted and published by

¹ The pleadings in this case misspell Appellee's name. This brief will use the proper spelling.

Snowbird Ski Resort and an instruction was given to the jury concerning the code. (R. 442, 793).

The case then proceeded to trial before the jury. After the parties rested, Shoultz properly moved for a directed verdict. (R. 838-39). The trial court denied the motion and allowed the case to go to the jury. (R. 842). The jury returned a special verdict. It found that Shoultz was negligent and that his negligence was a proximate cause of the plaintiff's injuries. It found that Ricci was also negligent but that his negligence was not a proximate cause of his injuries. The jury awarded the plaintiff \$16,458.84 for past medical expenses, \$12,579.00 for past lost income and \$100,000.00 for lost future income or loss of earning capacity, for a total award of \$129,037.84. (R. 244-46). A judgment was entered in favor of Ricci and against Shoultz for \$134,769.04, which included \$5,731.20 in prejudgment interest. (R. 270-72).

Shoultz filed a motion for j.n.o.v., or alternatively for a new trial or for remittitur, on the grounds that (1) the jury's finding that Shoultz was negligent was contrary to the evidence and against the law; (2) the jury's finding that Ricci's negligence was not a proximate cause of his injuries was contrary to the evidence and against the law; (3) the trial court erred in excluding expert testimony regarding the skier's responsibility code; and (4) the award of \$12,579.00 for past lost wages was against the law because it was based on lost gross income, not net income. (R. 273-87).

At the hearing on Shoultz's motion, the trial court rejected Shoultz's arguments based on the exclusion of expert testimony and the alleged inconsistency in the jury's finding that the plaintiff was negligent but that his negligence was not a proximate cause of his injuries. (R. 340-42). With respect to the exclusion of Shoultz's expert testimony, the court stated:

I know that the experts, to my knowledge, they came in, and the first knowledge that was given to [plaintiff's counsel] that they were going to testify as experts. And [plaintiff's counsel] had not been given any notice of the same.

The court felt he was entitled to have notice of expert witnesses, and entitled to find his own experts if he chose to do so, which he didn't have time.

(R. 341).

The trial court, however, granted Shoultz's motion for j.n.o.v. With respect to that ruling, the court stated:

And the only time this court is going to disturb a jury verdict is where I feel I have a duty and a responsibility so to do, in a case where the jury completely missed the situation. And, as I say, that's something this court does not like to do, unless the court feels like it's such a case that I would be derelict in my duty if I did not do so.

And, in this case, I feel that. I felt, at the time the jury brought the verdict back, that they were dead wrong. I felt, during the course of the trial, that there was no cause of action.

I've read your memorandums, and I'm still of the same opinion — even persuaded more — that there was no duty owed to the plaintiff. And — maybe I should correct that: there was a duty not to be negligent. But there was no negligence on the part of the defendant in this case, and

negligence, if any, was on the part of [Ricci] and his failure to ski under control in consistency with the skier's code.

(R. 342).

Shoultz submitted a proposed order granting his motion for a j.n.o.v. and conditionally granting his motion for a new trial, and Ricci objected to the proposed order. (R. 346-47, 350-51, 363-69). Following a hearing on the plaintiff's objections, the court signed Shoultz's proposed order but struck the paragraph conditionally granting a new trial. (R. 379, 383-85). The court later called counsel and indicated that it was amending its prior ruling to conditionally grant Shoultz's motion for a new trial. (R. 396-97). Following another hearing, the court denied Ricci's objection to the proposed modification and entered an amended order nunc pro tunc conditionally granting Shoultz's motion for a new trial. (R. 399-401).

Ricci has appealed the trial court's order granting Shoultz a j.n.o.v. and conditionally granting Shoultz's motion for a new trial. (R. 392). Shoultz has filed a cross-appeal on the basis that should the appellate court reverse on the ruling of j.n.o.v. and consider the new trial grant, the trial court erred when it refused to allow Shoultz to call expert witnesses regarding the applicability and interpretation of the Skier's Responsibility Code. (R. 404).

B. Statement of Facts

The appellant, Gary Ricci ("Ricci"), is a self-described "highly advanced expert skier" and has been skiing for seventeen years. (R. 550, 553). The appellee, Charles Shoultz

("Shoultz"), is an "advanced/intermediate" skier and has skied for approximately seven years. (R. 796, 815). On April 12, 1994, Ricci and Shoultz were involved in a ski accident at Snowbird Ski Resort on a run known as "Anderson's Hill." (R. 556).

Anderson Hill is considered quite steep. At the bottom, however, it flattens out into a "runout." (R. 569). There is a slight rise near the end of the runout. (R. 581-582). As skiers reach the runout, they customarily straighten out their path to maintain their speed so as to make it over that flat portion. (R. 580-81). On the day of the accident, the snow conditions were "basic spring morning." This means that the snow had melted during the day and froze during the night. Therefore, the snow was hard and smooth on the catted² or groomed surface. (R. 565, 663).

Ricci, upon approaching the top of Anderson Hill, saw a group of skiers skiing in the middle and catted portion of the bowl approximately 100 feet in front of him. (R. 570). This group was a ski class of which Shoultz was a member. (R. 822). The skiers, at the request of the instructor, Karl Boyer ("Boyer"), were making small turns in the catted portion of the bowl as they were descending. (R. 571, 828). Ricci began to descend the hill on the left side of the catted portion. (R. 571). As Ricci approached the middle of the hill, he was approximately 75 feet behind the ski class and 10-15 feet to their left. (R. 666-67). Upon reaching the bottom of the hill which flattens out into a runout, Ricci was 20 feet behind and 10 feet to the left of Shoultz. (R. 587). Both skiers were traveling at approximately 20 miles-

² A ski run is "catted" by a tractor-type machine that rolls over the snow and smooths out the terrain, making it easier to ski. (R. 565).

per-hour and were on a straight path. (R. 586-87). Ricci had no reason to believe that Shoultz knew Ricci was coming up behind him and did not observe anything about the way Shoultz was skiing that caused him any concern prior to the accident. (R. 588, 672). Likewise, Shoultz did not know that Ricci was behind and to the left of him. (R. 809).

Ricci stated that just as the runout begins to rise, he saw Shoultz having difficulty with his skis. (R. 589). He claimed that Shoultz's skis "split at the tip" and then Shoultz "caught an edge" on the snow. (R. 589). In other words, Shoultz's skis were no longer planing on the surface of the snow. The left ski rolled over on an edge which caused Shoultz to veer to his left and begin to fall. (R. 590, 668-69). As Shoultz was falling to his left, he lost speed and the two skiers collided with Shoultz veering into Ricci's right hip and leg. (R. 591). Ricci, too, swerved to his left in an attempt to avoid a collision. However, his efforts were unsuccessful and the two skiers were forced into the trees off the edge of the trail. (R. 593, 669-70). In sum, Ricci claimed that two seconds prior to the collision, Shoultz was in control; and one second prior, he "caught an edge" and was not in control. (R. 589, 605).

At trial, Shoultz gave a different version of the accident. Shoultz testified that he was skiing straight in the runout and approaching his ski instructor and another ski-class member at an approximate speed of 5 m.p.h. (R. 810). Shoultz was halfway through the runout when, without warning, he was hit from behind and knocked toward his left and off the trail. (R. 806). Therefore, Ricci struck Shoultz from behind on the backside of his right thigh. (R. 807). That collision caused Shoultz to veer off the trail and into a tree. Shoultz hit

the tree with his shoulders. (R. 811). Shoultz testified that just prior to the collision, he did not begin to fall and did not catch an edge. (R. 810).

Evidence was introduced of the Skier's Responsibility Code. That code is a well publicized list of rules that is put together by the National Ski Area Association. Nearly all ski resorts in the United States use it as a sort of "rules of the road." (R. 331). Snowbird publishes the code on its "Skier's Guide" and also posts it at the base of the ski lifts and some ticket sales locations. (R. 794). In part, the code provides:

(1) Ski under control and in such a manner that you can stop or avoid other skiers or objects.

(2) When skiing downhill or overtaking another skier, you must avoid the skier below you.

(R. 602, 606). In order for Ricci to obtain a Snowbird Season ski pass, he had to sign an agreement in which he stated that he understood the code and would abide by it. (R. 436).

Prior to trial, the trial court excluded expert testimony by Snowbird employees, particularly Bob Bonar ("Bonar"), Snowbird's mountain operations manager, regarding the application and interpretation of the Skier's Responsibility Code. (R. 442). The court only allowed Bonar to testify that the code was posted and published by Snowbird Ski Resort. (R. 442, 793).

SUMMARY OF THE ARGUMENT

The trial court correctly granted Shoultz's motion for j.n.o.v. Even when the evidence is viewed in a light most favorable to the nonmoving party (Ricci), Shoultz is entitled

to judgment as a matter of law. That evidence merely shows that Shoultz accidentally caught an edge on the snow and began to fall. When a person falls while skiing, he or she is not negligent as a matter of law. (Point I).

If Shoultz is not entitled to j.n.o.v., then the trial court correctly granted Shoultz's motion for a new trial pursuant to Rule 59(6) of the Utah Rules of Civil Procedure. Substantial evidence was produced at trial to support a verdict in his favor and against Ricci. The evidence showed that Shoultz was skiing straight through a runout at the bottom of a hill. He was skiing at a speed of 5 m.p.h., did not catch an edge and did not begin to fall. Instead, Ricci ran into Shoultz from behind on his right backside and forced him into the trees off the trail. Likewise, evidence produced at trial showed that Ricci was either the "uphill" skier or an "overtaking" skier, and violated the Skier's Responsibility Code when he failed to avoid Shoultz as the "downhill" skier. Thus, there was evidence that Ricci's actions were the proximate cause of his injuries which would support a verdict in Shoultz's favor. (Point II).

If the trial court erred in granting Shoultz a new trial pursuant to Rule 59(6) of the Utah Rules of Civil Procedure, then Shoultz is entitled to a new trial because the trial court abused its discretion when it excluded expert testimony concerning the application and interpretation of the Skier's Responsibility Handbook. Ricci possessed notice that those witnesses would testify as experts, and proper foundation could have been laid for such testimony. Had the trial court allowed the experts to testify, there is a substantial likelihood that the verdict would have been different.

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED SHOULTZ'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

A trial court properly grants a motion for a j.n.o.v. when the evidence is, as matter of law, insufficient to support the jury verdict. Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060, 1066 (Utah 1996). Therefore, a trial court is justified in granting a j.n.o.v. if, after looking at the evidence and all its reasonable inferences in a light most favorable to the nonmoving party, there is no competent evidence to support a verdict in favor of that party. Id. In this case, Shoultz was entitled to judgment as a matter of law. Even when all the evidence presented at trial is considered in the light most favorable to Ricci, there was simply no competent evidence to support a finding that Shoultz was negligent. Simply put, the evidence merely showed that Shoultz fell while skiing, which is a regular, normal and anticipated part of the sport.

A. UNDER THE FACTS OF THIS CASE, SHOULTZ WAS NOT NEGLIGENT AS A MATTER OF LAW IF HE FELL WHILE SKIING.

In order to establish a claim of negligence, a plaintiff must establish that (1) defendant owed plaintiff a duty; (2) defendant breached the duty; (3) the breach of the duty was the proximate cause of plaintiff's injuries; and (4) damages. See Cannon v. University of Utah, 866 P.2d 586, 588 (Utah App. 1993). The issue of whether a duty exists is entirely a question of law to be determined by the court. CT v. Martinez, 845 P.2d 246, 247 (Utah 1992).

A plaintiff cannot recover in the absence of a showing of a duty. Rollins v. Peterson, 813 P.2d 1156, 1158 (Utah 1991).

In this case, Shoultz had a duty to ski in a reasonable manner as determined by the totality of the circumstances. (See Jury Instruction No. 14 at R. 224). Ricci was held to that same duty. At trial, Ricci testified that two seconds before the accident, Shoultz was in control; one second prior to the accident, Shoultz “caught an edge” on the snow, lost control and began to fall. (R. 589, 605). There was no evidence that Shoultz engaged in careless, reckless or out-of-control skiing. Ricci testified at trial that Shoultz and his other class members were not having any difficulty as they skied down the middle of Anderson Hill and that all members were in control as they did so. (R. 572). Karl Boyer, Shoultz’s ski instructor, testified that throughout the day, Shoultz never exhibited any unsafe conduct while skiing. (R. 822). Simply put, there is no evidence, even when it is viewed in a light most favorable to Ricci, that shows Shoultz was engaging in any sort of activity that increased the risk of him falling. See Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991)(Snowbird employee jumped off of steep crest and landed on plaintiff’s head; employee ignored sign instructing skiers to ski slowly at that point and disregarded Snowbird ski patrol instructions telling skiers not to jump off the crest); Freeman v. Hale, 30 Cal. App. 4th 1388 (1994)(defendant did not have a duty to avoid an inadvertent collision with plaintiff while skiing but did have a duty to not increase that risk by consuming large quantities of alcohol while skiing).

The evidence presented in a light most favorable to Ricci shows the following.

The accident at issue in this case occurred on the easiest part of the mountain. The runout at the bottom of Anderson Hill was “catted” or groomed snow. (R. 817, 827). The day was clear and the weather was good. There was nothing in Shoultz’s path to obstruct him. (R. 564-65, 604, 801, 829-30). Ricci testified that with his experience in skiing, if he was skiing on that flat area of the run, he would not have “caught an edge” and fell if he was paying attention to his skiing. (R. 678). Therefore, Ricci argues that there is competent evidence from which the jury could conclude that Shoultz was negligent when he began to fall and that such negligence was the proximate cause of Ricci’s injuries.

Ricci’s argument, while appealing, misses the point. In this case, there is no evidence in the record that Shoultz was inattentive while he was skiing on the runout or on any other portion of the mountain. Instead, the evidence shows that the opposite is true. Stripped to its true form, Ricci’s argument is that: Shoultz had a duty to not fall while skiing; because Shoultz fell while skiing, he must have been negligent. Ricci’s argument ignores the fact that falling and inadvertent collisions with other skiers are an inherent part of the sport. Otherwise, every skier on the slopes would be guilty of negligence every time he or she accidentally fell. Clearly, a skier can be guilty of negligence if he or she skis recklessly or out of control and endangers other skiers. However, when a simple fall is alleged, such conduct does not, as a matter of law, constitute negligence.

For example, in Thompson v. McNeill, 559 N.E.2d 705 (Ohio 1990), the Supreme Court of Ohio was faced with an analogous situation. The plaintiff was hit in the forehead with a golf ball that had been struck by the defendant. The evidence established that defendant had shanked the shot toward the plaintiff and had yelled “fore” in order to warn the plaintiff. The plaintiff apparently did not hear such a warning and was struck. The court held that there was no liability for injuries caused by mere negligent conduct between participants of sporting events. The court stated:

Acts that would give rise to tort liability for negligence on a city street or in a back yard are not negligent in the context of a game where such an act is foreseeable and within the rules. For instance, a golfer who hits practice balls in his back yard and inadvertently hits a neighbor who is gardening or mowing the lawn next door must be held to a different standard than a golfer whose drive hits another golfer on a golf course. The principal difference is the golfer’s duty to the one he hit. The neighbor, unlike the other golfer or spectator on the course, has not agreed to participate or watch and cannot be expected to foresee or accept the attendant risk of injury. Conversely, the spectator or participant must accept from a participant conduct associated with that sport. Thus, a player who injures another player in the course of a sporting event by conduct that is a foreseeable, customary part of the sport cannot be held liable for negligence because no duty is owed to protect the victim from that conduct. Were we to find such a duty between co-participants in a sport, we might well stifle the rewards of athletic competition.

Id. at 707; See also Lawson v. Salt Lake Trappers, Inc., 901 P.2d 1013 (Utah 1995)(being struck by a foul ball at a baseball game “is one of the natural risks assumed by spectators attending professional games;” and beyond providing protection against such behind home plate, stadium does not have a duty to protect spectators from foul balls careening into the stands).

In the ski collision case of Freeman v. Hale, 30 Cal. App. 4th 1388 (1994), the court reasoned similarly:

As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person In the sports setting, however, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.

Id. at 1393 (quoting Knight v. Jewett, 3 Cal. 4th 296, 315-16 (1992)). Thus, the court concluded that conduct is outside the range of ordinary activity involved in a sport “if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.” Id. at 1394.

In the instant case, it is foreseeable to all skiers that other skiers on the slope may fall. In fact, it is the rare individual who never falls while skiing. See McDaniel v. Dowell, 26 Cal. Rptr. 140 (Cal. App. 1962)(evidence at trial showing that “even expert skiers ‘can go out of control,’ and that when skiers do so they may fall or they may ski out of control for a distance before they fall; anyone who happens to be in the pathway of such may be hit”). Indeed, the Utah Legislature has enacted an “Inherent risk of skiing” statute. See Utah Code Ann. § 78-27-51 et. seq. (1997). The statute bars claims against a ski operator for injury resulting from any of the inherent risks of skiing. Although in this case Ricci has made no claim against the ski operator, the statute is significant in that the legislature specifically deems

“collisions with other skiers” as an inherent risk of skiing. Utah Code Ann. § 78-27-52(1) (1997)(“Inherent risks of skiing” means those dangers or conditions which are an integral part of the sport of skiing, including, but not limited to . . . collisions with other skiers.”).

Falling while skiing is foreseeable. A person cannot be held liable for falling because no duty is owed to protect other skiers from that conduct. When a person accidentally catches his or her ski edge on the snow, an inherent risk of the sport is that that person may begin to fall into another skier. Such is what occurred in this case. A skier does owe another a duty to ski reasonably under the totality of the circumstances. However, there was no evidence put forth at trial that Shoultz did not do so. Instead, the evidence merely demonstrates that Shoultz accidentally caught an edge which caused him to veer to his left and begin to fall into Ricci’s path. In summary, the following statement by the Utah Supreme Court rings loud and true when applied to the facts of this case:

Not every accident that occurs gives rise to a cause of action upon which the party injured may recover damages from someone. Thousands of accidents occur every day for which no one is liable in damages, and often no one is to blame,

Schnuphase v. Storehouse Markets, 918 P.2d 476, 479 (Utah 1996)(quoting Martin v. Safeway Stores, Inc., 565 P.2d 1139, 1140 (Utah 1977)). The trial court correctly granted Shoultz’s motion for j.n.o.v. when it found that Shoultz was not negligent as a matter of law.

II. EVEN IF SHOULTZ IS NOT ENTITLED TO J.N.O.V., HE IS ENTITLED TO A NEW TRIAL BECAUSE SUBSTANTIAL COMPETENT EVIDENCE EXISTS WHICH WOULD SUPPORT A VERDICT IN HIS FAVOR.

The decision of the trial court to grant a new trial on the basis of insufficient evidence, Utah R. Civ. P. 59(a)(6), will not be disturbed on appeal when the record contains substantial competent evidence which would support a verdict in favor of the party moving for a new trial. Braithwaite v. West Valley City, Corp., 921 P.2d 997, 1001 (Utah 1996). The substantial evidence standard requires that evidence be “sufficient in amount and credibility that, when considered in connection with the other evidence and circumstances shown in the case, would justify some, but not necessarily all, reasonable minds acting fairly thereon to believe it to be the truth.” Price-Orem Investment Co. v. Rollins, Brown & Gunnell, 713 P.2d 55, 58 (Utah 1986).³ Although an appellate court determines that there was sufficient evidence supporting a jury’s verdict in favor of the nonmoving party, that does not preclude a finding that substantial competent evidence exists for a verdict in favor of the moving party.

³ In Price-Orem, the Utah Supreme Court also stated:

To establish that the trial court erroneously granted a new trial . . . [the nonmoving party] must marshal the evidence supporting [the moving party’s] case and demonstrate that such evidence is not sufficiently substantial or credible to support a verdict in favor of [the moving party].

Price-Orem Investment Co. 713 P.2d at 58. Ricci’s brief fails to meet that requirement. Nevertheless, this section of Shoultz’s brief will set forth the evidence which would support a verdict in his favor.

Braithwaite, 921 P.2d at 1002. In this case, because substantial competent evidence exists for a verdict in favor of Shoultz, this court should affirm the trial court's grant of a new trial.

A. SUBSTANTIAL COMPETENT EVIDENCE SHOWS THAT SHOULTZ WAS NOT NEGLIGENT.

As argued previously with respect to Shoultz's argument that he was entitled to j.n.o.v., there is simply no competent evidence upon which a jury could base a finding that Shoultz was negligent. The evidence submitted by Ricci at trial merely showed that Shoultz fell while skiing. There was no evidence submitted that Shoultz was out of control or in any other way engaging in reckless or careless skiing. Instead, Ricci's testimony showed that Shoultz accidentally caught the edge of his ski on the snow. That caused his skis to split at the tip and Shoultz veered to his left and began to fall. The two skiers, then, collided. (R. 590-91, 668-69). The mere fact of falling while skiing does not constitute negligence. See supra Point I.

In turn, Shoultz testified that he never caught the edge of his ski and he was not falling when the collision occurred. (R. 810). Instead, Shoultz was halfway through the runout when, without warning, Ricci hit him from behind on the back right side which forced him into the trees. (R. 806-07). Shoultz hit the trees with his shoulders, his skis were under him and when he hit the tree, the skis bent and "pitched" him backwards into the snow. (R. 811). At trial, Shoultz produced photographs of severe bruising on his right back side which tended to confirm his testimony. Shoultz's medical records showed that he also sustained

bruising on his left side, particularly his left front shoulder and left front thigh. Again, Shoultz testified he hit the trees going forward with the primary force on his shoulders which would explain the bruising on his left side. Shoultz did not take a picture of that bruising because by the time he had photographs taken ten days after the accident, such bruising was gone. (R. 694). In other words, the impact to his right buttocks had been more severe than that to his left shoulder and thigh and Shoultz's desire was to document the cause of the collision and not the minor injuries to his left side which resulted from his tumble into the trees. That evidence too, substantiates Shoultz's version of how the collision occurred.

Finally, the evidence concerning the Skier's Responsibility Code provides substantial competent evidence which would support a verdict in Shoultz's favor. The code is a well publicized list of rules that is put together by the National Ski Area Association. Nearly all ski resorts in the United States use it as a sort of "rules of the road." (R. 331); See Ninio v. Hight, 385 F.2d 350 (10th Cir. 1967)(plaintiff, the downhill skier, was injured when defendant ran into her; jury entered verdict in favor of defendant finding no negligence; appellate court remanded for new trial because trial court failed to instruct jury concerning rule that uphill skier must yield to skiers below). Snowbird publishes the code on its "Skier's Guide" and also posts it at the base of the ski lifts and some ticket sales locations. (R. 794). In order for Ricci to obtain a Snowbird Season Ski Pass, he had to sign an agreement in which he stated that he understood the code and would abide by it. (R. 436). The code provides in pertinent part:

SKIER'S RESPONSIBILITY CODE

There are elements of risk in skiing that common sense and personal awareness can help reduce.

1. Ski in control or in such a manner that you can stop or avoid other skiers or objects.
2. When skiing downhill or overtaking another skier, you must avoid the skier below you .

(R. 602, 606; Attached herein as Addendum). Evidence at trial showed that Ricci failed to adhere to the above provisions.⁴

As Ricci was descending Anderson Hill, he was behind Shoultz. Likewise, when the collision occurred on the runout, he was behind Shoultz. Ricci testified that just prior to the collision, he was 20 feet behind and 10 feet to the left of Shoultz. (R. 570, 587, 666-67). Shoultz, therefore, was the "downhill" skier throughout the series of events and Ricci was the

⁴ Violation of a code, ordinance or statute, although not constituting negligence per se, may be used as evidence of negligence. Gaw v. State, 798 P.2d 1130, 1135 (Utah App. 1990); Intermountain Farmers Assoc. v. Fitzgerald, 574 P.2d 1162 (Utah 1978), cert denied, 439 U.S. 860 (1978). Other jurisdictions have also recognized this general rule. See Rolick v. Collins Pine Co., 975 F.2d 1009, 1012-14 (3rd Cir. 1992), cert denied, 507 U.S. 973 (1993)(Expert witness allowed to testify concerning his opinion that defendant had failed to cause a logging operation to be conducted in accordance with industry standards incorporated in a regulation of OSHA; such testimony used as evidence of negligence); Martin v. Mapco Ammonia Pipeline, Inc., 866 F. Supp. 1304, 1306 (D.Kan. 1994)(Evidence of compliance or noncompliance with Pipeline Safety Act and OSHA is admissible in negligence action to show applicable standard of care and defendant's conformity with that standard); Nehring v. Lacounte, 712 P.2d 1329, 133-34 (Mont. 1986)(the violation of a statute, although not negligence per se, nevertheless may be relevant in determining whether a defendant's conduct was negligent by fixing a standard against which negligence can be measured).

“uphill” skier. According to the code, Ricci had a duty to avoid Shoultz as the downhill skier.⁵ Ricci’s only explanation for why he could not stop or avoid Shoultz was that he “didn’t have time.” (R. 592-594). The only plausible explanation of why the two skiers collided, then, was that Ricci was skiing too close to Shoultz. In other words, Ricci failed to ski sufficiently far behind and/or to the side of Shoultz to be able to avoid Shoultz in the event Shoultz turned, stopped or fell. The fact that Ricci was unable to stop or avoid Shoultz is competent evidence that Ricci’s failure was the proximate cause of the accident, and thus, would support a verdict in Shoultz’s favor.

Likewise, evidence adduced at trial showed that Ricci was overtaking Shoultz at the time of the accident.⁶ At the top of Anderson Hill, Ricci saw Shoultz and the rest of his ski class skiing in the middle of the catted portion of the bowl approximately 100 feet in front of him. (R. 570). Ricci began to descend the hill on the left side of the catted portion. (R. 571.) As Ricci approached the middle of the hill, he was approximately 75 feet behind Shoultz and 10-15 feet to his left. (R. 666-67). Upon reaching the bottom of the hill which flattens out into the runout, Ricci was 20 feet behind and 10 feet to the left of Shoultz. (R. 587). Thus,

⁵ In his brief, Ricci makes the surprising argument that because the runout rises slightly, Ricci was not skiing downhill. Thus, he could not be the “uphill” skier and the code provision regarding the duty of the “uphill” skier does not apply to him. Common sense dictates that his interpretation completely strains the meaning of the safety code.

⁶ At trial, Ricci testified that he was not overtaking Shoultz. (R. 606). However, simply because there is competing testimony on this (or any other point) does not preclude a finding that Shoultz presented substantial competent evidence supporting his position. Braithwaite, 921 P.2d at 1002.

Ricci had made up a distance of 80 feet as the skiers were descending Anderson Hill. In turn, Shoultz testified that he was proceeding at approximately 5 m.p.h. and was skiing in a straight course through the runout. Ricci testified that he was approaching Shoultz at a speed of 20 m.p.h. on the runout. The difference between the skiers' speed, then, was 15 m.p.h. and Ricci, as the uphill skier was overtaking Shoultz not only on the steeper part of the hill, but on the runout. In such a case, Ricci had a duty to avoid Shoultz and evidence at trial concerning his failure to do so would support a verdict in favor of Shoultz.

In this case, Shoultz was not, as a matter of law, negligent. Under Ricci's theory of the case, Shoultz merely began to fall when his ski caught an edge on the snow. Falling while skiing is not negligent. Likewise, other substantial competent evidence was adduced at trial which would support a verdict in Shoultz's favor. The evidence showed that Shoultz did not catch and edge or begin to fall. Instead, Ricci ran into Shoultz from behind and on Shoultz's right back side. Finally, substantial competent evidence was given at trial that Ricci was both the "uphill" skier and the "overtaking" skier. As such, that skier *"must* avoid the downhill skier below. . . ." A finding that Ricci was either the "uphill" or "overtaking" skier would support a verdict in Shoultz's favor, because Ricci's actions would be the proximate cause of the collision. If Shoultz is not entitled to j.n.o.v., then the trial court correctly granted his motion for a new trial pursuant to Utah R. Civ. P. 59(6) (1997).

III. IF SHOULTZ IS NOT ENTITLED TO J.N.O.V. OR A NEW TRIAL PURSUANT TO UTAH R. CIV. P. 59(6), HE IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED EXPERT TESTIMONY CONCERNING THE SKIER'S RESPONSIBILITY CODE.

On an appeal of the trial court's exclusion of expert testimony, an appellate court reviews whether the trial court abused its discretion. Steffensen v. Smith's Management Corp., 862 P.2d 1342, 1347 (Utah 1993). The burden is on the complaining party to prove that there is a "reasonable likelihood that the verdict would have been different if the trial court had allowed the expert testimony." Id. Because the trial court abused its discretion in this manner and there is a reasonable likelihood that the verdict would have been different had the trial court allowed the expert testimony, Shoultz is entitled to a new trial.

Prior to trial, the court excluded expert testimony by Snowbird employees, particularly, Bob Bonar, Snowbird's mountain operations manager, regarding the application and interpretation of the Skier's Responsibility Code to the facts of this case. (R. 442). The court only allowed Bonar to testify that the code was posted and published by Snowbird Ski Resort. (R. 442, 793).⁷

The court did not allow Shoultz's experts to testify concerning the interpretation of the code because Shoultz's counsel did not designate those witnesses as experts and the court felt that Ricci was entitled to notice concerning expert witnesses. (R. 341). However, the trial

⁷ A jury instruction was given concerning the Skier's Responsibility Code. See Instruction No. 22 at R. 232). However, the jury was not permitted to hear testimony regarding the application of the code to the facts of the accident.

court's scheduling order did not impose a deadline for the designation of expert witnesses. In addition, the Snowbird employees, including Bonar, were asked question in their depositions as to whether they had formulated any opinions as to the cause of the accident and whether the respective parties had violated the Skier's Responsibility Code. (R. 331-32). Ricci had ample warning that such opinions would be elicited from these individuals and could have, if he chose to do so, investigated the possibility of retaining an expert to testify on his behalf concerning the application of the Skier's Responsibility Code.

In addition, the trial court excluded the expert testimony on the basis that Shoultz could not lay appropriate foundation to allow Bonar to testify as to the application and/or interpretation of the Skier's Responsibility Code. (R. 442). Under Rule 702 of the Utah Rules of Evidence, such testimony would be permissible. An expert witness is allowed to testify if his testimony would assist the trier of fact in understanding a particular issue. Bonar was employed at Snowbird as the mountain manager. Prior to that, he was employed as the ski patrol director and assistant mountain manager. (R. 789-90). As such, Bonar was extremely well qualified in respect to the enforcement and implementation of the Skier's Responsibility Code at Snowbird. Therefore, a proper foundation could have been laid to allow Bonar to testify as to the application of the code in the particular context of this accident. Bonar would have been able to testify that the uphill skier (Ricci) had a duty to avoid the downhill skier (Shoultz), and that the uphill skier's failure to do so caused the accident.

Again, Rule 702 of the Utah Rules of Evidence allows experts to testify if their knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. Bonar's experience and specialized knowledge concerning the application, interpretation and enforcement of the Skier's Responsibility Code would have been a great assistance to the jury in applying the code to the particular facts at issue in this case.

The fact that Bonar did not witness the accident is not dispositive. Bonar could have offered testimony as to the application, interpretation and enforcement of the code based upon the respective version of events presented by both Ricci and Shoultz. Bonar would not have been asked to render an opinion as to whether Ricci was negligent. See Randle v. Allen, 862 P.2d 1329 (Utah 1992); Davidson v. Prince, 813 P.2d 1225 (Utah App. 1991), cert denied, 826 P.2d 651 (Utah 1991). Instead, Bonar would have been asked to express an opinion, based upon each party's version of the accident, whether the respective parties had violated the Skier's Responsibility Code. An expert is entitled to testify as to whether a particular party was in compliance with a particular code provision without opining as to whether that individual was negligent. See cases cited supra n. 3.

Had the trial court allowed Bonar to testify concerning the application and interpretation of the Skier's Responsibility Code, there is a likelihood that the jury verdict would have been different. Apparently, the jury was confused as to the code's interpretation. At trial, Ricci testified that the cause of the accident was that Shoultz lost control of his skis. However, when a person falls while skiing, he or she naturally "loses control." See McDaniel

v. Dowell, 26 Cal. Rptr. 140 (Cal. App. 1962). That is not the same, as the Skier's Responsibility Code provides, as a failure to "ski in control or in such a manner that you can stop or avoid other skiers or objects." In other words, a skier does have a responsibility to ski under control. A skier is not skiing "under control" if he or she is skiing excessively fast, recklessly or carelessly. However, a skier can fall or "lose control" when not engaging in that particular type of conduct. When a skier merely falls he or she is neither violating the Skier's Responsibility Code nor negligent in doing so.

Had Bonar been able to clarify the above interpretation of the Skier's Responsibility Code to the trier of fact, there remains a likelihood that the verdict would have been different. If this Court determines that Shoultz was not entitled to j.n.o.v. or a new trial, then Shoultz is entitled to a new trial because the trial court abused its discretion in disallowing expert testimony concerning the application and interpretation of the Skier's Responsibility Code. Ricci possessed notice of the expert testimony and proper foundation was available to allow the experts, particularly Bonar, to testify concerning the application and interpretation of the code to the facts of this case. That testimony was admissible pursuant to Rule 702 of the Utah Rules of Evidence.

CONCLUSION

The trial court was correct when it granted Shoultz's motion for j.n.o.v. Shoultz respectfully requests that this court affirm that ruling. If Shoultz is not entitled to j.n.o.v., then this court should affirm the trial court's ruling concerning the grant of a new trial.

Substantial competent evidence was produced at trial which would sustain a verdict in his favor. If Shoultz is not entitled to a new trial pursuant to Rule 59(6) of the Utah Rules of Civil Procedure, then, because the trial court abused its discretion concerning the exclusion of expert testimony on the application and interpretation of the Skier's Responsibility Code, Shoultz is entitled to a new trial. A substantial likelihood exists that had the trial court allowed that testimony, the jury's verdict would have been different.

DATED this 19th day of December, 1997.

STRONG & HANNI

By *Darren K. Nelson*
Paul M. Belnap
Robert L. Janicki
Darren K. Nelson
Attorneys for Appellee & Cross-Appellant

ADDENDUM

CAUTION: Read and fully understand the information in this Skier's Guide before using lifts or participating in activities at Snowbird. If you have any questions, you should discuss them with the Ski Patrol before entering activity areas.

Good physical condition, proper clothing, appropriate equipment and a knowledge of the principles of ski activities dramatically reduce your chances of having an accident. Please enjoy Snowbird ski activities while exercising common sense, caution and noting the following advice:

• Do not ski in areas rated above your individual ability level. We suggest that all skiers begin their day on runs rated "ASIEST," then move on to their suitable runs as they feel confident.

- Before skiing any runs at a bird rated **◆◆** or any

Snowbird's high altitude, it is advisable to protect exposed skin with a good sunscreen. For this same reason, sunglasses that block ultraviolet and infrared rays should be worn to protect your eyes.

- Audio headsets or headphones may endanger your well-being. If you are involved in an accident while using headsets, that fact may impose a liability on you.

- "Trail Boards" are located at the base of each lift for your information and caution.

• To report an emergency, DIAL 4218 on any EMERGENCY phone; the locations of which are noted on the trail map, or report the emergency or accident to any chairlift operator.

- In the event of an accident, cross skis immediately upslope from the injured person and remain until Snowbird's Ski Patrol has arrived.

- Obey "SLOW SKIING"

The various difficulty ratings are relative to the Snowbird area. During periods of low visibility or other inclement weather and snow conditions, the degree of difficulty of the ski runs may change. If you are unfamiliar with the area:

**Begin with those runs marked
EASIEST**

progress to





MORE DIFFICULT

and if your ability allows,
MOST DIFFICULT

**Check with Ski Patrol for
current conditions.
EXPERTS ONLY**

**All runs marked ● or ■ are
SLOW SKIING AREAS.
Fast or reckless skiing is not
permitted at Snowbird.**

Designates Family Ski Runs.

-  Emergency Phone
-  Ski Patrol
-  Shuttle Bus
-  Ski School Meeting Areas
 - 1 Chickadee Bowl
 - 2 Ski School House

There are elements of risk in skiing that common sense and personal awareness can help reduce.

1. Ski under control and in such a manner that you can stop or avoid other skiers or objects.
2. When skiing downhill or overtaking another skier, you must avoid the skier below you.
3. You must not stop where you obstruct a trail or are not visible from above.
4. When entering a trail or starting downhill, yield to other skiers.
5. All skiers shall use devices to help prevent runaway skis.
6. You shall keep off closed trails and posted areas and observe all posted signs.

**This is a partial list.
Be safety conscious!**

State of Utah Inherent Risk Fun. (New York Code Ann. 1982, 27-27-31, says it plainly that as a "chick" you assume the risk of and accept the responsibility for injury resulting from the inherent risks of skiing, in this instance, but are not bound by 31 Changing a rather conditional, 29 Variations or perceptions in time, 30 Menor or the conditions, 31 You are not subject to a condition can be no base upon, Inevit given the, too he, straps, impact it with life hovers and other sites in times and their components, 32 Collisions with other skiers, moves or persons, 34 A skier's failure to ski in when his can be a factor

"Others at Stonewall include, among others, anyone, male, female, transsexual, lesbian, bisexual, gay, who is sexually oriented or shares and their expression of it. It is about the politics of Stonewall that all people come out or using any of Stonewall's facilities, including spectators, assume the risks set forth above as well as all risks of injury and death which are inherent in this mountaintop setting environment," whether or not caused by the negligence of any person or entities, including Stonewall's Co-ops, its employees and agents,

The sub label that all *poison* markings flag, signify and convey on equipment or objects or other forms of marking devices are used by the user to inform you of the presence or location of some of the potential obstacles or hazards. These markings are no guarantee of your safety and will not protect you from injury. It is your responsibility under the **SKER'S RESPONSIBILITY CODE** to:

Before loading, please make sure you know and understand the loading and unloading instructions as posted at the lift. If you need further instructions or special assistance, notify the operator prior to entering the loading area.

When loading on the chair-lifts, small children should be loaded on the operator's side of the chair.

Please have tickets visible
when entering all lifts, for every
ride throughout the day.

This will help speed up the operation.

All of Snowbird's chairlifts are double chairlifts. There are no "singles" lines. Please try to pair up when entering the line.

When loading the Tram, please proceed directly onto the Tram Car, filling the corners first. This will help us begin the trip to the top as soon as possible.

If you are unfamiliar with any of our lifts or have any questions, please ask our operators for assistance.

Lifts	Vertical Rise	Travel Time	Travel Length	Skiers per hour
Aerial Tramway	2,900 ft. 883.9 m.	8 min.	8,396 ft. 2,568.8 m.	125 per cabin
Peruvian	1,000 ft. 304.8 m.	6 min.	2,944 ft. 897.3 m.	1,200
Willbere	668 ft. 207.7 m.	4.5 min.	2,080 ft. 634.0 m.	1,200
Gad 1	1,827 ft. 557.0 m.	13 min.	6,751 ft. 2,057.7 m.	1,200
Gad 2 (from middle to summit house)	1,239 ft. 377.6 m.	9 min.	4,059 ft. 1,237.2 m.	1,200
Mid-Gad	1,315 ft. 401.0 m.	9 min.	4,287 ft. 1,306.7 m.	1,100
Little Cloud	1,304 ft. 398.0 m.	7 min.	4,291 ft. 1,307.9 m.	1,200
Chickadee	142 ft. 43.3 m.	3 min.	842 ft. 256.6 m.	900

Total Lift Capacity: 9000 skiers per hour

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snowbird

DEPOSITION
EXHIBIT
1
Cathy Ricci

78-27-51. Inherent risks of skiing — Public policy.

The Legislature finds that the sport of skiing is practiced by a large number of residents of Utah and attracts a large number of nonresidents, significantly contributing to the economy of this state. It further finds that few insurance carriers are willing to provide liability insurance protection to ski area operators and that the premiums charged by those carriers have risen sharply in recent years due to confusion as to whether a skier assumes the risks inherent in the sport of skiing. It is the purpose of this act, therefore, to clarify the law in relation to skiing injuries and the risks inherent in that sport, to establish as a matter of law that certain risks are inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks.

History: L. 1979, ch. 166, § 1.

Meaning of "this act." — The term "this act" in the last sentence means Laws 1979, Chapter 166, which appears as §§ 78-27-51 to 78-27-54.

Cross-References. — Hazards inherent in mountaineering, skiing and hiking and hazards of area served by passenger tramways assumed by skier or sportsman, § 63-11-37.

COLLATERAL REFERENCES

Utah Law Review. — Utah's Inherent Risks of Skiing Act: Avalanche from Capitol Hill, 1980 Utah L. Rev. 355.

From Wright to Sunday and Beyond: Is the Law Keeping Up With the Skiers?, 1985 Utah L. Rev. 885.

Am. Jur. 2d. — 4 Am. Jur. 2d Amusements and Exhibitions § 81 et seq.

C.J.S. — 86 C.J.S. Theaters & Shows § 39 et seq.

A.L.R. — Liability for injury or death from ski lift, ski tow, or similar device, 95 A.L.R.3d 203.

Ski resort's liability for skier's injuries resulting from condition of ski run or slope, 55 A.L.R.4th 632.

Key Numbers. — Theaters and Shows ⇐ 6.

78-27-52. Inherent risks of skiing — Definitions.

As used in this act:

(1) "Inherent 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, variations or steepness in terrain; snow or ice conditions; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, impact with lift towers and other structures and their components; collisions with other skiers; and a skier's failure to ski within his own ability.

(2) "Injury" means any personal injury or property damage or loss.

(3) "Skier" means any person present in a ski area for the purpose of engaging in the sport of skiing.

(4) "Ski area" means any area designated by a ski area operator to be used for skiing.

(5) "Ski area operator" means those persons, and their agents, officers, employees or representatives, who operate a ski area.

History: L. 1979, ch. 166, § 2.

Meaning of "this act." — See note following same catchline in notes to § 78-27-51.

NOTES TO DECISIONS

Inherent risk.

The term "inherent risk of skiing," using the ordinary and accepted meaning of the term "inherent," refers to those risks that are essential characteristics of skiing — risks that are so integrally related to skiing that the sport cannot be undertaken without confronting these

risks. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

The determination of whether a risk is inherent is to be made on a case-by-case basis, using the entire statute, not solely the list provided in Subsection (1). *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

78-27-53. Inherent risks of skiing — Bar against claim or recovery from operator for injury from risks inherent in sport.

Notwithstanding anything in Sections 78-27-37 through 78-27-43 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 risks of skiing.

History: L. 1979, ch. 166, § 3; 1986, ch. 199, § 8.

NOTES TO DECISIONS

ANALYSIS

Assumption of risk.**Comparative fault.****Comparative legislation.****Duty to protect skiers.****Negligence.**

—Design or maintenance or ski run.

—Supervision of employees.

Assumption of risk.

This statute is meant to achieve the same results achieved under the doctrine of primary assumption of risk. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

Comparative fault.

Exempting suits concerning injuries caused by an inherent risk of skiing from the comparative fault statute is consistent with the assertion that the ski area operators are not at fault in such situations — that is, ski area operators have no duty to protect a skier from inherent risks of skiing. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

Comparative legislation.

The protections ski area operators possess under § 63-11-37 are not more expansive than the protections they possess under this statute. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

Duty to protect skiers.

Beyond the general warning prescribed by § 78-27-54 a ski area operator is under no duty to protect its patrons from the inherent risks of skiing. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

A ski area operator is under no duty to make all of its runs as safe as possible by eliminating the type of dangers that skiers wish to confront as an integral part of skiing, such as powder, moguls, and steep grades. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

Negligence.

—Design or maintenance or ski run.

Evidence raised a genuine issue of material fact, precluding summary judgment, in regard to the allegedly negligent design and maintenance of a ski run that was alleged to create a hazard to skiers. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

—Supervision of employees.

Evidence raised a genuine issue of material fact, precluding summary judgment, as to whether a ski area operator was negligent in not supervising its employees in regard to the practice of reckless skiing. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

COLLATERAL REFERENCES

Utah Law Review. — Utah's Inherent Risks of Skiing Act: Avalanche from Capitol Hill, 1980 Utah L. Rev. 355.

78-27-54. Inherent risks of skiing — Trail boards listing inherent risks and limitations on liability.

Ski area operators shall post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing, and the limitations on liability of ski area operators, as defined in this act.

History: L. 1979, ch. 166, § 4.

Meaning of "this act." — See note following same catchline in notes to § 78-27-51.

78-27-55. Repealed.

Repeals. — Section 78-27-55 (L. 1979, ch. 166, § 5), relating to notice requirements in case of injury arising from the inherent risks of

skiing and the statute of limitations on such action, was repealed by Laws 1980, ch. 43, § 1.

78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

History: L. 1981, ch. 13, § 1; 1988, ch. 92, § 1.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, inserted the Subsection designation (1); deleted "where not otherwise provided by statute or agreement"

following "civil actions" in Subsection (1); substituted "shall" for "may" following "the court" in Subsection (1); added "except under Subsection (2)" at the end of Subsection (1) and added Subsection (2).

NOTES TO DECISIONS

ANALYSIS

Breach of covenant of good faith by insurer.
Discretion of court.
Essential elements.
Findings.
Frivolous appeal.
Hearing.
State of mind.

"Without merit" and "good faith."
Cited.

Breach of covenant of good faith by insurer.

Proof of a breach of the covenant of good faith and fair dealing by an insurer does not show the bad faith necessary for an award under this section. *Canyon Country Store v. Bracey*, 781 P.2d 414 (Utah 1989).

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 1997, a true and correct copy of the foregoing Brief of Appellee & Cross-Appellant was mailed, first-class postage prepaid, to:

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