

2016

**Philip Rutherford and Wendy Rutherford vs. Talisker Canyons
Finance Co., LLC, Asc Utah, LLC and Summit Ski Team, Inc., :
Amicus Curiae Brief**

Utah Supreme Court

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RUTHERFORD,

Respondents,

TALISKER CANYONS FINANCE CO.,
LLC, ASC UTAH, LLC and SUMMIT SKI
TEAM, INC.,

Petitioners.

SKI UTAH'S AMICUS CURIAE
BRIEF

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: Appellate Case No. 20140917-SC

FILED
UTAH APPELLATE COURTS

JUL 13 2016

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IN THE SUPREME COURT OF THE STATE OF UTAH

PHILIP RUTHERFORD and WENDY
RUTHERFORD,

Respondents,

VS.

TALISKER CANYONS FINANCE CO.,
LLC, ASC UTAH, LLC and SUMMIT SKI
TEAM, INC.,

Petitioners.

• • • • •

**SKI UTAH'S AMICUS CURIAE
BRIEF**

Appellate Case No. 20140917-SC

TABLE OF CONTENTS

INTRODUCTION.....	1
ARGUMENT	
I. CLOVER AND WHITE SHOULD BE OVERRULED	4
A. <u>INHERENT RISK IS A LEGAL QUESTION OF DUTY BUT CLOVER AND WHITE INCORRECTLY TRANSFORMED IT INTO A FACT QUESTION</u>	4
B. <u>THE DANGEROUS PLAINTIFFS' ARGUMENT THAT CLOSING THE SKI RUN COULD HAVE ELIMINATED THE RISK</u>	5
C. <u>THE CURRENT MUJI JURY INSTRUCTION ON INHERENT RISK IS UNWORKABLE BECAUSE CLOVER AND WHITE HAVE CONFUSED INHERENT RISK LAW</u>	8
D. <u>STARE DECISIS SHOULD NOT OVERRIDE THE LEGISLATURE'S INTENT</u>	9
1. <u>Clover and White</u> Are Not Persuasive Precedent	10
2. <u>Clover and White</u> Are Not Firmly Established	11
3. <u>Clover and White</u> Have Not Worked Well and Are Inconsistent With Other Principles of Law	12
II. THE ANALYSIS UNDER THE INHERENT RISK STATUTE SHOULD NOT INCLUDE A DETERMINATION OF WHICH RISKS SKIERS WISH TO CONFRONT	13
III. COURTS SHOULD NOT ASSESS WHETHER A RISK CAN BE ELIMINATED WITH REASONABLE CARE.....	15
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<u>Clover v. Snowbird</u> , 808 P.2d 1037 (Utah 1991)	<i>passim</i>
<u>Eldridge v. Johndrow</u> , 2015 UT 21 (Utah 2015)	9
<u>Laney v. Fairview City</u> , 2002 UT 79 (Utah 2002)	10
<u>Normandeau v. Hanson Equip., Inc.</u> , 2009 UT 44 (Utah 2009)	4
<u>Rose v. Provo City</u> , 2003 UT App 77 (Utah. Ct. App. 2003)	4
<u>Rothstein v. Snowbird</u> , 175 P.3d 560 (Utah 2007)	<i>passim</i>
<u>State v. Menzies</u> , 889 P.2d 393 (Utah 1994)	9
<u>White v. Deseelhorst</u> , 879 P.2d 1371 (Utah 1994)	<i>passim</i>

Statutes

Utah Code Ann. § 78B-4-401 (2016) <i>et seq.</i>	<i>passim</i>
--	---------------

Treatises

20 Am. Jur. 2d <i>Courts</i> § 131 (2005)	9
---	---

INTRODUCTION

In the twenty-five years since this Court first interpreted the Inherent Risk Statute in Clover v. Snowbird, 808 P.2d 1037 (Utah 1991), it has become clear that ski law in Utah is incomprehensible and broken. Juries are determining legal issues that should be decided by the court, summary judgment is unavailable in nearly every case, and the Supreme Court Advisory Committee on the Model Utah Jury Instructions struggled to understand the law and then recently published an unworkable jury instruction that only further confuses the legal landscape. Ski Utah's members include each of Utah's fourteen ski resorts, all of which have been defendants in ski cases at some point. Because Inherent Risk law is so dysfunctional in Utah, the resorts have no idea when the Inherent Risk Statute may protect them, or how to apply Clover and White v. Deseelhorst, 879 P.2d 1371 (Utah 1994). As a result, Utah ski resorts simply assume the Inherent Risk Statute offers no protection at all, something the Utah Legislature clearly did not intend when it wrote "no skier may make any claim against, or recover from, any ski area operator for injury resulting from the inherent risks of skiing." Utah Code Ann. § 78B-4-403 (2016).

Ski Utah respectfully submits that this Court should overrule Clover and White. The principle of *stare decisis* is weak in this case since Clover and White are only twenty-five and twenty-two years old respectively, and neither holding has worked well or become so entrenched in Utah law that people rely on, or even know of, the decisions. Moreover, the precedent has never been uniformly accepted by this Court ever since White. See, White, 879 P.2d at 1374-75 (Utah 1994) (split decision with J.

Zimmerman and J. Russon disagreeing with Clover and J. Russon writing Clover was “nothing more than judicial legislation” which should be overturned); and see, Rothstein v. Snowbird, 175 P.3d 560 *P26 (Utah 2007) (3-2 decision with J. Wilkins and J. Durrant arguing the majority’s decision infused the Inherent Risk Statute with “intention not expressed by the legislature”).

If the Court elects to retain Clover and White, there are three major problems with the decisions which this Court should correct. First, the analysis of whether a risk can be “eliminated with reasonable care” means summary judgment is unavailable in nearly every case, something anathema to the legislature’s stated intent to “establish *as a matter of law* that certain risks are inherent in the sport.” Utah Code Ann. § 78B-4-401 (2016). In addition, the analysis of whether a risk can be eliminated with reasonable care often results in the dangerous argument that the resort could have eliminated the particular risk by simply closing the ski run where the injury occurred. This forces resorts to choose between either closing a run or facing liability exposure for opening it. In many circumstances, resorts have limited both the quantity and difficulty of the terrain they open due to this dilemma. Limiting terrain due to potential liability exposure contradicts the legislative intent of the Inherent Risk Statute to encourage the sport of skiing in Utah.

Second, Clover and White use the terms “eliminate” and “alleviate” interchangeably when discussing “whether a risk can be eliminated [or alleviated] with reasonable care.” This causes enormous confusion since *every risk* could theoretically be alleviated to some degree or another – an orange cone could be placed in front of every ice patch, every tree could be padded, or every rock could be painted yellow – but only a

few risks can be completely *eliminated*. This confusion plagues not only ski resorts and skiers, but also lawyers, judges and juries since nobody can say with any certainty what the standard actually is.

Third, Clover and White's requirement that courts determine whether skiers wish to confront certain risks or not should be abandoned. Every plaintiff/skier claims, after the fact, that they did not wish to confront the risk that injured them so the analysis is irrelevant in almost every case. Moreover, skiers subjectively wish to confront extremely different risks. Some skiers voluntarily take the risk of jumping off towering cliffs, while other skiers wish to confront only the risks posed by the "bunny slope." To generally impose upon every skier in Utah a set of risks that are judicially determined to be ones that every skier wishes to confront is an unworkable blanket approach that is unsupported by the text of the Inherent Risk Statute.

In sum, Ski Utah respectfully submits that Clover and White should be overruled and ski cases should be decided according to the plain language of the Inherent Risk Statute. Judges, not juries, should identify the risk as pled in the plaintiff/skier's complaint, and determine whether the risk falls within the scope of the statute. If it does, the claim is barred. While some may disagree with the protections the Inherent Risk Statute affords to ski resorts, the Utah legislature passed the statute as the elected body of this State, and neither Clover nor White should override that. The statute simply says "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." Those clear and plain words should be given effect.

I. CLOVER AND WHITE SHOULD BE OVERRULED

A. INHERENT RISK IS A LEGAL QUESTION OF DUTY BUT CLOVER AND WHITE INCORRECTLY TRANSFORMED IT INTO A FACT QUESTION

This Court held that ski resorts have no duty to protect skiers from the inherent risks of skiing. Clover, 808 P.2d at 1046 (“ski area operators have no duty to protect a skier from the inherent risks of skiing”). The question of whether a defendant owes a duty is a question of law. Normandeau v. Hanson Equip., Inc., 2009 UT 44, *P18 (Utah 2009) (“appellate courts have consistently held that the determination of whether a legal duty exists falls to the court.”) (citing, Rose v. Provo City, 2003 UT App 77, *P8 (Utah Ct. App. 2003) (“Whether a duty of care is owed is entirely a question of law to be determined by the court”). In fact, this Court unanimously ruled in Normandeau that the question of duty in negligence cases was a question of law even when it involved potentially fact-intensive issues. Id. at *P19 (duty determined by “analyzing the legal relationship between the parties, the foreseeability of injury, the likelihood of injury, public policy as to which party can best bear the loss occasioned by the injury, and other general policy considerations”).

As a result of the Clover and White decisions, the legal question of what is or is not an inherent risk is being answered by juries rather than as a matter of law. The reason for this is because of the “two categories of inherent risks” that the Clover court invented (nowhere mentioned in the Inherent Risk Statute). The categories are: (1) risks that skiers wish to confront, or (2) risks that a skiers do not wish to confront but which cannot be eliminated (or alleviated) with reasonable care. See, Clover, 808 P.2d at 1047.

Ski Utah is aware of no cases falling under the first category. This is likely because every skier/plaintiff always claims that they did not wish to confront the particular risk that injured them – “I wanted to ski steep terrain, *but not that steep*,” or “I wanted to ski powder, *but not powder that deep*,” or “I wanted to ski moguls, *but not moguls that big*,” and so forth. As a result, most of the cases fall into the second category where trial courts are asked to decide, usually on summary judgment, whether a risk can be eliminated/alleviated with reasonable care. Faced with confusing law and a reasonableness standard, most judges send the case to the jury, which contradicts the Legislature’s directive “to establish *as a matter of law* that certain risks are inherent in the sport of the skiing.”

B. THE DANGEROUS PLAINTIFFS’ ARGUMENT THAT CLOSING THE SKI RUN COULD HAVE ELIMINATED THE RISK

Many judges deny summary judgment for the resort based on the particularly dangerous argument that the risk at issue could have been eliminated by closing the ski run where the injury occurred. For example, in 2012 the Canyons ski resort moved for summary judgment under the Inherent Risk Statute in a wrongful death case where the skier/plaintiff was killed in an avalanche that happened inside the resort’s boundaries on a designated ski run. Plaintiff in the case argued the Canyons could have eliminated the risk of the avalanche by closing the run where the avalanche occurred. Judge Keith Kelly accepted Plaintiff’s argument and denied summary judgment, ruling as follows:

Comparing this case to Clover, that case involved a blind jump that resulted in injury of a skier below. This court concludes that one way in which the risk of that blind jump could have been alleviated was to close the jump. Similarly in this case, Plaintiff has presented evidence that the risk of

avalanche on the Red Pine Chute on December 23, 2007 could have been eliminated by closing the run until it had been made safe for skiers.

See, Ex. A.

Although Canyons ultimately prevailed in the jury trial¹, the district court's ruling is unfortunately typical in ski cases, and it has a particularly dangerous impact on ski resorts. It puts ski resorts in the position of choosing between facing liability for opening runs, because all ski runs have risks of one kind or another, or closing ski runs to avoid liability which diminishes the pleasure, variety, challenge, and the integral nature of the sport of skiing. This "Catch-22" is contrary to the legislature's stated public policy of encouraging skiing in Utah – "the Legislature finds that the sport of skiing is practiced by large numbers of residents in Utah and attracts a large number of nonresidents, significantly contributing to the economy of this state." Utah Code Ann. §78B-4-401 (2016).

In addition, this Court noted in Rothstein that the Inherent Risk Statute was passed due to uncertainty about what claims skiers could make against resorts which caused insurers to either deny coverage to resorts or charge impossibly high premiums:

According to the Legislature, it was necessary to *immunize* ski area operators from liability for injuries caused by inherent risks because they were otherwise being denied insurance coverage or finding coverage too expensive to purchase... The central purpose of the Act, then, was to permit ski area operators to purchase insurance at affordable rates. The insulation

¹ The jury determined the Canyons was not liable because every steep run with new snow at any ski resort may avalanche at any time, or maybe not at all, even when the resort has used extensive and powerful avalanche mitigation tools such as explosives. Thus, there is no exact point in time when a run is perfectly safe from avalanches, and even if there was, it is not humanly possible for ski resort personnel to predict when that point in time might arrive or how long it will last, or whether the entire run is "safe" as opposed to just portions of the run. Neither ski resort personnel nor anyone else can predict Mother Nature with such prescience.

of ski area operators from liability for injuries caused by inherent risks of skiing was a means to that end... **[The statute] is intended to clarify those inherent risks of skiing to which liability will not attach so that ski resort operators may obtain insurance coverage to protect them from those risks that are not inherent to skiing.**

Rothstein, 175 P.3d at 564 (Utah 2007) (3-2 decision with J. Wilkins and J. Durrant arguing the majority's decision infused the Inherent Risk Statute with "intention not expressed by the legislature") (emphasis added).

If a skier/plaintiff can avoid the Inherent Risk Statute by simply claiming the particular risk giving rise to the claimed injury is not inherent because the resort could have eliminated it by closing the run, neither the resorts nor their insurers can determine which risks are inherent (no insurance necessary) and which are not inherent (insurance necessary). As a result, and as it stands now, resorts and their insurers simply assume every claimed injury creates liability exposure, which reverts the ski industry back to the situation it was in before the Inherent Risk Statute was passed thirty-seven years ago:

The Legislature... 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.*

Utah Code Ann. § 78B-4-401 (emphasis added)

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C. THE CURRENT MUJI JURY INSTRUCTION ON INHERENT RISK IS UNWORKABLE BECAUSE CLOVER AND WHITE HAVE CONFUSED INHERENT RISK LAW

The MUJI jury instruction on the inherent risks of skiing is further evidence of the dysfunctional state of ski law in Utah. The instruction was adopted in February of 2012 by the Supreme Court Advisory Committee after three months of debate. It reads:

There are two types of inherent risks of skiing:
The first are risks that skiers want to confront or that [name of defendant] cannot eliminate by using reasonable care. [Name of defendant] has no obligation to eliminate these types of risks.

The second are risks that skiers do not want to confront and that [name of defendant] can eliminate by using reasonable care. Such risks are also inherent in skiing, but [name of defendant] must use reasonable care to eliminate risks of this second type.

Not only is this instruction wrong because the question of whether something is an inherent risk is a question of duty that should be answered by the court, not a jury, but the instruction is also incorrect because it confuses the tests for first and second category risks. Under the first category, the *sole analysis* is whether the particular risk giving rise to the claim is an integral part of skiing that a skier wishes to confront. White, 879 P.2d at 1375 (“The first [category] consists of risks that skiers wish to confront while skiing, for example, steep grades, powder snow, and mogul runs”). There is no mention in either White, Clover, or the Inherent Risk Statute about whether the resort might be able to eliminate a first category risk with reasonable care. The reasonable care analysis is only applicable to second category risks. Clover, 808 P.2d at 1047 (“the second category of risks consists of those hazards which no one wishes to confront but which cannot be alleviated by the use of reasonable care”).

The incorrect statement of the law contained in the jury instruction reflects the confused state of inherent risk law in Utah, and underscores the need for this Court to overturn Clover and White. If the MUJI Committee struggled to correctly state the law after three months of debate, and if trial judges and attorneys continually struggle to apply Clover and White, it is unfair to tell jurors to figure it out for themselves.

D. STARE DECISIS SHOULD NOT OVERRIDE THE LEGISLATURE'S INTENT

This Court's Supplemental Briefing Order asks the parties what role the principle of *stare decisis* should play in the Court's consideration of whether to overrule Clover and White. Ski Utah's position is that Clover and White effectively overruled the legislature because they gutted the Inherent Risk Statute. In a constitutional democracy where the balance of powers is sacrosanct, the principal of *stare decisis* should not serve to solidify and perpetuate bad legal precedent that undermined a valid legislative act. Ski Utah therefore respectfully submits that *stare decisis* should not play a role in the Court's determination of whether to overrule Clover and White.

If *stare decisis* is considered, the holding in Eldridge v. Johndrow, 2015 UT 21 (Utah 2015) is instructive. In Eldridge, this Court overturned a string of prior precedent regarding the "improper purpose" element of claims for intentional interference with economic relations. Id., at *P64 (citing, State v. Menzies, 889 P.2d 393, 399 (Utah 1994) ["Stare decisis is neither mechanical nor rigid as it relates to courts of last resort."]; 20 Am. Jur. 2d *Courts* § 131 (2005) ["The principle that a court should not overrule its own precedents is not a binding legal rule to be blindly followed . . ."].

The factors this Court considers in whether to overturn prior precedent were the following: (1) the persuasiveness of the authority and reasoning on which the precedent was originally based, and (2) how firmly the precedent has become established in the law since it was handed down. Id., at *P22. Under the second factor, the considerations include the age of the precedent, how well it has worked in practice, its consistency with other legal principles, and the extent to which people's reliance on the precedent would create injustice or hardship if it were overturned. Id.

1. Clover and White Are Not Persuasive Precedent

In addition to the reasons explained above as to why Clover and White are not persuasive precedent, this Court in Eldridge noted that the bad prior precedent contained holdings unsupported by any authority. Id., at *P24 (citing, Laney v. Fairview City, 2002 UT 79, ¶ 46 (Utah 2002) ["The precedent rejected in Menzies was established with little analysis *and without reference to authority*"]). The Clover decision cites no authority whatsoever for its holding that there are "two categories of inherent risks." The Clover court simply invented the categories without citing any Utah case law, any out-of-state case law, or any secondary legal authority. Similarly, neither Clover nor White relied on any legislative history regarding whether the legislature intended to have inherent risks categorized, or whether it expected courts or juries to consider which risks skiers wish to confront.

In addition, in White, which was the first appellate case where the litigants attempted to apply Clover, this Court was split 3-2 on the persuasiveness of Clover's reasoning. See, White 879 P.2d at 1377 (C.J. Zimmerman writing "I may not agree with

Clover v. Snowbird ..., a decision in which I did not participate” and J. Russon writing “I believe Clover is clearly wrong and constitutes nothing more than judicial legislation”). The only other case since White that touched on the Inherent Risk Statute was Rothstein v. Snowbird which was also a split 3-2 decision. See, Rothstein, 175 P.3d at *P26 (Justices Wilkins and Durrant dissenting). Thus, ever since Clover, this Court has been uncomfortable with the holding, and at least four separate Justices considered Clover wholly unpersuasive.

2. Clover and White Are Not Firmly Established

Clover and White are only twenty-five and twenty-two years old respectively. The string of precedent this Court overturned in Eldridge dated back more than thirty years. Clover and White are also not “established since the earliest days of statehood,” another factor this Court considered when it overturned the precedent in Eldridge.

Likewise, neither Clover nor White are regularly relied upon by the public. There are no other appellate cases where the “two categories of risks” were addressed (Rothstein dealt with releases of liability) and Ski Utah is unaware of any evidence that Utah’s skiing public relies upon, or even knows about, Clover and White. In Eldridge, there were “dozens” of cases citing the precedent this Court overturned. See, Eldridge, 2015 UT 21 at *P37. Furthermore, Eldridge noted that the vagueness of the improper purpose doctrine and the difficulty litigants faced applying it meant any public reliance on the doctrine was “foolhardy.” Id. at *P38. The holdings under Clover and White are arguably even more vague and difficult to apply than the principles overturned in Eldridge.

3. Clover and White Have Not Worked Well and Are Inconsistent With Other Principles of Law

For the reasons explained above, neither Clover nor White have worked well.

Summary judgment in ski cases is almost never available, juries are deciding legal questions of duty, and the jury instruction is unworkable. There is no consistency or useful guidance from the courts that ski resorts can rely on to determine which risks are inherent and which are not. It is a jury question every time, resulting in unpredictable outcomes and variable verdicts.

This dysfunctional state of ski law in Utah is also inconsistent with other principles of law. Clover and White are inconsistent with the Inherent Risk Statute because it instructs that cases should be decided “as a matter of law.” Utah Code Ann. § 78B-4-401 (2016). Also inconsistent are the two categories of risks under Clover. As Justice Russon put it:

The inherent risks of skiing statute does not, as *Clover* and the majority state, categorize inherent risks, nor does it establish a ‘reasonable care’ standard for certain types of inherent risks. To the contrary, it plainly states that ‘no skier may make *any* claim against, or recover from, *any* ski area operator for injury resulting from the inherent risks of skiing.’ Rather than misconstruing the plain language of the inherent risks of skiing statute in order to formulate a judicially prescribed result, this court should apply the plain language of that statute to the facts in this case and leave the possible infirmities of the statute for the legislature to remedy.

White, 879 P.2d at 1378 (internal citation omitted).

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II. THE ANALYSIS UNDER THE INHERENT RISK STATUTE SHOULD NOT INCLUDE A DETERMINATION OF WHICH RISKS SKIERS WISH TO CONFRONT

The Court's second question in its Supplement Briefing Order asks, if Clover and White are not overturned, what factors are relevant to a determination of which risks are those that skiers wish to confront and which are not? Ski Utah respectfully submits that this is an impossible analysis. As a threshold matter, nothing in the Inherent Risk Statute directs courts to engage in this inquiry, so courts and juries have no statutory language or any other legislative guidance upon which to base their decisions. That alone warrants eliminating the analysis of whether a skier wishes to confront a risk.

More fundamentally, however, it is an impossible analysis because each individual skier may subjectively wish to confront dramatically different risks. There are skiers at many of Utah's resorts who voluntarily ski off cliffs, take massive jumps, attempt inverted aerial maneuvers at high speeds, and generally take risks that other skiers would never wish for. Conversely, there are many skiers who do not wish to confront any other risks than those presented by the "bunny slope." To generally impose upon every Utah skier a set of risks that are judicially (not legislatively) determined to be ones that every skier wishes to confront requires the "bunny slope" skier to accept risks that he or she may not be prepared for, and it makes courts or juries rule that skiing off a cliff, for instance, is not a risk skiers wish to confront, when, to many skiers, it actually is. In other words, judicially imposed generalizations about which risks skiers wish to confront should not supersede the personal risk-taking decisions that each skier should be free, and in fact encouraged, to make on their own.

Similarly, expert testimony is not an appropriate basis for determining which risks skiers wish to confront because, as explained above, whether a risk is inherent or not is a question of duty, and therefore a question of law for the court, not an expert.

Secondly, confronting risk in skiing is a personal, subjective decision that the individual skier makes in his or her mind. Experts should not be allowed to testify regarding what someone may or may not have been thinking when they decided to confront a risk. For example, in a wrongful death case where the skier's estate sues a ski resort claiming that the particular risk which killed the skier should have been eliminated by the resort, an expert will have little or no basis for determining what the deceased skier's internal mental thought processes were in the seconds before his or her death. Any expert testimony on such matters would be speculative and lacking in foundation, as would be any jury verdict based on such testimony. See, Lindsay v. Eccles Hotel Co., 3 Utah 2d 364, 284 P.2d 477 (Utah 1955) ("a jury cannot be permitted to speculate").

Rather than engage in the speculative and legislatively unsupported exercise of letting experts testify on whether skiers wish to confront risks or not, Ski Utah submits the better approach is to simply apply the terms of the Inherent Risk Statute. Judges, not juries, should identify the risk as pled in the plaintiff/skier's complaint, and determine whether that risk falls within the scope of Utah Code § 78B-4-402 ("Definitions" section of Inherent Risk Statute containing list of various risks). If the risk falls within the scope of section 402, then the claim is barred. This straightforward textual analysis is how most statutes are applied, and application of the Inherent Risk Statute should be no different.

III. COURTS SHOULD NOT ASSESS WHETHER A RISK CAN BE ELIMINATED WITH REASONABLE CARE

As explained previously, applying the standard of whether a risk can be eliminated with reasonable care is harmful to the sport of skiing in Utah because plaintiff/skiers can always claim *post-hoc* that the risk which injured them could have been eliminated by closing the ski run that contained the risk. At minimum, this standard results in uncertainty because resorts have no guidance on which risks are actually inherent, and at its most harmful level, it results in resorts preemptively closing large swaths of skiable terrain for fear of liability exposure. Either result is contrary to the legislature's stated intent of rectifying "the confusion of whether a skier assumes the risks inherent in the sport of skiing." Utah Code Ann. § 78B-4-401.

In addition, the Clover and White decisions use the terms "eliminated" and "alleviated" interchangeably which makes it even more difficult for resorts to understand inherent risk law. See e.g., Clover, 808 P.2d at 1046-1047 ("the second category of risks consists of those hazards which no one wishes to confront but which cannot be alleviated by the use of reasonable care" versus eight sentences later "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 ... an inherent risk").

The terms "alleviated" and "eliminated" have very different meanings when applied to ski cases. Every risk could theoretically be alleviated – an orange cone could be placed in front of every ice patch, every tree could be padded, or every rock could be painted yellow. "Alleviation," therefore, does not differentiate between inherent and

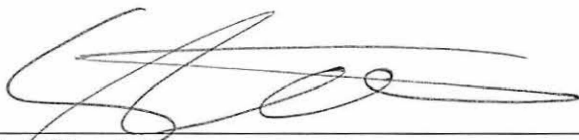
non-inherent risks. This forces resorts to guess at whether a risk can be sufficiently “alleviated” or whether the resort must eliminate it entirely.

In short, the standard of whether a risk can be eliminated (or alleviated) with reasonable care is just another reason why inherent risk law in Utah is so dysfunctional. It only compounds the problems created by Clover’s “two categories of risks,” and gives judges no clear guidance on how to decide a dispositive motion under the Inherent Risk Statute. Ski resorts have even more difficulty because they must determine how the confusing standard applies to their day-to-day operations.

CONCLUSION

The consequences of Clover and White are clearly contradictory to the terms of the Inherent Risk Statute. Clover and White should be overruled and the text of the Inherent Risk Statute should be applied as drafted. In the event Clover and White are retained, the standard of whether a risk can be eliminated/alleviated through reasonable care should be discarded, as should the analysis of whether a skier wishes to confront certain risks.

DATED: This 7th day of July, 2016

A handwritten signature in black ink, appearing to read 'Adam Straehan', written over a horizontal line.

Adam Straehan
STRACHAN STRACHAN & SIMON
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **SKI UTAH'S AMICUS CURIAE BRIEF** was served via mail and email on this 7th day of July, 2016.

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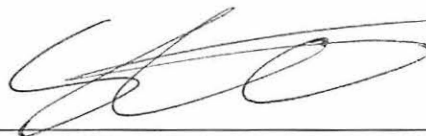


EXHIBIT A

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IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY, STATE OF UTAH

KYLE WILLIAMS, individually on behalf of
her deceased son, JESSE WILLIAMS, and
GINA WILLIAMS, individually and on
behalf of the estate and heirs of JESSE
WILLIAMS,

Plaintiffs,

VS.

AMERICAN SKIING COMPANY UTAH,
INC. (ASCU), and DOES I-X,

Defendants.

**ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
ON INHERENT RISK**

Case No. 080500318

Judge Keith Kelly

This matter came before the Court on January 23, 2012, for oral argument on Defendant's Motion for Summary Judgment on Inherent Risk on the issue of whether Plaintiffs' lawsuit

against The Canyons should be barred because it seeks recovery for a death that resulted from an avalanche which defendants allege is an "inherent risk of skiing" as defined by *Utah Code Ann.*, § 78B-4-404, et seq. David C. Biggs, Steele & Biggs, and Mark R. Taylor, Siegfried & Jensen, appeared on behalf of Plaintiffs and presented argument; and Adam Strachan and Gordon Strachan from Strachan, Strachan & Simon, appeared and presented argument on behalf of Defendant.

Having reviewed the parties' respective motion and memoranda and having considered further evidence presented through oral argument by counsel for the parties, the Court hereby rules and ORDERS as follows:

1. The Court is required to follow *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 and *White v. Deseelhorst*, 879 P.2d 1371, because the holdings in these two cases are more analogous to the current case than *Rothstein v. Snowbird Corp.* (175 P.3d 560), and because both are Utah Supreme Court cases which specifically interpret the Inherent Risk of Skiing Act, *Utah Code Ann.* § 78B-4-401, et seq.

2. Under *Clover*, the inherent risks of skiing are categorized in two parts: (1) those dangers that skiers wish to confront as essential characteristics of the sport of skiing, and (2) hazards which no one wishes to confront but cannot be alleviated¹ by the use of reasonable care on the part of the ski resort. These decisions are also heavily dependent upon the particular facts of those cases, indicating to this Court that any analysis of the Inherent Risk of Skiing Act must also be similarly based.

¹ The Court notes that in both the decisions of *White* and *Clover*, the Supreme Court uses the terms "eliminated" and "alleviated" interchangeably.

3. This Court concludes that skiers skiing inbounds at a ski resort do not wish to ...
Skiers do not wish to confront the risk of being buried in avalanches. ^{Kak}
confront the risk of an avalanche. As such, inbounds avalanches like the one at issue in this case

are not an inherent risk of skiing under the first prong of the Supreme Court's analysis of the statute.

4. With respect to the second prong – whether the risk of avalanches can be alleviated through the use of ordinary care – this determination requires an analysis of whether the evidence shows a factual dispute over whether the risk could have been so alleviated. The Court looks to Exhibit K to Defendants' Motion for Summary Judgment, the expert report of Mr. Douglas Hansen. His Opinion regarding the facts of the avalanche was as follows:

On 12/23/07 there was a high likelihood of avalanche on Red Pine Chutes, based on The Canyons' prior control records, the record of snow accumulation, and the nature of the slope, among other factors;

The potential avalanche carried with it a high degree of potential harm should the avalanche occur on Red Pine Chutes;

It is impossible to completely eliminate the high risk of serious harm from avalanche on Red Pine Chutes even through the exercise of reasonable care in controlling avalanches – based on the information I have reviewed, the Canyons did not exercise reasonable care before opening the run on 12/23/2007;

I would not have allowed people I was responsible for to ski Red Pine Chutes on 12/23/07 in light of the avalanche hazard on that day – The Canyons should not have allowed people to ski the run;

This is especially true because there were many alternate runs available for skiing on 12/23/07;

In order to properly determine whether it was safe to allow people in one's care to ski Red Pine Chutes, it is insufficient to rely on a visual inspection or the lack of a prior slide in the run on prior days; in conditions like the conditions that were present on 12/23/07 in Red Pine Chutes, it would have been prudent to dig a snow

pit before allowing those in my care to ski the run – based on the information provided, The canyons did not properly track the snowpack or perform adequate preventative research on Red Pine Chutes before opening it on 12/23/07;

In brief, it is my opinion in light of everything I have reviewed regarding the Red Pine Chutes slope generally and with regard to the avalanche on 12/23/07, that Red Pine Chutes is an avalanche-prone slope that presents a risk of serious injury or death to skiers on the run if the right conditions are present. 12/23/07 provided near ideal conditions for an avalanche on Red Pine Chutes. Among other factors that support my opinion, the following factors are important: this run had a prior history of avalanche activity; there was an avalanche that failed on the same layer just the day prior on a very similar run; and the slide path presents a danger of serious injury or death to a skier caught in an avalanche on the run partly because of the presence of trees near the bottom of the run;

Red Pine Chutes should not have been opened to be skied on 12/23/07, especially since an avalanche was triggered the prior day in the Charlie Brown's area (a similar run, according to Canyons employees). The Canyons knew that an avalanche had been triggered. Avalanches on similar slopes are one of the best indicators of avalanche danger. That avalanche should not have been ignored, but it seems it was ignored;

The decision to allow Red Pine Chutes to be skied by the general public was a decision that fell short of the standard of care for those that have the lives of others in their hands when it comes to skiing on avalanche-prone terrain.

5. This Court concludes that there are sufficient facts raising the question of whether this risk could have been alleviated and eliminated by the use of ordinary care.

6. In comparing this case with *Clover*, that case involved a blind jump that resulted in the injury of a skier below. This Court concludes that one way in which the risk of that blind jump could have been alleviated was to close the jump. Similarly in this case, Plaintiff has presented evidence that the risk of avalanche on Red Pine Chute on December 23, 2007 could have been eliminated by closing the run until it had been made safe for skiers.

7. This Court is not ruling that there is no circumstance under which an avalanche might be an inherent risk of skiing. However, under the particular facts of this case and the analysis performed under the guidance of *White* and *Clover*, there is a factual question raised about whether The Canyons could have alleviated the hazard or eliminated the hazard through the exercise of ordinary care.

8. Because of this factual dispute, this Court cannot say as a matter of law that The Canyons, through the exercise of ordinary care, could not alleviate or eliminate the danger to skiers of the inbounds avalanche that killed Jesse Williams on December 23, 2007.

9. Thus, summary judgment in this case is not appropriate.

THEREFORE, Defendant's Motion for Summary Judgment on Inherent Risk is DENIED.

DATED this 20th day of March, 2012.

BY THE COURT:

Keith Kelly
HONORABLE KEITH KELLY
Third District Court Judge



Approved as to form:

Gordon Strachan 2/22/12
Gordon Strachan, Esq.
Adam Strachan, Esq.
Attorneys for Defendant