

2006

William R. Rothstein v. Snowbird Corporation : Brief of Appellant

Utah Court of Appeals

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Case No. 20060158 SC

IN THE UTAH SUPREME COURT

WILLIAM R. ROTHSTEIN,
Plaintiff/Appellant,

vs.

SNOWBIRD CORPORATION,
Defendant/Appellee,

COPY

ON APPEAL FROM THE DISTRICT COURT
FOR THE THIRD JUDICIAL DISTRICT OF UTAH
HONORABLE ANTHONY QUINN

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JURISDICTION

This Court has jurisdiction over this appeal pursuant to *Utah Code Ann.* § 78-2-2(3)(j). This appeal is subject to reassignment to the Utah Court of Appeals pursuant to *Utah Code Ann.* § 78-2-2(4).

ISSUES PRESENTED

Plaintiff/Appellant William R. Rothstein purchased a season ski pass to Snowbird Ski Resort, which operates on public land. Salt Lake County ski resorts, including Defendant/Appellee Snowbird Corporation, require purchasers of season ski passes to sign a *Release and Indemnity Agreement* releasing the resorts for negligence which results in the injury to a patron. In order to obtain a seasons pass known as a *Seven Summits Pass* at Snowbird for the 2002-2003 season, Rothstein was required to sign two such *Releases*.¹ On February 3, 2003, Rothstein sustained serious, life-threatening injuries (12 broken ribs, a decimated right kidney, bruised heart, damaged liver and collapsed lung) when he skied into a massive manmade retaining wall (constructed of mine timber cribbing) that had been erected on one of Snowbird's ski runs. That retaining wall was snow covered and not marked.

¹ The first *Release* was to obtain a Snowbird season pass. The second *Release* was required to obtain the *Seven Summits Pass* that gave Rothstein additional skiing privileges such as not waiting in the lift lines. (*R. at 175-76.*)

Based upon the *Releases* that Rothstein had signed, the Honorable Anthony Quinn granted summary judgment in favor of Snowbird on Rothstein's negligence-based claims. The issues which Rothstein wishes to address on appeal are: Whether such *Releases* are enforceable or otherwise void and against public policy (1) as a result of *Utah's Inherent Risk of Skiing Act*, *Utah Code Ann.* § 78-27-52, *et seq.*, or (2) on the basis of being adhesion contracts?

STANDARD OF REVIEW

To determine whether the District Court properly granted summary judgment, this Court "review[s] the trial court's order granting summary judgment for correctness and accord[s] no difference to the court's legal conclusions. In addition, the Court views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Brigham Young University v. Tremco Consultants, Inc.*, 110 P.3d 678, 683 (Utah 2005); *Alta v. Holden*, 44 P.3d 781, 787 (Utah 2002); *Ward v. Intermountain Farmer's Ass'n*, 907 P.2d 264, 266 (Utah 1995). Enforceability of such *Releases* is a question of law. *Russ v. Woodside Homes*, 905 P.2d 901 (Utah App. 1985).

PRESERVATION OF ISSUE BELOW

The issue was preserved before the District Court in Snowbird's *Motion for Summary Judgment*. (*R.* at 170-249, 290-323, 383-399, 413 and 417-418.)

DETERMINATIVE STATUTES

In *Russ v. Woodside Homes*, 905 P.2d 901 (Utah App. 1985), the Utah Court of Appeals discussed the enforceability of such *Releases*, but not in a recreational/adhesion contract context. Neither did the Utah Court of Appeals in *Russ* consider what effect the *Utah Inherent Risk of Skiing Act* and the public policy it espouses would have upon the enforceability of such *Releases*. Other states, however, with similar *Inherent Risk of Skiing* statutes, and which promote their ski industry in much the same fashion as Utah (*i.e.* Vermont and Colorado), have found such *Releases* to be void as against public policy.

Rothstein submits that the *Utah Inherent Risk of Skiing Statute* produces the same result. And that *Statute* reads as follows:

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 or 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.

§ 78-27-51.

As used in this act:

(1) “Inherent risks of skiing” means those dangers or conditions which are an integral part of the sports of skiing, snowboarding, and ski jumping, including, but not limited to: changing weather conditions, variation 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 skiers, and a skier’s failure to ski or jump within the skier’s 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, nordic, freestyle, or other types of ski jumping; and snowboarding.

(4) “Ski area” means any area designated by a ski area operator to be used for skiing, nordic, freestyle, or other type of ski jumping, and snowboarding.

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

§ 78-27-52.

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.

§ 78-27-53.

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.

§ 78-27-54.

STATEMENT OF CASE

This case arose out of a serious skiing accident that occurred on February 3, 2003 when Rothstein struck a snow covered manmade retaining wall that was on one of Snowbird's ski runs. The retaining wall was unmarked. Rothstein was a season pass holder at Snowbird. Snowbird and all of the other Salt Lake County ski resorts require season pass holders to sign exculpatory agreements releasing the resorts for injuries incurred by skiers as a result of the resorts' negligence.

COURSE OF PROCEEDINGS

Rothstein sued Snowbird on two claims of negligence. (*R. at 109.*) Snowbird moved for summary judgment based upon the exculpatory agreements Rothstein had signed. (*R. at 172-194.*) On January 23, 2006, the District Court granted Snowbird's *Motion* dismissing Rothstein's negligence claims with prejudice. (*R. at 413, 417-418.*)² The District Court also granted Rothstein's *Motion to File an Amended Complaint* asserting a claim for gross negligence. (*R. at 413, 415.*) Rothstein thereafter filed his *Amended Complaint* (*R. at 419*) and a *Notice of Dismissal Without Prejudice* pursuant to *Utah Rule of Civil Procedure 41(a)(1.)* (*R. at 426.*) On February 16, 2006, Rothstein filed his *Notice of Appeal*. (*R. at 428.*)

² A copy of that *Order* is included in the *Addendum* to this Brief as Exhibit A.

STATEMENT OF FACTS

Rothstein was seriously injured on February 3, 2003 while skiing the *Fluffy Bunny Run* at the Snowbird Ski Resort. (*R. at 50, 53 and 55*) Rothstein was injured when he collided with a retaining wall constructed of mine cribbing that had been erected across the ski run. (*R. at 59.*) The resulting impact left Rothstein with 12 broken ribs, the loss of a kidney, a bruised heart, damaged liver and a collapsed lung. (*R. at 53.*)

Rothstein testified that the retaining wall was not visible as he skied down upon it. (*R. at 59 and 60.*) More importantly, Rothstein's testimony is confirmed by the photograph which Snowbird personnel took of Rothstein and the accident scene immediately afterwards. (*R. at 57.*) In the record at page 46, is a photograph of ski patrolmen working on the injured Rothstein. On this photograph, Rothstein drew an arrow showing the approximate route he skied on the *Fluffy Bunny Run*. Taken above the accident scene and looking down on the ski run, the retaining wall is completely snow covered and not visible in this photograph. (*R. at 60.*)

In the record at page 47, is another photograph of the same ski patrolmen providing medical care to Rothstein. This photograph is taken from below the retaining wall and shows the retaining with which Rothstein collided. (*R. at 51-52.*) Copies of the foregoing photographs are included in the *Addendum* to this

Brief as Exhibits B and C, respectively. Other photographs of the retaining wall and a DVD of the massive structure taken during the summer following Rothstein's accident appear in the record at pages 202, 203 and 390-91. One of these photographs of the retaining wall is also included in the *Addendum* as Exhibit D.

Dean Cardinale is Director of Snow Safety at Snowbird. (*R. at 60.*) Following the accident, Cardinale visited Rothstein while Rothstein was being hospitalized for his injuries. In that visit, Cardinale told Rothstein that the retaining wall should have been "marked," that it was hazardous and, more importantly, that the accident was Snowbird's fault. (*R. at 42.*) Bradley Sachs is a friend of Rothstein's. Sachs is also an attorney. Sachs likewise spoke with Cardinale about Rothstein's accident and Cardinale told Sachs that the retaining wall should have been marked. (*R. at 57.*)

Rothstein is an expert skier. Consequently, during a deposition, Snowbird's counsel asked Rothstein what should have been done to make that *Fluffy Bunny Run* safe, Rothstein gave the following answer:

I think this area should have been completely fenced off until the snowpack was such that the object was completely covered and it was safe to ski over.

(*R. at 54.*)

Pete Schory is the Head of Ski Patrol. Schory said that the *Fluffy Bunny Run* had been open since 1971. (*R. at 51.*) Schory also said that the retaining wall was constructed by Snowbird in the summer of 1983. (*R. at 89.*)

In response to *Interrogatories*, Snowbird admitted that it has never sold, given or provided a season's pass to anyone without requiring the signing of a *Release Agreement*. (*R. at 393.*) In response to the same *Interrogatories*, Snowbird further admitted that the retaining wall was constructed on land owned by the United States Forest Service. (*Id.*) In its *Memorandum in Opposition to Rothstein's Cross-Motion for Summary Judgment*, Snowbird admitted that all the other Salt Lake County Utah ski resorts (*i.e.* Alta, Brighton and Solitude) require similar *Release and Indemnity Agreements* from season pass holders. (*R. at 327.*)

In order to obtain a Seven Summits Pass, Rothstein was required to sign two *Release and Indemnity Agreements*. (*R. at 185 and 191.*) The first agreement provided as follows:

I am aware that "skiing, in its various forms" is a hazardous sport involving the risks of injuries and death. In consideration for my use of Alta or Snowbird ski areas, I hereby **waive all my claims**, including claims of personal injury, death and property damage against Alta or Snowbird, their agents and employees. **I agree to assume** all risks of personal injury, death and/or property damage associated with skiing, snowboarding and/or operating or resulting from the fault of Alta, Snowbird, their agents or employees. **I agree to hold harmless and indemnify** Alta and Snowbird, their agents and employees, from all my claims, including those caused by negligence or other fault of Alta or Snowbird, their agents or

employees. I agree that any litigation that I or my representatives initiate against Alta or Snowbird, their agents or employees, should be brought exclusively in Salt Lake County, Utah, and that the laws of the State of Utah shall govern.

(R. at 185) (emphasis in original).

The second *Release* contained the following language:

I hereby acknowledge that the use of the locker room, lounge, ski mountain and any privilege or service incident to my membership in Seven Summits Club is taken with knowledge of the risks of possible injury. I am aware that skiing and snowboarding in their various forms (“Skiing”) are hazardous sports involving the risks of injuries and death. In consideration of my use of the Snowbird Corporation (“Snowbird”) ski facility, I agree to assume and accept all risk of injury to myself and my guests, including the inherent risk of skiing, the risks associated with the operation of the ski area and the risk caused by the negligence of Snowbird, its employees or agents. I release and agree to indemnify Snowbird, all landowners of the ski area, and employees and agents from all claims for injuries or damages arising out of the operation of the ski area or my activities at Snowbird, whether such injuries or damages arise out of the risk of skiing or from any other cause, including the negligence of Snowbird, its employees and agents. I agree never to sue Snowbird, its employees or agents on any claim arising out of the operation of the ski area or my activities at Snowbird. This agreement is binding on my heirs and assigns.

(R. at 191) (emphasis in original).

SUMMARY OF ARGUMENT

It is important to note that those States (such as Colorado and Vermont) which promote their ski industry consider skiing at ski resorts as providing an essential public service. It is also important to note that Colorado and Vermont,

like Utah both have an *Inherent Risk of Skiing Act*. In Colorado and Vermont, such *Releases* are not enforceable as a matter of law because they are ambiguous as to what hazards are included and they violate public policy. The Colorado and Vermont Courts noted that their respective *Inherent Risks of Skiing* Statutes determine both the scope of the ski resort's immunity from suit and its responsibility to patrons. Hence, *Releases* for future injuries violated that public policy and are, therefore, unenforceable. The same would be true for the *Releases* at issue in the instant case pursuant to the Utah *Inherent Risk of Skiing Act*.

**STATES WITH A STRONG PUBLIC INTEREST IN THE SKI INDUSTRY
CONSIDER SIMILAR RELEASE AND INDEMNITY AGREEMENTS TO
BE VOID ON THE BASIS OF PUBLIC POLICY.**

In making a decision as to the legality of the exculpatory agreements between Rothstein and Snowbird, this Court must consider (1) whether the agreements are clear and understandable in expressing the intentions of the parties and (2) whether the agreements violate public policy. The existence of either one of the foregoing elements is sufficient to make a *Release* for future negligence unenforceable or void and both exist in this instance.

A. Clear Expression of Intent. The United States District Court for the District of Utah has stated Utah law to be “exculpatory agreements are binding so long as they are clear and unequivocal in expressing the parties’ agreement to absolve the defendant of liability.” *Ghionis v. Deer Valley Resort Co., Ltd.*, 839

F.Supp.789, 793 (D. Utah 1993). However, whether these *Releases* included any injury from man-made structures was not clearly stated. In fact, they basically speak in terms of injuries or damages arising from “risk of skiing,” the risk associated with the operation of a ski area, and the general “risk caused by the negligence of Snowbird.” The *Releases* say nothing about the risk posed by a snow-covered man-made retaining wall constructed on a ski run.

The United States District Court for Utah has also held that “assumption of risk requires a voluntary assumption of a known danger.” *Ghionis*, 839 F.Supp. 789 at 784 (citing *Mikkelson v. Haslam*, 764 P.2d 1384, 1388 (Utah App. 1980)). The wall that Rothstein hit was not a known danger connected with skiing, nor does the general language of these *Releases* encompass that danger. Rothstein, therefore, could not assume the risk of an unknown danger when the possibility of such a risk was not clearly stated in the *Releases*.

B. The Releases Violate Public Policy. The Utah Supreme Court has not adopted a standard for determining whether there is a strong public interest in the provision of ski services. But there is a standard that has been adopted by other states in evaluating public interest. See *Tunkl v. Regents of University of California*, 383 P.2d 441, 444 (Ca. 1963). *Tunkl* holds that a *Release* for future injury is invalid if it shows some or all of the following:

- [1] It concerns a business of a type generally thought suitable for public regulation.
- [2] The parties seeking exculpation is forming a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
- [3] The party hold itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.
- [4] As a result of the essential nature of the service, and the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks [the party's] service.
- [5] In exercising its superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby the purchaser may pay additional reasonable fees and obtain protection against negligence.
- [6] Finally, a result of the transaction, the personal property of the purchaser is placed under the control of the seller subject to the risk of carelessness by the seller [the seller's agents].

Id. at 445-446 (footnotes omitted). Rothstein submits that all six of the foregoing elements to invalidate the *Releases* exist in this instance.

To begin with, the ski industry is suitable for public regulation as is evidence by the *Inherent Risk of Skiing Act* which specifically provides:

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 the state.

Utah Code Ann. § 78-27-51. That finding would meet the first three elements of the *Tunkl* test.

The fourth and fifth elements of the *Tunkl* test are clearly met by the fact that all local ski areas apparently impose a similar liability provision as a condition for season's passes. Finally, with respect to the unmarked snow-covered retaining wall, Rothstein and others were clearly subject to Snowbird's control.

Many states have enacted a statute similar to Utah's *Inherent Risk of Skiing Act*. The Vermont equivalent of Utah's *Inherent Risk of Skiing Act* provides as follows:

Notwithstanding the provisions of section 1036 of this title, a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary.

12 V.S.A §1037 (1978). Based upon that *Act*, the Supreme Court of Vermont has held that "exculpatory agreements which defendants require skiers to sign, releasing defendants from all liability resulting from negligence, are void as contrary to public policy." *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 796 (Vt. 1995).

In *Dalury*, the defendant operated a ski resort where plaintiff Dalury was seriously injured when he collided with a metal pole that formed part of the control maze for a ski lift line. Before the ski season started, Dalury purchased a

season pass and signed a form releasing the ski area from all liability. The Superior Court granted summary judgment in favor of defendants, holding that the exculpatory agreements, which released defendants from all liability, were valid. The Supreme Court of Vermont explicitly overruled the Superior Court, stating that the exculpatory agreements were void as contrary to public policy.

In reaching this conclusion, the Supreme Court of Vermont rejected defendants' argument that ski resorts do not provide an essential public service. The Court reasoned, "the defendants' area is a facility open to the public. They advertise and invite skiers and nonskiers of every level of skiing ability to their premises for the price of a ticket." *Id.* at 799. "Each ticket sale may be, for some purposes, a purely private transaction. But when a substantial number of such sales take place as a result of the seller's general invitation to the public to utilize the facilities and services in question, a legitimate public interest arises." *Id.* The Court held that the defendant ski resort was in a better position to guard and insure against risks. The Court stated that

[t]he policy rationale is to place responsibility for maintenance of the land on those who own or control it, with the ultimate goal of keeping accidents to the minimum level possible. Defendants, not recreational skiers, have the expertise and opportunity to foresee and control hazards, and to guard against the negligence of their agents and employees. They alone can properly maintain and inspect their premises, and train their employees in risk management. They alone can insure against risks and effectively spread the cost of insurance among their thousands of customers. Skiers,

on the other hand, are not in a position to discover and correct risks of harm, and they cannot insure against the ski area's negligence.

Id.

Finally, the Court rejected defendants' argument that the public policy of the state, as expressed in the "*Acceptance of Inherent Risks*" statute, 12 V.S.A. §1037 *supra*, indicates a willingness on the part of the Legislature to limit ski area liability. The defendants argued that public policy favors the use of express releases such as the one signed by plaintiff. The Court rejected this argument, holding "defendants' allocation of responsibility for skiers' injuries is at odds with the statute. The statute places responsibility for the 'inherent risks' of any sport on the participant, insofar as such risks are obvious and necessary." *Id.* at 800 (citations omitted). "A ski area's own negligence, however, is neither an inherent risk nor an obvious and necessary one in the sport of skiing. Thus a skier's assumption of the inherent risks of skiing does not abrogate the ski area's duty 'to warn of or correct dangers which in the exercise of reasonable prudence in the circumstances could have been foreseen and corrected.'" *Id.* (citations omitted).

Much like Utah's *Inherent Risk of Skiing* statute, the Vermont statute protects ski resorts from liability based on the *inherent risks* of skiing, but does not go so far as to protect them from their own negligence. The Vermont courts refused to allow the ski resorts "to undermine the public policy underlying

business invitee law and allow skiers to bear risks they have no ability or right to control.” *Id.* at 799. The same should be true for Utah’s *Inherent Risk of Skiing* statute. Since, like the Vermont Legislature, the Utah legislature has clearly allocated the duties of skiers and ski area operators. In the floor debates on Utah’s *Inherent Risk of Skiing Act*, Senate Bill 146, the sponsor of that bill, Senator Finlinson, expressly stated the purpose of this bill was to *reduce* the liability of ski area operators and regulate the relationship between skiers and ski area operators. Senator Finlinson said, “this kind of law does not prohibit the individual from being successful or successfully bringing a claim against the operator if the operator was, in fact, negligent . . .” Senator Finlinson went on to say that this law imposed upon ski resorts the responsibility to operate in “a non-negligent manner.” *Afternoon Session of the Utah State Senate General Session of 1979, Day 40, February 16, 1979, Audograph Disc 184 & 185, Track 2 at 4 minutes.*

The legislative history of the floor debates continued and Senator Finlinson explained that, “the main thrust of Senate Bill 146 is to clarify the Utah law so that the skier assumes the responsibility for the inherent risks of skiing. The ski areas still have the responsibility for making sure ... they don’t operate in a negligent manner.” *Morning Session of the Utah State Senate General Session of 1979, Day 43, February 19, 1979, Audograph Disc 186 & 187, Track 6 at 3 minutes 50 seconds.* Given this express intent on the part of the Utah Legislature to allocate

responsibility for the operation of ski areas, it would violate public policy to allow ski area operators to waive their responsibilities under this statute by a separate private release.

Colorado's equivalent of the Utah *Inherent Risk of Skiing* statute reads as follows:

The general assembly hereby finds and declares that it is in the interest of the state of Colorado to establish reasonable safety standards for the operation of ski areas and for the skiers using them. Realizing the dangers that inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed, the purpose of this article is to supplement the passenger tramway safety provisions of part 7 of article 5 of title 25, C.R.S.; to further define the legal responsibilities of ski area operators and their agents and employees; to define the responsibilities of skiers using such ski areas; and to define the rights and liabilities existing between the skier and the ski area operator and between skiers.

C.R.S.A. § 33-44-102

As used in this article, unless the context otherwise requires:

(3.5) "Inherent dangers and risks of skiing" means those dangers or conditions that are part of the sport of skiing, including changing weather conditions; snow conditions as they exist or may change, such as ice, hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, and machine-made snow; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, streambeds, cliffs, extreme terrain, and trees, or other natural objects, and collisions with such natural objects; impact with lift towers, signs, posts, fences or enclosures, hydrants, water pipes, or other man-made structures and their components; variations in steepness or terrain, whether natural or as a result of slope design, snowmaking or grooming operations, including but not limited to roads, freestyle terrain, jumps, and catwalks or other terrain modifications; collisions with other skiers; and the failure of skiers to ski within their own abilities. The term "inherent dangers and risks of skiing" does not include

the negligence of a ski area operator as set forth in section 33-44-104(2). Nothing in this section shall be construed to limit the liability of the ski area operator for injury caused by the use or operation of ski lifts.

C.R.S.A. § 33-44-103. In *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982 (Colo. App. 1983), the Colorado Court of Appeals held that a private agreement could not modify the *Colorado Ski Safety Act's* express allocation of the duties of skiers and ski area operators. 668 P.2d 982.

The Colorado Court held that the operator's failure to warn the plaintiff of heavy equipment on the slope was negligence under the statute and that, based on the public policy announced by the legislature, liability for negligence based on a violation of the express terms of the statute could not be waived by a private agreement. The Court held, “[s]tatutory provisions may not be modified by private agreement if doing so would violate the public policy expressed in the statute. The statutes at issue here allocate the parties’ respective duties with regard to safety of those around them, and the trial court correctly excluded a purported agreement intended to alter those duties.” *Id.* at 987.

Again, similar to Utah’s *Inherent Risk of Skiing Act*, Colorado has a statute that clearly allocates the duties of skiers and ski area operators. The Colorado legislature, like the Utah legislature, intended that skiers would assume risks *inherent* in the sport of skiing, but did not intend to preclude skiers from bringing an action based on the ski area operator’s negligence. The Colorado Court of

Appeals was not willing to uphold a private agreement intended to alter these express statutory duties, and this Court should not either.

In *Hanks v. Powder Ridge*, 888 A.2d 456 (Conn. 2005), the Connecticut Supreme Court was guided by the *Tunkl* factors and found that an exculpatory agreement signed by snowtubing patron, releasing the ski resort from liability for personal injuries incurred as a result of their own negligence was invalid as against public policy. The Court stated “[t]he law does not favor contract provisions which relieve a person from his own negligence.” *Id.* at 741 (citations omitted). “This is because exculpatory provisions undermine the policy considerations governing our tort system.” *Id.* The Court reasoned that “[t]he concerns expressed by the court in *Dalury* are equally applicable to the context of snowtubing, and we agree that it is illogical to permit snowtubers, and the public generally, to bear the costs of risks that they have no ability or right to control.” *Id.* at 745. The Court concluded that the agreement at issue in *Hanks* violated public policy, not solely because of the volume of public participation, but because of many factors including: the fact that defendants invite the public generally to their facility; defendants, not recreational snowtubers, have the knowledge, experience and authority to maintain the snowtubing runs in reasonably safe condition and guard against the negligence of its employees; the defendants were in a better position to insure against the risk of their negligence and to spread the

costs of insurance to their patrons; that if they upheld the agreement, defendants would be permitted to obtain broad waivers of their liability and the incentive for them to maintain a reasonably safe snowtubing environment would be removed, with the public bearing the cost; and the fact that the defendants had superior bargaining power. All of these factors that the Connecticut Supreme Court used to determine that the agreement at issue in *Hanks* violated public policy are present in this case and this Court should hold also that the *Releases* at issue violate public policy.

In an analogous case, the New Mexico Court applied these six standards of *Tunkl* to an exculpatory release agreement and found it to be unenforceable as a matter of policy. See *Berlangier v. Running Elk Corp.*, 76 P.3d 1098 (N.M. 2003). *Berlangier* was a case in which the defendant operated a recreational resort in New Mexico which offered recreational activities such as fishing, horseback riding, hiking, etc. As a requirement for participating in the resort's activities, such as horseback riding, guests were required to sign a release. Plaintiff was seriously injured while horseback riding. The issue before the New Mexico Supreme Court was whether the release violated public policy so as not to be enforceable and the *Berlangier* court concluded that it did. The *Berlangier* court noted that public policy disallowing a release can be furnished either through statutory common law. A turning point on public policy in the *Berlangier* case

was the New Mexico's "*Equine Liability Act*, N.M.S.A. 1978 § 42-13-4 (1993)."

This law, which is similar to the *Inherent Risk of Skiing Act* in Utah, provided in pertinent part as follows:

- A. No person, corporation or partnership is liable for personal injuries to or for the death of a rider that may occur as a result of the behavior of equine animals while engaged in any equine activities.
- B. No person, corporation or partnership shall make any claim against, maintain any action against or recover from a rider, operator, owner, trainer or promoter for injury, loss or damage resulting from equine behavior unless the acts or omissions of the rider, owner, operator, trainer or promoter constitute negligence.
- C. Nothing in the Equine Liability Act shall be construed to prevent or limit the liability of the operator, owner, trainer or promoter of an equine activity who:
 - (1) provided the equipment or tack, and knew or should have known that the equipment or tack was faulty and an injury was the proximate result of the faulty condition of the equipment or tack;
 - (2) provided the equine and failed to make reasonable and prudent efforts to determine the ability of the rider to:
 - (a) engage safely in the equine activity; or
 - (b) safely manage the particular equine based on the rider's representations of his ability;
 - (3) owns, leases, rents or otherwise is in lawful possession and control of the land or facilities upon which a rider sustained injuries because of a dangerous condition that was known to the operator, owner, trainer or promoter of the equine activity;

(4) committed an act or omission that constitutes conscious or reckless disregard for the safety of a rider and an injury was the proximate result of that act or omission; or

(5) intentionally injures a rider.

N.M.S.A. 1978 § 42-13-4 (1993). Simply put, the *New Mexico Equine Liability Act* precluded anyone injured while horseback riding from suing for injuries was attributable to the behavior of the horse, but did allow injured persons to sue equine operators on other grounds, including their negligence involving those risks not inherent to horseback riding. The New Mexico Supreme Court reasoned that this Statute expressed a public policy that equine operators should be accountable for their own negligence when the injury did not involve the behavior of the animal. (*Id.* at p. 111.) The Court noted that this public policy existed because it expressed what activities the equine operator would be liable for and those for which he/she/it would not be liable. The same is true for the Utah *Inherent Risk of Skiing Act*.

The existence of risk allocating loss such as Utah's *Inherent Risk of Skiing Act* are very important because appellate courts consistently hold that such laws apportioning responsibility for injuries between resort operators and patrons constitute public policy that overrides *Release and Indemnity Agreements*.

Finally, within the context of the Colorado recreational skiing industry, the Tenth Circuit has stated that these *Release and Indemnity Agreements* are adhesion

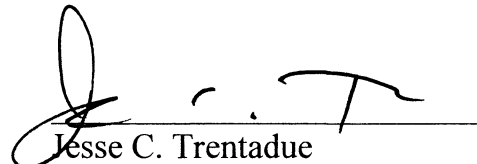
contracts. *See Rosen v. LTV Recreational Dev., Inc.*, 569 F.2d 1117, 1123 (10th Cir. 1978). And that is another reason for not enforcing the *Releases* at issue in the instant case since every ski resort in Salt Lake County requires patrons to execute such an agreement in order to obtain a season pass.

CONCLUSION

This Court should reverse or vacate the District Court's summary judgment and instruct the District Court to submit the case to a jury for further findings at a trial in this matter.

DATED this 14th day of June, 2006.

SUITTER AXLAND

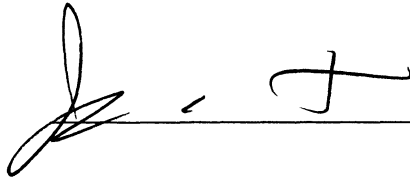

Jesse C. Trentadue
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served, via U.S. mail, two true and correct copies of the foregoing *Brief of Appellant* upon the following this 14th day of June, 2006.

Gordon Strachan
Kevin J. Simon
STRACHAN & STRACHAN, P.C.
P.O. Box 1800
Park City, Utah 84060-1800

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ADDENDUM

EXHIBIT A

JAN 23 2006

SALT LAKE COUNTY

By

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY

WILLIAM ROTHSTEIN, an individual,

Plaintiff,

v.

SNOWBIRD CORPORATION, a Utah
corporation,

Defendant.

ORDER

Civil No. 040925852

Judge Anthony Quinn

On December 13, 2005, this Court heard oral argument on (1) defendant Snowbird's Motion for Summary Judgment; (2) plaintiff's Cross-Motion for Partial Summary Judgment re: defendant's Eighth Affirmative Defense; (3) plaintiff's Rule 56(f) Request ("Motion") for Continuance; and (4) plaintiff's Motion to Amend. A separate Order will be entered concerning plaintiff's Motion to Amend as directed by this Court.

Although fully briefed, the Court determined that it was unnecessary at this time to rule on plaintiff's Motion for Partial Summary Judgment re: the Inherent Risk of Skiing Act Affirmative Defense.

Jesse Trentadue, Esq. of Suitter Axland appeared on behalf of plaintiff Rothstein. Gordon Strachan, Esq. and Kevin J. Simon, Esq. of Strachan & Strachan, P.C., appeared on behalf of defendant Snowbird.

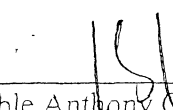
WHEREFORE, after reviewing the court papers submitted by plaintiff Rothstein and defendant Snowbird and hearing the arguments presented at the December 13, 2005 Hearing, this Court hereby **ORDERS, DECREES, and ADJUDGES** as follows:

1. Defendant Snowbird's Motion for Summary Judgment regarding plaintiff's *ordinary* negligence claim is **GRANTED** and plaintiff's Cross-Motion for Partial Summary Judgment regarding defendant's Eighth Affirmative Defense is **DENIED**. Plaintiff's *ordinary* negligence claim is, thus, dismissed with prejudice.

2. Plaintiff's Rule 56(f) Request (or "Motion") for Continuance is **DENIED**.

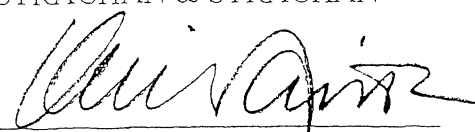
DATED this 29 day of Jan, 2006.

BY ORDER OF THIS COURT:


The Honorable Anthony Quinn
Third Judicial District Court Judge

Approved as to Form:

STRACHAN & STRACHAN


Kevin J. Simon 12/30/05
Attorneys for defendant Snowbird

SUITTER AXLAND

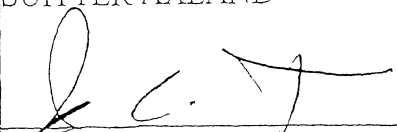

Jesse Trentadue
Attorneys for plaintiff Rothstein

EXHIBIT B

SWB 0012



EXHIBIT C

SWB 0020



EXHIBIT D

