

2006

William R. Rothstein v. Snowbird Corporation : Reply Brief

Utah Court of Appeals

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Case No. 20060158 SC

COPY

IN THE UTAH SUPREME COURT

WILLIAM R. ROTHSTEIN,
Plaintiff/Appellant,

vs.

SNOWBIRD CORPORATION,
Defendant/Appellee,

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

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Plaintiff/Appellant William Rothstein hereby submits this *Reply Memorandum* in further support of his appeal.

OBSERVATIONS

In its *Memorandum*, Snowbird makes ten (10) statements of fact and/or law that need to be briefly addressed, commencing with Snowbird's attempt to rewrite the legislative history of Utah's *Inherent Risk of Skiing Act*.

In his opening *Memorandum*, Rothstein referred the Court to the floor debate on the *Inherent Risk of Skiing Act*, which was Senate Bill 146. Specifically, Rothstein focused upon the comments of the Bill's sponsor, Senator Finlinson, which made clear that the purpose and stated objective of this *Law* was to reduce the liability of ski area operators and regulate the relationship between down hill skiers and ski resort/area operators by defining and allocating their respective duties of care. In that debate, for example, Senator Finlinson said that while Senate Bill 146 would require skiers to assume responsibility for the risks inherent in skiing, ski areas and ski operators still had the responsibility to make sure that they did not operate in a negligent manner.

In opposition to this express intent on the part of the Utah Legislature to allocate and define the duty of care between downhill skiers and ski resorts, Snowbird responds by including in the *Addendum* to its *Memorandum*, an **August 8, 2006, Affidavit** from **former** Senator Finlinson. In that *Affidavit*, Finlinson

states that the purpose of the *Act* was not to establish a ski resort - operators' duty of care or to protect skiers. Rather, "the intent of and sole driving force behind Utah's *Inherent Risk of Skiing Act* was to help protect ski area operators by statutorily immunizing them from liability for risk inherent in the sport of skiing, snow-boarding and other related activities." (*Finlinson Aff'd*, ¶ 4.) Finlinson goes on to state in his *Affidavit* that had the Utah Legislature intended to prohibit pre-injury *Release Agreements* in favor of ski area operators, it would have expressly done so. But there are several fatal flaws in Snowbird's use of this *Affidavit*, which Snowbird even calls "secondary evidence" of the Utah Legislature's intent in enacting the *Inherent Risk of Skiing Act*.

To begin with, Snowbird's use of Finlinson's *Affidavit* is improper since it was not part of the record before the District Court. Because that *Affidavit* is not part of the record on appeal, it should not be considered by this Court. *See Smith v. Four Corners Mental Health Center, Inc.*, 2003 UT 23, ¶ 33, 70 P.3d 904.

Another flaw in Snowbird's proffer of the Finlinson *Affidavit* is that Finlinson's statements, even though sworn, cannot, as a matter of law, be considered as part of the *Act's* legislative history.

The law is very clear. Courts cannot look to the testimony of a former legislator as part of the legislative history of a statute, nor can Courts consider such *ex parte* views in interpreting a statute. *See Sutherland*, 2A *Statutes and Statutory*

Constructions §§ 48:16 and 48:17 (6th ed. 2000). That such post enactment “evidence” is not part of a statute’s legislative history or to be used to interpret a law is not surprising. If it were otherwise, any time a senator, congressman or other elected official involved with the passage of a controversial law left office, lobbyists and other persons with a vested interest in a particular interpretation of that law would solicit former official to submit an affidavit setting forth the view of the statute they espoused. The biggest flaw in Snowbird’s use of this *Affidavit*, however, is that Finlinson’s statements conflict with the rulings of this Court.

Although Finlinson says that the *Inherent Risk of Skiing Act* was not intended to define and allocate duties of care between ski resorts and downhill skiers, this Court has held otherwise. In *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991), this Court held that this *Act* defined the duties that ski area operators owed to their patrons. (*Id.* at 1045-46). Snowbird cannot change that decision with Finlinson’s *Affidavit*. But that is not to say that Finlinson’s *Affidavit* is totally without evidentiary value.

It is an admission. The fact that Snowbird attempts with the Finlinson *Affidavit* to overcome the legislative history cited by Rothstein does in fact support the conclusion that the purpose of the *Inherent Risk of Skiing Act* was to define and allocate the duty of care required of those who operate ski areas and their patrons.

Thus, *Release and Indemnity Agreements* of the type asserted by Snowbird in the instant case would be against that Utah *Inherent Risk of Skiing Act*'s public policy.

Next, Snowbird focuses upon the factual issues in dispute between the parties, such as a claim that the *Fluffy Bunny Ski Run* on which Rothstein was injured was permanently closed by an orange flag roped-line used for warning and skier awareness purposes. (*Snowbird Memorandum*, p. 3.) Snowbird does this by reference to *Affidavits* from its personnel. But such statements are not supported by the photographs of the ski patrolmen working to save Rothstein's life included in the *Addendum* to Rothstein's opening *Memorandum*, nor are they supported by Rothstein's testimony that it was an open run:

Q: And, again, why did you say this is an open run?

A: Well, there is nothing marking it closed for a large portion – on a Cat track. It's marked open to ski. There is no indication whatsoever not to ski down that?

* **

Q: There was some discussion about whether the *Fluffy Bunny Run* should have been, "marked better." Was it marked at all?

A: It just an open run.

Q: So that would be, "no?"

A: It wasn't marked at all.

Q: Weren't you a little bit embarrassed to be skiing a run called *Fluffy Bunny*?

A: I am now.¹

(*Rothstein Depo.* pp. 184 and 185, R. 59.)

Another point Snowbird attempts to make in its *Opposition Memorandum* is that Rothstein did not have to ski and, in any event, could have skied without signing a release agreement. According to Snowbird, Rothstein could have skied at Snowbird on a day pass or he could have purchased a 2002 - 2003 season's pass from Park City resorts without signing a release. This, too, is a matter of factual dispute. Rothstein testified that he was required to sign similar releases when he purchased season's passes at Park City, Deer Valley and The Canyons.

Q: Had you signed any other release prior to the *Release* you signed when you purchased the Seven Summits Pass? . . .

A: I think what you mean is every time I bought a season's pass at a ski resort I have signed a similar *Release*.

Q: Okay. And which other resorts have you purchased a season's pass at besides the Seven Summits one for the 2002-2003 at Snowbird?

A: Park City, Deer Valley and The Canyons.

¹ Snowbird's claim that the *Fluffy Bunny Run* was closed to Rothstein and other skiers that day is also inconsistent with the District Court's statement that: "For purposes of these motions, I am assuming that this accident happened just the way Mr. Rothstein claims that it happened." (*Transcript* of December 13, 2005 hearing, R. 445, p. 2.) It is similarly inconsistent with the law with respect to disputes of fact on *Motions for Summary Judgment*, which must be resolved in favor of the non-moving party. See *Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991).

Q: And which years did you buy season passes when you signed releases at those three resorts.

A: During my tenure in Park City, which is 15 years, I have purchased all three - four of these resorts, Snowbird, Canyons and Deer Valley.

(*Rothstein Depo.*, pp. 51-52, R. 223.) What is not in dispute, however, is that Snowbird has never sold, given or provided a season's pass to anyone without requiring the signing of a *Release Agreement*. (R. 393.) Also undisputed is the fact that all of the Salt Lake County ski resorts require similar *Release and Indemnity Agreements* from season's pass holders. (R. 327.)²

The fourth point to be noted about Snowbird's *Memorandum* is that it refers the Court to a number of cases which uphold similar *Release and Indemnity Agreements* in a recreational context. This authority was apparently gathered by Snowbird from: Randy J. Sutton, *Annotation, Validity, Construction and the Effect of Agreement Exempting Operator of Amusement Facility From Liability for Personal Injury or Death of Patron*, 54 ALR 5th 513 (1997) More importantly, these cases are not from states having the equivalent of Utah's *Inherent Risk of Skiing Act* and they typically involve accidents or injuries that are inherent to that

² If the Court upholds Snowbird's *Release and Indemnity Agreement*, it is safe to say that to the extent they do not already do so, all 13 of the downhill ski resorts in the State of Utah will impose similar *Releases* upon persons wishing to ski upon the public lands of this State.

particular recreational activity.³ None of the cases relied upon by Snowbird, however, involve anything like the construction of the following mammoth retaining wall across a ski run that was snow covered and unmarked when Rothstein skied into the structure:



³ See e.g. *Milligan v. Big Valley Corp./B/A Grand Targhee Ski Resort*, 754 P.2d 1063 (Wyo. 1988) (ski racer hits tree); *Heil Valley Ranch, Inc. v. Smith Simkin*, 784 P.2d 781 (Colo. 1989) (rider thrown from horse); *Seigneur v. Nat'l Fitness Institute, Inc.*, 752 A.2d 631 (M.D. App. 2000) (torn muscle weightlifting); *Henderson v. Qwest Expeditions*, 174 S.W. 3d 730 (Tenn. App. 2005) (slip and fall on river rafting trip); *Platzer v. Mammoth Mtn. Ski Area*, 128 Cal. Rptr. 885 (Cal. App. 2002) (fall from chair lift); *Coates v. Newhal*, 236 Ca. Rptr. 181 (Cal. App. 1987) (fall from dirt bike); *Allan v. Snow Summit, Inc.*, 59 Cal. Rptr. 2d 813 (Cal. App. 1996) (skier falling).

Nor would anyone in Rothstein's position who signed Snowbird's *Release and Indemnity Agreements* have imagined that such a condition was allowed to exist on a ski run, much less that he or she was waiving all right to sue for injuries occasioned by skiing into that hidden wall.

More importantly, when faced with similar injury causing events not inherent in the particular recreational activity, Courts do not hesitate to hold *Release and Indemnity Agreements* unenforceable. Compare *Garrison v. Combined Fitness Centre, Ltd*, 559 N.E.2d 187 (Ill. App. 1990)(*Release* barred claim against health club by patron struck by barbell) with *Larsen v. Vic Tanny International*, 474 N.E. 2d 729(Ill. App. 1984)(*Release* did not bar patron's claim against health club for injuries occasion from inhaling gaseous vapors). See also *Edwards v. Wilson*, 364 S.E. 2d 642 (Ga. App. 1988) (*Release* not applicable to purchaser of pit pass at automobile race who sustained injuries as a result of defendant's negligent direction of traffic prior to commencement of race and outside of the pit area); *Johnson v. Thruway Speedways, Inc.*, 407 N.Y.S. 2d 81 (1978) (*Release* did not bar claim by spectator at an automobile race struck by maintenance vehicle and not by a vehicle involved in the race).

A fifth point to be noted is that Snowbird correctly points out that in *Hawkins v. Part-B-A Navajo Trails*, 37 P.3d 1062, 1065 (Utah 2001), this Court stated that it had not yet adopted any specific standard for determining the validity

of pre-injury *Exculpatory Agreement*. But in *Hawkins*, this Court did note that *Tunkl v. Regents of University of California*, 383 P.2d 441, 444 (Ca. 1963) sets forth standards for determining whether the public interest in the activity at issue warrants an exception to the general rule allowing releases. *Id.* at 1065.

Tunkl holds that a *Release* for future injury is invalid if it shows **some or all**⁴ 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 person or property of the purchaser is placed under the control of

⁴ No one particular factor seems to be controlling.

the seller subject to the risk of carelessness by the seller [the seller's agents].

Id. at 445-446 (footnotes omitted). Rothstein argued in his opening *Memorandum* that all six of the foregoing elements to invalidate the *Releases* exist in this instance. Snowbird disputes this contention.

Relying upon case law from states with a less significant ski industry such as *Chauvilier v. Booth Creek Holdings, Inc.*, 35 P.3d 383 (Wash. App. 2001),⁵ Snowbird insists that recreational activities could never be so essential or of such public importance to set aside a pre-injury *Release*. Rothstein submits, however, that the *Tunkl* factors are flexible so that in applying them Courts can take into consideration cultural as well as regional differences in evaluating the public importance of a particular activity such as the significance of the ski industry to the State of Utah and the people drawn to visit or reside in Utah because of skiing.

Snowbird's sixth point is that cases like *Daulry v. S-K-I, Ltd.*, 670 A.2d 795 (Vt. 1995) are the minority view while a majority of the jurisdictions hold that when it comes to recreational activities, pre-injury *Exculpatory Agreements* are enforceable. Snowbird is partially correct, *Dalury* is a minority position. It is also a decision from the State of Vermont which, like Utah, places great emphasis upon

A "Google" search under the words "ski Utah", for example, produces over 130,000 entries whereas a search for "ski Washington" produces only 739! Searches for "ski Vermont" and "ski Colorado" produce results similar to "ski Utah", 91,000 and 156,000, respectively.

its skiing industry and also has the equivalent of an *Inherent Risk of Skiing Act*.

Rothstein, therefore, submits that *Dalury* is, in fact, the more persuasive authority.

As a seventh point, Snowbird insists that *Phillip v. Monarch*, 668 P.2d 982 (Colo. App. 1983) which invalidated pre-injury *Release Agreements* based upon the *Colorado Ski Safety Act* is distinguishable because that *Law* enumerates a ski resort operators duty of care whereas Utah's *Inherent Risk of Skiing Act* does not. Admittedly, the *Colorado Ski Safety Act* does enumerate duties which ski operators owe to patrons and provides that a violation of these duties constitutes negligence. The enumerated duties, however, are not exclusive of additional duties owed by ski operators under the Colorado *Law*. Notwithstanding the duties set out in the *Colorado Ski Safety Act*, other common law duties exist as well. See *Boyer v. Crested Butte Mtn. Resort*, 960 P.2d 70, 78 (Colo. 1998); *Trigg v. City & Cnty. of Denver*, 784 F.2d 1058, 1059-60 (10th Cir. 1986). Although the Utah *Inherent Risk of Skiing Act* does not set out similar enumerated duties as the *Colorado Act*, it does define and allocate duties of both ski resort operators and patrons of those resorts. In fact, this Court has stated that the Utah *Inherent Risk of King Act* does define a ski resort operator's duty of care. See *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1045-46 (Utah 1991).

Snowbird claims as its eighth point that Colorado courts have retreated from or abandoned altogether the holding in *Phillips v. Monarch Recreation Corp.*,

668 P.2d 982 (Colo. App. 1983), wherein the Colorado Court of Appeals held that a preinjury *Exculpatory Agreement* could not modify the *Colorado Safety Act*'s allocation of duties of care between skiers and ski operators. Snowbird bases this contention on the holdings in *Bauer v. Aspen Highlands King Corp.*, 788 F.Supp. 472 (D. Colo. 1992) and *Mincin v. Vail Holdings, Inc.*, 308 F.3d 1105 (10th Cir. 2002). But neither *Bauer* nor *Mincin* had anything to do with the *Colorado Ski Safety Act*. *Bauer* involved a pre-injury *Release* signed in conjunction with renting skiing equipment and *Mincin* involved mountain biking.

Snowbird's ninth point is that other than Rothstein's near fatal accident, no other injuries have occurred in connection with the mine timber cribbing retaining built across the *Fluffy Bunny Run*. This also may or may not be true. But what Snowbird neglects to mention is that in 2003 there was a "low snowpack" whereas in other years the snow was so deep that the wall could be safely skied over. (*Rothstein Depo.*, pp. 121-24, R.54.) Snowbird likewise glosses over the fact that its Director of Snow Safety, Dean Cardinale, told Rothstein and Rothstein's friend, Bradley Sachs, that the retaining wall should have been "marked," that it was hazardous and, more importantly, that the accident was Snowbird's fault. (R. 42 and 57.)

Snowbird's tenth and final point may be, perhaps, its strongest. Snowbird states that despite his near fatal accident and permanent injuries, Rothstein skied

36 days the following ski season at Snowbird. The significance of this fact is that skiing is a passion for some people especially in Utah. Utah is a ski culture, one which fosters down-hill skiing and, as a consequence, attracts visitors and residents for whom skiing is a quality of life issue.

**NOTWITHSTANDING SNOWBIRD'S ARGUMENTS TO THE
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PUBLIC POLICY AND SO SHOULD UTAH**

The case law on the enforceability of pre-injury *Releases* signed by persons engaged in recreational activities has been collected in *Anno.*, 54 ALR 5h 513(1997). A review of this authority shows that those states such as Vermont and Colorado, which foster and promote their ski industry as part of their culture, have laws similar to Utah's *Inherent Risk of Skiing Act* and based upon those laws these States do not enforce pre-injury *Releases*. A review of this authority also shows that those states without a similar ski culture or similar laws defining the duty of care ski resorts owe to their patrons, typically enforce pre-injury *Releases* when the injury causing event falls within the type of risk inherent to that particular recreational activity, but when the injury occurs as a result of some event not normally encountered in that activity, pre-injury *Releases* are not enforced. Rothstein submits, therefore, that no jurisdiction would enforce the *Releases* involved in this case which purport to absolve Snowbird from its liability for


having constructed a massive mine cribbing retaining wall across a ski run without marking that hazard or otherwise warning Rothstein and other patrons of the presence and potential lethality of this obstacle.

CONCLUSION

This is a significant case to the State of Utah. How this Court rules on the question of whether *Release and Indemnity Agreements*, such as those required by Snowbird as a precondition to the purchase of a season's pass, are enforceable will have far reaching ramifications. If the Court upholds such *Release and Indemnity Agreements* there will be little, if any, incentive for ski resort operators to spend time and/or resources to make their resorts as safe as possible for patrons, and that would be in direct contravention to the stated purpose and objective of the *Inherent Risk of Skiing Act*. This Court, therefore, should reverse or vacate the District Court's grant of summary judgment and remand with instructions to allow this case to proceed to trial.

DATED this 18th day of September, 2006.

SUITTER AXLAND

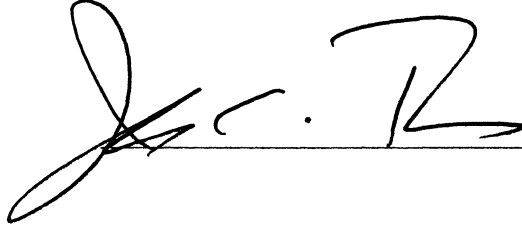


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CERTIFICATE OF SERVICE

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 18th day of September, 2006.

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A handwritten signature in black ink, appearing to read "K.J. Simon", is written over a horizontal line.

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