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Man vs. Mountain

MAN VS. MOUNTAIN

How Colorado Season-Pass Waiver Provisions Limit Liability Claims by Injured Skiers against Negligent Ski-Area Operators

Zachary Warkentin

INTRODUCTION

Mountains can be unforgiving places, and sports that take place on their terrain are endeavors of risk. Every year, numerous skiers and snowboarders accept this fact as a necessary evil, endured to participate in winter sports. The ever-present risk of injury, however, is no longer mitigated by reasonable liability protections against ski area operator negligence. In Colorado, current season-pass waiver provisions have removed liability protections from the sport. Such season-pass liability waivers (“waivers”) constitute adhesion contracts, mandating that pass-holders give up all legal recourse opportunity for negligent injury in order to participate in the sport on a season-pass basis. Moreover, these provisions are buried deep within dense contractual language, and are non-negotiable.¹ Ski area operators offer season-passes at reduced rates with the caveat that participation absolves the ski area operator from almost all liability, **even in situations that result in death.**² Therefore, ski operators profit from engendering the endeavor of risk by providing a platform for participation, yet they refrain from sharing in the inherent liability of faulty risk prevention. The Colorado legislature has been explicit and successful in its attempts to limit negligence claims against ski-areas.³ Further, the crafty drafting of waiver provisions leaves season-pass holders unknowingly bereft of nearly any legal recourse for severe injury incurred as a result of ski area negligence.

¹ See, Colorado Pass, Season Pass Application, *Warning, Assumption of the Risk, Release of Liability and Indemnification Agreement* (2007-08).

² *Id.*

³ Eric A. Feldman and Alison Stein, *Assuming the Risk: Tort Law, Policy and Politics on the Slippery Slopes*, 41.

I. THE CURRENT STATE OF SEASON-PASS LIABILITY IN COLORADO

The controlling Colorado statute of skier liability, The Colorado Ski Safety Act (“CSSA”) of 1979 (amended in 1990 and 2004), aims to limit liability claims against Colorado Ski Areas by skiing participants.⁴ The CSSA is an example of how powerful political and economic actors strategically use the assumption of risk to protect their material interests.⁵ It provides, “no skier may make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing.”⁶ “Inherent dangers” is intentionally ambiguous and allows ski areas to argue almost any cause of an injury as being encompassed in its purview.⁷ The Colorado legislature added this provision to the CSSA in 1990 with the dual-intention of decreasing ski areas liability and of deterring future tort claims.⁸

However, Colorado courts have not been completely compliant with the legislature’s intentions when interpreting, “inherent dangers.”⁹ For example, in the early 1990s, David Graven, a Denver-based attorney, claimed that he was injured due to Vail’s negligence after he slipped down an unmarked, steeply pitched ravine off an in-bounds run, and careened downward for over forty feet.¹⁰ As a result of the fall, Graven suffered several serious injuries.¹¹ The Colorado Court of Appeals dismissed a claim of negligence against Vail because the definition of “inherent dangers” in the Colorado Ski Safety Act precluded Graven’s basis for a claim.¹² However, in 1995, the Colorado Supreme Court reversed and remanded the case.¹³ The Court held that despite the Court of Appeal’s finding as a matter of law, there was sufficient evidence

⁴ Ski and Safety Act, C.R.S § 33-44-101 (1990).

⁵ Eric A. Feldman and Alison Stein, *Assuming the Risk: Tort Law, Policy and Politics on the Slippery Slopes*, 42.

⁶ Ski and Safety Act, C.R.S. § 33-44-112 (1990).

⁷ See, Eric A. Feldman and Alison Stein, *supra* note 5.

⁸ 1990 Amendments to Ski Safety Act of 1979, S.B. 90-80, Ch. 256, Laws of 1990, Section 1.

⁹ Eric A. Feldman and Alison Stein, *supra* note 5, at 40.

¹⁰ See, *Graven v. Vail Associates, Inc.*, 909 P.2d 514, 515 (Colo. 1995).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

of causation to raise an issue of fact for a jury to decide whether the ravine itself constituted an inherent danger in skiing.¹⁴ The *Graven* ruling effectively narrowed the legal perception of inherent dangers to include only those dangers reasonably encountered in the normal endeavor of skiing.

As a result of the *Graven* holding and other similar decisions, Colorado courts construe the CSSA to require a jury determination to the nature and extent of the duty owed by a ski area operator relative to the alleged "inherent danger" which caused the injury.¹⁵ If the danger that caused the injury is "inherent" in the assumption of risk of skiing, the ski operator is absolved of liability; if not, the operator may be liable.¹⁶ Naturally, ski areas are wary leaving a determination like this in the unpredictable hands of juries; and subsequently, they attempted to eliminate any potential for a finding by expanding the definition of inherent dangers within the text of season-pass waivers.¹⁷ The non-exhaustive list of current dangers includes: marked and unmarked obstacles, bumps, stumps, rocks of various sizes and failure of protective barriers and fencing.¹⁸

The waivers inappropriately lump man made and natural hazards into the same definition. Concededly, the on-mountain presence of stumps, bumps and rocks is part of the assumed risk of skiing. These hazards are naturally occurring characteristics of the terrain on which the sport takes place. But the failure of protective barriers is not a naturally occurring part of the assumed risk of skiing. Essentially, the waiver absolves ski areas of liability even if operator negligence is

¹⁴ See, *Graven*, 909 P.2d 514.

¹⁵ James H. Chalath, *2006 Survey of Ski Law in the United States*, <http://www.chalathatten.com/CM/Articles/2006-Survey-of-Ski-Law-in-the-United-States.asp>.

¹⁶ See, *Id.*

¹⁷ Colorado Pass, *Assumption of the Risk Agreement*, *supra* note 1.

¹⁸ *Id.*

the cause of serious injury.¹⁹ He or she promises not to sue the resort operator by “releasing any right to make a claim or file a lawsuit against any released party.”²⁰

Ski area operators and waiver proponents defend the waivers as necessary to keep ticket prices low because costly litigation results in increased overhead, which is naturally passed on to the consumer.²¹ In this regard, they are in line with the legislative intent of the CSSA, serving as a liability shield for ski areas.²² But critics counter that the liability waivers are essentially adhesion contracts that effectively vitiate the rights of skiers.²³ By vitiating any legal recourse for skiers through the use of the waiver provisions, Colorado ski areas have mitigated the risk of litigation in provisions that are neither negotiated nor often read by oppositional contracting parties. By signing a season-pass application, skiers give away their private right to contract freely as to liability, as well as their right to seek just remedy in a situation of negligent or gross-negligent operator action resulting in injury or death.

II. ADHESION CONTRACTS

The underpinnings of adhesion contracts lie in the doctrine of unconscionability.²⁴ Legislatures often prohibit, and courts often invalidate, adhesion contracts as a matter of public policy because they undercut one party’s private right to contract.²⁵ Governmental bodies are reticent to encourage policy that limits options for consumers operating in a free-market economy.²⁶ One reason for this is that adhesion contracts generally involve a great disparity in

¹⁹ *Id.*

²⁰ *Id.*

²¹ It is important to note that the cited liability waiver is in relation to season passes only, and does not apply to single-day lift tickets.

²² Eric A. Feldman and Alison Stein, *supra* note 5, at 40.

²³ James H. Chalat, *supra* note 15.

²⁴ *See*, DAVID G. EPSTEIN, ET AL., MAKING AND DOING DEALS: CONTRACTS IN CONTEXT (2d Ed., Matthew Bender & Company, Inc) (2006).

²⁵ Eric A. Feldman and Alison Stein, *supra* note 5, at 16, FN 52 (Citing Peter Schuck, *Rethinking Informed Consent*, 103 YALE L. J. 899, 912 (1994)).

²⁶ *See, Id.*

bargaining power between the parties.²⁷ A great disparity in bargaining power usually requires one of two things: (1) a demonstration by the plaintiff that no opportunity for negotiation was present at the time the contract for services was formed; or (2) that the services could not be obtained elsewhere.²⁸ When a party with modest bargaining power signs a commercially unreasonable contract, with little or no knowledge of its terms, it is unlikely that consent was present.²⁹

Here, the waiver provisions are non-negotiated, and likely never read by consumers. Season-passes are unobtainable without assenting to the liability waiver, which is likewise tucked deep within the voluminous waiver verbiage.³⁰ As a result, most people barely give the waiver provision and the additional contract language a second thought as they fill out the application.³¹ Additionally, the season passes are offered on a take-it or leave-it basis. They include the abrogation of private rights of action that likely would not be released by an informed party.³² Thus, the waivers run contrary to modern conceptions of equitable contract negotiation, and contain a provision of absolute liability release that undermines the courts' ability to shape public policy in governing the system of torts.³³

III. ARGUMENTS IN FAVOR OF THE USE OF THE WAIVER PROVISIONS

Ski areas argue that skiers are welcome to buy single-day passes, which have less extensive liability releases.³⁴ The argument is a smokescreen. The ultimate issue here does not concern day passes, but the validity of the contractual terms embodied within the season-pass

²⁷ See, *Bauer v. Aspen Highlands Skiing Corp.*, 788 F. Supp. 472 (D. Colo. 1992).

²⁸ *Bauer*, 788 F. Supp. at 474-75.

²⁹ DAVID G. EPSTEIN, *supra* note 24, at 431.

³⁰ Colorado Pass, *Assumption of the Risk Agreement*, *supra* note 1.

³¹ Eric Dexheimer, *Skier Beware: Vail Hits Back When an Injured Woman Sues*, WESTWORD.COM (2005), <http://www.westword.com/2005-04-07/news/skier-beware/>.

³² *Id.*

³³ DAVID G. EPSTEIN, *supra* note 24, at 416.

³⁴ Eric Dexheimer, *supra* note 31.

waivers. Skiers are not in a position to discover and correct risks of harm, and they cannot insure against a ski area's negligence.³⁵ Ski areas, not skiers, are best suited to foresee and control hazards and to guard against negligence of their agents and employees.³⁶ Therefore, by offering day-passes as an alternative, ski areas remedy none of the concerns created by the particular waiver provisions at issue. Moreover, ski-areas are aware that the low cost of season passes keeps liability concerns away from the forefront of season pass-purchasers' thoughts.³⁷

Liability waivers are additionally creeping into Colorado single-day passes. Both Silverton Mountain and Echo Mountain have recently incorporated complete liability waiver provisions into day passes.³⁸ The two separate areas are the only mountains in Colorado ever to do so.³⁹ Critics decry the liability waivers as ignoring the intention of the CSSA, which only immunized ski area operators from the inherent dangers of skiing.⁴⁰ Proponents counter that Silverton and Echo Mountain are unique areas, and that their actions simply serve notice to the skier that he is about to engage in a more dangerous ski experience.⁴¹ It is too soon to determine whether or not other Colorado ski areas will follow their lead. Furthermore, the statutory validity of these waivers has yet to be challenged in Colorado courts.

Waiver proponents further argue that limiting ski-operator liability is necessary to promote the success of the ski-industry, an industry the Colorado government relies on as a source of taxable income.⁴² Indeed, Colorado is recognized as one of the premier ski vacation destinations in North America, and during the 2006-2007 ski season, 11.6 million people skied at

³⁵ DAVID G. EPSTEIN, *supra* note 24, at 417.

³⁶ *Id.*

³⁷ Eric Dexheimer, *supra* note 31.

³⁸ Jason Blevins, *Ski-resort Waivers a Slippery Slope?*, THE DENVER POST, Mar. 28, 2006, <http://www.newsmode.com/2006/03/27/ski-resort-waivers-slippery-slope/display.jsp?id=4455>.

³⁹ *Id.*

⁴⁰ Jason Blevins, *supra*, note 38.

⁴¹ *Id.* (Silverton is generally regarded as an advanced-skier only mountain, and Echo Mountain primarily consists of terrain parks).

⁴² See, e.g., U.S. Census Bureau, *2002 Economic Census, Arts, Entertainment, and Recreation Colorado*, CENSUS.GOV, http://www.census.gov/econ/census02/data/co/CO000_71.HTM.

least one day at resorts in the United States.⁴³ The ski areas argue—similar to the Proponents of the approved 1990 CSSA amendments—that increased liability for ski resorts will increase overall costs, having a ripple effect through the industry eventually landing on consumers' shoulders.⁴⁴

As the price for a single day lift ticket in Colorado nears \$100,⁴⁵ it is increasingly difficult to validate a pro-waiver argument. It makes good policy, however, that the party best suited to monitor the facility carries the burden of protection.⁴⁶ The ski area operator (as opposed to the skiers) is in the principle position to maintain and patrol its runs.⁴⁷ Skiers submit to the ski area's control when they pay to play.⁴⁸ They are in no position to monitor the safety of the ski area.⁴⁹

IV. NEW DEVELOPMENTS IN SKI-AREA RESPONSE

Ski operators may be attempting to deter litigation on their own by aggressively challenging new claims. In a recent, high-profile case stemming from an incident that occurred in 2004, Vail's attorneys not only contested a \$4,000 claim by season-pass holder and Eagle-Vail resident, Julia Parsons, they *countersued* for \$100,000 dollars in attorney's fees.⁵⁰ The suit originated when Parsons was crossing Lionshead Bridge at the bottom of the front side of Vail Ski Resort and caught her knee on a metal bracket of the bridge that had been bent into oncoming traffic by a snowplow.⁵¹ The injury to Parsons's knee required three layers of stitches.⁵² Vail had planned to tear the bridge down in two months.⁵³ Colorado District Judge

⁴³ David Williams, *Ski Execs Target Asian Markets*, ROCKY MTN. NEWS, Jan. 4 2008.

⁴⁴ Eric A. Feldman and Alison Stein, *supra* note 5, at 40.

⁴⁵ A single day pass to Vail in 1996 cost \$38. Tickets presently cost \$97 (vail.com); a 255.3% increase over a 13-year period. Inflation over that period was never over 3.3% and adjusted accordingly, a 1996 single day pass would cost approximately \$54 today.

⁴⁶ Discussed *supra*.

⁴⁷ See, *Hanks v. Power Ridge Restaurant Corp.*, 276 Conn. 314, 331-32 (2005).

⁴⁸ *Id.* at 332.

⁴⁹ *Id.*

⁵⁰ Eric Dexheimer, *supra* note 31.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

Thomas Moorhead dismissed the claim because Ms. Parson signed the liability waiver on the season pass application.⁵⁴ But Vail was not finished. Vail countersued Parsons for its attorney's fees, arguing that because she signed its liability release waiver she released Vail from all liability except in matters of "wanton or willful" conduct.⁵⁵ A portion of the "Assumption of Risk, Release of Liability and Indemnification Agreement" in the 2007-08 Colorado Pass (similar to the one Parsons signed, which grants access to Vail, Beaver Creek, Keystone, Breckenridge and Arapahoe Basin Mountains) reads, "The Undersigned agree to pay all costs and attorney's fees incurred by any Released Party [Vail and Associates] in defending a claim or suit brought by or on behalf of the Undersigned."⁵⁶

Parsons subsequently dropped her option to appeal the District Court's dismissal in exchange for a drop of the countersuit.⁵⁷ Parsons and her attorney, Joseph Bloch, admitted to being blindsided by Vail's aggressive countersuit.⁵⁸ Afterward, Parsons acknowledged that she never would have filed the suit had she known that Vail's attorneys would file the countersuit.⁵⁹ Vail defended its unusually aggressive actions as simply a justified response to a claim without merit.⁶⁰

But Vail also intended to make an example of Parsons. Because Parson's \$4,000 request pales in comparison to rewards previously sought in multi-million dollar negligence actions against Vail, it appears that Vail's countersuit represents a preemptive strike against future claimants. Its primary purpose aimed at preventing a flood of similar claims. By permitting small-award, negligence-based litigation to go unchallenged, Vail would passively open itself

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Colorado Pass, *Assumption of the Risk Agreement*, *supra* note 1.

⁵⁷ Eric Dexheimer, *supra* note 31.

⁵⁸ Steve Lipscher, *Vail Drops Its Countersuit Against Skier Hurt at Bridge*, THE DENVER POST, Feb. 28, 2006.

⁵⁹ *Id.*

⁶⁰ *Id.*

(and other Colorado ski areas) to a potential wave of litigation. But the Parsons case marks a dramatic shift in Colorado ski-area litigation policy.⁶¹ Vail's actions are a threat to future claimants that ski-areas will not only defend their actions or omissions in court, but will aggressively counter-sue tort claimants.⁶²

VI. CONCLUSION

In the interests of public policy, the Colorado government should reassert equitable liability in ski-area operators. It is reasonable to expect them to be accountable for operator negligence. Ski areas, not skiers, are in the best position to maintain and regulate safety within their boundaries. In short, the nature of the ski business should place implicit responsibilities on ski-area operators, and they should not be allowed to immunize themselves from basic conceptions of negligence liability. Moreover, the permitted use of adhesive waiver provisions in season and some day passes gives ski areas less incentive to enact measures better protecting their patrons. This leaves skiers with two unsatisfactory choices: to boycott their favorite mountain in hopes that it will amend its negligence policy; or, to go ahead and ski, absent the typical protections afforded consumers in the normal course of business.

⁶¹ *Id.*

⁶² Eric Dexheimer, *supra* note 31.