DISTRICT COURT, GRAND COUNTY, COLORADO Court Address: 307 Moffat Avenue, P.O. Box 192, Hot Sulphur Springs, CO, 80451	DATE FILED: December 26, 2012
Plaintiff(s) SALYNDRA E FLEURY v. **Defendant(s)** INTRAWEST WINTER PARK OPERATIONS CORPORA	⚠ **COURT USE ONLY** ⚠
	Case Number: 2012CV132 Division: 1 Courtroom:

ORDER GRANTING THE DEFENDANT'S MOTION FOR DETERMINATION OF LAW AND FOR JUDGMENT ON THE PLEADINGS

GRANTED.

Issue Date: 12/26/2012

Mary C. Hoak

MARY CLARKSON HOAK
District Court Judge

DISTRICT COURT, GRAND COUNTY, COLORADO Post Office Box 192, 307 Moffat Avenue Hot Sulphur Springs, CO 80451 970-725-3357	
Plaintiffs: SALYNDRA E. FLEURY, individually, on behalf of Indyka Norris and Sage Norris, and as surviving spouse of Christopher H. Norris **v.** **Defendant:** INTRAWEST WINTER PARK OPERATIONS CORPORATION	▲ ▲ **COURT USE ONLY**
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This matter comes before the Court on Defendant Intrawest Winter Park Operations Corporation's ("Winter Park") Motion for Determination of Law and for Judgment on the Pleadings filed July 31, 2012. The Plaintiff, Salyndra Fleury, individually and on behalf of her infant children, filed a Response on August 17, 2012. The Defendants filed a Reply on August 24, 2012. Upon being fully apprised of the facts and law, the Court enters the following Order:

BACKGROUND

On January 22, 2012, Christopher Norris was fatally injured in an avalanche while skiing at the Winter Park ski area. Mr. Norris was skiing inbounds in a treed area when the avalanche occurred. His surviving wife, Ms. Fleury, filed a Complaint and Jury Demand on May 10, 2012 alleging two claims for relief: (1) negligence and wrongful death and (2) willful and wanton conduct. She seeks an unspecified amount of damages, including "non-economic and economic injury and damages including but not limited to, pain, suffering, grief, shock, emotional stress, loss of companionship, loss of household services, loss of earnings and funeral and burial expenses." Complaint at ¶33. The Court incorporates the factual allegations in Plaintiff's complaint and accepts them as true for purposes of this motion.

ISSUES

I. WHETHER THE AVALANCHE ALLEGED IN PLAINTIFF'S COMPLAINT IS AN INHERENT DANGER AND RISK OF SKIING WHICH PRECLUDES PLAINTIFF FROM BRINGING HER CLAIM UNDER THE SKI SAFETY ACT OF 1979, C.R.S. §33-44-101 *ET SEQ*. ("SSA").

II. WHETHER THE SSA CAPS THE MAXIMUM AMOUNT OF COMPENSATORY DAMAGES RECOVERABLE AGAINST A SKI AREA OPERATOR ON DERIVATIVE CLAIMS AT $250,000, PRESENT VALUE. WHETHER THE

CAP LIMITS THE PLAINTIFF'S RECOVERY TO $250,000 BOTH INDIVIDUALLY AND ON BEHALF OF HER INFANT CHILDREN.

STANDARD OF REVIEW

The Court addresses this motion under C.R.C.P. 12(c) instead of C.R.C.P. 12(b)(5). Rule 12(b)(5) motions can be made at any time before pleading if further pleading is permitted, whereas a Rule 12(c) motion is appropriate after the pleadings are closed. When considering a motion for judgment on the pleadings, the Court must construe the allegations of the pleadings strictly against the movant and must consider the allegations of the opposing party's pleadings as true. Abts v. Bd. of Ed., 622 P.2d 518, 521 (Colo. 1980).

Winter Park also seeks a determination of law under C.R.C.P. 56(h). Rule 56(h) states, "At any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question."

CONCLUSIONS OF LAW

1. Ms. Fleury's claims are precluded under the SSA because the avalanche alleged in her complaint is an inherent danger and risk of skiing.

Winter Park argues the SSA provides it immunity from the Plaintiff's claims because Mr. Norris' death resulted from an "inherent danger and risk of skiing." C.R.S. §33-44-112. "Inherent dangers and risks of skiing means those dangers 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.... variations in steepness or terrain, whether natural or as a result of slope design..." C.R.S. §33-44-103(3.5). The SSA provides that "...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." C.R.S. §33-44-112. An injury that results when a ski area operator violates a statutory duty, however, is not considered an inherent danger or risk. C.R.S. §33-44-103(3.5) and 33-44-104. As such, a ski area operator is not immune from liability when the injury allegedly results from negligence *per se*. C.R.S. § 33-44-104; Doering ex rel. Barrett v. Copper Mountain, Inc., 259 F.3d 1202, 1212 (10th Cir. 2001).

Winter Park seeks dismissal of the Plaintiff's entire complaint because the snow, terrain, and weather conditions that allegedly created the avalanche which killed Mr. Norris are inherent dangers and risks under the SSA. Winter Park also argues that it had no statutory duty to warn or close the trail which would make them negligent *per se*. It, therefore, contends it is immune from liability under the SSA.

Ms. Fleury responds with three arguments. She first argues that the legislature intended to limit the list of inherent dangers and risks to those that are present "regardless of any and all

reasonable safety measures which can be employed." C.R.S. §33-44-102. Because Winter Park knew or should have known the snow conditions could result in an avalanche they had a duty to either warn skiers or close the ski run. Winter Park's failure to employ reasonable safety measures places the injury producing avalanche outside the scope of C.R.S. §33-44-103(3.5). At the very least, and alternatively, Ms. Fleury maintains that whether the avalanche is an inherent risk of skiing presents an issue of material fact which must be resolved by a jury. Second, Ms. Fleury states that because the immunity provision in the SSA contravenes the common law of negligence, it must be strictly construed in her favor and against Winter Park. See Robbins v. People, 107 P.3d 384, 388 (Colo. 2005). Consequently, Ms. Fleury argues her claim is not precluded under the SSA because C.R.S. § 33-44-103(3.5) does not specifically list "avalanche" as an inherent danger and risk of skiing, nor does she believe "avalanche" can be inferred from other language in the statute. Third, Ms. Fleury seeks to convert this to a motion for summary judgment by presenting evidence outside the pleadings that Winter Park had a duty to control avalanche danger within the ski area boundary. The Court addresses each of these arguments in turn.

a. The inbounds avalanche that killed Mr. Norris is an inherent danger and risk of skiing even though "avalanche" is not specifically listed under C.R.S. §33-44-103(3.5).

After carefully reviewing the briefs and applicable authorities, and construing allegations of the complaint strictly against Winter Park, the Court concludes that the inbounds avalanche falls squarely within the definition of inherent dangers and risks of skiing. The complaint alleges that Winter Park "knew or should have known that the existing snow base, upon which... storms deposited their snowfall, was weak, unstable and in a condition known as 'rotten snow' which created dangerous avalanche conditions due to weakness, instability and poor condition of that pre-existing snow base." Complaint at ¶20. Ms. Fleury also points to warnings from the Colorado Avalanche Information Center indicating a heightened risk of avalanche danger resulting from a combination of terrain, weather conditions, and snow pack. Complaint ¶9-10. The warnings cautioned "natural and human triggered avalanches are very likely. Be careful near or below any slope over 30 degrees." Id. The warning also indicated new snow would fall and "the weak snowpack will not be able to handle even this modest new load." Id. These allegations, when taken as true, indicate that the combination of "changing weather conditions," "snow conditions," and "variations in steepness or terrain" as enumerated under C.R.S. §33-44-103(3.5) created the fatal avalanche.

This finding is consistent with rulings of other courts, in particular Kumar v. Copper Mountain, Inc., 431 Fed.Appx. 736 (10th Cir. 2011) which applies Colorado law. In Kumar, the plaintiff suffered severe injuries when he skied off a cornice that formed where several ski runs converge at Copper Mountain ski area. Id. at 737. The plaintiff brought both common law negligence and negligence *per se* claims against Copper Mountain. Id. The Court concluded that even though "cornice" is not specifically named as an inherent danger and risk of skiing, "the cornice at issue falls within the statutory definition of inherent danger. Id. At 738. At a minimum, it either falls within the section relating to snow conditions as they exist or change, or the provision covering variations in steepness or terrain." Id.

Based on the plain language of the statute and the persuasive authority of Kumar, the Court does not agree with Ms. Fleury's narrow interpretation that C.R.S. §33-44-103 must include the term "avalanche" in order for Winter Park to have immunity. The SSA defines inherent dangers and risks of skiing as "those dangers and conditions that are part of the sport of skiing, *including* changing weather conditions, snow conditions as they exist or may change...variations in steepness or terrain..." (emphasis supplied). While the Colorado Supreme Court has reserved judgment on whether the list of inherent dangers is exclusive, "it has indicated that the word 'include' typically signifies extension or enlargement and is not definitionally equivalent to the word 'mean.'" Barrett, 259 F.3d at 1214.

b. Winter Park is not required to take reasonable safety measures to mitigate the inherent dangers and risks of skiing absent a statutory duty under the SSA.

The Court also finds no legal requirement for Winter Park to take all reasonable safety measures, such as posting warning signs or closing the run, before an avalanche may be considered an inherent risk. The Plaintiff's argument is premised a very narrow interpretation of the SSA's legislative declaration, C.R.S. §33-44-102. Ms. Fleury also relies on Graven v. Vail Associates, Inc., 909 P.2d 514 (Colo. 1995) which was abrogated in 2004 by amendments that broadened the definition of inherent dangers and risks, and Ciocian v. Vail Corp., 251 P.3d 1130 (Colo. App. 2010), which is inapposite as it addresses only negligence *per se*. Cases such as Rowan v. Vail Holdings, Inc., 31 F.Supp.2d 889 (D. Colo. 1998) and Barrett, 259 F.3d 1202 are also no longer instructive since they rely on the abrogated Graven decision.

The Court agrees with Winter Park that the definition of inherent danger and risk under C.R.S. §33-44-103 is unambiguous and, therefore, it is unnecessary to rely on interpretive rules of statutory construction. The Court will note, however, that the broad purpose of the SSA is to define legal responsibilities of both ski area operators and skiers using a ski area, which includes defining the rights and liabilities existing between operators and skiers. C.R.S. §33-44-102; Kumar, 431 Fed.Appx. at 737. If a ski area can only be immune after it has employed all reasonable safety measures to mitigate inherent dangers, then a primary purpose of the SSA would be defeated. In other words, a ski area could be liable for any injury resulting from failure to mark a bare patch, ice or man-made snow. This contradicts the plain language and purpose of the SSA and, as explained above, has failed to gain traction in the courts.

For example, in Kumar the plaintiff attempted to circumvent the SSA by alleging that his injuries did not result from an inherent danger of skiing (the existence of the cornice), but instead from Copper Mountain's alleged failure to mark the feature. Id. at 737. The Court reasoned that, "the language of the SSA does not restrict the Act's application to claims resulting 'solely' from the inherent dangers of skiing, and Colorado courts recognize that there may be multiple 'but for' causes of an injury." Id. Here, the Plaintiff alleges that Winter Park's failure to warn or close the trail were proximate causes of Mr. Norris' death. Based on the reasoning in Kumar as well as the legislative purpose of the SSA, the Court rejects Plaintiff's argument that Winter Park must take reasonable safety measures in order to be immune.

The Court also rejects the Plaintiff's argument that the pleadings present issues of material fact. The Plaintiff bases her argument on Graven and its subsequent line of cases, which

are no longer good law. The SSA contains no language that could remotely be viewed as requiring Winter Park to warn skiers of high avalanche danger in the area in which Mr. Norris skied. Consequently, there are not issues of material fact about whether Winter Park had a duty to warn or close the trail. There is also no evidence of negligence *per se* that would overcome Winter Park's immunity under the SSA. The Plaintiff alleges that a combination of weather, snow conditions and the terrain created the avalanche. Winter Park does not dispute these facts. Consequently, there exist no genuine issues of material fact and Plaintiff's factual allegations cannot support her claims as a matter of law.

c. Plaintiff's additional evidence does not materially assist the Court in resolution of this issue and the Court declines to convert this motion into one for summary judgment.

The Court declines to consider the additional evidence submitted by Ms. Fleury. See C.R.C.P. 12(c) (Court has discretion to consider evidence outside pleadings and convert motion). The issue before the Court is whether Winter Park is immune from liability for Mr. Norris' death under the SSA. The additional evidence is relevant to common law negligence and does not materially aid the Court in resolution of the issues presented in this motion. Only if Ms. Fleury's negligence claims fall outside the scope of the SSA can the Court consider common law negligence. Graven, 909 P.2d at 520 (partially abrogated on other grounds).

d. Conclusion

The Court concludes that the inbound avalanche that killed Mr. Norris is an inherent danger and risk of skiing. Ms. Fleury may therefore not bring her claims or recover against Winter Park for economic and non-economic damages sustained from the avalanche. The Court realizes this ruling leaves Ms. Fleury and her infant children with no remedy to recover for the immeasurable losses they have suffered. The Court is also aware that this outcome may not appear just. The Court, however, is obligated to interpret and fairly apply the law as written and has done its best to fulfill this important role.

2. The SSA caps the maximum amount of compensatory damages recoverable against a ski area operator on derivative claims at $250,000, present value. This limits Plaintiff's recovery to $250,000 both individually and on behalf of her infant children.

Winter Park asks the Court to determine as a matter of law that the SSA caps compensatory damages in wrongful death cases to $250,000. The Colorado Supreme Court has addressed this exact issue in Stamp v. Vail Corporation, 172 P.3d 437 (Colo. 2007). The Colorado Supreme Court concluded that the SSA's damages cap provision, and not the WDA's damages cap provision, limits the amount of compensatory damages that may be recovered from a ski area operator in a skiing-related wrongful death action to $250,000." Id. at 447. Contrary to the Plaintiff's argument, the Colorado Supreme Court did not distinguish between economic and non-economic damages but rather found that all compensatory damages for derivative claims brought under the SSA are capped at $250,000. Compensatory damages include both non-economic and economic losses and are awarded to make the Plaintiff whole. Goodson v. American Standard. Ins. Co. of Wisconsin, 89 P.3d 409, 415 (Colo. 2004).

This Court is also not persuaded by Plaintiff's argument that applying the $250,000 cap to both economic and non-economic losses fails to give effect to the word "including" in C.R.S. §33-44-113. The SSA's limitation on liability reads, in relevant part, "The total amount of damages which may be recovered from a ski area operator by a skier who uses a ski area.... shall not exceed one million dollars, present value, *including* any derivative claim by any other claimant, which shall not exceed two hundred thousand dollars." C.R.S. §33-44-113 (emphasis supplied). First, Ms. Fleury was not a skier using the ski area. Rather she is bringing this claim a behalf of her deceased husband. A wrongful death claim is derivative by nature and the statute clearly limits derivative claims by any other claimant to $250,000. Stamp at 447. The statute applies to various types of claims for injury and wrongful death and must remain flexible to address various situations. Second, the statute makes no distinction between non-economic and economic derivative claims. The language of the statute is clear and unambiguous, therefore, there is no need to look at legislative hearing testimony. Based on the foregoing, the Court determines that as a matter of law, the Plaintiff's recovery of compensatory damages for her wrongful death claims is capped at $250,000, present value.

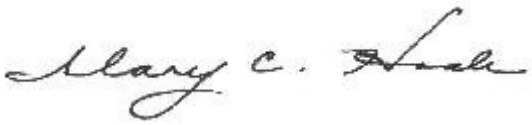
CONCLUSION

WHEREFORE, THE COURT GRANTS Winter Park's Motion for Determination of Law and for Judgment on the Pleadings. Ms. Fleury's first and second claims for relief are dismissed with prejudice. Should Ms. Fleury have been allowed to proceed with her claims, her compensatory damages for the wrongful death of her husband would, as a matter of law, be capped at $250,000, both individually and on behalf of her infant children.

The Court deems all pending motions moot.

The Court vacates the jury trial set on June 10, 2013, at 8:00 a.m.

SO ORDERED this 26th day of December, 2012.



Mary C. Hoak
District Judge