DISTRICT COURT, EAGLE COUNTY, COLORADO 885 Chambers Ave.; P.O. Box 597 Eagle, CO 81631	DATE FILED: June 8, 2018 CASE NUMBER: 2015CV15
Plaintiffs: **LOUISE H. INGALLS and STEPHEN E. CONLIN, individually and as surviving parents of TAFT M. CONLIN** v. Defendant: **THE VAIL CORPORATION**	**▲COURT USE ONLY▲** Case No.: 15CV15 Div.: 4

ORDER
GRANTING PLAINTIFF'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF THE LIABILITY WAIVER ASSOCIATED WITH THE 2011-2012 VAIL SEASON PASS APPLICATION FOR TAFT CONLIN

THIS MATTER is before the Court on the Motion *In Limine* to Exclude Evidence of the Liability Waiver Associated with the 2011-2012 Vail Season Pass Application for Taft Conlin (the "Motion") filed by Plaintiffs Louis H. Ingalls and Stephen E. Conlin (the "Plaintiffs") on May 31, 2017. The Response was filed by Defendants, the Vail Corporation (hereinafter, "the Defendant") on June 20, 2017. On June 22, 2017, the Plaintiffs filed their Reply. The Plaintiffs' Motion requests that the Court exclude evidence of the liability waiver. Both Plaintiff and Defendant have filed various notices of Supplemental Authority. Having reviewed the Motion, the parties' related Briefs and supplements as well as the Record, and being fully apprised of the merits, the Court now enters the following ORDER.

I. BACKGROUND

Plaintiffs claim the Defendant violated the portion of C.R.S. § 33-44-107(4) of the Colorado Ski Safety Act (the "SSA") that states:

If a particular trail or slope or portion of a trail or slope is closed to the public by a ski area operator, **such operator shall place a sign notifying the public of that fact at each identified entrance of each portion of the trail or slope involved. Alternatively, such a trail or slope or portion thereof may be closed with ropes or fences.** (emphasis added) *Id.*

Plaintiffs also claim the Defendant's violation of C.R.S. § 33-44-107(4) constitutes negligence and negligence *per se* pursuant to C.R.S. § 33-44-104(2). Section 33-44-104(2) provides in pertinent part:

> A violation by a ski area operator of any requirement of this article … shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of such operator.

Finally, Plaintiffs argue that the exculpatory agreement signed by the decedent's father is void as against public policy, unenforceable and inadmissible because such a waiver is ineffective to release claims for negligence *per se*. The Court disagrees that a violation of Section 33-44-107(4) constitutes negligence *per se*. Yet for the reasons below the, Court agrees that the exculpatory agreement would not be relevant to the matters that will be resolved at trial, and finds that therefore the waiver and facts relating to its execution are inadmissible. In furtherance of this holding, the Court strikes Defendant's affirmative defense of waiver.

II. ANALYSIS

A. The Traditional *Jones* Factors Don't Invalidate the Enforceability of the Instant Liability Waivers.

The parties acknowledge that exculpatory agreements have long been disfavored in Colorado. *Heil Valley Ranch, Inc. v. Simkin*, 783 P.2d 781, 783 (Colo. 1989). However, more recently the Colorado Supreme Court has found such agreements enforceable if they satisfy four factors. Thus, in determining whether an exculpatory agreement is valid and enforceable, a court must analyze: 1) the existence of a duty to the public; 2) the nature of the service performed; 3) whether the contract was fairly entered into; and 4) whether the intention of the parties is expressed in clear and unambiguous language. *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981).

As Defendant correctly posits, factors 2, 3 and 4 don't provide grounds for invalidating the waiver based on Colorado law.[1] "Colorado law has long permitted parties to contract away negligence claims in the recreational context." *See Espinoza v. Arkansas Valley Adventures, LLC*, 809 F.3d 1150, 1154 (10th Cir. 2016). The Colorado Supreme Court has expressly determined that businesses that engage in recreational activities do not perform services

[1] The second factor focuses on the nature of the service performed. This factor overlaps with the first factor because it calls the court to examine whether the service provided is an essential service. As above, the Court holds that skiing is merely a recreational activity and not an essential service.

The third factor is whether the contract was fairly entered into. There are no arguments that the agreement was unfairly entered into and like many other cases on this topic with similar facts, the Court finds that it was not. Plaintiff did not have to purchase the ski pass if he was uncomfortable with the exculpatory language. As the court already found, skiing is not an essential service. In such instances the Colorado Supreme Court has determined that there is no unequal bargaining power, such that an exculpatory agreement should be found invalid. *See, Jones*, 623 P.2d at 377-78. The fourth factor is whether the language of the release is clear and unambiguous. This Court finds the language is unambiguous .

implicating a public duty since skiing is a recreational and elective activity. As such an operator doesn't provide a service that is essential and of great importance overall to the public. *See Chadwick v. Colt Ross Outfitters*, Inc., 100 P.3d 465, 469 (Colo. 2004). Therefore, as appellate courts have repeatedly held, pursuant to the public portion of the *Jones* analysis, a ski operator such as Vail Resorts has no general duty to the public.

However, as mentioned above, the general assembly does impose a small, select number of specific duties on the ski operator. One is at issue here. C.R.S. § 33-44-107(4) of the Colorado Ski Safety Act states:

> If a particular trail or slope or portion of a trail or slope is closed to the public by a ski area operator, such operator shall place a sign notifying the public of that fact at each identified entrance of each portion of the trail or slope involved. Alternatively, such a trail or slope or portion thereof may be closed with ropes or fences. . A "slope" or "trail" is defined by C.R.S. §33-44-103(9). C.R.S. §33-44-107(4).

The SSA further states: "A violation by a ski area operator of any requirement of this article ... shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of such operator." C.R.S. § 33–44–104(2). Therefore, the typical first factor analysis may not be sufficient in this circumstance since specific statutory duties are at issue. When there is a specific duty to the public alleged to be violated this generally weighs against enforceability. Therefore the Court analyzes the public policy factor with more particularity, as described below.

B. Nonetheless, An Exculpatory Waiver Can't Contradict A Statutory Public Duty.

The Supreme Court has held that other public policy considerations not encompassed by the *Jones* factors may nonetheless invalidate a liability waiver even in the skiing context. *See, e.g., Boles v. Sun Ergoline, Inc.*, 223 P.3d 724, 726 (Colo. 2010). If an exculpatory waiver agreement purports to invalidate, contradict or excuse compliance with a statutory duty, such an agreement violates public policy. *Brigance v. Vail Summit Resorts,* Inc., 883 F.3d 1243 (10th Cir. 2018). For the reasons that follow, the Court concludes that the statutory negligence that would arise from Defendant's failure to comply with its statutory duty to mark trails it has decided to close in a peculiar and specific way, as set out in C.R.S. § 33-44 107(4), is not waivable by contractual means.

The primary argument made by Plaintiff to exclude all evidence of the exculpatory agreement is that the release here purports to release claims for negligence *per se,* which

Plaintiffs contend it cannot do as a matter of law. The Court disagrees that the statutory violation alleged by Plaintiffs is negligence *per se*[2]. Just as the statute defines the duty, the statute classifies a violation of that duty as simple "negligence." The statutory language identifying a ski operator violation as negligence *per se* has been eliminated by the legislature and is now replaced with the unadorned word "negligence."[3]

While there are not cases construing the proper standard of care imposed by such negligence, the Court views the change as a legislative effort to bring skier and ski operator into parity by making violations by either actionable negligence, while continuing a statutory scheme of select ski operator immunization. The Court finds that if the few specifically enumerated ski operator duties are not carefully complied with, that failure may expose skiers to dangers that the general assembly has carved out from those "inherent" to the sport of skiing. The Court therefore concludes that these directives are mandatory and the duty of the operator in this regard is one of "reasonable care." C.R.S. § 33–44–103; *See e.g. Mannhard v. Clear Creek Skiing Corp*., 682 P.2d 64, 65-66 (Colo. App. 1983).

In *Federal Insurance Co. v. Public Service Co.,* 194 Colo. 107, 570 P.2d 239 (1977), a non-skiing case involving transmission of electricity, the court held that a higher and different degree of care is required only when: (1) the activity is inherently dangerous; (2) the defendant possesses expertise in dealing with the activity; and (3) the general public would not be able to recognize or guard against the potential danger. The definition of "inherent risks and dangers of skiing" specifically excludes "the negligence of a ski area operator" as set forth in section 33–44–104(2). See C.R.S. § 33–44–103(3.5); *Kumar v. Copper Mountain, Inc.*, 431 Fed. Appx. 736, 737–38 (10th Cir. 2011). Further an avalanche is a danger the public generally recognized and is

[2] See C.R.S. 33-44-104 (2) which now states in part ". . . A violation by a ski operator of any requirement of this article … shall, to the extent such violation causes injury to an person or damage to property, constitute negligence on the part of such operator."

[3] Since its enactment in 1979, the General Assembly has amended the Act to increasingly limit a ski area operator's liability for skiing-related injuries. For example, in1990, the General Assembly added subsection 112, which immunizes ski area operators from liability for a skier's injury resulting from any of the inherent dangers and risks of skiing. *See* Ch. 256, sec. 7, § 33–44–112, 1990 Colo. Sess. Laws 1543. Subsequently, the General Assembly removed the words "per se" from the designation of a ski operator's violation as well as changed the definition of inherent dangers from "integral part of the sport of skiing to "dangers that are part of the sport of skiing," effectively abrogating that part of the Colorado Supreme Court's holding in *Graven v. Vail Associates*, 909 P.2d 514, 520 (Colo.1995). Ch. 341, sec. 1, § 33–44–103(3.5), 2004 Colo. Sess. Laws. 1393.

able to guard against. Thus, at least the first [4] and third [5] criteria are missing here. Those considerations, added to the removal of "negligence per se" language from the statute compel the conclusion that general assembly intended only a standard of ordinary negligence.

The Court's conclusion in this regard is buttressed by the purpose of the SSA which is "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. § 33–44–102. To this end the SSA provides: "Notwithstanding any judicial decision or any other law or statute 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 dangers and risks of skiing." C.R.S. § 33–44–112.

Additionally, the SSA also contains an "inconsistent law" provision that states: Insofar as any [legal] provision is inconsistent with the provisions of this article, this article controls." C.R.S. § 33-44-114. It follows that a purportedly controlling contractual provision that conflicts with or is inconsistent with the statute is also superseded or controlled by the statute.

As the Order Denying Defendant's Motion for Summary Judgment, dated April 14, 2017, (the "April 14, 2017 Order") previously held, the statutory terms regarding duties by a ski operator generally include any in-bounds skiable areas. This statutory language is clear and plain. *See, e.g., People v. Crouse*, 388 P.3d 39, 43 (Colo. 2017). If a ski operator decides to close a trail, it has the option of either placing a reasonable, visible sign of specific dimensions about the trail closure at each entrance of each trail or slope, or, roping or fencing the area off. The Court finds that pursuant to the SSA, common law negligence claims may be brought against the defendant for violations of these signage provisions, and liability for the operator's negligence in its compliance with the statutory mandate cannot be waived by contractual agreement. To hold to the contrary would permit the ski operator to completely eviscerate these enumerated statutory duties by contract.

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[4] The Court has not been referred to nor found any Colorado case law in which the "inherently dangerous" classification has been applied to passive activities or inaction pertaining to already existing dangerous natural conditions. *See e.g. Mannhard v. Clear Creek Skiing Corp*., 682 P.2d 64, 66 (Colo. App. 1983).

[5] For example, as to the third criterion, the facts indicate that with regard to the avalanche which actually caused Plaintiff's death, avalanche danger is a phenomenon of which the public is generally aware, and that conditions under which avalanches are likely to occur are easily recognized by most skiers. These factors are presumed to be fully known and appreciated by the skier himself. *See* Sections 33-44-109(3)(5) and(11).

Vail argues that since whether it closes a trail is a discretionary decision, it can waive the required performance of that statutory closing obligation. The Court disagrees. While trail closures are discretionary under the SSA, and generally there cannot be recovery for a trail that should have been closed but was not, that is not the situation here.[6] Here, there are sufficient averments in pleadings filed by the parties suggesting Vail intended to close Prima Cornice (or at least a portion thereof [the Upper Gate], but did not close the Lower Gate, (which may be either a separate trail, or, an additional entrance to Prima Cornice). These are issues for the jury to decide.

Here, Prima Cornice may have two separate entrances on a ridgetop. These entrances are apparently separated by about five hundred feet horizontally, and a lesser distance vertically. There is evidence to suggest that, although the Upper Gate was closed, the entire Prima Cornice trail or slope could be, and regularly was, accessed via the Lower Gate. There is apparent evidence to suggest that Vail may have been aware of this and, despite this knowledge, did not close off access to the entirety of Prima Cornice from the Lower Gate. Whether this is a violation of the statute is contested by the parties and as a result remains a question that must be resolved by the jury.

Vail further argues that only a ski area can determine an "identified entrance" for purposes of C.R.S. §33-44-107(4). The Court does not find it necessary to resolve this particular argument here as a matter of law; again it believes the issue is one for the trier of fact.

As stated in the Court's earlier April 14, 2017 Order, there is a factual dispute as to whether Vail was aware that skiers could and would hike or ski the entirety of Prima Cornice from the Lower Gate. If the jury finds that Vail was aware of this practice, and thus aware that the entirety of Prima Cornice is identifiable as a single trail, the jury could also find that when Vail decided to close one entrance to a trail or slope, it failed to properly close or mark an identified entrance" (the Lower Gate) to the area below the Upper Gate, despite a requirement by statute to properly mark or rope off all identifiable entrances to trails or slopes.

If a jury makes the prerequisite findings, liability could attach under C.R.S. §33- 44-104(2). Such liability would constitute the breach of a duty, an elemental requirement of negligence. An exculpatory agreement to waive such negligence is inoperable as a matter of law

[6] To put this obligation is a slightly different perspective, what is being examined in this lawsuit is not the "why" Vail marked or failed to mark trail or slope closures, but "how" Vail marked or failed to mark gate or trail closures.

and would therefore be irrelevant to the pertinent issues to be decided at trial. Therefore, admission or evidence of such a waiver agreement, as well as any facts surrounding its creation, would be irrelevant and inadmissible.

Although the SSA states that a breach of its provisions is negligence, the common law requirements for a recovery under a negligence theory are not displaced. *See generally Bayer v. Crested Butte Mtn. Resort, Inc.*, 960 P.2d 70 (Colo. 1998). As such, a claimant under the SSA is still required to prove the traditional elements of a negligence claim: duty, breach, causation, and damages. *See, e.g., Gallegos v. LeHouillier*, --- P.3d ----, 2017 COA 35 (Colo. App. 2017).

With a SSA claim, the duty is established by statute. Presuming a claimant can show that a ski area breached this statutory duty – for instance, through a lack of signage – the breach is also established through application of the SSA. Nevertheless, a claimant must still show both causation and resultant damages to successfully prevail. Plaintiff must be prepared to do so in this case.

This case contains a substantial number of interdependent issues, to a degree not present in most other negligence cases. For Plaintiffs to recover, they must establish that Vail had a duty under the SSA, and that this duty was breached. Plaintiffs must establish that a breach of the SSA caused injury, and then must establish damages. Along the way are questions ranging from Vail's alleged knowledge of access to closed areas via a different to comparative negligence if and when assessing damages and fault.

For these reasons, special interrogatories are appropriate to submit to the jury. Special interrogatories will not only assist in clarifying the record for both the public and any future appeal, but will also assist the jury in its duty. Therefore, the parties are to be prepared to be heard on the issue of special interrogatories.

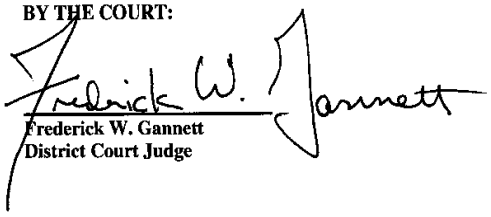
III. ORDER

For the foregoing reasons, a provision which is inconsistent with or purports to contradict liability for non-performance of the statutory duty alleged to have been violated here, C.R.S. 33-33-107(4), is void or voidable as a matter of law. In light of this conclusion, the Court further finds that an exculpatory agreement or facts pertaining to its' execution have no probative value or relevance to the issues to be decided at trial. Therefore, the Court **GRANTS** Plaintiffs' motion to exclude evidence of the liability waiver associated with the 2011-2012 Vail season

pass application signed on behalf of Plaintiffs' decedent pursuant to C.R.E. 403. In addition, the Court strikes Defendant's affirmative release and waiver defenses.

DONE this 8th day of June, 2018.

BY THE COURT:



Frederick W. Gannett
District Court Judge

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