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SNOWBOARDING LIABILITY: PAST, PRESENT AND FUTURE

Snowboarding has become a popular sport over the last ten years. The growth in the sport has resulted in injuries and lawsuits because of those injuries. States have been trying to help protect both the sport of snowboarding and the ski resorts by instituting ski safety statutes. Many states have been following the precedents set by ski cases that have already dealt with some of the same issues that are now affecting snowboarding. As this sport continues to grow, and may eventually include a similarly high number of participants as skiing, snowboarding case law will probably continue to follow the path of skiing case law. Eventually, the legal outcomes will be the development of statutes and common law that is consistent for both activities.

This note will discuss the legal issues that result from the sport of snowboarding. Part one of the note will introduce snowboarding and the popularity of the sport in the United States. Part two will discuss the current transition from skiing liability to snowboarding liability. Part three will discuss the dangers and claims of assumption of risk imposed on the sport of snowboarding. Finally, part four will examine the issues raised by waivers which limit liability and may be required in order to participate in the sport.

I. INTRODUCTION TO THE HISTORY AND GROWTH OF SNOWBOARDING

Snowboarding has been growing throughout the United States and all over the world. A snowboard is a board similar to "a wide ski ridden in a surfing position downhill over snow."¹ The first person to build a snowboard was M.J. Burchett in 1929, who secured his feet with clotheslines and horse reins to a piece of plywood.² In 1965, Sherman Poppen invented the "Snurfer" by binding two skis together and putting a rope through the nose of the skis.³ Finally, in 1969, Dimitrije Milovich took ideas from surfing and skiing to

* B.S. The University of Massachusetts-Amherst 2001; J.D. candidate, Albany Law School 2005. The author would like to thank his parents and sister for their support throughout his life.

1. MERRIAM-WEBSTER ONLINE DICTIONARY (2004), at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=snowboard> (last visited Nov. 21, 2004).

2. Julian Voje, *The Beginning of Snowboarding*, (July 7, 2003), at http://www.sbhistory.de/hist_in_the_beg.htm (last visited Oct. 17, 2004).

3. *Id.*

make a board that could be used on ski slopes.⁴ It was Jake Burton, however, who is well known for starting the company Burton Snowboards, who built upon Milovich's ideas and brought snowboarding from pieces of wood roped together to the cutting edge technology of today.⁵

Fourteen percent of all skier visits to U.S. ski areas during the winter of 1995 were snowboarders.⁶ Statistics have shown that "[i]n 1998, snowboarding [accounted for] almost 50% [of] all winter activity."⁷ Initially, however, ski resorts did not allow snowboarding because they felt that the snowboarders were rebels and would hurt the ski industry.⁸ There was a perception that snowboards ruined the slopes and made the terrain unsuitable for skiing.⁹ As snowboarding became increasingly popular, the ski resorts began to permit it.¹⁰ In the winter season of 1996-97 there were six ski resorts that did not allow snowboarding.¹¹ As of 2003, there were only three ski resorts in the United States that still did not allow snowboarding.¹² The popularity of snowboarding and the availability to snowboard at almost all ski

4. *Id.*

5. Lee Crane, *The History of Snowboarding: A 30 Year Time Line*, TRANSWORLD SNOWBOARDING, (Dec. 1, 1996) at <http://www.transworldsnowboarding.com/snow/instruction/article/0,13009,246571,00.html> (last visited Oct. 17, 2004); Kari Egan and Brandon Arnold, *How A Snowboard Is Made: Basic Snowboard Construction*, at <http://www.snowboarding.about.com/cs/gear/a/Construction.htm> (last visited Oct. 17, 2004) (stating that snowboards are constructed from many different types of materials that are molded together. On the bottom layer of the snowboard is a layer of plastic (P-Tex), which provides a "slippery surface that makes the snowboard slide on snow." The P-Tex base has steel edges around it in order to hold the snow while turning. The next layer is fiberglass, then the core, which is normally wood, followed by another layer of fiberglass and a top layer of protective plastic. Each snowboard is normally put together by hand and once the layers are put together with glue they are heated and molded together).

6. *Devising New Ways to Go Downhill*, 82 A.B.A. J. 87 (1996).

7. Julian Voje, *Snowboarding Today*, (July 7, 2003), at <http://www.sbhstory.de/> (last visited Nov. 21, 2004). "In 1994 Snowboarding was declared as an Olympic Sport." Snowboarding was in the Olympics for the first time in 1998. *Id.*

8. See Bob Donohoe, *Despite Persistent Drought, Ski Industry Upbeat*, ENTERPRISE (Salt Lake City, UT), Oct. 27, 2003, at S3.

9. Mark Clothier, *Snowboarding: The Latest Thing Going Down*, (Jan. 21, 2004), at <http://www.cnn.com/2004/TRAVEL/01/21/sprj.ski04.snowboarding/index.html> (last visited Nov. 10, 2004).

10. *Id.*

11. Michael Lucas, *Blacklist 96/97*, TRANSWORLD SNOWBOARDING (on file with author) (discussing the resorts that did not allow snowboarding which were Alta (Utah), Sundance (Utah), Deer Valley (Utah), Aspen (Colorado), Taos Ski Valley (New Mexico) and Mad River Glen (Vermont)).

12. National Ski Areas Association, *NSAA Member Areas That Do Not Allow Snowboarding*, at <http://www.nsaa.org/press/2004/nsaa-member-areas-that-do-not-allow-snowboarding.asp> (last visited Oct. 25, 2004) (discussing the three resorts Taos Ski Valley (New Mexico), Alta (Utah) and Deer Valley (Utah)).

resorts has encouraged people to start snowboarding at a young age.¹³ Instead of learning how to first ski and then snowboard, many families are solely teaching their children to snowboard.

II. TRANSITION FROM SKIING LIABILITY TO SNOWBOARD LIABILITY

A. Skiing

Ski liability cases have been brought in jurisdictions all over the United States. Cases have dealt with many issues including the "inherent danger" of skiing at a ski resort, the duty of care owed by skiers to each other, and the level of care owed by the ski operators to skiers and passengers on ski lifts.

One of the first reported ski accident cases occurred in 1951.¹⁴ In the case of *Wright v. Mt. Mansfield Lift, Inc.*¹⁵ Mrs. Florine Wright collided with the stump of a tree covered by snow when she was skiing down a trail in Stowe, Vermont.¹⁶ The court noted that skiing requires an ability to participate in the sport, and each skier must have good judgment to determine what he or she can do and what types of terrain he or she is able to handle.¹⁷ It held that there can be an inherent danger in skiing down a trail.¹⁸ The court in *Sunday v. Stratton Corp.* stated that in order to ski down a trail it must be maintained and should only be accessible if covered with enough snow to safely ski over.¹⁹ This case highlighted the fact that a ski area operator could be held liable if there was evidence of dangers existing on the trail which should have been

13. Clothier, *supra* note 9.

14. *Wright v. Mt. Mansfield Lift, Inc.*, 96 F. Supp. 786 (D. Vt. 1951).

15. *Id.*

16. *Id.* at 787.

17. *Id.* at 790-91.

Only the skier knows his own ability to cope with a certain piece of trail. Snow, ranging from powder to ice, can be of infinite kinds. Breakable crust may be encountered where soft snow is expected. Roots and rocks may be hidden under a thin cover. A single thin stubble of cut brush can trip a skier in the middle of a turn. Sticky snow may follow a fast running surface without warning. Skiing conditions may change quickly. What was, a short time before, a perfect surface with a soft cover on all bumps may fairly rapidly become filled with ruts, worn spots and other manner of skier created hazards.

Id.

18. *Id.* at 791.

19. *Sunday v. Stratton Corp.*, 390 A.2d 398, 401 (Vt. 1978).

In laying out the trail, every effort was made to achieve a "perfect surface for skiing." After cutting of trees, elaborate machines moved everything, stumps and brush included, from the trail to achieve a "complete new surface," like a "fairway, absolutely flat." The surface was then raked and fertilize[d], and all stones over 3 [inches] were removed by hand labor. Every night the trails are groomed in order for them to be flat and even from the left side of the trail to the right side. *Id.*

foreseen and corrected, but "[o]ne who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary."²⁰ In applying this assumption of risk principle, *Leopold v. Okemo Mountain, Inc.*, held that a collision with an unpadded lift tower was a risk assumed by the skier.²¹

In *Sunday*, the court held that not every risk or fall was necessarily inherent in the sport.²² "While skiers fall, as a matter of common knowledge, that does not make every fall a danger inherent in the sport."²³ James Sunday was injured while skiing at Stratton Mountain because Stratton did not maintain its ski trails and failed to give notice of hidden dangers.²⁴ This negligence caused the injury which resulted in Sunday becoming a quadriplegic.²⁵ The case meant that ski areas would be potentially liable for injuries that occur on the ski trails.²⁶ After the decision in *Sunday*, ski area insurers were concerned and threatened to stop insuring the resorts.²⁷ This could have seriously affected the future of skiing in Vermont if not for the enactment of the Vermont Sports Injury Statute.²⁸

Under section 1037 of the Vermont statutes, a person who takes part in a sport such as skiing inherits the dangers of the sport.²⁹ The statute was enacted in order to limit the amount of liability ski resorts owed to skiers on their slopes.³⁰

Courts of various states have ruled that there were inherent dangers in the sport of skiing and have allowed the jury to determine which risks in the sport were inherent, obvious or necessary to its participation.³¹ In each decision, it was either held that there was an inherent risk and no responsibility found, or one party was held economically liable to pay for the damages caused to the other party.³²

Skiing liability has also been dealt with on a criminal level. In 2000, the

20. *Wright*, 96 F. Supp. at 791.

21. *Leopold v. Okemo Mountain, Inc.*, 420 F. Supp. 781, 786 (D. Vt. 1976).

22. *See id.*

23. *Id.*

24. *Id.* at 400.

25. *Id.*

26. *Dillworth v. Gambardella*, 970 F.2d 1113, 1117 (2d Cir. 1992).

27. *Id.*

28. VT. STAT. ANN. tit. 12, § 1037 (2002).

29. *Id.*

30. *Dillworth*, 970 F.2d at 1117.

31. *See, e.g., Wright*, 96 F. Supp. at 791; *Sunday*, 390 A.2d at 400; *Dillworth*, 970 F.2d at 1117; *Leopold*, 420 F. Supp. at 786.

32. *See id.*

state of Colorado convicted a skier of reckless manslaughter for colliding with and killing another skier for an incident that occurred in 1997.³³ This was the first time a state had held one skier criminally liable for the injury of another skier. In the case of *People v. Hall*,³⁴ the defendant stood trial for reckless manslaughter because, while skiing at Vail Mountain, he collided with Allen Cobb.³⁵ Cobb died from brain injuries as a result of the collision.³⁶ The court stated that skiing can involve high speeds and temporary loss of control and that the General Assembly of Colorado "imposed upon a skier the duty to avoid collisions with any person or object below him."³⁷ It held that in this specific case, it was reasonable for a person to conclude that Hall consciously disregarded the risks associated with skiing when he collided with Cobb.³⁸

B. Snowboarding

Skiing cases have set precedents that have been used in determining liability in snowboarding cases. Even though snowboarding has been around for years, states have been slow to include the sport in the liability statutes. Now many states have a Ski Safety Act, which sets safety standards for skiers and imposes regulations on the operations of ski resorts.³⁹ As snowboarding incidents were brought to court, states started to notice that their Ski Safety Statutes might not cover someone using a snowboard.⁴⁰ These laws differ from state to state, but, in general, a skier, and recently snowboarders, can be held negligent if the Ski Safety Act is violated.⁴¹

The American National Standards Institute (ANSI) sets standards for ski areas, which are used by states to develop their Ski Safety Acts.⁴² The ANSI defines "skiers" to include "people using snowboards and handicape[d

33. *People v. Hall*, 999 P.2d 207, 210 (Colo. 2000).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 223; COLO. REV. STAT. § 33-44-109(2) (2003).

Each skier has the duty to maintain control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and objects. However, the primary duty shall be on the person skiing downhill to avoid collision with any person or objects below him.

Id.

38. *Hall*, 999 P.2d at 224.

39. *Doering v. Copper Mountain, Inc.*, 259 F.3d 1202, 1212 (10th Cir. 2001).

40. *Shukoski v. Indianhead Mountain Resort, Inc.*, 166 F.3d 848, 851 (6th Cir. 1999).

41. *Doering*, 259 F.3d at 1212.

42. *Shukoski*, 166 F.3d at 851.

people] using ski devices."⁴³ States are realizing the emergence of snowboarding in the ski industry and are trying different ways in order to follow the precedents set by previous ski-related cases and to conform with the ANSI.⁴⁴ Some states changed their Ski Safety Act to incorporate snowboarding, and others are trying to make snowboarding synonymous with skiing. Michigan considered snowboarders as "snowboard skiers" in order for snowboarding to be covered under its Ski Safety Act.⁴⁵ The court in *Shukoski v. Indianhead Mountain Resort, Inc.*⁴⁶ held that the Michigan Ski Area Safety Act (the "Act") covered snowboard skiers.⁴⁷ The Act was amended in 1995 to define what the term "skier" means and to add descriptions that include snowboarding under this definition.⁴⁸ The Act defines a skier as:

a person wearing skis or utilizing a device that attaches to *at least 1 foot* or the lower torso for the purpose of sliding on a slope. The device slides on the snow or other surface of a slope and is capable of being maneuvered and controlled by the person using the device. Skier includes a person not wearing skis or a skiing device while the person is in a ski area for the purpose of skiing.⁴⁹

The Act was amended to cover snowboarding, which exposes identical risks to the participant as alpine skiing.⁵⁰

Michigan uses the term "snowboard skiers" whereas Connecticut uses the term "skiboard" to describe snowboarding.⁵¹ In Connecticut, the court in *Mihail v. Ski Sundown, Inc.*⁵² used the term "skiboard" in order to combine the words snowboard and ski.⁵³ The court did not discuss the use of the term "skiboard," but in order for a snowboard collision to be covered under the Connecticut Ski Statute,⁵⁴ calling a snowboard a skiboard makes it sound like

43. *Id.*

44. *See id.*

45. *Id.* at 851.

46. *Id.* at 848.

47. *Id.* at 851.

48. *Id.*

49. *Id.* (emphasis added).

50. *Id.* at 852.

51. *Id.* at 851; *Mihail v. Ski Sundown, Inc.*, No. CV 92-058967, 1993 WL 214219, at *2 (Conn. Super. Ct. 1993).

52. *Mihail*, 1993 WL 214219, at *2.

53. *Id.* at *5.

54. CONN. GEN. STAT. § 29-212 (2003).

Each skier shall assume the risk of and legal responsibility for any injury to his person . . . arising out of the hazards inherent in the sport of skiing, unless the injury was proximately caused by the negligent operation of the ski area by the ski operator, his agents or employees. Such hazards include, but are not

the statute was written to cover not only ski injuries but also snowboard injuries.

In New Jersey,⁵⁵ however, a skier is defined as "a person utilizing the ski area for recreational purposes such as skiing or operating toboggans, sleds or similar vehicles, and including anyone accompanying the person."⁵⁶ The ski statute does not discuss snowboarding. In the case of *Murray v. Great Gorge Resort, Inc.*,⁵⁷ the plaintiff was injured while snowboarding on a trail at the defendant's ski area.⁵⁸ The plaintiff was snowboarding when he saw dirt and rocks in the middle of the trail and fell to the ground trying to avoid them.⁵⁹ New Jersey looked to the state of Utah in order to decide its first case about a snowboard accident at a ski resort.⁶⁰ Utah defined a "skier" as "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."⁶¹ New Jersey decided to adopt Utah's definition because a snowboarder is exposed to the same type of risks as a skier.⁶² New Jersey's statute has not incorporated snowboarding,⁶³ but in the future it may follow the trend of other states and amend its statute in order to cover snowboarding.

C. Treatment of Skiers and Snowboarders at Ski Resorts

Snowboarders and skiers used to be kept in different areas at some ski resorts.⁶⁴ This separation of snowboarders and skiers has changed

limited to: . . . (6) collisions with any other person by an skier while skiing.

Id.

55. N.J. STAT. § 5:13-2 (2003).

56. *Id.*; see *Murray v. Great Gorge Resort, Inc.*, 823 A.2d 101, 103 (N.J. Super. Ct. Law Div. 2003).

57. *Murray*, 823 A.2d at 101.

58. *Id.* at 102.

59. *Id.*

60. *Id.* at 103.

61. UTAH CODE § 78-27-52 (2004).

62. *Murray*, 823 A.2d at 103.

63. N.J. STAT. § 5:13-2 (2003).

A skier is deemed to have knowledge of and to assume the inherent risks of skiing, operating toboggans, sleds or similar vehicles created by weather conditions, conditions of snow, trails, slopes, other skiers, and all other inherent conditions. Each skier is assumed to know the range of his ability, and it shall be the duty of each skier to conduct himself within the limits of such ability, to maintain control of his speed and course at all times while skiing, to heed all posted warnings and to refrain from acting in a manner which may cause or contribute to the injury of himself or others.

N.J. STAT. § 5:13-5 (2004).

64. Clothier, *supra* note 9.

dramatically since skiers and snowboarders are now allowed on the same trails.⁶⁵ For a time, snowboarders and skiers were allowed on all the trails together and there was a special "snowboard park" where only snowboarders were allowed.⁶⁶ Ski resorts are encouraging people to snowboard as the sport has increased in popularity. Certain ski resorts did not want snowboarding on their slopes and some ski resorts would allow snowboarding only on certain trails. The case of *Mihail*⁶⁷ was brought in Connecticut by a skier who sustained injuries at a ski resort and claimed that the ski resort failed to adequately separate trails from those using snowboards and those using skis.⁶⁸ The court referred to the Connecticut Ski Statute and found that the injured skier did not establish a strong enough factual allegation to be awarded judgment in the case.⁶⁹ The judge stated in his opinion that "[s]tandards within the ski industry regarding separation of [skiers and snowboarders] are not within the knowledge and experience of judges or jurors."⁷⁰ Not only are states trying to modify their ski statutes and courts trying to follow past precedents, but both also have to be given knowledge through factual evidence about the constant changes of the ski and snowboard industry and their relationships at the ski resorts. Skiers and snowboarders are allowed to use the same trails at a ski resort and are not to be separated from each other. As the sport of snowboarding is evolving, the participants must be aware that there are dangers inherent in the sport and must assume some risks of the sport that limit the amount of claims that can be brought into the court system.

III. DANGERS AND ASSUMING THE RISK OF SNOWBOARDING.

There are many factors that can contribute to the dangers of snowboarding, which can increase the probability of injuries on the slopes. First, there is an inherent danger in participating in the sport of skiing or snowboarding which is codified by statute. "Inherent dangers and risks of skiing" are defined in Colorado Revised Statutes Section 33-44-103(3.5).⁷¹ The Colorado Revised Statute provides, in Section 33-44-112, 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."⁷² Section

65. *Id.*

66. *See id.*

67. *Mihail*, 1993 WL 214219, at *1.

68. *Id.*

69. *Id.*

70. *Id.* at *2.

71. COLO. REV. STAT. § 33-44-103(3.5) (2003).

72. § 33-44-112.

103(3.5) explicitly provides that these inherent dangers and risks of skiing do not include the negligent operation of lifts and tows. Moreover, the inherent dangers and risks of skiing do not include those dangers unnecessary to the sport.⁷³ Inherent risks of skiing or snowboarding include such things as variations or steepness in terrain and collisions with skiers.⁷⁴ Even though there are inherent dangers in the sport, people need to be able to handle a snowboard and ride it down the mountain safely. Snowboards come in different sizes to match the height of the snowboarder.⁷⁵ The age of the rider can have a big effect on safety because young children may not have strong enough legs to move the snowboard down the mountain and may fall and break their wrists.⁷⁶ The experience of the rider also has a big impact on the dangers of snowboarding. People feel that they can just get on a snowboard and ride down the slope because they see others snowboarding on the mountain or on television.⁷⁷ In the case of *Shukoski*,⁷⁸ a seventeen year-old snowboarder with three years of experience was involved in a serious accident while snowboarding in a terrain park at a ski resort.⁷⁹ The snowboarder was seriously injured because of his inexperience, and the incident could have been prevented if he had initially had proper instruction.⁸⁰ Proper snowboard instruction can prevent endangering yourself and others. Snowboarding has a fast learning curve, if one practices, but you should always take a lesson before trying to ride down a slope with other people around.⁸¹

There are proper things to do if a snowboarder falls or is going to take a rest while on a trail. Snowboarders and skiers should go as far over to the side of the trail as they can and stop where they can be seen from above.⁸² In the case of *Cruz v. Gloss*,⁸³ a skier was hit while resting one-third from the right-hand side of the trail by a snowboarder traveling in a line down the side of the

73. § 33-44-103(3.5).

74. Shep Critzer, *Equipment Key on Trip to Slopes*, THE DAILY NEWS LEADER (Staunton, VA), Dec. 4, 2002, at 4B.

75. See *Snowboarding: How To Buy; Snowboards: Selecting the Right Boards*, GREAT OUTDOORS, at <http://www.greatoutdoors.com/published/snowboard/howtobuy/snowboardsselectingtherightboard/> (last visited Nov. 10, 2004).

76. William M. Mirenda, Jr., M.D., *Snowboarding*, at <http://www.roanokeortho.com/sjsnow.htm> (last visited Oct. 27, 2004).

77. See Clotier, *supra* note 9.

78. *Shukoski*, 166 F.3d at 848.

79. *Id.* at 849.

80. See generally *id.*

81. *Latest Thing*, *supra* note 9.

82. 2002 Vail Resorts Management Company, *Vail Mountain Responsibility Code*, *Vail Resort Trail Map*, (on file with author) [hereinafter *Vail Responsibility Code*].

83. *Cruz v. Gloss*, 57 Pa. D. & C.4th 449 (2002).

trail.⁸⁴ Not only should the skier be at fault, but the snowboarder should have been traversing over the whole trail, rather than taking a straight line down the side of the trail. The safest part of the trail to ski or snowboard is down the center where there is the most room to maneuver. People ahead of you have the right of way and you should stop in a safe place for yourself and others.⁸⁵ Most ski resorts have codes of responsibility which are located around the mountain, on trail signs and in the trail map. The Vail Responsibility Code states what a person should be aware of and how he or she should act while participating in a winter activity, on the slopes.⁸⁶ "In addition to people using traditional alpine ski equipment, you may be joined on the slopes by snowboarders, telemark skiers or cross-country skiers, skiers with disabilities, skiers with specialized equipment and others."⁸⁷ People should show courtesy to others and be aware that there are elements of risk in skiing and snowboarding that common sense and personal awareness can help reduce.⁸⁸ The sport of skiing and snowboarding can become safer if people respect the warnings given to them by the ski resorts.

The individual parts of the snowboard can also be dangerous. The snowboard has metal edges around the whole snowboard.⁸⁹ These edges need to be very sharp in order to make a turn in the snow.⁹⁰ If you get out of control and hit someone on the slopes you could injure them with the edge of the snowboard.

Additionally, all snowboard bindings are sold with a safety strap.⁹¹ The safety strap attaches to the binding and keeps the snowboard attached to you even if you take your feet out of the bindings. In the case of *Campbell v. Derylo*,⁹² the court stated that safety straps can reduce the risk of injury from runaway snowboard equipment.⁹³ Here, the defendant removed his snowboard, without a safety strap, before reaching the bottom of the trail and

84. *Id.* at 451.

85. *Vail Responsibility Code*, *supra* note 82.

86. *Id.* (discussing that everyone on the slopes should stay in control, people ahead of you have the right of way, stop in a safe place for you and others, when starting downhill or merging, look uphill and yield, use devices to help prevent runaway equipment, observe signs and warnings, and keep off closed trails, and know how to use the lifts safely).

87. *Id.*

88. *Id.*

89. Crane, *supra* note 5.

90. *Id.*

91. *Id.*

92. *Campbell v. Derylo*, 89 Cal. Rptr. 2d 519 (Cal. Ct. App. 1999).

93. *Id.* at 523 (*citing* Heavenly Valley Ski Resort Skier Responsibility Code).

his snowboard slid away from him and hit the plaintiff in the lower back.⁹⁴ He took off his snowboard because there was a lot of ice and he was very tired.⁹⁵ The court stated that "[t]he absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury."⁹⁶ Snowboards have no built-in braking device, unlike skis, which are equipped with an automatic breaking device.⁹⁷ This type of incident can occur if safety straps are not used on a ski slope. Ski resorts used to require all snowboarders to have a safety strap, but now a lot of ski resorts do not require them, and if they do, they do not check very often to see if all snowboarders are using them.

Finally, not only do people ride down the slopes, they also like to try different tricks, which can increase the dangers of the sport. Ski resorts have special designated areas with jumps, rails and halfpipes⁹⁸ for snowboarders to do tricks. A snowboarder may not be experienced enough to try a specific trick and can seriously hurt himself. Also, snowboarding events on television encourage people to try new tricks.⁹⁹ If you try a trick that you are not capable of doing, you can injure yourself and other people. Ski resorts are trying to encourage safety on their mountains by offering expert-level terrain parks as well as lower-level terrain parks.¹⁰⁰ Mammoth Mountain in California is offering lower-level terrain for snowboarders so the whole family can snowboard together.¹⁰¹ They are also increasing the amount of supervision in the terrain parks as another safety feature.¹⁰² Anyone participating on the ski slopes should ski or snowboard cautiously within his or her ability, maintain control of his or her faculties and maintain a lookout.¹⁰³

The increase in snowboarding has lead to a substantial amount of injuries and lawsuits that have been filed regarding snowboarding throughout the United States. There were fourteen reported snowriding deaths for the winter

94. *Id.* at 521.

95. *Id.*

96. *Id.* at 523.

97. *Id.*

98. MERRIAM-WEBSTER ONLINE DICTIONARY (2002), available at <http://www.m-w.com/cgi-bin/dictionary?va=half-pipe> (last visited Oct. 25, 2004) ("A halfpipe is a U-shaped high sided ramp or runway used in snowboarding.").

99. Clothier, *supra* note 9.

100. Associated Press, *Snow Thrills for Kids; Western Resorts Catering to Adventure Seekers*, Nov. 14, 2003, available at <http://www.cnn.com/2003/TRAVEL/DESTINATIONS/11/11/kids.skiing.ap/index.html> (last visited Oct. 27, 2004).

101. *Id.*

102. *Id.*

103. *Vail Responsibility Code*, *supra* note 82.

season of 2002-03 in Colorado alone.¹⁰⁴ There are about forty-one serious injuries on the ski slopes per year, and in the 2002-03 season, there were a total of thirty-three serious skiing and snowboarding injuries.¹⁰⁵ "The rate of serious [ski/snowboard] related injury in 2002-2003 was .57 per million skier/snowboarder visits."¹⁰⁶

Snowboarding case law has looked to issues such as assumption of the risk, whether snowboarding is inherently reckless, whether a snowboard itself is dangerous and the duty of care owed to other people on the ski slopes. The responsibility codes at ski resorts seem to be used in a manner that encourages safety on the slopes. You assume the risk that there is a possibility of injury once you start skiing down the slopes. In California, by snowboarding on a ski slope, which is a proper venue for the sport, the snowboarder will not be liable for negligence to other people who may be on the slope at the same time.¹⁰⁷ Skiers and snowboarders share the same slopes and there is no requirement that each snowboarder or skier participate in the sport together in order for them to be co-participants in the sport.¹⁰⁸ Michigan follows the same ideas of California and injuries from a snowboarding accident are considered inherent risks of snowboarding.¹⁰⁹

In the case of *Mastro v. Petrick*,¹¹⁰ the court stated snowboarding has its inherent risks of participating in the sport, but snowboarding is not in and of itself inherently reckless.¹¹¹ In this case, a snowboarder collided with a skier who suffered a knee injury as a result.¹¹² The court held that the snowboarder was entitled to engage in the sport of snowboarding and was entitled to protection because the skier assumed the risk of being injured at the ski resort.¹¹³

California and Michigan case law have shown that collisions are an

104. 2002-2003 *Snowriding Deaths Report*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Mar. 4, 2003, available at http://www.rockymountainnews.com.drnm/state/article/0,1299,DRMN_21_1786193,00.html (last visited Oct. 19, 2004) (Five deaths at Keystone Resort, one death at Loveland, two deaths at Winter Park, one death at Beaver Creek, one death at Powderhorn, one at Aspen Mountain, one death at Solvista Golf and Ski Ranch and two deaths at Breckenridge).

105. National Ski Areas Association, *Facts About Skiing/Snowboarding Safety*, at http://www.nsaa.org/nsaa2002/_safety.asp?mode=the_facts (last updated Jan. 10, 2004).

106. *Id.*

107. *Mastro v. Petrick*, 112 Cal. Rptr. 2d 185, 191 (Cal. Ct. App. 2001).

108. *Id.* at 190.

109. *Shukoski*, 166 F.3d at 852.

110. *Mastro*, 112 Cal. Rptr. 2d at 185.

111. *Id.* at 192.

112. *Id.* at 187.

113. *Id.* at 192.

inherent risk of snowboarding, but a recent Connecticut Supreme Court decision ruled to the contrary. In *Jagger v. Mohawk Mountain Ski Area, Inc.*, which dealt primarily with a skiing accident, a skier brought a negligence action against a ski area employee and the operator of the ski area for injuries sustained in a collision with the employee.¹¹⁴ The court ruled that one's participation in the sport of skiing is one in which one does not voluntarily submit to bodily contact with other skiers.¹¹⁵ Skiers are negligent for collisions with other skiers.¹¹⁶ Connecticut believes that skiers owe each other a reasonable duty of care and that collisions are negligent acts that can be avoided.¹¹⁷ The evolution of snowboarding liability has followed from skiing case law, and in Connecticut, a snowboard collision will probably be considered negligent conduct.¹¹⁸

A snowboarder can also be acting recklessly by violating a ski responsibility code and be held liable for his actions. Snowboarding after consuming alcoholic beverages, an activity not ordinarily associated with skiing, may increase the risk of an accident.¹¹⁹ In the case of *Freeman v. Hale*,¹²⁰ the defendant consumed alcoholic beverages before and while on the ski slopes.¹²¹ He collided with the plaintiff and had the "duty to avoid increasing the risk of such a collision" by consuming alcohol.¹²² Whether a snowboarder's conduct is "negligent or reckless is a question of fact to be determined by the jury."¹²³

Snowboarding case law is only in its infancy. A snowboarder has yet to face criminal charges for a collision on the slopes. By assuming the risk of snowboarding, a snowboarder should not find himself criminally liable as long as the snowboarder did not act recklessly.

IV. WAIVER AGREEMENTS RELEASING LIABILITY

Ski resorts sometimes require skiers and snowboarders to sign waiver and release agreements. These agreements are written by ski resorts in order to try to limit their liability. Ski resorts obtain skier signatures under language

114. *Jagger v. Mohawk Mountain Ski Area, Inc.*, 849 A.2d 813, 815 (Conn. 2004).

115. *Id.* at 820.

116. *Id.*

117. *Id.* at 821.

118. *See id.* at 820.

119. *Freeman v. Hale*, 36 Cal. Rptr. 2d 418, 423 (Cal. Ct. App. 1994).

120. *Id.* at 418.

121. *Id.* at 420.

122. *Id.* at 423-24.

123. *Cruz*, 57 Pa. D. & C.4th at 472.

purporting to release the ski area from any negligence, including violations of statutory safety mandates. Normally, ski resorts require people to sign waivers when renting snow equipment, buying individual day tickets or season pass tickets.

In the case of *Phillip v. Monarch Recreation Corp.*,¹²⁴ the ski resort had an agreement on the back of every ski lift ticket.¹²⁵ The plaintiff was skiing down a trail and collided with a grooming machine.¹²⁶ The ski resort argued that the agreement on the back of the ski ticket meant that the plaintiff understood and assumed the risk of skiing.¹²⁷ The Ski Safety Statute in Colorado assigns both the ski resort and the skier duties with regard to safety on the ski slopes.¹²⁸ The court held that the agreement on the back of the ticket did not supersede the duties defined under the statute, and the ski resort was found negligent for its actions.¹²⁹

In 1995, the State of Vermont ruled on the issue of waiver agreements in the case of *Dalury v. S-K-I, Ltd.*,¹³⁰ which was a case of first impression.¹³¹ "In Vermont, a business owner has a duty 'of active care to make sure that its premises are in safe and suitable condition for its customers.'"¹³² The plaintiff was injured while skiing at the resort and "[b]efore the season had [begun, the plaintiff] had purchased a midweek season pass and signed a form releasing the ski area from liability."¹³³ The court stated that the release agreement was at odds with Vermont's ski statute.¹³⁴ A skier/snowboarder is responsible for the "inherent risks" of the sport and the "ski area's own negligence . . . is neither an inherent risk nor an obvious and necessary one in the sport of skiing."¹³⁵ The court stated that a ski resort still has to warn skiers of dangers on the trails, even though they assume the risk to participate in the sport.¹³⁶

124. *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982 (Colo. Ct. App. 1983).

125. *Id.* at 987.

126. *Id.* at 984; *Snow Grooming*, MT. BULLER, VICTORIA AUSTRALIA REPORTS (2004), available at <http://ski.mtbuller.com.au/reports/grooming.html> (last visited Oct. 27, 2004) (describing that grooming machines are used to flatten, pack and process the snow to a uniform consistency. Grooming machines make a rough skiing surface smooth.).

127. *Phillips*, 668 P.2d at 987.

128. *Id.* at 985-86.

129. *Id.* at 987.

130. *Dalury v. S-K-I, Ltd.*, 670 A.2d 795 (Vt. 1995).

131. *Id.* at 797.

132. *Id.* at 799. (citing *Debus v. Grand Union Stores*, 621 A.2d 1288, 1294 (Vt. 1993).

133. *Id.* at 796.

134. *Id.* at 800.

135. *Id.*

136. *Id.*

A skier "obtains a significant financial savings" by purchasing a season pass rather than day tickets and, as part of the purchase, must execute a release.¹³⁷ In the case of *Solis v. Kirkwood Resort Co.*,¹³⁸ the plaintiff, Mario Solis, signed a "Season Pass & Liability Release Agreement" when he bought a season pass at Kirkwood Resort.¹³⁹ The release stated:

[1] I understand that the sports of skiing, snowboarding, and other recreational activities involve inherent and other risks of INJURY and DEATH. I voluntarily agree to expressly assume all risks of injury or death that may result from skiing, snowboarding, or any other activity at Kirkwood Resort Company.

[2] I AGREE TO RELEASE Kirkwood Associates, Inc., d.b.a. Kirkwood Resort Company, its ski shop, snowboard shop, employees, owners, affiliates, agents, landowners, officers, directors (collectively 'PROVIDERS'), from all liability for injury, death, and property loss and damage that results from the passholder's participation in the sport of skiing, snowboarding, or any other activity at Kirkwood Resort Company including all liability which results from the NEGLIGENCE of PROVIDERS, or any other person or cause.

[3] I further agree to defend and indemnify PROVIDERS for any loss or damage arising from claims or lawsuits for personal injury, death, and property loss and damage related to participation in the sport of skiing, snowboarding, or any other activity at Kirkwood Resort Company.¹⁴⁰

This agreement was "a valid, binding and enforceable contract" when it was signed.¹⁴¹ The court found that the contract was clear and unambiguous, and the intent of the contract was that all claims would be barred by season pass holders.¹⁴² The ski resort still has the duty to warn skiers of dangers on the trails, but by signing the release agreement the ski resort has limited its liability in ski related lawsuits.¹⁴³

Even though a waiver agreement is signed, it does not mean that it is always enforceable. The conditions under which the agreement was signed and when the agreement was signed can be factors in determining whether an

137. *Solis v. Kirkwood Resort Co.*, 114 Cal. Rptr. 2d 265, 272 (Cal. Ct. App. 2001).

138. *Id.* at 265.

139. *Id.* at 268.

140. *Id.* at 270.

141. *Id.* at 268.

142. *Id.*

143. *Id.*

agreement is enforceable. In the case of *Rowan v. Vail Holdings, Inc.*,¹⁴⁴ Rowan was working for a ski company and testing ski wax at Vail Mountain.¹⁴⁵ He had tested the ski wax on his skis for three days and on the third day Vail

Mountain asked him to sign a liability release, which he did before skiing that day.¹⁴⁶ He was

skiing down a trail on the third day and was killed when he hit an unpadded wood support beam on a picnic deck.¹⁴⁷ Even though Vail Mountain had a liability release agreement it was still liable for the death of Rowan.¹⁴⁸

A. Is a Family Bound From Recovery by a Waiver Agreement?

Can the family of a person who has been killed recover on a wrongful

144. *Rowan v. Vail Holdings, Inc.*, 31 F. Supp. 2d 889 (D. Colo. 1998).

145. *Id.* at 892.

146. *Id.* at 893. Signed Release Stating:

Beneath the space to print the name, date and place of the event, are bold and capital letters stating, "PLEASE READ CAREFULLY. THIS IS A RELEASE OF LIABILITY AND WAIVER OF LEGAL RIGHTS." Following this language, the release stated in pertinent part: 1. I acknowledge that participation in ski racing (the "Event"), described above, or training in connection with such Event, is HAZARDOUS and involves a great risk of physical injury. I EXPRESSLY ASSUME ALL RISK ASSOCIATED WITH PARTICIPATING IN OR TRAINING FOR THE EVENT, including, without limitations, using ski lifts. I understand that I have the opportunity to inspect the race course and area prior to training for or participating in the Event and I assume the risk of all course conditions.

2. WARNING - Under Colorado law, a skier assumes the risk of any injury to person or property resulting from any of the inherent dangers and risks of skiing and may not recover from any ski area operator for any injury resulting from any of the inherent dangers and risks of skiing, including: Changing weather conditions; existing and changing snow conditions; bare spots; rocks; stumps; trees; collisions with natural objects, man-made objects, or other skiers; variations in terrain; and the failure of skiers to ski within their own natural abilities.

3. IN CONSIDERATION OF RECEIVING PERMISSION TO TAKE PLACE IN THE EVENT, I AGREE TO RELEASE AND HOLD HARMLESS VAIL ASSOCIATES, INC., ITS SUBSIDIARIES AND AFFILIATES . . . FROM ANY AND [SIC] CLAIMS I MIGHT STATE AS A RESULT OF PHYSICAL INJURY, INCLUDING DEATH, . . . INCLUDING THOSE CLAIMS BASED ON NEGLIGENCE OR BREACH OF WARRANTY.

5. This agreement is binding on my estate, heirs, administrators and assigns and shall be governed by the laws of Colorado . . .

At the bottom, before the date and signature, the release states in capital and bold letters, "I HAVE CAREFULLY READ THE FOREGOING LIABILITY RELEASE, UNDERSTAND ITS CONTENTS AND SIGN IT WITH FULL KNOWLEDGE OF ITS SIGNIFICANCE. I AM AT LEAST 18 YEARS OF AGE."

Id.

147. *Id.*

148. *See id.* at 908.

death action once a waiver agreement is signed? The Colorado Statute states that:

When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured.¹⁴⁹

In essence, if the injured party has died and could have maintained an action to recover damages, then the family of the injured party could recover those damages. If the waiver bars the injured party from bringing a claim, then the family cannot bring a wrongful death action.

B. Was the Release Valid?

Whether a release is valid is determined by factors expressed in the case of *Jones v. Dressel*.¹⁵⁰ A court looks at "(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."¹⁵¹ The court in *Rowan* looked to these factors to determine whether a valid waiver had been signed and absolved Vail Mountain from liability.¹⁵² The waiver did not fail under factor one or two because skiing was not a duty necessary to the public and it is also not an essential service.¹⁵³ The court decided that the release was not fairly entered into because the release was not offered until the third day of testing and had he been offered it on the first day, he might have chosen a different mountain.¹⁵⁴ Also, he was testing the ski wax for work and if he had refused to sign the release he might have had problems with his employment.¹⁵⁵ Regarding the language of the waiver agreement, the court declared that the waiver was ambiguous because it did not state which acts were covered under the agreement, including injuries inherent in the sport of skiing.¹⁵⁶ "If the plain language of the waiver is clear and unambiguous, it is enforced as a

149. COLO. REV. STAT. § 13-21-202 (2003).

150. *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981).

151. *Id.*

152. *Rowan*, 31 F. Supp. 2d at 896.

153. *Id.* at 897.

154. *Id.* at 897-98.

155. *Id.*

156. *Id.* at 899.

matter of law. If the plain language is unclear or unambiguous, it is void as a matter of law."¹⁵⁷ The court held that the release was invalid and permitted claims to be asserted against Vail Mountain.¹⁵⁸

C. Parent or Guardian Signing Release for a Minor

Parents or guardians may be required to sign waiver agreements on behalf of their children if they are under the age of eighteen and want to participate in the sport of skiing or snowboarding. The Washington Supreme Court has held that "to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable."¹⁵⁹ With this holding, the court allowed minors to prevail on claims of negligence against ski resorts, even though a parent signed a waiver on behalf of his or her children.¹⁶⁰ Statutes have already been written in Colorado which state that:

[I]n the absence of statutory or judicial authorization, the parent has no authority, merely because of the parental relation, to waive, release, or compromise claims by or against the child. This rule applies to a waiver, settlement, or release of the child's right of action for a personal injury or other tort.¹⁶¹

Courts all over the United States have considered the issue of waiver agreements signed by parents or guardians and have determined that a parent may not release a minor's prospective cause of action.¹⁶² In the case of *Cooper v. Aspen Skiing Co.*,¹⁶³ the plaintiff suffered injuries, including blindness, at the age of seventeen, while training on a ski race course when he crashed into a tree.¹⁶⁴ The plaintiff was participating in the Aspen Valley Ski Club when the accident occurred, and he and his mother had signed a form

157. *Id.*

158. *Id.* at 900.

159. *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 11-12 (Wash. 1992).

160. *Id.* at 16.

161. *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1233 n. 9 (Colo. 2002) (quoting 67A C.J.S. PARENT AND CHILD § 276 (1978)).

162. *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6 (Wash. 1992); *Apicella v. Valley Forge Military Acad. & Junior Coll.*, 630 F. Supp. 20 (E.D. Pa. 1985); *Fedor v. Mauwehu Council, Boy Scouts of Am. Inc.*, 143 A.2d 466 (Conn. Super. Ct. 1958); *Fitzgerald v. Newark Morning Ledger Co.*, 267 A.2d 557 (N.J. Super. L. 1970); *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647 (Cal. Ct. App. 1990).

163. 48 P.3d at 1229.

164. *Id.* at 1230.

titled "Aspen Valley Ski Club, Inc. Acknowledgement and Assumption of Risk and Release."¹⁶⁵ The release was written to release the Ski Club from:

[A]ny liability, whether known or unknown, even though that liability may arise out of negligence or carelessness on the part of persons or entities mentioned above. The undersigned Participant and Parent or Guardian agree to accept all responsibility for the risks, conditions and hazards which may occur whether or not they are now known.¹⁶⁶

The court followed the same reasoning as other states have in the past.¹⁶⁷ The court held that "a parent or guardian may not release a minor's prospective claim for negligence and may not indemnify a tortfeasor for negligence committed against his minor child."¹⁶⁸

V. CONCLUSION

The sport of snowboarding is growing quickly. It has been discussed how snowboard liability has transitioned from skiing liability throughout the United States. The sports are very similar and the types of cases courts are hearing are virtually the same. There are many dangers in the sport of snowboarding, and the growth of the sport has increased the chances for injury. Different measures are being taken in order to define the liability owed by different parties in a ski or snowboard lawsuit. In the near future, the development of case law and state statutes will reflect snowboarding as its own distinct sport.

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165. *Id.* at 1231.

166. *Id.*

167. *Id.* at 1235.

168. *Id.* at 1237.

