
DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 95 CV 1153, Courtroom 20

JAMES DOVEY and ELLEN DOVEY, individually; BRIAN DOVEY, a minor, by and through JAMES DOVEY and ELLEN DOVEY his natural parents and guardians,

Plaintiffs,

v.

VICTORIA BRECKENRIDGE CORPORATION, a Delaware corporation (presently noted as a withdrawn corporation by the Colorado Secretary of State) d/b/a VICTORIA BRECKENRIDGE HOLDINGS, INC. and d/b/a BRECKENRIDGE SKI CORPORATION, and, VICTORIA USA, INC., a Delaware corporation (presently noted as a withdrawn corporation by the Colorado Secretary of State); ABC, INC., and JOHN DOES 1-8 (whose true name(s) are unknown), Defendants.

THIS MATTER comes before the court on MOTIONS OF DEFENDANTS VICTORIA BRECKENRIDGE HOLDINGS, INC. AND VICTORIA USA, INC. TO DISMISS THE AMENDED COMPLAINT AND RECITATION OF AUTHORITY.

On March 24, 1993, Matthew Dovey skied an open trail named Pika at Breckenridge. Matthew fell, slid into a post and subsequently died from the impact. Matthew's parents and brother brought the above entitled action for the wrongful death of their son and brother.

Plaintiffs seek damages against Victoria Breckenridge Holdings, Inc., and Victoria USA, Inc. ("Victoria Defendants"), under the theory of negligence per se and common law negligence, primarily based on the allegation that the sign Matthew collided with was inadequately padded and negligently placed. The Plaintiffs also question the constitutionality of certain portions of the Colorado Ski Safety Act ("Act" or "Safety Act").

STANDARD OF REVIEW

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the trial court must view the allegations of the complaint in the light most favorable to the claimant, and the complaint cannot be dismissed unless it appears that the non-moving party is entitled to no relief under any statement of the facts which may be proved in support of the claims. *Douglas County National Bank v. Pfeiff*, 809 P.2d 1100 (Colo. App. 1991); *Abts v. Board of Education*, 622 P.2d 518 (Colo. 1980). If relief could be granted under any theory of law, the complaint is sufficient and should not be dismissed. *Halverson v. Pikes Peak Family Counseling*, 795 P.2d 1352 (Colo. 1990).

The court may not consider matters outside the allegations contained in the complaint when ruling on a motion to dismiss for failure to state a claim. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo. 1992).

ANALYSIS

In 1990 the Colorado Ski Safety Act was amended. The constitutionality of the amendments shall be addressed first since they have not been previously addressed by a Colorado court.

Statutes are presumed constitutional and the plaintiff, as the party attacking the statute, must prove the statute is unconstitutional beyond a reasonable doubt. *Giebink v. Fischer*, 709 F.Supp. 1012, 1017 (D.Colo. 1989); *Pizza v. Wolf Creek Ski Development Corp.*, 711 P.2d 671 (Colo. 1985). A statute must be construed, whenever possible, to give effect to all its parts and to the intent of the General Assembly. *Estate of David*, 776 P.2d 813 (Colo. 1989); *Gallegos v. Phipps, III*, 779 P.2d 856 (Colo. 1989).

In addition, this court adheres to the axiom propounded in *Colorado v. Warren*, 101 Colo. 586, 76 P.2d 94 (1937), whereby the court's purpose in examining an allegation of unconstitutionality, "is not to search for reasons why a law should be held unconstitutional, but rather to accept it as constitutional, unless its repugnancy to the fundamental law clearly appears." *Id.* at 96.

BACKGROUND OF THE COLORADO SKI SAFETY ACT

Coast to coast, practically every state with a substantial ski industry has implemented some form of a ski safety act. These statutes usually contain duties for both the skier and the ski area operator. However, the main objective of the statutes is quite obviously, for the protection of ski area operators from liability for certain types of injuries that can occur while skiing. The language contained in the statutes varies from the sublime, to statutes such as Colorado's which are far more draconian and act almost as a complete bar in protecting ski area operators from law suits arising from skiers injured on their slopes.

Colorado's Ski Safety Act was originally enacted in 1979. It acknowledged there are certain dangers that inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed. The express purpose of the Act was:

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.

Section 33-44-102, C.R.S. (1984 Repl.Vol. 14).

Contained within the Act was a rebuttable presumption that if a skier was injured due to an "inherent danger or risk" of skiing, that the skier was at fault. One of the purposes underlying this rebuttable presumption was to reduce the number of frivolous lawsuits and, accordingly, the rapidly rising cost of liability insurance accruing to the ski area operators. *Pizza*, 711 P.2d 679; *Giebink*, 709 F.Supp. at 1016.

In 1990, the General Assembly amended the Ski Safety Act. The legislative declaration contained in the bill enacting the 1990 amendments included the following:

The general assembly ... finds that, despite the passage of the "Ski Safety Act of 1979", ski operators of this state continue to be subjected to claims and litigation involving accidents which occur during the course of the sport of snow skiing, which claims and litigation and threat thereof unnecessarily increase Colorado ski area operators' costs. The general assembly further finds that such increased costs are due, in part, to confusion under the [act] as to whether a skier accepts and assumes the dangers and risks inherent in the sport of skiing. It is the purpose of this act, therefore, to clarify the law in relation to skiing injuries and the dangers and risks inherent in that sport, to establish as a matter of law that certain dangers and risks are inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from any ski area operator for injuries resulting from those inherent dangers and risks.

Colo.Sess.Laws 1990, ch. 256 at 1540.

One outcome of the 1990 amendments was to eliminate the "rebuttable presumption" that a skier is at fault for injuries stemming from an inherent risk or danger and replaced the presumption with definitive language eliminating the presumption:

Notwithstanding any judicial decision or any other law or statute to the contrary, including but

not limited to sections 13-21-111 and 13-21-11.7, C.R.S., 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.

Section 33-44-112, C.R.S. (1991 Supp.)(emphasis added). "Inherent dangers and risks" is defined in pertinent part as:

[T]hose dangers or conditions which are an integral 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, and trees, or other natural objects, and collisions with such natural objects; impact with lift towers, signs, posts, fences or enclosures, hydrants, water pipes, other man-made structures and components; variations in steepness or terrain, whether natural or as a result of slope design; ... and the failure of skiers to ski within their own abilities. The term 'inherent dangers and risks of skiing' does not include the negligence of a ski area operator as set forth in section 33-44-104(2).

C.R.S. Section 33-44-103(10), now codified as Section 33-44-103(3.5).

In enacting the amended statute, the General Assembly intended to insulate resort operators from liability for ski injuries caused by the defined "inherent dangers and risks of skiing." *Graven v. Vail Associates, Inc.*, 888 P.2d 310, 314 (Colo. App. 1994) ("*Graven I*") -- As long as those dangers are an integral part of the sport of skiing. *Graven v. Vail Associates, Inc.*, 94 SC 416, p.12 (Colo. Dec. 18, 1995) ("*Graven II*").

The Act also specifies the ski area operators' duties and the skiers' duties.

The ski area operators have a very limited number of duties imposed upon them by the legislature. In general, most of them relate to the posting of signs, providing certain lighting and marking for certain snow-making and snowmobile activities. *Giebink v. Fischer*, 709 F.Supp. 1012, 1015 (D.Colo. 1989).

A violation of one of the specific duties detailed in Sections 33-44-106 to 08 constitutes negligence per se to the extent such violation causes any injury to any person or damage to property. C.R.S. 33-44-104(2); *Pizza*, 711 P.2d 678.

Skiers duties are detailed in Section 33-44-109. In addition to the general provision that a skier ski within his or her own ability is a clause mirroring Section 33-44-112's limitation on actions for injury resulting from inherent dangers and risks of skiing (quoted above). Section 33-44-109 states in part, "Each skier expressly accepts and assumes the risk of and all legal responsibility for any injury to person or property resulting from any of the inherent dangers and risks of skiing..." (emphasis added).

PLAINTIFFS' VAGUENESS CHALLENGE

This court finds no merit to Plaintiffs' assertion that certain portions of the Colorado Ski Safety Act, as amended, are unconstitutionally vague.

In construing statutes the object is to ascertain and effectuate the intent of the General Assembly. *Estate of David*, 776 P.2d at 817. Where the meaning is clear and no ambiguity would result, the statute must be interpreted as written without resort to other rules of statutory construction. *Id.*

In determining the level of scrutiny to apply to a statute challenged on vagueness grounds the strictness of the vagueness test depends upon whether the enactment: (1) is an economic regulation; (2) imposes civil or criminal penalties; (3) contains a scienter requirement; and (4) threatens to inhibit the exercise of constitutionally protected rights. *Pizza*, 711 P.2d at 675.

The Ski Safety Act involves an economic regulation. As stated in *Pizza*, "[W]e are dealing with a civil statute which regulates constitutionally unprotected conduct and which has no effect on speech or expression." *Id.*

at 676. As an economic regulation the statute is subject to a less exacting standard than penal statutes or laws prohibiting first amendment rights. *Id.*

A good guideline is that a statute is unconstitutionally vague if it fails to provide a fair warning of the conduct encompassed by its terms or the conduct is so ill-defined as to create a danger of arbitrary and capricious enforcement. *Harris v. The Ark*, 810 P.2d 226 (Colo. 1991).

This court finds Plaintiffs' claim that Section 33-44-107(2)(d) describing posting of danger signs is unconstitutionally vague is without merit. Section 33-44-107(2)(d) states:

Danger areas, designated by a red exclamation point inside a yellow triangle with a red band around the triangle and the word "Danger" printed beneath the emblem. Danger areas do not include areas presenting inherent dangers and risks of skiing.

The court in *Graven I* addressed a similar concern with the language contained in Section 33-44-107(2)(d). In that opinion the court stated:

[W]hile the [Act] prescribes a particular type of sign to be used for designating "danger areas," the statute goes on to state that "danger areas" do not include "areas presenting inherent dangers and risks of skiing." ... While the semantics of this provision have a curious Catch-22 flavor, the intent of the General Assembly is, nevertheless, evident.

Graven I, 888 P.2d at 314. This court agrees and finds Section 33-44-107(2)(d) is not unconstitutionally vague.

Plaintiffs' second allegation of vagueness falls under Section 33-44-107(7)(1994 Cum. Supp.). That section is as follows:

The ski area operator shall mark hydrants, water pipes, and all other man-made structures on slopes and trails which are not readily visible to skiers under conditions of ordinary visibility from a distance of at least one hundred feet and shall adequately and appropriately cover such obstructions with a shock-absorbent material that will lessen injuries.

Plaintiffs assert under this section ski area operators have two duties. The first duty is to mark man-made structures and the second duty is to cover them "adequately and appropriately" with shock absorbent materials. Plaintiffs assert that whether the sign and supporting post was visible from a distance of 100 feet is moot. This court does not agree.

The question of the operators' duty boils down to the term "such obstructions," and whether it refers to all, "hydrants, water pipes, and all other man-made structures on slopes and trails" or if it refers only to "hydrants, water pipes, and all other man-made structures on slopes and trails which are not readily visible from a distance of at least one hundred feet."

In the interpretation of statutes, "[w]hen a referential or qualifying clause follows several words or phrases and it is applicable as much to the first word or phrase as to the others in the list, . . . the clause should be applied to all of the words or phrases that preceded it." *Estate of David*, 776 P.2d at 818 (Colo. 1989); see also *People v. Myers*, 714 P.2d 513, 515 (Colo. App. 1985)(relative and qualifying words and phrases are not presumed to modify solely the words or phrases they follow).

Using this guideline, only those obstructions which are not readily visible to skiers from a distance of one hundred feet shall be marked and adequately covered with shock absorbent materials.

The argument is further bolstered by the definition of "obstruction" and "obstruct." An "obstruction" is, "One that obstructs." The American Heritage Dictionary 859 (Second College ed. 1985). "Obstruct" is defined as, "To cut off from sight." The American Heritage Dictionary 859 (Second College ed. 1985). Therefore, the term "such obstructions" refers to those objects which are cut off from sight; which the legislature has decided are objects not visible from at least 100 feet away.

The term "such obstruction" applies to those objects that are not readily visible from a distance of one hundred feet. Plaintiffs do not argue that the sign post supporting the sign was not readily visible from the one hundred feet.

For the reasons stated above this court finds that the term "such obstructions" is not unconstitutionally vague.

PLAINTIFFS' DUE PROCESS AND EQUAL PROTECTION CHALLENGES

Plaintiffs allege Sections 33-44-103(10); 109; 107(8)(c); 112; and 113, C.R.S. unconstitutionally create a conclusive presumption that a skier is solely at fault when he or she is injured in an accident attributable to an "inherent danger or risk." Plaintiffs' Objection to the Victoria Defendants' Motion to Dismiss ("Plaintiffs' Objection"), p. 10-11. A conclusive presumption, Plaintiffs assert, violates the Due Process Clause of the United States and the State of Colorado.

Defendants state that Plaintiffs entire premise is misguided because the statutes do not set forth any presumptions at all but state a rule of law defining the rights of skiers and ski area operators.

The whole issue of whether certain statutory provisions state conclusive presumptions or are merely substantive rules of law, is a slippery issue at best. In most cases, the arguments asserted are usually two sides of the same coin.

"In strictness there cannot be such a thing as a 'conclusive presumption.' Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence. ... The term has no place in the principles of evidence, ... and should be discarded."

Wigmore, Evidence in Trials at Common Law, Vol. 9 2492 (4th ed. 1981).

Since a presumption always properly refers to a rebuttable assumption of fact, when the term presumption is used in a conclusive sense, it is not a true presumption but is merely a statement by the court of a rule of law.

Barron's Law Dictionary (1984).

The doctrine of "irrebuttable presumptions" gained a foothold in the American judicial system in Justice Stewart's majority opinion in *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). However, despite its brief existence, the doctrine never was consistently applied and is now not considered an acceptable approach in dealing with due process and equal protection arguments.

Weinberger v. Salfi, 422 U.S. 749, 45 L.Ed. 2d 522, 95 S.Ct. 2457 (1975), signaled the end of the "irrebuttable presumption" doctrine. Although there is some question as to whether the doctrine survives where "fundamental interests" are concerned, as stated above, the facts in this case do not involve "fundamental interests." See *Elkins v. Moreno*, 435 U.S. 647 (1978). In fact, the scope of the protection afforded by the irrebuttable presumption doctrine has become regarded in most courts as co-extensive with that of the equal protection clause. *People in the Interest of S.P.B.*, 651 P.2d 1213 (Colo. 1982).

The Colorado Ski Safety Act does not presume all skiers who are within its ambit are negligent without allowing any proof to be presented to the contrary. Rather, the Act imposes a requirement on all members of a defined class (i.e. skiers) to accept the risks of certain dangers and risks inherent in the sport of skiing in order to discourage litigation by a portion of that class.

As stated in *Michael H. v. Gerald D.*, 491 U.S. 110, 121, 109 S.Ct. 2333, 105 L.Ed.2d 91, 104, reh den US

106 L.Ed.2d 634, 110 S.Ct. 22 (1989), cases alleging irrebuttable presumptions must "ultimately be analyzed as calling into question not the adequacy of procedures but - like our cases involving classifications framed in other terms - the adequacy of the 'fit' between the classification and the policy that the classification serves."

Thus, the problem becomes whether a class could be validly created and whether the law as applied to the members of the class is unreasonable, arbitrary, and whether there is a rational relationship between the objective of the act and the means of accomplishment -- In other words, the facts need to be analyzed under a traditional equal protection analysis.

Because the parties only argued the point under the "irrebuttable presumption" this court hereby dismisses Plaintiffs' claim for a declaratory judgment based upon the Colorado Ski Safety Act creates an irrebuttable presumption.

PLAINTIFFS' PER SE AND COMMON LAW NEGLIGENCE CLAIMS

By approving *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991) in *Graven II*, the Colorado Supreme Court now requires trial courts to analyze more closely the facts of each case brought under the Act.

The Supreme Court in the 4 to 3 decision of *Graven II*, opined that although a skier accepts certain dangers and risks of skiing, not all of the dangers and risks listed in Section 33-44-103 (3.5), are inherent and integral in the sport. A determination of which cannot always be made as a matter of law. *Graven II*, at pp. 14-15. In essence, the Supreme Court agreed with the *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991), court which stated, "[I]f an injury was caused by an unnecessary hazard that could have been eliminated by the use of ordinary care, such a hazard is not, in the ordinary sense of the term, an inherent risk of skiing and would fall outside" the Ski Safety Act. *Clover*, 808 P.2d at 1047.

Under *Graven II* the court must now conduct the following analysis: 1) Determine whether the alleged injury resulted from an "inherent danger or risk" of skiing; 2) If it was caused by an "inherent danger or risk" of skiing then the next question is whether the "inherent danger or risk" was an integral part of the sport of skiing. It is this court's assumption that in order to determine whether an "inherent danger or risk" of skiing is an integral part of the sport, will require a *Clover* analysis.

More specifically, the trial court must decide whether the particular risk which allegedly caused the injury was an integral part or essential characteristic in the sport of skiing. Under *Clover* risks and dangers deemed inherent in the sport, but which could be eliminated by reasonable care are not integral and therefore the "inherent dangers and risks" definition would not apply. Thus, the Colorado Supreme Court without labeling the determination of "integral" part of skiing as a duty analysis, has added a new duty for ski area operators -- i.e. whether the ski area operator using reasonable care could have eliminated the "inherent danger or risk" of skiing, in determining whether the dangers and risks are integral.

This court also believes the Plaintiffs' claims survive under Section 33-44-107(7)'s requirement that markers not cause a serious hazard to skiers. Despite the fact that the Victoria Defendants were under no duty to pad the sign post adequately and appropriately under the first sentence of Section 33-44-107(7), the analysis of whether there was a per se breach of an operator's duty does not stop at that point. Section 33-44-107 is labeled "Duties of ski area operators - signs and notices for skiers' information." Subsection (7) states in part, "Any type of marker shall be sufficient, ... if the marker itself does not constitute a serious hazard to skiers." This court finds this clause applies not only to signs marking obstructions not visible from a distance of one hundred feet, but to all signs at ski areas. To find otherwise would have ludicrous results.

In other words, under a narrow interpretation, only signs marking obstructions not visible from a distance of one hundred feet would require being marked with signs that did not cause a serious hazard to skiers. Other than those, all other signs could cause a serious hazard to skiers with no attendant liability. Obviously, such a result would be outlandish.

For example, two signs are placed next to each other, each creating a serious hazard to skiers. The first

sign states, "only you can prevent forest fires." The second sign warns of an obstruction not visible within one foot. A skier falls into one of the signs and is injured. Under the narrow interpretation, the skier would have a per se claim against the ski area operator for the sign marking the obstruction, but falling into the sign regarding forest fires would be barred by the inherent dangers and risks definition.

In reading the Act as a whole, a ski area operator has no duty to cover signs adequately and appropriately that are visible from a distance of one hundred feet or more under Section 33-44-107(7)'s first sentence. Furthermore, a skier accepts all risk and responsibility for collisions with those unpadded signs except in the cases where the signs themselves constitute a serious hazard, and where the dangers and risks associated with the sign are not an integral part of skiing. Operators have a duty therefore, not to post signs that create a serious hazard to skiers under Section 33-44-107(7)'s second sentence, and the inherent dangers and risks associated with the sign are not an integral part of the sport of skiing if the ski area operator could have reasonably eliminated the dangers and risks.

Whether the sign Matthew collided with constituted a serious hazard to skiers is a question for the jury to determine. If the sign was not a serious hazard to skiers then whether the posts were padded or not becomes moot under the per se allegations.

Plaintiffs alleged, "As a direct and proximate result of the breach by Victoria to ... mark ... in conformity with the Ski Act, Matthew suffered a fractured neck and a lacerated spinal cord, thereby causing his death." Plaintiffs' Complaint, para. 16. Because Plaintiffs' assert a cognizable claim upon which relief could be granted the motion to dismiss Plaintiffs' *Negligence Per Se* claim is DENIED.

CONCLUSION

In light of *Graven II*, and the further analysis that must be followed at trial in determining whether the danger and risk Matthew encountered was integral in the sport of skiing and whether the sign created a serious hazard to skiers, Defendants' Motion to Dismiss is DENIED except to the extent that Plaintiffs' claim for declaratory judgment of unconstitutionality shall be DISMISSED.

DONE AND SIGNED this 3rd day of January, 1996.

BY THE COURT:

Original Order signed by Edward A. Simons, District Court Judge