

74960-9

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NO. 74960-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KRISTINE GUTHRIE,
Plaintiff/Appellant,

v.

STEVE NEWMAN AND JANE DOE NEWMAN, HUSBAND AND WIFE,
AND THE MARITAL COMMUNITY COMPOSED THEREOF,

Defendant/Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Bruce Heller, Judge

AMENDED OPENING BRIEF OF APPELLANT GUTHRIE

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COURT OF APPEALS
STATE OF WASHINGTON

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COMES NOW the Plaintiff/Appellant, by and through counsel undersigned, to file this Opening Brief.

A. INTRODUCTION

This is a personal injury case arising from a ski slope collision between a snowboarder heading downhill and a skier below. The Defendant/Respondent is an experienced snowboarder, and on January 5, 2012, he was snowboarding on Mt. Baker in Washington State, heading down the slope when he collided with a skier below. The injured skier is Plaintiff/Appellant Guthrie.

Due to the collision between the snowboarder heading downhill and the skier below, the skier below suffered serious injuries including a concussion and fractures that required multiple surgeries.

On February 26, 2016, the trial court granted Defendants' Motion For Summary Judgment and dismissed the plaintiff's case, concluding that principles of "assumption of risk" essentially negate the mandatory duty imposed by RCW 79A.45.030, the ("ski statute") requiring the person who is skiing downhill to avoid any collision with any person below. The trial court's discussion and reasoning are reflected in the Verbatim Report of Proceedings and CP 347-348.

On March 24, 2016 the trial court denied Plaintiff's Motion for Reconsideration, and explicitly confirmed its reasoning relying on a Pennsylvania appellate case, *Hughes v. Seven Springs Farm*, 762 A.2d 339, 344 (Pa. 2000). The trial court stated as follows: "...[S]tarting from the premise that collisions

with out-of-control skiers are an inherent risk of the sport, Defendant did nothing to increase such inherent risk. At most, he was negligent, which is one of the risks skiers are held to assume.” The Court also ruled that “Comparative negligence has no role to play under such circumstances”. See CP 347-348.

While Plaintiff/Appellant Guthrie acknowledges the potential efficiency of the present appellate process, and the need to clarify the relevance and application of the subject statute before proceeding to trial, the Plaintiff/Appellant asserts that the trial court was in error in its ruling and analysis and asserts that RCW 79A.45.030 imposed a mandatory duty on Defendant/Respondent as a snowboarder heading downhill, requiring Defendant/Respondent to be vigilant and avoid collision with Plaintiff/Appellant Guthrie below.

Plaintiff/Appellant Guthrie asserts that the codified duty reflected in the Washington State “ski statute” cannot be effectively negated by principles of “assumption of risk”, and that the trial court was in error.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing the Plaintiff/Appellant’s case, by ruling that RCW 79A.45.030 was negated by "assumption of risk" principles, and by ruling that there was no duty owed by the defendant because the plaintiff apparently knew there could be skiers and/or snowboarders proceeding downhill as they failed to be vigilant about her as a skier below. The error in the trial court's decision appears to be premised on disregard of the state statute, which appellant

asserts is a mandatory obligation imposed on skiers skiing downhill to prevent harms to those below. *See*, Verbatim Report of Proceedings.

2. The trial court erred in dismissing Plaintiff/Appellant's case under the reasoning reflected in the court order denying plaintiff's motion for reconsideration, apparently relying on the Pennsylvania Appellate Court. See Verbatim Report of Proceedings and CP 347-348.

C. ISSUES UPON APPEAL

1. In light of the inherent dangers of skiing and snowboarding, and the potential risks and harms to those who voluntarily participate, including those of different ages, experience and vulnerabilities, does Washington State have a law that imposes a mandatory duty of care on the skiers or snowboarders heading down hill, and do they have a duty to be vigilant and cautious to avoid collisions with skier's or snowboarders or others below them?
2. Under the present facts, can the mandatory duties and safety principles embodied in "the ski statute" be negated as a matter of law by a trial court relying on appellate cases from other jurisdictions?

D. STATEMENT OF THE CASE

On April 1, 2014, at Mt. Baker, the Plaintiff/Appellant Guthrie suffered traumatic and permanent injuries when Defendant/Respondent Newman snowboarded "downhill" and collided with her as she skied "below" him. It is beyond dispute that at the time of the collision Plaintiff/Appellant Guthrie was

skiing on the slope “below” Defendant/Respondent Newman. *See* Decl. of Kevin Clarke. CP 293- 295.

The Declaration of Jerald D. Pearson, filed separately with the trial Court, confirms the duties imposed by RCW 79A.45.030(6), and also the undisputed facts that Defendant/Respondent Newman was snowboarding “downhill” and Plaintiff/Appellant Guthrie was skiing “below” him. CP 273. In light of these undisputed facts, the statutory duty owed by the Defendant/Respondent as the snowboarder heading “downhill”, is not subject to negation by any “assumption of risk” arguments. Assumption of the risk arguments may pertain to potential liability of a ski resort as an operator, but not to one of its resort guests who collides with another skier.

A trial court must apply Washington law and conclude (as reflected in the court’s analysis and order at CP 347-348) that Defendant/Respondent Newman (snowboarding “downhill”) was negligent as a matter of law when he collided with Plaintiff/Appellant (skiing on the slope “below him”) and that Plaintiff/Appellant Guthrie was not negligent. RCW 79A.45.030(6).

E. STANDARD OF REVIEW

A summary judgment proceeding is subject to de novo review. On appeal, our courts engage in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Comm'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005).

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst*, at 501.

If reasonable minds could reach two different conclusions from the evidence concerning whether the claimant should prevail on the claim, then summary judgment is inappropriate. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 959 P.2d 1104 (1998).

F. ARGUMENT

I. The Washington State “ski statute” imposes a mandatory duty and is appropriate to apply in this case.

The trial Court did not apply Washington statutory and case law that support Plaintiff/Appellant’s arguments that Defendant/Respondent ignored a mandatory duty of care imposed upon him by a safety statute, the “ski statute”. The breach of the statutory duty was negligence, and the trial Court could have found Defendant/Respondent liable as a matter of law.

When it comes to ski accidents involving two skiers in Washington State, the skier who is skiing downhill has the duty to avoid injuring the skier below. A breach of that mandatory duty is negligence to be apportioned under Washington’s comparative negligence law.

The language of the “ski statute” was cited in Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment, and Plaintiff/Appellant sets it forth here to help frame and focus the Plaintiff/Appellant’s argument. CP 265 - 270. The applicable mandatory safety statute provides in relevant part as follows:

...

(3) every person shall maintain control of his or her speed and course at all times...

...

(6) because of the *inherent risks* in the sport of skiing all persons using the ski hill shall exercise reasonable care for their own safety. However, the *primary duty* shall be on the person skiing downhill to avoid any collision with any person or object below him or her.

...

(8) ...any person...on any type of sliding device shall be *responsible* for any collision...with another person...

[Emphasis added.]

RCW 79A.45.030, enacted 1989 [Formerly *RCW 70.117.020*.]

The language of the statute recognizes that where there is inherent risk there can also be a duty. Ignoring a mandatory duty in a safety statute without the imposition of liability is a *non sequitur*. The statute governs the responsibility of

a skier who is skiing downhill to exercise care to avoid injuries to others below, despite the acknowledged inherent risks of the sport of skiing. There is no reference to assumption of the risk in the “ski statute”. Inherent risk and assumption of the risk can be mutually exclusive, and in this case they are, a circumstance clearly anticipated by the Washington State legislature.

Despite the significance of the “ski statute” to this litigation and these parties, and despite the mandatory “shall” language of the “ski statute”, which is essentially a safety statute, the statute has been treated with indifference as the trial court defers to Pennsylvania courts and to the common law doctrines of assumption of the risk and inherent risk. To be clear, the “ski statute” establishes a standard for negligence, and the legislature included the term “negligence” at RCW 79A.45.030(4).

2. Common Law Arguments of Assumption of Risk Do Not Negate Codified Duties and Statutes.

Case law establishes that “Washington statutory law modifies...the common law.” *Codd v. Stevens Pass, Inc.*, 45 Wn.App. 393, 725 P.2d 1008 (1986), at 397. *Codd* was essentially a negligence case with a focus upon a ski resort’s posting of a warning sign subsequent to a fatal skiing accident when a skier hit his head on a mogul. The other focus of the case is on fatally flawed jury instructions that created confusion and misstated the law with respect to, *inter alia*, assumption of the risk and negligence *per se*. *Id.*, at 396. The dispute

involved the wording of the instructions, instructions that had no relevance to a skiing accident involving an uphill and a downhill skier. In *Codd*, the skier sued the resort. From Plaintiff/Appellant Guthrie's perspective, the significance of the *Codd* case is that it does not dismiss a negligence analysis out of hand simply because the operator of the resort raised the defense of assumption of the risk.

More to the point, this Court recognized in its *Codd* holding, that then RCW 70.117.020 (now RCW 79A.45.030, **"requires that skiers exercise reasonable care..."** and that **"[t]his is consistent with Washington's comparative fault law."** *Id*, at 398 [emphasis added.] This Court went on to say in *Codd* that, **"[i]n addition to the specific requirements of this section [of the "ski statute"], all skiers shall conduct themselves within the limits of their individual ability and shall not act in a manner that may contribute to the injury of themselves or any other person."** *Id*, at 400 [emphasis added.] This Court in *Codd* found that treating **"...assumption of the risk and contributory negligence as a bar to [Plaintiff's] recovery"** was **"fatally flawed"**. *Id*, at 401 [emphasis added.]

In the March 24, 2016 Order on Motion for Reconsideration in this case, page 2, lines 2-3, the trial Court stated "Defendant [Newman] did nothing to increase such inherent risk. At most, he was negligent, which is one of the risks skiers are held to assume." CP 348. This Order made no mention of the "ski statute". When the legislature has spoken, making it mandatory that a skier who

is skiing downhill conduct himself in a manner consistent with a duty of care owed to the skier below, and the skier who is skiing downhill breaches that duty, causing injury to the skier below, the result is negligence based liability. The trial Court acknowledges this is negligence, but then states this "...is one of the risks skiers are held to assume." This is reversible error.

Considering the court's analysis in the *Gleason* case, *Gleason v. Cohen*, 192 Wash. App. 788, 368 P.3d 531 (2016), Gleason and Cohen knew each other. They knew one another's strengths, weaknesses, risk appetites, and temperaments. In the present case, the two skiers never met before the traumatic collision. Guthrie did not have an understanding with Newman that he would be himself and she would suffer the consequences. Rather, the two were strangers obligated by the mandates of the Washington "ski statute" to protect those on the slopes below them. Defendant/Respondent Newman's knowledge of his duty is consistent with the statute, at least in terms that he knew that "...the uphill skier has more options..." Newman deposition, page 31:3-4. CP 304. He continued, "...the downhill skier rule, in my mind, comes from the fact that an uphill skier typically has more options and is more in control of the situation because they have the energy of coming down the hill." *See*, Newman deposition, page 32:14-17. CP 305. Also, "...I think the person with the most options to control the situation has the most responsibility." *See* Newman Deposition, page 33:15-17, CP 306.

It is important to recall the mandatory duties of the “downhill” skier, as opposed to the person to whom the duty is owed, the person “below.” The statute explicitly creates a “primary duty” on those above (coming “downhill”) to avoid colliding with anyone “below”. At all material times, that duty was owed by Defendant/Respondent Newman to Plaintiff/Appellant Kristine Guthrie. The “primary duty” language of the statute does not differentiate between animate and inanimate objects, or downhill children, or downhill vulnerable individuals, or good skiers or bad skiers, or big skiers or small skiers. It is strictly written to direct the “downhill” skier’s attention to all that lies ahead.

Plaintiff/Appellant Guthrie did not assume the risk of Defendant/Respondent Newman’s negligence in breaching his mandatory statutory duty of care with respect to her as the downhill skier. Nobody has argued that skiing is a contact sport and that collisions are expected or invited. The collision of two skiers is not pleasant or consensual, but when a downhill skier is careless, serious injury will occur, as here.

3. The Applicable Statute Confirms the Primary Duty of Defendant Newman to Avoid Collision with Plaintiff.

Unlike many states, the Washington State Legislature has undertaken to define a skier/snowboarder’s duty while engaged in that particular recreational activity. That legislation, which was enacted in 1977, and renumbered in 1989, makes this issue straightforward and clearly applicable in the present context.

Simply, it is the duty of a skier who is skiing downhill to avoid collision with any person “below” him and to control his speed.

Skiers do not have eyes in the back their heads, and it is obvious who is in the best position to anticipate circumstances that may lead to a collision. The skier who is skiing downhill has a duty, which has nothing to do with the skiing experience or athletic ability of any vulnerable skier “below”. Moreover, the statute makes complete sense in the context of safe practices, because a skier “below” may start moving, may fall, stop, turn, speed up, or slow down. Thus, the Defendant skiing “downhill” has a “primary duty” to anticipate any and all of these actions, and shall maintain both safe speed and control to comply with the duty mandated by Washington law.

G. CONCLUSION

We should all acknowledge that we are partners in a broad community of rights and responsibilities. Plaintiff/Appellant Guthrie respectfully requests that this Court provide guidance and analysis to the trial courts, and members of the legal profession, to effectively distinguish between the application of statutory duties and common law principles regarding “assumption of risk.”

Plaintiff/Appellant Guthrie respectfully requests that the trial court decision be overturned and that this matter be remanded for trial on the merits.

DATED this 25th day of July, 2016.

THE PEARSON LAW FIRM, P.S.



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DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 26th day of July, 2016, I caused a true and correct copy of this **AMENDED OPENING BRIEF OF APPELLANT GUTHRIE** to be served on the following:

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