CHALAT LAW
CHALAT | HATTEN | BANKER

CHALAT HATTEN & BANKER PC
JAMES H. CHALAT | LINDA J. CHALAT
RUSSELL R. HATTEN | EVAN P. BANKER | ALLISON R. HART

June 20, 2018

Legal precedent, not jury verdict, at heart of *Conlin v. Vail*.

The wrongful death verdict in favor of Vail Resorts was a victory for the ski industry. The jury concluded that Vail Resorts was not negligent in the January 22, 2012 death of 13-year-old Taft Conlin. Vail owes the family no damages; and the plaintiffs can now expect a bill of costs from Vail Resorts which would bankrupt any family.

The long and hard-fought case is also a testament to the grit and determination of the Ingalls-Conlin plaintiffs, and their stalwart lawyers. No pain is greater than that of the loss of a child. No case is more difficult than a long-drawn-out battle against a billion-dollar multi-national corporation.

However, for the skiing public, the legal precedent in the case is not in the jury's verdict. It is that the case was heard and determined by a jury as a finder of fact, rather than dismissed by the judge on a critical point of law.

That point of law involves the most heated legal dispute currently arising in civil actions in recreational, premises, and tort cases. That is whether large corporate service industries can protect themselves from all liability, even for their own negligence, by simply requiring a waiver of liability in their service agreements. Given the ubiquitous use of the internet to conclude consumer transactions, the "click-wrap" formula of requiring a full waiver as a contract term when making online purchases is now common-place. The ski industry is fully committed to this strategy. Every Colorado ski area operator requires its season pass purchasers to sign or to click "Agree" to a full liability release at the point of sale for a skier or snowboarder's season pass. Skiing at an area where you are not a season pass holder? Ski area operators now place a full liability release on the reverse of the day ticket.

By their terms, the liability releases would bar claims even for violations of a statutorily required duty of care; and release the ski area operators for their own acts of negligence.

The legal question becomes whether the liability releases are "worth" the keystrokes with which they are written. The answer, in the context of a ski accident case is: perhaps not.

Prior to the 2011-2012 ski season, the Ingalls-Conlin family had purchased a season pass from Vail Resorts for their son Taft. The season pass paperwork contained a full liability release of

1600 Broadway | Suite 1920 | Denver | Colorado | 80202
Phone: 303.861.1042| Cell: 303.882.4781 | Toll Free 800.221.5526
jchalat@chalatlaw.com WWW.CHALATLAW.COM

COLORADO | MICHIGAN | TEXAS | NEW YORK

Vail Resorts. The liability release would have barred all claims by the Ingalls-Conlin plaintiffs, even if the claim was founded – as this case was – on an alleged breach of Vail Resorts' duties under the Colorado Ski Safety Act (SSA).

If the liability release was valid and enforceable, the presiding judge, The Hon. Fred Gannett, would have been duty bound to dismiss the case without a jury ever being called to consider the facts and apply the law.

In a ruling on June 8, 2018 however, Gannett found that the season pass waiver was inoperable as a matter of law. He held that the liability release was invalid because it contradicted the ski area operator's statutory duty under the Colorado Ski Safety Act (SSA). Gannett's order is at the heart of the safety precedent in the case.

Injured skiers who have been hurt or families of skiers killed as the result of the alleged violation by the ski area of a statutory under the Ski Safety Act have frequently made the argument which Gannett adopted and made the law of Taft Conlin's case.

In three recent federal cases, the Tenth Circuit Court of Appeals has held such written release agreements bar all skiers' claims against ski area operators, no matter the character of the claim. In one case, moreover, the Court held that the mere printing of waiver language was enforceable to bar the skier's claims arising from a ski lift accident.

The federal precedent goes as far as to fully immunize ski areas in Colorado from all claims, not only for downhill skiing cases, such as *Ingalls v. Vail*. The precedent would also protect ski areas in all cases involving lift accidents.

Lift accidents have long been viewed from the standpoint of an enhanced standard of care for lift operators. Colorado ski area operators have, by rule of law, been bound in the operation of their lifts and tows, the duty to operate their lifts in accord with "the highest degree of care commensurate with the practical operation of the lift to ski area operators."

One argument favorable to Judge Gannett's holding that an liability releasee agreement cannot contradict a statutory public duty, is that the skiing industry already enjoys significant immunities and damages caps. The SSA limits damages claims against ski areas, for claims other than lift accidents, to $250,000. Municipal and state agencies have liability caps of $300,000 adjusted every three years for a cost of living increase; the medical industry enjoys caps on damages of $300,000 for non-economic losses such as impairment and pain and suffering, and a presumptive limit of $1,000,000 for all damages including economic losses.

Other state Supreme Courts in states with large skiing industries have held that liability release agreements are unenforceable in ski accident cases.

In 2014 the Oregon Supreme Court held that enforcement of a liability release agreement, in a teenage snowboarder's season pass agreement, was unconscionable and unenforceable. *Bagley v. Mt. Bachelor, Inc.*, 340 P.3d 27 (Or. 2014).

In 2007 the Utah Supreme Court held that a liability release agreement was unenforceable as contrary to public policy. That waiver had been signed by William Rothstein, an expert adult skier. Rothstein's season pass agreement provided for a complete waiver of claims against the Snowbird Ski Resort. The waiver also provided that Rothstein assumed all risks of injury including the risks created by Snowbird's own negligence. Utah's Inherent Risks of Skiing Act had been enacted because the ski areas argued that it could not buy insurance without statutory safeguards. The Utah court held:

> The bargain struck by the Act is both simple and obvious from its public policy provision: ski area operators would be freed from liability for inherent risks of skiing so that they could continue to shoulder responsibility for noninherent risks by purchasing insurance. By extracting a preinjury release from Mr. Rothstein for liability due to their negligent acts, Snowbird breached this public policy bargain. Rothstein v. Snowbird Corp., 175 P.3d 560, 564 (Utah 2007).

Vermont has a similar rule, holding that liability release agreements in skiing passes were void as contrary to public policy. *Dalury v. S-K-I, Ltd.*, 670 A.2d 795 (Vt. 1995).

Moreover, two other judges in Colorado state district courts have also determined that season pass waivers which purported to nullify the ski areas' statutory duties, were invalid as a matter of law.

Colorado's Fifth Judicial District includes Clear Creek, Lake, Summit and Eagle Counties. Those counties account for over half of Colorado's annual 12 million skier visits. The courts in those counties hear all manner of skiing-related cases, including: skier collision cases, lift and ski accident cases arising from Colorado's Skier Safety Act (SSA) and criminal cases involving reckless or intentional misconduct on the snow. It is no surprise that many of the significant Colorado Supreme Court skiing and lift accident cases have worked up the judicial system, having first been filed and decided in the Fifth Judicial District. Many of the judges, including Judge Gannett are experienced, committed jurists, who also have extensive skiing experience. Several have worked in law enforcement, and as ski patrollers.

Judge Gannett's ruling was well-founded and based on precedent. It should be the law of the State of Colorado, not just the law in the case of Taft Conlin.

Respectfully,

James H. Chalat