

SUPREME COURT OF COLORADO

Fleury v. Intrawest Winter Park Operations Corp.

372 P.3d 349 (Colo. 2016) · No. 2016 CO 41 · Decided May 31, 2016

SUMMARY

The Colorado Supreme Court held that an in-bounds avalanche qualifies as an inherent danger and risk of skiing under Colorado's Ski Safety Act. The court concluded that the statutory phrase "snow conditions as they exist or may change" encompasses avalanches and therefore bars claims against ski area operators for injuries resulting from such avalanches. The court affirmed dismissal of the plaintiff's negligence and wrongful death action.

CASE DETAILS

COURT	Supreme Court of Colorado
WRITING FOR THE COURT	Justice Eid
JURISDICTION	Colorado
DECIDED	May 31, 2016
DOCKET	2016 CO 41
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioner appealed after the trial court dismissed her negligence and wrongful-death action under the Colorado Ski Safety Act. The Colorado Court of Appeals affirmed in a split decision, and the Colorado Supreme Court granted certiorari.
STANDARD OF REVIEW	De novo review of the statutory-interpretation question.
PRECEDENTIAL VALUE	Published Colorado Supreme Court opinion; precedential
PARTIES	Salynda E. Fleury v. Intrawest Winter Park Operations Corporation

TOPICS

statutory interpretation wrongful death negligence personal injury torts

PRACTICE AREAS

statutory interpretation torts personal injury wrongful death

QUESTIONS PRESENTED

1. Whether an avalanche occurring within the bounds of a ski resort qualifies as an "inherent danger[] and risk[] of skiing" under the Colorado Ski Safety Act and therefore falls within the Act's immunity provision.

HOLDINGS

1. An in-bounds avalanche qualifies as an inherent danger and risk of skiing because it is encompassed by the statutory phrase "snow conditions as they exist or may change." The Ski Safety Act therefore precludes a skier's claim against a ski-area operator for injuries resulting from an in-bounds avalanche.

KEY QUOTATIONS

"Because an avalanche is, at its essence, the movement of snow, and is therefore a way in which snow conditions may change, we hold that section 38-44-108(8.5) covers in-bounds avalanches." (352)

"It follows that section 88-44-112 precludes skiers from suing operators to recover for injuries resulting from in-bounds avalanches." (352)

FACTUAL BACKGROUND

Christopher H. Norris was killed in an avalanche while skiing on the Trestle Trees run within Winter Park Resort. Before the accident, the Colorado Avalanche Information Center had issued an avalanche warning, and the existing snow base on the run was weak and unstable. Winter Park allegedly knew of the warnings and the run's susceptibility to avalanches but neither closed the run nor posted warnings.

PROCEDURAL HISTORY

After Christopher Norris was killed in an in-bounds avalanche at Winter Park Resort, Salynda Fleury sued Winter Park for negligence and wrongful death. Winter Park moved for a determination of law under C.R.C.P. 56(h) and for judgment on the pleadings under C.R.C.P. 12(c), arguing that the Ski Safety Act barred the action. The trial court dismissed the complaint with prejudice, the court of appeals affirmed, and the Colorado Supreme Court affirmed the court of appeals.

DISPOSITION

affirmed

CASES CITED

- Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C., 2012 CO 61, 287 P.3d 842
- Abts v. Board of Education, 622 P.2d 518 (Colo. 1980)
- Fleury v. Intrawest Winter Park Operations Corp., 2014 COA 13
- Hunsaker v. People, 2015 CO 46, 351 P.3d 388
- Stamp v. Vail Corp., 172 P.3d 437 (Colo. 2007)
- Ryals v. St. Mary-Corwin Regional Medical Center, 10 P.3d 654 (Colo. 2000)

OPINION

EID, J.

JUSTICE EID delivered the Opinion of - the Court. T1 In this case, we determine whether an avalanche that occurs within the bounds of a ski resort qualifies as an "inherent danger[] and risk[] of skiing" under the Ski Safety Act of 1979, §§ 88-44-101 to -114, C.R.S.

(2015) (the "SSA" or "Act"). If so, the statute would preclude skiers from bringing claims against ski area operators for injuries resulting from these kinds of avalanches. See § 38-44-112, C.R.S. (2015). ~12 Here, petitioner Salynda E. Fleury brought a negligence and wrongful death suit against respondent IntraWest Winter Park Operations Corporation ("Winter Park") after her husband was killed in an in-bounds avalanche at its resort.

Fleury claims that, although Winter Park knew that avalanches were likely to occur in the area where her husband was skiing that day, it neither warned skiers about this risk nor closed the area. Winter Park filed a motion for a determination of law under C.R.C.P. 56(h) and *350for judgment on the pleadings under C.R.C.P. 12(c), arguing that in-bounds avalanches are an inherent risk of skiing as defined in the SSA and that the SSA therefore precluded the lawsuit. The trial court agreed and dismissed the action pursuant 'to section 88-44-112.

T3 The court of appeals affirmed the dismissal in a split decision. The majority concluded that avalanches fall within the statutory meaning of the phrase "inherent dangers and risks of skiing" because they result from "snow conditions as they exist or may change," "changing weather conditions," and "variations of steepness or terrain," all of which are specifically enumerated as "inherent dangers and risks" under the statutory definition.

Fleury v. IntraWest Winter Park Operations Corp., 2014 COA 13, ¶¶ 15-16, — P.3d —. Judge J. Jones dissented, arguing that the statute neither expressly nor by clear implication included in-bounds avalanches as an inherent risk of skiing,. Id, at I 29 (J. Jones, J., dissenting). T4 We granted certiorari and now affirm. The definition of "inherent dangers and risks of skiing" in section 88-44-108(8.5), C.R.S.

(2015), specifically includes "snow conditions as they exist or may change." This phrase 'encompasses an in-bounds avalanche, which is, at its core, the movement, or changing condition, of snow. We therefore affirm the decision of the court of appeals. J. 5 We accept as true the following allegations from the complaint. See Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C., 2012 CO 61, ¶ 7, 287 P.3d 842, 845 (citing Abts v. Bd. of Educ., 622 P.2d 518, 521 (Colo.

1980). 16 On January 22, 2012, Christopher H. Norris was killed in an avalanche while skiing on the "Trestle Trees" run within the bounds of Winter Park Resort. In the days leading up to his death, the Colorado Avalanche Information Center had predicted heavy snow storms and issued an

avalanche warning to last through January 28. It warned skiers to "(b)le careful near or below any slope over 80 degrees" and cautioned that "the weak snowpack will not be able to handle even [a] modest new load" of snow from the coming storms.

Prior to the arrival of these storms, t\he existing snow base on the Trestle Trees run had grown weak and unstable, which made it prone to avalanches. Winter Park knew about the avalanche warnings, the unstable snow on the Trestle Trees run, and the areas within the resort that were most susceptible to avalanches on January 22, including Trestle Trees, but it neither closed the run nor posted signs to warn skiers of the avalanche risk. | T7 After her husband's death, Fleury brought negligence and wrongful death claims against Winter Park, Winter Park filed a motion for a determination of law under C.R.C.P..56(h) and for judgment on the pleadings under C.R.C.P.

12(c), arguing that the SSA barred the, lawsuit because avalanches constitute an inkerent risk of skiing under the statutory definition.. 18 The trial court granted the motion. It found that the allegations in the complaint indicated that the fatal avalanche resulted from a combination of "changing weather conditions," "snow conditions," and "variations in steepness or terrain" as enumerated in section 88-44-108(8.5).

The court rejected Fleury's argument that the statute needed to expressly enumerate the term "avalanches" for avalanches to be covered as an inherent risk because section 88-44-108(8.5) uses the non-exclusive term "including" before listing examples of inherent risks.

As such, it dismissed the complaint with prejudice. T 9 In a split decision, the court of appeals affirmed the dismissal, Fleury, 128. The majority agreed with the trial court that the word "including" was "illustrative and not, as Ms. Fleury argues, confined to the identified dangers" in the statute because it is "a word of extension or enlargement." Id, at T11.

It went on to conclude that avalanches result "from certain conditions of snow, and the degree 'of danger is affected by 'changing weather conditions' across 'variations of steepness or terrain'" +Id. at 115, Consequently, the court held that the term "inherent dangers and risks of skiing" under seetion 83-44-103(8.5) encompasses avalanches. Id. at I 16. *351'I 10 In dissent, Judge Jones objected that the majority "eobblfed] together three categories of covered dangers and risks" to conclude that avalanches are covered under the definition even though they are not expressly included in it.

Id, at 138 (J. Jones, J., dissenting). He argued that this approach violated the rule that statutory grants of immunity must be strictly construed, and characterized an avalanche as an "event-one that not even necessarily involves snow," as distinguished from "changing weather conditions," "snow conditions," or "variations in steepness or terrain." Id. at 11 38, 42, 48-45.

Finally, Judge Jones asserted that avalanches do not always result from the mere combination of these three factors, because other factors, including human action, can also cause them

independently. *Id.* at 146. Thus, even if the majority was correct to aggregate the different categories under the statute, Judge Jones contended that the statute still did not unambiguously encompass avalanches.

Id. at 148. For these reasons, he would have reversed the trial court. *Id.* at 129. {11 We granted certiorari to review the court of appeals' decision and now affirm.¹ The statutory definition specifically lists "snow conditions as they exist or may change" as an "inherent danger[] and risk[] of skiing." § 88-44-108(8.5). This phrase encompasses an in-bounds avalanche, which is, at its core, the movement, or changing condition, of snow.

We therefore hold that an in-bounds avalanche qualifies as an inherent risk of skiing under the SSA.² HL. T12 Whether the term "inherent dangers and risks of skiing" as defined in section 88-44-108(8.5) encompasses in-bounds avalanches is a question of statutory interpretation that we review *de novo*. *Hunsaker v. People*, 2015 CO 46, ¶ 11, 351 P.3d 388, 391. 13.

The SSA recognizes that certain dangers and risks "inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed" by ski area operators. § 88-44-102, C.R.S. (2015). It therefore provides 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," § 38-44-112.³ The Act specifically defines "inherent dangers and risks of skiing" as those dangers or conditions that are 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, cliffs, extreme terrain, and trees; or other natural objects, and collisions with such natural objects; impact with lift towers, signs, posts, fences or enclosures, hydrants, water pipes, or other man-made structures and their components; variations in steepness 'or terrain, whether natural or as a result of slope design, snowmaking or grooming operations, including but not limited to roads, freestyle terrain, jumps, and catwalks or other terrain modifications; collisions with other skiers; and the failure of skiers to ski within their own abilities. § 88-44-108(8.5) (emphasis added).

The Act specifically excludes "the negligence of a ski area operator as set forth in section 88-44-104(2)" from this definition and does not immunize operators for "injuries] caused by the use or operation of ski lifts." *Id.* *352[14 The phrase "snow conditions as they exist or may change" encompasses avalanches that occur within the bounds of a ski resort.

A "condition" is simply a "mode or state of being," Webster's Third New International Dictionary 473 (2008), or more specifically, "the physical state of something," Merriam-Webster Online Dictionary, <https://perma.co/BA4DZ-IUZA>. A "snow condition," therefore, is simply a "mode or state of being" or "the physical state" of snow. To put it differently, a snow condition is a description of the snow at any given time, Section 33-44-108(8.5) lists "ice, hard pack, powder,

packed powder, wind pack, corn, crust, slush, cut-up snow, and. machine-made snow" as examples of snow conditions-that is, ways in which to describe the physical state of the snow at any particular time, 15 The statute also contemplates that the snow conditions "may change." § 88-44-108(8.5) (listing "snow conditions as they exist or may change" as an inherent risk of skiing (emphasis added)).

One obvious way in which a snow condition "may change" is through movement of the snow, including by wind and gravity. And at its core, an avalanche is moving snow caused by gravity. The dictionary definition of "avalanche" is-"a large mass of snow, ice, earth, rock, or other material in swift motion down a mountainside or over a precipice." Webster's Third New International Dictionary 150 (2008); see also The American Heritage Dictionary of the English Language 383 (4th ed, 2000) (defining "avalanche" as "[a] fall or glide of a large mass, as of snow or rock, down a mountainside").

Although this definition could include snowless rockslides or landslides, "[in practice, ['avalanché'] usually refers to the snow avalanche." Nat'l Oceanic and Atmosphetic Admin., Avalanche, Natl Weather Serv. Glossary, <https://perma.cc/VYR3-CXAZ>; see also Nat'l Avalanche Ctr., Avalanche, Encyclopedia, <https://perma.cc/LRRT-KT82> (defining "avalanche" as "[a] mass of snow sliding, tumbling, or flowing down an inclined surface" and explaining the types of avalanches, all of which involve moving snow).

These sources confirm that an avalanche is most commonly understood as the movement of snow down a mountainside or other incline. T16 At bottom, then, an avalanche is one way in which snow conditions may change. As alleged here, snow conditions started with fresh snow on unstable snowpack, and, within moments, changed to a mound of snow at the bottom of the incline.

We therefore conclude that Norris's death is alleged to have been caused by changing snow conditions. T 17 Adopting the reasoning of the dissent. ing judge below, Fleury argues that an avalanche is "an event," not a snow condition, and that therefore an avalanche does not fall within the statutory language. See Fleury, 42 (J. Jones, J., dissenting). This interpretation, however, ignores the fact that the language covers snow conditions as they "exist" or "may change."

Because an avalanche is, at its essence, the movement of snow, and is therefore. a way in which snow conditions may change, we hold that section 38-44-108(8.5) covers in-bounds avalanches. It follows that section 88-44-112 precludes skiers from suing operators to recover for injuries resulting from in-bounds avalanches.4 IIL. T 18 For these reasons, we affirm the decision of the court of appeals.

JUSTICE MARQUEZ dissents, and JUSTICE GABRIEL joins in the dissent.. We granted certiorari to review the following issue: Whether, for the purposes of the Ski Safety Act ("SSA") of

1979, codified at sections C.R.S. 33-44-101 to -114 (2014), the term "inherent dangers and risks of skiing," as defined in C.R.S. 33-44-103(3.5) (2014), encompasses avalanches that occur within the bounds of a ski resort, in areas open to skiers at the time in question..

Because we find that the enumerated term "snow conditions as they exist or may change" encompasses in-bounds avalanches, we do not reach the question of whether the term "including" as used in section 33-44-103(3.5) is exclusive or non-exclusive..

We have construed the term "injury" to include death. *Stamp v. Vail Corp.*, 172 P.3d 437, 4474 (Colo. 2007)., Because we conclude that the phrase "snow conditions as they exist or may change" encompasses in-bounds avalanches, we need not consider Fleury's additional argument, based on the dissent, that "a statute's grant of immunity must be strictly construed."

Fleury, 138 (J. Jones, J., - dissenting); see *Ryals v. St. Mary-Corwin Reg'l Med. Ctr.*, 10 P.3d 654, 661 (Colo. 2000) ("A statute may modify or restrict a common law right only to the extent embraced by the statute.").