SB 44

Marc D. Bond
DELANEY, WILES, HAYES
REITMAN, & BRUBAKER, INC.

MEMORANDUM

(MARC BOND)

In an effort to prevent the adoption (or even consideration) of House Bill 491 and Senate Bill 403, Dennis Mestas, a prominent plaintiff's personal injury attorney wrote a letter to Rep. David Finkelstein dated March 4, 1992. Mr. Mestas' letter contains numerous factual errors and hyperbole. In many cases it is difficult to discern exactly what Mr. Mestas is trying to say. This memorandum sets forth and discusses what appear to be the major points in the letter.

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Claim: "[T]he proposed bill would grant immunity for negligent maintenance, construction and design activities that would virtually insulate the ski area from any liability for operation of the ski area operations."

Answer: The bill (like all inherent risk statutes) recognizes that skiers are responsible to navigate around all non-moving objects and hazards on the ski slope. The skier must navigate the slope at a reasonable rate of speed and determine the location and nature of any objects or conditions which may create a risk to that skier. The bill conforms with the definition of inherent risks in the Colorado statute, CRS § 33-44-103(10).

The area operator remains responsible for the remaining aspects, some of which: (1) Placement of warning and informational signs; (2) Operation and maintenance of the ski lifts; (3) Operation of all over-the-snow equipment; (4) Mitigation of avalanche hazards which may affect skiers within the area boundaries; (5) Operation of all activities which surround the ski slopes, but have no direct connection with the ski slopes, e.g., restaurants, parking lots, ski shops, hotels, etc; (6) Operation of any ski instructional programs.

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Claim: "[The bill] also adds death to the definition of 'injury.' Currently only injuries, not death are covered."

Answer: When the original bill was adopted in 1980, there was no debate concerning death as a "personal injury." It is difficult to discern how one can die without a "personal injury," and we believe death is included in the current definition.

The only reason the term "death" is added to the proposed legislation is to respond to the Alaska Supreme Court decision in Kissick v. Schmierer, 816 P.2d 188 (Alaska 1991). In that case, a passenger in a light plane signed a release agreement which stated that neither he nor his heirs would make any claim "for any loss, damage, or injury to my person or my property" which arose from his ride in the airplane. The plane crashed, and the passenger was killed. His widow sued, and claimed that the release agreement did not include death.

Although it is hard to imagine how death is not an "injury to my person," the Alaska Supreme Court held that the release agreement was ambiguous, and did not include "death." The purpose of the amendment is to clarify that "death" is included, as well as any other personal injury. There is no rational policy basis for abating liability for personal injuries, but not for death.

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Claim: "The act was largely the result of one lawsuit which was filed against Seibu."

Answer: The act, passed in 1980, was promoted by the Alaska Ski Area Operators Association. It was part of a nation-wide response to the Vermont Supreme Court decision in Sunday v. Stratton Corp., 136 Vt. 293, 390 A.2d 398 (Vt. 1978). In that case, a skier claimed that he had fallen after his ski became entangled in a small bush or piece of brush near the side of a beginner's trail. The skier became a quadriplegic as a result of the accident. The court held that the ski area operator could be liable for such an incident, and affirmed a jury verdict in favor of the skier.

Within five years, over 20 states with commercial ski operations adopted statutes which recognized that responsibility for injuries arising from the inherent risks of skiing rests with the skier. There are several reasons why such statutes are necessary and desirable, and why the legislature must use very specific language in expressing its intentions. Currently, 26 states have statutes recognizing the inherent risks of skiing.

The Schlaak case, while an example of the imposition of unreasonable liability on ski area operators, was not the impetus for the inherent risk statute. The complaint in the Schlaak case was filed on June 4, 1980, well after the legislation had been introduced (February 18, 1980), and adopted (May 21, 1980), and just eight days before Governor Hammond signed the bill into law.

Alaska legislation regulating the operation of ski areas was introduced as House Bill 778 in 1978 by Representatives Rudd, Lethin and Hayes, modeled after the Washington State statute adopted in 1977. RCW 70.117.010.-.040. This legislation passed the House, but was not heard in the Senate. In February of 1980, Senators Kerttula and Colletta introduced the bill which ultimately became the current law.

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Claim: "[The present statute] is a grossly unfair bit of special legislation for the benefit of one of the (if not the) largest recreational corporation in the world -- Koyudo Sangyo, Inc."

Answer: The statute protects all Alaskan ski area operators, including several municipalities -- Anchorage, Juneau and Valdez -- from unreasonable liability. There are 12 ski areas in the state, and the inherent risks listed in the legislation exist at each and every one of them. The legislation has been endorsed by the Anchorage Municipal Assembly, Alaska Visitors Association, and Anchorage Convention and Visitors Bureau have all adopted formal resolutions of support. The bills are also supported by the City and Borough of Juneau assembly members, and the Eaglecrest Ski Resort.

The legislation would also protect the availability of the sport of skiing to Alaskans. Given the current status of ski area liability in Alaska under the Hiibschman decision, it is entirely possible that the whole industry will disappear from the state under the rising tide of unfair litigation. These bills have broad organizational support, as well as support among the skiing public.

In his letter, Mr. Mestas has singled out Alyeska Resort with a surprising level of invective. Major corporations (which provide Alaskans with major employment opportunities) are easy targets for the type of harangue employed by Mr. Mestas, just as they are easy targets for lawsuits. New ski areas and major expansion programs are going to be built by large corporations and government agencies. The issue is whether the state wishes to encourage or discourage such economic development, and the jobs which come with it.

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Claim: The proposed legislation improperly immunizes operators from liability for design and construction of roads and catwalks.

Answer: It is appropriate to place the burden of scouting ALL of the terrain on the skier. Only the skier knows his or her capabilities and desires, and only the skier can couple those with the available terrain to obtain maximum enjoyment consistent with acceptable risk. A catwalk which interrupts a steep slope may be a nuisance to an expert skier who would like to be able to ski fast down the entire slope, but it is also a very welcome, gently sloped way down the hill for a beginner skier. The proposed legislation is in conformity with the laws of other states. Colorado, for instance, specifically includes catwalks and roads in its list of inherent risks: "Variations in steepness or terrain, whether natural or as a result of slope design, snowmaking, or grooming operations, including but not limited to roads and

catwalks or other terrain modifications." CRS § 33-44-103(10).

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Claim: "It should be kept in mind that skiing is not much different than driving a car."

Answer: Skiing is very much different from driving a car. A car driver travels a narrow band of road, the basic characteristics of which do not change over time. A skier travels all over a mountain side, the basic characteristics of which can change from one run to another with surface conditions, downed tree limbs, exposed surface conditions from melting snow, substantially decreased visibility, etc. A driver is encased in a warm, comfortable environment, and sits in a warm, comfortable seat as he makes driving decisions. A skier is exposed in a cold, windy, snowy environment, and is attempting to remain upright as well as evaluate the slopes ahead

A driver on a highway directs a machine that is specifically designed for the paved surface, and the surface has markings (solid and dashed lines) to steer his course in a single direction. A skier is directing two 6' boards with no power assist, and the surface has no markings and can be traversed sideways or downhill, or at an angle. Cars travel in single file, while skiers travel in whichever direction they individually choose.

A highway has a prepared surface with minimal bumps, while a ski slope unless recently groomed, has many bumps and subsurface conditions. A car stays on top of the prepared surface at all times, while skis travel below the snow surface in soft snow conditions, exposing the skier to subsurface hazards such as stumps, roots, rocks, etc. Highways are designed to allow drivers to maintain constant and uniform speeds over long distances, while ski runs require frequent course and speed corrections.

The attempted analogy between car drivers and skiers is inept, to say the least, and profoundly deceptive.

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Claim: The Hiibschman case "codified the common law that ski areas were not liable for injuries caused by the inherent risks of skiing."

Answer: The Hiibschman case gutted the inherent risk of skiing statute by holding that it merely codified the common law, and imposed on ski area operators the impossible burden of assuring that ski runs are "reasonably safe" under any and

all conditions. Virtually every other state which has skiing has recognized that the common law standard does not recognize the realities of skiing.

The common law standard grows out of the operation of commercial enterprises, such as stores, restaurants, banks, taverns, theaters, and the like, and does not recognize the distinct nature of ski areas, which invite patrons to challenge themselves mentally and physically on uneven mountainous terrain in winter conditions.

The better standard, adopted by the legislatures of the majority of skiing states, requires the operator to notify skiers of the general nature of the hazards to be encountered, and then requires the skier to accept those risks as part of his participation in the sport.

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Claim: "[W]e believe HB 491 is brought before the legislature because of not only the recent Hiibschman decision but also because of a recent death that occurred at Seibu's resort at Alyeska."

Answer: The push for an amendment to the inherent risk of skiing statute has nothing to do with Bart Rizer's death on December 8, 1991. It was prompted solely by the Alaska Supreme Court's Hiibschman decision dated December 6, 1991. The unfortunate and tragic death of Bart Rizer is but another example of the fact that skiing is a hazardous sport, and can not be made 100% safe. About 40 people die each year while downhill skiing in the United States. However, the rate of injuries, including deaths, is not related to the state of the law in each jurisdiction, but to the inherent risks of skiing which exist at all ski areas, regardless of location, to a greater or lesser degree. Ski area operators would be before the Alaska legislature whether or not Bart Rizer had died.

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Claim: Alyeska Resort was negligent in connection with the death of Bart Rizer.

Answer: Bart Rizer's death was a terrible tragedy of immense proportions. It is no comfort to those who mourn his passing to have to confront the fact that death, like other injuries, was the result of the inherent risks of skiing.

Alyeska Resort was not negligent in the death of Bart Rizer. Ski areas open when they have snow. Snow comes in myriad types and depths. We are unaware of a single ski area in the country which closes ski runs to children if the

snow is beyond a certain depth. Many children are competent to ski deep snow, just as many adults are unable to ski perfectly groomed, flat snow. Each skier must determine the limits of his own ability. Parents must determine whether their children are sufficiently mature to exercise good judgment in selecting the times and places to ski.

Alyeska opens an area to skiing when it believes the snow is sufficient to cover most of the rocks and undergrowth in an area. Those criteria were met on December 8, 1991, with respect to all areas opened to the public at Alyeska Resort, including the Bowl. During early season operations, Alyeska places warning signs informing its patrons of the existence of hazards due to early season conditions. These signs were posted at the bottom and the top of each lift, clearly visible to skiers as they board and depart from the lift. The signs state:

HAZARDOUS
CONDITIONS

Including but not limited to: Holes,
Open Water, Cliffs, Branches, & Stobs.
These and other conditions may
change at any time.

SKI AT YOUR
OWN RISK

Alyeska groomed a wide trail all the way from the Sundeck to the base of the mountain, making it easy for skiers to traverse the mountain on packed, gentle, easily skied slopes. At its narrowest point, the groomed surface was 69' wide.

Alyeska signed and roped the Bowl as it has for the last several years. In addition to the regular signs (including the list of inherent risks in AS 09.65.135), and the "Hazardous Conditions" signs noted above, Alyeska placed an additional warning sign at the bottom and top of every lift. These signs stated:

Limited
Snow Cover
Stay on
Main Trails

The Horror Hill run was not groomed, is not a "main run," and was marked by a black diamond sign which indicated it was a "Most Difficult" run. This sign was easily visible to every skier as they approached the run.

During the Sunday morning work runs, one member of the professional ski patrol skied down within 50 feet of the site where Bart Rizer later died, and examined the slope for hazards. This patroller discovered no unusual circumstances which would preclude opening the area later in the day.

Many skiers, the Rizers included, sought additional challenge and excitement by skiing off the groomed surfaces and into the deeper snow. Alyeska's patrons would have demanded ticket refunds if these slopes were closed to them on a day when powder skiing was excellent. While skiers would sometimes get bogged down in the deeper snow throughout the day, the ski patrol received no reports of skiers who had to be "dug out" of the snow, and no patroller reported a single instance where he was dispatched to assist any skier at risk due to deep snow that day. Ski patrollers were asked that day, as they often are asked, to assist in locating skis when the ski bindings released and became lost under the snow. This type of assistance is simply usual fare whenever there is an overnight snow fall of more than a few inches.

According to his skiing companion, Bart Rizer continually departed from the groomed trails as he skied that day. He was thereby made aware of the depth of the snow, and any potential difficulties in negotiating it. When he left the groomed surface seeking untracked snow, he also left his skiing companion, who did not wish to ski in the deeper snow.

The Bowl was "swept" by Alyeska ski patrollers immediately after the area was closed at 3:30 PM on December 8. (Sunset on that date was at 3:46 PM.) The Horror Hill run was swept by a professional ski patroller with 12 years experience on the Alyeska Ski Patrol and several years prior experience on the ski patrol at Alta, Utah. In the process, he skied within 100 feet of where Bart Rizer had fallen and was buried, and the patroller was able to visually examine the entire Horror Hill area as he slowly and methodically traversed the hill. Unfortunately, as is true in any careful sweep of skiing terrain, no ordinary and reasonable sweep procedures can find skiers who are entirely buried except for a very small portion of the back of his ski boots.

Alyeska had over 25 ski patrollers on duty on December 8, while the Alyeska Safety and Operations Plan required only 12 patrollers. When Bart Rizer was reported missing, the patrollers engaged in standard search and rescue techniques, which included: (1) Search of the base area and other likely places; (2) a sweep of the entire ski hill, including a second sweep of the bowl area; (3) a tightly spaced grid search in three teams of 7 patrollers each, using flares and headlamps. These procedures resulted in locating Bart Rizer after darkness had fallen. CPR was administered at the scene and on the toboggan trip down to

meet the Girdwood ambulance.

This was a tragic event that had a profound impact on Bart's family, and the patrollers who were involved in the search and attempts at resuscitation. It was not, however, the motivation for the initiative by ski area operators to restore the intent of Alaska's inherent risks of skiing law.

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Claim: "If this bill is passed as written, it would even insulate Alyeska from foreseeable avalanches that could kill hundreds of people because it is a 'snow condition that may change.'"

Answer: The proposed legislation says nothing about avalanches. All ski area operators, including Alyeska, have always accepted their responsibility to analyze and mitigate avalanche hazards within ski area boundaries. This claim is an unsubstantiated and exaggerated interpretation of the proposed legislation.

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Claim: The bill would eliminate liability for duties imposed on Alyeska by the Forest Service, and will erode safety precautions at Alyeska.

Answer: The legislation does not remove any provisions required by the safety and operations plans now required of all ski areas by law, whether located on federal, state or private lands AS 18.60.822. These requirements are enforceable by the appropriate federal and state agencies, which inspect ski area operations on a regular basis. National Forest permittees, like Alyeska Resort, are regulated by the U.S. Forest Service. Ski areas on state and private land are regulated by the Department of Public Safety. All ski area operators are at risk of losing their permit privileges for failure to abide by the provisions of the plan. If that happened, the ski area would be closed. Ski area operators have plenty of incentive to take all reasonable safety precautions.

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It is appropriate for the legislature to examine the motives of Dennis Mestas and the trial lawyer's association in opposing House Bill 491. Do they honestly believe they are promoting skier safety, or do they merely want to retain a possible target for future litigation? Perhaps we should ask Mr. Mestas what his "take" was in the Schlaak litigation, and what contingent fee arrangements he has made with the Rizers. When Mr. Mestas contacted one Alyeska employee to obtain information on the Rizer incident, he told the employee that he was looking forward

to suing Alyeska again, since it had been a while since he had done it. The legislature must decide whether it wants to retain a viable ski industry or to enrich a few trial attorneys at the expense of the vast number of skiers who accept the inherent risks of the sport.

Skier safety is most effectively promoted when those involved in skiing -- skiers, ski area operators, the Forest Service and other regulatory agencies -- get together to exchange ideas on ski area operations and skier education. Ski area operators cannot improve skier safety and the enjoyment of the sport if each act taken in the pursuit of both results in running the gauntlet of litigation which will result if action is not taken on these bills. These bills revise existing law to make it more consistent with the statutes now in place in other "skiing states."

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FEB 1 5 1993

February 10, 1993

Senator Robin Taylor
Chair, Senate Judiciary
Alaska State Capitol
Juneau, Alaska 99801

re: SB 44, Ski Operator Immunity Bill

Dear Senator Taylor,

SB 44 currently sits in Senate Judiciary. The Alaska Trial Lawyers strongly oppose this bill. SB 44 would grant immunity for negligent maintenance, construction and design activities that would virtually insulate the ski area from any liability for the operation of the ski area. The definition of "inherent danger and risk of skiing" is the crux of the bill, see page 12, line 4. Everything but the kitchen sink has been thrown in.

I have enclosed our position paper on the issue. There are members within our organization who would be happy to talk with you further about this issue.

Sincerely,

Debra C. Gravo

Debra C. Gravo
Executive Director
dch/encl.

ALASKA ACTION TRUST POSITION

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TO: **Senator Robin Taylor**
Chair, Senate Judiciary

FROM: **Dennis Mestas**

DATE: **February 10, 1993**

RE: **SB 44**

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On behalf of the Academy of Trial Lawyers, I have been asked to express our strong opposition to SB 44. SB 44 would grant immunity for negligent maintenance, construction and design activities that would virtually insulate the ski area from any liability for the operation of the ski area operations.

The state law Seibu wishes to repeal and revise vis a vis SB 44 was largely the result of one lawsuit which was filed against Seibu. In that case, a 16 year old boy was skiing on the newly opened night skiing area at Alyeska when he skied over an unmarked, unsigned, unlighted 15 foot drop-off that was in a shadowed area in the middle of the night skiing course. The shadows that obscured the drop-off were a result of Seibu placing the largest group of lights on the course immediately behind a grove of trees. As the case developed, it appeared that Seibu failed to advise the lighting engineers of the trees' existence (according to the lighting engineer) and Seibu somehow failed to notice the trees when it was placing the lights behind them. This is somewhat difficult to do when each light must be separately aimed with a sighting mechanism on it. Further, neither Seibu nor the lighting engineer noticed the trees and the shadow after the system was built and the area was open. This young boy was paralyzed for life from the waist down when he went off the drop-off and landed on a flat "cat track" - a road.

The drop-off was created by a road cut made by a dozer as it cut through the ridge comprising the ski area between lifts 1 and 4. Seibu left a near 90 degree cut-bank in the middle of the ski area instead of shaving off its upper edge to make a "roll." An expert, who was a former National Ski Areas Association president and extremely revered figure in the national ski industry, testified that the situation was "murderous and totally unacceptable." He further indicated it was far beyond the role (pale) of normal industry standards and was an easily, cheaply remedied situation.

I take the time to briefly set forth some of these facts as you should note that a provision of the proposed bill includes among the "inherent risks of skiing" variation or steepness in terrain "man-made structures, and their components ... including roads and catwalks or other terrain modifications". Thus, Seibu and other ski areas seek to be immunized for design and construction activities which are clearly avoidable, controllable and their responsibility and which are clearly not "unavoidable, natural consequences of the sport of skiing." According to the ski experts in the above case against Alyeska (Schlaak v. Seibu) such design and construction activities involving roads, lights, signs and trail marking are an integral part of the safety considerations that have to be kept in mind in making slopes safe for skiers during the design, construction and maintenance process.

It should be kept in mind that skiing is not much different than driving a car. The same human reactions and human frailties relating to vision, reaction time and attention are present. Thousands and thousands of people are travelling these "ski roads including many, many children." They deserve the same sort of consideration regarding a safe traffic design including elimination of hazards when reasonably possible as well as appropriate signs and warnings of hazards. Virtual cliffs constructed in the middle of a ski run because of improper road cutting certainly do not qualify for the rubric of "inherent hazards of skiing." Nor do other hidden hazards known to the ski area which the skier does not and cannot know of, such as snow making equipment.

Further, in this regard, I believe it is appropriate to refer to the recent Supreme Court decision which Seibu and others are apparently so desperate to make an end run around. The case is Hiibschman v. City of Valdez, et al. One of the thrusts of that opinion was that the present statute codified the common law that ski areas were not liable for injuries caused by the inherent risks of skiing. As the Supreme Court noted, it is only in this situation where the injuries or deaths are caused solely by such inherent risks that the lack of liability is apparent. Such risks are the natural and unavoidable risks -- the risks that cannot be controlled.

Perhaps even more importantly, the Supreme Court noted that the legislature in passing "tort reform" indicated a very strong statutory policy was present (as you will no doubt recall) to the effect that each party should only bear its own risk, i.e. the "tort reform" statutes.

Thus, we now have several and not joint liability. While at one point "tort reformers" wanted every party to be responsible for its own fault, now Seibu and others seek to avoid any responsibility which runs directly against the clear intent of legislature in passing "tort reform" and mandating complete several liability. Thus, the Supreme Court noted that it would not be

consistent to allow ski areas to escape liability while promoting the concept of true several liability. Here, the ski areas, of course, do not object to several liability, they just do not want to be among the "several."

Finally, we believe SB 44 is brought before the legislature because of not only the recent Hiibschman decision but also because of a recent death that occurred at Seibu's resort at Alyeska. On December 8, 1991, Bart Rizer, a 12 year old boy, died of hypothermia on an open slope in the bowl at Alyeska. Approximately four feet of snow had fallen in the 48 hours before his death and the bowl had not previously been open for skiing and had not been groomed. December 8, 1991, was a Sunday. On Saturday, skiing had been allowed on the ridge from the roundhouse down where a packed base was present. On Sunday, in the late afternoon, Seibu opened the bowl for skiing even though the bowl had not been adequately signed or roped off so as to warn skiers of extremely dangerous and indeed life threatening snow conditions that were present in some areas. Further, there was not even sufficient grooming done to allow the ski patrol to visually inspect and gain access to all parts of the bowl to check for downed skiers when the final sweep of the hill was made after the bowl was closed at 3:30 p.m. Many skiers had to be literally dug out of the snow as it was "bottomless powder" up to skiers' chests when off their skis.

While making a run through the bowl shortly before it closed, Mr. Rizer fell while proceeding down a short steep slope known as "Horror Hill" which is virtually in the middle of the bowl and is not obscured by trees. Unknown to Bart was the fact that extremely deep, treacherous snow was on Horror Hill. The snow was so deep that when he fell head first into it he was buried upside down up to his knees and was unable to extricate himself. When the final sweep was made a very short time later, Mr. Rizer was not found and he died of hypothermia after being abandoned on the mountain.

Apparently, he was in a very small hollow where he could not be seen from the only packed area down through the bowl. Seibu had packed one narrow track up through the bowl and therefore, this portion of Horror Hill could not be visualized from immediately below it as it could be when the whole area is packed because the snow was five or six feet deep and the ski patrol would have found it extremely difficult to walk through this deep snow across the bottom of the hill scrutinizing it for downed skiers. Similarly, because of the deep snow, a walk across the top of the hill could not be made without extreme difficulty. Apparently, one ski patrolman may have skied down a small portion of Horror Hill, but did not see Bart due to the snow condition and his location. There is no way that a proper sweep could have been made of this area given the extreme snow and the limited number of ski patrollers. Thus, for no good reason, a very bright and promising young man is dead.

You will note that a portion of the proposed bill is focused on grooming operations. Further, a portion of it is also focused at every possible snow condition. If this bill is passed as written, it would even insulate Alyeska from foreseeable avalanches that could kill hundreds of people because "snow on the ground is constantly changing". This is truly outrageous.

Seibu is required by the U.S. Forest Service to have a snow safety plan. This plan is prepared by the U.S. Forest Service in concurrence with Seibu. One of the stated objectives of their plan is as follows:

> One of the prime objectives in winter sports administration is to prevent accidents related to ski lifts, tows, avalanche and terrain hazards.

One of Seibu's stated and agreed to duties is as follows:

> Taking reasonable care to identify and mitigate hazards on primary ski slopes.

Thus, the Forest Service is directly involved in monitoring and requiring safe operation of Seibu's ski area at Alyeska. Most of the ski area is on Forest Service land and is governed by Forest Service Management regulations. All aspects of ski safety are addressed in this plan. These include signs far beyond those included in the present statute including cautionary signs, daily trail and snow condition signs, area map with trail locations, avalanche signs, and trail markers. There are many other provisions of the ski plan that are focused at safety.

The question is this, if Seibu and other ski areas on public Forest Service land are already required to try to achieve maximum public safety, why are they now trying to escape responsibility for what they are required to do? Why should Seibu be insulated for negligent use of our land? The clear import of Forest Service regulation and the Forest Service mandated safety plan is to maximize public safety, not eliminate it. SB 44 will cause further erosion of safety procedures at Alyeska and other ski areas rather than enhancing the stated Forest Service goal of maximum safety for recreational users of federal land.

Sec. 09.65.135. Limitations on claims arising from skiing. (a) A skier may not recover from a ski area operator for injury resulting from an inherent risk of skiing unless the injury occurred when the ski area operator was not providing the information required by (b) of this section.

(b) A ski area operator shall post trail signs at prominent locations within a ski area which shall include a list of the inherent risks of skiing and the limitation on liability of the ski area operator provided by this section.

(c) In this section

(1) "inherent risks of skiing" means the dangers or conditions which are an integral part of the sport of skiing, including, but not limited to

(A) changing weather conditions;

(B) variations or steepness in terrain;

(C) snow or ice conditions;

...(D) surface or subsurface conditions such as bare spots, forest growth, and rocks;

(E) collisions with lift towers, other structures, and their components unless the skier is on the lift;

(F) collisions with other skiers: and

(G) a skier's failure to ski within the limits of the skier's ability;

(2) "injury" means a personal injury or property damage or loss;

(3) "skier" means a person in a ski area engaged in the sport of skiing, sliding downhill on snow or ice on skis, a toboggan, a sled, a tube, a ski-bob, or other device for recreation in snow;

(4) "ski area means all ski slopes, trails and other places under the control of a ski area operator and administered as a single enterprise in the state;

(5) "ski area operator" means the operator of a ski area. (2 ch 80 SLA 1980)

The statement of legislative intent reads as follows:

The legislature finds that the sport of skiing is practiced by a large number of residents of the state and attracts a large number of nonresidents, significantly contributing to the economy of the state. It further finds that insurance carriers are increasingly reluctant to provide liability insurance protection to ski area operators and that the premiums charged by insurance carriers have risen sharply in recent years due to confusion as to whether a skier assumes the risks inherent in the sport of skiing when he participates actively. It is the intent of the legislature in enacting this Act to clarify the law in relation to skiing injuries and the risks inherent in that sport and to provide that, as a matter of public policy, a person engaged in that sport may not recover from a ski area operator for injuries resulting from those inherent risks.

Ch. 80, SLA 1980, in Temporary and Special Acts

Alaska State Legislature

Senator Tim Kelly, Chair
Senator Steve Rieger, Vice Chair
Senator Drue Pearce
Senator Judy Salo
Senator Georgianna Lincoln

SENATE LABOR AND COMMERCE COMMITTEE

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ADDENDUM TO SENATE LABOR & COMMERCE COMMITTEE REPORT ON CS SB 44 (L&C)

The Senate Labor & Commerce Committee requests that the Senate Judiciary Committee take a close look at the definitions of "ski area" and "ski area operator" on page 12, lines 19 through 24. The Committee is concerned about the potential liability of private property owners with property adjacent to a downhill ski area in the event a skier skis off the slopes under control of the ski resort and onto the private property and hurts him or herself. The Committee wants to ensure a private property owner would not be liable for the injuries in such a case.

Respectfully Submitted,

Tim Kelly

Senator Tim Kelly
Committee Chair

SPONSOR STATEMENT

Alaska State Legislature

Senator Tim Kelly, Chair
Senator Steve Rieger, Vice Chair
Senator Drue Pearce
Senator Judy Salo
Senator Georgianna Lincoln

SENATE LABOR AND COMMERCE COMMITTEE

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SPONSOR'S STATEMENT ON CSSB 44 (L&C)
ALASKA SKI SAFETY ACT OF 1993

CSSB 44 (L&C) attempts to strike a balance between protecting skiers and ski resort operators.

This legislation would remove ski resort operators from liability for injuries caused by the inherent risks and dangers of skiing. It does not absolve ski operators from negligence as outlined by this legislation.

In addition, this legislation would require ski operators to:

- Prepare and obtain approval from the Commissioner of Public Safety or land managing U.S. or State agency for a plan of operation for each ski season, and to provide a qualified ski patrol with qualifications meeting or exceeding the standards of the National Ski Patrol System.

  The Labor & Commerce Committee added langauge requiring that this plan be implemented throughout the ski season, and specific requirements as to what must be in the plan of of operation, such as provisions for ski patrol, avalanche control, tramway evacuation, hazard marking, first aid, etc...

- Establish and maintain a tramway sign system for the protection and instruction of passengers.

- Establish and maintain a sign system for ski trails and slopes intended to instruct skiers on the difficulty of the trail or slope.

  In addition, the Labor & Commerce Committee added language to require marking for exposed forest growth, rocks, stumps, streambeds, trees, roads, catwalks, or other terrain modifications not readily visible to skiers under conditions of ordinary visibility from a distance of at least 100 feet.

Passage of CSSB 44 (L&C) could have both minor and major economic impacts in Alaska. First, by attempting to lower insurance costs to ski resort operators throughout the State, these cost savings could be passed on to skiers in the form of lower ticket prices. Second, by recognizing the inherent risks of skiing and balancing the rights of skiers and ski resort operators, this legislation could encourage the continuing development of ski resorts in Alaska.

The Division of Tourism estimates that more than 43,000 tourists visited Alyeska Resort alone from October 1991 to May 1992, spending an average of $466 a piece while in Alaska. Currently, Seibu Alaska is investing more than $55 million in its current expansion. With passage of SB 44, Seibu intends to further develop Alyeska by expanding into the Winter Creek area.

Seibu's goal is to transform Alyeska into a world class ski resort which will attract winter travelers to our state from all over the world. This expansion would involve the investment of millions of dollars by Seibu, bring thousands of new tourists into our State at a time of year when we desperately need tourists to use the infrastructure that has been developed to support our summer tourism industry, and increase local employment opportunities.

This legislation would encourage other ski resort operators who are not now in Alaska to consider Alaska equally with the western United States and Canada when determining where next to expand.

CSSB 44 (L&C) has zero fiscal notes from the Department of Commerce & Economic Development and the Court System.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 4, 1993

SUBJECT: Civil liability for skiing accidents (Work Order No. 8-LS0317\A)

TO: Representative Mark Hanley

FROM: Michael F. Ford
Legislative Counsel

This memo is in response to your request for an explanation of the effects of the attached draft. In general, the draft revises the existing law regarding the liability of a ski area operator to an injured skier. By clarifying the duties of ski area operators and skiers, and by expanding the definition of "inherent danger and risk of skiing" the draft is intended to provide greater protection against lawsuits for ski area operators.

In 1975, the Alaska Supreme Court adopted a doctrine called the doctrine of comparative negligence. Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975). This doctrine actually evolved over a long period in which courts struggled to determine how to balance the negligence of the party being sued with the negligence of the party bringing the lawsuit. Instead of denying any recovery to a person who was partially at fault, the court adopted a policy under which any recovery would be reduced by the negligence of the person bringing the lawsuit. In short, the negligence of each party is compared, and any recovery is reduced by the percentage of fault that is attributed to the party who was injured.

In 1980, the legislature enacted AS 09.65.135, a statute that barred claims by injured skiers, if the claim arose from "an inherent risk of skiing" unless the ski area operator failed to post required warning signs. This statute appeared to remove these type of cases from the usual comparative negligence system adopted by the Alaska Supreme Court. Instead, in these cases if a skier was injured due to an inherent risk of skiing the skier was barred from any recovery as opposed to simply reducing the recovery by the negligence of the skier.

In 1986 the legislature codified the comparative negligence doctrine, as AS ~~09.16.070~~ 09.17.060. In doing this the legislature did not preclude application of comparative negligence to the immunity granted under AS 09.65.135.

LEGAL SERVICES SUMMARY

This was the situation when the Alaska Supreme Court decided Hiibschman v. City of Valdez, 821 P.2d 1354 (Alaska 1991). In this case an injured skier brought suit against a ski area operator. The ski area operator asserted the immunity of AS 09.65.135 and argued that the skier's injuries were as a result of an inherent risk of skiing. The court held that AS 09.65.135 did bar suits when the skier was injured by an inherent risk of skiing, but did not eliminate a ski area operator's liability under the comparative negligence doctrine if the ski area operator was also at fault. If the ski area operator is negligent in some regard, then the doctrine of comparative negligence applies and the injured skier may recover for injuries minus the fault attributed to the skier. Only if the skier is injured solely by an inherent risk of skiing would recovery be barred by AS 09.65.135. In short the court harmonized AS 09.~~16.070~~ 17.060 and AS 09.65.135 by allowing a lawsuit to proceed if the ski area operator was a negligent cause of the skier's injury.

The most significant policy issue raised by this draft is the question of the type and scope of immunity to be granted to ski area operators. The scope of the immunity granted is largely dependent on the definition of "inherent danger and risk of skiing." This definition should be carefully reviewed. There is also the issue of whether a ski area operator loses immunity when the negligence of the operator contributes to the injury, as held by the Alaska Supreme Court in Hiibschman. That issue could be decided differently by the legislature, but this draft probably does not change the law as set out in Hiibschman. (See proposed AS 05.45.010 and 05.45.020(b); and AS 05.45.010 and 05.45.100 in the draft you provided.)

If you have further questions on these matters please contact me.

MFF:lmb:pl
92-196.lmb

Enclosure

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO : CS SB 44 (L&C)

Revision Date:
Title: "An Act relating to civil liability for skiing accidents ..."
Sponsor: Senator Kelly
Requestor: Senate Judiciary

Department Affected: Labor
BRU: Labor Standards & Safety
Component: Mechanical Inspection
COMPONENT SERIAL NO. 346

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: $ None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Donald Study, CSP, Director Phone : 465-6003
Division: Labor Standards & Safety Date : 2/1/93

Approved by Commissioner: Charles W. Mahlen
Agency: Department of Labor Date: 2/1/93

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Rev 11/92

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSSB 44 (L&C)

Revision Date: _____
Title: "An Act relating to civil liability for skiing accidents."

Sponsor: Senator Kelly
Requestor: Judiciary

Department Affected: Administration
BRU: Risk Management
Component: _____

COMPONENT SERIAL NO. 0071

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0
FUNDING:						
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0
POSITIONS:						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY93) impact: 0

ANALYSIS: (Attach a separate page if necessary.)
This bill is directed to down hill ski areas--the c/s excludes cross-country ski trails as sometimes found on State lands. The bill as written will not impact Risk Management budget.

Prepared by: Don Hitchcock, Director
Division: Risk Management
Phone: (907) 465-2180
Date: 1-29-93

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 2/1/93

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HIIBSCHMAN V. CITY OF VALDEZ

--- P.2d ---
1991 WestLaw 256316
December 6, 1991

Synopsis of Decision and Holdings

Page	Holding
AK11	The statute does not eliminate a ski are operator's liability for negligence. The statute was intended to bar recovery for those actions which only the skier could control and that were beyond the ski area operator's control.
AK12	Therefore, the Ski Act preserved the common law duties of ski area operators at the time of the act's passage. A landowner must act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk. *Webb v. City and Borough of Sitka*, 561 P.2d 731, 733 (Alaska 1977).
AK13	The law on assumption of risk [was] restricted as an affirmative defense, but [left] intact the concept in its "no duty" form.
AK14	Only the person who voluntarily and unreasonably assumed a negligently created risk was contributorily negligent and barred from recovery. *Leavitt v. Gillaspie*, 443 P.2d 61, 67-8 (Alaska 1968).
AK14-15	An inherent risk in a sport is one which is obvious and necessary to it. The notice of the trail signs makes the listed risks obvious. A risk is not necessary if it could be eliminated or mitigated through the exercise of reasonable care -- necessary risks are those which cannot reasonably be eliminated by the area operator. A risk not listed in the statute may be an inherent risk if necessary and dangerous. The risk must be subjectively obvious to the skier. The skier must know of the risk's presence, understand its nature, and freely and voluntarily choose to encounter it.
AK15	Evidence of negligence on the part of the ski area operator takes the case out of the inherent risk of skiing context.

AK15 A jump is not listed in the statute, and the risk of a jump is not necessarily obvious or necessary.

AK16-17 Artificial items can be inherent risks if (1) they are not negligently designed or maintained; and (2) they are obvious and necessary.

AK17 Whether an item is natural or artificial, the duty owed to a skier is governed by *Webb.*

AK17-18 An artificially created jump can not be, as a matter of law, "variations or steepness in terrain" or "surface . . . conditions."

AK18-19 Altering natural conditions (e.g., cutting a tree) removes them from the category of inherent risks which are explicitly listed by the statute.

AK21-22 For "skiing beyond one's ability" to bar an action, the skier must subjectively know he or she is skiing beyond his or her ability, as an inherent risk of skiing must be necessary and subjectively obvious.

On knowledge of risk, Prosser states,

> [H]e must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger itself.... The standard to be applied is, in theory at least, a subjective one, geared to the particular plaintiff and his situation, rather than that of the reasonable man of ordinary prudence who appears in contributory negligence. If because of age or lack of information or experience, he does not comprehend the risk involved in a known situation, he will not be taken to consent to assume it. His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk but of the defense of contributory negligence.
>
> At the same time ... the plaintiff will not be heard to say that he did not comprehend a risk which must have been quite clear and obvious to him.

AK23 As the statute does not insulate a ski area operator from liability for negligence, once evidence of negligence exists, the case must go to the jury.

AK23 The ski area operator is free to argue that the skier voluntarily and unreasonably assumed a negligently created risk. The skier's negligence would then reduce recovery under the doctrine of comparative negligence.

AK24 We interpret the Ski Act so as not to nullify the comparative negligence statute.

AK25 While recovery is barred for an injury caused solely by an inherent risk of skiing, comparative fault applies when the injury is caused by a combination of an inherent risk of skiing and the ski area operator's negligence.

AK26 The Utah statute is different: (1) The Utah statute specifically states that notwithstanding anything in sections 78-27-37 through 78-27-43 to the contrary, no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing; (2) Alaska's comparative negligence statute was passed after the Ski Act, while Utah's was passed before the ski statute; and (3) since Alaska has had comparative negligence since 1975, the Ski Act's failure to eliminate it indicates legislative intent to retain a comparative negligence analysis.

AK28-29 Where there are no real, designated trails, posting signs at the warming hut and the base of the lift is not insufficient as a matter of law to meet the requirements of the statute.

AK30-32 The trial court did not abuse its discretion in excluding evidence of a prior DWI conviction.

Heather HIIBSCHMAN, By and Through her guardian, Debra WELCH, and Debra Welch, Appellants and Cross-Appellees,

v.

CITY OF VALDEZ and Valdez Office Building, Inc., d/b/a Valdez Bottle Stop Liquor Store, Appellees and Cross-Appellants.

Nos. S-3678, S-3679.

Supreme Court of Alaska.

Dec. 6, 1991.

Skier who was injured while navigating jump-bump on ski hill brought action against city which owned and operated hill. The Superior Court, Third Judicial District, Douglas J. Serdahely and Rene J. Gonzalez, JJ., granted part of city's summary judgment motion and let part of case go to jury which found against skier. Skier appealed and city cross-appealed. The Supreme Court, Rabinowitz, C.J., held that: (1) genuine issue of material fact existed as to whether jump was inherent risk of skiing or negligently created artificial condition and whether Limitations on Claims Arising From Skiing Act thus barred action against city, precluding summary judgment; (2) genuine issue of material fact existed as to whether skier's injury was the result of failure to ski within her ability within meaning of Act, precluding summary judgment; and (3) claim is not barred under Act if injury was caused both by inherent risk and ski area operator's negligence but skier's negligence would reduce recovery under doctrine of comparative negligence.

Affirmed in part, reversed in part and remanded.

1. Judgment ⇐181(33)

Genuine issues of material fact existed as to whether jump-bump on city ski hill was inherent risk of skiing or negligently created artificial condition, precluding summary judgment in action brought by skier against city under Limitations on Claims Arising From Skiing Act to recover damages for injuries sustained when skier skied over jump-bump. AS 09.65.135.

2. Theaters and Shows ⇐6(19)

Assumption of the risk did not bar skier's claim under Limitations on Claims Arising From Skiing Act against city which owned and operated ski hill to recover for injuries sustained in navigating jump-bump on hill, even though city claimed that jump-bump was open and obvious and knowingly encountered. AS 09.65.135.

3. Theaters and Shows ⇐6(19)

A risk must be "necessary" to be inherent risk of skiing for purposes of Limitations on Claims Arising From Skiing Act which precludes skier from recovering for injury resulting from inherent risk of skiing. AS 09.65.135.

4. Theaters and Shows ⇐6(38)

Artificially created jump on ski hill was not, as a matter of law, "variations or steepness in terrain" or "surface conditions" for purposes of Limitations on Claims Arising From Skiing Act which precludes action against ski area operator for inherent risks of skiing which include variations or steepness in terrain and surface or subsurface conditions. AS 09.65.135(a)(1)(B, D).

See publication Words and Phrases for other judicial constructions and definitions.

5. Theaters and Shows ⇐6(6)

Ski area operator protection from liability for artificial conditions provided by Limitations on Claims Arising From Skiing Act should be construed narrowly. AS 09.65.135.

6. Judgment ⇐181(33)

Genuine issue of material fact existed as to whether skier was skiing beyond her ability when she went over jump-bump on ski hill, precluding summary judgment in action brought against city which owned and operated ski hill to recover damages for injuries sustained when skier navigated jump-bump. AS 09.65.135.

7. Theaters and Shows ⇐6(19)

For "skiing beyond one's ability" to bar an action under Limitations on Claims Arising From Skiing Act, skier must subjectively know he or she is skiing beyond his or her ability, as inherent risk of skiing must be necessary and subjectively obvious. AS 09.65.135.

See publication Words and Phrases for other judicial constructions and definitions.

8. Theaters and Shows ⇐6(19, 26)

As Limitations on Claims Arising From Skiing Act does not insulate ski area operator from liability for negligence, once evidence of negligence exists, case must go to jury; however, ski area operator is free to argue that skier voluntarily and unreasonably assumed negligently created risk and skier's negligence would then reduce recovery under doctrine of comparative negligence. AS 09.17.060, 09.65.135.

9. Statutes ⇐223.4

While Supreme Court generally gives preference to specific statute over more general one, it must harmonize two statutes if possible.

10. Judgment ⇐181(33)

Genuine issue of material fact existed as to whether requisite warning signs were posted at prominent locations in ski area, precluding summary judgment in skier's action against ski area operator for injury resulting while she was navigating jump-bump on hill. AS 09.65.135.

11. Evidence ⇐146

Trial court did not abuse its discretion in action brought by skier against ski hill operator to recover damages for injury sustained while navigating jump-bump on hill in prohibiting operator from discovering or using evidence relating to skier's prior driving while intoxicated conviction and prior drinking experience; potential for prejudice, that jury would punish skier who had been drinking before skiing, for her prior conduct, outweighed evidence's marginal relevance. Rules of Evid., Rules 402, 403.

12. Appeal and Error ⇐970(2)

Supreme Court reverses trial court's decision on admission of evidence only for abuse of discretion.

Roger W. DuBrock, Law Office of Roger W. DuBrock, Anchorage, for appellants and cross-appellees.

Donna P. Walker, James M. Seedorf, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage for appellee and cross-appellant, City of Valdez.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON, and MOORE, JJ.

OPINION

RABINOWITZ, Chief Justice.

INTRODUCTION

Heather Hiibschman sued the City of Valdez in tort for injuries incurred as she went over a ski bump-jump at a city ski hill. The superior court granted part of the City's summary judgment motion and let part of Hiibschman's case go to the jury, which found against her. She appeals and the City cross-appeals, both primarily questioning the interpretation of Alaska's 1980 Limitations on Claims Arising From Skiing Act ("Ski Act"), AS 09.65.135.[1]

1. **Limitations on claims arising from skiing.**

(a) A skier may not recover from a ski area operator for injury resulting from an inherent risk of skiing unless the injury occurred when the ski area operator was not providing the information required by (b) of this section.
(b) A ski area operator shall post trail signs at prominent locations within a ski area which shall include a list of the inherent risks of skiing and the limitation on liability of the ski area operator provided by this section.
(c) In this section

(1) "inherent risks of skiing" means the dangers or conditions which are an integral part of the sport of skiing, including, but not limited to,
(A) changing weather conditions;
(B) variations or steepness in terrain;
(C) snow or ice conditions;
(D) surface or subsurface conditions such as bare spots, forest growth, and rocks;
(E) collisions with lift towers, other structures, and their components unless the skier is on the lift;
(F) collisions with other skiers; and

STATEMENT OF FACTS

Salmonberry Ridge, the only downhill ski facility in Valdez, opened to the public in January 1986. It is considered a beginner's hill, measuring 1,300 feet from top to bottom with a 208 foot vertical rise. From the base of the hill, one can view almost the entire hill.

Several bump-jumps could be found on the hill at the time of Hiibschman's accident.[2] The jump at issue was located at the lower left side of the hill if one looked at the hill from its bottom. The jump was located on a relatively flat area of the hill, although there was a steeper area just uphill of the jump. The jump was estimated to be from two feet to four feet in height. It was the only jump in that area of the hill and was a "focal point" of the run on that side of the hill.

On March 13, 1986, Heather Hiibschman, a fifteen year old, went skiing at Salmonberry Ridge. Hiibschman was a beginner skier. She had gone downhill skiing approximately six to ten times prior to the accident, although she had also cross-country skied. Prior to March 13, Hiibschman had been skiing at Salmonberry every day of the week.

Hiibschman had never taken the jump in question. She said, "Most of the time I just didn't feel like I was ready ... I couldn't find anybody who would teach me, show me how to do it, and I wanted to be shown how to do it before I went and just tried it myself." The day of her accident, she decided to try the jump. Hiibschman watched at least four of her friends take the jump. While they were slightly more advanced than Hiibschman, she also observed people of her ability level go off the jump. Her friend Aaron Kelly specifically showed her how to ski the jump. He advised her, "stay down, stay forward." Hiibschman stated that she felt fairly familiar with the approach and the takeoff, gaining that familiarity from watching people as she skied beside them, looking at the jump, and reading ski magazines to learn what she was supposed to do.

Hiibschman stood in line to take this jump. As she approached the jump, she concentrated on what she was doing. Hiibschman states that she snowplowed all the way to keep her speed as low as possible and that she was going slower than the skiers on the other side of the hill. As she approached the jump, she leaned forward. She also straightened out her skis so they would not cross when she hit the jump.[3] However, Hiibschman stated, the jump

> threw me way high, higher than I thought it would, and threw me back. And I was—still upside down in the air, and I was struggling to get forward, lean forward as hard as I could and I just didn't have enough time. My butt and the backs of my skis hit the ground at about the same time and then I rolled down the hill—slid actually.

Others confirmed that the jump "lofted you straight up into the air...." Hiibschman testified that when she landed, her skis "were almost perpendicular to the ground." She fell and landed on her tail bone, resulting in permanent paralysis from the waist down.

At the time Hiibschman jumped, a big pit existed at the base of the jump, where

(G) a skier's failure to ski within the limits of the skier's ability;
(2) "injury" means a personal injury or property damage or loss;
(3) "skier" means a person in a ski area engaged in the sport of skiing, sliding downhill on snow or ice on skis, a toboggan, a sled, a tube, a ski-bob, or other device for recreation in snow;
(4) "ski area" means all ski slopes, trails and other places under the control of a ski area operator and administered as a single enterprise in the state;
(5) "ski area operator" means the operator of a ski area.

2. While the City contends that this was more of a "bump" than a "jump," the term "jump" will be used. We draw the inferences in Hiibschman's favor, as she was the party opposing summary judgment. *Wilson v. Pollet*, 416 P.2d 381, 383–84 (Alaska 1966).

3. Others dispute Hiibschman's account. Some say that she was traveling quickly, approaching the jump at "full speed," becoming rigid as she neared the jump, and leaning too far back which caused her ski tips to go straight up. Again, we construe the facts in Hiibschman's favor at this stage.

people had been landing. The ski lift operator explained, "[A]t the end of the day you have this pit right here, this is an average distance where everybody's going to land, and they always fall and hit their butts on the snow and it just keeps digging it out and digging it out." Hiibschman never observed the landing area nor did anyone mention to her anything about it. The lift operator further explained, "as you landed it was kind of a flat surface, not too much incline so you had ... a hard landing ... because if you have an incline it tends to be more soft because you glide off it, but instead you kind of landed hard, boom, you know." Another lift attendant also said the jump was dangerous because the landing was too flat and a skier would get too much air time for the jump. About half the people taking the jump fell, some of whom were beginners.[4] Some skiers who fell also landed on their rear or back.

During testimony, when asked whether he thought the jump was dangerous, the ski lift operator answered, "Yes." He admitted that "I should have told them not to take the jump until they had learned how to ski better, because they kept getting behind on their skis...."[5] However, while the ski patrol would destroy jumps it considered unsafe or mark them as out of bounds, this jump was not so destroyed or marked. An expert in ski area design and planning thought it was inappropriate to have this jump, or any jump, on a beginner's hill unless the jump were marked as appropriate only for more advanced skiers.

One other key fact exists regarding the accident. Before skiing, Hiibschman and her friends stopped at the Valdez Bottle Stop Liquor Store. Hiibschman estimated that she had consumed between one and one-half and three beers before the accident. She believed that she was in control at all times while skiing and that the beers made no difference to her skiing performance. Hiibschman asserted that she had taken four runs between her last drink of beer and the time of the accident and she did not fall on any of those runs. She said she was clear headed as she started her descent towards the jump. An emergency medical technician who subsequently attended Hiibschman stated, "I could smell alcohol on her breath, but she was not obviously intoxicated."

On the day of Hiibschman's accident, there were at least five inherent risk of skiing signs posted at Salmonberry Ridge: one on the outside of the lift shack, one by the door to the warming hut, one inside the warming hut, and one on the inside of each bathroom door.[6] These signs were posted in places the Parks & Recreation Service thought were "the most prominent places on the ski hill."

4. The testimony varied widely on the success rate for navigating the jump. Some testimony indicated that hardly any of the skiers navigated it successfully and even intermediate skiers would fall. Yet, others said most skiers navigated this jump successfully.

5. The head of the ski patrol at the time of the accident stated, however, that to his knowledge, no other skier had ever been injured on that jump. The ski lift operator concurred.

6. The signs read as follows:

INHERENT RISKS OF SKIING

AS REQUIRED BY ALASKA STATE STATU[T]E SEC. 09.65.135, THIS NOTICE IS TO INFORM YOU OF THE INHERENT RISKS OF SKIING. INHERENT RISKS OF SKIING MEANS DANGEROUS CONDITIONS WHICH ARE AN INTEGRAL PART OF THE SPORT OF SKIING. THESE RISKS INCLUDE BUT ARE NOT LIMITED TO:

A. CHANGING WEATHER CONDITIONS;

B. VARIATIONS OR STEEPNESS IN TERRAIN;

C. SNOW OR ICE CONDITIONS;

D. SURFACE OR SUBSURFACE CONDITIONS SUCH AS BARE SPOTS, FOREST GROWTH, AND ROCKS;

E. COLLISIONS WITH LIFT TOWERS, OTHER STRUCTURES, AND THEIR COMPON[ ]ENTS UNLESS THE SKIER IS ON THE LIFT;

F. COLLISIONS WITH OTHER SKIERS;

G. A SKIER'S FAILURE TO SKI WITHIN THE LIMITS OF THE SKIERS ABILITY.

LIMITATION ON CLAIMS ARISING FROM SKIING

A SKIER MAY NOT RECOVER FROM A SKI AREA OPERATOR FOR INJURY RESULTING FROM AN INHERENT RISK OF SKIING.

Based on the Ski Act, the City moved for summary judgment, which the superior court granted in part and denied in part. The court held that Hiibschman's injuries resulted from "an inherent risk of skiing" which specifically included "variations or steepness in terrain," "surface ... conditions," and/or "a skier's failure to ski within the limits of the skier's ability." The superior court rejected Hiibschman's contention that the statute's categories violated equal protection. However, the superior court found that a genuine issue of material fact existed regarding whether the signs were posted "at prominent locations within [the] ski area...."

Hiibschman filed a motion for reconsideration. While the court concluded that artificial objects can qualify as an inherent risk of skiing within the statute, the court agreed with Hiibschman that negligent or defectively made or designed artificial conditions would not constitute an "inherent risk of skiing" and could be actionable in tort. However, the superior court stated that no competent evidence was presented to raise a genuine issue of material fact that the jump was negligently or defectively made or designed. The court also found it unnecessary to consider whether the slope was negligently maintained, instead treating the claim as one of negligent design.

Hiibschman then filed a second motion for reconsideration which the superior court granted in part, and denied in part. The court considered an expert affidavit stating that allowing a jump on a beginner hill was negligent and found that it raised a genuine issue of material fact as to whether the jump constituted an inherent risk of skiing. However, the court reaffirmed its prior conclusion that Hiibschman's attempt to ski over the jump was, as a matter of law, "a skier's failure to ski within the limits of the skier's ability." Thereafter the court submitted the issue of adequate signing to a jury. The jury returned a verdict in favor of the City on this issue. Hiibschman now appeals and the City cross-appeals.

PLEASE BE SAFETY CONSCIOUS AND HAVE A GOOD TIME.

I. DID THE JUMP CONSTITUTE AN INHERENT RISK OF SKIING OR A NEGLIGENTLY CREATED ARTIFICIAL CONDITION?

[1] The superior court found that a genuine issue of material fact existed as to whether the jump constituted an inherent risk of skiing, i.e. whether the jump was a non-negligently created or maintained variation in terrain. The City, in its cross-appeal, is asking the court to hold, as a matter of law, that the jump constituted an inherent risk of skiing.[7] The City contends that the jump was a "variation[ ] or steepness in terrain" or a "surface condition[ ]." The City also asserts that the jump was open and obvious and knowingly encountered, and argues that Hiibschman's alcohol consumption magnified any risk inherent in the jump. It claims the greater weight of authority would deem the jump an inherent risk of skiing.

Hiibschman maintains that the jump was an artificial condition created by a neglected stack of brush cut and stacked by the City. Alternatively, she submits that it may have been built by children with shovels borrowed from the City employees, and intentionally groomed by the employees. Her theory of negligence is that this jump was inappropriate for a beginners' hill, particularly as no warning of its danger was given.

We affirm the superior court's determination that a genuine issue of material fact existed as to whether the jump constituted an inherent risk of skiing.

A. *Evidence of Negligence*

First, we note that the statute does not eliminate a ski area operator's liability for negligence. The legislative history of the statute makes this clear. Industry proponents of the bill stated repeatedly that they

7. The superior court's grant of summary judgment is reviewed as to whether a genuine issue of material fact exists and whether the moving party is entitled to judgment on the law applicable to the established facts. *Sea Lion Corp. v. Air Logistics of Alaska Inc.*, 787 P.2d 109, 116 (Alaska 1990). All legal questions are afforded *de novo* review. *See Walsh v. Emerick*, 611 P.2d 28, 30 (Alaska 1980).

did not wish to avoid any responsibilities that were rightfully theirs, but they wanted to reduce nuisance claims. The statute was intended to bar recovery for those actions which only the skier could control and that were beyond the ski area operator's control. That the legislature intended to "clarify" the law and not change it, and that it sought to limit recovery for "inherent risks," reinforces our conclusion that industry liability for negligence was maintained.[8]

Therefore, the Ski Act preserved the common law duties of ski area operators at the time of the act's passage. In *Webb v. City and Borough of Sitka*, we said,

> The rule that we adopt is this: A landowner ... must act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk.[9]

561 P.2d 731, 733 (Alaska 1977).

[2] Further, at the relevant time the law on assumption of risk had been clarified, restricting it as an affirmative defense, but leaving intact the concept in its "no duty" form. We explained,

> The concept of assumption of risk was developed from the common law action of a servant against his master. The master was held to be not negligent if he provided a reasonably safe place to work, and the servant was said to have assumed the inherent risks that remained. In this sense assumption of risk was not an affirmative defense, but rather was another way of saying the master was not negligent; for the servant had the burden of proving that his injury resulted from a risk other than one inherent in a place that was a reasonably safe place to work.

Leavitt v. Gillaspie, 443 P.2d 61, 67–8 (Alaska 1968). We continued,

> But where assumption of risk was a defense, the question was whether plaintiff had voluntarily entered into a situation involving obvious danger, with knowledge of the danger, and without regard to whether he had acted in such a situation as a reasonably prudent man would have acted....
>
> As a matter of policy we disapprove of a concept which could result in a situation where an accident victim, even though not contributorily at fault, could be barred from recovery because he knew or should have known of a negligently created risk. The just concept should be whether a reasonably prudent man in the exercise of due care would have incurred the risk despite that knowledge, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in the light of all the circumstances, including the appreciated risk.

Id. Consequently, only the person who voluntarily and unreasonably assumed a negligently created risk was contributorily negligent and barred from recovery. *Hale v. O'Neill*, 492 P.2d 101, 103 (Alaska 1971); *Young v. State*, 491 P.2d 122, 125 (Alaska

8. The statement of legislative intent reads as follows:

> The legislature finds that the sport of skiing is practiced by a large number of residents of the state and attracts a large number of nonresidents, significantly contributing to the economy of the state. It further finds that insurance carriers are increasingly reluctant to provide liability insurance protection to ski area operators and that the premiums charged by insurance carriers have risen sharply in recent years due to confusion as to whether a skier assumes the risks inherent in the sport of skiing when he participates actively in the sport. It is the intent of the legislature in enacting this Act to clarify the law in relation to skiing injuries and the risks inherent in that sport and to provide that, as a matter of public policy, a person engaged in that sport may not recover from a ski area operator for injuries resulting from those inherent risks.
>
> Ch. 80, § 1, SLA 1980.

9. When AS 09.65.135 was passed in 1980, ski area operators were also under a statutory duty to avoid liability for negligence. Former AS 05.20.012, enacted in 1967, read:

> Liability For Accidents In Skiing Areas. No owner or operator of ski equipment may be held liable for the negligence of persons other than employees who use designated skiing areas owned or controlled by him, *unless the owner or operator has negligently maintained the designated skiing areas* or has furnished or supplied defective equipment, the use of which is the proximate cause of any injury

1971); *Bachner v. Pearson*, 479 P.2d 319, 328–330 (Alaska 1970).[10]

[3] While we believe the statute codified this case law in the ski context, it also aids trial courts by listing those risks which are considered inherent in the sport: those risks which are obvious[11] and necessary[12] to it. Evidence of negligence on the part of the ski area operators, however, takes the case out of the inherent risk of skiing context.

In the case at bar, it is not clear that the condition was an inherent risk of skiing, given that a jump is not specifically listed in the statute and its risk is not necessarily obvious or necessary.[13] Hiibschman stated she didn't think the jump was hazardous in the way it was designed or constructed before she went off of it. She said, "I didn't think it would be there if it was." She knew that the ski hill staff allowed the children to take the jump and therefore assumed it was safe for beginners.

Our review of the record persuades us that evidence of negligence also exists in the case at bar. For example, one witness stated that the jump should be torn down because "it wasn't fit, suitable ... because it was built to where you got too much air, and it was a flat landing." Hiibschman's expert witness stated that there should not have been any jumps at all on a beginner's slope and that if the ski area were intended for more than beginner skiers, the jumps should have been clearly marked as being suitable only for expert skiers. Others also testified that the jump was not safe for beginner skiers. In fact, the ski area had rules prohibiting artificial jumps, unless authorized by ski area management. With all inferences drawn in Hiibschman's favor, we conclude that genuine issues of material fact exist as to whether the jump was an inherent risk of skiing.

B. *Artificial versus Natural Conditions*

Hiibschman makes much of this distinction in her brief; the City, however, contends it is irrelevant to the legal question of whether the jump was a "variation[ ] or steepness in terrain," or a "surface ... condition[ ]." The City maintains the origin of the jump is irrelevant, as it is an inherent risk of skiing even if it was an artificial condition.

An artificial item can produce an inherent risk of skiing. The statute covers, for example, collisions with lift towers. AS 09.65.135(c)(1)(E). Other artificial items may also produce inherent risks assuming they are not negligently designed or maintained or assuming the risk is obvious and necessary (e.g. moguls on an expert trail).[14]

sustained by a person while engaged in skiing activities within the designated skiing areas. [§ 2 Ch. 25 SLA 1967] (Emphasis added).

10. Given the law of assumption of risk codified by the statute, we reject the City's argument that assumption of risk bars Hiibschman's claim on the basis that the jump was open and obvious and knowingly encountered. Similarly, the City cites cases indicating that the assumption of risk doctrine codified by statute "renders the reasonableness of the skier's ... behavior irrelevant." *E.g., Schmitz v. Cannonsburg Skiing Corp.*, 170 Mich.App. 692, 428 N.W.2d 742, 744 (1988). We reject this interpretation.

11. The frequent notice provided by trail signs makes the risk obvious.

12. A risk must be "necessary" to be an inherent risk of the sport.

> The question of whether a risk is necessary relates to the issue of the operator's duty; .... If a given danger could be eliminated or mitigated through the exercise of reasonable care, it is not a necessary danger. Necessary dangers, therefore, must be those which cannot *reasonably* be eliminated by the area operator.

Assumption of Risk After Sunday v. Stratton Corp.: The Vermont Sports Injury Liability Statute and Injured Skiers, 3 Vermont L.Rev. 129, 141–2 (1978) (emphasis in original).

13. A risk not listed in the statute may still be an inherent risk of the sport if necessary and obvious. The risk must be subjectively obvious to the skier. The plaintiff must know of the risk's presence, understand its nature, and freely and voluntarily choose to encounter it. W. Keeton, *Prosser & Keeton on Torts*, § 68, at 486–87 (5th ed. 1984).

14. If, as the City contends, moguls originate from "terrain variations, skier patterns, and snow and ice conditions," then they are not artificial conditions intentionally put on the run comparable to the jump.

See Rowett v. Kelly Canyon Ski Hill, Inc., 102 Idaho 708, 639 P.2d 6, 7 (1981) (no negligence by ski area operator when night skier injured by skiing into traffic control device which was adequately illuminated and discernible at a distance); *see also Smith v. Seven Springs Farm, Inc.*, 716 F.2d 1002, 1009 (3rd Cir.1983) (advanced intermediate skier voluntarily assumed the risk when he skied down a trail marked most difficult, aware of an icy headwall lined by an unprotected telephone-like pole).

Therefore, we hold that the duty owed to a skier for a natural or an artificial condition is governed by *Webb*, 561 P.2d 731 (faulty sidewalk) and *Moloso v. State*, 644 P.2d 205 (Alaska 1982) (rock slide during state highway project). Primarily, the origin of the danger figures into the *Webb* calculus, as it affects the burden on the respective parties of avoiding the risk. It is also relevant to the issue of the ski resort's knowledge of the danger.

[4, 5] We also hold, however, that an artificially created jump cannot be, as matter of law, "variations or steepness in terrain" or "surface ... conditions." AS 09.65.135(a)(1)(B) or (D). While the statute does not differentiate explicitly between a ski operator's responsibility for artificial versus natural conditions, the items it lists, as well as the intent to retain liability for negligence, indicate that ski area operator protection from liability for artificial conditions should be construed narrowly. The legislative history explained, "The intent of this legislation is to clarify the law concerning the *natural, inescapable* risks that are a part of the sport of skiing and to specify that a ski area operator is not liable for injuries resulting from these inherent risks." (Emphasis added).

We find particularly compelling the testimony provided by the National Ski Patrol System, Inc. during the bill's consideration:

> We agree with the concept of S.B. No. 470 which addresses the risks inherent in the sport of skiing. Ski area operators in the state definitely need protection from unjustified liability insurance claims associated with the *natural* risks of the sport. At the same time, we are concerned that skiers must also be adequately protected against any form of negligence caused by ski area operators. We believe with a few modifications, the proposed statute can achieve equitable protection for both ski area operators and the using public.
>
> Suggested revisions to sec. 09.10.320 *definitions* are:
>
> ....
>
> 2. (D). Eliminate the word "stumps". These are probably man induced obstacles that should be either eliminated, reduced, or marked as hazards by the ski area operator.

(Emphasis added). The recommendation to eliminate the word "stumps" was adopted, indicating that altering natural conditions (e.g. cutting a tree) removes them from the category of inherent risks which are explicitly listed by the statute. Our conclusion is reinforced by the presence of the word "stumps" in the Utah ski statute, upon which the Alaska statute is modeled. UCA § 78-27-52(1). Similarly, the National Ski Patrol System, Inc. recommended the following, which was not adopted:

> 1. (C) Expand on snow or ice conditions to clarify that variations may occur because of weather factors and/or hill grooming.
>
> For instance, standard grooming practices could cause variable snow surface conditions which skiers should accept as normal inherent risks on a managed ski run. Negligent grooming practices could cause unsafe conditions, such as leaving dangerous berms or cutbanks on groomed runs. Ski area operators should not be absolved from such negligence.

That the statute did not include snow variations from hill grooming as an inherent risk also reinforces the importance of this dichotomy.

Case law from other jurisdictions also emphasizes the importance of "natural conditions."

What the challenged statute does is to recognize that there are certain risks in-

herent in the sport of skiing that neither the skier nor the ski area operator can reasonably control. Indeed, the risk and often-rugged *natural* setting provides both the greatest attractions of skiing as well as the greatest elements of danger. *Natural conditions*, such as vegetation, snow cover and weather conditions, make trail conditions highly variable and difficult to manage.

Kelleher v. Big Sky of Montana, 642 F.Supp. 1128, 1130 (D.Mont.1986) (emphasis added). Other cases identifying the "inherent risks of skiing" often speak generally of items such as "grade, boundary, mid-trail obstructions, corners and varied conditions of the snow." *Wright v. Mt. Mansfield Lift, Inc.*, 96 F.Supp. 786, 790 (D.Vt. 1951). This includes things such as roots, rocks, brush, ruts, and wor. spots. *Id.* In *Leopold v. Okemo Mountain Inc.*, the court spoke of the "apparent and necessary danger" inhering in "trees, rocks and adverse terrain which border every trail." 420 F.Supp. 781, 787 n. 2 (D.Vt.1976).

Here, conflicting evidence exists as to whether this jump was artificially made or naturally part of the terrain. This presents a factual question for jury resolution. The ski lift operator believed the jump was artificial because after it was removed, no dirt, alders or rocks were left. He saw just leveled snow, "nice clean snow." Nor was there newly moved brush around to indicate that it was formed by brush. Also, he had observed the hill prior to the snowfall and others had told him that the jump was an artificial structure. Some operators called the jump "Chet's jump," allegedly after the individual who built it. One witness testified that he saw Chet and another person build these jumps. Supposedly, each day, the employees would throw more snow on the jump to keep it built up, and would groom it or pack snow on it to change its characteristics. Testimony was presented that children made and groomed the jumps with the shovels given to them by employees at the hill. Yet, there was also evidence that it was not a jump, but rather a bump that was used as a jump. The person who removed the jump said it was created by alder.

It remains for the jury to determine whether the jump is a natural variation in terrain or surface condition. Thus, we conclude that the superior court's denial of summary judgment in this respect was correct.

II. WAS HIIBSCHMAN'S INJURY A RESULT OF A FAILURE TO SKI WITHIN HER ABILITY WITHIN THE MEANING OF AS 09.65.-135(c)(1)(G)?

[6] The superior court concluded as a matter of law that at the time of the accident Hiibschman was skiing beyond her ability, within the meaning of AS 09.65.-135(c)(1)(G). Hiibschman argues that the trial court's reasoning produces absurd results, assumes the legislature intended to change tort liability, and is contrary to public policy. The City emphasizes that Hiibschman knew from personal observation what the jump entailed and knowingly assumed the risk. It argues that Hiibschman's alcohol consumption magnified any risk inherent in the jump.

The ski area operator is not liable for injuries resulting from inherent risks listed by the statute, including skiing beyond one's ability. A trial court should grant summary judgment only if no genuine issue of material fact exists. *Sea Lion Corp. v. Air Logistics of Alaska, Inc.*, 787 P.2d at 116 (Alaska 1990). Here, a disputed issue of fact exists as to whether Hiibschman was skiing beyond her ability. We hold that the trial court erred in not submitting this issue to the jury.

[7] For "skiing beyond one's ability" to bar an action, the skier must subjectively know he or she is skiing beyond his or her ability, as an inherent risk of skiing must be necessary and subjectively obvious. On knowledge of risk, Prosser states,

> [H]e must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger itself.... *The standard to be applied is, in theory at least, a subjective one*, geared to the particular plaintiff and his situation, rather than

> that of the reasonable man of ordinary prudence who appears in contributory negligence. If because of age or lack of information or experience, he does not comprehend the risk involved in a known situation, he will not be taken to consent to assume it. His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk but of the defense of contributory negligence.
>
> At the same time ... the plaintiff will not be heard to say that he did not comprehend a risk which must have been quite clear and obvious to him.

Keeton, *supra*, at 487–88 (footnotes omitted and emphasis added); *see also Rutter v. Northeastern Beaver County School Dist.*, 496 Pa. 590, 437 A.2d 1198, 1204 (1981).

Viewing the evidence most favorably to Hiibschman, we find that skiing this jump was within her ability level. The jump was located on a beginners' slope. The ski lift operator described Salmonberry Ridge as "very beginner, very slow. There is no difficulty to the run." Hiibschman had taken some down-hill ski lessons before, and had evaluated how to take this jump. Hiibschman watched beginners taking the jump, some mastering it. Others who mastered it, like Aaron Kelly, had fallen the first three times he jumped it. She did not notice anything dangerous about the way the jump was designed or constructed. Although Hiibschman was drinking, she said it did not affect her that day. Moreover, evidence was presented that teenagers and beginner skiers are not as able to accurately assess a degree of risk presented by a dangerous condition. Because contrary evidence was presented,[15] a contested issue of material fact exists. The question of whether Hiibschman was skiing beyond her ability should have gone to the jury.

III. IS A CLAIM BARRED IF THE INJURY WAS CAUSED BOTH BY AN INHERENT RISK AND THE SKI AREA OPERATOR'S NEGLIGENCE?

[8] As the statute does not insulate a ski area operator from liability for negligence, once evidence of negligence exists, the case must go to the jury. However, the ski area operator is free to argue that the skier voluntarily and unreasonably assumed a negligently created risk.[16] The skier's negligence would then reduce recovery under the doctrine of comparative negligence.

[9] In 1986, six years after the most recent inherent risk of skiing statute was passed (Ch. 80, SLA 1980), our legislature enacted a comparative negligence statute.[17] While we generally give preference to a specific statute over a more general one, *City of Cordova v. Medicaid Rate Comm'n.*, 789 P.2d 346, 352 (Alaska 1990), we must harmonize the two statutes if possible. *State, Dept. of Highways v. Green*, 586 P.2d 595, 602 (Alaska 1978).

> Ordinarily, an unambiguous statute is enforced as written without judicial construction or modification; however, this rule is not controlling when a seemingly unambiguous statute must be considered in conjunction with another act. *Hafling v. Inlandboatmen's Union*, 585 P.2d 870, 872 (Alaska 1978). In that case, we will examine the legislative history and adopt a reasonable construction which realizes legislative intent, avoids conflict or inconsistency, and gives effect to every provision of both acts. *Id.* at 873, 875, 877.

Lake v. Construction Mach., Inc., 787 P.2d 1027, 1030 (Alaska 1990).

15. For example, Hiibschman's mother told Chet Simmons that the accident was Hiibschman's own fault, that she was intoxicated and skiing out of control. As to this statement, Hiibschman's mother later submitted an affidavit denying she had said it.

16. Skiing beyond one's ability, AS 09.65.135(c)(1)(G), would constitute an unreasonable assumption of a negligently created risk.

17. Alaska Statute 09.17.060 reads as follows:

> **Effect of contributory fault.** In an action based on fault seeking to recover damages for injury or death to a person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for the injury attributable to the claimant's contributory fault, but does not bar recovery.

As such, we must interpret the Ski Act so as not to nullify the comparative negligence statute. The reason for this was explained in *Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 508 (8th Cir.1988):

> "[W]here assumption of risk coincides with contributory negligence, application of the doctrine operates to frustrate the very result that the comparative negligence statute was designed to achieve." *Rutter v. Northeastern Beaver County School District*, 437 A.2d at 1210 n. 6 (plurality). Dean Prosser also noted that the retention of this form of assumption of risk after legislative adoption of comparative negligence
>
> > [i]n all probability ... defeats the basic intention of the statute, since it continues an absolute bar in the case of one important, and very common, type of negligent conduct on the part of the plaintiff. It can scarcely be supposed in reason that the legislature has intended to allow a partial recovery to the plaintiff who has been so negligent as not to discover his [or her] peril at all, and deny it to one who has at least exercised proper care in that respect, but has made a mistake of judgment in proceeding to encounter the danger after it is known.
>
> W. Prosser, Prosser on Torts § 68, at 457 (4th ed. 1971) (footnote omitted).

We note that this approach has been adopted by Oregon. *Jessup v. Mt. Bachelor, Inc.*, 101 Or.App. 670, 792 P.2d 1232, 1233 *rev. denied* 310 Or. 475, 799 P.2d 646 (1990). The Oregon Court of Appeals held that while recovery is barred for an injury caused solely by an inherent risk of skiing, comparative fault applies when the injury is caused by a combination of an inherent risk of skiing and the ski area operator's negligence. *Id.*

The City disagrees with this approach, placing emphasis on a Utah statute similar to Alaska's Ski Act. The City cites *From Wright to Sunday and Beyond: Is the Law Keeping Up With the Skiers?* 4 Utah L.Rev. 885, 893–97 (1985):

> By extending immunity to ski resorts when an "inherent risk" causes the injury, the Utah legislature has pre-empted the comparative negligence statute for those risks. Thus, where an injury results from a hazard categorized as an "inherent risk," the skier injured in Utah is contributorily negligent per se, despite the comparative negligence statute.

Two critical facts, however, differentiate Utah's statute from the Alaska Ski Act. First, the Alaska statute omits language contained in the Utah statute: "[n]otwithstanding anything in Sections 78–27–37 through 78–27–43 [78–27–38 is the specific provision adopting comparative negligence] to the contrary, no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing." Utah Code Ann. 78–27–53 (1953). Second, Alaska's comparative negligence statute was passed *after* the Ski Act, whereas in Utah it was passed before the ski statute. The statutory enactment of comparative negligence in Alaska after the inherent risk of skiing statute, without acknowledging the Ski Act, indicates a legislative intent to allow principles of comparative negligence into the ski context. *Cf. In re Tapp*, 16 B.R. 315 (Bankr.Alaska 1981).

Moreover, because Alaska had comparative negligence as a matter of case law as early as 1975, *e.g. Kaatz v. State*, 540 P.2d 1037, 1049 (Alaska 1975), the Ski Act's failure to specifically eliminate comparative negligence in the ski context, as Utah did, indicates that the legislature did not intend to exclude comparative negligence analysis. Our conclusion is reinforced by the statute's legislative history, which indicates that the statute was not intended to eliminate ski area operator's liability for negligence.

On remand, questions of whether Hibschman's actions were reasonable, including the relevance of her drinking and her knowledge of the risk of taking the jump, will be relevant to the issue of comparative negligence.

IV. WERE THE POSTED SIGNS INSUFFICIENT AS A MATTER OF LAW TO SATISFY AS 09.65.135?

[10] The superior court found that a genuine issue of material fact existed as to

whether the signs were posted at prominent locations in the ski area. Hiibschman contends that the posted signs were insufficient as a matter of law, for they were not "trail signs" nor were they posted at "prominent locations" as required by statute.

We find Hiibschman's arguments without merit. The superior court left for the jury the general issue of the adequacy of notice and signing. The issues of "the size, content, number, location, and prominence of the signs" were all tried by the jury, and the evidence in the record supports the verdict. Steven Weber, who was the Director of the Parks and Recreation Department in Valdez at the relevant time, explained that he had posted the signs so that "the average skier—or the skier participating in the activity could stop and read the sign." It was typed in bold letters with some underlining. While there were no inherent risk of skiing signs on the hill itself, Weber stated:

> [W]e felt ... the best place to do that was at the bottom of the hill where most of the activity took place, where ... the skiers had to initially go by to get to the ski lift. Posting signs throughout the hill ... didn't really meet that requirement in my eyes. I felt that the intent or the spirit of this statute here was to inform the skiers, and I felt the best way to inform them was prior to skiing and not after skiing. And, skiers would traditionally normally use the restroom prior to skiing, use the warm-up hut prior to skiing to put their boots on and then ... by the nature of the way they travelled to the ski lift .... we had a couple of signs posted there they would have to go by in order to get to the ski lift and actually load on the lift.

Although no "trail" signs were posted, Salmonberry Ridge is just one small open hill; there are no real, designated trails as such. After skiers get off of the lift, they have the option of going to the right or going to the left, skiing each respective side of the hill. While others, including Hiibschman, said that they saw no signs, the jury found that such signs were posted. John Wiland, the mountain manager when Salmonberry Ridge opened, testified that signs were posted in each of the outhouses, going into the warming hut, on the lift shack, and at the top of the lift shack. Theresa Day was skiing on the day of Hiibschman's injury and recalls seeing signs posted in the outhouse and in the ski tow area. Aaron Kelly, who also was skiing with Hiibschman, saw the signs posted on the inside of the outhouse and on the front of the warming hut. Therefore, we affirm the superior court's ruling that genuine issues of material fact existed as to whether requisite signs were posted at prominent locations in the ski area.[18]

V. DID THE SUPERIOR COURT ABUSE ITS DISCRETION IN GRANTING THE PROTECTIVE ORDER RELATING TO HIIBSCHMAN'S PRIOR DWI CONVICTION AND/OR PRIOR DRINKING EXPERIENCE?

[11] The superior court prohibited the City from discovering or using evidence relating to Hiibschman's prior Driving While Intoxicated (DWI) conviction and prior drinking experience pursuant to Evidence Rule 402[19] and 403.[20]

[12] We reverse a trial court's decision on the admission of evidence only for an

18. Our resolution of the merits of this issue makes it unnecessary to discuss the City's argument that the issue is improperly before the court.

19. Evidence rule 402 states,
> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, by these rules, or by other rules adopted by the Alaska Supreme Court. Evidence which is not relevant is not admissible.

20. Evidence Rule 403 states,
> Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

abuse of discretion. *Adkinson v. State*, 611 P.2d 528, 532 (Alaska), *cert. denied* 449 U.S. 876, 101 S.Ct. 219, 66 L.Ed.2d 97 (1980). The City believes that such an abuse occurred; it argues that the probative value of the evidence far exceeds its prejudicial effect. The City intends to use the evidence to establish that Hiibschman and her mother knew of the adverse effects the alcohol had on Hiibschman's functioning. The City claims the evidence shows Hiibschman's lack of judgment on the day of the accident, as well as her mother's own negligence in permitting Hiibschman to drink alcohol. It also shows Hiibschman's tolerance level for alcohol.[21]

We hold that the superior court did not abuse its discretion in issuing the protective order. While the City argues that the court's citation to Rules 402 and 403 indicates that the court found "the evidence relevant under 402, but nonetheless excluded it under Rule 403....", the sparse reference by the superior court does not conclusively support the City's interpretation. The court also may have found the evidence irrelevant under Evidence Rule 402.

We conclude that the evidence does have marginal relevance. Hiibschman admits knowledge about the effects of alcohol. She has taken Freshman Health in school where she learned about the amount of alcohol that impairs one's judgment. While Hiibschman claims she did not drink enough to impair her judgment, the excluded evidence is only slightly relevant to this point. In *Dyer v. State*, the court of appeals said that evidence used to impeach a witness by showing that he was an alcoholic at the time of the incident about which he was testifying "was only tangentially probative of how much alcohol he actually drank that particular night." 666 P.2d 438, 451 (Alaska App.1983). Moreover, other evidence exists which suggests Hiibschman's consumption and impairment. The availability of alternative evidence goes to the probativeness of the evidence in dispute. Finally, this information is not relevant to the comparative negligence of Hiibschman's mother, for she did not give Hiibschman alcohol on the day in question.

The cases cited by the City are unhelpful. This type of relevance question, requiring the balancing of prejudice and probativeness, is a fact specific inquiry. The potential prejudice, that the jury would punish Hiibschman for her prior conduct, may outweigh the evidence's marginal relevance. The superior court did not abuse its discretion.[22]

CONCLUSION

We AFFIRM in part, and REVERSE in part, and REMAND the case for a new trial.

Ronald MUSGROVE, Appellant,

v.

Loita MUSGROVE, Appellee.

No. S-3968.

Supreme Court of Alaska.

Dec. 6, 1991.

Former wife brought action against former husband to recover arrearage in

21. Hiibschman was arrested in December 1985 for DWI. She entered a plea of no contest, receiving a sentence of a $250 fine, 72 hours in jail, and alcohol screening. She claimed that the experience made her very careful about drinking. The incident involved drinking some of her grandfather's beer and putting her mother's truck into a ditch. She alleges the truck ended up in the ditch not because of her alcohol consumption, but because the street had about four inches of glare ice on it. When she touched the brakes to stop at the stop sign, the truck slid into the ditch. She recognizes that her judgment was impaired.

22. As to the other issues on appeal, we need not address them. The City concedes that expert testimony is not essential if the matter is remanded. As to Hiibschman's argument that AS 09.65.135 violates equal protection under the Alaska Constitution, our construction of AS 09.65.135 makes resolution of this issue unnecessary.

time frame for the sodomy charge, the State is free to contend that the "possibility" of sodomy occurred at any time during the thirty-two-month period alleged in the information. I think it is unconscionable to allow the State to place a defendant in such a position as Wilcox finds himself. In my view, the majority eviscerates the due process right referred to in *McNair*.

The majority asserts that all the defendant loses by the prosecution's inability to give some reasonable specification of dates and times is the ability to prepare an alibi defense. The majority states:

> Therefore, Wilcox has no statutory or constitutional right to a charge framed so as to facilitate an alibi defense. Second, it is doubtful that an alibi defense is a realistic possibility because Wilcox had continual contact with the child half of the time over the thirty-two-month period.... Under these circumstances, we conclude that Wilcox has not shown any specific harm to his defense that he likely will suffer as a result of the lack of exact dates and times.

Apart from the effect of the majority's ruling, which makes an alibi defense impossible, there is no basis for the majority's factual conclusion that the defendant has "no realistic possibility" of an alibi defense because Wilcox had "continual contact with the child half of the time over the thirty-two-month period." If there were some time specification, the defendant might have an alibi defense during the time he had custody. The Court's assertion is a self-fulfilling prophecy, since it is impossible to prove one's whereabouts for a thirty-two-month period, or even half that time—the period the Wilcoxes had custody of the child.

Other serious obstacles to the defense occur as a result of the lack of fair notice. The defendant has no realistic possibility of producing any other defense—except an attack on the prosecution's case by cross-examination. The defendant will not be able to call any witnesses to testify as to his conduct on a given occasion because the prosecution will always be able to assert that the crime occurred on another occasion. Thus, the defendant is prevented from producing witnesses who might testify, for example, that on a particular occasion some alleged act of abuse was merely a hygenic act performed for the child or was some other innocuous and innocent activity. If the defendant waives his right not to testify, he may testify and deny that he ever abused the child, but such a denial against this charge is not likely to be effective, even if true. In short, when faced with a charge that abuse might have occurred at any time during a thirty-two-month period, a defendant is all but defenseless, except insofar as he can attack the prosecution's witnesses on cross-examination.

But even cross-examination will avail Wilcox little by way of a defense because the two key prosecution witnesses are a social worker and a psychologist whose testimony cannot be fairly cross-examined because they will testify to hearsay statements made to them by the child. Effective cross-examination regarding hearsay statements relayed by those witnesses is virtually impossible. Furthermore, the critical witness, the social worker to whom the child first made an accusation against the defendant, did not videotape her sessions with the child—a highly unprofessional lapse, in my view, and one that makes cross-examination even more futile.

It follows from the majority opinion that an averment of a crime in the statutory language specifying covering the elements of the offense is all that is necessary to satisfy a defendant's *constitutional right* of notice as to time, even though the evidence indicates that the allegations could be connected to a particular time. The result is paradoxical. The weaker and more amorphous the prosecution's case is, the less notice the defendant receives and the less chance the defendant will have of defending, other than by cross-examination. In addition, the State's case is rendered immune from a claim that there was a fatal variance. In short, although the defendant is presumed innocent, he is effectively stripped of any realistic possibility of defending against the charges.

In my view, the trial court, faced with a difficult issue, reached a correct and courageous conclusion. I would affirm the trial court. If the defendant goes to trial on the information in this case, the result is virtually foreordained.

Margaret CLOVER and Richard S. Clover, Plaintiffs and Appellants,

v.

SNOWBIRD SKI RESORT, dba Plaza Restaurant, a Utah corporation; and Chris Zulliger, Defendants and Appellees.

No. 890070.

Supreme Court of Utah.

March 1, 1991.

Guest brought action against ski resort to recover for injuries sustained in skiing accident allegedly caused by resort employee. The Third District Court, Salt Lake County, James S. Sawaya, J., entered summary judgment against guest, and she appealed. The Supreme Court, Hall, C.J., held that: (1) material fact issues existed in connection with guest's respondeat superior, negligent design and maintenance, and negligent supervision claims, and (2) inherent risk of skiing statute did not foreclose claim based on resort's negligent design and maintenance.

Reversed and remanded for further proceedings.

1. Appeal and Error ⇐934(1)

When reviewing order granting summary judgment, facts are to be liberally construed in favor of parties opposing motion, and those parties are to be given benefit of all inferences which might reasonably be drawn from evidence; determination of whether facts viewed under such standard justify entry of judgment is question of law, and reviewing court accords trial court's conclusions of law no deference, but reviews them for correctness. Rules Civ.Proc., Rule 56(c).

2. Master and Servant ⇐300

Under doctrine of respondeat superior, employers are held vicariously liable for torts their employees commit when employees are acting within scope of their employment.

3. Master and Servant ⇐332(2)

Question of whether employee is acting within scope of employment is question of fact; however, in situations where activity is so clearly within or without scope of employment that reasonable minds cannot differ, it lies within prerogative of trial court to decide issue as a matter of law.

4. Judgment ⇐181(33)

Material fact issue existed as to whether chef employed by ski resort was acting within scope of his employment at time of skiing accident, which occurred after chef had checked on one of resort's restaurants as requested, precluding summary judgment for resort on accident victim's claim under doctrine of respondeat superior. Rules Civ.Proc., Rule 56(c).

5. Master and Servant ⇐302(1)

Under "dual purpose doctrine," if employee's actions are motivated by dual purpose of benefiting employer and serving some personal interest, employee's actions will usually be considered to be within scope of employment.

See publication Words and Phrases for other judicial constructions and definitions.

6. Master and Servant ⇐302(1)

In determining whether employee was acting with scope of his employment under doctrine of respondeat superior, focus is not on whether employee's conduct was foreseeable by employer.

7. Master and Servant ⇐302(2)

Workers' compensation premises rule, employees who have fixed hours and places of work will usually be considered to be

acting outside scope of employment when travelling to and from work but within scope of employment while travelling to and from work when they are on their employer's premises, does not apply to third-party tort-feasor claims.

8. Theaters and Shows ⇐6(19)

Fact that injury is occasioned by one or more of dangers listed in inherent risk of skiing statute's definition of "inherent risk of skiing" does not foreclose claim against operator of ski area based on operator's negligence; list of dangers is nonexclusive and relates to dangers that are integral aspects of sport of skiing, and definition is intended to ensure that operators provide skiers with sufficient notice of risks they face when participating in sport of skiing as well as operators' liability in connection with such risks. U.C.A.1963, 78-27-51 to 78-27-54, 78-27-52(1), 78-27-54.

See publication Words and Phrases for other judicial constructions and definitions.

9. Statutes ⇐188

Terms of statute should be interpreted in accord with their usual and accepted meanings.

10. Statutes ⇐205

Statute should not be construed in piecemeal fashion, but as comprehensive whole.

11. Statutes ⇐222

In construing statute that deals with tort claims, it is proper to interpret statute in accord with relevant tort law.

12. Statutes ⇐181(1)

In dealing with unclear statute, court renders interpretations that will best promote protection of the public.

13. Judgment ⇐181(33)

Material fact issues existed in connection with accident victim's claims against ski resort for negligent design and maintenance, precluding summary judgment for resort. Rules Civ.Proc., Rule 56(c).

14. Master and Servant ⇐303

Regardless of whether employer can be held vicariously liable for employee's actions under doctrine of respondeat superior, employer may be directly liable for its own negligence in hiring or supervising employees.

15. Judgment ⇐181(33)

Material fact issues existed in connection with accident victim's claim that ski resort was negligent in supervising employee who purportedly caused victim's skiing injuries, precluding summary judgment for resort. Rules Civ.Proc., Rule 56(c).

Richard D. Burbidge, Stephen B. Mitchell, Peter L. Rognlie, Salt Lake City, for plaintiffs and appellants.

Jay E. Jensen, Todd S. Winegar, Salt Lake City, for defendants and appellees.

HALL, Chief Justice:

Plaintiff Margaret Clover sought to recover damages for injuries sustained as the result of a ski accident in which Chris Zulliger, an employee of defendant Snowbird Corporation ("Snowbird"), collided with her. From the entry of summary judgment in favor of defendants, Clover appeals.

Many of the facts underlying Clover's claims are in dispute. Review of an order granting summary judgment requires that the facts be viewed in a light most favorable to the party opposing summary judgment.[1] At the time of the accident, Chris Zulliger was employed by Snowbird as a chef at the Plaza Restaurant. Zulliger was supervised by his father, Hans Zulliger, who was the head chef at both the Plaza, which was located at the base of the resort, and the Mid-Gad Restaurant, which was located halfway to the top of the mountain. Zulliger was instructed by his father to make periodic trips to the Mid-Gad to monitor its operations. Prior to the accident, the Zulligers had made several inspection trips to the restaurant. On at least one occasion, Zulliger was paid for such a trip.

1. *Culp Constr. Co. v. Buildmart Mall*, 795 P.2d 650, 651 (Utah 1990).

He also had several conversations with Peter Mandler, the manager of the Plaza and Mid-Gad Restaurants, during which Mandler directed him to make periodic stops at the Mid-Gad to monitor operations.

On December 5, 1985, the date of the accident, Zulliger was scheduled to begin work at the Plaza Restaurant at 3 p.m. Prior to beginning work, he had planned to go skiing with Barney Norman, who was also employed as a chef at the Plaza. Snowbird preferred that their employees know how to ski because it made it easier for them to get to and from work. As part of the compensation for their employment, both Zulliger and Norman received season ski passes. On the morning of the accident, Mandler asked Zulliger to inspect the operation of the Mid-Gad prior to beginning work at the Plaza.

Zulliger and Norman stopped at the Mid-Gad in the middle of their first run. At the restaurant, they had a snack, inspected the kitchen, and talked to the personnel for approximately fifteen to twenty minutes. Zulliger and Norman then skied four runs before heading down the mountain to begin work. On their final run, Zulliger and Norman took a route that was often taken by Snowbird employees to travel from the top of the mountain to the Plaza. About midway down the mountain, at a point above the Mid-Gad, Zulliger decided to take a jump off a crest on the side of an intermediate run. He had taken this jump many times before. A skier moving relatively quickly is able to become airborne at that point because of the steep drop off on the downhill side of the crest. Due to this drop off, it is impossible for skiers above the crest to see skiers below the crest. The jump was well known to Snowbird. In fact, the Snowbird ski patrol often instructed people not to jump off the crest. There was also a sign instructing skiers to ski slowly at this point in the run. Zulliger, however, ignored the sign and skied over the crest at a significant speed. Clover, who had just entered the same ski run from a point below the crest, either had stopped or was traveling slowly below the crest. When Zulliger went over the jump he collided with Clover, who was hit in the head and severely injured.

Clover brought claims against Zulliger and Snowbird, alleging that (1) Zulliger's reckless skiing was a proximate cause of her injuries, (2) Snowbird is liable for Zulliger's negligence because at the time of the collision, he was acting within the scope of his employment, (3) Snowbird negligently designed and maintained its ski runs, and (4) Snowbird breached its duty to adequately supervise its employees. Zulliger settled separately with Clover. Under two separate motions for summary judgment, the trial judge dismissed Clover's claims against Snowbird for the following reasons: (1) as a matter of law, Zulliger was not acting within the scope of his employment at the time of the collision, (2) Utah's Inherent Risk of Skiing Statute, Utah Code Ann. §§ 78-27-51 to -54 (Supp.1986), bars plaintiff's claim of negligent design and maintenance, and (3) an employer does not have a duty to supervise an employee who is acting outside the scope of employment.

I. STANDARD OF REVIEW

[1] Summary judgment is proper in cases where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.[2] In cases where the facts are in dispute, summary judgment is only granted when, viewing the facts in a light most favorable to the party opposing summary judgment, the moving party is entitled to judgment. Therefore, when reviewing an order granting summary judgment, the facts are to be liberally construed "in favor of the parties opposing the motion, and those parties are to be given the benefit of all inferences which might reasonably be drawn from the evidence."[3] The determination of whether

2. Utah R.Civ.P. 56(c); *see, e.g., Utah State Coalition of Senior Citizens v. Utah Power & Light Co.*, 776 P.2d 632, 634 (Utah 1989).

3. *Payne ex rel. Payne v. Myers*, 743 P.2d 186, 187-88 (Utah 1987); *see also, e.g., Owens v. Garfield*, 784 P.2d 1187, 1188 (Utah 1989).

the facts, viewed in this light, justify the entry of judgment is a question of law. We accord the trial court's conclusions of law no deference, but review them for correctness.[4]

II. SCOPE OF EMPLOYMENT

[2, 3] Under the doctrine of respondeat superior, employers are held vicariously liable for the torts their employees commit when the employees are acting within the scope of their employment.[5] Clover's respondeat superior claim was dismissed on the ground that as a matter of law, Zulliger's actions at the time of the accident were not within the scope of his employment. In a recent case, *Birkner v. Salt Lake County*,[6] this court addressed the issue of what types of acts fall within the scope of employment. In *Birkner*, we stated that acts within the scope of employment are " 'those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.' "[7] The question of whether an employee is acting within the scope of employment is a question of fact. The scope of employment issue must be submitted to a jury "whenever reasonable minds may differ as to whether the [employee] was at a certain time involved wholly or partly in the performance of his [employer's] business or within the scope of employment."[8] In situations where the activity is so clearly within or without the scope of employment that reasonable minds cannot differ, it lies within the prerogative of the trial judge to decide the issue as a matter of law.[9]

In *Birkner*, we observed that the Utah cases that have addressed the issue of whether an employee's actions, as a matter of law, are within or without the scope of employment have focused on three criteria.[10] "First, an employee's conduct must be of the general kind the employee is employed to perform.... In other words, the employee must be about the employer's business and the duties assigned by the employer, as opposed to being wholly involved in a personal endeavor."[11] Second, the employee's conduct must occur substantially within the hours and ordinary spatial boundaries of the employment.[12] "Third, the employee's conduct must be motivated at least in part, by the purpose of serving the employer's interest."[13] Under specific factual situations, such as when the employee's conduct serves a dual purpose[14] or when the employee takes a personal detour in the course of carrying out his employer's directions,[15] this court has occasionally used variations of this approach. These variations, however, are not departures from the criteria advanced in *Birkner*. Rather, they are methods of applying the criteria in specific factual situations.

[4] In applying the *Birkner* criteria to the facts in the instant case, it is important to note that if Zulliger had returned to the Plaza Restaurant immediately after he inspected the operations at the Mid-Gad Restaurant, there would be ample evidence to support the conclusion that on his return trip Zulliger's actions were within the scope of his employment. There is evidence that it was part of Zulliger's job to monitor the operations at the Mid-Gad and that he was directed to monitor the operations on the day of the accident. There is also evidence that Snowbird intended Zulliger to use the ski lifts and the ski runs on his trips to the Mid-Gad. It is clear, therefore, that Zulliger's actions could be considered to "be of the general kind that the employee is employed to perform."[16] It is also clear that there would be evidence that Zulliger's actions occurred within the hours and normal spatial boundaries of his employment. Zulliger was expected to monitor the operations at the Mid-Gad during the time the lifts were operating and when he was not working as a chef at the Plaza. Furthermore, throughout the trip he would have been on his employer's premises. Finally, it is clear that Zulliger's actions in monitoring the operations at the Mid-Gad, per his employer's instructions, could be considered "motivated, at least in part, by the purpose of serving the employer's interest."[17]

[5] The difficulty, of course, arises from the fact that Zulliger did not return to the Plaza after he finished inspecting the facilities at the Mid-Gad. Rather, he skied four more runs and rode the lift to the top of the mountain before he began his trip to the base. Snowbird claims that the fact shows that Zulliger's primary purpose in skiing on the day of the accident was for his own pleasure and that therefore, as a matter of law, he was not acting within the scope of his employment. In support of this proposition, Snowbird cites *Whitehead v. Variable Annuity Life Insurance*. *Whitehead* concerned the dual purpose doctrine. Under this doctrine, if an employee's actions are motivated by the dual purpose of benefiting the employer and serving some personal interest, the actions will usually be considered within the scope of employment.[19] However, if the personal motivation for the activity is persuasive, "even though there may be some fraternization of business or performance of acts merely incidental or adjunctive thereto, [person] should not be deemed to be in the scope of his employment."[20] In situations where the scope of employment issue concerns an employee's trip, a useful test in determining if the transaction of business is purely incidental to a personal motive is "whether the trip is one which would have required the employer to send another employee over the same route or to perform the same function if the trip had not been made."[21]

In *Whitehead*, we held that an employee's commute home was not within the scope of employment, notwithstanding the plaintiff's contention that because the employee planned to make business calls from his house, there was a dual purpose for the commute.[22] In so holding, we noted that the business calls could have been made as easily from any other place as from the employee's home.[23] The instant case is distinguishable from *Whitehead* in that the activity of inspecting the Mid-Gad necessitates travel to the restaurant. Furthermore, there is evidence that the manager

4. *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636 (Utah 1989); *Bonham v. Morgan*, 788 P.2d 497, 499 (Utah 1989).

5. *See* W. Keeton, *Prosser and Keeton on the Law of Torts* § 70, at 502 (5th ed. 1984). *See generally, e.g., Whitehead v. Variable Annuity Life Ins.*, 801 P.2d 934, 935 (Utah 1989); *Birkner v. Salt Lake County*, 771 P.2d 1053, 1056–59 (Utah 1989).

6. 771 P.2d 1053 (Utah 1989).

7. *Birkner v. Salt Lake County*, 771 P.2d at 1056 (quoting W. Keeton, *Prosser and Keeton on the Law of Torts* § 70, at 502 (5th ed. 1984)).

8. *Carter v. Bessey*, 97 Utah 427, 93 P.2d 490, 493 (1939).

9. *Birkner v. Salt Lake County*, 771 P.2d at 1057.

10. *See* Restatement (Second) of Agency § 228 (1958); W. Keeton, *Prosser and Keeton on the Law of Torts* § 70, at 502 (5th ed. 1984).

11. *Birkner v. Salt Lake County*, 771 P.2d 1053, 1056–57 (Utah 1989); *see also Keller v. Gunn Supply Co.*, 62 Utah 501, 220 P. 1063, 1064 (1923).

12. *Birkner v. Salt Lake County*, 771 P.2d at 1057; *see also Cannon v. Goodyear Tire & Rubber Co.*, 60 Utah 346, 208 P. 519, 520–21 (1922).

13. *Birkner v. Salt Lake County*, 771 P.2d at 1057; *see also, e.g., Whitehead v. Variable Annuity Life Ins.*, 801 P.2d at 936; *Stone v. Hurst Lumber Co.*, 15 Utah 2d 49, 386 P.2d 910, 911 (1963); *Combes v. Montgomery Ward & Co.*, 119 Utah 407, 228 P.2d 272, 274 (1951).

14. *See Whitehead v. Variable Annuity Life Ins.*, 801 P.2d at 937 (applying the dual purpose rule); *see infra* notes 18–23 and accompanying text.

15. *See, e.g., Carter v. Bessey*, 93 P.2d at 492–93 (applying the substantial deviation test); *see infra* notes 24–31 and accompanying text.

16. *Birkner v. Salt Lake County*, 771 P.2d at 1057.

17. *Id.*

18. 801 P.2d 934 (Utah 1989).

19. *Id.* at 937.

20. *Id.* (citing *Martinson v. W–M Ins. Agency*, 6 P.2d 256, 285 (Utah 1980)).

21. *Id.*

22. *Id.*

23. *Id.*

both the Mid-Gad and the Plaza wanted an employee to inspect the restaurant and report back by 3 p.m. If Zulliger had not inspected the restaurant, it would have been necessary to send a second employee to accomplish the same purpose. Furthermore, the second employee would have most likely used the ski lifts and ski runs in traveling to and from the restaurant.

There is ample evidence that there was a predominant business purpose for Zulliger's trip to the Mid-Gad. Therefore, this case is better analyzed under our decisions dealing with situations where an employee has taken a personal detour in the process of carrying out his duties. This court has decided several cases in which employees deviated from their duties for wholly personal reasons and then, after resuming their duties, were involved in accidents.[24] In situations where the detour was such a substantial diversion from the employee's duties that it constituted an abandonment of employment, we held that the employee, as a matter of law, was acting outside the scope of employment.[25] However, in situations where reasonable minds could differ on whether the detour constituted a slight deviation from the employee's duties or an abandonment of employment, we have left the question for the jury.[26]

Under the circumstances of the instant case, it is entirely possible for a jury to reasonably believe that at the time of the accident, Zulliger had resumed his employment and that Zulliger's deviation was not substantial enough to constitute a total abandonment of employment. First, a jury could reasonably believe that by beginning his return to the base of the mountain to begin his duties as a chef and to report to Mandler concerning his observations at the Mid-Gad, Zulliger had resumed his employment. In past cases, in holding that the actions of an employee were within the scope of employment, we have relied on the fact that the employee had resumed the duties of employment prior to the time of the accident.[27] This is an important factor because if the employee has resumed the duties of employment, the employee is then "about the employer's business" and the employee's actions will be "motivated, at least in part, by the purpose of serving the employer's interest." [28] The fact that due to Zulliger's deviation, the accident occurred at a spot above the Mid-Gad does not disturb this analysis. In situations where accidents have occurred substantially within the normal spatial boundaries of employment, we have held that employees may be within the scope of employment if, after a personal detour, they return to their duties and an accident occurs.[29]

Second, a jury could reasonably believe that Zulliger's actions in taking four ski runs and returning to the top of the mountain do not constitute a complete abandonment of employment. It is important to note that by taking these ski runs, Zulliger was not disregarding his employer's directions. In *Cannon v. Goodyear Tire & Rubber Co.*,[30] wherein we held that the employee's actions were a substantial departure from the course of employment, we focused on the fact that the employee's actions were in direct conflict with the employer's directions and policy.[31] In the instant case, far from directing its employees not to ski at the resort, Snowbird issued its employees season ski passes as part of their compensation.

These two factors, along with other circumstances--such as, throughout the day Zulliger was on Snowbird's property, there was no specific time set for inspecting the restaurant, and the act of skiing was the method used by Snowbird employees to travel among the different locations of the resort—constitute sufficient evidence for a jury to conclude that Zulliger, at the time of the accident, was acting within the scope of his employment.

[6] Although we have held that Zulliger's actions were not, as a matter of law, outside the scope of his employment under the *Birkner* analysis, it is important to note that Clover also argues that Zulliger's conduct is within the scope of employment under two alternative theories. First, she urges this court to adopt a position taken by some jurisdictions that focuses, not on whether the employee's conduct is motivated by serving the employer's interest, but on whether the employee's conduct is foreseeable.[32] Such an approach constitutes a significant departure from the *Birkner* analysis.

[7] Second, Clover urges this court to apply the premises rule, a rule developed in workers' compensation cases,[33] to third-party tort-feasor claims. Under this rule, employees who have fixed hours and places of work will usually be considered to be acting outside of the scope of employment when they are traveling to and from work. However, they will be considered to be in the course of employment while traveling to and from work when they are on their employer's premises.[34] In this instance, we decline to adopt such an approach. It is to be noted that the policies behind workers' compensation law differ from the policies behind respondeat superior claims.[35] Furthermore, the premises rule departs from the analysis in *Birkner* in that it focuses entirely upon the second criterion discussed in *Birkner*, the hours and ordinary spatial boundaries of the employment, to the exclusion of the first and third criteria. Situations like the instant case, where the employee has other reasons aside from traveling to work to be on the employer's premises, demonstrate the need for a more flexible and intricate analysis in respondeat superior cases. In fact, it is not entirely clear that the premises rule would apply in a workers' compensation case if the only connection an employee had with work was that the employee, after some recreational skiing, was returning to work on the employer's ski runs.[36] We therefore, in this instance, decline to adopt these approaches.

III. NEGLIGENT DESIGN AND MAINTENANCE

[8] The trial court dismissed Clover's negligent design and maintenance claim on the ground that such a claim is barred by Utah's Inherent Risk of Skiing Statute, Utah Code Ann. §§ 78-27-51 to -54 (Supp. 1986). This ruling was based on the trial court's findings that "Clover was injured as a result of a collision with another skier, and/or the variation of steepness in terrain." Apparently, the trial court reasoned that regardless of a ski resort's culpability, the resort is not liable for an injury occasioned by one or more of the dangers listed in section 78-27-52(1). This reasoning, however, is based on an incorrect interpretation of sections 78-27-51 to -54.

Utah Code Ann. §§ 78-27-51 and -52(1)[37] read in part:

24. *See Carter v. Bessey*, 93 P.2d at 491-93; *Burton v. La Duke*, 61 Utah 78, 210 P. 978, 979-82 (Utah 1922); *Cannon v. Goodyear Tire & Rubber Co.*, 208 P. at 519-22.

25. *Compare Cannon v. Goodyear Tire & Rubber Co.*, 208 P. at 521 (substantial deviation from employment) *with Burton v. La Duke*, 210 P. at 981-82 (distinguishing *Cannon*).

26. *See Carter v. Bessey*, 93 P.2d at 493; *Burton v. La Duke*, 210 P. at 981.

27. *See Burton v. La Duke*, 210 P. at 979-81.

28. *See id.* 210 P. at 981; *see also Birkner v. Salt Lake County*, 771 P.2d at 1057.

29. *Burton v. La Duke*, 210 P. at 981.

30. 60 Utah 346, 208 P. 519 (1922).

31. *See id.* 208 P. at 520-21.

32. *See Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir.1968); *Hinman v. Westinghouse Elec. Co.*, 2 Cal.3d 956, 471 P.2d 988, 990, 88 Cal.Rptr. 188, 190 (1970).

33. *See Soldier Creek Coal v. Bailey*, 709 P.2d 1165, 1166 (Utah 1985).

34. 1 A. Larson, *The Law of Workmen's Compensation* § 15.11 (1990).

35. *See id.* at § 15.15 (rationale for expansions of the premises rule different than rationale of respondeat superior).

36. *See Pypers v. Workmen's Compensation Appeal Bd.*, 105 Pa.Cmwlth. 448, 524 A.2d 1046, 1049 (1987) (when employee remains on premises for party, injury received while leaving not compensable).

37. The Passenger Tramway Act, Utah Code Ann. § 63-11-37 (Supp.1986), also provides protections to ski area operators. This statute allows actions to recover for injuries caused by unnecessary hazards in design, construction, and operation of tramways but not for injuries caused by "the hazards inherent in the sports of mountaineering, skiing and hiking." The protections ski area operators possess under section 63-11-

ierent risks of skiing—Public policy
'he Legislature finds that the sport of
ing is practiced by a large number of
idents of Utah and attracts a large
nber of nonresidents, significantly
tributing to the economy of this state.
t further fi[nds] that few insurance
riers are willing to provide liability
urance protection to ski area opera-
s and that the premiums charged by
se carriers have risen sharply in re-
t years due to confusion as to wheth-
a skier assumes the risks inherent in
sport of skiing. It is the purpose of
s act, therefore, to clarify the law in
ation to skiing injuries and the risks
erent in that sport, and to establish as
matter of law that certain risks are
erent in that sport, and to provide
t, as a matter of public policy, no
son engaged in that sport shall recov-
from a ski operator for injuries result-
from those inherent risks.

ierent risk of skiing—Definitions
used in this act:

1) "Inherent risk of skiing" means
se dangers or conditions which are an
egral part of the sport of skiing, in-
ding, but not limited to: changing
ather conditions, variations or steep-
s in terrain; snow or ice conditions;
face or subsurface conditions such as
e spots, forest growth, rocks, stumps,
act with lift towers and other struc-
es and their components; collisions
h other skiers; and a skier's failure to
within his own ability.

on 78-27-53 states that notwithstand-
nything to the contrary in Utah's com-
ive fault statute, a skier cannot recov-
om a ski area operator for an injury
d by an inherent risk of skiing. Sec-
78-27-54 requires ski area operators to
trail boards at one or more prominent
ions within each ski area which shall
le a list of the inherent risks of skiing

re not more expansive than the protections possess under sections 78-27-51 to -54. refore, a separate analysis of section 63-11-

and the limitations on liability of ski area operators as defined in this act."

It is clear that sections 78-27-51 to -54 protect ski area operators from suits initiated by their patrons who seek recovery for injuries caused by an inherent risk of skiing. The statute, however, does not purport to grant ski area operators complete immunity from all negligence claims initiated by skiers. While the general parameters of the act are clear, application of the statute to specific circumstances is less certain. In the instant case, both parties urge different interpretations of the act. Snowbird claims that any injury occasioned by one or more of the dangers listed in section 78-27-52(1) is barred by the statute because, as a matter of law, such an accident is caused by an inherent risk of skiing. Clover, on the other hand, argues that a ski area operator's negligence is not an inherent risk of skiing and that if the resort's negligence causes a collision between skiers, a suit arising from that collision is not barred by sections 78-27-51 to -54.

Although the trial court apparently agreed with Snowbird, we decline to adopt such an interpretation.[38] The basis of Snowbird's argument is that the language of section 78-27-52(1) stating that "'[i]nherent risk of skiing' means those dangers or conditions which are an integral part of the sport of skiing, including but not limited to: ... collision with other skiers" must be read as defining all collisions between skiers as inherent risks. The wording of the statute does not compel such a reading. To the contrary, the dangers listed in section 78-27-52(1) are modified by the term "integral part of the sport of skiing." Therefore, ski area operators are protected from suits to recover for injuries caused by one or more of the dangers listed in section 78-27-52(1) only to the extent that those dangers, under the facts of each case, are integral aspects of the sport of skiing. Indeed, the list of dangers in section 78-27-52(1) is expressly nonexclusive. The statute, therefore, contemplates that the determination of whether a risk is inherent be made on a case-by-case basis, using the entire statute, not solely the list provided in section 78-27-52(1).

Furthermore, when the act is read in its entirety, no portion thereof is rendered meaningless. When reading section 78-27-52(1) in connection with section 78-27-54, it becomes clear that the relevance of section 78-27-52(1) is in insuring that ski area operators provide skiers with sufficient notice of the risks they face when participating in the sport of skiing, as well as ski area operators' liability in connection with these risks. It should also be noted that the interpretation urged by Snowbird would result in a wide range of absurd consequences.[39] For example, if a skier loses control and falls by reason of the negligence of an operator, recovery for injury would depend on whether, in the fall, the skier collides with a danger listed in section 78-27-52(1). Such a result is entirely arbitrary.

[9-12] To the extent that the wording of section 78-27-52(1) creates uncertainty regarding the specific application of the act, that confusion should be resolved through the use of the rules of statutory construction. A rule of construction which this court has commonly applied is that the terms of a statute should be interpreted in accord with their usual and accepted meanings.[40] Another rule is that a statute should not be construed in a piecemeal fashion but as a comprehensive whole.[41] Furthermore, "[i]f there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective, and to harmonize its provisions in accordance with its intent and purpose."[42] In cases such as this, where a statement of the statute's purpose is codified in the statute, this method of construction is particularly appropriate. It is also proper in construing a statute which deals with tort claims to interpret the statute in accord with relevant tort law. Finally, in dealing with an unclear statute, this court renders interpretations that will "best promote the protection of the public."[43]

In construing the statute in this manner, a helpful first step is to note that sections 78-27-51 to -54 limit the liability of ski area operators by defining the duty they owe to their patrons. The express purpose of the statute, codified in section 78-27-51, is "to clarify the law in relation to skiing injuries and the risk inherent in the sport ... and to establish [that] ... no person shall recover from a ski operator for injuries resulting from those inherent risks." Inasmuch as the purpose of the statute is to "clarify the law," not to radically alter ski resort liability, it is necessary to briefly examine the relevant law at the time the statute was enacted. Although there is limited Utah case law on point, when the statute was enacted the majority of jurisdictions employed the doctrine of primary assumption of risk in limiting ski resorts' liability for injuries their patrons received while skiing.[44] Terms utilized in the statute such as "inherent risk of skiing" and "assumes the risk" are the same terms relied upon in such cases. This language suggests that the statute is meant to achieve the same results achieved under the doctrine of primary assumption of risk.

38. Because we interpret Utah Code Ann. §§ 78-27-51 to -54 as not prohibiting legitimate negligence claims, we do not reach Clover's argu-

39. When dealing with unclear statutes, this court renders interpretations that will avoid "absurd consequences." *Curtis v. Harmon Electronics*, 575 P.2d 1044, 1046 (Utah 1978).

40. *Utah County v. Orem City*, 699 P.2d 707, 708 (Utah 1985).

41. *Peay v. Board of Ed. of Provo City Schools*, 14 Utah 2d 63, 377 P.2d 490, 492 (Utah 1962).

43. *Curtis v. Harmon Electronics*, 575 P.2d at 1046.

44. *See, e.g., Wright v. Mt. Mansfield Lift*, 96 F.Supp. 786, 791 (D.Vt.1951); *see also* Feuerhelm, *From Wright to Sunday and Beyond: Is the Law Keeping Up With the Skiers?*, 1985 Utah L.Rev. 885; Comment, *Utah's Inherent Risk of Skiing Act: Avalanche from Capitol Hill*, 1980

In fact, commentators suggest that the statute was passed in reaction to a perceived erosion in the protection ski area operators traditionally enjoyed under the common law doctrine of primary assumption of risk.[45]

As we have noted in the past, the single term "assumption of risk" has been used to refer to several different, and occasionally overlapping, concepts.[46] One concept, primary assumption of risk, is simply "an alternative expression for the proposition that the defendant was not negligent, that is, there was no duty owed or there was no breach of an existing duty." [47] This suggests that the statute, in clarifying the "confusion as to whether a skier assumes the risks inherent in the sport of skiing," operates to define the duty ski resorts owe to their patrons.

Section 78-27-53 also supports the notion that the ski statute operates to define the duty of a ski resort. This section exempts injuries caused by the inherent risks of skiing from the operation of Utah's comparative fault statute, which was enacted to avoid the harsh results of the all-or-nothing nature of the former law by limiting a party's liability by the degree of that party's fault.[48] Comparative principles have been applied in cases dealing with contributory negligence,[49] secondary assumption of risk,[50] and strict liability.[51] Exempting suits concerning injuries caused by an inherent risk of skiing from the comparative fault statute is consistent with the assertion that the ski area operators are not at fault in such situations—that is, ski area operators have no duty to protect a skier from the inherent risks of skiing.

Finally, it is to be noted that without a duty, there can be no negligence. Such an interpretation, therefore, harmonizes the express purpose of the statute, protecting ski area operators from suits arising out of injuries caused by the inherent risks of skiing, with the fact that the statute does not purport to abrogate a skier's traditional right to recover for injuries caused by ski area operators' negligence.

A similar analysis leads to the conclusion that the duties sections 78-27-51 to -54 impose on ski resorts are the duty to use reasonable care for the protection of its patrons[52] and, under section 78-27-54, the duty to warn its patrons of the inherent risks of skiing. Beyond the general warning prescribed by section 78-27-54, however, a ski area operator is under no duty to protect its patrons from the inherent risks of skiing. The inherent risks of skiing are those dangers that skiers wish to confront as essential characteristics of the sport of skiing (or) hazards that cannot be eliminated by the exercise of ordinary care on the part of the ski area operator.

45. *See* Feuerhelm, *supra* note 44; Comment, *supra* note 44. In fact, Snowbird in its brief and at oral argument contended that the statute was intended to reassert the doctrine of primary assumption of risk as it relates to ski accident cases.

46. *See, e.g., Moore v. Burton Lumber & Hardware*, 631 P.2d 865, 869-71 (Utah 1981); *Jacobsen Constr. v. Structo-Lite Eng'g*, 619 P.2d 306, 309-12 (Utah 1980). In contract law, the term is used in connection with provisions in which one party "expressly contracts not to sue for injury or loss which may thereafter be occasioned by the acts of another." *Jacobsen Constr. v. Structo-Lite Eng'g*, 619 P.2d at 310. In the law of torts, the term has been used to describe two different concepts. In its most common context, secondary assumption of risk, the term refers to the unreasonable encounter of a known and appreciated risk. Secondary assumption of risk is, in reality, an aspect of contributory negligence. Primary assumption of risk involves relationships where the defendant owes no duty of care to the plaintiff. *Id.*

47. *Jacobsen Constr. v. Structo-Lite Eng'g*, 619 P.2d at 310.

48. *See* Utah Code Ann. §§ 78-27-37 to -43 (Supp.1986); *Moore v. Burton Lumber & Hardware*, 631 P.2d at 870.

49. *Acculog, Inc. v. Peterson*, 692 P.2d 728, 730 (Utah 1984).

50. *Moore v. Burton Lumber & Hardware*, 631 P.2d at 869-71.

51. *Mulherin v. Ingersoll-Rand*, 628 P.2d 1301, 1303 (Utah 1981).

52. Ski area operators which invite skiers onto their property for business purposes owe a duty of reasonable care for the protection of their patrons. *See Stevens v. Salt Lake County*, 25 Utah 2d 168, 478 P.2d 496, 498 (Utah 1970); *see also Wright v. Mt. Mansfield Lift Inc.*, 96 F.Supp. 786 (D.Vt.1951).

As noted above, the purpose of the statute is to prohibit suits seeking recovery for injuries caused by an inherent risk of skiing. The term "inherent risk of skiing," using the ordinary and accepted meaning of the term "inherent," refers to those risks that are essential characteristics of skiing—risks that are so integrally related to skiing that the sport cannot be undertaken without confronting these risks. Generally, these risks can be divided into two categories. The first category of risks consists of those risks, such as steep grades, powder, and mogul runs, which skiers wish to confront as an essential characteristic of skiing. Under sections 78-27-51 to -54, a ski area operator is under no duty to make all of its runs as safe as possible by eliminating the type of dangers that skiers wish to confront as an integral part of skiing.[53]

The second category of risks consists of those hazards which no one wishes to confront but cannot be alleviated by the use of reasonable care on the part of a ski resort. It is without question that skiing is a dangerous activity. Hazards may exist in locations where they are not readily discoverable. Weather and snow conditions can suddenly change and, without warning, create new hazards where no hazard previously existed. Hence, it is clearly foreseeable that a skier, without skiing recklessly, may momentarily lose control or fall in an unexpected manner. Ski area operators cannot alleviate these risks, and under sections 78-27-51 to -54, they are not liable for injuries caused by such risks. The only duty ski area operators have in regard to these risks is the requirement set out in section 78-27-54 that they warn their patrons, in the manner prescribed in the statute, of the general dangers patrons must confront when participating in the sport of skiing. This does not mean, however, that a ski area operator is under no duty to use ordinary care to protect its patrons. In fact, if 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 of sections 78-27-51 to -54.

This definition of a ski area operator's duty is consistent with the approach used by the majority of jurisdictions in ski accident cases prior to the time the statute was adopted.[54] At the time the statute was enacted, the landmark case in the area was *Wright v. Mt. Mansfield Lift Inc.*[55] In *Wright*, a skier who was injured in a collision with a snow-covered stump was denied recovery under the doctrine of primary assumption of risk. The court held that although a ski resort has a duty to advise its patrons of specific hazards "which reasonable prudence would have foreseen and corrected," [56] the resort was under no duty to protect its patrons from those dangers that are inherent in the sport to the extent that those dangers are obvious and necessary.[57] Specifically, the court held that the existence of the stump was not reasonably foreseeable and was the type of general hazard that was obvious to the plaintiff.[58] This approach is consistent with the definition of duty derived from the use of the ordinary meaning of the terms of the statute. The prerequisite that a risk be necessary is consistent with the ordinary meaning of the term inherent. Similarly, the prerequisite that the risk be obvious is consistent with the requirement of section 78-27-54 that ski area operators warn of the inherent risk of skiing. This approach, therefore, fulfills the express purpose of the

53. Ski area operators, however, should use reasonable care to inform their patrons of the degree of difficulty of their runs.

54. *See supra* notes 44-45 and accompanying text.

55. 96 F.Supp. 786 (D.Vt.1951).

56. *Id.* at 790.

57. *See id.* at 790-92.

58. *See id.* In fact, the *Wright* court found that in 1951 requiring a ski resort to be aware of the type of hazard that caused the injury "would be to demand the impossible." *Id.* at 791. In contrast in this case, Clover claims that Snowbird had actual knowledge of the danger that caused her injury.

statute, "clarifying the law in relation to skiing injuries."

[13] Having established the proper interpretation of sections 78-27-51 to -54, the next step is to determine whether, given this interpretation, there is a genuine issue of material fact in regard to Clover's claim. First, the existence of a blind jump with a landing area located at a point where skiers enter the run is not an essential characteristic of an intermediate run. Therefore, Clover may recover if she can prove that Snowbird could have prevented the accident through the use of ordinary care. It is to be noted that Clover's negligent design and maintenance claim is not based solely on the allegation that Snowbird allowed conditions to exist on an intermediate hill which caused blind spots and allowed skiers to jump. Rather, Clover presents evidence that Snowbird was aware that its patrons regularly took the jump, that the jump created an unreasonable hazard to skiers below the jump, and that Snowbird did not take reasonable measures to eliminate the hazard. This evidence is sufficient to raise a genuine issue of material fact in regard to Clover's negligent design and maintenance claim.

IV. NEGLIGENT SUPERVISION

[14, 15] The trial court dismissed Clover's negligent supervision claim on the ground that an employer does not have a duty to supervise an employee whose actions are outside the scope of employment. Although we have held that Zulliger's actions were not, as a matter of law, outside the scope of employment, it is important to note that the trial court misstated the law. Regardless of whether an employer can be held vicariously liable for its employee's actions under the doctrine of respondeat superior, an employer may be directly liable for its own negligence in hiring or supervising employees.[59] In the instant case, Clover claims that Snowbird was negligent in not supervising its employees in regard to the practice of reckless skiing. In support of this contention, Clover provides evidence that Snowbird furnished its employees with ski passes as partial compensation for employment, was aware of the dangerous condition created by the jump, and was aware that its employees often took the jump, but did not take any measures to alleviate the danger. This evidence is sufficient to raise a genuine issue of material fact in regard to Clover's negligent supervision claim.

In light of the genuine issues of material fact in regard to each of Clover's claims, summary judgment was inappropriate.

Reversed and remanded for further proceedings.

HOWE, Associate C.J., STEWART and DURHAM, JJ., and JACKSON, Court of Appeals Judge, concur.

ZIMMERMAN, J., having disqualified himself, does not participate herein; JACKSON, Court of Appeals Judge, sat.

59. *See, e.g., Birkner v. Salt Lake County*, 771 P.2d 1053, 1059 (Utah 1989); *Stone v. Hurst Lumber Co.*, 15 Utah 2d 49, 386 P.2d 910, 911-12 (1963). *see also* W. Keeton, *Prosser and Keeton on the Law of Torts* § 70, at 501-02 (5th ed. 1984).

STATE of Utah, Plaintiff and Appellee,
v.
Tony W. MATSAMAS, Defendant and Appellant.

No. 880048.

Supreme Court of Utah.

March 6, 1991

(2) presence of evidence tending to corroborate truth of matter asserted in hearsay statements of alleged child victim can never be considered by court in making "interests of justice" reliability determination under statute allowing admission of out of court statements of child victim of sexual abuse.

Stewart, J., concurred and issued an opinion.

1. Infants ⇐20

Hearsay statements of alleged child victim of sexual abuse should not have been admitted without making necessary reliability findings under *Nelson*; court merely quoted terms of statute and then ordered testimony admitted, but made no specific findings as to what facts relevant to reliability were nor explained how those facts supported conclusion of admissibility. U.C.A.1953, 76-5-411(2).

2. Criminal Law ⇐693, 1036.1(1)

Under Rules of Criminal Procedure, party who wishes to object to admissibility of evidence must do so at least five days prior to trial, and party who fails to make clear and timely objection waives right to raise issue at appellate level. U.C.A.1953, 77-35-12(b)(2) (Repealed).

3. Criminal Law ⇐1036.1(2)

Trial judge effectively waived requirements of rule regarding admissibility of evidence, and objection to admissibility of evidence was preserved for appeal, where judge chose not to treat defendant's failure to raise issue with him before first day of trial as waiver, but rather proceeded to consider claim. U.C.A.1953, 77-35-12(b)(2) (Repealed).

4. Criminal Law ⇐1162

Supreme Court will only reverse verdict where lower court committed harmful error.

5. Criminal Law ⇐1169.1(9)
Infants ⇐20

Admission of hearsay testimony of adults as to statement of victim in prosecution of defendant for rape of child and sodomy on child without making requisite findings for admission of child's statements regarding sexual abuse was error, and the error was not harmless; testimony was allowed into evidence on basis that evidence would "assist" jury and court in understanding whether incident took place or not, other evidence of crimes was slight, testimony may have been essential to prove necessary elements, and testimony was explicit in nature. U.C.A.1953, 76-5-411(1)(b), (2).

6. Infants ⇐20

In any case where declarant is found "unavailable" within meaning of statute allowing admission of out of court statements of alleged child victim of sexual abuse, trial court may not rely on presence of corroborating evidence in determining that "interests of justice" warrant admission of that hearsay. U.C.A.1953, 76-5-411(1)(b), (2).

7. Infants ⇐20

Presence of evidence tending to corroborate truth of matter asserted in hearsay statements of alleged child victim of sexual abuse can never be considered by court in making "interests of justice" reliability determination under statute allowing for admission of out of court statements of alleged child victim of sexual abuse. U.C.A. 1953, 76-5-411(2).

Debra K. Loy and Elizabeth Holbrook, Salt Lake City, for defendant and appellant.

R. Paul Van Dam and Barbara Bearnson, Salt Lake City, for plaintiff and appellee.

ZIMMERMAN, Justice:

Defendant Tony W. Matsamas appeals from his jury convictions of rape of a child and sodomy on a child. *See* Utah Code Ann. §§ 76-5-402.1, -403.1 (1990). Matsamas argues, inter alia, that his convictions should be reversed because the trial court failed to make proper findings under section 76-5-411(2) of the Code before admitting evidence of the child victim's hearsay statements. Utah Code Ann. § 76-5-411(2) (1990). We agree and reverse and remand.

March 23, 1993

TO: Kenny Leaf

Fr: Patti Rizer

RE: SB 44

Please give this statement to members of the Senate Judiciary Committee before it discusses SB 44. Having a basic premise in mind before discussing liability issues helps a person make decisions.

General Liability Analysis
(Any Risk of Serious Bodily Injury)

Most honest safety experts will agree with the basic premise that no foreseeable risk of serious injury or death, no matter how slight, is acceptable if it is feasible and practical to eliminate the risk. Thus, most safety experts will concede that the reasonableness standard requires:

1. that an owner or operator must anticipate foreseeable uses of its equipment or property;

2. that an owner or operator must identify foreseeable risks, hazards, or dangers flowing from foreseeable uses;

3. that the owner or operator must eliminate such hazards if it is feasible to do so and practical to do so;

4. that the risks, hazards, or dangers must be guarded against or shielded, but only if it is not feasible and practical to eliminate them;

5. that the foreseeable risks, hazards, and dangers must be warned of, but only if it is not feasible and practical to eliminate them, guard against them, or shield the potential victim from them.

03/24/93 SB 44
ADDITIONAL TESTIMONY

Municipality of Anchorage

P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650

TOM FINK
MAYOR

DEPARTMENT OF CULTURAL AND RECREATIONAL SERVICES

FAXED 3-2-93

March 1, 1993

Senator Robin Taylor, Chair
Senate Judiciary Committee
Room 30
Juneau, Alaska 99801-1182

MAR -- 5 RECD

RE: CSSB44 & CSHB41 - Civil Liability for Skiing Accidents "Alaska Ski Safety Act of 1993"

Dear Senator Taylor:

After careful review of both of the above pieces of legislation, our department supports passage of CSSB44 entitled the "Alaska Ski Safety Act of 1993".

Most of our primary concerns have been satisfactorily addressed, however, we would like to see Sec. 05.45.040 expanded to contain an exclusion for single rope tow operations with less than a 500' vertical drop as it pertains to providing ski patrols and meeting the standards of the National Ski Patrol System, Inc. and a reduced signage requirement. These requirements could be onerous for small, single rope tow operations. The same result may be achieved through alternate provisions of the ski area operators annual plan through the use of local paramedics, first-aid givers and the effective use of signage.

CSHB41 does not allow property owner input on the annual plan which we feel should be included. The House's substitute adds to Sec. 05.45.070 a new sub-section (d) describing requirements for policies covering reckless skiers, definitions, and procedures for correction. This shifts the enforcement of reckless skiing disciplines to the ski patrol. Our position is the enforcement should be with the ski area operators and their designated personnel, which may or may not be ski patrol.

We support your efforts in limiting ski area liability and recreation tort reforms.

Very truly yours,

Constance R. Jones

Constance R. Jones
Director

cc: Anne Williams

MAR 2 4 RECD

Diana Woods
P.O. Box 468
Girdwood, AK 99587
783-2461

March 20, 1993

Dear Senator Robin Taylor,

I'm writing to express my concern over HB41 and SB44 and the current status of the Alaskan inherent risk of skiing law.

To say the least, I am disappointed at what I've been hearing about the public hearings in Juneau. There's a rumor going around that only one view is being heard at the hearings. I've heard that Mr. and Mrs. Rizer, the couple who's boy died in that unfortunate accident last season, are spearheading a drive to gut the inherent risk of skiing law, and are getting a disproportionate amount of time at the public hearings to do so.

I'm sorry their son died in that accident, but it really infuriates me that their grief has turned to anger and a desire to cripple alpine skiing in Alaska. Accidents happen, and Americans have to face up to taking responsibility for their own actions. I've been skiing for sixteen years; it's my favorite sport. Sure, I've hurt myself skiing, like I've hurt myself doing other, less risky things. But did I try to blame somebody? No! I CHOSE to do those things. No one forced me. I've got accident insurance because I accept the possibility that accidents happen, and I chose to be a responsible citizen by taking care of myself.

My experience with American ski resorts are that they are very conscientious about skier safety. They make a living when people have fun, not when they hurt themselves. Grooming and snow making have improved dramatically over the years, which have increased skiing pleasure and safety. Ski area employees take a great pride in skier safety. They plaster signs all over the mountain to help people be aware of possible natural hazards. But all this positive energy and professional responsibility is for naught if the skiing public refuses to take responsibility for their own actions.

It would be ridiculous to gut the inherent risk law and allow ski areas to be liable for every natural object on the hill, or to be liable every time a skier fell and hurt himself! When lift ticket prices are raised, they tell us it's due to the high cost of litigation. And if the inherent risk of skiing law is gutted, no one will be able to afford the ticket prices!

Yes, I agree businesses should be responsible for the safety of their products and services. As a frequent skier at Alyeska, I believe the staff more than meets industry standards. I do not want to see skyrocketing ticket prices ruin accessibility to the sport. Let's continue to expect people to take responsibility for themselves.

Please allow more time during public hearings so you may hear another side of the issue. Ask the ski industry experts questions about industry standards, not laymen. Please be open to other input. I urge you to please support HB41 and SB44 without tolerating any amendments to gut the effectiveness of these bills. Thank you.

Sincerely,

Diana Woods

Diana Woods

Dear Senator

I am against SB 44. It is special-interest legislation and does not protect skiers. It is extremely broad.

If this bill passes, the safety of hundreds of people are at stake. For example, Alyeska Resort experienced a large avalanche February 14, 1993, in a large open area where hundreds of skiers ski. The avalanche covered two large pieces of equipment. Ski patrollers began to probe with their ski poles, which indicated they weren't even sure if anyone was buried. If this bill passes, Alyeska would not have been responsible for any deaths or injuries.

Perhaps a citizens' advisory committee should help work on this bill. Lobbyists for Seibu and the ski industry in Juneau spent thousands of dollars to let you know why you should pass this bill. But you never hear from the average Alaskan citizens because they don't have the time or money to come to Juneau to lobby against the bill. In fact, many people don't even know this bill is before you.

And finally, and perhaps most importantly, **Alaska already has an inherent risk of skiing law that treats both the skier and the ski area operator fairly.** The Supreme Court's opinion is that the present statute codifies the common law that ski areas are not liable for injuries by the inherent risk of skiing. The ski industry is now saying everything imaginable is an inherent risk of skiing.

This bill is a step backwards from safety exposing hundreds and hundreds of people to death and injury and for what? **We need more safety, not less.**

Please vote no on SB 44.

Sally G Janis — Signature

2904 Brittany Dr — Address

SALLY A. JANIS — Print Name

22 — House District

K — Senate District

MAR 1 : RECD

Dear Senator Taylor:

I am against SB 44. It is special-interest legislation and does not protect skiers. It is extremely broad.

If this bill passes, the safety of hundreds of people are at stake. For example, Alyeska Resort experienced a large avalanche February 14, 1993, in a large open area where hundreds of skiers ski The avalanche covered two large pieces of equipment. Ski patrollers began to probe with their ski poles, which indicated they weren't even sure if anyone was buried. If this bill passes, Alyeska would not have been responsible for any deaths or injuries.

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This bill is a step backwards from safety exposing hundreds and hundreds of people to death and injury and for what? We need more safety, not less.

Please vote no on SB 44.

Signature

8481 Ridgeway

Address

Rosemary Fitzhett

Print Name

House District

Senate District

MAR 1 : RECD

Dear Senator Taylor

I am against HB 41. It is special-interest legislation and does not protect skiers. It is extremely broad.

If this bill passes, the safety of hundreds of people are at stake. For example, Alyeska Resort experienced a large avalanche February 14, 1993, in a large open area where hundreds of skiers ski. The avalanche covered two large pieces of equipment. Ski patrollers began to probe with their ski poles, which indicated they weren't even sure if anyone was buried. If this bill passes, Alyeska would not have been responsible for any deaths or injuries.

Perhaps a citizens' advisory committee should help work on this bill. Lobbyists for Seibu and the ski industry in Juneau spent thousands of dollars to let you know why you should pass this bill. But you never hear from the average Alaskan citizens because they don't have the time or money to come to Juneau to lobby against the bill. In fact, many people don't even know this bill is before you.

This bill is a step backwards from safety exposing hundreds and hundreds of people to death and injury and for what? We need more safety, not less.

Please vote no on HB 41.

Susan Nestell — 100 Friendly St #C
Signature — Address

Susan Nestell
Print Name — House District — Senate District

MAR 1 : RECD

Dear Senator Taylor:

I am against SB 44. It is special-interest legislation and does not protect skiers. It is extremely broad.

If this bill passes, the safety of hundreds of people are at stake. For example, Aleyska Resort experienced a large avalanche February 14, 1993, in a large open area where hundreds of skiers ski. The avalanche covered two large pieces of equipment. Ski patrollers began to probe with their ski poles, which indicated they weren't even sure if anyone was buried. If this bill passes, Alyeska would not have been responsible for any deaths or injuries.

Perhaps a citizens' advisory committee should help work on this bill. Lobbyists for Seibu and the ski industry in Juneau spent thousands of dollars to let you know why you should pass this bill. But you never hear from the average Alaskan citizens because they don't have the time or money to come to Juneau to lobby against the bill. In fact, many people don't even know this bill is before you.

This bill is a step backwards from safety exposing hundreds and hundreds of people to death and injury and for what? We need more safety, not less.

Please vote no on SB 44.

Adelaide A Dicks
Signature

Mile .5 Sagwon
HC 83 Box 2342 FR AK 99577
Address

ADELAIDE A. DICKS
Print Name

24
House District

L
Senate District

MAR 1 : RECD

Dear Senator Taylor

I am against HB 41. It is special-interest legislation and does not protect skiers. It is extremely broad.

If this bill passes, the safety of hundreds of people are at stake. For example, Aleyska Resort experienced a large avalanche February 14, 1993, in a large open area where hundreds of skiers ski. The avalanche covered two large pieces of equipment. Ski patrollers began to probe with their ski poles, which indicated they weren't even sure if anyone was buried. If this bill passes, Alyeska would not have been responsible for any deaths or injuries.

Perhaps a citizens' advisory committee should help work on this bill. Lobbyists for Seibu and the ski industry in Juneau spent thousands of dollars to let you know why you should pass this bill. But you never hear from the average Alaskan citizens because they don't have the time or money to come to Juneau to lobby against the bill. In fact, many people don't even know this bill is before you.

This bill is a step backwards from safety exposing hundreds and hundreds of people to death and injury and for what? We need more safety, not less.

Please vote no on HB 41.

John K. Fitchett — Signature

8481 Ridgeway Ave Anchorage, AK 99504 — Address

John K. Fitchett — Print Name

_____ House District

_____ Senate District

MAR 1 1 RECD

Dear Senator Taylor

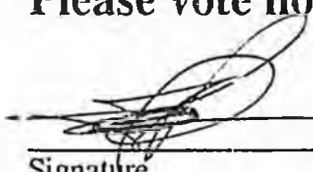
I am against HB 41. It is special-interest legislation and does not protect skiers. It is extremely bi ad.

If this bill passes, the safety of hundreds of people are at stake. For example, Alyeska Resort experienced a large avalanche February 14, 1993, in a large open area where hundreds of skiers ski. The avalanche covered two large pieces of equipment. Ski patrollers began to probe with their ski poles, which indicated they weren't even sure if anyone was buried. If this bill passes, Alyeska would not have been responsible for any deaths or injuries.

Perhaps a citizens' advisory committee should help work on this bill. Lobbyists for Seibu and the ski industry in Juneau spent thousands of dollars to let you know why you should pass this bill. But you never hear from the average Alaskan citizens because they don't have the time or money to come to Juneau to lobby against the bill. In fact, many people don't even know this bill is before you.

This bill is a step backwards from safety exposing hundreds and hundreds of people to death and injury and for what? We need more safety, not less.

Please vote no on HB 41.



Signature

3010 Brookview ST.
Address

Larry D. Pedersen
Print Name

House District

Senate District

MAR 1 : RECD

Dear Senator Taylor:

I am against SB 44. It is special-interest legislation and does not protect skiers. It is extremely broad.

If this bill passes, the safety of hundreds of people are at stake. For example, Alyeska Resort experienced a large avalanche February 14, 1993, in a large open area where hundreds of skiers ski. The avalanche covered two large pieces of equipment. Ski patrollers began to probe with their ski poles, which indicated they weren't even sure if anyone was buried. If this bill passes, Alyeska would not have been responsible for any deaths or injuries.

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This bill is a step backwards from safety exposing hundreds and hundreds of people to death and injury and for what? We need more safety, not less.

Please vote no on SB 44.

Rose M. Doyle
Signature

84-81 Ridgewood Loc.
Address

Rose M. Doyle
Print Name

House District

Senate District

MAR 1 : RECD

Dear Senator Taylor

I am against SB 44. It is special-interest legislation and does not protect skiers. It is extremely broad.

This ski bill does nothing to protect Alaskan skiers. In fact, it is so broad, it gives the ski area operators complete immunity from any injuries or deaths on their slopes.

As the bill now reads, if skiers were injured or died in the avalanche that occurred at Alyeska February 14, Seibu would not be responsible because this bill states an inherent risk includes "changing snow conditions as they exist or may change."

We already have an inherent risk of skiing law that is fair to both operators and skiers. The State Supreme Court said so. This is not a step forward toward safety but a step backward. Who says the ski area operators will act responsibly?

Please vote no on SB44.

Bernetta A. Austin — Signature

3010 Brookview St. Anch. AK 995-04 — Address

Bernetta A. AUSTIN — Print Name

_____ House District

_____ Senate District

MAR 1 : RECD

Dear ~~Representative Porter~~ Senator Taylor

SB54

I am against ~~HB41~~. It is special-interest legislation and does not protect skiers. It is extremely broad.

Ski areas are supposed to identify and mitigate hazards. This bill will allow ski areas to be immune from these responsibilities.

Alaska already has a inherent risk ski bill with good protection now.

This bill needs to be killed or changed considerably to protect Alaskan skiers. Ski areas are not monitored by any board, commission, department, insurance company or citizens' group. For example, who investigated Bart Rizer's death? No one. When the Snow Safety Ranger for the U.S. Forest Service was asked if he investigated the Rizer boy's death, he said no one asked him to. Who is going to oversee this industry? Why does this industry get a special exemption?

Perhaps a citizens' advisory committee should help work on this bill. Lobbyists for Seibu and the ski industry in Juneau spent thousands of dollars to let you know why you should pass this bill. But you never hear from the average Alaskan citizens because they don't have the time or money to come to Juneau to lobby against the bill. In fact, many people don't even know this bill is before you.

Please vote no on HB41.

David T. Brown — 2901 Brookview St. Anch., AK 9950.

Signature — Address

David T. Brown

Print Name — House District — Senate District

MAR 1 : RECD

Dear Senator Taylor:

I am against SB 44. It is special-interest legislation and does not protect skiers. It is extremely broad.

If this bill passes, the safety of hundreds of people are at stake. For example, Aleyska Resort experienced a large avalanche February 14, 1993, in a large open area where hundreds of skiers ski. The avalanche covered two large pieces of equipment. Ski patrollers began to probe with their ski poles, which indicated they weren't even sure if anyone was buried. If this bill passes, Alyeska would not have been responsible for any deaths or injuries.

Perhaps a citizens' advisory committee should help work on this bill. Lobbyists for Seibu and the ski industry in Juneau spent thousands of dollars to let you know why you should pass this bill. But you never hear from the average Alaskan citizens because they don't have the time or money to come to Juneau to lobby against the bill. In fact, many people don't even know this bill is before you.

This bill is a step backwards from safety exposing hundreds and hundreds of people to death and injury and for what? We need more safety, not less.

Please vote no on SB 44.

B Kalecin [illegible] 3011 Brookview Dr

Signature Address

B Kalecin Nuriddin

Print Name House District Senate District

MAR 1 5 RECD

Dear Senator Taylor:

I am against SB 44. It is special-interest legislation and does not protect skiers. It is extremely broad.

Ski areas are supposed to identify and mitigate hazards. This bill will allow ski areas to be immune from these responsibilities.

This bill needs to be killed or changed considerably to protect Alaskan skiers. Ski areas are not monitored by any agency, board, commission, department, insurance company, or citizen's group. Who investigated Bart Rizer's death? No one. When the Snow Safety Ranger for the U.S. Forest Service was asked if he investigated the Rizer boy's death, he said no one asked him to. Who is going to oversee this industry? Why does this industry get a special exemption?

Perhaps a citizens' advisory committee should help work on this bill. Lobbyists for Seibu and the ski industry in Juneau spent thousands of dollars to let you know why you should pass this bill. But you never hear from the average Alaskan citizens because they don't have the time or money to come to Juneau to lobby against the bill. In fact, many people don't even know this bill is before you.

Please vote no on this bill or change it so it will reflect the safety Alaskan skiers deserve.

Harriet A. Hall — Signature

8700 Geirinhas Place Anchorage AK 99507 — Address

Harriet A. Hall — Print Name

18 — House District

I — Senate District

MAR 8 RECD

Dear Senator

I am against SB 44. It is special-interest legislation and does not protect skiers. It is extremely broad.

If this bill passes, the safety of hundreds of people are at stake. For example, Aleyska Resort experienced a large avalanche February 14, 1993, in a large open area where hundreds of skiers ski. The avalanche covered two large pieces of equipment. Ski patrollers began to probe with their ski poles, which indicated they weren't even sure if anyone was buried. If this bill passes, Alyeska would not have been responsible for any deaths or injuries.

Perhaps a citizens' advisory committee should help work on this bill. Lobbyists for Seibu and the ski industry in Juneau spent thousands of dollars to let you know why you should pass this bill. But you never hear from the average Alaskan citizens because they don't have the time or money to come to Juneau to lobby against the bill. In fact, many people don't even know this bill is before you.

And finally, and perhaps most importantly, **Alaska already has an inherent risk of skiing law that treats both the skier and the ski area operator fairly**. The Supreme Court's opinion is that the present statute codifies the common law that ski areas are not liable for injuries by the inherent risk of skiing. The ski industry is now saying everything imaginable is an inherent risk of skiing.

This bill is a step backwards from safety exposing hundreds and hundreds of people to death and injury and for what? **We need more safety, not less.**

Please vote no on SB 44.

Signature	Address	
Ing Hiekel	18	I
Print Name	House District	Senate District

MAR 8 [illegible]

March 4, 1993

Senator Robin Taylor
SENATE
State Capitol
Room 30
Juneau, AK 99801-1182

Dear Senator Taylor:

I am only an occasional downhill skier, however I support legislation that protects ski areas and ski operators from costly litigation due to accidents associated with skiing. Skiing is a recreational sport, and there is a certain amount of risk associated with this type of sport. It's time for the individual to assume responsibility for his choice of sports and the risks associated with it. I would like to see your support for this legislation.

Please support Senate Bill 44.

Thank you very much for your time.

Sincerely,

Valerie Hennigan
PO Box 716
Girdwood, AK 99587

In December of 1991 the Alaska Supreme Court interpreted the statute as not preventing suits by injured skiers. Claiming an operator had failed to make the slopes "safe" for patrons. This ruling defeats the purpose of the statute and leaves operators and skiers in substantial danger that Alaska ski areas will not be able to obtain insurance at reasonable rates. Assuming that a ski area can still operate, ticket prices will have to increase substantially in order to cover the increased insurance premiums.

As a result of that Supreme Court decision the City of Valdez can no longer offer it's residents the recreation of downhill skiing. If this legislation does not pass perhaps other ski areas around the state will fall under the load of escalating premiums and frivolous law suits.

There is a segment of the community that believes that this legislation is proceeding only to protect a multinational corporation (Seibu) from liability. Most of the ski areas within the state are very small and most are products of the communities that they are located in. This legislation will affect all of them not just one of them and in most cases if insurance premiums rise as a result of poor legislative protection it will become cost prohibitive to operate. The ski areas are not trying to hide from their responsibilities to provide safety for the skiing public because we recognize that if we fail to do that soon we will be out of business.

Alaska has a lot to be proud of. Last year an Alaskan skier by the name of Hilary Lindh came home from the Olympics with a Silver Medal. I we fail to support this legislation where will the Hilary Lindh's of the future get a chance to practice and excel in this sport?

I urge you to please support this legislation!!

Sincerely,

Steven P. Remme
ASAA President

MAR 1 0 RECD

Alaska Ski Areas Association
7015 ABBOTT ROAD
ANCHORAGE, ALASKA 99516
(907) 346-1446

Alaska State Senate
Capitol Room 30
Juneau, Alaska 99801-1182
Attention: Senator Robin Taylor

3-1-93

Dear Senator Taylor :

I am writing in support of SB 44. I am the President of the Alaska Ski Areas Association and also the General Manager of Hilltop Ski Area here in Anchorage.

There are 13 downhill ski areas in Alaska: Cleary Summit, Ski Land, Ravenwood and Birch Hill all near Fairbanks. Black Rapids near Delta Junction. Hilltop, Hillberg, Arctic Valley and Alpenglow in Anchorage. Alyeska Resort in Girdwood. The Coast Guard Hill in Kodiak. Mt. Eyak in Cordova, and Eaglecrest near Juneau. In addition there are numerous organizations that prepare and operate Nordic trails: Chena Hot Springs Resort, Hatchers Pass Lodge and Anchorage Nordic Ski Club just to name a few.

There are many inherent risks in any sport. Skiing is no exception. Ski area operators sell access to a winter alpine or nordic environment not to a perfectly groomed danger free slope. This environment includes all manner of risks: weather, slopes, forest growth, snow conditions as well as some man made obstacles. All skiers should recognize that ski area operators and track setters can not modify even a small portion of this environment. There is no way to make skiing absolutely "safe". Individual skiers must bear some of the responsibility for their participation in the sport.

Since 1980 Alaska has had a statute relieving ski area operators of liability for injuries or property damage which arise from the inherent risks of skiing. The purpose of this statute was to recognize that a ski area operator could not eliminate these risks, and to ensure that a ski areas could obtain insurance and continue to provide skiers the opportunity to enjoy their favorite winter outdoor recreation. An effective law will continue to be important in providing the legal climate necessary to further development of winter tourism facilities in Alaska.

Paul D. Brooks
P.O. Box 111252
Anchorage, AK 99511

MAR 1 1 RECD March 8, 1993

Robin Taylor, Chairman
Senate Judiciary Committee
Alaska State Legislature

Dear Senator Taylor and Committee Members:

I am writing to express my support for Senate Bill No. 44, and encourage your enactment of this legislation. I have been an avid skier most of my life and have lived in Alaska since 1980. My wife, son, and I are members of the National Ski Patrol, and our daughter and two grandchildren are skiers, the latter being members of the Ski Jumping Team. I am on the volunteer Ski Patrol at Alyeska Ski Resort and my Wife and Son are Ski Patrollers at the Hilltop Ski Area. My Wife is the Patrol Director of the Hilltop Ski Area, and I am the Alaska Division Winter Emergency Care Supervisor for The National Ski Patrol.

Ski safety has always been a major emphasis for my wife and I, especially in raising our children and grandchildren. Skiing, like any other physical activity, has inherent risks, but these risks can be minimized with education and training. People must be accountable for their own actions and the choices they make. I believe this Bill goes a long way in clarifying the responsibilities of ski area operators and the skiing public participating in this sport.

Thank you for your interest and I encourage you to support this legislation when it comes up for a vote by the Senate.

Sincerely,

Paul D. Brooks

Paul D. Brooks

March 5, 1993

Robin Taylor, Chairman
Senate Judiciary Committee
Alaska State Legislature

Dear Chairman Taylor and Committee Members:

It is imperative that the legislature enact statutes which give recognition to the fact that people do have responsibility for their own actions and choices. The bill before you today - SB 44 - is one such measure. I encourage your speedy and favorable advancement of this type of legislation in general and this bill specifically. I also respectfully request your enthusiastic support and defense of this legislation when it reaches a vote of the body.

Sincerely:

Joe Wehrman

Joseph F. Wehrman III
3527 Vassar Dr.
Anchorage, Ak 99508