Expanding into Winter Creek really scares me. Winter Creek is prone to avalanches and deposits of deep snow. First we must improve safety as it exists, especially with Seibu's new hotel which will encourage skiers from other countries to visit Alyeska. Many of these skiers may not be able to speak English well or at all and often cannot ski well. Because Alyeska is considered a steep and difficult mountain, we need all the safety we can get, not less.

10. *Transform Alyeska into a world class ski resort which will attract winter travelers to our state from all over the world. Encourage other ski resort operators who are not now in Alaska to expand in Alaska.*

    This statement is farfetched. Alaska isn't nearly as sophisticated as compared with Colorado's and Utah's skiing industries. Colorado has over 10 million ski visits a year. The Alaska Division of Tourism estimates that more than 43,000 tourists visited Alyeska Resort from October 1991 to May 1992.

    After talking with the head of the Tramway Board in Colorado, we've learned that much controversy exists in Colorado about similar legislation that was rammed through the legislature in that state by the powerful ski industry.

And now to the enclosures:

- Ski Season deadliest in years. *Rocky Mountain News,* page 10, Tuesday, April 2, 1991, by Kris Newcomer. The 1990-91 ski season was the most deadly in Colorado since at least 1986, according to Colorado Ski Country USA, an industry trade group. They have been "unable to pinpoint any reasons."

  Think about this—since Colorado increased ski area immunity in its 1990 bill, they have experienced more deaths since at least 1986.

- Ski area insurance dropping despite industry's claims. *Colorado Springs Gazette Telegraph,* May 7, 1991. Insurance premiums for ski resorts decreased 10 percent in the 1989-90 season and 6.5 percent the year before according to the 1989-90 Economic Analysis of North American Ski Areas by the University of Colorado at Boulder Business Research Division.

- Aspen, Dear Valley at top of price mountain. Of the 23 ski areas listed, 19 of the resorts increased their prices this year. The other 4 resorts' ticket prices stayed the same. No resort dropped its rates.

My cause is safety, especially for children. Just because people are in a position of responsibility does not mean they will act responsibly.

Alyeska is a dangerous mountain. John Heiser, Director of Mountain Operations, and Mike Grandinetti, Risk Manager, said so. If that is the attitude of the Alaska ski industry, then why don't their advertisements reflect this "danger"? Why do they promote and advertise to send down bus loads of unsupervised young children who are allowed to ski freely anywhere on the mountain?

Why doesn't Seibu advertise or warn or instruct in these matters or this condition for safety? Bruce and I had a 2-hour ski lesson the day before Bart died. Our Seibu instructor said, "You must be aggressive and point your skis downhill and go for it. Growl before you take off. You can't hurt yourself in snow like this. Attack the mountain. You have no friends on a powder day."

Why doesn't Alyeska Resort keep accurate records? Their contradictory, inaccurate, and missing recording keeping was exposed during the discovery process of Bart's death.

The Anchorage School District's Risk Manager and the head of the Anchorage School District PTAs would not support Alyeska's ski program this year because Alyeska wanted them to sign liability waivers that made Seibu responsible for nothing.

Anchorage Community Schools in turn would not support Alyeska's programs this year. Community School coordinators felt the program lacked supervision, procedures, and accountability.

We have checked with other children's recreational groups including YMCA, Camp Fire, Boy Scouts. These groups have written procedures for missing persons. Not Seibu. We discovered that Seibu disregarded or threw away safety plans that included written missing persons' procedures. Their attitude is that it's too much trouble and too

expensive to look for missing people. In a harsh winter environment like Alaska, time is of the essence when someone is missing!

Seibu doesn't even have a map or a photograph of the ski area in the patrol/aid room where anyone would go to report a missing person.

Who will monitor Alyeska and other Alaskan ski resorts? The ski industry has no monitoring agency, commission, board, or committee to hold them accountable. Juneau's Eagle Crest had not even been visited by its insurance company as of January 19 for this year's ski season according to Mr. Swanson at Eagle Crest. Furthermore, no state agency has the expertise or money to monitor ski areas.

When supporting businesses, also think of safety, especially of children's safety. This bill assumes all skiers are experts. There is no consideration in this bill for young children or even adult beginners.

What is the hurry to pass a bill when we already have a law?

Who is supporting this bill? John Heiser says Alaska Visitors Association, Alaska Convention Bureau, Alaska Economic Development Corporation, Alaska motels, hotels, other ski areas.

Think about this. Where is the consumer in this picture? The average citizen doesn't even know about this bill and its ramifications. Why not ask someone who isn't involved with tourism and business about this bill?

Let's get to the reality of this bill. Let's look at this bill in the eyes of safety for Alaskan skiers, not just in the eyes of business and the ski industry.

Please reconsider your stand on this bill. Is it possible to teleconference this hearing?

Respectfully,

Patti Rizer

Enclosures

8-LS0317\E.2
Ford
3/1/93

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE PHILLIPS

TO: CSHB 41(L&C)

Page 5, line 9, after "Inc.":

Insert "This subsection does not apply to a ski area if the operator transports skiers using only a single tramway consisting of a rope tow, the rope tow does not transport skiers more than 500 vertical feet, and the ski area is operated by a nonprofit corporation or a municipality. In this subsection, "nonprofit corporation" means a corporation that qualifies for exemption from taxation under 26 U.S.C. 501(c)(3) or (4) (Internal Revenue Code)."

A M E N D M E N T

OFFERED IN THE HOUSE BY DAVIDSON

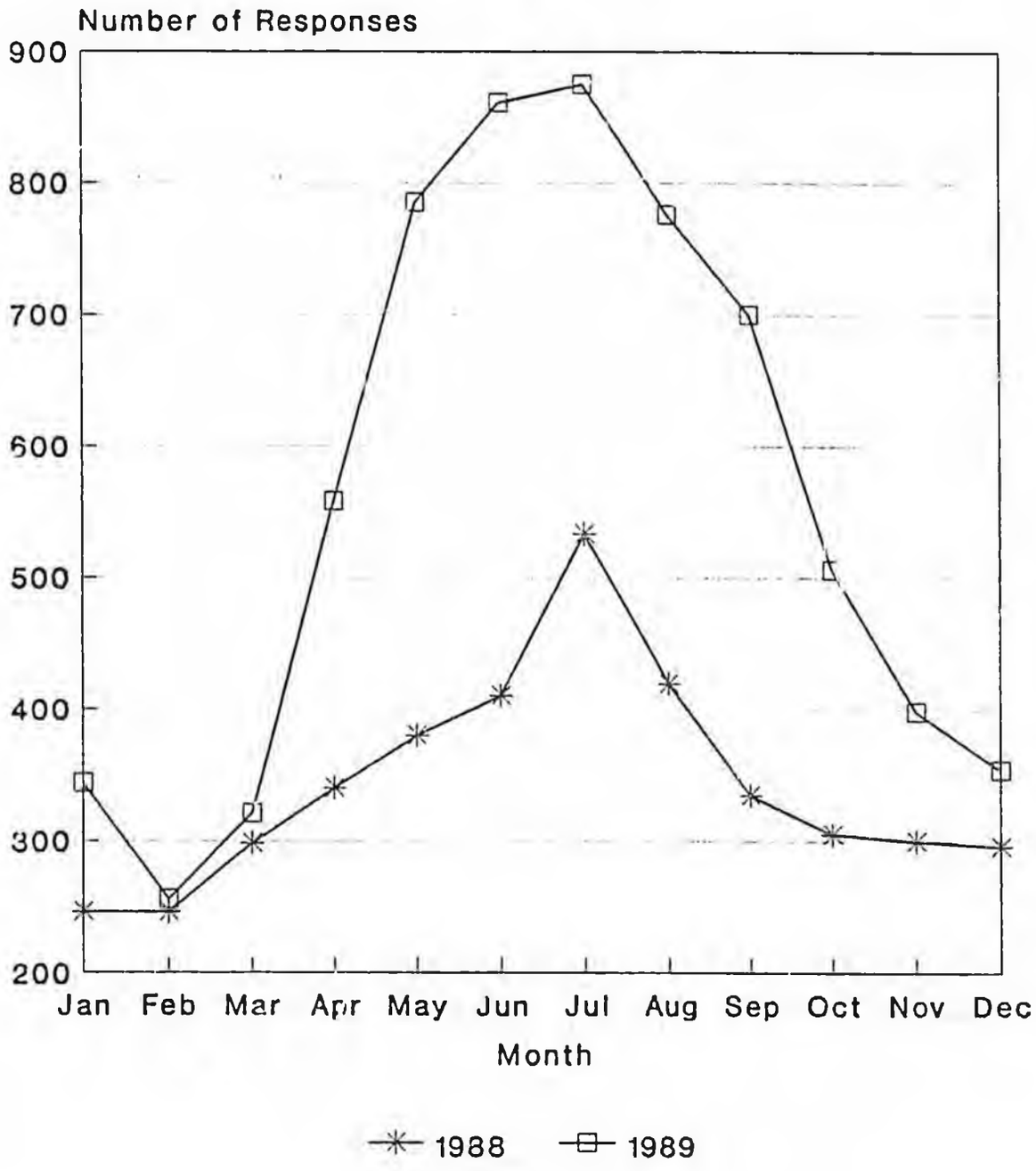
TO: CSHB 41(JUD)

Page 5, Line 1,

After, "<u>implement</u>"

Insert, "<u>and follow</u>"

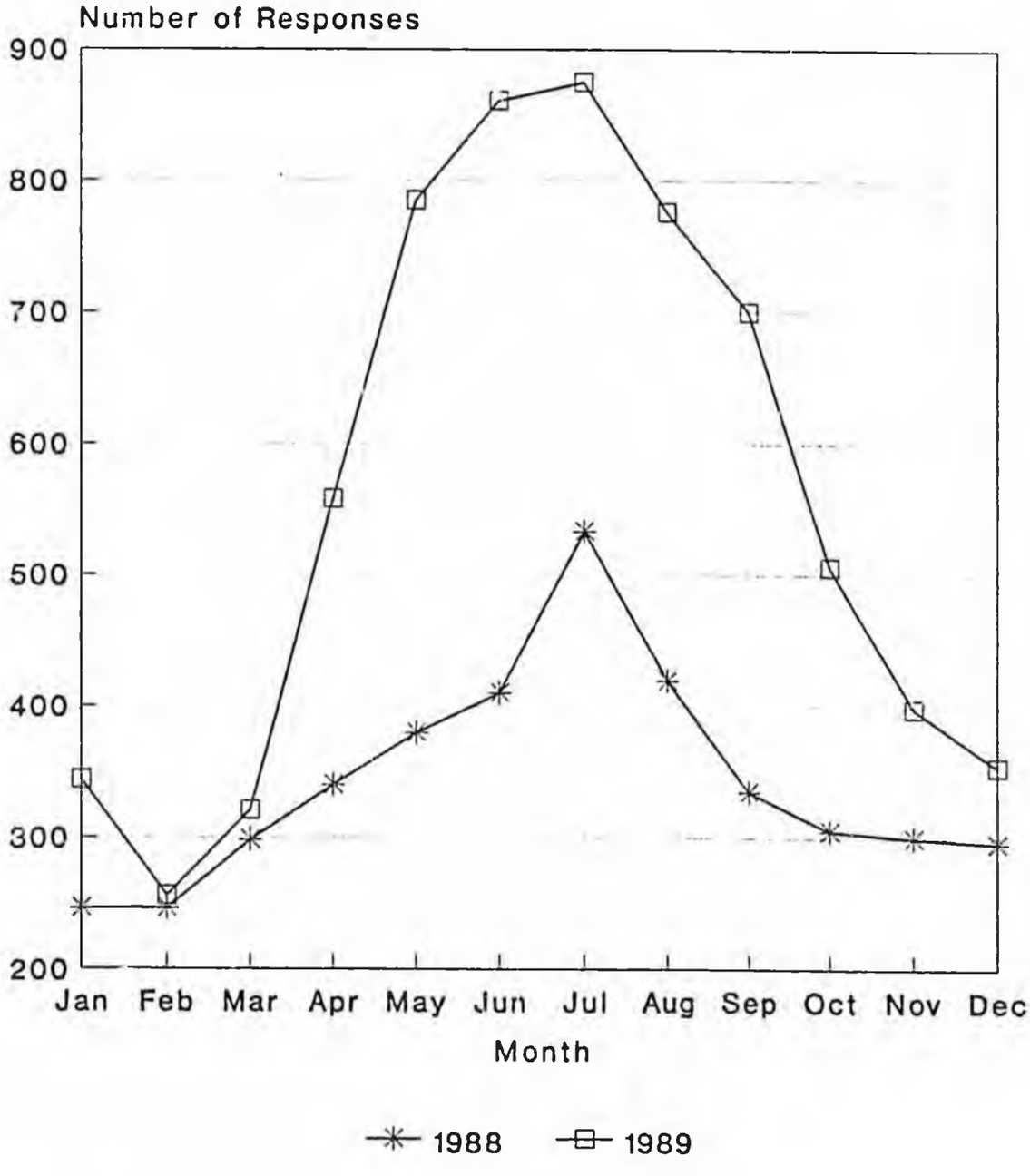
Figure 2.14
Total Police Office Responses
City of Valdez
1988 and 1989



CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

Figure 2.14
Total Police Office Responses
City of Valdez
1988 and 1989



2

A M E N D M E N T

OFFERED IN THE HOUSE BY DAVIDSON

TO: CSHB 41(RES)

Page 9, Line 19,

After, "abilities."

Add, "The term "inherent danger and risk of skiing" does not include the negligence of a ski area under AS 05.45.020(b), or acts or omissions of a ski area operator involving the use or operation of ski lifts."

Table 2.7
Valdez Police Department Crime and Officer Statistics, 1976, 1988, and 1989 Compared

Activity	1976	1988	1989	1988-89 % Increase
Assaults	96	34	58	70.6%
Accidents	469	112	298	166.1%
Bar disturbances	205	56	130	132.1%
Disturbances	54	149	359	140.9%
Driving while intoxicated	NA	76	153	101.3%
Person-days in jail	520	1,845	2,660	44.2%
Traffic tickets	1,079	200	456	128.0%
Arrests	346	301	673	123.6%
Officer responses	4,762	4,111	6,734	63.8%

Source: Valdez City Manger's Office; Valdez Department of Emergency Services

Table 2.8
Whittier Police Department Crime Statistics 1988 and 1989 Compared

Activity	1988	1989	1988-89 % Increase
Total calls for service	337	1,357	302.7%
Total arrests	39	90	130.8%
Total cases reported	79	168	112.7%
Detoxification holds	n/a	54	n/a
Incidents (noncriminal)	157	215	36.9%
Alcohol-related calls	10	70	600.0%
Domestic violence calls	3	12	300.0%

Source: Whittier Police Department

3

A M E N D M E N T

OFFERED IN THE HOUSE BY DAVIDSON

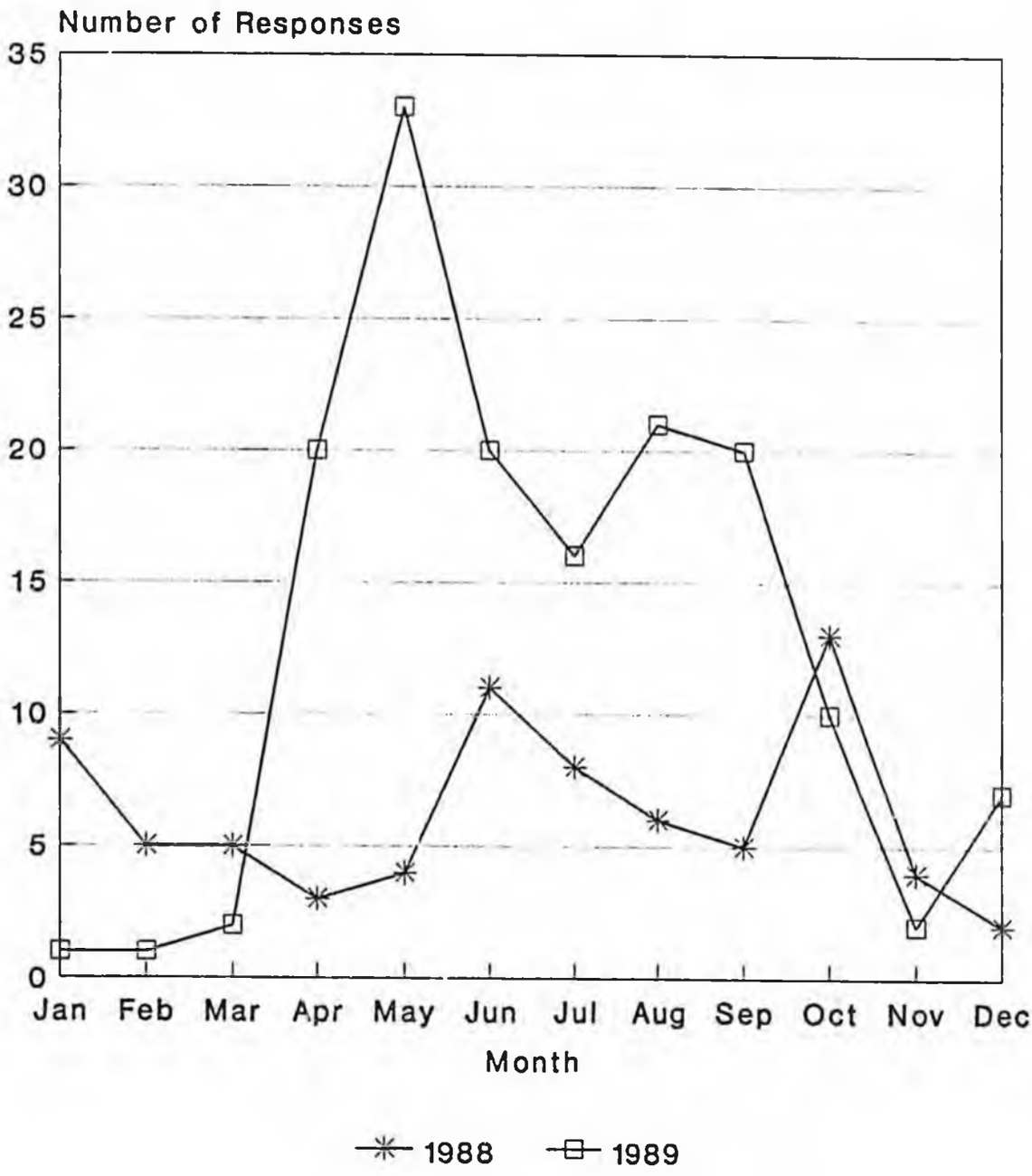
TO: CSHB 41(JUD)

Page 5, Line 19,

Add new provisions:

"(d) If the operator or its predecessor had a plan in effect on January 1, 1993, that plan shall operate for that ski area as a minimum standard for skier safety."

Figure 2.15
Police Officer DWI Responses
City of Valdez
1988 and 1989



4

A M E N D M E N T

OFFERED IN THE HOUSE BY DAVIDSON

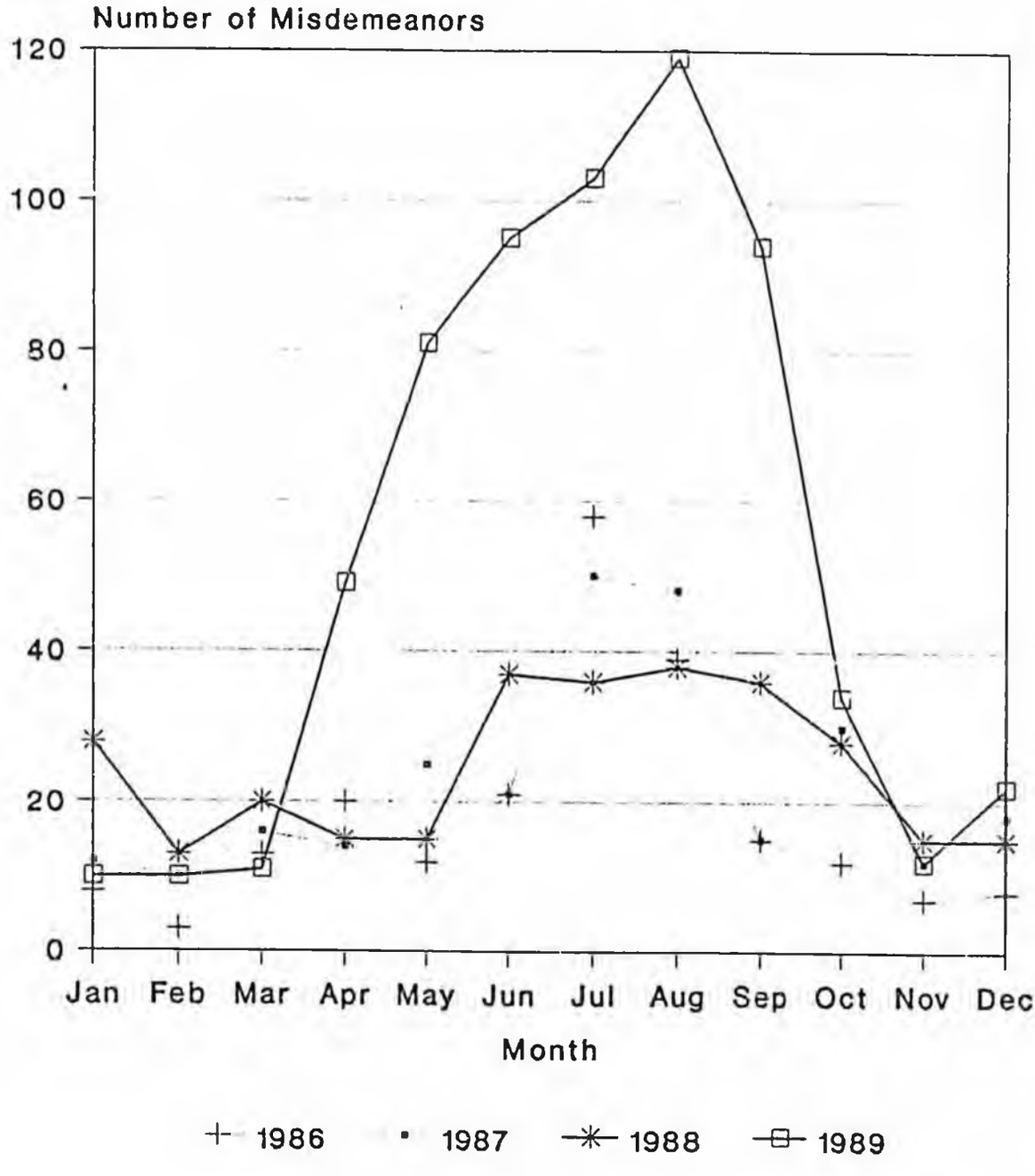
TO: CSHB 41(JUD)

Page 8, Line 30,

After, "<u>are located on a</u>"

Delete, "<u>groomed</u>"

Figure 2.16
Number of Misdemeanors
Valdez Superior Court
1986-1989



AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE NORDLUND
TO: CSHB 41(JUD)

Page 5, line 7, after "agency." add "The ~~Department~~ Commissioner of Natural Res shall adopt regulations to implement this section."

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 10, 1993 FURTHER REFERRALS: Finance

Date of Committee Action: 3-29-93

The JUDICIARY Committee considered: HB 41

HOUSE BILL NO. 41 CIVIL LIABILITY FOR SKIING ACCIDENTS

"An Act relating to civil liability for skiing accidents, operation of ski areas, and duties of ski area operators and skiers; and providing for an effective date."

RECOMMENDATIONS:
be replaced with CSHB41 (JUD) [X] the same title [ ] a new title

[ ] have attached amendments(s)

[X] do pass

[ ] do not pass

[ ] no recommendations

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[ ] zero fiscal note _____ 5 [X] zero fiscal note(s) DNR, Court, DCED, Labor, Law 2/10/93

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Brian D. Porter	✓	Jim Dandlekar		✓	
Gail Phillips	✓	Cliff Davidson	↘		
Pete Kott	✓				
Jeannette James	✓				

Brian D. Porter
CHAIRMAN'S SIGNATURE

Rep. Brian Porter, Chairman

House Judiciary Committee

Date: March 29, 1993

Place: Capitol Room 120

HB 61 Lower Alcohol Limit to .08 for DWIs'

Subject of Meeting: HB 41 Civil Liability for Ski Accidents; HB 147 Employer's Liability for Reference Info; HJR 3 Limiting Terms of Legislators

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
Margot Knuth	Law-Crim	Box 110300		3428		(Y) N	HB 61
Juanita Hensley	DPS/DMV	Box 20020	99802	~~4335~~	4335	(Y) N	HB 61
[redacted]	[redacted]					Y N	
Gretchen Pence	DPS	Box 300100	99811	4322		Y (N)	HB 41
Kenni Gorsuch	Miller	Box 240504, Douglas	99824		3-3531	(Y) (N)	HB 61 LISTEN ONLY
Gary Mendivil	Eaglecrest Ski Area	155 S. Seward St.	99801	586-5284 →		Y (N)	HB 41
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	

1/31/92

Texas, was killed when he hit a tree on the slopes at Steamboat.
Broussard's death was the second ski-related death at Steamboat in 11 days.

INFOBOX
SKIING DEATHS

Year	Skier deaths	Skier days
'86-87	7	9.4 million
'87-88	7	9.5 million
'88-89	6	9.9 million
'89-90	3	9.7 million
'90-91	9	10 million+

SOURCE: Colorado Ski Country USA
LIB3 LIB3
KEYWORDS: SKI INDUSTRY COLORADO ACCIDENT DEATH

COLORADO SPRINGS GAZETTE
TELEGRAPH
Colorado Springs, CO
(El Paso County)
AM, 104,645; Su, 116,325
MAY - 7 1991

STATE

Ski area insurance dropping despite industry's claims

Lawyers opposing liability cap say the Legislature was snowed

By Dave Curtin/Gazette Telegraph

Ski area insurance costs are declining, contrary to what members of the industry claimed in pushing through a state law that limits their liability in ski accidents.

And even though ski operators historically have cited soaring insurance costs as a cause for lift ticket inflation, don't expect prices to tumble, industry observers say.

> "The insurance industry created an unrealistic pressure on the ski areas . . ."
>
> **Colorado Trial Lawyers Association President Joe Epstein**

Insurance premiums for ski resorts decreased 10 percent in the 1989-90 season and 6.5 percent the year before, according to "The 1989-90 Economic Analysis of North American Ski Areas" by the University of Colorado at Boulder Business Research Division.

Ski industry lobbyists had cited skyrocketing insurance in getting a law passed last year that caps resort liability for a skier's injuries at $1 million. The law, which took effect this past season, doesn't limit a skier's ability to sue for injuries involving ski lifts.

"The Legislature was misled," said Joe Epstein, president of the Colorado Trial Lawyers Association, which opposed the law. "They were stampeded by the insurance industry and ski operators. This tells me it was a phony deal to begin with."

It wasn't phony, ski lobbyists say. Insurance premiums more than doubled from 1984 to 1988, while some deductibles went from $100,000 to $1 million, according to Colorado Ski Country USA, a trade group and a supporter of the new law.

The increases sent the ski industry and others such as day-care centers and dude ranches to the Legislature for relief, said Ski Country spokeswoman Kathleen Shaw.

But Epstein said the increases weren't justified by the insurance industry.

"If we had a tougher review by the (state) insurance commission, it would expose this," he said. "The insurance industry created an unrealistic pressure on the ski areas. This limited liability law is the result, and the consumer gets screwed."

Once the law was passed, insurance rates dropped quickly, said Charles Goeldner, a marketing professor

See SKIING/B8

Skiing/

From B1

who headed the CU study.

"When the liability is unlimited, the only thing insurance companies can do to protect themselves is raise the rates," Goeldner said. "If the legislature hadn't taken that action, we wouldn't see the declines we have."

But Epstein said it will take two years before the impact of the new law is felt because pending lawsuits fall under the old, unlimited liability law.

"If these insurance reductions are taking place under the old law," he asked, "what's the need to change it?"

Indeed, insurance rates were reduced partly because of safety promotions and physical improvements such as redesigning trails that merge to make the slopes safer for skiers, said Dick Williams, vice president of Pettit-Morry Co. in Denver, an insurance brokerage representing 120 ski areas nationwide, including most Colorado ski resorts.

"But there is no question that the enactment of the skier liability law has helped sort out the picture," Williams said. "The lines of liability are drawn."

Since ski areas have blamed higher lift ticket prices on insurance, "there should be a flip side to that," said Jim Lee, a lobbyist for the Colorado Trial Lawyers Association.

"If insurance premiums went down, I hope we can look forward to a reduction in lift ticket prices," Lee said.

But Goeldner said labor costs and resort improvements — not insurance rates — have caused lift ticket inflation.

"In Colorado, there has been $500 million of new facilities in the last decade," Goeldner said. "Consumers just love the quad chairlifts, the improved trails, snowmaking and snow grooming. When

THE
FOLLOWING
DOCUMENTS
ARE
POOR
ORIGINAL
COPIES

Aspen, Deer Valley at top of price mountain

Lift tickets for 1992-93 will cost as much as $46 during peak holiday time

By John Meyer

Rocky Mountain News Staff Writer

Aspen and Utah's Deer Valley appear to be the price leaders in the ski industry again this winter.

But if you're wondering which has the most expensive ticket, it depends on how you look at it.

Aspen Skiing Co.'s regular-season ticket window price will be $43, an increase of $2 over last year. Deer Valley will charge $42, as will Vail.

But Deer Valley will charge $46 during the busy December holiday period. During Aspen's holiday period, Dec. 19 to Jan. 2, the rate will be $45.

Aspen will sell discounted tickets at Front Range King Soopers stores again this winter. There, tickets for Aspen Mountain and Snowmass will cost $38. A Buttermilk-only ticket will be available for $26.

Ticket window prices attract a lot of attention when they are announced, but Front Range skiers seldom pay the full ticket window price.

"You can count on one hand the number of people from Denver who are going to buy a $43 or a $45 lift ticket in Aspen," said John Lay, president of Colorado Ski Country USA.

COLORADO LIFT TICKET PRICES

SKI AREA	1991-92	1992-93	1992-93 (off-site discount)
Arapahoe Basin	$33	$39	$24
Arrowhead	$23	$28	$23
Aspen Highlands	$30	$30	$25
Aspen Mountain	$41	$43	$38
Beaver Creek	$40	$42	$40
Breckenridge	$36	$38	$28 or $20
Buttermilk	$41	$43	$26
Copper Mountain	$35	$37	$30
Crested Butte	$36	$39	$28
Eldora	$25	$27	$23
Keystone	$37	$38	$30
Loveland	$28	$30	$24
Monarch	$25	$26	$24
Powderhorn	$25	$25	N/A
Purgatory	$34	$35	$34
Silver Creek	$24	$26	$21
Ski Cooper	$18	$22	$20
Ski Sunlight	$28	$28	$25
Snowmass	$43	$43	$38
Steamboat	$37	$39	N/A
Telluride	$36	$39	N/A
Vail	$40	$42	$40
Winter Park	$34	$36	$30

Discount tickets are available at various locations, including many supermarkets, Gart Bros., Vickers Bros. Ski Rentals and Christy Sports.

(*) The holiday price (Dec. 19-Jan. 2) for Aspen Skiing Co. mountains will be $45.

The largest increase in the state this year is Arrowhead at $5. Ski Cooper increased its price $4, while Telluride and Crested Butte each went up $3.

Most lift ticket prices have been known for more than a month, but Aspen announced its prices only this week. Breckenridge, which was considering $38 or $39 for its full-fare price, has settled on $38.

The off-site discount price for Breckenridge has not been decided, but it should be $28 or $2 Breckenridge's Summit Count neighbors, Keystone and Copp Mountain, will charge $30 Front Range outlets, as will Wi ter Park.

Colorado ski areas set a reco last year with 10.4 million ski visits. But J. William Berry, pu lisher of the *Ski Industry Newsle ter,* says it's too early to predi what kind of season is in store f Colorado areas.

"I think you've got a hell of problem — air fares," Berry sai "Nobody knows what's going t happen there. With air fares bein rather high, things could get little tight."

But Lay said key indicators ar up. More people are booking vaca tions and buying skis or ski-relate goods.

"Our numbers as of right no are ahead of last year at thi time," Lay said. "The sale of soft goods and hard goods is dramatically more robust than it was a year ago."

Harry Baxter of the Jackson Hole area in Wyoming said people appear to be waiting to see how much snow that area gets before booking. Uncertainty over air fares is inhibiting advance sales, he said.

But Lay says Colorado Ski Country is "very bullish" on the coming season.

"The national economy is bottoming out," Lay said. "We're encouraged by what appears to be a stronger economy on both coasts vs. last year."

10-21-92

1/31/92

RANK 9 OF 180, PAGE 1 OF 4, DB RM1, DOCUMENT 93077

[redacted] Co.

DATE: TUESDAY APRIL 2, 1991
PAGE: 10 EDITION: FINAL
SECTION: LOCAL LENGTH: MEDIUM
SOURCE: BY KRIS NEWCOMER
ROCKY MOUNTAIN NEWS STAFF WRITER
MEMO: SEE END OF TEXT FOR INFOBOX

2 DEATHS ON WEEKEND MAKE TOLL ON SLOPES [redacted] POINT

Two deaths over the weekend - including a peculiar accident at Keystone - turned [redacted] 1990-91 ski season into the most deadly in Colorado since [redacted], industry officials said yesterday.

Nine skiers have died on the slopes since resorts opened late last fall, according to Colorado Ski Country USA, an industry trade group based in Denver.

Last year, three skiers died, said Ski Country spokeswoman Cathy Kruzic. The annual average since the 1986-87 season is seven deaths per season, she said.

RANK 9 OF 180, PAGE 2 OF 4, DB RM1, DOCUMENT 93077

Officials have been unable to pinpoint any reasons for more deaths this year than in past years. Five of the nine skiers killed this year hit trees, one suffocated in powder, two collided with other skiers and one was killed in a fall.

Colorado resorts have been busier this year than in the past, but not so much busier that crowded conditions can be blamed for more deaths, Kruzic said.

The number of ''skier days'' recorded at Colorado resorts has climbed steadily from 9.4 million during the 1986-87 season to 9.7 million last year. This season's total is expected to top 10 million, according to Ski Country.

The Virginia woman who died Sunday was skiing at 6 p.m., taking advantage of Keystone's night program. But Summit County undersheriff Gary Lindstrom said visibility was unrelated to her accident.

In fact, Lindstrom said, officials were at a loss to explain how Susan Kuehnle, 32, of Falls Church, Va., died after colliding with a 13-year-old boy who was uninjured.

Neither Kuehnle nor the teen-ager was skiing out of control - an offense prosecuted with increasing vigor by law-enforcement officials in ski communities, said Lindstrom.

Both were on a nearly flat stretch of a beginner's run when they startled one another on the downhill side of an island of trees. Kuehnle skied around the island; the boy skied along a path through the middle.

RANK 9 OF 180, PAGE 3 OF 4, DB RM1, DOCUMENT 93077

When he emerged from between the trees, the two ''bumped,'' knocking both off balance, Lindstrom said. Both skiiers tumbled. The boy got up and brushed himself off. But the woman suffered a severe head injury.

Lindstrom said a deputy revisited the accident site yesterday with a video camera, looking for possible explanations for Kuehnle's death. Results of an autopsy were expected today.

Kuehnle's accident [redacted]

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

March 8, 1993

Brian Porter, Chairman
House Judiciary Committee
Alaska State Legislature

Dear Representative Porter and Committee Members:

I am writing to express my support for House Bill No. 41, 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 House.

Sincerely,

Paul D. Brooks

Paul D. Brooks

March 4, 1993

Representative Brian Porter
House of Representatives
State Capitol
Room 122
Juneau, AK 99801-1182

Dear Representative Porter:

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 continued support of House Bill 41.

Thank you very much for your time.

Sincerely,

Valerie Hennigan
PO Box 716
Girdwood, AK 99587

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

Alaska House of Representatives
Capitol Room 122
Juneau, Alaska 99801-1182
Attention: Representative Brian Porter

3-9-93

HB 41

Dear Representative Porter:

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.

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
ASSA President

Dear Brian Porter,

This letter is in regard to Senate Bill 44 and the ski industry's effort to immunize itself from liability.

I believe that this would result in insufficient protection for public interest of the skiing public at Alyeska Resort. Seibu Corp. would be allowing itself to escape from the responsibility that comes with operating a business safely for their clientele.

I was formerly employed by Alyeska / Seibu for nine years and am presently involved in litigation against them. If there are to be more hearings on this bill, I would like the opportunity to testify as to why these immunities are wrong. I believe this will result in a failure to care by a large Japanese Corporation in a small Alaskan community.

Sincerely,
Renee Whitten

box 837
Girdwood AK
99587
783-3159

March 5, 1993

Brian Porter, Chairman
House Judiciary Committee
Alaska State Legislature

Dear Representative Porter 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 - HB 41 - is such a measure. I encourage your speedy and favorable advancement of this type of legislation in general and this particular 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

MARCH 5, 1993

REPRESENTATIVE BRIAN PORTER
HOUSE OF REPRESENTATIVES
STATE CAPITOL - RM 122
JUNEAU, ALASKA 99801-1182

DEAR REP. PORTER,

I AM WRITING TO ASK FOR YOUR CONTINUED SUPPORT IN THE LEGISLATION THAT PROTECTS SKI AREAS AND SKI AREA OPERATORS FROM LITIGATION DUE TO ACCIDENTS ASSOCIATED WITH THE INHERENT RISKS OF SKIING. I ASK YOU TO PLEASE SUPPORT HOUSE BILL 41.

SINCERELY,

DAVID WILSON
GIRDWOOD, ALASKA

15140 Mesa Place
Anchorage, AK 99516
March 1, 1993

Brian Porter
Alaska State House of Representatives
State Capitol
Juneau, AK 99801-1182

Dear Representative Porter

I am writing regarding HB41. I believe it is a grave mistake to limit the liability of the ski operators. If there is no threat of civil liability that we can hold over their heads, there is no guarantee they will act responsibly. You, above all others in the House should know that just because people or businesses are put in positions of responsibility doesn't guarantee they'll act that way.

Look what has just happened recently--have you seen the ads on TV by Alyeska Resort regarding the observance of ski trail signs? If Alyeska was so interested in promoting safety why have they waited until now to run such ads? You and I know very well it is because they are now in the middle of lawsuit over the lose of a young skier's life. Don't be fooled, as soon as the lawsuit is settled they will resort to their old ways.

To get an idea of how honest the ski operators have been in the past, you need only ask how closely the Forest Service regulations are being followed by their lease holders. Have the ski operators had their safely and search and rescue plans in place AND OPERABLE? Upon examination you will find poor compliance. Yet this is public land the ski operators are using.

To pass HB41 without making the ski operators liable would be a big mistake for the public and for the skiing tourist, especially since there is already a satisfactory law in place that deals with the inherent risk of skiing. Do not let this special interest bill pass the way it is written.

Sincerely,

Dianne Holmes

Dianne Holmes
345-1514

RICHARD L. HARREN

Attorney at Law
P. O. Box 874692
Wasilla, Alaska 99687

Lakeview Professional Building
Suite 204
851 E. Westpoint Dr.

Richard L. Harren
Telephone (907) 376-2355
Facsimile (907) 376-9099

March 16, 1993

Representative Brian Porter
State Capitol Building
Juneau, AK 99801

Dear Representative Porter:

Thank you for taking the time to meet with me last week regarding the ski operators immunity bill. I appreciate your attention to the view of one who may someday be faced with the practical problems of interpreting this lengthy act.

In my view, this act is simply more government and creates more questions than it answers. The important thing to realize is that ski operators will be liable for their own negligence under either the existing law or the proposed legislation. We do not need the fresh set of questions this new bill will create for attorneys to stew and fight over.

Enclosed for your reference is a summary of my testimony before the House Judiciary Committee last Friday. Please feel free to contact me if you have any questions.

Very truly yours,

Richard L. Harren

Enclosure
jc

C:\WP51\DATA\HB418TAS.201

Summary of House Judiciary Committee Testimony
of Richard Harren regarding H.B. 41

I. Existing law is in the best interest of the state.

a. The ski slopes in Alaska will be safer if the present law is retained. Ski operators have it in their mind that passage of this bill will relax their obligations to the public. With their relaxed obligations, they can be expected to lay-off people who safeguard and attend to conditions and skiers on the slopes. Less attention can be expected on behalf of operators to eliminate hazards on the slopes. Accordingly, with the present law there will be less crippled people and less injured people in Alaska as a result of skiing.

b. Ski operators will enjoy cheaper insurance rates under the present law. Testimony before Labor and Commerce suggested that national ski area operators association maintains statistics on accidents and claims upon which insurance rates are based. If ski operators relax their attention to safety on the slopes, accidents will increase and so will insurance rates.

c. By maintaining a higher standard of expectations of safety from ski operators, Alaskans can expect more Alaskans to be employed at ski slopes.

d. The labor force of ski areas will become more skilled as they are forced to determine which hazards can be eliminated and which ones cannot. Ski areas will continue to improve their standards of operation rather than seeing them deteriorate.

e. There will be less litigation under existing law than with the new law. This benefit can be better appreciated by reviewing the discussion outlined in the amendments that follow.

II. The present revenue required to cover the risk of injury is not excessive.

a. Testimony before Labor and Commerce indicated that Eagle Crest ski area in Juneau pays approximately $50,000 per year for insurance. Their gross receipts for the last accounting year total approximately $780,000. Using those figures, insurance is less than 7 percent of gross revenues. It is helpful to compare this percentage to another "inherently dangerous" activity: driving an automobile.

If a person drove 20,000 in one year at a cost of 30¢ per mile, $6,000 would be the annual cost of operating the automobile. In this day and age, one has to be a pretty good driver with a modest vehicle to have an insurance cost of less than $600 per year. If a family's cost of transportation is less than $6,000 in a year, it is likely that the percentage which goes to

pay for insurance is more than 10 percent. Driving is a necessity in our civilization, and it does result in many disabling injuries.

The cost of insurance to ski area operators is reasonable and not worth the fuss that Alyeska has generated with this proposed legislation. Rather, ski areas appear to be thriving with Alyeska expanding and a new development proceeding briskly in Hatcher Pass.

III. Proposed amendments to H.B. 41.

a. If H.B. 41 must be passed several amendments can improve it. The stated purposes of the Act are to more clearly define areas of responsibility. As written, the proposed legislation will actually have the effect of clouding the responsibilities of skiers and ski areas. One of the Act's purposes, to, "Provide that where an injury is the result only of an inherent risk of skiing, a comparative negligence or comparative fault analysis does not apply," is already the law.

IV. Specific Amendments (additions underlined, deletions [bracketed]).

a. Eliminate Sec. 05.45.010(2). ["If a person is injured as a result of an inherent danger and risk of skiing and negligence by the ski area operator, in determining percentages of fault the trier of fact may not treat the inherent danger and risk of skiing, to the extent it contributed to the injury, as part of the fault attributed to the ski area operator].

b. The first sentence of Sec. 05.45.040(a) should read, "A ski area operator shall prepare a plan of operation for each ski season and shall implement and follow the plan throughout the ski season."

c. Sec. 05.45.040(c) should be added to state, "If the operator or its predecessor had a plan in effect on January 1, 1993, that plan shall operate for that ski area as a minimum standard for skier safety.

d. At. p. 3, Sec. 05.45 060(e)(5) should be amended to read, "Mark exposed forest growth, rocks, stumps, stream beds, trees, or other natural objects that are located on [groomed] slopes or trails and that are not readily visible to skiers under conditions of ordinary visibility from a distance of at least 100 feet."

e. The warning mandated at Sec. 05.45.060(g) should be amended to read,

> WARNING.
> Under Alaska law, the risk of an injury to person or property resulting from any of the inherent dangers and risks of skiing rests

with the skier. A skier may not recover from a ski area operator for an injury resulting from any of the inherent dangers and risks of skiing, including changing weather conditions, existing and changing snow conditions, bare spots, rocks, trees, collisions with natural objects, man-made objects or other skiers, variations in terrain, and the failure of skiers to within their own abilities. The term "inherent danger and risk of skiing" does not include the negligence of a ski area under A.S. 05.45.020(b), or acts or omissions of a ski area operator involving the use or operation of ski lifts.

V. Comments concerning specific amendments.

a. Proposed amendment IV(a), above, is necessary because it is simply not a viable task to separate out a percentage of fault for the inherent danger and risk of skiing. This provision will create a great deal of confusion and will keep lawyers fully employed. This is the equivalent of allocating a percentage of fault to an icy road, a curve or a hill when a motor vehicle goes out of control and injures another. As an attorney, I'm not aware of any similar provision under our scheme of laws to compare with this proposal. This provision will open the door to a host of creative applications by attorneys.

b. Without the express requirement on the part of the operator to follow the plan a very serious danger exists that the plan for safety and operations will become a hollow shell. By inserting this simple phrase, attorneys will have a lot less to argue about and there will be much less pressure on ski operators to actually follow the plans that they devise.

c. Amendment IV(c), above, is necessary to prevent a ski operator from seriously cutting back on the safe guards provided for skiers. Without this provision it would be possible for the safety plans of ski operators to deteriorate and for ski areas to operate more dangerously than they have been in the past.

d. Amendment IV(d), above, makes the operator responsible to mark hazards on un-groomed slopes as well upon groomed slopes. At the present time, many of the slopes, probably more than half at Alyeska are not groomed. In order to avoid liability for marking hazards, a ski operator could simply choose not to groom slopes.

Attorney Mark Bond testified that it would be unreasonable for an operator to put yellow ribbons around all trees on both groomed and non-groomed slopes. That testimony is misleading. Mr. Bond did not point out to the committee, however, that only trees not visible from 100 feet need to be marked. Even

a 1 inch piece of brush is visible from 100 feet and so there should be no need to put ribbons around trees on ski slopes. This provision, on the other hand, protects a skier from booby traps that cannot be seen or detected until the skier is within 100 feet of the hazard.

Committee members were provided a copy of the operations and safety plan of Eagle Crest ski area. P. 63 of that plan, Appendix J, refers to "hazard marking." Appendix J points out that hazard marking is a very prudent and viable objective for a ski area operator to pursue. This appendix, by itself, rebuts many of the arguments of the proponents of this bill. This appendix demonstrates that the standard of ordinary and reasonable care can be applied to a ski area operator just as it is applied to all other land owners and persons who invite others onto their property.

e. The warning proposed in H.B. 41 actually misstates the law to skiers. In the definitions section, "inherent danger of risk of skiing" is defined at Sec. 05.45.200(3). The definition of "inherent danger of risk of skiing" is pretty well paraphrased in the warning mandated for signs and lift tickets. However, noticeably absent is the information for consumers that ski area operators can be subject to claims based upon their own negligence. In order to prevent misrepresentation to consumers this provision must be added to the warning. There is evidence in the record of the Labor and Commerce Committee that ski area operators strive to deceive the public into believing that there are no claims that can be brought against ski areas. The manager of Alyeska testified before Labor and Commerce that they do not settle cases brought against them because they don't want to establish a precedent. Stated another way, they do not want to admit to anyone that they can be held liable for their mistakes and the damages they cause. Under either present law or this proposed bill, operators will be liable for injuries caused by their own negligence.

C:\WP51\DATA\HEARTEST

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSHB 41 (L&C)

Revision Date: March 4, 1993
Title: "... relating to liability for skiing accidents, operations of ski areas..."
Sponsor: Representative Phillips
Requestor: Representative Phillips

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

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-
CAPITAL						
REVENUE FUND SOURCE:						
FUNDING:						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: March 4, 1993

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: March 4, 1993

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ANALYSIS (Continued):

The committee substitute version for HB 41 redefines ski areas to eliminate cross-country ski areas. This change answers most of the concerns expressed in our fiscal note of January 22, 1993, concerning potential liability and costs that might be incurred by the Department of Natural Resources.

February 27, 1992

Rep. Brian Porter
Chairman House Judicial Committee
Box V
Juneau, Alaska 99811

Dear Rep. Porter:

Kachemak Ski Club would like to take this opportunity to comment on HB 41 which will regulate and limit the liability of ski areas in Alaska. We support the concept of HB 41 and wish to add our support to the passage of this bill. The continued threat of lawsuit is rapidly eliminating most of the small ski areas throughout the United States and Alaska.

Kachemak Ski Club is a non-profit corporation based in Homer. Our Group has operated a rope tow approximately 12 miles out of town for the past 30 years. This ski area, the Fred Harbison Memorial Ski area is being run by Kachemak Ski Club members on weekends. We have no paid employees and annual revenues have not exceeded $7000. The Area has less than 300 vertical feet and is open to the public. The entire hill is visible from the lodge and there is virtually no avalanche hazard. Most of the annual revenues are used to acquire liability insurance each year. The nearest other area is Alyeska which is 180 miles away. Primary users of this area are families and students of Homer.

We support the concept of HB41 but wish to inform you of the consequences of its implementation on our local ski area. Our ski area will be unable to maintain a patrol of National Ski Patrol standards under section 05.45.040 either financially or on a volunteer basis. We believe that in ski areas such as ours which lacks long runs and has a limited vertical, a ski patrol of such expertise an excessive requirement.

Kachemak Ski Club can and will meet the other requirements in HB 41. Or group realizes that this bill is meant to protect us as a ski area but we also realize that the legislature has no desire to eliminate small public service groups such as ours. We urge the committee to amend HB 41 so that Non-profit corporations with small verticals can continue to operate without the requirement of a full time ski patrol.

Thank-you for considering this request.

Sincerely yours,

Chris Moss Treas.
Kachemak Ski Club
Box 3705
Homer, Alaska 99603

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO : CSHB 41(L&C)

Revision Date:
Title: Civil Liability for Skiing Accidents
Sponsor: Representatives Phillips, Hudson, Porter
Requestor: House 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 G. Study, CSP, Director
Division: Labor Standards and Safety
Phone : 465-6003
Date : 1/22/93

Approved by Commissioner: Charles W. Mahlen
Agency: Department of Labor
Date: 3/4/93

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DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

JAN 20 1993

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Mail Stop 3101

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

MEMORANDUM January 20, 1993

SUBJECT: Civil liability for skiing accidents (HB 41)

TO: Representative Gail Phillips
Attn: Sandy

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 09.17.060. In doing this the legislature did not preclude application of comparative negligence to the immunity granted under AS 09.65.135.

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 09.17.060 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:pl
93-034.plm

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

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JUNEAU, ALASKA 99811-0300
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465-3603

January 25, 1993

The Honorable Gail Phillips
Alaska House of Representatives
P.O. Box 113100
Juneau, Alaska 99811

Re: HB 41 - An Act relating to civil liability for skiing accidents, operation of ski areas, and duties of ski area operators and skiers

Dear Representative Phillips:

Your office has asked the Department of Law to look at HB 41 regarding ski areas and to identify any legal concerns. Assistant Attorney General Susan Cox and I have reviewed the draft bill as of this date and offer the following comments:

1. Proposed AS 05.45.100(h) [p. 11, l. 23] provides that a skier who violates (c) or (g) of that section is guilty of a violation, referring to a definition in the criminal code. It is not clear, however, just how this section will be enforced or how a skier may be cited for a violation. Currently, the bill does not designate responsibility for enforcement of this provision to a particular state agency. Though the Department of Public Safety has general enforcement powers when violations are committed in the presence of a trooper, it may be important to designate a responsible department and more explicitly set out a citation process. (Please see AS 18.35.340 and 18.35.341 for an example.)

2. The proposed definitions at AS 05.45.100(6), (7), and (9) address "ski area", "ski area operator", and "ski slopes or trails." These definitions are general and appear to be circular. One concern is that hiking trails on state owned land that are used as cross-country ski trails in the winter may be required to post signs and hire ski patrol staff under these all-inclusive definitions (i.e., the trail at Point Bridget State Park in Juneau is used as a cross-country

ski trail in winter). Furthermore, the state could encounter liability in some unexpected circumstances in areas that have unimproved trail systems. If this bill is not intended to have the impact of requiring all hiking trails that may be used as cross-country trails in the winter to be posted with signs and hire ski patrol staff, it will be necessary to address this in these definitions .

Please feel free to contact me with any questions.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: Kristen F. Bomengen
Kristen F. Bomengen
Assistant Attorney General

KFB:jh

cc: Susan Cox
Assistant Attorney General

Deborah Behr
Assistant Attorney General

Kris Lethin, Legislative Liaison
Office of the Governor

Sandy Nusbaum
Office of Representative Phillips

Department of Commerce & Economic Development / POSITION PAPER

HB 41: **"An Act relating to civil liability for skiing accidents, operation of ski areas, and duties of ski area operators and skiers; and providing for an effective date."**

HB 41 sets duties of ski operators and skiers. The bill removes the liability of ski operators for injuries resulting from an inherent danger and risk of skiing. The department has no position on SB 44.

C E Beedon for
Paul Fuhs, Acting Commissioner

Date: 1-22-93

PF/TL/dgl010PP.INS
012193a

BILL NO: House Bill No. 41 **DATE:** January 26, 1993

TITLE: "An Act relating to civil liability for skiing accidents, operation of ski areas, and duties of ski area operators and skiers; and providing for an effective date."

CONTACT: Arbe Williams 465-2700

House Bill No. 41 recognizes the hazards inherent to the sport of skiing and proposes to limit the liability of ski area operators to injuries caused by the operators' negligence. The bill would also require a ski area owner who operates a tramway to maintain a sign system for the protection and instruction of passengers and would require a ski area operator to post signs for trails and slopes.

The Department of Labor presently inspects equipment at ski areas. Section 05.45.020(b) provides that a ski area operator who violates the department regulations related to the construction, operation and maintenance of recreational devices is negligent and civilly liable to the extent the violation causes injury to a person or damage to property. This section would provide greater weight to such violations in court proceedings.

As this legislation does not assign additional responsibilities or duties to the department, it does not have a fiscal impact on the Department of Labor.

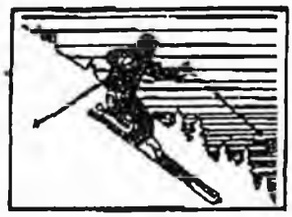
APPROVED:

Charles W. Mahlen, Commissioner

POSITION PAPER/Department of Labor

THE NEED FOR AND PROBABLE EFFECTS OF INHERENT RISKS OF SKIING LEGISLATION

House Bill 491 and Senate Bill 403



There are very few things which can be predicted with any degree of success in the litigation arena.[1] It is therefore difficult to predict with any degree of certainty the effect in an individual case of the adoption of House Bill 491 or Senate Bill 403, or if the Alaska Legislature adopted a statutory scheme similar to Colorado or New Hampshire.

Nevertheless, it is easy and appropriate to outline the basic differences between (1) the current statute, AS 09.65.135, as interpreted by the Alaska Supreme Court; (2) the statute as proposed in HB 491 and SB 403; and (3) the adoption of a comprehensive statute governing skiing responsibilities and duties, such as Colorado or New Hampshire.

I. The Need for Legislation Regarding the Inherent Risks of Skiing

Prior to 1978, it was generally assumed among ski area operators and the courts that skiers were responsible for their own injuries arising from the inherent risks of skiing. This doctrine was called "primary assumption of risk," and basically held that a ski area operator is not liable for injuries arising from the inherent risks of skiing. An operator owed his patron no duty to eliminate those risks, because they were part of the sport. Skiers assumed those dangers by their very participation in the sport. This doctrine was most eloquently set forth in *Wright v. Mt. Mansfield Lift, Inc.*, 96 F.Supp. 786, 790-91 (D.Vt. 1951). In that case, a skier claimed to have struck a stump (created by clearing the ski trail), and fallen, breaking her leg. The court held the ski area operator had no duty to protect against a danger so obvious in the sport of skiing:

> Skiing is a sport; a sport that entices thousands of people; a sport that requires an ability on the part of the skier to handle himself or herself under various circumstances of grade, boundary, mid-trail obstructions, corners and varied conditions of the snow. Secondly, it requires good judgment on the part of the skier and recognition of the existing circumstances and conditions. Only the skier knows his own ability to cope with a certain piece of trail. Snow, ranging from powder to ice, can be of infinite kinds. Breakable crust may be encountered where soft snow is expected. Roots and rocks may be hidden under a thin cover. A single thin stubble of cut brush can trip a skier in the middle of a turn. Sticky snow may follow a fast running surface without warning. Skiing conditions may change quickly. What was, a short time before, a perfect surface with a soft cover on all bumps may fairly rapidly become filled with ruts, worn

---

[1] The most certain prediction is that the lawyers on each side will more than likely reap greater benefits from the litigation than the clients.

spots and other manner of skier created hazards.

. . .

In this skiing case, there is no evidence of any dangers existing which reasonable prudence on the parts of the defendants would have foreseen and corrected. It isn't as though a tractor was parked on a ski trail around a corner or bend without warning to skiers coming down. It isn't as though on a trail that was open work was in progress of which the skier was unwarned. It isn't as though a telephone wire had fallen across the ski trail of which the defendant knew or ought to have known and the plaintiff did not know.

The trail at the point of the accident was smooth and covered with snow. There were no unexpected obstructions showing. The plaintiff, in hitting the snow-covered stump as she claims to have hit, was merely accepting a danger that inheres in the sport of skiing. To hold that the terrain of a ski trail down a mighty mountain, with fluctuation in weather and snow conditions that constantly change its appearance and slipperiness, should be kept level and smooth, free from holes or depressions, equally safe for the adult or the child, would be to demand the impossible. It cannot be that there is any duty imposed on the owner and operator of a ski slope that charges it with the knowledge of these mutations of nature and requires it to warn the public against such.

A short 27 years later, the Vermont Supreme Court turned the skiing community on its head with the holding in *Sunday v. Stratton Corp.*, 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 incident. 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 one form of a statute imposing responsibility for injuries arising from the inherent risks of skiing on 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.

The first point is that ski area operators require certainty. It is very important that ski area operators know exactly those things for which they are responsible, and those things for which the skier is responsible. If area operators know what their duties are (provided they are not so onerous as to require more expenditures than can be recouped through revenues, i.e., ticket prices), and they know how to comply, skiing as a sport will be greatly enhanced. Insurance rates will go down for those who comply with the known requirements, especially after it is well-established that claims arising from inherent risk incidents can be resolved by summary motion. Cases like *Sunday v. Stratton*, which impose liability in unpredictable

circumstances, deprive operators and their insurers with the certainty necessary to develop an effective risk management program.

The second point is that courts resist change, especially when the legislature alters the common law as established by the court. It is imperative that the legislation show a clear intent to alter the common law with respect to the rights and duties of skiers and ski area operators. Section 1 of both bills does this, and is a critical component of the legislation. The best solution, of course, is for the legislature to adopt a comprehensive statute regulating the operation of ski areas, setting forth the specific duties of an operator to his patrons, and the specific responsibilities of ski areas. In addition to the reluctance with which courts greet changes in the laws they have "written," courts eagerly entertain the application of constitutional test to legislative acts which deviate from the common law. While most challenges to inherent risk statutes have been unsuccessful,[2] the Montana Supreme Court found the Montana act unconstitutional.[3]

The third point, and perhaps the most important, is that skiing is unlike any other commercial enterprise. Ski area operators offer skiers access to large areas of mountainous alpine terrain. This terrain contains all manner of variations in terrain, hills, gullies, ridges, holes, streams, forests, brush, grass, rocks, etc. Skiing takes place in the winter time, with all of the winter weather conditions. The patrons of a ski area engage in a highly athletic sport which requires good physical conditioning and quick reflexes. By the nature of the sport, the patrons slide on a steep, slippery surface at speeds which, even for the beginner or intermediate, easily exceed even the speed of the fastest runner. Unlike the operator of a skating rink or bowling alley or golf course, there is no physical way a ski area operator can modify, control, or even monitor each rock, tree, ridge, icy spot, or other single point condition so as to protect all patrons from injury. Yet a ski liability case is tried as if the area operator should focus all of his attentions and resources on the one tiny spot on the hill where the accident occurred.

Alyeska Resort has an enviable safety record when compared to other ski areas in the United States. Ski accident safety is traditionally measured in terms of the number of accidents

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[2] The following cases upheld inherent risk of skiing statutes as constitutional: *Pizza v. Wolf Creek Ski Development Corp.*, 711 P.2d 671 (Colo. 1985); *Grieb v. Alpine Valley Ski Area, Inc.*, 400 N.W.2d 653 (Mich.App. 1986); *Scmitz v. Cannonsburg Skiing Corporation*, 428 N.W.2d 742 (Mich.App. 1988); *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E. 2d 1128 (W.Va. 1991); *Northcutt v. Sun Valley Co.*, 787 P.2d 1159 (Idaho 1990); *Collins v. Schweitzer, Inc.*, --- F.Supp. —, 1991 WestLaw 196753 (D.Idaho 1991); *Glebink v. Fischer*, 709 F.Supp. 1012 (D.Colo. 1989); *Weinrauch v. Park City*, 635 F.Supp. 91 (D.Utah 1986).

[3] *Brewer v. Ski-Lift, Inc.*, 762 P.2d 226 (Mont. 1988). The Montana statute has since been amended to respond to the concerns expressed by the Montana Supreme Court. *See* Montana Code §§ 23-2-701 *et seq.*

incurred per thousand skier visits. A "skier visit" is one skier visiting the ski area on a single day. The number of accidents is the number of skiers who report injuries to the ski patrol. Over the last several years, the number of accidents at Alyeska has consistently remained well below the national average:

COMPARISON OF NUMBER OF SKI ACCIDENTS			
Year	Skier Visits	United States	Alyeska Resort
89-90	133,466	3.4	2.7
90-91	138,762	3.4	1.8
91-92 (as of 02/29/92)	132,280	3.3	1.1

Despite this positive safety record, Alyeska Resort spends a substantial amount of money each year defending claims made by injured patrons. The resort changed insurers effective December 1, 1989. Since that date, Alyeska Resort has paid over $100,000 in legal fees related to claims made by skiers, and currently has 6 open claims files. The net claim amounts and/or reserves for claims exceeds $200,000.

Why is a relatively safe ski resort stuck with very high legal fees and insurance premiums? Largely because Alyeska, like all Alaska ski areas, is without effective protection from claims arising from the inherent risks of skiing.

The fact is that despite the best efforts of any ski area operator, a very few skiers are going to get hurt while engaging in the sport. Some will sustain minor injuries, some will suffer permanent and/or serious injuries, and a very, very few will die. This is not because the skiers or the operators are bad people, or are foolish, or do not take care of themselves or the ski area. It is a result of a sport which combines high speed, mountainous steep terrain, varying snow and weather conditions, and rocks, trees, bushes, stumps, etc.

Currently, Alyeska is forced to consider any skier who suffers a substantial injury as a potential claimant. The rules are not clear, the chances of liability uncertain, and the amounts awarded potentially very large.

II. Current Status of Ski Law in the United States

Since there is no uniform law proposed by the American Law Institute, the statutes vary substantially. There are essentially three legal positions taken by the states within which skiing occurs. These are: (1) the common law as recently reinterpreted and established by the supreme courts in the various states; (2) statutes which tend to preserve the common law, but list the

inherent risks of skiing and limiting the liability of ski area operators; and (3) statutes which replace the common law with a specific list of duties for ski area operators and skiers.

A. Common Law

The first position is the common law duties established by the court: A landowner or possessor of land is required to 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). This makes sense when the size and nature of the parcel, when combined with the activities of the patrons in various weather conditions, allows the owner or possessor to generally monitor each area of his land. In the world of skiing, it imposes a theoretical desirable norm which is absolutely impractical in the real world. Each assertion of liability focuses on a mere snapshot of time and space, and totally ignores all of the other conditions of the land and patrons, and the efforts of the ski area operator to improve skier safety. Ski area operators need more certainty with respect to their duties than a jury trial from hind sight on every ski accident involving more than minor injuries.

B. List of Inherent Risks

The second position is the option selected by Alaska in 1980, and by a few other states, including Utah. This involves three parts. First, the legislature adopts a descriptive, non-comprehensive list of the inherent risks of skiing. Then, the legislature requires the ski area operator to post a notice informing skiers of the inherent risks of skiing and the limitation of liability. Finally, in exchange for correctly posting the notice, the ski area operator is relieved of liability for injuries arising from the inherent risks of skiing. The effectiveness of these statutes depends largely on their interpretation by the supreme court in the state of adoption. In both Alaska and Utah, the state supreme courts have restrictively interpreted these statutes. *Hiibschamn v. City of Valdez*, 821 P.2d 1354 (Alaska 1991); and *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991). Both courts held that this kind of statute merely codifies the common law, and does not prevent a patron from claiming the operator was negligent, even when the injury is caused by an inherent risk of the sport. The uncertainty created by this interpretation largely renders the statute meaningless. As the Utah Supreme Court stated, "While the general parameters of the act are clear, application of the statute to specific circumstances is less certain. ... The statute, therefore, contemplates that the determination of whether a risk is inherent be made on a case-by-case basis ..." 808 P.2d at 1044 and 1045.

C. Substitution of Duties for Ski Area Operators and Skiers

The third position is the adoption of a comprehensive statute regulating the operation of ski areas, which is the position taken by Colorado and New Hampshire, among others. In its adoption of the statute, the legislature makes it clear that it is not merely codifying the common

law, but is comprehensively rewriting the law with respect to the operation of ski areas. First, the legislation sets forth with some particularity the duties of ski area operators to their skiing patrons, including generally very specific requirements regarding signs informing skiers of the relative difficulty of runs, and warning about the inherent risks. These statutes include regulation of the operation of tramways, much as Alaska has done in AS 05.20. The statutes also contain a list of prohibited activities by skiers who ride tramways. These statutes then set forth the duties of skiers with respect to their own safety and the safety of other skiers. Finally, the statutes generally state that so long as the operator fulfills his duties, or so long as a failure to fulfill a particular duty is not the cause of an injury, the ski area operator can not be held liable to the injured patron. These statutes provide the necessary certainty for ski area operators, thus encouraging the development and operation of ski areas. These statutes are also more likely to survive a constitutional challenge, because they impose specific duties on ski area operators in exchange for the limitation of liability. Colorado State: CRS §§ 33-44-101 to -114, interpreted in *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982 (Colo.App. 1983), and *Pizza v. Wolf Creek Ski Development Corp.*, 711 P.2d 671 (Colo. 1985). New Hampshire Statute: NHS §§ 225-A:1 to A:26, interpreted in *Adie v. Temple Mountain Ski Area, Inc.*, 238 A.2d 738 (N.H. 1968), and *Berniger v. Meadow Green-Wildcat Corp.*, 945 F.2d 4 (1st Cir. 1991).

III. The Hilbschman Case, and the Legal Implications of the Decision on Incidents occurring at Alyeska Resort

The *Hilbschman* case arose at Salmonberry Ridge, a small ski area operated by the City of Valdez. Heather Hilbschman, 15 years old at the time, went skiing with friends at Salmonberry Ridge on March 13, 1986, the first year the area was open. Prior to going skiing, the group stopped by a liquor store and purchased beer, which they consumed during the day. Hilbschman watched several people jump over a bump on the hill estimated to be between two and four feet high. She waited in line to take her turn to go over the jump. When she went over the bump, she leaned backward and fell, resulting in paraplegia.

Based on the inherent risk of skiing statute, the Superior Court granted summary judgment to the City on all issues except the question of whether the City had complied with the signage requirement. The lower court held that Hilbschman had failed to ski within the limits of her ability. A jury later determined that the City had complied with the signage requirements.

The Supreme Court reversed the summary judgment, and sent the case back to the Superior Court for trial. There are several rulings in the *Hilbschman* decision which render the inherent risk of skiing statute largely ineffective. The following discussion illustrates a number of the problems created by the *Hilbschman* case, provides examples of recent incidents at Alyeska Resort which are affected by the rulings, and explains the application of the *Hilbschman* case, the proposed legislation and the more comprehensive ski statutes, to the example:

A. The statute preserved the common law duties of ski area operators. Thus, the ski area operator is required to act as a reasonable person in maintaining all skiing terrain under

his control in a "reasonably safe" condition.

Problem: Ski area operators are unlike any other business which invites patrons to enjoy land. Skiers seek an outdoor athletic experience in a winter alpine setting on very large tracts of land. Many skiers who get hurt were seeking higher physical challenges in steeper terrain, deeper snow, or using terrain variations to jump. Given the weather, slope, vegetation, etc., it is impossible for a ski area operator to keep the entire ski area "reasonably safe" under all conditions.

Example: Skier skied down Von Imhoff Trail at a high rate of speed, turn right off the main trail and attempted to jump from a small ridge. Skier fell before reaching the top of the ridge, struck some ice or rocks, and broke his back. Skier claims Alyeska liable because of negligent failure to provide sufficient snow cover or because the ski run was icy or because there were rocks where the skier fell.

1. Under the *Hilbschman* ruling, this case must go to a jury trial on whether Alyeska should have opened at all, whether there was sufficient warning of the off trail conditions, and whether Alyeska could have provided sufficient snow coverage or removed the rocks off the trail.

2. Under HB 491 and SB 403, this case probably would be resolved under summary judgment, provided the operator had posted the required warning signs. Section 1 makes clear the legislative intent to alter the common law, and the amendments in section 3 make it clear that whether the accident was caused by ice or rocks, it is the skier's responsibility. The statute and the required warning sign notify skiers of the dangers, and their responsibility.

3. Under Colorado or New Hampshire inherent risk statutes, the case certainly would be resolved under summary judgment, provided the operator had posted the required warning signs and fulfilled the other requirements under those statutes. Those statutes substitute an entire new set of responsibilities and obligations for area operators and skiers in the place of the general common law duty of landowners. These statutes recognize the unique nature of skiing.

B. An inherent risk is one which is obvious and necessary to it. A risk is not necessary if it could be eliminated or mitigated through the exercise of reasonable care. The listing of a risk in the statute makes the risk obvious, but does not make it necessary – necessary risks are those which cannot reasonably be eliminated by the area operator.

Problem: The purpose of the statute was to require the skier to accept the risk of all inherent risks, not just those listed. It is irrelevant whether the risk is necessary, since the risk and the enjoyment factor often coincide. An example is a skier skiing down steep terrain on hardpack snow. Speed and descent are exhilarating, but also increase

the risk of injury. It does not matter whether the steep terrain or snow conditions are necessary, because the skier intended to encounter them.

Example: Skier fell while skiing on South Face, a steep run, after ski binding released. Skier slid down South Face, and tried to stop his descent by putting foot in snow. One foot caught in the snow, and he broke his femur. Skier claimed Alyeska liable because South Face was too icy to be opened that day. Skier's friend testified in deposition that they had skied the South Face the previous day, and at least once before that day without any problems. He also testified that they were expert skiers and had actively sought challenging runs.

1. Under the *Hilbschman* ruling, this case probably would have been tried before a jury. The court's ruling would have required a trial on the issue of whether Alyeska was negligent in opening the South Face that day, because the snow was "too hard" or "icy," and whether the snow conditions were a "necessary" part of the sport, thus an inherent risk.

2. Under HB 491 and SB 403, this case would be resolved under summary judgment, provided the operator had posted the required warning signs. Section 3 amends the list of inherent risks to clearly specify that all snow conditions are inherent risks, even as they change during the day or from day to day.

3. Under Colorado or New Hampshire inherent risk statutes, the case certainly would be resolved under summary judgment, provided the operator had posted the required warning signs and fulfilled the other requirements under those statutes.

C. Evidence of negligence, even where the injury resulted from an inherent risk, takes the case out of the protection afforded by the statute, and the case must be tried before a jury.

Problem: Only an incompetent plaintiff's attorney would be wholly unable to theorize an allegation of negligence and find an expert who will confirm the theory in virtually any skiing accident. The whole point of an inherent risk statute is that the burden of avoiding injury from such a risk is wholly on the skier. This single holding means that almost every case must go to a jury trial, because it is the rare negligence case that can be resolved by summary judgment. *Braham v. Fuller*, 728 P.2d 641, 646 (Alaska 1986); *Webb v. City and Borough of Sitka*, 561 P.2d 731, 735 (Alaska 1977).

Example: Skier skied down Sourdough Trail. His binding came loose, he lost a ski, and fell. Skier slid feet first to the edge of the main trail and struck a rock, breaking his back. Skier claims Alyeska liable because of negligent failure to provide sufficient snow cover, failure to remove the rock, and failure to mark the rock.

1. Under the *Hiibschman* ruling, this case would have been tried before a jury. The court's ruling requires a trial on the issue of whether the rock was in the main run or off the main trail, whether there was sufficient snow, and whether Alyeska should have removed the rock.

2. Under HB 491 and SB 403, this case might be resolved under summary judgment, provided the operator had posted the required warning signs. Section 3 amends the list of inherent risks to clearly specify collisions with natural objects, on or off the trail, are an inherent risk of the sport. There has been some earth work in the vicinity of the rock, however, and there is some question whether this fact would take the rock out of the status of "natural object."

3. Under Colorado or New Hampshire inherent risk statutes, the case certainly would be resolved under summary judgment, provided the operator had posted the required warning signs and fulfilled the other requirements under those statutes. Non-moving objects on the ski hill are the responsibility of the skier, whether on the main trails or off in the woods.

D. Artificial conditions are not inherent risks. Any alteration to natural conditions -- earth work to create a ski run, cutting a tree, grooming a ski slope -- removes those conditions from inherent risks of skiing within the list in the current statute.

Problem: This means that a ski area operator's efforts to improve safety by, for example, grading ski trails in the summer time increase the operator's risk of liability. This creates an incentive to leave dangerous -- but natural -- conditions in place. The legislature should encourage a ski operator to take steps to reduce naturally created hazards.

Example: A skier fell on the back of her skis on the Von Imhoff Trail, and slid through a transition onto Upper Sourdough, breaking her hip. Both runs were cut and graded out of the forest by Alyeska, and both provide substantially easier routes down the mountain than the natural conditions which existed before the work was performed. No claim has yet been made.

1. Under the *Hiibschman* ruling, any claim made would have to proceed to a jury trial. The slopes are artificial, and therefore, by Alaska Supreme Court definition, can not be considered an inherent risk of skiing. Any claim that asserted the injuries were a result of trail design, construction or maintenance would be impervious to a motion for summary judgment.

2. Under HB 491 and SB 403, this case would almost certainly be resolved under summary judgment, provided the operator had posted the required warning signs. Section 3 amends the list of inherent risks to clearly specify that variations in

terrain, whether natural or a result of slope design and terrain modification, are an inherent risk of the sport.

3. Under Colorado or New Hampshire inherent risk statutes, the case certainly would be resolved under summary judgment, provided the operator had posted the required warning signs and fulfilled the other requirements under those statutes. In particular, Colorado's statute specifically lists "variations or steepness in terrain, whether natural or a result of slope design, snowmaking or grooming operations, including but not limited to roads, catwalks, or other terrain modifications" are inherent risks of skiing. *See* Colorado Revised Statutes § 33-44-103(10).

E. Where warning signs must be placed and what they must say is an issue for the jury to resolve.

Problem: The best place to put the signs is where people who use the ski area are most likely to see them. The present statute, which requires "trail signs at prominent locations within a ski area" is open to vast interpretation, thus requiring a jury trial in every case on whether the signs were "trail signs" and whether they were placed in "prominent locations." Ski area operators need to know precisely what to post and where they have to post it.

Example: Skier (29-year old) was apparently skiing fast down the Waterfall and lost control, flying into the woods and striking two trees. Skier suffered severe multiple trauma. (The patrollers who attended his injuries were awarded the National Ski Patrol Purple Heart for a life-saving effort.) Skier's father has made repeated inquiries regarding the incident, but has not yet made a claim.

1. Under the *Hiibschman* ruling, this case would have been tried before a jury. Although it appears that the cause of the injuries was one or more inherent risks: trees, snow conditions or failure to ski within the limits of the skier's ability, the court's ruling requires a trial on the issue of whether Alyeska's signage was sufficient to comply with the warning sign requirements in the current inherent risk statute.

2. Under HB 491 and SB 403, this case would almost certainly be resolved under summary judgment, provided the operator had posted the required warning signs. Section 2 imposes firm and certain signage requirements both with respect to content and location. Alyeska can KNOW without a doubt what has to be done to comply, and can in fact comply. Section 3 amends the list of inherent risks to clearly specify collisions with natural objects, on or off the trail, are an inherent risk of the sport.

3. Under Colorado or New Hampshire inherent risk statutes, the case certainly would be resolved under summary judgment, provided the operator had posted the required warning signs and fulfilled the other requirements under those statutes. Non-moving objects on the ski hill are the responsibility of the skier, whether on the main trails or off in the woods.

IV. Conclusion

The need for legislation is apparent. In order for skiing to be available for Alaskan residents in any form and at reasonable ticket prices, the operators must know and be able to comply with the duties required by the state. This can best be effected by the adoption of an effective inherent risk statute.

Save - ski resort bill

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 abilit,' 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 operators 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.

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).

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

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] Hübschman 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." Hübschman'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 Hübschman'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*

Hübschman 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 Hübschman'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 can not 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.

Note

(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.

Note

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 worn 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 assumpuon 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.

Colorado Revised Statutes

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ARTICLE 44

Ski Safety and Liability

33-44-101. Short title. This article shall be known and may be cited as the "Ski Safety Act of 1979".

Source: L. 79, p. 1237, § 1.

Law reviews. For article, "Changes in Colorado Ski Law", see 13 Colo. Law. 407 (1984).

33-44-102. Legislative declaration. The general assembly hereby finds and declares that it is in the interest of the state of Colorado to establish reasonable safety standards for the operation of ski areas and for the skiers using them. Realizing the dangers that inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed, the purpose of this article is to supplement the passenger tramway safety provisions of part 7 of article 5 of title 25, C.R.S.; to further define the legal responsibilities of ski area operators and their agents and employees; to define the responsibilities of skiers using such ski areas; and to def . the rights and liabilities existing between the skier and the ski area operator and between skiers.

Source: L. 79, p. 1237, § 1.

33-44-103. Definitions. As used in this article, unless the context otherwise requires:

(1) "Base area lift" means any passenger tramway which skiers ordinarily use without first using some other passenger tramway.

(2) "Competitor" means a skier actually engaged in competition or in practice therefor with the permission of the ski area operator on any slope or trail or portion thereof designated by the ski area operator for the purpose of competition.

(3) "Conditions of ordinary visibility" means daylight and, where applicable, nighttime in nonprecipitating weather.

(4) "Passenger" means any person who is lawfully using any passenger tramway.

(5) "Passenger tramway" means a device as defined in section 25-5-702 (4), C.R.S.

(6) "Ski area" means all ski slopes or trails and other places under the control of a ski area operator and administered as a single enterprise within this state.

(7) "Ski area operator" means "operator" as defined in section 25-5-702 (3), C.R.S., and any person, partnership, corporation, or other commercial entity having operational responsibility for any ski areas, including an agency of this state or a political subdivision thereof.

(8) "Skier" means any person utilizing a ski area for the purpose of skiing or for the purpose of sliding downhill on snow or ice on skis, a toboggan, a sled, a tube, a ski-bob, or any other device.

(9) "Ski slopes or trails" means those areas designated by the ski area operator to be used by skiers for any of the purposes enumerated in subsection (8) of this section. Such designation shall be set forth on trail maps, if provided, and designated by signs indicating to the skiing public the intent that such areas be used by skiers for the purpose of skiing. Nothing in this subsection (9) or in subsection (8) of this section, however, shall imply that ski slopes or trails may not be restricted for use by persons using skis only or for use by persons using any other device described in subsection (8) of this section.

Source: L. 79, p. 1238, § 1.

33-44-104. Negligence - civil actions. (1) A violation of any requirement of this article shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of the person violating such requirement.

(2) A violation by a ski area operator of any requirement of this article or any rule or regulation promulgated by the passenger tramway safety board pursuant to section 25-5-710 (1) (a), C.R.S., shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of such operator.

(3) All rules adopted or amended by the passenger tramway safety board on or after July 1, 1979, shall be subject to sections 24-4-103 (8) (c) and (8) (d) and 24-34-104 (9) (b) (II), C.R.S.

Source: L. 79, p. 1238, § 1; L. 80, p. 789, § 28; L. 81, p. 1179, § 10.

33-44-105. Duties of passengers. (1) No passenger shall board a passenger tramway if he does not have sufficient physical dexterity, ability, and knowledge to negotiate or use such facility safely or until such passenger has asked for and received information sufficient to enable him to use the equipment safely. A passenger is required to follow any written or verbal instructions that are given to him regarding the use of the passenger tramway.

(2) No passenger shall:

(a) Embark upon or disembark from a passenger tramway except at a designated area except in the event of a stoppage of the passenger tramway (and then only under the supervision of the operator) or unless reasonably necessary in the event of an emergency to prevent injury to the passenger or others;

(b) Throw or expel any object from any passenger tramway while riding on such device, except as permitted by the operator;

(c) Act, while riding on a passenger tramway, in any manner that may interfere with proper or safe operation of such passenger tramway;

(d) Engage in any type of conduct that may contribute to or cause injury to any person;

(e) Place in an uphill track of a J-bar, T-bar, platter pull, rope tow, or any other surface lift any object that could cause another skier to fall;

(f) Embark upon a passenger tramway marked as closed;

(g) Disobey any instructions posted in accordance with this article or any verbal instructions by the ski area operator regarding the proper or safe use of a passenger tramway unless such verbal instructions are contrary to this article or the rules promulgated under it, or contrary to posted instructions.

Source: L. 79, p. 1239, § 1.

Law reviews. For note, "Exculpatory Clauses and Public Policy: A Judicial Dilemma", see 53 U. Colo. L. Rev. 793 (1982).

33-44-106. Duties of operators - signs. (1) Each ski area operator shall maintain a sign system with concise, simple, and pertinent information for the protection and instruction of passengers. Signs shall be prominently placed on each passenger tramway readable in conditions of ordinary visibility and, where applicable, adequately lighted for nighttime passengers. Signs shall be posted as follows:

(a) At or near the loading point of each passenger tramway, regardless of the type, advising that any person not familiar with the operation of the device shall ask the operator of the device for assistance and instruction;

(b) At the interior of each two-car and multicar passenger tramway, showing:

(I) The maximum capacity in pounds of the car and the maximum number of passengers allowed;

(II) Instructions for procedures in emergencies.

(c) In a conspicuous place at each loading area of two-car and multicar passenger tramways, stating the maximum capacity in pounds of the car and the maximum number of passengers allowed;

(d) At all chair lifts, stating the following:

(I) "Prepare to Unload", which shall be located not less than fifty feet ahead of the unloading area;

(II) "Keep Ski Tips Up", which shall be located ahead of any point where the skis may come in contact with a platform or the snow surface;

(III) "Unload Here", which shall be located at the point designated for unloading;

(IV) "Safety Gate", which shall be located where applicable;

(V) "Remove Pole Straps from Wrists", which shall be located prominently at each loading area;

(VI) "Check for Loose Clothing and Equipment", which shall be located before the "Prepare to Unload" sign.

(e) At all J-bars, T-bars, platter pulls, rope tows, and any other surface lift, stating the following:

(I) "Remove Pole Straps from Wrists", which shall be placed at or near the loading area;

(II) "Stay in Tracks", "Unload Here", and "Safety Gate", which shall be located where applicable;

(III) "Prepare to Unload", which shall be located not less than fifty feet ahead of each unloading area.

(f) Near the boarding area of all J-bars, T-bars, platter pulls, rope tows, and any other surface lift, advising passengers to check to be certain that clothing, scarves, and hair will not become entangled with the lift;

(g) At or near the boarding area of all lifts, regarding the requirements of section 33-44-109 (6).

(2) Other signs not specified by subsection (1) of this section may be posted at the discretion of the ski area operator.

(3) The ski area operator, before opening the passenger tramway to the public each day, shall inspect such passenger tramway for the presence and visibility of the signs required by subsection (1) of this section.

(4) The extent of the responsibility of the ski area operator under this section shall be to post and maintain such signs as are required by subsection (1) of this section in such condition that they may be viewed during conditions of ordinary visibility. Evidence that signs required by subsection (1) of this section were present, visible, and readable where required at the beginning of the passenger tramway operation on any given day raises a presumption that all passengers using said devices have seen and understood said signs.

Source: L. 79, p. 1240, § 1.

33-44-107. Duties of ski area operators - signs required for skiers' information. (1) Each ski area operator shall maintain a sign and marking system as set forth in this section in addition to that required by section 33-44-106. All signs required by this section shall be maintained so as to be readable and recognizable under conditions of ordinary visibility.

(2) A sign shall be placed in such a position as to be recognizable as a sign to skiers proceeding to the uphill loading point of each base area lift depicting and explaining signs and symbols which the skier may encounter at the ski area as follows:

(a) The ski area's least difficult trails and slopes, designated by a green circle and the word "easiest";

(b) The ski area's most difficult trails and slopes, designated by a black diamond and the words "most difficult";

(c) The ski area's trails and slopes which have a degree of difficulty that falls between the green circle and the black diamond designation, designated by a blue square and the words "more difficult";

(d) Danger areas, designated by a red exclamation point inside a yellow triangle with a red band around the triangle and the word "Danger" printed beneath the emblem;

(e) Closed trails or slopes, designated by an octagonal-shaped sign with a red border around a white interior containing a black figure in the shape of a skier with a black band running diagonally across the sign from the upper right-hand side to the lower left-hand side and with the word "Closed" printed beneath the emblem.

(3) If applicable, a sign shall be placed at or near the loading point of each passenger tramway, as follows:

"WARNING: This lift services (most difficult) or (most difficult and more difficult) or (more difficult) slopes only."

(4) If a particular trail or slope or portion of a trail or slope is closed to the public by a ski area operator, such operator shall place a sign notifying the public of that fact at each identified entrance of each portion of the trail or slope involved. Alternatively, such a trail or slope or portion thereof may be closed with ropes or fences.

(5) The ski area operator shall place a sign at or near the beginning of each trail or slope, which sign shall contain the appropriate symbol of the relative degree of difficulty of that particular trail or slope as set forth by subsection (2) of this section. This requirement shall not apply to a slope or trail designated "easiest" which to a skier is substantially visible in its entirety under conditions of ordinary visibility prior to his beginning to ski the same.

(6) The ski area operator shall mark its ski area boundaries in a fashion readily visible to skiers under conditions of ordinary visibility. Where the owner of land adjoining a ski area closes all or part of his land and so advises the ski area operator, such portions of the boundary shall be signed as required by paragraph (e) of subsection (2) of this section. This requirement shall not apply in heavily wooded areas or other nonskiable terrain.

(7) The ski area operator shall mark hydrants, water pipes, and all other man-made structures on slopes and trails which are not readily visible to skiers under conditions of ordinary visibility from a distance of at least one hundred feet and shall cover such obstructions with a shock-absorbent material that will lessen injuries. Any type of marker shall be sufficient, including but not limited to wooden poles, flags, or signs, if the marker is visible from a distance of one hundred feet and if the marker itself does not constitute a serious hazard to skiers.

Source: L. 79, pp. 1242, 1245, § § 1, 1.

Applied in Rimkus v. Northwest Colo. Ski Corp., 706 F.2d 1060 (10th Cir. 1983).

33-44-108. Ski area operators - additional duties. (1) Any motorized snow-grooming vehicle shall be equipped with a light visible at any time the vehicle is moving on or in the vicinity of a ski slope or trail.

(2) Whenever maintenance equipment is being employed to maintain or groom any ski slope or trail while such ski slope or trail is open to the public, the ski area operator shall place or cause to be placed a conspicuous notice to that effect at or near the top of that ski slope or trail.

(3) All snowmobiles operated on the ski slopes or trails of a ski area shall be equipped with at least the following: One lighted headlamp, one lighted red tail lamp, a brake system maintained in operable condition, and a fluorescent flag at least forty square inches mounted at least six feet above the bottom of the tracks.

(4) The ski area operator shall have no duty arising out of its status as a ski area operator to any skier skiing beyond the area boundaries marked as required by section 33-44-107 (6).

(5) The ski area operator, upon finding a person skiing in a careless and reckless manner, may revoke that person's skiing privileges.

Source: L. 79, p. 1242, § 1.

Warning sign must be posted when maintenance equipment is present on slopes for purposes of "grooming and maintaining" a slope, but is not actively "grooming" in that particular location. Phillips v. Monarch Recreation Corp., 668 P.2d 982 (Colo. Ct. App. 1983).

33-44-109. Duties of skiers - penalties. (1) Each skier solely has the responsibility for knowing the range of his own ability to negotiate any ski slope or trail and to ski within the limits of such ability.

(2) Each skier has the duty to maintain control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and objects. However, the primary duty shall be on the person skiing downhill to avoid collision with any person or objects below him. It is presumed, unless shown to the contrary by a preponderance of the evidence, that the responsibility for collisions by skiers with any person, natural object, or man-made structure marked in accordance with section 33-44-107 (7) is solely that of the skier or skiers involved and not that of the ski area operator.

(3) No skier shall ski on a ski slope or trail that has been posted as "Closed" pursuant to section 33-44-107 (2) (e) and (4).

(4) Each skier shall stay clear of snow-grooming equipment, all vehicles, lift towers, signs, and any other equipment on the ski slopes and trails.

(5) Each skier has the duty to heed all posted information and other warnings and to refrain from acting in a manner which may cause or contribute to the injury of the skier or others. Each skier shall be presumed to have seen and understood all information posted in accordance with this article near base area lifts, on the passenger tramways, and on such ski slopes or trails as he is skiing. Under conditions of decreased visibility, the duty is on the skier to locate and ascertain the meaning of all signs posted in accordance with sections 33-44-106 and 33-44-107.

(6) Each ski used by a skier while skiing shall be equipped with a strap or other device capable of stopping the ski should the ski become unattached from the skier. This requirement shall not apply to cross country skis.

(7) No skier shall cross the uphill track of a J-bar, T-bar, platter pull, or rope tow except at locations designated by the operator; nor shall a skier place any object in such an uphill track.

(8) Before beginning to ski from a stationary position or before entering a ski slope or trail from the side, the skier shall have the duty of avoiding moving skiers already on the ski slope or trail.

(9) No person shall move uphill on any passenger tramway or use any ski slope or trail while such person's ability to do so is impaired by the consumption of alcohol or by the use of any controlled substance, as defined in section 12-22-303 (7), C.R.S., or other drug or while such person is under the influence of alcohol or any controlled substance, as defined in section 12-22-303 (7), C.R.S., or other drug.

(10) No skier involved in a collision with another skier or person in which an injury results shall leave the vicinity of the collision before giving his name and current address to an employee of the ski area operator or a member of the voluntary ski patrol, except for the purpose of securing aid for a person injured in the collision; in which event the person so leaving the scene of the collision shall give his name and current address as required by this subsection (10) after securing such aid.

(11) No person shall knowingly enter upon public or private lands from an adjoining ski area when such land has been closed by its owner and so posted by the owner or by the ski area operator pursuant to section 33-44-107 (6).

(12) Any person who violates any of the provisions of subsection (3), (9), (10), or (11) of this section is guilty of a class 2 petty offense and, upon conviction thereof, shall be punished by a fine of not more than three hundred dollars.

Source: L. 79, p. 1243, § 1; L. 82, p. 255, § 17.

33-44-110. Competition. (1) The ski area operator shall, prior to the beginning of a competition, allow each competitor a reasonable visual inspection of the course or area where the competition is to be held.

(2) The competitor shall be held to assume the risk of all course conditions including, but not limited to, weather and snow conditions, course construction or layout, and obstacles which a visual inspection should have revealed. No liability shall attach to a ski area operator for injury or death of any competitor proximately caused by such assumed risk.

Source: L. 79, p. 1243, § 1.

33-44-111. Statute of limitation. All actions against any ski area operator or its employees brought to recover damages for injury to person or property caused by the maintenance, supervision, or operation of a passenger tramway or a ski area shall be brought within three years after the claim for relief arises and not thereafter.

Source: L. 79, p. 1243, § 1.

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The phrase "incidental to the use of land" requires that a nexus exist between the commercial or business enterprise and the use giving rise to the injury. Smith v. Cutty's Inc., 742 P.2d 347 (Colo. App. 1987).

ARTICLE 44

Ski Safety and Liability

Law reviews: For article, "1990 Update on Colorado Tort Reform Legislation", see 19 Colo. Law. 1529 (1990); for article, "Allocation of the Risks of Skiing: A Call for the Reapplication of Fundamental Common Law Principles", see 67 U. L. Rev. 165 (1990).

33-44-101. Short title.

Law reviews.
For article, "The Development of the Standard of Care in Colorado Ski Cases", see 15 Colo. Law. 373 (1986).

33-44-103. Definitions. (8) "Skier" means any person using a ski area for the purpose of skiing; for the purpose of sliding downhill on snow or ice on skis, a toboggan, a sled, a tube, a ski-bob, a snowboard, or any other device; or for the purpose of using any of the facilities of the ski area, including but not limited to ski slopes and trails.

(10) "Inherent dangers and risks of skiing" means those dangers or conditions which are an integral part of the sport of skiing, including changing weather conditions; snow conditions as they exist or may change, such as ice, hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, and machine-made snow; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, streambeds, and trees, or other natural objects, and collisions with such natural objects; impact with lift towers, signs, posts, fences or enclosures, hydrants, water pipes, other man-made structures and their components; variations in steepness or terrain, whether natural or as a result of slope design, snowmaking or grooming operations, including but not limited to roads and catwalks or other terrain modifications; collisions with other skiers; and the failure of skiers to ski within their own abilities. The term "inherent dangers and risks of skiing" does not include the negligence of a ski area operator as set forth in section 33-44-104 (2). Nothing in this section shall be construed to limit the liability of the ski area operator for injury caused by the use or operation of ski lifts.

Source: (8) amended and (10) added, L. 90, p. 1540, § 2, effective July 1.

Cross references: For the legislative declaration contained in the act amending subsection (8) and enacting subsection (10), see section 1 of chapter 256, Session Laws of Colorado 1990.

The term "ski area" does not include an area devoted to the parking of motor vehicles and the operation of shuttle buses. Therefore, none of the provisions of this act are applicable. McLean v. Winter Park Recreational Ass'n, 762 P.2d 751 (Colo. App. 1988).

33-44-104. Negligence - civil actions.

This article applies to ski accident cases and not § 13-21-115. Calvert v. Aspen Skiing Co., 700 F.Supp. 520 (D. Colo. 1988).

This article would apply to ski accident cases which involve dangerous conditions that are ordinarily present at ski areas and § 13-2-115 would protect skiers against those dangerous conditions that are not commonly present at ski areas. Giebink v. Fischer, 709 F. Supp. 1012 (D. Colo. 1989).

33-44-107. Duties of ski area operators - signs and notices required for skiers' information. (2) (d) Danger areas, designated by a red exclamation point inside a yellow triangle with a red band around the triangle and the word "Danger" printed beneath the emblem. Danger areas do not include areas presenting inherent dangers and risks of skiing.

(7) The ski area operator shall mark hydrants, water pipes, and all other man-made structures on slopes and trails which are not readily visible to skiers under conditions of ordinary visibility from a distance of at least one hundred feet and shall adequately and appropriately cover such obstructions with a shock-absorbent material that will lessen injuries. Any type of marker shall be sufficient, including but not limited to wooden poles, flags, or signs, if the marker is visible from a distance of one hundred feet and if the marker itself does not constitute a serious hazard to skiers. Variations in steepness or terrain, whether natural or as a result of slope design or snowmaking or grooming operations, including but not limited to roads and catwalks or other terrain modifications, are not man-made structures, as that term is used in this article.

(8) (a) Each ski area operator shall post and maintain signs which contain the warning notice specified in paragraph (c) of this subsection (8). Such signs shall be placed in a clearly visible location at the ski area where the lift tickets and ski school lessons are sold and in such a position to be recognizable as a sign to skiers proceeding to the uphill loading point of each base area lift. Each sign shall be no smaller than three feet by three feet. Each sign shall be white with black and red letters as specified in this paragraph (a). The words "WARNING" shall appear on the sign in red letters. The warning notice specified in paragraph (c) of this subsection (8) shall appear on the sign in black letters, with each letter to be a minimum of one inch in height.

(b) Every ski lift ticket sold or made available for sale to skiers by any ski area operator shall contain in clearly readable print the warning notice specified in paragraph (c) of this subsection (8).

(c) The signs described in paragraph (a) of this subsection (8) and the lift tickets described in paragraph (b) of this subsection (8) shall contain the following warning notice:

WARNING

Under Colorado law, a skier assumes the risk of any injury to person or property resulting from any of

the inherent dangers and risks of skiing and may not recover from any ski area operator for any injury resulting from any of the inherent dangers and risks of skiing, including: Changing weather conditions; existing and changing snow conditions; bare spots; rocks; stumps; trees; collisions with natural objects, man-made objects, or other skiers; variations in terrain; and the failure of skiers to ski within their own abilities.

Source: (2)(d) and (7) amended and (8) added, L. 90, p. 1541, § 3, effective July 1.

Cross references: For the legislative declaration contained in the act amending subsections (2)(d) and (7) and enacting subsection (8), see section 1 of chapter 256, Session Laws of Colorado 1990.

33-44-108. Ski area operators - additional duties. (5) The ski area operator, upon finding a person skiing in a careless and reckless manner, may revoke that person's skiing privileges. This subsection (5) shall not be construed to create an affirmative duty on the part of the ski area operator to protect skiers from their own or from another skier's carelessness or recklessness.

Source: (5) amended, L. 90, p. 1542, § 4, effective July 1.

Cross references: For the legislative declaration contained in the act amending subsection (5), see section 1 of chapter 256, Session Laws of Colorado 1990.

33-44-109. Duties of skiers - penalties. (1) Each skier solely has the responsibility for knowing the range of his own ability to negotiate any ski slope or trail and to ski within the limits of such ability. Each skier expressly accepts and assumes the risk of and all legal responsibility for any injury to person or property resulting from any of the inherent dangers and risks of skiing; except that a skier is not precluded under this article from suing another skier for any injury to person or property resulting from such other skier's acts or omissions. Notwithstanding any provision of law or statute to the contrary, the risk of a skier/skier collision is neither an inherent risk nor a risk assumed by a skier in an action by one skier against another.

(2) Each skier has the duty to maintain control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and objects. However, the primary duty shall be on the person skiing downhill to avoid collision with any person or objects below him.

Source: (1) and (2) amended, L. 90, p. 1542, § 5, effective July 1.

Cross references: For the legislative declaration contained in the act amending subsections (1) and (2), see section 1 of chapter 256, Session Laws of Colorado 1990.

The term "responsibility" as used in subsection (2) encompasses the legal concept of "fault". In effect, the statute creates a rebuttable presumption that the skier is at fault

whenever he collides with an object listed in subsection (2), and "fault" may be defined as the equivalent of negligence. Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671 (Colo. 1985).

Given the connection between "responsibility" and "negligence", in the context of a skiing accident case, the term "responsibility" may be equated with the concept of "negligence" for purposes of applying the presumption contained within subsection (2). Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671 (Colo. 1985).

The phrase "natural object" is not unconstitutionally vague. Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671 (Colo. 1985).

Skiers as a group do not constitute a suspect class, and being free from a legislatively imposed rebuttable presumption of negligence is not a fundamental right. Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671 (Colo. 1985).

Evidentiary presumption contained in subsection (2) places upon skier the burden of rebutting the presumption by presenting evidence of the ski area operator's negligence which outweighs the presumption of the skier's sole negligence. Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671 (Colo. 1985).

Presumption is not unconstitutionally vague in describing rebuttal burden. Pizza v. Wolf Creek Development Corp., 711 P.2d 671 (Colo. 1985).

33-44-111. Statute of limitation. All actions against any ski area operator or its employees brought to recover damages for injury to person or property caused by the maintenance, supervision, or operation of a passenger tramway or a ski area shall be brought within two years after the claim for relief arises and not thereafter.

Source: Entire section amended, L. 90, p. 1543, § 6, effective July 1.

Cross references: For the legislative declaration contained in the act amending this section, see section 1 of chapter 256, Session Laws of Colorado 1990.

This section and not former § 13-80-110 is the applicable statute of limitations for actions to recover damages for an injury in a ski area. Schafer v. Aspen Skiing Corp., 742 F.2d 580 (10th Cir. 1984).

Three-year statute of limitations in this section does not violate equal protection or constitutional provisions governing special legislation, grant of special privileges or immunities, or access to courts. Schafer v. Aspen Skiing Corp., 742 F.2d 580 (10th Cir. 1984).

Neither § 2-4-107 nor 2-4-108 applicable in determining the computation of the statute of limitations in this section. Schafer v. Aspen Skiing Corp., 742 F.2d 580 (10th Cir. 1984).

Statute not applicable to action resulting from injury occurring in a parking lot. Since the term "ski area" does not include an area devoted to the parking of motor vehicles and the operation of shuttle buses, none of the provisions of this act, including the statute of limitations in this section, are applicable. McLean v. Winter Park Recreational Ass'n, 762 P.2d 751 (Colo. App. 1988).

33-44-112. Limitation on actions for injury resulting from inherent dangers and risks of skiing. Notwithstanding any judicial decision or any other law or statute to the contrary, including but not limited to sections 13-21-111 and 13-21-111.7, C.R.S., no skier may make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing.

Source: Entire section added, L. 90, p. 1543, § 7, effective July 1.

Cross references: For the legislative declaration contained in the act enacting this section, see section 1 of chapter 256, Session Laws of Colorado 1990.

33-44-113. Limitation of liability. The total amount of damages which may be recovered from a ski area operator by a skier who uses a ski area