

[NEWS & VIEWS]

WHO'S AT FAULT HERE?

The liability release armor that protects ski areas against lawsuit and loss isn't bulletproof, as evidenced by the recent decision against Mt. Hood Skibowl, Ore. A Multnomah County jury awarded \$11.4 million to the plaintiff who said he collided with a 4-by-4 wooden signpost on a Skibowl bike trail and was left paralyzed from the waist down—his lawyers argued that the ski area should have had collapsible markers at the trail crossing.

Skibowl, which suspended its mountain biking operations indefinitely in May, called the verdict “unprecedented,” adding that, “Liability releases in Oregon currently offer recreation providers with practically little to no protection, and they are less effective than they are in neighboring states and others across the country, which allow for the use of liability waivers in recreational contexts.”

To better understand the liability release situation, SAM reached out to ASDA attorney Brian Johnson of Minnesota firm Nilan Johnson Lewis.

SAM: Is release loss in law a trend?

Johnson: I am not sure I would call it a trend, but releases are under attack. For example, the Oregon Supreme Court struck down releases as being against public policy some years ago. New York does not recognize releases. Other states eschewing releases include Vermont, Montana, and Virginia.

The Minnesota Supreme Court is currently deciding a case on the issues

of whether 1) releases signed by a parent for his or her minor child should be outlawed, and 2) whether all releases, even those signed by adults, should be outlawed. We expect a decision in late 2022 or early 2023.

Why is this happening? Many judges find releases distasteful, and not favored in the law. Judges would prefer to have juries decide cases involving injured skiers and snowboarders rather than have cases thrown out on the “technicality” of a release signed before the accident even occurred. That is definitely the trend in my state of Minnesota.

SAM: How can ski areas protect themselves?

Johnson: Ski areas should have their patrons sign a document called an “Express Assumption of Risk.” Express assumption of risk means that the inherent risks of the sport are put in writing, and signed by the patron, and/or on tickets, websites, signage.

The express assumption of risk legal doctrine recognizes that certain recreational activities have inherent risks that cannot be prevented. For skiing and riding, these include changing weather conditions, uneven terrain, collisions with fixed objects or other skiers, etc. A skier who is injured by encountering an inherent risk of skiing cannot prevail against the ski area in those states that recognize the defense of assumption of risk.

Most courts are more accepting of the defense of express assumption of risk because the skiers are advised as to

what risks they are going to encounter, and those risks are clearly understood by skiers and riders.

SAM: What about a bifurcated release? What is it and how does it offer ski areas protection?

Johnson: A bifurcated release allows the patron to pay extra money in order to not sign a release. So, a patron may choose to pay an extra \$20 on a day pass to not sign the ski area release of liability, or an extra \$100 to not sign a season pass release of liability.

The legal advantage? In all lawsuits involving a release of liability, the judge will examine whether or not the patron had bargaining power against the ski area when signing the release. That bargaining power issue can be an important element of state law to determine the validity of any given release. With a bifurcated release, the ski area can argue that the patron had bargaining power because the patron could have paid the small extra amount to not sign the release. Courts have found that the bifurcated release gives the patron bargaining power with the ski area, thereby upholding the release.

For ski areas in Minnesota and Wisconsin that use bifurcated releases, I can safely say 99 percent of patrons will not pay the extra money to avoid signing a release. The ski areas are losing nothing by offering bifurcated releases, and instead reap great benefits in the courts.

SAM is planning a broader look at this topic in a future issue.