



For Injured Skiers, An Uphill Fight

WITH HELP OF STATE STATUTE, RESORTS BEAT BACK LAWSUITS

By CHRISTIAN NOLAN

Kenny Salvini, 23, was skiing at about 35 mph when he went off a jump at a resort in the state of Washington in 2004. Crashing into the packed snow, Salvini broke vertebrae, severed his spinal cord and remains paralyzed. Claiming the jump wasn't safely constructed, he sued the resort and collected \$14 million from a jury.

The verdict sent shockwaves through the ski industry in Connecticut and across the country, especially among resorts with "terrain parks" that contain jumps and obstacles on which skiers and snowboarders perform tricks in their best imitation of X Games superstar Shaun White.

As resort operators worried that skyrocketing insurance costs could force them out of business, more states enacted statutes providing greater legal protections. Meanwhile, resorts continued to require customers to sign away litigation rights via waiver forms.

However, such waivers are not enforceable in the face of negligence claims in Connecticut, thanks to a state Supreme Court opinion *Hanks v. Powder Ridge Restaurant Corp.* in 2005. But a bigger blow to the Connecticut ski industry came in 2004 when the Supreme Court, in *Jagger v. Mohawk Mountain Ski Area*, ruled that if the ski resort created the danger, they cannot hide behind statutes stating that outdoors enthusiasts assume risk when they hit the slopes.

In turn, the state's four ski resorts lobbied lawmakers into strengthening the state's assumption-of-risk ski statute to counter the *Jagger* opinion.

The table was set to put the new law to the test. The state just needed the right case. Attorney Ralph Monaco, of New London's Conway & Londregan P.C. thought he had that case and did not hesitate to sue Ski Sundown.

Broken Neck

In February 2006, 15-year-old James Malaguit skied off a jump in the terrain park at the New Hartford resort, did a reverse spin and landed on the back of his head and neck. The Brewster, N.Y., teen is paralyzed from the chest down. "He can't even hold a pen to sign his name," Monaco said.

Malaguit's family alleged negligence and sought \$40 million in damages. The teen has already accumulated more than \$700,000 in medical bills.

"This was as much a case against the ski industry as a whole rather than just Ski Sundown," said one of the defense attorneys for Ski Sundown, Charles F. Gfeller, of Seiger Gfeller Laurie LLP in West Hartford.

Ski resorts nationwide feared a jury would once again be swayed by sympathy, the defense lawyers said.

But in what ski resorts hope becomes the norm in terrain park injury cases, a Litchfield jury took just 84 minutes to decide in favor of

Ski Sundown late last month "When you choose to do something you have to accept personal responsibility for your choices," said the other defense lawyer, Mark B. Seiger. "That's something the jurors understood."

Gfeller said skiers are faced with lots of fast-paced decisions but ski resorts shouldn't be held responsible for the poor choices.

"You choose whether to turn, slow down, speed up, whether to jump or not. You're confronted with a lot of choices," said Gfeller. "You have to accept responsibility for the choices you make and bad things can happen to good people unfortunately and that's what happened here."

Legislative Intent

Monaco plans to appeal the verdict, arguing that the state's ski statute that says skiers assume the risks inherent with the sport does not apply to terrain park jumps and should not have been shown to the jury in this case.

Monaco said legislators had a chance to include terrain parks in the statute five years ago. "The proposal in 2005 was to include as an inherent hazard terrain park jumps. The legislature rejected that," said Monaco.

Monaco and other plaintiffs' lawyers believe terrain parks should be treated differently because the dangers are created by the ski resorts themselves (in the form of jumps and obstacles) as opposed to on a slope where the dangers often come from nature (a tree or patch of ice) or bad decision-making by the customer.

The Connecticut Trial Lawyers Association testified against the statute in 2005, arguing that skiers should assume the risks associated with the sport like uneven slopes but that should not prevent ski resorts from liability if failing to warn of man-made hazards. "If you create the danger, you own it," said Monaco.

Gfeller, whose firm represents ski resorts in six states, explained that when the tricks trend began in the early 1990s, skiers and snowboarders were building their own jumps out of packed snow. He said jumpers were launching themselves into the woods or into oncoming downhill skiers.

To cut down on liability issues, more ski resorts began building their own jumps. Seiger said nearly all of the country's 476 ski areas now have terrain parks. "With the introduction of terrain parks, the injury rates have continued to come down," said Seiger.



Attorneys Mark B. Seiger (left) and Charles F. Gfeller successfully defended Ski Sundown in New Hartford against a lawsuit in which a lawyer for a teen paralyzed in a skiing accident sought \$40 million.

"Terrain parks were a risk management tool introduced by the ski industry to make the sport safer as a whole," added Gfeller.

Gfeller and Seiger said this was the first skiing case tried in Connecticut under the newly revised assumed risk. Just over half the states nationwide have specific skiing statutes but those that don't have similar ones that encompass a range of recreational activities.

Seiger cautioned that state statutes vary greatly in the protections afforded to ski resorts. States like Washington and Maine have more ski areas, and thus have a greater interest in protecting resorts.

With added protections, lawsuits against ski resorts have become increasingly more difficult to get passed the pre-trial stages, said attorney Philip T. Newbury Jr., of Howd & Ludorf LLC in Hartford. "The cases I've tried in Connecticut have either been a defense verdict or very low plaintiff's verdicts," said Newbury.

Newbury attributed the overall litigation trend to two things. First, most people understand skiing and snowboarding involves some risk. And two, that state has a "favorable statute to the industry in the state on assumption of the risk."

Newbury said part of the reason that the Connecticut statute protects the ski resorts so well is that it is in line with Vermont's statute, where many Connecticut residents travel to ski. "The other thing is, the ski industry and their insurance companies take these cases very seriously and typically mount a very vigorous defense," said Newbury.

In fact, Gfeller and Seiger have not lost a skiing case that they have defended in 29 years. "We're not afraid to try them," said Seiger.

Seiger, who handled Shaun White's first contract with Burton Snowboards, said he tells plaintiff's lawyers upfront they are in for a tough time to even get the case to trial. After that happens, Seiger said, "a lot of plaintiffs attorneys just withdraw the cases."