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RECREATION SAFETY ACT IMMUNITY LIMITED TO INHERENT RISKS

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A number of jurisdictions have enacted recreation "safety" statutes which effectively incorporate the assumption of risk defense into the state code. Some of these statutes are activity specific, e.g. skiing and snowmobiling. Others, like the Wyoming Recreation Safety Act in the *Dunbar* opinion described below, are more general, providing immunity from liability for injuries arising from inherent risks in outdoor recreational activities.

Traditionally, the assumption of risk defense has been raised as an absolute defense to liability for ordinary negligence. Within this context, assumption of risk is defined as a voluntary encounter with a known danger wherein the participant expressly or impliedly consents to careless misconduct which would otherwise provide a basis for negligence liability. The required knowledge of the danger has to be more than a general awareness of risk. Rather, the individual has to subjectively appreciate and consent to the risks to be undertaken.

Assumption of risk may be either expressed in a written release or liability waiver document describing the risks to be assumed, or implied from merely participating in an activity. Implied assumption of risk is sometimes referred to primary assumption of risk. Under primary assumption of risk, a participant necessarily assumes the inherent, and thus unavoidable, risks of injury generally associated with participation in a sport or recreational activity. For example, participants colliding with each other is an inherent and unavoidable risk in most contact sports like football. Accordingly, under primary assumption of risk, a participant in football necessarily assumes the inherent and unavoidable risk of injury from those types of collisions which would be considered part of the game. A participant, however, would not necessarily accept a level of risk over and above the general scope of dangers intrinsic to a sport or recreational activity. Similarly, as described in *Dunbar,* the issue was whether the injury sustained by plaintiff was necessarily an inherent risk within the scope of immunity available to providers under the state recreation safety act.

FACTS OF THE CASE

In the case of *Dunbar v. Jackson Hole Mountain Resort Corporation*, No. 03-8057, 2004 U.S. App. LEXIS 25807 (U.S.C.A. 10th Cir. 2004), plaintiff Camie Dubar was severely injured when she fell in a "ski and snowboard terrain park" operated by defendant Jackson Hole Mountain Ski Resort. As described by the federal appeals court, the facts of the case were as follows:

> In March 2001, Camie Dunbar suffered the stated injuries when she skied off a snow ledge in a specially designed "terrain park" at the Jackson Hole Mountain Resort in Jackson Hole, Wyoming. A 33-year-old self-described intermediate skier from South Florida, Dunbar skied into the terrain park area with other members of her group who were part of a

promotional ski trip sponsored by her employer Clear Channel Communications.

Containing various man made features such as a table top jump and a snowboard half-pipe, the Jackson Hole terrain park is designed for advanced skiers and snowboarders who choose to recreate in a very challenging risk-filled environment. The terrain park is separated by a fence and a boundary rope from an intermediate ski run. To enter the terrain park, skiers must pass through a gate marked with a warning sign, alerting them that they are entering an advanced ski area where "serious injuries, death, and equipment damage can occur." At the time of the accident, the terrain park had been relocated to its position in an intermediate ski run, and did not appear on the Resort's trail maps.

On the last day of her trip, Dunbar, along with Dave Dresher and Mike Jennings, went up the mountain intending to "investigate" the terrain park. In proceeding down an intermediate ski run, they skied through an initial gate providing a warning sign that they were entering a double black diamond "terrain feature trail." After stopping adjacent to a red tram car which served as the office for the "pipe and park" crew who were responsible for maintenance of the terrain park, Dunbar observed other skiers and snowboarders maneuver various features in the terrain park.

Based on their observations, Dunbar and her companions decided that they did not want to try any of the features. In her deposition, Dunbar attested to thinking "this is my last day [and] I want to go home in one piece." She stated that she did not know that there was a snowboard half-pipe in the terrain park, and believed instead that the area included only the jumps she observed from the red gondola. There is no suggestion by either party that Dunbar intended to jump any of the terrain jumps or intended to try her hand at stunts as a skier in a snowboard half-pipe.

Having decided that she did not want to ski any of the double-black diamond features, she asked a Jackson Hole employee how to exit that area "if you don't want to take this terrain park." She was told either to take off her skis and hike back to the gate through which she had entered or to proceed in the direction of a "catwalk" to which the employee pointed. Unbeknownst to Dunbar, the "catwalk" led to a side entrance to the snowboard half-pipe.

Ms. Dunbar along with her companions skied along the "catwalk." Although it is a matter of some dispute between the parties, in order to proceed down the catwalk, skiers had to pass warning signs indicating that they were approaching a snowboard half-pipe area. Both Dunbar and her companions claim not to have noticed the signs. Dunbar and Jennings

> went along the catwalk, up an incline, across a flat deck, and fell approximately twelve feet into the half-pipe. Jennings managed to maneuver his snowboard in such a way as to avoid injury. Dunbar was not so fortunate. As a consequence of her fall into the half-pipe, she suffered severe injuries to her pelvis and thigh requiring surgery and intensive physical therapy. Dunbar testified that she will neither be able to return to her pre-injury range of motion, nor will she be capable of having a natural childbirth as a result of the injury to her hip.

Dunbar claimed that Jackson Hole's negligence caused her injuries. The federal district court granted summary judgment in favor of defendant Jackson Hole. In so doing, the federal district court found that "Jackson Hole did not owe Dunbar a duty of care for risks inherent in her chosen recreational activity under the Wyoming Recreational Safety Act. Dunbar appealed.

ON APPEAL

On appeal, Dunbar argued that "the risks inherent to alpine skiing do not include the risk of falling into the side of a snowboard half-pipe when following a Jackson Hole employee's instructions on how to exit the terrain park."

As noted by the appeals court, the Wyoming legislature had enacted the Wyoming Recreation Safety Act (Wyo. Stat. Ann. § 1-1-121 et. seq.) to limit negligence liability for providers of recreational sports and activities, including alpine skiing, equine activities, and other outdoor pursuits in the state. In so doing, the state legislature had effectively lowered the generally applicable legal duty under the common law to act with reasonable care. Specifically, under the Wyoming Recreation Safety Act, "a provider of a recreational opportunity has no duty to protect participants from 'inherent risks' of the particular sport or recreational opportunity." In pertinent part, the Safety Act provided as follows:

> Any person who takes part in any sport or recreational opportunity assumes the inherent risks in that sport or recreational opportunity, whether those risks are known or unknown, and is legally responsible for any and all damage, injury or death to himself or other persons or property that results from the inherent risks in that sport or recreational opportunity.
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> A provider of any sport or recreational opportunity is not required to eliminate, alter or control the inherent risks within the particular sport or recreational opportunity.

As cited by the appeals court, the Safety Act defined inherent risks as "those dangers or conditions which are characteristic of, intrinsic to, or an integral part of any sport or recreational opportunity." Further, the Act defined "Sport or recreational opportunity" as "commonly understood sporting activities" which expressly included "alpine skiing."

Such limited immunity from negligence liability under the Act was limited to those danger which were "characteristic of" or "intrinsic to" or "an integral part" of the sport. Conversely, the appeals court found that the Act would allow a negligence action against a provider of a recreational opportunity "when the injury is not the result of an inherent risk of the sport or recreational opportunity:" In determining whether a legal duty of reasonable care existed under the Act, the appeals court would, therefore, consider "whether the specific risks can be characterized as inherent to the sport or activity."

As characterized by the appeals court, "inherent risks' are "those risks which are essential characteristics of a sport and those which participants desire to confront, or they are undesirable risks which are simply a collateral part of the recreation activity." In so doing, the court noted that "a risk that was atypical, uncharacteristic, and not intrinsic to the recreational activity" would not be considered an inherent risk under the Act. According to the court, such "atypical or uncharacteristic risks can arise even in those specific sports the Wyoming legislature clearly intended to exempt from liability for inherent risks." Specifically, the court found that risks which would not be considered inherent might arise "from the choices a recreation provider makes on behalf of the participant and from the conditions in which the recreational opportunity is provided."

Applying these principles to the facts of this particular case, the issue was whether Camie Dunbar's injury arose from an inherent risk in alpine skiing. Or, was Dunbar's injury produced by "a risk that was atypical, uncharacteristic, and not intrinsic to the recreational activity"? In general, the appeals court acknowledged that "falling twelve feet into a trench in the middle of an intermediate ski-run would decidedly not constitute an inherent risk of alpine skiing." The appeals court, however, found that "[s]uch a level of generality" was "not appropriate" in determining what risk was inherent in Dunbar's activity under the Act. According to the court, the appropriate analysis would "inquire into the specific circumstances of both her actions and those of the recreation provider."

> Because a determination of what risks are inherent to a sport or activity may change by descriptive differences, we have stated that when attempting to determine whether a risk is inherent to a sport, we can not look at the risk in a vacuum, apart from the factual setting to which the participant was exposed. Instead, we must analyze the risk at the greatest level of specificity permitted by the factual record.

In this particular instance, the trial court had found that "a terrain feature such as a half-pipe located within a fenced terrain park is an inherent risk to a skier that voluntarily and knowingly enters that park." The appeals court rejected this finding. In the opinion of the appeals court, "the simple fact of Dunbar's choice to enter the terrain park" did not redefine the sport or activity in which Dunbar was engaged at the time of her injury, i.e., alpine skiing. Moreover, in the opinion of the appeals court, it was unclear "whether the warning signs and double black designation properly applied to the area that Dunbar actually traversed [from the intermediate ski run to the catwalk] or if they were limited to the physical space containing the dangerous terrain features."

> If the double black diamond designation applies only to the specific terrain features and if the warnings apply only to those skiers and snowboarders who attempt to maneuver over and among the trail features down the fall line of the mountain, then it may be difficult to conclude that Dunbar assumed a double black diamond risk simply by skiing across the fall line on an intermediate slope to the tram car and then proceeding, as directed, by way of the catwalk.

Further, the appeals court found that Dunbar had specifically decided not to ski over certain terrain features in terrain park. Dunbar had done so in accordance with Jackson Hole's warning signs directing skiers and snowboarders to "please observe terrain features, their risks, and their degree of difficulty before using," As a result, the appeals court found the trial court had erred in failing to consider the inherent risks associated with "choices one would make when actually intending to ski over [or not to ski over] the specific features."

> Having "entered" the terrain park, Dunbar did not "use" the terrain park as a terrain park--viz., she did not attempt to jump the table top jump nor did she attempt to do stunts in the snowboard half-pipe. She attempted to exit the terrain park without "taking" any of the features, and followed instructions from a Jackson Hole employee on how to exit the park.

CONCLUSION

Under the circumstances of this case, the appeals court concluded that "the district court erred when it found that the risk of falling twelve feet into a snowboard half-pipe was an inherent risk of Dunbar's alpine skiing. In reaching this determination, the appeals court took particular note that Dunbar "had stopped and observed double diamond terrain features and had chosen not to 'take' those features."

> When, as is here, genuine issues of material fact exist, it is properly a question for the jury to determine whether dangers that are "characteristic of" or "intrinsic to" or "an integral part" of the sport of alpine skiing evaluated under the specific factual circumstances of this case [to] include those encountered by Dunbar in skiing from the main intermediate run to the tram car and from the tram car along the catwalk.
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> If Dunbar's accident was not the product of an inherent risk of her recreational activity, then a question remains for the fact finder concerning what duty was owed her and whether Jackson Hole fulfilled that duty. We have already concluded that Dunbar's mere presence in the entrance area of the terrain park does not give rise as a matter of law to a heightened risk above what is normal to alpine skiing.

In reaching this determination, the appeals court further noted that "whatever risks Dunbar assumed herself, it seems clear that she did not also assume the risk of needing to interpret the delphic statements of Jackson Hole's employees."

> [Jackson Hole made a choice for Dunbar] in directing her to exit the terrain park area by either hiking out the main entrance or skiing along the catwalk. We have made clear that a duty of care may arise from choices made for the participant by the recreation provider… [O]nce Dunbar asked a Jackson Hole employee how to exit the terrain park area without "taking" any of the features, Jackson Hole owed a duty to provide her with appropriate instructions, which might have included a specific warning to beware of the drop into the half-pipe at the end of the catwalk. Whether or not they fulfilled that duty is a question for the jury.

The appeals court, therefore, reversed the summary judgment of the district court in favor of Jackson Hole and remanded (i.e., sent back) this case for "further proceedings consistent with this opinion." On remand, a jury would determine whether Dunbar had assumed the risk of injury under the particular circumstances of this case and whether the Recreation Safety Act barred Dunbar's negligence claims.