COLORADO COURT OF APPEALS **2014 COA 13**

Court of Appeals No. 13CA0517
Grand County District Court No. 12CV132
Honorable Mary C. Hoak, Judge

Salynda E. Fleury, individually, on behalf of Indyka Norris and Sage Norris, and as surviving spouse of Christopher H. Norris,

Plaintiff-Appellant,

v.

IntraWest Winter Park Operations Corporation,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE FOX
Navarro, J., concurs
J. Jones, J., dissents

Announced February 13, 2014

Burg Simpson Eldridge Hersh & Jardine, P.C., Diane Vaksdal Smith, Nelson P. Boyle, James G. Heckbert, Englewood, Colorado, for Plaintiff-Appellant

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¶ 1 This case arises from the death of Christopher H. Norris, who was killed by an avalanche while skiing at Winter Park Resort. Mr. Norris's wife, Salynda E. Fleury, individually and on behalf of her minor children Indyka and Sage Norris, sued defendant, IntraWest Winter Park Operations Corporation (IntraWest), the operator of Winter Park Resort. The district court granted IntraWest's motion for determination of law and judgment on the pleadings, ruling that an avalanche is an inherent danger or risk of skiing under the Ski Safety Act, § 33-44-101 to -114, C.R.S. 2013 (the Act), and therefore IntraWest cannot be liable for Mr. Norris's death. We agree and affirm.

I. Background and Procedural History

¶ 2 On January 22, 2012, Mr. Norris was fatally injured in an avalanche while skiing inbounds at Winter Park Resort on a run known as Trestle Trees/Topher's Trees (Trestle Trees). Ms. Fleury asserted claims for negligence and wrongful death. Ms. Fleury claimed that IntraWest knew or should have known that an avalanche was likely to occur on Trestle Trees on January 22, 2012, and that IntraWest's failure to warn skiers about the likelihood of

avalanches or failure to close Trestle Trees caused Mr. Norris's death. Ms. Fleury sought an unspecified amount of economic and noneconomic damages, and punitive damages for IntraWest's alleged willful and wanton conduct.

¶ 3 IntraWest moved for a determination of law under C.R.C.P. 56(h), and a judgment on the pleadings under C.R.C.P. 12(c), asserting immunity from liability because an avalanche is an inherent danger or risk of skiing under the Act. *See* §§ 33-44-103(3.5) (defining inherent dangers and risks of skiing) and 33-44-112 (granting immunity when an injury results from an inherent danger or risk of skiing). IntraWest also asserted that the Act caps the maximum amount of compensatory damages for derivative claims at $250,000, present value. *See* § 33-44-113.

¶ 4 The court held that the avalanche that killed Mr. Norris was an inherent risk of skiing, and thus IntraWest was not liable for his death. The court dismissed Ms. Fleury's claims with prejudice, but opined that were Ms. Fleury allowed to proceed with her claims, compensatory damages would be capped at $250,000, individually and on behalf of her minor children.

II. Liability Under the Act

¶ 5 Ms. Fleury contends that the district court erred in determining that the avalanche was an inherent risk of skiing under § 33-44-103(3.5). We disagree and therefore affirm.

A. Standard of Review

¶ 6 We review a district court's order granting a judgment on the pleadings under C.R.C.P. 12(c) de novo. *In re Estate of Johnson*, 2012 COA 209, ¶ 18. We likewise review a district court's determination of a question of law under C.R.C.P. 56(h) de novo. *Henisse v. First Transit, Inc.*, 247 P.3d 577, 579 (Colo. 2011). An order deciding a question of law is proper "[i]f there is no genuine issue of any material fact necessary for the determination of the question of law." C.R.C.P. 56(h). The nonmoving party is entitled to all favorable inferences. *Henisse*, 247 P.3d at 579.

¶ 7 Statutory interpretation, the matter we must address here, presents a question of law and is also subject to de novo review. *Stamp v. Vail Corp.*, 172 P.3d 437, 442 (Colo. 2007). When the language of the statute is clear and unambiguous, we give effect to its plain and ordinary meaning. *Id.* Likewise, when the General

Assembly defines a term, we must apply that definition. *People v. Swain*, 959 P.2d 426, 429 (Colo. 1998); *In re M.D.E.*, 2013 COA 13, ¶ 10. However, when the language is ambiguous — that is, reasonably susceptible of multiple meanings — we may consider extrinsic indications of the General Assembly's intent. *Stamp*, 172 P.3d at 442; *In re M.D.E.*, ¶ 10.

B. Applicable Law

¶ 8 In adopting the Act, the General Assembly recognized that there are dangers inherent to the sport of skiing, regardless of the safety measures that may be employed by ski area operators. § 33-44-102. The Act's stated purposes are to "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 define the rights and liabilities existing between the skier and the ski area operator and between skiers." *Id.* Consistent with these purposes, the Act grants ski area operators immunity from claims for injuries resulting from any of the inherent dangers and risks of skiing. § 33-44-112. Accordingly, a skier may not

recover if his injury — or death, *see Stamp*, 172 P.3d at 447 — is the result of an inherent danger or risk of skiing.

C. Avalanches as Inherent Dangers or Risks of Skiing

¶ 9 Ms. Fleury contends that because an "avalanche" is not specifically listed as an inherent danger or risk of skiing in § 33-44-103(3.5), the General Assembly did not intend that it should be so regarded for purposes of the Act. Relying on *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007) (holding that a court cannot add words to a statute), and *Lunsford v. Western States Life Insurance*, 908 P.2d 79, 84 (Colo. 1995) (where the legislature has spoken with exactitude, a court must construe the statute to mean that inclusion or specification of a particular set of conditions necessarily excludes others), she argues that the definition of "inherent dangers and risks of skiing" is a finite list. According to Ms. Fleury, construing the definition to include avalanches would expand the scope of a ski area operator's immunity under the Act in contravention of the intent of the General Assembly. We disagree, for two reasons.

1. Plain Meaning of the Act

¶ 10 First, giving effect to the plain meanings of the words in the Act, we conclude that an avalanche fits the definition of inherent dangers and risks of skiing. As relevant here, the inherent dangers and risks of skiing include:

> those dangers or conditions that are 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; [and] variations in steepness or terrain, whether natural or as a result of slope design[.]

§ 33-44-103(3.5). We must apply this definition as written. *Swain*, 959 P.2d at 429.

¶ 11 The operative definition contains the word "including" before listing nonexclusive examples. Because the General Assembly typically uses "include" as a word of extension or enlargement, listing examples in a statutory definition does not restrict the term's meaning. *See S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1233 n.4 (Colo. 2011); *see also Lyman v. Town of Bow Mar*, 188 Colo. 216, 222, 533 P.2d 1129, 1133 (1975) (stating that the word "'include'" in a statute ordinarily signifies extension or enlargement, and it is not synonymous with the word "'mean'").

The list is illustrative and not, as Ms. Fleury argues, confined to the identified dangers.

¶ 12 In *Kumar v. Copper Mountain, Inc.*, the Tenth Circuit held that a cornice, which is not listed in the Act, is an inherent danger or risk of skiing. 431 F. App'x 736, 738 (2011). This cornice regularly formed at the intersection of two ski runs, but the resort did not post any warning signs alerting skiers to its existence or the potential danger of the steep drop-off at the edge. *Id.* at 737. The injuries in *Kumar* occurred when the skier did not see the edge of the cornice, and he unintentionally skied off of that edge. *Id.* The Tenth Circuit concluded that a cornice falls within the statutory definition of an inherent danger or risk of skiing either "within the section relating to snow conditions as they exist or change, or the provision covering variations in steepness or terrain." *Id.* at 738.

¶ 13 Similar to a cornice, an avalanche — "a large mass of snow, ice, earth, rock, or other material in swift motion down a mountainside or over a precipice," *see Webster's Third New International Dictionary Unabridged* 150 (2002); *see also Union Ins. Co. v. Houtz*, 883 P.2d 1057, 1068 (Colo. 1994) (an appellate court

may consult recognized dictionaries to determine the ordinary meanings of words) — fits one or more of the statutory examples of inherent dangers or risks of skiing.

¶ 14 Ms. Fleury's complaint alleges that the avalanche that killed Mr. Norris was caused by new snowfall on top of a weak and unstable snowpack on a north-facing slope of greater than thirty degrees. Thus, even pursuant to Ms. Fleury's own allegations, the avalanche resulted from changing snow conditions (new snowfall) and existing snow conditions (weak and unstable snowpack) caused by weather and slope steepness (slope exceeding thirty degrees).

¶ 15 An avalanche falls neatly into the examples of dangers in the Act, and comports with the common understanding of a "danger": a "[p]eril; exposure to harm, loss, pain, or other negative result." *Black's Law Dictionary* 450 (9th ed. 2009); *see also Union Ins. Co.*, 883 P.2d at 1068. An avalanche is itself a danger resulting from certain conditions of snow, and the degree of danger is affected by "changing weather conditions" across "variations of steepness and terrain." *See Mannhard v. Clear Creek Skiing Corp.*, 682 P.2d 64, 66

(Colo. App. 1983) (characterizing avalanche danger as arising from dangerous natural snow conditions).

¶ 16 We thus construe the definition of inherent dangers and risks of skiing in § 33-44-103(3.5) as written to include an avalanche. *See Swain*, 959 P.2d at 429; *Kumar*, 431 F. App'x at 738. This construction is fully consistent with the legislative recognition that, regardless of all reasonable safety measures a ski area operator may employ, skiing is fraught with dangers. *See* § 33-44-102; *see also Mannhard*, 682 P.2d at 66.

2. Legislative Intent

¶ 17 Since its enactment in 1979, the General Assembly has amended the Act to increasingly limit a ski area operator's liability for skiing-related injuries.[1] In 1990, the General Assembly added section 112, which immunizes ski area operators from liability for a

[1] It is true that statutes granting immunity are in derogation of the common law and must be strictly construed. *See State v. Nieto*, 993 P.2d 493, 506 (Colo. 2000). It is equally true, however, that we must assume that General Assembly knew this law when it increasingly broadened ski area operators' immunity. *See Smith v. Miller*, 153 Colo. 35, 39, 384 P.2d 738, 740 (1963) ("[I]t must be assumed that the legislature acted with full knowledge of relevant constitutional provisions, inherent judicial powers existing, and of previous legislation and decisional law on the subject[.]").

skier's injury resulting from any of the inherent dangers and risks of skiing. *See* Ch. 256, sec. 7, § 33–44–112, 1990 Colo. Sess. Laws 1543; *see also Stamp*, 172 P.3d at 443-44 (Colo. 2007) ("By narrowly defining the claims that can be brought by injured skiers against ski area operators and by limiting the recovery in successful skiers' claims, the 1990 amendments broaden the [Act's] protection of ski area operators.").

¶ 18 In 2004, the General Assembly changed the definition of inherent dangers and risks of skiing from "dangers or conditions which are an integral part of the sport of skiing" to "dangers or conditions that are part of the sport of skiing," thereby broadening the types of inherent risks covered by the Act and decreasing the liability of ski area operators. *See* Ch. 341, sec. 1, § 33-44-103(3.5), 2004 Colo. Sess. Laws. 1393. Removing the words "an integral" effectively abrogated the part of the supreme court's holding in *Graven v. Vail Associates*, 909 P.2d 514, 520 (Colo. 1995), that required courts to determine if a danger encountered on the ski

slopes was "integral to the sport,"[2] and only granted immunity for such dangers.

¶ 19 We conclude that the inclusion of an avalanche as an inherent danger or risk of skiing is consistent with the General Assembly's intent, as evidenced by the evolution of the Act.

D. Duty to Warn

¶ 20 We also reject Ms. Fleury's argument that IntraWest is liable for Mr. Norris's death because it failed to close Trestle Trees — and failed to post closure signage — or warn skiers about the avalanche danger on January 22, 2012.

¶ 21 The Act prescribes the rights and responsibilities of ski area operators, *see* § 33-44-102, and two sections of the Act require sign placement throughout the ski area. Section 33-44-106 requires specific signs at the loading and unloading positions of ski lifts or tramways, and section 33-44-107 requires signs noting the difficulty of each slope, the entry point of extreme and freestyle

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[2] Following *Graven* and construing the Act's definition of "inherent dangers and risks of skiing," *Rowan v. Vail Holdings, Inc.*, 31 F. Supp. 2d 889, 903 (D. Colo. 1998), defined "integral to the sport" as those risks that are so integrally related to skiing that the sport cannot be undertaken without confronting those risks. *Id.*

terrain, closed trails or slopes, ski area boundaries, and man-made structures along the slopes. Significantly, the Act's signage requirements relate to man-made obstacles, ski area boundaries, and the steepness of the terrain. An avalanche is neither man-made nor a constant feature on the terrain.

¶ 22 Further, the General Assembly's 2004 amendments removed a part of § 33-44-107(2)(d) that previously required ski area operators to post a sign notifying skiers of "danger areas," which exclude "areas presenting inherent dangers and risks of skiing." *See* Ch. 341, sec. 2, § 33-44-107(2)(d), 2004 Colo. Sess. Laws. 1393. This change further evinces that the General Assembly intended to broaden the immunity of ski areas by decreasing their obligations and responsibilities.

¶ 23 Again, *Kumar*, 431 F. App'x 736, is instructive. It held that Copper Mountain was not required to warn skiers about the cornice because "[a] ski area operator is negligent for failure to warn only when it violates the specific and detailed warning requirements of [the Act] as set forth in §§ 33-44-106 and -107." *Id.* at 739. Additionally, *Kumar* held that inherent dangers and risks of skiing

include skiing over features, like cornices, that are not subject to the statute's signage requirements. *Id.*

¶ 24 We see nothing in the Act to support Ms. Fleury's interpretation that IntraWest was required to close Trestle Trees or post warning signs, notwithstanding the fact that IntraWest may have had the ability to do so. The Act enumerates specific sign requirements and does not require ski area operators to warn skiers of possible avalanches or to close slopes with avalanche danger. Therefore, IntraWest was under no duty to post a warning sign at, or to close, Trestle Trees on January 22, 2012. *See Kumar*, 431 F. App'x at 739.

¶ 25 As discussed above, the General Assembly has increasingly broadened ski area operators's immunity for skier injuries. While Mr. Norris's death was tragic, IntraWest is not liable under the Act. If the General Assembly wishes to hold ski areas accountable for avalanche-related injuries or deaths, it should amend the Act.

¶ 26 We thus conclude that the district court properly dismissed Ms. Fleury's claims against IntraWest.

III. Recovery Limits

¶ 27 Because we find no liability, we decline to address Ms. Fleury's claim that the district court erred in determining that her recovery is statutorily capped at $250,000.

¶ 28 The judgment is affirmed.

JUDGE NAVARRO concurs.

JUDGE J. JONES dissents.

J. JONES, J., dissenting.

¶ 29 I respectfully dissent from the majority's conclusion that an avalanche is an inherent danger or risk of skiing as defined in subsection 33-44-103(3.5), C.R.S. 2013. In my view, that provision does not expressly or by clear implication include avalanches occurring on open, designated ski trails within its definition; therefore, the grant of immunity in section 33-44-112, C.R.S. 2013, for injuries resulting from the inherent dangers and risks of skiing does not apply to injuries resulting from such avalanches. Because Mr. Norris was killed as a result of an avalanche on an open, designated trail within the ski area — an event for which IntraWest does not have immunity — I would reverse the district court's judgment and allow his family members' claims to proceed.

I. The Relevant Statutes

¶ 30 Section 33-44-112 provides in relevant part that "[n]otwithstanding any judicial decision or any other law or statute 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 dangers and risks of skiing." This provision therefore

grants any "ski area operator" (a term defined in subsection 33-44-103(7)) immunity from suit and damages for injuries resulting from inherent dangers and risks of skiing. *See Johnson v. Bodenhausen*, 835 F. Supp. 2d 1092, 1094-96 (D. Colo. 2011); *see also Air Wis. Airlines Corp. v. Hoeper*, 2012 CO 19, ¶¶ 19-25 (discussing the distinction between immunity from suit and immunity from damages), *rev'd on other grounds*, 561 U.S. ___ (2014).[1]

¶ 31 Subsection 33-44-103(3.5), in turn, defines "inherent dangers and risks of skiing." It provides in full as follows:

> "Inherent dangers and risks of skiing" means those dangers or conditions that are 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, cliffs, extreme terrain, and trees, or other natural objects, and collisions with such natural objects; impact with lift towers, signs, posts, fences or enclosures, hydrants, water pipes, or other man-made structures and their components; variations in steepness or terrain, whether natural or as a result of slope design, snowmaking or grooming

[1] It is undisputed that the claims asserted here are those of a "skier," and that IntraWest is a "ski area operator."

> operations, including but not limited to roads, freestyle terrain, jumps, 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.

See also § 33-44-107(8)(c), C.R.S. 2013 (setting forth what a warning on every lift ticket must state).

¶ 32 The question here is whether an avalanche occurring on an open, designated ski trail within a ski area clearly fits within this statutory definition of "inherent dangers and risks of skiing." If it does, the suit is barred. If it does not, the suit is not barred.

II. Standard of Review

¶ 33 The district court granted IntraWest's motion for judgment on the pleadings pursuant to C.R.C.P. 12(c), and its motion for a determination of a question of law pursuant to C.R.C.P. 56(b). As the majority correctly notes, we review decisions granting both such motions de novo. And the sole question presented in the context of

those motions is one of statutory interpretation, the resolution of which is a question of law that we also review de novo.

III. Applicable Principles of Statutory Interpretation

¶ 34 Our primary goals in applying any statute are to discern and then give effect to the General Assembly's intent. *Hassler v. Account Brokers of Larimer Cnty., Inc.*, 2012 CO 24, ¶ 15; *Commercial Research, LLC v. Roup*, 2013 COA 163, ¶ 7. We first look to the statutory language, giving the words and phrases used therein their plain and ordinary meanings. *Hassler*, ¶ 15; *Krol v. CF & I Steel*, 2013 COA 32, ¶ 15. But we do not consider those words and phrases in isolation. Rather, we must read the relevant statutory language in the dual contexts of the particular statute at issue and the entire related statutory scheme. *Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010); *Commercial Research*, ¶ 7. And we must do this so as to give consistent, harmonious, and sensible effect to all parts of the statute. *Jefferson Cnty. Bd. of Equalization*, 241 P.3d at 935.

¶ 35 If this analysis shows that the relevant statutory language is unambiguous, we apply it as written, without resorting to other

methods of ascertaining legislative intent. *Id.*; *accord Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011). But if this analysis shows that the relevant statutory language is ambiguous, we may consider other indicators of legislative intent. *Jefferson Cnty. Bd. of Equalization*, 241 P.3d at 935; *Commercial Research*, ¶ 7. Such indicators may include, for example, legislative history, the General Assembly's declaration of purpose, prior law, and the consequences of a particular construction. *See* § 2-4-203, C.R.S. 2013; *Jefferson Cnty. Bd. of Equalization*, 241 P.3d at 935; *Bd. of Cnty. Comm'rs v. Costilla Cnty. Conservancy Dist.*, 88 P.3d 1188, 1193 (Colo. 2004).

¶ 36 Statutory language is ambiguous if it is susceptible of more than one reasonable interpretation. *See A.M. v. A.C.*, 2013 CO 16, ¶ 8; *see also Jefferson Cnty. Bd. of Equalization*, 241 P.3d at 936 ("A statute is ambiguous when it 'is capable of being understood by reasonably well-informed persons in two or more different senses.'" (quoting in part 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 45:2, at 13 (7th ed. 2007))).

¶ 37 Ordinarily, the foregoing general principles supply a sufficient framework for resolving a question of statutory interpretation. But because the statutes at issue in this case grant an immunity from suit, other principles come into play. Specifically, we must strictly construe such statutes because they are in derogation of the common law. *State v. Nieto*, 993 P.2d 493, 506 (Colo. 2000); *see Clyncke v. Waneka*, 157 P.3d 1072, 1077 (Colo. 2007) (per Bender, J., with two justices concurring and one justice concurring in the judgment; applying this principle to a statute granting limited immunity to persons involved in equine activities). And, if the General Assembly "wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent either expressly or by clear implication." *Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1076 (Colo. 1992); *see Ryals v. St. Mary-Corwin Reg'l Med. Ctr.*, 10 P.3d 654, 661 (Colo. 2000) ("A statute may modify or restrict a common law right 'only to the extent embraced by the statute, which may not be enlarged by construction, nor its application extended beyond its specific terms.'" (ultimately quoting in part *Robinson v. Kerr*, 144 Colo. 48,

52, 355 P.2d 117, 119-20 (1960))); *Farmers Grp., Inc. v. Williams*, 805 P.2d 419, 423 (Colo. 1991) (same; and citing cases for the proposition that the intent to abrogate a common law right must appear clearly, either "directly or by necessary implication" (internal quotation marks omitted)).

IV. Analysis

¶ 38 The majority errs, I believe, in giving the definition of "inherent dangers and risks of skiing" in subsection 33-44-103(3.5) an expansive reading rather than a narrow one. Avalanches are not mentioned in that definition.[2] The majority concludes that they are nevertheless included within the definition by cobbling together three categories of covered dangers and risks — "changing weather conditions," "snow conditions as they exist or may change," and "variations in steepness and terrain." Fundamentally, I believe that approach contravenes the governing principles that a statute's grant of immunity must be strictly construed, may not be expanded by construction, and must appear expressly or by clear implication.

[2] Avalanches are not mentioned anywhere in the Ski Safety Act.

¶ 39 It also seems to me that the General Assembly has spoken with exactitude in defining inherent dangers and risks of skiing, delineating with specificity the types of conditions and events which fall within that definition. In *Vigil v. Franklin*, 103 P.3d 322 (Colo. 2004), the supreme court, in construing a statute limiting liability, made clear that "'when the legislature speaks with exactitude, [a court] must construe the statute to mean that the inclusion or specification of a particular set of conditions necessarily excludes others.'" *Id.* at 327 (quoting *Lunsford v. W. States Life Ins.*, 908 P.2d 79, 84 (Colo. 1995)).

¶ 40 It is not as if avalanches are unheard of occurrences in mountainous areas, or even on or near ski areas. And yet the General Assembly — despite formulating a lengthy definition identifying numerous specific conditions and events — did not expressly (or otherwise clearly) include avalanches. Given the exactitude with which the General Assembly has spoken, I do not believe it is appropriate for us to essentially add another event to the definition.

¶ 41 Even were I to agree with the majority that we may aggregate categories of conditions and events to infer inclusion of unmentioned conditions or events, I would not agree with the majority that aggregation of the three categories on which it relies unambiguously shows that avalanches are included within the statutory definition.

¶ 42 An avalanche is "a large mass of snow, ice, earth, rock, or other material in swift motion down a mountainside or over a precipice." *Webster's Third New Int'l Dictionary* 150 (2002). It is, therefore, an event — one that not even necessarily involves snow. Thus understood, I believe that the majority's effort to fit avalanche within the statutory definition fails on its own terms.

¶ 43 The statute includes "changing weather conditions" within the definition. Though, to be sure, a change in weather conditions may contribute to the creation of an avalanche, the fact remains that an avalanche cannot be characterized as a change in weather conditions — avalanches and changing weather conditions are qualitatively different kinds of events.

¶ 44 In including "snow conditions as they exist or may change" within the definition, the General Assembly explained what it meant by that term by following it with "such as ice, hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, and machine-made snow." These examples describe types of snow by the snow's physical properties or source. An avalanche is not such a condition.

¶ 45 Nor is an avalanche a "variation[] in steepness or terrain." Again, the General Assembly explained that term. It includes variations "whether natural or as a result of slope design, snowmaking or grooming operations, including but not limited to roads, freestyle terrain, jumps, and catwalks or other terrain modifications." This describes conditions as encountered by a skier in the ordinary course of skiing, and in static condition. An avalanche is not such a condition.[3]

¶ 46 Further, an avalanche may not be caused by a combination of changing weather conditions, snow conditions, and variation in

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[3] In this way an avalanche is distinguishable from the cornice at issue in *Kumar v. Copper Mountain, Inc.*, 431 F. App'x 736 (10th Cir. 2011). A cornice is clearly a variation in steepness or terrain.

steepness or terrain. Other factors, such as human conduct, may contribute to the creation of such an event.

¶ 47 The majority's analysis also fails to account for the fact that the General Assembly identified particular events which would fit within the statutory definition — collisions with natural objects, impacts with man-made objects, and collisions with other skiers. The event at issue here — an avalanche — is not among them.[4]

¶ 48 In sum, I do not believe that the statutory categories of dangers and risks, considered fully, in context, and as a whole, unambiguously encompass avalanches occurring on open, designated ski trail. *See Jefferson Cnty. Bd. of Equalization*, 241 P.3d at 935 (the meaning of a statutory term must be determined by considering its context).

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[4] The statutes certainly cover events which occur because of a skier's encountering the conditions identified, and in that sense cover other events. *See* § 33-44-112 (providing immunity for claims for injuries "resulting from" those conditions). But that merely begs the question whether the skier encountered such a condition. If the condition or event was not one within the definition in subsection 33-44-103(3.5), there is no immunity. The "resulting from" language in section 33-44-112 is not an expansion of the definition in subsection 33-44-103(3.5).

¶ 49 Because, as noted above, a grant of immunity must appear expressly or by clear implication, this conclusion arguably ends the analysis. But there is some authority to the effect that looking to legislative history is appropriate in these circumstances. *See Picher v. Roman Catholic Bishop of Portland*, 974 A.2d 286, 294 (Me. 2009). To be on the safe side, I have considered the legislative history, as well as other indicators of legislative intent.

¶ 50 The legislative history is not enlightening. The General Assembly's declaration of purpose, however, is of some help. It provides that one of the purposes of the Ski Safety Act is to further define the legal responsibilities of ski area operators with respect to "the dangers that inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed . . . ." § 33-44-102, C.R.S. 2013. "Inhere" has been defined as "[t]o exist as a permanent, inseparable, or essential attribute or quality of a thing; to be intrinsic to something." *Black's Law Dictionary* 853 (9th ed. 2009); *see also Webster's Third New Int'l Dictionary* 1163 (defining "inherent" as "structural or involved in the constitution or essential character of something: intrinsic, essential").

¶ 51 In my view, avalanches are not "intrinsic" to "the sport of skiing" on open, designated ski trails within ski areas. They stand in contrast to the conditions and events listed in subsection 33-44-103(3.5), all of which seem to me to be such as a reasonable skier would reasonably anticipate or expect.

¶ 52 Lastly, my research of similar statutes in other states turned up one revealing nugget. Statutes in several other states relating to ski area operator immunity define inherent dangers and risks of skiing in terms almost identical to those in subsection 33-44-103(3.5). *See, e.g.*, Idaho Code Ann. § 6-1106 (2013); Mont. Code Ann. § 23-2-702(2) (2013); N.M. Stat. Ann. § 24-15-10 (2014); Or. Rev. Stat. § 30.970(1) (2014); Utah Code Ann. § 78B-4-402(1) (West 2013). As far as I can tell, they do not mention avalanches, with one exception — Montana's statute.

¶ 53 Mont. Code Ann. § 23-2-702(2) includes within the definition of "[i]nherent dangers and risks of skiing" all of the conditions and events included in section 33-44-103(3.5). But it adds one more — "avalanches, except on open, designated ski trails." § 22-2-702(2)(c). This tells me two things. First, Montana's legislature did

not believe avalanches were covered by the other portions of the definition — including those on which the majority relies in this case. And second, the Montana legislature did not view avalanches occurring on open, designated ski trails as an inherent danger or risk of skiing.[5] Unless the Montana legislature's view is to be regarded as unreasonable as a matter of law, *see A.M.*, ¶ 8 (a statute is ambiguous if it is susceptible of more than one reasonable interpretation), I think this indicates at the very least some ambiguity in Colorado's statute — an ambiguity which must be resolved by concluding that there is no immunity for injuries resulting from avalanches. *See Van Waters & Rogers*, 840 P.2d at 1076 (an abrogation of a common law right must appear expressly or by clear implication).

¶ 54 For the foregoing reasons, I respectfully dissent.

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[5] This last point is further supported by the fact that, in 2007, a bill was introduced in the Montana legislature which would have (in part) deleted the language "except on open, designated ski trails" from subsection (2)(c); however, the final bill that was enacted did not make that deletion.