

SUPREME COURT, STATE OF COLORADO

BRIEF OF *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR CERTIORARI

People of the State of Colorado,

Petitioner

v.

Nathan Hall

Respondent

James H. Chalat, as *Amicus Curiae*, and pursuant to C.A.R. 29, respectfully submits this brief in support of the Petition for Certiorari.

I. SUMMARY OF THE ARGUMENT

Skiing safety is a paramount issue of statewide concern. Many Coloradans ski. Many Coloradans are economically reliant on the ski industry. Many citizens of other states, and nations, come to Colorado to ski and snowboard. Skiers and snowboarders assume that our courts will not tolerate recklessness which causes death, whether it be on the slopes, on the highway while driving to the mountain, or in a ski town saloon *après ski*.

The decision below acknowledged that the Defendant-Respondent (“Hall”) was skiing recklessly, too fast for conditions, on an a slope open to the public, and that Hall’s speed was so great as to inflict on the victim (“Cobb”) fatal injuries, as if Cobb had suffered a high speed car accident. The record below contained testimony from which a jury could conclude that Hall was skiing recklessly, at a high speed, sitting back, directly down the fall line, bouncing off of

moguls, becoming airborne, and colliding into Cobb, probably with Hall's skis striking Cobb in the side of the head, killing him.

Yet, the decision below concludes that such conduct could not be found, by any reasonable jury, to evince a mental state of disregard for the safety of others sufficient to support a charge of reckless manslaughter.

The decision below takes, as its antecedent premise, the incorrect assumption that reckless skiing cannot reasonably be expected to cause death to another skier on the slope. At the heart of the decision is the false distinction between recklessness causing injury, versus recklessness causing death.

The premise and the distinction are inaccurate.

It is accepted fact that reckless high speed skiing may cause the reckless skier's own death. It is equally reasonable to infer that a skier's reckless high speed skiing can also result in the injury or death of another. The view that substantial injury might be foreseeable but that death is not, amounts to a distinction without a factual basis, in logic or experience.

II. INTEREST OF THE *AMICUS CURIAE*

The implications, of the decision below, are far-reaching and profoundly unsettling for the skiing public. Colorado courts have traditionally been proponents of skier safety. But from the decision below, a bewildering inference is drawn. Does this mean that one's recklessness will result in criminal charges only if the victim is injured, but not killed? Does the state on one hand impose civil liability for negligence, but no criminal culpability for recklessness? The clear and consistent policy of Colorado should be to encourage safe skiing, and to impose appropriate

criminal sanctions on the responsible party, when criminal recklessness causes another person's death.

The decision unwisely signals that reckless skiing is tolerated in Colorado. Beyond the effect of casting a shadow on the safety of Colorado skiers, the decision below will erode confidence in skier safety, and thus threaten Colorado's ski industry.

The questions raised herein are not matters of isolated, local concern, but impact the entire state. Colorado depends to a great extent on its tourism business. Alpine skiing, snowboarding, and related activities, constitute a substantial portion of Colorado's tourism economy. The ski business is extremely competitive, and Colorado ski communities vie for skiers against well developed, well-capitalized resorts, in other states, Europe and Canada. Increasingly, ski safety is becoming a factor in the destination choice of skiers, especially for families.¹ The decision below degrades skier safety, and thus will have an adverse effect on this important segment of the Colorado economy, as it suggests that reckless and unsafe behavior on Colorado's ski slopes will be tolerated by law enforcement.

Colorado slopes host one-fifth of all skier visits in the United States. More people come to Colorado to ski and snowboard, than to any other state in the union. We are truly the leading state in the nation for skiing. Colorado has a leadership role in matters of ski safety. This Court's moral authority should be asserted in favor of ski safety.

For these reasons, this Court should take up the case, for full review.

¹ McDowell, "Changing Skiing's Macho Image," N.Y. TIMES, Feb. 15, 1997 at 21; Witchel, "What do Mothers Want?" SKI AREA MANAGEMENT p. 64 (Jan. 1996).

III. ARGUMENT - REASONS TO ALLOW THE WRIT

A. It is reasonably foreseeable that reckless skiing can cause death to another.

Skiing can be dangerous. *Graven v. Vail Associates, Inc.*, 909 P.2d 514 (Colo. 1995). High speed collisions with fixed objects can be fatal. *Rowan v. Vail Holdings, Inc.* --- F.Supp.2d ----, 1998 WL 901546 (96-D-2761, D.Colo.12/24/98)(decedent collided into viewing stand); *Martin, v. Spirit Mountain Recreation Area Authority*, 566 N.W.2d 719 (Minn. 1997)(decedent hit tree); *Yauger v. Skiing Enterprises, Inc., d/b/a Hidden Valley Ski Area*, 206 Wis.2d 76, 557 N.W.2d 60 (Wis. 1996)(child killed in collision with unpadded concrete lift tower foundation); *Brouhard v. Johnson, d/b/a Frost Fire Mtn. Resort*, 555 N.W.2d 81 (ND 1996)(tree); *Schmitz v. Cannonsburg*, 170 Mich.App. 692, 428 N.W.2d 742 (Mich 1988)(tree); *Scott v. Pacific West Mountain Resort*, 834 P.2d 6 (Wash. 1992)(timing hut).

These examples of high-speed, fatal, collisions with fixed objects, are merely some of the cases which have reached courts throughout the country. Countless examples exist of high-speed skiers striking fixed objects with sufficient velocity to cause death to themselves. It only stands to reason from logic and experience that if, rather than hitting a tree, the reckless skier hits another skier, that the forces involved are sufficient to kill, either the speeding skier, the victim into whom he collides, or both. Nevertheless, the Court below held:

The Court does not find that a person of ordinary prudence and caution would infer, in the absence of other evidence and under the circumstances of this case, a substantial risk of death in the event of collision, from the fact that Defendant was skiing too fast for conditions and out of control. (Order Affirming County Court Judgment, 1/13/99)

High speed skier-skier collisions may result in severe injuries, such as a career ending orthopaedic injury, *Ulissey v. Shvartsman*, 61 F.3d 805 (10th Cir. 1995); a severe head injury,

Clover v. Snowbird, 808 P.2d 1037 (Utah 1991); or to reduce a young man to a lifelong coma, *Giebink v. Fischer*, 709 F.Supp. 1012 (D.Colo., 1989). It follows from logic, as well as experience, that the recklessness of a high speed skier can result in the death of another skier on an slope open to the public. The Colorado federal court has reviewed such a factual situation, although the issues before it were entirely different, in the unfortunate case of *Glover v. Vail Corporation*, 955 F.Supp. 105, affirmed 137 F.3d 1444 (10 Circ. 1998).

B. Authoritative studies bear out the common sense appreciation for the risk of death to others, posed by high speed reckless skiing.

The statistics bear out common sense, experience and observations. The National Ski Areas Association reports that about 33 people have died skiing/snowboarding per year on average. During the 1997-98 season, 26 fatalities occurred out of the 54.1 million skier/snowboarder days reported for the season. The per-participant skier/snowboarder fatality rate in 1997 equates to 2.4 per 1 million on-slope participants. Most deaths are a result of skiers hitting fixed objects, especially trees, at high speeds. ²

Specifically related to the question of collisions, the United States Consumer Product Safety Commission has recently studied 108 skiing deaths occurring between 1990 - 1997. Nine of these were skiing deaths resulting from collisions with another person. Industry studies, from here and abroad, agree that skier-skier collisions cause from 3.5% to 5% of all skiing injuries; but, in full agreement with the CPSHC report, the studies conclude that skier-skier collisions result in a disproportionately higher rate of severe injuries. The studies indicate that over thirty per cent of skier collisions result in head injuries. Bluntly recommending helmets for children,

² National Ski Areas Association,
(<http://www.nsaa.org/MemberUpdate/factssafety.htm>).

the studies attest that children were especially vulnerable to head injuries caused by skier collisions.³

Most skier fatalities are a direct result of high speed skiing in circumstances similar to the Hall/Cobb accident, and also involve a young man, skiing at high speeds, on intermediate trails. Most skiing fatalities and injuries occur in the same population that engages in other high-risk behavior. Victims are predominantly male, in their late teens to late twenties. Experts observe that this is the same population that suffers most fatal car accidents and most industrial accidents.

4

To hold, as a matter of law, that reckless high speed skiing does not present a foreseeable risk of death, is simply untrue, and disregards logic, common sense, and fact.

C. Policy reasons to allow the writ.

1. Skier safety is eroded by the decision below.

³ “Skiing Helmets, An Evaluation of the Potential to Reduce Head Injury,” U.S. Consumer Product Safety Commission (Washington, D.C., January 1999); Ekeland, et al., "Alpine Skiing Injuries in Children," Skiing Trauma and Safety: Ninth International Symposium, ASTM STP 1182, pp. 43-49 (Johnson, Mote and Zelcer, Eds., A.S.T.M., 1993); Burtscher and Philadelphia, "Skiing Collision Accidents: Frequency and Types of Injuries" Skiing Trauma and Safety: Tenth Volume, ASTM STP 1266, pp. 73-76 (Mote, Johnson, Hauser and Schaff, Eds., A.S.T.M., 1996); Jenkins, Johnson and Pope, "Collision Injuries in Downhill Skiing," Skiing Trauma and Safety:Fifth International Symposium, ASTM STP 860, pp. 358-366 (Johnson and Mote, Eds., A.S.T.M.,1985).

⁴ Shealy, "Death in Downhill Skiing from 1976 Through 1992, a Retrospective View," Skiing Trauma and Safety: Tenth Volume, ASTM STP 1266, pp. 66-73 (Mote, Johnson, Hauser and Schaff, Eds., A.S.T.M. 1996).

The decision below was erroneous on its merits. Courts should not allow economic policy concerns to drive determinations which effect fundamental liberties in criminal cases. However, this Court should take up this case because the error of the Court below has the unfortunate, and unintentional effect of undermining skier safety in Colorado. For many years, Colorado district attorneys have prosecuted reckless skiers when death or serious injury resulted. For instance, in 1989, Howard Hidle pled guilty to criminally negligent homicide in a skier collision causing the death of a child. *People v. Hidle*, Grand County, 89 CR 68. In *People v. Coglán*, the defendant ultimately pled to felony charges in connection with the serious injuries he caused to a child into whom he collided. *People v. Coglán*, Routt County, 89 CR 44. These prosecutions were generally well publicized, and reinforced the public's understanding that reckless skiing would not be tolerated in Colorado. The unfortunate implication to be drawn from the decision below, is that Colorado does not have the legal framework in place to undertake such prosecutions, and that reckless skiing will not be sanctioned. As a result, the public can apprehend an increased risk of harm from reckless skiers.

2. The ski industry is harmed by the decision below.

The Colorado ski industry is a leading economic force in Colorado. Based on several studies, it can be fairly argued that skiing accounts for about 3 percent of Colorado's Gross State Product.⁵

⁵ A published ski industry study completed in 1991 stated that skiing generated direct and secondary sales attributable to skiing and associated resort operations in excess of \$2.5 billion. In 1991, Colorado's Gross State Product was approximately \$79.042 billion. U.S. Bureau of Economic Analysis, (http://www.bea.doc.gov/gsp/gspdata/gsp_co.prn).

In 1997-1998, Colorado resorts drew about 12.06 million skier visits, by far, the most popular state for skiing.⁶

Focusing on the resort where the Hall/Cobb accident occurred, we learn that Vail Mountain measured 1.6 million skier/days in the 1997-1998 season. In and of itself, Vail Mountain contributes significantly to the local and state economy.⁷ Moreover, skiing remains the Western Slope's largest industry, outstripping traditional industries such as agriculture, mining, and petroleum. Chalat, "Colorado Ski Law" 27 COLO. LAW. 5 (Feb. 1998).

Thus, substantial economic interests of Colorado are effected by the decision, as consumers who are choosing between ski destinations, will perceive Colorado as a less safe for skiing.

⁶ NSAA reports that about 53 million skier days occur annually in the United States. (<http://www.nsa.org/MemberUpdate/estskiervisits.htm>)

⁷ Colorado Ski Country USA, "Colorado Ski industry Statistics" Denver Post (6/23/98); Id. Fn 4. Vail Associates reports that on average, skiers spend \$68.00/day of skiing at Vail. Last ski season, Vail Mountain, alone, generated \$109 million of Colorado's gross state product of \$120 billion.

IV. CONCLUSION

For the reasons above undersigned supports the petition and respectfully requests that the Court grant certiorari.

DATED: _____

Respectfully submitted,

CHALAT LAW OFFICES, P.C.

James H. Chalats, #8037
Amicus Curiae
1900 Grant Street, Suite 1050
Denver, Colorado 80203
Telephone: (303) 861-1042