COSSOUL, ET AL. v. HEAVENLY VALLEY LP, ET AL., SC20180207

Ski Resort Defendants' Motion for Summary Judgment

Plaintiffs Tanguy Cossoul and Nolann Cossoul, both minors, by and through their guardian ad litem Matthew Cossoul, and Matthew Cossoul, individually, commenced this action in October 2018, alleging causes of action against numerous defendants for (1) negligence/premises liability/failure to warn, (2) dangerous condition of property (Gov. Code § 835), (3) negligence (Gov. Code § 815.2), and (4) negligent infliction of emotional distress/bystander liability.[1]

Defendants Heavenly Valley LP, dba Kirkwood Mountain Resort, VR Heavenly I, Inc., and Vail Resorts, Inc. (collectively, "Resort defendants") move for summary judgment against the 1st C/A for negligence/premises liability/failure to warn on the following grounds:

1. The 1st C/A is barred by the doctrine of primary assumption of risk because plaintiff's accident and injuries are due to the inherent risks of snowboarding, as to which the Resort defendants owed no duty to plaintiff; and
2. The 1st C/A fails as a matter of law because the Resort defendants had no duty to eliminate, guard against, or warn plaintiff of potential dangers on property owned by others.

A. THE COMPLAINT

This action arises from injuries Tanguy sustained while snowboarding with his father Matt, his brother Nolann, Xavier Cremoux, and Matthew Cremoux at Kirkwood Mountain Resort on April 16, 2017.[2] Tanguy was 15 years old at the time of the accident. (Compl., ¶ 14.) The Cossouls were staying at the Timber Ridge

[1] Matthew and Nolann dismissed their claims in the complaint, with prejudice, on June 12, 2019. (Pl.'s Index of Evid. & Evid. in Opp'n to Mot., Ex. 3.)

[2] The court will use the Cossouls' and Cremouxs' first names to avoid confusion, not out of disrespect.

townhomes located on Palisades Drive. (*Id.*, ¶ 16.) Timber Ridge is part of The Palisades at Kirkwood Homeowners' Association, which was designed and advertised as a "ski-in/ski-out" area. (*Id.*, ¶¶ 11, 16.) Palisades Drive is a residential road providing access to the homes in the ski-in/ski-out area. (*Id.*,¶ 19.)

At or around 3:00 p.m., the group was traveling on a run named Lower Olympic to the ski-in/ski-out area. (*Id.*, ¶ 17.) On or before April 16, 2017, the route the group took led to an area where the snow pack abruptly terminated, creating a cliff approximately 20 to 25 feet high, down to Palisades Drive. (*Id.*,¶¶ 22–23.) As Tanguy traveled this course and approached Palisades Drive on his snowboard, he did not see or detect the drop-off from the edge of the snow to the roadway and he fell over the edge. (*Id.*,¶ 23.)

His father called 911, and Kirkwood Ski Patrol personnel and an El Dorado County Emergency Medical Services ambulance arrived on scene to render aid. (*Id.*,¶ 24.) Tanguy was transported by helicopter to a hospital in Reno. (*Ibid.*) He suffered a traumatic brain injury, ruptured diaphragm, compressed left lung, and broken hip in the fall. (*Id.*,¶ 25.) Due to swelling and clotting in his brain, Tanguy fell into a coma for three months. (*Ibid.*)

B. STANDARD OF REVIEW

A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action at issue cannot be established, or that there is a complete defense to the cause of action. (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party bears the initial burden of making a prima facie showing of the nonexistence of a triable issue of material fact, and only if the moving party carries the initial burden does the burden shift to the opposing party to produce a prima facie showing of the existence of a triable issue of material fact. (*Ibid.*)

"A motion for summary judgment must be decided on admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions

and matters of which judicial notice may be taken. [Citation.] … [¶] 'Personal knowledge and competency must be shown in the supporting and opposing affidavits and declarations. [Citations.] [¶] The affidavits must cite evidentiary facts, not legal conclusions or "ultimate" facts. [Citation.] [¶] Matters which would be excluded under the rules of evidence if proffered by a witness in a trial as hearsay, conclusions or impermissible opinions, must be disregarded in supporting affidavits. [Citation.]' " (*Guthrey v. State of Cal.* (1998) 63 Cal.App.4th 1108, 1119–1120 [internal quotation marks omitted], quoting *Hayman v. Block* (1986) 176 Cal.App.3d 629, 638.)

"The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1024.) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion. (*Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417.)

C. PRELIMINARY MATTERS

1. Plaintiff's Objections to Resort Defendants' Evidence

Objections to Declaration of Jill Haley Penwarden

No. 1: Sustained on the grounds of improper use of discovery responses and hearsay. (Code of Civ. Proc. § 2030.410; *Castaline v. City of Los Angeles* (1975) 47 Cal.App.3d 580, 587–589 [a third-party's interrogatory responses are hearsay as against other parties].) " 'It would be unreasonable and absurd to permit questions and answers respectively propounded and received in an interrogatory proceeding between two parties to be used against a third party when the latter is not given the right to propound cross-interrogatories or to exercise the privilege conferred upon the party initiating the proceeding … to require the adverse party to whom the interrogatories are directed to make a further response.' [Citations and footnote.]"

(*Castaline*, *supra*, 47 Cal.App.3d at pp. 587–588, quoting *Assocs. Discount Corp. v. Tobb Co.* (1966) 241 Cal.App.2d 541, 551–552 [superseded by statute on unrelated issue].)

The case *The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, cited by Resort defendants in reply to the objection, is not on point. In *Luckman*, the defendant moved for summary judgment and filed a declaration from its attorney declaring that he had personal knowledge that the documents attached to his declaration were a co-defendant's verified interrogatory responses and exhibits the co-defendant had attached to the responses. Addressing only the authentication requirement, the Court of Appeal held that this was sufficient to show that the "interrogatory responses in this action were what they purported to be." (*Id.* at pp. 34–35.) The appellate court did not otherwise address the admissibility of the evidence pursuant to Code of Civil Procedure § 2030.410, and the court noted that the plaintiffs themselves relied on the same evidence in opposing summary judgment. (*Id.* at p. 34.) As such, the appellate court found that the trial court erred by not considering the evidence.

Objections to Declaration of Frederick Newberry

Nos. 2–7: Overruled.

No. 8: Sustained on lack of foundation.

No. 9: Overruled as to ¶¶ 14, 22–40. Sustained on the basis of lack of foundation as to ¶¶ 13, 15–21.[3]

Objections to Declaration of William Wirtanen

Objection Nos. 10–11: Overruled.

[3] Paragraph 12 of Mr. Newberry's declaration would seem to suffer from the same defect as paragraphs 13, and 15–17; however, plaintiff did not object to paragraph 12.

2. Resort Defendants' Objections to Plaintiff's Evidence

Objection & Motion to Strike Declaration of Larry Heywood

The motion to strike is denied.

The general and specific objections are sustained on the grounds of lack of proper foundation, lack of basis for opinion, relevance, and the declaration and attached photographs consist of inadmissible subsequent remedial measures (Evid. Code § 1151).

Objection & Motion to Strike Declaration of Stanley Gale

The motion to strike is denied.

Objections to ¶¶ 3–5, 7, 11, 14–16, 22, 24–25, 30, 37: Overruled.

Objections to ¶¶ 23, 26: Sustained on the basis of inadmissible subsequent remedial measures.

Objection to ¶ 29: Sustained on the grounds of misstates testimony and improper legal conclusions.

Objection to ¶ 31: Sustained on the basis of relevance.

Objection to ¶ 32: Sustained on the bases of argumentative and improper legal conclusions.

Objection to ¶ 33: Sustained on the basis of speculation.

Objection to ¶ 38: Sustained on the grounds of argumentative and speculation.

Objection to ¶ 39: Sustained on lack of basis for opinion and misstates testimony.

Objection to ¶ 40: Sustained on the grounds of argumentative and based on improper matter.

Objection to ¶ 43: Sustained on basis of improper legal conclusions.

Objection to ¶ 44: Sustained on speculation, lack of basis for opinion, and conclusory.

Objection to ¶ 47: Sustained on speculation, improper legal conclusions.

Objection to ¶ 48–49: Sustained on speculation and inadmissible subsequent remedial measures.

Objection to ¶ 50: Sustained on the basis of improper legal conclusions.

D. DISCUSSION

Plaintiff alleges, inter alia, that Resort defendants knew or should have known that guests were regularly using the route to access the ski-in/ski-out area known as The Palisades. (*Id.*,¶ 27.) Further, that Resort defendants had a duty to warn against dangers that were not plainly visible, open, and obvious. They breached that duty by failing to protect or warn guests against these concealed dangers, and failing to use reasonable care in the ownership, control, management, inspection, maintenance, and repair of dedicated runs and adjacent easements under Resort defendants' control, including the route at issue. (*Id.*, ¶¶ 28–29, 34–35.) And, as a direct and legal result of Resort defendants' negligence, gross negligence, recklessness, and conscious/willful disregard for the risk of injury or harm, plaintiff crashed and suffered severe, debilitating, and permanent injuries. (*Id.*, ¶ 35.)

1. Doctrine of Primary Assumption of the Risk

Resort defendants first move for judgment on the grounds that the affirmative defense of primary assumption of the risk bars plaintiff's 1st C/A against them. To establish a cause of action for negligence, plaintiff must prove Resort defendants owed a duty of care. (*Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, 751.) Generally, each person has a duty to use due care to avoid injuring others by their careless conduct. (Civ. Code § 1714.) Any exception to the general rule must be based on statute or clear public policy. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315.) The doctrine of primary assumption of risk is one such exception. (*Hamilton v. Martinelli & Assocs.* (2003) 110 Cal.App.4th 1012, 1021.)

To determine if a plaintiff assumed the risk of a particular activity, a court must decide if the defendant owed a duty to the plaintiff. (*Knight*, *supra*, 3 Cal.4th at

p. 313.) The existence and scope of a defendant's duty of care is a question of law. (*Ibid*.) In the sport or recreational context, determining the existence and scope of a defendant's duty of care is a "legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity," (*ibid*.), rather than "the particular plaintiff's subjective knowledge and awareness[,]" (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068).

Some dangers are inherent and integral to participation in a sport or recreational activity, and a court is to consider these dangers when determining whether there is a duty of care. "As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person. [Citation.] Thus, for example, a property owner ordinarily is required to use due care to eliminate dangerous conditions on his or her property. [Citations.] In the sports setting, however, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. Thus, although moguls on a ski run pose a risk of harm to skiers that might not exist were these configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them. [Citation.] In this respect, the nature of a sport is highly relevant in defining the duty of care owed by the particular defendant.

"In some situations, however, the careless conduct of others is treated as an 'inherent risk' of a sport, thus barring recovery by the plaintiff. For example, numerous cases recognize that in a game of baseball, a player generally cannot recover if he or she is hit and injured by a carelessly thrown ball [citation], and that in a game of basketball, recovery is not permitted for an injury caused by a carelessly extended elbow [citation]. The divergent results of the foregoing cases lead naturally to the question how courts are to determine when careless conduct of another properly

should be considered an 'inherent risk' of the sport that (as a matter of law) is assumed by the injured participant.

"Contrary to the implied consent approach to the doctrine of assumption of risk …, the duty approach provides an answer which does not depend on the particular plaintiff's subjective knowledge or appreciation of the potential risk. Even where the plaintiff, who falls while skiing over a mogul, is a total novice and lacks any knowledge of skiing whatsoever, the ski resort would not be liable for his or her injuries. [Citation.] And, on the other hand, even where the plaintiff actually is aware that a particular ski resort on occasion has been negligent in maintaining its towropes, that knowledge would not preclude the skier from recovering if he or she were injured as a result of the resort's repetition of such deficient conduct. In the latter context, although the plaintiff may have acted with knowledge of the potential negligence, he or she did not consent to such negligent conduct or agree to excuse the resort from liability in the event of such negligence." (*Knight*, *supra*, 3 Cal.4th at pp. 315–316.)

Thus, a defendant does not have a legal duty to eliminate or protect a plaintiff from risks inherent or integral to a sport or recreational activity. In general, however, a defendant does "have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." (*Id.* at p. 315.)

The doctrine of primary assumption of risk operates as a complete bar to a plaintiff's recovery. (*Ibid.*) " '[W]hen the plaintiff claims the defendant's conduct increased the inherent risk of a sport, summary judgment on primary assumption of risk grounds is unavailable unless the defendant disproves the theory or establishes a lack of causation.' " (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 112, quoting *Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 740.)

A court must also consider the relationship between the parties in determining whether or not a defendant owes a legal duty to a plaintiff. A defendant who "is an organizer of the activity or someone who has provided or maintained the facilities and

equipment used" will have a duty to participants not to increase the inherent risks of the activity. (*Luna*, *supra*, 169 Cal.App.4th at p. 109, discussing *Morgan v. Fuji Country USA*, *Inc.* (1995) 34 Cal.App.4th 127, 132, 134.)

California courts have identified some of the inherent risks in snow skiing, including, without limitation: variations in terrain; falling into ravines or canyons; surface or subsurface snow or ice conditions; bare spots, rocks, trees, low hanging branches, and other forms of natural growth or debris; collisions with other skiers; collisions with fences, including barb wire fences and other boundary barriers; and collisions with other properly marked or plainly visible objects and equipment, including snowmaking equipment and chairlift towers. (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1202; *Kane v. Nat'l Ski Patrol Sys.*, *Inc.* (2001) 88 Cal.App.4th 204, 213; *Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 12; *O'Donoghue v. Bear Mountain Ski Resort* (1994) 30 Cal.App.4th 188, 193–194.) Thus, manmade hazards such as snowmaking equipment and chairlift towers are inherent risks so long as they are obvious, either because they are plainly visible (e.g., because of their size) or because they are well-marked. (*Connelly*, *supra*, 39 Cal.App.4th at p. 12.)

" 'Safety is important, but so is the freedom to engage in recreation and challenge one's limits. The primary assumption of risk doctrine balances these competing concerns by absolving operators of activities with inherent risks from an obligation to protect their customers from those risks. [¶] What the primary assumption of risk doctrine does not do, however, is absolve operators of *any obligation* to protect the safety of their customers. [Citation.] As a general rule, where an operator can take a measure that would increase safety and minimize the risk of the activity *without also altering the nature of the activity*, the operator is required to do so.' [Citation.]" (*Summer J. v. United States Baseball Fed'n* (2020) 45 Cal.App.5th 261, 271–272 [emphasis in original].) "[T]he primary assumption of risk doctrine has never relieved

an operator of its duty to take reasonable steps to minimize inherent risks without altering the nature of the activity." (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1301.)

2. Nature of the Activity

The parties disagree about how to characterize the nature of the risk that plaintiff encountered and whether it is an inherent risk of snow skiing. Resort defendants assert it is an inherent risk of skiing for participants to encounter variations in terrain, such as snowbanks and drops. Whereas, plaintiff asserts it is not an inherent risk of skiing for participants to encounter a drop onto a paved road when trying to leave a resort on a ski-in/ski-out path.

Having considered the parties' arguments, the court finds that the risk plaintiff encountered is most analogous to encountering a terrain variation, which courts have already found is an inherent part of skiing. (*Lackner*, *supra*, 135 Cal.App.4th at p. 1202; *Connelly*, *supra*, 39 Cal.App.4th at p. 12.) Plaintiff's argument that falling onto a paved road is not an inherent risk of skiing is not persuasive and is irrelevant. The paved road did not increase Tanguy's risk of injury. Falling is an inherent risk of snow skiing, and the paved road did not cause Tanguy's fall. "The *Knight* exception applies when the defendant increased the *risk of injury* beyond that inherent in the sport, not when the defendant's conduct may have increased the severity of the injury suffered." (*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 116.)

3. Plaintiff Assumed the Inherent Risks of Snowboarding and Resort Defendants Did Not Increase the Inherent Risks

For the following reasons, the court finds that Resort defendants met their initial burden of establishing that plaintiff's 1st C/A is barred by the doctrine of primary assumption of the risk, and plaintiff did not meet his burden of establishing there are triable issues of material fact.

Tanguy, age 15 at the time, has no memory of the events from the date of the incident. (Separate Stmt. of Undisputed Facts ("SSUMF"), ¶¶ 4–5, pp. 1–2.) Prior to the incident, Tanguy had been snowboarding for about three years and considered himself an intermediate snowboarder. (*Id.*, ¶ 6, p. 2.) He liked to ride between the trees on untouched powder. (*Id.*, ¶ 7, p. 2.) He knew there could be obstacles off-piste, including trees and tree wells. (*Id.*, ¶ 9, p. 2.) Tanguy had snowboarded before in terrain parks, including the weekend of the incident, and had intentionally taken jumps of "possibly five feet" in these parks. (*Id.*, ¶ 10, p. 2.) His father Matt had been skiing for about 40 years, including in the Lake Tahoe region, Utah, Europe, and Canada. (*Id.*, ¶¶ 11–12, p. 3.) In his decades of skiing, Matt had experienced changes in weather and visibility, and had encountered terrain variations. (*Id.*, ¶¶ 13–14, p. 3.) The other members of the group were all intermediate to expert skiers and snowboarders. (*Id.*, ¶¶ 18–27, pp. 4–6.) Members of the group were aware that there was a large snowpack at Kirkwood during the 2016–2017 season. (*Id.*, ¶¶ 16–17, 21, pp. 4–5.)

On a prior visit to Kirkwood, Matt had skied from the lower side of Lower Olympic to Palisades Drive because he wanted to have a shorter walk along the road. (*Id.*, ¶ 28, p. 6; ¶ 4, p. 14.) He learned it was possible to ski down to Palisades Drive through a conversation with other skiers he saw near the road. (*Id.*, ¶ 29, p. 6.) He never saw anything in writing describing the incident area as a ski-in/ski-out path. (*Id.*, ¶ 31, p. 7.) The snowpack then was much lower than the 2016–2017 ski season. (*Id.*, ¶ 33, p. 7.) On the prior occasion that he took the shortcut down to Palisades Drive, he navigated down to the road without injury. (*Id.*, ¶ 32, p. 7.)

On the afternoon of April 16, 2017, the group decided to take their last run of the day and head to the apartment. (*Id.*, ¶¶ 34–35, p. 7; ¶ 5, p. 15.) No one in the group consulted a trail map to choose their route down toward the apartment. (*Id.*, ¶¶ 35–36, pp. 7–8.) Matt skied downhill in front of the group, and stopped at the skier's left

edge of the Lower Olympic run. (*Id.*, ¶ 37, p. 8.) He saw a group of skiers exiting Lower Olympic and skiing through the trees bordering the left side of the run, and he then remembered the shortcut through the trees to the road he had skied on a prior occasion. (*Id.*, ¶¶ 38–39, p. 8; ¶ 7, p. 15.) When the rest of the group arrived, Matt told them there was a path downhill that could shorten their walk to the apartment if they skied off the side of Lower Olympic and into the trees. (*Id.*, ¶ 40, p. 9; ¶ 6, p. 15.) The snow is not groomed in the trees off-piste from Lower Olympic. (*Id.*, ¶ 41, p. 9.) Rooftops and building were visible downhill. (*Id.*, ¶ 42, p. 9.) The group discussed that "the road is probably between those two buildings" that they could see downhill. (*Id.*, ¶ 11, p. 16.) Their "goal was to go down to the road between the two buildings." (*Id.*, ¶ 12, pp. 16–17.) The group stopped and gathered once more after leaving the Lower Olympic run. (*Id.*, ¶ 43, p. 9.) After a brief stop, Matt skied down first in the group. (*Id.*, ¶ 44, p. 9.)

Matt suddenly felt one foot "lowering" and realized there was "a big slope there." (*Id.*, ¶ 45, p. 10.) He made a hard turn and stopped, and almost fell from the snow bank. (*Id.*, ¶¶ 45–47, p. 10.) As soon as he stopped he waved his hand in the air and shouted, "To the right! To the right!" (*Id.*, ¶ 48, p. 10.) Xavier Cremoux, who was skiing down second, saw Matt and made a hard turn and stopped next to him. (*Id.*, ¶ 49, p. 10.) Xavier was able to avoid falling from the snowbank. (*Id.*, ¶ 50, p. 10.) A few seconds later, Matt saw Tanguy snowboarding straight down the mountain. (*Id.*, ¶ 54, p. 11.) Xavier estimated Tanguy's speed at 25 miles per hour. (*Id.*, ¶ 55, p. 11.) Tanguy did not appear to react to his father's shouts. (*Id.*, ¶ 56, p. 12.) Xavier's son Matthew Cremoux, who was further uphill, watched Tanguy snowboard down and that he attempted to stop prior to reaching the snowbank, but did not stop. (*Id.*, ¶¶ 41, 59, pp. 9, 12.) Matthew estimated Tanguy's speed at 15–20 miles per hour. (*Id.*, ¶ 58, p. 12.) Matthew and Nolann were able to avoid falling from the snowbank. (*Id.*, ¶ 60, p. 12.)

The area from which Tanguy fell consists of three undeveloped homesites, which are not owned by the Resort defendants, and they do not hold easements over these lots. (*Id.*, ¶ 15, p. 17; ¶ 18, p. 19; ¶¶ 27–28, pp. 25–26; ¶¶ 35–36, pp. 32–33; ¶¶ 43–44, pp. 38–39; Newberry Decl., ¶¶ 12, 15–17.) As of the date of the incident, the Resort defendants did not control or maintain Palisades Drive, perform any maintenance on Palisades Drive, conduct any inspections on Palisades Drive, and did not perform any snow removal along Palisades Drive. (SSUMF, ¶¶ 20–24, pp. 20–23; Newberry Decl., ¶¶ 22–25, 29, 33, 37.)

It is true that the Cremouxs testified at their depositions that they did not see any rope lines or ski area boundary signage on the path they followed to Palisades Drive. (Pl. Index of Evid., Ex. 2, 139:2–141:19; Ex. 6, 69:6–21.) However, the Resort defendants provided evidence that the ski boundary was marked in that area, including signage for Palisades Drive, Snowcrest, and the base area along the skier's left side of Lower Olympic, including an assortment of bamboo, bamboo and disks, and bamboo and rope. (Penwarden Decl. in Support of Reply, Ex. MM, pp. 111:15–17, 111:21–22, 111:25–112:1; Ex. NN, pp. 32:17–18, 32:20–22, 38:5–8, 39:9–11, 67:5–7.)

In *Gregorie v. Alpine Meadows Ski Corp.* (E.D. Cal., Aug. 7, 2009, No. CIV.S-08-259 LKK/DAD) 2009 WL 2425960,[4] Jessica Gregorie and her friend were snowboarding at Alpine Meadows. They decided to take the High Beaver Traverse to access the "Beaver Bowl" area. While hiking the traverse, Gregorie took off her snowboard, she slipped due to the icy conditions of the snow, she fell and slid over a rock outcropping and died. (*Id.* at *2.) One of the issues that the plaintiffs (her parents and successors in interest) argued was that Gregorie had not assumed the risk of snowboarding on the traverse because the location of the ski boundary was unclear. The federal court stated: "The problem with plaintiffs' evidence is that even if

[4] Although not binding authority, federal caselaw may be cited as persuasive authority.

defendants did not accurately mark the ski boundary and they failed to adequately maintain the area that was out of bounds, these actions seem not to have not increased the risk of the sport. Plaintiffs do not materially object to [expert] testimony, which shows that risks posed by surface conditions and falling are inherent in the sport of snowboarding. [The expert] further testified that sliding downhill and impacting objects below are inherent risks of snowboarding. [Citation.] It thus appears that the location of the boundary in this case is immaterial because, whether Gregorie fell within or outside of the boundary, sliding beyond the boundary and impacting objects is an inherent risk of snowboarding. [Fn.]" (*Id.* at *11.)

Thus, even if the Resort defendants did not mark the entire ski boundary at Kirkwood, or even if they did not accurately mark the boundary, it is immaterial because terrain variations and falling over edges are still inherent risks of snow skiing. (*Ibid.*; *O'Donoghue*, *supra*, 30 Cal.App.4th at pp. 193–194.) Furthermore, plaintiff provided no evidence that a purported lack of boundary markings caused plaintiff's injury, especially given that the group's whole intention was to leave the ski resort and ski down to Palisades Drive in order to return to their apartment.

The court already made a finding that variations in terrain, which can include a snowbank, are an inherent risk of snow skiing, and that the surface upon which plaintiff fell is immaterial. Additionally, Resort defendants provided sufficient evidence to make a prima facie showing that plaintiff was aware there could be obstacles off groomed runs, and he deliberately snowboarded off-piste into the trees in an effort to reach Palisades Drive so as to shorten the walk to the group's apartment. Thus, plaintiff voluntarily assumed the risks.

The Resort defendants also provided sufficient evidence to make a prima facie showing that they did not increase the inherent risks of snow skiing. The Resort defendants provided evidence that they do not own the land from which Tanguy fell, they do not own Palisades Drive, they do not plow, maintain, or inspect Palisades

Drive, and they did not create the snowbank from which plaintiff fell. In response, plaintiff did not provide any evidence to make a showing that there are triable issues of material fact as to whether the Resort defendants do, in fact, own, maintain, or control the area at issue. And, even if part of the ski boundary was not marked or was marked inaccurately, plaintiff did not meet his burden of demonstrating a triable issue of material fact as to whether this caused his fall.

As such, Resort defendants met their initial burden of demonstrating that the 1st C/A is barred by the doctrine of primary assumption of risk. In response, plaintiff did not meet his burden of establishing there are triable issues of material fact.

4. Resort Defendants Had No Duty to Eliminate, Guard Against, or Warn Plaintiff of Potential Dangers on Property Owned by Others

Lastly, Resort defendants move for judgment against plaintiff's 1st C/A on the basis that they had no duty to warn him of potential dangers on property owned by others.

"As applied to persons who own or occupy land, California tort law imposes a duty 'to maintain land *in their possession and control* in a reasonably safe condition.' [Citations.]" (*Lopez v. City of Los Angeles* (2020) 55 Cal.App.5th 244, 254–255.) The general rule has an exception: a person who owns or occupies land owes "a duty to maintain abutting, *publicly owned property* in a reasonably safe condition if that person has 'exercise[d] control over th[at] property.' [Citations.] That is because a person who exercises 'supervisory control' over property has the power to keep it in a reasonably safe condition, which makes it 'just' to impose a ' "duty to exercise due care in the management of th[at] property." ' [Citations.] … [¶] … Thus far, courts have identified two situations in which an owner or occupier of private land has engaged in affirmative or positive action sufficient to hold them liable for a hazard located on abutting, *publicly owned property*: (1) when the owner or occupier has created that hazard [citations], or, (2) if the hazard was created by a third party, when the owner

or occupier has ' "dramatic[ally] assert[ed]" ' dominion and control over the abutting, publicly owned property by effectively treating the property as its own [citation]." (*Id.* at pp. 255–256 [emphasis added].)

As discussed earlier, Resort defendants provided evidence that they do not own, maintain, or control the land from which plaintiff fell from or Palisades Drive. Additionally, they provided evidence that they did not create the snowbank at issue and do not plow or remove snow from Palisades Drive. In response, plaintiff does not seriously dispute these assertions, except to object to the admissibility of Resort defendants' evidence. The court sustained some of these objections, but not all of the objections to Resort defendants' evidence concerning ownership, maintenance, and control of land and the road. Furthermore, plaintiff did not provide any evidence to demonstrate a triable issue of material fact that the Resort defendants do, in fact, own, maintain, or control the area at issue, or created the hazard.

Accordingly, Resort defendants met their initial burden of demonstrating that the 1st C/A also fails because they had no duty to eliminate, guard against, or warn plaintiff of potential dangers on property owned by others. In response, plaintiff did not meet his burden of establishing there are triable issues of material fact.

Resort defendants' motion for summary judgment is granted.

TENTATIVE RULING # 1: RESORT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS GRANTED. A LONG CAUSE HEARING HAS ALREADY BEEN SCHEDULED FOR 2:00 P.M., THURSDAY, DECEMBER 9, 2021, IN DEPARTMENT FOUR.