| | |
|---|---|
| **San Miguel County Court**<br>San Miguel County, State of Colorado<br>Court Address:<br>PO Box 919, 305 W. Colorado Ave.<br>Telluride, CO 81435<br>tel: 970-369-3300<br>fax: 970-728-6216 | DATE FILED: November 27, 2017 11:09 AM<br>CASE NUMBER: 2016S26 |
| **Jayleen Troutwin**<br>Plaintiff<br>v.<br><br>**Christopher Parke**<br>Defendant | ▲ **COURT USE ONLY** ▲<br><br>Case Number:<br>**16 S 26**<br>Div: **G** |

## Order of Judgment

This matter came before the Court for trial on May 10, 2017. Both Parties appeared with counsel. Based on the testimony and evidence presented at trial, along with other legal authority, the Court makes the following findings of fact, conclusions and orders. The Court concludes that the Defendant is liable and enters an order of judgment in the Plaintiff's favor in the amount of $7,500.00.

### I. Introduction and Findings of Fact

1. Based on the testimony and evidence presented at trial, the Court makes the following findings of fact.

2. On April 3, 2016, at roughly 9:30 a.m., Jayleen Troutwin met Greg Hope at the top of Revelation Bowl at the Telluride Ski Resort. The pair were skiing at the resort but planned to exit through the ski area boundary and descend into Bear Creek, a drainage adjacent to the resort popular with backcountry skiers. Troutwin and Hope traversed west out of the ski resort and across the head of the Bear Creek drainage toward Wasatch Peak and the "Little Wasatch ridge." From that high ridge, several steep, difficult and increasingly popular ski descents slope back into Bear Creek. Troutwin and Hope intended to ski the "Grandfather Couloir," a route that begins on the north side of the "Oblivion Bowl" at the top of the Little Wasatch ridge. This decent begins with open skiing on the north side of the Oblivion Bowl, increasingly steep skiing through narrow rock-lined gullies, a roped-rappel through a very steep notch in a cliff-band, and then again open skiing on the face's apron into Bear Creek for a final trail along the creek back into the Town of Telluride.

3. That same day, Christopher Parke and his partner Dan Margolis also left the Telluride Ski Resort to snowboard[1] on an adjacent route on the Little Wasatch face. In fact, they made contact with Troutwin and Hope along their climb up the ridge. Parke and Margolis also intended to ski into Oblivion Bowl, but on a route farther south than that attempted by Troutwin and Hope. Importantly, both routes converge at the bottom of the Little Wasatch face.

4. On April 3, Troutwin and Hope were both experienced backcountry skiers. Hope was qualified as an expert in backcounty skiing techniques at trial, and estimated that he had skied into Bear Creek on over 100 occasions. Troutwin was less experienced and was making her first attempt at skiing the Grandfather Couloir. She nevertheless had received training in avalanche safety, wilderness medicine and had some mountaineering experience as well. Both Hope and Troutwin wore helmets, carried avalanche rescue equipment such as avalanche transceivers or "beacons," as well as shovels and search probes. They wore climbing harnesses in anticipation the rappel, and had reasonable knowledge of anchoring and rappelling techniques. They also carried cellular telephones and a radio.

5. Parke and Margolis carried similar avalanche safety equipment and had similar backcountry experience. Importantly, they too carried cell phones, but not a radio. Among all the safety techniques and concepts that all of the four skiers were aware of, one technique was critical on April 3: the skiers understood and utilized the concept of skiing one-at-a-time down avalanche-prone slopes. This technique minimizes the number of skiers exposed to the risk, and allows others to observe and perform a rescue in the event an avalanche engulfs the lone skier. More, the parties knew that a person skiing on a steep, unstable snowpack can "trigger" an avalanche. The parties understood that they should avoid skiing above one-another to therefore avoid triggering an avalanche that might strike a skier below.

6. The Parties also understood that avalanche risk is unpredictable. For example, Hope installed the rappel anchor that he and Troutwin would use mid-route. The anchor consists of two bolts drilled into the rock, connected by a chain onto which a rope was permanently fixed. With the assistance of a specialized rappelling device connected to the skier's climbing harness, through which the rope runs and which creates friction against the rope, a skier or climber can make a controlled descent. Hope had recently moved this anchor to a new location that was more sheltered from debris and even avalanches that might unpredictably fall from above. More, the parties discussed their familiarity with avalanche bulletins issued by the Colorado Avalanche Information Center. Despite their familiarity with the Center's forecast, the parties skied with avalanche rescue gear, and as discussed above, utilized techniques to limit the effect of an avalanche. It is therefore clear that the parties could not predict whether an avalanche might occur – they could merely try to manage the risk.

7. The two parties met at the top of the ridge and had a brief discussion about their plans for descent. Implicit in this discussion was the concept mentioned above of limiting the amount of time one group would ski above the other at a higher elevation. In the event that one group of skiers triggered an avalanche, the group below would be caught and potentially injured. Though Parke and Margolis arrived first at the top of the ridge, the two groups agreed that Troutwin and

[1] This Court uses the phrase "ski" and "snowboard" interchangeably throughout this Order. The difference in techniques has no bearing on this matter.

Hope would descend their route first. Parke and Margolis would wait until the first group was out of the way of a potential avalanche.

8. The two groups would not be able to see one-another after the first started their route. Troutwin and Hope had a radio commonly used to facilitate communication between groups in similar scenarios, but Parke and Margolis did not. Rather, the two groups discussed using their cell phones. While cell phone service was mediocre in the area, the groups anticipated that Troutwin and Hope would call or at least send a text message to Parke and Margolis at the top of the ridge when the former were out to the way of danger from a skier-triggered avalanche.

9. Again, while Parke and Margolis had arrived on the ridge before Troutwin and Hope, the former agreed to allow the latter to descend first. Parke and Margolis later had regrets about this decision. Indeed, Parke and Margolis felt a degree of awe toward Hope. Greg Hope is something of a celebrity among extreme backcountry skiers. Parke and Margolis used the phrase "halo effect" to describe their decision to defer to Troutwin and Hope's request to descend first. Regardless of the reason, they clearly agreed to wait while Troutwin and Hope completed their route so as not the put them in danger of a skier-triggered avalanche.

10. Troutwin and Hope left the meeting at the top of the ridge around 11:30 a.m. and traversed to their route at the north side of Oblivion Bowl. They made their way down the steep face toward the fixed rappel rope anchor. While it was Troutwin's first time on the route and the pair descended slowly, they arrived at the anchor without mishap.

11. Both Troutwin and Hope attached themselves to the anchor to prevent an injurious fall, and Troutwin in turn connected her rappelling device to the rope to descend first. Midway through her descent, Troutwin and Hope were struck by a large cloud of loose snow hurtling down the face. This "slough" formed a loose-snow avalanche. Hope yelled a warning to Troutwin, but the latter was struck mid-rappel. She was pushed away from the rock and into the air and ultimately off of the rope. She fell at least 20 feet.

12. Troutwin testified that she was familiar with methods of backing-up the belay or rappel device that she used on April 3 to descend the fixed rope. She was familiar with the concept of employing certain devices or techniques used on a rappel to prevent a person from moving down a rope if she lost control of that rope on descent – either due to human error or rock fall or avalanche or any reason that a descender might lose control. She nevertheless did not employ such a backup April 3.

13. After the slough avalanche passed, Hope descended the rope and found Troutwin in a safe spot below. She was in pain, but ambulatory. While Troutwin was able to ski out of Bear Creek, she sustained a number of injuries including a strained AC joint in her shoulder, strained hand and torn labrum in her hip.

14. Parke and Margolis had indeed waited at the top of the ridge for Troutwin and Hope to descend. They waited between 30 and 45 minutes for communication from the first group, and tried to make their own call to Troutwin and Hope, but could not make contact with them. The weather was warming, and more groups of skiers were headed up the ridge behind Parke and

Margolis to make their own ski descents. Parke and Margolis felt that if they waited too long, skiing conditions would become more dangerous as the warmth made the snow less stable. In addition, as more groups gained the ridge to begin their descents, Parke and Margolis would in turn be put in danger by those subsequent groups skiing above. Parke and Margolis could have retraced their steps down the ridge and not made their particular chosen descent, but they elected to snowboard as planned.

15. Parke began his descent and after a few turns down the Oblivion Bowl, he triggered the large cloud of slough below him that grew in size and speed as it fell down the face. Again, this slough became an avalanche and was the same that struck Troutwin and Hope.

16. Parke and Margolis arrived at Troutwin and Hope's location shortly after the avalanche. Parke indicated that he had started his descent and had triggered the avalanche that struck Troutwin and Hope. A verbal and physical altercation ensued – Hope was furious that Parke would begin his descent before he and Margolis had received notice from Troutwin and Hope that they were safe. Parke's emotions were equally raw, and he ultimately acknowledged to Troutwin that he had caused her injuries, and that he would even reimburse her medical expenses.[2] He made two payments to Troutwin to do so, but has made no subsequent payment.

## II. Issues Presented

17. The Plaintiff, Ms. Troutwin, claims that Parke was negligent in triggering the avalanche that caused her injuries. She claims that Parke owed her a duty of care – perhaps an assumed duty created by their agreement at the top of the Little Wasatch ridge – not to ski into into the Oblivion Bowl before she was safely out of harm's way at the bottom of their route.

18. The Defendant, Mr. Parke, asserts that backcountry skiing is inherently dangerous and that no duty can be attributed to him.

## III. Analysis

### A. General Legal Authority

19. This small claims action is brought pursuant to §13-6-401 et seq., C.R.S. (2017), and C.R.C.P. 501 et seq., (2017). In addition, Colorado recognizes the traditional negligence cause of action.

> A claim for relief founded on negligence requires proof of the following elements: (1) a duty or obligation, recognized by law, requiring the defendant to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) a failure or breach of duty by the defendant to conform to the standard required by law; (3) a sufficient causal connection between the

[2] Despite this fact, Plaintiff makes no claim here based on contract or another theory related to this initial agreement to reimburse Troutwin for her medical expenses. More, the extent to which this fact represents an offer of settlement, no party objected to its admission and it has no bearing on the conclusions reached below.

> offensive conduct and the resulting injury; and (4) actual loss or damage to the plaintiff. *Hall v. McBryde*, 919 P.2d 910, 912 (Colo. App. 1996) (citations omitted).

20. Colorado courts have also looked to the Restatement (Second) of the Law of Torts (hereinafter the "*Restatement*") for guidance in this rich area of law, and have adopted certain provisions of the *Restatement*. *See e.g., P.W. v. Children's Hospital Colorado*, 364 P.3d 891 (Colo. 2016).

## B. Duty

21. "Whether a legal duty should be imposed in a particular case is essentially one of fairness under contemporary standards—whether reasonable persons would recognize a duty and agree that it exists." *Hall*, 919 P.2d at 912.

22. Plaintiff argues that the Defendant assumed a duty of care by agreeing not to begin his descent until his group had made contact with the Plaintiff's group to be sure that the Defendant would not descend directly above the Plaintiff. To this end, the Plaintiff cites the *Restatement* §323, *Lester v. Marshall*, 352 P.2d 786 (Colo. 1960), *P.W.*, 364 P.3d 891, and *Jefferson County School Dist. v. Justus*, 725 P.2d 767 (Colo. 1986).

23. The assumed duty doctrine "must be predicated on two factual findings." *Justus*, 725 P.2d at 771. "A plaintiff must first show that the defendant, either through its affirmative acts or through a promise to act, undertook to render a service that was reasonably calculated to prevent the type of harm that befell the plaintiff." *Id*. "Second, a plaintiff must also show either that he relied on the defendant to perform the service or that defendant's undertaking increased plaintiff's risk." *Id*.[3]

[3] There was some discussion and argument presented at trial regarding the distinction between misfeasance and nonfeasance, as though the requirement on Parke and Margolis to refrain from skiing into Oblivion Bowl without knowing whether Troutwin and Hope were clear is some sort of nonfeasance that limits liability. This argument misapplies the distinction. The alleged act that breached the alleged duty of care was an affirmative one – skiing into Oblivion Bowl.

> In order that either an act or a failure to act may be negligent, the one essential factor is that the actor realizes or should realize that the act or the failure to act involves an unreasonable risk of harm to an interest of another, which is protected against unintended invasion. If the act, or the failure, involves such a risk, it is negligent irrespective of whether, either in itself or in the manner in which it is done or omitted, it constitutes or results in a breach of a contractual or other duty…. *Restatement*, Ch. 12, Topic 4, "Scope Note".

In any event, "the rule of no duty for nonfeasance applies only where the peril in which the actor knows that the other is placed is not due to any active force which is under the actor's control." *Western Innovations Inc., v. Sonitrol Corp.*, 187 P.3d 1115, 1159 (Colo. App. 2008) (citing the *Restatement* §314, comment d). It is undisputed that the Defendant triggered the avalanche that harmed the Plaintiff by descending his chosen route – his decision to undertake that route was entirely within his control.

24. Characterizing this action as a service can cause confusion. Put differently:

> [w]here a person represents by word or act that he has done or will do something upon the performance of which he should realize that others will rely, he is liable for expectable harm caused by the reliance of others and his failure of performance, if his representation was negligently or intentionally false, or if without excuse he fails to perform. *Lester*, 352 P.2d at 791 (citations omitted).

25. Returning to the findings required by *Justus*, this Court first finds that Parke clearly undertook to wait for Troutwin and Hope to finish their route, and in agreeing to wait he rendered a service reasonably intended to prevent causing a skier-triggered avalanche that might harm Troutwin and Hope. The harm contemplated and mitigated by this agreement was that from a skier-triggered avalanche. Both groups discussed the hazard of skiing above one-another due to avalanche risk. The agreement to ski the face one-group-at-a-time had as its sole purpose preventing the type of skier-triggered avalanche that ultimately occurred.

26. With respect to the second *Justus* finding, the Plaintiff clearly relied on this agreement. Troutwin and Hope began their descent thinking that the risk of avalanche triggered by Parke and Margolis above was mitigated because they would refrain from skiing above the first group.

27. This Court therefore finds that the Defendant assumed a duty of care in agreeing not to ski his chosen route while Troutwin and Hope were still skiing theirs in an effort to avoid a skier-triggered avalanche.

28. To be sure, their plan involved prospective communication by cell phone to confirm that the first party was clear. The Defendant argues that any such agreement or assumption of duty was frustrated by the failure of the cell phone communication plan. It is not clear, however, that the plan actually failed. There is evidence that Parke tried to call Hope and Troutwin, but received no answer. Clearly, Parke tried to call while Troutwin and Hope were still descending. But the first group may not have had cell phone service until they were off the route and perhaps back to the Town of Telluride. Based on how difficult and engaging the descent was, it may be that they did not notice their phones ringing. It could be that Parke simply did not wait long enough to allow the communication plan to work.

29. Parke and Margolis could not see Troutwin on her rappel, and without direct communication, it was probably impossible for Parke and Margolis to confirm that Troutwin and Hope were clear. But it was not impossible to continue to comply with the duty they assumed. They simply could have turned around and retraced their steps up the ridge to ski a different route down into Bear Creek.

30. In addition, there appears to have been some discussion about how long Parke and Margolis would wait, as if part of a default plan if direct communication failed. This Court cannot find

with any certainty that there was an agreed upon time after which the Parties would assume that it was safe for the second party to descend. All of the Parties provided varying testimony about their assumptions of how long Troutwin and Hope's descent would take.

31. Because Parke and Margolis began their descent without knowing whether Troutwin and Hope were clear of the danger of a skier triggered avalanche, and having assumed a duty of care to refrain from such action, the Court finds and concludes that Parke failed to act as a reasonable person would under those circumstances and thereby breached the duty he assumed.

32. It is worth noting the juxtaposition of the facts of this particular case to other recent cases involving avalanche risk in Colorado ski resorts. Indeed, the Defendant argues that backcountry skiing is inherently dangerous and that harm from avalanches is such an inherent risk. Two courts have recently dealt with notion of the "inherent dangers and risk of skiing" pursuant to the Colorado Ski Safety Act. *Fleury v. IntraWest Winter Park Operations Corp.*, 372 P.3d 349, 349 (Colo. 2016); *see also, Ingalls et al, v. The Vail Corp*., 2015 CV 15, District Court, Eagle County, Colorado. Setting aside the fact that this instant case does not involve the Ski Safety Act, it is striking that the Court in *Fleury* found that avalanches are an inherent risk of skiing even within the boundary of a ski resort that likely spends considerable effort to stabilize the snowpack to prevent avalanches. To impose a duty in such an unpredictable, inherently dangerous environment, the argument goes, would place an unfair burden on defendants and create an unattainable standard for defendants to meet.

33. Here, however, the duty was defined by the agreement that the Parties reached at the top of the ridge.

34. The critical difference in the instant case, however, is that Parke, Margolis, Hope and Troutwin discussed this danger and formed a plan to mitigate it. Parke and Margolis acknowledged and understood the risk, and they expressly assumed a duty of care. The duty was defined by the agreement that the Parties reached at the top of the ridge, and Troutwin and Hope relied on that agreement.

35. More to the Defendant's argument that backcounty skiing is inherently dangerous, it is true that participants in certain inherently dangerous sports owe no duty of ordinary care to one another. *Laughman v. Girtakovskis*, 374 P.3d 504 (Colo. App. 2015). This so-called contact sports exception is an acknowledgement that while certain sports are "inherently dangerous," participants voluntarily participate despite their knowledge of that risk. *Id*. at 508. Further, they "vigorously participate," and though they may take steps to mitigate that risk, the activity necessarily involves the type of harm that occurs. *Id*.

36. But the clear distinctions between those contact sports and this instant case include the fact that the backcountry skiers activities and the attendant risks are not directed toward one-another, and that the Defendant in the instant dispute expressly assumed a duty of care.

37. Here, the promise that Parke undertook is simple – he agreed to wait until Troutwin was out of the way of an avalanche that Parke knew he might trigger before he began his snowboard descent.

## C. Cause

38. "To recover on a negligence claim, a plaintiff must show that the defendant's alleged negligence proximately caused the claimed injury." *Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 985 (Colo. App. 2011). The test of whether a plaintiff's injury was in fact caused by a defendant's negligence is the classic "but for" test. *Id*. "The requirement of 'but for' causation is satisfied if the negligent conduct in a natural and continued sequence, unbroken by any efficient, intervening cause, produce[s] the result complained of, and without which the result would not have occurred." *Id*. (citations omitted). "The plaintiff must prove causation in fact by a preponderance of the evidence." *Id*.

39. It is undisputed that Parke caused the avalanche that struck Troutwin, and both caused her fall and her injuries. The evidence presented at trial includes numerous admissions by Parke that he caused the avalanche. While it is unclear at which exact moment Troutwin received her injuries – when initially struck by the avalanche, during the tumult of being thrust off the rock wall, or after her fall – it is clear that but for the avalanche she would not have sustained her injuries. There is no evidence of any intervening event that might break this causal chain. The Court therefore finds and concludes that Parke caused Troutwin's injuries.

## D. Damages

40. That a plaintiff suffers damages must be proved just as any other element of a negligence cause of action. While "[t]he trial court, as trier of fact, has wide discretion in fixing the measure and amount of damages, *Bigler v. Richards*, 151 Colo. 325, 328, 377 P.2d 552, 553 (1963), a plaintiff bears the burden of proving the fact of damages "with reasonable certainty." *Tull v. Gundersons, Inc.*, 709 P.2d 940, 943 (Colo. 1985). "[A]n award of damages cannot be based on mere speculation or conjecture, [but] once the fact of damage has been established with the requisite degree of certainty, uncertainty as to the amount of damages will not bar recovery." *Id*. "The amount of damages awarded may be an approximation, provided that the fact of damages is certain and provided the plaintiff introduces some evidence that is sufficient to permit a reasonable estimation of damages." *Pfantz v. Kmart Corp*., 85 P.3d 564, 570 (Colo. App. 2003).

41. Troutwin requests an award of damages to support her medical expenses. "Compensatory damages are awarded in order to make the injured party whole." *Board of County Comm'rs v. Slovek*, 723 P.2d 1309, 1314 (Colo.1986). A plaintiff can also recover for future medical expenses as another form of economic damages. *Tait v. Hartford Underwriters Ins. Co.*, 49 P.3d 337, 341 (Colo. App. 2001); *Pfantz*, 85 P.3d at 570-71; *Seeing Denver Co. v. Morgan*, 185 P. 339, 342 (Colo. 1919) (citations omitted) ("The jury may, in assessing damages, consider the circumstance that in the future plaintiff will be subjected to expenses for doctor's bills, nursing, and attendance, and if the condition of the person is such that further outlays for medical and surgical treatment or nursing and attendance will be required, they may give damages for such prospective expenses.")

42. Last, Colorado has abrogated, by statute, the common-law collateral source rule, which formerly allowed for full recovery of medical expenses despite reimbursement by an insurer.

§13-21-111.6; *Wal-Mart Stores, Inc. v. Cossgrove*, 276 P.3d 562 (Colo. 2012); see also §10-1-135(d), C.R.S. (2017) ("It is in the best interests of the citizens of this state to ensure that each insured injured party recovers full compensation for bodily injury caused by the act or omission of a third party, and that such compensation is not diminished by repayment, reimbursement, or subrogation rights of the payer of benefits."). Pursuant to §13-21-111.6, a court must "reduce a successful plaintiff's verdict as a matter of law by the amount the plaintiff 'has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company or fund in relation to the injury ... sustained.'" *Cossgrove*, 276 P.3d at 566 (citing §13-21-111.6).

43. At trial, Troutwin presented clear testimony regarding her injuries and the medical costs she is likely to incur as a result of those injuries. She summarized those costs in Exhibit 6. As a result of her injuries, she is likely to incur $51,010.00 before insurance reimbursement. She expects to pay $9,660.00 in out-of-pocket expenses. No evidence was presented to the contrary. The Court finds these expenses to be reasonably certain and reasonably grounded in the evidence presented. The statutory cap on damage awards in the small claims division is $7,500.00. The Court therefore awards Troutwin $7,500.00 in damages.

**E. Comparative Negligence and Assumption of Risk**

44. While not vigorously litigated at trial, the Defendant's Answer asserts two defenses: that Troutwin was also negligent and that her negligence was the cause of her own injuries, and that Troutwin assumed the risk of avalanche.

45. Colorado is a comparative negligence jurisdiction. §13-21-111, C.R.S. (2017). The statute nevertheless maintains the definition of contributory negligence. *See P.W.*, 364 P.3d at fn.3. "[T]he question is whether the plaintiff by his conduct can be said, as a matter of law, to have exposed himself to an unreasonable risk of harm. *King Suppers, Inc. v. Mitchell*, 342 P.2d 1006, 1010 (Colo. 1959). Contributory negligence is "conduct on the part of a plaintiff but for which he would not have been injured." *Safeway Stores, Inc. v. Langdon*, 532 P.2d 337, 429 (Colo. 975) (overruled on other grounds by *Laura A. Newman, LLC, v. Roberts*, 364 P.3d 972 (Colo. 2016)). "Comparative negligence is applicable only if there is evidence that would support a finding that both parties are at fault." *Winkler v. Rock Mountain Conference of United Methodist Church*, 923 P.2d 152, 159 (Colo. App. 1995).

46. Assumption of risk is also a statutory defense, and is a form of comparative negligence. §13-21-111.7, C.R.S. (2017). The defense of assumption of risk may be apply "to claims for which comparative negligence principles are applicable." *Winkler*, 923 P.2d at 159. "[A]ssumption of the risk requires knowledge of the risk and consent to it." *Carter v. Lovelace*, 844 P.2d 288, 1289 (Colo. App. 1992).

47. These defenses may have been predicated on the fact that Troutwin failed to use a backup device or technique while on the fixed rappel rope, as discussed in paragraph 12, above. No evidence was presented, however, that Troutwin lost control or was thrust off of the rappel rope for any other reason than being struck by the slough avalanche.

48. Further, these defenses may have been predicated on the assertion by the Defendant that backcountry skiing is inherently dangerous. These defenses fail on this latter argument, however, due the fact that the very harm that the Plaintiff incurred is the harm the Defendant assumed a duty of care to prevent.

> [W]hen a defendant assumes a duty to a plaintiff, what counts as contributory negligence is determined largely by the scope of the defendant's duty. If the defendant's duty to protect the plaintiff contemplates, encompasses, and thereby subsumes the plaintiff's duty not to act in a certain way, then the plaintiff cannot be faulted for acting in that way…. If the duty undertaken by the defendant and the harm to the plaintiff precisely match—in that the purpose of the undertaking was to prevent the harm—then it would be improper to allow the defendant to use the occurrence of that type of harm as a defense, since that was the very thing he was obliged to prevent. *P.W.*, 364 P.2d at 897 (citations omitted).

49. More, the failure to use protective devices or techniques in the backcountry skiing context is not unlike the failure to use a seatbelt or motorcycle helmet, both of which the court has addressed and declined to establish as basses for the application of a comparative negligence defense.[4] *See Dare v. Souble*, 674 P.2d 960 (Colo. 1984); *see also Carlson v. Ferris*, 58 P.3d 1055, 1059 (Colo. App. 2002) ("The failure to use the complete safety belt system is not a proper consideration in determining the degree of driver's comparative negligence, if any."). The *Souble* court's reasoning is helpful here:

> [f]irst, a defendant should not diminish the consequences of his negligence by the failure of the injured party to anticipate defendant's negligence in causing the accident itself. Second, a defense premised on an injured party's failure to wear a protective helmet would result in a windfall to tortfeasors who pay only partially for the harm their negligence caused. Third, allowing the defense would lead to a veritable battle of experts as to what injuries would have or have not been avoided had the plaintiff been wearing a helmet. *Id*. at 963.

50. The Court therefore finds and concludes that the Defendant has failed to carry his burden of showing either pure comparative negligence or assumption of risk, and declines to apportion liability based on relative negligence.

[4] The Court declines to extend these defenses to include the defense that the Plaintiff failed to mitigate her damages. The failure to mitigate damages is an affirmative defense and was not specifically pled in this action. *See* C.R.C.P 8(c); *see also Fair v. Red Lion Inn*, 943 P.3d 431 (Colo. 1997).

### F. Policy Considerations

51. This Court has determined that Parke's duty of care is a result of his express assumption of that duty, rather than broader policy concerns that are typically addressed in protracted discussions of legal duty. It is nevertheless worth noting that given the increasing popularity of backcountry skiing and skiing into Bear Creek in particular, the risk of skiers triggering avalanches above one-another is likely increasing. In situations where skiers have no knowledge of whether a group is below, the legal outcome of an accident may be different than the result reached here. A liability rule that thus encourages skiers to avoid investigating whether their descent might pose a risk to those below feels averse to sound public policy. Communication and coordination between groups of backcountry skiers is surely good practice.

52. But meaningful communication is not necessarily impossible in these circumstances. This Court is swayed by the availability of radios like that which Troutwin and Hope carried. These radios are a communication option that appears more reliable than cellular telephones. Perhaps if they become more prevalent, more communication between parties will take place. And it follows and is foreseeable that other communications platforms or safety standards will develop to address this specific risk. The liability rule discussed here does not necessarily foreclose those developments.

53. The ethics and liability rules associated with backcountry skiing are likely to continue to evolve as its popularity increases and safety standards emerge. The law is likely to continue to evolve in kind.

## IV. Conclusion and Orders

54. The Court finds and concludes, based on a preponderance of the evidence presented at trial, that Parke owed Troutwin a duty of care to act as a reasonable person would having acknowledged the risk of a skier-triggered avalanche. When he skied into Oblivion Bowl above Troutwin and triggered such an avalanche, he failed to act as a reasonable person would in that situation, and therefore breached that duty of care. Parke caused Troutwin's injuries when the avalanche that he triggered struck Troutwin, and Troutwin incurred damages due to those injuries. The Court therefore finds that Parke is liable for those injuries.

55. A reasonable measure of those damages is $9,660.00. Due to the statutory cap on damages in the small claims division, the Court therefore enters a judgment in favor of Troutwin in the amount of $7,500.00.

56. While Troutwin is entitled to costs as a prevailing party, no evidence of those costs has been presented. The Court grants leave to file a bill of costs.

57. The Court therefore orders:

1) A judgment for the Plaintiff in the amount of $7,500.00 shall enter.
2) A bill of costs and motion to amend this judgment to reflect those costs may be filed within 21 days.

Done this 27th Day of November, 2017.

_____

D. Cory Jackson
District Court Judge