NAME OF LAW FIRM
NAME OF ATTORNEY (State Bar #)
ADDRESS
PHONE
FAX

Attorneys For Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

NAME OF PLAINTIFF,

Plaintiff,

vs.

NAME OF DEFENDANT,

Defendant.

Case No. 05 AS02248

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Judge: Hon. Shellyanne W.L. Chang
Dept: 54
Date: July 7, 2006 9:00 a.m.

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I. INTRODUCTION

This case arises from a collision between a snowboarder and a skier, occurring at the Sierra-at-Tahoe Ski Resort on December 12, 2004. Plaintiff was on a family ski trip. At the time of the collision, she was standing near the left side of a ski run with several family members. They were waiting for still more family members to ski down to where they had agreed to come to a stop. While standing in plain sight near the left side of the ski run, Plaintiff was struck from behind by Defendant, who was snowboarding down a crowded beginner run at a very high rate of speed, and who may have jumped blindly from a bank on the skiers' left hand side of the run. Plaintiff sustained a serious traumatic brain injury.

Defendant has made a motion for summary judgment claiming that plaintiff's action is barred by the doctrine of assumption of risk. Plaintiff will show that defendant has failed to meet the high burden imposed on those filing for summary judgment. Defendant's own moving papers show that he was snowboarding in excess of 35 miles per hour in a designated slow skiing/snowboarding area on a run that was crowded with other skiers and snowboarders. The combination of speed in an inappropriate area and inattentiveness on the part of defendant is remarkably similar to the facts in *Lackner v. North* (2006) 135 Cal.App.4th 1188. There, the Court of Appeal reversed a summary judgment in favor of the defendant snowboarder, holding that the evidence was sufficient to prove recklessness.

There is ample evidence from which a jury could conclude that defendant was acting recklessly when he performed a blind jump off a bank onto the ski run, where he collided with plaintiff, who was simply standing there waiting for other members of her party. Further, even under the facts as shown in defendant's moving papers, he was riding extremely fast on a crowded run that was designated as a slow skiing area. Plaintiff was standing in an area unobstructed from view. Yet, defendant failed to see her until he could not avoid the collision. Defendant has not shown, and cannot show, that this collision was the result of conduct that is inherent in the sports of skiing or snowboarding.

II. STATEMENT OF FACTS

Plaintiff was skiing at the Sierra-at-Tahoe ski resort on December 12, 2004, on a ski run known as Sugar N Spice. (SUF #1) Defendant was snowboarding at the same resort. (SUF #2) In the course of her skiing, Plaintiff stopped near the left side of the Sugar N Spice run near several members of her

family. (SUF #5 and response thereto)

Defendant rates himself as an intermediate snowboarder, but he has never taken any lessons. (SUF #4) He does not pay attention to trail maps, the maps at the tops of the chairlifts, or the signs that pointed out that Sugar N Spice was the easiest way down from the top of the Grandview Express chairlift. (SDF #3)[1] He did not pay attention to whether the run was rated for beginners or more advanced skiers. (SDF #4)

The Sugar N Spice run is rated as "easiest" and is designated as a "slow skiing" area along its entire length. (SDF #2) Defendant did see several "slow" signs before he entered onto Sugar N Spice. (SDF #5) He slowed down, but was still traveling fast. (SUF #8) His speed on Sugar N Spice was estimated by a witness to be in excess of 35 miles per hour, even though Sugar N Spice was a crowded beginner run. (SDR #2, 9) Defendant did not have any need to be going at such a high rate of speed. Sugar N Spice can be readily negotiated by snowboarders at slow speeds throughout its entire length. (SDF #17)

Under the version of facts that is most favorable for Defendant, he came over a rollover and saw several people in front of him, one of which was Plaintiff, who was less than 40 feet ahead of him. (SDF #6, 7) Although there was nothing interfering with his vision of the area where plaintiff was standing, he had not seen her or the others in her group earlier. (SDF #8) While Defendant claims to have carved to the right in an attempt to avoid a collision (SUF #10), an eye witness states that Defendant did not have the ability to turn to avoid the collision. (SDF #10) Rather, Defendant headed straight toward Plaintiff, hitting her squarely without turning or checking his speed. He barreled over her. (SDF #11)

According to other witnesses, Defendant jumped off the bank on the skiers' left side of Sugar N Spice just before colliding with Plaintiff, (SDF #13) even though Defendant himself admits it would be highly irresponsible of him to have "gotten air" off the bank without first looking to see where he would land. (SDF #12)

General rules of skiing, known as the "Responsibility Code," urge skiers and snowboarders to abide by the following:

[1] SDF – Plaintiff's Statement of Disputed Factual Issues.

- Stay in control;
- Be able to stop or avoid other people/objects;
- People ahead of you have the right-of-way;
- Observe signs and warnings.

(SDF #14) These rules are posted on the lift towers for people to see as they ride up the Grandview Express chairlift. (SDF #15) Defendant had ridden that chairlift three times on the day of this collision. (SDF #16)

These facts demonstrate that Defendant was intentionally violating many of the important safety rules of skiing. He was skiing at an extremely high speed in a slow skiing area that was crowded with others. He was not able to turn to avoid a collision. He was not paying attention to the posted signs and warnings that told him to slow down. He ignored important information, such as that found on the trail map that designated Sugar N Spice as a slow skiing area, and would have informed him that it was a run for beginner skiers. He would have known that such skiers would be going much more slowly than he was going. Yet, he chose to indulge himself by riding at a very high rate of speed without looking where he was going. He may well have executed a blind jump off the bank on the skiers' left side of the trail, landing just before colliding with Plaintiff.

These facts would clearly support the conclusion that Defendant was irresponsible and reckless in his conduct on December 12, 2004, and that it was his irresponsibility, willful ignorance of the rules, and refusal to even make an effort to obey the rules that caused this collision.

III. LEGAL PRINCIPLES PERTAINING TO SUMMARY JUDGMENT

A motion for summary judgment is not available to decide individual theories of liability.

> To be entitled to summary judgment, the moving defendant must establish as a matter of law that none of plaintiff's asserted causes of action can prevail. A defendant may do so as to a particular cause of action by establishing, as a matter of undisputed fact, that it has a complete defense to that cause of action. [Citation.] The moving party must provide supporting documents and establish the claims of the adverse party are entirely without merit on any legal theory [citation] and establish there is no duty owed to the plaintiff [citation]. *Morgan v. FUJI Country USA, Inc.* (1995) 34 Cal.App.4th 127, 131.

The role of the trial court in a summary judgment is to determine whether triable issues of fact exist, not to resolve those issues. *Id.* at 131. All doubts are to be resolved in favor of the party opposing

summary judgment. *Ferrell v. Southern Nev. Off-Road Enthusiast Ltd*. (1983) 147 Cal.App.3d 309, 313. Due to the drastic nature of summary judgment and the importance of safeguarding the right to trial, the moving party's evidence is to be strictly construed. *Brantley v. Pisaro* (1996) 42 CalApp.4th 1591, 1601; *Shively v. Dye Creek Cattle Co.* (1994) 29 Cal. App. 4th 1620, 1627.

The moving party bears the burden of persuasion that there is no issue of material fact and must make a *prima facie* showing. *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850. The moving party must show that it is entitled to judgment as to all theories of liability asserted. *Lopez v. Sup. Ct.* (Friedman Bros. Investment Co.) (1996) 45 Cal.App.4th 705, 717. Defendant must either negate a duty to the plaintiff or establish undisputed facts that provide a complete defense. *Romano v. Rockwell Int'l., Inc.* (1996) 14 Cal.4th 479, 486.

The opposing party has no obligation to establish anything until and unless the moving party has met its burden. *Consumer Cause, Inc. v. Smilecare* (2001) 91 Cal.App. 4th 454, 468.

C.C.P. § 437c (p)(1)&(2). The opposing party's affidavits are to be liberally construed. *Pender v. Radin* (1994) 23 Cal. App. 4th 1807, 1813. If, at the end of the day, there is evidence from which a jury could find for the opposing party, the motion should be denied.

IV. ASSUMPTION OF RISK

Defendant's motion is based upon his claim that plaintiff's action is barred by primary assumption of the risk. As a general rule, California's negligence law provides that each person has a duty to use ordinary care and is responsible for injuries caused by his or her failure to do so. Cal. Civ. Code § 1714(a) (2006). In the context of active sports, such as skiing, the scope of this duty is limited by the doctrine of primary assumption of the risk. *See e.g., Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 115.

In *Knight*, 3 Cal.4th 296 (and the companion case of *Ford v. Gouin* (1993) 3 Cal.4th 339, the California Supreme Court attempted to clarify the proper application of the doctrine of assumption of risk after the adoption of comparative fault principles in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804. The *Knight* court pointed out that the term assumption of risk had been used, "in a number of different factual settings involving analytically distinct legal concepts [citations]." 3 Cal.4th at 303. The *Knight/Ford* decisions dealt with two of those concepts, commonly called primary and secondary assumption of risk.

Primary assumption of risk encompasses, "those instances in which the assumption of risk doctrine embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular risk." *Id*. at 308. Secondary assumption of risk includes, "those instances in which the defendant owes a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendants breach of that duty." *Id.*[2] Recovery is denied in a "primary assumption of risk" case and is merged into the comparative fault system in a "secondary assumption of risk" case. *Id.*

For purposes of this case, we are dealing with the doctrine of primary assumption of risk, which applies where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect plaintiff from the particular risk of harm that caused the injury. Whether the defendant owes a legal duty to protect plaintiff from the particular risk of harm turns on the nature of the sport and the defendant's role in or relationship to that sport. *Id.* at 315, 317. This issue is decided by the court. *Id.* at 313.

The Court went on to summarize the general rule of liability in active sports:

> Although defendants generally have no legal duty to eliminate (or protect plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty not to increase the risks to a participant over and above those inherent in the sport. *Id.* at 315-16.

A. The Duty Between Coparticipants.

Both *Knight* and *Gouin* involved determination of the duty owed to one another by coparticipants in a sport. The Court held that, as between coparticipants, the legal duty owed was to refrain from injuring one another intentionally or by engaging in conduct "that is so reckless as to be totally outside the range of ordinary activity involved in the sport." *Knight*, *supra*, at 3 Cal.4th. 320; *Ford*, *supra*, at 3 Cal.4th 345. This is a departure from traditional negligence based liability.

In explaining the rationale for carving out an exception to traditional negligence liability for coparticipants, *Knight* summarized its review of coparticipant cases from many jurisdictions and many sports:

[2] Although *Knight* commanded only a plurality of the Court, and not a majority, the Supreme Court has reaffirmed the basic principles of *Knight's* lead opinion, and they are considered controlling law. *Cheong v. Antablin*, 16 Cal.4th 1063, 1067 (1996); *See Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 537-538.

> In reaching the conclusion that a coparticipant's duty of care should be limited in this fashion, the cases have explained that, in the heat of an active sporting event like baseball or football, a participant's normal energetic conduct often includes accidentally careless behavior. The courts have concluded that vigorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct. The cases have recognized that, in such a sport, even when a participant's conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of *legal liability* for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.

3 Cal.3d. at 318-19.

Under these circumstances, conduct that is merely careless is treated as an "inherent risk" of the sport. *Id.* at 316. A risk is considered inherent in a sport if the risk cannot be eliminated without chilling vigorous participation in a sport or fundamentally altering the nature of the sport. *Id.* at 318-19.

B. Ascertaining What Risks Are Inherent In A Sport

Given the general rule of liability articulated in *Knight*, that there is no duty to eliminate risks inherent in a sport but that defendants have a duty not to increase the risk over and above those inherent in a sport, it becomes important to ascertain what risks are inherent in a given sport. That determination is a fact-driven inquiry. In doing so, a court faces a quandary:

> It seems to us that *Knight* has crammed a square peg of fact into the round hole of legal duty: whether there is or is not a duty in a primary assumption of risk case turns on the question whether a given injury is within the factual conceptions of the particular sport and how it is played. This works fine with regard to sports which are themselves a matter of common knowledge. We all grew up with baseball and football; some of us have skated, skied, or sailed. But what of sport such as, say, synchronized swimming, Olympic pentathlons, or parasailing?

Staten v. Superior Court (1996) 45 Cal.App.4th 1628, 1635.

Courts have used various sources of information to determine what risks are inherent in a sport. In the recent case of *Avila v. Citrus Community College Dist.*, 131 P.3d 383, 41 Cal.Rptr.3d 299, 2006 Daily Journal D.A.R. 4122, 06 Cal. Daily Op. Serv. 2855 (Cal. 2006), the Supreme Court referenced several books in its determination that the risk that a batter will be hit by a pitch, even one thrown intentionally at the batter's head, is an inherent risk of the sport of baseball. *Id.* at 311-12. *See, also, Wattenbarger v. Cincinnati Reds, Inc.*, (1994) 28 Cal.App.4th 746, 753 (Court used Official Companion

to World Sports and Games as a reference in determining that pitching a baseball involves an inherent risk of arm injury). Other cases have considered the testimony of expert witnesses. *See e.g.*, *Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1396, fn. 5; *Ferrari v. Grand Canyon Dories*, (1995) 32 Cal.App.4th 248, 255-57.

In seeking to avoid imposing a duty that might chill vigorous participation in a sport, thereby altering its fundamental nature, the Court needs to consider the customary practices of the sport. In *American Golf v. Superior Cour*, (2000) 79 Cal.App.4th 30, the Court stated, "the standards in the industry define the nature of the sport." *Id*. at 37, citing several examples.

Balthazor v. Little League Baseball, Inc. (1998) 62 Cal.App.4th 47 refused to impose duties over and above those that were customary in the sport. *Id.* at 52. In *Fortier v. Los Rios Community College District* (1996) 45 Cal.App.4th 430, the Court refused to impose a duty to provide helmets for pre-season drills, stating:

> There is in fact little difference between the drill in which plaintiff was participating and a supervised game of touch or flag football engaged in by students in the school yard or on the playground. Typically participants in such games do not wear helmets."

Id. at 439.

Similarly, in *Ferrari v. Grand Canyon Dories*, *supra*, the Court refused to impose a duty to provide a different kind of white water raft, stating that the one used was standard in the industry. 45 Cal.App.4th at 256-57.

While courts may hesitate to impose a duty that would require safety precautions beyond those that are customary in an activity, there should be no reluctance to impose a duty that would require a defendant to conform its conduct to the accepted standards applicable to an activity or sport. For example, in *Balthazor*, *supra*, the appellant contended that the sponsors of a baseball game were under a duty to provide batting helmets that had faceguards for little league baseball players. The Court refused to impose such a duty because the use of batting helmets without faceguards was customary. 62 Cal.App.4th at 52. Surely if the sponsors of the little league game had refused to provide any batting helmets at all, liability would have been justified. The customary use of batting helmets for baseball would provide a powerful argument that providing such helmets was a reasonable obligation that could

be imposed without altering the sport. The same might be said if the injury in *Fortier*, *supra*, had occurred in the course of a tackle football game, rather than during a pre-season non-contact drill.

Where certain safety measures are customary in a sport, the inherent risks of that sport must be ascertained with those safety measures in mind. It cannot be said that requiring one to take the customary safety measures would fundamentally alter a sport or would chill vigorous participation in the sport. If that were the case, the safety measures would not be customary. A risk cannot be inherent in a sport if measures to protect against it are customarily taken. The evidence here will show that there were numerous safety measures that are customary in skiing that were simply ignored by the defendant. Defendant's intentional failure to pay attention to and comply with those safety measures increased the risks to others on the slopes well above that risk of collision that is inherent in skiing and snowboarding.

1. The Inadequacy Of A List Of Inherent Risks

It is not enough that a particular type of injury or accident sometimes occurs during a sport or activity. A review of cases where courts have critically analyzed the duty issues demonstrates that simply listing certain types of accidents as inherent risks does not suffice.

In *Wattenbarger v. Cincinnati Reds, Inc.*, *supra*, the Court ruled that even though an arm injury suffered by throwing pitches is an inherent risk of baseball, those conducting pitching tryouts for major league baseball had a duty to protect participants from aggravating an existing injury. 28 Cal.App.4th at 753-756. To determine whether a particular injury is inherent in a sport, the Court must inquire more deeply.

In *Freeman v. Hale*, *supra*, the Court held that not all skier collisions were inherent risks of skiing. Where the cause of the collision was consumption of alcohol, primary assumption of the risk would not provide a defense. 30 Cal.App.4th at 1396-97. Similarly, in *Randall v. Mammoth Mountain Ski Area*, (E.D. Ca. 1999) 63 F.Supp.2d 1251, the Court held that not all terrain variations encountered by a skier are inherent risks of the sport. Mammoth Mountain's motion for summary judgment was denied where the terrain variations involved were man-made, artificial ridges about a foot-and-a-half high. The *Randall* court stated that the ridges were not similar to changes in terrain found naturally that skiers would expect to encounter. *Id.* at 1255. The lesson of these cases is that the determination of whether a particular risk inheres in the sport depends on the specific nature of the sport involved and the

specific facts of each case, not by referring to a list.

The court needs to examine the specific sport involved to ascertain whether reasonable steps can be taken to minimize these risks without fundamentally altering the sport or chilling vigorous participation.

2. Skier Collision Cases

While some courts have listed collisions between skiers as an inherent risk of skiing, they have also made it clear that not all collisions between skiers are caused by risks inherent in skiing. They have looked to the circumstances of each collision and to the conduct of the defendant that contributed to the collision.

In *Freeman v. Hale*, *supra*, the Court of Appeals reversed a summary judgment in favor of the defendant in a ski collision case. There was evidence that the defendant had been drinking alcohol and had manifested symptoms associated with drinking alcohol. Applying the guidelines from *Knight*, the decision provides guidance as to what type of conduct does not fall within the defense of assumption of risk.

> [W]e conclude that conduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent in the sport) if prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.

Id. at 1394.

The Court went on to hold that the fact that some skiers simultaneously engage in both skiing and consumption of alcohol does not mean that drinking is an activity ordinarily "involved" in skiing as that term was used in *Knight*, because consumption of alcohol could be prohibited without fundamentally altering the sport. *Freeman*, 30 Cal.App.4th at 1396.

The Court summed up its holding, "[W]hile Hale did not have a duty to avoid an inadvertent collision with Freeman, he did have a duty to avoid increasing the risk of such a collision." *Id.*

Lackner v. North, (2006) 135 Cal.App.4th 1188, involved a collision between a snowboarder and a skier. The snowboarder, North, was considered to be an advanced snowboarder. He had just descended a challenging slope at a very fast speed. The skier was standing on a flat area below the slope, talking to her husband with her back to the slope. Although the visibility was clear and the area was

wide open, North failed to see Lackner until he was too close to avoid hitting her. The Court held that there was a triable issue of fact as to whether the collision was inadvertent and unavoidable, as claimed by North, or was caused by North racing his teammates and being preoccupied with his position, causing him to ride into the rest area at a high rate of speed without looking where he was going. *Id.* at 1201. The Court analogized North's conduct to that of a driver who exits a freeway without slowing down or looking for other cars. *Id.*

As a measure of what it takes to amount to reckless conduct in a situation similar to that in this action, the Court referred to Section 500 of the Restatement Second of Torts, stating that,

> One acts with reckless disregard of safety of another if the actor 'does an act or intentionally fails to do an act, which is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.' Comment a to that section describes two types of reckless conduct. In both types the actor knows or has reason to know of facts which create a high degree of risk of physical harm to another and deliberately proceeds to act or fail to act. However, in one type the actor proceeds 'in conscious disregard of, or indifference to, that risk. In the other, the actor . . . does not realize or appreciate the high risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to have the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.' *Lackner*, 135 Cal.App.4th at 1200, citing Restatement (Second) of Torts § 500 (1965).

The *Lackner* court also addressed the issue of whether or not that defendant would possibly be liable for punitive damages. The Court held that North's conduct did not rise to the level of despicable and summarized North's conduct, which was sufficient to meet the criteria for recklessness as follows: "His error was in snowboarding at a high rate of speed without looking in the direction he was heading." *Id.* at 1213. The same can be said for Defendant. Plaintiff was standing in an area where she was readily visible. She was not moving. Yet, Defendant did not see her soon enough to avoid colliding with her. Just as was the case in *Lackner*, Kosachevich's error was in snowboarding at a high rate of speed without looking in the direction he was heading. Kosachevich's recklessness is compounded by the fact that he was in a slow skiing area, and still further by the fact that the slow skiing area was crowded.

In the recent case of *Mammoth Mountain Ski Area v. Graham*, (2006) 135 Cal.App.4th 1367, (Mammoth Mountain) still another district of the Court of Appeals reversed a summary judgment in

favor of a defendant in a case arising from a collision between a snowboarder and a skier. There, the snowboarder was boarding down a slope while having a snowball fight with his brother when he collided with a ski instructor. The ski instructor was simply standing on the slope watching his students. *Id.* at 1369-1370.

There, as here, defendant contended that the behavior was arguably negligent but did not amount to recklessness because collisions are one of the inherent risks of skiing or snowboarding. The Court rejected that argument and found that there was a triable issue of fact because a jury could find that the conduct amounted to recklessness, "*i.e.*, a conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it . . . ." citing Comment g to Restatement Second of Torts. *Mammoth Mountain*, 135 Cal.App.4th 1373, citing Restatement (Second) of Torts § 500 cont. (1965). Here, it can also be said that Defendant made a conscious choice to ride at a very high speed into a slow skiing area that was crowded with others. Such conduct obviously presented serious danger to others. Kosachevich's choice of a course of action was reckless, just as was the case in *Mammoth Mountain, supra*.

The collision cases listed by defendant shed no additional light on the issue. *Cheong v. Antablin* (1997) 16 Cal.4th 1063 involved an inadvertent collision that was unavoidable. The Court acknowledged that if the facts demonstrated that the defendant had acted recklessly, liability would follow, but felt there was no evidence of recklessness under the facts of that case. *Id.* at 1066.

Mastro v. Petrick (2001) 93 Cal.App.4th 83 arose from another snowboarder-skier collision. The Court of Appeals affirmed a summary judgment in favor of the defendant. The principal issue discussed in the case revolves around whether snowboarding and skiing are different sports and therefore the liability matrix created by *Knight* and *Ford* is somehow changed. The Court held that the difference did not change the rules of liability. *Id.* at 89-90. As to whether the facts were sufficient to constitute recklessness, we are left with the conclusion that they were not, but with very little of the facts themselves. *Id.* at 83, fn*, 91-92. The decision is of no value in assessing what it takes to constitute reckless conduct.

The lesson of the various collision cases is that the defendant will be liable if his or her conduct was reckless so as to be outside of the ordinary activity involved in the sport as opposed to inherent in the

sport. A measure of recklessness is found in Restatement Second of Torts Section 500, variously stated as: one who knows or should know that his acts or omissions create a high degree of risk of physical harm to others and proceeds to act in spite of that risk (*See Lackner, supra*, 135 Cal.App.4th at 1200), or who makes a conscious choice of a choice of action with knowledge of the serious danger to others involved in it (*See Mammoth Mountain, supra*, 135 Cal.App.4th at 1373). The primary policy considerations are: (1) did the defendant breach his obligation not to increase the risks to a coparticipant over and above those inherent in the sport and (2) could defendant's conduct be prohibited without chilling vigorous participation or fundamentally altering the sport? *Knight, supra,* at 318-319.

If both of those questions can be answered yes, then the defendant's conduct is not protected by the doctrine of assumption of risk.

We apply the principles to the facts of this collision. Here, Kosachevich must be held to know that collisions at high speed could produce serious injuries. While he professed not to know about the various safety rules that apply to skiing, he must be held to those rules. They are prominently posted in many locations at Sierra-at-Tahoe. He rode up the chairlift three times on the day of the collision. Many of those rules are posted on the various supporting poles that one passes riding up the chairlift. Ignorance is no excuse. He knew that this was a slow skiing area, and that he would expect to see people skiing much more slowly than he was. Yet, he chose to ride down a crowded slope in excess of 35 miles per hour with complete disregard for the safety of others on the slope. Under the evidence provided in this case, Kosachevich's high rate of speed and lack of vigilance of others on the slope, combined with his failure to obey the basic safety rules of skiing, greatly increased the risk of collision. He clearly breached his obligation not to increase the risks over and above those inherent in the sport.

Kosachevich's conduct could be prohibited without chilling vigorous participation or fundamentally altering the sport of snowboarding. In fact, his conduct *was* prohibited. Rather than chilling vigorous participation, prohibition of Kosachevich's conduct would allow for healthy participation in the sport. Failing to prohibit conduct such as that exhibited by Kosachevich would chill participation by many skiers who would prefer not be constantly worried about being run over from behind by speeding snowboarders. Kosachevich is still free to satisfy his need for speed on other, less crowded runs, not marked for slow skiing/boarding.

Defendant raises a possible inference that the terrain may have prevented Kosachevich from seeing Plaintiff until he was so close that he could not avoid her. If so, Kosachevich's recklessness is even more glaring. He would be skiing at high speed into an area where he could not see far enough ahead to stop within the range of his vision. He was simply playing a game of Russian roulette, hoping that there wasn't a person or object in his path on the other side of the breakover. The Responsibility Code requires that all skiers and snowboarders stay under control so they can be able to avoid collisions with objects or other skiers or snowboarders. It also requires that the overtaking rider yield to those people in front of him. Kosachevich has completely ignored both of those rules. It can hardly be said that prohibiting his conduct would somehow change the fundamental nature of snowboarding. There are other slopes where he can ride fast and other areas where he can do tricks. Intentionally violating the basic safety rules of his sport is, by definition, outside the ordinary activity involved in the sport. Boarding too fast in heavy traffic on a beginner slope that is designated for slow skiing and riding is just as dangerous as weaving in and out of lanes on the highway at high speed.

To evaluate the inherent risks of skiing or snowboarding, one must consider the customary rules and practices applicable. If skiers and boarders are not required to maintain control and avoid hitting others or objects, snow sports will become a much more hazardous undertaking. If overtaking riders are not required to yield the right-of-way to those ahead of them, the slope becomes chaotic. In short, failing to enforce these basic rules would fundamentally alter snow sports. Failing to enforce these basic rules would chill vigorous participation by many on the slopes who would be in fear of being run over by speeding skiers or snowboarders. Skiing and snowboarding are, and are meant to be, non-contact sports. They are not competitive activities in the setting of a recreational ski area. They are, in fact, cooperative activities where the safety of all depends on each abiding by the customary rules. To allow some to intentionally disregard those rules increases dramatically the danger to all.

V. CONCLUSION

Contrary to defendant's arguments, not all ski collisions fall within the inherent risks of skiing. Here, Kosachevich owed others on the slope a duty to comply with the fundamental right-of-way rules of skiing and to ski slowly in a slow skiing area. His intentional failure to do these things in a designated slow skiing area constitutes reckless activity that is outside the normal sport of skiing or snowboarding.

Kosachevich’s behavior fits the pattern of cases finding the defendant liable for colliding with others. He was riding too fast on a beginner slope to allow him to fully appreciate the traffic and terrain below him. He was inattentive, failing to see plaintiff, who was simply standing toward the side of the run, along with other members of her party. There is evidence he jumped onto the run from the bank. Failing to hold Kosachevich responsible for thus increasing the risks of collisions beyond those that are inherent in the sport would have a chilling effect on others and would fundamentally alter the sports of skiing and snowboarding.

Dated: June 21, 2006

NAME OF LAW FIRM

____
NAME OF ATTORNEY
Attorney for Plaintiff

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