WEST VIRGINIA SUPREME COURT OF APPEALS
DOCKET NO. 22-0468

Thomas B., individually and as parent
And next friend of A.B., a minor,

Plaintiffs Below, Petitioner,

On Appeal from a final order of the
Circuit Court of Tucker County
(Civil Action No. 20-C-4)

U.S. Hotels and Resort Management, Inc.,
And Regency Hotel Management, LLC

Defendants Below, Respondent.

RESPONDENTS U.S. HOTEL AND RESORT MANAGEMENT, INC., AND REGENCY HOTEL MANAGEMENT, LLC'S RESPONSE TO PETITIONER'S BRIEF

John R. Merinar, Jr. (WV ID #6080)
Bonnie J. Thomas (WV ID #13476)
Steptoe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
(304) 933-8000 (phone)
(304) 933-8183 (fax)
jack.merinar@steptoe-johnson.com
bonnie.thomas@steptoe-johnson.com

Counsel for Respondents U.S. Hotels and Resort Management, Inc., And Regency Hotel Management, LLC

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I. STATEMENT OF THE CASE

Respondents U.S. Hotels and Resort Management, Inc., and Regency Hotel Management LLC, (collectively, "Canaan Valley") submit this brief in response to Petitioner's Brief ("Brief") and request for review and appeal of Circuit Court of Tucker County Judge James Courrier, Jr.'s decision and order granting Canaan's Motion to Dismiss Plaintiffs' Complaint.

On January 27, 2019, Petitioner's daughter A.B. ("A.B."), a minor alleged to have special needs, was snow tubing at the snow tubing park operated by Respondents at Canaan Valley Resort.[1] A.B.'s father, Petitioner, had purchased tickets for the snow tubing park for A.B. and her two minor siblings.[2] Petitioner alleged that prior to purchasing the tickets, he informed the Canaan Valley attendant that he was purchasing the tickets for his minor children, including A.B. who has special needs.[3] Petitioner alleged that he was informed by a Canaan Valley employee, agent and/or representative that A.B. and her siblings could safely enjoy the snow tubing park without being accompanied by an adult.[4]

A Canaan Valley employee was allegedly stationed at the top of the snow tubing park where snow tubers begin their descent.[5] Petitioner alleged that it was this individual's duty to monitor guests at the top of the hill and to indicate to guests when the guest or guests in front of them have cleared the lane making it safe for them begin their descent.[6] On A.B.'s second run

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[1] Compl. ¶ 16, Joint Appendix 1.
[2] *Id.* ¶ 16.
[3] *Id.*
[4] *Id.* Petitioner has attempted to add a great number of allegations through his expert's affidavit and brief. These added allegations were not pled nor required to be considered by the Trial Court.
[5] *Id.* ¶ 15.
[6] *Id.*

down the snow tubing hill, she was allegedly struck by another snow tuber before she had cleared from her lane.[7] A.B. was allegedly seriously injured.[8]

Petitioner filed his Complaint on June 8, 2021, in the Circuit Court of Tucker County alleging two counts of negligence.[9] In Count I, Petitioner alleged that Canaan Valley was negligent in failing "to properly train and supervise its employees" who were working the snow tubing park on January 27, 2019.[10] In Count II, Petitioner alleged that Canaan Valley negligently and recklessly operated and maintained the snow tubing park by (1) permitting other guests to slide down the hill before A.B. had cleared her lane and by (2) failing to "keep a proper lookout and properly direct guests, including minors and those with special needs, who were utilizing the snow tubing park."[11]

On June 30, 2021, Canaan Valley moved for dismissal of Plaintiffs' Complaint, arguing that the West Virginia Skiing Responsibility Act ("WVSRA") W.Va. Code §20-3A-1, *et seq.* provided Canaan Valley immunity from tort liability for collisions between snow tubers.[12] Petitioner responded on November 30, 2021, and supplemented that response with the Affidavit of purported expert Chris Currey on December 6, 2021.[13] The Honorable Judge James W. Courrier heard arguments on December 10, 2021, and entered an Order on May 24, 2022, granting Defendants' Motion to Dismiss as to both Counts I and II.[14] Petitioner filed his Notice of Appeal

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[7] *Id.* ¶ 17.
[8] *Id.* ¶ 18.
[9] *Id.*
[10] *Id.* ¶ 28.
[11] Compl. ¶¶ 32, 33;Joint Appendix 54.
[12] *Id.*; Joint Appendix 2.
[13] This response and affidavit are the first mentions of Canaan Valley's alleged advertising of providing special services for those with special needs.
[14] Joint Appendix 54.

on June 17, 2022, which included an expansion of the facts originally pled.[15]

In its Order granting Canaan Valley's Motion to Dismiss, the Circuit Court made the following pertinent Findings of Fact and Conclusions of Law:

> 1. The WVSRA applies to the present case as [A.B.] satisfied the definitions of "skier" and "skiing" as defined in W. Va. Code § 20-3A-2(h) and (i). Moreover, while it is not binding on this Court, the Court finds persuasive the opinion of Judge H. L. Kirkpatrick in *Travis and Morgan Bailey, on behalf of their minor son, Parker Bailey v. New Winterplace, Inc., a West Virginia Corporation*, Civ. A. No. 15-C-389-K. Judge Kirkpatrick found it clear that "snow tubing must be placed on the same footing as snow skiing, in terms of an interpretation of the WVSRA, pertaining to the circumstances at bar." Furthermore, it is clear that the West Virginia Legislature intended for skiing and snow tubing to be treated the same under the WVSRA as it added "snowboarding and snow tubing" to the WVSRA's skiing definition in 2006. W. Va. Legislature Wrap-Up, 5/31/2006. . . .
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> 4. In § 20-3A-6 of the WVSRA, the West Virginia Legislature **expressly limited a ski area operator's liability to injuries caused by the failure to follow the ski area operator's duties set forth in statute.** *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E.2d 634, 637 (1991);
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> 5. In the case at bar, the relevant duty requires ski area operators to: "(8) **maintain the ski areas in a reasonably safe condition,** except that such operator shall not be responsible for any injury, loss or damage caused by the following: variations in terrain; surface or subsurface snow or ice conditions; bare spots, rocks, trees, other forms of forest growth, or debris; collisions with pole lines, lift towers, or any components thereof; or collisions with snowmaking equipment which is marked by a visible sign or other warning implement in compliance with subdivision (2) of this section." W. Va. Code § 20-3A-3(8);
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> 6. Pursuant to the reasoning of *Travis and Morgan Bailey, on behalf of their minor son, Parker Bailey v. New Winterplace, Inc., a West Virginia Corporation*, Civ. A. No. 15-C- 389-K, which involved a similar incident and asserted similar negligence claims as the case at bar, "**the Defendant's duty to maintain the ski area in reasonably safe condition did not extend to risks for which is it**

[15] In this Notice, Petitioner set forth arguments not pled in his Complaint, and which Respondents contends are not helpful to Petitioner even if they had been.

specifically immunized, such as the risk of collisions between tubers." Furthermore, Judge H.L. Kirkpatrick added that **to allow the plaintiff's claim to proceed would subvert the purpose of the WVSRA**. *Id*;

7. As to the duties and responsibilities of individual skiers, § 20-3A-5(a) of the WVSRA plainly enumerates the duties' of skiers as well as the risk and legal responsibility that each skier expressly assumes when participating in the sport of skiing. **A collision between snow tubers is a risk and legal responsibility that a skier expressly assumes** as W. Va. Code § 20-3A-5(a) explicitly states "**if while actually skiing, any skier collides with any object or person**, except an obviously intoxicated person of whom the ski area operator is aware, **the responsibility for such collision shall be solely that of the skier** or skiers involved and not that of the ski area operator.";. . . .

10. Lastly, **[Canaan] did not owe a heightened duty and standard of care to [A.B] as a result of her special needs as no relevant legal authority supports this assertion**. Additionally, the West Virginia Supreme Court's holding in *Stephen W. v. Timberline Four Seasons Resort Mgmt.*, No. 14-1158, at 3 (W. Va. Aug. 31, 2015) (memorandum decision), seems to explicitly contradict this argument. In particular, **the West Virginia Supreme Court declined to read into the WVSRA that the child's age affected its applicability when it held that the WVSRA "makes no reference to a skier's age."** *Id.* In further support, the Court emphasized that "the WVSRA's clear provision that all skiers assume the inherent risks of skiing" and that "skier' is defined as `any person present at a skiing area under the control of a ski area operator for the purpose of engaging in the sport of skiing[.]'" *Id.* Moreover, the Court made it clear that **"it is not for this Court arbitrarily to read into [a statute] that which it does not say.** Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." *Id.*[16]

II. SUMMARY OF THE ARGUMENT

This Court should deny Petitioner's request for review and appeal because it defies (1) the plain language of the WVSRA and (2) the precedent set by this Court and courts across the state applying the WVSRA over the nearly forty years since its enactment in 1984. In *Pinson v.*

[16] Joint Appendix 54(emphasis added).

Canaan Valley Resorts, Inc., 196 W. Va. 436, 473 S.E.2d 151 (1996), the Court upheld a grant of summary judgment and relied upon the express provisions of the WVSRA specifying certain conditions for which the ski operator is not responsible, including "[v]ariations in terrain; surface or subsurface snow or ice conditions; bare spots, rocks, trees, other forms of forest growth or debris . . . .[17] More recently the Court affirmed summary judgment for a ski area operator under similar circumstances.[18] Although Petitioner has argued that A.B.'s injuries are distinguishable from the plaintiffs' injuries in *Addis* and *Pinson* because they were not caused by ice, ungroomed snow, or conditions related to variations in the terrain, that argument fails. *Pinson* and *Addis* stand for the proposition that the WVSRA immunizes ski area operators from liability not just from the inherent risk to skiers posed by ice and snow conditions, but also the assumed inherent risks specifically enumerated in W. Va. Code § 20-3A-5, including collisions with objects or other skiers.[19]

Furthermore, this Court should deny Petitioner's request for review and appeal because Petitioner's asserted arguments regarding an alleged heightened duty owed to individuals with special needs based on Canaan Valley's "advertising" to such persons is both factually irrelevant to any claim analyzed under the WVSRA and procedurally untimely and inappropriate. Petitioner's Complaint made no allegation of such a heightened duty. As such this issue was not appropriately presented to the Trial Court and is not appropriate in this appeal. In addition, Petitioner makes some arguments for the first time on appeal. This Court should not consider these matters, which were not part of the pleading nor the Trial Court's consideration of the Motion to

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[17] *Pinson v. Canaan Valley Resorts, Inc.*, 196 W. Va. 436, 473 S.E.2d 151 (1996); W. Va. Code § 20-3A-3(8) (1984).
[18] *Addis v. Snowshoe Mountain, Inc.*, No. 12– 1537, 2013 WL 6152356 (W. Va. Nov. 22, 2013) (unpublished memorandum decision)(affirming summary judgment in a negligence action filed by an experienced skier who was injured when, after his ski became dislodged, he "stopped on a 'very steep slope' and, while attempting to put his ski back on, he slipped on ice, over a drop-off, and into the nearby wooded area" as barred by WVSRA).
[19] W. Va. Code § 20-3A-5.

Dismiss. With or without consideration of these matters, however, the Trial Court's granting of dismissal to Canaan Valley should be affirmed in all respects.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the facts and legal arguments have been adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument, Canaan Valley asserts that oral argument is not necessary under West Virginia Rule of Appellate Procedure 18(a)(4) unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this appeal is appropriate for argument pursuant to West Virginia Rule of Appellate Procedure 19 and disposition.

IV. ARGUMENT

A. Standard of Review.

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*."[20] Despite that, when examining a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and therefore, its allegations are to be taken as true, "[t]he purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint."[21] The Supreme Court of Appeals of West Virginia has held that "[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[22] Stated another way, "a trial court should not dismiss a complaint where sufficient facts have been alleged that, if proven, would entitle the

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[20] Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995)

[21] *Cantley v. Lincoln Co. Com'n*, 221 W.Va. 468, 470, 655 S.E.2d 490, 492 (2007); *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978).

[22] *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977).

plaintiff to relief."[23]

While Canaan Valley does not disagree with Petitioner's suggestion that "a motion to dismiss for failure to state a claim [is] viewed with disfavor and rarely granted," this Court has held that, "[m]otions to dismiss provide necessary relief in instances where a party requests relief that it cannot receive or attempt to enforce rights which it does not have.[24] As a final note, by attempting to add factual allegations he did not plead, Petitioner is evidently trying to generate issues of fact. This is inappropriate under the West Virginia Rules of Civil and Appellate Procedure.

B. Each of Petitioner's Assignments of Error Takes Issue with The Trial Court's Application of the Plain Language of the WVSRA and This Court's Guidance on Statutory Interpretation.

Petitioner asserts four assignments of error: (1) the Trial Court did not determine if Canaan Valley maintained the snow tubing park in a reasonable safe "manner"; (2) the Trial Court should not have applied *Travis and Morgan Bailey, on behalf of their minor son, Parker Bailey v. New Winterplace, Inc., a West Virginia corporation* such that it supports a finding that the WVSRA bars a claim arising out of a collision between A.B. and another skier; (3) the Trial Court should have determined that W. Va. Code § 20-3A-5(a) cannot apply to tubing but only other types of skiing under the WVSRA; and (4) the Trial Court should have found that Canaan Valley owes a heightened duty toward A.B. In each assignment of error, Petitioner argues for what *he* believes the law *should be*—not what the law actually is. Canaan Valley will address each assignment of error separately, but they share in common the same fundamental flaw, which is that they ignore the Trial Court application of the plain and unambiguous language of the WVSRA.

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[23] *Cantley*, 221 W.Va. at 470, 655 S.E.2d at 492.
[24] *See, e.g., State ex rel. McGraw,* 194 W.Va. at 776, 461 S.E.2d at 522.

1. The Clear and Unambiguous Standard.

This Court has had, on several prior occasions, an opportunity to apply plain, unambiguous statutory language. In those instances, this Court has held that, "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case **it is the duty of the courts not to construe but to apply the statute.**"[25]

In accord with this practice, the Trial Court found, as a threshold matter, that Petitioner A.B. met each of the necessary criteria to be covered as a "skier" under the WVSRA.[26] Specifically, the trial court found that under the clear and unambiguous language of the WVSRA, A.B. was a covered "skier,"[27] because she was engaged in the act of "skiing" in a "ski area" of a "ski area operator" at the time of her injury.[28] Because A.B. is a "skier" under the WVSRA, the clear and unambiguous language of the statute was applied by the Trial Court, resulting in the conclusion that A.B.'s claims must be dismissed.

2. Relevant Language of the WVSRA.

Despite that Petitioner's claims have been a moving target throughout the briefing of this case, the plain language of the WVSRA provides that Canaan Valley is statutorily immune from Petitioner's negligence action(s), and the trial court's granting of Canaan Valley's motion to dismiss for Petitioner's failure to state a claim was not erroneous for any of the four reasons asserted by Petitioner. In 1984, the West Virginia Legislature passed the WVSRA, finding that:

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[25] Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959)(emphasis added).
[26] Joint Appendix 54.
[27] The WVSRA, at W. Va. Code § 20-3A-2(h), sets forth the definition of a "skier," as "any person present at a skiing area under the control of a ski area operator for the purpose of engaging in the sport of skiing in locations designated as the ski slopes and trails but does not include a passenger using an aerial passenger tramway."
[28] *Id.*

> Since it is recognized that there are **inherent risks in the sport of skiing** which should be understood by each skier and which are essentially impossible to eliminate by the ski area operator, **it is the purpose of this article to define those areas of responsibility** and affirmative acts for which ski area operators shall be liable for loss, damage or injury **and those risks which the skier expressly assumes for which there can be no recovery**.[29]

In doing so, the Legislature legally recognized what many other states have also codified—that the act of skiing comes with inherent risks for which, as a matter of public policy, ski area operators should not be assigned liability.[30] Rather, the West Virginia Legislature defined the specific areas of responsibility/liability that should lie with the "ski area operators" as well as those which should lie with the individual "skier" who assumes the inherent risks of skiing.[31] Furthermore, the Legislature designated specific risks of injuries that it considered as inherent in the sport of skiing, including collision with other skiers.[32] In sum, the statute requires that, "[e]ach skier expressly assumes the risk of and legal responsibility for any injury, loss or damage to person or property which results from participation in the sport of skiing," including, specifically, that "skiers assume the risk of injury which results from variations in terrain, snow or ice conditions, and collisions with marked snow-making equipment."[33]

The plain language steps leading to the conclusion that Petitioner's claims are barred begin with W.Va. Code § 20-3A-2(i), which defines "skiing" as "sliding downhill or jumping on snow or ice on skis, a toboggan, a sled, **a tube**, a snowbike, a snowboard, **or any other device by utilizing any of the facilities of the ski area**."[34] Next, W.Va. Code §20-3A-2(e) defines

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[29] W. Va. Code§ 20-3A-1(emphasis added).
[30] Other states with skiing liability statutes include Pennsylvania, Michigan, Washington, Colorado, Idaho, Maine, Oregon, Connecticut, Wyoming, Vermont, Ohio, North Carolina, Arizona, Massachusetts, New Mexico, and Montana.
[31] W. Va. Code§ 20-3A-3; W. Va. Code§ 20-3A-5.
[32] W. Va. Code. § 20-3A-5(a).
[33] W. Va. Code § 20-3A-3(8); W. Va. Code § 20-3A-5(a).
[34] W.Va. Code § 20-3A-2(emphasis added).

"ski area" as "all ski slopes and trails not including any aerial passenger tramway." W.Va. Code §20-3A-2(j) then defines "ski slopes and trails" as including "those areas designated by the ski area operator **to be used by skiers** for the purpose of participating in the **sport of skiing in areas designated *for that type* of skiing activity**." [35] Here, the trial court reasoned that because A.B. was sliding downhill on a tube ("skiing") in a snowtubing park ("ski trail") under the control of Canaan Valley ("ski area operator"), she was a "skier" covered by the WVSRA when she was injured.[36]

The final step is the application of W.Va. Code §20-3A-5, which provides that "skiers" "expressly assume[] the risk of and legal responsibility for any injury, loss or damage to person or property which results from participation in the sport of skiing."[37] Despite Petitioner's contention otherwise, the legislature went on to specifically enumerate inherent risks and responsibilities assumed by the "skiers," as follows:

> Each skier shall have the sole individual responsibility for **knowing the range of his or her own ability to negotiate any ski slope or trail**, and it **shall be the duty of each skier** to ski within the limits of the skier's own ability, to maintain reasonable control of speed and course at all times while skiing, to heed all posted warnings, to ski only on a skiing area designated by the ski area operator and to refrain from acting in a manner which may cause or contribute to the injury of anyone. **If while actually skiing, any skier collides with any object or person, except an obviously intoxicated person of whom the ski area operator is aware, the responsibility for such collision shall be solely that of the skier or skiers involved and not that of the ski area operator.**[38]

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[35] *Id.*

[36] Joint Appendix 1 at ¶16. Notably, this clear language interpretation flies in the face of Petitioner's third assignment of error—that, in Petitioner's calculation, "collisions while tubing" does not mean, "collisions while skiing" under the WVSRA.

[37] W. Va. Code § 20-3A-5.

[38] *Id.* (emphasis added).

When examining the circumstances of this case, the result was clear for the Trial Court: A.B. was tubing, which makes her a "skier" under the WVSRA; A.B. collided with a person, who has not been alleged to have been intoxicated, and therefore "the responsibility for such collision shall be solely that of [A.B.] or skiers involved."[39] At its core, this case boils down to a collision of two snow tubers. In accord with the clear and unambiguous language of the WVSRA, Canaan Valley, as a ski area operator, is specifically immune from actions arising out of collisions between snow tubers. This Court, therefore, should affirm the Circuit Court's application of the plain language of the WVSRA, which necessarily results in the conclusion that Canaan Valley is statutorily immune.

3. *Finding that Canaan Valley is immune from Petitioner's Claims is consistent with the intent of the Legislature.*

It is not necessary to delve into analysis of Legislative intent when the language is plain. But, it is at least interesting to note that the plain language which results in finding that Petitioner is a skier, and thus cannot bring a claim based on a collision with another skier, is consistent with Legislative intent. First, the only exception under the WVSRA to the mandate that ski area operators are not responsible for collisions between skiers is when one of the skiers is intoxicated. The Legislature obviously could have carved out other exceptions, for minors, or for others with some diminished capacity, but it chose not to do so. Second, W.Va. Code §20-3A-1 states in pertinent part, "...it is the purpose of this article to define those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury and those risks for which the skier expressly assumes the risk **and for which there can be no recovery."** (emphasis added). Read *in pari materia* with W.Va. Code §20-3A-5, there can be no doubt that the Legislature intended to immunize ski area operators like Canaan Valley from liability for

[39] *Id.*

collisions between skiers, and in W.Va. Code § 20-3A-2(h) and (i), the Legislature made it clear that Petitioner and the other person snow tubing with whom A.B. collided are skiers under the WVSRA.

4. Courts across the nation have consistently found upheld the immunity ski resorts for injuries to skiers incurred while participating in the act of "skiing" due to "skiing responsibility" statutes similar to the WVSRA.

Likewise, given the plain language of the WVSRA, it is not necessary to consider how other states have dealt with the same issue. Nonetheless, it is at least interesting to note that courts in other states, faced with essentially the same issue, have concluded that ski area operators are immune. *See Lanzilla v. Waterville Valley Ski Resort, Inc.*, 517 F. Supp. 2d 578, 580 (D. Mass. 2007) (noting that snow tubing is an activity in which ski area operators are immunized if injuries resulted); *Maddocks v. Whitcomb*, 896 A.2d 265, 268 (Me. 2006) (affirming summary judgment and finding that snow tuber was barred from recovery pursuant to Maine's ski area liability statute and ski resort operators have no duty to instruct skiers or snow tubers on safety measures)[40]; *Bazarewski v. Vail Corporation*, 23 F. Supp. 3d 1327, 1329 (D. Colo. 2014) ("The parties agree that the Colorado Ski Safety Act . . . applies in this case."); *Horvath v. Ish*, 2011-Ohio-2239, ¶ 9, 194 Ohio App. 3d 8, 11, 954 N.E.2d 196, 198, *aff'd on other grounds*, 2012-Ohio-5333, ¶ 9, 134 Ohio St. 3d 48, 979 N.E.2d 1246 (finding that snowboarding fits within definition of 'skier' under

[40] In *Maddocks*, the plaintiff was sliding down the tubing chute when she went over a bump or hillock made of snow in the chute, became airborne on her tube, and was injured upon landing. *Id.* at ¶ 3. She filed suit claiming that the defendant was negligent in the operation of the snow tubing area. *Id.* In examining defendant's motion for summary judgment pursuant to Maine's ski area liability statute, the *Maddocks* court wrote, "[w]hen interpreting a statute, we accord the words of a statute their plain ordinary meaning. If that meaning is clear, we will not look beyond the words of the statute, unless the result is illogical or absurd." *Id.* (internal citations omitted). In line with the language and the trial court's ruling in this matter, the Maddocks court held, "Maine's ski area liability statute], provides that each person who participates in the sport of skiing accepts, as a matter of law, the risk inherent in the sport and may not recover from the ski area operator for injuries resulting from the inherent risks of skiing. As the definition of skiing for purposes of section 15217 unambiguously includes the use of a ski area for sliding downhill on a tube, 32 M.R.S. § 15217(1)(B), the inherent risks of skiing include the inherent risks of snow tubing. *Id.* at ¶ 9 Included within the inherent risks of skiing that bar recovery are collisions with or falls resulting from natural and manmade objects such as the hillock. 32 M.R.S. § 15217(1)(A). Maddocks's injury resulted from such a collision; therefore, she is barred from recovery pursuant to section 15217(2)." *Id.*

the statute "recognizes that skiing is an inherently dangerous activity and that a skier assumes the risk and liability of injury and damage that arises from the inherent dangers of skiing"); *Cecere v. Loon Mountain Recreation Corp.*, 155 N.H. 289, 923 A.2d 198 (2007)(affirming trial court's granting of summary judgment where snowboarder was a "skier" under statute, prohibiting person participating in the sport of skiing from maintaining action against a ski area operator for injuries caused by risks inherent to skiing.)

C. The Fact That The WVSRA Also Establishes Ski Area Operators' Duty To Maintain Ski Areas In A Reasonably Safe Condition Does Not Change The Conclusion That Petitioner's Claims Are Barred Because Canaan Valley Is Immune.

W. Va. Code § 20-3A-3(8) provides that ski area operators such as Canaan Valley shall "[m]aintain ***the ski areas*** in a ***reasonably safe condition.***" Petitioner argues that his allegations implicate this section of the WVSRA and thus dismissal is inappropriate. The flaw in his argument is obvious: it ignores the point that, while WVSRA creates this duty, (as discussed above), the WVSRA also creates an exception to this duty for inherent risks. Hence, the language of W.Va. Code § 20-3A-5, which provides that skiers are solely responsible for collisions between the skiers involved.

Petitioner attempts to rely on a U.S. District Court for the Northern District of West Virginia case captioned *Hardin v. Ski Venture, Inc.*,[41] and a string of six out of state cases interpreting other states' law regarding skiing immunity or assumption of risk.[42] However, the cases cited by Petitioner are easily distinguishable; in nearly all instances, the out-of-state cases

[41] 848 F.Supp. 58, 61 (1994).

analyze risks not enumerated as inherent risks assumed by skiers in those states.[43] *Hardin* will be addressed below.

In *Hardin*, the plaintiff skier was skiing at Snowshoe. He alleged that he skied through an area where snowguns were operating while pointing uphill (into the faces of skiers) on an open trail, the wet man-made snow adhered to his goggles, and consequently he skied into a tree. The District Court denied Snowshoe's motion for summary judgment because, in the opinion of the Court, there was a question of fact surrounding whether W.Va. Code § 20-3A-5, which lists "surface and subsurface snow and ice conditions" immunized Snowshoe from liability for projecting man-made snow into the air; or instead, the facts at issue brought the case under the scope of what the Court referred to as the "general duty clause" found in W.Va. Code § 20-3A-3(8). It is not difficult to perceive why the *Hardin* Court would find that the clarity needed for summary judgment was lacking, given the argument that "surface and subsurface snow and ice conditions" encompassed man-made snow projected into the air. By contrast, here, there is no such lack of clarity. Whether the risk encountered by Petitioner is covered by the plain language of W.Va. Code § 20-3A-5 is not debatable, and thus there is no basis for concluding that a question exists under the general duty clause of W.Va. Code § 20-3A-3(8).

Petitioner also attempts to rely on *In Stephen W., individually and as next friend of J.W. v. Timberline Four Seasons Resort Management Co.*, 2015 WL 5125536 (W.Va. August 31, 2015). There, a minor skier collided with an electrical box when she veered to avoid colliding with another skier.[44] The *Stephen* plaintiff argued that the defendant was liable by "failing to maintain the ski slope in a reasonably safe condition" and that even if the electrical box was marked by a

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[43] An exception is that Petitioner cites *Maddocks v. Whitcomb*, which affirmed summary judgment in favor of the defendant on facts and law that is similar to WVSRA, as discussed *infra*. 896 A.2d 265, 267, 2006 ME 47 (ME 2006).

[44] *Id.*

caution sign (as required by the WVSRA), the defendant's failure to pad the electrical box violated its duty to keep the trail in a "reasonably safe condition.[45] However, this Court held that the defendant was not liable because the WVSRA states that ski area operators are not liable for "collisions with snowmaking equipment which is marked by a visible sign."[46] Similarly, in the present case, the WVSRA clearly and unambiguously states that Canaan Valley is not liable for the collisions of skiers with objects or persons, and rather the skiers themselves are liable.

To find, as the Petitioner urges, that a ski area operator like Canaan Valley has responsibility for those risks that skiers expressly assume under the WVSRA, would be to contradict the express purpose of the WVSRA to define ski area operators' responsibilities and skiers' assumptions of risks.[47] Despite the Petitioner's argument to the contrary, the Legislature has already determined that collisions between skiers "are essentially impossible to eliminate by the ski area operator."[48] Such collisions expressly are not the responsibility of ski area operators under the Act.[49] Therefore, unlike the situation in *Hardin*, where the Court was not confident that the risk at issue was within the scope of those enumerated in W.Va. Code §20-3A-5, the WVSRA does not require ski area operators prove that collisions between skiers are essentially impossible to eliminate; rather, the Legislature has already determined that.[50] Despite Petitioner's self-serving assertion that the supplemented opinion of their expert, Mr. Currey (attached to their response to the motion to dismiss) somehow sets forth the parameters of liability and responsibilities of ski area operators that would supersede the express language of the WVSRA, the same is simply not true. The WVSRA defines the conditions for which ski area operators are immune. Other

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[45] *Id.* at *1.
[46] Id. at *3 (quoting W.Va. Code § 20-3A-3).
[47] *See* W. Va. Code § 20-3A-1.
[48] *See* W. Va. Code § 20-3A-1.
[49] W. Va. Code § 20-3A-5(a).
[50] *Id.*

conditions not enumerated are subject to the general duty clause in W.Va. Code § 20-3A-3(8); but skier on skier collisions (including tuber on tuber collisions) are not subject to W.Va. Code § 20-3A-3(8). The WVSRA establishes these parameters; Mr. Currey does not.

In the case at hand, the fact that A.B. is alleged to have special needs does not change the outcome. For that matter, neither do other factual allegations, whether actually pled in the Complaint or alleged later in an expert's affidavit. The Legislature did not provide that immunity for collisions between skiers (to include snow tubers) is contingent on whether a snow tuber has navigational control, whether snow tubers or staff can see the complete snow tube slope from the top of the hill or keep a proper lookout, whether a certain number of staff were present or assigned to be in certain places in the snow tubing area, whether staff were trained a certain way, or whether it is foreseeable that collisions between snow tubers may take place. Under the WVSRA, ski area operators are immunized for collisions between snow tubers regardless of these factors. The sole exception to ski area operators' immunity for collisions between snow tubers is for collisions with obviously intoxicated persons of whom the operator is aware.[51] Therefore, none of the other factors alleged and urged to be relevant by the Petitioner affect Canaan Valley's immunity.

D. The Circuit Court did not err when relying on *Travis and Morgan Bailey, on behalf of their minor son, Parker Bailey v. New Winterplace, Inc., a West Virginia Corporation*, because the facts are analogous and the Court can consider persuasive authority.

Petitioner's second assignment of error includes that the trial court was incorrect in its reliance on persuasive authority from *Travis and Morgan Bailey, on behalf of their minor son Parker Bailey, v. New Winterplace*, for the legal determinations that, "snow tubing must be placed on the same footing as snow skiing, in terms of an interpretation of the WVSRA," and "the factual

[51] W. Va. Code § 20-3A-5(a).

circumstances and allegations are similar, but that "the Defendant's duty to maintain the ski area in reasonably safe condition did not extend to risks for which is it (sic) specifically immunized, such as the risk of collisions between tubers."[52] Specifically, Petitioner alleges the cases are "factually distinguishable" and the reasoning and decision in *Bailey* is "not persuasive" to this case.

A person can almost always find minor, inconsequential distinctions between cases. That is what Petitioner has done here. In *Bailey*, plaintiffs Travis and Morgan Bailey took their three-year-old son, P.B., snow tubing.[53] Near the end of the snow tube lane, P.B. had to ascend a small incline in order to reach the exit of the lane. P.B.'s first trip was without incident; however, on his second trip, P.B. did not have enough momentum to ascend the incline at the exit and his tube came to a stop in the lane with him on it.[54] A snow tuber then traveled down P.B.'s lane and collided with him, causing him severe injuries. On that day, the ski area operator allegedly had no employees to monitor or assist snow tubers.[55]

Very similar to the Petitioner here, the *Bailey* plaintiffs alleged causes of action for negligence and a violation of West Virginia Code § 20-3A-3(8), including alleged failures to properly staff and train employees, failure to implement safety procedures and inspect the tubing area, and a failure to adequately design the snow tubing lanes for visibility, respectively.[56] The defendants filed and were granted a motion to dismiss for failure to state a claim, asserting the claims were barred by the WVSRA.[57] Under a similar analysis to the trial court *sub judice*, the

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[52] Petitioner's Brief, p. 16 (citing Joint Appendix 56 – 57).
[53] *Bailey v. New Winterplace, Order Granting Defendant New Winterplace, Inc.'s Motion to Dismiss*, (Circuit Court of Raleigh County, W.Va. Sept. 30, 2015), Joint Appendix 18-26.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

Bailey court held that, "the defendant's duty to maintain its 'ski areas in a reasonably safe condition' [did] not extend to risks for which it is specifically immunized under the [WVSRA], and [the ski area operator was] therefore immune from suit for actions arising out of collisions between snow tubers."[58] Furthermore, the *Bailey* court reasoned that allowing negligence theories of "inadequate staffing, improper training, or deficient design" to proceed against the ski area operator would "subvert the purpose of the WVSRA."[59]

Petitioner cites how P.B. was stuck on the ascent at the end of the lane when hit from behind, whereas A.B. was standing next to her tube when hit from behind. This distinction has no merit. Petitioner also asserts that, here, Canaan Valley allowed additional tubers to follow A.B. without ensuring she had time to exit—while ignoring that, likewise, the ski area operator in *Bailey* had no employees directing tubers and therefore allowed tubers to follow P.B. Petitioner even argues that the reason P.B. did not complete the course was a lack of momentum and "the defendant in that case could not add weight or speed to the minor child's tube to ensure he completed the ride," whereas Canaan Valley "could have done any number of things to prevent or decrease the risk of harm to [A.B.], but it failed to do so."

Consistency is desirable. The *Bailey* case is as close as one could reasonably expect to get to the case at bar. Both involved collisions between minor plaintiffs and other snow tubers, resulting in serious injuries. Both involve similar allegations of negligence. The Trial Court committed no error in considering it and giving it such weight as the Court determined to be appropriate.

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[58] *Id.*
[59] *Id.*

E. The Circuit Court did not err when interpreting W. Va. Code § 20–3A–5 to include the definition of "skiing" found in in W. Va. Code § 20–3A–2.

Petitioner's third assignment of error has no legal basis and asserts that the Trial Court erred in determining that A.B. had a duty under the WVSRA to avoid collision because "when tubing, unlike when skiing, the tuber does not have the ability to determine the course or speed." While Petitioner may not share nor agree with the intentions of the Legislature in defining "skiing" under the WVSRA to explicitly include "tubing," Petitioner has no basis for his contention. Instead, W.Va. Code § 20-3A-2(i) explicitly defines "skiing" as "sliding downhill or jumping on snow or ice on skis, a toboggan, a sled, **a tube**, a snowbike, a snowboard, or any other device by utilizing any of the facilities of the ski area."[60] Second, an examination of the language throughout the WVSRA further supports a finding that "skiing," as utilized within the WVSRA, includes more than the meaning asserted by Petitioner. For example, W.Va. Code § 20-3A-2(j) defines "ski slopes and trails" as including "those areas designated by the ski area operator to be used by skiers for the purpose of participating in the sport of skiing in areas designated **for that type of skiing activity**." W.Va. Code §20-3A-2(e)(emphasis added). As such, the WVSRA defines "skiing" to include those patrons "sliding downhill on snow… on a tube" and contemplates that there are multiple "types" of "skiing activities" which take place in their own designated areas.[61]

Furthermore, the Legislature's provision of immunity to ski area operators for collisions between snow tubers was not made unknowingly or by mistake. In 2006, the West Virginia Legislature "update[d] definitions in the West Virginia Skiing Responsibility Act to reflect the addition of snowboarding and tubing as skiing."[62] It is clear, therefore, that the

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[60] W.Va. Code § 20-3A-2(emphasis added).
[61] *Id.*
[62] W. Va. Legislative Wrap-Up, 5/31/2006, cited in Joint Appendix 18-26.

Legislature has already determined that skiing and snow tubing are to be treated the same under the WVSRA; otherwise, the Legislature would not have updated the WVSRA to include snow tubing. The plain language of the WVSRA now provides immunity to ski area operators for collisions between snow tubers because they are skiers. Additionally, at least one trial court of this state has determined that the plain language of the WVSRA provides that, "snow tubing must be placed on the same footing as snow skiing, in terms of an interpretation of the WVSRA."[63]

Lastly, although the West Virginia Supreme Court of Appeals has not had occasion to address the specific issue of whether or not an individual who is "snow tubing" is "skiing" under the WVSRA, cases examining other state's skiing liability statutes have repeatedly found "snow tubing" to be synonymous with "skiing." *See Lanzilla v. Waterville Valley Ski Resort, Inc.*, 517 F. Supp. 2d 578, 580 (D. Mass. 2007) (noting that snow tubing is an activity in which ski area operators are immunized if injuries resulted); *Maddocks v. Whitcomb*, 896 A.2d 265, 268 (Me. 2006) (noting that snow tubing chute qualified as a "ski area" pursuant to Maine's ski area liability statute); *Bazarewski v. Vail Corporation*, 23 F. Supp. 3d 1327, 1329 (D. Colo. 2014) ("The parties agree that the Colorado Ski Safety Act . . . applies in this case.").

In sum, there is no credible argument that W. Va. Code § 20-3A-5 does not apply to individuals who are snow tubing, because those persons are skiers.

F. The Circuit Court did not err in determining that there was no legal basis to apply a higher standard of care with regard to guests like A.B. who have special needs.

Petitioner's fourth assignment of error again, in essence, takes issue with the Trial Court's application of the plain language of the WVSRA at W. Va. Code § 20-3A-3. Here again, Petitioner has no legal basis for this alleged assignment of error. Petitioner simply asserts that the

[63] Bailey v. New Winterplace, Order Granting Defendant New Winterplace, Inc.'s Motion to Dismiss, (Circuit Court of Raleigh County, W.Va. Sept. 30, 2015), Joint Appendix 18-26.

Trial Court erred in finding that Canaan Valley did not owe a heightened standard of care to individuals with special needs. In an incredible reach, Petitioner cites W. Va. Code § 61-8F-1, enacted in 2022, to claim that the West Virginia Legislature "has noted for greater protections for disabled persons."[64] W. Va. Code § 61-8F-1 is a criminal statute which provides greater protections for child victims of crimes who are also disabled. Not only did the events of this case take place years before the passing of this irrelevant statute, but the statute itself has nothing at all to do with civil litigation and a negligence standard. Instead, Petitioner admits that this Court has not addressed a higher standard of care toward skiers with special needs—and the WVSRA does not address it either.

Nonetheless, Petitioner asserts that A.B. should have received "greater protections" because Canaan Valley "advertised itself to the public that it accommodated special needs individuals" because it "posted to its Facebook and Twitter social media pages that it was hosting the Special Olympics."[65] Petitioner further asserts that the "public advertisement" "opened the door to be held to a higher standard of care."[66] However, by Petitioner's own admissions, a heightened duty of care beyond what is ascribed by the WVSRA has never previously been applied to ski area operator in the state of West Virginia.[67] Moreover, it would be a terrible step in the wrong direction to create a public policy that those who offer opportunities to persons with special needs must do so under the burden of a higher standard of care in negligence cases.

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[64] Petitioners' Brief, p. 21.

[65] *Id.*, p. 23. Of course, these are facts that are being asserted for the first time in this appeal and procedurally are inappropriate to be included in this review, as the trial court could not have reviewed the same.

[66] As a matter of public policy, if agreeing to host the Special Olympics in turn exposes a ski area operator to increased liability into perpetuity, no facility would continue to agree to host such events.

[67] This begs the question how Canaan could be found liable for failing to meet a duty of care which did not yet exist and of which it could not have had notice.

Moreover, it is not as though the concept of a plaintiff with a capacity less than that of an adult is unique to this case. As previously discussed, in *Bailey*, the Honorable H.L. Judge Kirkpatrick applied the same standard to three-year-old P.B.[68] In doing so, the trial court explained that, although the accident had "tragic results," the ski area operator's duty to maintain the ski area in reasonably safe condition did not extend to risks for which is it specifically immunized under the WVSRA.[69] Furthermore, the *Bailey* court acknowledged that "the WVSRA is a comprehensive and overarching act . . .[wherein t]he Legislature expressly set forth only one stated exception to this impenetrable shield: a collision with an obviously intoxicated person of whom the ski area operator is aware." *See*, W. Va. Code § 20-3A-5(a). Here, the Legislature contemplated exceptions—and provided only one that makes no mention, reference, or hint that it would include individuals with special needs.

Similarly, this Court's holding in *Stephen W. v. Timberline Four Seasons Resort Mgmt.*, No. 14-1158, at 3 (W. Va. Aug. 31, 2015) (memorandum decision), concerned a minor plaintiff. This Court declined to read into the WVSRA that the child's age affected the applicability of the WVSRA. Specifically, this Court held that the WVSRA "makes no reference to a skier's age."[70] In further support, the Court emphasized that "the WVSRA's clear provision that *all* skiers assume the inherent risks of skiing" and that "skier' is defined as `*any person* present at a skiing area under the control of a ski area operator for the purpose of engaging in the sport of skiing[.]'"[71] Moreover, the Court made it clear that "it is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial

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[68] *Bailey v. New Winterplace, Order Granting Defendant New Winterplace, Inc.'s Motion to Dismiss*, (Circuit Court of Raleigh County, W.Va. Sept. 30, 2015), Joint Appendix 18-26.
[69] *Id.* at p. 6.
[70] *Id.*
[71] *Id.*

interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted."[72]

V. CONCLUSION

As set forth herein, the Trial Court did not err in dismissing Petitioner's claims *in toto*, as Petitioner's Counts I and Counts II are barred by the clear and unambiguous language of the West Virginia Skiing Responsibility Act. As such, Respondents U.S. Hotels and Resort Management, Inc., And Regency Hotel Management, LLC, respectfully request that this Court affirm the Circuit Court's granting of dismissal of Petitioner's Complaint for failure to state a claim, with prejudice.

Dated this 10th day of November, 2022.

John R. Merinar, Jr. (WV ID #6080)
Bonnie J. Thomas (WV ID #13476)
Steptoe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
(304) 933-8000 (phone)
(304) 933-8183 (fax)
jack.merinar@steptoe-johnson.com
bonnie.thomas@steptoe-johnson.com

Counsel for Respondents U.S. Hotels and Resort Management, Inc., and Regency Hotel Management, LLC

[72] *Id.*

WEST VIRGINIA SUPREME COURT OF APPEALS
DOCKET NO. 22-0468

Thomas B., individually and as parent
And next friend of A.B., a minor,

Plaintiffs Below, Petitioner,

On Appeal from a final order of the
Circuit Court of Tucker County
(Civil Action No. 20-C-4)

U.S. Hotels and Resort Management, Inc.,
And Regency Hotel Management, LLC
Defendants Below, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November 2022, true and accurate copies of the foregoing Respondents U.S. Hotels and Resort Management, Inc., and Regency Hotel Management, LLC's Response to Petitioner's Brief was deposited in the United States Mail postage prepaid addressed to the following counsel of record:

William C. Brewer, Esquire
Stephanie J. Shepherd, Esquire
265 High Street
4th Floor, Citizen Building
Morgantown, WV 26505

John R. Merinar, Jr. (WV ID #6080)
Bonnie J. Thomas (WV ID #13476)