IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Thomas B., individually and as parent and next friend of A.B., a minor,
Plaintiffs Below, Petitioners,

v.

CASE NO.: 22-0468

U.S. Hotel and resort Management, Inc., and Regency Hotel Management, LLC,
Defendants Below, Respondents.

PETITIONERS' BRIEF

William C. Brewer, Esq.
West Virginia State Bar No. 448
Ramsey K. Jorgensen, Esq.
West Virginia State Bar No. 14074
P.O. Box 4206
Morgantown, WV 26504
wbrewer@brewerlaw.com
ramsey@brewerlaw.com
Counsel for the Petitioners Thomas B. and A.B.

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PETITIONERS THOMAS B. AND A.B.'S BRIEF

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2. The Circuit Court erred when it relied on the case *Travis and Morgan Bailey, on behalf of their minor son, Parker Bailey v. New Winterplace, Inc., a West Virginia Corporation* because the facts of that case are neither similar nor relevant to be indicative of the Legislature's intent in this case.

3. The Circuit Court erred when it found that Anna, or the tubers that struck Anna, had the duty to avoid collision because when tubing, unlike when skiing, the tuber does not have the ability to determine the course or speed of the tube.

4. The Circuit Court erred in finding that the Resort should not be held to a higher standard because the Resort advertised and enticed families having children with special needs to attend the Resort, but it did not have the proper precautions in place to care for and aid individuals with special needs, such as Anna.

II. STATEMENT OF THE CASE

A. Factual Background

Petitioner Thomas B. (hereinafter referred to as "Mr. B) read an advertisement posted on social media by Canaan Valley Resort (hereinafter referred to as "the Resort"). JOINTAPP39. The advertisement stated the Resort was hosting the Special

Olympics for individuals with special needs. JOINTAPP39. After discovering the advertisement, Mr. B decided to take his family to the Resort. Mr. B saw this advertisement when he was searching for activities that could accommodate his daughter's special needs and activities the entire family could enjoy. Petitioner A.B., (hereinafter referred to as "Anna") has Down's Syndrome and requires special aid or accommodations to ensure she can actively, but safely, participate in several activities. JOINTAPP3.

After seeing the advertisement, on January 27, 2019, Mr. B purchased tickets for the Snow Tubing Park at the Resort for his children, including Anna. JOINTAPP3. The Resort implied it was capable of accommodating individuals with special needs by hosting the Special Olympics.

After purchasing the Snow Tubing Park tickets, Mr. B asked the staff at the Resort whether it was safe for Anna to participate because she has Down's Syndrome, and she may require additional accommodations. JOINTAPP3. The staff assured Mr. B that it was safe and permissible for Anna to participate. Because of the reassurances, Mr. B allowed Anna to participate in the snow tubing. JOINTAPP3.

All of Mr. B's children began tubing down the Snow Tubing Park shortly after Mr. B spoke with the Resort staff. JOINTAPP3. On the second run down the hill, Anna was struck from behind by another tuber who was allowed to begin his/her descent prior to Anna clearing the tubing lane. JOINTAPP3. Anna was knocked unconscious and began bleeding from her mouth. JOINTAPP3. Despite the collision, additional

tubers were permitted to continue down the hill while Anna lay on the ground unconscious, nearly striking her additional times. JOINTAPP3.

Neither an employee nor agent of the Resort came to the aid of Anna, but rather an unidentified patron called 911 and provided emergency medical assistance to Anna. JOINTAPP3 – JOINTAPP4. The Resort did not immediately provide any medical assistance to Anna as no ski patrol person, or other employee or agent of the Resort qualified to administer emergency aid, was readily available. JOINTAPP3. Additionally, the Resort did not verify the medical training of the unidentified patron who administered emergency aid to Anna. JOINTAPP4.

B. Procedural Background

Petitioners instituted an action against Respondents on or about January 26, 2021. Respondents filed a Motion to Dismiss pursuant to W.Va. R. Civ. Proc. 12(b)(6) and a Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's Complaint on or about June 30, 2021. Petitioners filed a Response to the Motion on or about November 30, 2021. Petitioners then supplemented their Response with the Affidavit of Chris Currey on or about December 6, 2021.

A hearing on Respondents Motion was held before the Circuit Court of Tucker County on December 10, 2021. By Order dated May 23, 2022, the Circuit Court of Tucker County granted Respondents' Motion to Dismiss.

III. STANDARD OF REVIEW

The standard of review in this case is *de novo* because the Circuit Court granted Respondents' Motion to Dismiss, filed pursuant to Rule 12(b)(6) of the West Virginia

Rules of Civil Procedure. *Elmore v. Triad Hospitals, Inc.*, 220 W.Va. 154, 157-58, 640 S.E.2d 217, 220-21 (2006). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

IV. REQUEST FOR ORAL ARGUMENT

Petitioners hereby request that they be permitted to present Oral Argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure as this is a matter of first impression for this Court.

V. SUMMARY OF THE ARGUMENT

The section of the West Virginia Skiing Responsibility Act ("WVSRA") regarding ski area operators' immunity does not apply to this case. The purpose of the WVSRA is "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." W.Va. Code § 20-3A-1. However, ski area operators still have a duty to their customers, patrons, or visitors to "maintain the ski areas in a reasonably safe condition. . ." and they cannot escape liability for their own negligent acts. In this case, the ski area operators' negligence caused injuries to Anna and should be held liable for their own negligent actions and/or inactions

In granting the Respondents' Motion to Dismiss, the Circuit Court erroneously relied upon a case from the Circuit Court of Raleigh County, West Virginia, entitled *Travis and Morgan Bailey, on behalf of their minor son Parker Bailey, v. New Winterplace, Inc.*, Civil Action No. 15-C-389-K. The facts in *Bailey* are distinguishable from the facts in this

case. In *Bailey*, the child was injured due to something beyond the ski area operator's control. In the instant case, the ski area operator had complete control over whether Anna was subjected to a risk of harm.

In the instant case, the Circuit Court held that the Resort did not owe a heightened duty and standard of care to Anna because of her special needs. However, recently the West Virginia Legislature has stated the need for greater protections for disabled persons. While the Special Protections for Disabled Children Act of 2022 is not directly on point or controlling in this matter, it does provide a great deal of perspective to this case. In enacting the Special Protections for Disabled Children Act of 2022, the West Virginia Legislature recognized the need for special protections for certain individuals, such as Anna, a person with Down's Syndrome.

Furthermore, the Resort should be held liable in this case because the Resort held itself out to families and individuals as able to accommodate individuals such as Anna. The Resort's advertisement opened the door to be held to a higher standard and this higher standard requires a higher level of protection for individuals with special needs. In this case, the Resort failed to do so.

VI. ARGUMENT

A. The Circuit Court erred when it found that Petitioners claims were barred by the West Virginia Skiing Responsibility Act because the Resort has a duty to maintain the Resort in a reasonably safe manner and there are facts and evidence that must be discovered in order to determine whether the Resort met this standard.

The Circuit Court granted Respondents' Motion to Dismiss on the grounds that the West Virginia Skiing Responsibility Act ("WVSRA") granted immunity to the Resort

in the instance of a collision between skiers at the Resort that did not have alcohol as a factor. JOINTAPP54 – JOINTAPP59. However, the Court completely ignores the language of the statute stating that the Resort must "[m]aintain the ski areas in a reasonably safe condition. . ." W. Va. Code § 20-3A-3(8).

"Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995). The circuit court, viewing all the facts in a light most favorable to the nonmoving party, may grant the motion 'only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his[, her, or its] claim which would entitle him[, her, or it] to relief'" *Id.* at 776, 461 S.E.2d at 522 (quoting Syl. pt. 3, in part, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977)).

In upholding the WVSRA against an equal protection challenge, this Court noted that the Legislature's intent in enacting the WVSRA was to "immunize ski area operators *only* for the '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*[.]'" *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 693, 408 S.E.2d 634, 643 (1991) (quoting W.Va. Code 20-3A-1) (emphases added).

The District Court for the Northern District of West Virginia stated that "the West Virginia Supreme Court of Appeals has determined that the West Virginia Legislature did not intend to immunize ski area operators from liability for negligence where it involves a violation of an operator's duty to maintain the ski areas in a

reasonable safe condition." *Hardin v. Ski Venture, Inc.*, 848 F.Supp. 58, 61 (1994). Other Courts around the United States have held similarly, that a ski area operator is not immunized for negligent actions and/or inactions for which they could have foreseen a harm, and the harm could have been eliminated. See *Maddocks v. Whitcomb*, 896 A.2d 265, 267, 2006 ME 47 (ME 2006) (stating that the Maine ski area liability statute provides for actions against ski area operators for the negligent operation or maintenance of the ski area); *Huneau v. Maple Ski Ridge, Inc.*, 17 A.D.3d 848, 794 N.Y.S.2d 460 (N.Y. Sup. Ct. App. Div. 3d Dep't. 2005) (holding that the Plaintiff's case was not barred as there were factual allegations as to whether the ski area attendants' actions were inconsistent with their job duties and unreasonably created a risk of injury); *Nolan v. Mt. Bachelor, Inc.*, 317 Or. 328, 336, 856 P.2d 305, 309 (Or. 1993) (quoting statutory language providing that a ski area operator's liability for injuries sustained at the ski area is limited to those that occur as a result of the ski area operator's negligence); Syl. pt. 6, *Kopeikin v. Moonlight Basin Management, LLC*, 981 F.Supp.2d 936 (Dist. Mont. 2013) (stating that "Montana's skier responsibility statutes do not immunize ski area operators from their own negligence"); *Brown v. Stevens Pass, Inc.*, 97 Wash.App. 519, 984 P.2d 448 (Wash. Ct. App. Div. 1 1999) (holding that genuine issues of material fact existed as to whether the ski resort negligently failed to pad metal fence posts that were fixed into the ground by concrete, thereby enhancing the skier's risk of injury); and *Verberkmoes v. Lutsen Mountains Corp.*, 844 F.Supp. 1356, 1359 (D. Minn. 5th Div. 1994) (stating that the test for determining whether a hazard is an inherent risk of skiing is whether it is a danger "which reasonable prudence on the part[] of the defendant[] would have foreseen and

corrected," and holding that encountering and colliding with a parked ATV on a ski path was not an inherent risk of skiing).

In enacting the WVSRA, the Legislature's purpose was not to provide ski area operators with *carte blanche* and shield them from all immunity. Ski area operators can be and continue to be liable for their own negligent actions and/or inactions. This Court's rulings in several other cases regarding the WVSRA are not applicable in this case because the facts in the other cases dealt with injuries caused by changes in terrain or whether an object off the slope was properly marked by a sign, as required, and not the negligence of the ski area operator. The injuries in this case are because of the negligence of the ski area operator.

Despite the fact that this Court has affirmed circuit court rulings granting other defendants' or respondents' Motions to Dismiss or Motions for Summary Judgment wherein the plaintiff alleged a failure to keep the ski area in a reasonably safe condition, the facts of those cases can be distinguished from the facts of this case.

In *Pinson v. Canaan Valley Resorts, Inc.*, 196 W.Va. 436, 473 S.E.2d 151 (1996), this Court affirmed the circuit court's ruling granting summary judgment to the defendant. In *Pinson*, the plaintiff described herself as an "intermediate skier," but she fell and was injured when she happened upon "excess, ungroomed natural snow." *Id.* at 437, 439, 473 S.E.2d at 152, 154. However, the WVSRA explicitly immunizes ski area operators for injuries caused by "variations in terrain; surface or subsurface snow or ice conditions." W.Va. Code § 20-3A-3(8). The WVSRA further states that each skier "shall have the sole individual responsibility for knowing the range of his own ability to negotiate any slope

or terrain, and it shall be the duty of each skier to ski within the limits of the skier's own ability[.]" W. Va. Code § 20-3A-5. Further, the Court recognized that the resort in *Pinson* informed the plaintiff that she needed to be aware of changing conditions, and that change in skiing or snow conditions on a ski slope or trail is a risk that is inherent to the sport of skiing. *Pinson*, 196 W.Va. at 441, 473 S.E.2d at 156.

The allegations and circumstances presented in *Addis v. Snowshoe Mountain, Inc.*, 2013 WL 6152356 (W.Va. Nov. 22, 2013) are similar to those presented in *Pinson*. In *Addis*, the plaintiff was an experienced skier, and in fact, was a former ski instructor. *Addis*, 2013 WL 6152356, at *2 (W.Va. Nov. 22, 2013). The plaintiff alleged that the defendant was negligent in not properly maintaining the ski area when he slipped on ice while skiing down a double black diamond slope. *Id.* at *1. Again, this Court recognized that skiers, rather than ski area operators, are liable for injuries caused by "variations in terrain; surface or subsurface snow or ice conditions." *Id.* at *3 (quoting *Pinson*, 196 W.Va. 436, 473 S.E.2d 151 (1996)).

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), this Court was presented with the issue of a minor skier colliding with an electrical box when she veered to avoid colliding with another skier. The plaintiff argued that the defendant was liable because it did not properly mark the electrical box with a "visible sign or other warning implement" and by "failing to maintain the ski slope in a 'reasonably safe condition.'" *Id.* at *1. However, this Court found and held that the defendant in *Stephen W.* could not be liable because there was in fact a warning sign, and the WVSRA states that ski area

operators are not liable for "collisions with snowmaking equipment which is marked by a visible sign." *Id.* at *3 (quoting W.Va. Code § 20-3A-3). The Court further stated that the defendant was not required to pad the electrical box because of the presence of a sign.

Importantly, the cases of *Pinson*, *Addis*, and *Stephen W.* are factually distinguishable and not persuasive in this case. While it remains true that ski area operators cannot be liable for variations in skiing conditions, collisions with snowmaking equipment that is clearly marked with a visible sign, or for collisions with other skiers, they can be and should be held liable for employees' actions that are negligent and inconsistent with their job duties and create a risk of injury.

The case most persuasive here is *Hardin v. Ski Venture, Inc.*, 848 F.Supp. 58 (N.D. W.Va. 1994). In *Hardin*, it was alleged that the ski area operator was negligent in maintaining the park in a reasonably safe condition. *Id.* at 59. Specifically, the plaintiff alleged that the defendant was negligent because the snowmaking equipment produced "excessively wet snow," the snowmaking equipment was pointed uphill towards the face of oncoming skiers, and the wet snow stuck to the plaintiff's goggles, causing him to lose vision and collide with a tree, paralyzing him. *Id.* at 59. As stated above, the Court in *Hardin* recognized this Court's holding in *Lewis v. Canaan Valley* in which this Court noted that "the West Virginia Legislature did not intend to immunize ski area operators from liability for negligence where it involves a violation of an operator's duty to maintain the ski areas in a reasonably safe condition." *Hardin*, 848 F.Supp. at 61. The Court in *Hardin* found that the plaintiff had pled allegations of a "dangerous

condition [that] could have been eliminated if the defendant had reasonably maintained [the ski area]." *Id.* at 62. The Court held that questions of fact existed and a jury must determine "whether the defendant reasonably maintained and located the snow-making machine and/or whether the plaintiff assumed an inherent risk of skiing and/or violated the duties imposed upon him." *Id.* at 61.

Much like the issues presented in *Huneau* and *Brown*, supra., the actions and/or inactions of the Resort and its employees caused the injuries and harm suffered by Anna. The Resort negligently created the risk of harm to Anna when it did not properly train its staff to protect the tubers in the Snow Tubing Park. In other words, but for the negligence of the Snow Tubing Park employee, Anna would not have been injured. In this case, Anna was not injured due to her undertaking of an activity outside of her skill set. Anna was not injured by a variation in terrain of surface or subsurface snow or ice conditions. Anna was not injured by colliding with a visibly marked structure. Anna was injured when an employee of the Resort permitted additional riders to continue to ride down the hill before she had properly cleared the landing area. Anna was injured due to the negligence of an employee of the Resort who did not properly ensure the lane was clear from other tubers before allowing more tubers to ride down the hill.

As noted in *Hardin, Lewis, Pinson*, and W.Va. Code § 20-3A-1, the purpose of the WVSRA is to immunize ski area operators from harms and injuries that are inherent to the sport of skiing *which are essentially impossible for the ski area operator to eliminate*. In this case, the injury to Anna could have been prevented by the ski area operator. Anna

did not assume this risk. Anna was injured when another tuber struck her from behind because the ski area operator neglected his job duties.

This Court has not previously defined what risks are inherent to the sport of skiing. However, the United States District Court for the District of Minnesota, citing the United States District Court for the District of Vermont, has defined a test for determining whether a risk is inherent to the sport of skiing, and it is persuasive in this case.

"The test for determining if a hazard is an inherent risk of skiing is whether it is a danger 'which reasonable prudence on the part of the defendant would have foreseen and corrected.'" *Verberkmoes*, 844 F.Supp. at 1359 (citing *Wright v. Mt Mansfield Lift*, 96 F.Supp. 786, 791 (D. Vt. 1951). In *Verberkmoes*, the plaintiff alleged that the ski area operator was negligent when the plaintiff encountered and struck an ATV that was parked near the ski run. *Id.* at 1357 - 58. The plaintiff intentionally fell in order to avoid hitting the ATV at full speed, but the plaintiff's arm was still broken in the collision with the parked ATV. *Id.* at 1357-58. In denying the defendant's Motion for Summary Judgment, the court in *Verberkmoes* found that

> "[t]he location of a parked ATV is within the control of the ski resort. It is not a hazard which is fixed, but one which moves about a ski area. . . Thus, a parked ATV is not a hazard that a skier would typically expect to encounter every time he skis a particular hill, as he would expect to see an obvious hazard such as a lift tower. Nor is an ATV a hidden hazard such as a snow-covered stump which might be virtually undetectable."

Id. at 1359. The District Court held that "the hazard posed by an ATV parked on or near a groomed trail is a danger that reasonable prudence on the part of [the defendant] would have foreseen and corrected or at least placed a warning for skiers." *Id.* at 1359.

Prior to the Order entered by the Circuit Court granting Respondents' Motion to Dismiss, Petitioners engaged the services of Chris Currey, an expert in the field of ski area operations and snow tubing park maintenance and safety. Mr. Currey noted in his affidavit that there are certain standards, policies, and practices for ski area operators and snow tubing parks set by the National Ski Areas Association (hereinafter referred to as "NSAA"). JOINTAPP47 - JOINTAPP53.

According to Mr. Currey, to prevent injuries and protect employees and patrons of ski resorts and tubing parks, certain standards, policies, and practices set by the National Ski Areas Association (hereinafter referred to as "NSAA") must be adopted and implemented. JOINTAPP47 - JOINTAPP53. The NSAA also categorizes the types of snow tubing parks: (1) unmanaged or uncontrolled; and (2) managed or controlled. JOINTAPP47.

Mr. Currey, in his Affidavit, stated that the Resort in this case is a managed snow tubing park due to the presence of employees, supervisors, a ski ramp or magic carpet, and other fixtures in the area. JOINTAPP48. The NSAA customs, standards, policies, or practices, per Mr. Currey, note several actions that a managed snow tubing park must take in order to protect itself, its employees, and its patrons: (1) the presence of a supervisor; (2) a safety and/or instructions video or a safety and/or an instructions speech before patrons are permitted to participate; (3) a person, often a supervisor, to

accompany participants in the Adaptive Skiing Program, should the Resort offer one; (4) an expeditor at the top of the snow tubing park to launch patrons and allow patrons to begin their descent downhill, and the expeditor having a clear line of sight to the landing area to ensure safe completion of the ride and that it is safe to allow additional patrons to follow; (5) a person at the landing area to communicate to the expeditor when it is safe to allow additional rides to follow, should the expeditor not have a clear line of sight to the landing area; and (6) emergency medical personnel on staff in the event of an emergency or injury, often the ski patrol. JOINTAPP48 - JOINTAPP52.

Per Mr. Currey, the Resort failed to adhere to the customs, standards, policies, and practices enumerated (2), (3), (5), and (6). JOINTAPP48 - JOINTAPP52. More specifically, Mr. Currey stated that upon information and belief, Mr. B's family and children, including Anna, did not receive any safety and/or instructions video of any kind prior to their participation in the snow tubing park at the Resort. JOINTAPP48.

Mr. Currey stated that Anna, as a child with Down's Syndrome, should have participated in an Adaptive Ski Program with an employee to assist her. JOINTAPP49. Unfortunately, the Resort failed to assist Anna with any training even though Mr. B informed the cashier at the Resort of Anna's special needs. JOINTAPP49. Mr. B was informed that it was permissible for Anna to participate in the Snow Tubing Park, and that the Snow Tubing Park had an individual on staff that specialized in working with individuals with special needs. JOINTAPP49.

Furthermore, the Resort failed to have an individual at the bottom of the hill that informed the expeditor when it was safe to allow additional tubers to follow.

JOINTAPP50. This standard is not required if the expeditor has a clear line of sight to the landing area. When looking at the expeditor's role in this case, based on the layout of the Snow Tubing Park, the expeditor likely had a clear line of sight to the landing area. In the event he/she did not, the Resort was required to have an additional person at the bottom of the hill. JOINTAPP50. Whether the expeditor had a clear line of sight to the landing area has not been established in the case because additional discovery is needed.

Regardless of whether the expeditor did or did not have a clear line of sight to the landing area, the expeditor permitted additional tubers to continue down the hill before properly ensuring that it was safe to do so. While the Resort had an expeditor on duty, the expeditor himself/herself did not properly abide by his/her duties to ensure that it was safe for additional tubers to go down the hill. In not doing so, the expeditor, and therefore the Resort, violated the custom, standard, policy, and/or practice number (4), above.

Finally, Mr. Currey stated that the Resort failed to adhere to custom, standard, policy, and/or practice number (6) because, upon information and belief, when Anna was injured, no emergency personnel of the Resort came to her aid. JOINTAPP51. Instead, a bystander who claimed to be an Emergency Medical Technician (without verification by any person or the Resort) came to the aid of Anna. The Resort permitted this unidentified person to provide emergency aid to Anna.

Having failed to adhere to those customs, standard, policies, and practices, the Resort did not properly maintain the Snow Tubing Park, and it cannot be shielded from

liability as a result. The Resort has a statutory duty to maintain the ski areas in a reasonably safe manner. The Resort failed to do so in this case. According to Mr. Currey, the Resort failed to keep the premises in a reasonably safe condition. Additional discovery is needed to determine what accommodations were made, what accommodations should have been made, and what accommodations were required to be made.

B. The Circuit Court erred when it relied on the case *Travis and Morgan Bailey, on behalf of their minor son, Parker Bailey v. New Winterplace, Inc., a West Virginia Corporation* because the facts of that case are not similar and relevant to be indicative of the Legislature's intent in this case.

In granting the Respondents' Motion to Dismiss, the Circuit Court noted and relied upon a case from the Circuit Court of Raleigh County, West Virginia, entitled *Travis and Morgan Bailey, on behalf of their minor son Parker Bailey, v. New Winterplace, Inc.*, Civil Action No. 15-C-389-K. JOINTAPP56 – JOINTAPP57. Specifically, the Circuit Court states that it relies on *Bailey* in two instances: (1) 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," and (2) in stating that the factual 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." JOINTAPP56 – JOINTAPP57.

However, the facts between *Bailey* and this case are distinguishable. In *Bailey*, the minor child was travelling down a hill at the snow tubing park and was struck from behind by another tuber, much like that of Anna in this case. JOINTAPP19. That is the

extent of the similarities. In *Bailey*, the child hit a small hump in the middle of the descent of the hill. JOINTAPP19. The child in *Bailey* did not have the momentum or speed to carry him over the hump. As a result, the minor child came to rest on the hump and was unable to successfully complete the descent down the hill and was struck from behind by another tuber, causing injury. JOINTAPP19.

In this case, Anna had completed her run down the hill at the Snow Tubing Park and was standing up, next to her tube. She was standing in plain view of any person who may have been actively checking to ensure the lanes were cleared. Anna had not cleared the landing area and was struck from behind. The employee at the top of the hill had allowed additional tubers to follow Anna and tube down the hill after Anna without first ensuring that she had enough time to clear the landing area.

By no fault of the defendant in *Bailey*, the minor child did not have the required speed or momentum to carry him over the hump to the expected landing area. The defendant in that case could not add weight or speed to the minor child's tube to ensure he completed the ride. However, in this case, the Resort could have done any number of things to prevent or decrease the risk of harm to Anna, but it failed to do so. By not taking the proper precautions, the Resort in this case increased the risk of harm to Anna, and she was injured as a result.

The Raleigh County case of *Travis and Morgan Bailey, on behalf of their minor son Parker Bailey v. New Winterplace, Inc.*, Civil Action No. 15-C-389-K is factually distinguishable and not persuasive to this case. The Circuit Court erred in relying on it in dismissing Petitioners' claims against Respondents.

C. The Circuit Court erred when it found that Anna, or the tubers that struck Anna, had the duty to avoid collision because when tubing, unlike when skiing, the tuber does not have the ability to determine the course or speed of the tube.

Within the WVSRA, it is stated that "it shall be the duty of each skier to ski within the limits of the skier's own ability, [and] to maintain reasonable control of speed and course at all times while skiing. . ." W.Va. Code § 20-3A-5(a). The WVSRA further states that "[e]ach skier has the duty to maintain control of his or her speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and objects. However, the primary duty shall be on the person skiing downhill to avoid collision with any person or objects below him or her." W.Va. Code § 20-3A-5(f).

"Skier," under the WVSRA is defined as "any person present at a skiing area under the control of a ski area operator for the purpose of engaged 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." W.Va. Code § 20-3A-2(h). Respondents, in their Motion to Dismiss, point out that in order to be categorized as a "skier," Anna needed to meet three criteria: (1) that she was skier, as defined by the WVSRA; (2) that she was injured at a ski area; and (3) that the ski area was under the control of the Respondents, who are ski area operators. See JOINTAPP12 - JOINTAPP13. Petitioners do not contend that Anna was not a skier, as defined by the WVSRA and analysis provided by Respondents in their Motion.

"Skiing," under the WVSRA, is defined 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." W.Va. Code § 20-3A-2(i). Again, Petitioners do not contend that Anna was not "skiing" as provided by the WVSRA.

Notably, however, there are striking differences between the sport of skiing and the act of tubing. As noted above, the WVSRA places the duty on the skier to "maintain control of his or her speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and objects." W.Va. Code § 20-3A-5(f). Again, the Act puts the primary onus on those persons looking down towards other skiers to avoid injury and collision. W.Va. Code § 20-3A-5(f).

While skiing, with skis, a person has the ability to turn, speed up, slow down, maneuver, and overall, has the ability to avoid potential collisions, injuries, and other harms, both to themselves and to others below.

While tubing, a person has no such ability. A tube does not have a mechanism to speed up, slow down, turn, or avoid any object that is directly in front of the tube until the tube meets its natural end. The only way a person may attempt to alter the course or speed of a tube is by reaching out with the rider's arms, legs, or other body part, into the snow, ice, or terrain, and manually alter the course or speed. Surely the West Virginia Legislature's intent was not to require tubers to do such an act, as that action would significantly increase the risk of injury or harm to the person attempting to alter the course or speed of the tube.

Interpreting the language of the pertinent code section, the onus of avoiding injury is the person who permits the course and speed of the tube in its descent down the Tubing Park. That person, in this case, was the "expeditor," the person at the top of the hill that permits tubers to begin their descent.

The expeditor at the top of the hill either allows or disallows tubers to begin their descent. As such, that person is in control of the course and speed of the tube and tubers. The expeditor may designate a lane, if any, or a location wherein the tube/tubers waiting to begin their descent may launch from. Once the launch has occurred and the tube/tubers have begun their descent to the landing area, the tube/tuber has no ability to alter the course downhill until the natural end.

The expeditor at the Resort is an employee of the Resort, and an employer is liable for the negligent acts of its employees that occur within the scope of their employment. See Headnote 9, *Roof Service of Bridgeport, Inc. v. Trent*, 244 W.Va. 482, 854 S.E.2d 302 (2020) (stating that the "doctrine of Respondeat Superior imposes liability on an employer of the acts of its employees within the scope of employment. . .").

As such, the Circuit Court erred in determining it was either Anna or the tubers that struck Anna that bore the responsibility, duty, and/or liability for the harms and injuries suffered by Anna, and discovery is required in this case to determine the extent of the relationship between the expeditor on the day Anna was injured and the Resort.

D. The Circuit Court erred in finding that the Resort should not be held to a higher standard because the Resort advertised and enticed families having children with special needs to attend the Resort, but it did not have the proper precautions in place to care for and aid individuals with special needs, such as Anna.

In its ruling, the Circuit Court held that the Resort did not owe a heightened duty and standard of care to Anna as a result of her special needs. In so holding, the Circuit Court relied on this Court's holding in *Stephen W., v. Timberline Four Seasons Resort Management*, No. 14-1158, at *3 (W.Va. Aug. 31, 2015) wherein this Court held that because the WVSRA "makes no reference to a skier's age, a child's age that is injured while skiing is of no consequence to the case." JOINTAPP58 - JOINTAPP59.

However, recently the West Virginia Legislature has noted the need for greater protections for disabled persons.

> "The legislature finds that disabled persons and particularly disabled children are often more vulnerable and in greater need of protection than the nondisabled. Concomitant with greater vulnerability is the enhanced risk of injury and intimidation, particularly when the child is noncommunicative. Based upon these facts, the Legislature has determined that it is appropriate that enhanced protections be put in place statutorily to provide a framework of protections to improve disabled children's education and, quality of life as well as ease the concerns of their loved-ones and caregivers."

W.Va. Code § 61-8F-1 (2022).

While the Special Protections for Disabled Children Act of 2022 is not directly on point or controlling in this matter, it does provide a great deal of perspective to this case. In enacting the Special Protections for Disabled Children Act of 2022, the West Virginia Legislature recognizes the need for special protections for certain individuals, such as Anna.

This Court has not had the occasion to develop whether a person with special needs is owed a heightened duty of care when the person owing the duty is made aware of those special needs.

Convincingly, though, in considering whether a common carrier has a duty to assist disabled persons, the Supreme Court of Minnesota has held that "disabled passengers are owed a special duty of care by carriers when their disability is made known." *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 743 (1997).

> "If a passenger, because of extreme youth or old age, or any mental or physical infirmities, is unable to take care of himself, he ought to be provided with an attendant to take care of him. But if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure (sic) the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity."

Id. at 743 (quoting *Croom v. Chicago, M. & St. P. Ry. Co.*, 52 Minn. 296, 298-99, 53 N.W. 1128, 1129 (1893)). While the court in *Vaughn* is discussing a heightened duty owed by common carriers, it is certainly indicative of the requirements of the Resort to act in this case.

The Resort should have provided Anna with greater protections and should not be immune from liability because the Resort advertised itself to the public that it accommodated special needs individuals such as Anna. The Resort advertised this specific accommodation on the weekend that Anna was injured.

The Resort posted to its Facebook and Twitter social media pages that it was hosting the Special Olympics on the weekend Anna was injured. It was not until Mr. B viewed an advertisement for the Resort stating that it was capable of accommodating special needs individuals that Mr. B decided to take his family to the Resort.

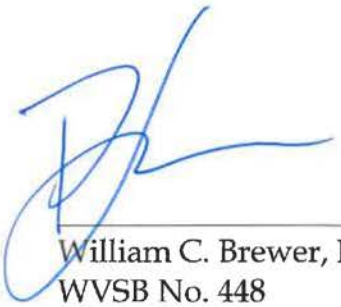
When the Resort publicly advertised, it opened the door to be held to a higher standard of care. Furthermore, Mr. B relied upon that advertisement and specifically asked the Resort if it was safe for Anna, a child with Down's Syndrome, to participate in the snow tubing activities. The Resort reassured Mr. B that was not only okay for her to participate but that it was safe.

The Circuit Court erred in determining that Anna was not to be afforded higher protections due to her special needs. In fact, the Circuit Court erred in determining that the Resort met its requirements for any individual based on the information provided by Mr. Currey.

The West Virginia Legislature has demonstrated a higher standard for individuals charged with the care of children with special needs. The Resort advertised its services to individuals with special needs. Anna was not afforded the protections required for a person without special needs, let alone a person with special needs. Discovery is required in this case to determine what steps could have been and should have been taken to protect Anna, an individual with special needs, from injuries, harms, and dangers.

VII. CONCLUSION

Accordingly, as set forth herein, the Circuit Court erred when it granted Respondents' Motion to Dismiss as there is a claim for relief stated in the Complaint, and Petitioners' claims are not barred by the WVSRA. This Court should reverse the Circuit Court's granting of Respondents' Motion to Dismiss and remand the case back to the Circuit Court for further proceedings and discovery.

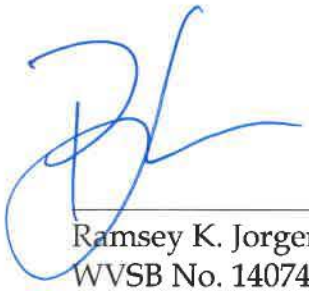


William C. Brewer, Esq.
WVSB No. 448
Ramsey K. Jorgensen, Esq.
WVSB No. 14074
Counsel for Petitioners
William C. Brewer & Assoc. PLLC
P.O. Box 4206
Morgantown, WV 26504
(304) 291-5800
wbrewer@brewerlaw.com
ramsey@brewerlaw.com

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true and accurate copy of the within ***Petitioners Thomas B. and A.B.'s Brief*** and a copy of the ***Joint Appendix***, on this 15th day of September, 2022, via United States mail, postage prepaid, upon the following:

John R. Merinar, Jr.
Steptoe & Johnson, PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330



Ramsey K. Jorgensen, Esq.
WVSB No. 14074
Counsel for Petitioners
William C. Brewer & Assoc. PLLC
P.O. Box 4206
Morgantown, WV 26504
(304) 291-5800
ramsey@brewerlaw.com