



March 14, 2019

Local Government Committee

The Hon. Chair Senator Joann Ginal,

The Hon. Senator Angela Williams, Vice Chair

The Hon. Senator Jeff Bridges

The Hon. Senator Don Coram

The Hon. Senator Larry W. Crowder

Staff Contact: Elizabeth Haskell Elizabeth.Haskell@state.co.us

Re: SENATE BILL 19—159

Dear Senator Ginal, and Committee Members:

The Passenger Tramway Safety Act ("PTSA") C.R.S. 25-5-701, et seq., was first enacted in 1965. It is the one of the oldest tramway statutes in the United States. Colorado's leadership in the ski industry means that other states often look to Colorado for leadership in ski and tramway safety and in relevant statutory, regulatory and case law. The PTSA sits at the heart of a framework of statutory and regulatory provisions which together regulate the tramway industry and by express statutory language the PTSA governs the baseline standards of care for legal cases for damages for death and injury related to skier and passenger accidents involving passenger tramways. The legislative history of the General Assembly's hearings on skier safety very clearly articulates that the legislation was not intended to reduce the legal responsibilities of ski area operators. SB 90-80, S.T. 71 – 72 (Jan. 30, 1990).

Gerald Groswald, President of Winter Park, Trustee for CO Ski Country Lobby, founder of the National Sports Center for the Disabled, and National and Colorado Skiing Halls of Fame inductee, testified in 1990 before the Senate Committee, in 1990, "We are not asking that ski areas be absolved of the responsibility for our own negligence." SB 90-80, S.T. 26:1-13 (Jan. 30, 1990).

Contrary to Mr. Groswald' balanced statements, today the industry is engaged in an extensive and expensive legal campaign to immunize itself from *any liability, including its statutory responsibilities under the PTSA* and the Colorado Ski Safety Act. The

General Assembly should not, we believe, take up the PTSA without knowing that the industry intends to continue to immunize itself from any legal responsibility based upon your statute. They expect to defeat any claim on the basis of written waivers which are embedded in the "click-through" internet sales of season passes, written waivers which must be signed to purchase a ticket to ski on public lands, or simply by placing "your use of this ticket releases us from any liability" language on the reverse of lift passes, often in tiny font. We simply believe that this Committee needs to see the PTSA in the context of current developments in the field.

We propose three amendments to the SB 19-159.

1. Replace "willful and wanton misconduct" with "Negligent" in §706

First, we agree with the Sunset Review Key Recommendation that the Tramway Act Section 706 be amended to repeal the language "Willful and wanton misconduct" and replace it with the word "Negligent." The statute would then read:

25-5-706. Disciplinary action - administrative sanctions - grounds.

...

(3) The board may take disciplinary action for any of the following acts or omissions:

...

(d) ~~Willful or wanton misconduct~~ **Negligent conduct** in the operation or maintenance of a passenger tramway;

2. Forbid waivers in lift passes or lift tickets which nullify the PTS Act's duties of care.

Second, we propose that the Committee reject the area operators' requirement of a waiver and release in any season pass or day ticket.

An amendment is needed to protect the rights of passengers to bring claims for damages as provided for under the Passenger Tramway Act, incorporated by the Colorado Ski Safety Act as provided for under C.R.S. 33-44-104(2):

A violation by a ski area operator of any requirement of this article or any rule or regulation promulgated by the passenger tramway safety board pursuant to section 25-5-704 (1) (a), C.R.S., shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of such operator. 33-44-104(2). Negligence - civil actions.

The amendment we propose naturally falls into Section 705 of the Tramway Act, as it imposes legal duties on the area operators. To clarify that these duties cannot be unilaterally nullified by the ski area operator by the use of a waiver, release and thus shift the cost and responsibility onto a passenger or skier, this section should include a new subsection (2) as set out below.

25-5-705. Responsibilities of area operators.

(1) The primary responsibility for design, construction, maintenance, operation, and inspection rests with the area operators of passenger tramway devices.

(2) The General Assembly reaffirms the holding of *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982 (Colo. App. 1983), that no provision of this article or of C.R.S. 33-44-104 may be modified or abrogated by private agreement or contract including by any liability release or waiver. And notwithstanding C.R.S. § 13-22-107, any provision in an agreement, contract, season pass, lift ticket, liability release, waiver or similar document seeking to modify or alter the duties and responsibilities imposed by the Tramway Act or rules promulgated by the Tramway Board is void as against public policy.

This amendment is necessary to protect children, families, and individuals from area operators nullifying statutory safety rules by waivers in season lift passes or day tickets.

These waivers are being used to undermine the safety system imposed by the Tramway and Ski Safety Act. There is a developing federal jurisprudence which nullifies the Tramway and Ski Safety Acts by enforcing these waivers notwithstanding the clear public policy of shared responsibility in the context of the operation, maintenance and installation of tramways. Blanket waivers and releases incorporated within lift tickets and season passes have undermined the statutory framework of duties of care imposed upon area operators.

See, Brigance v. Vail Summit Resorts, Inc., 883 F. 3d 1243 (10th Circ. 2018)(passenger's claim for failure to stop lift during load – injury claims barred by waiver). *Raup v. Vail Summit Resorts*, 734 Fed.Appx. 543 (10th Circ. 2018) not selected for publication (barring claims for a summer lift passenger's injuries based on small type waiver on the reverse of a single use lift ticket); *Rumpf v. Sunlight, Inc.*, 14-CV-03328-

WYD-KLM, 2016 WL 4275386, at *2 (D. Colo. Aug. 3, 2016)(Plaintiffs' claims for her claim of negligent operation of the lift were barred by the exculpatory language contained in both the ski rental agreement and the lift ticket).

State court trial judges have ruled differently: *Bradley v. Aspen Skiing Company, LLC*, 11CV43 (Pitkin Cty. Dist. Ct., 2012) (duties under PTSA, incorporated by the SSA, cannot be abrogated by release and waiver agreement for season pass). *See also, Donohoe et al., v. Kirby, et al.*, 2013CV030039, at p. 5 (Chafee Cty. Dist. Ct., 2014) (premises liability duties and driving duties of care could not be waived). *Contra, Mitchell v. Vail Summit Resorts*, 17CV30022 (Summit Cty. Dist. Ct. 2018) (enforcement of waiver does not contradict the underlying policy embodied in the SSA). *But see, Harris v. Schreiber & Vail Summit Resorts*, 2009 CV 133, (Summit Cty. Dist. Ct. 2009) (An exculpatory clause cannot avoid negligence per se); *accord, Ingalls v The Vail Corporation*, 15CV15 (Eagle Cty. Dist. Ct. 2018) (An exculpatory waiver can't contradict a statutory public duty).

The inconsistent federal and state court decisions have created a landscape of uncertainty and misapplication of Colorado law. Courts that have held that waivers attached to season passes and lift tickets bar any and all claims against area operators have effectively rendered the Passenger Tramway Safety Act null and void, which leaves the public with no recourse or remedy against area operators even though the General Assembly has enacted *per se* negligence is the standard of care under the specific duties required by the PTSA of regulated area operators to protect the public. To put it simply, someone injured as a result of the negligent conduct of an area operator's operation, maintenance, construction or modification of a passenger tramway has no way to recoup any of their damages in Colorado. Clearly, the Passenger Tramway Act was not created so that it could simply be gutted by the regulated industry incorporating a waiver in its season passes or on the back of a lift ticket/season pass.

3. Affirm the highest duty of care.

Third, we recommend that the Tramway Act be amended to codify the 51-year old Colorado rule of law that additionally requires a ski lift operator to exercise the highest degree of care commensurate with the practical operation of the ski lift. *Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 72 (Colo. 1998), as modified on denial of reh'g (June 22, 1998) *Summit County Development v. Bagnoli*, 166 Colo. 27, 40, 441 P.2d 658, 664 (1968).

We suggest this amendment appear as a subsection (2) to §25-5-717.

25-5-717. Provisions in lieu of others.

(1) The provisions for regulation, registration, and licensing of passenger tramways and the area operators thereof under this part 7 shall be in lieu of all other regulations or registration or licensing requirements, and passenger tramways shall not be construed to be common carriers within the meaning of the laws of this state.

(2) A ski lift operator must exercise the highest degree of care commensurate with the practical operation of the ski lift.

Respectfully,

CHALAT HATEN & BANKER PC

A handwritten signature in blue ink that reads "James H. Chalats". The signature is written in a cursive style with a large initial "J" and a long, sweeping tail.

James H. Chalats

JHC/bmf