

## LETTER TO THE EDITOR

Dear Editor,

I am not a member of your association, but I am a member of the Colorado Trial Lawyers Association (we have not yet updated our name).

I thought your readers might be interested in the following case report concerning a Utah state court ski case which we recently settled.

Johnny Kotun, age 28, was an expert recreational skier. He was skiing at Snowbird Ski Resort, on March 25, 2007. Preparing to quit for the day, at 4:00 p.m., Kotun was traversing along a lower cat walk across the "Wilbere cutoff" and was headed toward one of the lower parking lots.

The defendant, a 16-year-old off-duty junior ski instructor, was descending the Wilbere cutoff. The defendant took a jump off of a terrain change, and performed a 360. He landed, carved two wide arc turns and collided at high speed into Kotun.

Kotun was seen waving his arms and shouting at the defendant trying to avoid him in the moments before the collision. At impact, Kotun was ejected from his skis and thrown 30 feet into a nearby tree. The defendant also went airborne into the same tree.

About 25' from the point of impact was a large, orange SLOW banner. The testimony from the defendant, the witnesses (including chairlift passengers who witnessed the accident) combined with the slope angles, point of impact and departure trajectories of the parties, formed a basis for plaintiff's expert to establish the defendant's minimum speed at the moment of impact of approximately 42 mph.

The defendant sustained a non-displaced pelvic fracture, a concussion (no helmet) and bruising to his kidneys and spleen. He recovered without any impairment.

Kotun sustained mandibular and maxillary fractures. Although he was wearing a helmet, Kotun also sustained an intra cerebral and frontal lobe hemorrhage, and a severe shear injury. He recovered from the facial fractures but is now hemiplegic on his left side, and has significant cognitive and speech impairments.

An office equipment sales person earning \$28,000.00 per year, Kotun also volunteered as the varsity football receiver's coach at a large Salt Lake City high school. Kotun had been a high school football star, and a Division III college football player.

Paid medicals in the case were \$131,000.00.

The facts did not meet the detailed requirements of *respondent superior* under the Utah case of *Clover v Snowbird*, 808 P. 2d 1037 (1991) and therefore Snowbird was not a defendant in the case. The defendant had clocked out from work an hour prior to the accident, and he had taken several lifts for personal/recreational skiing before the accident. He was not in uniform at the time of the accident. Prior to the accident, he had taken off the skis on which he would work, and was using a borrowed pair of "trick skis."

The defendant, a high school junior living with his family in Salt Lake, had a total of \$1.5 million in homeowner's coverage.

Utah's ski safety statute does not impose per se liability on the uphill skier in a skier collision case. *Ricci v Schoultz*, 963 P.2d 784 (Utah 1998). See also Utah Code Ann. § 78-27-52(1)(f).

We approached the case against the defendant under a "risk enhancement" theory. See e.g., *Lackner v. North*, 135 Cal. App. 4th 1188, 37 Cal. Rptr. 3d 863 (2006).

The parties settled for the defendant's policy limits of \$1.5 million. A significant portion of the settlement payment was structured. I co-counseled the case with Craig Adamson and Craig Hoggan of Dart Adamson and Donovan of Salt Lake City. Our retained experts were:

Ski safety: Stan Gale

Engineering & accident reconstruction: Patrick Kelley, P.E.

Economics: Pat Pacey, Ph.D.

Rehabilitation: Doris Shriver

Neuro-psych: Erin Bigler, Ph. D.

JOHN NICHOLAS KOTUN, by and through his guardian and conservator MARIETTA KOTUN vs. STUART HOWE by and through his parent and general guardian RICHARD G. HOWE.

Civil No. 070907467 Judge L.A. Dever.

Third Judicial District Court in and for Salt Lake County, State of Utah.

Jim Chalot,  
Denver, Colorado