IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fillingham v. Big White Ski Resort Limited,*
2017 BCSC 1702

Date: 20170926
Docket: S151607
Registry: Vancouver

Between:

Gary Colin Fillingham and
Her Majesty in Right of the Province of Alberta

Plaintiffs

And:

ABC Corporation operating as Big White Ski Resort Limited, Kelowna Condominium Services Ltd., DEF Corporation operating as Solana Ridge Condominium Complex, GHI Corporation operating as Re/Max Kelowna Properties Management, JKL Corporation operating as The Aspens Condominium Complex also known as Strata Plan KAS 2516,
MNO Corporation operating as Tree Top Developments Corp., British Columbia Strata Management Inc.,
UVW Corporation, XYZ Corporation and John Doe

Defendants

And:

Big White Ski Resort Ltd., Strata Plan K675 operating as The Phoenix,
DEF Corporation operating as Solana Ridge Condominium Complex,
Kelowna Condominium Services Ltd., JKL Corporation operating as
The Aspens Condominium Complex also known as Strata Plan KAS 2516,
The Owners KAS 675 operating as Solana Ridge

Third Parties

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the Plaintiffs:	S. Berezowskyj
Counsel for the Defendant Big White Ski Resort Limited:	R. Kennedy
No other appearances	
Place and Date of Hearing:	Vancouver, B.C. August 25, 2017
Place and Date of Judgment:	Vancouver, B.C. September 26, 2017

Introduction

[1] The plaintiff Gary Colin Fillingham asserts that he sustained serious injuries, including a broken leg, while snowboarding at Big White Ski Resort on March 4, 2013. Mr. Fillingham says that he was injured when a known route from "Highway 33," a ski run on Big White, to the Solana Ridge condominium complex ("Solana Ridge") led him over a sheer ten-foot drop down into a parking lot.

[2] Big White Ski Resort is owned and operated by the defendant Big White Ski Resort Limited. I will refer to the resort as "Big White," and refer to the defendant Big White Ski Resort Limited as "BW Limited." BW Limited is now the sole remaining defendant in the action.

[3] There is no dispute that, on the day of the accident, Mr. Fillingham was snowboarding on a Big White day ticket. The ticket (a copy of which is found at Appendix A) contained detailed language excluding liability (the "Exclusion"), and stated in particular:

> As a condition of use of the ski area and other facilities, the Ticket Holder assumes all risk of personal injury, death or property loss resulting from any cause whatsoever including but not limited to: the risks, dangers and hazards of skiing, snowboarding, tubing, skating, cycling, hiking and all other recreational activities; the use of ski lifts; collision or impact with natural or man-made objects or with skiers, snowboarders or other persons; travel within or beyond the ski area boundaries; or negligence, breach of contract, or breach of statutory duty of care on the part of Big White Ski Resort Ltd. and its directors, officers, employees, instructors, volunteers, agents, independent contractors, subcontractors, representatives, sponsors, successors and assigns (hereinafter collectively referred to as the "Ski Area Operator"). The Ticket Holder agrees that the Ski Area Operator shall not be liable for any such personal injury, death or property loss and releases the Ski Area Operator and waives all claims with respect thereto. . . .

[4] A large, highly visible notice (a reduced copy of which is found at Appendix B) that contained detailed language substantially identical to the Exclusion was posted at all ticket locations at Big White.

[5] BW Limited seeks dismissal of the action on a summary trial, on the basis that the Exclusion is effective to exclude any liability to Mr. Fillingham, and constitutes a complete defence to the allegations of negligence made against BW Limited.

[6] Mr. Fillingham says that, when considering the enforceability of waivers (such as contained in the Exclusion), the law draws a distinction between the types of risks that regularly exist and are to be expected when engaging in an activity, and those risks that are extraordinary or unexpected because they are created by the party seeking to rely on the waiver. He says that BW Limited is unable to rely on the Exclusion because BW Limited itself created an extraordinary and unexpected hazard and such a hazard does not fall within the scope of the Exclusion.

[7] Accordingly, Mr. Fillingham seeks either: (a) a declaration that the Exclusion is not enforceable; or, in the alternative (b) an order dismissing the summary trial application and directing that the matter of the enforceability of the Exclusion be left for determination at the trial. (I note that the claims of the other named plaintiff, Her Majesty in Right of the Province of Alberta, are dependent on Mr. Fillingham establishing liability against BW Limited. No separate submissions were made on behalf of that plaintiff.)

[8] BW Limited has examined Mr. Fillingham for discovery, and relied heavily on Mr. Fillingham's discovery evidence at the hearing of the summary trial. As of August 25, 2017, the plaintiffs had not yet examined a representative of BW Limited for discovery.

[9] For the reasons that follow, I conclude that the Exclusion provides a complete defence to the plaintiffs' claims against BW Limited, and the action must, therefore, be dismissed.

Background facts

[10] Many of the background facts are undisputed.

[11] Solana Ridge consists of two buildings. Building 2 is a short distance away from and immediately to the south of "Highway 33," one of the runs on Big White. Highway 33 is a "green circle" run, indicating it is one of the easiest runs at Big White. A short distance above where Highway 33 passes by Building 2, there is a large orange "SLOW" banner placed by the Big White ski patrol, cautioning skiers and snowboarders to slow down as they proceed down the slope.

[12] Mr. Fillingham's parents have owned a unit in Solana Ridge for about 20 years. Before the accident, Mr. Fillingham stayed there on many occasions when skiing and snowboarding at Big White.

[13] Mr. Fillingham started skiing at about 3 or 4 years of age, and, during his teens, he was involved in ski racing and freestyle skiing. By his mid-20s, Mr. Fillingham rated his abilities as a skier and snowboarder as very good and advanced. He considered himself to be very familiar with the runs at Big White. Mr. Fillingham was also very familiar with the Exclusion.

[14] Skiers and snowboarders are able to access Solana Ridge and its parking lot from Highway 33. There are two access routes. One is to ski or snowboard down Highway 33 to below Building 2 and then turn to the right. The other route, which I will call a short cut, does not require the skier or snowboarder to travel to below Building 2. The short cut is taken by skiing or snowboarding down Highway 33 and turning to the right toward the parking lot at the end of Building 2. Persons taking the short cut then ski or snowboard down an embankment into the parking lot. Use of the short cut is permitted, and it is not unusual for skiers and snowboarders staying at Solana Ridge to take it. An independent witness, Rhona Brackley, stated that, on March 3, 2013, she saw people using the short cut, which she described as a "path" from Highway 33 to Solana Ridge. Her husband, Allen Brackley also observed the "path."

[15] The parking areas and driveways of Solana Ridge are usually plowed after major snowfalls. BW Limited is responsible for that snow plowing and clearing. The snow plowing and snow removal creates an embankment or cutbank between Building 2 and Highway 33.

[16] There are rope lines along Highway 33. All rope lines are maintained by the Big White ski patrol. There is a rope line along the right side of Highway 33 as it passes by Building 2.

[17] There is a conflict in the evidence about whether the rope line is ever adjusted, depending on whether the short cut is available for use or not.

[18] Barry Rehbein is a Solana Ridge unit owner and the president of the strata council, who worked as a volunteer and professional ski patroller for Big White between 1989 and 2008. According to Mr. Rehbein, the rope line is not adjusted by the Ski Patrol depending on the day-to-day conditions of the short cut. Rather, according to Mr. Rehbein, it remains constant regardless of the condition of the short cut.

[19] Mr. Rehbein's evidence is consistent with the evidence of Jeremy Hopkinson, the Vice-president of Mountain Operations for BW Limited, and the evidence of Heather Moore, the Ski Patrol Centre Manager at BW Limited. However, Mr. Hopkinson's evidence is conclusory and appears to be disguised hearsay, based on what he understands (or has been told) is the practice of the Big White ski patrol. Ms. Moore's evidence is also conclusory. She does not say, for example, that at any time prior to the accident she made any observations of the condition of the rope line at the point of the short cut.

[20] On the other hand, Mr. Fillingham and his father both say that sometimes the rope line is open, and sometimes it is not. They both say that, on numerous occasions, when the rope line has been open, they have skied through the opening down a gradual slope into the parking lot at Solana Ridge, thus taking the short cut. When the rope line has not been open at the short cut, both say that they have travelled further down on Highway 33 and taken the other route. Other than when the accident occurred, neither of them was aware of any occasions on which the rope line was open and there was not a gradual slope down into the parking lot. The evidence of Mr. Fillingham's mother, Marta Fillingham, is to the same effect.

[21] In the early morning on March 4, 2013, Mr. Fillingham was snowboarding on the mountain with his father, who was on skis. At about 9:30 a.m. they came back to Solana Ridge to pick up Mr. Fillingham's wife and his mother. Both Mr. Fillingham and his father say that, on their way back to Solana Ridge, there was a gap in the rope line at the short cut. Both say that they used the short cut, proceeding down a gradual slope in the snow that ended in the Solana Ridge parking lot.

[22] According to Mr. Brackley, that morning, when he walked into the Solana Ridge parking lot to check the cloud conditions, he saw a snow loader operating in the parking lot.

[23] After Mr. Fillingham and his father picked up Mr. Fillingham's mother and his wife, the four Fillingham family members then left Solana Ridge and returned to the mountain. Mr. Fillingham was again on a snowboard. Around Noon, the group was returning to Solana Ridge. As they were proceeding along Highway 33, Mr. Fillingham pulled ahead of the others. According to Mr. Fillingham, when he came to the turn-off for the short cut, the gap in the rope line was still there, as it had been earlier in the morning. He snowboarded through the gap. However, according to Mr. Fillingham, instead of the gradual slope that had been there earlier in the morning, there was a sheer drop, and he fell into the Solana Ridge parking lot. There is no dispute that the drop was ten feet. There is also no dispute that Mr. Fillingham sustained injuries as a result of his fall.

[24] The investigation report prepared and photographs obtained by Big White staff confirm that, at the time of Mr. Fillingham's accident, the rope line at the short cut was open, and there was a gap about 16 feet wide.

[25] According to Ms. Brackley, she was in the Solana Ridge parking lot immediately after the accident and saw Mr. Fillingham on the ground, apparently badly injured. Both Ms. Brackley and Mr. Brackley say that they observed that the short cut path they had observed earlier had been removed, and there was a sheer drop into the parking lot.

[26] According to Mr. Fillingham's father, Gary Fillingham, when he went back to the area on Highway 33 on March 6, 2013, the rope line, which had been open on March 4, was closed. BW Limited did not respond to Gary Fillingham's evidence in any way.

Discussion and analysis

[27] Counsel made only brief submissions concerning the suitability of this matter for summary trial.

[28] In both written and oral argument, Mr. Berezowskyj (on behalf of Mr. Fillingham) submitted in the alternative that the question whether the hazard that resulted in Mr. Fillingham's injuries fell within the scope of the Exclusion should not be determined on the basis of a summary trial, but should instead be left for the full trial.

[29] Mr. Kennedy, counsel for BW Limited, resisted the idea that the court would or could make any findings concerning negligence on the part of his client, in view of the conflicts in the evidence about snow clearing and the state of the rope lines, for example. He advised that BW Limited was not conceding any negligence. Rather, its position is that the conflicts in the evidence are not a barrier to having the liability issue decided based on the Exclusion, and that it is entitled to a dismissal of the action.

[30] I will therefore discuss suitability relatively briefly.

[31] The court may grant judgment on a summary trial, either on an issue or generally, unless the court is unable on the whole of the evidence to find the facts necessary to decide the issues of fact or law, or the court is of the opinion that it would be unjust to decide the issues on the application. Judgment may be granted on a summary trial application despite conflicting affidavits or conflicting evidence where the court is able to make the necessary findings of fact. A triable issue or arguable defence will not always defeat a summary trial application, and cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law, provided that the judge does not find it is unjust to do so: see ***Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*** (1989), 36 B.C.L.R. (2d) 202 (C.A.) at p. 211.

[32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. Here, there was evidence tendered by Mr. Fillingham (as respondent to the application) on the negligence issues, to which Big White did not respond. As a result, Big White ran the risk of findings being made against it, based on the unchallenged evidence tendered by the plaintiff.

[33] Of course, a summary trial, although heard (generally) on a paper record in chambers, remains a trial of the action for which the plaintiff (even if not the applicant) retains the onus of proof of establishing his or her claim(s), and the defendant (even if not the applicant) retains the burden of establishing any defence that is raised.

[34] I note that some of the evidence contained in the affidavits filed by both sides is inadmissible on a summary trial. For example, Mr. Hopkinson's affidavit contains opinions and conclusions that are based on documents he reviewed but which are not in evidence. Even if the documents had been attached as exhibits, they would not, without more, be admissible to prove facts set out in them. Mr. Hopkinson's affidavit also contains inadmissible argument, speculation and disguised hearsay. There are parts of the affidavit of Ms. Moore that suffer from the same problems. Parts of the affidavits from members of the Fillingham family members are inadmissible hearsay.

[35] I have given no weight to what is inadmissible.

[36] In addition, Big White asks the court to determine a "slice" of the litigation: namely, its liability based on the Exclusion. In ***Greater Vancouver Water District v. Bilfinger Berger AG***, 2015 BCSC 485, Griffin J. summarized (at para. 110) the factors that the court must consider on applications to determine by summary trial only part of the issues in the lawsuit.

[37] I have concluded that I am able to find the facts necessary to decide the issues on liability based on the Exclusion, and that it would not be unjust to do so.

[38] Based on the admissible evidence, I find the following facts:

(a) Mr. Fillingham was a very experienced skier and snowboarder, including at Big White, and he was very familiar with the Exclusion. The Exclusion was on the back of the ticket he purchased on March 4, 2013 and substantially identical language was also displayed prominently on the notices in the ticketing area of Big White;

(b) Big White permits the use of the short cut, which is a known route to the Solana Ridge parking lot. The evidence of Mr. Fillingham, Mr. Fillingham's parents, Ms. Brackley and Mr. Rehbein supports this conclusion;

(c) Big White is responsible for snow plowing and snow clearing in the Solana Ridge parking lot. This fact is not disputed by Big White;

(d) snow plowing and clearing in the Solana Ridge parking lot creates an embankment or cut bank, as described by Mr. Rehbein. However, when the short cut is being used, the slope is a gradual one. This is consistent with the evidence of Mr. Fillingham and Mr. Fillingham's father, and also with the evidence of the Brackleys, who described the route as a "path";

(e) Big White erects and maintains the rope line along Highway 33;

(f) on March 3, 2013 and on the morning of March 4, 2013, the short cut was available for use and being used by skiers and snowboarders. Ms. Brackley observed it being used on March 3, and the evidence of Mr. Fillingham and his father that they used it when returning to Solana Ridge in the morning on March 4 is uncontradicted;

(g) based on the evidence of use of the short cut on both March 3 and the morning of March 4, I conclude that the rope line along Highway 33, at the point of the short cut, was open on both March 3 and the morning of March 4. The fact that the rope line was open permitted use of the short cut. I accept the evidence of Mr. Fillingham and Gary Fillingham on that point. The open line is shown in the photographs taken and diagram created after the accident. I also accept their evidence that there are occasions when the rope line was not open, and that, on those occasions, they did not use the short cut. Gary Fillingham observed that, on March 6, the rope line was not open. Mr. Rehbein's general and conclusory evidence that the rope line was not adjusted and remained constant is inconsistent with the actual use of the short cut on March 3 and the morning of March 4, as well as with the evidence of Mr. Fillingham and his father. In my opinion, the evidence of Mr. Fillingham and his father on the condition of the rope line at the short cut is more reliable than both the general statements from BW Limited about its practice, and Mr. Rehbein's evidence. Moreover, BW Limited filed no evidence in reply to the evidence of Mr. Fillingham and Gary Fillingham on this point;

(h) during the morning on March 4, 2013, and after the members of the Fillingham family returned to the mountain, but before Noon, Big White cleared snow from the Solana Ridge parking lot, and, as a result, the short cut and path into the parking lot that the Brackleys observed on March 3, and that Mr. Fillingham and his father used earlier in the morning on March 4, was removed. In its place was a sheer ten-foot drop into the parking lot. The conclusions in the affidavit of Mr. Hopkinson about the absence of snow clearing on March 4, based on records he reviewed, are inadmissible. Rather, Mr. Brackley's evidence of what he observed the morning of March 4, together with the evidence of Mr. Fillingham and Gary Fillingham about the change in conditions between 9:30 a.m. and Noon, when the accident occurred, lead me to conclude that snow clearing took place, removed the path and created the ten-foot drop;

(i) as of Noon on March 4, 2013, when Mr. Fillingham was coming down Highway 33, the rope line at the short cut was still open. However, the path had been removed, thereby creating a hazard if the short cut was used, and the open rope line failed to mark or warn of that hazard.

[39] I find further that, in not taking steps after clearing snow in the Solana Ridge parking lot to ensure the rope line at the short cut from Highway 33 was closed, BW Limited failed to take reasonable care and was negligent.

[40] I make no findings concerning any negligence on the part of Mr. Fillingham.

[41] I turn then to the main issue on this summary trial: can BW Limited rely on the Exclusion?

[42] In support of his argument that a failure to close the rope line in the circumstances nevertheless falls within the scope of the Exclusion, and the Exclusion therefore constitutes a complete defence, Mr. Kennedy cites (among other cases): ***Union Steamships Limited v. Barnes***, [1956] S.C.R. 842; ***Mayer v. Big White Ski Resort Ltd.***, 1997 CanLII 4261 (B.C.S.C.), aff'd 1998 CanLII 5114 (B.C.C.A.); ***Dixon v. B.C. Snowmobile Federation***, 2003 BCCA 174; and ***Dyck v. Manitoba Snowmobile Association***, [1985] 1 S.C.R. 589.

[43] On behalf of Mr. Fillingham, Mr. Berezowskyj submits that, on the facts, given the unusual hazard that was created by BW Limited itself, BW Limited cannot rely on the Exclusion to avoid liability to Mr. Fillingham because the scope of the Exclusion is not sufficiently broad. Where the risk or hazard involved is beyond what one might reasonably be expected to have accepted when participating in a particular activity, even broad language such as that found in the Exclusion may not or should not defeat a claim, in Mr. Berezowskyj's submission.

[44] In support of this argument, Mr. Berezowskyj cites ***Parker v. Ingalls***, 2006 BCSC 942. The plaintiff in that case, a student in a martial arts class, suffered a severe knee injury as a result of his instructor demonstrating a move and exerting torque or pressure on the plaintiff's right leg and knee joint. The instructor sought to rely on a waiver contained in the studio's enrollment package. The waiver stated as follows:

> Student further acknowledges the existence of some risk of personal injury in participating in the prescribed course of instruction and expressly agrees to assume the risk of all injuries, death or property damage and agrees to indemnify and save harmless Studio from and against any and all liability, including all expenses, legal or otherwise, incurred by Studio in the defense of any claim or suit.

[45] On a trial of liability only, Madam Justice Allan concluded (at para. 70) that the waiver did not release the defendant from liability because she did not accept the defendant's evidence that he brought the waiver to the attention of the plaintiff when the plaintiff enrolled for instruction.

[46] Madam Justice Allan went on to conclude that, in any event, the plaintiff's claim did not fall within the scope of the waiver because the mechanism of injury was not among the types of risk the parties would reasonably expect the waiver to cover. She wrote, at paras. 72-73:

> [72] In any event, I find that an injury such as that experienced by Mr. Parker does not fall within the scope of the waiver. In my opinion, Mr. Parker, by engaging in shoot-fighting lessons accepted certain risks of injury but he did not accept the risk of injury at the hands of his instructor whom he trusted not to harm him. It is reasonable for Mr. Ingalls to seek a waiver from accidents occurring in the case of a student injuring himself as a result of falling or doing a move incorrectly, or being injured by another student in the course of an exercise. However, it is not reasonable for Mr. Ingalls to seek to exclude himself from his own negligence where he is conducting a demonstration in which he has complete control over the safety of the student. Mr. Parker was not asked to consent that risk and he did not do so.
>
> [73] In this case, I find that Mr. Ingalls failed to take reasonable steps to bring the contents of the waiver to Mr. Parker's attention and that a reasonable person would have known that Mr. Parker did not agree to release Mr. Ingalls from negligently injuring him.

[47] Mr. Berezowskyj also relies on ***Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)***, 2010 SCC 4 in support of the argument that, on the facts, the scope of the Exclusion is not sufficiently broad to allow BW Limited to avoid liability to Mr. Fillingham, because the circumstances in which Mr. Fillingham suffered injury are beyond what the parties could be taken to have intended to exclude.

[48] In ***Tercon***, the Province had accepted a bid in an RFP process from an ineligible party. The Province sought to avoid liability to Tercon for breach of the bid contract on the basis of an exclusion clause that excluded liability in respect of "any claim for compensation of any kind whatsoever, as a result of participating in this RFP." The analytical framework was set out in the judgment of Binnie J. (dissenting in the result), with which the majority agreed, at paras. 122-123 [*italics* in original]:

> [122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.
>
> [123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

[49] The majority (agreeing with the trial judge) concluded (at para. 78) that the parties could not have intended to exclude a damages claim resulting from the Province unfairly permitting a bidder to participate who was not eligible to do so. Cromwell J. wrote:

> . . . I cannot conclude that the parties, through the words found in this exclusion clause, intended to waive compensation for conduct like that of the Province in this case that strikes at the heart of the integrity and business efficacy of the tendering process which it undertook.

[50] In my opinion, the result in ***Tercon*** does not assist Mr. Fillingham.

[51] On the other hand, when I apply the analytical framework described by Binnie J. to the Exclusion, in my view, the intention is clear: it is to exclude liability on the part of the Ski Area Operator to the Ticket Holder for "all risk of personal injury . . . <u>resulting from any cause whatsoever</u>" [<u>underlining</u> added]. "Any cause whatsoever" specifically includes, but is not limited to, negligence on the part of the Ski Area Operator. Mr. Fillingham, as I have found, was very familiar with this language. He had seen it many times, and carried on his activities on the basis that he was assuming "all risk of personal injury," including, without limitation, risk of personal injury caused by the negligence of BW Limited. That is what Mr. Fillingham did at Big White on March 4, 2013.

[52] Mr. Fillingham, based on his evidence, knew that some of the time, the short cut was roped off, and some of the time it was not. The essence of his complaint in this action is that, as of about Noon on March 4, BW Limited failed to adequately mark – by closing the rope line – a hazard it had created, and was negligent in doing so. I have found that BW Limited was negligent. However, in my view, what occurred is not so extraordinary or unique that it could be said the parties did not intend for it to be covered by the Exclusion.

[53] In my opinion, the facts here are distinguishable from ***Parker***. Mr. Parker was injured by his teacher and instructor, someone whom Madam Justice Allan found Mr. Parker <u>trusted</u> not to harm him. That is very different from the relationship Mr. Fillingham as a snowboarder had with BW Limited. Given the words of the Exclusion, it would have been entirely unreasonable for Mr. Fillingham to expect BW Limited to be looking out for Mr. Fillingham's well-being.

[54] Mr. Berezowskyj submitted that, if the Exclusion were found to be valid and broad enough to encompass Mr. Fillingham's claim, then there are strong public policy reasons for preventing a recreational operator from relying on a ticket waiver to avoid liability in circumstances where it actively creates the hazard from which its guests were not properly protected, and were in fact invited to court. However, in my opinion, this is not a case where an overriding public policy (evidence of which was thin at best) outweighs the case in favour of enforcement of the Exclusion.

[55] In support of the plaintiff's alternative position that whether the hazard here falls within the scope of the Exclusion should not be determined on the basis of a summary trial, Mr. Berezowskyj cites ***Champion v. Ski Marmot Basin***, 2005 ABQB 535 and ***Brown v. Blue Mountain Resort Ltd.***, 2002 CanLII 7591 (Ont. S.C.J.). In both of those cases, the court determined that whether the defendant's conduct and the resulting hazard fell within the scope of the waiver on which the defendant relied was a question that should be determined following a trial. However, I agree with Mr. Kennedy that those cases are of little assistance because they are applying a summary judgment rule that is quite different from, and more limited than, the B.C. summary trial rule.

<u>Summary and disposition</u>

[56] In summary, the Exclusion provides a complete defence to the plaintiffs' claims against BW Limited. The action is, accordingly, dismissed.

[57] Costs will follow the event.

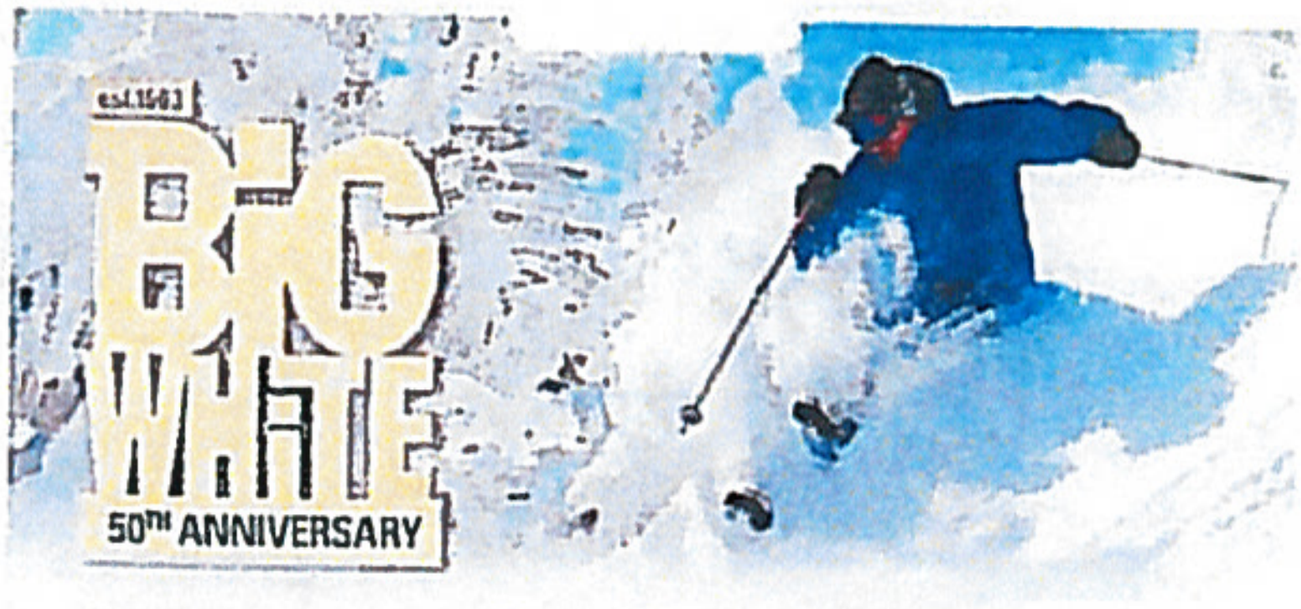
"ADAIR J."

Appendix A

FILLINGHAM v. Big White Ski Resort Ltd. et al.

Date of Incident: March 4, 2013

Sample Adult Day Ticket



MAR 4 2013

Adult 1 Day

A14763047001

PLEASE READ THE EXCLUSION OF LIABILITY AND ASSUMPTION OF RISK NOTICE ON BACK

HST# 100511351

Big White SKI RESORT

bigwhite.com

CANADA'S FAVOURITE FAMILY RESORT

NOTICE TO ALL USERS OF THES
EXCLUSION OF LIABILITY - ASSUMPTION OF RI
THESE CONDITIONS WILL AFFECT YOUR LEGAL RIG
RIGHT TO SUE OR CLAIM COMPENSATION FOLLO

PLEASE READ CARE

As a condition of use of the ski area and other facilitie
assumes all risk of personal injury, death or property
any cause whatsoever including but not limited to: the
hazards of skiing, snowboarding, tubing, skating, cy
other recreational activities, the use of ski lifts; colli
man-made objects or with skiers, snowboarders or o
within or beyond the ski area boundaries; or negligence
or breach of statutory duty of care on the part of Big W
and its directors, officers, employees, instructors,
independent contractors, subcontractors, represen
successors and assigns (hereinafter collectively refe
Area Operator"). The Ticket Holder agrees that the Ski
not be liable for any such personal injury, death or
releases the Ski Area Operator and waives all claims w
The Ticket Holder agrees that any litigation involving th
shall be brought solely within the Province of British
be within the exclusive jurisdiction of the Courts of the
Columbia. The Ticket Holder further agrees that these
rights, duties and obligations as between the Ski Are
Ticket Holder shall be governed by and interpreted so
with the laws of the Province of British Columbia and n

THE SKI AREA OPERATOR'S L
EXCLUDED BY THESE CON
PLEASE ADHERE TO THE ALPINE RESPONSIBILI
RESPONSIBLE FOR YOUR OWN SAFETY IN AL

This pass is not transferable or

PLEASE READ THE EXC
OF LIABILITY AND ASSU
OF RISK NOTICE AB

Appendix B

PLEASE READ

EXCLUSION OF LIABILITY ON TICKET

NOTICE TO ALL USERS OF THESE FACILITIES

EXCLUSION OF LIABILITY - ASSUMPTION OF RISK - JURISDICTION

THESE CONDITIONS WILL AFFECT YOUR LEGAL RIGHTS INCLUDING THE RIGHT TO SUE OR CLAIM COMPENSATION FOLLOWING AN ACCIDENT

PLEASE READ CAREFULLY!

As a condition of use of the ski area and other facilities, the ticket holder assumes all risk of personal injury, death or property loss resulting from any cause whatsoever including but not limited to: the risks, dangers and hazards of skiing, snowboarding, tubing, tobogganing, cycling, mountain biking, hiking and other recreational activities; the use of ski lifts, carpet lifts and tube tows; collision or impact with natural or man-made objects or with other persons; travel within or beyond the area boundaries; or negligence, breach of contract, or breach of statutory duty of care on the part of the ski area operator and its employees, instructors, guides, agents, independent contractors, subcontractors, representatives, sponsors, successors and assigns (hereinafter collectively referred to as the "Ski Area Operator"). The ticket holder agrees that the Ski Area Operator shall not be liable for any such personal injury, death or property loss and releases the Ski Area Operator and waives all claims with respect thereto. The ticket holder agrees that any litigation

involving the Ski Area Operator shall be brought solely within the Province of British Columbia and shall be within the exclusive jurisdiction of the Courts of the Province of British Columbia. The ticket holder further agrees that these conditions and any rights, duties and obligations as between the Ski Area Operator and the ticket holder shall be governed by and interpreted solely in accordance with the laws of the Province of British Columbia and no other jurisdiction.

THE SKI AREA OPERATOR'S LIABILITY IS EXCLUDED BY THESE CONDITIONS

PLEASE ADHERE TO THE ALPINE RESPONSIBILITY CODE AND BE RESPONSIBLE FOR YOUR OWN SAFETY IN ALL ACTIVITIES

No. 5 for identification
EXAM. OF G Billingham
MARGARET WILLS
United Rehabilitation Service Ltd

CWSAA
Canadian Ski Areas Association

10/2010