Navigating Novel Negligence Cases

Part 3: Ski Accident Cases

New York State ACADEMY OF TRIAL LAWYERS

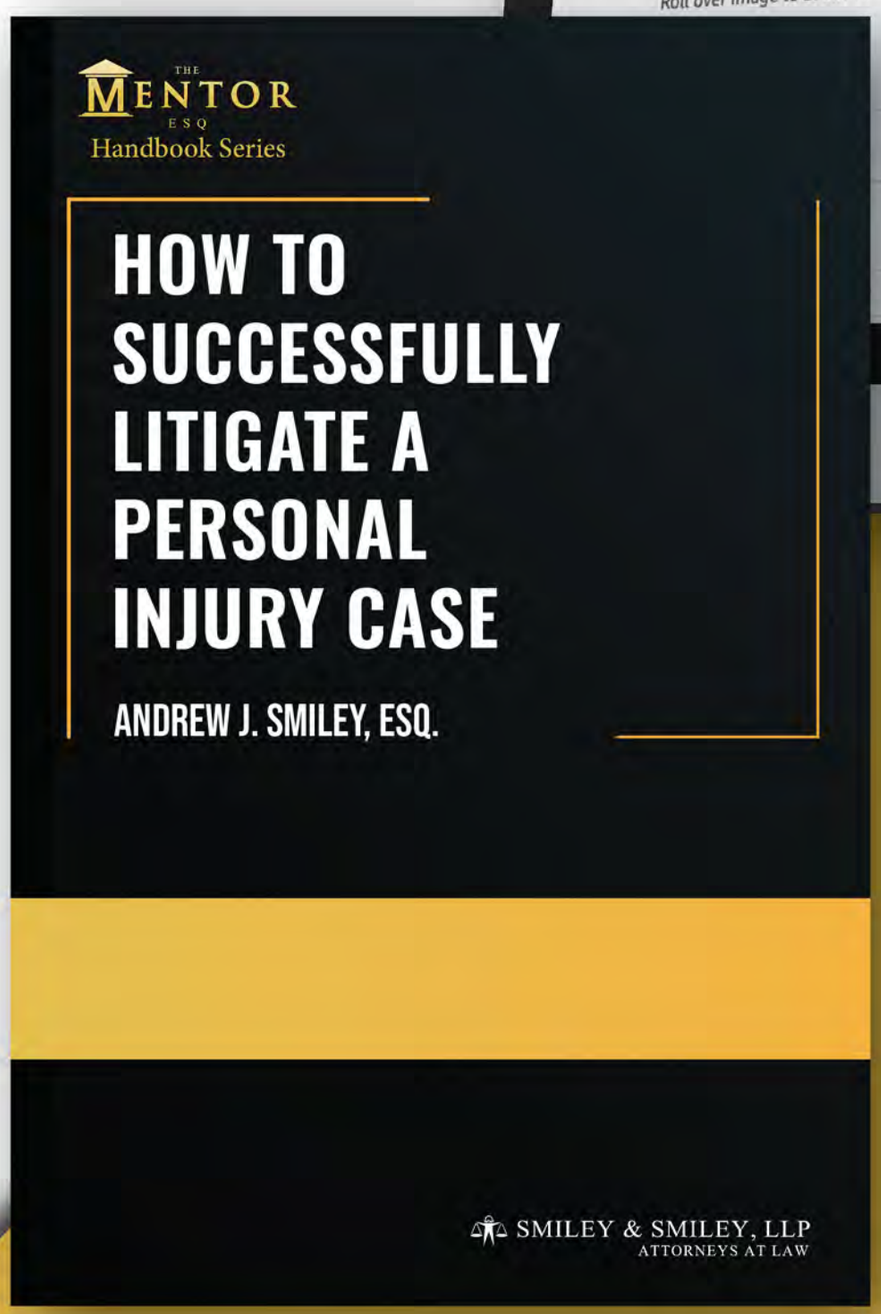
PRESENTED BY

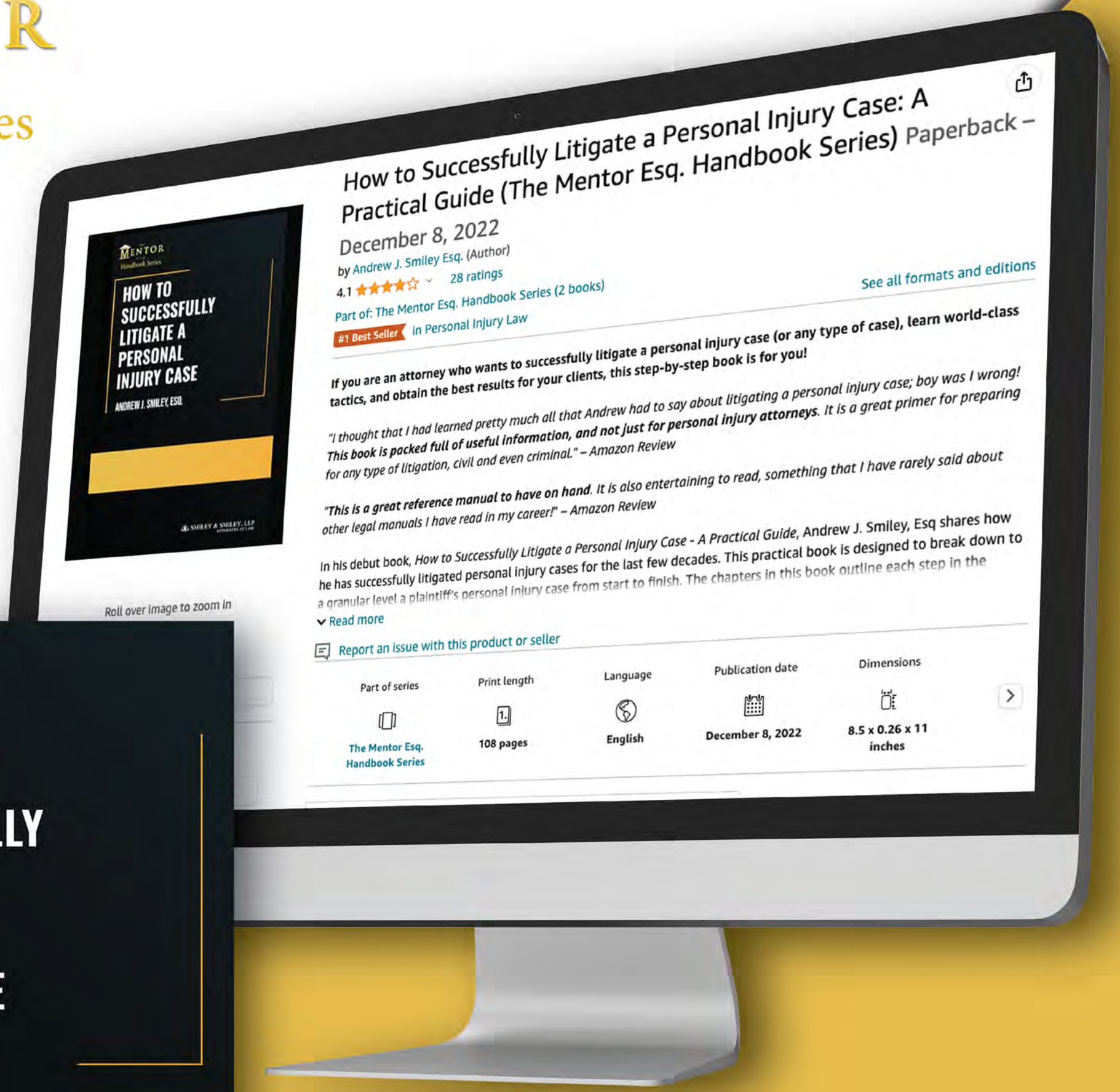
Andrew Smiley

PRESENTED LIVE
MARCH 6, 2024
1PM VIA ZOOM

THE MENTOR ESQ

Handbook Series





#1 Best Seller

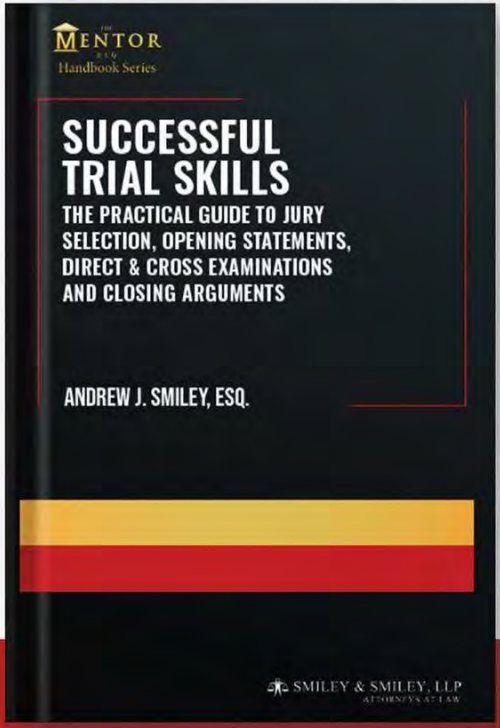
in Personal Injury Law

GET YOURS TODAY!

THE MENTOR ESQ
Handbook Series

SUCCESSFUL TRIAL SKILLS

ANDREW J. SMILEY ESQ.



ARE YOU READY TO ELEVATE YOUR TRIAL SKILLS AND CONQUER THE COURTROOM?

My latest book "Successful Trial Skills" is already sitting as the #1 new release in Trial Practice, Juries and Litigation Procedures.

JOIN THE ACADEMY FOR FREE CLE

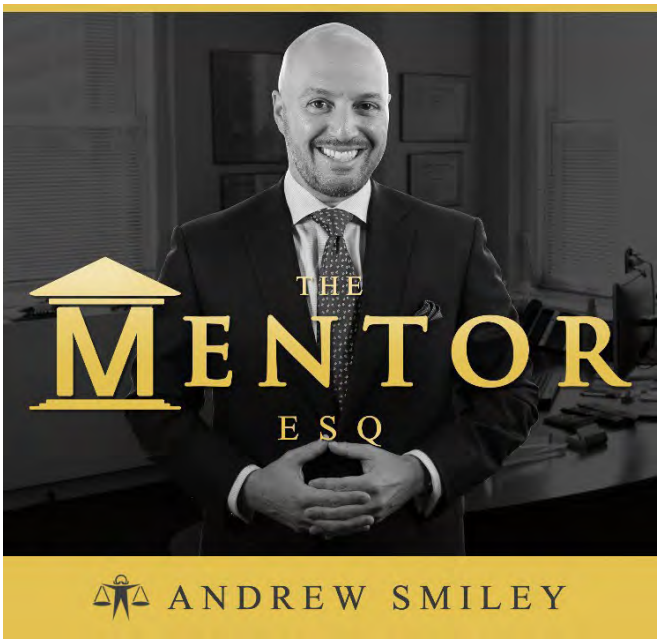
Academy members now get FREE access to all live AND on-demand CLE courses!

- The Academy presents CLE webinars providing CLE credits in all categories, including Diversity, Inclusion and Elimination of Bias.
- All of our courses are video recorded and made available to view on-demand on our website.

Interested in joining? Contact us for more information

518-364-4044 info@trialacademy.org

New York State ACADEMY OF TRIAL LAWYERS



Andrew J. Smiley, Esq.
Smiley & Smiley, LLP
122 East 42nd Street, NYC 10168
212.986.2022
asmiley@smileylaw.com
www.smileylaw.com
www.thementoresq.com

CURRICULUM VITAE

Education:

·Brooklyn Law School - Juris Doctorate 1996

Moot Court Honor Society - Vice President/Executive Board (Chair of Trial Division)
Moot Court Honor Society - Competitor - National Appellate Trademark Competition
Moot Court Honor Society – Coach, National Trial Team – Regional Champions
CALI Excellence For The Future Award - Advanced Legal Research
Judge Edward and Doris A. Thompson Award for Excellence in Trial Advocacy

·Tulane University, New Orleans, LA - Bachelor of Arts (Honors, Psychology) 1993

Professional:

· *Smiley & Smiley, LLP*

Managing Partner & Senior Trial Attorney, January 2001 - present
Associate, June 1996 - December 2000
Law Clerk, September 1993 - June 1996
Major verdicts and settlements in plaintiffs' personal injury, medical malpractice and wrongful death litigation

· *Adjunct Clinical Instructor of Law - Brooklyn Law School*, Trial Advocacy Program (1998-2004)

· *The Mentor Esq. Podcast – A Podcast for Lawyers*

- Founder & Host (2019 – Present)

· *New York "Super Lawyer"*
2010, 2011,2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023

·Bar Admissions:
- The United States Supreme Court
- New York State Courts
- United States Eastern District, Southern District & Northern District of New York
- United State District Court of Vermont

Organizations/Affiliations:

·New York State Academy of Trial Lawyers
-Immediate Past President (May 2018- May 2019)
-President (May 2017 – May 2018)
-President-Elect – (April 2016- May 2017)
-Vice President – 1st Dept. (July 2013-May 2016)
-Executive Committee (May 2019 – present)
- Board of Directors (2013- present)
- Judicial Screening Committee (2013- present)
- Master CLE Instructor (2020 – present)
- CLE Instructor (2013 – present)

·New York City Trial Lawyers Alliance
-Chairman of Board of Governors (July 2017 – July 2019)
-President (July 2015 – July 2017)
-Vice President (June 2013 – July 2015)
-Treasurer (June 2011 – June 2013)
-Secretary (June 2009- June 2011)
-Board of Directors (2000-present)

- Judicial Screening Committee, Kings County Democratic Party (2013)
- New York State Bar Association
- Brooklyn Bar Association
  Medical Malpractice Committee
  Supreme Courts Committee
- American Bar Association
- The American Association for Justice

- Brooklyn Law School Alumni Association
- National Order of Barristers
- Lime Rock Drivers Club
- Porsche Club of America (Connecticut Valley Region)
- Porsche Sim Racing League
- Sports Car Driving Association (SCDA)
- Just Hands Racing Foundation – Board of Directors

Authored Books

Smiley, Andrew J. *How to Successfully Litigate a Personal Injury Case – A Practical Guide* 2022, The Mentor Esq. Handbook Series – Available on Amazon

Smiley, Andrew J. *Successful Trial Skills – A Practical Guide to Jury Selection, Opening Statements, Direct & Cross Examinations and Closing Arguments*, 2024, The Mentor Esq. Handbook Series – Available on Amazon

Continuing Legal Education (CLE) Presentations:

(69) *Litigation Back to Basics – Part 3: Introducing Evidence and Impeaching Witnesses*, New York State Academy of Trial Lawyers, December 6, 2023

(68) *Litigation Back to Basics – Part 2: Working With Experts*, New York State Academy of Trial Lawyers, November 1, 2023

(67) *Construction Site Injury Litigation: Pursuing or Defending Claims Against Site Owners, Contractors, and Other Third Parties,* Strafford CLE/BarBri, October 17, 2023

(66) *Litigation Back to Basics – Part 1: Preparing and Conducting Depositions*, New York State Academy of Trial Lawyers, October 4, 2023

(65) *Depositions*, Office of The New York State Attorney General – Legal Education and Professional Development, September 28, 2023

(64) *How to Litigate a Medical Malpractice Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, June 7, 2023

(63) *How to Litigate a Medical Malpractice Case – Part 5: Pre-Trial Preparation*, New York State Academy of Trial Lawyers, May 3, 2023

(62) *How to Litigate a Medical Malpractice Case – Part 4: Discovery & Depositions*, New York State Academy of Trial Lawyers, April 4, 2023

(61) *How to Litigate a Medical Malpractice Case – Part 3: Commencing the Action*, New York State Academy of Trial Lawyers, February 28, 2023

(60) *How to Litigate a Medical Malpractice Case – Part 2: Expert Selection*, New York State Academy of Trial Lawyers, February 1, 2023

Continuing Legal Education (CLE) Presentations Continued:

(59) *How to Litigate a Medical Malpractice Case – Part 1: The Initial Screening*, New York State Academy of Trial Lawyers, January 4, 2023

(58) *How to Litigate a Construction Accident Case – Part 4:* Motion Practice, New York State Academy of Trial Lawyers, December 7, 2022

(57) *Preparing for Depositions: Best Practices for Asking and Answering Questions*, Office of The New York State Attorney General, 2022 Legislature Program, December 6, 2022

(56) *How to Litigate a Construction Accident Case – Part 3: Depositions*, New York State Academy of Trial Lawyers, November 2, 2022

(55) *How to Litigate a Construction Accident Case – Part 2: Commencing The Action*, New York State Academy of Trial Lawyers, October 3, 2022

(54) *Trial Series: Part 2 - Opening Statement Webinar*, Queens County Bar Association, September 22, 2022

(53) *How to Litigate a Construction Accident Case – Part 1: An Overview of New York Labor Law*, New York State Academy of Trial Lawyers, September 7, 2022

(52) *How to Litigate a Catastrophic Automobile Accident Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, July 6, 2022

(51) *How to Litigate a Catastrophic Automobile Accident Case – Part 5: Mediation and Settlement*, New York State Academy of Trial Lawyers, June 2, 2022

(50) *How to Litigate a Catastrophic Automobile Accident Case – Part 4: Expert Depositions*, New York State Academy of Trial Lawyers, May 4, 2022

(49) *How to Litigate a Catastrophic Automobile Accident Case – Part 3: Liability and Damages Experts*, New York State Academy of Trial Lawyers, April 6, 2022

(48) *How to Litigate a Catastrophic Automobile Accident Case – Part 2: Commencing the Action*, New York State Academy of Trial Lawyers, March 2, 2022

(47) *How to Litigate a Catastrophic Automobile Accident Case – Part 1: The Investigation*, New York State Academy of Trial Lawyers, February 4, 2022

(46) *Anatomy of a Trial, a Trial Skills Series – Part 5: Summations*, New York State Academy of Trial Lawyers, January 5, 2022

(45) *Anatomy of a Trial, a Trial Skills Series – Part 4: Cross-Examination*, New York State Academy of Trial Lawyers, December 1, 2021

(44) *Anatomy of a Trial, a Trial Skills Series – Part 3: Direct Examination*, New York State Academy of Trial Lawyers, November 3, 2021

Continuing Legal Education (CLE) Presentations Continued:

(43) *Anatomy of a Trial, a Trial Skills Series – Part 2: Opening Statements,* New York State Academy of Trial Lawyers, October 6, 2021

(42) *Anatomy of a Trial, a Trial Skills Series – Part 1: Jury Selection,* New York State Academy of Trial Lawyers, September 10, 2021

(41) *How to Successfully Litigate a Personal Injury Case Series - Part 7: It's a Wrap!,* New York State Academy of Trial Lawyers, July 7, 2021

(40) *How to Successfully Litigate a Personal Injury Case Series - Part 6: The Trial*, New York State Academy of Trial Lawyers, June 2, 2021

(39) *How to Successfully Litigate a Personal Injury Case Series - Part 5:Pre-Trial Disclosures and Gearing up for Trial,* New York State Academy of Trial Lawyers, May 5, 2021

(38) *How to Successfully Litigate a Personal Injury Case Series - Part 4: Depositions,* New York State Academy of Trial Lawyers, April 7, 2021

(37) *How to Successfully Litigate a Personal Injury Case Series - Part 3: Your Adversary, the Preliminary Conference and Initial Discovery,* New York State Academy of Trial Lawyers, March 3, 2021

(36) *How to Successfully Litigate a Personal Injury Case Series - Part 2: Early Settlement, Jurisdiction, Venue & Commencing The Lawsuit,* New York State Academy of Trial Lawyers, February 3, 2021

(35) *How to Successfully Litigate a Personal Injury Case Series - Part 1: Getting the Case, Investigation and Ready to File,* New York State Academy of Trial Lawyers, January 6, 2021

(34) *Brick by Brick: Building a Personal Injury Practice,* New York State Academy of Trial Lawyers, December 10, 2020

(33) *Working with Experts to Build Your Case*, New York State Academy of Trial Lawyers, October 8, 2020

(32) *Fitness Industry Liability: Gyms, Trainers and Waivers*, The Mentor Esq. Podcast, September 8, 2020

(31) *Let's Make a Federal Case Out of It: Litigating Personal Injury Cases in Federal Court,* New York State Academy of Trial Lawyers, June 9, 2020

(30) *Crisis Management - The Corona Virus Pandemic*, The Mentor Esq. Podcast, April 9, 2020

(29) *Do You Have a Federal Tort Claims Act Case in Your Office,* New York State Academy of Trial Lawyers, December 10, 2019

(28) *Auto and Truck Claims, Accidents and Litigation 2019 – Evaluating Damages and Use of Experts,* New York State Bar Association, September 9, 2019

Continuing Legal Education (CLE) Presentations Continued*:*

(27) *Thoughts and Strategies in the Ever-Evolving Product Liability Litigation – The Plaintiff's Perspective*, The Defense Association of New York, March 12, 2019

(26) *Trial Techniques: Lessons on Dealing with Millennial Jurors; Summations; Requests to Charge and Post-Trial Motions*, The Defense Association of New York, January 31, 2019

(25) *Trial Techniques: Interactive Lessons from the Plaintiff and Defense Perspectives*, The Defense Association of New York, September 17, 2018

(24) *Punitive Damages – What to Plead, What to Prove: Medical Malpractice*, New York State Academy of Trial Lawyers, June 8, 2017 & June 21, 2017

(23) Presenter on Evidence, *2016 Annual Update, Precedents & Statutes for Personal Injury Litigators*, New York State Academy of Trial Lawyers, September 30, 2016

(22) *Medical Malpractice in New York: A View from All Sides: The Bench, The Bar and OCA,* New York State Bar Association, October 11, 2015

(21) *Effectively Using Experts in Personal Injury Cases,* Lawline, October 8, 2015

(20) *Killer Cross Examination Strategies,* Clear Law Institute, April 21, 2015

(19) *Powerful Opening Statements,* Clear Law Institute, January 13, 2015

(18) *The Dram Shop Law: New York Liquor Liability,* Lawline.com, November 20, 2014

(17) *Killer Cross Examination Strategies,* Lawline.com, November 20, 2014

(16) *Trial Techniques: Tricks of the Trade Update,* Lawline.com, October 14, 2014

(15) *Personal Trainer Negligence Update,* Lawline.com, October 14, 2014

(14) *Trial Techniques – Part 2: Cross- Examination & Closing Arguments*, Brooklyn Bar Association, May 15, 2014

(13) *Trial Techniques – Part 1: Jury Selection, Opening Statements & Direct Examination,* Brooklyn Bar Association, May 7, 2014

(12) *Health, Fitness & Adventure Sports Liability*, New York State Bar Association, August 1, 2013

(11) *Direct Exams: How To Make Your Witnesses Shine*, New York State Academy of Trial Lawyers, May 6, 2013

(10) *Opening Statements: A Recipe for Success*, Lawline.com, August 7, 2012

Continuing Legal Education (CLE) Presentations Continued*:*

(9)*"You Had Me at Hello": Delivering an Effective and Powerful Opening Statement*, New York State Academy of Trial Lawyers, April 1, 2012

(8) *Preparing the Construction Accident Case*, New York County Lawyers Association, March 26, 2012

(7) *The Nults and Bolts of a Trial*, New York State Academy of Trial Lawyers, October 24, 2011

(6) *Personal Trainer Negligence*, Lawline.com, March 22, 2011

(5) *Trial Effectively Using Experts in Personal Injury Cases*, Lawline.com, May 4, 2011
Techniques: The Tricks of the Trade, Lawline.com, February 16, 2011

(4) *Practice Makes Perfect: Learn to Practice Like a Pro*, Lawline.com, January 18, 2011

(3) *Jury Selection 101, New York State Academy of Trial Lawyers*, December 14, 2010

(2) *Practical Guidelines for Getting Items into Evidence*, Lawline.com, March, 2010

(1) *Winning Your Case: Trial Skills that Count*, Lawline.com, August 21, 2009

Television Appearances
Fox News Channel
-The O'Reilly Factor
-What's Happening Now with Martha McCallum
- America's News Room
- Fox & Friends
-Fox Business Channel
-Neil Cavuto
-Money with Melissa Francis
CNN -Anderson Cooper 360
ET – Entertainment Tonight
Bloomberg TV
Headline News
Tru TV
Court TV
The Morning Show with Mike and Juliet

Interests, Hobbies:

High Performance Driving Events, Sim Racing, Tennis, Lego, Cooking

NY CLS Gen Oblig § 5-326

Current through 2023 released Chapters 1-730

New York Consolidated Laws Service > General Obligations Law (Arts. 1 — 19) > Article 5 Creation, Definition and Enforcement of Contractual Obligations (Titles 1 — 18) > Title 3 Certain Prohibited Contracts and Provisions of Contracts (§§ 5-301 — 5-337)

§ 5-326. Agreements exempting pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable

Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.

History

Add, L 1976, ch 414, § 1, eff Sept 1, 1976.

End of Document

Kearney v. Okemo L.L.C.

United States District Court for the District of Vermont

August 11, 2016, Decided; August 11, 2016, Filed

Case No. 5:15-cv-00166

Reporter
2016 U.S. Dist. LEXIS 106011 *

BRIAN J. KEARNEY, Plaintiff, v. OKEMO LIMITED LIABILITY COMPANY, d/b/a Okemo Mountain Resort, and THE UNITED STATES SKI AND SNOWBOARD ASSOCIATION, Defendants.

Core Terms

ski, membership, parties, public policy, choice-of-law, exculpatory clause, general public, summary judgment, motorcycle, registrant, box, click-wrap, training, online, inspection, premises, cases, substantial relation, contractual, exculpatory, competed, courts, skier

Counsel: [*1] For Brian J. Kearney, Plaintiff: Andrew J. Smiley, Esq., Guy I. Smiley, Esq., Smiley & Smiley, LLP, New York, NY; Matthew D. Anderson, Pratt Vreeland Kennelly Martin & White, Ltd., Rutland, VT.

For Okemo Limited Liability Company, d/b/a Okemo Mountain Resort doing business as Okemo Mountain Resort, Defendant: Andrew H. Maass, Esq., Ryan Smith & Carbine, Ltd., Rutland, VT; Thomas P. Aicher, Esq., Cleary Shahi & Aicher, P.C., Rutland, VT.

For The United States Ski and Snowboard Association, Defendant: Andrew H. Maass, Esq., Eric J. Morgan, Esq., Ryan Smith & Carbine, Ltd., Rutland, VT.

Judges: Geoffrey W. Crawford, United States District Judge.

Opinion by: Geoffrey W. Crawford

Opinion

OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Doc. 58)

Plaintiff Brian J. Kearney brings this personal injury action against Defendants Okemo Limited Liability Company, doing business as Okemo Mountain Resort, and the United States Ski and Snowboard Association ("USSA"), alleging negligent installation of safety netting during a downhill alpine ski race in February 2015. Defendants seek summary judgment on the ground that Plaintiff signed a release prior to his participation in the race. The court heard argument on Defendants' [*2] Motion on July 25, 2016. For the reasons discussed below, Defendants' Motion for Summary Judgment (Doc. 58) is DENIED.

Background

The court considers only those facts relevant to the pending motion.

Plaintiff was seriously injured while competing in an amateur downhill ski race at Okemo Mountain Resort ("Okemo") in Ludlow, Vermont in February 2015. USSA sanctioned the competition. To be eligible to participate,

individuals had to have a USSA membership and proper ski equipment. Participants also had to conduct a visual inspection of the course and take at least two official training runs prior to the race.

Plaintiff became a USSA member on December 16, 2014 for the 2014-2015 ski season through USSA's website. As part of the USSA membership registration process, registrants were required to acknowledge and agree to be bound by the terms of USSA's Assumption of Risk and Release of Liability agreement (the "release"). (Doc. 61-16 at 10-11.)

The release contained the following exculpatory provision:

> Member hereby unconditionally WAIVES AND RELEASES ANY AND ALL CLAIMS, AND AGREES TO HOLD HARMLESS, DEFEND AND INDEMNIFY USSA FROM ANY CLAIMS, present or future, to Member or his/her property, or [*3] to any other person or property, for any loss, damage, expensive, or injury (including DEATH), suffered by any person from or in connection with Member's participation in any Activities in which USSA is involved in any way, due to any cause whatsoever, INCLUDING NEGLIGENCE and/or breach of express or implied warranty on the part of USSA.

(Doc. 58-5 at 2.) As used in the release, "USSA" referred to USSA and "its subsidiaries, affiliates, officers, directors, volunteers, employees, coaches, contractors and representatives, local ski clubs, competition organizers and sponsors, and ski and snowboard facility operators." (*Id.*) The term "Activities" included "skiing and snowboarding in their various forms, as well as preparation for participation in, coaching, volunteering, officiating and related activities in alpine, nordic, freestyle, adaptive, and snowboarding competitions and clinics." (*Id.*) The release also contained a choice-of-law provision, which stated that it would be "construed in accordance with, and governed by the substantive laws of the State of Colorado, without reference to principles governing choice or conflict of laws." (*Id.*)

Analysis

I. Summary Judgment Standard

A party [*4] is entitled to summary judgment when it shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. "Material facts" are those that, under the applicable substantive law, "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A dispute over a "material fact" is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* A party opposing a properly pleaded summary judgment motion "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Id. at 256* (citations omitted). If the nonmovant offers evidence that "is merely colorable, or is not significantly probative, summary judgment may be granted," *id. at 249-50* (citations omitted), but "all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought." *Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1223 (2d Cir. 1994)* (citation omitted).

II. Plaintiff's Acceptance of Click-Wrap Release

The type of release at issue in this case is commonly referred to as a "click-wrap" agreement.[1] *See* Feldman v. Google, Inc., 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) (leading case discussing click-wrap agreements). Courts routinely find these types of agreements [*5] enforceable. *See* id. at 236-43; *see also* Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012); TradeComet.com LLC v. Google, Inc., 693 F. Supp. 2d 370, 377-78 (S.D.N.Y. 2010). Because the click-wrap technology does not permit the customer to continue to use the website unless he or she clicks on the required box on the screen, courts have accepted proof of use at the site as evidence of the customer's agreement. *See* Feldman, 513 F. Supp. 2d at 232-33, 235; Fteja, 841 F. Supp. 2d at 834-35, 841.

Plaintiff admits that he applied for a USSA membership online, but states that he has no recollection of seeing or acknowledging the release. (Doc. 61-27 at ¶ 11.) He attempts to create a factual dispute by asserting that Defendants have yet to produce a release signed or initialed by him. However, unlike when a person physically signs a paper contract, such documentation does not necessarily exist in the click-wrap context. (*See* Doc. 61-16 at 27 (noting that screenshot images for each step of membership process are not saved in USSA's computer database).) Nevertheless, courts frequently enforce such agreements. For example, in *Feldman*, the plaintiff challenged the [*6] validity of a forum selection clause in an electronic click-wrap agreement. 513 F. Supp. 2d at 231. In support of the agreement's enforceability, the defendant relied upon an affidavit from an information technology representative familiar with the steps that the plaintiff would have needed to go through in order to create the online account that plaintiff indisputably had created. *See* id. at 232-33. The representative testified that in order to complete the account sign-up process, the plaintiff would have been required to accept certain terms and conditions by checking a "Yes, I agree" box. *See id.* If plaintiff had failed to check this box, he would not have been able to complete his application, activate his account, or incur charges. *See id.* The representative testified that plaintiff did activate his account and had incurred charges, and the court found this evidence sufficient to authenticate the click-wrap agreement. *See* id. at 232-33, 235; *see also* Fteja, 841 F. Supp. 2d at 831, 834-35, 841 (to counter plaintiff's argument that there was no proof he agreed to forum selection clause, defendant offered similar evidence showing that plaintiff was Facebook user and could not have become one unless agreeing to Facebook's terms of use).

Here, USSA's information technology [*7] representative and software developer, Dana Alexandrescu, was deposed and offered testimony regarding USSA's online membership process and Plaintiff's application. Ms. Alexandrescu testified that she has been familiar with USSA's website and the online membership process since its inception in 2008. She produced demonstrative exhibits of the release currently in use by USSA and testified that the same agreement has been used in USSA's online membership process since 2008. All online registrants since 2008 have been required to read and acknowledge the release by checking a box that states, "I HAVE CAREFULLY READ THE FOREGOING AND UNDERSTAND IT TO BE A LEGALLY BINDING RELEASE AND INDEMNITY AGREEMENT." (Doc. 61-16 at 10; Doc. 61-17 at 13.) Ms. Alexandrescu testified that the

[1] Click-wrap agreements "require a user to affirmatively click a box on the website acknowledging awareness of and agreement to the terms of service before he or she is allowed to proceed with further utilization of the website." United States v. Drew, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009) (citation omitted).

USSA website has never permitted a registrant to become a USSA member without checking this box. If a registrant were to not agree to the release and leave the box unchecked, the page with the release would continuously reload and prompt the registrant to check the box. Only after checking the box would the registrant be permitted to complete the membership process.[2] Upon completion of the process, the registrant [*8] receives a confirmation receipt, welcome letter, and USSA membership number.

It is undisputed that Plaintiff applied for and received his USSA membership online in December 2014. Plaintiff admits that he received a confirmation email from USSA and that his credit card statement reflects a payment for his USSA membership. (Doc. 71-2 at 3.) Though he does not remember whether he saw or acknowledged the release, Plaintiff has offered no evidence and asserted no specific facts to rebut Defendants' evidence that one cannot receive a USSA membership, as Plaintiff did, [*9] without first accepting the release. *See* Fteja, 841 F. Supp. 2d at 834, 841 (rejecting plaintiff's argument that forum selection clause was unenforceable because he did not remember agreeing to it); *see also* Feldman, 513 F. Supp. 2d at 236 ("Absent a showing of fraud, failure to read an enforceable click[-]wrap agreement, as with any binding contract, will not excuse compliance with its terms." (citations omitted)). The court finds that no triable issue exists concerning Plaintiff's acceptance of the release.

[2] Plaintiff attempts to argue that an individual could choose to not accept the terms of the release and still become a USSA member, basing his argument on a demonstrative exhibit provided at Ms. Alexandrescu's deposition. The exhibit consisted of a screenshot of the online enrollment process captured prior to the "I agree" box being checked. (*See* Doc. 61-17 at 13.) It shows the application as Plaintiff would have seen it *before* he clicked on the box to demonstrate his consent. Any screenshot can be captured and printed, but printing the screen before acceptance does not demonstrate that acceptance is not required to join USSA.

III. Choice-of-Law Provision in Release

Plaintiff urges the court to disregard the Colorado choice-of-law clause in the release and apply Vermont law to the instant dispute. Defendants submit that the court ought to apply Colorado law, as provided for in the parties' contract.

"The validity of a contractual choice-of-law clause is a threshold question that must be decided not under the law specified in the clause, but under the relevant forum's choice-of-law rules governing the effectiveness of such clauses." Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 332 (2d Cir. 2005) (citation omitted). As this is a diversity action, the court looks to Vermont's choice-of-law rules to determine which law applies. *See* Thea v. Kleinhandler, 807 F.3d 492, 497 (2d Cir. 2015) ("Where jurisdiction is predicated on diversity of citizenship, a federal court must apply the choice-of-law [*10] rules of the forum state." (citations omitted)).

Exculpatory clauses in release agreements are evaluated under principles of contract law. *See* Colgan v. Agway, Inc., 150 Vt. 373, 553 A.2d 143 (1988). The Vermont Supreme Court has adopted the Restatement (Second) of Conflict of Laws (the "Restatement") for choice-of-law questions in contract matters. *See* McKinnon v. F.H. Morgan & Co., Inc., 170 Vt. 422, 423, 750 A.2d 1026, 1028 (2000) (citation omitted). Section 187 of the Restatement provides:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights

and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

a. the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

b. application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue [*11] and which, under the rule of § 188,[3] would be the state of the applicable law in the absence of an effective choice of law by the parties.

The court finds that the issue before it, whether the exculpatory clause is valid or [*12] void under public policy, is not one which the parties could have resolved by an explicit provision in their agreement. It does not lie within their contractual capacity. *See* Restatement (Second) of Conflict § 187 cmt. d (noting that issues of contractual validity cannot be determined by explicit agreement). The court therefore considers the law specified in the release under § 187(2) of the Restatement, and finds that both exceptions to its application have been met.

A. No Substantial Relationship or Reasonable Basis Exception

The chosen state of Colorado has no "substantial relationship" to the parties or the transaction. Plaintiff is a resident of New York. USSA is a Utah corporation and Okemo is a Vermont entity. The incident in question did not occur in Colorado. The only facts Defendants have offered in support of applying Colorado law to this case are: (1) Colorado is home to more USSA member clubs than any other state and hosts the majority of USSA's major events, and (2) there was a possibility that Plaintiff could have competed in Colorado at some point during the relevant ski season. The court finds that such a tenuous and hypothetical connection does not vest in the state of Colorado a substantial relationship to the parties or specific transaction [*13] at issue in this case. *See* Rutherford ex rel. Rutherford v. Talisker Canyons Fin. Co., 2014 UT App 190, ¶ 24, 333 P.3d 1266.

In contrast, Vermont's relationship to the parties and transaction is significant. Okemo is a Vermont corporation, the competition was held in Vermont, Plaintiff was issued a lift ticket by Okemo requiring all disputes to be litigated in Vermont, Plaintiff participated in inspection and training runs in Vermont, and Plaintiff's injury occurred in Vermont.

Colorado has no substantial relationship to the parties or the transaction. Moreover, the minimal facts offered in support of the choice-of-law provision do not clearly establish a "reasonable basis" for choosing Colorado law. In any event, the court need not decide this issue because the choice-of-law provision also

[3] Section 188 of the Restatement provides, "The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6." The policy factors set out in § 6 include: (1) the needs of the interstate and international systems, (2) the relevant policies of the forum, (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty, predictability, and uniformity of result, and (7) ease in the determination and application of the law to be applied. With the exception of the protection of justified expectations, the court finds that the other factors either do not tip in any particular direction or favor the application of Vermont law.

fails under the second exception to § 187(2) of the Restatement, as discussed below.

B. Public Policy Exception

First, applying Colorado law would undoubtedly produce a result contrary to a fundamental policy of Vermont. Whereas exculpatory clauses in ski contracts have been held to be enforceable under Colorado law, *see, e.g.,* Brush v. Jiminy Peak Mountain Resort, Inc., 626 F. Supp. 2d 139, 149-51 (D. Mass. 2009) (applying Colorado law), courts applying Vermont law consistently hold such releases to be void as contrary to important public policies of the state. *See, e.g., Spencer v. Killington, Ltd., 167 Vt. 137, 702 A.2d 35 (1997)*; Dalury v. S-K-I, Ltd., 164 Vt. 329, 670 A.2d 795 (1995).

Second, Vermont has a "materially [*14] greater interest" than Colorado in the determination of this issue.[4] Colorado's interest in this case is minimal. The fact that Plaintiff may have competed there in the course of the relevant ski season and that USSA hosts many events in that state does not create a significant interest in a case concerning a Vermont ski race. Conversely, Vermont's interest is plain. Vermont has a general interest in having its laws apply to contracts governing transactions taking place within the state. Vermont also has a significant interest in the conduct at issue here. Skiing is an important recreational activity for Vermonters and those visiting the state, and the Vermont Supreme Court has repeatedly noted its interest in holding ski resorts responsible for skier safety. *See, e.g., Spencer, 167 Vt. at 140-43, 702 A.2d at 36-38* (ski race open to public implicates public interest and policy considerations); Dalury, 164 Vt. at 331-36, 670 A.2d at 797-800. This court has specifically recognized Vermont's "special interest in this kind of litigation" given "the serious nature of the[se] claim[s] and the potential that future such events could result in injuries to Vermonters and visitors to the state." Umali v. Mount Snow Ltd., 247 F. Supp. 2d 567, 572 (D. Vt. 2003). As entities like USSA "will undoubtedly continue to sponsor and run events in Vermont," Vermont must [*15] "be able to regulate events like the race in question and to develop consistent and specific legal doctrine to protect both the mountain sports industry and its component parts, including its racing participants." *Id.*

The choice-of-law provision does not control in this case and we rely on Vermont law to determine the enforceability of the release.[5]

IV. Release Void as Contrary to Vermont's Public Policy

The leading Vermont Supreme Court case governing the enforceability of contract provisions waiving negligence claims is Dalury v. S-K-I, Ltd., 164 Vt. 329, 670 A.2d 795 (1995). In *Dalury*, the Court rejected the

---

[4] As discussed previously, the court notes, pursuant to § 187(2)(b) of the Restatement, that Vermont would be the state of applicable law under § 188 in the absence of the choice-of-law provision given that it has the most "significant relationship" to the transaction and the parties.

[5] Defendants cite to Stamp Tech, Inc. ex rel. Blair v. Lydall/Thermal Acoustical, Inc., 2009 VT 91, ¶ 23, 186 Vt. 369, 987 A.2d 292, as evidence that Vermont choice-of-law rules require Colorado law to be applied. The court finds this argument unpersuasive. In *Stamp Tech*, the Vermont Supreme Court noted that "[i]n the absence of a statute in the forum state providing otherwise, it is well-settled that it would be contrary to the justified expectations of the parties for a court to interpret their agreement by the laws of any jurisdiction other than that specified in the contract." *Id.* (citing Restatement (Second) of Conflict § 187 cmt. c). However, that case involved an indemnification claim arising out of a contract for the installation of safety guards between [*16] two commercial parties. *See id.* at ¶¶ 2-6. The court does not read *Stamp Tech* as governing the enforceability of contractual provisions that waive an individual's right to sue a corporate entity for negligence.

exculpatory language in ski tickets issued to customers as being "contrary to public policy." *Id. at 330, 670 A.2d at 796*. The Court concluded that "ultimately the determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations." *Id. at 333-34, 670 A.2d at 798* (internal quotation marks and citation omitted). It then went on to make its public policy determination largely on the basis of two factors derived from the seminal case of *Tunkl v. Regents of University of California, 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441 (Cal. 1963)*: (1) ski areas are open to the general public without regard to special training or ability, and (2) the longstanding rule that premises owners are in the best position to assure for the safety of their visitors.[6] *See Dalury, 164 Vt. at 332-35, 670 A.2d at 797-99*. As noted by this court in *Littlejohn v. TimberQuest Park at Magic, LLC, 116 F. Supp. 3d 422, 426 (D. Vt. 2015)*, "[t]hese principles have remained unchanged [*17] in the cases which have followed *Dalury*."

In *Spencer v. Killington, Ltd., 167 Vt. 137, 702 A.2d 35 (1997)*, the Vermont Supreme Court considered whether a participant in an amateur ski race series was sufficiently different from the recreational skier in *Dalury* such that an exculpatory clause could be enforced against him. The Court ultimately held that the same public policy concerns underlying *Dalury* "appl[ied] with equal force" to the amateur ski racer. *Id. at 142-43, 702 A.2d at 37-38*. In so ruling, the *Spencer* Court relied on the same two principles it had emphasized in *Dalury*. (1) the race was open to the general public, including persons with limited or no experience in competitive skiing, and (2) the defendants, as opposed to the race participants, had:

> the expertise and opportunity to maintain and inspect their premises, to foresee and control hazards, to train their employees in risk management, to guard against the negligence of their agents and employees, and to insure against [*18] the risks and spread the increased cost of insurance among race participants or all skiing customers.

Id. at 142, 702 A.2d at 37. The Court saw "no salient distinctions between [its case] and *Dalury*," *id. at 143, 702 A.2d at 38*, making clear that, under Vermont law, ski areas and sport event organizers will not be absolved from liability by virtue of an exculpatory clause even in the context of amateur racing.

While *Dalury* and subsequent cases identify other factors that courts might consider when weighing exculpatory clauses against public policy, those "most consistently applied" in cases resembling the instant matter continue to be "whether the defendant was in control of the location where the injury occurred" and "whether these premises were open to the general public." *Littlejohn, 116 F. Supp.3d at 427*. Here, the parties do not dispute that Defendants were in control of the premises. Rather, the parties focus their dispute on whether the race was open to the general public. While Plaintiff submits that it was, Defendants disagree. In support of their position, Defendants point out that individuals could only compete in the event if: (1) they had an active USSA membership, (2) they conducted both a visual inspection of the course and took at least two official training [*19] runs, and (3) they had proper ski equipment.

---

[6] In making its determination, the *Dalury* Court did not depend upon the *Tunkl* factor of whether skiing was an essential industry or service. The Court explained that "[w]hether or not [the ski resort] provide[s] an essential public service does not resolve the public policy question in the recreational sports context." *Dalury, 164 Vt. at 334, 670 A.2d at 799*.

The court finds that, like the race in *Spencer*, the race here was open to the general public. While it is undisputed that a USSA membership was required to compete, any member of the public could register for such a membership, even on the day of the event. Being a USSA member is not exclusive nor does it require any level of skill. The organization consists of approximately 30,000 members. *Cf.* Provoncha v. Vt. Motocross Ass'n, 2009 VT 29, ¶ 20, 185 Vt. 473, 974 A.2d 1261 (exculpatory clause enforced where general public not permitted to race in motorcycling club's event and club consisted of only 300 members). The race was open to participants of varying skill levels, including beginners with no race experience, and anyone between the ages of eighteen and ninety. *See* Umali, 247 F. Supp. 2d at 574-75 (exculpatory release void as contrary to public policy where plaintiff competed in ski race open to participants of all skill levels). That all racers were required to conduct a visual inspection and take training runs before the competition does not change the court's analysis. As these pre-race measures took place on the same course as the event itself, it remains undisputed that skiers of all levels of ability could show up and get on the course without [*20] training elsewhere first. Lastly, while proper ski equipment was a necessary prerequisite, no specific racing gear was required. Rather, any participant with skis and a helmet would meet the eligibility requirements. In other words, all barriers to entry were largely superficial. Nothing prohibited a novice skier from arriving at Okemo on the day of the race, signing up for a USSA membership, renting skis and a helmet, and having immediate access to the race course.

Though Defendants urge the court to enforce the exculpatory clause by citing two other Vermont Supreme Court cases, Provoncha and Thompson v. Hi Tech Motor Sports, Inc., 2008 VT 15, 183 Vt. 218, 945 A.2d 368, the court finds these cases distinguishable. In *Thompson*, the Court held that a liability waiver signed by an individual injured during a motorcycle test ride did not contravene public policy.[7] *See* 183 Vt. 218, 2008 VT 15 at ¶ 7, 945 A.2d 368. In so doing, the Court specifically distinguished the premises liability concerns at issue in *Dalury*. The Court noted that "whereas public policy places the burden of maintaining safe premises on a landowner, public policy concerning motorcycle safety places the burden of safe driving on the operator of the motorcycle." *Id.* at ¶ 9. And unlike skiers who "are not in a position to discover and correct risks of harm" [*21] on a trail, a motorcycle test driver has "the ability to undertake precautions to avoid hazards associated with operation" and it was "logical to place the incentive for safe driving on the party who has actual control of the vehicle." *Id.* at ¶¶ 9, 12. *Provoncha* enforced an exculpatory clause in the motorcycling racing context, relying in large part on the fact that only members of a small motorcycling club were permitted to race in the event. *See* 185 Vt. 473, 2009 VT 29 at ¶ 120, 974 A.2d 1261.

While it is true that this court in *Littlejohn* noted that the debate surrounding the enforceability of release agreements appeared to be split between recreational activities and "more risky pursuits" such as motorcycling, skydiving, scuba diving, and mountaineering, *see* 116 F. Supp. 3d at 428, the fact that the race at issue here was a high-risk activity does not automatically place it within the scope of *Thompson* and *Provoncha*. Those cases do not stand for the proposition that exculpatory waivers in the context of high-risk sports

---

[7] Though the agreement was consistent with public policy, the Court ultimately found that the release was insufficiently clear to exculpate the defendant from its own negligence. *See* Thompson, 183 Vt. 218, 2008 VT 15 at ¶¶ 16, 20, 945 A.2d 368.

automatically satisfy public policy concerns. Instead, [*22] they note that such waivers are unlikely to contravene public policy because specialized, risky activities are commonly not open to all, but rather require special skill and prior experience, and frequently take place in settings that are not under the control of business operators. Neither of those things is true in this case. That the race at issue here was a high-risk activity does not change the fact that it was also open to the general public and that Defendants, like those in *Dalury* and *Spencer*, not Plaintiff, were the ones with both the expertise and opportunity to inspect the premises and control for hazards. If the court enforced the exculpatory clause at issue here, it would remove the incentive for Defendants to manage the risks posed by their ski areas and events to the general public, an outcome plainly contrary to the principles underlying *Dalury. See Spencer, 167 Vt. at 142, 702 A.2d at 37* ("[I]f defendants were permitted to obtain broad waivers of their liability, an important incentive for ski areas to manage risk would be removed, with the public bearing the cost of the resulting injuries." (quoting *Dalury, 164 Vt. at 335, 670 A.2d at 799*)). As individuals engaged in recreational activities open to the general public in [*23] the state of Vermont continue to be entitled to expect that the activity will be made reasonably safe and that business owners will be responsible for the safety of their premises, the court will not enforce the exculpatory language of the release agreement on public policy grounds.

Conclusion

For the reasons stated above, Defendants' Motion for Summary Judgment (Doc. 58) is DENIED.

Dated at Rutland, in the District of Vermont, this 11th day of August, 2016.

/s/ Geoffrey W. Crawford

Geoffrey W. Crawford, Judge

United States District Court

End of Document

VERMONT **GENERAL ASSEMBLY**

The Vermont Statutes Online

The Vermont Statutes Online have been updated to include the actions of the 2023 session of the General Assembly.

NOTE: The Vermont Statutes Online is an unofficial copy of the Vermont Statutes Annotated that is provided as a convenience.

Title 12 : Court Procedure

Chapter 027 : Pleading and Practice

Subchapter 002 : Pleadings Generally

(Cite as: 12 V.S.A. § 1037)

§ 1037. Acceptance of inherent risks

Notwithstanding the provisions of section 1036 of this title, a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary. (Added 1977, No. 119 (Adj. Sess.), § 2, eff. Feb. 7, 1978.)

NY CLS Gen Oblig § 18-101

Current through 2024 released Chapters 1-49, 61-90

New York Consolidated Laws Service > General Obligations Law (Arts. 1 — 19) > Article 18 Safety in Skiing Code (§§ 18-101 — 18-108)

§ 18-101. Legislative purpose

The legislature hereby finds that alpine or downhill skiing is both a major recreational sport and a major industry within the state of New York. The legislature further finds: (1) that downhill skiing, like many other sports, contains inherent risks including, but not limited to, the risks of personal injury or death or property damage, which may be caused by variations in terrain or weather conditions; surface or subsurface snow, ice, bare spots or areas of thin cover, moguls, ruts, bumps; other persons using the facilities; and rocks, forest growth, debris, branches, trees, roots, stumps or other natural objects or man-made objects that are incidental to the provision or maintenance of a ski facility in New York state; (2) that downhill skiing, without established rules of conduct and care, may result in injuries to persons and property; (3) that it is appropriate, as well as in the public interest, to take such steps as are necessary to help reduce the risk of injury to downhill skiers from undue, unnecessary and unreasonable hazards; and (4) that it is also necessary and appropriate that skiers become apprised of, and understand, the risks inherent in the sport of skiing so that they may make an informed decision of whether or not to participate in skiing notwithstanding the risks. Therefore, the purpose and intent of this article is to establish a code of conduct for downhill skiers and ski area operators to minimize the risk of injury to persons engaged in the sport of downhill skiing and to promote safety in the downhill ski industry.

History

Add, L 1988, ch 711, § 1, eff Nov 1, 1988 (see 1988 note below).

End of Document

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

RICHARD GRAJEDA, Plaintiff, v. VAIL RESORTS INC., VAIL RESORTS MANAGEMENT COMPANY, and OKEMO LIMITED LIABILITY COMPANY d/b/a/ OKEMO MOUNTAIN RESORT, Defendants.	)	Case No. 2:20-cv-00165

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
(Doc. 89)

Plaintiff Richard Grajeda brings this negligence action against Vail Resorts Inc., Vail Resorts Management Company, and Okemo Limited Liability Company (collectively, "Defendants"), seeking damages for injuries he sustained in a collision with a snowmaking station while skiing at Okemo Mountain Resort ("Okemo"). Plaintiff claims Defendants inadequately padded the snowmaking station because the padding did not extend to the base of the station, allowing him to collide with the station's bare metal pole. He also asserts that Defendants negligently placed the snowmaking station in the center of a beginner's trail.

Pending before the court is Defendants' June 1, 2022 motion for summary judgment. (Doc. 89.) Plaintiff responded to the motion on July 14, 2022 (Doc. 98), and Defendants replied on July 28, 2022. (Doc. 104.) The court held a hearing on September 27, 2022 and a *Daubert* hearing on January 13, 2023 and March 10, 2023 on the admissibility of the opinions of Defendants' expert witness Dr. Irving Scher, at which point it took the motion for summary judgment under advisement.

Plaintiff is represented by Andrew J. Smiley, Esq., Guy I. Smiley, Esq., and

Matthew D. Anderson, Esq. Defendants are represented by Kristen L. Ferries, Esq., Craig R. May, Esq., Habib Nasrullah, Esq., Joel P. Iannuzzi, Esq., and Thomas P. Aicher, Esq.

I. The Undisputed Facts.

On December 19, 2019, Plaintiff went skiing with friends at Okemo. At the time, there were no issues with visibility. Plaintiff had skied twice before, approximately seven years prior, and considered himself to be a beginner skier. That morning, Plaintiff rode the B Quad chair lift to a ski trail called "Lower Mountain Road." During his first run down that trail, Plaintiff fell while attempting to come to a complete stop but was able to "g[e]t back up and resume[]" skiing. (Doc. 89-4 at 19.) As he was skiing, he passed several pieces of snowmaking equipment.

On his second run, Plaintiff again rode the B Quad chair lift and began skiing down the same trail. As he approached the lower section of Lower Mountain Road, he encountered a group of ski school students crossing the trail in front of him. Plaintiff saw the group when they were approximately fifteen to twenty feet ahead of him and veered to the left to avoid them. As he did so, he hit an icy patch and fell onto his left hip. His skis came off and he slid down the ski trail on his left side and then on his stomach. Plaintiff's head and shoulders faced uphill as he slid, so that he could not see where he was sliding. He testified in deposition that: "As I was sliding, [I] felt a dip in the snow, and then I went under something, and I slammed into a metal pole or a steel pole." *Id.* at 31. He later stated: "The impact was very hard on my back. I could almost feel it reverberating or something." (Doc. 98-12 at 3.)

Okemo employee Ray Kennedy stated that he saw Plaintiff ski toward a snowmaking station, then saw the station's padding "shudder" and fall from an "upright" position to lay horizontally. (Doc. 89-5 at 3-5.) Mr. Kennedy did not see the actual collision. Okemo Director of Ski Patrol Chris Lancaster acknowledged that beginner skiers regularly fall on Lower Mountain Road and another beginner ski trail named Open Slope.

On December 19, 2019, Okemo's assistant on-snow services and trail maintenance manager Kyle Kostura recorded that "all blue padding was covering their respective

snowmaking infrastructure as of my departure at 0900." (Doc. 89-6 at 2.) Mr. Kostura testified in deposition that he did not specifically recall checking the Gilman TS-2 padding on the snowmaking station prior to Plaintiff's collision but that it "was part of a visual ride through" that he conducted from his snowmobile that morning to confirm that the padding straps were attached to the snowmaking station and that there were no gaps between the padding and the snow. (Doc. 89-7 at 3.)[1] He has never seen a pad that was not touching the snow surface, although he sometimes needed to dig a buried pad out of the snow. He explained why pad placement is important:

> Q. Why is it necessary for the pad to be flush[] on the snow and not on different levels?
>
> A. Two reasons: One, it's esthetic. No. 2, it's how the pad is properly supposed to be fitted up against the gun.
>
> Q. And why is it supposed to be fit up against the gun flush[] as opposed to uneven?
>
> A. So that's their whole purpose is to prevent somebody from sliding underneath it and we want the pad to take the blow, so to speak.

(Doc. 98-8 at 3.)

Defendants' policy is therefore to ensure snowmaking equipment is properly padded:

> Q. What about ski patrol, do you know what was expected of ski patrollers when they would do any type of inspection of pads on tower guns -- on snow guns? Sorry.
>
> A. Our responsibility what we train our staff is to ensure that the pad is clear of snow facing up the fall line and flush with the ground.
>
> Q. What do you mean when you say flush with the ground?
>
> A. I mean it doesn't have a large gap or isn't buried in snow. So depending on snow making, we look to see that it's resting on the ground in front of the gun generally.
>
> Q. Am I correct when you say that it's supposed to be flush on the ground and there's not supposed to be gaps or uneven levels between the base of a

[1] *See* Doc. 89-7 at 3 ("Q. Did you check on that specific snowmaking gun and padding that morning, December 19, 2020, before the lifts opened? A. It was part of a visual ride through, yes. Q. Do you have an actual recollection of check in on that? A. Not that specific one, no.).

> Gilman tower pad and a snow surface?
>
> A. Sometimes an uneven level is unavoidable. We try to avoid having a gap.
>
> Q. Why do you try to avoid having a gap? What is the reason for that?
>
> A. I'm pausing because it's common sense, I guess, we want them to be flush with the ground because a skier would impact the pad if they were to be sliding in that direction. We obviously don't want a gap below it.

(Doc. 98-7 at 11-12.)

An agent of the pad's manufacturer testified that a Gilman TS-2 pad should prevent a skier from striking the padded pole:

> So if the individual were to hit the blue blanket where the cylinders are it is designed to crumple to decelerate him to stop him from actually ending up hitting the metal object behind it. It is impossible to get through the blanket and those two tower cylinders to get to that object.

(Doc. 98 at 20) (quoting Doc. 96-4 at 68). She is not aware of any instance in which a skier suffered serious injuries after colliding with a Gilman TS-2 pad. (Doc. 96-4 at 3.)

Plaintiff acknowledges that "snowmaking equipment is a necessary part of the operation of a ski area[.]" (Doc. 89-4 at 26.) He agrees that icy patches, other skiers, and colliding with manmade or natural objects may be inherent risks of skiing. He further agrees that the "Responsibility Code" requires skiers to ski in control at all times to avoid people and objects and is "pretty commonsense" and applies to "things like this snowmaking pipe[.]" (*Id.* at 24.)

According to Plaintiff's expert witness Dick Penniman, there are instances when "placing man-made structures in the fall line of beginner or lower skill-level trails is unavoidable" (Doc. 88-3 at 10) and where removal of fixed objects such as snowmaking station standpipes is "not practical[.]" *Id.* at 7. He testified that Gilman TS-2 "shields," the type of padding on the snowmaking station involved in Plaintiff's collision, is "the best shielding there is. . . . [A]s far as causing serious injury, the shield is very good." (Doc. 88-4 at 9.)

According to Defendants' ski safety expert, Mark Petrozzi, Okemo had portable

snowmaking devices prior to 2019 and that, "with trade[-]offs," those devices could have been used to make snow in the area in which Plaintiff fell instead of an immovable snowmaking station such as the one at issue in this case. (Doc. 98-5 at 3-4.) He acknowledges that Okemo used to make snow on the trail in question using portable guns and that, but for Defendants' placement of the snowmaking gun, Plaintiff's injuries would not have occurred.[2] Vail Resorts Director of Health and Safety Dana Kent agreed that Defendants could have relocated the snowmaking station elsewhere.

II. The Disputed Facts.

A. Whether the Snowmaking Gun Was in the Middle of a Beginner Trail.

The parties dispute whether the snowmaking station Plaintiff struck was on the side or in the middle of the ski trail. Citing Plaintiff's deposition testimony that the snowmaking equipment he hit was "[o]ff to the side" of the ski trail, Defendants contend that the station was between the Lower Mountain Road and Open Slope ski trails, but not in the middle of the trail. (Doc. 89-4 at 27.) Photographs, however, support a conclusion that it is located closer to at least one of the trails' center. Mr. Petrozzi testified that the snowmaking equipment in question "[was] not trail side" and "other than knowing how they designate [the trails], not if you're just there skiing there you probably wouldn't" know where one trail ends and the other begins. (Doc. 96-2 at 3.)

Although the location of the snowmaking station is a fixed point that cannot be disputed, the parties disagree as to the proper characterization of that location. This is not a dispute that precludes summary judgment. *See Korn v. Fed. Ins. Co.*, 2019 WL 4277187, at *5 (W.D.N.Y. Sept. 10, 2019) (holding that disputed facts did not preclude

---

[2] Q. Okay. But specifically the risk of striking that snow making station didn't exist prior to 1993, correct?

A. Of course not.

Q. Okay. And if that snow making station wasn't there at the time of Rick's skiing on December 19, 2019, he wouldn't have had a risk of striking it, would you agree with that?

A. Yes.

(Doc. 98-5 at 8-9.)

summary judgment where they "consist[ed] of arguments regarding the proper characterization of undisputed evidence as opposed to actual disputes of fact").

B. Whether the Snowmaking Gun was Properly Padded and Whether Plaintiff Struck the Pole.

The parties further dispute whether the Gilman TS-2 padding was properly attached to the snowmaking equipment. Plaintiff maintains that a gap existed between the bottom of the padding and the surface of the snow, allowing him to slide beneath the padding and collide with the snowmaking gun's metal pole. In addition to his own testimony, he cites deposition testimony from individuals who arrived soon after the accident, one of whom testified that when he arrived, Plaintiff "was underneath the pole, underneath the blue foam padding . . . within that little ravine of where that drop-off is" and that he was lying "on his stomach[] . . . [b]asically making a T with his body against the pole." (Doc. 85-8 at 2-3.) Okemo ski patroller Michael Morabito noted that when he arrived, Plaintiff "was up against the post. And his body was a little angulated that way, he was definitely not straight." (Doc. 85-9 at 3.) When asked whether Plaintiff had struck the metal pole, Mr. Morabito stated: "I couldn't tell exactly how he got into the position that he was in." *Id.*

Plaintiff also proffers statements from various reports and emails which Defendants either contend are inadmissible hearsay[3] or were not submitted.[4] Okemo's investigation report includes an "Incident Card" which states "I was going down and

---

[3] On summary judgment, Plaintiff need only establish the evidence will be admissible at trial. *See Trevizo v. Adams*, 455 F.3d 1155, 1160 (10th Cir. 2006). Certain contested evidence may be a business record or a statement made for the purpose of medical diagnosis and treatment. "Under the [latter] exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included." Advisory Committee's Note to Fed. R. Evid. 803(4). The statements also need not be made by the victim and may be admissible even if the declarant is unavailable as a witness. *See Danaipour v. McLarey*, 386 F.3d 289, 297-98 (1st Cir. 2004) ("[S]tatements by bystanders, family members, and others, made for the purposes of treating an injured person and pertinent to that treatment, have often been admitted under Rule 803(4).") (internal quotation marks and citation omitted).

[4] Plaintiff cites an email Vail Resorts Director of Health and Safety Dana Kent sent to unnamed individuals on the day of the incident which is not part of the record.

there were people to my right so I went left then slide into the pole" as the "Guest Description of Incident[.]" (Doc. 85-5 at 29.) It includes a "Witness Statement Form" signed by David Villani which, in response to the prompt "What Did You See/Hear Occur?", states "He saw his friend face down wrapped around pipe four people around him no patrol yet[.]" *Id.* at 46.

An incident report written by Ludlow Ambulance Service EMS Care Provider Gregory Stoughton states: "I received report from ski patrol that the patient had struck a pole, and was complaining of chest and hip pain, and unable to feel his legs[,]" and "[t]he patient reports skiing and trying to avoid a collision with another skier when he struck a chairlift pole. He does not recall any additional impacts, however bystanders state he then slid underneath the padding on the pole." (Doc. 85-12 at 2.)

Although Plaintiff claims that he slid under the pole and was located under the padding, Defendants contend their expert Dr. Scher will testify that Plaintiff's injuries are consistent with him not striking the pole because, among other things, there was scant evidence of bruising.[5] Dr. Scher further opines that because of Plaintiff's excessive speed at the time of the collision, his injuries were inevitable and would have been the same if he struck a properly padded pole.

Defendants further cite evidence that bystanders removed the padding after the collision as well as the deposition testimony of Okemo ski patroller Mary Mancino that when she responded to the scene, she observed Plaintiff "was up against a snow making station . . . against, like the padding in front of the snow making station." (Doc. 104-1 at 3.) Ms. Mancino stated that there was padding on the snowmaking gun when she arrived and that "[Plaintiff's] body was – I believe – he was on his belly and his left side was to the snow making station. His head was uphill and the padding was kind of over him as if it had been dislodged a little bit[,]" meaning that "[t]he top [of the padding] was slightly out as if he had hit the bottom of the pad and knocked the top out." *Id.* at 3-4. She further

[5] Plaintiff challenges Dr. Scher's qualifications to offer such an opinion which the court will address in a separate ruling.

testified that "[a]s we were arriving on scene," an unknown individual took the padding "off and over the patient" so that ski patrol could better access him. *Id.* at 5.

There are thus genuine issues of material fact as to whether Plaintiff struck the padding or the pole, whether the padding was attached and flush with the snow, and whether it makes a difference in terms of causation.

III. Conclusions of Law and Analysis.

A. Standard of Review.

The court must grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material' . . . if it 'might affect the outcome of the suit under the governing law.'" *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 39 (2d Cir. 2015) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "A dispute of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* at 39-40 (quoting *Anderson*, 477 U.S. at 248).

In ruling on summary judgment, the court "construe[s] the evidence in the light most favorable to the non-moving party" and "resolve[s] all ambiguities and draw[s] all permissible factual inferences in favor of the party against whom summary judgment is sought." *Lenzi v. Systemax, Inc.*, 944 F.3d 97, 107 (2d Cir. 2019) (internal quotation marks omitted). There is no genuine dispute where "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party[.]" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

The moving party always "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). "Once the moving party demonstrates that there are no genuine issues of material fact, the nonmoving party must come forth with evidence sufficient to allow a reasonable jury to find in [its] favor." *Spinelli v. City of New York*, 579 F.3d 160, 166 (2d

Cir. 2009) (internal quotation marks omitted) (alteration in original). "Thus, a nonmoving party can defeat a summary judgment motion only by coming forward with evidence that would be sufficient, if all reasonable inferences were drawn in [its] favor, to establish the existence of [an] element at trial." *Id.* at 166-67 (internal quotation marks omitted) (alterations in original).

"The function of the district court in considering the motion for summary judgment is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists." *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010) (citation omitted). "A non-moving party cannot avoid summary judgment simply by asserting a 'metaphysical doubt as to the material facts.'" *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 75 (2d Cir. 2005) (quoting *Matsushita*, 475 U.S. at 586). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted). However, if the evidence "presents a sufficient disagreement to require submission to a jury[,]" the court should deny summary judgment. *Id.* at 251-52. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Kaytor*, 609 F.3d 537 at 545 (internal quotation marks omitted).

Notwithstanding the existence of disputed issues of fact, Defendants contend that under any version of the facts they are entitled to judgment as a matter of law in their favor.

B. Whether Defendants Are Entitled to Summary Judgment on Plaintiff's Negligence Claim Under Vermont's Sports Injury Statute.

Under Vermont law, "[c]ommon law negligence has four elements: a legal duty owed by defendant to plaintiff, a breach of that duty, actual injury to the plaintiff, and a causal link between the breach and the injury." *Demag v. Better Power Equip., Inc.*, 2014 VT 78, ¶ 6, 197 Vt. 176, 179, 102 A.3d 1101, 1105 (internal quotation marks omitted). Defendants argue that under Vermont's Sports Injury Statute, 12 V.S.A. § 1037, they had no duty to exercise reasonable care with respect to the snowmaking equipment Plaintiff

struck because Plaintiff's injuries resulted from an obvious and necessary danger inherent in the sport of skiing.

1. The Burden of Proof under the Sports Injury Statute.

This court has previously ruled that it is a defendant's burden to establish that the Vermont Sports Injury Statute applies and eliminates a duty of care. *See Mejia-Haffner v. Killington/Pico SKI Resort Partners, LLC*, 2016 WL 6476958, at *2 (D. Vt. Nov. 1, 2016)) ("The court will place the burden of proof with respect to 12 V.S.A. § 1037 on the defendant.") (Crawford, J.). In *Sklar v. Okemo Mountain, Inc.*, however, the District of Connecticut reasoned more persuasively that "primary assumption of risk relates specifically to the existence of a duty rather than to the availability of a defense to an established breach" and the Vermont's Sports Injury Statute "relates specifically to the existence of a duty on the part of the defendant." 877 F. Supp. 85, 88-89 (D. Conn. 1995). "Since the burden of proving the existence of a legal duty properly falls on Plaintiffs, the burden of proving that the risk is not inherent in the sport also falls on Plaintiffs." *Id.* at 88.

The Second Circuit has similarly held it "was not error" to place the burden on a plaintiff to prove a duty exists notwithstanding the Sports Injury Statute. *See Madhessian v. Stratton Corp.*, 210 F.3d 355, at *2 (2d Cir. 2000) (unpublished summary opinion).

In *Rosen v. Jay Peak*, No. 21-cv-00006 (D. Vt. June 15, 2023), this court recently placed the burden of establishing a duty of care under the Vermont Sports Injury Statute on the plaintiff. In so doing, the court reasoned that whether a duty exists in the first instance is a "threshold issue" that a party must establish in presenting his or her case to a jury. *See id.* at Doc. 77 at 7, 9 ("As a threshold issue, you must first decide whether a Vermont law known as the 'Sports Injury Statute' applies in this case. . . . It is Dr. Rosen's burden to establish a duty of care under the Sports Injury Statute."); *see also Est. of Frant v. Haystack Grp., Inc.*, 641 A.2d 765, 766 (Vt. 1994) ("[W]hether the ski area's use of wooden corral posts was an 'obvious and necessary' risk should have been a threshold question of fact decided by the jury."). This is consistent with Vermont tort law, which requires a plaintiff to establish a duty as part of any negligence claim. *See*

Demag, 2014 VT 78, ¶ 6 (identifying establishment of a legal duty as the first element of common law negligence). The court thus follows *Madhessian*, *Sklar*, and *Rosen* instead of *Mejia-Haffner*.

2. Whether Colliding with Snowmaking Equipment is a "Necessary and Obvious Risk of Skiing" under 12 V.S.A. § 1037.

Under Vermont law, "a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary." 12 V.S.A. § 1037. Section 1037 incorporates the primary assumption of risk doctrine, the "essence of [which] is that certain situations involve dangers so obvious and necessary that the defendant does not owe any duty to the plaintiff, and therefore is not required to warn its patrons of the dangers or take any steps to eliminate them." *Nelson v. Snowridge, Inc.*, 818 F. Supp. 80, 82 (D. Vt. 1993); *see also Est. of Frant*, 641 A.2d at 769 (finding that "§ 1037 can only incorporate one of these views, and . . . the *Wright/Sunday* theory of primary assumption of risk is the one that has been retained").

"[W]hat risks in a sport are inherent, obvious, or necessary to its participation[] [is] a question that ordinarily must be resolved by the jury." *Dillworth v. Gambardella*, 970 F.2d 1113, 1119 (2d Cir. 1992).[6] Defendants contend that because ski resorts could not operate without snowmaking, colliding with snowmaking equipment on trails is an "obvious and necessary" danger inherent to skiing as a matter of law. Like the risks posed by ice in *Nelson v. Snowridge, Inc.*, 818 F. Supp. at 83, or by dense fog in *Covel v. Mt. Mansfield Co.*, 237 A.D.2d 791, 792 (N.Y. App. Div. 1997), Defendants assert that "the only way to eliminate the risk of collision with snowmaking equipment would be to close Okemo whenever there isn't enough snow to ski." (Doc. 89 at 16.)

Ice and fog are natural phenomena that a ski resort could neither reasonably eliminate nor control. *See Nelson*, 818 F. Supp. at 83 (noting that "[n]o improvements in

[6] *See also Est. of Frant v. Haystack Grp.*, Inc., 641 A.2d 765, 771 (Vt. 1994) (Allen, J., concurring) ("Ordinarily, the question of whether a danger is obvious and necessary within the meaning of 12 V.S.A. § 1037 should be resolved by a jury."); *Umali v. Mount Snow Ltd.*, 247 F. Supp. 2d 567, 575 (D. Vt. 2003) ("Whether a risk is inherent, obvious and necessary to a sport is ordinarily an issue appropriate for a jury.").

grooming technique have been able to eliminate ice from the New England ski slopes"); *Covel*, 237 A.D.2d at 792 ("A ski area operator is not charged with the duty of preventing or warning patrons of such uncontrollable 'mutations of nature[.]'") (quoting *Wright v. Mt. Mansfield Lift,* 96 F. Supp. 786, 791 (D. Vt. 1951)). For this reason, the Vermont Supreme Court has held that "[s]kiers should be deemed to assume only those skiing risks that the skiing industry is not *reasonably required* to prevent." *Est. of Frant*, 641 A.2d at 771 (emphasis supplied). Unlike *Nelson* or *Covel*, "[t]his case raises no issues involving the weather, or conditions that cannot reasonably be controlled by the operator. It instead involves the necessity and obviousness of the risk associated with a person-made" snowmaking station on a beginner slope. *Umali v. Mount Snow Ltd.*, 247 F. Supp. 2d 567, 575 (D. Vt. 2003).

Under Vermont law, a "necessary" risk is one that "is impossible or unreasonably difficult or expensive to eliminate." *Dillworth v. Gambardella*, 776 F. Supp. 170, 172 (D. Vt. 1991), *aff'd*, 970 F.2d 1113 (2d Cir. 1992). Stated differently, "necessary dangers are those that are there *even when* due care is exercised. A person need accept only those risks that are inherent in the sport, not those increased risks that are cause[d] by another's failure to use due care." *Dillworth*, 970 F.2d at 1121 (internal citation omitted) (alteration in original).

Defendants cite case law from other states finding that colliding with snowmaking equipment is an obvious and necessary risk of skiing under those states' sports injury laws.[7] These statutes are inapposite. "In drafting 12 V.S.A. § 1037, the [Vermont]

---

[7] *See, e.g.*, MICH. COMP. LAWS ANN. § 408.342 (West 1981) (defining "obvious and necessary" dangers of skiing as "includ[ing], but are not limited to, injuries which can result from . . . collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment"); ME. REV. STAT. ANN. tit. 32, § 15217 (West 2007) ("'Inherent risks of skiing' means those dangers or conditions that are an integral part of the sport of skiing, including . . . water or air pipes, snowmaking and snow-grooming equipment, . . . and collisions with or falls resulting from such man-made objects[.]"); 42 PA. STAT. AND CONS. STAT. ANN. § 7102(c) (West 2011) (providing that "there are inherent risks in the sport of downhill skiing"); *see also Lin v. Spring Mountain Adventures, Inc.*, No. CIV.A. 10-333, 2010 WL 5257648, at *8 (E.D. Pa. Dec. 23, 2010) ("Collisions with equipment necessary for the operation of a ski facility, such as snow making equipment, are

legislature avoided cataloguing fact-specific examples of 'obvious and necessary' risks inhering in sports such as skiing." *Est. of Frant*, 641 A.2d at 770.

> The legislature thereby recognized, as *Wright* demonstrates, that yesterday's necessary skiing risks tend to become, with the passage of time and advancement of technology, reasonably avoidable. At the time *Wright* was decided, skiers were forced to assume the risk of colliding with snow-covered tree stumps, because grooming and inspection techniques in 1949 had not evolved to where it was feasible to detect and remove, or warn skiers about, such hazards. As Frant's expert witness suggested, state-of-the-art technology has evolved well beyond the early stages. Even the ski industry now concedes that today the failure to detect a tree stump could serve as the basis for negligence "in view of improved grooming techniques." *See* [*Sunday v. Stratton Corp.*, 390 A.2d 398, 402 (Vt. 1978)]. The language of 12 V.S.A. § 1037 is broad enough to account for safety improvements in the skiing industry. We do not think the legislature's purpose in reasonably protecting the skiing industry is compromised by asking a jury to supply a contemporary sense of what constitutes an obvious or necessary risk.

Id. at 770-71.

Adopting the standards set by other states' sports injury laws would be inconsistent with the Vermont Supreme Court's interpretation of 12 V.S.A. § 1037, which generally allows a jury to evaluate which risks and dangers are inherent to the sport of skiing and which recognizes that certain risks may be eliminated by advancements in technology and other developments in a sport.

In deciding which risks and damages are inherent in skiing as a matter of law, a court must thus proceed with caution. As the Second Circuit observed:

> Given changes in the methods and technologies used to maintain ski trails, increased efforts to attract new skiers, and an increase in the portion of trails dedicated to novice skiers, the Vermont court refused to decide whether defendant owed a duty as a matter of law. Instead, it thought the question of whether the danger was obvious, necessary, and inherent was one properly determined by a jury.

---

undoubtedly a risk inherent in the sport of skiing."); *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855, 857 (Cal. Ct. App. 1995), *as modified* (Oct. 17, 1995) (holding that the inherent risks of skiing include "collisions . . . with properly marked or plainly visible snow-making or snow-grooming equipment") (internal quotation marks omitted).

Dillworth, 970 F.2d at 1118.

Plaintiff has proffered evidence that modern snowmaking technology includes portable snowmaking equipment, which Okemo owns and could have used on the trail in question. Plaintiff has further proffered evidence that Defendants could have relocated the snowmaking equipment with which he collided so that no collision was possible. Testimony from Okemo employee and ski safety expert Mark Petrozzi that the snowmaking gun Plaintiff collided with is "not trail side" (Doc. 96-2 at 3) renders it a jury question whether it is a risk inherent to skiing to encounter a fixed snowmaking station in the middle of a beginner trail.

Although snowmaking may be integral to the operation of ski resorts, in the light most favorable to Plaintiff, a jury could reasonably conclude that the risk of colliding with snowmaking equipment in the middle of a beginner ski trail was "reasonably avoidable" by relocating the equipment elsewhere or replacing it with portable snowmaking and thus was not an obvious and necessary danger inherent to the sport. *See Eipp v. Jiminy Peak, Inc.*, 154 F. Supp. 2d 110, 116 (D. Mass. 2001) (observing that where plaintiff collided with a snow gun in the midst of an expert trail, summary judgment was not available for the ski resort because although "inherent risks" constitute "all natural conditions beyond the control of the ski area operators or the skier[,] [t]he presence of a snowgun in the middle of a ski trail does not appear to fall into this category") (internal quotation marks omitted).

Plaintiff has further established a genuine issue of fact as to whether the snowmaking station was properly padded. *See Erickson v. The Stratton Corp.*, No. 5:11-cv-00051, Doc. 102 at 7, 8 (D. Vt. May 13, 2013) (allowing jury to decide whether ski resort failed to properly pad a snowmaking hydrant with which plaintiff collided).

Because the court cannot determine as a matter of law that the snowmaking equipment's position and padding in this case was an obvious and necessary danger of skiing, Defendants' request for summary judgment under 12 V.S.A. § 1037 is DENIED.

3. Whether Defendants Breached Their Duty to Plaintiff.

If colliding with a snowmaking gun on a beginner trail was not an obvious and

necessary danger of skiing, Defendants owed Plaintiff a duty "to keep [their] premises reasonably safe." *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 799 (Vt. 1995) ("[A] ski area owes its customers the same duty as any other business—to keep its premises reasonably safe."). Whether a defendant's conduct breaches its duty to the plaintiff is ordinarily a question for the jury. *See LeClair v. LeClair*, 2017 VT 34, ¶ 16, 204 Vt. 422, 433, 169 A.3d 743, 750 (2017) ("It is for the jury as factfinder, not this Court, to determine whether defendant breached a duty to prevent plaintiff from being injured by a dangerous condition on the property that defendant should have anticipated plaintiff would encounter.").

Defendants argue that they did not breach any duty owed to Plaintiff as a matter of law because no reasonable jury could find that Okemo's placement of its snowmaking equipment was unreasonable or that a gap existed between the snowmaking padding and the snow that allowed Plaintiff to strike an unprotected metal pole.

With regard to the reasonableness of the placement of Okemo's snowmaking equipment, Plaintiff cites evidence that Defendants were aware that beginner skiers frequently fell on the Open Slope and Lower Mountain Road trails. He also cites Defendants' admissions that it would have been possible to remove the snowmaking equipment from that area and move it trail side or replace it with portable snowmaking equipment.

In support of his allegations that the snowmaking equipment was improperly padded, Plaintiff cites testimony from two of Defendants' employees that snowmaking gun padding must be flush with the snow surface to prevent skiers from sliding under it and coming in contact with snowmaking equipment. In addition to his own deposition testimony that he slid "into a metal pole or a steel pole" (Doc. 89-4 at 31), he proffers testimony from others that he was lying against the pole and that a skier cannot hit the metal portion of snowmaking equipment when Gilman TS-2 padding is properly installed.

Although Plaintiff lacks evidence of the precise manner of his collision, the evidence is not "so replete with inconsistencies and improbabilities that no reasonable

juror would undertake the suspension of disbelief necessary to credit the allegations made in his complaint." *Jeffreys v. City of New York*, 426 F.3d 549, 555 (2d Cir. 2005) (internal quotation marks omitted). "[C]ircumstantial evidence may be . . . sufficient to raise a genuine issue of material fact precluding the grant of summary judgment." *Gayle v. Gonyea*, 313 F.3d 677, 684 (2d Cir. 2002). Moreover, under Vermont law, the reasonableness of a defendant's actions is generally a question for the jury. *See State Farm Mut. Auto. Ins. Co. v. Colby*, 2013 VT 80, ¶ 32, 194 Vt. 532, 545, 82 A.3d 1174, 1184 (2013) ("The question of reasonableness is ordinarily for the factfinder.").

Viewing the facts in the light most favorable to Plaintiff, a jury could reasonably find that Defendants breached their duty to Plaintiff by improperly placing and padding the snowmaking equipment with which he collided. *See Peresypa v. Jiminy Peak Mountain Resort, Inc.*, 653 F. Supp. 2d 131, 140 (D. Mass. 2009) ("As there are factual questions regarding the actual location of the snow gun in relation to the skiable area of the trail and whether it was adequately marked and padded, Defendant's motion for summary judgment will be denied as to this claim."). Because a genuine dispute of material fact exists regarding whether Defendants breached their duty of care, summary judgment is inappropriate.

4. Whether Defendants' Breach Caused Plaintiff's Injuries.

Under Vermont law,

> causation requires both "but-for" and proximate causation. Thus, the plaintiff must first show that the harm would not have occurred "but for" the defendant's conduct such that the "tortious conduct [was] a necessary condition for the occurrence of the plaintiff's harm." The plaintiff must also show that the defendant's negligence was "legally sufficient to result in liability," such that "liability attaches for all the injurious consequences that flow [from the defendant's negligence] until diverted by the intervention of some efficient cause that makes the injury its own." Although proximate cause "ordinarily" is characterized as "a jury issue," it may be decided as a matter of law where "the proof is so clear that reasonable minds cannot draw different conclusions or where all reasonable minds would construe the facts and circumstances one way."

Collins v. Thomas, 2007 VT 92, ¶ 8, 182 Vt. 250, 253-54, 938 A.2d 1208, 1211 (internal

citations omitted) (alterations in original).

Defendants argue that Plaintiff cannot establish causation because he fails to proffer any admissible evidence from which a jury could conclude that his injuries would have been less severe had he hit the padding and not a metal pole. As Defendants point out, Dr. Scher opines that Plaintiff was skiing at a speed that rendered his injuries inevitable. How fast Plaintiff was skiing, whether Plaintiff struck the snowmaking equipment's padding or pole, and whether he was comparatively negligent are all contested issues of fact that must be decided by the jury. Plaintiff need not rule out every possible cause of his injuries in order to present them to a jury. *See Ahmad v. E. Ramapo Cent. Sch. Dist.*, 2013 WL 12446244, at *2 (S.D.N.Y. Aug. 15, 2013) ("I cannot as a matter of law rule out the possibility that the jury could reject all of [d]efendant's stated reasons and accept [p]laintiff's argument that retaliation was the sole reason for his termination.").

Even if a jury concludes that Plaintiff would have suffered the same injuries had the snowmaking station been properly padded, it remains undisputed that the snowmaking equipment could have been located elsewhere. The alleged "tortious conduct" of placing the snowmaking equipment in the middle of a beginner ski trail was a "necessary condition for the occurrence of . . . [P]laintiff's harm[,]" giving rise to a genuine dispute of material fact regarding causation. *Collins*, 2007 VT 92, ¶ 8, 182 Vt. at 253-54, 938 A.2d at 1211; *see also Dodge v. McArthur,* 223 A.2d 453, 455 (Vt. 1966) ("[I]f the initial negligence creates a situation making it likely that some other force or action will occur and bring about harm, responsibility remains with the original actor."). "[A] showing of cause-in-fact almost always involves circumstantial evidence" and "the greater the risk that the defendant's conduct will result in the harm the plaintiff suffered, the more likely that a jury will be allowed to find that such conduct was the cause of that harm." *Gemmink v. Jay Peak Inc.*, 807 F.3d 46, 48-49 (2d Cir. 2015).

For similar reasons, the question of foreseeability cannot be resolved as a matter of law. "Proximate cause is the law's method of keeping the scope of liability for a defendant's negligence from extending by ever-expanding causal links." *Est. of Sumner*

v. Dep't of Soc. & Rehab. Servs., 649 A.2d 1034, 1036 (Vt. 1994). A jury could reasonably find that Defendants' placement and padding of the snowmaking equipment was a foreseeable risk of the harm Plaintiff suffered. *Cf. Collins*, 2007 VT 92, ¶ 10, 182 Vt. at 255, 938 A.2d at 1212 (holding the "defendant's conduct was not the proximate cause of plaintiff's injury, because there was no relationship between the defects and the accident"). As the Second Circuit has explained, Plaintiff need not negate all alternative causation mechanisms in order to survive summary judgment:

> [W]hen a party's negligence increased the likelihood of an accident occurring, a jury could find that the negligence caused the harm, even in the absence of more direct evidence indicating causation. Proffering evidence negating causation then becomes the responsibility of the party that seeks to deny the effect of its negligence. And today, circumstantial connections between a defendant's negligence and the harm that occurred have been deemed enough to raise a question for the jury[.]

Est. of Gustafson ex rel. Reginella v. Target Corp., 819 F.3d 673, 676-77 (2d Cir. 2016) (internal citations omitted).

Because the evidence is not "so clear that reasonable minds cannot draw different conclusions[,]" summary judgment must be denied. *Collins*, 2007 VT 92, ¶ 8, 182 Vt. at 254, 938 A.2d at 1211 (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment (Doc. 89) is DENIED.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 30th day of June, 2023.

Christina Reiss, District Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

RICHARD GRAJEDA, Plaintiff, v. VAIL RESORTS INC., VAIL RESORTS MANAGEMENT COMPANY, and OKEMO LIMITED LIABILITY COMPANY d/b/a/ OKEMO MOUNTAIN RESORT, Defendants.	)	Case No. 2:20-cv-00165

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO EXCLUDE DEFENDANTS' EXPERT IRVING SCHER, PHD
(Doc. 85)

Plaintiff Richard Grajeda brings this negligence action against Vail Resorts Inc., Vail Resorts Management Company, and Okemo Limited Liability Company (collectively, "Defendants"), seeking damages for injuries he sustained in a collision while skiing at Okemo Mountain Resort ("Okemo"). Pending before the court is Plaintiff's May 18, 2022 motion to exclude Defendants' biomechanical engineering expert Irving Scher, Ph.D., P.E. ("Dr. Scher"). (Doc. 85.) Defendants opposed the motion on July 28, 2022 (Doc. 102), and Plaintiff replied on August 17, 2022. (Doc. 107.) The court held a hearing on the motion on September 27, 2022 and evidentiary hearings on January 13, 2023 and March 10, 2023 at which Dr. Scher testified.

Plaintiff is represented by Andrew J. Smiley, Esq., Guy I. Smiley, Esq., and Matthew D. Anderson, Esq. Defendants are represented by Kristen L. Ferries, Esq., Craig R. May, Esq., Habib Nasrullah, Esq., Joel P. Iannuzzi, Esq., and Thomas P. Aicher, Esq.

I. Factual Background.

On December 19, 2019, Plaintiff fell while downhill skiing with friends at Okemo on "Open Slope," which is a beginner trail. At the time, there were no issues with

visibility, but the weather was cold and the snow conditions were icy. Plaintiff had skied twice before, approximately seven years prior, and considered himself to be a beginner skier.

On his second ski run that morning, Plaintiff rode the B Quad chair lift to a ski trail called "Lower Mountain Road." As he approached the lower section of the ski trail, he encountered a group of ski school students crossing the trail in front of him. Plaintiff saw the group when they were fifteen to twenty feet ahead of him and veered to the left to avoid them. As he did so, he hit an icy patch and fell onto his left hip. His skis came off and he slid down the ski trail on his left side and then on his stomach. Plaintiff's head and shoulders faced uphill as he slid, so that he could not see where he was sliding. He testified in deposition: "As I was sliding, [I] felt a dip in the snow, and then I went under something, and I slammed into a metal pole or a steel pole." (Doc. 89-4 at 31.) He later stated: "The impact was very hard on my back. I could almost feel it reverberating or something." (Doc. 98-12 at 3.)

Okemo employee Ray Kennedy saw Plaintiff ski toward a snowmaking station, then saw the station's Gilman TS-2 padding "shudder" and fall from an "upright" position to lay horizontally. (Doc. 89-5 at 3-5.) He did not see the actual collision but testified that the padding was on the uphill side of the snowmaking equipment. At the time, he was looking out of a window in a building approximately 500 feet downhill from the snowmaking equipment.

Plaintiff's friend, Kyle Cotter, arrived at the accident scene soon after Plaintiff's collision and observed that Plaintiff "was underneath the pole, underneath the blue foam padding . . . within that little ravine of where that drop-off is" and that he was laying "[o]n his stomach[] . . . [b]asically making a T with his body against the pole." (Doc. 85-8 at 2-3.) At the time Okemo ski patroller Michael Morabito arrived at the scene, Plaintiff "was up against the post. And his body was a little angulated that way, he was definitely not straight." (Doc. 85-9 at 3.)

Ski patroller Mary Mancino responded to the scene with Mr. Morabito and observed that Plaintiff "was up against a snow making station . . . against, like, the

padding in front of the snow making station." (Doc. 104-1 at 3.) In response to questioning, Ms. Mancino testified in her deposition that there was padding on the snowmaking gun when she arrived, and that "[Plaintiff's] body was – I believe – he was on his belly and his left side was to the snow making station. His head was uphill and the padding was kind of over him as if it had been dislodged a little bit[,]" meaning that "[t]he top [of the padding] was slightly out as it he had hit the bottom of the pad and knocked the top out." *Id.* at 3-4.

On December 19, 2019, the day of Plaintiff's collision, Okemo's assistant on-snow services and trail maintenance manager Kyle Kostura recorded that "all blue padding was covering their respective snowmaking infrastructure as of my departure at 0900." (Doc. 89-6 at 2.) Mr. Kostura testified in deposition that he did not specifically recall checking the Gilman TS-2 padding on the snowmaking station prior to Plaintiff's collision but that it "was part of a visual ride through" that he conducted from his snowmobile that morning to confirm that the padding straps were attached to the snowmaking station and that there were no gaps between the padding and the snow. (Doc. 89-7 at 3.)[1] He has never seen a pad that was not touching the snow surface, although he has sometimes needed to dig a buried pad out of the snow.

Plaintiff suffered significant injuries and was rendered a paraplegic. Elizabeth Gilman, President of the corporation that manufactures Gilman TS-2 padding, is unaware of an incident in which a skier was seriously injured when he or she collided with Gilman TS-2 padding. She testified that a Gilman TS-2 pad should prevent a skier from striking the padded pole:

> So if the individual were to hit the blue blanket where the cylinders are it is designed to crumple to decelerate him to stop him from actually ending up hitting the metal object behind it. It is impossible to get through the blanket and those two tower cylinders to get to that object.

(Doc. 98 at 20) (quoting Doc. 96-4 at 68).

---

[1] *See* Doc. 89-7 at 3 ("Q. Did you check on that specific snowmaking gun and padding that morning, December 19, 2020, before the lifts opened? A. It was part of a visual ride through, yes. Q. Do you have an actual recollection of check in on that? A. Not that specific one, no.).

Plaintiff claims Defendants inadequately padded the snowmaking station because the Gilman TS-2 padding did not extend to the base of the station, allowing him to collide with the station's bare metal pole. He also asserts that Defendants negligently placed the snowmaking station in the center of a beginner's trail.

II. Dr. Scher's Qualifications.

Dr. Scher is a Principal and Biomechanical Engineer at Guidance Engineering and Applied Research. He has a Ph.D. and Master of Science in Mechanical Engineering from the University of California, Berkeley, and a Bachelor of Science in Mechanical Engineering from the University of Pennsylvania. He specializes in biomechanical engineering and accident reconstruction and has published extensively in these areas, with a particular focus on snow sport safety.

Dr. Scher has chaired or served on boards and committees for organizations including the International Society for Snowsport Safety, the Safety Equipment Institute, and ASTM International. He served as an Adjunct Associate Professor of Clinical Physical Therapy in the Department of Biokinesiology and Physical Therapy at the University of Southern California from 2004 to 2009 and is currently an Affiliate Associate Professor in the Department of Mechanical Engineering at the University of Washington. Since 2017, he has provided expert testimony in depositions, trials, hearings, and arbitration proceedings in state and federal courts.

Dr. Scher provided several opinions in this case, which he described as "presented with a reasonable degree of mechanical engineering, biomechanical engineering, and scientific probability and are provided on a more probable than not basis." (Doc. 85-2 at 39.) Plaintiff asks the court to exclude Dr. Scher's testimony pursuant to Fed. R. Evid. 702 because his opinions are speculative, lack a proper scientific foundation, do not rely on proper scientific methodologies, and exceed his area of expertise. Plaintiff offers an expert rebuttal opinion by J.Q. Campbell, Ph.D. ("Dr. Campbell"), a biomechanical consultant specializing in biomechanics and accident reconstruction, which criticizes each of Dr. Scher's opinions.

III. Conclusions of Law and Analysis.

The admissibility of expert testimony is governed by Fed. R. Evid. 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702 obligates the court to serve as a gatekeeper for expert testimony, ensuring "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

Expert testimony that is admissible under Rule 702 may still be excluded if its "probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. These dangers are particularly pronounced in the context of expert testimony, given the unique weight that a jury may place on such testimony. *See Daubert*, 509 U.S. at 595 ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.") (internal quotation marks omitted).

"Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* at 596; *see also United States v. LaVictor*, 848 F.3d 428, 444 (6th Cir. 2017) (holding that "[a]ny emerging prejudice [from an expert witness's testimony] was addressed during cross-examination").

A. Whether to Consider Dr. Scher's Reply Declaration.

In response to Dr. Campbell's criticisms of his report and Plaintiff's motion in limine to exclude his opinions, Dr. Scher provided a thirty-page reply declaration with

thirty-five pages of attachments ("Dr. Scher's Declaration" or the "Declaration"). Plaintiff does not move to strike Dr. Scher's Declaration in full but argues the Declaration's paragraphs 18, 20, 27, 28, 31, 40, 41, 43, 45, and 46 or its attachments are improper and must be excluded because the Declaration was untimely and not properly disclosed.

"[I]f requested and allowed by the [c]ourt, a reply expert report may follow" a rebuttal report. *Sandata Techs., Inc. v. Infocrossing, Inc.*, 2007 WL 4157163, at *1 (S.D.N.Y. Nov. 16, 2007) (citing Fed. R. Civ. P. 26(a)(2)). Expert rebuttal evidence is allowed if it "is intended solely to contradict or rebut evidence on the same subject matter identified by another party [.]" Fed. R. Civ. P. 26(a)(2)(D)(ii); *see also United States v. Casamento,* 887 F.2d 1141, 1172 (2d Cir. 1989) ("The function of rebuttal evidence is to explain or rebut evidence offered by the other party."); *Suazo v. Ocean Network Express (N. Am.), Inc.*, 2023 WL 2330428, at *11 (S.D.N.Y. Mar. 2, 2023) ("Rebuttal evidence is properly admissible when it will explain, repel, counteract or disprove the evidence of the adverse party.") (internal quotation marks omitted) (quoting *Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 44 (S.D.N.Y. 2016)). "The scope of a rebuttal is limited to the 'same subject matter' encompassed in the opposing party's expert report, Fed. R. Civ. P. 26(a)(2)(D)(ii), but district courts have been reluctant to narrowly construe the phrase 'same subject matter' beyond its plain language." *Allen v. Dairy Farmers of Am., Inc.*, 2013 WL 211303, at *5 (D. Vt. Jan. 18, 2013) (internal quotation marks omitted).

A rebuttal expert may use new methodologies "for the purpose of rebutting or critiquing the opinions of [the opposing party's] expert witness," *Park W. Radiology v. CareCore Nat'l LLC,* 675 F. Supp. 2d 314, 326 (S.D.N.Y. 2009), but "a rebuttal expert report is not the proper 'place for presenting new arguments, unless presenting those arguments is substantially justified and causes no prejudice.'" *Dairy Farmers of Am.*, 2013 WL 211303, at *5 (alteration adopted) (quoting *STS Software Sys., Ltd. v. Witness Sys., Inc.,* 2008 WL 660325, at *2 (N.D. Ga. Mar. 6, 2008)).

Regardless of whether a party seeks leave to file a reply expert report, Rule 26(e) requires parties to supplement their Rule 26(a) expert disclosures in a timely manner "if

the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing" or "as ordered by the court." Fed. R. Civ. P. 26(e)(1)(A)-(B). After the parties exchanged initial expert witness disclosures and reports in this case, the court issued a Fourth Amended Stipulated Discovery Schedule/Order requiring the parties to submit expert rebuttal reports on or before May 15, 2022 and to conduct any depositions of rebuttal experts by June 15, 2022. Because the pending motion to exclude Dr. Scher's opinions relies in part on Dr. Campbell's rebuttal report and deposition testimony, the court allowed Defendants to submit supplemental briefing in response to Dr. Campbell's rebuttal opinion.[2] As Dr. Scher's Declaration was filed with Defendants' response, Plaintiff's argument that it must be excluded on timeliness grounds is unpersuasive.

Dr. Scher's Declaration must nonetheless comply with the standards governing reply expert reports or supplemental disclosures. Like rebuttal reports, "[r]eply expert reports may be appropriate if the rebuttal reports raise new matters not discussed in the initial reports." *Ironshore Ins. Ltd. v. W. Asset Mgmt. Co.*, 2013 WL 2051863, at *2 (S.D.N.Y. May 15, 2013). If allowed by the court, a reply report "should be confined to

---

[2] In response to Plaintiff's objection to Defendants' request for additional time to respond to the motion in exclude Dr. Scher after Dr. Campbell's deposition, the court stated:

> I don't like the idea of having supplemental briefing when it's not necessary. If you had moved to exclude the witness[]'s testimony solely as a matter of law with no reference to your expert witness's opinion, I would agree with you, there's no reason. But you used your expert's opinion to impeach, for lack of a better word, their expert and to show why the court should exclude that opinion. So you injected Dr. Campbell into the argument as to why the engineer should be excluded. Having done that, *I will be hearing supplemental briefing*, and I'm going to allow [Defendants] to respond two weeks after the completion of Dr. [Campbell's] deposition. That will be an all-in response, and you probably will have to order an expedited transcript. But you are, at this point, on notice of what aspects of Dr. [Campbell's] opinion undercut or allegedly undercut your engineer's opinion. So that's how we're going to do it. And, if [P]laintiff requests an opportunity, well, they will have an opportunity to reply, I will allow that as well.

Transcript from May 23, 2022 Motion Hearing, at 54-55 (emphasis supplied).

new matters adduced by the defense and not to repetition of the plaintiff's theory of the case." *Id.* (internal quotation marks omitted). "It is [also] not an opportunity for the correction of any oversights in the plaintiff's case in chief." *Id.* (internal quotation marks omitted) (quoting *Crowley v. Chait,* 322 F. Supp. 2d 530, 551 (D.N.J. 2004)).

Similarly, an expert may not use Rule 26(e) supplementation as a guise for merely reiterating opinions from his or her initial report or adducing previously available information to strengthen those opinions. "It is only if the expert subsequently learns of information that was previously unknown or unavailable, that renders information previously provided in an initial report inaccurate or misleading because it was incomplete, that the duty to supplement arises." *S.W. v. City of New York*, 2011 WL 3038776, at *2 (E.D.N.Y. July 25, 2011) (internal quotation marks omitted) (quoting *Sandata Techs., Inc.*, 2007 WL 4157163, at *3-4).

Paragraph 18 of Dr. Scher's Declaration summarizes how he conducted his qualitative analysis of Plaintiff's injuries. He opines: "[t]hese types of analyses are biomechanical engineering analyses[.]" (Doc. 102-3 at 9, ¶ 18.) Because it does not respond to Dr. Campbell's report or adduce information correcting or completing his initial opinion on this subject, Paragraph 18 is not a proper subject for reply expert testimony or supplementation.

Dr. Campbell's report criticizes Dr. Scher's deposition testimony regarding how Plaintiff could have come to rest next to the snowmaking station's metal pole after striking the padding. Dr. Campbell opined: "Dr. Scher has not shown any calculations regarding 'the laws of physics' he used to reach this opinion and does not appear to have done any." (Doc. 85-4 at 8) (emphasis omitted). Paragraph 20 of the Declaration responds to Dr. Campbell's criticism by observing that during physical crash testing Dr. Campbell conducted as part of his rebuttal report, the test padding "demonstrate[d] the same . . . response that [Dr. Scher] described in [his] deposition[.]" (Doc. 102-3 at 11, ¶ 20.) Because Paragraph 20 focuses on an issue that was not raised in Dr. Scher's initial report and is "intended solely to contradict or rebut evidence on the same subject matter," Fed. R. Civ. P. 26(a)(2)(D)(ii), it constitutes a permissible reply.

Paragraphs 27, 28, and 31 of the Declaration respond to Dr. Campbell's criticism that Dr. Scher did not validate the computer model he created to assess whether Plaintiff's injuries could have resulted from striking the snowmaking station padding. Dr. Scher's initial report stated that he used the MADYMO human body computer model because of "the well-established and validated database of human and anthropomorphic testing device models" and opined that using MADYMO to "determine fall kinematics and vehicle occupant motions and loads in the body is . . . supported by peer-reviewed, scientific publications that document its validity." (Doc. 85-2 at 29.) The report did not address whether or how Dr. Scher validated the MADYMO human body element of his computer model and did not cite any peer reviewed studies in support. Instead, Dr. Scher's opinion was based on the assumption that because the individual components of his model have been validated, the combination of those components has also been effectively validated.

Paragraph 27 of the Declaration cites examples of how the MADYMO human body model has been validated by others, including by its creators and by a team of French biomechanical engineers in a peer-reviewed article on snowboarding backwards falls (the "Wei article"). Dr. Scher was aware of the MADYMO validation work and Wei article prior to his initial expert report but did not cite them specifically. Validation of the MADYMO model is thus information that should and could have been included in Dr. Scher's initial report. It is neither proper supplementation nor proper rebuttal.

In Paragraph 28 of his Declaration, Dr. Scher cites a 2022 thesis produced by a doctoral biomechanical engineering student that relied upon the Wei article's validation of the MADYMO model for assessing torso injuries (the "Dorsemaine thesis"). In addition to being proffered to rebut Dr. Campbell's criticism, the Dorsemaine thesis did not exist when Dr. Scher produced his initial expert report in December 2021. Paragraph 28 thus constitutes both permissible reply expert testimony and supplemental expert testimony under Rule 26(e).

Dr. Campbell opined that Dr. Scher could have validated his model by "trying to replicate [earlier experimental] tests with the M[ADYMO] human dummy model to

determine if the forces produced by the model corresponded to reality." (Doc. 85-4 at 20.) In response to Dr. Campbell's citation to a 2005 paper by Forman et al. supporting this proposition, Dr. Scher states in Paragraph 31 of the Declaration that he performed additional modeling work to replicate Forman et al.'s physical cadaver testing using his computer model, then compared the results to validate his model. This testing, however, ventures beyond "addressing the deficiencies" of Dr. Campbell's testimony regarding the MADYMO validation generally or "explaining why [Dr. Campbell's validation testimony] was defective." *Lidle v. Cirrus Design Corp.*, 2009 WL 4907201, at *5 (S.D.N.Y. Dec. 18, 2009). The Forman et al. research was available well before Dr. Scher's initial expert report. Because "[t]here is no reason that [Dr. Scher] could not have conducted those tests before his initial report was drafted," Paragraph 31 does not qualify as a proper reply or supplemental expert disclosure. *Id.* (observing that "plaintiffs' gamesmanship in this regard is precisely what the Rules were intended to prevent").

Similarly, Dr. Campbell's report critiqued Dr. Scher's modeling of the snowmaking station padding and stated that Dr. Campbell conducted experimental crash tests to validate Dr. Scher's padding model. Paragraph 40 of the Declaration states that in response to Dr. Campbell's rebuttal opinion, Dr. Scher verified the validity of his padding model by using the computer model to replicate a 2009 study of the force generated by a ballistic pendulum contacting a Gilman TS-2 snowmaking station pad. Dr. Scher's response in Paragraph 40 does not address the deficiencies of Dr. Campbell's analysis but attempts to introduce new evidence of new testing he could have conducted prior to his initial expert report. Paragraph 40 therefore also does not constitute an appropriate reply report or supplemental expert disclosure.

Paragraphs 41, 43, 45, and 46 of the Declaration address Dr. Campbell's criticisms of the data and methodology Dr. Scher used to calculate the "Factor of Risk," a ratio using the outputs of the computer model to assess the likelihood of injuries similar to Plaintiff's. These paragraphs of the Declaration respond directly to Dr. Campbell's rebuttal report and seek to contradict or rebut his opinions by pointing out deficiencies in his data and reasoning. This type of point-by-point rebuttal is the proper function of a

reply report: "to contradict, impeach or defuse the impact of the evidence offered by an adverse party." *Peals v. Terre Haute Police Dep't*, 535 F.3d 621, 630 (7th Cir. 2008) (citation omitted). "To the extent that [Dr. Scher] disclose[s] new opinions [or data] that were not included in [his] original reports, [these paragraphs] are clearly responsive to [Dr. Campbell's] report[] and do not cause prejudice or surprise to [Defendants]." *S.W.*, 2011 WL 3038776, at *4; *see also Suazo*, 2023 WL 2330428, at *12 (admitting rebuttal expert testimony that fell "[s]quarely within the scope" of the initial expert report). "[T]he rules do not require an expert to anticipate every argument made by an opposing expert or risk preclusion." *S.W.*, 2011 WL 3038776, at *4. Paragraphs 41, 43, 45, and 46 are thus appropriate reply expert testimony.

In addition to the Wei article, the Declaration's attachments include numerous PDF versions of websites about biomechanical engineering from an array of universities. These attachments are not responsive to Dr. Campbell's rebuttal report, nor do they supplement Dr. Scher's initial report with previously unknown or unavailable information. They are accordingly impermissible as a reply opinion or a supplemental disclosure.

Even when an expert reply or rebuttal report is improper, because preclusion of an expert report may "be a harsh sanction[,]" *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co.*, 769 F. Supp. 2d 269, 278 (S.D.N.Y. 2011), courts must consider the following factors when determining whether to strike an improper expert report: "(1) the party's explanation for the failure to comply with the discovery order; (2) the importance of the testimony of the precluded witness; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance." *Softel, Inc. v. Dragon Med. & Sci. Commc'ns, Inc.*, 118 F.3d 955, 961 (2d Cir. 1997) (citing *Outley v. City of New York,* 837 F.2d 587, 590-91 (2d Cir. 1988)). The court allowed Defendants to submit supplemental briefing, and Dr. Scher's opinions are key to their argument that Plaintiff cannot prove the causation element of his negligence claim. Nonetheless, allowing Dr. Scher to bolster his opinions with information and new testing which were previously available to him causes both

prejudice and surprise to Plaintiff. Dr. Scher has been deposed. Plaintiff should not be required to re-depose him to address an impermissible reply or supplementation. As the court has denied Defendants' motion for summary judgment, this case is ready to be set for trial. A continuance at this late stage is not warranted. *See* Fed. R. Civ. P. 1. "Alternative sanctions would not effectuate the intent of the discovery rules, cure the prejudice to [Plaintiff], and allow this litigation to continue apace." *In re Terrorist Attacks on Sept. 11, 2001*, 2023 WL 2366854, at *7 (S.D.N.Y. Mar. 6, 2023). Although the court does not sanction Defendants, striking portions of an extensive Declaration must still be consistent with the Federal Rules. For this reason, the court has nevertheless considered Dr. Scher's improper rebuttal and supplementation and concludes that it does not affect the court's rulings herein.

For the foregoing reasons, in deciding the pending motion to exclude the court will not consider Paragraphs 18, 27, 31, or 40 of Dr. Scher's Declaration, or the Declaration's attachments consisting of websites about biomechanical engineering generally or university biomechanical engineering departments.

B. Whether Dr. Scher's Photogrammetric Analysis and Related Opinion Must Be Excluded.

Dr. Scher used photogrammetry to estimate the distance between the snow surface and the bottom of the padding attached to the snowmaking station with which Plaintiff collided. Comparing the typical chest and shoulder dimensions of a man of Plaintiff's height and weight with the results of his photogrammetric analysis, Dr. Scher opined:

> If the subject Gilman TS-2 padding system was strapped to the subject HKD snowmaking gun base such that it was levitating off the snow (as suggested by [Plaintiff's expert] Mr. [Dick] Penniman), the space under the padding system (to the snow) would have been limited by the geometry of HKD snowmaking gun equipment. This space would not have permitted an individual of Mr. Grajeda's size to move under the padding system and contact significantly the metal base.

(Doc. 85-2 at 39.)

Relying on known measurements of objects in a photograph taken on the day of Plaintiff's collision, including a sign, the snowmaking station, and the padding, Dr. Scher

determined that the padding's position would have been limited by the snowmaking gun's jackscrew, bracket, and hose attachment. He concluded that there were approximately two to three inches between the padding and the snow surface; that the bottom and top of the exposed jackscrew were approximately fifty-nine and seventy-six inches above the snow surface, respectively; and that the hose attachment was sixty-six inches above the snow surface. Based on these measurements, the site inspections conducted at his direction, witness testimony that the padding generally faces uphill, and his experience examining ski area padding, Dr. Scher opined that the padding system could only have moved upward five inches before contacting the jackscrew's top attachment. He did not observe "physical evidence of contact" with the jackscrew on the padding, indicating that the padding was not forced up before or during Plaintiff's accident. (Doc. 85-2 at 19-20.) He confirmed the results of his photogrammetric analysis by creating a virtual model of the padding and snowmaking equipment in a computer graphics program called 3D Studio Max using data from a "laser scan" of the collision site, photographs from the investigation, and the known dimensions of the padding and snowmaking equipment.

Plaintiff contends Dr. Scher is not an expert in photogrammetry and his photogrammetric analysis is unreliable. He further contends that Dr. Scher did not take the photograph on which he relies and did not personally verify its accuracy.

"[P]hotogrammetry [is] the science of measurement from photographs." *Gecker as Tr. for Collins v. Menard, Inc.*, 2019 WL 3778071, at *4 (N.D. Ill. Aug. 12, 2019) (internal quotation marks omitted). As an engineer, Dr. Scher is trained in measurement and mathematical analysis. He has used photogrammetry in his work for the past nineteen years. His "knowledge, skill, experience, training, or education" qualify him to provide expert testimony about photogrammetry. Fed. R. Evid. 702.

Courts have recognized photogrammetry and the associated use of laser scanning are reliable methodologies accepted within the fields of science and engineering. *Gecker as Tr. for Collins*, 2019 WL 3778071, at *4 (collecting cases and observing that "[a]s technology has become more advanced, so too have photogrammetric techniques and

applications; however, photogrammetry itself has a long, recognized history of reliability in the scientific and judicial community"); *see also id.* at *5 ("When Dr. Fisher generated a laser scan point cloud using the Faro Focus3D X330 scanner, he applied standard, peer-reviewed techniques from the field of photogrammetry in forming his conclusions.").

While Plaintiff does not contend that photogrammetry is unreliable as a methodology, he asserts that Dr. Scher failed to reliably apply photogrammetric methods to the available evidence because he analyzed a single photograph taken by an unidentified person several hours after Plaintiff's accident in which the padding has been replaced on the snowmaking gun base by an unknown person. He also inspected the scene virtually rather than in person and relied on measurements taken by others. His subsequent laser scan was taken more than a year after the accident. Plaintiff's rebuttal expert Dr. Campbell opined that Dr. Scher's analysis is inaccurate because the objects in the photograph were not situated in a single plane perpendicular to the camera and the photograph shows visible variation in the surface of the snow around the snowmaking station base. He contested the accuracy of Dr. Scher's assumptions that the padding faced uphill and that its position and movement were limited by the snowmaking station's structure.

Although an expert's testimony may not be "speculative or conjectural," an expert may base his testimony upon reasonable assumptions of fact. *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996) ("A district court has discretion under Federal Rule of Evidence 703 "to determine whether the expert acted reasonably in making assumptions of fact upon which he would base his testimony") (internal quotation marks omitted). "Unless the information or assumptions that [the] plaintiff's expert relied on were 'so unrealistic and contradictory as to suggest bad faith,' inaccuracies in the underlying assumptions or facts do not generally render an expert's testimony inadmissible." *Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 52 (S.D.N.Y. 2016). "Other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony." *Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp.,*

LLC, 571 F.3d 206, 214 (2d Cir. 2009) (alteration adoption and internal quotation marks omitted).

Dr. Scher need not take a photograph himself in order to rely on it in forming his opinions. *See Daubert*, 509 U.S. at 592 ("Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation."); *United States v. Clayton*, 643 F.2d 1071, 1074 (5th Cir. 1981) ("A witness qualifying a photograph need not be the photographer or see the picture taken; it is sufficient if he recognizes and identifies the object depicted and testifies that the photograph fairly and correctly represents it."); *see also United States v. Ruggiero*, 928 F.2d 1289, 1303 (2d Cir. 1991) ("Rule 901(a) requires the proponent of any evidence to submit 'evidence sufficient to support a finding that the matter in question is what its proponent claims.' This requirement is satisfied if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.") (internal quotation marks omitted). He also need not personally inspect the scene depicted in the photograph. *See Jackson v. E-Z-Go Div. of Textron, Inc.*, 326 F. Supp. 3d 375, 436 (W.D. Ky. 2018) ("Photogrammetry is defined by taking measurements based on objects in *photographs* of an accident scene and does not require examination of the scene itself.") (emphasis in original). Although it is unclear whether certain objects and the snow contours in the photograph reflected the conditions at the time of the Plaintiff's collision and remained undisturbed by a presumably chaotic accident scene, these disagreements generally pertain to weight as opposed to admissibility.

Likewise, it matters not whether Dr. Scher took certain measurements himself provided those measurements are reliable. The photograph Dr. Scher analyzed contains multiple objects whose dimensions were measured by individuals following his directions. It also depicts the padding which Dr. Scher personally examined and measured and upon which his opinions regarding the orientation of the padding are based. Dr. Scher claimed these opinions are corroborated by Okemo employee Ray Kennedy's deposition testimony that at the time of the collision the padding was upright and facing

uphill.

Dr. Scher's assumptions are reasonable and non-speculative in light of the information available to him. *See Gecker as Tr. for Collins*, 2019 WL 3778081, at *6 ("Under *Daubert,* the accuracy of Dr. Fisher's underlying data goes to weight, not admissibility, of his [photogrammetry] testimony."). They do not contain obvious inaccuracies suggestive of bad faith. To the extent Plaintiff wishes to contest the accuracy of Dr. Scher's measurements or assumptions, he may do so on cross-examination. *See Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) (recognizing that "our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony").

Finally, although the court has not yet ruled whether the photograph fairly and accurately represents what is depicted therein at the relevant time of Plaintiff's collision, *see Zerega*, 571 F.3d at 214 (upholding objection to admission of photograph that district court sustained for lack of a proper foundation), evidence generally need not be admissible to provide a basis for an expert witness opinion. *See United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008) ("Under Rule 703, experts can testify to opinions based on inadmissible evidence, including hearsay, if 'experts in the field reasonably rely on such evidence in forming their opinions.'") (quoting *United States v. Locascio,* 6 F.3d 924, 938 (2d Cir. 1993)). In this case, however, whether the photograph is a true and accurate representation of the objects depicted therein is likely to be essential to the admissibility of Dr. Scher's opinions. Because Defendant may be able to lay a proper foundation for the photograph on which Dr. Scher's photogrammetry opinions are based, Plaintiff's motion to exclude those opinions is DENIED WITHOUT PREJUDICE.

C. Whether Dr. Scher's Qualitative Analysis of Possible Injury Mechanisms Must Be Excluded.

Dr. Scher reviewed Plaintiff's medical records and other materials to conduct a qualitative analysis of the mechanisms of Plaintiff's injuries, including whether Plaintiff's injuries could have been produced by impacting the padding on the snowmaking station base, and whether Plaintiff's injuries were more consistent with

striking the padding or the metal base. In light of the injuries described in Plaintiff's medical records,[3] he concluded that Plaintiff's "thoracic spine injuries were produced biomechanically by a large extension moment, along with axial loading of the spine and a lateral bending moment." (Doc. 85-2 at 39.) Dr. Scher opined that this large "extension moment" occurred when Plaintiff struck the left side of his mid-lower back on the padding, causing his torso to decelerate while his pelvis and lower extremities continued at their pre-impact velocities. According to Dr. Scher, the loads produced by this impact and the energy and momentum of the "non-contact areas" overwhelmed the load bearing capacity of Plaintiff's thoracic spine. *Id.* at 26. "Portions of this additional momentum and energy were attenuated by the creation of additional injuries (such as ligament tears and transverse process fractures)." *Id.*

Considering Plaintiff's "constellation of spine fractures," "large region of tissue swelling," and "posterior, medial rib head fractures," as well as his lack of injuries consistent with striking a "fixed rigid object" such as contusions, abrasions, lacerations, localized ecchymosis, or anterolateral or posterior-lateral rib fractures, *id.* at 27-28, Dr. Scher opined that Plaintiff's injuries were more consistent with striking the Gilman TS-2 padding than a metal pole. If Plaintiff's left mid-back had contacted the metal base of the snowmaking equipment, Dr. Scher opined Plaintiff would likely have "sustained additional rib fractures, spinous process fractures, localized ecchymosis, contusions, abrasions, and/or lacerations on his body where he contacted the pole." *Id.* at 28. Absent

---

[3] Dr. Scher described Plaintiff's injuries as follows:

> [Plaintiff's] post-accident medical records reported an unstable T9 fracture involving middle and posterior columns with evidence of ligamentous injury involving the T8-T9 anterior and longitudinal ligament, posterior longitudinal ligament, interspinous ligament, and right capsular ligament. In addition, the medical records document an epidural hemorrhage at T8 and T9, epidural air from T6 through L1, paraspinous soft tissue swelling and gas in paraspinous soft tissues from T5 through T12, a pleural hemorrhage (more on the right side), an aortic injury at T9-T10, posterior medial rib fractures at T8 through T10, and fractures of the left L1 and L2 transverse processes.

(Doc. 85-2 at 26.)

physical evidence of these types of injuries, Dr. Scher opined Plaintiff's injuries were most likely produced by striking the Gilman TS-2 padding.

Plaintiff contends that Dr. Scher is not qualified to testify regarding the specific causation of Plaintiff's injuries because he is not a medical doctor and lacks sufficient medical training. Defendants counter that biomechanical engineers are "qualified to testify as to the force on [a] [p]laintiff's body during the accident, the type of injury it could cause, and whether [a] [p]laintiff's injuries were consistent with that analysis." *Gecker as Tr. for Collins*, 2019 WL 3778071, at *8. Dr. Scher opined that because biomechanical engineering focuses on determining the forces and motions creating damage to the body, it is distinct from medicine, which instead focuses on diagnosing and treating the damage.[4]

Courts in the Second Circuit typically allow biomechanical engineers to testify only to general causation, "i.e., whether the force sustained by a 'plaintiff in the subject accident could potentially cause certain injuries.'" *Thomas v. YRC Inc.*, 2018 WL 919998, at *5 (S.D.N.Y. Feb. 14, 2018) (emphasis omitted) (quoting *Manlapig v. Jupiter*, 2016 WL 916425, at *3 (S.D.N.Y. Mar. 10, 2016)). A biomechanical engineer without a medical degree or training is therefore generally not allowed to "testify regarding whether a specific accident caused or contributed to a plaintiff's injuries." *Gade v. State Farm Mut. Auto. Ins. Co.*, 2015 WL 7306433, at *15 (D. Vt. Nov. 19, 2015) (footnote omitted);

---

[4] The Federal Judicial Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (3d ed. 2011), which Dr. Campbell cited in his rebuttal report, states:

> The traditional role of the physician is the diagnosis (identification) of injuries and their treatment, not necessarily a detailed assessment of the physical forces and motions that created injuries during a specific event. The field of biomechanics (alternatively called biomechanical engineering) involves the application of mechanical principles to biological systems, and is well suited to answering questions pertaining to injury mechanics. Biomechanical engineers are trained in principles of mechanics (the branch of physics concerned with how physical bodies respond to forces and motion), and also have varying degrees of training or experience in the biological sciences relevant to their particular interest or expertise.

(Doc. 102-4 at 4.)

see also Bennett v. Target Corp., 2019 WL 7556361, at *7 (E.D.N.Y. Jan. 2, 2019) (agreeing with courts in the Southern District of New York that without medical training, "biomechanical engineers are not qualified to testify as to whether an accident caused or contributed to any of plaintiff's injuries, as this would amount to a medical opinion") (alteration adopted and internal quotation marks omitted).

Although Dr. Scher received training in human biology as part of his education, he does not have a medical degree or formal medical training. He is therefore unqualified to "venture into the realm of medical diagnosis by reviewing [Plaintiff's] primary medical records and opining as to the extent of his injuries." *Rodriguez v. Athenium House Corp.*, 2013 WL 796321, at *5 (S.D.N.Y. Mar. 5, 2013).[5] His opinions regarding the mechanism of Plaintiff's injury are not framed as general causation opinions "about the nature and amount of force generated by the accident in question and the observed effect of that force on a human body in comparable accidents." *Morgan v. Girgis*, 2008 WL 211250, at *6 (S.D.N.Y. May 16, 2008). Instead, they purport to opine as to the specific cause of Plaintiff's injuries.

Because Dr. Scher is not qualified as an expert witness in the medical field, Plaintiff's motion to exclude Dr. Scher's specific causation opinion based on his qualitative analysis is GRANTED. Dr. Scher may provide only an opinion regarding general causation which is a factual predicate for his specific causation opinion.

---

[5] Several courts have excluded Dr. Scher's specific causation opinions. *See, e.g.*, *Cooper v. Thompson*, 353 P.3d 782, 791 (Alaska 2015) (affirming trial court's limitations on Dr. Scher's testimony based on its "conclu[sion] that any testimony about the specific causes of [the plaintiff's] injuries would exceed Dr. Scher's biomechanics expertise and amount to a medical diagnosis he was not qualified to make"); *Forhan v. Altena*, 2012 WL 6727465 (Wash. Super. July 5, 2012) ("Scher is simply not qualified to give such opinions about the causal connection between the collision and Plaintiff's injuries."); *Wallace v. Pineda*, No. A-14-705744-C (Nev. Dist. Ct. Aug. 8, 2016) (excluding Dr. Scher's opinions that "biomechanically, the force and other facts [Dr. Scher] identified from the collision are not consistent with causing certain injuries to Plaintiff" and observing "[t]o the degree [Dr. Scher] has published anything on biomechanics, he has not shown any of his work was applicable to Plaintiff['s] . . . specific injuries").

D. Whether Dr. Scher's Opinion Based on His Computer Modeling Must Be Excluded.

Dr. Scher created a computer model to determine the possible force on Plaintiff's spine from impacting a snowmaking station with Gilman TS-2 padding that was fully or partially fastened to the snowmaking station's base. Based on simulations he ran with his model, he opined that Plaintiff's injuries were caused by striking the snowmaking station padding at a high rate of speed. In turn, he opined that Plaintiff would have sustained the same injuries whether the padding was properly installed or not. Dr. Scher recorded the simulation input parameters and results in a spreadsheet but did not otherwise save the raw output data from the over seventy computer simulations he ran.

According to Dr. Scher, his computer model supported the conclusion that Plaintiff must have slid into the padding at sixteen or more miles per hour to produce his thoracic spine injuries, leading Dr. Scher to conclude that "it is highly likely that [Plaintiff] was skiing faster than a typical beginner,[6] and at or above the average speeds of non-beginners on these types of trails, prior to contacting the Gilman TS-2 padding system (that is, when he was skiing just before his accident)." *Id.* at 31 (footnote supplied).

Dr. Scher's computer model combined two software programs: MADYMO and LS-DYNA. Dr. Scher described MADYMO as a "well-established and validated database of human and anthropomorphic testing device models" that is "regularly" used by biomechanical engineers "to model accidents and determine the motions of individuals[.]" (Doc. 85-2 at 29.) Using MADYMO, Dr. Scher created a "surrogate" for Plaintiff by scaling the MADYMO human body model to represent a 5'11" tall, 180-pound man wearing a ski helmet and ski boots.[7] He used MADYMO to model the

---

[6] Dr. Scher based his opinion regarding typical speed for beginner skiers on his research on skier speeds, which found that "the average speed of beginner and non-beginner skiers on slopes similar to Lower Mountain Road is 10.5 miles per hour and 18.6 miles per hour[,]" respectively. (Doc. 85-2 at 23.) His report does not, however, cite this research or any other publications supporting this data.

[7] It is undisputed Plaintiff was not wearing skis when he collided with the snowmaking station.

interactions between surfaces and the computer surrogate and the loads on the surrogate. He used LS-DYNA to model the "finite[ ]elements," such as the snowmaking equipment and Gilman TS-2 padding system, based on his measurements, unidentified scientific literature, and material testing of a piece of Gilman TS-2 padding which he acquired from a mountain in New Jersey.

To "test a range of potential impact scenarios[,]" Dr. Scher used his model with various initial conditions, including the surrogate's location relative to the snowmaking gun, its body position, and its velocity. *Id.* He conducted simulations in which the padding was "fixed permanently" to the snowmaking gun's base, unattached and able to move freely, or removed entirely. He then compared the model's outputs for the human body's kinematics, thoracic spine compression force, and thoracic spine moment with the forces associated with injury creation. He named this ratio the "Factor of Risk." *Id.* When the Factor of Risk was above one, a thoracic spine injury was more likely than not, with the likelihood increasing as the Factor of Risk increased. Dr. Scher opined that regardless of whether the padding was fixed or could move freely, when the model's surrogate impacted his left mid-back on the padding, "extension moments and axial compression loads in the mid-thoracic spine were often large and the associated Factor of Risk ratio exceed[ed] . . . [one] when using the scaled values for thoracic spine injury." *Id.* at 30.

As of the issuance of his initial expert witness report, Dr. Scher had not independently validated his novel application of the MADYMO and LS-DYNA programs and cited no evidence that anyone else had done so.

1. Whether Dr. Scher's Computer Modeling Opinion Is Admissible Under Fed. R. Evid. 702.

Plaintiff asks the court to exclude Dr. Scher's opinions based on his computer modeling because they were created for the purposes of this litigation, because Dr. Scher is not qualified to model thoracic spine injuries, and because his model is unreliable, irrelevant, and untested. Plaintiff observes that Dr. Scher's novel computer modeling has never been peer-reviewed or validated by either Dr. Scher or anyone else.

Dr. Scher uses computer modeling in his research, and the scientific literature

proffered by the parties demonstrates that biomechanical engineers commonly use computer modeling to simulate impacts on the human body. As a threshold matter, Dr. Scher's "knowledge, skill, experience, training, [and] education" in the field of biomechanical engineering qualify him to testify as an expert regarding computer modeling of thoracic spine injuries. Fed. R. Evid. 702.

"[W]hether a witness's area of expertise [is] technical, scientific, or more generally 'experience-based,' Rule 702 requires the district court to fulfill the 'gatekeeping' function of 'mak[ing] certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Nimely v. City of New York*, 414 F.3d 381, 396 (2d Cir. 2005) (citations and footnote omitted).

> In deciding whether a step in an expert's analysis is unreliable, the district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand.

Amorgianos, 303 F.3d at 267.

a. The Computer Model's Basis in Peer-Reviewed Research, Error Rate, and Raw Output Data.

"In determining whether a computer simulation is reliable, the court may consider whether the program has been or can be tested, has been subjected to peer review and publication, has a known or potential rate of error and has gained general acceptance in the relevant scientific community." *Valente v. Textron, Inc.*, 931 F. Supp. 2d 409, 420 (E.D.N.Y. 2013), *aff'd*, 559 F. App'x 11 (2d Cir. 2014) (citing *Daubert*, 509 U.S. at 593-94). Although Dr. Scher testified that he has published peer-reviewed research using the same combination of LS-DYNA and MADYMO, he did not identify this research. Moreover, while his research has focused on snow sport safety generally, Dr. Scher has not studied impacts to the thoracic spine as part of that work. Rather, he "developed [his] opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995). The fact that Dr. Scher's opinions were derived

solely for purposes of litigation undercuts their reliability. *See id.* (expressing a preference for opinions derived not solely for litigation purposes because "an expert [who] testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science").

There is no known error rate for Dr. Scher's model. *See Daubert*, 509 U.S. at 594 ("[I]n the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error[.]"); *Valente*, 931 F. Supp. 2d at 421 ("The Court also finds that [the expert's] simulation model is not reliable because its error rate is unknown and cannot be determined."). Dr. Scher's work in this case has not been peer-reviewed or published, *see Daubert*, 509 U.S. at 593 (observing that "[a]nother pertinent consideration is whether the theory or technique has been subjected to peer review and publication" though "[p]ublication . . . is not a *sine qua non* of admissibility"), nor has it been tested. *See id.* ("Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.").

Plaintiff asserts that Dr. Campbell was unable to replicate Dr. Scher's computer model simulation results using the data and software he provided, because although Dr. Scher provided the model files and a summary of the results he obtained for each set of input parameters he used, he did not retain or provide the raw output data produced when he ran the model. He averred that in his experience as a journal editor and reviewer, article manuscripts are commonly accepted for publication when accompanied by data in the format he employed. This may be true, however, "[t]he Advisory Committee's notes to the 1993 amendment of Rule 26 of the Federal Rules of Civil Procedure specifically state that the expert witness disclosure include the data and other information considered by the expert." *Wile v. James River Ins. Co.*, 2020 WL 5995183, at *4 (W.D.N.Y. Oct. 9, 2020). Without disclosure of Dr. Scher's raw data, "there is no way to check the quality and accuracy of [his] work." *Bain v. Wrend*, 2017 WL 11505976, at *2 (D. Vt. Sept. 6, 2017). The inability to test Dr. Scher's model weighs against its admissibility under Rule 702.

b. The Computer Model's Factual Inputs.

Although experts may make reasonable assumptions of fact, they may not offer testimony that is "speculative or conjectural[.]" *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008) ("At trial, proffered expert testimony should be excluded if it is speculative or conjectural . . . ; the [a]dmission of expert testimony based on speculative assumptions is an abuse of discretion[.]") (first alteration in original) (internal quotation marks and citations omitted). If expert testimony does not "fit" the facts of the case so that it is helpful to the jury in understanding the evidence or resolving a factual dispute, it does not satisfy the requirements of Rule 702. *Daubert*, 509 U.S. at 591 (citing *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)); *see also Downing*, 753 F.2d at 1242 (observing that an "aspect of relevancy" is "whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute").

Dr. Scher ran more than seventy simulations of Plaintiff's collision using different combinations of variables such as velocity, slope angle, pad stiffness, and with the padding affixed permanently to the snowmaking equipment and not affixed at all. Although he testified that his intent was not to recreate the actual collision,[8] he relied on

---

[8] When Dr. Scher was asked, "[I]n doing this modeling were you attempting to re-create the incident?" he responded, "No, I was not." (Doc. 119 at 41.) Dr. Scher's concession that he did not attempt to recreate the actual collision reflects his opinion that it does not matter how Plaintiff came to collide with the snowmaking system as he only studied what transpired at the moment of impact. Dr. Scher explained: "[Y]ou're right, in the sliding portion, all those things that you mention absolutely matter: the snow, topography, the type of snow, all of those things. I agree 100 percent. Those things only don't matter -- or they don't matter only when you're considering that 100 milliseconds of padding contact." (Doc. 124 at 84-85.) He explained why he considered only the padding contact as follows:

> Q. How long is the model analyzing the impact here?
>
> A. Approximately 120 milliseconds.
>
> Q. And why is it running for 120 milliseconds?
>
> A. Because that's when the peak loads occur. So after 120 milliseconds, the injury would already have happened, and so I'm not interested after that.
>
> Q. And how do you know that peak loads occur at that point?

the simulation results to opine that it was "highly likely" that Plaintiff was skiing faster than sixteen miles per hour when he fell and that Plaintiff's injuries resulted from sliding into the padding, not the snowmaking gun's metal base, at a high rate of speed, purportedly to demonstrate that Plaintiff was at least contributorily negligent for his own injuries. (Doc. 85-2 at 31.) The range of values Dr. Scher used in his model do not reflect the known facts of the case and thus Dr. Scher has failed to "show that he has sufficient data to use the methodology employed." *Rogers by Rogers v. K2 Sports, LLC*, 348 F. Supp. 3d 892, 901 (W.D. Wis. 2018). Similar computer modeling work by Dr. Scher has been excluded by at least one other federal court which found that "[his] simulation, and the opinions based on it, are inadmissible because they are based on guesswork rather than the facts of [the plaintiff's] accident." *Id.* As one court explained:

> A district court must determine whether a methodology, even one based on established scientific foundations, is reliable for the factual issues raised in a particular case. . . . Even a generally accepted computer simulation program, like PC–Crash, which is based on the laws of physics and accepted principles of accident reconstruction, is not a reliable methodology in all factual circumstances[.]

Valente, 931 F. Supp. 2d at 421.

Because Dr. Scher's computer modeling does not reflect the known facts of the case, whether it can be reliably used to analyze those factual circumstances remains unknown. *See Dreyer v. Ryder Auto. Carrier Group, Inc.*, 367 F. Supp. 2d 413, 434 (W.D.N.Y. 2005) ("The reliability of the expert's methodology in reaching his conclusions must . . . be evaluated against the specific facts at issue, not generalized theories.") (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 154 (1999)). This, too, weighs against its admissibility.

> A. Because afterwards you see the loads decreasing as you continue the simulation.
>
> Q. And what's the significance of the peak loads?
>
> A. The peak loads would be the highest likelihood of injury.

(Doc. 119 at 48.)

c. Validation of the Computer Model's Application of MADYMO and LS-DYNA.

"Regardless of the use, confidence in computational simulations is only possible if the investigator has verified the mathematical foundation of the model and validated the results against sound experimental data." Doc. 85-4 at 19 (quoting Heath B. Henninger et al., *Validation of Computer Models in Biomechanics*, 224(7) PROCS. INST. MECH. ENG'RS, PART H: J. ENG'G MED. 801 (2010)) (internal quotation marks omitted); *Valente*, 931 F. Supp. 2d at 421 ("Without validation, the Court cannot determine whether [the expert]'s simulation model, reliably simulates an accident involving a vehicle rollover."). "[V]alidation is defined as the process of determining the degree to which a model is an accurate representation of the real world from the perspective of the intended uses of the model[.]" Doc. 85-4 at 19 (internal quotation marks omitted). "[I]n order to validate a simulation through real-world testing, an individual must put certain inputs into both the simulation and the real-world system and compare the results to see if they are similar enough within some desired degree of accuracy." *Valente*, 931 F. Supp. 2d at 423–24.

Dr. Scher contends that his modeling work is consistent with that conducted by a team of biomechanical engineers in France who have used computer modeling to study spinal flexion-extension injuries in snowboarding accidents. Like Dr. Scher, those researchers combined "finite element" and human body model software packages. The researchers then "validated" their models by using them to reproduce experimental crash tests and compared the results from the computer model simulations and crash tests. They also compared the response of the MADYMO human body model to work with cadavers published by other researchers.[9]

---

[9] The researchers summarized their process in the abstract of their 2018 paper *Spinal Injury Analysis for Typical Snowboarding Backward Falls*: "A human facet-multibody model, which was calibrated against spinal flexion-extension responses and validated against vehicle-pedestrian impact and snowboarding backward fall, was used to reproduce typical snowboarding backward falls considering various initial conditions . . . . The SPI risks were quantified by normalizing the numerical spinal flexion-extension ROMs against the corresponding ROM thresholds from literature." (Doc. 102-3 at 48.)

In response to criticism that he could and should have performed a similar validation of his novel application of the LS-DYNA and MADYMO programs, Dr. Scher testified:

> What you're asking would be for me to take a cadaver and then take that and run it into the subject padding, which is more equivalent to the human body model. I think that would be difficult and I'm not sure ethically sound with the University of Washington here to do that for a forensic case.

(Doc. 119 at 110.)

Dr. Scher also conceded that he did not validate his model using "real[-]world crash test validation" with crash dummies (Doc. 85 at 15), but responded in his Declaration to Dr. Campbell's criticism by claiming he later "validated" the MADYMO human body model for blunt impacts to the thoracic spine region by using MADYMO and LS-DYNA to "model[] the impacts described by Forman et al.[,]" who conducted an experiment in which they "contacted the back of seated cadavers with a rigid impactor and reported thoracic spine extension angles[.]" (Doc. 102-3 at 18.) He averred that because "[t]he human body model's thoracic spine response in the simulated impacts matched well the thoracic spine extension results reported by Forman et al.[,] . . . the MADYMO human body model passes validation for impacts to the thoracic spine region." *Id.* This validation process was similar to that used by the French research team and cited by Plaintiff, as well to that employed in at least one research study conducted by Dr. Campbell. Dr. Scher averred that it is common practice for biomechanical engineers to rely on this type of validation.

Dr. Scher's validation based on the Forman et al. study does not constitute proper reply expert testimony or supplemental expert disclosure. He did not proffer any other admissible evidence showing that he personally validated the MADYMO human body model for thoracic spine impacts. After his report and rebuttal reports, he claimed to have sent an email dated January 12, 2023 to Dr. Pierre-Jean Arnoux which resulted in a response that was favorable. Defendants' counsel did not produce this email until the eve of the second part of the court's *Daubert* hearing and the court ruled that this late disclosure was improper supplementation of an expert witness's opinion.

Dr. Scher claimed he did not need to validate his model personally, because he merely combined two validated software programs[10] and because "[e]ssentially Dr. Wei has validated and shown that the human body model from MADYMO is reliable for looking at the response of the thoracic spine in snow sports accidents and contacts[,]" (Doc. 119 at 23), and "[t]he Wei group with Dr. Pierre-Jean Arnoux already validated the human body model, so I did not feel that I needed to redo that." *Id.* at 102.[11]

The French research study referenced by Dr. Scher, however, cautioned that it was specific to snowboarding backward falls:

> Current [spinal injury ("SPI")] analysis was only performed for snowboarding backward falls. . . . The experimental reproduction of snowboarding backward falls was the only study available for our model validation to investigate SPI in winter sports. As far as we knew, experimental reproductions of other winter-sports accidents were found nowhere else in literature. Model validation against other accident scenarios and SPI analysis for these conditions remain to be done in future works.

---

[10] Dr. Scher testified:

> Q. Dr. Scher, could you talk briefly about validation of the model here. You already talked about the work of Dr. Wei and MADYMO. What else did you do to validate this model here?
>
> A. Sure. Yeah. The way I see it, there's kind of like three elements, if you will. One is the human body model, which we've talked about quite a bit.
>
> The second would be the actual modeling environment itself. Does the computer package, LS-DYNA and MADYMO, calculate the physics properly, the physics and engineering? And I think the answer there is an easy yes. It's well accepted by everyone that I know of, frankly. It's been shown over and over to do the forward equations of motion. So these are essentially expanded versions of Newton's laws, and you take an initial condition and you integrate it forward in time. Very common, taught in undergrad and graduate schools, modeled appropriately with LS-DYNA and MADYMO. So that has been validated repeatedly. It's used by government agencies. It's used by companies, Ford, GM, Boeing. All of these companies use LS-DYNA and MADYMO. So that's the modeling package.

(Doc. 119 at 57-58.)

[11] Because Dr. Scher's citation to the Wei article's validation of the MADYMO model does not constitute proper reply expert testimony or supplemental expert disclosure, the court cannot not consider it in evaluating the reliability of Dr. Scher's computer modeling.

(Doc. 102-3 at 55.) Dr. Scher acknowledged that this statement advised against use of the model in other circumstances but concluded it did not impact his ability to rely on the French research team's validation of the MADYMO human body model for his work in this case.[12] He cited a Ph.D. thesis by Dr. Marine Dorsemaine, another member of the French research team, as an example of another researcher who has used the team's MADYMO validation work in research analyzing skier collisions with rigid objects,[13] but he did not claim the Dorsemaine thesis is a direct validation of his own model.

Dr. Scher's reliance on other researchers' validation work to validate a model he conceded is a "novel" application[14] calls into question the reliability of his opinions. He admitted that validation is the *sine qua non* of reliability. *See* Doc. 124 at 87 ("Q: . . . This is your platform, and you want to sell it to whoever or you want to write about it and you want to validate it. You would have done the testing, crash testing? A: That's true. If it was a unique platform and a unique dummy, absolutely."). He has not shown that his computer model has been "evaluated against the specific facts at issue in order to ensure that the model can reliably recreate the relevant accident at issue." *Valente*, 931 F. Supp. 2d at 424. He thus did not employ the degree of rigor in developing his computer model for his expert witness opinions that would be expected outside the courtroom. *See*

---

[12] Dr. Scher stated: "What they mean, and I know this from talking with Dr. Wei and Pierre-Jean Arnoux, is that if you want to use this model for, say, a skier fall and the fall kinematics before contacting, say, the snow, then you'd need an additional step. But in terms of the human body model being valid or contacting objects, no, it's valid. You don't need to do additional work." (Doc. 119 at 95.) This explanation is not included in Dr. Scher's reports.

[13] Dr. Scher testified that he is familiar with Dr. Dorsemaine's Ph.D. thesis because was "was actually on her Ph.D. committee, so [he] observed her defense and judged it." (Doc. 119 at 24.) Plaintiff argues this indicates Dr. Scher's bias.

[14] Although Dr. Scher testified that engineers frequently combine LS-DYNA and MADYMO programs, he acknowledges he has never previously combined these computer modeling programs to predict thoracic spine injury nor is he aware of anyone else who has done so. *See* Doc. 119 at 67 ("Q. And you've never published a peer-reviewed article or peer-reviewed research on using computer modeling to predict a thoracic spinal cord injury in a ski accident or any other kind of accident, correct? A. That's right. Just cervical and lumbar spine."); *id.* at 68 ("Q. And isn't it true, sir, that there does not exist to date any peer-reviewed articles or published studies on how much force is required upon someone's thoracic spine to cause a spinal cord injury at the T9 level of the thoracic spine? A. As you've asked it, no.").

Kumho Tire Co., 526 U.S. at 152 (noting that the court "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

d. Validation of the Computer Model Padding.

To accurately calculate the forces possible in a collision like Plaintiff's, Dr. Scher's model also needed to account for the properties of the padding attached to the snowmaking station. Although Defendants provided Dr. Scher with the padding involved in Plaintiff's collision (the "subject padding") and exemplar Gilman TS-2 padding (the "exemplar padding"), Dr. Scher used neither in his testing. Instead, he tested a piece of padding which he acquired at least five years ago from a ski resort in New Jersey and which he believed to be the same material as the exemplar padding. He testified that, in his experience, all Gilman TS-2 foam has the same properties after it is exposed to the elements for "a couple of years[.]" (Doc. 124 at 19.) Dr. Scher's experience with Gilman TS-2 foam, however, is not identified in his report. His choice of materials for testing reflected his desire to preserve the exemplar padding for demonstrative evidence at trial. Again, this is not the type of scientific rigor that could reasonably be expected from an expert in the field. *See Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997) (explaining that *Daubert* "requires the district judge to satisfy [her or] himself that the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting").

Dr. Scher validated the padding model by comparing it to the results of testing conducted by Carley Ward and Plaintiff's expert Mr. Penniman.[15] Although Dr. Scher

---

[15] Dr. Scher explained:

> Q. Dr. Scher, could you talk briefly about validation of the model here. You already talked about the work of Dr. Wei and MADYMO. What else did you do to validate this model here?
>
> . . .
>
> A. And then I used in this case standard engineering techniques. I took the material properties of Gilman foam, measurements of the subject pad, and put

asserted that his model of the padding reproduced the results of Ms. Ward's physical testing to an acceptable degree, [16] he criticized those same test results, stating: "There is insufficient information provided by Mr. Penniman for Ms. Ward's and the Gilman Corporation testing to figure out why specifically there is [a] ~54 percent increase in deceleration in Ms. Ward's testing." (Doc. 85-2 at 34.) Dr. Scher's decisions to validate his computer model by using a study about which he lacked information and which he criticized further call into question the reliability of his opinion.

e. Dr. Scher's Use of the Computer Model's Output Data to Calculate Thoracic Spine Injury Likelihood.

In addition to challenging the reliability of the model's outputs, Plaintiff argues that Dr. Scher employed a flawed methodology to calculate his Factor of Risk ratio, which predicts injury likelihood by comparing the model-generated impact loads with the average injury loads he calculated using data from published scientific literature. Pointing to Dr. Scher's acknowledgment that no peer-reviewed research has been published on the force required to cause thoracic spinal injuries like Plaintiff's, Plaintiff contends that Dr. Scher improperly scaled injury loads from the lumbar spine to the thoracic spine. Dr.

> them together into a padding system, and then I look at the response and compared it to Dr. Ward's testing that Mr. Penniman used. So instead of running my own tests with a Bla[c]k Tuffy or a crash test dummy, instead of arguing about those, I decided it was okay, because I had the data from Miss Ward's testing, to look at the velocity profiles, the acceleration profiles, are we talking about the same time durations, the pole shapes, all of that, and determined that those were appropriate. The one thing I did do was because my material testing on the foam is *quasi* static, it's a slow compression test, and we know these pads respond differently with higher speeds, I used a multiplier for stiffness, which is a common technique used in mechanical engineering. It's well accepted. Everyone uses it that I know of. And I scaled the material curve for *quasi* static to the dynamic curve that would match Ms. Ward's testing.

(Doc. 119 at 57-58.)

[16] As described in Dr. Scher report, Ms. Ward used a pickup truck to drive a "Black Tuffy" dummy, which consisted of molded blue rubber attached to a piece of plywood and "a single triaxial accelerometer," into a padded pole to calculate the dummy's deceleration upon impact. (Doc. 85-2 at 33.) Dr. Scher did not provide any details about the padding Ms. Ward used in her testing.

Scher notes Dr. Campbell's own use of scaling to develop child-specific injury criteria where only adult-specific data were available. He also cites two articles and a textbook that use scaling to compare the forces experienced by the lumbar and thoracic spines in his Declaration, but neither he nor Defendants provide the text of those articles. In deposition, Dr. Scher testified that he did not "know specific literature" regarding "the accuracy of scaling lumbar studies to thoracic spine injuries[.]" (Doc. 85 at 25) (internal quotation marks omitted).

Without more information regarding the basis for Dr. Scher's scaling technique, Defendants essentially ask the court to accept Dr. Scher's word that his possibly novel scaling is reliable. "The [c]ourt would not be performing its gatekeeping function, if it merely accepted, without any proof, a party's contention that its expert's opinion is reliable." *Valente*, 931 F. Supp. 2d at 422. Absent proof that Dr. Scher's scaling to calculate the injury loads of the thoracic spine is supported by peer-reviewed literature or generally accepted in the biomechanical engineering community, Dr. Scher's Factor of Risk calculations do not comport with Rule 702's reliability requirements. *See also Valente v. Textron, Inc.*, 559 F. App'x 11, 13 (2d Cir. 2014) (quoting *Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC,* 571 F.3d 206, 213-14 (2d Cir. 2009)) ("[I]t is well-settled that where, as here, a trial judge finds that assumptions underlying expert testimony 'are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison,' it has the discretion to exclude the testimony.").

For the foregoing reasons, Dr. Scher's computer modeling opinion is unreliable and inadmissible under Rule 702.

2. Whether Dr. Scher's Computer Modeling Opinion Is Admissible Under Fed. R. Evid. 403.

Even if the court had decided Dr. Scher's computer modeling was admissible under Rule 702, under Rule 403 the court must analyze whether the danger of unfair prejudice or confusing the issues substantially outweigh the probative value of Dr. Scher's computer model. Here, the probative value of Dr. Scher's novel application is not particularly robust in light of his lack of validation; however, its highly technical,

seemingly "scientific" presentation has a significant potential to confuse a jury. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595; *see also Nimely*, 414 F.3d at 397 (noting the "unique weight such [expert testimony] may have in a jury's deliberations"). In light of the novel and untested application and the significance of the opinion he seeks to offer to the jury, his computer model will not be helpful to the jury and has a substantial risk of misleading jurors into believing that a model created by a well-qualified engineer has more predictive certainty than Dr. Scher's own research has demonstrated.

Under Rule 403, the probative value of his opinions regarding computer modeling is substantially outweighed by the potential for juror confusion. In addition, there would be unfair prejudice to Plaintiff from an untested "scientific" analysis of his skiing speed where scant evidence of that speed is otherwise present in this case. Dr. Scher's computer modeling is inadmissible for this reason as well. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.").

For the foregoing reasons, Plaintiff's motion to exclude Dr. Scher's computer model and the opinions based on it is GRANTED.

E. Whether Dr. Scher's Opinion Regarding the Limitations of Ski Padding Systems Must Be Excluded.

Dr. Scher opined: "[a]ll ski area[] padding systems have limitations (for example, finite energy attenuation capabilities) and cannot prevent all injuries when contacted by a snowsport participant." (Doc. 85-2 at 39.) Based on his "experience testing padding used at ski areas and [on] data from scientific presentations at ski safety meetings," Dr. Scher stated that typical padding systems used at ski resorts could absorb "less than a few hundred joules" from an impact, leaving enough energy to produce significant injury. *Id.* at 31. According to Dr. Scher,

> at the speeds and energies associated with beginner skiers on trails of

> similar slopes to Lower Mountain Road, the Gilman TS-2 padding system would have produced a low likelihood for [Plaintiff]'s injuries; that is, the padding would be effective in preventing severe injury at contact from a person traveling at beginner skier speeds.

Id.

If Plaintiff had been traveling at eighteen miles per hour, Dr. Scher opined that Plaintiff would have struck the padding with more than 2,600 joules of kinetic energy. He concluded that because of the limits on the amount of energy that ski area padding can absorb, at this speed, "there would be sufficient energy remaining to produce significant injuries even if the padding was attached in a more rigid fashion to the subject padded HKD snowmaking equipment; alternate padding application or position would not have modulated the outcome of the subject accident." *Id.*

Defendants contend that because Plaintiff does not challenge the admissibility of Dr. Scher's opinions related to the limitations of ski trail padding systems, Plaintiff's motion "cannot preclude Dr. Scher from offering his unchallenged opinions at trial." (Doc. 102 at 15.) The court's gatekeeping role under Rule 702 is not confined to admissibility challenges raised by the parties. *See Daubert*, 509 U.S. at 588 ("[U]nder the Rules [of Evidence] the trial judge must ensure that *any and all* scientific testimony or evidence admitted is not only relevant, but reliable.") (emphasis supplied); *Kumho Tire Co.*, 526 U.S. at 147 (expanding *Daubert*'s "gatekeeping obligation" under Rule 702 to "all expert testimony"); *Fraser v. Wyeth, Inc.*, 992 F. Supp. 2d 68, 97 (D. Conn. 2014) (observing that "the Court had the authority to raise *Daubert* concerns *sua sponte*"); *see also United States v. Beigel*, 370 F.2d 751, 756 (2d Cir. 1967) (observing that there is a "duty of the federal courts to make an independent inquiry concerning the admissibility of evidence in federal cases").

Dr. Scher opined: "[i]n order for a padding system to reduce the likelihood of injury to Mr. Grajeda, it would have needed to reduce his energy significantly such that Mr. Grajeda's body attenuated less energy than needed for injury." (Doc. 85-2 at 31.) Based on his research finding that ski trail padding can attenuate less than several hundred joules of kinetic energy, he estimated that if Plaintiff was sliding at eighteen

miles per hour when he contacted the snowmaking gun, the padding would not have absorbed enough energy to prevent severe injury. A representative of the Gilman Corporation, however, has testified she is unaware of a single skier who has collided with properly placed Gilman padding and sustained serious injury. Dr. Scher does not attempt to discredit or explain this deposition testimony.

"If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Advisory Committee Notes, 2000 Amendments, Fed. R. Evid. 702. Because Dr. Scher's opinion regarding the energy attenuation limitations of Gilman TS-2 padding is drawn from his experience researching that topic, he may opine that at certain skiing speeds neither the Gilman TS-2 padding nor any other type of padding will prevent significant injuries. Plaintiff is free to cross-examine Dr. Scher with evidence to the contrary. Dr. Scher may not, however, opine that Plaintiff was skiing at a particular speed when the underlying facts do not support that contention and when his computer modeling is inadmissible and does not support it.

For the foregoing reasons, Plaintiff's motion to exclude Dr. Scher's opinions regarding padding limitations in preventing certain injuries is GRANTED IN PART and DENIED IN PART.

F. Whether Dr. Scher's Alternative Explanation for How Plaintiff Came to Rest Next to the Snowmaking Station Base Must Be Excluded.

In response to a question by Plaintiff's counsel during a deposition, Dr. Scher testified that Plaintiff could have come to rest next to the snowmaking gun pole despite having struck the padding:

> Q. So, explain for me, Dr. Scher, that if you're saying that [Plaintiff] could not have slid under the pad and struck the pole, how is it that he ended up . . . against the pole if he didn't slide under the padding?
>
> A. Sure. Absolutely. So, as [Plaintiff] contacts the padded pole – and we know from the dimensions of the pad, the gun, the approximate size of [Plaintiff], that there wouldn't be space for him to completely go under the pad. He interacts with the pad during his contact. During that contact,

> there's going to be a radio component toward the center of the HKD base pole, and there's going to be a tangential component. As he contacts and compresses the cylinder into a more oval shape, or at least one of them starts to wrap around it and created his injuries, that pad is also going to not just compress, but rotate around the pole. As the bottoms hit and the top ones come out, it can then – if the buckle breaks – fall on top of him, so he's actually under it at the end of the event. Alternatively, if – and I remember there was testimony that they had to lift the pad up and over him. Because of the contour of the snow, if he's against part of the pad part – part of the pole at the end, they lift it up and out, he can slide down next to the pole at the very end.

(Doc. 85-3 at 261-62.) Dr. Scher stated that this opinion was not part of his initial report and not based on his computer modeling work or other simulations or testing, but rather was "just physics. That's Newton's and Euler's laws. Yeah. That's classic Newton physics." *Id.* at 263.

Although Plaintiff challenges Dr. Scher's deposition testimony regarding how Plaintiff could have hit the padding but come to rest against the snowmaking gun's metal pole as speculative, he does not challenge the scientific validity of the laws of physics underpinning his opinion which are generally accepted in the scientific community. Plaintiff instead contends that when Dr. Campbell ran the model, it showed that the human body model "bounced off the padding" away from the pole after impact, contradicting Dr. Scher's testimony. (Doc. 85 at 22.)

Because the computer model was designed to simulate only the 100 to 120 milliseconds of impact, the model's results when it is run for a longer time do not contradict Dr. Scher's explanation. Nevertheless, "[a]n expert opinion requires some explanation as to how the expert came to his conclusion and what methodologies or evidence substantiate that conclusion." *Riegel v. Medtronic, Inc.*, 451 F.3d 104, 127 (2d Cir. 2006), *aff'd*, 552 U.S. 312 (2008). Dr. Scher did not explain how he applied Newton's and Euler's laws, and his testimony "essentially provided no explanation of how he had reached his conclusion[.]" *Id.* Lay jurors may be incapable of filling in the gaps and may have no in-depth understanding of the laws of physics he relies on. Dr. Scher's opinion is therefore unhelpful to the jury in determining the facts of this case. *See*

Fed. R. Evid. 702 (requiring an expert witness to "appl[y] the principles and methods reliably to the facts of the case" and requiring the court to find the resulting opinion will "help" the jury).

The court therefore GRANTS Plaintiff's motion to exclude Dr. Scher's alternative explanation for how Plaintiff could have struck the padding but come to rest next to the snowmaking gun pole.

G. Whether Dr. Scher's Rebuttal of Mr. Penniman's Opinions Must Be Excluded.

Dr. Scher offered a rebuttal opinion responding to the opinions of Plaintiff's expert Mr. Dick Penniman that a skier could not have been injured by hitting a properly installed Gilman TS-2 pad, that Defendants should have employed alternative padding or barriers to prevent skiers from colliding with the snowmaking gun, and that ASTM International has established safety criteria for ski area padding. He offers the following criticism:

> Mr. Penniman's logic and opinions regarding the condition and set up of the subject Gilman TS-2 padding system before and during the accident are complete speculation. Mr. Penniman conducted no analysis and his bases/logic are flawed for his conclusions regarding whether or not [Plaintiff] contacted the subject padding, the HKD snowmaking gun base (metal pole), or both.

(Doc. 85-2 at 39.) He further opined that to his knowledge as an active ASTM International member and the former chair and current vice-chair of the ASTM F27 committee which sets snow sport standards, he is unaware of any ASTM International or International Standards Organization snow sport standards governing ski area padding.

Dr. Scher criticized Mr. Penniman's conclusions regarding the circumstances of Plaintiff's collision as speculative and baseless. In an Entry Order dated March 23, 2023, this court significantly limited Mr. Penniman's testimony and excluded his opinion that Plaintiff's injuries were caused by striking a metal pole. Dr. Scher's rebuttal testimony responding to those excluded opinions is thus no longer relevant. *See* Fed. R. Evid. 702. Plaintiff's motion to exclude Dr. Scher's rebuttal opinion is therefore GRANTED.

CONCLUSION

For the foregoing reasons, Plaintiff's motion to exclude Defendants' expert Dr. Irving Scher (Doc. 85) is GRANTED IN PART and DENIED IN PART.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 27th day of July, 2023.

Christina Reiss, District Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

RICHARD GRAJEDA, Plaintiff, vs. VAIL RESORTS INC., et al. Defendants.	)	CIVIL ACTION NO. 2:20-cv-165

PLAINTIFF OPENING STATEMENT
Friday, February 2, 2024
Burlington, Vermont

BEFORE:

THE HONORABLE CHRISTINA C. REISS,
District Judge, and a Jury

APPEARANCES:

ANDREW J. SMILEY, ESQ., and GUY I. SMILEY, ESQ., and MICHAEL S. SOLOMON, ESQ., Smiley & Smiley, LLP, 122 East 42nd Street, 39th Floor, New York, NY 10168, Counsel for the Plaintiff

CRAIG R. MAY, ESQ., HABIB NASRULLAH, and EMILY P. LINEHAN, ESQ., Wheeler Trigg O'Donnell LLP, 370 Seventeenth Street, Suite 4500, Denver, CO 80202, Counsel for the Defendants

THOMAS P. AICHER, ESQ., Cleary, Shahi & Aicher, P.C., 110 Merchants Row, P. O. Box 6740, Rutland, VT 05702-6740, Counsel for the Defendants

Johanna Massé, RMR, CRR
Official Court Reporter
P. O. Box 5852
Burlington, VT 05402
802-951-8102 | 802transcripts@gmail.com

Friday, February 2, 2024

(The following was held in open court with the jury present at 9:21 AM.)

MR. ANDREW SMILEY: Thank you, your Honor. And may it please the Court. Judge Reiss.

Counsel.

Members of the jury, good morning.

THE JURORS: Good morning.

MR. ANDREW SMILEY: By way of reintroduction, my name is Andrew Smiley, and I, along with my colleagues, Guy Smiley and Michael Solomon, represent the plaintiff, Richard Grajeda, otherwise known as Ric, and that's Ric seated right there. And behind Ric are his parents, Carol and Richard Grajeda.

"I can't feel my legs." "I can't feel my legs." Those are the words that Richard Grajeda spoke on December 19th, 2019, while lying face down in the snow on a frigid, cold, clear day at Okemo Mountain up against a steel snowmaking pole with a heavy pad on top of him pinning him down. "I can't feel my legs."

You will learn, members of the jury, that on December 19th, 2019, Ric was with friends for what was meant to be an enjoyable ski vacation at Okemo Mountain in Ludlow, Vermont, a mountain that was owned and operated by Vail Resorts, Incorporated, the largest ski area owner and operator in the world. You will learn that on that day Ric Grajeda was a

beginner skier, and he was skiing down a trail at Okemo Mountain called Open Slope, a beginner trail that goes right down to the base lift at the base lodge of the mountain.

You will learn that he was skiing, practicing his wedge turns, when he slipped on a patch of ice. And when he slipped on the patch of ice, he was no longer skiing. He was lying flat on the ground. His skis came out from under him, his head facing uphill, his feet downhill, and he proceeded to slide on the ground, and he slammed into a metal pole after his body went into a depression or divot in the snow.

At that moment you will learn and you will hear from Ric - he's going to be our first witness to take the witness stand - his whole body reverberated; he felt the pain; he felt some pad sitting on top of him, something heavy. He didn't know what it was at that time. He tried to get up. He couldn't. "I can't feel my legs."

Members of the jury, this incident, this accident, occurred in the middle, the middle, of a beginner trail. Not on the sides. Not in the trees. You will learn that Ric was exactly where he was expected to be that day, where beginner skiers are supposed to go, doing what beginner skiers are supposed to do, and you will hear evidence in this trial about what he hit. He hit a solid steel pole.

You'll hear evidence in this case that refers to that as a pole, as pipe, or as a post, and you'll learn that what it is

is it is a permanently affixed, man-made obstacle that people at Okemo back in the early '90s, 25 years before this accident, decided to affix permanently in the middle of the trail to make snow and that that pole would be buried five or so feet into the ground and it would stand as the post that would go up and out, pretty high up, that a snowmaking device called an HKD snow gun would be attached to, and the water would run up to it, and that's what would make the snow on this trail. And you will learn that the pole that he hit is one of several that Okemo decided back in the early '90s to place in the middle of that slope to make snow on the trail. It is a pole. It is a solid pipe. It is a post that didn't have to be there.

You will learn, members of the jury, that before the early '90s, beginner skiers and any skiers, for that matter, could ski at Okemo Mountain on the Open Slope trail wide-open in front of them with no obstacles, with no poles, with nothing placed in their way, without a hazard, for decades. Okemo, you'll learn, opened in the late '50s. People skied there in the '60s, in the '70s, all the way up into the late '80s, and even into the 1990s without any risk of hitting a man-made obstacle placed in the middle of the trail, and they were able to make snow.

We don't dispute and we will not dispute at this trial that ski resorts need to make snow. With the warming conditions out there and to run a mountain and so skiers can

enjoy, everybody wants snow, but what we absolutely dispute and what the evidence will show is that they could have made snow without putting an obstacle, a hazard, in the middle of a beginner trail where the evidence will show they knew people were going to hit it. They knew it. And they left it there.

You will learn that before they placed these man-made obstacles on that trail at Okemo in the middle of the trail, they made snow all the time on Open Slope in a safe manner. You'll learn the way they did it is through the use of portable snow guns. Portable snow guns. Small little tripod-type devices that were connected to hoses that they would bring out onto the trail. They would close the trail so that there was no risk that the skiers would hit these removable, portable snowmaking guns. They'd close the trail; bring out the guns; blanket the trail with snow; remove the snowmaking guns; open up the trail; and skiers, beginners, intermediate skiers, experts, could all ski safely down Open Slope trail to the base lodge to either go back up and ski again or to go home safely without the risk of any obstacle, man-made, in their way. It just didn't need to be there. And on December 19, 2019, 25 years later, they still hadn't changed this antiquated obstacle in their way.

You will learn, members of the jury, that technology for snowmaking dramatically has improved in the last several decades and that for at least a decade before this tragic day

for Ric, there was not only the original option of the removable snowmaking guns that they could bring out onto the trail and then remove, but the technology had gotten so good to the point that they could put these huge towers up off on the sides of the trails, out of the way of skiers, with these big snowmaking guns, big fans that could blast snow out on the trail, that they could sit in their office at the snowmaking centers, turn them on, turn them off, make snow when skiers are on or off the mountain without any risk of a hazard in the middle of the trail. They actually had that technology on the mountain prior to Ric's accident, and they chose to use it in other places, but they didn't use it on a beginner trail where it could have prevented what's happened to Ric.

You will also learn that the portable snowmaking technology dramatically improved in the ski industry throughout the country where these fans -- you didn't have to put them even on the trailside. You will learn and you will see pictures and you will hear from the defendants' own ski safety expert that there are these portable, big blowing snowmaking fans with big knobby wheels on them that they can hook up to their equipment, their snowmaking plows or snowmobiles or anything else, they can drive them out onto the -- onto the trail, blast it and cover it with snow, and take them off the trail before letting skiers come down.

Members of the jury, there is no dispute in this case, no

dispute - in fact, the defendants' own witnesses will admit to you - that the poles were removable. They didn't have to be there. They will admit to you that the hazard that paralyzed Ric Grajeda didn't have to be there. They will admit to you that before the early '90s, when they put this hazard there, there was no chance of Ric being paralyzed while skiing on the Open Slope trail. There's no dispute it was a removable, man-made hazard that did not need to be there.

Now, you will learn that Vail Resorts, Incorporated, went on a shopping spree for mountains in Vermont back in 2018 and bought several ski areas, and Okemo was one of them. They purchased it in the fall of 2018, more than a year before Ric's accident, a full ski season and summer and off-season before Ric's accident, to assess the mountain, to bring their vast resources and knowledge as the biggest ski area owner and operator in the world, to make sure the mountain is safe, to assess whether there were unnecessary hazards on the trail, to decide how to prevent injury that was preventable, to make it safer for their paying customers like Ric, and the evidence will show that from the time they purchased Okemo in 2018 until the time of Ric's accident, they did nothing, nothing, with regard to safety assessment. They didn't look through the mountain and decide, "What can we do to make things safer? What resources can we bring to make it safer for skiers like Ric who are beginners who just want to show up and have a nice

time and safely learn how to ski?"

You're going to get to hear from somebody that we are going to call in our case that we've asked Vail to produce, a woman by the name of Dana Kent, and you will hear from Ms. Kent, and you will hear that at the time of Ric's accident, she was Vail's health and safety manager for the East Coast overseeing all of Vail's properties, including Okemo Mountain. You will hear Ms. Kent testify that, no, she didn't do any real safety assessment. She skied around the mountain, looked at it.

You'll learn that she was in charge of deciding what devices should be placed on the mountain to make it safer for skiers at the mountain. But when you hear her testimony, you'll hear that, not Vail's responsibility to take reasonable steps to prevent injuries to skiers. Ric didn't want to get paralyzed, he should have stayed home. Not their job.

They didn't upgrade the snowmaking stations. They didn't remove them. They didn't upgrade the technology. Nothing. They didn't focus at all on increasing safety for skiers.

Now, the heavy padding that Ric felt on him, that was a padding system called the Gilman Tower Shield or Gilman padding system. You're going to hear a lot about that, and I'm going to give you a preview of what I expect you'll hear about the Gilman padding system.

First of all, you'll learn that Okemo back in the early

'90s placed two large orders, in 1994 and in 1997, from the Gilman Corporation for padding equipment and padding components, and it was those 20-plus-year-old components that were still being used on December 19th, 2019, on the Open Slope trail where those poles were placed.

If you put a hazard in the way of skiers, you will learn that they need to take reasonable steps to prevent an injury that they think could happen to the skiers. And if you're going to put a solid steel pole in the way of a beginner skier, you better make sure that you're protecting these skiers from being catastrophically injured, striking that pole if it's unprotected.

Now, they had the ability to do that. If they were going to insist on putting a dangerous pole in the middle of the skiers' trail in their way, then they have to pad it. They have to take reasonable steps as the owner of the property to prevent injuries like what happened to Ric and others. And the way that this padding works -- you're going to hear testimony from the owner and president of the Gilman Corporation named Elizabeth Gilman. You're going to hear her testimony prior to court. We're going to read it for you. And you're going to hear how her system is meant to work. And we're not going to dispute that the padding, if installed properly, works. And here's what Okemo bought from Gilman and what should have been done to prevent Ric's accident.

So the padding system, you will learn, is based on what they call are cylinders, foam cylinders. These are big, six-foot-high, round cylinders that are hollow in the middle, and Okemo bought 50 plus of them back in the early '90s. Instead of buying one that was made as a set that Okemo -- that Gilman sold -- they could have bought prearranged cylinders with padding and straps and just placed them in front of snowmaking poles, but instead they bought 50-some odd cylinders, they bought rolls of blue padding blankets to put around the cylinders, and they made their own devices by adding those components together. And that's okay. They can do that if they do it properly.

And you'll learn that what should have been in place at the time of Ric's accident that would have prevented Ric from being paralyzed for the rest of his life and prevented us being here, there should have been two -- at least two -- and they could have used more if they chose to. You'll hear from Ms. Gilman that the more, the better, obviously. That what's supposed to happen is you put these two big hollow cylinders, foam cylinders, next to each other. They're connected with a bolt. They're black. You wrap them with a blue pad. They have straps on the back with buckles. You strap them really tightly and affix them to the pole. You install them flush on the ground, on the snow, with no gaps so that a skier can't slide under it, and if you do that, if you affix it tightly and

properly to the steel pole and if you put it flush on the ground without gaps for skiers to be flat down and slide under, this is how it's designed to work and we believe would have worked and should have worked.

These hollow cylinders absorb impact of a skier that slides into it, sort of like a balloon if you squeeze it. It squeezes in, and if you let go, it comes back out. So the purpose -- there's about 10 inches of hollow space in these cylinders, and what happens is the cylinders will absorb the impact, spring back out -- so they absorb the force of a skier. They spring back out and deflect the skier away from the steel pole, away from the object that it's designed to protect.

So if the padding is installed properly, there's the blue pad, not too thick, several inches, but it's made to hold everything together and make it so there's no gaps between the hollow cylinders, because if you don't want to have the blue pad and you just have the black cylinders, if you put two round cylinders next to each other, you maybe can get through them.

So they sell this blue padding they call roll stock that Okemo bought. They cut the size that they thought was necessary. They wrap it around these cylinders. And what's supposed to happen is if a skier loses control for any reason, on ice, catches a tip, is learning how to ski and falls, and there's this pole in the way, if the padding is there, the skier will hit the pad, the pad will absorb the impact and will

deflect them away and off they go, usually with minimal injury at best.

You will hear from Elizabeth Gilman a few critical things that I want to bring to your attention right now. First you will hear her say that she knows her equipment cold. She's not just the boss. She's gone into the rooms where they manufacture this product. She said, "I'm not going to ask anybody to do anything I wouldn't do." She learned how it's made. She's manufactured it. She's done her own squeezing and standing and driving cars on these pads. She knows her stuff cold, and you're going to hear that from her testimony. And she testified, and you will hear, that it is impossible - those are the words you'll hear, impossible - to hit a snowmaking pole, a steel pole, if her padding is properly installed flush to the ground, that you cannot get through it. It is impossible to get through that blue pad, get through the two hollow cylinders, and hit the pole. It's impossible.

The other important thing that you'll hear is that if it is installed properly, it deflects the skier away from the hazard. And if it was installed properly in this case, Ric would have slid into a protected pad, it would have absorbed his impact, would have deflected him off --

MR. MAY: Your Honor, I'm going to object. This is beyond the scope of any testimony we expect to hear, and Ms. Gilman is not an expert in this case.

THE COURT: All right. As long as it's a fair characterization of the testimony that will be presented, I'm going to allow it. It's up to the jury to weigh the evidence and decide the credibility of witnesses.

You may continue.

MR. ANDREW SMILEY: Thank you, your Honor.

It would deflect Ric off and away, and he would have slid off down the gentle rest of this slope and we wouldn't be here and he wouldn't be in that wheelchair.

The other thing you'll learn from the testimony of Elizabeth Gilman is that she's been selling these components and these pads for decades, since the '80s, thousand -- over a thousand of them. Sells them to ski resorts around the East Coast and out West. And not once before learning about Ric's case, not once, has she heard of anybody being seriously injured as a result of colliding with her padding system. It works. But the key is it has to be properly installed.

That's the key. Because if the padding is not properly affixed, if it's not flush with the snow, if there's a gap left on uneven snow -- you'll learn that on a ski slope, it's not just flat and smooth everywhere, especially -- you'll see photographs where these snowmaking stations are. It's the snowmaking tower; there's some hydrants around it. People go in that work at Okemo to adjust them. The snow levels are uneven. It's not consistently flat and smooth. And it's their

job to do what's necessary to make it flat and smooth, if they have to fill in more snow or dig it out or whatever it is.

But you will hear from Okemo's own witnesses -- two witnesses in particular I want to draw your attention to, a gentleman by the name of Chris Lancaster, who is the director of ski patrol at the time from Okemo, and from a gentleman named Kyle Kostura, whose job it was to install, inspect, and place the padding on the day of Ric's accident. And what we expect you will hear from both of them on this witness stand - again, we've asked the defendants to bring them here for us to question in the case - that, yes, it's common sense in the industry, it's common practice to make sure that the padding is flush and on the snow, because otherwise it's useless. It's known that skiers fall and slide, and if you're leaving a gap that they can slide under and hit the pole, it's like having no protection at all. Why bother having it there if you can directly hit a solid steel pole like what happened to Ric?

Not only will you hear from their own employees at Vail that they are required based on industry custom and practice to make sure the padding is installed properly and inspected regularly every day to make sure it's there to prevent something like what happened to Ric from happening, that Vail Resorts, Inc., when they bought Okemo over a year before the accident, implemented their own risk resource guidelines, padding guidelines. You're going to see those.

The defendants' own guidelines, you will see, says that when you're putting this padding in in front of a man-made obstacle, the padding needs to be properly affixed in front of the hazard, and it says in caps, you will see, capitalized, the only word on that sentence capitalized is the word "on." On. On. On the snow. Installed on the snow. Flush to the ground. That's what you're going to hear. And there's a reason that that's capitalized in their own guidelines, because they know the danger that would exist if it's not flush to the ground. It's like having no padding at all.

And that's what happened in this case, members of the jury. You will learn that as Ric went skiing down that day, the padding wasn't flush to the ground. It wasn't properly affixed to the pole. And unfortunately for Ric, there was nothing he could do. Once you hit ice -- everybody knows, especially in Vermont, in a car or otherwise, you hit ice; you're not in control at that moment. You'll learn Ric did not ski into the pole. He did not ski into the padding. He wasn't an out-of-control skier who was either messing around or doing something stupid and he skied into the padding. Before he was even near the padding, he slipped on ice, something that happens all the time.

And to be clear, we are not here to argue to you that slipping on ice is the fault of the defendants. He wasn't paralyzed or even injured from slipping on ice. But instead of

sliding down safely on this gentle beginner slope, he slid under the pad and smacked into this pole. That's what happened here. They didn't follow their own guidelines, and that's why he struck the pole, members of the jury.

And the worst part is that you will hear evidence that employees of Vail Resorts, Inc., and experts in the ski industry, they know that beginners are going to fall on beginner trails. They know this. You will hear testimony from the director, Chris Lancaster, yeah, people fall on a daily basis. You will hear they have thousands of skiers coming through that mountain on a busy ski weekend throughout the winter, coming right through the trail that Ric was on, and there are people falling left and right.

By their nature, by definition, beginner skiers don't have the same level of control as someone that's able to ski at the glen or ski the moguls or ski backcountry or ski in the trees and avoid things. They don't have that control. That's what they're learning. They're learning to stop. They're learning to turn. Why put a hazard in front of them? They knew that that could happen. That's why they have these guidelines to make sure that it's properly protected.

The evidence will show that they were negligent in two ways: first, by having this pole there to begin with. It was an unnecessary man-made hazard that had no business being in the middle of the beginner trail. That's number one.

Number two, the way they were also further negligent is that if you're going to put a potentially catastrophic injury-rendering, man-made obstacle in the middle, the middle, of a beginner trail where beginner skiers are known to fall and known would slide and hit it, you better make sure it is properly padded. You better make sure that your employees inspect that padding before skiers like Ric get on the mountain to go skiing down, and they failed to do that.

They failed to properly inspect the padding that day. They failed to make sure that it was properly affixed. They failed to make sure that there weren't any gaps. And that is negligence, members of the jury. And that's what we believe the evidence will overwhelmingly establish in this case, and that's what we intend to prove to you in this case.

When you hear from Ric, he's going to tell you what brought him to Okemo that day, and you're going to get to learn about him, learn about the young man he is. You'll learn that at the time of this accident four years and a month or so ago, he was 21 years old. He's 25 now. He's from Long Island, grew up in New York, but during the time of this incident, this accident, he was a college student at University of Alabama. I think we saw that there are some football fans. Roll Tide. And he was in his senior year of college, and this was winter break, December 19th, right before the Christmas and New Year holidays.

And a group of his friends from back home -- and you'll meet several of his friends. They're going to come here at trial. But he was with a group of six other friends. You're going to meet two of them, a gentleman by the named of David Villani, a gentleman by the name of Kyle Cotter. He was with both of them, and they're going to tell you about their observations that day, and several other friends that you'll hear about, that they all knew each other from summertime back in Long Island, they worked at a country club together as lifeguards for a summer job, and they became friends.

Several of the friends, David and some others, were very good skiers, and they were putting together a trip for the friends to get together and do some skiing in December and thought it would be fun to get together and go up to Okemo for a few days, rent an Airbnb near the mountain, see everyone on the break, and go have a nice time skiing. And they had planned on this, and then they extended the invitation to Ric even though he wasn't as advanced as them. And they extended it to Kyle Cotter, his friend who you'll meet, also a beginner skier, and they thought it would be fun for everybody to get together and go skiing.

Ric said, "Sure. Sounds like fun. I've never skied in Vermont. I've only skied a few times," you'll learn. He only skied a few times in his life at a couple mountains in New York when he was younger and in the Boy Scouts, but he had heard

Okemo had a reputation as a family-friendly, safe mountain, and his friends were going to go, and he thought it would be fun to go as well.

You'll learn that Ric before going to Okemo went to a local ski shop, rented some ski gear; that they all got up the day before, on December 18th, checked into the Airbnb; and that on the morning of December 19th, he arrived at Okemo with his friends when they opened around 9 o'clock in the morning, that he needed to get his helmet. He didn't have one, so he went to the rental area. He rented a helmet.

He needed to get a ticket, which these days are not really tickets as much as cards, the Epic Pass, which are cards, and you'll hear that at least one of his friends was an Epic Pass holder. That's why they chose Okemo. And they were able to assist him with getting a card for himself to ski that day.

You'll learn that he went to the window, paid his money for the card, got the card, was told you put it in your jacket pocket. There are now scanners in place, not the older days when you have the metal things that went around and you flipped the thing over and they scanned the sticker. You just stick it in your pocket. He put it in his pocket, and off he went with his friends to ski that day.

You'll learn that he only had one semester left at the University of Alabama. He was going to graduate that spring. That was the plan. He was working hard. He was trying to

improve his grades because his plan was to go to law school afterwards. He double-majored at the University of Alabama in political science, international politics, and he minored in Italian. And you'll hear from Ric what his dreams were and still are. He wanted to be an international lawyer. His goal was to maybe intern and work as a paralegal in a law firm, take the LSAT, become a lawyer, and go, I guess, hang out in Italy and practice law and use the skills he learned minoring in Italian.

But all that changed. That's never happening. That all changed. And you'll learn that that day he gets to the mountain; he gets with his friends; they take the base lift at Okemo up to the top of the beginner run of Open Slope. You may hear about another trail called Lower Mountain Road. That was also in the vicinity of Open Slope. Both beginner trails that are fed by that chairlift.

He got off and he skied down the first run, practicing his wedge turns. They call it pizza. That's the way beginners learn to start to ski before their skis become French fries, where they're parallel. They go from pizza to French fries, and he was working on that, working his way down the mountain. He did his first run, said, "Okay. That went well. Let's try it again."

You'll hear about the weather conditions. It was frigid. It was below zero that day, a cold Vermont December, clear blue

sky, but cold. The conditions were cold. Ice patches around. And you'll hear what happened on the fateful second run, just his second run that morning.

He gets to the top of the lift. He's with his friends. Everybody starts to go off. Some go to Lower Mountain Road. He's on Open Slope. He's skiing down, undisputedly in control, slowly. You're not going to hear from one witness at this trial that Ric was speeding or doing anything out of control. He's doing exactly what Vail Resorts, Inc., expected of beginner skiers on those trails. He wasn't off on the sides. He wasn't in the trees.

He's skiing down the middle of the trail. He sees a group of ski school kids. He says, "I better go around those." He starts to turn left. Skis fall out from under him on a patch of ice, and that's when he's face down, and he's sliding. And at that point he's not in control. You can't control yourself once you're down on the ground and sliding. He was trying to stop and hoping to stop and didn't expect to get stopped by a solid steel metal pole that was going to render him paraplegic. And when he slid under that pad and he hit that pole, members of the jury, his life was changed. "I can't feel my legs." And you'll learn what happened at that point.

You'll hear evidence that bystanders were right there and responded to the scene, that the pad was pinning him down. He was lying there helplessly unable to move, unable to move his

legs, with this heavy foam blue pad and cylinders on top of him that the bystanders removed the padding, that it had actually dislodged partially off the pole and was angled off, fallen off, on top of him. You'll learn that's not supposed to happen. You'll hear from Vail's own witnesses a properly installed pad is not supposed to fall off the pole. But it was leaning off. You'll learn that these bystanders took the padding off of him, put it off to the side and out of the way.

You'll learn that his friends, Dave Villani, Kyle Cotter, showed up. When Kyle Cotter -- he showed up very quickly. He was skiing right in the same area. He saw Ric under the pad up against the pole. He said, "Hang in there, buddy. I'm going to go get help." Then the bystanders came, removed the pad.

Then you're going to hear from David Villani, his other friend who's going to come here and testify, that when he got to the scene, he found Ric "wrapped around pipe." That is a quote. That is a statement that you will see that ski patrol took from David Villani, that he found his friend "wrapped around pipe."

You're going to hear a lot of evidence that will establish that Ric slid under the pad and hit the pole, and that's where he was found. That's what the evidence in this case will show. And you're going to hear it in several ways: First a statement from David Villani and his testimony. He's going to tell you what he observed.

You're going to hear from Kyle Cotter. He's going to tell you that he saw Ric under the pad against the pole.

You're going to hear from Vail Resorts, Inc.'s own ski patrollers who were first to respond to the scene. A ski patrol by the name of Mike Morabito, who we've also asked the defense to produce in our case who we get to question in front of you. You will hear that Mike Morabito said that he was the first responder from ski patrol - he arrived on the scene. The padding was already removed and off to the side. He didn't look at it - and that he saw Ric awkwardly bent up around the pole. And he was concerned based on what he saw. He was concerned that Ric had likely sustained some spinal injury based on the awkward way he was angled up against the pole. That's how ski patrol found Ric that day.

You'll hear that another ski patroller, a woman by the name of Chelsey Manley, who ended up becoming the lead investigator to investigate, and I put that in quotes because we're going to talk about that, to investigate what happened in this accident. The lead investigator ski patroller, Chelsey Manley, showed up, and she's going to tell you, "Yeah, when I showed up, Ric was up against the pole."

You're going to see medical records from the ambulance that was waiting at the base of the trail that ski patrol had to try and stabilize Ric. They were very concerned about him having a spinal injury. They brought him down in a toboggan to

a waiting ambulance. That ambulance brought Ric to a helicopter, to a medical chopper, and took him off to the hospital. That's how his day ended. That's how Ric's vacation and time at Okemo ended. That's how he left the mountain, in a helicopter, paralyzed.

And you will hear, you will see in evidence that we are going to put into evidence today from Ludlow's ambulance that was there to receive Ric from ski patrol, escorted by Chelsey Manley, the ski patrol lead investigator, and you will see in the ambulance records where it states that ski patrol reported to the EMS technicians that Ric slid under a pad and was found up against and he hit a pole.

So Ric leaves the mountain in a helicopter, and then what happens back at Okemo? More importantly, what didn't happen back at Okemo? You will learn, members of the jury, that Vail Resorts had guidelines. You're going to see those guidelines. We're going to put them up on your monitors for you to read their words, their own words of what to do when something like this happens.

You will learn that they are supposed to perform an investigation when a "major incident" occurs. That they knew that Ric was likely paralyzed in this accident, that he had spinal injuries, that a beginner 21-year-old skier left a beginner trail that day paralyzed. They're supposed to jump into action and investigate: How could this happen? What can

we do to prevent this from happening again in the future?

Well, the first thing you'll learn is that Dana Kent, who was the manager of health and safety for Vail Resorts, was there that day. And what she did is she typed up an e-mail within a few hours that day of the accident, which happened around 10:00, a little after 10:00 in the morning, and she sent an e-mail out, major incident report, which she's required to do by the rules, by their own rules, by their guidelines you'll see, and it went to the CEO of Vail Resorts; it went to their law department, their in-house law department to their general counsel, their top lawyer; it went to people at Okemo, their management, including a gentleman who's sitting in here in court today with the team, Vail's team over there, by the name of Eb Kinney, who was some type of manager of snow operations of Okemo. This e-mail blast went out to everybody from Dana Kent, and you're going to see the e-mail, and you're going to see what it says.

It's going to say a beginner skier on a beginner trail hit a man-made HKD snow gun post and they suspect spinal and rib injuries. That's the e-mail that went out to notify everybody, This is what happened at our mountain today, Vail. And you know what you'll hear, members of the jury? To date not one response to that e-mail. Eb Kinney didn't respond. Vail Resorts' CEO didn't respond. No response. Because they didn't care. They didn't care that a beginner skier was paralyzed at

their mountain.

You will hear it's their position that it's not their job to prevent injury. "If you don't want to get paralyzed, don't ski at a Vail Resorts mountain." That's not me saying that. You will hear that from the person from Vail in charge of the health and safety of their guests at the time of Ric's accident.

What else were they supposed to do, according to their guidelines, members of the jury? Well, the first thing, and you'll see in their own guidelines, is they have to preserve the scene of what happened here. They have to cordon it off. They have to document: Was there padding? What were the snow conditions? What happened here? How did this happen? How did a young man leave our mountain paralyzed in a helicopter? What happened?

They didn't cordon off the area. Not only did they not cordon off the area, they left it. They left it exposed for the rest of the day in the holiday season with skiers skiing by for five hours before Chelsey Manley got her investigation kit together with a camera and went back at the end of the day after 3:00 PM and attempted to take some photographs. By then the scene was -- no idea if it was the same, if it was disrupted, or what happened.

And not only did they not cordon off the area, they didn't preserve any of the components involved in the accident. They

knew -- they sent an e-mail to their legal department: This is what happened. And they still didn't preserve this evidence.

Not only that, you will see, again, in Vail's guidelines in written form that Vail Resorts, Inc., had in place a method for what is supposed to be done as far as an investigation when something as horrible and horrific as what happened to Ric happens under their watch. They're supposed to preserve evidence. You'll hear from Dana Kent, "Yeah, I had a full expectation that they would have preserved the evidence. I just trained Okemo staff a year ago on how we do investigations. They all have the guidebook. On a major incident, they're supposed to photograph it and you're supposed to preserve." Preserve the blue padding. Preserve the cylinders. Preserve the straps. Preserve the buckles. Nope. None of it was preserved. None of it.

Not only was it not preserved, there were no photographs taken at the time of the accident, no photographs of Ric, no photographs of the snow conditions, no photographs of the depression that he went into, no photographs of the padding as it was at the time of the accident, no photographs of the back to see why did this thing fall off, no photographs of the straps, no photographs of the buckle. Vail's own employee will tell you they were supposed to, they should have preserved it, they should have cordoned off the scene, and they didn't do it at all. Now, whether it was purposeful or incompetent, that's

up for you, members of the jury, to decide, but there's no dispute it should have been done.

And why should it have been done? Because Vail Resorts, Inc.'s own guidelines say that we need to investigate a major incident like what happened to Ric to find out what the contributing factors were. Why did this happen? Was it Ric's fault? Was it Vail's fault? How could this happen? And why would they want to do that? Why would you hope they would do that and look into the contributing factors? You'll see it says in their own guidelines: to prevent this from happening to someone else. And that makes sense. We don't want this to happen to someone else. That's what a ski resort operator who cares about their customers would want to do.

But you'll see that's not what Vail Resorts did. They did not look into the contributing factors of what caused this accident. And you'll see when I question Dana Kent why not. I expect you'll hear a response that, "Hey, like I say, if you don't want to get injured -- our investigation shows he skied into a pole. You're not supposed to ski into a pole. You're not supposed to ski into a pad. You've got to avoid that, Ric. So we -- there's nothing more we can do. That's it. That's it."

Members of the jury, there was no follow-up here. You're going to see the investigation report by Chelsey Manley. And she's going to get on the stand, hopefully - we've asked her to

be produced - and we're going to ask her questions, and you're going to see that the investigation report was filled with errors and misinformation, errors and misinformation that we, Ric's lawyers, learned of well after the accident that Vail didn't even know about.

For example, you're going to see a nice staged photograph in her report, and I don't say that lightly, a staged photograph that was taken at an unknown time on the mountain sometime after Ric's accident that shows some set of blue pad with cylinders placed up against the snowmaking station involved in Ric's accident with a nice little red sign that says "POR" up against the pad to indicate point of rest. It says in the report you'll see that this photograph was taken showing the padding involved, it was taken right after Ric's accident at 10:40 AM, that this is it.

But you'll learn that nobody knows who took the photograph. The defense admits they don't know who took the photograph. They don't even know who put the pad back up onto the pole. All we know is that after this accident happened, these bystanders took the padding off and put it to the side. But in the investigation report you're going to see a photograph of a padding with hollow cylinders -- one with hollow cylinders in front of the pole that's meant to somehow represent that, A, that was the blue pad involved in Ric's accident; B, those are the hollow cylinders involved in the

accident; and C, those were the snow conditions involved in the accident and that's the orientation of the pad and how it looked.

But not one witness is going to come in here, members of the jury, and tell you, "Oh, yeah, that's the exact padding involved in Ric's accident. I know it because I saw it before his accident that day and that's -- I can confirm that's it. That's the position it was in. This is when it was put back up." Nope. Not one witness.

You're going to see a lot of photographs of blue padding and hollow cylinders. And I'm giving you this heads-up because I anticipate the defense is going to say, "This was the padding involved in Ric's accident." The lawyers for Vail may say that. But you, members of the jury, keep your eye out in this trial for one witness who can confidently tell you, "Yeah, that's the padding. I know it's the padding. I saw it installed that way before Ric's accident." Not one witness.

Not only was there a staged photograph that we learned that no one knows who took it, who put the padding up, what time it was taken, but we have a concession from them, they admit, that that 10:40 time, it could not have been at 10:40 because the camera used from their investigation kit up at the ski patrol hut, there's -- it would be impossible that from the time of Ric's accident for a ski patroller to get down the mountain, up there, get the kit, take the photograph.

Impossible. So they acknowledge, yeah, that's wrong. We don't know who took that photo. We don't know who put up the pads.

What's worse, members of the jury, is that you'll see other photographs in the investigation report that have hollow cylinders with a different blue pad in front of it, and you'll be able to see it's a different one because the markings on the outside of the padding are obviously different than the first staged photograph. This is a different set of pads. And Chelsey Manley, when I questioned her before trial, she thought they were all the same ones. "No, I thought those were the pads also involved in the accident, and that's what I put in my report. I now know they're different pads, but I thought they were all the same."

We, you, members of the jury, are never going to know. We're never going to know what actual cylinders, what actual padding, what actual buckles and straps there were involved in this accident. We're going to see lots of pictures, but not one witness will be able to tell you because they didn't preserve it; they didn't photograph it; they didn't document it as they were required to do.

You're going to learn something else. You're going to learn that we determined once my firm got involved in the case that there was a broken buckle found after the happening of this accident. Kyle Kostura will tell you, the guy who was in charge of making sure it was properly installed and in place,

that he doesn't -- he's not sure but someone told him, "Hey, there's a broken buckle. We've got to make sure we replace it."

What happened to the broken buckle? We'll never know. You're not going to see it. You're not even going to see a photograph of it, because you know what happened to the broken buckle? It got thrown away. Incompetence, purposeful, you'll decide. But certainly you'll learn it was a departure not to preserve a broken buckle. Do we know if that's why the padding fell off, because it wasn't affixed properly? We'll never know.

Not only did they dispose of important evidence, but you'll learn, members of the jury, that they actually altered evidence in this case. And I don't say that lightly.

In the investigation report, there is a set of pads photographed by Chelsey Manley that in these what are supposed to be hollow cylinders, there are what are called spacers. You're going to see a picture and you're going to see what it is, and I'm going to try and describe it for you. A spacer is kind of like a doughnut. It's made of hard foam. It's a circle like a disk. It's got a thickness to it, it's firm, and it has a hole in the center.

And you're going to learn that Gilman Corporation sold a product called a post guard. And the post guard was a tight foam, much smaller, a whole different unit than what we've been

talking about as far as the cylinders and the padding. It was meant to slide over a pole just to leave that there, and it had a spacer in the middle, and it was firm. It wasn't a compression zone. It wasn't meant for that. It was meant to just be a firm pad that you slide over a thinner, smaller pole.

Now, when the lawyers, all of us, questioned -- and by "all of us," Vail's lawyers as well. When we questioned Elizabeth Gilman about her padding and about a lot of the things you're going to hear at this trial, after the day of questioning, she reached out to the lawyers: "Oh, my goodness, I had to reach out to you." You're going to hear this. "I saw something in the investigation report when I was looking back through the photos that I'm very concerned about."

You will hear from her testimony that she identified that there were spacers placed in the hollow cylinders that you can see in the photographs from their investigative report, spacers at the top of two of the hollow cylinders with a blue pad in front of it in front of a snowmaking pole that Vail Resorts, Inc., indicated was the actual padding involved in this accident. Again, we don't know, but that's what the ski incident report shows and says. And Elizabeth Gilman said, "I need to go back on the record and explain why I'm concerned."

So we set a future date for my firm and Vail's lawyers to question Ms. Gilman about her concerns. And you will learn that the day before her deposition, she received and my firm

received photographs, more photographs, of what they believe were the padding involved -- the defendants believe were the padding involved in this incident, two sets of pads, two sets of cylinders. And guess what. In those photographs taken the day before her deposition, there were no spacers in those cylinders. They were gone.

The spacers that you will read that she saw in the investigation report, there's no doubt about what they were. I'm sure -- I know you're going to, I anticipate, hear testimony that "Maybe that was snow in there; maybe that was a shadow. We don't put spacers in there." You'll hear her say ten different ways in her testimony, "Those are my spacers. I know it. I make them. I see them. No doubt about it. And they shouldn't be there."

And the only way that they could end up in those cylinders in that photograph is that employees of Vail at some point or Okemo went to those post guards that they bought 20 years before, took the spacers out -- they have one in the top and one in the bottom, so they either took one in the top and one in the bottom out of a separate product that they sell and purposely put them inside these hollow cylinders for some reason or they took two from different ones, but she says, "Either way," you're going to hear her testimony, "these are spacers from a different product that someone at that mountain took out of my product" that they bought 20-some odd years ago

"and put it into these."

And by doing that, it rendered the whole purpose useless, because when you put a fixed solid spacer inside these hollow cylinders, it won't compress. That's the whole purpose. It's got to compress, absorb, and deflect, and if you hit something that has something solid and firm in it, it's not going to have the ability and it's not designed for that.

Ms. Gilman went so far as to say, "I would not ski on that trail at Okemo if I knew that that's how they used my product and that's how they installed it." That is not the way it's meant to be used. That is not the way it's meant to be placed. But she will tell you that's the setup she saw in Vail Resorts, Incorporated's investigative report about the happening of Ric's accident, a dangerous, improper use of the product.

What's worse, members of the jury, is that when she was shown these photographs taken by the defendants one day before her second questioning, she said, "Yeah, I don't see the spacers, but I'll tell you what I do see. I see crowbar marks. I see" -- "or screwdriver marks, gouges inside these cylinders, and I know what those are, because I know my foam. It doesn't get gouges in it. And I've done it before. We've tested it out. We've put spacers in. We've taken things out, and I can tell you without a doubt," you will hear from her testimony, "that either those hollow cylinders I'm looking at are completely different cylinders than the ones in their

investigative report," because the ones in the report had spacers and these don't, "or they're the same cylinders and someone went in and pried out the spacers before taking these photographs," that between the time of the investigative report photographs on December 21st, two days after Ric's accident, until the time several years later when these photographs arrived, somebody at Okemo went in there and pried out the spacers. That's what you will hear. That's what they did in their investigation, members of the jury.

So what are the consequences of their negligence? What are the consequences of what happens when they put a hazard in the way of a beginner skier, fail to properly pad it, fail to investigate, fail to look into the contributing factors?

By the way, one thing you won't see in that investigation report is that Ric did anything wrong. He's not blamed in that report. They don't say skier error. They don't say skier fault. They don't put any blame on Ric other than perhaps an expert, outside paid consultant that Vail may bring in. Not one ski patroller, not one witness, not one of Ric's friends, not one bystander is going to come into that courtroom and tell you Ric did anything wrong that day, did anything unexpected or unanticipated that any other beginner skier would do. He did nothing wrong.

Ric was taken by the helicopter. He's going to tell you very shortly, probably later today, about what it was like

lying in the back of that ambulance in pain, unable to move, alone, without his friends or family. His clothes were taken off on this frigid day so they could try and render aid to him. He was transported onto this helicopter. He was flown to New Hampshire, to Dartmouth-Hitchcock Trauma Center, where he was evaluated. You're going to see those records. We're putting them into evidence this afternoon. You'll see all his medical records. They're this big.

You'll see that they did an intake. They reported that he slipped on ice, slid into a pole, and that's when Ric learned the extent of his injuries. You're going to hear about those injuries.

He broke his back on the impact. Fractured his spine in the mid level of his back, the thoracic level. We have a specialist in spinal rehabilitation, a physician, who's going to come here early next week and explain and show you diagrams about Ric's injuries and his treatment. The thoracic spine, the middle of his back, burst. It's called a burst fracture. Shattered. Spinal cord severed. Three broken ribs on his left side. A tear of his aorta. Two lungs with blood and air in them.

Ric learned while at the hospital, the doctor came in and told him, "Sorry, Ric. You're never going to walk again." He'll tell you about that. He'll tell you what it's like to be 21 years old living your best life, having a future ahead of

you, being told, "Sorry, kid. You're never going to walk again."

You're going to hear about his stay in the hospital, about how he was scared, about how his family were hours away that got that fateful call. You'll hear his mom, Carol, testify to getting that call a parent never wants to get: "You've got to get up here. Your son, he's paralyzed. He's in the hospital. He had a horrible accident." You'll hear about that.

You'll hear about what was going through Ric's mind, how he was feeling in this hospital alone, scared, worried. You'll hear that he was told, "Ric, you also have to go in for surgery. We've got to do some things here. You've got blood and air in your lungs. We have to do procedures where we have to cut the sides of your chest. We're going to have to insert tubes directly into your lungs to drain out the blood and the air so that you can breathe properly. Ric, we're going to have to bring you in for a major spinal stabilization surgery because your spine is broken and it's dangerous." You can't be around with a broken spine.

You'll learn about an extensive surgery. We're going to show you imagery. We're going to show you the records, the scans of what is currently in Ric's spine, what they had to do. He had to go under general anesthesia. They had to make incisions into his back. They had to insert screw after screw after screw and rods into his spine in an attempt to fix and

hold his spine together, permanent hardware that he has in his back today, permanent hardware that you will hear may have to come out. We don't know what's going to happen as he gets older, how it's going to hold up.

You will learn that Ric spent two weeks in the hospital. Christmas, a treasured holiday that he always loved and enjoyed with his family, he was in the hospital. You'll learn that New Year's Eve, the day of New Year's Eve, he wasn't celebrating the turning of 2020. He was getting loaded into an ambulance to take him from Dartmouth-Hitchcock Hospital to a place called Kessler Rehabilitation Center, where he would then face the next two months as an inpatient in that hospital trying to deal with his injuries, trying to learn how to cope, trying to face what life is going to be like for the rest of his life in a wheelchair.

You're going to see the thousands and thousands of pages of medical records that we're going to put into evidence from Dartmouth-Hitchcock, from Kessler Rehabilitation Center, all the pain medication he had to take, all of his complaints of pain, all of the work he's done since then, still till now, to try and walk again, to try and be strong, to try and face the future. You're going to hear all the efforts Ric has made and continues to make.

Once he was discharged from rehabilitation therapy, he continued to go for physical therapy and occupational therapy.

He's still doing that today. As of right now, you will learn that every single week he spends three days of the week working to get better and to stay strong in therapy. He drives two and a half hours to a facility that helps him get up, put on braces, try and move his body, try and get stronger, Tuesdays, Thursdays, Saturdays. That's his routine. He's missing it this week to be here. He's trying. He's doing what he can. He's a fighter.

You will learn that he went for mental health therapy. He's gone to a lot of therapists in trying to find one that can get through to him, that can help him. He's having a hard time. You'll see records. You'll hear him say he's felt like he should have died on that mountain and maybe it would be easier than being in a wheelchair the rest of his life. Maybe it would be less of a burden on his family and on his friends and on his parents if he was dead. Horrible thing that Ric as a young 21-year-old, now 25 -- he'll tell you about his battles with that, and he's working on it.

You're going to hear what his daily life is like, something that none of us would ever hope to have to experience day to day. He's going to tell you that simple daily tasks, like coming into this courthouse, going up two steps to a witness chair, simple daily tasks in life, how challenging it is when you're a paraplegic. Taking care of himself, going to the bathroom.

We all have to pee during the day, during the night. For Ric, if he wants to get out of bed in the middle of the night and pee, he's got to get his wheelchair, he's got to get himself into it, he has to wheel himself into a bathroom, and he has to catheterize himself. Anytime he wants to release his bladder, he has to take a plastic tube, insert it in his penis, into his bladder, to release it. Every day, multiple times, middle of the night, the rest of his life.

Simple things like pooping. He can't do that. He doesn't have the control to do that. You'll learn he has to put gloves on and put special suppositories and use his fingers to help remove the poop every time. You'll hear about incontinence that happens when you're paraplegic, how he wets himself, how he poops himself, how demeaning it is to have to ask his mother and father to help clean him.

He's going to talk about his erectile dysfunction that was impacted as a result of these injuries, a young man hoping to date, hoping to find a spouse, hoping to have some fun sexually as young, healthy, single people should. That was taken away from him. He'll tell you about how that feels. He's a handsome young man. Ric didn't have a lack of dates when he was in college. He had a girlfriend who he adored. You'll learn what happened with that girlfriend, that not only was his Christmas in 2019 ruined but a year later in 2020, the day before Christmas his girlfriend dumped him. She couldn't

handle dating a paraplegic.

Ric will tell you how he's scared. He's scared if he's ever going to find someone willing to marry into this, how he's going to date somebody, how dating life has changed, even on the apps. He can't just put a photograph. He's got to be out there. He's got to let them know about his limitations. This is not a man who's already established with a family and children and support. He was a young man on the cusp of his future. Ric will tell you about that.

You'll see a video - it's called a day-in-the-life video - that Ric will narrate and show you that you'll be able to watch later today where a camera crew followed Ric around so that you, members of the jury, could get an idea of what it's like of how simple tasks like living at home with a narrow hallway and a set of stairs to get down to the kitchen and another set of stairs to get down to the garage to get out of the house, he's got to work his way in a wheelchair; he's got to get into a special chair at the top of each set of stairs, go down it; get into another chair, go down it.

He's going to talk about how despite what many people hear about how the world is supposed to be ADA compatible, it's just not true. It's not true. His friends' homes don't have ramps. Steps up to the witness chair doesn't have a ramp. Life is not friendly to a paralyzed person, and he's going to share that with you.

You will hear about the financial consequences that comes with being paralyzed at a young age. The defendants do not dispute the medical bills to date in this case. $664,000 of medical bills to date, and Ric's still got another 50 plus years to go, members of the jury. That's just the last three and a half years.

You will hear from experts. We will bring in a life care planner who will go through with you a plan for the future of his life and what he's going to need, what those costs are going to be. They're tremendous. They're substantial. For the next 50 years, he's going to need doctors' visits. He's going to need medication. He's going to need therapy, physical and mental health. He's going to need accommodations. He's going to need to get a vehicle so that he can have some independence. It's going to have to be modified. If he hopes to get a home on his own, he'll have to modify that. If he wants to enter into studies to try and walk again or get some special devices, this stuff isn't cheap. You're going to hear about this. You're going to hear about the extreme burden, financial burden, that was caused solely because of the negligence of Vail Resorts, Incorporated.

You'll hear how his ability to earn an income has been impacted. You will hear testimony from Dr. Jeffrey Perry. He's a top spinal rehabilitation doctor at NYU Langone Spinal Institute. He's going to tell you that his job is working with

paralyzed people trying to help them, trying to help them get employment. But it's hard. It's hard, because Ric can't work a full-time job. Ric needs to take breaks. You'll see it throughout this trial. He needs to take breaks. He needs to lie flat on his stomach. His legs uncontrollably spasm on him. He needs to take long bathroom breaks. Just something as simple as to go and poop, when he takes that suppository, he just has to sit on the toilet for a half an hour until it happens and wait. He's exhausted. He's tired. It's a struggle.

You'll learn that his future ability to work full time, in Dr. Perry's opinion, of other people with similar injuries, it's reduced by usually half. Maybe they can work real long days while they're younger, but as they get older, less days. Maybe it's part time. But there's no doubt about it, you'll hear from the experts, his ability to earn has been dramatically decreased. This isn't a situation where an injury, a paralyzing injury, happens to somebody who already was established, who already had a job, who was already getting paid and they could go back to their desk job, albeit with some accommodations.

It is so hard, you'll learn, to enter the workforce for any young person, disabled or not. Young people live at home, young people trying to get good jobs. It is not a friendly world out there to get a job. And if Ric's got to compete with

his limitations of what he can tell a company that he needs, what accommodations against an able-bodied person who says, "I don't need any accommodations. I can work full time," well, life isn't fair, and that's, unfortunately, what Ric has ahead of him.

You'll hear from him. He's going to try. He's a fighter. He believes. He's studying for the LSAT. He still wants to get to law school. He's still hopeful he'll get there, and we all hope he does. It's going to be a tough road. And even if he does get there, he's not going to be able to do it full time and easily. That's for sure.

Members of the jury, this case was just simply preventable. And what are the defendants going to have to say for themselves? What do we anticipate the defense to all of this will be? Well, first of all, we don't expect there to be any accountability. Not even a small iota. Not one admission of "maybe we could have done things better." No accountability or acknowledgment from Vail Resorts. No one even responded to this investigation. Two days after the accident, they filed their report, put it in the cabinet, and it was done. That's it. No follow-up. No steps taken. No discussions had.

They're going to come before you, we anticipate, and claim it's an inherent risk, members of the jury. "You know what? If you don't want to get injured, stay home. If you're a beginner skier, if you want to take your grandchildren skiing,

if you want to take your elderly parents or grandparents, if you all want to go out and have a nice day on the mountain, if you don't want to get paralyzed, if you don't want to hit a steel pole, stay home. Don't ski at our resorts. There's nothing we can do to prevent injury. The only thing we can do is tell you to stay home. Everything's an inherent risk when you go skiing. It's a dangerous sport."

You're going to hear about what is anticipated and inherent risk. The judge is going to instruct you -- Judge Reiss will instruct you on the law. There is a law here in Vermont called the sports injury statute that says if you're injured as a result of the inherent risk of a sport, you can't sue for it. And we have no problem with that. There are inherent risks in skiing. There was discussion about it during jury selection. Of course you can fall while skiing and get hurt and injure your knee and tear an ACL. Of course you can slip and fall on ice. Of course if you go off tree skiing, you can hit a tree. Of course fog can happen. Of course there's natural -- there's stumps; there's uneven terrain, skiers colliding with each other, changing weather conditions, snow surfaces that change, rain, snow, ice.

You will learn and the judge will instruct you that an inherent risk is something that is necessary, has to be there, and it can't reasonably be removed. You can't change ice. You can't change -- there's nothing Vail could do to prevent skiers

from skiing into each other. There's nothing Vail could do to prevent Ric from slipping on ice. We're not saying that was negligent. Of course he knew he could slip on ice. But he wasn't injured when he slipped on ice. He was injured because instead of sliding off on his way and being deflected, he slammed into a metal pole that they put in his way and didn't protect. That's not an inherent risk. It is not an inherent risk if that risk can be reasonably removed.

Vail Resorts, Inc., had plenty of resources available to them to reasonably get rid of those poles, make snow, either by trailside equipment or portable equipment that they could close the trail and make it, remove the equipment after the snow is made, and open up the trail. But instead of doing that, Vail Resorts, Inc., we anticipate in just a few moments is going to get up here and say, "Things happen, members of the jury. He went skiing. It happens. You get hurt. You slide into stuff. You hit stuff." They don't get some blanket immunity just because snowmaking is needed at a resort.

THE COURT: So make sure this is an opening statement. And how much more time do you have?

MR. ANDREW SMILEY: Just a few minutes, your Honor.

THE COURT: All right.

MR. ANDREW SMILEY: Thank you.

Again, there's no dispute that before they put these poles in, there was no risk of injury. It wasn't an inherent risk

before they put the pole in. It only became a hazard and a risk after they put a pole there and after they failed to properly protect it.

We also expect, members of the jury, that another way that they're going to attempt to shift away from their accountability is to blame Ric for smoking cannabis. You will learn that early that morning, about 7:00 AM, he got up at the house with one of his friends, Tom Breitenstein, to go shovel out the snow before having breakfast and getting ready to ski, and he -- and Tom asked him, "Do you want to smoke a little bit of cannabis before we go out and shovel the snow?" He said, "Sure." They did. They shoveled the snow. Within an hour the effects wore off, they went back into the house, they had breakfast, they got their ski gear on, they went to the mountain, and they went on with their day. The effects had worn off long before they even left the house that morning.

But while he's lying there paralyzed, ski patrol asked him what happened, and he said, "I slipped on ice and slid into a pole." And then they asked him, and you'll see on a card - it's part of their form - "Did you have any drugs or alcohol within the last 24 hours?" And he said, "Yeah. Early this morning I smoked some cannabis." And that was it.

There's no evidence that he was impaired by the time he arrived at Okemo, by the time he was skiing, or that it had anything to do with this accident. There's no blood test that

you're going to see, no lab result, no information at all about the cannabis. Not one witness is going to come in here and tell you he was impaired or observed to be impaired at any time that day. Not one ski patroller, not one EMS person, not one first responder is going to come in and say, "Oh, yeah, we responded and he seemed impaired." None of that. You'll hear no evidence of it. It's a nonissue in this case. It's just not. It has nothing to do with it. But we anticipate, "Hey, look at this in the records. This must be the cause." That's what we anticipate. They're going to blame him. They're going to hope that you all will say, "Oh, it must be his fault."

All that I ask, members of the jury, is that you use your God-given common sense. That's all Ric wants of you. That's all I ask of you. Apply your God-given common sense to the facts and evidence at this trial, and I'm convinced that you will see that the defendants were negligent in placing a man-made hazard that was removable, that was not an inherent risk, that should not have been there, in Ric's way. They failed to inspect it properly, and they failed to install it properly.

One last thing I forgot to mention earlier that I just want to point out as well. There are no records that this pad was inspected. Kyle Kostura, the person in charge of inspecting the pads, he didn't fill out any forms. There's lots of forms Vail has, but nothing to confirm something as

important as protecting skiers by protecting this pole. Nothing showing that that was inspected.

But what did happen when he was on his way in a helicopter? The assistant director of ski patrol, Everett Moore, reached out to Kyle Kostura: "Yeah, there was a discussion about the fact that a beginner skier was paralyzed and found under a pad and hit the pole. Didn't you inspect? What did you do that day? You need to document something." And you'll see that eight hours after Ric's accident, an e-mail was sent by Kyle Kostura, the person in charge of inspecting and making sure it's installed properly, an e-mail was sent to the assistant director saying "Dear Mr. Moore: Attached is the letter you requested."

You'll see the letter. The letter says "I did my normal routine in the morning. I -- I saw everything seemed to be proper, maybe I made some adjustments, but nothing out of the ordinary. It all was good." That's it.

You'll decide what you think about that letter and the timing of the letter and the timing of the person who wrote the letter. But when we question Kyle and what I anticipate you'll hear if he takes the stand, if the defense produces him, is that he didn't inspect the pad. He says he rode by on his snowmobile that morning. He has no recollection of the actual padding involved, of actually getting there. But one thing we know, he didn't get off the snowmobile. He didn't go over and

inspect and look at the pad and tighten the straps and make sure it was flush with the snow. Nope. He rode by on his snowmobile, up the mountain that day. That was the extent of the inspection that day. That's what he said.

Thank you, members of the jury, for your patience. I know this was a long opening. Thank you on behalf of Ric and his family for being jurors, for committing to use your God-given common sense. Listen to the evidence, and I am confident that if you do that, that at the end of this trial, when I have the opportunity to get up before you and ask you to decide this case, that there will be no doubt in your mind that the defendants, Vail Resorts, Incorporated, were negligent and that they should be held responsible for the injuries and the future damages and the past damages that Ric has sustained and will suffer from for the rest of his life.

Thank you so much.

Thank you, your Honor.

(End of plaintiff's opening statement.)

C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

February 2, 2024

_____

Johanna Massé, RMR, CRR

call a rebuttal witness, then I'm going to close the evidence, and then we'll go into closing.

MR. A. SMILEY: Thank you, your Honor.

(Jury in at 3:11 PM.)

THE COURT: We are back on the record in Grajeda v. Vail.

Does plaintiff have a rebuttal case?

MR. A. SMILEY: No, your Honor. The plaintiff rests.

THE COURT: All right. At this point the Court closes the evidence in this case, and we are going to start with closing arguments. We may have Mr. Smiley's closing argument go into Friday morning. That's just the way it is. We're going to use your time efficiently.

Mr. Smiley, you may commence.

MR. A. SMILEY: Thank you, your Honor.

And may it please the Court, Judge Reiss, Counsel, members of the jury, good afternoon.

JUROR: Hello.

MR. A. SMILEY: If ever there were a case that called out for your God-given common sense, this is that case. The credible evidence in this case established that on December 19th, 2019, Ric, was a beginner skier at Okemo. He was on his second run that day skiing down in a wedge doing exactly what beginner skiers do, exactly what we've heard during this trial is expected of beginner skiers. Going slowly on a slope with a

gradual grade with the easiest marking slope at Okemo, Open Slope. He's making turns in a wedge, looking down at his skis, looking up to where he's going. He sees a group of kids up above. He does what he's required to do. As he's going around them, he slips. He slips on ice. Also something that happens when you ski, whether you're a beginner whether or not.

But what was different about what happened with Ric is that when he slipped on the ice, instead of just sliding down on this gentle slope to a natural stop, what happened to Ric is he slid down backwards on his stomach, he slid into a depression in the snow, under the pad, and slammed up against a solid steel pole that was buried upwards of 10 feet in the ground, and he smacked his body up against that, and he didn't feel anything below his legs. "I can't feel my legs." That's what the credible evidence in this case has established. We all know that that's exactly what happened in this case, members of the jury, despite what we anticipate Vail's defense team will try and convince you of to the contrary.

The credible evidence in this case overwhelmingly establishes that Ric hit that pole, that he slid into the pole, and I'd like to review that credible evidence with you, and I appreciate your patience in advance today, likely tomorrow morning. It will take a little time. But I know you've been diligent. I've seen you observing all of the witnesses in this case. And I'd like to highlight what I think supports the

plaintiff's case to prove to you why the defendants, Vail Resorts, Incorporated, are responsible for the life-altering, catastrophic, paralyzing injuries that my young client sustained. It never should have happened. None of us should be here today, members of the jury. Ric should not be confined to a wheelchair, members of the jury.

Now, the judge is going to instruct you on the law, but I'm just going to highlight some areas as I go through my summation how I believe the law applies to the evidence. Don't take my word for it. The judge will instruct you and it's your duty as jurors to listen to the judge's instruction. I'm going to give you my preview of that.

You will learn that we have the burden of proof to prove our case and that the burden of proof is a preponderance of the evidence, it's more likely than not. If you picture the scales of justice, Lady Justice who's blindfolded because what she sees, justice has to be blind, and she holds her scales out, and on the left side here I want you to think my left side is the plaintiff's case, and on the right side is the defendants' case, and I'm going to show you all the evidence that's going to go on to our scale, the plaintiff's scale, and how heavily it's going to tip down, and then I ask you, when the defense gets up here, hold them to that same standard. See what they've got on their scale. And I'm convinced that at the end of your listening to my summation, defense counsel's

summation, my rebuttal summation, there will be no doubt in your mind that the scale tips heavily in our favor on every single issue we are required to prove to you.

The first point, Ric hit a pole. Let's look at all the evidence - we're going to go through it now - that you've heard and seen in this case that supports the fact that that's actually what happened here and that's why Ric is paralyzed. He hit the pole.

Let's start with the beginning of the scene of the accident. Who's the first we heard from? It was Ric. It was Ric. Ric told you what happened. You had the opportunity to observe Ric on the witness stand. You judge his credibility. I'm not going to vouch for him. That's your job. You decide if he was being honest with you or not. That's your role with all the jurors *[sic]*, and I'm going to tell you what I think about some of the witnesses in this case but ultimately it's up to you. Decide what you believe. Decide what you don't. I think Ric was extremely credible, but that will be up for you. Ric told you what happened. He told you the truth. He told everybody the truth that day, that he slid under a pad into a depression in the snow and he slammed into a pole, that he's lying there up against this cold pole is his body reverberating from pain. He can't feel his legs. He's got this heavy pad weighing him down until somebody came and took it off of him. Do you doubt that? Do you really doubt that, members of the

jury? Do you think he's lying to you? Think about that. That's the first piece of evidence, Ric's own testimony.

In the ambulance on his way to the helicopter, Chelsey Manley gets in the ambulance with him and she's got her card there, because she wants to make sure they're doing the investigation, and I've got a lot to say about that investigation, which I'll share with you in my summation. Ric is lying there by all accounts terrified. He's scared. He's a 21-year-old young man away from home. His clothes are being ripped off. He's lying on a toboggan. He can't feel anything from his waist down. Chelsey Manley's getting information, and she asks him what happened? And what does he tell her? You can see it. See it right on the incident card that we're showing you. He says, "I was going down and there were people to my right so I went left then slid into the pole." That's evidence. Do you think he's lying? Do you think he's coming up with something when he's paralyzed when this just happened and he's in an ambulance? Do you think he's thinking, well, I really hit the pad, but if I bring a lawsuit, you know, that's probably not going to sound so good, so maybe I'm going to say I hit the pole? Of course not, members of the jury. Of course not. He was honest.

Do you think it's helpful for us as his lawyers in this case to have to deal with the fact that he was truthful and said he smoked weed that morning? No, it's not. And of

course the defense -- we'll get to that later, but of course the defense, "Aha, we've got a defense here. We're going to say it's all because he smoked cannabis." But that's another piece for you to consider of how truthful and honest this young man is, that he's lying there, they were asking him what happened, he told them like you see on your screen. He was truthful. And by the way, it also says on this incident card that he was -- if you look at the bottom, A3 O times four, alert and oriented in all aspects. He was alert. He was oriented. He wasn't high. That's some fantasy. That's some phantom argument that they want you to believe, members of the jury. I beg of you, focus on the evidence in this case, not the hyperbole. Not defense counsel's arguments. Challenge each other when you go to deliberate. Challenge each other. If somebody says something that you're not sure, look at the evidence. The evidence will lead the way. The evidence will lead the way for you, members of the jury. I have no doubt about that.

Not only did Ric give this statement, but he goes into the ambulance. Ski patrol brings him down in a toboggan, down the slope. They're transporting this young man into the ambulance, and they take a history, and they take it from ski patrol. And let's look at what ski patrol told the ambulance personnel. They said the patient is a 21 -- nope. This is the wrong one. This is the -- but you can leave this up. This is

the helicopter that he's getting into. You see in front of you the helicopter notes. Patient is a 21-year-old male being transported from the scene to Dartmouth-Hitchcock Medical Center for the benefit of a Level I trauma center that provides trauma and neurosurgery. "Patient reports" -- that's Ric talking to the people as he's getting loaded into a helicopter. Patient reports that he was skiing when he lost his balance and hit a pole. He lost his balance and hit a pole. Patient was wearing a helmet and denies loss of consciousness. Immediately after hitting the pole that patient reports he was unable to move or feel from the waist down." Evidence, members of the jury. Consistency. It's another thing you should consider. What makes sense to you? There's no conflicting evidence here. The defense tries to create and Vail's own employees try and create maybe some conflicting evidence or tries to hide the truth of what happened here instead of actually looking into it, but this is evidence. And now let's look at the ambulance -- what the ambulance report said. Ludlow Ambulance from going from the slope into the ambulance on the way to the helicopter. And we're going to pull that up for you.

You have up on your screen -- these are the records from the ambulance that was waiting at the base of the slope. And let's look at the highlighted part: The patient was brought to our awaiting stretcher by Ski Patrol via toboggan. I received report from ski patrol," not even from Ric. I

received report from ski patrol, from Vail's own employees, "that the patient had struck a pole, and was complaining of chest and hip pain, and unable to feel his legs." Not only did Ric tell everybody what happened; ski patrol. Nobody wanted to admit and own up to this on the witness stand. Not Chelsey Manley. Not anybody else. But someone from ski patrol told the ambulance people that Ric hit a pole.

And then let's see what Ric told them in the ambulance. "The patient reports skiing, trying to avoid a collision with another skier when he struck a chairlift pole. He does not recall any additional impacts, however bystanders state he then slid underneath the padding on the pole." Underneath the pad, struck a pole. That's what this case is. That's what the evidence shows. There's more evidence. The scale now keeps tipping down and down with all of the evidence that he struck the pole.

We know that David Villani, his friend, one of the better skiers in the group, an expert skier, showed up on the scene, and you heard from David, and again, you saw David and Kyle Cotter. These are nice young men. These aren't some young punks out there doing stupid stuff. They're good kids. David Villani. He flew here from Chicago to get on that stand and tell you the truth. And you had the opportunity to observe him, to judge his credibility, to see if he's being straight with you, and I leave that to you to decide. I submit to you I

found him to be extremely credible.

THE COURT: No. We can't do that, right?

MR. A. SMILEY: I'm sorry.

MR. AICHER: That's twice now, your Honor. I just need to make a record.

THE COURT: Yes. So attorneys are not allowed to provide opinions of witnesses' credibility.

MR. A. SMILEY: You decide if you found him credible. But what did we hear from David Villani? A couple of very important things that are going to tip the scales even further on this issue. First, at the base following this accident, Vail's employees took a statement from him, and let's see what he says. It's highlighted here. "He saw his friend face down wrapped around pipe four people around him no patrol yet." Dave was there before ski patrol, and he saw Ric lying face down wrapped around pipe. He didn't say -- he didn't mince words, right? He didn't say I saw my friend, he looked like maybe he was up against a pad or near a pole. No. He said wrapped around pipe. And that is consistent with what we've heard from other witnesses. Dave Villani told you, members of the jury, that when he got there he spoke to good samaritans. You've heard them referred to as bystanders. These are good samaritans. They were skiers or snowboarders, no one's really quite sure who or what, but they obviously were right there, and they told Dave Villani what they saw. Dave told you this.

They told David and he told you, I showed up, I saw these people, they were helping, they said, yeah, they saw the accident. They saw Ric go around a group of ski school kids, slide on ice, he slid under the pad into the pole, the pad fell down off the pole and was pinning down on top of hum. That's exactly what Ric was describing as what happened to him. Evidence, members of the jury. Evidence. They were so concerned that this pad was sitting on him while he was under it up against a pole that they thought it could be hurting him, so they took the padding off. That's more evidence he struck the pole.

Kyle Cotter then arrives upon the scene, either before or after David. Likely before, because he saw him under the pad. Again, you heard from Kyle Cotter. He flew in here. He's a high school guidance counselor. You decide if you thought he was being straight with you. You decide.

What did Kyle Cotter say? Kyle Cotter said, yeah, I saw my friend, I saw my friend. He was scared. He was saying I can't feel my legs. He was under a pad up against the pole. Evidence, members of the jury. You heard it. You saw it with your own eyes. And we saw an exhibit that David marked -- I'm sorry, that Kyle marked at an earlier deposition, and we saw how he marked the position of his friend, and we're looking at that now, and then he showed on the pad, no, this photograph -- this staged photograph, and I don't say that lightly, I don't

say that lightly. We all know, members of the jury - it's undisputed - the padding was removed after it was falling off. It was removed by the good samaritans, and it was put off to the side. Not one person has been identified by Vail who can say, yeah, I saw the pad that came off, I put it back up, this is the position it was in. At best we know an hour and 48 minutes later, at best, someone took a photograph. No one knows who. But Kyle says, no, no, no, this photograph, that's not what it looked like, members of the jury. I saw him. The pad was all the way up there where that green line is, and Ric was under it. More evidence.

Members of the jury, nobody has come in and disputed the testimony of Ric, of David Villani, and Kyle Cotter that there was a big depression in the snow under the pad by the snow gun. Nobody has disputed that. That is undisputed. And it makes sense. If there's a gap underneath the pad because there's a depression in the snow, that's how you slide under. That's how you slide into a pole. It's the equivalent of having no protection at all. No pad at all. More evidence that he struck the pole.

After we heard from Kyle Cotter, we know that the first patroller to arrive on the scene was Mike Morabito, and you heard Ric's very appreciative, and we do not dispute that the ski patrollers are caring people that are in this business to assist and render aid. They got there quickly, as quick as

they could, and they did the best they could, and we've got no problem with that. Ric's very appreciative of that. They stabilized him and they got him into the hands of other medical professionals to take care of him. They did a great job with that. We've got no issue with that, members of the jury.

But what did Mike Morabito tell you? He said by the time he arrived at the scene, the padding had been removed and he saw Ric, and he described Ric's position. And let's look at what he said.

I asked him, I said it was one of the reasons that you thought he might have a spinal injury because you saw his body wasn't straight, it was kind of angulated in a weird way up against the post? And he said yes.

Mike Morabito came here, took the witness stand, and told all of you, yeah, when I found Ric, he was up against the pole. More evidence.

But there's more. There's more evidence you heard in this case. You heard from Chelsey Manley, who is now Chelsey Moore. She's married to Everett Moore. Chelsey Manley responded as a first patroller, and we heard what she had to say, either as a patroller or an investigator, in one capacity or the other. And let's take a look.

Question: Okay. His right hip was against the pole or post?

Answer. Uh-huh.

Answer, you just have to say yes. Answer yes, I apologize question so it was his right hip you're saying answer yes question: All right. And he was on his side laying up against the pole, right?

Answer: Yes.

But Chelsey Manley said more. I asked her, based on your investigation, your investigation, Vail's investigation that you were taking a lead on, did you determine that he struck the pipe and remained in that position when he came to rest?

Chelsey's answer: Based on my investigation, yes.

More evidence, members of the jury, he hit the pole from Chelsey Manley.

Mike Morabito didn't dispute when I asked him, Do you have any reason to dispute what these good samaritans slid, he slid under and hit it? "No I have no reason to dispute it." All of the evidence in this case is that he hit a pole. But that doesn't look too good to Vail that a beginner skier slides into an improperly protected pole and ends up fracturing his back and sustaining multiple other injuries while he's there as their paying guest on their mountain. That doesn't look good. So what evidence is there that they bring to you to say no, he hit the pad, he didn't hit a pole, he hit a pad. Ray Kennedy. We heard a lot from Ray Kennedy, and he took the stand. I got to problem with Ray. Ray said, hey, I was down, yeah. I was

500 to 550 feet down the mountain in a building on the phone looking through a window and we saw Ray's view. He didn't see what happened. And it's not even like he's trying to say he really did see what happened. Because when we asked him did you see, did you actually see what happened, Ray, he said, No, I'm not sure I've seen it. And when I said, Mr. Kennedy, you know, you were all the way down 500 to 550 feet at the base of the mountain, you couldn't see what was happening on the uphill side where the pad was. You don't actually know what Ric struck, whether he hit the pad, whether he went under, whether he hit the pole, and he says, I don't know. He says, All I know is I saw him ski in, I saw the pad shake and shudder and fall off. That's what Ray said. It was amazing how many witnesses came in here and tried to say, Oh, he was speeding, oh, he hit the pad, and everyone's basis for that? Ray Kennedy. Right? Chelsey Manley in the very first photograph, He hit the pad. That's her conclusion. We'll get to that. Where did you get that from? Ray Kennedy. Well, let's look. I asked Mr. Kennedy: And describe for me what you observed as far as the impact itself, if you did see the impact itself.

Answer: I don't know if I seen it. I seen the padding shake and fall over.

Question: Is it fair to say other than seeing the padding shake and fall over, that you did not see what his actual body struck?

Answer: Yes. That's fair to say."

So if defense counsel gets up here and starts talking about how Ray Kennedy saw him strike a pad and how Ray Kennedy said he was speeding, okay, see what evidence they show you. See what evidence there is. We saw his witness card. We saw Ray Kennedy's witness card. It was a statement taken by Chris Lancaster two days after the accident when word got to him. He went to Ray, and he filled out a card. And what did you see or hear occur? Chris Lancaster, director of ski patrol, records from Ray Kennedy the following: I saw him come from the Mountain Road side. It looked like he was coming from uphill, skied right into the tower gun pad, it fell over right onto him.

Here's the important part in my opinion. This next part. Because this, members of the jury, is the only time anybody was actually asked or documented did Ric do anything wrong? Was he going fast? Was he out of control? Did you see any of that? This is the only documentation. I don't know why they didn't ask anybody else in the forms. They asked Ray. They gave him a shot. And let's see what it says. Ray, in your opinion was incident caused by skier/rider/user error (e.g., out of control, too fast, use lift improperly, caught edge, *et cetera*)? And what does Ray say? "I was too far away to really tell." He doesn't say, yeah, he was going fast. He doesn't say, yeah, he slammed into that pad like crazy. He

doesn't blame -- he doesn't say Ric was out of control. So I don't know where this argument's coming from. That's your job. But if an argument shows up in this courtroom that Ric was speeding, that he was out of control, I beg of you, members of the jury, show me the evidence. Hold the defense to that. Where are they get that go from? So many witnesses came in here. Even today and yesterday we heard from their witnesses. Mark Petrozzi, Eb Kinney, Chris Lancaster. Oh, yeah, we thought it was speed involved. That's what we think. He was skiing fast and out of control."

Where did you get that from?

"Ray Kennedy."

You just saw it. You heard it. You heard from Ray. You saw his statement. Ray didn't say he was speeding. Nobody did. Not one person. The only shred of evidence in this case is the statement that the defense found in some medical records that said he was going at speed. It doesn't say Ric told them that. It doesn't say who told them that. It's evidence. You can consider it. But you need to weigh that with all the other evidence, members of the jury. We don't know how that got into that record. We don't know if someone said, yeah, I think he was probably going fast and they told somebody else and it could have just been all the ambulance people. We don't know. But that's it. And I submit to you that that's not credible evidence. That's not a witness. That's not attributed to a

person. That's not saying Ric told them. That's not saying ski patrol told them. That's not saying anybody told them. You had a lot of witnesses come through this courtroom in the last two weeks. A lot. Right? Ric's friends. You heard depositions of Ric's friends. Every single Vail employee that was at the mountain that day that looked into it, that responded. Not one person refuted Ric's testimony and his friends' testimony that he was skiing slowly and in control on a beginner trail doing exactly what beginners are required to do.

The evidence is overwhelming that he hit the pole. Overwhelming, members of the jury, and I ask you to keep your eyes focused when the defense gets up here and tries to say otherwise. Hold them to their task of the evidence.

Now, knowing that it's very dangerous, the possibility of sliding into a steel pole in the middle of a trail when you're a beginner or any other kind of skier -- and you saw pictures. You saw that little kid, right, in that photo skiing in a tuck trying to go fast. You saw Mark Petrozzi video of that person skiing by. That's what happens on a mountain. Kids are going fast. People are having fun. They're racing each other. They're going fast. Some skiers are going slowly. There's a lot of things going on there. There's a lot of stuff happening. And they knew, they knew, that people would hit this pole. Chris Lancaster told you. Mr. Penniman got up here

and told you about that saying, If it's on the trail and it's a beginner, a beginner's going to hit it. Not only did they know it but there were prior incidents which we'll talk about in a minute.

So knowing this, if you're going to have a pole there, which shouldn't be there, you need to make sure it's properly padded with the Gilman padding system.

Now, before I get to talking about the Gilman padding system, there's one more critical piece of evidence that I want to bring to your attention that also goes into our scale that Ric hit the pole. And that's the e-mail we all saw from Dana Kent. Let's take a look at that e-mail.

So this e-mail was sent that afternoon on the day of the accident, 4:00, almost 4:30 in the afternoon by Dana Kent, and we heard all the people she sent it to. The CEO of Vail Resorts, Incorporated, overseeing 37 resorts around the world. The CEO got this e-mail. Their top lawyer got this e-mail. Their PR people got this e-mail. Their insurance claims representatives got this e-mail. Eb Kinney got that e-mail. Chris Lancaster got that e-mail. All of these people got an e-mail of a major incident notification, and we all know what that is, and we're going to look at it in my summation later on in their risk resource guide. A major incident. Catastrophic, life-altering injuries. What happened to Ric. Major incident. And they were required to notify people, and they did. And

let's see what she said.

Dana Kent, Vail's manager of health and safety at the time overseeing all the East Coast Vail-owned mountains, including Okemo Mountain. She identifies that he was a skier and he was a beginner under ability level. You see that? Shows he was on Open Slope, as we've heard. Injury: Ribs, spine. You heard me ask Ms. Kent when she was on the stand, you knew this was bad, ribs and spine. You knew it was spinal injuries. You knew that he was likely paralyzed. You knew he was taken off this mountain in a helicopter. She acknowledged that. And what does she say the mechanism of injury is? Collision with man-made object (HKD post). We've heard the term "pole," post, stanchion maybe even, pipe. Vail's own manager of health and safety told everybody that a beginner skier collided with a man-made post and was transported to Dartmouth-Hitchcock via air ambulance. That's the helicopter. Air ambulance.

Isn't it interesting that she didn't get one response? Isn't that interesting, members of the jury? Think about that. She told you no one called her, no one responded. No one cared. No one cared, members of the jury, that a young man, a beginner skier, struck a man-made post, pipe, steel pole, that they put in his way, purposely put there, that didn't have to be there. He hit it. He got paralyzed and taken off in a helicopter. Does Vail's CEO reach out and say, Oh, my

goodness, how does that happen? Does Eb Kinney reach out to her and say oh, my goodness how does this happen? Does Chris Lancaster? Does one person? Where is the decency? Where's the one witness who took this stand and said, yes, we felt awful for what happened to Ric that day? That's unacceptable. Beginner skiers should not get paralyzed when they're skiing where we expect them to, doing what we expect them to do. It is unacceptable. It wouldn't have been that hard to show some decency at this trial, for one witness to say, yeah, yeah, that was bad. We needed to look into it. And what's worse is their own rules require them to look into it, members of the jury. We'll talk about that tomorrow morning. I know that I'm running low on time today, and I'm going to be respectful of your time. Not one person looked into how this happened. Not one person from Vail had the decency to even consider how this happened. No. Ah, it's probably some out-of-control skier going fast, hit a pad, got paralyzed. Come on. Is that acceptable? That's not acceptable. And what happens when that call comes through in the base lodge no further away from this accident than Ray Kennedy was sitting in a nice conference room is Dana Kent, Eb Kinney, all the leadership team. Eb Kinney gets the call, there was a major incident, somebody was just -- is about to be helicoptered off here, and I ask Dana Kent and I ask Mr. Kinney, certainly, certainly somebody jumped up out of that room and said, Oh, my goodness, how could this happen?

It's right here. I can see it. Let's go. Let's see. How did this happen? Look at the area? What were the contributing factors? What were the circumstances that led to a beginner skier being paralyzed? What in the world happened? But no. Not one person. I asked Dana Kent why don't you go? She didn't have the right shoes. Is that acceptable? Eb Kinney had the right shoes. He didn't go. Where's the caring? And if at least they're not going to care, at least where's the responsibility? Where's the responsible investigation to look into it and find out how in the world could this happen? To not only find out how it could happen but to make sure it doesn't happen again. Their own rules talk about that.

Your Honor, if it's okay, at this time I think it would be appropriate to break.

THE COURT: All right. We only have about ten minutes more. You don't have the case. Remember I talked to you about keeping an open mind. Same rules about not acquiring any information from any other source, talking to anybody about the case, letting anybody talk to you about the case. We'll come back at 9:15, and we'll resume closing arguments. I wish you a good evening, and we'll excuse the jury and have the attorneys remain in the courtroom.

(Jury out at 3:49 PM.)

THE COURT: Mr. May, you wanted to talk to me about *res ipsa loquitur* on page 11, and I told you I'd give you an

testimony in the courtroom and the evidence in the courtroom and nothing else? Seeing no hands raised, we are going to resume.

Remember what I told you in orientation. This is the day when the deliberations may go later than 4 o'clock. If you need access to your cell phones on a break, I will make sure that happens.

We will resume, and we are in Mr. Smiley's closing argument, and you may continue.

[Court Reporter's Note: Quoted material appears as read, and quotation marks were placed in the best judgment of the court reporter.]

MR. A. SMILEY: Thank you, your Honor. And may it please the Court. Judge Reiss.

Counsel.

Members of the jury, good morning.

THE JURORS: Good morning.

MR. A. SMILEY: Let's talk about the Gilman padding system. You've heard a lot about this. By now I think everyone in this courtroom, including this jury, knows probably more about the Gilman padding system than the majority of the Vail employees did at the time of Ric's accident on December 19th, 2019.

What we've learned is that there is a system out there that's been used for a long time, and it's been shown to be

effective. It's been shown to be effective. It's this Gilman padding system, and it's got these hollow cylinders in the middle. It's wrapped by a blue blanket that keeps it all together so there's no gaps in between, and we know what it's designed to do and why it's been used and why it's really the gold standard if you need to protect a hazard.

And the way that it works, what we've learned at this trial, is that if someone impacts the padding system, it is designed to do two important things: absorb and deflect. And let's take a look at the Gilman catalog, the first page, which talks about what their product does.

Now, it says here first "Exclusive, state-of-the-art, crumple-zone technology as part of shields, guards, and cylinders creating the ideal zone of deceleration," slowing things down, "flexing, bending, temporarily distorting to dissipate, and limit impact forces." Limit impact forces.

It then goes on to talk about the right shape. It's "specifically designed to deflect away from the tower, pole, gun, or pipe." Specifically designed to deflect away from the pipe, members of the jury. And it's "one of the most effective ways to help reduce direct contact and injury."

This is also not in dispute in this case, that the padding system works, and what it does is it's got these 10-inch internal cylinders, these black hollow cylinders, that if someone slides into it, if someone skis into it, there's a

crumple zone. The cylinders are hollow for a reason in the middle. They'll go in, they'll absorb the impact, and then they'll come back out and deflect the skier away from the hazard. That's how they're designed to work.

And you heard from Elizabeth Gilman. You heard from her testimony that it is "impossible" -- and I'm showing you her words on the screen here. It is "impossible" -- that is a very strong word. That's why we're highlighting it for you. "It is impossible to get through that blanket and those two tower cylinders to get to that object." But the key is it has to be installed properly. It has to be installed properly. If it is installed properly on the snow without a gap, everybody agrees in this courtroom that if someone were to slide into it, it would absorb their impact and it would deflect them away from the pole.

And we know that's not what happened here. It's not disputed. If it did its job, if it was installed properly, Ric would have bounced and been deflected away from the pole. He wouldn't have been found wrapped around the pole, wrapped around pipe, angled awkwardly up against the pole. He wouldn't have been found under the pad. That's what the evidence shows in this case.

If they have to put this steel pole hazard in a beginner skier's way and they're going to put a padding system in front of it that's supposed to work, you've got to make sure there's

no gaps, because if there's a gap that a skier can get under and slide into, then of course it's like having no padding at all.

You heard from Kyle Kostura. He told you what would happen if the padding that he was responsible for inspecting was properly installed. And let's look at what he said. I asked him, "And so if someone were to hit this pad, if it were properly installed and they hit it, it's supposed to absorb the impact, right, and then bounce back out and deflect the skier away from the pole that's in front of it; is that right?

"Yes."

But that didn't happen here. That didn't happen here because it wasn't installed properly. And amazingly, truly amazingly, Kyle Kostura was the only witness for the defense, was the only Vail Resorts employee, was the only Vail employee employed at the mountain in December of 2019 who actually knew and actually knows how these padding systems work. I asked all of them. Dana Kent: "I don't know. I don't know how these work. I defer that to Chris Lancaster."

Chris Lancaster: "I don't know how these padding systems work. The director of health and safety, Dana Kent, that's her job to make sure to know what to put in and how they work."

I asked Eb Kinney. I said, "Wouldn't you expect the director, the top person of your ski patrol, to know how these pads actually work?" All this talk about safety and "we work

hard on safety"? They don't even know how the pads work. And he said, "Yeah, I'm surprised. He should be -- he should know how they work."

One person. One person, Kyle Kostura, is the only one from Vail who actually even knows how these safety devices are supposed to work. And he told you, and you see it on your screen, he said if it's installed properly, if Ric hit a properly installed pad, it would absorb the impact and deflect him away. And we know that's not what happened. The defense doesn't say, "Yeah, he was deflected away; yeah, it absorbed his impact and deflected him away." I'll be pretty surprised if you hear that argument come out in this courtroom, because the evidence certainly didn't say it.

If it was installed properly, we wouldn't be here. It's that simple. Your God-given common sense, members of the jury.

We heard testimony from Liz Gilman, and I know you didn't actually get to see her in the courtroom, but you heard her testimony. You heard her words. She knows her product. She knows it well. She's very firm in her belief. She felt uncomfortable having to testify because Vail and Okemo are her customers. She didn't want to say anything that could be adverse to them. But she was honest. And look at what she said.

MR. AICHER: Your Honor.

THE COURT: Yes. So it's for the jury to decide --

MR. A. SMILEY: Oh, yup.

THE COURT: -- the credibility of the witnesses.

And I will tell you, as I've told you before, the attorneys' arguments, their statements, their questions are not evidence. They're not on the witness stand under oath.

So let's remember that it's the jury's determination of credibility that matters in this case.

MR. A. SMILEY: She took an oath to tell the truth, the same oath that every single witness had to take before getting on the stand, and after taking an oath to tell the truth, this is what she said:

"QUESTION: Of those thousand or so tower shields that Gilman Corporation has sold again have you ever been advised that an injury of a skier resulted while impacting one of those tower shields?

"No, sir. I am not aware of any, sir."

Not just a paralyzing injury. Any injury. Any serious injury. You heard me ask all of these witnesses at this trial, all of these ski professionals, all of these people who have been involved in safety, involved in patrol, involved in padding installations, not one of them -- I asked them all, "Have you ever heard of somebody being paralyzed, of somebody being helicoptered off a mountain from sliding into a properly installed Gilman pad?" Nope. No. Dana Kent: No. Chris Lancaster: No. Eb Kinney: No. Mark Petrozzi: No. Even the

$305,000 man had to acknowledge he didn't even hear about it. He didn't even -- he couldn't even say it.

Not one witness in this courtroom has told you that what happened to Ric could happen or ever has happened from someone colliding with a properly installed Gilman pad. But the defense would like you to believe, "Oh, it was installed properly. It didn't deflect him. It didn't absorb his impact. He ended up being paralyzed. But it was installed properly." Ask yourselves, members of the jury, if it was installed properly, would that happen? And if you think it would, then why are they using this device? Why are they using this device? Why is there a pole in the middle of the trail, members of the jury, if this could happen to a beginner skier on a beginner slope skiing at beginner speeds?

This is what Irving Scher said. He couldn't identify from this --

MR. AICHER: Excuse me, your Honor. We don't have an official transcript from yesterday.

THE COURT: I'm going to allow this, and you can do the same.

MR. AICHER: Okay.

THE COURT: Go ahead. The jury is the only one who decides what they've heard. We can always do a read-back. This is a proper use of it, and I will let you do the same.

MR. AICHER: So, your Honor, the unofficial is on the

screen.

THE COURT: I understand that.

MR. AICHER: Okay.

MR. A. SMILEY: Members of the jury, even the defense's own highly compensated expert, who's worked for them before, flew in from Seattle, took the stand, even he had to say this:

"QUESTION: All right. Do you agree, sir, that the Gilman TS-2 padding would be effective in preventing severe injury and contact from a person traveling at beginner speeds? Yes or no?

"ANSWER: In general for direct contact injuries, I think in general it is, yes."

He's even saying it. Their expert's saying it. If it's installed properly, a beginner skier colliding with it, it's going to protect them from injuries. You haven't heard anything to the contrary. You haven't heard anything to the contrary, members of the jury. This is what the evidence is. This is what you've seen. This is what you've read. This is what you've heard.

So here's the thing. If it works so well and no one's ever been paralyzed, how could it have been installed properly and Ric become so severely injured? It's not possible. It doesn't make common sense. What happened is he slid under it and he hit the pole. And look at the injuries he sustained, members of the jury. Look at the injuries. Let's take a quick

look.

Dr. Perry got on the stand and he explained to you the injuries that were caused to Ric from striking this steel pole. He showed you on this demonstrative exhibit that T9, T9, a piece of bone, a vertebra in the spine, was burst and it went into the spinal cord. You saw fractures on his back. You see a tear of the aorta. This is confirmed by actual images, members of the jury. All these fractures. That's from hitting a pad? Common sense. Of course that's what happens when you slam into a solid steel pole. No one's ever heard of these kinds of injuries from hitting a properly installed pad.

Look what happened to his chest. Both of his lungs collapsed. Fractures of three ribs, ribs 9, 10, and 11.

We can clear this, please.

Common sense. That's all I'm asking you, members of the jury. Common sense. These are injuries that happen when you slide into an unprotected steel pole. That's what the evidence in this case shows.

So it's vital, it is vital, and even Kyle Kostura acknowledged it's vital, to make sure the pads are properly installed, that they inspect them each morning before their customers, who pay a lot of money and make a lot of effort to get to that mountain -- you heard what Ric had to do to get there to ski. He had to save -- scrap together some of his own money as a college student, get together with a group of guys,

they all pooled their money together to get a house, they all drove up -- paid gas money, drove up, stayed in the house, drove to the mountain. They had to rent equipment. They had to rent a helmet. They had to buy expensive passes to get on the mountain to get up and ski, and the judge will tell you that Vail Resorts had a legal duty to take reasonable steps to prevent paying customers like Ric from being seriously injured, from hazards that they knew and reasonably should have known existed. And the evidence is undisputed that they knew putting a pole in the middle of the trail was a hazard; they knew people would hit it. You heard from Mr. Penniman a beginner's going to hit something in their way. You heard from Chris Lancaster people fall on a daily basis, and he knows that with that pole, that system, in the way, that they're going to slide into it. We'll talk about the incident reports you saw that people had slid into it.

So they knew, members of the jury. They knew that someone exactly like Ric, doing exactly what he did, a beginner skier going on their mountain and skiing, could fall for any reason. Any reason. Could fall and slide into that pad. And they knew that if it wasn't properly installed, this could happen, members of the jury. What happened to Ric could happen. They had the duty, the judge will instruct you, to take reasonable steps, steps equal to the potential for danger, proportionate steps, and the danger is what happened to Ric. The danger is

ruining a young man's life or potentially a young child's life or potentially an adult or an elderly person's life.

MR. AICHER: Objection, your Honor.

THE COURT: Basis?

MR. AICHER: Our motion *in limine* regarding protection of others is irrelevant.

THE COURT: All right. This is preincident. Let's confine it to that.

MR. A. SMILEY: They knew before Ric even got on the slope that day that he could hit that pipe and that there is a very good chance he would hit that pipe and that other people had hit that pipe or padding system. So knowing that someone could get paralyzed from hitting an unprotected pole, reasonable care would require them to perform a proper inspection each morning before their customers skied down that slope.

A reasonable inspection would include looking at the pad, making sure there's no gaps under the pad, making sure it's tightly affixed, making sure there's no broken buckles. And what evidence have we heard at this trial about a reasonable inspection? None. None.

First of all, there's no records that Kyle Kostura or anyone even inspected that pad that morning. The defense was happy to put in lots of forms, lots of checklists that Vail had that day, right? Weather conditions, snowmaking, trail sweeps,

dispatch. Where are the checklists for checking something as important as making sure people don't get catastrophically injured on your mountain? Where are the checklists of any inspection done?

Not only didn't he do it, not only did he not document it, but he didn't even have a form to check off. So there's no proof that he even did any inspection. I asked Kyle Kostura, "Can you tell this jury, do you remember getting up that morning? Do you remember going over to the pad and inspecting it?" And what did he say? First of all, let's look at his testimony about his inspection.

"QUESTION: That's not my question. Isn't it true, sir, that you don't have any actual recollection of inspecting the pad involved in Ric's accident that morning?"

His answer: "Not specifically the installation, no."

An actual recollection means you don't remember doing it. "You don't remember inspecting it, do you?" He doesn't.

"All right. You don't have any records that you actually inspected it that morning, do you?" Nope, no records.

"You don't have any witnesses that can confirm that you actually inspected it that morning, do you?" Nope, no witnesses. "I don't remember it; I don't remember doing it; I don't have any records; I don't have any checklists."

There's no evidence in this court before you to reasonably conclude that a reasonable inspection proportional to the

potential resulting danger was done by anybody on that mountain. The one thing, the one thing, that's provided to you in this courtroom relating to the inspection, members of the jury, is a letter and an e-mail prepared eight hours after the accident, that night, by Kyle Kostura. And he didn't just on his own come up with this and say, "I -- I heard -- I drove by on a snowmobile afterwards." He didn't come in and say, "Yeah, I went over there. I did some inspection. I better write it up. I want to tell everyone it wasn't my fault. I inspected it. Everything's good."

No. He waited until Everett Moore, Everett Moore, the director of ski patrol that day -- because Chris Lancaster wasn't there, so Everett Moore was the top dog of ski patrol that day. You heard testimony it was his duty that day to oversee an investigation and make sure everything was done properly, all right? And Everett Moore gets an e-mail that you have up on your screen sent by Kyle Kostura, 6:05:19 PM. 6 o'clock at night. I wonder what kind of conversations were had, members of the jury, between the happening of the accident and this e-mail and this letter. I wonder. It was certainly after the e-mail sent by Dana Kent alerting everybody that a guy just got helicoptered off the mountain.

And look what he says: "Everett, Attached is the statement you asked for." And let's look at that statement. "On the morning of December 19, I performed a daily morning

ride through the Clock Tower base area. On this ride I checked our blue shields that cover hydrant clusters and double barrel pads that encase our HKD guns. I adjusted the pads as needed and tightened straps. Overall, routine morning. Snowmaking had not made snow, no abnormal winds or weather. There were only small adjustments to be made and all blue padding was covering their respective snowmaking infrastructure as of my departure. Kyle Kostura."

Isn't that lovely? I don't see anything in here saying "I inspected the padding system involved in this tragic accident." But you take a look. You take a look and see if this is a sufficient basis to believe credibly that he actually inspected the padding.

And we saw what he had to do that morning. He had 50 sets, 50 sets, of these padding stations to check out. He was on his snowmobile. He had to go up and down. They had him highlight, you know, the route he took. He's on his snowmobile. He's got stuff to do. He's got to shuttle staff members up to Sunburst. He's got to shuttle them to the restaurants. He's moving. He's going. He's got so much to do, he's got to be on a snowmobile instead of walking up, specifically in this base area. This wasn't something high up on the mountain. You could walk up to these. You've seen the photos. These three installations where beginner skiers, kids, people learning, they knew were going to be there. And no, not

him or anyone else goes and walks up to those installations and actually inspects them.

At best, at best, if you want to believe everything that you've heard from Kyle Kostura and the defense, he's riding by on a snowmobile, at best, six feet away, and I submit to you he probably wasn't six feet away, but at best, let's assume he's six to seven feet away riding on a snowmobile looking over his shoulder, he said. He's looking over his shoulder, and he keeps moving on. Is that a reasonable inspection? Do skiers expect that?

Would someone like Ric go and ski at that mountain if they knew that there's a chance that somebody didn't even actually get off a snowmobile and go over and look for a gap and take the shovel off of their snowmobile, fill in the snow, set it right, walk behind it, tighten the straps, make sure no buckles are broken? He had the right to expect that. Any skier that day had the right to expect that reasonable level of care. And it didn't happen. It didn't happen by the evidence at best.

Why didn't he stop his snowmobile? It wouldn't have taken that long. At least for the stations right in the area of Ric's accident where they knew there was a potential. Because you saw the video that Mark Petrozzi put in, right? He's skiing down. It's in evidence. You can ask for it to be shown to you again. I don't want to take your time with it now. But we saw the video, and we saw the snowmaking guns on the sides

of the trail, right? They were on the sides. Ric wasn't skiing on the side of the trail. He's skiing right in the middle. He doesn't want to take a chance of going off and hitting something on the side or hitting the trees. He's doing exactly what he's supposed to be doing. So why couldn't Kyle Kostura or anybody, anyone, take a few minutes to just go and make sure that the padding is properly installed? They didn't do it, and that's what we'll talk about that's called negligence. The judge will instruct you on that, but it is a failure to use reasonable care in proportion to the danger that could exist if that care is not exercised.

By the way, where was Everett Moore? Where was Everett Moore? Why didn't Vail bring in the guy --

MR. AICHER: Your Honor --

MR. A. SMILEY: -- who was --

THE COURT: He's allowed to do that, and the jury knows that Mr. Smiley could have called him as well.

MR. AICHER: Thank you, your Honor.

MR. A. SMILEY: Where was he? They flew in a guy for $300,000 from Seattle to take this stand. They flew in Kyle Murphy from Breckenridge, Colorado, to just get on the stand and talk about his snow conditions report from an hour and a half after the accident. Why didn't they get Everett Moore here? Think about that. You guys decide. Wouldn't it have been nice to have heard from this person whose name showed up

throughout this trial? "Everett Moore asked for the letter." "Everett Moore took the photo. No, he didn't take the photo. I don't know who took the photo." "Everett Moore told me there was a broken buckle. I don't know who knew it. I don't know." But by all the testimony, he was the man in charge of this investigation that day, because Chris Lancaster had the day off. Chris Lancaster spoke to Everett Moore. Where was Everett Moore? Maybe there's a reason they didn't want to call him. You decide.

The evidence in this case clearly established by a preponderance of the evidence that the standard of care within the ski industry required that there be no gaps between the bottom of the Gilman pad and the snow surface. We heard from the defendants' own witnesses, and I want to highlight that for you, no gaps. Unacceptable. We don't want children sliding underneath, we don't want skiers sliding underneath, because if there's a gap and there's a depression in the snow, if it's uneven and it's sitting on a ledge so that part of it's not on the snow surface and someone could get in and under there, it's like having no padding at all. That's why the industry custom is no gaps.

Let's look at what the director of ski patrol, Chris Lancaster, had to say about the gaps:

"QUESTION: Can you explain to the jury why you wouldn't want a gap to exist between the snow surface and the bottom of

the padding?

"ANSWER: Sure. Common sense, you want the pad to be on the snow so that if a guest was sliding, they would impact the pad. That's correct."

He agrees. He agrees with me. He agrees with everybody else in this industry. It's common sense, and that's all I'm asking of you, members of the jury. Of course you want it on the snow. Because we want Ric to hit that pad so it would absorb his forces and deflect him away. We don't want him to go under there. No gaps.

Who else did we hear from about no gaps? We heard from Ben Partridge, the manager -- Kyle's supervisor, the manager of the department overseeing the padding and the installation, another person who amazingly doesn't even know how these pads work. And look what he said:

"QUESTION: All right. And under what circumstances would it be okay to have any sort of gap between a part of the pad and the snow surface?

"ANSWER: Small gaps would be considered acceptable, something that, like, maybe just a ski tip could go under. What these pads are doing is protecting the human body," protecting the human body, "so we would always make sure that there was never a gap that even an infant child could slide under."

No gaps. Chris Lancaster -- Ben Partridge.

Who else talked about no gaps at this trial? Ben Partridge had more to say on it. I said, "This was your department, right? You were in charge of the department on December 19th where the people that you supervised were required to know that when they checked the padding, there weren't gaps underneath it, correct?

"Yeah.

"And you weren't there that day, so you don't know if the padding was hanging on a ledge of snow with a gap under it, correct?

"Correct."

No one's come in here and disputed that. Think about it. Look at the evidence. Not one witness has come in here and said, "No, there wasn't a gap there that day. No, there wasn't a depression in the snow underneath. No, it wasn't possible for Ric to get under that pad." Not one witness.

Mr. Penniman we called in. You'll judge his credibility. He took the stand. He's been in the ski industry for 60 years. Decades. All kinds of stuff all around the world. He's written articles on padding systems. And look what he said:

"I want you to assume, Mr. Penniman, there's been testimony from Ric that he was under a pad up against a pole. I want you to assume that for my question. Is that something in your experience that just couldn't happen based on Ric's size?

"ANSWER: No. It could easily happen if there's a gap.

"QUESTION: And why is that?

"ANSWER: Well, he may be six feet tall when he's skiing, but he's only this tall when he's sliding." Remember he put his hands up like that?

"Let the record reflect he's holding his hands inches above one another to demonstrate to the jury." He explained about a gap.

And lastly, the defense's own ski safety expert, who used to have Okemo as a client, who used to be in risk management on behalf of Okemo, do you think he was objective? You decide. Of all the ski people in the world that Vail could have called here as an expert, why in the world did they choose someone that was a risk management person that had Okemo as a client? Why?

And I asked Mr. Petrozzi, "Now, would you agree that if there was a gap between the snow surface and the bottom of the pad, that that could be a way that Ric ended up getting under the pad and being found up against the pole?"

His answer: "Depending on the size of the gap, yes."

He doesn't even dispute it, members of the jury.

Kyle Cotter took the stand. He showed you, "Yeah, this photograph in their investigation report, this isn't what it was like. No. The pad was as high as that green line sitting on snow with an exposed gap underneath it that I saw my friend

underneath, that I saw my friend underneath that pad because the gap was big enough, up against the pole." You judge his credibility. Was he lying to you?

And not only does the undisputed evidence show there shouldn't be a gap, but it's so critical that Vail and Okemo Mountain had it in their own rules. You're looking at the Trail Work page that you've seen throughout this trial. The highlighted portion says that the "Tower/Hydrant/Gun Pads." Gun pads, that's what we're talking about here. They must be "facing up hill" on the "fall line, sitting on snow." We did not cap and bold that, okay? The "on snow" that you're seeing on this document in caps, in bold, that's how it existed in their rules. Why did they emphasize that of everything on that page? Everything on that page, it's the only thing in caps and bold other than the headings, "sitting on snow." No gaps. It's vital. It's crucial. No gaps prevents a young man from having his life ruined.

And you know what, members of the jury? If they didn't have the ability to properly inspect these pads, if they didn't have the checklists, if they didn't want to take the time, if it was just too much work for Vail to make sure that these pads were properly installed to protect Ric, then you know what? Get those poles out of there. Get them out of there. They shouldn't have been there in the first place. These things were dinosaurs. They were installed back in the early '90s,

which I guess at that time they thought it was appropriate, for whatever reason, to stick a pole in the middle of the trail, but they learned a lot since the '90s. They learned that, yeah, people hit it. Yeah, people are going to continue to hit it. They learned a lot. They learned it was a hazard, and it didn't have to be there.

And you heard undisputed testimony, members of the jury, from all the witnesses, including the defendants' own witnesses, of all kinds of alternatives available to Vail at the time of the accident. They didn't need to have a steel pole in the middle of the trail. They have a hundred trails. This was one of two that had poles in the middle, and they couldn't even give you a good reason of why. Not one witness came in here and said, "Oh, we had to. We couldn't make snow without a pole in the middle of the trail."

Well, you know what? Get rid of that pole. It's a dinosaur. The judge will instruct her in her law that they had a duty to consider, and you should consider, the state of technology that existed and was available to Vail at the time of the accident.

Ray Kennedy said he's an old-school guy. He likes things the old ways. But you know what? They are required to keep up with the state of technology. And since the time in '92, '93, whenever they put these poles in - they don't know, but we all know it was in the early '90s - 25 years had gone by, and in

that time snowmaking technology got better; it got more efficient; it got safer. And back before 1993, there wasn't even a chance of Ric hitting this pole because it didn't exist. They made snow just fine.

We heard from Mark Petrozzi that at the time that he was their risk management claims representative at Okemo, he knew. He said, "I never got a claim involving a pole in the middle, because there wasn't one." And I asked him, "Now, when Ric's accident that we're here for and that you're a retained expert for the defense on, that couldn't have happened before 1993 the way it did in this case, right?

"In terms of striking a snowmaking station that wasn't there? I mean, yeah, right. Yes, obviously."

Ric's accident wouldn't have happened if they didn't put the pole there, and they didn't have to put the pole there. They were making snow just fine for decades before putting it in. You heard about the alternatives that existed back before 1993. They were able to make snow. It wasn't necessary to have a pole there. They would bring the hoses out on these portable sleds; they'd line them all up on the mountain after skiing ended for the day; they'd close the trail; they'd make snow on it all night. In the morning those things would be removed off the trail, they'd open it up, and everybody could go skiing. Okay? No hazard. No chance of a beginner skier like Ric hitting a pole, hitting an improperly placed pad. The

risk did not exist. It didn't have to be there. And that all existed at the time of Ric's accident.

I again asked Ray Kennedy, Ray Kennedy, the head of snowmaking for 28 years at Okemo, "In addition to these trailside snowmaking fan towers, isn't it fair to say that back in December of 2019 your team and crew had available to make snow equipment that is portable and not permanently affixed?

"ANSWER: We do.

"All right. And back in December of 2019, did you have these sort of sleds that the hoses could be connected to and the gun would be put on the sled and the sleds could be brought out with the hoses onto the trail, close the trail, make the snow, remove the portable sleds, and open up the trail?

"ANSWER: We did."

He had it. It was there. It was there. This isn't some hypothetical wondering what could you have done? They had 100 snow guns there that they could have used. A hundred of these that they could have brought out. Why didn't they do that? Because it maybe would take a little bit more time? A little bit more time, members of the jury, to prevent this, what happened to Ric? Common sense, please. Common sense.

Not only could they have brought those guns out, but we heard from the defendants' own expert, Mark Petrozzi, about alternatives. In fact, he acknowledged that there were portable fans that could be brought out, the fan technology

that had been in existence for ten years before Ric's accident, the tower fans that you saw pictures of, and let's look what Mr. Petrozzi had to say about other ways they could have made snow and that it wasn't necessary to have a pole in the middle of a trail.

"QUESTION: Okay. And it's got the big knobby wheels and the ability to be hooked up to some type of equipment to carry it out to make snow and remove it?

"Yup.

"And in fact, that can be used as an alternative to a fixed snowmaking station to bring it to places to make snow and then remove it, right?

"Yup. Yes.

"All right. We can close that.

"And back in December of 2019, Okemo had portable snowmaking equipment that could have been used to make snow instead of the permanently affixed steel snowmaking gun, correct?

"Yes."

Okay? So Mark Petrozzi -- and we saw photographs. We saw photographs -- oh, let me -- we have something else up. Mr. Kinney sitting right here, the senior director of mountain operations, we asked him about that.

"And so instead of using these poles, an alternative option if the team wanted it at Okemo in December of 2019 would

have been to do like they did back in the day: pull out the sleds, make the snow, remove the sleds, open up the trail. That was an option: Yes or no?

"They also mentioned, sir --

"Yes or no, is that an option?

"Yes, that's an option.

"And also back in December of 2019, there were tower fan guns on the side of at least one trail, right?

"Yes, sir.

"And it was an option to make snow from the sides of the trail in lieu of a pole in the middle. That was an option, right?

"Yes."

He's right here, members of the jury. He's been here this whole trial, Mr. Kinney, and he's here telling you, "Yeah, we didn't need that pole in the middle of the trail. We didn't need that hazard. We didn't need to take that risk by putting that pole and not having it properly padded that something like this, like what happened to Ric, could happen." They didn't need to take that risk.

And Dana Kent, Dana Kent, the manager of health and safety, although she acknowledged that even though safety is in her title at Vail at that time, it wasn't really that much about the safety of guests. Take that for what you will. And I asked her this:

"QUESTION: Instead of the snowmaking guns being on the sides of where we're seeing grass here between the grass and the road, when the snow would fall, they would be in the middle of all the skiable terrain?

"ANSWER: It is -- it is in the middle. It's in the middle of the skiable terrain.

"And you would agree that they could be removed, correct?

"I agree that anything can be removed if you spend the money.

"You would agree specifically that these snowmaking stations we're looking at in this exhibit could be removed, right?

"ANSWER: I agree that anything can be removed with the right amount of money."

She didn't come in here and say, "No, we couldn't do it. We couldn't remove these." All they had to do was send somebody out there; cut off those poles at the bottom; take it out; make sure that it wasn't a hazard; get rid of them; fire up the tower fan guns they had already on the side of the trail. We saw a photo of the tower fan gun that was there. We saw it. We'll see it in a moment.

There were alternatives. Here it is. You're looking at the TechnoAlpin T40 fan gun. This is technology that is much newer, by over a decade, from these dinosaur steel pole hazards in the middle of the trail, and you see it's off to the side.

It's off to the side of the slope. It's pointing right up to where Ric's accident was.

And by the way, I want to bring to your attention the fact that not one witness said that they even use these poles in the middle of the trail to make snow as of December 2019. I didn't hear it. You check the evidence. We know that they had a tower fan gun here with snow on the side. For all we know, they were using that even though Ray Kennedy admitted he doesn't like the electricity, he doesn't like having to fix electronics, he's an old-school guy. For all we know, they used this trailside gun to make snow and those fan guns were just sitting there because they were all dinosaurs and no one took the time to get rid of them.

I asked Mr. Kennedy, I said, "Mr. Kennedy, if someone from Vail Resorts, Incorporated, had asked you when you were the head of snowmaking to figure out a way to make snow in the Open Slope area without using the permanently affixed steel snowmaking guns that were there, is it fair to say you could have figured out a way to do that?

"ANSWER: If that was asked of me?" Because it never was. It should have been, but it wasn't, but if that was asked of him? His answer was, "Yes, I could have figured it out." Because with all this talk you've heard about safety and they're all about safety, where's the proof? Where's any evidence? Where's the safety assessment done when Vail took

this mountain over in 2018? Where's any proof of anything that they did to say, "Any way Vail can come in here now, we own this mountain. Let's make sure this place is safe. Let's make sure it's got the right technology. Let's get old hazards out of the way"? No. "Let's speak to Ray Kennedy. Let's say, 'Ray, you've been doing this 28 years. Let's make it safer. Let's get these poles out of the middle. You can figure out a way, right?'" They didn't do that. If they did, we wouldn't be here, members of the jury. We wouldn't be here.

You saw in the video -- and I'm not going to play the video, but you saw in Mark Petrozzi's video, and I'll just show you a couple screenshots from it, these snowmaking poles like the same ones involved in Ric's accident were on the sides of the trail. On the sides. So if Ric is skiing down the middle of the trail, he's not going to hit them.

But look what happens. Look what happens when you get closer. When you get closer to the base where all of these skiers converge, where there's little kids skiing, where there's experts skiing, where everyone's going - they're so concerned that they're putting these "Slow" signs in - why in the world are they putting these in the middle of Ric's way? His goal was to get to that snowmaking -- to get to that chairlift down there. Why are they putting these hazards in his way? Why aren't they on the sides like higher up? They didn't need to be there.

Now, we saw prior incidents. Prior incidents. And here's the significance of the fact that they have documented prior incidents within just a few years of this accident all the way up to almost a month beforehand: notice. These incident reports put Vail on notice, "Hey, people are hitting these things. They're hitting them. You know they're hitting them. You want to leave them there? If you do, more people can hit them. More people are likely to hit them. And someone could get very seriously injured." So that's one reason these prior incident reports. It gives them notice that not only, as they testified, they knew skiers would fall and hit these things, but here's proof. Prior to Ric's accident, they were on notice that skiers, beginner skiers, intermediate skiers, fast skiers, slow skiers.

And I asked Mr. Lancaster, "In addition to these incident reports," I said, "you also know that on a daily basis every single day that this trail is open for skiers, that skiers are falling on that trail. You know that?

"That's correct, sir.

"And despite the fact that you knew people fell in that area that we're talking about on a daily basis, you knew that on several occasions before Ric's accident skiers had slid into the padding or the poles or some portions of the snowmaking stations in that area, and you did not take any steps to change the location of those snowmaking stations, did you?

"No, I didn't." "Yeah, I knew. I knew people fell. I knew people slid into it. I know people were colliding, and I knew it was going to continue to happen. But no, I didn't take any steps to remove it. I didn't make a call to anybody: Ray, Dana, Eb." Pick anybody. Nobody talked about this. No one said, "My goodness, people are sliding into these things. Let's get them out of there."

And look at this incident from December 29, 2018, almost a year exactly to the date of Ric's accident. Look at this notice that they got. An expert skier, five foot eight, 165 pounds, hit the blue foam barrier. They fell. They were "unable to stop on ice." That sounds familiar. "Slid into the blue foam." That sounds familiar. The "foam barrier face first at high speed." "Face first at high speed." And guess what. It worked. The pad was properly installed that day. They went home on their own even though they hit it at a high speed, even though that person, that expert skier, was going fast and collided with that pad.

It worked. It works when it's properly installed. And despite all this noise you're hearing about Ric's speed -- which there's not one shred of evidence that he was going fast, not one shred of credible evidence, that's for sure, not one witness, "Oh. Well, he must have been going fast and that's what happened. That's how he ended up fracturing his back, severing his spine, tearing his aorta, collapsing his lungs,

fracturing his ribs." Come on. This person left there on their own. "Patient is done skiing for the day." They "verbalized their understanding." See ya. They weren't helicoptered off the mountain. So don't buy into this whole speed nonsense, because there's no evidence of it.

And even assume for argument's sake, which we do not assume, but just for your consideration when you're in the jury deliberation room, let's say one of you says, "Well, he must have been going fast." Okay. If he was going fast, then say, "Well, look what happened to this person. They were going -- an expert at high speed face first and they went home that day." Even if he hit it fast, absorb, deflect. Not under the pad. Not against the pole. But he wasn't going fast.

It was amazing to me to see these witnesses on the stand, Eb Kinney, Chris Lancaster, "Yeah" -- Dana Kent, "Yeah, you know, we weren't really sure what happened here. We kind of just thought it was a skier going fast and hitting a pad. That's what we thought." Really? Really, members of the jury? Even if that's what they thought, shouldn't they have gone one step further and said, "Well, should that happen? That's never happened before, even with an expert skier going fast." It shouldn't happen.

You're looking at some photographs from Mark Petrozzi, their expert's, mountain, Gunstock Mountain, where he's been a patroller for 30 years. This is what reasonable care looks

like.

Let's just back up one photo. All right. Right here.

On the left side is the newer technology. It's the tower fan gun that's an SMI PoleCat off of the skiable terrain with a yellow pad in front of it. You'll see all the padding there was yellow. Why? Yellow provides a little more notice. It's warning. We all drive on the street. Red, yellow, green. Not blue. Blue?

Awareness device? Really? This whole phrase of "awareness device," members of the jury, is something that ski industry defense lawyers, ski industry risk management people, ski industry people who need to hide their own negligence, they use that phrase. "Oh, this padding has minimal, minimal impact mitigation device purpose. It's really an awareness device: Hey, look what's here. There's a danger." Use your common sense.

If they wanted a true awareness device, make it red. Paint that whole pole red. Put up a big banner in red in front of it: "Danger. Stay Away." Put up a red net around it. Don't put up what looks like to be a nice big fluffy blue pad that you heard Ric say, you heard Mr. Penniman say that reasonable skiers would have a reasonable expectation that that was a big foam pad and the reason it was there was to protect them. Okay?

So there's a yellow pad, and there's a pole tower gun

here. Let's see what else he had at his mountain. Here's another example. It's off the trail. Off the trail.

Now, this is what we referred to, the TR8. This is a portable fan gun. It's the same thing that's up on the tower that you've previously seen, but they can make it mobile. Apparently they have a hard time getting long extension cords. That's what I heard from Mr. Kinney. But all you had to do was plug this thing into power and wheel it out there and make snow and then wheel it back. That's what the technology was. They could have used these fan guns. They all admitted they had them there that day.

Now, look at this historic photo that Mr. Petrozzi or Mr. Kinney was able to say, "Yeah, this was from probably the late '80s, early '90s, right before they put these poles in." There are no obstacles here like we just saw in the prior photograph. There aren't big snowmaking stations in there. People could ski here on beautifully made snowmaking snow without a risk of a hazard. We wouldn't be here today, members of the jury, if it wasn't for the defendants putting a steel pole in Ric's way.

And isn't it rich that they put it in his way and then they blame him for not avoiding it. Think about that. It didn't have to be there. It was never there before 1993. For decades they made snow. They put a steel pole in his way, and then they say, "Well, it's his fault. Yeah, we put it there.

Yeah, it didn't have to be there. Yeah, he's a beginner skier who doesn't have full control yet and is learning how to turn, how to stop. Yeah, people fall every day. But it's his fault. We put it there. But he should avoid what we put in his way, members of the jury. It's his responsibility." Look at all of that. Look at all of that hazard that they put in the middle of a beginner trail. Beginner trail, members of the jury. It did not need to be there.

So we also learned that the blanket fell off. The whole padding system fell off. We've heard all this talk from Ray Kennedy. I think the only thing we all can agree on that Ray Kennedy actually did see was the padding shudder and fall off the pole. Not supposed to happen. Not supposed to happen. Not only is that not supposed to happen, but not one witness has said they'd ever even heard of it happening. Never heard of it happening that a skier would collide with a properly installed pad and it would fall off the pole.

There was nothing unusual in Ric's accident. He didn't come off a jump and hit it. He didn't ski into it like in these Bugs Bunny videos with his arms and feet out right into the pole. Nothing unusual happened here. He's a beginner skier, slipped on ice, and slid into the pad. Why did it fall off? Why did he end up under it?

Look at what Mr. Kinney had to say. "Mr. Kinney, is it fair to say that prior to Ric's accident in December of 2019,

that in your entire career at Okemo, you had never heard of a beginner skier or any skier, for that matter, suffering a serious injury from colliding with a properly installed Gilman pad?

"That's correct, sir."

He never even heard of it. So we had all these witnesses who have never heard of someone being paralyzed. I asked them all; they never heard of a pad fall off. I asked them all; they never heard of someone being paralyzed on a beginner trail from colliding with a properly installed pad and helicoptered off. This was not a typical day at Okemo. This had never happened before.

We probably have combined hundreds of years of ski area experience from all these witnesses you've heard from. No one's heard of someone being paralyzed from hitting a properly installed pad; nobody has heard of a padding fall off if it's properly installed; no one's heard of someone sustaining paralyzing injuries and being helicoptered off from hitting one of these.

So the question is: Why? Why was what happened in Ric's accident so different that no one ever heard of it happening before? Not only why, but let's find out why. Let's find out why. And that's the purposes of an incident investigation.

Let's just talk about the word "investigation." You investigate something, right? You investigate, look into it,

investigate what went on to try and figure things out, right? That's the purpose of an investigation. Don't take my word for it. Vail's own guidelines say the purpose of the investigation is to document everything, to preserve it, to cordon the area off, to take photographs, to determine the contributing factors. Another way of saying contributing factor: What happened? What happened? So let's look at this investigation that Vail did. Let's look at this shoddy investigation that was either so grossly negligent and incompetent or it was purposefully done to not look into the contributing factors so they can close their file, as they did, and stick it in a filing cabinet 48 hours after this tragic accident and never look back.

We're looking at the incident investigation. This is the first page. And note in the Injury Summary: "Alert and oriented." You'll see that if you look through the medical records. Despite anything they're going to argue to the contrary, Ric was alert and oriented at all times on the mountain that day.

Now let's go to this first photograph. All right. Here's what we know about this page of their official Vail investigation. The first thing we know is that the time is wrong. 10:40. The accident happened at 10:05, according to their own records. Wouldn't it be nice to have a photograph saying that it's at 10:40, within minutes, within minutes of

him being transported off? I think they said that it was 10:32 when he was taken off the mountain in a toboggan. "Here's the photograph. Let's have it. Let's document it. This is how everything existed at the time of the accident. We've got a photo taken at 10:40." Well, guess what. We know it wasn't 10:40. They admitted.

This photograph, even if you believe the evidence that they shared with you -- that's up to you, but even taking it at face value that Chelsey Manley had any idea what any of those time and Bates stamps were for these photographs, it would have been at 11:48, more than an hour and a half after the accident, more than an hour after he was transported away, more than an hour and a half after the scene was taken over by numerous ski patrollers, toboggans, Good Samaritans, people, walking, moving, after we all know the pad was removed, right, by the Good Samaritans and put off to the side. It was removed.

Where did this pad come from? We don't know. Not one witness could tell you. Who put it up there? We don't know. Not one witness can tell you. Who took this photograph? We don't know. Not one witness can tell you. Chelsey tried to say her husband took it. But he said, "No. I don't know what she's talking about. I didn't take it." You saw that testimony. Maybe that's why we didn't hear from him.

It is a staged photograph, and we don't even know who staged it. And we know there's a depression even shown right

there. Look at that. And we know that it's sitting on the edge of snow. We've heard testimony from Okemo's own witnesses and Vail's own witnesses, Kyle Kostura said, "Nah, I'd have to adjust that. I wouldn't even be happy with that gap." And that's their evidence that they're putting in their file that they want you to believe is the proper way to install padding, members of the jury.

So the very first page of their investigation report, if anybody wanted to look into this case and look at this file to say, "Well, what happened in that case of Ric Grajeda? What happened in that accident?" they'd open it up. "Oh, we see. Look at that pad. It's properly installed. That photograph was taken right afterwards. No harm, no foul here." And then look at the Photo Notes. Look what Chelsey put in here: He collided with the barrel pad; the pad fell; it was moved to the side.

She doesn't mention he slid into the pole. By her own testimony, she says the first time she heard any allegation that it was the pad he hit and not the pole was two days later from Ray Kennedy. But did she speak to Ray? Did the lead investigator say, "Ray, what's going on? What did you see? Let's talk. We're both on the mountain. We've both been in this industry. Neither of us have ever heard of anybody being air-lifted out from hitting a pad. What did you see? Let's figure this out." She ignored -- purposefully ignored

statements in their own report taken at the time of this accident from Ric and from Dave Villani. And let's look at those statements.

We're now looking at Ric's statement. "I was going down and there were people to my right so I went left and slid into the pole." He gave this statement directly to Chelsey herself, the woman creating this report. He told her and she documented it that he slid into the pole.

Let's look at what else. Look at what Dave Villani said that's in this report. And, again, these were statements that were given right at the time of the happening of this accident, not two days later from Ray Kennedy. And Dave Villani -- we've seen this. He says, "He saw his friend face down wrapped around pipe with four people around him and no patrol yet."

Did Chelsey Manley put in this report, "Well, all my investigation so far shows he slid into a pole and he was wrapped around pipe"? Did she put that in the report? No. Ask yourselves why not. Why did she wait two days? When these reports are supposed to be done within 24 hours, why did she wait 48 hours and then, based on Ray Kennedy being 550 feet away who didn't see anything, that's what they put in this investigation? And he was "too far away to really tell." That's in the report as well, members of the jury.

And then what were they supposed to do in this investigation? Let's look at their own rules. Section 2.3(b):

"patrol will coordinate the following, where appropriate: cordon off the area and access to the area." Well, we know they didn't cordon it off. They didn't preserve the scene. And why? Why didn't they do that? They didn't deem it appropriate. Are you satisfied with that? It's not appropriate? A young man; this has never happened before, ever; it doesn't fall off; no one's been paralyzed, helicoptered off? They could have taken -- they have tons of netting and bamboo. They could have put a perimeter around there. Why didn't they cordon it off?

I asked them, "If Ric had died on that mountain, would you have cordoned it off?" "No. Not appropriate." Come on, members of the jury. These are their own guidelines. "Cordon off the area." They didn't do it. Incompetent. Negligent.

What else didn't they do that the rules require that they do as part of their investigation? "If possible . . . measurements, notes . . . , photos, witness contact information." "The site conditions and other perishable evidence that may change over time should be collected immediately." Immediately.

They didn't save the pad when it was taken off. They were all there. Even Kyle Kostura, again, riding by on his snowmobile - I guess that's what Kyle does all day, rides around on his snowmobile - he didn't get off then, say, "Oh, my goodness. I'm the one in charge of inspecting this. How did

this happen? This isn't supposed to happen." Why didn't Kyle go grab those pads? Why didn't Kyle look at them? Because Kyle's too busy to get off his snowmobile, members of the jury. He's a busy guy.

Chelsey Manley didn't photograph the scene. She didn't photograph the padding involved. She didn't even photograph the padding in the staged photo, that one photo from the front. Where are the photographs from the back? Where's the closeups underneath? Where's it from all the different angles? What kind of investigation is this? And you heard Dana Kent say that she had an expectation that they would photograph everything and preserve everything, and they didn't, and she said, "That is a departure from Vail's own guidelines." Don't take my word for it. Look at the rules. Listen to the woman whose job it was to implement these rules, to train them on the rules. Dana Kent, manager of health and safety, said, "Nope, they were supposed to preserve all of this and they didn't."

It would have been helpful. I'd like to know what was behind that pad. Did they tie it off? Were there broken buckles and straps hanging? Who knows? Who knows? We don't know. We never will.

We've heard about this being a major incident notification. Well, they followed this rule. Dana Kent sent the e-mail out. We've talked about that. And when are they supposed to do that? When there's a catastrophic,

life-altering guest incident. Catastrophic, life-altering. My client, Ric, has sustained a catastrophic, life-altering -- think about that. Life-altering incident. And they didn't photograph it; they didn't cordon off the area; they didn't preserve it.

Not only did they fail to preserve evidence, members of the jury, but there's evidence in this trial for you to consider that they messed with the evidence, that they messed with the evidence. You heard from Ms. Gilman and you saw in the investigation report they had two different sets of pads. They brought two sets of pads here to show you. All we know about these pads are they're the ones in the investigation report. Not one witness has testified that these are the pads involved in Ric's accident.

Chelsey Manley even thought all the pads in her own investigation report were not only the ones involved in the accident but actually her photographs were of the same padding. It wasn't until years after when I questioned her that she realized, "Oh, yeah, I think these are different sets of pads. I didn't know that." Nobody knew that. Nobody. Not Chris Lancaster, not Dana Kent, not Chelsey Manley.

Who looked at this report? You know who didn't look at this investigation report? The senior director of operations at Okemo Mountain. You know who that person is? You do, because he's sitting right here with Vail's lawyers: Eb

Kinney. And you heard what he had to say. "I never even looked at the report until this trial." Is that a reasonable and appropriate investigation, members of the jury? Or is it a blatant error, is it a blatant turning of a blind eye? Is that what it is? So that their negligence is not documented in their own records.

Let's look at Photo 19. We're going to zoom in. This was in the investigation report, and it's not disputed that this is a different set of padding system than the one in the earlier photographs. And you can see at the top of this padding the spacers that Liz Gilman talked about.

Now, the defense would like you to believe, "No, those aren't spacers in there. We've never seen them. We've never heard of them. They can't fit in there." But Liz Gilman, you heard her testimony. She was so upset, she was so distraught, she was so concerned that she had to call Mr. Aicher after we spent a day questioning her, she had to call me to go back on record to say it's -- "This is tough. I don't want to have to say this, but here's what I saw, and I need to bring it to your attention." Here's what she said by looking at that photograph:

"So your best take on what you know in looking at this would be just that it is a spacer that you could see as opposed to the top of an entire post guard?

"ANSWER: Right, it's absolutely a spacer."

I first asked her about this. I said, "First I just want to finish up on the phone conversation you had with me. Then I'll ask you about a conversation you had with Mr. Aicher.

"Did you tell me in our phone conversation that what you saw in photograph 19," what we just looked at, members of the jury, that that "was the wrong product that you wouldn't sell that design?"

Her answer was: "So what I stated was that -- what I stated was that it's not what we sell for a Tower Shield.

"When you say that is not what we sell what specifically are you referring to," Ms. Gilman?

"I said or manufacture.

"This is the cylinder with the spacers inside. And again, I don't know if there was a spacer at the top and the bottom or just the top. I can only go with photo 19 and felt it was necessary to speak to both of you."

What else did she have to say? She was so certain, she didn't say it once that she knew it was a spacer. She said again, "That is definitely the component cylinder added by an employee at Okemo the spacer. Our component cylinders that are inside the URS blanket the blue blanket are hollow."

You judge the evidence, members of the jury. But there's no dispute as to how that testimony reads. She looked at the photo. She knows her products. She saw spacers in there. They're not there. They shouldn't be there. But someone at

Okemo put it there. And you know what the problem is? They're gone. What happened to the spacers from the time of this investigation report to after Mr. Aicher and I received that phone call from Ms. Gilman and scheduled her to go back on record on March 11th?

Look what happened on March 10th, the day before. Photographs arrived. And this is a photograph of the cylinders surrounded by the blue pad that we saw in Photo 19 that she said there's spacers in. And she said, "Yeah, that's -- it's either different cylinders or it's the same cylinders and the spacers were taken out, but I can tell you it's not the same as what I saw in the photo, and I can also tell you -- see that highlighted area? Those are gouge marks." She said specifically, "So whether or not this one is the one that was used for that this one I can state with my foam had something inside that was pried out. Those are the telltale tool markings of what happens when I do it."

And I asked her about the significance of that: "Do you recall saying to me during the conversation you had with me that morning something with regard to whether or not you would ski at Okemo if they were using what you saw in photograph 19 as a protecting shield for that snow tower?"

Her answer -- the woman who sells these pads, the woman who manufactures them, the woman whose client are the defendants that we are suing in this case, her answer:

"Summarizing the way I stated it -- the way I stated it did -- summarizing the way I stated it I did say for Okemo, because that was what we were talking about, if that in fact had spacers through out I would not want to ski into it. I would not feel comfortable skiing at Okemo with that object."

You heard the testimony. You put a spacer in there, it defeats the whole purpose of the crumple zone.

THE COURT: So, Mr. Smiley.

MR. A. SMILEY: Yes.

THE COURT: We are at our midmorning break time, and I have a signal that people would like a break.

MR. A. SMILEY: Okay.

THE COURT: So we're going to take it.

MR. A. SMILEY: Thank you.

THE COURT: You don't have the case, ladies and gentlemen of the jury. You know that. So we'll wish you a good break, and we're going to take ten minutes to make things quicker.

Let's excuse the jury and have the attorneys remain in the courtroom.

(Jury out at 10:32 AM.)

THE COURT: So I should note for the record that I looked over at Mr. Isham. He touched his watch and mouthed the word "bathroom."

All right. How much more do you have, Mr. Smiley?

MR. A. SMILEY: Probably about 45 minutes, 40 minutes.

THE COURT: Try to be efficient.

MR. A. SMILEY: I'm trying. There's a lot of evidence to get through, your Honor.

THE COURT: There is. But you can eliminate repetitions.

MR. A. SMILEY: I'm doing my best, and I don't believe I'm repeating.

THE COURT: All right. We're going to take a ten-minute break.

(A recess was taken from 10:33-10:45 AM.)

THE COURT: Bill, can we bring back the jury. Thank you.

(Jury in at 10:46 AM.)

THE COURT: We are back on the record in Grajeda v. Vail. We're in Mr. Smiley's closing argument.

And you may resume.

MR. A. SMILEY: Thank you, your Honor.

As part of the investigation, critical part of this investigation, if not the most important part, is in 7.1(a) of the risk resource guide, and let's just take a brief look at that. "The purpose of a prompt post-incident review is to provide review participants with an accurate overview of the incident and the opportunity to assess contributing factors and future prevention of similar incidents." Contributing factors.

What happened. No one looked into what happened. Certainly not their investigation report.

So we asked all their witnesses: How did this accident happen? What were the contributing factors? Why did something so unusual happen on the mountain that day? And let's look at what they said to you, members of the jury. Here's what the manager of health and safety, top person that we've heard from at Vail on this issue, had to say:

"QUESTION: Ms. Kent, you've previously gone on record under oath and said that 'it's not up to the ski resort to prevent an injury,' correct?

"ANSWER: That's correct."

That's the woman in charge of safety of their guests. That's what she had to say to you, members of the jury.

Let's look at what Mr. Kinney had to say to you when I was asking him about looking into this accident. Contributing factors.

"So if I understand you correctly, in your role as senior director of mountain operations on the day of this catastrophic accident that happened just a few hundred yards from where you were seated in an office with senior management of the mountain, that you didn't even look at the investigation report until this trial? Is that correct?

"That's correct."

That's how he handled this case.

"Who specifically, sir, did you speak about the contributing factors that led to Ric being helicoptered off the mountain that day?

"I talked to Chris Lancaster about it, I talked to Kyle, I talked to Ben, Everett Moore. Lots of people. Multitude. Bruce Schmidt, my GM. Dana.

"Did you hear me ask all of Vail's employees who had testified did you speak with Mr. Kinney about the happening of this accident? Did you hear me ask those questions?

"Yes, sir.

"Did you hear all of them say no?

"Yeah. I was surprised by that."

Think of all of his employees who took an oath -- who got up on the stand with him sitting in the courtroom, took an oath to tell the truth, and said, "No, he never asked me anything." "No, I didn't speak to him." He gets on the stand and said, "Yeah, that was surprising to me." Think about that, members of the jury.

Chris Lancaster, the head of ski patrol still and for many years before this accident, I asked him, "Sir, did you even consider for the slightest moment that perhaps there was an unacceptable gap between the bottom of the pad and the snow surface existing at the time of this accident and that's how Ric sustained his injury, that he went into a depression in the snow, under the pad, and struck the pole? Did you even

consider that possibility for a moment?

"I would say no."

Let's look at what the lead investigator had to say, Chelsey Manley: "Did Dana Kent ever reach out to you to discuss the circumstances of this accident following the happening of the accident?

"No."

Dana Kent was sitting a hundred yards or so away or 500 yards. She was at the base of the mountain. Chelsey's the lead investigator. Dana Kent was in charge at the highest level over this investigation. Dana Kent trained Chelsey on this exact handbook and these rules. Didn't even speak to the investigator. Didn't even speak to the investigator.

"So from the day of the accident, December 19th, up until present, did you even speak with Vail's manager of health and safety about the circumstances of Ric's accident?

"Not that I remember.

"Did she have any discussions with you about what the contributing factors were involved in this accident?

"No.

"Did you even look into what, if any, contributing factors there were in this accident?

"I did not."

The lead investigator didn't follow the rule book. Didn't actually even investigate this. Didn't look into contributing

factors. Didn't look into what in the world happened.

Ben Partridge, I asked him, "So as the person whose team was in charge of installing and inspecting the padding involved in Ric's accident, weren't you the least concerned about, hey, maybe, maybe there was something wrong with the padding or the way it was installed that day that was a contributing factor in Ric's accident?"

His answer: "I wasn't. I had faith in my crew's ability to do our job."

He didn't look into the contributing factors.

Nobody, nobody, looked into how in the world this happened. And you know why? You know why they didn't look into it? Because if they did look into it, if they took a moment, if they actually spoke with anybody, if they actually spoke with each other, if they actually met as their own rules require them to do to discuss it -- Dana Kent says, "Oh, that wasn't implemented yet." The meeting. Come on. It's another way of saying, "No, I didn't pick up the phone or send an e-mail and tell everybody, 'Get your butt in my office. Let's figure out why this young man left this mountain in a helicopter paralyzed.'" Why didn't they do this? Because it wouldn't have been that hard to figure out what happened here. You all know what happened. Everybody in this courtroom knows what happened. Kyle Cotter told you what happened. Ric told you what happened. Dave Villani told you what happened. The

Good Samaritans told you what happened. He slipped into a depression under the pad, slammed into the pole, and that's what happened.

But they didn't want to find that out. They didn't want to document that anywhere in their reports, because that would show their negligence. And why in the world would Vail Resorts Incorporated want to have a document in their file that in any way actually showed what happened in this case? That's why not one single person looked into how in the world this life-altering, catastrophic event happened.

The judge is going to instruct you on negligence, the negligence that they wanted to hide by not doing a proper investigation, by not looking into the contributing factors. We believe there are four areas of negligence, and you only need to find one, but I want you to consider all of these areas.

First of all, the defendants were negligent -- and the judge will instruct you what that means, but it's failing to use reasonable care. They were negligent in putting this hazard in the way of beginner skiers or any skiers in the first place when they had no reason to. They were negligent in putting it there when they didn't have to, when for decades before they could make snow without risking something like this happening.

They were negligent in failing to remove the pole, and

poles that had been there for 25 years, these dinosaurs of technology, knowing that people had slid into it and hit it and it was going to keep happening again and again and again until something like this happened, something like what happened to Ric. They should have removed it. They were on notice that hazards existed, that people had hit those, and that there was a potential for serious injury, and they had many alternative ways to make snow. It was negligent to leave it there knowing of the extreme dangerous hazard that they were creating by leaving it there.

They were negligent in improperly installing the pad, all the testimony I just reviewed, on the snow, no gaps, and we know there was a gap. That's what the evidence shows. So they were negligent. It wasn't installed properly. Whoever last put that pad there set it up on the edge. It was sitting there, and it was sitting on a ledge of snow, and it was sitting just like my cup is sitting on the side of counsel table, with a nice gap underneath it for a skier to slide under and into the pole. That was negligence.

And then lastly, they were negligent in failing to do a proper inspection. Assume for the moment that the pole had to be there. Assume for the moment that they had to have padding on it. Assume for the moment that at some point it was properly installed earlier, a day or two before. A proper inspection that morning, not riding by on your snowmobile on

your way to do millions of other errands and looking over your shoulder, a proper inspection to make sure it was safe, that would have prevented this accident. That was negligence, members of the jury.

So what are the consequences? What are the consequences of their negligence that I've just outlined? You've seen and you've heard the consequences. The consequences resulted in Ric's life being forever altered.

Not often you hear about someone with a life-altering, catastrophic injury. Those are the consequences. Ric at 21 years old, scared, scared. We heard from two of the defense witnesses, Mike Morabito when he arrived on the scene and Eb Kinney. Scared. Think about that observation. It's not my word. It's theirs. Being scared has to be one of the most horrific things, to be truly scared, and Ric was scared. Think about that. Think about Ric, how scared he was.

And the reason I'm going through these consequences, members of the jury, is because soon I will be asking you to compensate Ric for these life-altering injuries, and you need to consider what's fair and adequate and reasonable compensation for Ric, for his life-altering injuries. And let's try to go through some of those now, what happened up until now.

We know he was scared. He couldn't feel his legs. He was put in a toboggan. His clothes were cut off of him. He was

alone without his friends, without his parents, who were hours away, paralyzed, lying there, being asked questions, being put in a helicopter. He'd never been in a helicopter before. I'm sure this wasn't the way he wanted to experience that for the first time, being taken to some strange hospital in New Hampshire, having everybody come to him and examine him, learning that he's never going to walk again, being told that, being alone in that hospital, being told "You're going to need surgery," being told "You have to have tubes inserted into both sides of your chest." And you saw that process. "We have to drain the blood and air out of your lungs." Being told "Your spinal column has been compromised. We need to get you into surgery. We have to put screws and rods into your back, Ric, and that's not going to make you any better. I'm sorry. You're not going to walk, and we still have to do this to you."

Think about what this young man had to go through. Staying there for two weeks; seeing his family, his mom, Carol, who you heard from, his dad, Richard, knowing that they had to rush out and to receive that call that no parent ever, ever wants to get: "Your child was in a horrific accident. He's been paralyzed. He's never going to walk again." It's hard to fathom, members of the jury.

And they showed up there. You heard about that meeting. You heard how upsetting it was for Ric, the guilt. He felt guilty that he did something wrong by going skiing as a

beginner skier that day to end up paralyzed. He felt bad that he made his parents so upset.

He spent Christmas there. Christmas will never be the same for him again. He spent that first Christmas paralyzed in a hospital bed, and the second Christmas his girlfriend dumped him the day before or after. That's Christmas to Ric for the rest of his life.

You heard he spent New Year's being put in another ambulance, being brought to New Jersey to a rehabilitation center, where he would be a patient for the next two months, nine weeks, alone. It was COVID. Restricted visitors. Scared. Thinking of his future.

You've heard all the efforts Ric has made. He's a fighter. You saw him get up there. You saw him get up and say, "I'm walking. I am walking at my graduation." Good for him. Good for him. He's a fighter, and he's going to continue to fight, but he shouldn't have to. He's tried everything.

He's still trying to walk like the rest of us. He's still trying to. He goes to Project Walk. His father takes him, round trip six-hour drive, twice a week, religiously, even though Lynne Nicolson says, "No, he doesn't need it. He could be doing better things with his life." Who is she to tell him? He's trying. He wants to walk again. Do you blame him?

He's tried aquatic therapy; he's tried acupuncture; he's tried massage; physical therapy, occupational therapy,

inpatient, outpatient; at-home stretching. He's tried it all, and he's going to continue to do that every day for the next 54.7 years of his statistical life expectancy.

Think about that. He's 25 now. This happened to him four years ago when he was 21, what he's been going through to date, and he's got another half a century plus. God bless him. Fifty-four more years. And hopefully a lot longer, because that only gets him to 79 years old. My dad's 85. He's going to live longer, Ric - I'm sure he will - but you have to follow the statistics, and that's a long time, and you need to consider that, members of the jury, in your verdict.

Consider the future for Ric. Consider the fact that every day for the rest of his life, 365 days a year, 54.7 more years ahead of him, to do something as simple as getting out of bed to go to the bathroom in the middle of the night requires him to find his wheelchair, to transfer to his wheelchair, to get his gloves, to get a plastic catheter tube, to insert into his penis up into his bladder. That's what he has to do in the middle of the night for the rest of his life. And he has to do it in the morning, and he's got to do it in the lunch, and he's got to do it during court breaks. Just to pee. Life altering.

His bowel regimen. He can't move his bowels on his own. He's got to put special suppositories. He's got to dedicate an hour to an hour and a half just to sit on the toilet, and then after he's put a glove on and used his fingers. He has

accidents. He has to ask his parents to help clean himself, a 25-year-old man who told you how he wants to be independent. He needs to ask his mom and dad to clean poop off of him because he has an accident. That's the consequences of their negligence, members of the jury.

Erectile dysfunction. He's in his prime. He's a young man. He wants to date. He wants to get married. He wants to have children. He won't be able to have that same type of life, ever. Every day. That's what he has ahead of time. He has got a long road to go. And those are just a small sample.

You saw his spasms, perhaps one of the worst things of this injury. This poor young man, it's like he's got somebody with a Taser standing under him, all of a sudden hit the Taser and his legs start going. You saw it on the witness stand with your own eyes. He doesn't know when it's going to come on. He doesn't know how long it's going to last. It's painful. It's uncomfortable. It's awkward.

Could you imagine him in any job that he has to meet with a client, trying to get to that client on a day like today and it's snowing out? He's got to navigate -- we all navigated to get to this courthouse, and we're going to navigate to get out of here. Just think about how hard that is to do when you're in a wheelchair, to just cross the street in the snow. Simple things.

Not everyplace is ADA accessible. There are steps

everywhere. Even in this beautiful, majestic courthouse we're in, to get up on the witness stand is two steps. It's not ADA. He's not able to get up those steps on his own. Simple things, members of the jury, life altering, every day for the rest of his life.

Can you imagine him meeting with a client? Let's hope he's going to be a lawyer. Let's hope he does it. I hope he is. I'm rooting for Ric. Meeting with a client and his legs start spasming in the middle or he's got to go and spend an hour and a half in the bathroom or his back is hurting him so much, he's got to take an hour to go lie down on his back *[sic]*, how is he going to work a full day? You be the judge of that.

You heard from Dr. Perry. You judge his credibility. You compare his credibility with Lynne Nicolson. You heard Dr. Perry say life is tough for a paralyzed person. Especially a young man like Ric who wasn't in the workforce to begin with. It's not like he had a good office job that he can go back to. It is so hard.

You heard Dr. Wolstein say it is so hard to get a job for any 25-year-old college graduate now. Kids are living at home into their 20s, trying to find work, trying to be independent. It's a cruel world. You think an employer if they're faced with two options, do I hire this nice young man who's in a wheelchair where we're going to have to make all kinds of ramps

and accommodations in our office, we're going to have to give him extra time off, we're going to have to give him time to take breaks to use the bathroom, to deal with his spasms, to lie on his stomach, or do we hire this other person who's equally qualified but we don't have to worry about any of that stuff? Who are they going to hire? Come on. You'd like to think in a perfect world Ric would get the job, but it's not happening like that. That's the consequences of their negligence, members of the jury.

At best, he'll get a job. At best, at best, you heard from Dr. Perry, and you saw with your own eyes, he'll work 50 percent, either full time if he can for a year or two or half the time here, but certainly he's not going to be able to get up and have that 9:00-to-5:00 job and put it in and do it for the rest of his life with just the fact that he needs to go for therapy several days a week. Who's going to hire somebody full time that needs to do that?

Mental anguish, members of the jury. Mental suffering. You've heard about his physical injuries. You've observed them. You've seen them. You can't see inside his brain, unfortunately. You can't see what's going on. But we've tried to elicit for you to get an understanding of how he's been affected mentally. You've heard he's worked his way through different therapists trying to connect with someone. You've heard him say he wished he died on that mountain. You heard

his mom, Carol, say every single day, every day, "I wish I died on that mountain." He feels like he's a burden to his parents. He feels like he's a burden to everybody. He's lost his independence, which was the most important thing to him. How does that feel? His mental anguish. It's life altering. Life altering.

Socially, physical activities, what has been taken away from him? He can't walk normally; he can't run; he can't swim; he can't play soccer; he can't go for hikes. All of these passions he had. We all have passions. We all have things that are important to us, our hobbies, and I asked you about that in jury selection: "What do you like to do? What are you passionate about?" His passions have been taken away from him, have been stolen from him. He will never go hiking again up a mountain, ever. He'll never play soccer again. He'll never know what it feels like to kick a soccer ball again, ever. That's what's been taken away from Ric, members of the jury. That's what you need to consider when you're considering the extent of his damages, of his physical pain and suffering, of his emotional pain and suffering, of just being able to go out with his friends.

You heard him say his friends all wanted to get together and go to karaoke and they invited him. Well, guess what. The karaoke place wasn't ADA accessible. "Sorry, Ric. Stay home. We're going without you." How horrific is that? You can't be

with your friends. You can't go to your friend's house. Think about your friends and their homes that you go to. Think about how many steps maybe in your own home you have to get in or out of or his friends' homes that aren't ADA. He can't even go and visit his friends.

This is what we call loss of enjoyment of life. Ric's enjoyment of life -- which is really all we can all hope for as human beings is to have some enjoyment in our life. I hope we all do. His enjoyment of life has been taken away from him because instead of going for a hike, instead of going out on normal dates with girls, instead of being with his friends, instead of being independent, he's stuck in that wheelchair, he's in a bathroom with a catheter, his legs are spasming, and he can't do any of this. And he never will. That's the most tragic part. He's got his whole future ahead of him, and that enjoyment has been ripped away from him, members of the jury.

There's been financial/economic consequences as a result of this. You heard testimony from Dr. Wolstein, the vocational expert, unchallenged. They didn't bring in a vocational expert. They didn't bring in a life care planner. They didn't bring in an economist. There's no dispute as to the economic damages that have been presented to you. If they wanted to dispute it, they certainly could have brought in their own experts. They certainly could have cross-examined our experts and challenged their numbers. Not one number was challenged,

members of the jury. Don't take my word for it. Look for yourself.

You saw the future care he's going to need from Dr. Wolstein. He gave you the summaries, which we're just scrolling through, of what he's going to need for the next 54 years and hopefully more. Doctors' evaluations, medications, therapies, surgical interventions, supplies, accommodations, home modifications, transportation, and you heard that these are all conservative numbers. And we purposely asked Dr. Wolstein, "Don't speculate. Don't put in things that you don't know. Just the basics what he's going to need, the basics."

Look, for example, on transportation at the top right there. Put in there for transportation, he's putting in hand controls to modify a car. Wouldn't it be nice for Ric to have a van that he could wheel into? Wouldn't it be nice for Ric to have something with equipment that can hook up to his chair that he could transfer in and it can move his chair into the back, a pickup truck, something like that, something that he could operate with hand controls? Wouldn't it be nice for Ric to have a power wheelchair so he doesn't have to put all that energy?

He's young now. He's strong. But what about when he's 70 years old? What about when he's 75? How in the world is he going to get up an incline in a wheelchair on his own? How is

he going to have that strength? It's hard to think about, members of the jury, but I beg of you, it's required of you in this courtroom, to think about Ric not as a 25-year-old young man sitting here but think about when he's 70, when he's 80, when he's 85.

We didn't speculate in this life care plan. It's conservative. We didn't put in power wheelchairs. We didn't put in the cost of potential future technology that may cost millions of dollars to help him walk again, some surgical implant, some -- some experimental testing that he could avail himself of. And I'm asking you, members of the jury, to give him that, to give him those resources so if five years, ten years, 20 years, 30 years, when he's only 50 years old, from now, if there's some expensive technology that could help him walk, that can help him have a better quality and enjoyment of life, please give that to him. That's what we're asking. That's what he deserves, members of the jury.

THE COURT: So the jury is not going to be speculating about future technology.

Mr. Smiley, you estimated about 40 minutes.

MR. A. SMILEY: Yup.

THE COURT: Okay? Go ahead.

MR. A. SMILEY: Now, you're going to get a verdict sheet, members of the jury. It's a three-page document. This is how you will render your verdict, and the judge is going to

go over this with you. So to the extent I say anything different, ignore me; listen to Her Honor. She knows a lot more than I do, and she's going to tell you about the law and the verdict sheet. But I just want to touch on a couple of things of brutal importance to Ric.

The very first question you're going to be asked is about the Vermont sports injury statute, and you are going to be asked, and I'm quoting, number 1, "Plaintiff, Richard Grajeda, alleges that his injuries were caused by the negligence of Defendants, Vail Resorts Inc., Vail Resorts Management Company, and Okemo Limited Liability Company, doing business as Okemo Mountain Resort.

"Do you find that the injury Plaintiff suffered was the result of an 'obvious and necessary' danger inherent in the sport of skiing, as defined by the Vermont Sports Injury Statute?" You will have time to look at this in your deliberations. You have time to discuss this. This is the first question that you must answer.

If you answer yes to this question, that his accident was a result of an inherent risk in this sport, that it was a result of an obvious and necessary risk, your verdict, if you say yes, is for the defendants. It's for Vail. You will go no further. You will send Ric home with nothing. You will be saying that his accident, it's just an inherent risk.

Well, the judge is going to instruct you on the law of

inherent risk. And we talked about inherent risk in jury selection. There was a lot of discussion about people saying they slipped on ice and fell, skiers collide. Of course. Of course there are inherent risks in skiing, and we don't dispute that. An inherent risk -- the judge will instruct you an inherent risk is a risk that is obvious and necessary and is impossible, impossible, or unreasonably difficult or expensive to eliminate. Again, an inherent risk is an obvious and necessary risk that is impossible or unreasonably difficult or expensive to eliminate. The judge will also tell you that a ski area's own negligence, however, is neither an inherent risk nor an obvious and necessary one in the sport of skiing.

Of course there are inherent risks. Inherent risks are things that the ski area operator and owner can't make safe. You can't eliminate ice on a mountain. The fact that you can slip and fall while skiing, that's an inherent risk. We're not saying it's not. But Ric's injuries weren't caused by slipping and falling on ice. They were caused when he slid into a pole that, undisputably, did not need to be there. It wasn't impossible to remove. To the contrary. They could have totally removed it. They could have made snow.

And, members of the jury, it wasn't even there prior to 1993. How can it be an inherent risk if it wasn't even there and people were skiing down that trail every day on snow and they made snow? Sure, an inherent risk could be weather

conditions: fog, rain, snow. It could be snow conditions: hardpack, ice, broken-up stuff. It could be skiers colliding with each other. I'm pretty sure there's nothing that Vail could do to prevent the weather from being different. There's nothing they could do to prevent skiers colliding with each other. There's nothing they can do to make sure there's no ice anywhere on their mountain. Those are inherent risks. Of course, going off the side of a trail, doing some skiing, hitting a tree, that's an inherent risk. They can't prevent everybody from doing that. Those are inherent risks.

But not putting a steel pole in the middle of a trail. That doesn't have to be there. That can be removed. There's no evidence that would be unreasonably difficult to remove. There's no evidence that it would be too costly to remove. There's no evidence that it would be impossible to remove. Of course it could. Not only could it, but it should have. And failing to properly pad it and a skier going under the pad, as I just told you, the defendants' negligence is not an inherent risk.

The phrase "obvious and necessary" is a crucial one, and I just want to address that to you. You would have to find that the snowmaking station in the middle of the trail is obvious and, and, necessary for the sport of skiing. It's an obvious risk and a necessary risk. The risk has to be obvious and necessary.

We don't dispute that the pole and the blue pads were obvious. Ric said he saw them. Everybody saw them. Of course it was there. But the risk wasn't obvious. The risk of being paralyzed, the risk that a gap could exist and you could slide under it as a beginner skier and be paralyzed, that wasn't obvious to anyone. To the contrary, Ric thought the padding was there to protect him. He assumed that if he slid into it, he'd bounce off, just like the padding's supposed to work. And he had the right to reasonably expect that Vail would properly install and inspect the pads and they would protect him.

You heard testimony from one of the witnesses that it's like a seat belt, right? The padding's like a safety, it's like a seat belt. Well, if you don't put the seat belt on, it's not going to provide any safety protection. If you don't properly install and inspect the pad, it's not going to provide that. That is not an inherent risk. Necessary, okay? It has to be "and necessary." It has to be a necessary risk for the sport of skiing.

You've heard the defense say that snowmaking in general is necessary for the sport of skiing. But that's not what this case is about. We're not saying you can't have snowmaking. That's not what this case is about at all. And don't let them try and put this global thing that anything related to snowmaking means it's an inherent risk. That would give them the right to -- if you find that this is an inherent risk, then

they don't even have to put a pad on it if a pole's an inherent risk. That's what you would be saying if you find that this was an inherent risk. You would say they don't even have a duty to put a pad on it. And I'm sure that's not what this jury would want to do.

Necessary. Not one witness took the stand and said it's necessary, we can't have the sport without a pole in the middle of the trail. They didn't say that. When you look at this, when you look at the verdict sheet, when that first question is asked, there should be no dispute at all that this is not an inherent risk. It is not necessary. It wasn't impossible to remove. You heard the testimony from all of their witnesses, all of them: It could be removed; it could be -- the risk removed; they could use alternatives; it didn't have to be there. But they put it there. And now they want to say it's an inherent risk.

Just because it has to do with snowmaking, members of the jury, they can't go and pull a snow hose at neck level across a line -- across a slope where a skier could slide in and be clotheslined and knocked down and say, "Hey, it's snowmaking. It's an inherent risk." They don't get some blanket coverage that anything related to snowmaking is an inherent risk. And that's what they're going to try and argue. I don't know what Mr. Aicher's going to say when he gets up here, but I'm pretty confident he's going to say snowmaking is essential, it's

necessary, it's inherent to the sport. Okay. Make sure he follows up and explains why that pole had to be there, members of the jury. Hold them to task.

The answer to number 1 has to be no. No. The second answer: "Do you find" -- second question: "Do you find that the Plaintiff proved by a preponderance of the evidence each essential element of his negligence claim?" Yes or no. The judge will instruct you on the elements of our claim. So don't take my word for it. Listen to the judge's instructions, but in general you have to find it wasn't an inherent risk, which is an easy one, that they should have used reasonable care, that they owed that to Ric.

Under the law they owed a duty to use reasonable care to protect him from hazards that they knew existed. They knew it existed, and they didn't protect him. They didn't use reasonable steps. That's negligence. They breached that duty, and as a result of that, his injuries resulted. That's it. It was a proximate cause. It happened as a result of their negligence.

And we've outlined at least four areas of negligence. You don't need all four, just one, or a combination. But clearly they were negligent. That's why they didn't even look into the contributing factors, because they didn't want their evidence of negligence before you.

Now, after a finding of negligence and not inherent risk,

then you are asked to consider the defendants' affirmative defenses, their claim that Ric, Ric, was at fault. It's Ric's fault. That's their claim. This accident was Ric's fault. And they want you to say it was his fault. But you know what? The judge is going to instruct you they have the same burden of proving Ric was at fault as we do in proving they were at fault: by a preponderance of the evidence.

There's no evidence Ric did anything wrong here. There's no evidence that Ric did anything other than what every ski person in this room testified to is expected of a beginner skier. He was in the middle of the trail. He wasn't skiing above his abilities. He wasn't skiing off bounds. He didn't go skiing into the pole. He fell beforehand and slid. They want to say, "Well, he shouldn't have swerved to avoid the ski school students." But then if he didn't avoid the ski school students, they'll say he breached the responsibility code by skiing into ski school students. I mean, come on. He did exactly what he was supposed to do. He skied around them, okay? He avoided them. He complied with his obligation, and he fell. Falling is not negligence.

So, look, challenge them; hold them to their burden. What proof is there that Ric did anything wrong? That's why - I know you heard it - I asked every single Vail witness on the stand, "Tell this jury what Ric did wrong." "Oh, I have no opinion on that." Nobody blamed Ric for this accident except

one person: Mark Petrozzi. Mark Petrozzi comes in here. You'll decide whether you think he's objective. And he says, "Oh, yeah, he was out of control. He swerved. He was too fast. He needs to -- his decision-making was flawed." He never actually really said that he did anything to cause his own accident. He danced around it when I tried to press him. You decide. There's no evidence Ric did anything wrong in this case.

And the whole cannabis -- the whole cannabis discussion, you'll decide based on this evidence, but I submit to you that that was just a blatant attempt, frankly an insult to your intelligence, members of the jury, to try and blame Ric for his honesty that morning. Yeah, he smoked some cannabis that morning. Yeah, it wore off. It had nothing to do with anything that day. They even paid a guy to fly in, a toxicologist from Philadelphia, to get on this stand, and he couldn't even tell you that it had anything to do with Ric's accident. I asked him point-blank, "Are you telling this jury he was impaired?" Nope. "Are you telling this jury that the smoking of cannabis had anything to do with Ric's accident?" Nope. He couldn't even say it.

Not one person said Ric was impaired. All the evidence is he was clear, he was alert, he was oriented. And if they want to blame a skier for smoking cannabis and if they really want to say that that's what caused this accident, then why in the

world do they have a bar at the top of the mountain? Think about that. They have a full bar at the top of the mountain for skiers to go up during the day, sit at the bar, have cocktails. And it's not just beer and wine. Full bar. Drink as much as they want, get on their skis, and ski down. If they're that concerned, that concerned, why are you serving alcohol on the mountain? Where's the warnings? Where's the notice saying "Don't come on our mountain if you smoke cannabis or had something to drink"? Because they want to make the money. That's why they have a bar. "Hey, we can make money. We can sell our alcohol."

They're not worried about power running their bar at the top of the mountain, are they? They're not worried about drawing too much power from Ludlow. They want to make sure that their Summit Bar is fired up and ready for business to serve alcohol. They'd rather make sure of that than making sure it goes to the proper snowmaking equipment.

The pole doesn't discriminate, members of the jury. It doesn't matter why he slipped on ice. It doesn't matter why Ric fell. It doesn't matter if he was drunk, if he was high, if he got pushed, if he got tripped, if he crossed his skis, if another skier bumped into him. That doesn't matter. The pole doesn't discriminate. It doesn't say, "I'm going to protect you as long as you didn't smoke cannabis, but I'm not going to protect you if you did." The pole doesn't discriminate.

So even, even, if you give any credence to the defense argument that Ric somehow was at fault in this case, they also have to prove proximate cause. Proximate cause. They'd have to say, "Yeah, the cannabis smoking, yeah, his flawed decision-making, that was the cause of him being paralyzed." And they can't do that. We know that's not true. Because no matter what, if he drank ten martinis at the top of the mountain and was blitzed out of his mind and went skiing down and slid into that pole, if the defendants were not negligent, if it was properly installed on the snow, no matter how intoxicated or impaired he was, he would have hit that pad; it would have absorbed his impact and deflected him on his way, members of the jury. The answer is no, he wasn't at fault. There's no comparative fault here.

Lastly -- I'm almost there. There's a lot to go through. I appreciate your patience. You'll be done hearing from me in just a few moments. The last page goes to damages. This is why Ric is here. This is why Ric is here. Damages. You, members of the jury, have an incredible power. It's quite remarkable, our civil justice system. You collectively can right a wrong under our civil justice system. Unfortunately, no one can go back in time and undo what Ric has suffered. We can't unring the bell. Our civil justice system allows for compensation that fairly and adequately compensates someone for the consequences of another's negligence. That's how it works.

That's why we're here, to ask you to compensate Ric for what they've taken away from him so he can have the best life moving forward.

Now, the first category of damages are the past bills. There's a line here that says "Reimbursement of past medical bills." That's the first line of damages that we are asking that you compensate Ric for. The defense does not dispute the amount of those bills, and they've been stipulated at $664,918.38. It's in evidence, the stipulation. You'll have it in the jury room with you. That's a sliver of what this case is about.

Half of that amount the defense spent --

THE COURT: So, Mr. Smiley, I'm going to have you move more quickly and make sure that it's not repetitive.

MR. A. SMILEY: Next, "Present value of future medical costs, accommodations, and modifications." Present value of these costs. This is the life care plan, okay? This is the life care plan of his basic needs to cover the medical tab, the conservative needs, and you saw that life care plan, and you saw the present value, and I want to talk about that.

Now, the number's different that you see in the life care plan. It's actually more in the life care plan than what's on the economic report because that plan was rendered several years ago, so the numbers have gone down because time has passed, rates have passed, so the numbers we're asking are even

more conservative. The Court is going to instruct you that for future economic damages for the rest of his life, you need to reduce those to present value. If you recall, there was testimony about what a dollar today will get you over the next 50 years. It's going to grow. But it's important for you to understand what the future amounts are first before we get to the present value.

Now, the future amounts, there are two scenarios that Dr. Wolstein looked into. One is if Ric becomes a lawyer but can only work half time; the other is if he doesn't become a lawyer and only works half time. And you'll see that in these two different scenarios the numbers change. The life care plan stays the same, but the loss of income changes.

So number 2, he doesn't become a lawyer. He gets a different job, so he loses out on that potential income that he could have gotten, so it's a higher number. The future amount in Scenario 2, and we are asking you -- you can consider any of these. We are asking you to go for the one with more. We're not shy about that. We want to give Ric the best possible future he can have and make sure his economics are covered. The future cost of that is $22,276,295. Over 22 million in just economic loss. Forget about pain and suffering, loss of enjoyment of life, what he's going to have to deal with. That's just financial loss that we've proven to you. 22 million.

Now, when you reduce that to present value and we go to Scenario 2 of the present value of that number, it's a total of 7,904,805, which means it takes $7,094,805 in today's money, present value money, to generate that 22 million over the course of his life expectancy. And it's broken down into b. and c. So b. is the present value of the life care plan, and we're going to show you what that is under the present value numbers on Exhibit 84. The life care plan is 2,971,020. So that's the number we're going to ask you to put in here for the present value. And the present value for the loss of his future income is also on the page, on Exhibit 84, and that number is 4,933,785. And we would ask that you put that number here as the present value.

Now, those numbers, those are just to pay the bills, so to speak. That's just the economics. This young man is going to have tens of millions of dollars in economic loss as a result of this accident over the next 54.7 years.

The last category, this is the real compensation. This is the intangibles. This is the life-altering injuries he sustained. And you will be told by the judge that if you find the defendants negligent, which we strongly believe the evidence fully supports in this case, that you should award him compensation for his past and future physical and emotional pain and suffering, including loss of enjoyment of life, and those are the items I've talked about earlier.

How do you come up with a number? How do you come up with a number, members of the jury? That's your job. Again, you have a mighty power here, a mighty power, that the civil justice system gives you. You will be able to deliberate, you will talk amongst yourselves, and it will be up to you whether or not you decide the defendants did everything appropriately, whether this is just an inherent risk and Ric needs to go home empty-handed; or you determine it's not an inherent risk, they were negligent, and he needs fair and adequate compensation moving forward. That is up to you. That is the power you have.

And it's our position that the only way, the only way, to properly, fairly, and adequately compensate a young man who sustained, by all accounts, life-altering injury, catastrophic/life-altering injury -- we've heard that phrase. We've seen it in the records. We heard it from Ms. Nicolson. You have to compensate him with life-altering compensation. Life-altering injury. How do you compensate that? With life-altering compensation. I make no bones about that. We are asking you to compensate Ric, to give him the best enjoyment of life that he could have reasonably expected but for their negligence. To give him the money, the compensation, to help as possible to make up for what this young man has ahead of him for the rest of his life, what's happened before and what's going in the future, and it's up to you to decide,

but I'm going to make a recommendation to you. You can disagree with me. You can agree. It is up to you.

But if you look at the future medical and financial values of 22 million just to pay the bills, we believe that life-altering compensation to fairly and adequately compensate Ric for his life-altering injuries is you multiply that number times four. That is our recommendation to you. $88 million. Yes, that is a huge sum of money. It is a life-altering sum of money, members of the jury. But that's what he's entitled to. You compensate a life-altering injury with life-altering compensation. And with that compensation that you will provide to him, whatever you decide to do, and we will respect your decision - we know you've been paying close attention to the evidence - you will be providing Ric with the best possible enjoyment of life that he can have, whatever he wants to use that money for to try and make up for what was taken away from him in some way, shape, or form for the next 54 years.

And as I conclude, members of the jury, I ask you to take your time in deliberation, speak with each other, and consider the fact that after your verdict, which we will live with and Ric will live with - your verdict will stand - me, my colleagues, we will move on to other cases and do our work and to our families. Her Honor has other cases and other trials ahead. Defense counsel, they'll be moving on. You'll be moving on back to your lives. But Ric, Ric's life has been

altered, and he can't come back. He cannot come back to you in 30 years. He can't come back to you and say, "Oh, I had to have the surgery removed. Dr. Perry was right." He can't come back and say, "I'm elderly now. I need more. I need more to help me." This is it. This is it. And you have the power. You have the power to bring justice into this courtroom. You have the power to give Ric the future he deserves, that he was robbed of, as a result of the negligence of the defendants.

Thank you, members of the jury, so much for your time throughout this trial and your diligence in paying attention to the evidence and the witnesses and for bearing with me. I know I can be long-winded, but there was a lot of evidence. It's a very important case for this young man, Ric Grajeda, and I thank you all so much.

THE COURT: All right. We are 20 minutes from lunch. We're going to take a shorter lunch. We can go longer into the lunch hour, so, like, 12:15.

What's your preference, Mr. Aicher, Mr. May? Get started now? How would you like to --

MR. AICHER: Sure. Why don't we start now and --

THE COURT: All right. And then I will probably break us at 12:15 or so. We're going to take a shorter lunch. We'll get it to the jury in a prompt fashion.

MR. AICHER: I can still say good morning, ladies and gentlemen. Thank you for your service and your attention.

SPECIAL THANKS TO ACADEMY SPONSORS

NAM (National Arbitration and Mediation) is consistently recognized by the legal community for its superb customer service and exceptional panel of arbitrators and mediators.

Attorney operated Medicare, Medicaid, ERISA and other healthcare lien resolution, and MSA allocation firm. Precision resolves liens so that trial attorneys can focus on the task at hand: winning the case.

A podcast for lawyers and aspiring lawyers hosted by Andrew J. Smiley, Esq.

A full service lien resolution company that comes at no cost to law firms and is reducing liens for clients by an average of over 50%.

Your comprehensive plaintiff-loyal settlement planning firm. Negotiation and mediation support, lien resolution and structured settlement plans.

Physician life care planners, vocational assessment specialists, professional economists, Medicare secondary payer compliance experts, and neuropsychologists.

A fully-integrated case management system designed exclusively for personal injury and mass tort litigation practice.

The attorney's comprehensive resource for structured settlement annuities, consulting and negotiation services.

SPECIAL THANKS TO ACADEMY SPONSORS

Cypress Grove Technologies

Provides managed IT services to customers, including proactive support, live monitoring, management and maintenance for their systems.

Robson Forensic — The Experts

A highly credentialed group of engineers, architects, scientists and fire investigators who assist in disputes and litigation through investigations, reports and testimony.

LEXITAS™

Offers an array of services including local and national court reporting, medical record retrieval, process service, registered agent services and legal talent outsourcing.

FIRMPRO™ From C&R Insurance Services, LLC

Professional liability insurance that helps protect law firms with 1-9 attorneys, including attorneys billing less than 26 hours per week.

Sobel Tinari Economics Group

A team of award-winning economists and analysts that provides high-quality economic consulting services in a wide variety of litigated matters.

CP Counsel Press — The Appellate Experts®

Assists attorneys in all 50 states with expert assistance in preparing, filing, and serving appeals in any state or federal appellate court nationwide and several international tribunals.

ZR Per Diem

Providing busy lawyers with fast, easy, professional, court appearance and deposition coverage services throughout NY, NJ, and PA.

Flagstar® Bank

Offers a wide range of financial products and services while striving to create a one-of-a-kind banking experience grounded in relationships, nurtured through service, and measured by results.

SPECIAL THANKS TO ACADEMY SPONSORS

MEDQUEST®

Providing medical experts; medical record retrieval; summaries, chronologies & demands by physicians; and medical cost reports by testifying life care planners.

Nota by M&T Bank

Trust accounting and banking solutions for law firms. It is designed with attorney insights - for lawyers, by lawyers - and is a no-cost, cloud-based platform for those managing solo and small law firms.

SELECT INJURY DOCTORS

With over 160 individual facilities throughout NY and NJ, provides a platform that connects individuals to healthcare providers who specialize in treating all aspects of musculoskeletal and traumatic injuries.

cloudlex

More than just a case management system - designed exclusively for plaintiff personal injury law firms, and allows you to take control of your practice from intake to closure and beyond.

RECORD REFORM
A MEDQUEST COMPANY

Providing physician assistance in reducing, organizing and reviewing digital files.

TRIAL 1

Helping you target the type of case you're looking for through website design, video and educational content production, and targeted design of your web presence.

HART SETTLEMENT GROUP
PARTNERED WITH
SAGE
SETTLEMENT CONSULTING

Hart Settlement Group's focus centers around assisting attorneys as well as individuals and their families with the evaluation design and negotiation of structured settlements.

Emerald-Associated reporters, inc.
...where your words count!

Court reporting and videography services since 1989, as well as litigation support, online document management and protected file storage.

SPECIAL THANKS TO ACADEMY SPONSORS

Kincaid Wolstein | VOCATIONAL & REHABILITATION SERVICES

Providing objective vocational evaluations, life care plans, and loss of household services evaluation; and will testify credibly & confidently regarding rehabilitation processes, needs, and resources.

MediVisuals
Powerful visuals for every phase of litigation.

America's leading medical exhibit specialist offering products such as Animations, Interactive Presentations and Timelines, 3-D Models and Exhibit Boards.

Judgment Enforcement
Law Offices of
LAURENCE J. SASS

Helping NY attorneys recover on judgments for their clients against uninsured and defaulted defendants by using innovative investigative and legal strategies and dogged persistence.

Expert Institute

The leading expert witness service offering custom expert recruiting and high-touch consulting in every specialty.

LexisNexis®

A prominent provider of information and analytics solutions tailored for legal, regulatory, and business experts. Offerings include legal research databases, insights, and news.

NYSM
SUCCESS THAT ADDS UP!

A boutique, full service structured settlement firm that provides web-based settlement calculators for the exclusive use its clients.

WA
WALKER ADVERTISING

With over 40 years of experience in the industry, we understand the needs of lawyers. We provide law firms with leads and resources to reach new heights of success.

GoReminders

Easy-to-use software for automated reminders & text messages, confirmations & online scheduling, and 2-way texting—saves you time, makes you money.

SPECIAL THANKS TO ACADEMY SPONSORS

Earn CLE credits around the world.
In addition to customized CLE programming, programs offer cultural immersion and local community engagement, creating memorable experiences for lawyers and non-lawyers alike.

The nation's largest online deposition bank, exclusively for plaintiff lawyers.

Providing concise summaries of all torts decisions from the 1st and 2nd Departments and Court of Appeal every week by email, their website, or the NYTW ANYWHERE app.

As a provider of payroll, human resource solutions, and tax service, Reliable Payroll offers a wide range of services.