

Mack v The Shop

In November of 2004, Chicago resident Mathew Mack purchased high end skis, boots and bindings from the Shop. In March of 2005, with the first use of this equipment, Mr. Mack was seriously injured at Steamboat while he was skiing down an intermediate trail and suffered a slow twisting fall. He claimed that his skis did not release in the fall. Mack sustained a severe comminuted fracture of his tibial plateau that propagated into his tibia and fibula. Mr. Mack had a difficult and complicated recovery that resulted from 4 surgeries and significant permanency.

The claims against the Shop revolved around the initial DIN settings of the skis and whether they were appropriate. The shop ticket indicated that Mr. Mack designated himself as a 3+ skier, which is a discretionary setting. Unfortunately the shop ticket was never signed by Mr. Mack, the shop employees had no memory of their interaction with Mr. Mack and Mr. Mack testified that he does not recall ever being asked what his skier type was, but had he been asked he would have designated himself as a Type 2 skier. Complicating matters further when the Shop did their testing of Mr. Mack's skis prior to release to Mr. Mack, unlike any standard skier type, a type 3+ testing is done manually and there is no print for the testing results. Post accident testing done by Plaintiff's expert Peter Leffe showed that the forward lean tests were way outside the in-use range for a type 3+ skier.

We retained Dr. Shealy as our liability expert. Dr. Shealy's post accident testing showed that the bindings were within the inspection range for a 3+ skier, as well as in forward twist within in-use range for a type 2 skier (because of overlap in the adjustment chart). There was considerable debate as to what information, if any, the Shop should have provided to Mr. Mack when he presumably requested a discretionary setting. ASTM F 939-05 recommends that skiers be provided with an information sheet with a request for a discretionary setting that specifically advises them that with a 3+ the bindings are less likely to release and therefore increases your risk of injury.

Peter Rietz conducted the expert deposition of Peter Leffe and dismantled him. Mr. Leffe conceded that he had no knowledge as to the custom and practice of ski shops in providing additional information and warnings to skiers who request a discretionary setting. Moreover and most significantly, Mr. Rietz got plaintiff's expert to concede that he would not testify as to causation. Complicating matters for the defense was the fact that Mr. Mack's initial orthopedic surgeon from Steamboat, Dr. Fabian testified at his expert deposition that Mr. Mack's injury was consistent with the bindings being set too high and that such a setting would have exacerbated the severity of the plaintiff's injuries. Indeed Dr. Fabian testified that Mr. Mack's fracture was the worst he had ever seen.

We nevertheless moved for summary judgment on the issue of causation asserting that plaintiff had insufficient prove that the binding not releasing was a cause of Mr. Mack's injury; we focused on the peer reviewed literature that stands for the proposition that binding function is unrelated to knee injuries. Initially the trial court granted our motion and dismissed the plaintiff's complaint. Based upon a motion for reconsideration by plaintiff, however, the trial court reversed itself determining that the

testimony of the Dr. Fabian raised a sufficient question of fact as to whether the binding failing to release was a cause of Mr. Mack's injuries.

The case was set for a 2 week jury trial in October, 2012. In August, 2012 plaintiff's counsel requested to take the trial testimony of Dr. Fabian as he resides in Colorado and could not travel to Chicago to testify live. At the trial preservation deposition, Maryjo Falcone vigorously cross examined Dr. Fabian on his qualifications to provide expert testimony as to binding function. Dr. Fabian upon cross examination conceded that he was not qualified to provide any testimony as to the mechanical function of bindings and while he could testify as to the mechanism of the plaintiff's injury, he was not qualified to testify how the plaintiff's injuries did or did not relate to the mechanical function of bindings. Dr. Fabian further testified that plaintiff's injuries could have occurred with optimally functioning bindings and that he would not be providing any testimony on causation.

In light of this extremely favorable testimony, we filed a motion to reconsider our motion for summary judgment on the basis that in light of Dr. Fabian's testimony, if given at trial, the Viking Ski Shop would be entitled to a directed verdict. It was a battle to have the new trial court consider this motion so close to trial. Based upon the persuasive submission by the Rietz Law Firm's appellate specialist Brian Birenbach, the court accepted our motion. On the morning of jury selection, the trial court ruled in our favor and opined that based upon the trial testimony of Dr. Fabian, she was duty bound to dismiss this case. The work done on this case by the Rietz Law Firm resulted in a complete vindication for the Shop, provided a strong message in our seriousness in the defense of ski shops around the country and spared the insured the expense of a 2 week trial. Overall a complete success.