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BORDEN, J., with whom PALMER, J., joins, dissenting and concurring. I agree fully with part II of the majority opinion, namely, that our decision in *Jaworski* v. *Kiernan*, 241 Conn. 399, 696 A.2d 332 (1997), does not apply to collisions between a skier and a ski instructor caused by the instructor's negligence. I therefore concur in and join part II of the majority opinion.

I disagree, however, with part I of the majority opinion, in which the majority concludes that General Statutes § 29-212 does not bar the plaintiff skier's action seeking to recover for damages caused by a collision with a negligent ski instructor employed by the defendant ski area operator. I therefore dissent from part I of the majority opinion and, contrary to the majority, would answer ''Yes'' to the first certified question, namely, ''[p]ursuant to . . . § 29-212,[1] does a skier assume the risk of, and legal responsibility for, an injury arising out of a collision with a ski instructor, acting in the course of his employment with the ski area operator, when the collision is caused by the instructor's negligence?'' In the remainder of this opinion, therefore, I address only the first certified question.

I begin by stating what I agree with regarding part I of the majority opinion. First, I agree with the majority that the claim of the plaintiff, Mary Ann Jagger, against the defendant ski operator, Mohawk Mountain Ski Area, Inc. (Mohawk), is based on vicarious liability, namely, that the defendant ski instructor, James Courtot, while in the scope of his employment, negligently lost control and collided with the plaintiff, and that Mohawk is vicariously liable as Courtot's employer, and on direct liability, namely, that Mohawk negligently failed to train and supervise Courtot.

Second, I agree with the majority's suggestion that § 29-212 presents an example of what might be viewed as legal schizophrenia, using that psychiatric word in its more popular sense of a split personality. On the one hand, § 29-212 provides that a skier ''assume[s] the risk[s] of and legal responsibility for any injury to his person or property arising out of the hazards inherent in the sport of skiing''—which means that a skier *may not* recover for injuries caused by the negligent conduct of the ski area operator or its employees because of the doctrine of assumption of risk, under whatever form of the doctrine is adopted. This is because the doctrine by definition provides a complete defense to a claim of negligence. On the other hand, § 29-212 provides that a skier may, nonetheless, recover if ''the injury was proximately caused by the negligent operation of the ski area by the ski area operator, his agents or employees''—which means that a skier *may* recover for injuries caused by the negligent conduct of the ski area operator

or its employees, despite the doctrine of assumption of risk. Read literally, therefore, § 29-212 simply does not make sense because the two propositions are, without more, simply contradictory to each other.

Third, I agree with the majority that § 29-212, including its counterparts in § 29-211; see footnote 1 of this opinion; and General Statutes §§ 29-213 and 29-214,[2] were adopted in the wake of the Vermont Supreme Court's decision in *Sunday* v. *Stratton Corp.*, 136 Vt. 293, 390 A.2d 398 (1978), in which that court held that the doctrine of assumption of risk did not bar the plaintiff skier's action against the ski area operator for his injuries arising out of a fall caused by a clump of brush located a short distance off the edge of the trail. I also agree that the legislative history of those statutes indicates *both*: (1) a purpose to protect the Connecticut ski area industry from what the industry perceived to be a severe risk of financial ruin, by erecting a shield from liability for the industry consisting of the explicit recognition of the doctrine of assumption of risk; and (2) a purpose to see that skiers injured by the ski area operator's negligence would nonetheless retain the right to recover. My reading of the entire legislative history, however; see 22 S. Proc., Pt. 4, 1979 Sess., p. 1150; 22 S. Proc., Pt. 7, 1979 Sess., p. 2380; 22 S. Proc., Pt. 11, 1979 Sess., p. 3654; 22 S. Proc., Pt. 15, 1979 Sess., pp. 4874–86, 5135; 22 H.R. Proc., Pt. 10, 1979 Sess., p. 3278; 22 H.R. Proc., Pt. 36, 1979 Sess., pp. 12,663–12,707; Conn. Joint Standing Committee Hearings, Public Safety, Pt. 2, 1979 Sess., pp. 436–50, 452–64; convinces me that the legislature never explicitly came to grips with the notion that these two purposes were and are in direct conflict with each other. Hence, the superficial, at least, schizophrenia, which I noted previously. Put another way, in order to resolve this inherent conflict within the statutory scheme, we must find ''something more'' in it to have it make sense.

Therefore, as is usually the case regarding difficult questions of statutory interpretation, it is left to the judiciary to interpret the statutory scheme so as to make sense of it. Consequently, I agree with the majority's implicit recognition that there must be something more to make sense of the statute and, therefore, it is necessary to identify some overarching principle that will do so.

The majority finds that overarching principle in the notion of control. The majority states that ''pursuant to § 29-212, a skier has assumed the risk of hazards inherent in the sport of skiing; namely, those hazards that are beyond the control of the ski area operator and cannot be minimized by the operator's exercise of reasonable care. For those risks that are within the sphere of control of the ski area operator, and that may be minimized or eliminated with reasonable practicality, the operator owes a duty of due care and may be

held liable in tort should that duty be breached and proximately cause injury to a skier.'' This means, according to the majority, that: (1) if the hazard is one over which the ski operator has control—that is, a hazard that the ski operator ''may . . . [minimize] or [eliminate] with reasonable practicality''—the operator is liable, and the skier has *not* assumed the risk; but (2) if the risk is one over which the ski operator does *not* have control—that is, a hazard that the ski operator may *not* minimize or eliminate with reasonable practicality—the skier *has* assumed the risk, and the operator is *not* liable.

Applying that principle to the claim of the plaintiff, the majority then concludes ''that the negligence of an employee or agent of a ski area operator is not an inherent hazard of the sport of skiing,'' and that, therefore, the plaintiff's claim ''is not statutorily barred by § 29-212 . . . .'' Necessarily implicit in this conclusion of liability on the part of the ski operator is the conclusion that the operator had control over its employee's negligent skiing—that is, that the employee's negligent skiing was a hazard that the operator could have minimized or eliminated with reasonable practicality.

I

Before proceeding with my competing analysis of the statutory scheme, I note that, in my view, the majority's conclusion is fundamentally flawed even on its own terms. The vicarious liability claim here is that Mohawk is vicariously liable because Courtot, who was out on the slopes in the scope of his employment, negligently lost control and collided with the plaintiff. I simply fail to see how such conduct reasonably can be considered within the control of Mohawk.

Any and every ski instructor, no matter how carefully selected, trained, and instructed to be careful, and no matter what degree of control is attempted to be exercised by the ski area operator, can at any instantaneous moment of skiing lose control, and that is a risk that is simply ''beyond the control of the ski area operator and cannot be minimized by the operator's exercise of reasonable care.'' Thus, under the majority's test, I would think that the conclusion would have to be that the plaintiff's claim would be barred by § 29-212 because, under that test, the skier *has* assumed a risk inherent in the sport of skiing, namely, a risk that is not within the control of the ski area operator. Indeed, that is just the point of vicarious liability of an employer: the employer is liable, not because he is at fault in any way—in fact, he is liable despite the fact that he is *not* at fault—but only because he, as the profit taker, should bear the loss as between him and the *other innocent* party, who was injured by his employee's negligence. See *Nowak* v. *Nowak*, 175 Conn. 112, 125–26, 394 A.2d 716 (1978). Put another way, if the ski area operator *were* in control of the ski instructor at that time, the

operator would be directly liable, not vicariously liable.[3]

In addition, the majority opinion has ignored critical language of § 29-212 that bears directly on the present case. Among the risks that § 29-212 specifically assigns to the assumption of risk category undertaken by the skier—and therefore the category of *nonliability* of the ski operator—is subdivision (6), which concerns ''collisions with any other person by any skier while skiing.''[4] That language applies directly to the facts of this case. Moreover, that language must apply to this case, where the ''other person'' is employed by the ski area, because if the other skier were not an agent or employee of the ski area, the ski area operator would have no legal responsibility for his negligence in the first place and, hence, no need to be shielded from liability by the doctrine of assumption of risk.

Finally, as the majority has articulated and applied its test in the present case, in my view it has in effect written the doctrine of assumption of risk out of the statute entirely. The majority states: ''[W]e conclude that the negligence of an employee or agent of a ski area operator is not an inherent hazard of the sport of skiing,'' and, therefore, will not be barred by the assumption of risk part of the statutory scheme. The problem is this: *every* claim by an injured plaintiff will necessarily arise out of the alleged negligence of an employee or agent of the ski area. I cannot readily think of one that will not—unless, of course, it is the rare case in which the ski area happens to be owned by one person and the injury happens to have been caused by the negligence of the owner, rather than one of the employees. This is particularly true where, as will usually be the case, the ski area operator is a corporate entity; in such a case, the corporation can only be liable through the negligence of its agents. Therefore, all that a plaintiff's lawyer will have to do in order to avoid any application of the assumption of risk part of the statute will be to allege vicarious liability of the employer based upon ''the negligence of an employee or agent'' of the operator, and make allegations tying the alleged negligent conduct to that employee or group of employees who had the responsibility for that particular aspect of the negligent conduct. Thus, under the majority's formulation of the test, and particularly under its application of the test to the facts of the present case, I fail to see what risks will fall under the assumption of risk doctrine and, therefore, be barred by § 29-212. The majority, therefore, has taken a statute that was conceived, originally at least, as an *aid* to the ski industry by ensuring that the doctrine of assumption of risk would apply, at least as to *some* claims against the ski operator, and interprets it in such a way that the doctrine will practically *never* apply. In other words, using the majority's test, as it is applied in the present case, I am hard put to conceive of a factual situation in which an operator, who would otherwise be liable, would

nonetheless be shielded by the assumption of risk doctrine.[5]

II

Having stated my disagreement with the majority's analysis, I now return to what I view as the appropriate way to make sense of the competing principles of § 29-212 concerning (1) the imposition of the doctrine of assumption of risk by a skier, and therefore no liability for the ski area operator for damages to an injured skier, and (2) liability in the ski area operator to the injured skier based on the negligence of the employees or agents of the ski area operator. Unlike the majority, however, I resolve this statutory dilemma by reading the statutory scheme as a whole, and by consulting the language of the statute. Moreover, unlike the majority's analysis, my analysis leaves room for *both* liability based on negligence *and* assumption of the risk, depending on the facts alleged, and the applicable language of the entire statutory scheme.

I begin with § 29-211. See footnote 1 of this opinion for the text of § 29-211. Section 29-211 begins as follows: "In the *operation* of a passenger tramway or ski area, each *operator* shall have the obligation to perform certain duties *including, but not limited to*" seven specified duties. (Emphasis added.) That statute then lists those seven nonexclusive obligations or duties, which focus on such matters as conspicuously marking trails and hazards, maintaining trail boards indicating the relative difficulties of trails, notifying skiers of the need for ski retention devices, conspicuously giving notice when maintenance men or equipment will be on the trails, and conspicuously marking trail intersections. What is notable about § 29-211, which specifies a set of explicit but explicitly nonexclusive obligations of the ski area operator,[6] is that it ties these obligations directly to the "*operation* of a . . . ski area . . . ." (Emphasis added.) Thus, I view these obligations as a set of legislative directives as to what kinds of obligations are inherent in the operation of a ski area.

This is significant because § 29-212, after stating that a skier assumes the risks inherent in the sport of skiing, states the following proviso: "unless the injury was proximately caused by the negligent *operation* of the ski area by the ski area operator, his agents or employees." (Emphasis added.) The use of the word "operation" here creates a direct linguistic link to the use of the same word in § 29-211. This linguistic link suggests to me that the scope of the ski area operator's liability, as opposed to the skier's assumption of risk, must be measured by reference to the obligations listed in § 29-211 as those obligations or duties that are part and parcel of the *operation* of a ski area. Put another way, my view of making sense of the statute is as follows: if the claim of negligence involves conduct within those matters listed in § 29-211, or some other conduct that,

by its nature, is inherent in the operation of a ski area,[7] the ski area operator would be liable for the negligence. If the claim of negligence does not fall within that defined sphere, the skier is deemed to have assumed the risk under § 29-212.

Obviously, every case would have to be evaluated on a fact specific basis under this standard, and by reference to the language used in both §§ 29-211 and 29-212. It is clear to me, however, that an instantaneous loss of control by a ski instructor on the slopes does not fall within the type of conduct that is covered by § 29-211.

Furthermore, I refer to the language of § 29-212 (6), which specifically provides that one of the risks that a skier assumes is ''collisions with any other person by any skier while skiing.'' This language does not suggest, nor does any reason in policy suggest, that the phrase, ''collisions with any other person,'' has an implicit exception for a collision with an ''other person'' who is employed by the ski area operator. Such a collision is precisely what happened in the present case. I conclude, therefore, that Mohawk is not liable for the collision alleged by the plaintiff in this case because: (1) an instantaneous loss of control by Courtot is not a matter that falls within the type of conduct specified in § 29-211 as inherent in the operation of a ski area; and (2) such a collision is specifically identified in § 29-212 (6) as the type of mishap as to which the plaintiff was deemed to have assumed the risk.[8]

I would, therefore, answer the first certified question in the positive.

[1] Although both the certified question and the majority opinion specifically address only § 29-212, in my view, as I explain in more detail in part II of this opinion, § 29-212 is more properly analyzed in conjunction with General Statutes § 29-211. I, therefore, set out both of those statutes here.

General Statutes § 29-211 provides: ''In the operation of a passenger tramway or ski area, each operator shall have the obligation to perform certain duties including, but not limited to: (1) Conspicuously marking all trail maintenance vehicles and furnishing the vehicles with flashing or rotating lights which shall be operated whenever the vehicles are working or moving within the skiing area; (2) conspicuously marking the location of any hydrant or similar device used in snow-making operations and placed on a trail or slope; (3) conspicuously marking the entrance to each trail or slope with a symbol, adopted or approved by the National Ski Areas Association, which identifies the relative degree of difficulty of such trail or slope or warns that such trail or slope is closed; (4) conspicuously marking all lift towers within the confines of any trail or slope; (5) maintaining one or more trail boards at prominent locations within the ski area displaying such area's network of ski trails and slopes, designating each trail or slope in the same manner as in subdivision (3) and notifying each skier that the wearing of ski retention straps or other devices used to prevent runaway skis is required by this section, section 29-201 and sections 29-212 to 29-214, inclusive; (6) in the event maintenance men or equipment are being employed on any trail or slope during the hours at which such trail or slope is open to the public, conspicuously posting notice thereof at the entrance to such trail or slope; and (7) conspicuously marking trail or slope intersections.''

General Statutes § 29-212 provides: ''Each skier shall assume the risk of and legal responsibility for any injury to his person or property arising out of the hazards inherent in the sport of skiing, unless the injury was proximately caused by the negligent operation of the ski area by the ski area operator, his agents or employees. Such hazards include, but are not limited to: (1) Variations in the terrain of the trail or slope which is marked in accordance with subdivision (3) of section 29-211 or variations in surface or subsurface

snow or ice conditions, except that no skier assumes the risk of variations which are caused by the operator unless such variations are caused by snow making, snow grooming or rescue operations; (2) bare spots which do not require the closing of the trail or slope; (3) conspicuously marked lift towers; (4) trees or other objects not within the confines of the trail or slope; (5) boarding a passenger tramway without prior knowledge of proper loading and unloading procedures or without reading instructions concerning loading and unloading posted at the base of such passenger tramway or without asking for such instructions; and (6) collisions with any other person by any skier while skiing.''

[2] General Statutes § 29-213 provides: ''No skier shall: (1) Intentionally drop, throw or expel any object from a passenger tramway; (2) do any act which shall interfere with the running or operation of a passenger tramway; (3) use a passenger tramway without the permission of the operator; (4) place any object in the skiing area or on the uphill track of a passenger tramway which may cause a skier to fall; (5) cross the track of a J bar lift, T bar lift, platter pull or similar device or a rope tow, except at a designated location; (6) depart from the scene of a skiing accident when involved in the accident without leaving personal identification, including name and address, or before notifying the proper authorities and obtaining assistance when such skier knows that any other skier involved in the accident is in need of medical or other assistance; (7) fail to wear retention straps or other devices used to prevent runaway skis.''

General Statutes § 29-214 provides: ''It shall be a special defense to any civil action against an operator by a skier that such skier: (1) Did not know the range of his own ability to negotiate any trail or slope marked in accordance with subdivision (3) of section 29-211; (2) did not ski within the limits of his own ability; (3) did not maintain reasonable control of speed and course at all times while skiing; (4) did not heed all posted warnings; (5) did not ski on a skiing area designated by the operator; or (6) did not embark on or disembark from a passenger tramway at a designated area. In such civil actions the law of comparative negligence shall apply.''

All four statutory sections, namely, §§ 29-211, 29-212, 29-213 and 29-214, were adopted as §§ 2 through 5 of No. 79-629 of the 1979 Public Acts. Thus, they should be viewed together.

[3] Of course, to the extent that the plaintiff claims that the employer failed in conduct over which it did have control, such as selecting, training or instructing its ski instructors, then the majority's test of control would mean that, under *that* allegation, as well as the allegation of the operator's vicarious liability for the ski instructor's loss of control on the slopes, the ski operator would also be liable and the plaintiff would not have assumed the risk. The majority opinion, however, contains no such limitation. Therefore, under the majority's analysis, the ski operator would be liable under *both* sets of allegations; the direct liability allegation would be an a fortiori case as compared to the vicarious liability allegations. Thus, as I explain further in the text of this opinion, under the majority's analysis, there are virtually no allegations that would invoke the doctrine of assumption of risk to bar a skier's claims against the ski operator.

[4] The majority concludes that this specific language does not control this case because the statute ''creates an exception for injuries arising out of the negligent operation of the ski area by the operator,'' which the majority further defines by its ''fictitious control'' analysis. That must also mean, therefore, that if *any* of the specifically identified risks in subdivisions (1) through (5) of § 29-212; see footnote 1 of this dissent; are realized, the ski operator will not be shielded by the doctrine of assumption of risk with respect to any of those other risks, because they are all obviously within the operator's control. Thus, as I point out in this dissent, the majority effectively reads the doctrine of assumption of risk out of the statutory scheme, despite the specific provisions of § 29-212 (1) through (6).

[5] Ironically, the majority's discussion of the policy roots of vicarious liability; see footnote 16 of the majority opinion; further bolsters this point. By casting its test of control in terms of the *right* to control, which is one of the bases for vicarious liability, the majority ensures that the ski operator will *never* be shielded by the doctrine of assumption of risk. This is true because: (1) an operator would never be liable in the first instance for conduct or omissions of his employees unless he had the *right* to control their conduct in question—what the majority accurately refers to as ''fictitious control''; see footnote 16 of the majority opinion; and (2) *therefore* under the majority's analysis, if the conduct in question *was* within that

sphere of fictitious control, the operator would be liable. From what risks, then, will the operator be shielded by the doctrine of assumption of risk? I cannot think of any. Moreover, this is true irrespective of whether the skier's claim is based on direct or vicarious liability, because under the majority's ''control'' analysis, the ski operator would always be deemed to have control over his *own* conduct.

[6] In this regard, I disagree with the thrust of the argument contained in part I A of the majority opinion, which lays heavy emphasis on a perceived difference between the statutory ''obligations'' of the ski area operator and the statutory ''duties'' of the ski area operator, as phrased in § 29-211. I simply fail to see the significance of this semantic difference. The statute provides that the operator has the obligation to perform these duties. It would mean the same, I think, if it provided, instead, that the operator had ''certain duties, including but not limited to'' the same seven nonexclusive duties.

[7] For example, I would conclude that the failure to train ski instructors would be within the negligent operation of a ski area, within the meaning of the liability portion of § 29-212. See footnote 7 of the majority opinion.

[8] I reiterate, however, that, to the extent that the plaintiff claims that the collision was proximately caused, not by any instantaneous loss of control by Courtot, but by Mohawk's failure to properly train or supervise him, the plaintiff would be entitled to recover. See footnote 7 of this opinion.