IN THE SUPREME COURT OF THE STATE OF OREGON

MYLES A. BAGLEY, individually Plaintiff-Appellant, Petitioner on Review, AL BAGLEY, individually, and LAUREN BAGLEY, individually, Plaintiffs, v. MT. BACHELOR, INC., dba MT. BACHELOR SKI AND SUMMER RESORT, Defendant-Respondent, Respondents on Review, and JOHN DOES 1-10, Defendants	Supreme Court No. S061821 Court of Appeals No. A148231 Deschutes County Circuit Court No. 08CV0118SF

PLAINTIFF'S OPENING BRIEF ON THE MERITS

On review of the Opinion of the Court of Appeals dated Sept. 5, 2013
Opinion by Sercombe, J.; Ortega, P.J., and Hadlock, J., concurring,
In an Appeal from the Judgment of the Deschutes County Circuit Court
The Honorable Steven P. Forte, Judge

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INTRODUCTION

Eighteen-year-old Myles Bagley, a skilled and experienced snowboarder, went over a jump in a terrain park that had been constructed by Mt. Bachelor and suffered a spinal injury that resulted in permanent paraplegia. He brought this action alleging that Mt. Bachelor had been negligent and the jump was defectively designed and maintained. The Court of Appeals, like the trial court before it, rejected plaintiff's argument that the exculpatory clause on the season pass agreement was unenforceable because it was contrary to public policy and was unconscionable. *Bagley v. Mt. Bachelor, Inc.*, 252 Or App 390, 310 P3d 692 (2013). Plaintiff urges this court to reverse the courts below, hold that Mt. Bachelor's "release" is unenforceable, and remand this case for a jury trial on plaintiff's negligence claim.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question: Does a release agreement violate public policy when it is imposed as a non-negotiable condition of entry to a ski area and immunizes a ski area operator from liability for negligence that unreasonably creates risks not inherent in the sport?

Proposed Rule: An exculpatory clause that immunizes a ski area operator from responsibility for its own negligence is inconsistent with

the policy balance struck by the legislature in the skiing activities statute, and is unenforceable.

Second Question: Is such an exculpatory clause unconscionable under Oregon law?

Proposed Rule: An exculpatory clause in a non-negotiated "take-it-or-leave-it" agreement is unconscionably "harsh and inequitable" when it immunizes a ski area from responsibility for its negligent conduct, and imposes on the individual participant the entire weight of the consequences of that negligence.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

In September 2005, Myles Bagley purchased a season pass from Mt. Bachelor. In February 2006, he snowboarded over a man-made jump in a terrain park at Mt. Bachelor and suffered catastrophic injury.

In the form agreement that a person must sign in order to receive a season pass, Mt. Bachelor included an exculpatory clause that would immunize it from responsibility for any actions short of intentional misconduct. In its opinion, the Court of Appeals quoted the language of that "release and indemnity" provision (252 Or App at 392-3), but omitted part of its context. A copy of the entire season pass document appears in Appendix I, App 1-2.

The "agreement" also includes a "Duties of Skiers and Assumption of Risk" provision that "applies to all skiers [and] snowboarders." App 2. Under a section entitled "Your Duties," the "agreement" lists the "duties of skiers" as set forth in the Skiing Activities Statute, ORS 30.985(1)(a) through (l). *Id.* The document then sets forth the assumption of risk provision of ORS 30.975 (the purchaser "assumes the inherent risks of skiing insofar as they are reasonably obvious, expected or necessary"), together with the definition of "inherent risks" contained in ORS 30.970(1). *Id.*

The "release and indemnity" portion of the document goes on to state that the season pass holder "agree[s] to release and indemnify" Mt. Bachelor "from any and all claims for * * * injury or death" which the holder "may suffer or for which he or she may be liable to others;" it then states that it applies "to any claim even if caused by negligence." App 1, 2. The release does not state **whose** negligence, nor does it make any reference to any conduct of Mt. Bachelor that could increase the risks of skiing beyond the "inherent risks." There is no indication in this record that Myles Bagley knowingly assumed the risk that Mt. Bachelor would fail to exercise reasonable care and would design, construct and maintain a defective jump capable of causing a catastrophic injury. There is no evidence that Myles

understood the release to apply to anything other than the inherent risks of his sport.

Mt. Bachelor moved for summary judgment, asserting that the release agreement absolved it of liability for any negligence. Plaintiff, in response and in a cross-motion for summary judgment, asserted *inter alia* that the release was unenforceable because it was contrary to public policy and because it was unconscionable. Am. Open. Br. at ER 26; TCF 33. The trial court granted defendant's motion for summary judgment. Am. Open. Br. at ER 39-44.

The Court of Appeals affirmed, rejecting plaintiff's arguments that such an exculpatory clause release was contrary to Oregon public policy and was unconscionable.[1] Plaintiff sought and this court granted review.

SUMMARY OF ARGUMENT

In 1979, the Oregon Legislature enacted the Skiing Activities Statute and made clear the boundary between the liability of area operators and the risks assumed by skiers. Apparently not satisfied with this statutory structure, Mt. Bachelor has employed an exculpatory clause in its season

[1] The Court of Appeals also affirmed the trial court's rejection of plaintiff's argument that he had disaffirmed the agreement after reaching majority. Plaintiff did not seek review of that holding. It is plaintiff's position that such an exculpatory clause is inconsistent with Oregon law and unenforceable whether the skier is young or old, a novice or an expert.

pass agreement that immunizes it from any liability for its own negligence, and places on skiers the avoidable risks created by its own conduct. Plaintiff, an experienced and able snowboarder, claims that his devastating spinal injury was caused by Mt. Bachelor's negligent design of a jump in its terrain park, a risk not inherent in his sport that was created by Mt. Bachelor. It is contrary to the policy set in place by the legislature for the operator to impose the consequences of its negligence on its customers.

Furthermore, this standard form take-it-or-leave-it provision, unilaterally imposed by Mt. Bachelor, is a classic adhesive contract; its attempt to shift the burden of its negligence to the customer who can do nothing to reduce the risk is clearly harsh and inequitable. For the last half century, the legislature has prescribed that such an exculpatory clause is *prima facie* unconscionable in the case of consumer goods that cause personal injury. Under this court's decision in *Illingworth v. Bushong,* 297 Or 675, 688 P2d 379 (1984), that same rule should be applied in this context. Mt. Bachelor never established that its exculpatory clause was <u>not</u> harsh and inequitable, and it should be held unconscionable as a matter of law.

ARGUMENT

I. Mt. Bachelor's exculpatory clause is inconsistent with the legislative policy underlying the Skiing Activities Statute.

In 1979 the Oregon Legislature enacted the Skiing Activities Statute, ORS 30.970 *et seq.* (see Appendix A to this brief). In the preamble to the enactment, the legislature provided the following explanation:

> Whereas it is the purpose of this Act **to clarify the policy of this state governing the duties of skiers and the liability of operators** of ski areas with respect to skiing injuries resulting from alpine or Nordic skiing; and
>
> Whereas the Legislative Assembly affirms the principle that certain risks are inherent in the sport, and that, **as a matter of public policy,** no person engaged in such sport shall recover damages from a ski operator **for injuries resulting from those inherent risks[.]** 1979 Or Laws ch 665 (preliminary recitals)(emphasis added).

Plaintiff contends that in this statute the legislature did just what it said it would do: it struck a policy balance between the inherent risks, assumed by the skier, and the liability of the operators.

A. The Statutory Text

The statute begins with definitions, the first of which states that the term "inherent risks of skiing"

> includes, but is not limited to, those dangers or conditions which are an integral part of the sport, such as changing weather conditions, variations or steepness in terrain, snow or ice conditions, surface or subsurface conditions, bare spots, creeks and gullies, forest growth, rocks, stumps, lift

> towers and other structures and their components, collisions with other skiers and a skier's failure to ski within the skier's own ability. ORS 30.970.

ORS 30.975 then provides:

> In accordance with ORS 31.600 [establishing comparative fault] and notwithstanding ORS 31.620 (2) [abolishing implied assumption of the risk], **an individual who engages in the sport of skiing**, alpine or Nordic, **accepts and assumes the inherent risks of skiing insofar as they are reasonably obvious, expected or necessary**. (Emphasis added.)

The statute assumes that ski area operators, while not liable for injuries resulting from inherent risks of the sport, remain liable for injuries caused by their own negligence. Under ORS 30.980(1), (2) and (4), notice of injury to the operator within 180 days after the injury or death occurs is a required condition of maintaining an action against an operator; and the legislature also prescribed a two-year statute of limitation (extended by minority, ORS 12.160,[2] and death, ORS 12.190[3]). ORS 30.980 (3). An operator is required to inform skiers of the notice requirement and the effect of a failure to comply. ORS 30.980(5). A failure to give notice will not bar a claim if the operator has actual knowledge within 180 days, or there is

[2] Extending statutes of limitation during minority, not to exceed five years. ORS 12.160(1) and (2).

[3] Extending statutes of limitation by one year from death, when a person entitled to bring an action dies before it is commenced.

good cause for failure to give notice, or the operator fails to comply with its duty to inform skiers of the requirement. ORS 30.980(4).

Finally, the statute provides a nonexclusive list of a skier's duties, violation of which entitles the operator "to withdraw the violator's privilege of skiing." ORS 30.985. The operator is also obligated to notify skiers of these duties. ORS 30.990.

In *Nolan v. Mt. Bachelor, Inc.*, 317 Or 328, 856 P2d 305 (1993), this court said that the reference to the comparative fault statutes in ORS 30.975

> suggests that the legislature contemplated the possibility that a skier's injury might result in part from an inherent risk of skiing and in part from the skier's own or another's negligence. 317 Or at 335.

The court found this textual "suggestion" confirmed by legislative history: legislators had commented that the bill "'clearly allowed for the situation where there may be injury caused by a combination of the assumption of the inherent risk by the skier and of area operator negligence,'" in which case comparative negligence would apply. 317 Or at 335-336, quoting Minutes, House Comm. on the Judiciary, June 8, 1979, pp. 8-9. The court held that the trial court had erred in instructing the jury that it must find for defendant if an inherent risk contributed in any way or to any degree to the injury plaintiff suffered. 317 Or at 336.

Mt. Bachelor's season pass document, as previously summarized, quotes ORS 30.985, 30.975, and the statutory definition of "inherent risks," 30.970(1).

B. The Legislative History

The legislative history of the skiing activities statute is an unusually clear and detailed picture of the legislature's decision-making and its intent, sufficient to establish that the legislature was striking a balance between competing policies and interests.

Senate Bill 329 and 329A

Senate Bill 329 – "relating to skiing" – was first discussed in the Senate Committee on Agriculture and Natural Resources on February 2, 1979. It was introduced by Senator Heard, who began with this statement:

> The issue of liability in the case of personal injury in skiing accidents has recently received national attention. Senate Bill 329 has been designed to clearly attribute the responsibility for personal ski injuries to the individual skier. **This bill does not, however, disregard the responsibility of the ski area operator to maintain and operate a safe recreational area.**
>
> Skiing has been, and will continue to be, a relatively dangerous sport. This bill merely assures that all parties concerned understand the limitations of their liability should an accident occur.
>
> A recent Vermont court decision [*Sunday v. Stratton, infra*] has made it clear that some form of limiting liability for ski area operators is necessary. Last year the Vermont court

> awarded $1.5 million to an individual who caught his ski on some underbrush and subsequently fell and broke his back. The court contended that the ski area did not make it sufficiently clear that skiing was indeed a dangerous sport.
>
> * * *
>
> Should the Vermont precedent gain acceptance in the courts of other skiing states, the end result will be higher insurance premiums for ski areas which will in turn pass this added cost on to the consumer.
>
> Minutes, Senate Agriculture, Feb. 2, 1979, Ex. B (prepared statement of Senator Heard).

In the Vermont case, *Sunday v. Stratton Corp.*, 136 Vt 293, 390 A2d 398 (1978), the court held that a clump of brush left on a groomed slope that was marketed as safe for novice skiers was not an inherent risk of the sport but was a breach of the defendant's duty to use reasonable care.[4] Insurance

[4] The operators and insurers exaggerated the import of the decision in *Sunday v. Stratton Corp*. In that case, plaintiff's evidence established that the defendant had failed to groom with reasonable care a slope it advertised as having been groomed for complete novices. Darrel Johnson, speaking for ski area operators, acknowledged that in fact *Sunday v. Stratton Corp.* did not expose the industry to exposure for injuries from inherent risks of the sport. *See* Minutes, House Judiciary Comm. Subcomm. 3, May 24, 1979, p. 7. Two years after the skiing activities statute was passed, in a case that arose before its effective date, this court reached the same result as had the legislature, using somewhat different terminology. In *Blair v. Mt. Hood Meadows Development Corp.* 291 Or 293, 302, 630 P2d 817 (1981), the court stated: "[T]he fact that a sport participant's injury results from a risk which is an element of a sport even when properly conducted may continue to defeat recovery for negligence because the defendant's duty in the context of the sport may not extend to protecting against such risks." In other words, the operator would not be liable for an injury caused by an inherent risk. In

premiums, a witness said, had increased by 27% (Minutes, Senate Agriculture, Feb. 2, 1979, p. 5); in a subsequent hearing, another witness stated that premiums had doubled across the country, and in some cases in the East had tripled. Minutes, Senate Agriculture, Feb. 21, 1979, p. 2. As Representative Lombard later stated to the House Judiciary Committee,

> the case had an incredible ripple effect throughout the whole ski industry and ski areas in the rest of the country. First of all, insurance companies all of a sudden started waking up [to] the types of risks that they were insuring and covering and started backing off. They also started increasing their premiums horrendously. A lot of lawsuits started popping up against the ski areas. Minutes, House Committee on Judiciary, June 8, 1979, p. 6.

Before the Senate Committee, Representative Throop, from Mt. Bachelor's district, spoke of the "explosion of interest and participation in downhill skiing," and stated the bill was "a significant step toward clarifying responsibilities and rights of not only ski lift operators, but also skiers." *Id.*, Senate Agriculture, Feb. 2, 1979, p. 3. Representative Lombard, with both Mt. Ashland and the Tomahawk Ski Bowl in his area, saw the legislation as "more clearly defining liability," which he felt was necessary in light of the Vermont case. *Id.* Keith Petrie, the General Manager at what was then called Multopor Ski Bowl, stated that proponents

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reaching that conclusion the court cited *Sunday v. Stratton Corp.* with approval. 291 Or at 301.

> **were not trying to duck their responsibility [f]or negligence, if in fact it occurs.** We just want protection from those areas where we do not have a control over the individual skier. *Id.,* p. 4 (emphasis added).

The original proposed bill was modeled on the Washington statute enacted two years previous (Minutes, Senate Agriculture, p. 3, and Ex. E), and like that statute began with a signage requirement designed, Senator Heard said, "to ensure that individual skiers are adequately informed of proper procedures." *Id.*; *see* RCW 79A.45.010 ("Ski areas sign requirements") and 1977 ex.s. ch 139 §1. That enactment also listed the duties and responsibilities of skiers. *See* RCW 79A.45.030 (Standard of conduct – Prohibited acts – Responsibility) and 1977 ex.s. ch 139 §2). From the outset both committee members and witnesses saw some problems with the Washington approach and with the language of the bill. *Id.,* p. 3 (Sen. Kulongoski, Sen. Ragsdale, and Rep. Lombard). By the time of a second hearing on February 21, Senator Kulongoski proposed an amendment to replace the proposed bill with language that included this version of "assumption of risk" language:

> [A]n individual who engages in the sport of skiing accepts as a matter of law the dangers that are inherent in skiing insofar as they are obvious and necessary. Minutes, Senate Agriculture, Feb. 21, 1979, Ex. A.

Darrel Johnson, an attorney who had defended ski areas, said the bill was

> an effort to balance the risks that are involved and to impose upon the skier the normal, reasonable, expected, necessary and obvious dangers that are inherent in the sport. Minutes, Senate Agriculture, Feb. 21, 1979, p. 3.

He supported Senator Kulongoski's proposed approach.

In addition to area operators, skiers and ski patrol representatives testified in favor of the bill; one skier stated that "skiers should share the responsibility of the inherent risk in skiing." *Id.*, p. 4. A listing of skiers' duties was felt to be necessary in order to educate skiers, to deter reckless conduct, and to prevent "hit and run" incidents. *Id.*, p. 2-4. At the end of the hearing, the bill was sent to a subcommittee to work out the issues and revise the language. *Id.*, p. 4.

That subcommittee, consisting of Senator Kulongoski and Representative Lombard, met with representatives from ski areas (including attorney Johnson) and from the Oregon Trial Lawyers Association. Minute, Senate Subcommitee on Agriculture, March 26, 1979, p. 1. Senator Kulongoski stated that the committee would cover three areas: assumption of risk, notice requirements and duties of the skier. *Id.* Mr. Johnson proposed a version that contained Senator Kulongski's concept of assumed inherent risks, and provided a definition of "inherent risks of skiing" that, with minor changes, was eventually enacted. *Id.*, p. 1 and Ex. B. Mr.

Johnson made clear "that his proposed amendments in no way were an attempt to eliminate the negligence of ski operators." *Id.*, p. 1.

The OTLA representative took the position that the bill was unnecessary, that comparative fault "was already the law in Oregon," and took particular issue with the provision requiring a notice of claim within 90 days of the occurrence giving rise to the claim. *Id.*, p. 1. At a subsequent meeting Senator Kulongski stated he wanted to see the 90 days extended to 180. Minutes, Sen. Subcommittee on Agriculture, April 5, 1979, p. 1. OTLA presented a version of the bill that stated circumstances that would excuse noncompliance. Minutes, Senate Subcommittee on Agriculture, April 12, 1979, Ex. D at 4 (compare Ex. A at p.2). A week later, the subcommittee had accepted part of that proposal, had changed "notice of claim" to "notice of injury," and added a section that required operators to inform skiers of the notice of injury requirement and the possible consequences of noncompliance. Minutes, Senate Subcommittee on Agriculture, April 19, 1979, Ex. A at 3 (section 2(5) of the proposed bill).

At that final subcommittee meeting, the focus of discussion was on the section delineating skier's duties. In explaining a section providing that skiers outside a designated trail would proceed "at their own risk" [*see* Minutes, Senate Subcommittee, 4/12/79, Ex. A at 4 (section (10)), for a draft

that includes this language], Mr. Johnson explained that "at [their] own risk" meant "inherent risk only" and did not refer to operator negligence. Minutes, Senate Subcommittee, 4/19/1979, at 1. Senator Kulongoski suggested changing the phrase to "assume the inherent risks thereof," a proposal that was adopted. *Id.*

The amendments to the bill were presented to and adopted by the full Senate Committee (with one minor change in wording[5]) and the bill was sent to the floor with a "do pass" recommendation. Minutes, Senate Agriculture, April 27, 1979, p. 2.

In the House

In the House, SB 329A was introduced to a Subcommittee of the House Judiciary Committee by Representative Lombard, who explained that the Senate had "vastly improved upon" the original bill modeled on the Washington legislation. Minutes, House Judiciary Comm. Subcomm. 3, May 24, 1979, p. 2. Mr. Petrie, from Multopor Ski Bowl, once again explained the increased insurance costs in the wake of the Vermont case, and reiterated what he had told the Senate committee:

> **It is not that the area operators are trying to duck their responsibility or pass off their negligence**. They are supportive of the bill in an effort to clarify responsibilities

[5] To make clear that skiers' duties "include but are not limited to" the list enumerated in subsection 4 of the bill; *see* ORS 30.985(1).

> of the individual skier. It is in the areas where the operator has no actual control over what the skier actually does and in the skier's day to day decisions of what he does while he is skiing. *Id.* (emphasis added); *cf.* comments made to Senate Agriculture on Feb. 2, 1979, quoted *supra*.

He went on to state:

> The main thing this bill is trying to do is to define those areas of responsibility to the skier where the operator had no control over the skier's actions, such as speed, where the skiing is actually done, running into other skiers, etc. As far as owner's responsibility, it is very heavily controlled by the Forest Service and the American Standards Institute Safety Code for Chairlifts. Minutes, House Judiciary Comm. Subcomm. 3, May 24, 1979, p. 2-3.

Representative Lombard analogized the "duties of skiers" to the "rules of the road" for vehicular traffic. *Id.*, p. 10.

Members of the subcommittee expressed two main concerns: the bill listed the skier's duties but did not set forth "any corresponding duties of the ski area" (*Id.*, p. 3), and it imposed a 180-day "statute of limitation" (*Id*.). As to the second, Mr. Petrie responded that it was a "notice of injury" that was required, and it was needed because of the transitory nature of the work force and the difficulty in tracing witnesses. *Id.*, p. 4. Once again, he said that "[t]he operators **are not trying to duck out from under their responsibilities,**" and would "go to extreme efforts to notify people" of the law's requirements. *Id.* As to the first, he emphasized safety codes and Forest Service requirements, and asserted generally that the law otherwise

defined operator obligations. *Id.* pp. 5-7; *see also* p. 12 (testimony of Darrel Johnson: operator obligations for "maintenance of the slopes, maintenance of the lifts" was "already a part of the requirements."). Representative Lombard characterized operators as "strictly regulated." *Id.*, p. 7.

Darrel Johnson, an attorney who represented ski areas, told the subcommittee that the legislative abrogation of assumption of the risk had left doubt as to whether operators were obligated to protect skiers against risks inherent in the sport when properly conducted. The purpose of the legislation, he said, was to remove that doubt, and place such inherent risks on the skier. *Id.*, p. 7-8. He emphasized that "**it would be left to the jury to determine what was an inherent risk and what wasn't."** *Id.*, p. 11 (emphasis added). He characterized the enumeration of skiers' duties as "the rules of the road" (*Id.*, p. 9-10), and emphasized that they were designed to protect other skiers, not the ski area. *Id.*

On June 8, Representative Lombard introduced the bill to the full Judiciary Committee and stated (as quoted *supra*) that the need for the bill stemmed from increasing insurance premiums in the wake of the Vermont Supreme Court's opinion in *Sunday v. Stratton Corporation*, *supra*,

combined with the statutory abolition of implied assumption of the risk. ORS 31.620(2).[6] He summarized:

> Because of the ripple effect, the practical effect of the *Stratton* case is that most of the states that have ski facilities have been looking to their legislatures to effect some type of legislation to define the rights and responsibilities of the ski area operators and the skiers. Minutes, House Comm. on the Judiciary, June 8, 1979, p. 6.

Representative Lombard went on to explain that, although the original bill had basically copied the Washington statute, that enactment was, "on closer inspection," seen to have flaws, and the subcommittee of the Senate Agricultural Committee had completely rewritten it. *Id.* Again, he summarized:

> The bill basically states in the introductory clause that as a matter of legislative intent the purpose of the Act is **to clarify the policy of the state governing the duties of skiers and the liability of operators of ski areas** and to affirm the principle that certain risks are inherent in the sport. As a matter of public policy, a person engaged in the sport should not recover damages from an operator for injuries resulting [from] those inherent risks. *Id.*, p. 7 (emphasis added).

A legislator (Representative Frohnmayer) inquired whether by listing "rocks and stumps" as inherent risks, the proposed statute would relieve an operator of any obligation to warn, and was informed it did not; Representative Lombard suggested that while gradual reduction in snow

[6] "The doctrine of implied assumption of the risk is abolished."

cover might be inherent, an operator would certainly have the duty to warn of certain risks created by use or grooming:

> [I]f there is a boulder or stump over a particularly large mogul, there is no question in the minds of the members of the committee that there is an obligation and duty on the part of the ski area operator to mark those kinds of obstructions. *Id.*, p. 7.

Mr. Petrie, general manager of Multopor Ski Bowl and president of the Ski Area Operators Association of the Pacific Northwest,[7] agreed that under those circumstances an action would not be precluded, saying: "In those areas where the 'surprises' occur, he does not know an operator who does not mark." *Id.* In another exchange with Representative Frohnmayer, Mr. Petrie agreed that an operator's failure to remove a skier known to be intoxicated would not be an "inherent risk." *Id.*, p. 8. Representative Lombard said that the statute "allowed for the situation" where an injury was "caused by a combination of the assumption of the inherent risk by the skier and of area operator negligence:"

> [I]f the injury is due solely to those risks, there would be a bar to recovery. On the other hand, if operator negligence is alleged, the comparative negligence issue is addressed and it becomes a jury issue. *Id.*, p. 8-9
>
> The bill does leave the avenue open for people who do have a valid claim. *Id.*, p. 9.

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[7] Mr. Petrie's occupation appears in the Minutes of the Senate Committee on Agriculture, Feb. 2, 1979, p. 1, 3.

> The ultimate determination is going to be a jury question. The operative language, "obvious, expected and necessary" will probably be the jury question. If the jury says that it wasn't reasonably obvious, expected or necessary, the doctrine will not apply. *Id.*

Mr. Petrie added an example:

> [A]n obvious obstruction would be at the Palmer chairlift at Timberline. At the lift, rock croppings [*sic*] are seen all over. That is a situation where a rock certainly can appear during the course of the day. Skiing that lift, a person just better plan on it. The Multipor [*sic*] ski area has basically grass slopes and people do not expect rocks or stumps on those slopes. Any should be marked there. *Id.*

As Mr. Petrie stated bluntly when the discussion turned to an operator's obligation to mark the difficulty of slopes or runs: "[I]f the operator did not have the degree of difficulty posted, he should be nailed." *Id.*, p. 15.

Representative Lombard reassured the Judiciary Committee that "a defect in the tower or in the lift mechanism itself is not something that is generally reasonably obvious, expected or necessary" and that the record in the Senate hearings clearly established that "defects in equipment are not intended to be insulated by this bill." *Id.* p. 10. Representative Lombard emphasized the significance of the decision to reinstate assumption of the inherent risks:

> [W]hen there was assumption of the risk, part of the definition was those risks were assumed that were only "reasonably obvious, necessary and expected."

> * * *
> [T]he corollary of the doctrine of the assumption of risk is that **the operator of the amusement has a duty under the common law, even where there was assumption of risk, to protect the participant from those risks that were not reasonably obvious, expected or necessary.** * * * He is saying that the operator has to make a decision to protect the skier against those risks which are not reasonably obvious, expected or necessary. **Under the common law, that is what he is liable for.**
>
> *Id.,* p. 13 (emphasis added)

Representative Lombard once again summarized, near the end of the discussion:

> If there is negligence on the part of the operator and negligence on the part of the skier, it is his understanding that the intent is that it would go into a comparative negligence situation. *Id.*, p. 17.

Or as he had already stated: "The bill does leave the avenue open for people who do have a valid claim." *Id.*, p. 9.

C. The legislative policy balance inconsistent with enforcement of Mt. Bachelor's release.

In this case, Myles Bagley has claimed consistently that Mt. Bachelor's exculpatory clause is unenforceable because it is contrary to public policy. This court has stated the general proposition that "[a]greements to exonerate a party from liability or to limit the extent of the party's liability for tortious conduct are not favorites of the courts but neither

are they automatically voided." *K-Lines v. Roberts Motor Co.*, 273 Or 242, 248, 541 P2d 1378 (1975)(finding enforceable a clause limiting liability to the cost of repair and replacement in a transaction between business owners in a commercial setting). This court has also stated the general proposition that "ordinarily, the creation of law for reasons of public policy is a task assigned to the legislature not to the courts." *Bennett v. Farmers Ins. Co.*, 332 Or 138, 149, 26 P3d 785 (2001); *see also DeMendoza v. Huffman*, 334 Or 425, 445, 51 P3d 1232 (2002)(quoting *Bennett*, and holding that the policy underlying punitive damages, "like other nonconstitutional issues of law, may be changed by the legislature.").

As made clear by the extensive discussions above, as well as by the terms of the enacted statute, the legislature responded to the industry's concerns by striking a policy balance between the responsibilities of skiers and the liability of operator. It modified the common law to make clear that the inherent risks of the sport, as carefully defined, would fall on the consumer rather than ski area, that the skier would be responsible to comply with the "rules of the slopes," and that the operator would receive early notice of an injury occurring on its premises before it could be held liable for its own negligence. In the preamble to the enacted bill, it said twice, in two

different ways, that it was stating public policy. On the one hand, the purpose of the Act was

> **to clarify the policy of this state governing the duties of skiers and the liability of operators of ski areas** with respect to skiing injuries resulting from alpine or Nordic skiing[.]

And on the other, the legislature stated that

> certain risks are inherent in the sport, and that, **as a matter of public policy**, no person engaged in such sport shall recover damages from a ski operator for injuries resulting from those inherent risks[.]

The industry was given three benefits with the passage of the Act: it could not be held liable for an injury that resulted from an inherent risk that was "reasonably obvious, expected or necessary;" in most cases notice of an injury within 180 days was a predicate to a claim; and it had a statutory list of skiers' duties which could assist, not only in management of the slopes, but in litigating comparative fault. But these concessions were given with the clear understanding that operators would be liable for injuries that resulted from their own negligence; the balance struck was between "the duties of skiers and the **liability** of operators," not the duties of skiers and the **nonliability** of operators.

The terms of the Skiing Activities Statute dominated every other provision of Mt. Bachelor's season pass agreement. *See* Appendix I. The

trial court, in ruling that the release did not run counter to public policy, cited the skiing activities statute, but only insofar as its provisions "outline the skier's responsibilities and assumption of risk." Am. Open. Br. at ER-43. The Court of Appeals, in holding that the release did not offend public policy, never mentioned the statute at all,[8] and failed to respond to plaintiff's arguments that a release of responsibility for negligent conduct "withdraws the Oregon public's benefit of the bargain that led to enactment" of the statute as well as violating the policy underlying the common law of premises liability. Am. Open. Br. at 32 (quoted); Reply Br at 6-8 discussing the statute). In a footnote the Court of Appeals turned instead to the statute "indemnifying [*sic*] landowners from liability in connection with 'use of the land for recreational purposes,' ORS 105.672 – 105.696, stating that "it would be counterintuitive to hold that a contract with the same operative effect as that statutory scheme is void as contrary to public policy." 258 Or App at 406 n. 8 (App-11). But the recreational lands immunity statute is simply irrelevant: it applies only to landowners who make no "charge," and ask no payment, for permission to enter on their property for recreation.

[8] The court's sole mention of the statute was in a preliminary footnote. 258 Or App at 394, fn 2 (App 3).

ORS 105.688(3).[9] The court did not explain why this inapplicable statute can vitiate the careful balance struck in the skiing activities statute between immunity for the inherent risks of skiing/snowboarding and liability for acts that increase the risks beyond those inherent in the sport.

Two other state courts that have invalidated exculpatory clauses as inconsistent with public policy have done so in part because of their legislature's enactment of similar statutes governing ski areas. In *Rothstein v. Snowbird Corp.*, 175 P3d 560 (Utah 2007), the Utah Supreme Court held that a release in a season pass agreement was unenforceable. In that case the plaintiff, an expert skier, was injured when he collided with a retaining wall that was camouflaged from view and was unmarked to warn skiers. 175 P3d at 561. In evaluating the enforceability of the release, the court observed:

> Few legislative expressions of public policy speak more clearly to an issue * * * than the public policy rationale for Utah's Inherent Risks of Skiing Act [cite omitted] speaks to preinjury releases for negligence. *Id.* at 563.

The court started with the statement of public policy that introduced the substantive text:

> It is the purpose of this act, therefore, to clarify the law in relation to skiing injuries and the risks inherent in that sport, to establish as a matter of law that certain risks are inherent

[9] That statute provides that, with certain exceptions not relevant here, "the immunities provided by ORS 105.682 do not apply if the owner makes any charge for permission to use the land for recreational purposes[.]"

> in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks. *Id.* at 563-4 (quoting statute).

The legislature acted, the court pointed out, because the cost of insurance was "imperiling the economic viability of ski area operators," which in turn would affect the industry's contribution to the state economy. *Id.* at 564.

> The bargain struck by the Act is both simple and obvious from its public policy provision: ski area operators would be freed from liability for inherent risks of skiing so that they could continue to shoulder responsibility for noninherent risks by purchasing insurance. By extracting a preinjury release from Mr. Rothstein for liability due to their negligent acts, Snowbird breached this public policy bargain.

In *Dalury v. S-J-I Ltd.*, 164 Vt 329, 670 A2d 795 (1995), the Vermont Supreme Court held that a release exculpating a ski resort from liability for negligence to a recreational skier who was injured after colliding with a metal pole violated public policy and was unenforceable. The court found irrelevant to that policy question the defendants' argument that ski resorts did not provide an "essential public service." A legitimate public interest arises, the court said, when thousands of people respond to "the seller's general invitation to the public to utilize the facilities and services in question." 670 A2d at 798-99. Pointing to the policies underlying the law of premises liability and societal expectations about public accommodations, the court observed:

> If 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. * * * It is illogical, in these circumstances, to undermine the public policy underlying business invitee law and allow skiers to bear risks they have no ability or right to control. *Id.* at 799.

Finally the court found the release "at odds with the statute" which, like the Oregon statute places on skiers the "inherent risks" of the sport:

> The statute places responsibility for the "inherent risks" of any sport on the participant, insofar as such risks are obvious and necessary. A ski area's own negligence, however, is neither an inherent risk nor an obvious and necessary one in the sport of skiing. Thus, a skier's assumption of the inherent risks of skiing does not abrogate the ski area's duty "to warn of or correct dangers which in the exercise of reasonable prudence in the circumstances could have been foreseen and corrected. 670 A2d at 800.

Even in the absence of such a statute as Oregon's, the Connecticut Supreme Court found that a similar exculpatory clause violated public policy when it was invoked to immunize a ski resort from a claim for negligence in the design and operation of a snowtubing run. *Hanks v. Powder Ridge Restaurant Corp.*, 276 Conn 314, 885 A2d 734 (2005). The court said:

> [D]efendants, not recreational skiers, have the expertise and opportunity to foresee and control hazards, and to guard against the negligence of their agents and employees. They alone can properly maintain and inspect their premises, and train their employees in risk management. They alone can insure against risks and effectively spread the costs of insurance among their thousands of customers. Skiers, on the other hand, are not in a position to discover and correct

> risks of harm, and they cannot insure against the ski area's negligence. 885 A2d at 744-45.

The court listed the following factors in its decision:

> [W]e conclude today that the agreement at issue in this case violates public policy, not solely because of the volume of public participation, but because: (1) the defendants invite the public generally to snowtube at their facility, regardless of snowtubing ability; (2) snowtubers are under the care and control of the defendants as a result of an economic transaction; (3) the defendants, not recreational snowtubers, have the knowledge, experience and authority to maintain the snowtubing runs in reasonably safe condition, to determine whether the snowtubing equipment is adequate and reasonably safe, and to guard against the negligence of its employees and agents; (4) the defendants are in a better position to insure against the risk of their negligence and to spread the costs of insurance to their patrons; (5) if we were to uphold the present agreement under the facts of this case, the defendants would be permitted to obtain broad waivers of their liability and the incentive for them to maintain a reasonably safe snowtubing environment would be removed, with the public bearing the cost; (6) the agreement at issue is a standardized adhesion contract, offered to snowtubers on a "take it or leave it" basis, and without the opportunity to purchase protection against negligence at an additional, reasonable fee; and (7) the defendants had superior bargaining authority. 885 A2d at 745 fn. 9.

The court made clear that the decision did not "extend to the risks inherent in the activity of snowtubing." *Id.* at 747 fn. 12.

In 1979 when the Skiing Activities Statute was enacted, ski areas were apparently not utilizing release agreements. They had not yet had the

audacity to contend that the best way to "manage the risks"[10] was to place all of them (not just the "obvious, expected and necessary ones inherent in the sport) squarely on the skiing public, and the best way to manage liability was not to have much of it. Plaintiff is unaware of any ski area in Oregon that does not utilize a form of release on its season pass agreements as well as its daily lift tickets.

Skiers in Oregon have no choice. If they want to ski, they are forced to accept the risks – hidden, unexpected and unnecessary – that are not inherent in the sport but could have been avoided if the facility had exercised reasonable care. These exculpatory clauses make a mockery of the legislature's effort to draw a careful line between "the duties of skiers and the liability of operators of ski areas." App 7. The exculpatory clause should be unenforceable on the grounds that it is inconsistent with public policy as set forth in the Skiing Activities Statute.

[10] In the hearing before the House Judiciary Committee, Representative Lombard explained that placing the "inherent risks," those that were "reasonably obvious, expected and necessary" on the skier was important to the operator's "risk management" decisions. Minutes, House Jud. Comm., June 8, 1979, p. 12.

II. Mt. Bachelor's release agreement is unconscionable and therefore unenforceable.

The exculpatory clause is not only inconsistent with the policy underlying the statute that governs the industry, it is also unconscionable. This is not one of those "limited circumstances" that allow enforcement of a clause "that purport[s] to immunize a party from the consequences of its own negligence." *Estey v. MacKenzie Engineering Inc.*, 324 Or 372, 376, 927 P2d 86 (1996).

A. The "release agreement" is a contract of adhesion.

The Court of Appeals erred when it declined to recognize this standard form "take-it-or-leave-it" agreement, imposed by Mt. Bachelor with no opportunity to bargain, as a contract of adhesion.

In concluding that the exculpatory clause in the season pass was not procedurally unconscionable, the Court of Appeals rejected the proposition that this ski pass agreement was "impermissibly adhesive." 258 Or App at 407-408. This court defines an adhesion contract simply and clearly as a "'take-it-or-leave-it'" agreement that is "'the product of unequal bargaining power between the parties.'" *Reeves v. Chem Indus. Co.*, 262 Or 95, 100-101, 495 P2d 729 (1972)(pointing to insurance contracts as an example); *see also Perkins v. Standard Oil Co.*, 235 Or 7, 17, 383 P2d 107 (1963)(a "form contract prepared by Standard * * * is a contract of 'adhesion' in the sense

that it is a take-it-or-leave-it whole."). The Court of Appeals employed that same definition in *Vasquez-Lopez v. Beneficial, Oregon, Inc.*, 210 Or App 553, 567, 152 P3d 940 (2007):

> Plaintiffs were given a standard form "take it or leave it" contract drafted by defendant – a classic contract of adhesion [cite to *Reeves, supra* omitted] which, in some jurisdictions is *per se* procedurally unconscionable [cited omitted.] 210 Or App at 568.

In this case the Court of Appeals said the release was not "impermissibly adhesive," because Myles Bagley had a "meaningful choice:" he could have just said "no" and not engaged in winter sports. That, of course, is the nature of a "take-it-or-leave-it" agreement. But the Court of Appeals went on to say that a "meaningful choice" – nonparticipation being that choice – is necessarily present unless that alternative would result in the denial of an "essential public service." 258 Or App at 408. With such an approach, a movie theater could print an exculpatory clause on the back of a theater ticket absolving it of any liability for a failure to maintain its premises, and there would be no basis to claim that the "agreement" was "impermissibly adhesive." Projectors could fall atop moviegoers below, and theater owners would be able to argue that patrons simply could have said "no" and rented DVDs at home.

As the Court of Appeals has noted (*Vasquez-Lopez*, *supra*, 210 Or App at 567), a lack of procedural unconscionability does not end the inquiry: the critical question is substantive unfairness. But a refusal to find some degree of procedural unconscionability can surely affect the ultimate calculus as to whether a contract provision is unduly burdensome – indeed, for the Court of Appeals in this case, it seems to have done just that. The decision that release agreements "in the context of recreational activities are not impermissibly adhesive" is inconsistent with the definition stated by this court in *Reeves*, *supra*; it is also inconsistent with its own rule in *Vasquez-Lopez*, *supra*, a rule that makes no reference to the subject matter of the contract.

In fact, this "release agreement" was the product of unequal bargaining power, there was a total absence of any negotiation or opportunity to negotiate, and there was no meaningful alternative if Myles Bagley wanted to continue to develop his skills as a snowboarder. The release is adhesionary, and the Court of Appeals was wrong to dismiss as inconsequential the indicia of procedural unconscionability.

B. The release is *prima facie* unconscionable.

In 1961, Oregon enacted a substantial portion of the Uniform Commercial Code, including Article 2 (Sales). ORS Chapter 72; 1961 Or

Laws ch 726. ORS 72.7190(3) – section 2-719 of the Uniform Code – provides:

> Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. **Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable but limitation of damages where the loss is commercial is not.**

In actions for breach of implied or express warranties, UCC 2-719 has been applied according to its terms to invalidate provisions that limited or excluded liability for consequential damages as a result of personal injury. *See, e.g, Mathews v. Ford Motor Co.,* 479 F2d 399, 402 (4th Cir 1973) (stating that §2-719(3) of the Code "denounces as prima facie unconscionable the limitation of damages for personal injuries that are caused by consumer goods. Since Ford did not rebut this presumption, Matthews was entitled to recover damages for his injuries."); *Collins v. Uniroyal, Inc.,* 126 NJ Super 401, 406-7, 315 A2d 30, 34 (1973), *aff'd* 64 NJH 260, 315 A2d 16 (1974)(in a wrongful death action after a tire blowout, citing §2-219(3), and stating: "There is no evidence in the record to overcome the clear unconscionability of limiting consequential damages in this case to the repair or replacement of the tire."); *McCarty v. E.J. Korvette, Inc.,* 28 Md App 421, 347 A2d 253, 261 (1975)(action for injury suffered in an accident caused by tire blowout; defendants offered no

evidence that an exclusion of consequential damages for personal injury was not unconscionable, and it therefore was "unconscionable as a matter of law" under the UCC provision.) As jurisdictions moved to strict liability theories and away from breach of warranty, annotations under this section of the UCC tend to involve litigation between commercial entities in a commercial context rather litigation involving consumer goods and personal injury claims. *See* Uniform Laws Annotated, Vol. 1B, Uniform Commercial Code § 2-719, Notes of Decision 39-41 (West Publishing 1989 and 2004 Supp Pamphlet).

In *Illingworth v. Bushong*, 297 Or 675, 688 P2d 379 (1984), the court evaluated the enforceability of a liquidated damages provision in an earnest money agreement by applying a Uniform Commercial Code provision, ORS 72.7180(1)[11] to the non-UCC contract. ORS 72.7180(1) imposes a "reasonableness" requirement: "A term fixing unreasonably large liquidated damages is void as a penalty." This court stated:

> Insofar as policy choice is concerned, enactment of the statute makes the choice, or choices, by the constitutional department of state government that is responsible to the people for that kind of choice. 297 Or at 692.

[11] *See* Appendix IV to this brief.

The court reasoned that the statute represented a legislative policy choice on a common-law issue, and saw no good reason "for not using that same rule" in other contexts. *Id.*

In *Steele v. Mt. Hood Meadows Oregon, Ltd.*, 159 Or App 272, 974 P2d 794, *rev den* 329 Or 10, 994 P2d 119 (1999), the Court of Appeals concluded that a release that did not mention negligence was ambiguous, construed it against the drafter, and held it unenforceable. In a concurring opinion, Judge Armstrong highlighted "an issue about the enforceability of the provision that the parties raised but the majority does not reach." 159 Or App at 281. Judge Armstrong observed:

> Under *Illingworth*, the policy embodied in ORS 72.7190(3) should apply to consumer contracts that are not subject to the UCC, such as the contract at issue here. Applying that policy to the exculpatory provision in the parties' contract would lead me to conclude, on this record, that the provision could not be enforced against plaintiff's claim, but that policy would not necessarily prevent the enforcement of comparable provisions in other consumer contracts. The enforceability of such provisions presumably would turn on whether the evidence presented by the parties would persuade a court that enforcement would not be unconscionable. 159 Or App at 281-82.[12]

[12] *See similarly Blanchfill v. Better Builds, Inc.*, 160 Or App 527, 534 n. 6, 982 P2d 53 (1999)(citing the concurrence in *Steele* and noting that neither party had argued for the application of the UCC provision relating to unconscionability of lease contracts, and therefore the court would express no opinion as to its application).

Plaintiff urges this court to follow *Illingworth*, and take the same approach to consumer services as the UCC mandates for consumer goods: Limitation of consequential damages for injury to the person in the case of consumer goods should be *prima facie* unconscionable. Plaintiff points out that the ORS 72.7190(3) is just as important for what it doesn't do as for what it does. What it does is create a presumption of unconscionability when the transaction involves consumer goods and personal injury. What it does not do is distinguish between consumer goods that are "essential" or "necessary" and consumer goods that are luxury or recreational items, a distinction that the Court of Appeals utilized twice in this case – once to say the release was not "impermissibly adhesive" and once to say it was not substantively unfair. 256 Or App at 407, 409.

C. The release is harsh and inequitable, and therefore unenforceable.

In the Court of Appeals, Mt. Bachelor had nothing to say about the substantive unfairness of the release, other than to complain that plaintiff "ignores the right to contract." Resp Br at 19. In the trial court, Mt. Bachelor had nothing at all to say about substantive unconscionability; it merely took issue with plaintiff's characterization of the contract as one of adhesion. TCF 37, Mt. Bachelor's Combined Response and Reply, at 13. Since Mt. Bachelor has not shown, and cannot show, that this exculpatory

clause is fair and equitable, the release provision is unconscionable and unenforceable.

The Court of Appeals was remarkably silent about what it termed the "substantive fairness" of the exculpatory provision. It states that "the provision in the release agreement disclaiming liability for negligence was not 'unreasonably favorable' to Mt. Bachelor," 258 Or App at 409, but does not explain why it is reasonable to place on a customer the entire burden of Mt. Bachelor's own negligence. It cites its opinion in *Harmon v. Mt. Hood Meadows,* 146 Or App 215, 932 P2d 92 (1997) which addressed and rejected a particular limited public policy argument. 258 Or App at 409. It cites cases from other jurisdictions that agree with its result (*Id.*), but fails to distinguish cases from other jurisdictions that refused to enforce similar releases in the context of skiing. *See, e.g., Rothstein v. Snowbird Corp.,* 175 P3d 560 (Utah 2007), discussed *supra.* Once again, the court invokes the inapplicable recreational lands immunity statute, ORS 105.682, stating: "We fail to see how a private contract to the same effect is substantively unfair as a matter of law." And perhaps most significantly, the court "return[s] to the overarching notion that the terms at issue must be read in light of their recreational context," citing a New Jersey case for that proposition. 258 Or App at 409.

The only fact, the sole circumstance, that the court cites to support either procedural or substantive fairness is that skiing is simply recreational, not a necessary or essential service. This is a distinction without a difference; Mt. Bachelor's take-it-or-leave-it release provision places the entire risk of its own negligent conduct on members of the public who use its facility. If enforced in this case, it places on Myles Bagley the lifelong financial burden of coping with a physical disability that plaintiff contends could have been avoided if Mt. Bachelor had exercised reasonable care. As the Washington Supreme Court has observed, enforcement of such a release means that "the defendant is under no obligation of care for the benefit of the plaintiff, and shall not be liable for the consequences of conduct which would otherwise be negligent." *Wagenblast v. Odessa Sch. Dist.*, 110 Wn2d 845, 848, 758 P2d 968 (1988)(invalidating an agreement releasing a school district from liability as a condition of participating in sports). Viewed in such a light, it is apparent that a ski area should not be allowed to employ a release agreement to avoid obligations of care placed on it, not only by the common law, but by the Forest Service in its use permits, by the ANSI standards made applicable by those permits, and by the Oregon Legislature.

In considering the contractual validity of exculpatory or limitation of liability clauses, this court has repeatedly acknowledged the importance of

considering "the possibility of a harsh or inequitable result that would fall on one party by immunizing the other party from the consequences of his or her own negligence." *Estey v. MacKenzie Engineering Inc.*, *supra*, 324 Or at 376-77; *Commerce & Industry Ins. v. Orth*, 254 Or 226, 231-32, 458 P2d 926 (1969); *Southern Pacific Co. v. Layman*, 173 Or 275, 279, 145 P2d 295 (1944). If the question is one of basic fairness, as these cases suggest, then the answer is clear: A provision that relieves Mt. Bachelor of its obligation to exercise reasonable care in the design and maintenance of a jump in a terrain park, and places on the consumer the risk of Mt. Bachelor's negligence, is harsh and inequitable.

Conclusion

The court should reverse the Court of Appeals and remand this case to the trial court to vacate the judgment and for further proceedings.

Respectfully submitted,

/s/ Kathryn H. Clarke

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Attorneys for Petitioner Bagley

APPENDICES

ATTENTION SKIERS/SNOWBOARDERS/SNOWRIDERS

YOUR DUTIES

The following **Duties of Skiers** and **Assumption of Risk** provision applies to all skiers, snowboarders, and all other snowriders.

O.R.S. 30.990 REQUIRES US TO NOTIFY SKIERS OF THEIR DUTIES PURSUANT TO O.R.S. 30.985. THE LAW IMPOSES THE FOLLOWING DUTIES ON ALL SKIERS REGARDLESS OF WHAT TYPE OF EQUIPMENT THEY USE. VIOLATION OF ANY OF THE FOLLOWING DUTIES ENTITLES MT. BACHELOR TO WITHDRAW THE VIOLATOR'S PRIVILEGE OF SKIING.

A. **Skiers who ski in any area not designated for skiing within the permit area assume the inherent risks thereof.**

B. **Skiers shall be the sole judges of the limits of their skills and the ability to meet and overcome the inherent risks of skiing and shall maintain reasonable control of speed and course.**

C. **Skiers shall abide by the directions and instructions of the ski area operator.**

D. **Skiers shall familiarize themselves with posted information on locations and degree of difficulty of trails and slopes to the extent reasonably possible before skiing on any slope or trail.**

E. **Skiers shall not cross the uphill track of any surface lift except at the points clearly designated by the ski area operator.**

F. **Skiers shall not overtake any other skier except in such a manner as to avoid contact and shall grant the right of way to the other skier.**

G. **Skiers shall yield to other skiers when entering a trail or starting downhill.**

H. **Skiers must wear retention straps or other devices to prevent runaway skis and snowboards.**

I. **Skiers shall not board rope tows, wire rope tows, J-bars, T-bars, ski lifts, or other similar devices unless they have sufficient ability to use the device and skiers shall follow any written or verbal instructions that are given regarding the device. Skiers shall request instructions if unfamiliar with any ski lift device before boarding it.**

J. **Skiers, when injured in a skiing accident, shall not depart from the ski area without leaving their names and addresses if reasonably possible.**

K. **A skier who is injured should, if reasonably possible, give notice of the injury to the ski area operator before leaving the ski area.**

L. **Skiers shall not embark or disembark from a ski lift except at designated areas or by the authority of the ski area operator.**

Skiers/Snowboarders/Snowriders Assume Certain Risks

O.R.S. 30.975 PROVIDES THAT AN INDIVIDUAL WHO ENGAGES IN THE SPORT OF SKIING, ALPINE OR NORDIC, ACCEPTS AND ASSUMES THE INHERENT RISKS OF SKIING INSOFAR AS THEY ARE REASONABLY OBVIOUS, EXPECTED OR NECESSARY. INHERENT RISKS OF SKIING INCLUDE, BUT IS NOT LIMITED TO, THOSE DANGERS OR CONDITIONS WHICH ARE AN INTEGRAL PART OF THE SPORT, SUCH AS CHANGING WEATHER CONDITIONS, VARIATIONS OR STEEPNESS IN TERRAIN, SNOW OR ICE CONDITIONS, SURFACE OR SUBSURFACE CONDITIONS, BARE SPOTS, CREEKS AND GULLIES, FOREST GROWTH, ROCKS, STUMPS, LIFT TOWERS AND OTHER STRUCTURES AND THEIR COMPONENTS, COLLISIONS WITH OTHER SKIERS, AND A SKIER'S FAILURE TO SKI WITHIN THE SKIER'S OWN ABILITY.

MINOR RELEASE AND INDEMNITY AGREEMENT

I HEREBY AGREE TO RELEASE AND INDEMNIFY MT. BACHELOR, INC., ITS OFFICERS AND DIRECTORS, OWNERS, AGENTS, LANDOWNERS, AFFILIATED COMPANIES, AND EMPLOYEES FROM ANY AND ALL CLAIMS FOR PROPERTY DAMAGE, INJURY, OR DEATH WHICH THE MINOR(S) NAMED BELOW MAY SUFFER OR FOR WHICH HE OR SHE MAY BE LIABLE TO OTHERS, IN ANY WAY CONNECTED WITH SKIING, SNOWBOARDING, OR SNOWRIDING. THIS RELEASE AND INDEMNITY AGREEMENT SHALL APPLY TO ANY CLAIM EVEN IF CAUSED BY NEGLIGENCE. THE ONLY CLAIMS NOT RELEASED ARE THOSE BASED UPON INTENTIONAL MISCONDUCT.

BY MY SIGNATURE BELOW, I AGREE THAT THIS MINOR RELEASE AND INDEMNITY AGREEMENT WILL REMAIN IN FULL FORCE AND EFFECT AND I WILL BE BOUND BY ITS TERMS THROUGHOUT THIS SEASON AND ALL SUBSEQUENT SEASONS FOR WHICH THIS SEASON PASS IS RENEWED.

I HAVE CAREFULLY READ AND UNDERSTAND THIS AGREEMENT AND ALL OF ITS TERMS.

PARENT OR GUARDIAN (must be signed by parent or guardian if the user is under eighteen (18) years of age).

MINOR NAME: (Please print) _____ LAST _____ FIRST

PARENT OR GUARDIAN NAME: (Please print) _____ LAST _____ FIRST

RELATIONSHIP: (Please print) _____

_____ DATE _____

PARENT OR GUARDIAN Signature:

Exhibit 4
Page 2 of 3

APP 2

Pass Holder

Street Address

City | State | Zip | Phone Number

Email Address

MT. BACHELOR SEASON PASS AGREEMENT

Date of Birth | Age

Exhibit 4

PASS MUST BE VISIBLE FOR ATTENDANT TO SEE. As a condition, the holder of this ticket is being permitted to use the facilities of the area and agrees that management is not responsible for the Passes if lost or stolen. Permission to utilize a pass is granted only to the individual to whom it is issued. **Passes may not be sold or transferred.** Misuse of the pass will result in forfeiture of the pass without refund. Misconduct caused by the holder of the pass will also result in forfeiture of the pass without refund.

Mt. Bachelor, Inc. makes no warranties with respect to the duration of the ski season. Mt. Bachelor, Inc. in its sole discretion will determine the length of the ski season and the number of lifts in operation at any one time, based on snow conditions and other variables. **ALL SALES ARE FINAL AND THERE WILL BE NO REFUNDS DUE TO LACK OF SNOW, THE LENGTH OF THE SEASON OR FOR ANY OTHER REASON EXCEPT INJURIES.** Injury refund policy is posted at www.mtbachelor.com and is also included in your season pass packet.

RELEASE AND INDEMNITY AGREEMENT

IN CONSIDERATION OF THE USE OF A MT. BACHELOR PASS AND/OR MT. BACHELOR'S PREMISES, I/WE AGREE TO RELEASE AND INDEMNIFY MT. BACHELOR, INC., ITS OFFICERS AND DIRECTORS, OWNERS, AGENTS, LANDOWNERS, AFFILIATED COMPANIES, AND EMPLOYEES (HEREINAFTER "MT. BACHELOR, INC.") FROM ANY AND ALL CLAIMS FOR PROPERTY DAMAGE, INJURY, OR DEATH WHICH I/WE MAY SUFFER OR FOR WHICH I/WE MAY BE LIABLE TO OTHERS, IN ANY WAY CONNECTED WITH SKIING, SNOWBOARDING, OR SNOWRIDING. THIS RELEASE AND INDEMNITY AGREEMENT SHALL APPLY TO ANY CLAIM EVEN IF CAUSED BY NEGLIGENCE. THE ONLY CLAIMS NOT RELEASED ARE THOSE BASED UPON INTENTIONAL MISCONDUCT.

I/WE ALSO AGREE THAT ALL DISPUTES BETWEEN MYSELF OR MY CHILD AND MT. BACHELOR, INC. ARISING FROM MY/OUR USE OF MT. BACHELOR, INC.'S FACILITIES OR SERVICES WILL BE GOVERNED BY THE LAWS OF THE STATE OF OREGON AND THE EXCLUSIVE JURISDICTION THEREOF SHALL BE IN THE STATE COURTS OF THE STATE OF OREGON, AND THE VENUE FOR THESE DISPUTES SHALL BE IN DESCHUTES COUNTY, OREGON.

IF ANY PART OF THIS CONTRACT IS DETERMINED TO BE UNENFORCEABLE FOR ANY REASON OR IN ANY CIRCUMSTANCE, IT IS INTENDED THAT ALL OTHER TERMS WILL BE ENFORCED IN ALL OTHER CIRCUMSTANCES.

THE UNDERSIGNED(S) HAVE CAREFULLY READ AND UNDERSTAND THIS AGREEMENT AND ALL OF ITS TERMS ON BOTH SIDES OF THIS DOCUMENT. THIS INCLUDES, BUT IS NOT LIMITED TO, THE DUTIES OF SKIERS, SNOWBOARDERS, OR SNOWRIDERS. THE UNDERSIGNED(S) UNDERSTAND THAT THIS DOCUMENT IS AN AGREEMENT OF RELEASE AND INDEMNITY WHICH WILL PREVENT THE UNDERSIGNED(S) OR THE UNDERSIGNEDS' ESTATE FROM RECOVERING DAMAGES FROM MT. BACHELOR, INC. IN THE EVENT OF DEATH OR INJURY TO PERSON OR PROPERTY. THE UNDERSIGNED(S), NEVERTHELESS, ENTER INTO THIS AGREEMENT FREELY AND VOLUNTARILY AND AGREE IT IS BINDING ON THE UNDERSIGNED(S) AND THE UNDERSIGNEDS' HEIRS AND LEGAL REPRESENTATIVES.

BY MY/OUR SIGNATURE(S) BELOW, I/WE AGREE THAT THIS RELEASE AND INDEMNITY AGREEMENT WILL REMAIN IN FULL FORCE AND EFFECT AND I WILL BE BOUND BY ITS TERMS THROUGHOUT THIS SEASON AND ALL SUBSEQUENT SEASONS FOR WHICH I/WE RENEW THIS SEASON PASS.

SEE REVERSE SIDE OF THIS SHEET IF SIGNING FOR A MINOR (UNDER 18) AND FOR DUTIES OF SKIERS, SNOWBOARDERS, OR SNOW RIDERS WHICH YOU MUST OBSERVE.

DEPOSITION EXHIBIT

Pass Holder Name

(Signature) Date

I AGREE TO DISPLAY MY PASS EACH AND EVERY TIME I LOAD ON A MT. BACHELOR SKI LIFT. I understand that failure to comply constitutes misuse of my pass and may result in loss of skiing privileges.

Your Pass is required for use of the facilities ~ If you forget your Pass, you will be required to purchase a daily ticket ~ $60.00 non-refundable charge for replacing lost or stolen pass.

ORS 30.970 – 30.990: SKIING ACTIVITIES

30.970 Definitions for ORS 30.970 to 30.990. As used in ORS 30.970 to 30.990:

(1) "Inherent risks of skiing" includes, but is not limited to, those dangers or conditions which are an integral part of the sport, such as changing weather conditions, variations or steepness in terrain, snow or ice conditions, surface or subsurface conditions, bare spots, creeks and gullies, forest growth, rocks, stumps, lift towers and other structures and their components, collisions with other skiers and a skier's failure to ski within the skier's own ability.

(2) "Injury" means any personal injury or property damage or loss.

(3) "Skier" means any person who is in a ski area for the purpose of engaging in the sport of skiing or who rides as a passenger on any ski lift device.

(4) "Ski area" means any area designated and maintained by a ski area operator for skiing.

(5) "Ski area operator" means those persons, and their agents, officers, employees or representatives, who operate a ski area. [1979 c.665 §1]

30.975 Skiers assume certain risks. In accordance with ORS 31.600 and notwithstanding ORS 31.620 (2), an individual who engages in the sport of skiing, alpine or nordic, accepts and assumes the inherent risks of skiing insofar as they are reasonably obvious, expected or necessary. [1979 c.665 §2]

30.980 Notice to ski area operator of injury to skier; injuries resulting in death; statute of limitations; informing skiers of notice requirements.

(1) A ski area operator shall be notified of any injury to a skier by registered or certified mail within 180 days after the injury or within 180 days after the skier discovers, or reasonably should have discovered, such injury.

(2) When an injury results in a skier's death, the required notice of the injury may be presented to the ski area operator by or on behalf of the personal representative of the deceased, or any person who may, under ORS 30.020, maintain an action for the wrongful death of the skier, within 180 days after the date of the death which resulted from the injury. However, if the skier whose injury resulted in death presented a notice to the ski area operator that would have been sufficient under this section had the skier lived, notice of the death to the ski area operator is not necessary.

(3) An action against a ski area operator to recover damages for injuries to a

skier shall be commenced within two years of the date of the injuries. However, ORS 12.160 and 12.190 apply to such actions.

(4) Failure to give notice as required by this section bars a claim for injuries or wrongful death unless:

(a) The ski area operator had knowledge of the injury or death within the 180-day period after its occurrence;

(b) The skier or skier's beneficiaries had good cause for failure to give notice as required by this section; or

c) The ski area operator failed to comply with subsection (5) of this section.

(5) Ski area operators shall give to skiers, in a manner reasonably calculated to inform, notice of the requirements for notifying a ski area operator of injury and the effect of a failure to provide such notice under this section. [1979 c.665 §3]

30.985 Duties of skiers; effect of failure to comply.

(1) Skiers shall have duties which include but are not limited to the following:

(a) Skiers who ski in any area not designated for skiing within the permit area assume the inherent risks thereof.

(b) Skiers shall be the sole judges of the limits of their skills and their ability to meet and overcome the inherent risks of skiing and shall maintain reasonable control of speed and course.

(c) Skiers shall abide by the directions and instructions of the ski area operator.

(d) Skiers shall familiarize themselves with posted information on location and degree of difficulty of trails and slopes to the extent reasonably possible before skiing on any slope or trail.

(e) Skiers shall not cross the uphill track of any surface lift except at points clearly designated by the ski area operator.

(f) Skiers shall not overtake any other skier except in such a manner as to avoid contact and shall grant the right of way to the overtaken skier.

(g) Skiers shall yield to other skiers when entering a trail or starting downhill.

(h) Skiers must wear retention straps or other devices to prevent runaway skis.

(i) Skiers shall not board rope tows, wire rope tows, j-bars, t-bars, ski lifts or other similar devices unless they have sufficient ability to use the devices, and skiers shall follow any written or verbal instructions that are given regarding the devices.

(j) Skiers, when involved in a skiing accident, shall not depart from the ski area without leaving their names and addresses if reasonably possible.

(k) A skier who is injured should, if reasonably possible, give notice of the injury to the ski area operator before leaving the ski area.

(l) Skiers shall not embark or disembark from a ski lift except at designated areas or by the authority of the ski area operator.

(2) Violation of any of the duties of skiers set forth in subsection (1) of this section entitles the ski area operator to withdraw the violator's privilege of skiing. [1979 c.665 §4]

30.990 Operators required to give skiers notice of duties. Ski area operators shall give notice to skiers of their duties under ORS 30.985 in a manner reasonably calculated to inform skiers of those duties. [1979 c.665 §5]

OREGON LAWS

and

RESOLUTIONS AND MEMORIALS

Enacted and Adopted by the

Sixtieth Legislative Assembly

at its

Regular Session

Beginning January 8 and Ending July 4

1979

Published by

OREGON LEGISLATIVE ASSEMBLY

person for violation of the motor vehicle laws, except convictions of offenses described in ORS 482.430, while the person is driving:

(a) Under circumstances requiring [*him*] the person to be licensed as a chauffeur [*or while driving an*];

(b) A motor vehicle in the course of the person's employment in the collection, transportation or delivery of mail if the vehicle is government owned or marked for the collection, transportation or delivery of mail in accordance with government rules; or

(c) An authorized emergency vehicle as defined in ORS 487.005.

(3) The nonemployment driving record [*of such person*] shall include the person's motor vehicle accidents and convictions for violation of the motor vehicle laws other than those included in the employment driving record.

Section 2. ORS 746.260 is amended to read:

746.260. (1) When an individual applies for a policy of casualty insurance providing either automobile liability coverage, uninsured motorist coverage, automobile medical payments coverage or automobile physical damage coverage on an individually owned passenger vehicle including pickup and panel trucks and station wagons or a renewal of such policy, an insurer shall not consider the applicant's employment driving record in determining whether the policy will be issued or renewed or in determining the rates for the policy. An insurer shall not cancel such policy or discriminate in regard to other terms or conditions of the policy based upon the applicant's employment driving record.

(2) As used in this section, "employment driving record" means **the employment driving record described in ORS 486.054** [*that record showing motor vehicle accidents in which the applicant is involved and convictions of the applicant for violation of the motor vehicle laws, except convictions of offenses described in ORS 482.430, while the applicant is driving under circumstances requiring him to be licensed as a chauffeur or while driving an authorized emergency vehicle as defined in ORS 483.002*].

(3) This section is not intended to affect the enforcement of the motor vehicle laws.

Approved by the Governor July 24, 1979.

Filed in the Office of the Secretary of State July 25, 1979.

CHAPTER 663

AN ACT [SB 870]

Relating to occupational regulation; amending ORS 690.095.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 690.095 is amended to read:

690.095. (1) Every holder of a certificate shall display it [*in a conspicuous place adjacent to or near his work chair. If he has no work chair, the certificate shall be displayed*] in a conspicuous place within the shop.

(2) Every holder of a license shall display it in a conspicuous place within the shop.

Approved by the Governor July 24, 1979.

Filed in the Office of the Secretary of State July 25, 1979.

CHAPTER 664

AN ACT [SB 975]

Relating to vehicles; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this Act is added to and made a part of ORS 483.502 to 483.536.

SECTION 2. Notwithstanding ORS 483.528 and 483.530:

(1) A granting authority may establish an experimental program for the issuance of permits to allow any vehicle, combination of vehicles, load, article, property, machine or thing having a gross weight, size or description not permitted under ORS 483.502 to 483.525 to move over any highway or street under the jurisdiction of the granting authority. Any experimental program established under this section shall be established by rule or resolution, as appropriate.

(2) A granting authority may include in an experimental program established under this section:

(a) Provisions and requirements that differ from provisions and requirements under ORS 483.528 or 483.530; and

(b) Any provisions or requirements the granting authority determines may simplify or expedite the process of issuing permits for movement described in subsection (1) of this section.

(3) Any person or vehicle issued a permit under an experimental program established under this section is not in violation of ORS 483.528 or 483.530 if the person or vehicle complies with the conditions of the permit and the experimental program.

(4) Violation of any requirement or provision of an experimental program established under this section or of a permit issued under an experimental program is subject to those penalties applicable to violations of similar provisions under ORS 483.528 and 483.530.

SECTION 3. Section 2 of this Act is repealed on December 31, 1981.

Approved by the Governor July 24, 1979.

Filed in the Office of the Secretary of State July 25, 1979.

CHAPTER 665

AN ACT [SB 329]

Relating to skiing.

Whereas it is the purpose of this Act to clarify the policy of this state governing the duties of skiers and the liability of operators of ski areas with respect to skiing injuries resulting from alpine or nordic skiing; and

Whereas the Legislative Assembly affirms the principle that certain risks are inherent in the sport, and that, as a matter of public policy, no person engaged in such sport shall recover damages from a ski operator for injuries resulting from those inherent risks; now, therefore,

Be It Enacted by the People of the State of Oregon:

SECTION 1. As used in this Act:

(1) "Inherent risks of skiing" includes, but is not limited to, those dangers or conditions which are an integral part of the sport, such as changing weather conditions, variations or steepness in terrain, snow or ice conditions, surface or subsurface conditions, bare spots, creeks and gullies, forest growth, rocks, stumps, lift towers and other structures and their components, collisions with other skiers and a skier's failure to ski within the skier's own ability.

(2) "Injury" means any personal injury or property damage or loss.

(3) "Skier" means any person who is in a ski area for the purpose of engaging in the sport of skiing or who rides as a passenger on any ski lift device.

(4) "Ski area" means any area designated and maintained by a ski area operator for skiing.

(5) "Ski area operator" means those persons, and their agents, officers, employes or representatives, who operate a ski area.

SECTION 2. In accordance with ORS 18.470 and notwithstanding subsection (2) of ORS 18.475, an individual who engages in the sport of skiing, alpine or nordic, accepts and assumes the inherent risks of skiing in so far as they are reasonably obvious, expected or necessary.

SECTION 3. (1) A ski area operator shall be notified of any injury to a skier by registered or certified mail within 180 days after the injury or within 180 days after the skier discovers, or reasonably should have discovered, such injury.

(2) When an injury results in a skier's death, the required notice of the injury may be presented to the ski area operator by or on behalf of the personal representative of the deceased, or any person who may, under ORS 30.020, maintain an action for the wrongful death of the skier, within 180 days after the date of the death which resulted from the injury. However, if the skier whose injury resulted in death presented a notice to the ski area operator that would have been sufficient under this section had the skier lived, notice of the death to the ski area operator is not necessary.

(3) An action against a ski area operator to recover damages for injuries to a skier shall be commenced within two years of the date of the injuries. However, ORS 12.160 and 12.190 apply to such actions.

(4) Failure to give notice as required by this section bars a claim for injuries or wrongful death unless:

(a) The ski area operator had knowledge of the injury or death within the 180-day period after its occurrence;

(b) The skier or skier's beneficiaries had good cause for failure to give notice as required by this section; or

(c) The ski area operator failed to comply with subsection (5) of this section.

(5) Ski area operators shall give to skiers, in a manner reasonably calculated to inform, notice of the requirements for notifying a ski area operator of injury and the effect of a failure to provide such notice under this section.

SECTION 4. (1) Skiers shall have duties which include but are not limited to the following:

(a) Skiers who ski in any area not designated for skiing within the permit area assume the inherent risks thereof.

(b) Skiers shall be the sole judges of the limits of their skills and their ability to meet and overcome the inherent risks of skiing and shall maintain reasonable control of speed and course.

(c) Skiers shall abide by the directions and instructions of the ski area operator.

(d) Skiers shall familiarize themselves with posted information on location and degree of difficulty of trails and slopes to the extent reasonably possible before skiing on any slope or trail.

(e) Skiers shall not cross the uphill track of any surface lift except at points clearly designated by the ski area operator.

(f) Skiers shall not overtake any other skier except in such a manner as to avoid contact and shall grant the right of way to the overtaken skier.

(g) Skiers shall yield to other skiers when entering a trail or starting downhill.

(h) Skiers must wear retention straps or other devices to prevent runaway skis.

(i) Skiers shall not board rope tows, wire rope tows, j-bars, t-bars, ski lifts or other similar devices unless they have sufficient ability to use the devices, and skiers shall follow any written or verbal instructions that are given regarding the devices.

(j) Skiers, when involved in a skiing accident, shall not depart from the ski area without leaving their names and addresses if reasonably possible.

(k) A skier who is injured should, if reasonably possible, give notice of the injury to the ski area operator before leaving the ski area.

(L) Skiers shall not embark or disembark from a ski lift except at designated areas or by the authority of the ski area operator.

(2) Violation of any of the duties of skiers set forth in subsection (1) of this section entitles the ski area operator to withdraw the violator's privilege of skiing.

SECTION 5. Ski area operators shall give notice to skiers of their duties under section 4 of this Act in a manner reasonably calculated to inform skiers of those duties.

Approved by the Governor July 24, 1979.

Filed in the Office of the Secretary of State July 25, 1979.

APPENDIX IV
Relevant Portions of Oregon's Uniform Commercial Code

ORS 72.7180 Liquidation or limitation of damages; deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

ORS 72.7190 Contractual modification or limitation of remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of ORS 72.7180 on liquidation and limitation of damages:

> (a) The agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
>
> (b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in the Uniform Commercial Code.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. **Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.**

These provisions were enacted in 1961 Or Laws c. 726, with the same section numbers.

CERTIFICATE OF COMPLIANCE

Brief length:

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and the word count of this brief is 8691 words.

Type size:

I hereby certify that the size of the type in this brief is not smaller than 14 point for both text and footnotes as required by ORAP 5.05(4)(f).

CERTIFICATE OF SERVICE AND FILING

I certify that on this date I electronically filed the foregoing **Plaintiff's Opening Brief on the Merits** with the State Court Administrator and served two copies of the same document by first class mail on:

Andrew C. Balyeat
Attorney for Respondent on Review

DATED this 26th day of February, 2014.

/s/ Kathryn H. Clarke
Kathryn H. Clarke OSB 791890
Attorney for Petitioner Bagley