IN THE SUPREME COURT OF THE STATE OF OREGON

MYLES A. BAGLEY, individually,

Plaintiff-Appellant,
Petitioner on Review,

and

AL BAGLEY, individually, and LAUREN BAGLEY, individually,

Plaintiffs,

v.

MT. BACHELOR, INC., dba Mt. Bachelor Ski and Summer Resort,

Defendant-Respondent
Respondent on Review,

and

JOHN DOES 1-10,

Defendants.

Supreme Court No. S061821

Court of Appeals No. A148231

Deschutes County Circuit Court
No. 08CV0118SF

BRIEF OF AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL

Petition for Review of the Decision of the Court of Appeals dated September 5, 2013. Opinion by Sercombe, J., Ortega, P.J., and Hadlock, J., concurring, on Appeal from the Judgment of the Deschutes County Circuit Court, the Honorable Steven P. Forte, Judge

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BRIEF OF AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL

INTRODUCTION

Amicus Curiae Oregon Association of Defense Counsel ("OADC") appears in support of the positions advanced by defendant-respondent Mt. Bachelor, Inc., in this case. Although OADC supports Mt. Bachelor's arguments on all issues on review, OADC focuses this brief on rebutting the incomplete portrait of Oregon's law of contracts as set forth in the brief of plaintiff and the amicus brief of the Oregon Trial Lawyers Association ("OTLA"). Contrary to their presentations, Oregon law provides coherent and easy-to-apply factors in deciding whether to interfere with private parties' right to contract and declare contractual terms as either void against public policy or else void as unconscionable. Moreover, a number of Oregon cases over the decades have considered the same type of contractual provision at issue here—*i.e.,* a contractual limitation or release on liability for ordinary negligence—and have upheld its enforceability over these and other objections raised by plaintiffs. Despite these many holdings, the Oregon Legislature has *never* intervened to change this law to prohibit—or even to limit or disfavor—such liability releases.

Thus, OADC asks the Court here to continue to follow this long-standing, well-established and logically-sound precedent, which should lead to

an affirmance of the dismissal of this case based on the contractual release to which the parties agreed. Businesses and individuals in this state have had the benefit of reasonably clear legal authority and guidelines on this subject, which has enabled them to conduct their affairs and enter agreements with a degree of certainty as to the applicable law. In contrast, plaintiff and OTLA here propose a revolutionary "re-write" of Oregon's law of contracts, which would create new, arbitrary standards, and which may erase both the contract at issue between Mr. Bagley and Mt. Bachelor and also key terms from innumerable other contracts across the state in vastly different industries (as OTLA contends, ranging from sky diving to mushroom picking). This invitation to change Oregon law should be rejected.

ARGUMENT AND AUTHORITY

I. The Parties' Liability Release on Claims for Ordinary Negligence Is Not Void Against Public Policy.

Plaintiff's first challenge to the contractual release he executed with Mt. Bachelor is based on an argument that the term is void against public policy. To say that a contractual term is "void against public policy" is tantamount to saying it is "unlawful" and "illegal." *Phillips v. Thorp*, 10 Or 494, 496-97 (1883). It is a disfavored argument given that "[t]he presumption is that all contracts are legal and not illegal." *Oregon Growers' Co-op Ass'n v. Lentz*,

107 Or 561, 582, 212 P 811 (1923); *see also* ORS 40.135(*l*) (statutory presumption that "[p]rivate transactions have been fair and regular").

Individuals and businesses enjoy a broad right to enter into contracts with others. As noted by the drafters of the Restatement (Second) of Contracts:

> "The principle of freedom of contract is itself rooted in the notion that ***it is in the public interest*** to recognize that individuals have broad powers to order their own affairs by making legally enforceable promises."

Id., Intro. Note to Ch. 8 (1981) (emphasis added).

Once executed, parties similarly enjoy the right to rely on the set terms of those contracts, knowing that such terms will be enforced by the courts where necessary. Indeed, once a contract is executed, "the presumption is that it is valid and free from mistake, and that the writing truly expresses the contract as made." *Miller v. Miller*, 120 Or 484, 489, 252 P 705 (1927).

Likewise, there is a remarkably broad scope of acceptable contract terms, with which courts will not interfere. One type of contractual term that has long been recognized as permissible in this state is a limitation or release on future liability. As the Oregon Supreme Court noted some 54 years ago:

> "There is nothing inherently bad about a contract provision which exempts one of the parties from liability. The parties are free to contract as they please, unless to permit them to do so would contravene the public interest."

Irish & Swartz Stores v. First Nat'l Bank, 229 Or 362, 375, 349 P2d 814 (1960).

This followed upon the authors of the original Restatement of Contracts back in 1932 noting the general legality of a "bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law for the protection of others against unreasonable risk of harm * * *." Restatement of Contracts §574 (1932); *see also* Restatement (Second) of Torts §496B (1965) ("A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligence or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy").

As detailed below, Oregon courts have repeatedly approved of such provisions, "even if the release is between a corporation and an individual." *Poirier v. United Grocers, Inc.*, 110 Or App 592, 597, 824 P2d 1158 (1992). Indeed, there are at least three cases (including the Court of Appeals' opinion below) that have affirmed a liability release provision in the precise scenario of a release on a ski lift contract between a ski operator and a skier. *See Bagley v. Mt. Bachelor, Inc.*, 258 Or App 390, 310 P3d 692 (2013); *Silva v. Mt. Bachelor, Inc.*, No. 06-6330-AA, 2008 US Dist LEXIS 55942 (D Or July 21, 2008); and *Harmon v. Mt. Hood Meadows, Ltd.*, 146 Or App 215, 932 P2d 92 (1997).

On the question of when a liability release becomes unlawful and illegal by "contraven[ing] the public interest," *see Irish*, 229 Or at 375, the "governing principles are well-established." *Steele v. Mt. Hood Meadows Oregon, Ltd.*, 159 Or App 272, 276, 974 P2d 794, *rev. denied*, 329 Or 10, 994 P2d 119 (1999).

To summarize the case law, discussed below, a liability release will only be found void against public policy where it (1) violates a law or policy that has been expressly articulated by the Oregon legislature or other governing lawmaking body; or (2) violates the judicially-stated requirements that the release be (a) unambiguous; (b) limited to "ordinary negligence"; and (c) not involving an "essential public service." *See* discussion below; *see generally* Restatement (Second) of Contracts §178(1) ("A promise or other term of an agreement is unenforceable on grounds of public policy if [1] legislation provides that it is unenforceable or [2] the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.").

The liability release in the present case is not void against public policy under any of these standards.

A. The Oregon Legislature Has Not Prohibited This Release.

To hold a contractual provision void based on the wishes of the legislature or other lawmaking body, it is obvious that the body itself must have

spoken clearly on the subject. Indeed, "Oregon requires that a public policy be ***clear and 'overpowering'*** before a court will interfere with the parties' freedom to contract on the grounds of public policy." *Young v. Mobil Oil Corp.*, 85 Or App 64, 69, 735 P2d 654 (1987) (emphasis added); *see generally, e.g., Perla Dev. Co., Inc. v. PacifiCorp*, 82 Or App 50, 727 P2d 149 (1986), *rev. denied*, 303 Or 74, 734 P2d 354 (1987) (finding contract term involving public utility to be illegal and unenforceable because the Public Utilities Commissioner had issued a new administrative order barring such terms); *Unander v. Unander*, 265 Or 102, 506 P2d 719 (1973) (departing from prior law regarding enforceability of antenuptial agreements in part due to the new policy recognized by the legislature in passing "no fault" divorce laws).

If the legislature wishes to change the law of the state—including issues relating to the common law of contracts—then it may simply act by passing laws on the subject. *See, e.g.,* 2007 amendment to ORS 653.295 (causing noncompetition agreements to be voidable and unenforceable in a number of additional circumstances); ORS 36.620(5) (rendering arbitration agreements between employers and employees voidable and unenforceable in certain circumstances). If such a change is to be made, it should be made by the legislature. *See* Restatement (Second) of Contracts §179, cmt. b ("The declaration of public policy has now become largely the province of legislators

rather than judges. This is in part because legislators are supported by facilities for factual investigations and can be more responsive to the general public").

It is plain that the Oregon legislature has never directly or indirectly spoken on the enforceability—or even the desirability—of the release at issue in this case. Although the legislature could try to gain support to pass a law that is against liability releases in general (such as banning them in form contracts with consumers) or in particular (such as banning them at ski resorts), it has never done so. As a result, the question of whether the release at issue violates a legislative enactment should end here, and the analysis should shift to whether the release complies with the judicial requirements on a liability release (discussed below).

Instead, plaintiff constructs a novel argument to claim that such liability releases are prohibited as a result of Oregon's Skiing Activities Statute, which can be found at ORS 30.970 to ORS 30.990. But such a rule or policy has never been found in these statutes in the 35 years since they were enacted in 1979. Rather, these statutes deal with a specific and narrow issue—the continued application of the doctrine of "assumption of risk" in the context in ski activities after that defense had been generally abolished in 1975—and they nowhere discuss the permissible contractual terms or relationship between the ski operator and the skier. *See* ORS 174.010 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in

substance, contained therein, not to insert what has been omitted, or to omit what has been inserted * * *").

In the Skiing Activities Statutes, the Oregon legislature ***could have*** included—and still in the future may decide to include[1]—a prohibition on liability releases against ordinary negligence, which is precisely what the Alaska legislature did in 1994. *See* Alaska Stat. §5.45.120 ("A ski area operator may not require a skier to sign an agreement releasing the ski area operator from liability in exchange for the right to ride a ski area tramway and ski in the ski area. A release that violates this subsection is void and may not be enforced.") This Alaska statute is the type of legislative pronouncement that is "clear and 'overpowering'", and which allows the "court [to] interfere with the parties' freedom to contract on the grounds of public policy." *Young*, 85 Or App at 69. But it is a pronouncement that is noticeably missing here.

A detailed summary of the Oregon Skiing Activities Statutes, including its legislative history, is contained in Mt. Bachelor's briefing here and below, and so there is no need to repeat that history here. However, six additional comments about deficiencies in plaintiff's arguments are necessary:

First, plaintiff gleans the alleged legislative "policy" regarding releases not from the statutory text, and not from any drafts or official summaries, but solely from various remarks made prior to the law's passage by individual

[1] Subject to Article I, section 21, of the Oregon Constitution contracts clause.

legislators and witnesses. But, "'it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law.'" *State v. Kelly*, 229 Or App 461, 465, 211 P3d 932*, rev. denied*, 347 Or 446, 223 P3d 1054 (2009) (quoting *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009)). "'Only the text of the statute receives the consideration and approval of a ***majority*** of the members of the legislature,' as the constitution requires." *Id.* (emphasis added). Indeed, where the text of a statute is "capable of one, and only one, reasonable construction," then the "legislative history—however clearly it may express the legislature's intentions—is worth precisely nothing." *Id*. at 466; *see also id.* ("Cherry-picked quotations from single legislators or nonlegislator witnesses are likely to be given little weight, as the likelihood that such scraps of legislative history represent the views of the institution as a whole is slim").

Here, no possible legislative text supports a conclusion that the legislature meant to prohibit contractual releases against ordinary negligence. As a result, stray remarks by legislators and witnesses on that particular subject are "worth precisely nothing." *Id.* Indeed, if anything, such remarks are contrary authority to plaintiff's position. For example, plaintiff contends that members of the Subcommittee of the House Judiciary Committee expressed concerns that the bill limited the rights of skiers without creating or articulating "any corresponding duties of the ski area." *See* Appellant's Brief at p. 16.

Assuming such concerns were in fact raised, then it necessarily follows that these concerns were either rejected or else not followed by the legislative body, given that the final statute did not articulate or express "any corresponding duties of the ski area."

Second, even assuming they were relevant, the individual remarks of legislators and witnesses "cherry-picked" by the plaintiff still do not go far enough. Plaintiff has not located a single remark in the history, for example, expressing concern about the interplay between the new law regarding "inherent risks of skiing" and liability releases regarding "ordinary negligence." There appears to have been no discussion of liability releases whatsoever. Simply put, the subject was not before the legislature, and not the subject of legislation, when it passed the Skiing Activities Statute.

Third, plaintiff argues that the statute "assumes" that ski operators remain liable for skier injuries because ORS 31.980 places certain procedural requirements on skiers in filing lawsuits against ski operators. *See* Appellant's Brief at p. 7. But this assumption says nothing about the enforceability of private agreements to release liability. In fact, the statute did ***nothing*** to protect, strengthen, guarantee, or codify a plaintiff's common-law tort claim for injuries against a ski operator. Thus, the analysis on the question of the enforceability of a contractual liability release in the context of skiing would

have followed the same analysis both before and after the passage of the Skiing Activities Statute.

Moreover, contrary to plaintiff's suggestion, the procedural requirements set forth by ORS 31.980 would ***not*** be rendered meaningless by contractual liability releases because Oregon courts have consistently held (discussed below) that parties may only lawfully exculpate themselves from claims for "ordinary negligence," and not for "gross negligence." *See K-Lines v. Roberts Motor Co.*, 273 Or 242, 249, 541 P2d 1378 (1975). Thus, even in the presence of a valid release, the procedural requirements of ORS 31.980 would still be in full force where a plaintiff sues a ski operator for its gross negligence.

Fourth, plaintiff's primary case authority, *Rothstein v. Snowbird Corp.*, 175 P3d 560 (Utah 2007), in fact betrays the very weaknesses in plaintiff's arguments. In addition to being from a foreign jurisdiction, and in addition to being a poorly-reasoned decision (as noted by its dissenting opinion), *Rothstein* reached its conclusion ***only*** because Utah's Inherent Risks of Skiing Act included a substantive section on the "public policy" associated with skiing activities, which included an express legislative finding that "the sport of skiing is practiced by a large number of residents of Utah and attracts a large number of nonresidents, significantly contributing to the economy of this state." *Id.* at 563 (quoting Utah Code Ann. §78-27-51). Since issuing *Rothstein*, the Utah Supreme Court has refused to extend its holding to other recreational activities

which lacked a clear statement of "public policy" within the activity's governing statute. *See Penunuri v. Sundance Partners, Ltd.*, 301 P3d 984, 993 (Utah 2013) (holding that Utah's "Equine Act," which provided that equine activity sponsors were not liable for injuries caused by "inherent risks" associated with equine activities, was "silent regarding public policy" in its statutory text and so did not create a public policy to void pre-injury releases); *Pearce v. Utah Athletic Foundation*, 179 P3d 760 (Utah 2000) (holding that there was no "public policy" prohibiting a liability release at a bobsled track). A review of these Utah cases makes it evident that it is *Penunuri*—not *Rothstein*—which contains similar facts to this case. As the court summed up in *Penunuri*:

> "the fact that the Equine Statute does not eliminate a sponsor's liability for negligence ***does not mean*** that the Legislature intended to invalidate preinjury waivers for ordinary negligence. In other words, ***nowhere*** does the text suggest that equine sponsors may not contractually further limit their liability for risks that are not inherent to equine activities."

Id., 301 P3d at 989 (internal quotation omitted) (emphases added). The same result should be reached in this case.

Fifth, plaintiff and OTLA frequently try to bolster their arguments by making factual assertions about the industry in general, such as by making assertions about the conduct of Mt. Bachelor's competitors (who are not parties to this case) or about the practices of ski operators in the 1970's prior to the

passage of the Skiing Activities Statute. In addition to being irrelevant on the question of the legislature's intent, all such assertions must be disregarded because they were not in the record below in this case.

Lastly, if such industry-wide information is of any use, it should be considered and deliberated upon by the proper body, the Oregon legislature, which remains free to consider the evidence and pass laws restricting or altering the availability of liability releases in this state. But, thus far, such legislation has never been passed. The legislature did not take any action after *K-Lines* upheld a liability release as not void against public policy in 1975. *See id.*, 273 Or at 254. It did not take any action after the courts affirmed a "take-it-or-leave it" liability release relating to "recreational activities" in 1990 in *Mann v. Wetter*, 100 Or App 184, 785 P2d 1064 (1990), *rev. denied*, 309 Or 645 (1990). It did not take any action after courts affirmed such liability releases in the context of ski resorts in *Harmon v. Mt. Hood Meadows, Ltd.*, 146 Or App 215, 932 P2d 92 (1997) or *Silva v. Mt. Bachelor, Inc.*, No. 06-6330-AA, 2008 US Dist LEXIS 55942 (D Or July 21, 2008). In sum, such releases are permissible under Oregon law, and the legislature has never stated otherwise.

B. This Agreement Falls within the Accepted Scope of Liability Releases.

As noted above, Oregon's courts have imposed several straightforward requirements on the form and content of liability releases for them to survive a

"void against public policy" challenge. It is only where these requirements have not been met where "the interest in [the contract's] enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement (Second) of Contracts §178(1). As discussed below, these requirements are as follows: (1) that the release not be "ambiguous"; (2) that it not exceed liability for "ordinary negligence" and (3) that it not release liability for "essential public services." The contract in this case easily passes all three requirements, and is therefore enforceable.

Before delving into these three requirements, it is worth pointing out that liability releases have ***not*** been voided as against public policy simply because they involve a consumer transaction using a "form" or "take-it-or-leave it" contract, where the above three requirements are otherwise met. *See Poirier*, 110 Or App at 597 ("In the absence of a public policy, the rule applies, even if the release is between a corporation and individual").

For example, in *Mann v. Wetter*, the court affirmed a liability release in a scuba diving instructional program, even though the release (i) was on a "form" contract distributed by the company to all of its students; and (ii) was not even presented to the plaintiff until "after he had already attended some of the classes, had paid his fees and was fully committed to the program." *Id.*, 100 Or App at 187-88. Despite the obvious "unequal bargaining power" between the parties, the release was nevertheless affirmed because (1) it was not ambiguous;

(2) it was limited to ordinary negligence; and (3) it did not involve an "essential public service." *See id.* at 186-88; *see also Best v. U.S. Nat'l Bank of Oregon*, 303 Or 557, 560, 739 P2d 554 (1987) (noting that "***apart from the adhesive nature of the account agreement***, the record reflects few indicia of one-sided bargaining. The depositors could close their accounts at any time and for any reason. There is no evidence that the depositors were not of ordinary intelligence and experience. There is also no evidence that the Bank obtained any agreement from the depositors through deception or any other improper means.") (emphasis added).

1. The Agreement Was Not Ambiguous Because It Explicitly Stated that It Covered Claims for "Negligence".

Courts have first required that liability releases be unambiguous as to which claims they are purporting to release. "When one party seeks to contract away liability for its own negligence in advance of any harm, the intent to do so must be 'clearly and unequivocally expressed.'" *Steele v. Mt. Hood Meadows Oregon, Ltd.*, 159 Or App 272, 279, 974 P2d 794 (1999) (quoting *Estey v. MacKenzie Engineering, Inc.*, 324 Or 372, 376, 927 P2d 86 (1996)). Thus, in *K-Lines*, the court approved a liability release that was "in easily readable type" that was "not ambiguous or confusing." *Id.*, 273 Or at 252.

In considering this issue on negligence releases, a primary focus of the courts has been whether the release specifically uses the word "negligence"

within its text. Thus, in *Steele*, the court declined to enforce a release on a negligence claim where the contractual provision did not mention the term or concept of "negligence" within it, but merely claimed to generally release "any claims for personal injury." *Id.*, 159 Or App at 277. Accordingly, the *Steele* court found the release to be "ambiguous" and construed it against its drafter. *Id.* at 281; *see also id.* at 277 (discussing *Southern Pac. Co. v. Layman*, 173 Or 275, 145 P2d 295 (1944), where "[a]bsent a specific reference to negligence [in an indemnity clause], the court declined to find that the landowner would have assumed the risk of the railroad's negligence * * *.").

The flip-side of these holdings, however, is that liability releases are ***not*** ambiguous when they expressly use the term "negligence." As the court noted in *Harmon v. Mt. Hood Meadows, Ltd.*:

> "Because of the release provisions' explicit reference to 'claims based upon negligence,' there is no question here * * * as to whether those provisions clearly and unequivocally expressed an intent to limit defendants' liability for the consequences of their own negligence."

Id., 146 Or App at 218 n.1 (internal quotation omitted); *see also Estey*, 324 Or at 376 (collecting cases indicating that a release of a party's own negligence must be clearly and unequivocally expressed within the contractual term); *Steele*, 159 Or App at 277 n.3 (indicating that no further analysis needs to be performed on the question of whether the release is "ambiguous" if the term

contains a "specific reference to negligence") (citing *Cook v. Southern Pac. Transp. Co.*, 50 Or App 547, 551-53, 623 P2d 1125, *rev. den.* 291 Or 1, 631 P2d 340 (1981)).[2]

Because the release at issue in the present case expressly states that it applies to claims for "negligence," the release cannot be found to be "ambiguous" under the above authorities.

2. The Release Is Limited to Ordinary Negligence.

Just as contractual releases on claims for ordinary negligence have long been recognized as permissible, contractual releases on claims for gross negligence, recklessness, or intentional misconduct have long been found unenforceable. For example, back in 1932 the drafters of the first Restatement of Contracts noted that liability releases were generally permissible so long as they were limited to "negligence not falling greatly below the standard established by law for the protection of others." *Id.* §574; *see also* Restatement

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[2] Of course, *Estey* and *Steele* go on to state that "a release need not always specifically refer to negligence to bar a negligence claim." *See Steele*, 159 Or App at 278; *see also Estey*, 324 Or at 378 ("We decline to hold that the word 'negligence' ***must*** appear in order for an exculpatory or limitation of liability clause to be effective against a negligence claim") (emphasis added); *see also Atlas Mut. Ins. Co. v. Moore Dry Kiln Co. of Oregon*, 38 Or App 111, 589 P2d 1134 (1979) (affirming release on negligence and strict liability tort claims where the contract purported to release liability arising "from any cause"). When the word "negligence" is not used, then a number of additional considerations come into play as to whether the release is sufficiently unambiguous. *See Steele*, 159 Or App at 278 (applying factors). Here, such factors need not be considered because the release at issue specifically states that it applies to claims for "negligence."

(Second) of Contracts 195(1) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy").

This standard distinguishes "ordinary negligence" on the one hand, with "gross negligence" or recklessness, which is "conduct falling greatly below that standard." *K-Lines*, 273 Or at 249 (quoting official comment to Restatement of Contracts §574). "[T]hrough a concern for public policy considerations, courts generally have only enforced exculpatory provisions that are limited to ordinary negligence." *Farina v. Mt. Bachelor*, 66 F3d 233, 235 (9th Cir 1995) (collecting cases and authorities). Thus, in *Farina*, the Ninth Circuit applying Oregon law found a contractual release to violate Oregon's public policy because it released "liability for more than ordinary negligence, including gross negligence and wanton or willful misconduct." *Id.*

It is important to note that this rule does ***not*** require the contractual term to specify that it does not apply to gross negligence or intentional misconduct. That issue came before the court in *Harmon v. Mt. Hood Meadows, Ltd.*, where the plaintiff sought to void a contractual release on grounds of "overbreadth/anti-severability" because the term did not exempt gross negligence or intentional misconduct from its scope. *See id.*, 146 Or App at 221. The court soundly rejected that contention because challenges to contractual terms based on public policy must necessarily be determined on an

"as applied" basis. *Id.* at 221-222. In other words, the court is ***not*** to determine "whether defendants' release might be unenforceable to other plaintiffs asserting other claims"; rather, it must determine whether it is "unenforceable as applied to plaintiff." *Id.* Because the plaintiff in *Harmon* only brought claims for ordinary negligence against the defendants, his argument was rejected and the liability release was deemed enforceable. *Id.*

Likewise, it is undisputed in the present case that plaintiff limited his claims against Mt. Bachelor to claims for "ordinary negligence." As a result, the release of that claim falls within the permissible boundary of liability releases under Oregon law. Although the *amicus* brief filed by OTLA likes to emphasize the dangerous conditions associated with ski jumps in a terrain park, *see, e.g.,* OTLA Brief at p. 30-31, the fact remains that plaintiff could have conceivably asserted claims based on gross negligence or recklessness if he had a good faith basis to do so, but he did not. The claims for ordinary negligence that he did file have long been recognized as appropriate subjects within a contractual liability release.

3. The Release Does Not Pertain to an "Essential Public Service".

The last requirement imposed by the courts regarding "public policy" is that the contractual term should not cause liability to be released for an "essential public service." The origins of this rule are over 100 years old, such

as where the Oregon Supreme Court held that it would violate public policy for a common carrier to "stipulate against liability for loss or injury of property intrusted to it for carriage and transportation occasioned by its own negligence or that if its agents or servants." *Normile v. Oregon R&N Co.*, 41 Or 177, 184, 69 P 928 (1902).

Likewise, in 1932, the drafters of the first Restatement of Contracts noted that otherwise-valid liability releases would be "illegal" where "one of the parties is charged with a duty of public service, and the bargain relates to the negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation." *Id.* §575(1)(b). Similarly, the Restatement (Second) of Torts in 1965 noted that releases are not enforceable when one party is a "common carrier, an innkeeper, a public warehouseman, a public utility, or is otherwise charged with a duty of public service." *Id.* §496B, cmt. (g). The rule is logical: "Having undertaken the duty to the public, which includes the obligation of reasonable care, such defendants are not free to rid themselves of their public obligations by contract, or by any other agreement." *Id.*

Oregon courts have long looked to these Restatements in similarly rejecting releases in the context of essential public services. *See Real Good Food Store, Inc. v. First Nat'l Bank of Oregon*, 276 Or 1057, 557 P2d 654 (1976) (quoting above sections). As noted in *Real Good Food*, certain kinds of

businesses—such as banks, common carriers, and utility companies—"perform an important public service and, for that very reason, are subject to state and federal regulation." *Id.* at 1061. In conducting their essential and regulated business with the general public, therefore, those companies "may not 'contract away' for the negligence of its own employees." *Id.*

The Oregon courts have never deviated from this standard of "important public service." *See also Estey*, 324 Or at 379 (noting that it was unnecessary for the court to reach the second question of whether "a professional engineer who performs a structural inspection of a private home is charged with a duty of public service, so that they are precluded from contractually limiting his liability for negligence"). Nor have the courts ever applied it outside of the classic examples of "public duty" defendants, such as common carriers and banks.

The latter issue then squarely presented itself in *Mann v. Wetter*, 100 Or App 184, 785 P2d 1064 (1990), *rev. denied*, 309 Or 645 (1990). Specifically, the plaintiff alleged that a negligence release contained in a form contract by a

scuba diving instructional program violated public policy.[3] The claim was brought by the estate of the individual who signed the agreement, as he had died during the open-water certification dive at the end of the program, allegedly by the defendants' negligence in administering it. *Id.* at 186.[4]

Following the authority discussed above, the court concluded that a "diving school does not provide an essential public service," and so, therefore, "no public policy considerations * * * prevent a diving school from limiting liability for its own negligence." *Id.* at 187. In so concluding, the court recognized that, as a general matter, "businesses that provide recreational activities are not providing essential public services." *Id.* at 188, n.1 (collecting cases from other jurisdictions with same conclusion).

Critically, ***unlike*** the situation with an "essential public service" such as electricity, the court noted that parties are more at liberty to decide whether they

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[3] As noted above, *supra* at pp. 14, the plaintiff in *Mann* also complained that the parties had "unequal bargaining power," including that the term was presented in a "form" contract. *See id.* at 186. Although the decedent signed a "form" contract, the court rejected this procedural challenge because the release fell within the judicial requirements of public policy: the term was not ambiguous (it referenced "negligence"), the claim was limited to ordinary negligence, and it did not relate to an essential public service.

[4] Though the defendants' alleged negligence in *Mann* caused the unfortunate death of the diving student, it is important to note that the court did not consider or factor in the severity of this injury in deciding whether the contractual release violated public policy. Because the question of enforceability relates to the terms of the contract at the time of its execution, that was the correct analysis. Similarly, the nature or extent of the plaintiff's injuries in this case are not relevant to the issues before the Court.

wish to engage in a particular recreational activity—that is to say, "the decedent was free not to continue the course." *Id.* at 188 n.2; *see also McBride v. Minstar, Inc.*, 283 NJ Super 422, 662 A2d 567, *aff'd sub nom McBride v. Raichle Molitor, USA*, 283 NJ Super 422, 662 A2d 567, *cert denied* 143 NJ 319, 670 A2d 1061 (NJ 1995) (enforcing release included in a contract to sell ski equipment: "When an individual enters a ski shop to buy ski equipment, s/he does have a *need* for those goods and services, merely a desire. * * * The skier merely faces the prospect of a ski-less weekend."); *Milligan v. Big Valley Corp.*, 754 P2d 1063, 1067 (Wyo 1988) (noting decedent "could have chosen not to race. Skiing in the race was not a matter of practical necessity for the public, and putting on the race was not an essential public service.").

In the face of such authority, plaintiff here must prove either (1) that skiing is an "essential public service"; or else (2) that the "essential public service" standard should be abandoned after more than 100 years. Neither is a tenable argument.

First, skiing is plainly a recreational sport; it is not an offering that is necessary for basic health or minimum standards of living, such as electricity. Nor are the operations of ski resorts "subject to state and federal regulations" in the manner of a public utility, regulating their operations such as how to groom a slope, how construct a ski jump, or what rates may be charged to the public for use. Plaintiff has also suggested a potential public interest if the plaintiff

was working toward a career as a professional skier. But such an intention by plaintiff is nowhere stated in the record. Moreover, the same concern could be raised about any activity, from sky diving to mushroom picking. Indeed, it is notable that the plaintiff in *Mann v. Wetter* was enrolled in an "instructional program" to become a certified scuba diver, but this aspect of the program did not change the fact that it was fundamentally a "recreational activity," not an "essential public service." *Id.* at 186.

It should also be added that liability releases for providers of important public services like banks, common carriers, and utility companies are void against public policy ***only*** where they pertain to the important public service being provided. *See* Restatement of Contracts §575(1)(b) (limiting rule to where "the bargain relates to negligence in the performance of any part of its ***duty*** to the public") (emphasis added); *see also id.*, illus. 2 (noting that a railroad company's liability waiver with an adjacent land owner for fires caused by sparks "is not illegal, since the prevention of fires is not part of the carrier's public duty"). Along these lines, even a bank which provides "important public services" may still be able to enforce exculpatory clauses in circumstances not centrally related to its public charge, such as prior to the establishment of a "relationship of bailor and bailee" between the bank and depositor. *See Real Good Food*, 276 Or at 1064.

The rule simply underscores how ski area operators do not offer an "essential public service." If they did, what would be the relevant scope of the duties to the public with which they are charged? There are no laws, regulations, or rules to inform this question. Would the duty pertain only to the functioning of the chair lifts? Would it include the slopes? Would it include the terrain parks? Would a ski area operator be obliged to offer a terrain park to all customers because the state has an interest in ensuring that the public has adequate opportunities to ride on obstacles and jump off ramps? The absurdity of these questions simply reinforces that skiing is not an "essential public service."

Lastly, plaintiff has offered no good reason or authority to depart from the "essential public service" standard that has been applied for over 100 years in Oregon. The rule is sound, and it is reflective of the fact that "[t]here is nothing inherently bad about a contract provision which exempts one of the parties from liability." *Irish & Swartz*, 229 Or at 375 (1960). Thus, unless such releases impact "essential public services," they should continue to be enforceable in Oregon unless and until the legislature decides to take action, which thus far it has not done, including in the 24 years that have passed since *Mann v. Wetter*.

II. The Parties' Liability Release on Claims for Ordinary Negligence Is Not Unconscionable.

The doctrine of unconscionability has existed in Oregon since the nineteenth century. *See Carey v. Lincoln Loan Co.*, 203 Or App 399, 420, 125 P3d 814 (2005), *aff'd*, 342 Or 530, 157 P3d 775 (2007). Unconscionability is a legal issue that must be assessed as of the time of contract formation, so again the facts relating to the nature and extent of the plaintiff's injuries are irrelevant to the analysis. *W.L May, Co. v. Philco-Ford Corp.*, 273 Or 701, 707, 543 P2d 283 (1975).

In more recent cases, Oregon courts have applied the familiar standards on unconscionability set forth by the Uniform Commercial Code (ORS 72.3020) and Section 208 of the Restatement (2d) of Contracts. *Carey*, 203 Or App at 420. This includes "both a procedural and substantive component." *Vasquez-Lopez v. Dominguez,* 210 Or App 553, 566, 152 P3d 940 (2007).

Although there is no formal template in performing this analysis, Oregon cases have stated that "substantive unconscionability is ***absolutely necessary***" to a finding of unconscionability." *Id.* at 567 (emphasis added). Thus, under Oregon law, "procedural unconscionability is relevant, but the emphasis is clearly on substantive unconscionability." *Id.* at 569.

Here, the liability release between the parties is neither procedurally nor substantively unconscionable. But given that substantive unconscionability is

"absolutely necessary" to this analysis, this brief will discuss that issue first, which is a sufficient basis on which to reject plaintiff's allegation of unconscionability.

A. The Liability Release Cannot Possibly Be Substantively Unconscionable Because Courts Have Already Accepted These Exact Releases As Being Lawful And Enforceable.

Substantive unconscionability focuses on "substantive fairness" (*Carey*, 203 Or App at 423) and "the one-sided nature of the substantive terms." *Vasquez-Lopez*, 210 Or App at 567. However, the doctrine of unconscionability "does not relieve the parties from all unfavorable terms that result from the parties' respective bargaining positions; it relieves them from terms that are *unreasonably* favorable to the party with greater bargaining power." *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App 610, 626-27, 156 P3d 156 (2007) (italics in original). Courts have only struck down contractual provisions as unconscionable in "rare instances." *Id.* Thus, for example, in *Carey*, the court found it unconscionable for a sophisticated lender to impose a term on an unsophisticated property buyer which prohibited the re-sale of the property absent the lender's consent, even if such consent was arbitrarily withheld. *Id.* at 426-27. In so finding, the court noted that the term served no commercial purpose, was contrary to recent Oregon case law regarding the reasonableness component to withholding consent, and the only purpose of the

provision was "to give defendant an unwarranted opportunity to seek a windfall in return for" letting plaintiffs re-sell the house. *Id.*

The question for this Court is therefore as follows: *Is a contractual term that unambiguously releases a claim for ordinary negligence not involving an essential public service a contractual term that is substantively unfair and unreasonable?*

Simply put, the answer must be *no*. As detailed in the pages above, this precise kind of contractual release has been approved as lawful and permissible for many years by Oregon courts, as well as by the various Restatements. Again, as this court noted 54 years ago, "[t]here is nothing inherently bad about a contract provision which exempts one of the parties from liability." *Irish & Swartz*, 229 Or at 375 (1960). How then could such a provision now—for the first time—be deemed substantively unconscionable? Indeed, the fact that all of the contractual release cases discussed above ***do not*** discuss or apply an unconscionability analysis is further proof that this defense is simply inapplicable to this type of long-recognized contractual term.

B. There Was No Procedural Unconscionability In the Formation of the Liability Release.

As noted above, because the liability release is so obviously not substantively unconscionable, there is no need to consider procedural unconscionability. *Vasquez-Lopez v. Dominguez,* 210 Or App at 567.

However, to the extent the Court wishes to consider the issue, it must be noted that use of a "form" contract, "take-it-or-leave-it" contract, or "adhesion" contract is permissible under Oregon law and does not result in a finding of procedural unconscionability. *See Best v. U.S. Nat'l Bank of Oregon*, 303 Or 557, 561, 739 P2d 554 (1987) (noting that the contract between the bank and depositors was "adhesive" but rejecting argument of unconscionability because "the record reflects few indicia of one-sided bargaining").

Thus, courts look for facts above and beyond the existence of a form contract. The focus of procedural unconscionability is on two factors: "oppression" and "unfair surprise." *Carey*, 203 Or App at 422. Courts particularly look for evidence of "deception, compulsion, or lack of genuine consent." *Id.* at 422-23. For example, in *Motsinger*, the court noted that the contractual term at issue was required on a "take-it-or-leave-it" basis as a condition of employment, and yet the court held: "[a]part from a showing of unequal bargaining power, plaintiff has not demonstrated that the circumstances of contract formation carried other indicia of procedural unconscionability." *Id.*, 211 Or App at 615. For example, there was no evidence in the record of deception, compulsion, or surprise. *Id.* at 615-17. As a result, the court concluded that the form contract and unequal bargaining power were not enough to invalidate a contractual provision on the basis of unconscionability. *Id.*

The present case is similar to *Motsinger*. Although the liability release was present on a "form" contract, plaintiff has not submitted any other evidence to support procedural unconscionability. Indeed, as the above quotation from *Motsinger* confirms, it is ***plaintiff's*** burden to demonstrate procedural unconscionability, given that it is an affirmative defense. Here, plaintiff on appeal has not pointed to any evidence in the record other than the contract itself to sustain his burden. Apparently no testimony has been offered, for example, from the plaintiff or from representatives from Mt. Bachelor as to the circumstances surrounding the formation of this contract. For this reason and the other reasons listed above, plaintiff's unconscionability defense should be rejected.

III. Plaintiff's Request to Re-Write Oregon's Unconscionability Law Should Be Rejected.

Finally, perhaps in an acknowledgement that plaintiff's arguments are unsuccessful under well-established Oregon law, plaintiff and OTLA invite the Court to depart from this precedent and to fashion out of whole cloth a new and broader standard for unconscionability. The Court should reject this invitation because plaintiff has not offered any compelling reason (or any legitimate reason at all, other than that plaintiff seeks reversal) to depart from the existing standard. Nor does has plaintiff offered a workable or better alternative standard for unconscionability.

A. Plaintiff's Proposal to "Follow the UCC."

Plaintiff's main proposal is to find exculpatory contracts "*prima facie* unconscionable" under a section of the Uniform Commercial Code on Sales, ORS 72.7190(3). This proposal is misguided for a number of different reasons.

First, needless to say, the UCC does not govern the present contract for services. This, in itself, is a sufficient ground to reject plaintiff's argument.

But even if the UCC provisions may be given some persuasive or non-binding authority, plaintiff has nevertheless pointed to the ***wrong section*** of the UCC that would be analogous to the present case. In fact, cases in Oregon have been looking to the UCC regarding unconscionability both in sales and non-sales cases since at least 1975, but the relevant section to analyze unconscionability is UCC §2-302, codified in Oregon at ORS 72.3020, which is entitled "Unconscionable contract or clause." *See id.* In *W.L. May v. Philco-Ford Corp.*, 273 Or 701, 543 P2d 283 (1975), the court considered a defense of unconscionability under that section, along with its official comments, and articulated the same familiar test discussed in the preceding section relating to "oppression," "unfair surprise," and unreasonably "one-sided" terms. *See id.* at 707-08. The court in *Best* followed this same standard for unconscionability and relied on *W.L. May* even though *Best* was not a case arising under the UCC. *See id.*, 303 Or at 560-61. As later noted by the court in *Carey*:

> "Since the adoption of the Uniform Commercial Code, the courts have relied on ORS 72.3020 and, later, Restatement (Second) of Contracts §208, as providing the standard for determining whether a contractual provision is unconscionable. Although the statute applies directly only to contracts for the sale of goods, it influenced the subsequent Restatement, which generally follows it."

Id. at 421. Thus, the standard for unconscionability from the UCC is the same standard discussed in *May*, *Best*, *Carey*, *Vasquez-Lopez*, and *Motsinger*, discussed above, and there is no basis to find unconscionability of the present contract under that standard.

Second, the section of the UCC relied upon by plaintiff—ORS 72.7190(3)—has no connection to the facts of the present case. That section deals with the narrow and particular issue as to what remedies can be eliminated for a buyer who had purchased goods ***subject to a warranty***. *See id.* Thus, ORS 72.7190(3) only makes sense when it is viewed in conjunction with ORS 72.3130 (express warranties on goods), ORS 72.3140 (implied warranty of merchantability), and ORS 72.3150 (implied warranty for particular purpose), all of which relate to the kinds of warranties that the seller may attach to the goods as part of a sale.

Thus, ORS 72.7190(3) states only that it is "*prima facie* unconscionable" for a seller of goods to offer a warranty on those goods but then to simultaneously exclude consequential damages for physical injuries to the

buyer from those warranted goods, such as if the goods were to explode and hurt someone. *See id.* Such personal injury claims are analogous to products liability claims, for which a plaintiff may typically recover damages based on a showing of strict liability, without even having to prove negligence. *See generally Tillman v. Vance Equip. Co.*, 286 Or 747, 754, 596 P2d 1299 (1979) (noting that sellers of goods make implicit representations by placing article into stream of commerce that their products are not unreasonably dangerous); *see also Brokenshire v. Rivas & Rivas, Ltd.*, 142 Or App 555, 922 P2d 696 (1996) (discussing Oregon's product liability statutes).

Also of note, an Official Comment to the UCC version of ORS 72.7190(3) (UCC §2-719) indicates as follows:

> "Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risk. ***The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316*** [ORS 72.3160]."

Id. (emphasis added). Indeed, pursuant to ORS 72.3160, sellers of goods are free to disclaim some or even all warranties, including by using "expressions like 'as is,' 'with all faults' or other language." ORS 72.3160(3)(a). In sum, ORS 72.7190(3) is relevant to UCC-based product defect injuries for goods that

were warranted to the buyer, but it provides no guidance whatsoever in the present case.

The fact that ORS 72.7190(3) is inapplicable is also supported by the fact that it has never once been used outside of its obvious context since it was enacted in 1961—some ***53 years ago***—despite the numerous cases discussing the enforceability of liability waivers in Oregon, discussed above. Plaintiff's attempt to re-write Oregon law anew based on this old statute should therefore be rejected.[5]

B. OTLA's Proposal for an Open-Ended Unconscionability Analysis.

Lastly, the *amicus* brief submitted by OTLA goes even further than plaintiff's position and suggests that courts should engage in a case-by-case, *ad hoc* determination of "fairness" of any and every contractual term. If accepted, such a standard would have a severely negative impact on the parties' freedom to contract in this state, and it would have repercussions across every industry, ranging (to use OTLA's examples) from the sky diving industry to mushroom hunting. It would also lead to an increase in the volume of litigation, as well as added uncertainty of litigation—where the enforceability of a contractual term

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[5] Alternatively, it is worth adding that even if ORS 72.7190(3) and its "*prima facie* unconscionability" standard applied in this case, plaintiff in this case has made no particular factual showing to support unconscionability in this case (*see supra* at pp. 30 and therefore the rejection of this defense as a matter of law should be affirmed.

that has been enforced through the ages suddenly may depend upon the strength of the extrinsic evidence regarding the negotiations surrounding the contract.

In sum, there is no good reason to depart from established Oregon law regarding liability releases, whether the analysis is based on the defenses of public policy or on unconscionability. The current legal requirements, discussed above, should be retained for a variety of reasons, including that:

(1) They are practical, predictable, and easy to apply;

(2) They have been recognized, applied, and upheld in cases going back many decades;

(3) They have never been altered or restricted by the Oregon legislature;

(4) They respect the "public interest" in recognizing that "individuals have broad powers to order their own affairs by making legally enforceable promises" (*see supra*, at pp. 3); and

(5) They have been relied upon by countless businesses and individuals across the state every single day in doing their business and ordering their affairs.

For all of these reasons, OADC urges this Court to affirm the Court of Appeals in dismissing this case based on the parties' valid and enforceable release against ordinary negligence.

Dated this 2nd day of April, 2014.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and (2) the word count of this brief (as described in ORAP 5.05(2)(a), inclusive of footnotes and headers, but exclusive of the cover, table of contents, table of authorities, certificates and signature blocks), is 9,861 words as determined by the Word Count feature of Microsoft Word.

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

DATED this 2nd day of April, 2014.

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CERTIFICATE OF FILING AND SERVICE

I certify that on April 2, 2014, I filed the foregoing **Brief of *Amicus Curiae* Oregon Association of Defense Counsel** with the State Court Administrator through the court's eFiling System, and served the same document on the following parties via the court's eFiling System:

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