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 REPLY 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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April 2014

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PLAINTIFF'S REPLY BRIEF

Mt. Bachelor ignores the fact that plaintiff alleges that his injury resulted from Mt. Bachelor's negligence.

In the introduction to its brief, and again just before it concludes, Mt. Bachelor asserts that its exculpatory clause should be enforced because skiing or snowboarding is "an inherently dangerous activity" over which a ski area operator has little control. Resp Br at 3, 41.[1] This ignores the fact that plaintiff alleges that Mt. Bachelor failed to exercise reasonable care in its design of the jump in the terrain park it constructed, and that Myles Bagley's injury resulted from that negligence, from something over which Mt. Bachelor did indeed have control, and not from a risk inherent in the sport. Mt. Bachelor's arguments about the "malleability of snow" and an operator's inability to control the conduct of the skier or snowboarder are simply not relevant to any question before the court.

Mt. Bachelor asserts "facts" that appear nowhere in the record of this case.

In its brief Mt. Bachelor refers to a sign that appeared, it asserts, at the entry to the terrain park in which Myles Bagley was injured, and attaches in

[1] Mt. Bachelor's responsive brief is entitled "Brief on the Merits." Plaintiff refers to it as Resp Br throughout this reply.

its appendix a photograph of the sign which, it says, was taken the day of his injury. Resp Br 5 and App-1. Although there was a passing reference on one page of plaintiff's deposition to a photograph of such a sign, and that deposition page was attached to Defendant's Motion for Summary Judgment (TCF 29, Ex. 1, p. 9 of 18, cited in Resp Br at 5), the photograph itself appears nowhere in the record of this case (neither in the trial court record nor the record on appeal), and the photograph that is appended to Mt. Bachelor's brief is simply not authenticated. Even if this were in the record, plaintiff believes it is irrelevant to the legal question presented to this court – Myles Bagley was an expert snowboarder and well aware of the inherent risks of the sport and of terrain parks, but he was not aware that Mt. Bachelor's jump was defectively designed. The sign, however, is not in the record, and it should be disregarded.[2]

Subsequently in its brief, in discussing unconscionability, Mt. Bachelor asserts that plaintiff did have a meaningful choice to climb the designated "uphill travel corridors" instead of paying for and using a lift ticket. Resp Br at 24 and App-2 through App-6. The information referred to in Mt. Bachelor's discussion is not in the record, and in any event the

[2] The name of the terrain park, the precise "snow feature" involved in Bagley's injury, and the asserted lack of witnesses (Resp Br at p. 5) is also not in the record.

attached documents are from the current season, not the 2005-2006 season during which Bagley was injured. Again, plaintiff believes that Mt. Bachelor's argument is beside the point; a 3-hour climb for a ten-minute descent is not, in fact, a meaningful alternative to a ski lift for a participant whose interest is in the downhill sport, not just exercise in the outback, and who wants to use his snowboard rather than carry it.

The interface between common law and legislation.

Both Mt. Bachelor and *Amicus* OADC mischaracterize plaintiff's arguments based on the skiing activities statute. Mt. Bachelor states that "[t]here is no indication that the legislature intended to create a public policy duty in the skiing activities statute that could not be waived" and that "the court must assume that if the legislature had intended to ban the use of release agreements it would have said as much." Resp Br at 12, 14. OADC simply complains that liability releases aren't "prohibited" by the terms of the statute and weren't discussed when it was passed. Brief of *Amicus Curiae* OADC at 5, 10. Plaintiff isn't sure what Mt. Bachelor means by a "public policy duty," but plaintiff has never contended that releases were discussed by the 1979 legislature and has never argued that the legislature specifically intended to ban their use when it passed the statute. The fact is,

the industry had not yet discovered this particular tool, and releases were not discussed during the legislative process.

Plaintiff does not ask the court to "construe" the statute, to define the meaning of ambiguous terms; plaintiff doesn't ask the court to "insert a provision that does not exist" (Resp Br at 13); and the rules against such alterations are simply irrelevant. This is an inquiry into whether the legislature has defined a policy that is relevant to the court's evaluation of an issue posed by the common law: whether under these circumstances a release agreement "would contravene the public interest" (*Irish & Swartz Stores v. First Nat'l Bk.,* 220 Or 362, 375, 349 P2d 814 (1960)) or is "void as against public policy." *K-Lines, Inc., v. Roberts Motor Co.,* 273 Or 242, 248, 541 P2d 1378 (1975).

In *Berlangieri v. Running Elk Corp.,* 134 NM 341, 76 P3d 1098 (2003), the New Mexico Supreme Court held unenforceable a liability release as inconsistent with the policy underlying that state's Equine Liability Act (NMSA 1978, §42-13-4(1993)). Plaintiff was injured while horseback riding at defendant's resort when his saddle slipped as the horse galloped. The court concluded that the legislature intended that patrons of businesses such as the resort "should be able to make claims against them

for negligence, but not for equine behavior" (76 P3d at 1111) – a risk of which is inherent in equine activities:

> [T]he Act expresses in general terms a policy that operators should be held liable for negligence, but not for events beyond their control. 76 P3d at 1112.

And the court made this comment on the interaction between statutory and common law:

> Our interpretation of the Equine Liability Act complements the common law, rather than supplants it. **The public policy exception to the enforcement of liability releases is a common law doctrine. The Act provides the expression of policy that makes the exception applicable**. *See Torres v. State,* 119 NM 609, 612, 894 P2d 386, 389 (1995) ("It is the particular domain of the legislature, as the voice of the people, to make public policy.")[.]
>
> 76 P3d at 1111 (emphasis added).

The New Mexico court found support for this approach in *Moragne v. States Marine Lines, Inc.,* 398 US 375 (1970). In that case, the Supreme Court recognized an action under general maritime law for wrongful death. In reaching that conclusion, the court noted that every state had enacted wrongful death statutes, as had Congress in other contexts, and observed:

> This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.
> * * *

> This appreciation of the broader role played by legislation in the development of the law reflects the practices of common-law courts from the most ancient times. * * * It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles – many of them deriving from earlier legislative exertions.
>
> 398 US at 390-91, 392.

In a seminal 1908 article, Roscoe Pound had criticized the

> narrow and illiberal attitude toward legislation conceded to be constitutional, regarding it as out of place in the legal system, as an alien element to be held down to the strictest limits and not to be applied beyond the requirements of its express language. Pound, R., *Common Law and Legislation,* 21 Harv L Rev 383, 385 (1908).

Dean Pound concluded his article with this statement, quoted by the New Mexico court in *Berlangieri, supra,* 76 P3d at 1111:

> Formerly it was argued that common law was superior to legislation because it was customary and rested upon the consent of the governed. Today we recognize that the so-called custom is a custom of judicial decision, not a custom of popular action. * * * We see in legislation the more direct and accurate expression of the general will. *Id.* at 406.

As an equally prominent academic noted 25 years later:

> Differences of degree will always present themselves in any consideration of the extent to which values created by statute should be recognized in fields not directly governed by legislation. But a thorough understanding of the process underlying the statute will often give a clue as to the influence that it deserves. "Mischiefs," as Coke said, are often responsible for legislative action and are the key to its

> meaning. The consequences of the mischief may only have been appreciated by the legislature in a limited field and patent abuses alone eliminated. But thorough understanding of the statute enables one to pierce through the specific remedial measures to a concern with the causative influences that made action necessary. On the other hand, statutes may represent merely a rectification of the existing pattern of the law without striking at its deeper assumptions. Yet even rectifications, sufficiently abundant, may, like the empiric process of adjudication, spell out an attitude of more moment than the manifestations themselves, and thus bring into being a policy calling for a fuller realization.
>
> Landis, J.M., *Statutes and the Sources of Law,* Harv Legal Essays 213, 226-27 (1934), reprinted 2 Harv. J. on Legis. 7, 22 (1965).

This court has not been reluctant to examine and take into account the policy underlying a legislative enactment, in order to determine its impact on common law rules not necessarily implicated by the terms of the statute. For instance, in *Woolston v. Wells,* 297 Or 548, 687 P2d 144 (1984),[3] the court examined a common law rule of premises liability that was phrased as a limitation on the responsibility or liability of possessors of land to invitees.

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[3] Mt. Bachelor cites *Woolston* as authority for the proposition that "ski areas can and do increase the risks" by offering terrain parks, but their duty is only "to warn of the terrain." Resp Br at 4. That is not an accurate re-statement of *Woolston.* A possessor must make "the premises reasonably safe" and must discover conditions that create an unreasonable risk" and either "eliminate the condition" or "warn any foreseeable invitee of the risk" so it can be avoided. 297 Or at 557-58. Under the circumstances in this case, the only safe option was to "eliminate" the design defect. In any event, this argument has to do with whether Mt. Bachelor was negligent, an inquiry Mt. Bachelor has thus far avoided by invoking its release agreement.

This common law rule, the court concluded, was simply another way of stating that the invitee assumed the risk, and therefore was inconsistent with the policy choice made by the legislature in substituting comparative fault for the absolute bar of contributory negligence or implied assumption of risk. The common law rule had been applied by this court after the enactment of the comparative fault statute (*see Katter v. Jack's Datsun Sales, Inc.,* 279 Or 161, 566 P2d 509 (1977)), but as the court pointed out in *Woolston*, neither party in *Katter* had claimed that the rule was inconsistent with the comparative fault statute. The *Woolston* opinion modified the common law rule because its application would "frustrate[] the purpose of instituting a system of comparative fault." 297 Or at 556.

But perhaps the best example is *Illingworth v. Bushong,* 297 Or 675, 688 P2d 379 (1984), the case that applied a provision of the Uniform Commercial Code to modify a common law rule on the enforceability of liquidated damages clauses:

> It is true that the legislature's choice, by its terms, applies only to contracts for the sale of goods, but we are unable to perceive any good reason for not using that same rule as the initial point of departure for analyzing the validity of provisions for liquidated damages in contracts in general. It may be that reasons for variance will surface in the context of litigating the validity of such provisions, but until then the courts of this state shall follow that legislative formulation in cases of this kind. 297 Or at 692-93.

Both Mt. Bachelor and plaintiff have quoted this court's statement 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), quoted Resp Br at 2 and Open Br at 22. Mt. Bachelor apparently believes that plaintiff is asking this court to "create law for reasons of public policy." What plaintiff is asking is that the court apply common law exceptions to the enforceability of exculpatory clauses in a manner consistent with the policy choices of the legislature whose task it is to make them.

The 1979 legislature struck a balance between the risks assumed and duties assigned to skiers and the liability of area operators.

The skiing activities statute is not one that "fails fully to disclose the operative forces behind [the] legislation;" a "preamble," as Dean Landis noted, provides "some means of formulating in an authoritative manner the conception of policy upon which the statute is based[.]" Landis, *supra,* 2 Harv. J. on Legis. at 26. Neither Mt. Bachelor nor OADC ever respond to the legislature's statement of policy in the preamble, or explain how this release is consistent with the policy balance between "the duties of skiers and the liability of operators" that the 1979 Legislature thought it was articulating in the statute. The policies stated in the preamble are never

mentioned in their briefs; indeed, Mt. Bachelor asserts that the enactment "do[es] not include a statement of public policy," a statement that can only be true if the preamble is ignored.

In *Nolan v. Mt. Bachelor, Inc.*, 317 Or 328, 856 P2d 305 (1993), the court stated that the reference in the skiing activities statute to the comparative fault provisions

> *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. The legislative history of the skiing activities statute confirms that interpretation. *See State ex rel Juv. Dept. v. Smith,* 316 Or 646, 651, 853 P2d 282 (1993) (where text of statute *suggested* a particular interpretation, court looked to legislative history of statute for confirmation). (Italics added.)

In this case, the statutory provisions and the policy statements in the preamble suggest that the legislature was engaged in balancing policies, and the legislative history confirms that suggestion. The comments and concerns of proponents, opponents, witnesses and legislators repeatedly demonstrate the competing policies that were involved and the compromise that was being made. The legislative history summarized in Plaintiff's Opening Brief (and submitted as a whole in a Supplemental Appendix) is hardly an example of "cherry-picking" and cannot really be termed "scraps." OADC Brief at 9.

Neither Mt. Bachelor nor *Amicus Curiae* OADC spend any time with the legislative history. They simply disregard it. Both of them mention only the legislature's choice not to enumerate the "duties of the ski area" in addition to listing the duties of skiers, and want the court to infer from their absence in the statute that "these concerns" with ski area duties were "rejected" or "not followed." Resp Br at 19; OADC Brief at 9-10. Neither brief discusses the many references in the legislative history to safety codes, Forest Service requirements, and common law responsibilities as obviating the need for further enumeration of ski area duties. *See* Open Br at 15-17.

OADC's final remark on public policy is to assert that the legislature never took action in response to judicial opinions that certain exculpatory agreements were enforceable. "Legislative inaction is a weak reed upon which to lean in determining legislative intent." *Berry v. Branner,* 245 Or 307, 311, 421 P2d 996 (1966). It is telling that both OADC and Mt. Bachelor want to place a greater emphasis on what the legislature didn't do than on what it did.

The release agreement is *prima facie* unconscionable and on these facts the presumption has not been overcome.

Neither Mt. Bachelor nor *Amicus Curiae* OADC respond to plaintiff's argument that under the Supreme Court's decision in *Illingworth v.*

Bushong, supra, the UCC approach to unconscionability (ORS 72.7190(3)) should be applied. Indeed, neither brief even mentions *Illingworth*, or the references to it in Court of Appeals decisions. *See, e.g., Steele v. Mt. Hood Meadows Oregon, Ltd.*, 159 Or App 272, 281-82, 974 P2d 794 (2007)(Armstrong, J., concurring)*; Blanchfill v. Better Builds, Inc*., 160 Or App 527, 534 n. 6, 982 P2d 53 (1999). Mt. Bachelor cites a North Dakota Court of Appeals decision rejecting the application of the UCC provision on unconscionability to invalidate a release utilized by a roller skating rink; the court there declined to apply it because it was "limited, by its terms, to injuries arising from the sale of consumer goods." *Clanton v. United Skates of America,* 686 NE2d 896 (Ind App 1997). That court, of course, was not analyzing the question in a context that included a precedent such as *Illingworth*.

The UCC provision on the enforceability of exculpatory clauses represents as much of a legislative policy choice as did the UCC provision on the enforceability of liquidated damages provisions at issue in *Illingworth*. There is no good reason for not applying the same rule in other contexts than the sale of goods. This exculpatory clause is prima facie unconscionable.

Mt. Bachelor argues that its release cannot be impermissibly adhesive because its customers have a "meaningful choice" to climb uphill rather than to use the lift. In *Chauvlier v. Booth Creek Ski Holdings, Inc.,* 109 Wn App 334, 388, 35 P3d 383 (2001), the Washington Court of Appeals concluded that a ski area release on a season pass was not adhesive, based in large part on the fact that the plaintiff could have purchased a somewhat more expensive day pass which did not involve a release. Such an option was not offered and was not available to Myles Bagley; and there is no honest comparison possible between the kind of option offered the skier in *Chauvlier* and the alternative which Mt. Bachelor suggests could have been chosen by Myles Bagley. Plaintiff submits that this release agreement meets certain indicia of procedural unconscionability – it was a standard form agreement, offered with no opportunity to negotiate, and the product of unequal bargaining power, and without any meaningful alternative.

As to substantive unfairness, Mt. Bachelor offers no clear defense. Mt. Bachelor reiterates what it said in its introduction: that plaintiff was engaged in "an inherently dangerous activity over which [Mt. Bachelor] ha[d] little, if any control." Resp Br at 3, 27. Because of that lack of control over "the manner in which [the participant] engage[s] in the activity," and because that activity is "recreational," a release is "equitable." Resp Br at 27

As already noted, plaintiff alleges that Mt. Bachelor designed and constructed a jump, failed to exercise reasonable care when it did so, invited the public to pay a charge and use it, and a skilled participant suffered a devastating injury as a result of conduct that was in Mt. Bachelor's exclusive control – not because of a risk inherent in the activity or his "manner" of engaging in it. Mt. Bachelor never shows why it is "equitable" to enforce an exculpatory clause under those circumstances, and cannot discuss the issue without trying to reframe the question into something it isn't.

Toward the conclusion of its brief (Resp Br at 36) Mt. Bachelor asserts that the release meets "substantive conscionability requirements" and "the fairness test"

> because the participant is beyond the complete and practical control of the released party.

But that is not true here: Myles Bagley was, unfortunately, not "beyond" the effect of the defectively designed jump, and therefore not "beyond" the circumstance created by and under "the complete and practical control" of Mt. Bachelor. Mt. Bachelor thus defends its release agreement by denying any basis for it being held liable in the hopes that no factfinder will be allowed to disagree with its assertions that there is no basis for holding it liable. This circularity provides no support for the proposition that this release agreement is not harsh and inequitable.

Conclusion

Mt. Bachelor criticizes the skiing activities statute because "skiers aren't barred from bringing a claim based on an inherent risk." Resp Br at 16. Its problem is with the proposition that a skier only assumes those risks that are "reasonably obvious, expected or necessary," which means that the an operator may have to defend itself before a jury and cannot have "an expeditious resolution of claims by way of summary judgment proceedings." Resp Br at 17. In other words, it may have liability. That's exactly what the statute contemplated.

It frustrates the legislative policy underlying the statute to permit Mt. Bachelor to make its own negligence an inherent risk that must be assumed by its customers, and to place responsibility for that negligence on the individual who suffers injury from it is unconscionable. The court should reverse and remand this case for a jury trial.

Respectfully submitted,

/s/ Kathryn H. Clarke

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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 **3562** 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 Reply Brief** with the State Court Administrator and served two copies of the same document by first class mail on:

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DATED this 15th day of April, 2014.

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