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. N004068

Court of Appeals No. A148231

Deschutes County Circuit Court
Case No. 08CV0118SF

61821

BRIEF ON THE MERITS

Of the Opinion of the Court of Appeals dated September 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

Kathryn H. Clarke, OSB 791890
PO Box 11960
Portland, Oregon 97211
(503) 460-2870

kathrynhclarke@mac.com

Arthur C. Johnson, OSB 530512
Johnson, Johnson, Larson & Schaller, PC
975 Oak Street Suite 1050
Eugene, Oregon 97401
(541) 484-2434
ajohnson@jjlslaw.com

Attorneys for Petitioner Myles A. Bagley

Counsel continued next page

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Andrew C. Balyeat, OSB 951927
Balyeat & Eager, LLP
920 NW Bond St., Ste. 209
Bend, Oregon 97701
(541) 322-0404
andy@balyeatlaw.com

Attorney for Respondent on Review
Mt. Bachelor, Inc.

Kristian Roggendorf, OSB 013990
Roggendorf Law LLC
5200 Meadows Road Suite 150
Lake Oswego OR 97035
(503) 726-5927
kr@roggendorf-law.com

Attorney for Amicus Curiae *Oregon Trial Lawyers Association*

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I. INTRODUCTION

The specific issue presented is whether a clear and unambiguous exculpatory agreement in the context of a hazardous recreational activity is enforceable under Oregon law. The overwhelming majority of states which do not have a statutory enactment disallowing pre-injury releases enforce them, within strict limits. Oregon is within that group. The issue before the Court is whether Oregon should join the distinct minority of states that have found some uncodified basis to declare that the use of release agreements by ski areas violates public policy.

The Plaintiff argues that this other basis is based on fundamental fairness; specifically, that the subject release is unconscionable. Mt. Bachelor submits that fundamental fairness is present with the enforcement of release agreements in the context of hazardous recreational activities provided specific requirements of procedural and substantive due process are satisfied.

There are some jurisdictions which disallow the use of liability releases for personal injury, but those that do, usually do so as a matter of statutory enactment, rather than common law. States that have such statutory enactments include additional provisions which provide far greater protection to ski areas than Oregon's statutes.

The Plaintiff argues that Oregon's skiing activities disallow the use of liability releases, but a review of the text and legislative history clearly speaks otherwise. The Oregon Skiing Activities statutes do not address the use of release agreements, do not codify duties of ski areas and provide no statement of public policy.

Mt. Bachelor will provide the background facts of this case, the basis of the trial court's decision and the affirmance on appeal. It will also review the various approaches and considerations of other jurisdictions that have examined this issue.[1]

The determination as to what constitutes a sufficient public policy basis to render a release provision unenforceable is complicated by the presence of competing public policies, *e.g.* the right to contract, the availability of recreational opportunities and the right to bring a claim based on negligence. In Oregon, a public policy must be "clear and overpowering" before a court will interfere with the parties' freedom to contract on the ground of public policy. *Young v. Mobil Oil Corp.*, 85 Or App 64, 69, 735 P2d 654 (1987). Oregon also

[1] Although the Plaintiff and the Oregon Trial Lawyers Association complain of the proliferation of release agreements, Mt. Bachelor focuses on the specific issue presented; the specific approaches, considerations and factors related to the use of release agreements in the context of hazardous recreational activities, particularly skiing and snowboarding.

has a strong public policy of encouraging recreational opportunities. *See* ORS 105.672-105.696.

When all of the competing policies are considered, it becomes apparent that the better course is to enforce these agreements within strict limits. This is particularly true where, as here, the participant is involved in an inherently dangerous activity over which the released party has little, if any, control. Ski areas have the ability to educate and warn, but they do not have control over the skier/snowboarder. There is virtually an infinite number of ways that a given snow feature may be used by an individual as varying speed, "pop,"[2] body movement, takeoff stance, angles of approach, the attempt of different types of tricks and jumps, landing stance and the type of equipment being used (skis or snowboard). Snow is a malleable substance subject to continuous change due to weather, ski/snowboarder use and various other factors.

All of these factors combine to create a wide variety of experiences for skiers and snowboarders of all ability levels and experience on the very same snow feature. As a result, specific criteria for the design, construction and maintenance of snow features are not only impractical, but largely impossible.

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[2] When a skier or snowboarder approaches the lip of jump he or she can "pop" or "ollie" which involves flexing their legs to spring or "pop" off the lip. Am. Open. Br. at ER 20.

As will be discussed, this factor has been critical in the various jurisdictions that have addressed the issue presented herein.

The Plaintiff makes a brief reference in his "Questions Presented" that the existence of snow features unreasonably creates risks not inherent to the sport. The Plaintiff does not support that statement with any factual or legal argument nor is it relevant to this case. In any event, ski areas can and do increase the risks of snowboarding and skiing by offering terrain with bumps, moguls and jumps, but their duty in that regard is to warn of the terrain, not elimininate it. *Woolston v. Wells*, 297 Or 548, 557-58, 687 P2d 144 (1984). The Plaintiff was purposely snowboarding in a freestyle terrain park. A ski area has no duty to protect a skier or snowboarder who deliberately enters an area with hazardous terrain. *O'Donoghue v. Bear Mountain Ski Resort*, 30 Cal. App. 4th 188, 193, 35 Cal. Rptr. 2d 467 (1994). When a potentially hazardous area is marked and/or plainly visible no liability to the ski area exists. *Solis v. Kirkwood Resort Company*, 94 Cal. App. 4th 354, 366-67, 114 Cal. RPTR 2d 265 (2002) citing therein *Connelly v. Mammoth Mountain Ski Area,* 39 Cal. App. 4th 8, 12-14, 45 Cal. Rptr. 2d 855 (1995).

II. FACTS

The Plaintiff has been a lifetime skier and snowboarder. He entered into his first season pass agreement with Mt. Bachelor his freshmen year of high

school. He purchased season passes each of the succeeding three years. Resp. Br. at Supp ER 5. All of these season pass agreements included the release provision at issue. By his senior year of high school, the 2005-2006 season, the Plaintiff had become a professional level snowboarder who spent the bulk of his time in the terrain parks at Mt. Bachelor. He enjoyed performing inverts with spins, back flips, front flips and spins. His was able to perform aerial spins ranging from 180 to 900 degrees. Resp. Br. at Supp ER 8-10. On February 16, 2006 the Plaintiff was unable to land his jump off of the second snow feature (a table top jump) in Terrain Park Sector I of the "Air Chamber" terrain park at Mt. Bachelor. There were no witnesses.

The Plaintiff was admittedly familiar with the risks and rules of the "Air Chamber" terrain park posted at the entry of the park. TCF 29, Ex 1, p. 9 of 18. A photograph of the sign referenced by the Plaintiff taken on the date of the accident is attached as App-1. The sign warns users of the presence of various snow features, advises of the inherent dangers and sets forth the following rules:

1) the user is responsible to inspect the snow features before initial use and throughout the day because features vary in size and change constantly due to snow conditions, weather, usage, grooming and time of day;

2) the user should always ride in control and within his or her ability; and

3) the user and only the user controls the degree of difficulty he or she will encounter in using Freestyle Terrain, both on the ground and in the air. The signage includes the following admonition:

> USE OF FREESTYLE TERRAIN EXPOSES YOU TO
> THE RISK OF SERIOUS INJURY OR DEATH.
> INVERTED AERIALS ARE NOT RECOMMENDED.
> YOU ASSUME THE RISK

The Plaintiff was not only aware of the inherent risks associated with snowboarding, but further understood that those risks were necessarily increased with his style of snowboarding, which included performing aerial tricks in the terrain park. Am. Open. Br. at ER 18-19.

The Plaintiff also admittedly understood that the season pass agreement he and his father executed on September 29, 2005, and those he signed the preceding three years included the subject release provision. Am. Open. Br. at ER 17-18. He understood that he was snowboarding under those terms on the date of the accident. Am. Open. Br. at ER 17.

The Plaintiff brought this action alleging negligence in the design, construction, maintenance or inspection of that snow feature and requested damages in an amount exceeding $21,500,000.00.[3] Mt. Bachelor filed its

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[3] The Complaint seeks damages for Plaintiff Myles Bagley in the amount of $21,500,000.00. His parents, Lauren Bagley and Al Bagley seek additional economic and non-economic damages in an amount to be proven at trial. TCF 1 pp. 5-6.

Answer denying negligence and included the affirmative defense of "Release." Thereafter, Mt. Bachelor filed a motion for summary judgment on its affirmative defense of release. The Plaintiff filed a cross-motion for partial summary judgment pertaining to that same issue. The trial court granted Mt. Bachelor's motion and denied the Plaintiff's cross-motion. The Court of Appeals affirmed the trial court's decision in its decision dated September 5, 2013.

III. TRIAL COURT PROCEEDINGS

The Plaintiff's argument to the trial court was focused primarily on the respective bargaining power of the parties and asserted the "public interest" in protecting business invitees from the negligence of ski area operators.[4] Mt. Bachelor argued that exculpatory release agreements did not violate public policy and were enforceable provided 1) the language was clear and unambiguous, 2) did not include a release of claims based on intentional misconduct, 3) did not involve an essential public service and 4) was not impermissibly adhesive. Mt. Bachelor relied, in part, on *Harmon v. Mt. Hood*

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[4] The Plaintiff's argument that a release of responsibility for negligent conduct "withdraws the Oregon public's benefit of the bargain that led to the enactment of these statutes" did not appear until the commencement of the appellate proceedings. *See* FN 2, Resp Br 16.

Meadows, Ltd., 146 Or App 215, 932 P2d 92 (1997) and *Mann v. Wetter*, 100 Or App 184, 785 P2d 1064, *rev den* 309 Or 645 (1990).

The trial court found that the release agreement was enforceable and not violative of public policy because the Plaintiff was admittedly aware of the presence of the release agreement and further acknowledged his acquiessence to the provision by utilizing his season pass from November of 2005 up until the date of the subject accident. The court further found that snowriding could not be deemed an essential service.

IV. APPELLATE PROCEEDINGS

The Court of Appeals assessed the language of the agreement under the circumstances in order to determine whether it violated public policy "as applied" to the facts of the particular case pursuant to *Harmon v. Mt. Hood Meadows, Ltd.*, 146 Or. App. 215, 217-218, 932 P2d 92 (1996). Pursuant to *Harmon*, a party seeking to avoid contractual responsibility must demonstrate that enforcement of the contractual provision as to *him* or *her* will offend public policy. *Id.*

The court issued a number of findings in its determination that the subject release agreement did not violate public policy and was thus enforceable. They are summarized as follows:

1) The release agreement's language "clearly and unequivocally" expressed Mt. Bachelor's intent to disclaim liability for negligence. In reaching that conclusion, the court considered the nature of the parties' obligations and expectations under the contract. "[W]e are hard-pressed to envision a more unambiguous expression of the 'expectations under the contract'." *Bagley v. Mt. Bachelor, Inc.*, at 405.

2) Release agreements that disclaim liability for negligence do not necessarily offend public policy where it pertains exclusively to recreational activities and, most prominently, where the business seeking to relieve itself of such liability does not provide an essential public service. *Bagley* at 405 citing therein *Mann v. Wetter, supra.* A ski resort primarily offers recreational activities with the possible exceptions that did not apply in this case, *e.g.*, training for search-and-rescue personnel and does not provide an essential public service. *Bagley* at 406;

3) The Plaintiff's claims related only to ordinary negligence. *Bagley* at 406 citing therein *Steele v. Mt. Hood Meadows Oregon, Ltd.,* 159 Or App 272, 974 P2d 794 (1999) and *Harmon v. Mt. Hood Meadows, supra;*

4) The release agreement was not procedurally unconscionable. The focus is on two factors: oppression and surprise. Oppression arises from an inequality of bargaining power which results in no real negotiation and no

absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a printed form drafted by the party seeking to enforce the terms. *Bagley* at 407;

5) With respect to "oppression," the Plaintiff was free to choose not to snowboard at Mt. Bachelor, was an experienced snowboarder who had previously signed release agreements required by at least two other ski resorts, and had signed a release agreement in obtaining a season pass at Mt. Bachelor during each of the preceeding three years.

6) Snowboarding is a recreational activity and the Plaintiff could have simply declined to sign the release without being denied to an essential public service. *Bagley* at 408;

7) There was no "surprise" because the terms of the bargain were not hidden by Mt. Bachelor. To the contrary, the release provision appeared at the beginning of the agreement and was highlighted by a centered and underlined introductory heading drawing the skier's attention to the fact that he or she was signing a release. *Bagley* at 408;

8) The release agreement was not procedurally unconscionable. Although the parties came to the bargaining table with unequal power, standard-form release agreements in the context of recreational activities are not

impermissibly adhesive. *Bagley* at 407 citing therein *Harmon* at 219 n.4 and *Mann* at 187-188;

9) In assessing the Plaintiff's argument that the release was substantively unconscionable the focus is on the terms of the contract itself in light of the circumstances of its formation; ultimately, the substantive fairness of the challenged terms being the "essential issue." *Bagley* at 409 citing therein *Carey v. Lincoln Loan Co.*, 203 Or App 399, 423, 125 P3d 814 (2005), *aff'd on other grounds*, 342 Or 530, 157 P3d 775 (2007); *Vasquez-Lopez*, 210 Or App at 566-569, 152 P3d 940; and

10) The provision in the release agreement was not "unreasonably" favorable to Mt. Bachelor. Excuplatory provisions in ski-related form agreements are not impermissibly adhesive because a person does not have a *need* for skiing, merely a desire. Accordingly, the purchaser is free to walk away. The court noted that this would not be true with an essential public service such as a consumer of automobile insurance or an individual who cannot find a place to live during a housing shortage. *Bagley* at 409-410. citations ommitted.

V. ARGUMENT

A. The use of release agreements is not contrary to any policy expressed in the Oregon Skiing Activities statutes.

The Plaintiff's first argument is that the use of a release agreement by Mt. Bachelor's is inconsistent with the legislative policy underlying the Oregon Skiing Activities statutes in that it violates the "policy balance" between skiers and ski area operators.

Oregon has promulgated statutes pertaining to skiing and ski areas. See ORS 30.970-30.990. These statutes set forth the "duties" of skiers, require ski area operators to inform skiers of those duties, establish notice requirements and a statute of limitations pertaining specifically to injury or death while skiing, and provide that those who engage in the sport of skiing accept and assume the risks inherent in that activity.

There is no indication that the Oregon Legislature intended to create a public policy duty in the skiing activities statutes that could not be waived. The skiing activities statutes do not include a statement of public policy, do not codify the duties of ski area operators and make no reference whatsoever to the use of release agreements.

The Plaintiff's argument relies on the inference that because the legislature included provisions concerning the inherent risks of skiing, a tort

claim notice and statute of limitations, it must have envisioned the ability of an injured skier or snowboarder to bring an action. In fact, these provisions exist because the legislature simply did not consider or address the potential use of release agreements by ski areas. This is quite clear upon review of the text of the statutes together with the legislative history.

Oregon statutory and case law provide that 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 ommitted, or to omit what has been inserted. ORS 174.010; *Bergmann v. Hutton*, 336 Or 596, 607, 101 P3d 353 (2004).

The Plaintiff is requesting the Court to insert a provision that simply does not exist. As noted by this court, by applying the *exact language* enacted, courts rely on the "best evidence" to determine the legislature's intent. *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 610, 859 P2d 1143 (1993) (hereinafter "*PGE*"). When the Supreme Court decided *PGE*, and modified *PGE* in *State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009) the court outlined the methodology for interpreting statutes. The court "demarcated" a clear boundary line between the powers of the legislature and those of the court and, in doing so, circumscribed the court's authority to construe a statute. *Young v. State*, 161 Or App 32, 38, 983 P2d 1044 (1999).

The court must assume that if the legislature had intended to ban the use of release agreements it would have said as much. *See e.g. Fort Vannoy Irrigation Dist. v. Water Res. Comm'n*, 214 Or App 88, 93-94, 162 P3d 1066 (2007), aff'd and remanded, 345 Or 56 (2008). For example, the Alaska Ski Safety Act includes the following provision:

> **§ 05.45.120. Use of liability releases**
>
> **(a) A ski 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.**
>
> (b) Notwithstanding (a) of this section, a ski area operator may
>
> > (1) require a special event coach, participant, helper, spectator, or rental customer to sign an agreement releasing the ski area operator from liability in exchange for the right to coach, participate, assist in, or observe the special event; or
> >
> > (2) use a release agreement required by a third party as a condition of operating a rental program or special event at the ski area.

(Emphasis added)

Alaska and a number of other states passed comprehensive legislation concerning the rights and responsibilities of skiers and ski area operators which do create a "policy balance" or "bargain." For example, the Alaska Act also

includes a provision prohibiting a person from bringing an action against a ski area operator for an injury resulting from an inherent danger and risk of skiing. § 05.45.010.

Idaho also adopted a comprehensive legislative approach with the passage of the Idaho Ski Safety Act. The Idaho Act includes a statement of legislative purpose, the duties of skiers and duties of ski area operators and their respective liability. *Title 6, Chapter 11-Responsibilities and Liabilities of Skiers and Ski Area Operators*. Under the Idaho Act, ski areas cannot utilize release agreements, but skiers cannot recover any damages or losses relating to the violation of any of their duties. In addition, ski area operators are only liable for damages caused by the breach of their statutory duties. See § 6-1101 - 6-1109.

The Plaintiff's claim would be absolutely barred under the Idaho Ski Safety Act. Pursuant to the Act, a ski area operator has no duty to eliminate, alter, control or lessen the risks inherent in the sport of skiing and no activities undertaken by the operator in an attempt to eliminate, alter, control or lessen such risks shall be deemed to impose on the operator any duty to accomplish such activities to any standard of care. *Northcutt v. Sun Valley Company*, 117 Idaho 351; 787 P2d 1159, 1162-1163 (1990). In addition, the duties described in § 6-1103 and 6-1104 are the *only* duties a ski area operator has with respect to the inherent risks of skiing and even anything an operator does to fulfill those

duties cannot be held to be negligence because the operator had no duty to accomplish the activity to any standard of care. *Collins v. Schweitzer, Inc.*, 774 F. Supp. 1253, 1259 (1991).

Colorado also enacted a comprehensive ski safety act which provides considerable protection to ski area operators. For example, § 33-44-112 provides that "no skier may make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing." In addition, the General Assembly narrowly defined the claims that can be brought by injured skiers against ski area operators and capped the amount of recovery of a successful skier claim at the sum of $1,000,000. § 33-44-113. *See Fleury v. IntraWest Winter Park Corp.*, 214 COA 13, 17; 2014 Colo. App. Lexis 242 (2014) for a history of amendments to the Act providing increasing protection for ski area operators.

Because statutory construction methodology, not policy considerations, guide the court in discerning the legislature's intent, the court may only seek to further the underlying policy by giving effect to the statute's actual wording. *Johnson v. Swaim*, 343 Or 423, 430-431, 172 P3d 645 (2007) (citing therein *Rodriguez v. The Holland, Inc.*, 328 Or 440, 446, 980 P2d 672 (1999)).

The Oregon legislature did not enact a comprehensive statutory skiing act. Skiers are not barred from bringing a claim based on an inherent risk nor

are ski areas prohibited from using release agreements. There is no "bargain" or "policy balance." The Plaintiff requests the Court to rewrite the Oregon Skiing Activities statutes to insert a single one-sided provision prohibiting the use of release agreements. That would certainly be a function of the legislature. If the statutes are to be amended, ski areas would certainly request additional provisions barring the filing of claims based on the inherent risks of skiing. The inherent risk statute, as written, provides that a skier accepts only those inherent risks whieh are *reasonably obvious, expected or necessary* thereby creating an issue of fact precluding an expeditious resolution of claims by way of summary judgment proceedings. ORS 30.980. If the legislature's intent was to prohibit the use of release agreements by ski areas, it certainly could have amended the statutes within the last 35 years.

The Plaintiff refers this court to *Rothstein v. Snowbird Corp.*, 2007 Ut 96, 175 P3d 560 (2007) (3 to 2 decision) as an example of another court which found exculpatory clauses unenforceable in light of a statutory scheme that provides immunity for inherent risks. The Plaintiff's reliance on *Rothstein* is misplaced. In *Rothstein*, the court relied entirely on the public policy section of the statute. Absent the expressed statement of public policy, it would not have ruled that pre-injury releases were unenforceable. "Extracting public policy from statutes can be no less challenging. Moreover, in most instances, our

proper role when confronted with a statute should be restricted to interpreting its meaning and applications as revealed through its text. To pluck a principle of public policy from the text of a statute and to ground a decision of this court on that principle is to invite judicial mischief." *Rothstein* at 563. "When, however, the legislature clearly articulates public policy, and the implications of that public policy are unmistakable, we have the duty to honor those expressions of policy in our rulings. Such is the case here." *Id.*

The Utah Supreme Court confirmed that its holding was strictly limited in *Penunuri v. Sundance Partners, Ltd.*, 2013 Ut. 22, 301 P3d 984 (2013). In *Penunuri*, the Plaintiff was injured while participating in a guided horseback ride near Sundance resort. Before the ride, she signed a release and then she waived her right to sue Sundance for injuries caused by Sundance's ordinary negligence. Penunuri requested the court to deem the release unenforceable in that it violated the public policy expressed in the Equine Act. The court concluded that the Equine Act establishes no public policy that invalidates pre-injury releases for ordinary negligence.

The court then considered whether the Equine Act was sufficiently similar to Utah's Inherent Risk of Skiing Act such that the "public policy bargain" it inferred from the language of the Skiing Act in *Rothstein* similarly invalidated pre-injury releases under the Equine Act. Because the Equine Act

lacked the discussion of public policy contained in the Skiing Act, the court declined to infer that the Equine Act was a result of a public policy bargain. Accordingly, the court concluded that the waiver was enforceable and did not violate public policy. *See* also *Pearce v. Utah Athletic Foundation*, 597 Utah Adv Rep 13, 179 P3d 760, 767 (2008) (we now join the majority of courts by adopting the rule that pre-injury releases for recreational activities are not invalid under the public interest exception) (bobsledding).

A similar argument failed in *Street v. Darwin Ranch, Inc.* 75 F Supp 2d 1296 (D. Wyo. 1999). In Street, the plaintiff asserted that Wyoming's Recreation Safety Act (the "Act") established a public policy which created a public duty for equine providers. *Street* at 1299. The court found no merit in this argument because the Act did not create a statutory duty of care for equine providers. *Street* at 1300. The Wyoming Legislature, considered establishing statutory equine provider duties before enacting the 1993 Amendments of the Act, but ultimately decided not to do so. *Street* at 1300.

The Oregon Legislature also discussed the inclusion of duties of ski area operators but ultimately elected not to do so. Chairman Rutherford expressed his concern that the legislation listed a number of things that skier had to do but did not include any corresponding duties for the ski area operators except to

give notice to the skiers of their duties. Minutes, House Comm. on Judiciary, Subcomm. 3, May 24, 1979, P. 3.

In *Street*, the court noted that the policy expressed by the Act was to benefit the recreation industry and Wyoming economy by eliminating provider liability for inherent recreation activity risks. Accordingly, the court noted that the use of a release agreement, was at the very least, consistent with the public policy expressed by the Act, if not, in furtherance of it. The court thus deemed the Plaintiff's position that the use of the release agreement violated a policy expressed by the Act was both "puzzling" and "bewildering." *Street* at 1300-1301.

Washington's statutory scheme is similar to Oregon's except that it does codify certain duties for ski areas. The inclusion of these duties, however, does not prohibit the use of release agreements. In *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wash. App. 334, 35 P3d 383 (2001), the court rejected the Plaintiff's argument that a pre-injury release could not be used to abrogate the duty of care imposed on ski area operators pursuant to Washington's skiing statutes because the legislature had not legislated on the public policy issue. *Id* at 346.

In sum, the Oregon Legislature did not pass a comprehensive ski safety act setting forth a policy balance that bars the filing of claims arising out of an

inherent risk nor does it bar the use of release agreements. If the Legislature wished to reexamine the statutes given the use of release agreements, it would do so. As noted by the Plaintiff, this court has 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).

B. Mt. Bachelor's release agreement is not unconscionable.

1. The season pass agreement is not impermissibly adhesive.

The Plaintiff first argues that the season pass agreement is a contract of adhesion and is therefore unenforceable. Again, this argument has not been accepted by Oregon or other jurisdictions. The majority rule is that the use of release agreements in the context of hazardous recreational activities are either not adhesive or are not impermissibly adhesive. *Bagley* at 407 citing therein *Harmon* at 219 n4 and *Mann* at 187-188. Voluntarily participation in inherently dangerous sporting activities simply does not lend itself to a claim that a release agreement is an invalid adhesion contract. *See Chepkevich v. Hidden Valley Resort, L.P.*, 607 Pa 1, 2 A.3d 1174, 1190; *Milligan v. Big Valley Corp.*, 754 P2d 1063, 1067 (1988); *Stelluti v. Casapenn Enterprises, LLC*, 203 N.J. 286, 1A3d 678, 687-688; *Allan v. Snow Summit, Inc.*, 51 Cal. App. 4th, 1358, 59 Cal. Rptr. 2d 813 (1996); *Seigneur v. National Fitness Institute, Inc.*, 132 Md. App.

271, 752 A. 2d 631 (2000); *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 NW2d 727 (1986) and *Jones v. Dressel*, 623 P2d 370 (1981).

The Plaintiff argues that the agreement was the product of unequal bargaining power, the Plaintiff had no opportunity to negotiate and no meaningful alternative existed for the Plaintiff to develop his skills as a snowboarder. First, describing a contract as adhesive in character is not to indicate its legal affect. *Sprague v. Quality Rests. Northwest, Inc.,* 213 Or App 521, 526, 162 P3d 331 (2007) (adhesion contract held enforceable in the absence of oppressive conduct and agreement was clear, fully described and not brought about by deception). See also *Motsinger v. Lithia Rose-Ft, Inc.*, 211 Or App 610, 615, 156 P3d 156 (2007) (adhesion contract enforceable in the absence of deception or compulsion).

The Court of Appeals focused on the conditions of contract formation and looked to two factors: oppression and surprise. *Bagley* at 407 citing therein *Vasquez-Lopez v. Beneficial Oregon, Inc*. at 566-567. The court noted that oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. The above cases support the proposition that the "reasonable expectations" of the adhering party must be considered.

Here, the Plaintiff admittedly expected to engage in what he understood to be the inherently dangerous sport of snowboarding and further understood that he increased that risk by utilizing the terrain park and attempting extraordinary aerial front flips, back flips, and spins.

The Plaintiff's analogy to a moviegoer that has a projector fall on his or her head is not persuasive. First, a moviegoer would certainly be "surprised" by a falling projector. Movie going is not an inherently dangerous activity. It would not be within the reasonable expectation of a moviegoer that a projector might fall on his or her head. Nor are moviegoers advised to inspect the projector ensuring that it is securely affixed to the ceiling or wall prior to taking their seat. A movie theater has complete control over how securely it affixes the projector to the wall or ceiling. A ski area has no control over a snowboarder's speed, angle of approach, course, "pop," the control of his or her body or the decision as to whether and what type of aerial flip or spin will be attempted. It is also doubtful that a movie ticket would be deemed conspicuous.

The Plaintiff's suggestion that there was no opportunity to negotiate is accurate, but that is common in modern day society. It is not commercially reasonable for Mt. Bachelor to negotiate individually with each skier or snowboarder. More importantly, there is no apparent reason why a skier or snowboarder could not read, understand and agree to the terms of a preprinted

adhesion form contract. The Plaintiff read and understood it. The Plaintiff and other like minded people who enter into these agreements appreciate the impact and extent of the release. Finally, a skier/snowboarder can simply decide not to agree to its terms without being denied an essential service.

The Plaintiff's suggestion that there was no meaningful alternative for him to develop his skills as a snowboarder is not accurate. In addition to the incredible of amount of backcountry skiing available in Central Oregon, skiers and snowboarders can and do hike Mt. Bachelor and ski and snowboard within the ski area boundaries. They do so at no charge as the ski area is located on U.S. Forest Service ground. The increase of uphill travelers has been such that Mt. Bachelor, with the approval of the U.S. Forest Service, had to develop an uphill travel policy due to safety concerns for uphill and downhill recreationists, ski area operations, the use of heavy machinery (groomers) and explosives used for avalanche control. There is no part of the Mt. Bachelor ski area that is not accessible free of charge. See the policy and map at § 21.500 of Mt. Bachelor's Operating Plan attached at App-2-4. The policy and map is published on Mt. Bachelor's website which is attached at App-5-6.

The Plaintiff's argument also presumes the practical necessity of snowboarding and the performance of high risk aerial flips and spins. The Plaintiff's particular interest in snowboarding has no bearing on whether the

"public interest" is involved. The issue is tested objectively, by the activity's importance to the general public, not by its subjective importance to a particular Plaintiff. *See Booth v. Santa Barbara Biplane Tours, LLC*, 158 Cal. App. 4th 1173; 70 Cal. Rptr. 3rd 660 (2008) (aerial sightseeing tour).

The elements of oppression and surprise favor enforcement of the release. It was within the reasonable expectation of the Plaintiff that he would execute a release for the convenience of riding the chairlifts. He fully expected to snowboard and perform what he knew were dangerous aerials in the terrain park. The Plaintiff was free to choose whether to snowboard at Mt. Bachelor. He also had the choice to refuse to sign the release and snowboard at Mt. Bachelor without the convenience of riding chairlifts. Superior bargaining power means little in the absence of a practical necessity to engage in the activity. In sum, the Plaintiff was a highly experienced snowboarder who admittedly understood that he was snowboarding under the terms of a release, that snowboarding was inherently dangerous and the risk was increased by his decision to perform aerial flips and spins in the terrain park.

2. The season pass agreement is not *prima facie* unconscionable.

The Plaintiff urges this court to apply a UCC sale of goods provision to service contract involving a hazardous outdoor recreational activity. The desired result is to create a blanket presumption of unconscionability. The

Plaintiff's suggested approach fails to take into consideration the inherent risks associated with snowboarding, the lack of control a ski area has over the snowboarder, the right to contract, the public policy of encouraging recreational activities and the resulting conflict of that policy that would necessarily result.

First, the UCC provision cited by the Plaintiff is inapplicable on its face. Snowboarding does not involve the sale of goods. The Plaintiff references Justice Armstrong's concurring opinion in *Steele v. Mt. Hood Meadows Oregon, Ltd.,* 159 Or. App 272, 281-282, 974 P2d 74 (1999) wherein he suggested that the court could apply ORS 72.7190(3) to the provision of recreational activities. Oregon courts have not adopted this approach nor is Mt. Bachelor aware of any other state that has done so.

The Plaintiff's approach was advanced and rejected in *Clanton v. United States of America,* 686 NE2d 896 (1997). In *Clanton*, the Plaintiff argued that the release utilized by the Defendant roller skating rink was "*prima facie* unconscionable" because the release constituted a limitation of personal injury damages in contravention of Ind. Code § 26-1-2-719(3) which prohibited the limitation of damages for personal injuries. The court held, however, that this code section was limited, by its terms, to injuries arising from the sale of consumer goods and was thus inapplicable to the present case. *Clanton* at 900. Moreover, the court noted that it had repeatedly upheld the validity of

exculpatory releases in connection with voluntary recreational activity, even though it prevents the injured party from recovering his or her injuries. *Id.* This included cases involving horseback riding, a motorcycle training course, scuba diving and skiing. *Id.*

The Plaintiff's suggested approach ignores the inherent dangers associated with snowboarding and other recreational activities as identified in *Clanton.* It also fails to take into consideration the fact that it is equitable for a recreational provider to obtain a release when the participant is in control of the manner in which they engage in the activity. The distinction between essential services and recreational activities is critical in the determination as to what constitutes a sufficient "public policy" to interfere with the right to contract.

A contract for the sale of goods is simply not analagous to snowboarding in a terrain park. Oregon's "as applied" approach and the six-factor *Tunkl* approach discussed later in this brief provides the mechanism to evaluate each contract in its particuclar context. This includes the degree under which a releasing party is under the the control of the released party and therefore subject to the released party's negligence.

The Plaintiff's approach also unnecessarily interferes with Oregon's right to contract. Oregon requires that a public policy be clear and "overpowering" before a court will interfere with a party's freedom to contract on the ground of

public policy. *Bagley* at 403 citing therein *Young v. Mobil Oil Corp.*, 85 Or App 64, 69, 735 P2d 654 (1987).). See also *Bliss v. Southern Pacific Co., et al.*, 212 Or 634, 646, 321 P2d 324 (1958) (public policy requires the contracts entered into between two or more persons competent for that purpose to be held sacred and enforced unless some other overpowering rule of public policy intervenes which renders the agreement illegal or unenforceable). The Plaintiff's approach improperly elevates tort law over contract law by creating a presumption to alter contractual provision.

In addition, it fails to consider the competing public policy of promoting the opportunity to participate in recreational activities. See ORS 105.672-105.696. This issue was also addressed in *Clanton, supra,* where the court noted that the adoption of Indiana's equivalent to ORS 72.7190(3), Ind. Code § 26-1-2-719(3), would dramatically raise the cost of participation in recreational activities and severely limit the public's recreational opportunities. Indiana, as Oregon, enacted legislation to encourage recreational activities by limiting the liabilities of landowners who open their property for recreational use by the public. *Clanton* at 900 citing therein Ind. Code § 14-22-10-2.

Finally, the adoption of the Plaintiff's approach would create conflicting public policies depending on the manner in which skier or snowboarder accessed the run. Under the Plaintiff's approach he would benefit from a

presumption that the release was invalid because he paid for the convenience of riding the chairlifts. If, on the other hand, the Plaintiff would have hiked up Mt. Bachelor and suffered the very same accident and injuries, his claim would be barred by ORS 105.682. The Plaintiff complains of the Court of Appeals' reference to ORS 105.672-105.696, but the court was simply noting that, "as a general matter, 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." *Bagley at 406 fn 8.*

3. The release is not harsh and inequitable.

The Plaintiff's final argument is that the release provision is substantively unconscionable in that the shift of the burden of injury entirely to the Plaintiff is harsh and inequitable. In support of that argument, the Plaintiff characterizes the Court of Appeals' distinction between recreational activities and essential services as a "distinction without a difference." The determination as to whether a provision is substantively unconscionable, however, is determined on a case by case basis with consideration of the unique facts on an "as applied" basis.

Accordingly, the four factor test utilized by Oregon courts includes the determination as to whether the activity involves an essential public service. The determination as to whether an activity involves an essential public service

involves substantive conscionability. As noted above, Oregon courts have held that pre-injury release agreements are not void as being against public policy provided 1) the language is clear and unambiguous; 2) does not release claims based on intentional misconduct; 3) does not involve an essential public service, and 4) is not impermissibly adhesive. *Bagley* at 404-405 citing therein *Steele v. Mt. Hood Meadows Oregon, Ltd.*, 159 Or App 272, 974 P2d 794, *rev. den.* 329 Or 10, 994 P2d 119 (1999); *Estey v. McKenzie Engineering Inc.*, 324 Or 372, 376, 927 P2d 86 (1996); *Mann v. Wetter*, 100 Or App 184, 187, 785 P2d 1064, *rev. den.* 309 Or 645, 789 P2d 1387 (1990) and *Harmon v. Mt. Hood Meadows, supra* at 222.

These factors pertain to both procedural and substantive conscionability and were thoroughly examined by the Court of Appeals in this case. The first and fourth requirements pertain to procedural conscionability. The second and third factors concern substantive conscionability.

Oregon Courts have stressed the importance of examining the nature of the activity so as to consider the factors of bargaining power, compulsion and whether terms are unreasonably favorable to the party with the greater bargaining power. Superior bargaining power is more likely to exist when the service is of practical necessity to the public. *Milligan, supra* at 1066-1067. As

noted by the Court of Appeals, Oregon courts have applied substantive rigor in assessing claims in unconscionability.

> The doctrine of unconscionability does not relieve 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. Oregon courts have been reluctant to disturb agreements between parties on the basis of unconscionability, even when those parties do not come to the bargaining table with equal power. **In those rare instances in which our courts have declared contractual provisions unconscionability, there exist a serious procedural and substantive unfairness.**

Bagley at 406 citing therein *Hatkoff v. Portland Adventist Medical Center*, 252 Or App 210, 217, 287 P3d 1113 (2012). (emphasis added).

Oregon courts have enforced release provisions in the context of recreational activities, but similar provisions have not been enforced where the provision 1) exempts an employer from liability to an employee in the course of employment; 2) exempts a person charged with a duty of public service from liability to one to whom that duty is owed for compensation; or 3) the other party is similarly a member of a class protected against the class to which the first party belongs. *Real Good Food v. First National Bank,* 276 Or 1057, 1060, 557 P2d 654 (1976) (banking); *Voyt v. Bekins Moving & Storage,* 169 Or 30, 46, 119 P2d 586 (1941) (warehousemen)*; Normile v. Oregon Nav. Co.,* 41 Or 177, 184, 669 P 928 (1902) (common carrier); *Georges v. Pacific Telephone*

& Telegraph, 184 F. Supp 571, 576-78 (Dist. Or 1960) (public utility*);* Restatement (Second) of Contracts § 282 (1965).

The nature of the activity is also directly relevant to the issue of compulsion. Unconscionability may involve deception, compulsion, or lack of genuine consent. *Vasquez-Lopez* at 566-567. There simply is no compulsion to engage in hazardous recreational activities. In sum, the issue as to whether a provision is substantively unconscionable must be decided on a case-by-case basis on its own unique facts. *Id* and *Motsinger v. Lithia Rose-Ft, Inc.*, 211 Or App 610, 623-24, 156 P3d 156 (2007).

The nature of the activity must be considered to see if the provision has a reasonable relation to the risks of that activity. If a provision is so one-sided as to be oppressive and bears no reasonable relation to the risks involved, the provision may be unenforceable. *W. L. May Co. v. Philco-Ford Corp.,* 273 Or 701, 708, 543 P2d 283 (1975). The nature of the activity is thus directly relevant to that determination. See *Vasquez-Lopez* at 566-67. Snowboarding is a voluntary recreational activity that carries with it the significant risk of injury. As a result, the inclusion of a release for ordinary negligence is reasonably related to snowboarding and is not unreasonably favorable. A release of ordinary negligence may not be reasonably related to going to the cinema and thus may well be unreasonably favorable to the cinema.

The Plaintiff complains the Court of Appeals cited cases of other jurisdictions that agreed with its holding, but failed to cite cases from other jurisdictions that have refused to enforce release agreements in the context of skiing. The Plaintiff specifically references *Rothstein v. Snowboard, supra*, but *Rothstein* is based on a statutory public policy that is not present in the Oregon statutes. A better comparison would be the state of Minnesota which utilizes the identical factors considered by Oregon courts in the determination of whether a pre-injury release violates public policy. *Malecha v. St. Croix Valley Skydiving Club, Inc., supra.*

The Plaintiff's suggested approach is in the distinct minority. The vast majority of states that do not have a statutory enactment regarding the use of release agreements enforce them, provided specific requirements of procedural and substantive due process are satisfied.[5] These states, including Oregon, have adopted specific rules and factors to be considered in the determination as to whether a particular release violates public policy. A common factor to all is the distinction between voluntary recreational activity and the provision of an essential public service.

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[5] See *Hanks v. Powder Ridge Restaurant Corporation*, 276 Conn. 314, 885 A2d 734, 752-753 for a comprehensive list of states that uphold releases of liability in a variety of recreational or athletic settings.

A large number of states have adopted a standard, or a variation thereof, referred to as the *Tunkl* factors set forth by the California Supreme Court in *Tunkl v. Regents of the University of California*, 60 Cal. 2nd 92, 101, 383 P2d 441 (1963). See *Hanks v. Powder Ridge Restaurant, Corp.*, 276 Conn. 314, 885 A2d 734, 743. In *Tunkl*, the court concluded that release agreements violate public policy if they affect the public interest adversely and identified six factors relevant to this determination:

1) the agreement concerns a business of a type generally thought suitable for public regulation;

2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;

3) the party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards;

4) as a result of the essential nature of the service and economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks its services;

5) in exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against this negligence; and

6) as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Of the six factors above, at least two factors pertain to procedural unconscionability, *e.g.* factors 4 and 5. The remaining factors, including the determination as to whether the activity involves an essential public service, pertain to substantive conscionability.

The application of the "*Tunkl* factors" most often result with the enforcement of release agreements in the context of recreational activities. For example, our neighbors to the north and south, Washington and California, apply *Tunkl* to validate exculpatory agreements in the recreational sports context. *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wash. App. 334, 35 P3d 383 (2001); *Vodopest v. MacGregor*, 128 Wash. 2d 840, 913 P2d 779 (1996). *Platzer v. Mammoth Mountain Ski Area*, 104 Cal. App. 4th 1253; 128 Cal. Rptr. 2d 885 (2002) (lift riding); *Westlye v. Look Sports, Inc.*, 17 Cal. App. 4th 1715; 22 Cal. Rptr. 2nd 781 (1993) (adjustment of ski bindings); *Hulsey v.*

Elsinore Parachute Center, 186 Cal. App. 3rd 333, 214 Cal. Rptr. 194 (1985) (parachute jumping); and *Okura v. United States Cycling Federation*, 186 Cal. App. 3rd 1462, 231 Cal. Rptr. 429 (1986) (bicycle racing). *See* also *Booth v. Santa Barbara Biplane Tours, LLC*, 158 Cal. App. 4th 1173; 70 Cal. Rptr. 3rd 660 (2008) (aerial sightseeing tour).

In *Vodopest*, the court noted that Washington case law upholds pre-injury release agreements for potentially hazardous recreational activities like scuba diving, mountain climbing, automobile demolition derby driving and skiing. *Vodopest* at 864. The court in *Vodopest* also noted that an important consideration in deciding if an exculpatory clause violates public policy is whether the person who signs the release will be under the control of the person seeking exculpation for negligence and subject to the risk of that person's carelessness. *Vodopest* at 859. This sixth factor involves substantive conscionability and meets the fairness test because the participant is beyond the complete and practical control of the released party and the injury occurred as a result of the combination of actions, some of which are within the control of the participant.

Mt. Bachelor can and did warn users of these varying factors and increased risk. The exposure to this risk is often the source of exhilaration that motivates people to snowboard and, in this case, to attempt aerial flips and

spins. Unfortunately, when the Plaintiff undertook this activity he exposed himself to a high risk of injury. Only he controlled his speed, course, angle, "pop" and the difficulty of his aerial maneuver. Skiing and snowboarding requires the skier or rider to exercise appropriate caution and good judgment. Sometimes, even despite the exercise of due care, accidents and injuries occur.

The Plaintiff cites *Dalury v. S-K-I, Ltd.*, 164 Vt. 329, 670 A2d 795 (1995) in support of his argument that Oregon's approach and that contained within the *Tunkl* factors, *i.e.*, the determination as to whether an activity "involves an essential public service" is irrelevant to the policy question of whether a release agreement is contrary to public policy. The Vermont Supreme Court, in *Dalury*, did not entirely reject the adoption of the *Tunkl* factors but did adopt a "totality of the circumstances" approach which involves considering the backdrop of current societal expectations. *Dalury* at 333-334.

The Plaintiff also cites *Hanks v. Power Ridge Restaurant Corporation*, 276 Conn. 314, 885 A2d 734 where the deeply divided Supreme Court of Connecticut adopted Vermont's "totality of the circumstances" approach. The Court in *Hanks* acknowledged that its decision represented the "distinct minority view" and was inconsistent with the majority of states which uphold adhesion contracts releasing recreational operators from perspective liability for personal injuries caused by negligence. *Hanks* at 747.

The approach taken in *Dalury* has been subject to criticism for a variety of reasons which includes the inconsistent results in the employment of an amorphous totality of the circumstances test. *Hanks* at 749 fn 1. For example, subsequent to its decision in *Dalury*, the Supreme Court of Vermont enforced a release agreement in the context of a motocross event. *Provoncha v. Vt. Motocross Ass'n, Inc.*, 185 Vt. 473, 974 A2d 1261 (2009). It also held that despite the great public need for motorcycle safety, a waiver of liability for injuries occurring on test drives does not contravene public policy. *Thompson v. Hi Tech Motorsports, Inc.*, 183 Vt. 218, 945 A2d 368, 372 (2008).

The Supreme Court of Maryland declined to adopt the *Tunkl* approach but did so in order to enforce an exculpatory clause in an agreement between an investor and a securities firm. The Plaintiff urged the court to adopt the *Tunkl* factors because under that test, a stockbroker-client relationship with publie interest. *Wolf v. Ford*, 335 Md. 525, 537, 644 A2d 522 (1994). The court declined and instead focused on the three exceptions to the general rule why an exculpatory clause should not be enforced: 1) intentional harm or extreme forms of negligence; 2) grossly unequal bargaining power; or 3) in transactions affecting the public interest. The court found the absence of the first two factors and declined to adopt *Tunkl* in its determination as to whether an investor-broker-investment company relationship was not one that so affected

the public interest that the court should disturb the parties' contract. *Wolf* at 537. *Wolf* thus illustrates the inconsistent results of the "totality of the circumstances" approach.

Oregon, as Washington and California, together with a near unanimity of other states, has rejected the public policy analysis utilized by the court in *Dalury*. See *Seigneur v. National Fitness Institute, Inc.*, *supra* at 641 and dissent in *Hanks v. Powder Ridge Restaurant Corporation, supra* at 734, 752-753. The Plaintiff's approach remains the distinct minority view, followed only by Connecticut (*Hanks*) and Virginia (*Hiett v. Lake Barcroft Community Ass'n*, 244 Va. 191, 194, 418 S.E.2d 894 (1992)).

In *Chauvlier v. Booth Creek Ski Holdings, Inc.* 109 Wash. App. 334, 35 P3d 383 (2001), the court noted the importance of evaluating the services' or activities' importance to the public and noted that despite its recreational appeal, skiing is not a service of great importance to the public, much less a service of practical necessity. *Id* at 388. The court in *Chauvlier* specifically rejected the approach taken in *Dalury* because *Dalury*, unlike Washington, declined to adopt the six-factor public policy analysis adopted by the Washington Supreme Court in *Wagenblast v. Odessa School District*, 110 Wash. 2d 845, 849, 758 P2d 968 (1988). The court noted that because

Vermont's public policy analysis widely differed from its own, *Dalury* lost much of its persuasive value. *Id* at 388-389.

The Plaintiff cites *Wagenblast* for the proposition that the subject release is unconscionable, but the reliance on *Wagenblast* is misplaced. In *Wagenblast*, the court noted that release agreements had been upheld which involved voluntary recreational activities, *e.g.* a toboggan slide, a scuba diving class, mountain climbing instruction, an automobile demolition derby and ski jumping. The court did but held that application of the "*Tunkl* factors" to a release which public school students were required to sign as a condition of engaging in school related activities was not enforceable because interscholastic athletics are part and parcel of the overall educational scheme in Washington and are a matter of public importance in public schools. *Id* at 972-973. The subject release would be enforced in Washington as it involves a purely recreational activity.

Similarly, California has expressly rejected the approach taken in *Dalury*. *See Allan v. Snow Summit, Inc.*, 51 Cal. App. 4th, 1358, 59 Cal. Rptr. 2d 813 (1996). The California court upheld a liability release signed by a student skier using a public policy analysis almost identical to the one adopted in *Wagenblast*. *Id* at fn 37. In *Allan*, the Plaintiff ski student suffered back injuries after taking lessons from the Defendant ski school owner. The court

rejected the Plaintiff's claims that the release constituted an adhesion contract and further found that the Plaintiff did not show that the waiver of liability was unconscionable or that it fell outside the Plaintiff's reasonable expectations. The court applied the "*Tunkl* factors" and cited a long list of other cases finding that although exculpatory clauses affecting the public interest are invalid, exculpatory agreements in the recreational sports context do not implicate the public interest. *Allan* at 823.

The minority approach improperly elevates premises liability tort law above the freedom to contract, fails to take into account the countervailing policy interest of providing recreational opportunities to the public, fails to recognize that certain recreational activities are inherently dangerous and fails to consider the fact that the ski area operator has little, if any, control over the skier/snowboarder. Finally, the Plaintiff's approach would place Oregon ski areas at a distinct disadvantage in the Pacific Northwest as the Plaintiff's claim would not be viable in our neighboring states of Washington, Idaho and California.

VI. CONCLUSION

Defendant, Mt. Bachelor, Inc. respectfully requests the Supreme Court of Oregon to affirm the judgment of the Court of Appeals affirming the judgment

of the Circuit Court granting Defendant Mt. Bachelor's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment.

Dated this 2nd day of April, 2014.

Respectfully submitted,
BALYEAT & EAGER, LLP

By: s/ Andrew C. Balyeat
Andrew C. Balyeat, OSB #951927
Of Attorneys for Defendant

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 (as described in ORAP 5.05(2)(a)) is 10,831 words.

Type size

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).

BALYEAT & EAGER, LLP

By: s/ Andrew C. Balyeat
Andrew C. Balyeat, OSB #951927
Attorney for Respondent on Review

CERTIFICATE OF FILING AND SERVICE

I certify that on April 2 2014, I filed the original of this **BRIEF ON THE MERITS** with the State Court Administrator through the court's eFiling System and served the same document on:

Kathryn H. Clarke, OSB 791890
PO Box 11960
Portland, Oregon 97211
kathrynhclarke@mac.com

Arthur C. Johnson, OSB 530512
Johnson, Johnson, Larson & Schaller, PC
975 Oak Street Suite 1050
ajohnson@jjlslaw.com

Attorneys for Petitioner Myles A. Bagley

Kristian Roggendorf, OSB 013990
Roggendorf Law LLC
5200 Meadows Road Suite 150
Lake Oswego OR 97035
kr@roggendorf-law.com
Attorney for Amicus Curiae *Oregon Trial Lawyers Association*

through the court's e-Filing System.

BALYEAT & EAGER, LLP

By: s/ Andrew C. Balyeat
Andrew C. Balyeat, OSB #951927
Attorney for Respondent on Review