IN THE SUPREME COURT OF THE STATE OF OREGON

MYLES A. BAGLEY, individually, Plaintiff-Appellant, Petitioner on Review,	)	Supreme Court No. S061821
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.	)	Court of Appeals No. A148231 Deschutes County Circuit Court No. 08CV0118S

BRIEF OF *AMICUS CURIAE*
OREGON TRIAL LAWYERS ASSOCIATION
IN SUPPORT OF PETITION FOR REVIEW

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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I. INTRODUCTION

Snow sports comprise a substantial share of Oregon's recreation industry, and her citizens visit the slopes nearly two million times a year. These sports typically involve traversing at high speed down a steep mountain slope of packed snow and ice, and by their nature pose a risk of serious injury. With the skiing activities statute, SB 329 (1979), Oregon's Legislature struck a very specific public policy balance: it relieved resort operators of the duty to protect participants from the "inherent risks" in snow sports that "are reasonable obvious, expected or necessary," ORS 30.975, [1] in exchange for retaining legal recourse for participants injured by the resorts' creation of dangerous conditions on the slopes. *Amicus Curiae* Oregon Trial Lawyers Association (OTLA) participated closely in the drafting of this statute, and joins the Plaintiff

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[1] ORS 30.975 provides:

> In accordance with ORS 31.600 and notwithstanding ORS 31.620(2), an individual who engages in the sport of skiing, alpine or nordic, accepts and assumes the inherent risks of skiing insofar as they are reasonably obvious, expected or necessary.

in advocating for review here to enforce that legislative balance crafted over 30 years ago.

In 1979, the skiing activities statute was the subject of numerous hearings in which ski industry representatives made multiple assurances that they were not seeking immunity for their own negligence, but only for the risks inherent in the sport. Oregon's resulting public policy as codified in ORS 30.975 was not intended to—and therefore does not—allow resort operators to shield themselves from the consequences of dangers they introduce into the sport independent of those "inherent risks." The proper policy balance must be maintained, because while exceedingly popular, the result of falls and impacts on ski slopes can have dire effects—as evidenced by the tragic paralysis suffered by the young Plaintiff in this case. It is either contrary to public policy or unconscionable to allow a party to affirmatively create a dangerous situation, as is alleged here, and then obtain immunity by a take-it-or-leave-it blanket release.

OTLA respectfully urges this Court to accept review of this case to articulate that the "inherent risks" of snow sports—defined at ORS

30.970(1)[2]—do not include negligently designed jumps and/or landings built by resort operators. In addition to that clarification, OTLA also respectfully requests this Court announce that ski resorts may not demand waivers that seek to avoid duties beyond the public policy

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[2] ORS 30.970 provides:

> As used in ORS 30.970 to 30.990:
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> > (1) "Inherent risks of skiing" includes, but is not limited to, those dangers or conditions which are an integral part of the sport, such as changing weather conditions, variations or steepness in terrain, snow or ice conditions, surface or subsurface conditions, bare spots, creeks and gullies, forest growth, rocks, stumps, lift towers and other structures and their components, collisions with other skiers and a skiers failure to ski within the skiers own ability.
> >
> > (2) "Injury" means any personal injury or property damage or loss.
> >
> > (3) "Skier" means any person who is in a ski area for the purpose of engaging in the sport of skiing or who rides as a passenger on any ski lift device.
> >
> > (4) "Ski area" means any area designated and maintained by a ski area operator for skiing.
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> > (5) "Ski area operator" means those persons, and their agents, officers, employees or representatives, who operate a ski area.

limits set in the skiing activities statute. In the alternative to a public policy basis for rejecting such releases, OTLA urges the Court to declare that ski releases are to be examined under unconscionability standards. Should the Court reach the unconscionability issue, OTLA requests this Court further announce that it is substantively unconscionable for a ski resort to absolve itself from its own lack of reasonable care.

II. ARGUMENT IN SUPPORT OF REVIEW

Not since *Nolan v. Mt. Bachelor, Inc.*, 317 Or 328, 856 P2d 305 (1993), has this Court had occasion to interpret the meaning of "inherent risks," as used in ORS 30.970 and ORS 30.975. In *Nolan*, although this Court held that "a collision with another skier" is not an inherent risk of the sport, it had no reason under those facts to opine whether man-made jumps and landings fall into the same category of "inherent risks" such as "[s]lippery or hard-packed snow, steep terrain, and … [the] failure to ski within the skier's own ability[.]" *Id*., at 334 (citation and internal quotation marks omitted). Nor has this Court established whether, as a matter of public policy, a ski resort may demand a release that goes

beyond a release of the inherent risks of skiing, or if unconscionability applies to the interpretation of ski release contracts. These significant legal issues are ones of first impression, of significant importance to Oregonians, and should be addressed to avoid manifest unfairness. In short, *this* is a fitting case for review.

A. *Bagley* presents several significant questions of Oregon law.

There are three important questions of law for this Court to resolve on review here. First, the overall interpretation of the scope of ORS 30.970 and ORS 30.975 must ultimately come from this Court, and it has been over 30 years since the law was passed. Given the number of ski resorts and visits in Oregon and the substantial economic impact of snow sports on Oregon, the clarification of the scope of ORS 30.975 alone presents a significant question of law. Second, it is a significant and novel question of law whether parties are permitted to go beyond the immunity set out in ORS 30.975 when they are operating facilities on

the unique and necessarily limited resource of Oregon's public lands.[3] Third, this Court has an opportunity (if the Court reaches this issue) to articulate a fully-formed theory of unconscionability in light of the various now-mature approaches in other jurisdictions, and either approve of or modify the direction taken by the Oregon Court of Appeals over the past several decades. Indeed, the last time the Court significantly discussed unconscionability, that "legal doctrine [was] undergoing a rapid evolution." *W.L. May Co. v. Philco-Ford Corp.*, 273 Or 701, 706, 543 P2d 283 (1975). These issues are not only all significant questions of law, they are all essentially questions of first impression. *See* ORAP 9.07(5).

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[3] University of Oregon, Community Service Center, *Oregon's Ski-Snowboard Industry Carves a $482 Million Impact*, http://blogs.uoregon.edu/cscenter/tag/oregons-winter-sports/ ("The ski and snowboarding experience in Oregon is unique in that all but one of the state's main ski areas are located on public lands managed by the U.S. Forest Service"). Mt. Bachelor is one of the resorts on public lands. http://www.mtbachelor.com/winter/mountain/company_info/history (Defendant Mt. Bachelor is leasing land from the U.S. Forest Service).

1. *In ORS 30.975, the Legislature intended to maintain liability for a ski resort's own negligence as a matter of public policy, and a release cannot go beyond that policy.*

Nolan v. Mt. Bachelor, Inc., 317 Or 328, did not offer any indication whether a release beyond the "inherent risks" of snow sports would be valid. A review of the legislative history of the skiing activities statute shows, however, that releases from a resort's own negligence are contrary to the policy adopted by the Legislature. Indeed, when the Legislature delineates an exception to a legal duty, parties are not then permitted to go beyond that policy unless it is to the benefit of the public and the individual waiving her rights. *See In re Leisure*, 336 Or 244, 253, 82 P3d 144 (2003) ("Statutory rights may be waived, but only to the extent that they serve no broader public policy but are directed solely to the protection of the individual who purports to waive them").

ORS 30.970 to ORS 30.990 provide that ski resort operators are relieved from the duty to warn about or attempt to rectify the "inherent risks" of snow sports, not permitted to absolve themselves of all responsibility for what occurs at their facilities. The legislative history

of the skiing activities statute is replete with the consistent refrain from ski industry representatives that this bill was ***not*** an attempt by them to "duck their responsibility or pass off their negligence," as stated by Mr. Keith Petrie, then-General Manager of Multipor Ski Bowl, but rather:

> an effort ***to clarify responsibilities of the individual skier***. It is in the areas ***where the operator has no actual control*** over what the skier actually does and in the skier's day to day decisions of what he does while he is skiing.

SB 329 (1979), House Judiciary, Testimony of Keith Petrie, May 24, 1979, at 2 (emphasis added).

Indeed, the House Committee postulated that resort operators remained responsible for dangers hidden by the terrain itself:

> REP. FROHNMAYER stated that rocks and stumps are listed as inherent risks. By identifying those as risks of skiing, he asked if that meant that the ski area operator has no obligation to put up cross stands and poles in front of it.
>
> REP. LOMBARD replied that it did not. In the strict legal sense, in contemplation of the operation of the ski area, during the day snow will be scraped away and rocks will bear out. Things like that happen and are to be anticipated. On the other hand, if there is a boulder or stump over a particularly large mogul, there is no question in the minds of the members of the committee that there is an obligation and duty on the part of the ski area operator to mark those kinds of obstructions.

SB 329 (1979), House Judiciary, comments by Representatives Frohnmayer and Lombard, June 8, 1979, at 7. The notion of a "clarification of responsibilities," the industry's assertions of taking responsibility for its own actions, and the understanding of the legislators that ski resort operators remained liable for non-obvious risks of skiing, all stand in sharp contrast to the blanket release procured by Defendant Mt. Bachelor in this case.

The public, the industry, and future litigants will all benefit greatly from this Court clarifying the extent that resorts remain liable for the dangers they create. Such residual liability seems to be exactly what the Legislature intended when otherwise providing immunity from liability for the "inherent risks" of snow sports to the extent" reasonably obvious, expected or necessary." The testimony from the supporters of the bill was that it would cover these "inherent risks only, not additional [*sic*]. ***It does not exclude negligence***." SB 329, Senate Agriculture, comments from Darrel Johnson, Oregon Ski Area Operators lobbyist, April 19, 1979, at 1 (emphasis added). If that is the case, then immunity

for a poorly designed or constructed ramp falls outside the public policy articulated in by ORS 30.975, and should be void. *See In re Leisure*, 336 Or at 253. Thus, the second significant principle of law for this Court to answer is whether a resort may go outside established public policy in crafting a release to its own benefit.

2. This Court may need to define the common law rule governing whether releases are unconscionable.

The third fundamental question of law presented here is whether it is unconscionable for a ski resort to secure immunity from its own negligence in a take-it-or-leave-it contract for recreational activities. The last substantial guidance offered by this Court on unconscionability occurred prior to the passage of the skiing activities statute.[4]

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[4] *See K-Lines, Inc. v. Roberts Motor Co.*, 273 Or 242, 248, 541 P2d 1378 (1975) ("Agreements to exonerate a party from liability or to limit the extent of the party's liability for tortious conduct are not favorites of the courts but neither are they automatically voided. The treatment courts accord such agreements depends upon the subject and terms of the agreement and the relationship of the parties"); *W. L. May Co. v. Philco-Ford Corp.*, 273 Or 707-08 ("in determining whether the substantive contract provisions of a commercial contract are unconscionable, we look to the circumstances existing at the time of the execution of the

In this case, there is an issue whether Defendant's release was a contract of adhesion and thus procedurally unconscionable. However, this Court faces a more important issue of first impression: whether it is substantively unconscionable for a ski resort to exempt itself from liability for a jump that the resort itself designed or built poorly, resulting in the foreseeable lifetime paralysis of an eighteen-year-old young man.[5] Given such a weighty issue, the substantive unconscionability issue certainly deserves a more sustained analysis than the cursory treatment given by the Court of Appeals. *See Bagley v. Mt. Bachelor, Inc*., 258 Or App 390, 409, 310 P3d 692 (2013), (stating

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contract and examine the challenged provisions in the light of both the general commercial background and the special commercial needs of the particular trade involved"). *Compare Tolbert v. First Nat'l Bank*, 312 Or 485, 492 n4, 823 P.2d 965 (1991) (only mentioning unconscionability, and noting that it is "assessed as of the time of contract formation and applies to contract terms rather than to contract performance") (citation and internal quotation marks omitted).

[5] This Court also must decide whether to adopt the Court of Appeals' elements of substantive unconscionability, or set them itself. *See, e.g., Motsinger v. Lithia Rose-Ft, Inc.*, 211 Or App 610, 617, 156 P3d 156 (2007) (substantive unconscionability involves "disparity in bargaining power … combined with the terms that are unreasonably favorable to the party with the greater power").

merely that that "provision in the release agreement disclaiming liability for negligence was not 'unreasonably favorable' to Mt. Bachelor").

B. With nearly 2 million skier/snowboarder visits a year in Oregon, these issues arise quite often and affect many Oregonians.

Skiers and snowboarders are subjected to ski releases nearly two million times a year in Oregon. *See* University of Oregon, *Oregon Skier Profile and Economic Impact Analysis*, at 49 (December 2012) (2010-11 season).[6] About one-third visited Mt. Bachelor.[7] Each was required to release Mt. Bachelor from liability for catastrophic harm from operator-caused injury. Day skiers, meaning those who do not spend the night near resorts, amounted to almost 80% of the visits during the 2010-11 season. *Id.* at ii. These people necessarily live fairly near the resort and

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[6] *Supra,* Note 3.

[7] *See* Brandon Sawyer, *Oregon snow sports by the numbers* Oregon Business (November/December 2013) http://www.oregonbusiness.com/articles/154-november-december-2013/11603-oregon-snow-sports-by-the-numbers.

thus are most likely Oregon citizens. Thus, this case is of substantial importance to large numbers of Oregonians. *See* ORAP 9.07(2), (3).

C. Numerous remaining ORAP 9.07 factors militate in favor of review.

Interpreting ORS 30.970(1) and ORS 30.975, discerning the acceptable application of the public policy found in that statute, and announcing or clarifying rules for the doctrine of unconscionability are all issues of Oregon law. ORAP 9.07(4). This court has only once had occasion, some 20 years ago, to interpret ORS 30.970's definition of "inherent risks" of snow sports, and that case involved an employee running into a guest while skiing, not a hazard built by the ski resort. *See Nolan v. Mt. Bachelor, Inc.*, 317 Or 328.

The decision of the Court of Appeals, with all respect, was wrong. *See* ORAP 9.07(14). The Court of Appeals here—citing to the recreational immunity statute—noted in this case that "it would be counterintuitive to hold that a contract with the same operative effect as that statutory scheme is void as contrary to public policy." 258 Or App

at 406 n8. But the recreational immunity statute does not apply to for-profit ventures. ORS 105.688(2)(a) (immunity applies only if the owner "makes no charge for permission to use the land"). *See Coleman v. Oregon Parks & Rec. Dep't*, 347 Or 94, 102, 217 P3d 651 (2009) (even when charging for a use other than what caused the injury, "the state made a charge for permission to use Tugman Park and thus forfeited recreational immunity").

In any event, it was error to allow a release that went beyond expressly crafted public policy. Contracts that echo statutory policy plainly are acceptable, but contracts that contravene the statutory scheme are void or voidable. *E.g. In re Leisure*, 336 Or at 253 (default period waived only where it benefits public and the individual waiving rights).[8] The legislative history shows that the skiing activities statute was not intended to relieve ski resorts of liability for their own negligence, and it was drafted with in such a way as to avoid granting

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[8] *Cf Huff v. Bretz*, 285 Or 507, 518, 592 P2d 204 (1979) (where statute required an application to be filed with the State to change location of a water diversion, any contract that allowed such a diversion without an application was void as against public policy).

such immunity. Therefore, a contract providing immunity from an operator's own negligence runs in the opposite policy direction, and cannot be enforced.

Furthermore, the result here is manifestly unfair—the young Plaintiff here faces a lifetime of paraplegia after functioning at an "expert" snowboarder level for several seasons prior to taking the jump built by Mt. Bachelor. *See* ORAP 9.07(14)(a) (error results in serious and irreversible injustice). Requiring that young man to bear this burden alone—or for society to have to assist him with that burden—when he is alleged to be the victim of another person's poor design cannot be countenanced. In the end, Plaintiff's injury and damages cannot be ameliorated by any other branch of government. ORAP 9.07(14)(b).

Bagley also meets many of this Court's procedural criteria for review, including being well-briefed below, and by having these eminently qualified counsel on appeal and review to ensure that the issues will be properly presented to this Court. *See* ORAP 9.07(7), (15). In the same vein, the record is sufficiently developed on a motion for summary judgment so that the Court can reach the identified issues. *See*

ORAP 9.07(8). The Court of Appeals further published a detailed written opinion touching on all the relevant issues. *See* ORAP 9.07(11).

Finally, this Court has granted OTLA's motion to appear as *amicus curiae* in this matter. Should this Court accept review, OTLA will file a merits brief on the issues identified above.

III. CONCLUSION

Amicus Curiae OTLA urges this Court to allow review for the reasons stated above.

RESPECTFULLY SUBMITTED this 9th day of December, 2013.

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
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Brief Length:

I certify that (1) this brief complies with the word count limitation in ORAP 5.05(2)(b)(ii), 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 block), comes to 3,015 words as determined by the Word Count feature of Microsoft Word .

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DATED this 9th day of December, 2013.

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 9, 2013, I filed the foregoing ***Amicus* Brief in Support of Petition for Review of Oregon Trial Lawyers Association** by electronic filing with the State Court Administrator at this address:

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