SKILAW.COM
Ski Law Update 2014 - 2016
Legislation, Cases, and Developments
Jim Chalat, Nov. 29, 2015

Current issues and Trends in Ski Law: Waivers and Releases

The extent to which blanket waivers in favor of ski area operators, particularly which appear in season passes or ski school enrollment forms, will provide blanket immunity from liability even from ski area duties set out in statutes;

1. Colorado state trial courts: Claims made under the Colorado Ski Safety Act, the Colorado Snowmobile Act, or the Colorado Premises Liability Act. Waivers are invalid in statutory negligence claims.

a. Lift accidents

An agreement that is contrary to public policy is void as a matter of law. The public policy of the Colorado Ski Safety Act ("CSSA") is to create a civil remedy for violations of the CSSA. Blanket exculpatory agreements, which say that the guest waives *all* civil remedies, are void to the extent that the ski area operator's violation of the CSSA caused harm.

The District Court in Pitkin County held that an Aspen Skiing Company season pass waiver was ineffective and void in a lift case. *Bradley v. Aspen Skiing Company,* Pitkin County Combined Courts, 11 CV 43 (May 10, 2012*).* Ryan Bradley was skiing at Aspen Highlands on a season pass. He was waiting on at the load here board at the bottom terminal of the Deep Temerity lift.

Prior to Bradley coming to the load here board, the lift crew had loaded an injured guest, in a toboggan, using a Jake Table to secure the toboggan onto the chairlift. A Jake Table is a steel frame which is secured to the chair and makes a platform upon which the toboggan rests. The patroller sits in the chair next to the patient to monitor the patient. To facilitate a prompt evacuation, a Jake Table is typically at or near the base of any chairlift located at the bottom of a valley or "dead end" slope from which exit to the base area requires the skier/snowboarder to take a chairlift.

In Bradley's case, after the injured skier's toboggan was unloaded at the top of the lift, the attendants left the Jake Table on the chair in order to return it to the lower terminal. The bottom lift crew allegedly neglected to stop the chair and unload the Jake Table. That the lift attendants were grilling hot dogs on an outdoor grill for the guests ("Wiener Wednesday") was allegedly a factor in their inattention. The

chair upon which the Jake Table was loaded came down the liftline, rotated around the lower bull wheel, and crashed into Bradley who was next in line to board.

The ski area operator claimed that the season pass waiver signed by Bradley immunized it from all liability, including the liability imposed by the CSSA in its operation of the chairlift. The Court held:

> Parties may not privately contract to abrogate statutory requirements. *Citations omitted.* The Court thus concludes that as to the negligence *per se* [statutory negligence] claims asserted by Plaintiff, the exculpatory agreement is inoperable to release Defendant from liability for those claims.

b. Snowmobile accidents

Likewise, season pass waivers are inapplicable in cases based upon the Colorado Snowmobile Safety Act. *Harris v. Schreiber, et al.,* Summit County District Court, Colorado, Div. R. 09CV133 (December 21, 2009). Harris, was skiing down a trail. Below him, Schreiber, a ski patroller, was driving a snowmobile from skier's left to skier's right on a trail, which was obscured by a tree-line, and at which ran at right angles to Harris's path of travel. As Harris reached the bottom of his trail, Schreiber's snowmobile emerged from the tree-line, on the intersecting trail. Harris collided with the snowmobile, and sustained a severely comminuted femur fracture

Harris was snowboarding, and using the lifts and facilities under a season pass he purchased. The season pass application contained a comprehensive, all-inclusive release and waiver of liability. Harris signed the applicable documents containing the waiver and release.

The duties of a "person operating a snowmobile" are codified at Colorado's Snowmobile Act, Colo. Rev. Stat. § 33-14-101, 116: "no person shall operate a snowmobile in a careless or imprudent manner without due regard for width, grade, corners, curves, or traffic of trails … and all other attendant circumstances." Harris alleged a *per se* violation of the Snowmobile Act.

The Court agreed, and held the Snowmobile Act to invalidate the waiver signed by Harris.

> The language of C.R.S. §33-14-116 makes clear that it is designed to protect the general public against the careless, imprudent, or reckless operation of a snowmobile. Protection of the general public necessitates protection against the types of injuries typical of a collision with a snowmobile, which would include the injuries allegedly suffered by plaintiff here. Thus, the [Snowmobile Act] allows for a claim of negligence per se. The Snowmobile Act imposes statutory requirements that cannot be waived. . . .Although the Snowmobile Act imposed no direct duty on Vail, Schreiber had a duty under it that could not be waived. The Court further finds that respondeat superior has its roots in public policy and the law of agency. In light of the foregoing, the Court ultimately determines that allowing Vail to avoid respondeat superior liability for Schreiber's alleged failure to comply with statutory requirements would violate public policy.
>
> Order by Judge W. Terry Ruckriegle, Chief Judge of the 5th Judicial District, District Court, Summit County, Colorado (December 21, 2009).

c. Premises liability/Jeep tour

Adapting the logic of *Harris* and *Bradley* the Colorado District Court for Chaffee County found that the Colorado Premises Liability Act (CPLA) also imposed statutory duties of care which cannot be waived under an exculpatory agreement. CPLA duties cannot be relinquished in a written waiver. This critical determination would control substantial rights and liabilities in many cases. For instance, the doctrine may invalidate season pass or individual day passes' waivers at amusement parks, recreation centers, and other facilities, which typically require a waiver of liability in exchange for a membership or entry. *Donohoe, et al. v. Kirby and High Country Jeep Tours*, District Court, County of Chaffee, State of Colorado, Case No. 2013CV030039 (February 17, 2014, Judge Charles M. Barton presiding).

The court analyzed the waiver and release signed by the Donohoe plaintiffs under the factors established in the case of *Jones v. Dressel.*

> In determining whether an exculpatory agreement is valid, there are four factors which a court must consider: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.
>
> *Jones v. Dressel*, 623 P.2d 370, 376 (Colo.1981).

However, in this case, one of "first impression," or without precedent, the court held that the CPLA trumped the waiver and release which High Country Jeep required that the plaintiffs signed.

> The legislature has set the standard of care landowners owe to invitees as a matter of public policy. *Citations omitted.* [C]odification of the premises liability act confirms that landowner negligence is an issue of public concern. An exculpatory clause which contradicts the CPLA may violate public policy. The court is not aware of a published appellate case which has enforced an exculpatory agreement in a CPLA claim. Non-enforcement of the exculpatory contracts here will promote the public policy expressed in the CPLA. It seeks:

Reviewing the four *Jones v. Dressel* factors, the court found that the High Country Jeep Tours waiver violated each of the standards. As to the substantive public policy question, the court wrote: "It is hard for the court to conceive of how these public policies will be promoted by finding Defendants owed, by virtue of the exculpatory contract, no duty to protect its customers from dangers of which they knew or should have known."

Although the "nature of the service" was recreational touring of old mining sites and off-road jeep touring, the court held that "releasing Defendants from all liability would dis-incentivize Defendants from driving the Jeeps safely with a corresponding increased danger of harm to other users of the roadways." The court reviewed the regulatory/legislative scheme concerning commercial carriers, the USFS permit process which allowed the defendant to offer tours on federal lands, and common statutes relating to the duties of drivers of vehicles. From this review, the court's ruling was bolstered that the public interest would be served by voiding the exculpatory contract.

Finally, the court found that the 3rd and 4th *Jones v. Dressel* factors were also violated. These concerned the formation of the contract – the signing of the release. Mrs. Donohoe had paid a non-refundable

deposit, in advance on the internet, by credit card. There was no mention then of an exculpatory contract. Moreover, the on-line brochure touted that High Country Jeep Tours was an "insured carrier," and that its tours were "permitted in the San Isabel National Forest." Both of these representations, particularly the insurance statement "reasonably led [Donohoe] to believe that if an accident happened while on the jeep tour the company's insurance was available for injuries or damages."

The court voided the exculpatory agreement.

d. The federal decisions to the contrary:

To the contrary, are two federal cases:

> *Squires ex rel. Squires v. Goodwin*, 829 F.Supp.2d 1062 (2011) aff'd 715 F.3d 867 (10th Circ. 2013) held that a mother's signature on a waiver of liability was enforceable against a 17-year-old developmentally disabled child.
>
> *Robinette v. Aspen Skiing Co., L.L.C.*, 08 CV 00052MSK, 2009, WL 1108093 (D. Colo. Apr. 23, 2009) aff'd sub nom. *Robinette v. Aspen Skiing Co.*, 363 F. App'x 547 (10th Cir. 2010) granted defendant's motion for summary judgment because it concluded that the season pass waiver which the snowboarder had signed was enforceable.

Kimberly Squires was a wheelchair bound disabled child. Her mom took her to Breckenridge to participate in a program for the disabled. Kimberly was paired with an instructor. Placed on a "bi-ski," Kimberly rode while the instructor steered and braked the bi-ski from behind using tethers. For some reason, the trail on which Kimberly was skiing was not closed to recreational skiers. A recreational skier named Goodwin lost control, skied into the tethers between the instructor and Kimberly. The instructor dropped or lost her grip on the tethers. Kimberly's bi-ski accelerated totally out of control and crashed into a tree at high speed. Kimberly's injuries were severe.

When Kimberly's Mother enrolled her in the disabled/adaptive program, she had signed a complete exculpatory agreement. The court upheld the enforceability of the agreement. In contrast to the state court decisions, the federal Magistrate found that the waiver and release satisfied the statutory requirements and the so-called *Jones v. Dressel* standards. The court held, in our view incorrectly, that under Colorado law, Kimberly's mother's release was valid. The court held that there was no disparity in bargaining power between program and Kimberly's mom. Finding that the exculpatory agreement was fairly entered into, free from legal jargon, and encompassed risks of the incident, that the release did not violate public policy. To distinguish *Squires* it should be noted that Kimberly's claims rested on no *per se* or statutory duty.

Similarly, in the *Robinette* case, the federal district court enforced an exculpatory waiver and release in a snowmobile versus skier case. Robinette was snowboarding at Snowmass. He had signed a season pass with a waiver, which encompassed any accident. An allegedly negligent snowmobile driver caused a collision, very similar to that in *Harris, supra.* The Court held that the release and the Snowmobile statute were "not inconsistent" in their express provisions, purposes, or in practical implementation. Held: season pass exculpatory agreement to be enforceable, and the case was dismissed. The reasoning and result are in direct contradiction to the decision in *Harris.*

e. Conclusion re: Colorado trial court decisions

Stay away from federal court. The state courts are much more likely to appreciate grounds to invalidate waivers.

2. Bagley v. Mt. Bachelor

The most important ski accident cases to be decided in 2014 was *Bagley v. Mt. Bachelor, Inc.,* 356 Or. 543, 340 P. 3d 27 (Ore. Dec. 18, 2014). The Supreme Court of Oregon, in a unanimous opinion, held that a season pass exculpatory agreement was unconscionable and void. The decision reversed the Court of Appeals decision affirmed. Bagley v. Mt. Bachelor, Inc., 258 Or.App. 390, 310 P.3d 692 (2013).

The facts indicated that Myles Bagley had bought season passes from Mt. Bachelor for two previous seasons. The season pass exculpatory agreement had always included a lengthy waiver and release. The manner of sale and the content of the season pass agreement at issue in this Oregon case are for all practical purposes, identical to season pass waivers and releases sold by every ski area in the United States.

Nonetheless, the Court held that the Mt. Bachelor waiver and release contained within its season pass was unfair, unconscionable, and unenforceable.

Lauren Bagley has proved herself a courageous and formidable plaintiff. She sued Mt. Bachelor on behalf of her son, Myles. Myles was 18 years old on February 16, 2006 when he was injured and paralyzed while snowboarding over a terrain park feature in the Mt. Bachelor terrain "Air Chamber" terrain park. Bagley contended that Mt. Bachelor was negligent in the design, construction, maintenance, and inspection of the jump.

The Court looked at two elements of the season pass agreement.

First, the circumstances and fairness of the so-called "formation" of the contract; or, in other words, what happened when Bagley bought his pass. Was it entered into freely and voluntarily? Or, was the agreement given to him on a take-it or leave-it basis? Could he modify the wording of the agreement? Was one party (the ski area) in a superior bargaining or financial position such that there was unfairness in the formation of the contract.

The court articulated its standards as follows:

> [Was] the release was conspicuous and unambiguous . . . was a [there] a substantial disparity in the parties' bargaining power; whether the contract was offered on a take-it-or-leave-it basis; and whether the contract involved a consumer transaction. Relevant substantive considerations include whether enforcement of the release would cause a harsh or inequitable result to befall the releasing party; whether the releasee serves an important public interest or function; and whether the release purported to disclaim liability for more serious misconduct than ordinary negligence. Nothing in our previous decisions suggests that any single factor takes precedence over the others or that the listed factors are exclusive. Rather, they indicate that a determination whether enforcement of an anticipatory release would violate public policy or be unconscionable must be based on the totality of the circumstances of a particular transaction.

> The analysis in that regard is guided, but not limited, by the factors that this court previously has identified; it is also informed by any other considerations that may be relevant, including societal expectations.
>
> *Bagley v. Mt. Bachelor, Inc.,* 340 P. 3d at 38.

The court found, and Bagley had admitted, that the release language was conspicuous and unambiguous. However, the court did find that this was not an "agreement between equals." Mt. Bachelor was in a superior bargaining position, and offered the season pass exculpatory release agreement on a take-it-or-leave-it basis. The court noted that:

> [W]hen one party is in such a superior bargaining position that it totally dictates all terms of the contract and the only option presented to the other party is to take it or leave it, some quantum of procedural unconscionability is established. The party who drafts such a contract of adhesion bears the responsibility of assuring that the provisions of the contract are not so one-sided as to be unconscionable" *Bagley,* 340 P. 3d at 40.

Based on these standards, the court held that the exculpatory waiver and release contained in the season pass agreement was unfairly entered into; the court emphasized that there was a substantial disparity in the parties' bargaining power and that the release was offered to the plaintiff *Mt. Bachelor's other customers* on a take-it-or-leave-it basis. *Bagley,* 340 P. 3d at 44.

The court noted that "[i]t may be difficult in such circumstances to untangle the causal forces that lead to an injury-producing accident." *Bagley,* 340 P. 3d at 43. This important thought will bear consideration at a later trial of the case.

The court noted the defendant's contentions: "As discussed, the release was conspicuous and unambiguous, defendant's alleged misconduct in this case was negligence, not more egregious conduct, and snowboarding is not a necessity of life . . . [Nonetheless] even in the context of expert snowboarding in defendant's terrain park, defendant was in a better position than its invitees to guard against risks of harm created by its own conduct." *Id.*

On the question of the interplay of the duties of the ski area and the Oregon Skier Responsibility Law, Skier Responsibility Law, ORS 30.970 - 30.990, the court noted the Oregon statute did *not* abrogate the common-law principle that skiers do not assume responsibility for unreasonable conditions created by a ski area operator insofar as those conditions are not inherent to the activity. *Nolan v. Mt. Bachelor, Inc*., 317 Or. 328, 336, 856 P.2d 305 (1993). Based on this, and following the same logic which Judge Barton exercised in the *Donohoe* case, the Oregon Supreme Court found that there is public policy underlying the common-law duty of a ski area operator to exercise reasonable care to avoid creating risks of harm to its business invitees. That public policy was violated by the exculpatory provisions of the season pass agreement.

The court also relied heavily on another state Supreme Court decision striking a ski area's exculpatory agreement. In *Dalury v. S–K–I, Ltd.,* 670 A.2d 795 (1995) the Vermont Supreme Court concluded that a ski lift agreement containing a blanket release violated public policy. The ski area argued that skiing—like other recreational activities—is not a necessity of life. The sale of a lift ticket is a purely private transaction that implicated no public interest. "No single formula will reach the relevant public policy issues in every factual context." *Dalury v. S-K-I, Ltd.,* 670 A.2d at 798. Rather, the court stated that it

would consider "the totality of the circumstances of any given case against the backdrop of current societal expectations." *Id.*

The Oregon court found significant public policy considerations at stake and looked to the Vermont court's decision in *Dalury* for precedent. The Vermont court held that the ski areas, "not recreational skiers, have the expertise and opportunity to foresee and control hazards, and to guard against the negligence of their agents and employees. . . They alone can insure against risks and effectively spread the cost of insurance among their thousands of customers."

Not only was the ski area in a better financial position to spread the risk, but there was also an economic incentive in safety. The rule that liability breeds responsibility, and immunity breeds impunity, was articulated in this way by the Vermont Supreme Court, and it resonated across the country with the Oregon Supreme Court:

> If defendants were permitted to obtain broad waivers for their liability, an important incentive for ski areas to manage risk would be removed with the public bearing the cost of the resulting injuries. It is illogical, in these circumstances, to undermine the public policy underlying business invitee law and allow skiers to bear risks they have no ability or right to control.
>
> *Bagley*, 340 P. 3d at 43 (*quoting Dalury,* 670 A.2d at 799).

The Oregon Supreme Court held that the Bagley season pass waiver and release, the so-called "exculpatory agreement" was unconsicionable.

Oregon thus joined Vermont and Utah, holding that waivers, releases, or so-called exculpatory agreements are unconscionable and unenforceable as contrary to public policy. *See, Rothstein v. Snowbird Corporation*, 175 P.3d 560 (Utah 2013) holding the releases required by Snowbird "offend the public policy of this state as articulated by the Legislature." *Rothstein,* 175 P.3d at 563. The policy offended by the release in the pass agreement was the Utah Inherent Risks of Skiing Act, Utah Code Ann. §§ 78–27–51 to –54 (2002 & Supp.2007). "The bargain struck by the Act is both simple and obvious from its public policy provision: ski area operators would be freed from liability for inherent risks of skiing so that they could continue to shoulder responsibility for noninherent risks by purchasing insurance. By extracting a preinjury release from Mr. Rothstein for liability due to their negligent acts, Snowbird breached this public policy bargain." *Rothstein,* 175 P.3d at 564. *See also, Rutherford v. Talisker Canyons,* 333 P.3d 1266 (Utah Ct. App. 2014) *cert. granted*, 343 P.3d 708, (Utah, Feb. 13, 2015). *See also, Scott v. Pacific West Mountain Resort* 119 Wash 2d 484, 834 P. 2d 6 (1992) holding that the parent's waiver and release of of the ski area for liability violated public policy insofar as the child's claims. However, the wavier and release the parents' cause of action based upon the skiing injury to their child during a practice slalom run.