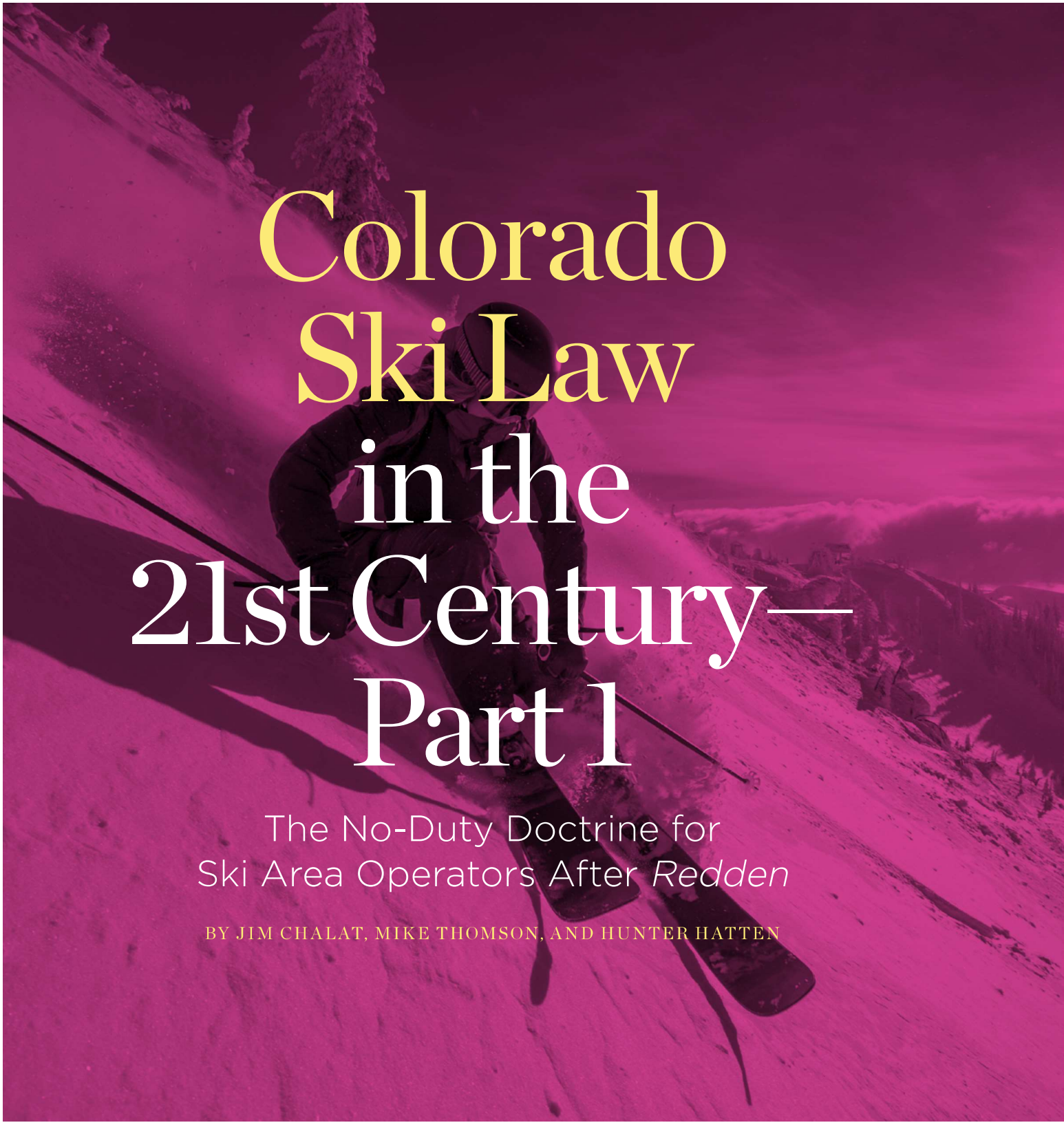
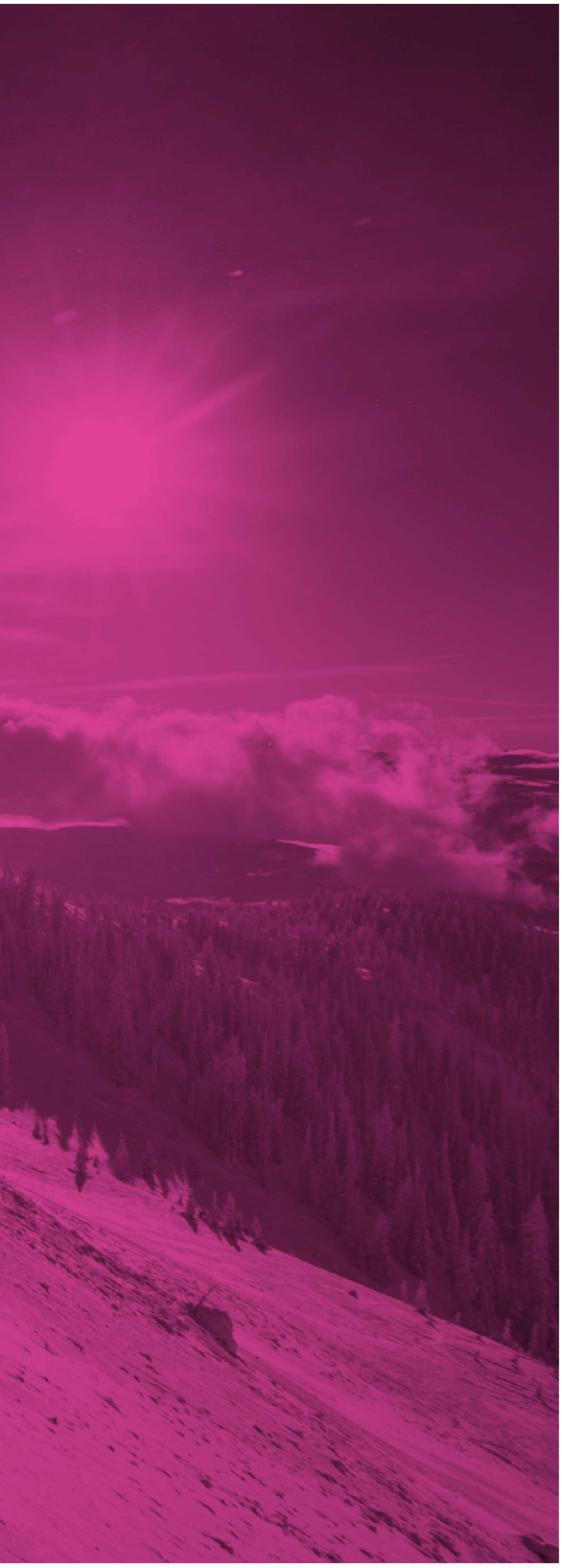


Colorado Ski Law in the 21st Century—Part 1

The No-Duty Doctrine for Ski Area Operators After *Redden*

BY JIM CHALAT, MIKE THOMSON, AND HUNTER HATTEN



This two-part article discusses the history of ski law in Colorado and how Redden v. Clear Creek Skiing Corp.*, decided on December 31, 2020, has significantly changed the duties imposed on ski area operators.*

In *Redden v. Clear Creek Skiing Corp.*, the Colorado Court of Appeals held that a skier's signed exculpatory agreement effectively waived the skier's statutory claims under the Colorado Ski Safety Act (SSA) and the Passenger Tramway Safety Act (PTSA).[1] In Colorado, all skiers are on a lift pass that, in one way or another, carries exculpatory language that is enforceable to bar claims by the skier against the ski area operator. Thus, *Redden* is, in effect, a judicial repeal of the safety statutes that have long governed the duties owed by ski area operators to skiers and ski lift passengers. *Redden* also effectively abolished the long-standing Colorado common law doctrine that ski area operators owed to passengers the highest duty of care in the operation of lifts and tramways.

Part 1 of this article reviews the statutory standards of care for ski law and examines the history of the Colorado state and federal precedent concerning exculpatory agreements pre-*Redden*. It then briefly summarizes the *Redden* decision. Part 2 will analyze the majority and dissenting opinions in *Redden* and compare *Redden*'s result with how other jurisdictions construe exculpatory skiers' waivers. Part 2 will also discuss how Colorado law may evolve post-*Redden*.

Legal Framework of Ski Law in Colorado

The SSA[2] defined rights and responsibilities and imposed statutory duties of care on skiers and ski area operators. The SSA immunized ski area operators from liability for the so-called "inherent risks" of skiing. It articulated duties of care for ski area operators in the operation of the ski area, primarily with regard to warning signs and trail maps to alert skiers to the difficulty of trails, ski area boundaries, closures, and marking man-made objects to be visible from 100 feet away.[3] Regarding the design, installation, maintenance and operation of ski lifts, the SSA incorporated by reference, as its safety standards for the operation of ski lifts, the rules and regulations promulgated under authority of the PTSA.[4]

The PTSA established the Passenger Tramway Safety Board (PTSB). The PTSB operates as an administrative agency within the Department of Regulatory Agencies. The PTSB has long been empowered to enact specific ski lift safety regulations.[5] The SSA further established a per se negligence cause of action for any party injured by a breach of any SSA statutory standard. By reference, it adopted the PTSB's duly enacted regulatory standards as the statutory standard of care by which ski area operators must conduct lift operations.[6]

SSA/PTSA Standards Coexisted with Traditional Highest Duty of Care Standard

Since 1968, ski area operators in Colorado owed the highest degree of care commensurate with any lift's practical operation, design, construction, maintenance, and inspection, regardless of season.[7] Thirty years later, in *Bayer v. Crested Butte Mountain Resort*, the Colorado Supreme Court held that this traditional high duty of care was not preempted or superseded by enactment of PTSA or SSA.[8] Reinforcing the statutory authority of the SSA and PTSA, the Court held that the statutory provisions under which violations of those Acts constitute statutory negligence per se do not bar common law negligence actions against operators of ski lifts.[9]

The "No-Duty" Doctrine

The *Redden* approval of exculpatory agreements extends immunity to ski area operators. Immunity is the opposite of liability. Duty is connected to liability through the analysis of rights or no rights.[10] With every skier or snowboarder being

subject to a waiver—whether on the back of the ticket, incorporated in the ticket or season pass through an Internet purchase, or from a signed paper agreement from the rental or ticket window—*Redden* effectively repeals any statutory duties owed by ski areas. We therefore characterize the *Redden* decision as stating a broad judicial "no-duty" doctrine for ski area operators notwithstanding the statutory enactments to the contrary.

Statutory Negligence

Black's Law Dictionary defines the term "per se" as "by itself" or "standing alone." Per se typically stands for a legislative standard of care that is then legislatively, or by judicial inference, a definitive legal duty, the breach of which is considered "per se" negligence. Because the SSA expressly provides for a negligence claim, we prefer to use the term "statutory negligence" over "per se" when discussing the liability provisions of the SSA and the incorporated PTSA regulations as standards of care.

Ski Area Exculpatory Agreements

For years, every Colorado ski area's season pass, day pass, or multiday pass, whether bought in person or online, has contained exculpatory language. The scope of releases included in ski passes is generally as broad as language allows. These agreements typically state that the pass holder shall release, hold harmless, defend, and indemnify the ski area operator from any liability for injury, death, losses, and damages sustained, in whole or in part, from the customer's participation in any activity while using the ski area facilities, including the lifts. The exculpatory agreements extend to activities most people don't associate with the inherent risks of skiing. The barred claims extend to

- the construction, maintenance, and operation of ski lifts;
- lift attendant negligence;
- premises liability for injuries occurring off the slopes, such as at restaurants, toilets, warming huts, and parking lots;
- rental equipment liability;
- injuries sustained by spectators at a ski race; and
- any damages caused by the ski area operators' negligence, negligence per se, or otherwise wrongful conduct.

The waiver's indemnity clause requires that the purchaser pay fees and costs if they sue the ski area operator. The waivers do not only appear on season pass agreements and lift tickets. Every ski area rental shop requires the skier or snowboarder to sign a universal waiver pertaining to *any* liability arising from any "activities" incidental to the ski area operator's premises, lifts, operational duties, or warning duties under the SSA.

The "Click-Wrap"

Typically, ski area operators market season passes and day tickets over the Internet. Like purchases of software applications or smartphones, online purchases of lift tickets include a process known as the "click-wrap," in which the consumer agrees to the terms of sale by clicking their cursor on a check box. For software or electronic device purchases, this is called an end-user license agreement (EULA). In the context of the purchase of a software application or an electronic device, the EULA includes licensing agreements, use limitations, privacy and payment agreements, and warranty or warranty disclaimer terms.

In the context of a ski lift pass purchase, the Internet sale includes the waiver and release language in the same way a EULA is provided within an electronic device or application sale. The waiver and release, or exculpatory agreement, is typically a lengthy document titled, in all caps and bold font as: **ASSUMPTION OF RISK, RELEASE OF LIABILITY & INDEMNITY AGREEMENT**. It is usually preceded by language such as: **PLEASE READ CAREFULLY. THIS IS A RELEASE OF LIABILITY AND WAIVER OF CERTAIN LEGAL RIGHTS**. This document is presented by means of an embedded reader on the screen in a lengthy scroll-through Scribd format. To get to the final payment function and complete the purchase, the consumer needs to click "yes" to the waiver and release. The document is the digital equivalent of the paper multipage season pass release, waiver, and indemnification agreements.[11] Digital click-throughs to the click-wrap are tantamount to digital contractual signatures and are, therefore, enforceable.[12]

Most consumers execute the click-wrap function and bind themselves to terms and conditions of agreements without reading the terms. In 2017, Deloitte surveyed 2,000 consumers in the United States concerning their Internet purchase habits and found that 91% of people consent to purchases or user rights to software without reading the legal terms and service conditions of the EULA. For people aged 18 to 34, the rate is even higher. In that age group, 97% of users agree to conditions without reading the terms.[13] The day-to-day experience of a nationally top-ranked intellectual property attorney is consistent with the Deloitte findings.[14]

No matter the manner of signing the waiver, whether it's simply buying a ticket with the waiver language on the back or the peel-off, through an Internet purchase, or an in-person contract signed at the lift office or the ski shop, the waiver is enforceable under the *Redden* decision, and bars, in the broadest terms, claims against ski area operators.

Differences in State and Federal Decisions on Exculpatory Agreements

Caselaw decided before *Redden* illustrates the scope of exculpatory agreements that would now be valid under *Redden*'s no-duty doctrine. This caselaw demonstrates the tension between the long-standing (some argue obsolete) precedent of waiver enforcement in the recreational setting[15] against the equally long-standing doctrine of disallowing enforcement of exculpatory agreements in statutory negligence claims.[16]

The Precedent of Phillips

In *Phillips v. Monarch Recreation Corp.*, decided shortly after the SSA was enacted in 1979, the Colorado Court of Appeals rejected a defense to a negligence per se action against a ski area operator based on ticket waiver. It held that the SSA allocates skiers' and ski area operators' duties and that the trial court properly excluded any agreement to modify or alter statutory standards of care.[17]

Phillips was the first Colorado Court of Appeals decision to consider the effect of a waiver of the statutory duties under the SSA.

“Prior to *Redden*, Colorado state district courts would feel bound by *Phillips*. The state district courts in Colorado would hold that the SSA and the PTSA preempted the 1981 Colorado Supreme Court doctrine of enforcement of exculpatory agreements established under the precedential waiver case of *Jones v. Dressel*.”

At issue in *Phillips* was a provision in the original version of the SSA that required ski area operators to place a conspicuous notice near the top of a slope or trail open to the public on which equipment is being used for grooming or maintenance.[18]

Phillips was skiing when he crashed into a snow groomer that was headed up a catwalk. Monarch had not placed the required statutory warning at the top of the slope cautioning skiers of the snow groomers below. Exculpatory language on Phillips's lift ticket stated that its use meant that Phillips "understood and assumed the risk of skiing."[19] The trial court refused to allow the jury to consider the lift ticket language. The court of appeals affirmed.

Prior to *Redden*, Colorado state district courts consistently followed *Phillips* and rejected ski area operators' contention that waivers and releases fully immunized ski area operators from duties established under the SSA. State district courts held that private parties may not use contracts to abrogate the SSA's statutory requirements.[20] Specifically, they concluded that under the SSA and PTSA, ski area operators and other recreational providers may not use exculpatory agreements to release them from liability for statutory negligence claims.

An altogether different paradigm simultaneously evolved in Colorado's federal district courts and the US Court of Appeals for the Tenth Circuit, beginning in 1993, with the ski binding failure-to-release case of *Bauer v. Aspen Highlands*.[21] US District Court Judge Babcock found a rental agreement waiver barred Bauer's claims alleging the rental shop was negligent for failing to properly adjust her rental boots and bindings. Judge Babcock wrote that Bauer could have "satisfied her business interest by absorbing the ambiance of Aspen without skiing."[22]

Rarely have Colorado federal and state courts evolved so differently in their treatment of a class of injured tort victims. In Colorado state district courts, injured skiers could get their day in court. Yet, in federal courts, not only would the skiers' cases be dismissed, but the courts would then, post-dismissal, issue orders for heavy fees and costs under the exculpatory agreements' indemnification clauses. *Redden*, by a one-vote margin, tipped the scales against the precedent in *Phillips* and adopted the exculpatory agreement enforcement policy of the federal courts, thus essentially nullifying the statutory duties established by the SSA and the PTSA.

Redden Summary

Part 2 of this article will provide a detailed analysis of the *Redden* decision. To provide context for the discussion of state and federal case law before *Redden*, however, it is helpful to understand its holdings.

Redden holds that, under exculpatory waivers and releases built into season pass agreements or printed on lift passes, skiers waive their rights to make claims against or sue Colorado ski area operators for statutory negligence under the core statutory framework governing ski area operators' liability,[23] including the SSA[24] and the PTSA.[25]

Exculpatory agreements and lift ticket waivers now also negate ski area operators' common law duty of the highest duty of care in lift operations.

With regard to *Phillips*, the *Redden* majority stated that the "decision in *Phillips* appears to be inconsistent with more recent pronouncements by the Colorado Supreme Court and General Assembly regarding Colorado policies toward the enforceability of exculpatory agreements in the context of recreational activities."[26]

Pre-*Redden* State Court Decisions on Exculpatory Agreements in Statutory Negligence Cases

Prior to *Redden*, Colorado state district courts would feel bound by *Phillips*. The state district courts in Colorado would hold that the SSA and the PTSA preempted the 1981 Colorado Supreme Court doctrine of enforcement of exculpatory agreements established under the precedential waiver case of *Jones v. Dressel*.[27]

In 1973, William Jones, a 17-year-old sky diver, signed a contract with a sky diving service. The services included the aircraft ride to altitude for the jump. The contract contained an exculpatory clause.[28] Jones was seriously injured when the plane provided by the sky diving service crashed while climbing to altitude for the sky divers.

The NTSB report on the *Jones* airplane crash determined that the plane crash was solely caused by the pilot's multiple in-flight decisions and improper operation of the flight controls.[29] The crash had nothing to do with the recreational elements or inherent risks of sky diving. Nonetheless, the *Jones* case has been the polestar in Colorado in establishing the preference for enforcement of waivers in any recreational setting. *Phillips* was a noted exception because the SSA safety standards were held not to be subject to the lift ticket waiver.

Anderson *and* Ciocian*: Ski Industry Declines to Raise its Waiver in a Statutory Negligence Claim Under the SSA*

In 2007, two virtually identical accidents occurred at Beaver Creek Ski Resort, which is owned by Vail Resorts. The accidents both occurred in a natural tree glade area below Primrose and Bitterroot. These two runs descend onto a catwalk traverse at the ski area boundary. Below the catwalk, a gladed area descends toward a paved private access road lying below a 19-foot retaining wall. There were nine ski area boundary signs on the catwalk. These signs faced uphill and were located at points along the downhill side of the catwalk, 24 to 51 yards apart over 303 yards.

On February 25, 2007, Jesse Anderson was descending Primrose. Despite the signs, he crossed the catwalk into the terrain below. Within moments, Anderson skied through the lower portion of the glade, fell off the retaining wall, dropped onto the paved road, and was severely injured.

On March 3, 2007, Melissa Ciocian, a mother of two toddlers, professional court reporter, and Gypsum resident, snowboarded down

essentially the identical path, through the upper glades of Primrose, crossed over the catwalk, and then rode off the retaining wall.

Both skiers sued Vail Resorts, arguing that the boundary signs did not comply with the requirements of the SSA under CRS § 33-44-107(6), which provides that "[t]he ski area operator shall mark its ski area boundaries in a fashion readily visible to skiers under conditions of ordinary visibility."

The trial court granted Vail Resorts summary judgment in both cases, finding that the ski resort's nine boundary signs satisfied its statutory duty. On appeal, the Colorado Court of Appeals reversed, holding that the skiers had shown a disputed issue of fact regarding the boundary signs' visibility.[30]

However, no discussion was taken up in those cases on the applicability of both skiers' season pass waivers. Vail Resorts admitted that it did not attempt to contract away its statutory duties under the SSA to mark its boundaries adequately through the exculpatory agreements.[31]

Bradley v. Aspen Skiing Co.*: Chairlift Operator's Statutory Duties of Care*

On February 20, 2010, Ryan Bradley was in the lift line at the Deep Temerity lift at Aspen Highlands. Bradley was an expert skier. He was also familiar with waivers and releases from his experience as an alpine guide and as a coach in the Roaring Fork School District. Bradley had a season pass—with an exculpatory agreement—to Aspen Highlands.

The Deep Temerity chairlift was a fixed grip triple chairlift. It served extreme terrain, and was a "dead end" lift, meaning that from the runs it serves, the Deep Temerity chairlift was the only lift out. From the base of the Deep Temerity, the only way to evacuate injured skiers was by transport up the lift to access trails leading to the base lodge and medical care.

Earlier that morning, before Bradley had entered the Deep Temerity lift line, the chair had been stopped to load an injured skier for evacuation. A "jake table" was used to load the injured skier onto the chairlift. A jake table is a steel frame adapted to fit on the chair and on which patrol can secure a patient-loaded toboggan. Lift attendants at the top terminal unload the toboggan, leave the jake table secured to the chair, and send it back to the lift's bottom terminal, where the attendants are supposed to stop the lift and unload the jake table.

After Bradley entered the lift line, and as he advanced toward the "load here" board, the chair carrying the unloaded jake table was approaching the loading area. The attendants failed to anticipate the loaded chair coming on the return side. The chair with the jake table swung around the lower bull wheel at full speed and proceeded to the loading area. A moment later, Bradley turned to look behind him to look at the chair to load. He was hit at full lift speed by the jake table and was injured. Ironically, Bradley was the next patient evacuated on the jake table. He sued Aspen Skiing Company.[32]

The governing standards for the operation of fixed grip aerial tramways are the American National Standards for Passenger Ropeways–Aerial Tramways, Aerial Lifts, Surface Lifts, Tows and Conveyors–Safety Requirements (ANSI standards). The ANSI standards have been promulgated as PTSB rules at 3 CCR 718-1 (2019). A violation of the PTSB's rules, when it results in personal injury or property damage, constitutes statutory negligence.[33]

Bradley's complaint against Aspen Ski Company pointed to a specific ANSI standard adopted by the PTSB that read: "A lift attendant is required: (1) to maintain orderly passenger traffic conditions within his/her area of jurisdiction, (2) to advise and assist passengers, as required, and (3) to maintain surveillance of his/her area of jurisdiction."[34] The ANSI standards then in effect required a lift operator to stop the lift immediately "[s]hould a condition develop in which continued operation might endanger a passenger."[35] Bradley maintained that the link between the SSA and the PTSB regulation adopted by ANSI clearly imposed a statutory duty of care upon the ski area and thus created a statutory negligence cause of action.

Aspen moved for summary judgment based on the season pass exculpatory agreement. Bradley objected based on the *Phillips* rule that parties may not contract away their statutory duties. Pitkin County District Court Judge Lynch denied Aspen's motion. The court held that the SSA provided for statutory negligence claims that the parties could not eliminate through private contracts.[36]

Harris v. Schreiber*: Colorado Snowmobile Act Provisions Not Preempted by Exculpatory Agreement*

On December 24, 2008, J. R. Harris was skiing at Keystone on a Vail Resorts' season pass. The pass carried an exculpatory clause functionally identical to that signed by Bradley, Anderson, and Ciocian. Harris was an experienced skier

who read, understood, and signed the season pass waiver.

Harris was descending a black diamond (expert) run immediately under the Wayback chair lift line. The Wayback lift line trail terminates as it intersects with a blue square (intermediate) transfer trail named Foxtrot (n/k/a Willows). Foxtrot descends from a skier's left to right relative to Wayback. A Keystone patroller was running a snowmobile uphill, against traffic on Foxtrot. As Harris intersected with Foxtrot, he had a duty to yield to skiers already on that trail. He was therefore looking left, in the direction of expected skier traffic. The patroller's snowmobile collided with Harris from the right. Harris sued Keystone and alleged per se or statutory negligence violations of the Colorado Snowmobile Act, CRS § 33-77-116.[37]

Presented with a CRCP 56(h) motion for determination of law, Summit County District Court Judge Ruckriegle held that the season pass exculpatory agreement was valid only "to the extent that an exculpatory clause disclaims duties that are not imposed by statute."[38] Snowmobile collision cases rest on the skiers' duty to lookout, ski in control, and stay clear of snow-grooming equipment.[39] The ski area operator's countervailing duty was founded upon the Colorado Snowmobile Act,[40] which expressly imposes a duty of care upon snowmobile operators to operate their machines with due care. The court found that the Snowmobile Act articulated a statutory duty upon which a claim for statutory negligence was allowed.[41]

Ingalls v. Vail Corp.: *Avalanche/Terrain Closure*

On January 22, 2012, 13-year-old Taft Conlin was swept away and killed by an avalanche on the Prima Cornice trail on Vail Mountain. His parents filed a wrongful death case against Vail Resorts. They alleged that Vail Resorts failed to comply with the SSA, which requires ski area operators to place a sign at the entrance of each portion of a trail or slope closed to the public notifying the public of the closure.[42]

Prior to the 2011–12 ski season, the Ingalls-Conlin family had purchased a Vail Resorts season pass for their son. The season pass paperwork contained a full liability release of Vail Resorts. The liability release, if enforceable, would have barred all plaintiffs' claims, even if the claims were based on an alleged breach of Vail Resorts' duties under the SSA. Nonetheless, the plaintiffs sued Vail Resorts for wrongful death. At the heart of their claim was Vail Resorts' failure to close off the lower gate into Prima Cornice, through which Taft Conlin had skied before ascending on the slope and then skiing down. The family alleged that Vail Resorts knew or should have known of the practice by local youngsters to enter Prima Cornice from the lower gate and climb up into the deep snow just below it. The family argued Vail Resorts had violated CRS § 33-44-107(4), which required a sign, rope, or fence closure at "each portion of the trail or slope involved" in the closure. Vail Resorts argued that the parents had effectively waived any claim for the death of their son by signing the season pass exculpatory agreement.

In ruling on a pretrial motion, Eagle County District Court Judge Gannett found that the season pass waiver was inoperable as a matter of law as to bar the statutory negligence claim. He held that the season pass release was invalid because it contradicted the ski area operator's statutory duty under the SSA.

Judge Gannett reasoned that the legislature intended the SSA to be the controlling standard for skier and ski area operator duties and liabilities. The court's conclusion was buttressed by the SSA's purpose, which expressly was to define the legal rights, responsibilities, and liabilities of ski area operators and skiers.[43] The court found the 2011–12 season pass's full liability release inconsistent with and therefore invalid to nullify the SSA's statutory duties.[44]

An Eagle County jury rendered its verdict for Vail Resorts.[45] In an unpublished opinion, the court of appeals affirmed the judgment, including a costs judgment in favor of Vail Resorts. It held that the special interrogatories submitted to the jury by the trial court properly guided the jury through the logic underlying the claim.[46]

Donohoe v. High Country Jeep Tours: *Colorado Premises Liability Act and Motor Vehicle Cases*

In June 2011, the Donohoe family was planning a Colorado vacation. They went online and bought a jeep tour in Chafee County. When the family arrived at the defendants' office they were presented with a "Release, Acceptance Of Responsibility And Acknowledgement Of Risks," which Mrs. Donohoe signed on behalf of her and her family. The online and in-office brochures indicated that the High Country Jeep Tours was licensed and insured. The brochures also warned that the deposit made when the tour was booked would not be refunded were the family to cancel the tour.

About one hour into the jeep tour, the driver lost control and rolled the jeep onto its side, causing serious injuries to the passengers.

The family sued.[47] In her amended complaint, Donohoe alleged claims under the Colorado Premises Liability Act (CPLA) and pursuant to Colorado statutory standards relating to careless driving. The defendants moved for summary judgment based upon the terms of the release.

The court denied defendants' motion for summary judgment, holding that the exculpatory agreement Mrs. Donohoe signed violated the public policy underlying the CPLA and the statewide regulation of motor vehicle safety.

Pre-*Redden* Colorado Federal Court Decisions on Exculpatory Agreements in Statutory Negligence Cases

The US District Court for the District of Colorado and the Tenth Circuit have consistently enforced exculpatory agreements to bar claims of injured skiers and boarders and in other recreational milieus.[48]

Rumpf v. Sunlight, Inc.: *Rental and Lift Ticket Waiver*

On December 27, 2012, Sally Rumpf went to Sunlight, a ski resort near Glenwood Springs, where she and her husband rented ski equipment. As part of the ski rental, they each executed a release, which stated:

> I AGREE TO RELEASE AND HOLD HARMLESS the equipment rental facility, its employees, owners, affiliates, agents, officers, directors, and the equipment manufacturers and distributors and their successors in interest (collectively "PROVIDERS"), from all

liability for injury, death, property loss and damage which results from the equipment user's participation in the RECREATIONAL SNOW SPORTS for which the equipment is provided, or which is related in any way to the use of this equipment, including all liability which results from the NEGLIGENCE of PROVIDERS, or any other person or cause.

The Rumpfs then purchased lift tickets. On the reverse side of the tickets sold by Sunlight there was, in small font, release language. Mrs. Rumpf fell while trying to board the Segundo chairlift and injured her shoulder. US District Court Judge Daniel granted summary judgment to Sunlight, finding "both agreements clearly and unambiguously express the parties' intent to release Sunlight from liability."[49] The Rumpfs never advanced a statutory negligence claim under the SSA,[50] but instead relied solely on meeting arguments by Sunlight under the *Jones* four-factor test: (1) whether the service involves a duty to the public, (2) the nature of the service provided, (3) whether the agreement was fairly entered into, and (4) whether the intention of the parties is expressed in clear and unambiguous language.[51]

Prior to *Redden*, as discussed above, lift accident plaintiffs had success in defeating exculpatory agreements in Colorado state courts by making statutory negligence claims under the SSA. In *Rumpf*, however, the court did not have an opportunity to consider statutory negligence claims.[52]

Brigance v. Vail Summit Resorts: *Ski School and Lift Ticket Waiver*

On March 23, 2015, Teresa Brigance visited the Keystone ski area, owned and operated by Vail Summit Resorts (Vail Resorts). Brigance was in a ski lesson taught by a Vail Resorts employee. Brigance was instructed on how to board and off-load the chair lift. Later, while unloading from the chair lift, Brigance's ski boot became wedged between the chair and the ground at the unloading area, causing injury. Brigance brought an action against Vail Resorts to recover for injuries she sustained while getting off the ski lift.

The Tenth Circuit found that the ski school waiver Brigance signed released Vail Resorts from liability.[53] The court recognized that that the SSA and PTSA identified various duties and responsibilities that, if violated, may subject a ski area operator to liability. Nonetheless, the court found that the statutory duties and responsibilities could be released in a waiver.[54] The court reasoned that under Colorado law, exculpatory agreements are not invalid as contrary to public policy simply because they involve an activity subject to state regulation. The court relied upon *B & B Livery, Inc. v. Riehl*, in which the Colorado Supreme Court enforced a broader clause limiting liability from non-inherent risks in equine activities.[55] The Tenth Circuit refused to distinguish the intent of the equine activities statute from that of the SSA. It held that exculpatory agreements do not conflict with Colorado public policy merely because they release liability to a greater extent than the statutory inherent risk bar on claims set out in the SSA.[56]

"The Tenth Circuit found that the ski school waiver Brigance signed released Vail Resorts from liability. The court recognized that that the SSA and PTSA identified various duties and responsibilities that, if violated, may subject a ski area operator to liability. Nonetheless, the court found that the statutory duties and responsibilities could be released in a waiver."

Raup v. Vail Summit Resorts: *Lift Ticket Waiver*

On June 25, 2013, Carolyn Raup visited Breckenridge and bought a lift ticket for a scenic ride up the Colorado SuperChair. Raup did not sign a release of liability. But at the bottom of the front of the ticket, in capital letters printed in five-point font, was the following language: "IMPORTANT WARNING ON REVERSE." Raup did not look at the back of the ticket, which included release language in small font.

At the unloading station for the SuperChair there was a mix-up and Raup failed to unload at the "unload here" position. She stumbled when she hopped off the chair past the unloading board and was hit by the chair from behind. She was knocked off the unloading platform and severely injured her leg and ankle. She sued Vail Resorts.

Raup's attorneys argued that the CPLA controlled, eschewing any reliance on the SSA and its link to the PTSA. Raup argued that the CPLA preempted the waiver and release. The Tenth Circuit disagreed, holding that the CPLA did not expressly preclude parties from using exculpatory agreements to execute waivers.[57] Raup did not invoke the SSA and PTSA in the lower court. The Tenth Circuit deemed that

Raup, through counsel, waived any arguments contending that her waiver was ineffective against statutory negligence claims because she failed to raise it in her original case.[58]

Patterson v. PowderMonarch, L.L.C.: *Exculpatory Agreement on Lift Ticket*

On March 18, 2014, Brenda Patterson made an online payment of $57 for a ski lift ticket at Monarch Mountain (Monarch), owned and operated by PowderMonarch, L.L.C. After purchasing her lift ticket, Patterson received an email confirmation, which thanked her for her "reservation" and informed her that there would be "NO REFUNDS for any cancellations under 48 hours." Patterson testified that she could not print her lift ticket at home and picked it up when she got to the ski area.

The back of the lift ticket contained the word "WARNING," followed by seven paragraphs printed in a small font disclaiming any liability and warning that use of the pass would constitute acceptance of these terms. This warning and the exculpatory language were printed on lightweight glossy material that peeled off to expose the ticket's adhesive side, which then needed to be folded onto a wicket commonly used to attach a lift pass to a skier's parka. Monarch argued that the ticket's peel-off portion was "designed so the ticket holder must interact with this 'WARNING' side by peeling it away from the adhesive front of the ticket before the ticket may be used to access the resort's ski facilities." Patterson testified that she did not read the ticket's warning before or after peeling it off and attaching it.

Later that day, Patterson and her son fell when unloading from a chairlift. The lift was not stopped while Patterson was lying on the ground. A skier from the next chair unloaded from the lift and collided with Patterson. Her ski boot hit Patterson's leg, causing injury to Patterson. She required extensive medical treatment.

Patterson sued Monarch, and the case was assigned to US District Court Judge Daniel, who had also decided *Rumpf*. He granted summary judgment in *Patterson* as well, for similar reasons. Once again the plaintiffs failed to raise the statutory negligence argument to void the exculpatory agreement.[59] On appeal, Patterson's attorneys argued that the addition of a release of liability two days after Patterson paid for her ticket constituted a contract modification for which there was no additional consideration, and that the exculpatory agreement was invalid under Colorado law because it was neither fairly entered into nor expressed in clear and unambiguous language. The Tenth Circuit disagreed, stating that "[t]he Colorado Supreme Court would find the exculpatory agreement at issue in this case to be fairly entered into due to its recreational nature and the lack of incompetency, compulsion, or other specific evidence that Ms. Patterson was essentially placed at the mercy of the other party's negligence."[60] The court further noted that it was not persuaded that the exculpatory agreement was unclear or ambiguous.[61]

It is important to note that in *Patterson*, *Raup*, and *Brigance*, arguments under the SSA and PTSA were not clearly before the trial court and thus limited the Tenth Circuit's review to claims under the CPLA and evaluation of the waivers in question under the standards of contract or unconscionability.

Espinoza v. Arkansas Valley Adventures: *Rafting Release*

Brown's Canyon on the Arkansas River has a particularly dangerous section of rapids from Fisherman's Bridge access to the Stone Bridge access. Within this section lies "Seidel's Suckhole," a Class IV rapid.

SueAnn Apolinar was a 38-year-old resident of San Antonio, Texas, who worked as a pharmacy technician. After looking at a website for Arkansas Valley Adventures (AVA), she booked a rafting trip on Brown's Canyon for herself and her son, Jesus "Jesse" Espinoza Jr., with AVA.[62] AVA was a river outfitter licensed under the Colorado River Outfitter's Act (CROA).[63] On June 7, 2011, before the trip began, she signed an exculpatory agreement entitled "Rafting Warning, Assumption of Risk, and Release of Liability & Indemnification Agreement" (the Agreement) on her and her son's behalf.

On June 8, 2011, the second day of the trip, Apolinar was thrown from her raft as it capsized in Seidel's Suckhole. A guide pulled her back into the raft, but before he could gain control of the raft, it reached the next rapid and capsized again, and Apolinar fell out again. The current swept into a logjam, where she became entangled and drowned.

Twelve days after Apolinar's death, the *Summit Daily News* reported that AVA's owner was quoted as saying that it's not uncommon for rafts to flip or dump paddlers in the Seidel Suckhole rapid, particularly when water levels rise to between 1,400 and 3,500 cubic feet per second.[64] Chaffee County Sheriff's deputies reported that the Arkansas was flowing at 3,340 cubic feet per second at the time of the accident.[65] Apolinar's son sued AVA, alleging negligence per se under the CROA and fraud. AVA sought summary judgment, arguing that the Agreement shielded it from liability.

Espinoza argued that the Agreement violated public policy because white water rafting is regulated by Colorado statute and that enforcement of the exculpatory clause in the Agreement would frustrate the purposes of regulation. Espinoza's attorneys argued that CROA makes it a misdemeanor for rafting companies to operate any raft in a careless or imprudent manner. As such, they argued that this was a matter of public concern and attempted to derive a per se negligence claim from the CROA,[66] citing *Stanley v. Creighton*.[67] There, the Colorado Court of Appeals invalidated exculpatory lease clauses because they conflicted with the CPLA.[68] The trial court held that *Stanley* did not control because the CROA did not provide for a civil remedy for the outfitter's breach of statutory safety standards.[69]

Espinoza also argued that AVA misrepresented that the trip was safe for beginner rafters. The trial court rejected that argument because no record evidence established how the Agreement was presented to Apolinar or the representations AVA made to her when she signed the Agreement.[70] Summary judgment was entered for AVA, and Espinoza appealed to the Tenth Circuit.[71]

Tenth Circuit Judge Gorsuch held that the exculpatory agreement did not violate Colorado public policy, notwithstanding the CROA's prohibition on rafting companies operating rafts in a careless or imprudent manner. Judge Gorsuch explained that the CROA appeared to be coextensive with the

> In a precursor to the logic employed in *Redden* and relying on *Brigance*, the magistrate judge noted that the SSA did not provide a 'clear legislative expression' of the legislature's intent to eliminate parties' ability to contract away negligence claims.

preexisting common law standard of care. While the CROA imposed criminal liability, it did not address civil liability.[72]

Judge Gorsuch also pointed out that the Colorado Supreme Court had held in equine cases that exculpatory agreements could bar claims otherwise permitted by the equine statute.[73] However, Judge Gorsuch noted:

> We do not mean to suggest that some future statute could not—or even that some other current statute might not—preclude the enforcement of releases like the one here. Neither do we mean to suggest that the Colorado Supreme Court could not alter its common law policy with respect to recreational releases.[74]

However, because no such provision existed, the Tenth Circuit affirmed the trial court's order, and final judgment was entered in AVA's favor.

Hart v. Blume*: Ski Collision Caused by On-Duty Snowboard Instructor*

Skier collision cases are not typically barred by standard ski waivers or by the doctrine of assumption of risk. However, for every rule there is an exception. On March 22, 2019, 60-year-old Michael Hart was skiing on Frontier, a beginner run at Breckenridge ski resort (owned by Vail Resorts) when he was allegedly run into by Omar Blume, an on-duty, uniformed snowboard instructor who was teaching a beginner-level snowboarding class. He and his class had just crossed over a "small" jump when the collision between Hart and Blume occurred.

According to Hart, Blume was the uphill and overtaking skier at the time of the collision, and was at fault for the incident. Hart had sustained a serious and potentially permanent shoulder injury, which required surgery and extensive rehabilitation and caused him to miss work.

Nearly three years before the collision, Hart had completed an online season pass application for Breckenridge. The application contained a release in which he agreed to not sue and to release from all liability Vail Resorts and its employees for any injury or loss that arose in whole or in part out of the pass holder's participation in skiing. Hart annually renewed his season pass online and in the "click-wrap" process clicked the "yes" button as acknowledgement of his prior season pass application and the release agreement.

Hart sued Blume in state court.[75] He did not sue Breckenridge. He acknowledged that he probably signed an exculpatory agreement when buying his season pass that barred his claim against Breckenridge. He was also counseled that from the standpoint of a ski area operator, a skier/snowboarder collision was the responsibility of the skiers involved, and the SSA considered a collision an inherent risk of skiing for which the ski area operator, but not the responsible skiers, were immune from liability.[76]

Blume moved for summary judgment, arguing that Hart's season pass release agreement immunized Breckenridge ski area employees from liability. Hart's attorneys argued that the SSA prohibited the release and preempted the exculpatory agreement's enforceability as to Blume. Specifically, Hart relied on CRS § 33-44-109(1), which provides that the ski area operator's immunities under the SSA do not preclude a skier from suing another skier for any injury. Specifically, the statute authorizes skier versus skier or snowboarder claims with the following language: "Notwithstanding any provision of law or statute to the contrary, the risk of a skier/skier collision is neither an inherent risk nor a risk assumed by a skier in an action by one skier against another."[77] Hart argued that the exculpatory agreement by its terms was an assumption of risk contract that impermissibly overruled section 109(1). Hart further argued that the SSA does expressly set out a preference against waivers in section 114, which states that "[i]nsofar as any provision of law or statute is inconsistent with the provisions of this article, this article controls."[78]

The magistrate judge disagreed and recommended summary judgment in Blume's favor.[79] The magistrate judge's recommendation stated that nothing in section 109(1) prohibits parties

from contracting away negligence claims. In a precursor to the logic employed in *Redden* and relying on *Brigance*, the magistrate judge noted that the SSA did not provide a "clear legislative expression" of the legislature's intent to eliminate parties' ability to contract away negligence claims. The parties ultimately agreed to a dismissal with prejudice, and District Court Judge Blackburn ordered the recommendation to be mooted.

Conclusion

The SSA was enacted to balance reasonable safety standards against the inherent risks of skiing. The statute itself states that its provisions control over any inconsistent provision of law or statute. The Colorado Supreme Court held in *Stamp v. Vail Corp.*[80] that the SSA sets forth the governing law concerning ski area liability regarding the operation of both ski slopes and ski lifts.

Now, however, every Colorado skier is skiing on a lift pass containing a waiver and release in favor of the ski area operators. The tension between the federal courts' enforcement in the recreational setting versus the equally long-standing Colorado state court doctrine of disallowing enforcement of exculpatory agreements in statutory negligence claims resulted in vastly different outcomes for plaintiffs.

In a closely decided 2-1 opinion, *Redden* resolved that tension. The duties established for ski area operators by the SSA essentially do not exist after *Redden*. Part 2 of this article discusses *Redden* in more detail, describes how courts in other jurisdictions construe exculpatory agreements, and considers how this area of law may evolve post-*Redden*. CL



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NOTES

1. *Redden v. Clear Creek Skiing Corp.*, 490 P.3d 1063 (Colo.App. 2020), *cert. denied*, No. 21SC94, 2021 WL 4099429 (Colo. Sep 7, 2021).
2. Ski Safety Act of 1979, CRS §§ 33-44-101 et seq., *as amended*.
3. CRS §§ 33-44-106, -107, -108.
4. CRS §§ 12-150-101 et seq. (formerly CRS §§ 25-5-701 et seq.).
5. The PTSB was created by CRS § 12-150-104.
6. CRS § 33-44-104(1) and (2). Section 104(1) reads: "A violation of any requirement of this article shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of the person violating such requirement." Section 104(2) reads: "A violation by a ski area operator of any requirement of this article 44 or any rule promulgated by the passenger tramway safety board pursuant to section 12-150-105(1)(a) shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of such operator."
7. *Summit Cnty. Dev. Corp. v. Bagnoli*, 441 P.2d 658, 665 (Colo. 1968).
8. *Bayer v. Crested Butte Mountain Resort*, 960 P.2d 70 (Colo. 1998).
9. *Id.* at 79.
10. These legal philosophical correlatives and opposites were taught by Prof. Thompson G. Marsh (1903–92) and Prof. Wesley N. Hohfeld (1879–1918). *See* Marsh, "A Tribute to Outstanding Lawyers in Colorado History," 31 *Colo. Law.* 13 (July 2002). *See also* Hohfeld, "Some Fundamental Conceptions as Applied in Judicial Reasoning," 23 *Yale L.J.* 16 (1913); Shapiro, "The Most-Cited Articles from the Yale Law Journal," 100 *Yale L.J.* 1449, 1514 (1991).
11. *See, e.g., Brigance v. Vail Summit Resorts, Inc.*, 883 F.3d 1243 (10th Cir. 2018).
12. Digital signatures are widely accepted as evidence of mutual assent. *Levine v. Vitamin Cottage Nat. Food Mkts, Inc.*, No. 20-cv-00261, 2021 WL 4439800, at *6 (D.Colo. Sept. 27, 2021).
13. Cakebread, "You're Not Alone, No One Reads Terms of Service Agreements," *Bus. Insider* (Nov. 15, 2017), https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11.
14. Email from Charles Luce, chair, Intellectual Property group, Moye White, LLP, to author (Jan. 10, 2023) ("The reliably predictable disregard given to, and the Mach 2 speed with which the average person scrolls through a clickthrough agreement, has often caused me to muse that the safest place in the world to hide a trade secret would be in the middle of the Apple End User License Agreement.").
15. *Barker v. Colo. Region*, 532 P.2d 372 (Colo. App. 1974); *Jones v. Dressel*, 623 P.2d 370, 375 (Colo. 1981).
16. *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982, 987 (Colo.App. 1983).
17. *Id.*
18. CRS § 33-44-108(2). The section was amended in 2004 to add: "This requirement shall not apply to maintenance equipment transiting to or from a grooming project." Colo. Sess. Laws 2004, Ch. 341, § 3, eff. May 28, 2004.
19. *Phillips*, 668 P.2d at 987.
20. *Bradley v. Aspen Skiing Co.*, No. 11cv43 (Pitkin Cnty. Dist. Ct. May 10, 2012); *Harris v. Schreiber*, No. 2009cv133, Lexis ID 28602069 at 9 (Summit Cty. Dist. Ct. Dec. 21, 2009); *Ingalls v. Vail Corp.*, No. 2015cv000015 (Eagle Cty. Dist. Ct. Dec. 2, 2021); *Donohoe v. Kirby*, No. 2013cv030039 (Chaffe Cty. Dist. Ct. Feb. 17, 2014).
21. *Bauer v. Aspen Highlands Skiing Corp.*, 788 F. Supp. 472 (D.Colo. 1992) ("I conclude that the exculpatory agreement was fairly entered into and is not an adhesion contract.").
22. *Bauer*, 788 F. Supp. at 475.
23. *Redden*, 490 P.3d at 1066.
24. Ski Safety Act of 1979, *supra* note 2.
25. CRS §§ 12-150-101 et seq.
26. *Redden*, 490 P.3d 1063 at 1076 ¶ 56 (quoting *Brigance*, 883 F.3d 1243 at 1261–62 (10th Cir. 2018)).
27. *Jones v. Dressel*, 582 P.2d 1057 (Colo.App. 1978), *aff'd*, 623 P.2d 370 (Colo. 1981).
28. The exculpatory clause extended to any "of the activities contemplated by this Agreement, whether such loss, damage, or injury results from the negligence of the Corporation, its officers, agents, servants, employees, or lessors or from some other cause." An important distinguishing fact in *Jones* is that the agreement, at least on its face, was not presented in a "take it or leave it" manner. In fact, "[t]he contract also contained an alternative provision which would have permitted Jones to use Free Flight's facilities at an increased cost, but without releasing Free Flight from liability for negligence." *Jones*, 623 P.2d at 372.
29. NTSB Report, ID No. DEN75FTE25, file No. 3-4290 (Oct. 19, 1974).
30. *Anderson v. Vail Corp.*, 251 P.3d 1125, 1128 (Colo.App. 2010); *Ciocian v. Vail Corp.*, 251 P.3d 1130, 1134 (Colo.App. 2010).
31. *Anderson*, 251 P.3d at 1129; *Ciocian*, 251 P.3d at 1134–35.

32. Jim Chalat and Evan Banker represented Ryan Bradley.

33. CRS § 33-44-104(2) provides that "[a] violation by a ski area operator of this article 44 or any rule promulgated by the passenger tramway safety board . . . shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of such operator."

34. 3 CCR 718-1, ANSI B77.1-2006 § 4.3.3.2.3. That regulation has since been amended by ANSI B77.1-2011 § 4.3.2.3.3. and adopted by the PTSB. The 2011 standard dilutes the standard of care: "[A] lift attendant is required to be knowledgeable of operational and emergency procedures; monitor passengers' use of the aerial lifts by observing, advising, and assisting passengers as they disembark from the lift; and to respond to unusual occurrences or conditions by choosing an appropriate action, *which may include, without limitation, s*topping the aerial lift." (emphasis added).

35. *Id.*

36. Order Regarding Defendant's Motion for Summary Judgment, *Bradley*, No. 11cv43.

37. Jim Chalat and Evan Banker represented J.R. Harris.

38. *Harris*, Lexis ID 28602069 at 9.

39. CRS § 33-44-109(2), (4).

40. CRS § 33-14-116.

41. *Harris*, Lexis ID 28602069 at 9 ("Despite the fact that exculpatory agreements are not invalid of themselves, statutory requirements cannot be avoided or modified by contract.") (first citing *Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 492 (Colo. 1998); then citing *Amedeus Corp. v. McAllister*, 232 P.3d 107 (Colo.App. 2009); and then citing *Phillips*, 668 P.2d at 987).

42. CRS § 33-44-107(4).

43. In his order, Judge Gannett relied on CRS § 33-44-102 as the source for the legislative purpose of the SSA.

44. Order Granting Plaintiff's Motion in Limine to Exclude Evidence of the Liability Waiver Associated With the 2011-2012 Vail Season Pass Application for Taft Conlin, *Ingalls v. Vail Corp.*, No. 2015cv000015 (Eagle Cty. Dist. Ct. June 8, 2018).

45. *See* Chalat, "Legal Precedent, Not Jury Verdict, at Heart of Conlin v. Vail," *Law Week Colo.* 15 (July 9, 2018).

46. *Ingalls v. Vail Corp.*, No. 2018CA1471, 2020 Colo.App. LEXIS 1658 (Colo.App. Oct. 1, 2020).

47. *Donohoe*, No. 2013cv030039. Jim Chalat represented Mrs. Donohoe and her daughter.

48. *Bauer*, 788 F. Supp. 472; *Patterson v. PowderMonarch, LLC*, 926 F.3d 633, 639 (10th Cir. 2019); *Brigance*, 883 F.3d 1243; *Raup v. Vail Summit Resorts, Inc.*, 734 F. App'x. 543, 546 (10th Cir. 2018); *Rumpf v. Sunlight, Inc.*, No. 14-CV-03328, 2016 WL 4275386 (D.Colo. Aug. 3, 2016).

49. *Rumpf*, 2016 WL 4275386, at *4.

50. *Id.* at *3. ("Based on the Plaintiffs' response, it does not appear that they are contesting that the exculpatory language contained in the rental agreement or the lift ticket satisfies the above-mentioned *Jones* criteria, arguing instead that because 'this case arises from a ski lift attendant's negligence, the exculpatory release language is inapplicable and irrelevant.'").

51. *Jones*, 623 P.2d at 376.

52. *Rumpf*, 2016 WL 4275386.

53. *Brigance*, 883 F.3d at 1256.

54. *Id.* at 1260.

55. *B & B Livery, Inc. v. Riehl*, 960 P.2d 134 (Colo. 1998).

56. Public policy does not always preclude exculpatory agreements as to claims of negligence per se. *Brigance*, 883 F.3d at 1250.

57. *Raup*, 734 F. App'x. at 553. The court supported its reasoning by referring to *Brigance*, stating that "when it comes to recreational services, 'individuals are generally free to walk away if they do not wish to assume the risks described in an exculpatory agreement.'" (citing *Brigance*, 883 F.3d at 1253–54). The court also noted that "we would have to blind ourselves to reality" to believe that the legislature thought that the CPLA barred exculpatory agreements.

58. *Raup*, 734 F. App'x. at 552.

59. Late in the case, plaintiffs attempted to argue that the CPLA was implicitly pleaded in the complaint. The court found that the CPLA was not properly before the court. *Patterson v. PowderMonarch, L.L.C.*, 16-CV-00411, 2017 WL 4158487, at *10 (D.Colo. July 5, 2017), *aff'd sub nom. Patterson v. PowderMonarch, LLC*, 926 F.3d 633.

60. *Patterson*, 926 F.3d at 641.

61. *Id.* at 643.

62. Opinion and Order Granting Motion for Summary Judgment, *Espinoza v. Ark. Valley Adventures, LLC*, No. 13-cv-01421, 2014 WL 4799663 (D.Colo. Sept. 26, 2014).

63. CRS § 33-32-104.

64. Kurbun, "A River Wild: Running Seidel's Suckhole on Colorado's Arkansas," *Summit Daily* (June 20, 2011), https://www.summitdaily.com/news/a-river-wild-running-seidels-suckhole-on-colorados-arkansas. *See also* Chalat, *supra* note 45.

65. Nguyen, "Victim Was on Commercial Rafting Trip Through Brown's Canyon When It Capsized," *Denv. Post* (June 8, 2011), https://www.americanwhitewater.org/content/Accident/detail/accidentid/3470.

66. *Espinoza v. Ark. Valley Adventures*, 2014 WL 4799663, *aff'd by Espinoza v. Ark. Valley Adventures, LLC*, 809 F.3d 1150 (10th Cir. 2016).

67. *Stanley v. Creighton Co.*, 911 P.2d 705, 708 (Colo.App. 1996).

68. *Espinoza*, 2014 WL 4799663, at *5.

69. *Id. Compare* CRS § 33-32-107(2)(b) *with* CRS § 33-44-104, which explicitly imposes civil liability for the breach by a skier or ski area operator of the express safety standards set out in the SSA. Judge Krieger wrote:

> However, the *Stanley*-type situation is not present here. CROA does not address the scope of civil liability of rafting operators . . . . Rather, it provides for the creation of safety standards that are enforceable by criminal penalty. *See* C.R.S. §§ 33-32-107, 108. If the exculpatory provision of the Agreement were to bar Mr. Espinoza's wrongful death claim, Colorado nevertheless could implement its public policy under CROA by prosecuting and punishing AWA under the CROA safety standards. In fact, the record reflects that CROA enforcement occurred in this case. *Id.*, at *5–6.

70. *Espinoza*, 2014 WL 4799663, at *4.

71. *Espinoza*, 809 F.3d 1150. Russell Hatten and Evan Banker of Chalat Hatten Banker PC participated in writing the brief for amicus curiae Colorado Trial Lawyers Association, in support of plaintiff-appellant.

72. *Espinoza*, 809 F.3d at 1156; *Lahey v. Covington*, 964 F.Supp. 1440 (D.Colo. 1996).

73. *Espinoza*, 809 F.3d at 1155 (citing CRS § 13-21-119(3) (equine statute) and *B & B Livery, Inc.*, 960 P.2d at 138)).

74. *Espinoza*, 809 F.3d at 1156.

75. The matter was then removed, on Blume's petition, to federal court. *Hart v. Blume*, No. 19-CV-02471, 2020 WL 1814412, at *2 (D.Colo. Mar. 26, 2020), *report and recommendation rejected*, No. 19-CV-02471, 2020 WL 1696050 (D.Colo. Apr. 7, 2020). Jim Chalat represented Hart.

76. CRS § 33-44-103(3.5). However, section 109(1) provides that

> a skier is not precluded under this article from suing another skier for any injury to person or property resulting from such other skier's acts or omissions. Notwithstanding any provision of law or statute to the contrary, the risk of a skier/skier collision is neither an inherent risk nor a risk assumed by a skier in an action by one skier against another.

77. CRS § 33-44-109(1).

78. CRS § 33-44-114.

79. Recommendation of US Magistrate Judge, *Hart*, No. 19-CV-02471.

80. *Stamp v. Vail Corp.*, 172 P.3d 437, 443 (Colo. 2007) ("The cumulative effect of these provisions gives the [Ski Safety Act] primary control over litigation arising from skiing accidents."). Co-author Michael J. Thomson represented plaintiffs.