

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED December 4, 2025 5:06 PM</p>
<p>Colorado Court of Appeals Court of Appeals Case No. 2024-CA-480</p>	
<p>Summit County District Court, Colorado Hon. Judge Reed W. Owens District Court Case No. 2022CV30043</p>	
<p>Petitioner/Appellant: JOHN LITTERER, v. Respondents/Appellees: VAIL SUMMIT RESORTS, INC., a corporation; and DWIGHT MCCLURE, an individual.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">ANSWER BRIEF</p>	

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 57, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

It contains 9,208 words.

The brief complies with C.A.R. 28(a)(7)(A).

In response to each issue raised, Appellees provide under a separate heading before the discussion of the issue, a statement indicating whether Appellees agree with Appellants' statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

Respectfully submitted this 4th day of December, 2025.

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Issues Presented for Review

The Court granted certiorari on these issues:

1. Whether the Court of Appeals erred when it held all of Plaintiff's claims against Defendants were waived when he purchased a 2022-2023 Epic Pass.
2. Whether the Court of Appeals erred when it upheld the dismissal of Plaintiff's willful and wanton conduct and exemplary damages claims.
3. Whether the Court of Appeals erred when it failed to address whether Vail's exculpatory agreements bar Plaintiff's claim for negligence per se under this court's decision in *Miller v. Crested Butte, LLC*, 549 P.3d 228 (Colo. 2024).

Statement of the Case

This case presents a straightforward contract matter. In late 2022 – months after suing Vail Summit Resorts, Inc. (“VSRI”) and its employee Dwight McClure for an accident in December 2020 while snowboarding at Breckenridge Ski Resort – Litterer agreed to release all his accrued claims against VSRI and its employees. Before purchasing a pass for the 2022-2023 ski season, Litterer was presented with a release agreement to consider and sign. That release agreement provided, among other things, that, “in exchange for allowing [Litterer] to participate” in snowboarding at Breckenridge, Litterer would “RELEASE AND GIVE UP ANY AND ALL CLAIMS AND RIGHTS THAT [HE] MAY NOW HAVE AGAINST ANY RELEASED PARTY.” CF, pp. 427-428. “Released Party” included McClure and VSRI. CF, p. 427. In the proposed release, Litterer affirmed that he “UNDERSTAND[S] THIS RELEASES ALL CLAIMS, INCLUDING . . . THOSE RESULTING FROM ANYTHING WHICH HAS HAPPENED UP TO NOW.” *Id.*

Litterer signed the release agreement at 9:22 a.m. on November 20, 2022. CF, p. 426. At that time, Litterer knew the nature and extent of his injuries. He knew what his existing claims were, because he had filed a lawsuit months earlier. He had the release agreement in front of him. That release was clear as a bell (“all claims,” “any and all claims,” “anything that has happened”). Litterer had lawyers with whom he could have discussed the release. He knew what he was getting in exchange, and nothing in the record suggests that Litterer was incompetent, hurried, under pressure, or unable to consult with his lawyers before signing.

The district court, and later the court of appeals, held that Litterer’s 2022 release was enforceable and required dismissal of his claims. Both courts were correct. Colorado’s strong public policy favoring freedom of contract extends at least as far as allowing an adult to release his existing, known claims. The judgment should be affirmed.

A. Litterer’s Accident

Litterer’s released claims arose as follows. While snowboarding at Breckenridge on December 18, 2020, Litterer collided with a red

snowmobile operated by McClure, a VSRI employee. CF, p. 4. Litterer, 6'1" and 190 pounds, was snowboarding downhill and moving at 20-30 miles per hour when he turned left at the intersection of the road where McClure was traveling. CF, pp. 297, 794.

It is undisputed that McClure, traveling to his workstation, was on a straight road that was an approved snowmobile route, was traveling well under the speed limit, and was in the middle of the road, not hugging the tree line to his right, as Litterer would later incorrectly claim. CF, pp. 183-184, 208-209, 458, 468, 474, 493, 506-508, 733. The snowmobile tracks in this picture show McClure's path:



CF, p. 493 (post-accident photograph taken from 100 feet behind the snowmobile's point of rest).

Litterer – snowboarding downhill toward McClure – had “the duty to ... maintain a proper lookout so as to be able to avoid other skiers and objects” and “the primary duty” “to avoid collision” with any person or object below him,” including McClure. *See* C.R.S. § 33-44-109(2).

However, Litterer was going so fast when he turned onto the snowmobile's road that he could not stop or change direction. CF, p. 588. Litterer later told his medical providers that he was going 20-30 miles per hour as he turned into the snowmobile's path. CF, p. 794.

Litterer hit the snowmobile and was injured, including a 1.5 centimeter cut on his lip and bruising on his abdomen. CF, p. 799. He was treated that day and discharged the next day “in good condition.” *Id.* After returning to Texas, Litterer saw a urologist twice, *see* CF, p. 154, the second time to go over his results, and saw an orthopedist, who recommended home stretches and exercises. *Id.* Litterer also claimed to

get massages every six months. *Id.*¹ An MRI more than two years later (in September 2021) found Litterer had “minimal” left hip osteoarthritis and other mild or minimal findings. CF, pp. 799-800.

B. Litterer’s Lawsuit and Subsequent Release

Litterer sued on May 10, 2022, naming McClure personally and VSRI as defendants. CF, p. 3. After the district court dismissed five claims, Litterer had four claims remaining: three against McClure (for alleged negligence, negligence per se, and “extreme and outrageous conduct”) and one claim against VSRI (for negligence to an invitee under the Premises Liability Act). Litterer based his negligence per se claim against McClure on a criminal law, the Colorado Snowmobile Safety Statute, C.R.S. § 33-14-116, not the Ski Safety Act or the Tramway Act. CF, p. 5. Litterer did not plead gross negligence.

Litterer then moved to amend his complaint, under C.R.S. § 13-21-102, to add a prayer for exemplary damages. CF, pp. 182-194. Section 102(1)(a) provides that, “In all civil actions in which damages are

¹ Litterer’s brief refers to “substantial time and treatment” before being “able to snowboard again.” *See* Op. Br., at 13. The brief gives no supporting record citation.

assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages.” *See* C.R.S. § 13-21-102(1)(a). Exemplary damages “may not be included in any initial claim for relief,” but can be sought in an amended complaint if the plaintiff “establishes prima facie proof of a triable issue.” *See* C.R.S. § 13-21-102(1.5)(a).

Litterer’s exemplary damages motion was meritless. He merely claimed that McClure was driving too close to the tree line on McClure’s right-hand side. CF, pp. 191-193. Nevertheless, under the forgiving “prima facie” standard that applies to such motions, the district court granted the motion to add exemplary damages.² CF, pp. 378-382. Litterer’s amended complaint then added a “fifth claim for relief,” for “exemplary damages.” CF, pp. 177-181.

² Such motions are hardly ever denied. A Westlaw search shows that of 383 Colorado appellate decisions involving motions to seek exemplary damages, the trial court denied the motion in four (4).

In late 2022, well after filing his complaint, Litterer decided to join his family for a ski trip to Breckenridge. CF, p. 445. For that trip, he bought a five-day ski pass in advance. *Id.* As a part of that transaction, Litterer signed the release agreement (the “2022 Release”), which provided in part:

In consideration for allowing the Participant to participate in the Activity, I FURTHER RELEASE AND GIVE UP ANY AND ALL CLAIMS AND RIGHTS THAT I MAY NOW HAVE AGAINST ANY RELEASED PARTY AND UNDERSTAND THIS RELEASES ALL CLAIMS, INCLUDING THOSE OF WHICH I AM NOT AWARE, THOSE NOT MENTIONED IN THIS RELEASE AND THOSE RESULTING FROM ANYTHING WHICH HAS HAPPENED UP TO NOW.

CF, pp. 427-428. Litterer submitted his electronic signature at 9:22 a.m. on November 20, 2022. CF, p. 426. It is undisputed that Litterer electronically signed the 2022 Release. CF, pp. 972-973. Indeed, Litterer testified that he “believe[d]” doing so was “a necessary requirement” to buy a ski pass. CF, p. 154.

C. The Summary Judgment Motion and Ruling

McClure and VSRI later moved for summary judgment on Litterer’s remaining claims for negligence, negligence per se, extreme and outrageous conduct, and negligence under the Premises Liability

Act. CF, pp. 510-533. The motion argued that no reasonable jury could find for Litterer on his outrageous conduct claim, CF, pp. 526-528, that his negligence per se claim was not viable, CF, pp. 525-526, and that Litterer's 2022 Release barred all his claims, CF, p. 523.

The motion specifically argued that Litterer had, on November 20, 2022, released all his then-existing claims against McClure and VSRI. CF, p. 523. The summary judgment motion included, as an undisputed material fact, that Litterer "agreed to the terms of" the 2022 Release. CF, p. 518. Attached to the summary judgment motion was a declaration from a senior manager at Vail Resorts Management Company establishing that Litterer purchased a 2022-2023 Epic Pass. CF, p. 414. The 2022 Release states at the top in capital letters:

RELEASE OF LIABILITY, WAIVER OF CLAIMS,
ASSUMPTION OF RISKS AND INDEMNITY AGREEMENT

WARNING: PLEASE READ CAREFULLY BEFORE
SIGNING! THIS IS A RELEASE OF LIABILITY WAIVER
OF CERTAIN LEGAL RIGHTS INCLUDING THE RIGHT
TO SUE

CF, p. 426.

Litterer opposed the motion, arguing that VSRI had "failed" to move for summary judgment on his "claim for exemplary damages," CF,

p. 617, which, contrary to Colorado law, Litterer apparently visualized as a free-standing claim.³ Applying the “*Jones* factors” applicable to *prospective* exculpatory agreements, see *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981), Litterer also argued that his 2022 Release was not “fairly entered into,” because it was an “adhesion contract,” and was not “clear and unambiguous,” because it did not describe the precise circumstances of his accident. CF, pp. 632-635.

The district court granted the summary judgment motion, holding that Litterer “released any and all claims” in his 2022 Release. CF, pp. 1255-1258. Applying “familiar principles of contract interpretation,” the district court found that the 2022 Release covered Litterer’s existing claims. 1256. The court rejected Litterer’s view that the 2022 Release was an “exculpatory agreement.” CF, p. 1257. As the court explained, in a post-accident release, the parties do “not contract in advance to

³ See, e.g., *Ferrer v. Okbamicael*, 2017 CO 14M, ¶ 44 (“Exemplary damages do not present a separate, distinct cause of action, but rather, depend on an underlying claim for actual damages.”), *superseded on other grounds by statute*, C.R.S. § 13-21-111.5(1.5)(c); *Palmer v. A.H. Robins*, 684 P.2d 187, 213 (Colo. 1984) (“[I]t is not a separate and distinct cause of action. Rather, it is auxiliary to an underlying claim for actual damages.”).

release tort liability.” *Id.* Instead, the parties voluntarily agree to resolve an existing dispute, both having knowledge of the alleged tort liability, the extent of the plaintiff’s injury, the merit (or lack thereof) of the plaintiff’s existing claims, and the consideration offered for the release. CF, pp. 1255-1256; *see also* 29 *Williston on Contracts*, § 73:1 (Thomson Reuters: 4th ed., May 2025 update) (“A release, as the word is used technically in speaking of executory contracts, is a discharge of an existing obligation or right of action”).

Accordingly, the district court concluded that the post-accident release does “not encourage [a] ski area operator’s lack of care” or “incentivize negligence.” CF, p. 1256. A party with an existing claim who thinks that claim is more valuable than the consideration offered for the release can simply reject it and continue to assert the claim. “Remorse,” the court noted, is “an insufficient basis” to set aside a release. CF, p. 1257 (quoting *Dearnley v. Mountain Creek*, 2012 WL 762150, at *4 (N.J. Super. Ct. App. Div. Mar. 12, 2012)). The court then dismissed “all claims with prejudice.” CF, p. 1258.

D. Litterer’s Rule 59(a) Motion and the District Court’s Ruling

Litterer moved under C.R.C.P. 59(a) to amend the judgment. CF, pp. 1005-1010. Litterer argued that the district court should not have dismissed his demand for exemplary damages because it was “synonymous with claims for gross negligence and willful and wanton conduct.” CF, pp. 1007. This was a sea change from Litterer’s summary judgment opposition, where he had argued that it was “improper [to] seek summary judgment on Plaintiff’s exemplary damages claim by now labeling it a ‘gross negligence’ or ‘willful and wanton’ claim[.]” CF, p. 618. Litterer’s Rule 59 reply also argued that a release can never apply to claims based on “willful and wanton conduct,” “regardless of when or how many times it is executed.” CF, p. 1121 (emphasis omitted).

The district court denied the Rule 59 motion. CF, pp. 1200-1207. The court first pointed out that it had dismissed Litterer’s alleged “claim” for “willful and wanton conduct” well more than 14 days before Litterer filed his Rule 59 motion. *See* CF, pp. 1202-1203; C.R.C.P. 59(a)(3)-(4). The court then held that an exemplary damages demand is not a “distinct cause of action,” and that a post-accident release, agreed

to “*after* sustaining injuries, *after* hiring a lawyer, and *after* suing” is enforceable, even if the plaintiff who agreed to the release had alleged “willful and wanton conduct.” CF, pp. 1203-1206.

E. Litterer’s Appeal to the Court of Appeals

Litterer appealed. After argument, a division of the court of appeals affirmed, finding that Litterer had released his existing claims in the 2022 Release. *Litterer v. Vail Summit Resorts, Inc. & Dwight McClure*, No. 24CA480, ¶¶ 17-18 (Jan. 30, 2025) (“COA Opinion”). The division noted the 2022 agreement “operates as a release rather than an exculpatory agreement with respect to Litterer’s claims[.]” *Id.*, ¶¶ 22-23. The division explained that an exculpatory agreement is “closely scrutinized” because it attempts to protect a party against future negligence, whereas a “release” is “the relinquishment of a vested right or claim to a person against whom the claim is enforceable.” *Id.* (quoting *Neves v. Potter*, 769 P.2d 1047, 1049 (Colo. 1989)).

As a release, the 2022 agreement was governed by “general contractual rules of interpretation and construction.” COA Opinion, ¶ 23 (citing *Bunnett v. Smallwood*, 793 P.2d 157, 159 (Colo. 1990)); *see*

also 29 Williston on Contracts, § 73:7 (“the rules of interpretation that are applicable to contracts generally are equally applicable to releases”). The division held that the 2022 Release was supported by an offer, an acceptance, and consideration – the basic requisites of contract formation. COA Opinion, ¶¶ 24-26.

Litterer argued that his “assent” was lacking because he did not testify that he read the 2022 Release and did not testify about his subjective intent. The division rejected these arguments, noting that Litterer had conceded that “his subjective and unexpressed intent or understanding of the [2022 Release] is irrelevant to his assent to the agreement.” COA Opinion, ¶¶ 25-26. The division further reasoned that the language of the 2022 Release was unambiguous and that “Colorado law recognizes that one generally cannot avoid contractual obligations by claiming that he or she did not read the agreement.” *Id.*, ¶¶ 26-27 (internal quotation marks and citation omitted). The division rejected Litterer’s “undeveloped” unconscionability assertion. *Id.*, ¶ 28.

Because Litterer had agreed to the 2022 Release, the division next considered whether the district court properly applied that release in

Litterer’s case. The division held that it had: the 2022 Release clearly and unambiguously applied to Litterer’s existing claims, and “dismissal of claims encompassed by” a release is “proper[.]” COA Opinion, ¶ 30 (quoting *Arline v. Am. Fam. Mut. Ins. Co.*, 2018 COA 82, ¶ 12)); *see also* 29 *Williston on Contracts*, § 73:9 (“As is the case with any contract, the scope and meaning of a release is generally governed by the intent of the parties as expressed in their written document”); C.R.C.P. 8(c) (recognizing “release” as an affirmative defense).⁴ That holding also resolved Litterer’s contention that his supposed “claim” for “willful and wanton conduct” should not have been dismissed. COA Opinion, ¶ 38. Finally, the division held that Litterer’s demand for exemplary damages could not survive without an underlying claim for actual damages. *Id.*, ¶¶ 47-48.

Because the division relied on the 2022 Release, it did not reach the other issues raised on appeal. COA Opinion, ¶¶ 35-48.

Litterer then filed a petition for certiorari, which was granted.

⁴ Rule 8(c) recognizes “waiver” as a separate affirmative defense. *See* C.R.C.P. 8(c).

Summary of the Argument

This case was properly resolved by the district court and again by the court of appeals, each applying basic contract principles. The division correctly held that Litterer’s 2022 Release of “any claims that [he] may have against any released parties” arising from “anything that may have happened up until now” obviously covered claims arising from his 2020 accident. COA Opinion, ¶ 23. The division also correctly held that “exemplary damages” is not a free-standing “claim.” *Id.*, ¶¶ 47-48. Finally, the division rightly did not reach an issue (whether *Miller’s* interpretation of the Ski Safety Act’s effect on prospective waivers of negligence per se claims asserted under that Act or the Tramway Act should be applied to the snowmobile statute, a criminal law) it need not reach to decide Litterer’s appeal. *Id.*, ¶ 47.

Litterer’s opening brief fails to identify any error in the division’s decision. Most of the brief simply lifts statements from court opinions, strips them of context, and asserts them as alleged support for invented legal “rules.” One such rule supposedly bars a plaintiff from “ever” releasing existing negligence per se or gross negligence claims – no

matter how often or when they are released. Another rule supposedly treats an exemplary damages demand as the same as a claim for gross negligence. These putative legal rules are unsupported by any case or statute and conflict with Colorado's public policy of freedom of contract.

Litterer – a competent, 31-year-old adult – freely released his existing claims against McClure and VSRI. He was presented with clear contract language, had counsel available, knew of his existing claims, and voluntarily agreed to terms, set out in attention-grabbing CAPITAL LETTERS, that released those claims. The only Colorado authority that limits releases such as Litterer's is C.R.S. § 13-21-301(1)(b), which precludes a release within 30 days of an injury if the claimant is hospitalized or under the care of a medical professional. That statute allows the release here.

The judgment should be affirmed.

Argument

I. The Court of Appeals Correctly Held That Litterer Released His Existing Claims in the 2022 Release

The court of appeals held that Litterer released his existing claims in 2022, when he decided to come back to Breckenridge for more snowboarding and signed the 2022 Release. COA Opinion, ¶ 11, 29-30. Because Litterer released his claims, the district court had properly granted summary judgment to the released parties. That result was correct and consistent with precedent. Litterer’s contract formation and policy challenges to his 2022 Release have no merit.

A. Preservation and Standard of Review

Litterer incorrectly claims he preserved his “contract formation” arguments and misstates the standard of review. *See Op. Br.*, at 15-16.

1. Litterer Did Not Preserve His “Contract Formation” Arguments

Litterer conflates two distinct issues: (1) whether the parties ever formed a contract and (2) whether the terms of the 2022 Release cover his claims. *Compare Op. Br.*, at 16 (claiming to have preserved “contract

formation issues”) *with id.* at 30 (arguing about “[t]he *scope* of a general release” (citation omitted)).

In their summary judgment motion, McClure and VSRI included, as an undisputed material fact, that Litterer agreed to the 2022 Release. CF, p. 518 (Statement of Undisputed Material Facts # 9) (“Plaintiff agreed to the terms of a Release of Liability, Waiver of Claims, Assumption of Risk, and Indemnity Agreement”). Litterer did not dispute that material fact or otherwise deny that he had agreed to the 2022 Release, and the district court naturally found no genuine dispute on this issue at summary judgment. CF, pp. 1240-1241.⁵ Nor did Litterer allege any genuine dispute about fraud, mistake, misrepresentation, lack of consideration, or another issue that would prevent the formation of the 2022 Release. *Id.*

Litterer’s contract formation arguments appeared for the first time in the court of appeals. The division held that, by contesting two of the “Jones factors” – neither of which are about whether a contract was

⁵ Litterer argues that he preserved his contract formation arguments at page 623 of the record. *See Op. Br.*, at 16 (citing “R.623.”). That page has nothing to do with contract formation.

formed – Litterer had sufficiently disputed contract formation. COA Opinion, ¶ 18. The division then considered, and rejected, Litterer’s contract formation argument. Thus, while the Colorado Supreme Court *can* review the division’s holding about formation because it “ha[s] actually been determined by another court,” *see Comm. For Better Health Care for All Colo. Citizens by Scheier v. Meyer*, 830 P.2d 884, 888 (Colo. 1992), it should instead deem Litterer’s challenges to contract formation forfeited and affirm on that basis, *see People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006) (“On appeal, a party may defend the trial court’s judgment on any ground supported by the record, whether relied upon or even considered by the trial court.”).

2. Litterer Misstates the Standard of Review

Litterer’s statement of the standard of review is also lacking. Op. Br., at 15. Whether a contract was formed is a question of fact. *Yaekle v. Andrews*, 195 P.3d 1101, 1111 (Colo. 2008). While the summary judgment record is reviewed de novo, a defendant’s “affirmative showing of specific facts, uncontradicted by any counter affidavits, leaves a trial court with no alternative but to conclude that no genuine

issue of material fact exists.” *Civil Serv. Comm’n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). Because Litterer did not contest his acceptance of the contract in the district court, the Court should consider his acceptance as conclusively established.

Because Litterer did not deny contract formation in the district court, all “competent evidence in the record” supports the district court’s finding. The effect of an unambiguous release is a question of law. *See Mahoney Marketing Corp. v. Sentry Builders of Colorado, Inc.*, 697 P.2d 1139, 1140 (Colo. App. 1985) (citing *Radiology Professional Corp. v. Trinidad Area Health Ass’n*, 577 P.2d 748 (Colo. 1978)); *see also* 76 *C.J.S. Release § 99 (May 2025 update)* (“Generally, the meaning, construction, interpretation, and legal effect of a release are questions of law for determination by the court, where there is no ambiguity in the instrument.”).

B. Litterer Agreed to the 2022 Release

The division correctly held that Litterer agreed to the 2022 Release, as matter of standard contract formation principles. *See* COA Opinion, ¶¶ 25-27.

A release is “an agreement to which general contractual rules of interpretation and construction apply.” *Bunnett*, 793 P.2d at 159; *see also Matter of Estate of Arnold*, 2024 COA 44, ¶ 12 (applying contract rules to interpret a release); *Restatement (Second) of Torts*, § 885, cmt. c (“[T]oday releases are effective if given for consideration although not under seal and are therefore regarded as contracts rather than grants.”). Under Colorado law, contract formation requires “mutual assent to an exchange, between competent parties, with regard to a certain subject matter, for legal consideration.” *FDIC v. Fisher*, 2013 CO 5, ¶ 11 n. 2 (citation and quotation omitted). All those requirements are met here.

1. Mutual Assent to the 2022 Release

Litterer and VSRI both assented to an exchange. VSRI would allow Litterer to participate in snowboarding at its resorts, and Litterer would “release and give up any and all claims and rights that [he] may now have” against VSRI and its employee McClure, including “those resulting from anything that has happened up to now.” As *Miller* held, a

party assents to the pass terms by “purchasing and using the passes.”

Miller v. Crested Butte, LLC, 2024 CO 30, ¶ 8.

Litterer nevertheless claims that the 2022 Release lacked “mutual understanding and agreement,” arguing without any evidentiary support that he “never intended to dismiss all his active claims[.]” *See Op. Br.*, at 30-31. This argument, which Litterer barely develops, is without merit.

First, Litterer’s “subjective, unexpressed intent” is irrelevant to mutual assent. *French v. Centura Health Corp.*, 509 P.3d 443, 449 (Colo. 2022); *see also Restatement (Second) of Contracts*, § 17, cmt. c (“it is clear that a mental reservation of a party to a bargain does not impair the obligation he purports to undertake”). Litterer’s post-formation assertions about what he subjectively “intended” are not relevant.

Second, “mutual assent” is shown by objective manifestations, including the parties’ “acts, conduct, and words, along with attendant circumstances[.]” *French*, 509 P.3d at 449. The objective evidence that Litterer assented to the 2022 Release is overwhelming.

On November 20, 2022, at 9:22 a.m., Litterer electronically signed a “Release of Liability, Waiver of Claims, Assumption of Risks and Indemnity Agreement.” CF, p. 426. The agreement had a “WARNING,” advising Litterer to “PLEASE READ CAREFULLY BEFORE SIGNING!” *Id.* Litterer was advised that the agreement was a condition of snowboarding at Vail-owned resorts in the 2022/2023 ski season. Litterer paid for the pass after signing the 2022 Release, received the pass, and then used the pass to snowboard at Vail-owned resorts. CF, p. 445. That was sufficient assent to the 2022 Release. *See, e.g., Miller*, 2024 CO 30, ¶ 8. None of Litterer’s “objective acts raise a question about the presence of any ‘manifestation of assent’” to the 2022 Release when he signed it, and his “bald assertion of lack of subjective intent” is immaterial. *Avemco Ins. Co. v. N. Colo. Air Charter, Inc.*, 38 P.3d 555, 565, 563 (Colo. 2002).

Third, Litterer suggests that his “ongoing lawsuit” shows that he did not agree to release his claims. *See Op. Br.*, at 31. The Court, however, rejected exactly that argument in *Avemco*. There, the defendant argued that, because it had filed counterclaims on a contract,

it logically would not have assented to rescind that same contract. *Avemco*, 38 P.3d at 564. The Court held that the ongoing litigation was irrelevant to whether the defendant's objective acts showed assent to the rescission. *Id.* ("NCAC also places great weight on the fact that, before it cashed the premium refund check, it filed its counterclaims. NCAC contends that this provides evidence of its intent *not* to agree to the rescission attempted by *Avemco*. Again, we are unpersuaded."). Ongoing litigation – which often might be exactly why parties are agreeing to a release – is not the kind of “surrounding circumstance” that undermines objective evidence of mutual assent to a release. *Cf. Restatement (Second) of Contracts*, § 18, cmt. c (“In some cases the setting makes it clear that there is no contract, as where a business transaction is simulated on a stage during a dramatic performance.”).

Moreover, Litterer's repeated argument that the 2022 Release required him to “voluntarily dismiss” his lawsuit, which he did not agree to do (and, in fact, never did), is unavailing. *See Op. Br.*, at 30-31. The 2022 Release provides a defense to be asserted and decided in the lawsuit, not an automatic dismissal of the lawsuit, just as rescission

was a defense in *Avemco*. See 38 P.3d at 557 (“*Avemco* then moved for summary judgment on all claims, including the claim of mutual rescission. The trial court granted summary judgment in *Avemco*’s favor on the issue of mutual rescission.”).

Finally, Litterer’s reliance on *Cruz v. Benine*, 984 P.2d 1173, 1179 (Colo. 1999), for the proposition that he did not intend to release McClure and VSRI – the parties he was already suing – from liability is misplaced. Op. Br., at 31. There, the Colorado Supreme Court held that the Uniform Contribution Among Tortfeasors Act, C.R.S. § 13-50.5-105, did not bar the petitioner’s action against two respondents who were not parties to a prior lawsuit because the settlement agreement resolving the first action did not expressly release the respondents and the respondents did not show the settlement parties intended to release them from liability. See *Cruz*, 984 P.2d at 1180 (“Tortfeasors who were not parties must show ‘either that the release was intended to discharge them or that the releaser has received full compensation for the injuries sustained.’”) (citing *Neves*, 769 P.2d at 1053).

By contrast, there can be no doubt that the 2022 Release governs the claims Litterer had asserted against McClure and VSRI. The 2022 Release expressly released VSRI and its “employees” from “any and all” claims Litterer had against them. CF, p. 427. Litterer knew exactly who he was releasing from liability because he had already alleged that McClure was operating the snowmobile at Breckenridge, a VSRI-owned resort, and that McClure and VSRI were responsible for his injuries. CF, p. 4. Litterer chose to release them and go back to the same resort to snowboard, just six months after he sued over his accident.

2. Competent Parties

Litterer does not argue that he was not competent to agree to the exchange. He was over 30 years old and of sound mind.

3. Certain Subject Matter

The exchange was “with regard to a certain subject matter,” *FDIC*, 2013 CO 5, ¶ 11 n. 2, specifically the terms and conditions of Litterer’s access to Vail-owned resorts in the 2022/2023 ski season. Litterer does not argue that he mistakenly believed he was entering into an

agreement with a different party or with respect to a completely different subject matter. *See id.*

4. Supported by Legal Consideration

Finally, the release was supported by “legal consideration”: VSRI’s promise to allow Litterer to access its resorts in the 2022/2023 ski season if conditions allowed. VSRI (which is neither a common carrier nor a public utility) was not required to give access to Litterer, who had already sued VSRI and made incorrect claims about the conduct of an employee. VSRI provided sufficient consideration to Litterer. *See Lucht’s Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1061 (Colo. 2011) (“This court has long held that any benefit to a promisor or any detriment to a promisee at the time of the contract—no matter how slight—constitutes adequate consideration.”).

C. Litterer’s 2022 Release Unambiguously Applied to His Claims

Litterer’s 2022 Release was clear and unambiguous. In it, he “release[d] and g[a]ve up any and all claims and rights [he] may now have against any released party.” CF, pp. 427-428. Litterer affirmed

that he “understand[s] this releases all claims, including . . . those resulting from anything which has happened up to now.” *Id.*

Though Litterer now argues that this language is “overbroad and ambiguous,” nothing about it is ambiguous or overbroad. A contract term is ambiguous if it is susceptible to more than one reasonable interpretation, which the 2022 Release of existing claims is not. *See Ad Two, Inc. v. City & Cnty. of Denver*, 9 P.3d 373, 376 (Colo. 2000). The phrase “any and all claims” covers just that, “any and all claims.” *See, e.g., Stamp v. Vail Corp.*, 172 P.3d 437, 447 (Colo. 2007) (rejecting the “illogical conclusion” that “any,” even standing alone, “means ‘less than all.’”); *Hudgeons v. Tenneco Oil Co.*, 796 P.2d 21, 23 (Colo. App. 1990) (“‘All’ is an unambiguous term and means the whole of, the whole number or sum of, or every member or individual component of, and is synonymous with ‘every’ and ‘each.’”). And the relevant claims are those “resulting from anything that has happened up to now.”

Nor is the 2022 Release “overbroad.” It covers exactly what a release would be expected to cover: all claims against the released parties that Litterer had when he signed the release, “resulting from

anything which has happened up to now.” *See Neves*, 769 P.2d at 1049. Indeed, Litterer knew what his claims were when he signed the 2022 Release because he had already asserted them.

Litterer’s overbreadth argument relies solely on a Ninth Circuit decision, *Farina v. Mt. Bachelor, Inc.*, 66 F.3d 233, 235 (9th Cir. 1995), which is inapposite here. *See Op. Br.*, at 20, 22, 31. *Farina* did not hold that a release was “overbroad” because it released “any and all” existing claims. Instead, applying Oregon law, the court held that the “release clause [sic]” which Farina signed “prior to his accident,” *see* 66 F.3d at 234, was “void” because “Mt. Bachelor sought to exculpate itself for any and all claims that an injured skier *might bring* against it,” including gross negligence and willful misconduct. *Id.*, at 236 (emphasis added). The clause was void under Oregon law because it sought to prospectively waive gross negligence, not because it retrospectively released “any and all” existing claims.

In an argument that jumbles his objections to the validity of the 2022 Release with his arguments about its scope, Litterer claims that he “never intended to dismiss all of his active claims” so there was no

“meeting of the minds” about whether the 2022 Release applied to those claims. Op. Br., at 31. Litterer cites no record evidence supporting an inference that he misunderstood the scope of the 2022 Release when he signed it. Moreover, it is a “fundamental principle of contract law” that “an unambiguous contract cannot be made ambiguous by extrinsic evidence.” *Am. Fam. Mut. Ins. Co. v. Hansen*, 2016 CO 46, ¶ 27.

Likewise, “if the language of the contract is unambiguous, it will be deemed to express the intent of the parties,” and the Court will “not engage in further examination of the surrounding circumstances” to determine subjective intent. *Hess v. Hobart*, 2020 COA 139M2, ¶ 13.

The division did not err when it held that the 2022 Release unambiguously applied to claims arising from Litterer’s 2020 accident. COA Opinion, ¶ 29.

D. Litterer Was Free to Release All His Claims

Litterer argues, apparently as a matter of free-ranging public policy, that existing gross negligence and negligence per se claims can “never” be released, even by an adult represented by counsel. *See Op.*

Br., at 22. Litterer claims that Colorado courts have already forbidden any and all releases of those claims. He is incorrect.

First, the General Assembly has legislated in this area, *see* C.R.S. § 13-21-301, but Litterer’s proposed public policy is nowhere to be found. *In re Marriage of Zander*, 2021 CO 12, ¶ 22 (“The General Assembly is the branch of government charged with creating public policies, and the courts may only recognize and enforce such policies.”) (quoting *Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540, 553 (Colo. 1997)). When the General Assembly enacted C.R.S. § 13-21-301, it imposed just one limitation on a post-injury general release: those releases “shall be void” if given “[w]ithin thirty days after the date of the occurrence causing the injury” by a person who was “under the care of a practitioner of the healing arts” or was hospitalized. *See* C.R.S. §§ 13-21-301(1)(b), (2). This provision does not apply to Litterer because he gave his release almost two years after his accident. The General Assembly has not imposed any other restriction on the freedom of competent adults to release their existing claims.

The statute does not limit enforceability in any of the ways Litterer wishes. *Marriage of Zander*, 2021 CO 12, ¶ 22 (“[I]t is not for the courts to enunciate the public policy of the state if, as here, the General Assembly has spoken on the issue.”) (citing *Grossman v. Columbine Med. Grp., Inc.*, 12 P.3d 269, 271 (Colo. App. 1999)). To the extent that Litterer desires a change in the law, the place to accomplish that is at the General Assembly. *Id.*

Second, the General Assembly has acted with precision with respect to releases of specific claims or by specific plaintiffs. *See Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1233 (Colo. 2002) (“[T]he Colorado Probate Code provides significant procedural protections for minors in the post-injury claim context.”); C.R.S. § 15-14-412(1)(b) (before granting a petition to approve a personal injury settlement for a child or other protected person, the probate court must determine that the settlement “is in the best interest of the protected person”); C.R.S. § 13-20-806(7)(a)-(b) (forbidding “any express waiver of, or limitation on, the legal rights, remedies, or damages provided by” the Construction Defect Action Reform Act or the Colorado Consumer Protection Act but

allowing “[a] waiver, limitation, or release contained in a written settlement of claims, and any recorded notice of such settlement, between a residential property owner and a construction professional after such a claim has accrued”). The General Assembly has never provided that gross negligence or negligence per se claims cannot ever be released by a competent adult.

Third, Colorado courts have not adopted Litterer’s never-releasable position. Litterer’s quotations from *Miller* and other cases make the mistake of taking general statements from an opinion while ignoring their context. *See City of Aurora v. Congregation Beth Medrosh Hagodol*, 345 P.2d 385, 388 (Colo. 1959) (“General expressions in an opinion must be read in the light of the questions presented and the facts in the particular case.”); *Ark. Game & Fish Com’n v. United States*, 568 U.S. 23, 35 (2012) (“[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.”) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821)).

Miller concerned a prospective waiver of a negligence per se claim. 2024 CO 30, ¶¶ 7-9, 39 (considering whether C.R.S. § 13-22-107 allows

releases of “prospective negligence claims on behalf of a child”); *id.*, at ¶ 68 (Márquez, C.J., dissenting in part) (“As relevant here, Statute 13-22-107(3), C.R.S. (2023) expressly permits a parent to waive their child's prospective claim for ‘negligence.’”). *Miller* was routine in this respect: Cases involving “exculpatory agreements” concern the validity of releasing claims for “future negligence.” See *Stone v. Life Time Fitness, Inc.*, 2016 COA 189M, ¶ 21; *Wycoff v. Grace Comm. Church of Assemblies of God*, 251 P.3d 1260, 1263 (Colo. App. 2010); *Shive v. 24 Hour Fitness USA, LLC*, 2025 COA 87, ¶¶ 5-6; see also *Colton v. The New York Hospital*, 414 N.Y.S.2d 866, 872 (N.Y. Sup. Ct. 1979) (explaining that “exculpatory agreement” refers to “agreements prospectively limiting liability”).

Indeed, because only a *prospective* negligence per se claim was involved, *Miller* quoted the language governing *prospective* negligence claims, omitting the language dealing with already-accrued claims. See 2024 CO 30, ¶ 7 (omitting agreement to “release and give up any and all claims and rights that I may now have against any released party,” including “those resulting from anything which has happened up to

now”). The Colorado Supreme Court’s statements about enforceability must be taken in that context. *City of Aurora*, 345 P.2d at 388. Unlike *Miller*, this case involves application of a post-injury release to existing claims. *Miller* has nothing to say about a post-injury release.

Litterer points out that the *Miller* court referred to “private release agreements,” even though that case involved a pre-injury agreement. *See* Op. Br., at 29. That reads too much into the court’s use of the word “release.” *Miller* involved C.R.S. § 13-22-107(3), which provides that “[a] parent of a child may, on behalf of the child, release or waive the child’s *prospective claim* for negligence.” *See* C.R.S. § 13-22-107(3) (emphases added). (In *Cooper*, the case prompting Section 107(3), the agreement was called, in part, a “release.” *See* 48 P.3d at 1231-32.) The *Miller* court was simply tracking the statutory language, not *sub silentio* addressing existing, “non-prospective” claims for negligence *per se*. And the *Miller* court also referred to the agreement there as an “exculpatory agreement,” *see* 2024 CO 30, ¶¶ 19, 36, a “parental waiver,” *see id.*, ¶¶ 41-42, and a “liability waiver.” *Id.*, ¶ 42.

Moreover, if Litterer’s reading of *Miller* were correct, then the Colorado Supreme Court outlawed post-injury, post-accrual releases by adults of negligence per se and gross negligence claims, in a case having nothing to do with adults or with post-injury, post-accrual releases.⁶ That interpretation of *Miller* would mean such claims can never be privately settled and must be taken to trial in order to bring a dispute to resolution, an absurd result which would violate longstanding public policy favoring settlement. *See, e.g., Davis v. Flatiron Materials Co.*, 511 P.2d 28, 32 (Colo. 1973); *Arline*, 2018 COA 82, ¶ 19; *Smith v. Zufelt*, 880 P.2d 1178, 1185 (Colo. 1994) (“When considering alternative consequences, we will defer to results that encourage the settlement of disputes.”) (citations omitted); *Mem. Med. Ctr. of East Texas v. Keszler*, 943 S.W.2d 433, 435 (Tex. 1997) (“There is no logic in prohibiting people from settling existing claims. Significantly, such a rule would preclude

⁶ Whether a gross negligence claim could be prospectively waived was not at issue in *Miller*; everyone agreed that such a claim could not be prospectively waived. The Court’s discussion of gross negligence was therefore dictum. *See People in Int. of Clinton*, 762 P.2d 1381, 1385 (Colo. 1988) (noting that when language in an opinion “was not necessary to the disposition of the issues presented,” such language “should be recognized as dictum without precedential effect”).

settlement of many such claims.”); *Williston on Contracts*, § 73:7 (“because releases are in the nature of settlements, the strong public policy in favor of encouraging the resolution of disputes is also implicated, and courts will interpret releases to further that policy”).

As Litterer’s position demonstrates, general language in an opinion can “lead to bizarre results if considered outside the context of the whole opinion.” *City of Aurora*, 345 P.2d at 387. Litterer’s view would mean no competent adult could ever release a negligence per se or gross negligence claim, no matter “when or how often” they agreed to a release, and that no settlement of those claims would ever be valid, final, or enforceable.

Finally, Colorado’s long-settled policy of contractual freedom strongly favors allowing competent parties to release their existing claims. *See, e.g., Ravenstar, LLC v. One Ski Hill Place, LLC*, 2017 CO 83, ¶ 12; *City & Cnty. of Denver v. District Court*, 939 P.2d 1353, 1361 (Colo. 1997) (“The right of parties to contract freely is well developed in our jurisprudence.”). Whether to release Litterer’s existing claims for damages was a decision for Litterer to make, just as suing in the first

place was his decision to make. Nothing prevented him from rejecting the 2022 Release, snowboarding elsewhere, and continuing to sue, if he thought that was the best course for him or if he wished to pursue McClure or VSRI for their supposed “gross negligence” or to hold McClure or VSRI to their alleged “statutory obligations” under the snowmobile statute. Any public interest in whether Litterer should have released his existing claims or continued to pursue them was miniscule, at best. Having made his choice, Litterer cannot take the benefits of his release while rejecting its obligations.

The court of appeals correctly held that Litterer released all his existing claims in the 2022 Release.

II. The Court of Appeals Correctly Rejected Litterer’s Exemplary Damages Demand and His Alleged Claim for “Willful and Wanton Conduct”

Litterer argues that, because he was allowed to demand exemplary damages, he was on a glide path to a jury trial with unreleasable “exemplary damages” and “willful and wanton” “claims.” *See Op. Br.*, at 34-37. Litterer is incorrect. Because the court of appeals correctly concluded that Litterer’s release barred “any and all” of his

existing claims against McClure and VSRI, it also properly rejected Litterer's demands that he be allowed to try a free-standing "claim" for exemplary damages, or a supposed "claim" for "willful and wanton conduct." *See* COA Opinion, ¶¶ 37-38, 47-48. Neither one is a free-standing claim for relief, and, even if they were, Litterer's 2022 Release would apply to them.

A. Preservation and Standard of Review

Litterer incorrectly claims that he preserved "this issue," without explaining what "this issue" is. *See* Op. Br., at 33-34. Litterer did not preserve any objections to the district court's resolution of his never-brought gross negligence claim because he never sought to amend his complaint to add a gross negligence claim. Litterer instead incorrectly argued in his Rule 59 motion that his "claim" for exemplary damages is "identical to" and "synonymous with" a claim for gross negligence, so he should have been permitted to try his exemplary damages case before a jury. CF, pp. 1007-1009, 1120-1121. Litterer preserved only his argument that his exemplary damages "claim" should be reinstated if

his negligence per se claim is not barred by the 2022 Release. COA Opinion, ¶ 21.

Litterer’s standard of review statement is incomplete. Whether to amend findings or judgment under C.R.C.P. 59 is reviewed for abuse of discretion. *Zolman v. Pinnacol Assur.*, 261 P.3d 490, 502 (Colo. App. 2011). Litterer does not mention this standard in his opening brief, nor does he argue there has been an abuse of discretion.

B. “Exemplary Damages” Are Not a Free-Standing Claim for Relief

The division properly held that Litterer’s demand for exemplary damages “could not stand without an underlying claim for actual damages.” COA Opinion, ¶ 40. As the division explained, once Litterer’s substantive claims were dismissed, he “did not have an underlying claim for actual damages to which exemplary damages could be tied.” *Id.*, ¶ 48 (quoting *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1127 (Colo. 1982)) (“[B]y its own terms section 13-21-102 has no application in the absence of a successful underlying claim for actual damages.”). That holding was correct and consistent with Colorado Supreme Court precedent.

It is well-established that exemplary damages “do not present a separate, distinct cause of action, but rather, depend on an underlying claim for actual damages.” *Ferrer*, 2017 CO 14M, ¶ 44, *superseded by statute on other grounds*, § 13-21-111.5(1.5)(c); *Harding Glass*, 640 P.2d at 1127; *Palmer*, 684 P.2d at 213 (“[I]t is not a separate and distinct cause of action. Rather, it is auxiliary to an underlying claim for actual damages.”); *Mtg. Fin. Corp. v. Podleski*, 742 P.2d 900, 903 (Colo. 1987) (“The award of exemplary damages is not a separate and distinct cause of action, but is permitted only in conjunction with an underlying and independent “civil action” in which actual damages are assessed for a legal wrong done to the injured party.”).

Litterer denies this basic, settled point by arguing that the courts (including the Colorado Supreme Court) have failed to notice that a demand for exemplary damages under section 13-21-102 is really a gross negligence claim traveling under a different name. *Op. Br.*, at 35. Litterer’s position that demanding exemplary damages is “synonymous” with bringing a legal claim for gross negligence is flawed. Among other things, exemplary damages cannot be pleaded in an initial complaint,

see C.R.S. § 13-21-102(1.5)(a), and must be proved beyond a reasonable doubt, *see* C.R.S. § 13-25-127(2), neither of which is true for a gross negligence claim. And “willful and wanton conduct” – one of the standards for awarding exemplary damages – can exist without any negligence at all, which is not true for a gross negligence claim. *See, e.g., Clark v. Morris*, 710 P.2d 1130, 1133-34 (Colo. App. 1985) (finding willful and wanton conduct in connection with conversion claim); *Holter v. Moore & Co.*, 681 P.2d 962, 967 (Colo. App. 1983) (same for breach of fiduciary duty claim).

Moreover, Litterer has no good reason why, if he meant to bring a gross negligence claim, he didn’t just do the obvious thing: plead a gross negligence claim. *See* C.R.C.P. 8(e)(1) (“Each averment of a pleading shall be simple, concise, and direct.”). Neither the district court nor the court of appeals erred by declining to “rewrite [Litterer’s] pleadings” to include a gross negligence claim. *See* COA Opinion, ¶ 47.

C. “Willful and Wanton Conduct” is Not a Free-Standing Claim for Relief

The division held that Litterer’s 2022 Release barred his supposed “claim” for “willful and wanton conduct.” *See* COA Opinion, ¶ 38. As

explained above, that conclusion was correct. Moreover, although the division did not reach the issue, there is no free-standing claim for “willful and wanton conduct.”

Colorado law does not recognize an independent tort cause of action for willful and wanton conduct. Rather, “willful and wanton” is a description of “aggravating circumstances” surrounding an actual civil claim. *Palmer*, 684 P.2d at 214 (citation and quotation omitted); *see also Clark*, 710 P.2d at 1133-34 (“Although the mere taking of property under a claim of right over the protest of one in possession is not generally sufficient grounds for exemplary damages in a conversion action, if the taking is done in such a manner as to constitute a wanton and reckless disregard of the injured party’s rights, exemplary damages are available.”) (cleaned up); *Carani v. Meisner*, 2009 WL 2762719, at *4 (D. Colo. Aug. 26, 2009), *aff’d*, 521 F. App’x 640 (10th Cir. 2013) (“[T]his Court’s research (and the Plaintiffs’ briefing) identifies no case that recognizes and defines a separate, actionable claim based simply on a party engaging in willful and wanton conduct towards another.”); *Core-Mark Midcontinent, Inc. v. Sonitrol Corp.*, 2012 COA

120, ¶ 19 (although “Colorado recognizes an action for willful and wanton breach of contract, and permits a party to recover noneconomic damages in such an action, ... [t]his theory of recovery does not sound in tort”).

A legal claim has elements – for example, for negligence, the existence of a duty, its breach, and resulting damages – while “willful and wanton conduct” is simply a “circumstance.” See C.R.S. § 13-21-102(1)(a) (“In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages.”). Litterer identifies no authority holding otherwise.

Litterer argues that *Schwindt v. Hershey Foods Corp.*, 81 P.3d 1144 (Colo. App. 2003), recognized a “*claim for willful, wanton, and reckless disregard.*” Op. Br., at 24 (emphasis added). That is not what the court held. Rather, it held only that allegations of willful and wanton conduct did not state a claim for an intentional tort that could

survive the Workers' Compensation Act's exclusivity provision. *See Schwindt*, 81 P.3d at 1146. The point in *Schwint* was that even *if* the plaintiff had stated a claim by alleging willful and wanton conduct, such a claim was "at most a claim for gross negligence," so it was barred by the act. *Id.* In other words, the court accepted plaintiffs' allegations for the sake of argument and concluded that they failed. It did not hold that Colorado law recognizes willful and wanton conduct as an independent cause of action. *Id.* The district court did not abuse its discretion in denying Litterer's motion to amend the judgment.

III. The Court of Appeals Correctly Declined to Reach the Merits of Litterer's Negligence Per Se Claim Against McClure

Litterer argues that the court of appeals erred when it "failed to address" whether Litterer's 2022 Release barred his negligence per se claim under *Miller*. *See Op. Br.*, at 32-33. He is wrong. The division distinguished Litterer's retrospective 2022 Release from a prospective exculpatory agreement (two concepts treated very differently under the law, as explained above), and, as a result, did not need to reach whether

Miller applied to Litterer’s negligence per se claim under the snowmobile statute.

A. Preservation and Standard of Review

Litterer argued in the court of appeals that *Miller* would apply to his negligence per se claim under the snowmobile statute. Whether the court of appeals should have reached a merits issue it did not need to reach to resolve the appeal is reviewed for abuse of discretion. *See, e.g., Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) (holding it is “hardly novel” for a “court to choose among threshold grounds for denying audience to a case on the merits” and finding no abuse of discretion in the lower court’s choice).

Litterer misstates the standard of review, arguing that the Colorado Supreme Court reviews de novo. Op. Br., at 32. However, the certiorari issue is whether the court of appeals erred by “failing to address” an issue. It is not whether the court of appeals decided that issue incorrectly. The latter would be reviewed de novo, but the former is a matter of discretionary judicial administration. *Hunter v. SCL Health-Front Range, Inc.*, 514 P.3d 322, 326 (Colo. App. 2022) (“We

decline to exercise our discretion to affirm on an alternative basis”) (capitalization regularized). It is reviewed for abuse of discretion under this Court’s general superintending authority. *See* Colo. Const. art. VI, § 2; *People v. Spann*, 561 P.2d 1268, 1269 (Colo. 1977).

B. The Court of Appeals Addressed *Miller*

As discussed above, the division correctly concluded that Litterer’s 2022 Release was not an exculpatory agreement, because it did not concern prospective negligence claims. *See* COA Opinion, ¶ 23 (quoting *Jones*, 623 P.2d at 376). Rather, Litterer had vested claims against McClure and VSRI stemming from the 2020 accident, and the 2022 Release required Litterer to “release any and all claims against VSRI or its employees, including claims from *past* events.” *Id.*, ¶ 24 (emphasis in original); *see also Williston on Contracts*, § 73:1 (“A release, as the word is used technically in speaking of executory contracts, is a discharge of an existing obligation or right of action”). Therefore, the division correctly distinguished this case, which involved a retrospective release of a negligence per se claim, from *Miller*, which involved a prospective release of a negligence per se claim.

Other courts have reached the same conclusion, as should this Court. *See, e.g., Dearnley*, 2012 WL 762150, at *4 (“The release provisions of the 2009 agreement are not the analytical equivalent of its exculpatory provisions.”). In *Dearnley*, the plaintiff released his vested claims against a ski area when he purchased a ski pass months after his accident. *Id.* at *1. The appellate court concluded that the release agreement “neither eroded defendant’s duty of care nor did it incentivize negligence.” *Id.* at *4. As here, “[e]ach of the contracting parties gained or gave away something of value,” and there “was no coercion, duress, fraud, or sharp practices afoot.” *Id.*

C. The Court of Appeals Did Not Have to Decide Whether *Miller* Applied to Negligence Per Se Claims Under the Snowmobile Statute

Having decided that the 2022 Release was not an exculpatory agreement, the court of appeals affirmed because the release barred Litterer’s claims. *Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 406 (Colo. App. 2004) (appellate courts may affirm on any basis supported by the record). The power to affirm on any basis supported by the record implies the discretion not to reach unnecessary

issues. The division therefore was not required to decide whether *Miller's* interpretation of the Ski Safety Act and its effect on waivers of prospective negligence per se claims under that act should be applied to the quite different snowmobile statute, or whether the Ski Safety Act itself precludes alleged negligence per se claims based on statutes not listed in section 33-44-104(2). *See Wend v. People*, 235 P.3d 1089, 1097 n. 5 (Colo. 2010) (“we need not reach this argument because we decide the case solely on the more narrow issue”); C.R.S. § 33-44-104(2); C.R.S. § 33-44-114 (“Insofar as any provision of law or statute is inconsistent with the provisions of this article, this article controls.”). When an appeal can be resolved on other grounds, declining to reach the merits of another issue is routine and prudent, not an abuse of discretion. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 242 (2009) (“the judges of . . . the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case.”).

Conclusion

The judgment should be affirmed.

Respectfully submitted this 4th day of December, 2025.

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Certificate of Service

The undersigned hereby certifies that on December 4, 2025, a true and correct copy of the foregoing **ANSWER BRIEF** was e-filed and served via the Colorado Court E-filing System to the following:

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