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| <p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p> | <p style="text-align: center;">DATE FILED October 30, 2025 4:50 PM</p> <p style="text-align: center;">▲ FOR COURT USE ONLY ▲</p> |
| <p>Colorado Court of Appeals Court of Appeals Case No.: 2024-CA-480</p> <hr/> <p>District Court, Summit County, Colorado Hon. Reed W. Owens District Court Case Number: 2022-CV-30043</p> | |
| <p>Petitioner/Plaintiff:</p> <p>JOHN LITTERER,</p> <p>v.</p> <p>Respondents/Defendants:</p> <p>VAIL SUMMIT RESORTS, INC., a corporation, and DWIGHT MCCLURE, an individual.</p> | <p>Supreme Court Case No: 2025-SC-134</p> |
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| <p>PETITIONER’S OPENING BRIEF</p> | |

CERTIFICATE OF COMPLIANCE

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

This brief complies with C.A.R. 28(g).

Choose one:

- It contains 7,265
- It does not exceed 30 pages.

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

For the party raising the issue:
It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. ____), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:
It contains, under a separate heading, a statement of whether such party agrees with the opponent’s statements concerning the standard of review and preservation for appeal, and if not, why not.

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ISSUES PRESENTED FOR REVIEW:

Pursuant to the Court's September 15, 2025 Order, this Court certified the following issues for review:

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

I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

On December 18, 2020, Petitioner John Litterer (hereinafter “Plaintiff”) was seriously injured in a snowboarder-snowmobile collision caused by Respondents (hereinafter “Defendants”). *R. 4.* At the time of the collision, Defendant McClure was driving a snowmobile owned by Defendant Vail Summit Resorts, Inc. (“VSRI”) dangerously uphill against snowrider traffic, and in a blind corner where the snowmobile was not visible to downhill snowriders such as Plaintiff, nor was Plaintiff visible to Defendant McClure *Id.* Additionally, Defendant McClure was acting within the scope of his employment with Defendant VSRI, and was violating Defendant VSRI’s express policies and procedures as set forth in VSRI’s snowmobile operations manual regarding driving a snowmobile in a “blind corner.” *Id.*; *R. 614.*

Plaintiff filed his Complaint and Jury Demand against Defendants in Summit County District Court on May 10, 2022. *R. 8.* Plaintiff’s Complaint asserted claims for negligence, **negligence *per se***, respondeat superior, negligent entrustment/supervision, negligent hiring, extreme and outrageous conduct, **willful and wanton conduct**, reckless endangerment, and premises liability. *R. 4-8.*

Plaintiff’s negligence *per se* claim was filed pursuant to the Colorado Snowmobile Safety Statute, C.R.S. § 33-14-116. *R. 5.* Further, Plaintiff’s willful and

wanton conduct claim, which is synonymous with a gross negligence claim, was based on Defendants' reckless disregard. *R. 7.; R. 1119-1120.*

On August 5, 2022, Defendants filed their Motion to Partially Dismiss Plaintiff's Complaint. *R. 50.* Subsequently, on November 14, 2022, the District Court dismissed all Plaintiff's claims, except for the Premises Liability Claim, against Defendant VSRI. *R. 1229.* Plaintiff's claims for negligence, negligence *per se*, and extreme and outrageous conduct against Defendant McClure survived dismissal. *R. 1237.*

Importantly, on May 18, 2023, the District Court granted Plaintiff's Motion to Amend Complaint to Add a Claim for Exemplary Damages, determining "Plaintiff has established a triable issue on his claim for exemplary damages." *R. 381.*

On November 13, 2023, Defendants filed their Motion for Summary Judgment on Plaintiff's remaining claims. *R. 510.* On January 16, 2024, the District Court granted Defendants' Motion for Summary Judgment and dismissed all claims based on Defendants' private release agreements. *R. 975, 987, 990.*

On January 30, 2024, Plaintiff filed his Motion for Amendment of Findings and Judgment Pursuant to C.R.C.P. 59(a), arguing his exemplary damages claim was based on Defendants' gross negligence, and thus could not be waived pursuant to Colorado law. *R. 1005-1011.* On March 18, 2024, the District Court denied Plaintiff's Rule 59(a) Motion. *R. 1200-1207.*

On March 25, 2024, Plaintiff filed his Notice of Appeal with the Colorado Court of Appeals. *R. 1275*. On Appeal, Plaintiff argued the District Court erred in dismissing his claims because, pursuant to this Court’s Ruling in *Miller v. Crested Butte, LLC*, Defendants’ private release agreements could not preclude Plaintiff’s claims for negligence *per se* and willful and wanton conduct / gross negligence. *Litterer v. Vail Summit Resorts, Inc.*, 2024 WL 5356991, at *17 (Colo. App. Jan. 30, 2025). Additionally, Plaintiff argued that because he has viable claims for negligence *per se* and gross negligence, he also has a valid claim for exemplary damages. *Id.* at * 28.

On January 30, 2025, merely two weeks after oral argument, the Appellate Court issued its opinion affirming the complete dismissal of Plaintiff’s claims. *Litterer v. Vail Summit Resorts, Inc.*, 24CA0480, 2025 WL 353306, at *2, ¶ 11 (Colo. App. Jan. 30, 2025). The Appellate Court’ decision was entirely predicated on Plaintiff merely purchasing a ski pass two years after the collision, and during his active litigation against Defendants, which the Appellate Court ruled was a complete waiver of all claims against Defendants. *See id.* Although Plaintiff had established a “triable issue” on his claim for exemplary damages, in addition to this Court’s ruling in *Miller* that a valid negligence *per se* claim cannot be waived, the Appellate Court nonetheless upheld the dismissal of Plaintiff’s claims. *Id.* at *7, ¶ 49.

II. STATEMENT OF FACTS

This case arises out of a snowmobile-snowboarder collision on December 18, 2020, at Breckenridge Ski Area. *R. 4*. The collision occurred on an open ski trail where the Wirepatch run intersects with a maintenance road, which Defendants designate “Peak 8 Road.” *R. 151*. Plaintiff was descending Wirepatch with his brother, Emil Litterer, who was snowboarding behind him. *R. 595-96*.

As he descended this section of Wirepatch, Plaintiff, an expert snowboarder, was snowboarding in control and in bounds while maintaining control, a reasonable speed, and a proper lookout at all times. In fact, Plaintiff and his brother could not have been snowboarding fast because the slope is nearly flat where the collision occurred. According to Defendant VSRI’s own investigation photographs, the slope angles of Plaintiff’s path of travel were only between 2 degrees and 5 degrees steep. *R. 505*.

Corroborated by Defendant VSRI’s “Site Diagram,” a rope closure blocked off the section of Wirepatch just below Peak 8 Road. *R. 597*. Accordingly, Plaintiff was forced to turn skier’s left onto Peak 8 Road.

As Plaintiff was snowboarding down this flat trail, a VSRI snowmobile operated by Defendant McClure was driving uphill and against snowrider traffic. As indicated by VSRI’s Honeycomb Review “Incident Summary,” the dense tree line on Mr. Litterer’s left side (Defendant McClure’s right side) of the trail creates a

known “**blind section**” at the intersection of Peak 8 Road and Wirepatch. *R.* 588 (*emphasis added*).

Suddenly, and without any warning, Defendant McClure violently collided into Plaintiff, causing him serious injuries. The blunt force of the collision bent Plaintiff’s body forward and slammed him into the front of the snowmobile. *R.* 592-93. In fact, the impact was so severe that it caused the metal struts of the snowmobile to bend. *R.* 847. Defendant McClure admitted the collision was violent and that Plaintiff “hit [the snowmobile] very hard.” *Id.*

The strong and sudden impact with the snowmobile caused immediate injury to Plaintiff. Breckenridge Ski Patrol’s “Incident Card” states Plaintiff urinated blood at the scene, reported an 8 out of 10 pain level, and subsequently was transported to the hospital by ambulance. *R.* 67. Plaintiff filed this lawsuit against Defendants on May 10, 2022. *R.* 8.

Importantly, Defendant McClure knew that this is a ski run where skiers and snowboarders are frequently present. *R.* 607. VSRI’s snowmobile operation policy expressly mandates in the “**Blind Corners**” section: “**Snowmobile Operators must pay attention when operating around tight curves that have limited visibility. When approaching a blind corner on a catwalk or road, and there is down traffic (skiers etc.), slow down and move to the outside of the turn. By doing so you will be able to provide yourself with maximum visibility of**

oncoming skiers or other traffic, as well as putting your snowmobile in a better position to be seen by others.” R. 614 (emphasis added).

Prior to the violent collision caused by Defendants, Plaintiff had purchased an Epic Pass online for the 2020-2021 ski season. R. 969. Plaintiff was forced to enter into an exculpatory agreement in order to purchase his online Epic Pass. *Id.* An additional exculpatory agreement was on the back of Plaintiff’s Epic Pass, which he used on the day of the collision. R. 971. Both of VSRI’s broad exculpatory agreements purport to prospectively waive any claims Plaintiff may have against VSRI and its employees. *Id.*

Plaintiff suffered significant injuries resulting from the severe impact with the VSRI snowmobile. R. 186. However, following substantial time and treatment, Plaintiff was able to snowboard again. Accordingly, Plaintiff purchased an online Epic Pass for the 2022-2023 ski season. R. 972. At the time Plaintiff purchased the 2022-2023 Epic Pass, he was in ongoing, highly contested litigation against Defendants in Summit County District Court. In fact, the Case Management Conference had occurred, discovery had commenced, depositions had been performed, and the District Court had ruled on Defendants’ Motion to Dismiss. R. 1229.

The 2022-2023 Epic Pass Plaintiff purchased required him to “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 that has happened up to now.” *R. 973* (capitalization omitted). Plaintiff had no reason to believe he was waiving his active litigation claims against Defendants, and effectively dismissing his lawsuit against them, by merely purchasing a ski pass.

ARGUMENT

I. SUMMARY OF THE ARGUMENT

The Appellate Court erroneously upheld the District Court’s dismissal of all of Plaintiff’s claims because it improperly concluded Defendants’ private release agreements waived all of Plaintiff’s ongoing claims, and that Plaintiff’s exemplary damages claim was not supported by an underlying claim for damages.

In accordance with this Court’s ruling in *Miller v. Crested Butte*, none of Defendants’ private release agreements may operate as a complete waiver of their statutory obligations pursuant to a valid claim for negligence *per se*. Moreover, Colorado law is clear that exculpatory agreements can never bar a willful and wanton conduct claim. Neither the *Miller* decision nor prior Colorado case law distinguish between pre-injury exculpatory agreements and post-injury releases with respect to negligence *per se* and willful and wanton conduct claims.

If this Court determines Defendants’ releases cannot completely bar Plaintiff’s claims for negligence *per se* and willful and wanton conduct, then Plaintiff’s

exemplary damages claim must be reinstated because Plaintiff will have valid underlying claims for actual damages. Accordingly, this Court must reverse the dismissal of Plaintiff's negligence *per se*, willful and wanton conduct, and exemplary damages claims.

II. PLAINTIFF DID NOT WAIVE ALL HIS CLAIMS WHEN HE PURCHASED A 2022-2023 EPIC PASS

A. STANDARD OF REVIEW

Grants of summary judgment are subject to de novo review. *Edwards v. Bank of Am., N.A.*, 382 P.3d 1272, ¶13 (Colo. App. 2016). “Summary judgment is a drastic remedy that should be granted only when the pleadings and the supporting documents demonstrate that no genuine issue of material fact exists and that the moving party is legally entitled to judgment.” *Preferred Profl Ins. Co. v. Doctors Co.*, 419 P.3d 1020, 1023 (Colo. App. 2018); *W. Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo. 2002).

This issue also involves statutory construction issues, which are also reviewed de novo. *Miller v. Crested Butte, LLC*, 549 P.3d 228, 234 (Colo. 2024). Additionally, this issue involves principals of contract formation, which are reviewed de novo. *French v. Centura Health Corporation*, 509 P.3d 443, 449 (Colo. 2022).

Plaintiff's Complaint alleged a negligence *per se* claim pursuant to C.R.S. § 33-14-116. *R. 4*. This Court had not issued its ruling in *Miller* until after the District

Court completely dismissed Plaintiff's case. Plaintiff preserved the contract formation issues in his Response to Defendants' Motion for Summary Judgment. *R.* 623. The District Court ruled on these issues in its January 16, 2024 Order granting Defendants' Motion for Summary Judgment. *R.* 987-990.

B. PLAINTIFF PROPERLY PLED HIS CLAIM FOR NEGLIGENCE *PER SE*

To determine whether Plaintiff waived his negligence *per se* claim, the Court must first confirm the plausibility of that claim. *See Miller*, 549 P.3d at 234. "Negligence per se occurs when a defendant violates a statute adopted for the public's safety and the violation proximately causes a Plaintiff's injury." *Id.*; *see also Scott v. Matlack, Inc.*, 39 P. 3d 1160, 1166 (Colo. 2002).

In his Complaint and Jury Demand, Plaintiff asserted a claim for negligence *per se* against Defendants for their violation of C.R.S. § 33-14-116 (the "Colorado Snowmobile Safety Statute"). *R.* 5. The Colorado Snowmobile Safety Statute provides, in part:

"(1) No person shall operate a snowmobile in a **careless or imprudent manner without due regard for width, grade, corners, curves, or traffic of trails**, the requirements of section 33-14-110(3), and all other attendant circumstances.

(2) No person shall operate a snowmobile in such a manner as to indicate either a **wanton or willful disregard for the safety of persons or property**.

(4) No owner shall permit such snowmobile, while under his control, to be operated in violation of the provisions of this article."

C.R.S. 33-14-116 (emphasis added).

Thus, the Colorado Snowmobile Safety Statute expressly mandates that an operator safely, carefully, and prudently operate a snowmobile, with due regard for the various physical features and potential traffic on trails, as well as “all other attendant circumstances.” C.R.S. 33-14-116(1). It further prohibits the operator from operating the snowmobile with “**wanton or willful disregard for the safety of persons.**” C.R.S. 33-14-116(2) (emphasis added).

This statute was enacted for the public’s safety because it provides guidelines for both snowmobile operators and owners regarding the safe operation of snowmobiles. “A separate statute imposes a statutory duty upon all snowmobile operators (including those at ski areas) to operate snowmobiles in a careful and prudent manner.” 45 Am. Jur. Proof of Facts 3d 115 (Originally published in 1998) (*citing* C.R.S. § 33-14-116).

It is nonsensical and contrary to public policy for a ski area snowmobile operator to be afforded complete immunity for colliding with and hurting a guest as a result of what could be considered criminal conduct. Such a result was certainly not intended by the Colorado General Assembly.

In *Miller*, the Plaintiff filed a lawsuit against Crested Butte for injuries she suffered from a fall from a chair lift. *Miller*, 549 P.3d at 230. The *Miller* Plaintiff also entered into the ski area’s release merely by virtue of purchasing a ski pass. *Id.* at

231. The *Miller* Plaintiff alleged claims for Negligence – Highest Degree of Care; Negligence *Per Se* for violation of the Skier Safety Act, the Passenger Tramway Safety Act, and other related provisions; and Gross Negligence. *Id.* at 232.

Importantly, the Colorado Snowmobile Safety Statute is contained in Article 33 of the Colorado Revised Statutes, which is the “Wildlife and Parks and Outdoor Recreation Article.” This is the exact same Article where the Colorado Skier Safety Act, C.R.S. § 33-44-101, et. seq., resides. *See C.R.S. § 33-44-101.* Thus, the Snowmobile Safety Statute and the Skier Safety Act are part of the same statutory scheme. These statutes are therefore interrelated and clearly apply to Defendants, who own and operate snowmobiles at a ski area.

Moreover, the Colorado Snowmobile Safety Statute shares many similarities with Colorado’s Careless Driving Statute, C.R.S. § 42-4-1402, which is routinely utilized as the basis for a negligence *per* claim in auto collision cases. That statute imposes a criminal penalty against drivers whose conduct violates the statutory duty of care. The Careless Driving Statute provides in part:

“(1) A person who drives a motor vehicle... **in a careless and imprudent manner. Without due regard for the width, grade, curves, corners, traffic, and use of the streets...** and all other attendant circumstances, is guilty of careless driving.

(2)(b) If the person’s actions are the proximate cause of bodily injury to an individual, the person commits a class 1 misdemeanor traffic offense.”

C.R.S. 42-4-1402 (emphasis added).

The Snowmobile Safety Statute and Careless Driving Statute both proscribe criminal penalties to violators, and both may be asserted as the basis of a civil negligence *per se* claim. These statutes provide a specific duty of care to give due regard to the width, grade, curves, corners, and traffic while operating a motorized vehicle, and both prohibit careless and imprudent conduct. The Snowmobile Safety Statute, which is incorporated in part in VSRI's snowmobile operations manual, further prohibits willful and wanton conduct. *R. 614*. The Careless Driving Statute is therefore substantially similar to the Colorado Snowmobile Safety Statute, and again, is frequently asserted in motor vehicle collision cases as the basis for a negligence *per se* claim.

Furthermore, nowhere in *Miller* does this Court limit its holding to the statutes at issue in that case. Rather, the *Miller* Court held a plaintiff need only “demonstrate that the statute was intended to protect against the type of injury [he] suffered and that [he] is a member of the group of persons the statute was intended to protect.” *Miller*, 549 P.3d at 234 (quoting *Scott v. Matlack, Inc.*, 39 P. 3d 1160, 1166 (Colo. 2002)). “If the statute applies to defendant’s actions, then the statute conclusively establishes that the defendant’s standard of care and violation of the statute is a breach of [its] duty.” *Id.*

The Snowmobile Safety Statute plainly defines a statutory duty of care, Plaintiff is unquestionably a member of the public that the statute was adopted to

protect, and Plaintiff clearly suffered an injury the statute was intended to protect against. Therefore, Plaintiff properly pled his negligence *per se* claim based on Defendants' violation of the Colorado Snowmobile Safety Statute.

C. THE 2022-2023 EPIC PASS PURCHASED BY PLAINTIFF DID NOT WAIVE HIS CLAIM FOR NEGLIGENCE *PER SE*

The Appellate Court summarily and improperly dismissed Plaintiff's negligence *per se* claim based on Defendants' private release agreements. *Litterer*, WL 353306, at *2, ¶ 11 (Colo. App. Jan. 30, 2025). However, Colorado law does not permit private release agreements to bar claims for negligence *per se*. *Miller*, 549 P.3d at 230.

In its January 30, 2024 unpublished opinion, the Appellate Court held Plaintiff released "any and all claims" against Defendants when he purchased the 2022-2023 Epic Pass. *Litterer*, WL 353306, at *2, ¶¶ 11, 13. In doing so, and as further discussed herein, the Appellate Court failed to address the *Miller* ruling and its application to Defendants' releases. Consequently, the Appellate Court affirmed the dismissal of all of Plaintiff's claims solely based on Defendants' overbroad release. *Id.* This Court may follow the same reasoning as the 9th Circuit Court of Appeals and render Defendants' overbroad release void as a matter of law. *See Farina v. Mt. Bachelor, Inc.*, 66 F.3d 233, 236 (9th Cir. 1995)

The Appellate Court further held Defendants' 2022-2023 Epic Pass "operates as a *release* rather than an *exculpatory agreement* with respect to Litterer's claims."

Id. at *4, ¶ 23 (emphasis added). The Appellate Court noted that a release is “the relinquishment of a vested right or claim to a person against whom the claim is enforceable.” *Litterer*, WL 353306, *4, ¶ 23 (quoting *Neves v. Potter*, 729 P.2d 1047, 1049 (Colo. 1989)). However, neither *Miller* nor Colorado law distinguish between a release and an exculpatory agreement when ruling that valid claims for negligence *per se*, willful and wanton conduct, and exemplary damages cannot be waived.

Colorado law is settled that a party can never discharge its statutory obligations through an exculpatory agreement. *Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 492 (Colo. 1998) (“Parties may not privately contract to abrogate statutory requirements or contravene the public policy of this state.”) “Private parties may not by agreement or rule render ineffectual the rules and standards provided by statute.” *Gonzales v. Indus. Comm’n*, 740 P.2d 999, 1002 (Colo. 1987).

In *Miller*, this Court upheld that established Colorado law, and also confirmed its application to ski area **releases**, by holding “as a matter of first impression, Crested Butte may not absolve itself, by way of private **release agreements**, of liability for violations of the statutory and regulatory duties on which Miller’s negligence *per se* claim is based. Accordingly, we conclude that the district court erred in dismissing that claim.” *Miller*, 549 P.3d at 230 (emphasis added). The *Miller* ruling is clear that all “release agreements” cannot waive a valid negligence *per se*

claim. *Id.* This Court did not limit its ruling to apply only to exculpatory agreements. *Id.*

In rejecting Crested Butte's argument, this Court further held in *Miller* "we perceive nothing [in the statutes] indicating a legislative intent to authorize liability waivers that would eradicate the statutory and regulatory duties that the legislature itself codified." *Id.* at 236. Therefore, it is clear from this Court's decision in *Miller* that private release agreements, including both pre-injury exculpatory agreements and post-injury release agreements, cannot bar a claim for negligence *per se*.

Further, Defendants' release agreements, which purport to shield Defendants from liability for "any and all claims," are overbroad and thus void. *See Farina*, 66 F.3d at 236. "In one simple, broad sentence, Mt. Bachelor sought to exculpate itself for any and all claims that an injured skier might bring against it. This attempt rendered Mt. Bachelor's entire release clause invalid. It is not our role to enforce only part of the release clause where it is not obvious from the language of the clause that the parties intended the clause to be severable." *Id.* The same reasoning utilized by the 9th Circuit applies to Defendants' releases in this case.

Plaintiff alleged a valid claim for negligence *per se*, which cannot be released pursuant to *Miller*. Accordingly, this Court must reverse the Appellate Court's decision upholding the District Court's dismissal of Plaintiff's negligence *per se* claim.

D. PLAINTIFF PROPERLY PLED HIS CLAIM FOR WILLFUL AND WANTON GROSS NEGLIGENCE

Before considering whether the 2022-2023 Epic Pass bars Plaintiff's gross negligence claim, this Court must determine whether Plaintiff properly pled his claim for willful and wanton conduct, which is the exact same as a claim for gross negligence. *See Miller*, 549 P.3d at 234.

Importantly, Defendant McClure's conduct constitutes a clear violation of the Snowmobile Safety Statute and VSRI's express safety policies as set forth in its snowmobile operation manual. *R. 614*. Based on Defendants' conduct, the District Court granted Plaintiff's Motion to Amend Complaint to Add a Claim for Exemplary Damages. *R.381*. In its Order, the District Court determined "Plaintiff has established a triable issue on his claim for exemplary damages." *Id.* The District Court therefore confirmed there was sufficient prima facie evidence that Defendants' willful, wanton, and reckless conduct exceeded mere negligence.

A claim for willful and wanton conduct is synonymous with a claim for gross negligence. "**Gross negligence is willful and wanton conduct**, that is, action committed recklessly, with conscious disregard for the safety of others." *Hamill v. Cheley Colo. Camps, Inc.*, 262 P.3d 945, 954 (Colo. App. 2011) (emphasis added).

It must be noted there are no Colorado Pattern Jury Instructions or express Colorado common law elements for a gross negligence claim. Colorado case law defining "[g]ross negligence" as "willful and wanton conduct" confirms these claims

are identical and share the same terms of art. *Id.* This Court may therefore clarify and confirm that a claim for willful and wanton conduct is synonymous with a claim for gross negligence.

Plaintiff's Complaint explicitly pled a claim for willful and wanton conduct. R. 7. Colorado courts have long treated claims for gross negligence and willful and wanton conduct synonymously. *See Hamill*, 262 P.3d at 954; *see also Schwindt v. Hershey Foods Corp.*, 81 P. 3d 1144, 1146 (Colo. App. 2003) (holding that a Plaintiff's claim for willful, wanton, and reckless disregard amounted to a gross negligence claim rather than an intentional tort).

In his Response to Defendants' Motion to Partially Dismiss, Plaintiff argued his claim for willful and wanton conduct arose from Defendants' negligence *per se* "violations of the snowmobile operation and safety statute, C.R.S. §33-14-116." R. 80. Plaintiff further argued "[t]his specific statute prohibits any person from operating 'a snowmobile in such a manner as to indicate either a **wanton or a willful** disregard for the safety of persons or property.' C.R.S. §33-14-116(2) (emphasis added)." *Id.* Plaintiff's willful and wanton conduct claim therefore arises from the same conduct that as his negligence *per se* claim for violation of the Snowmobile Safety Statute.

As stated above, the standard of care Defendant McClure owed to Plaintiff while operating the VSRI snowmobile is specifically prescribed by the Colorado

Snowmobile Statute, and is also dictated by VSRI's snowmobile operator policies. Specifically, VSRI's snowmobile operation policy expressly mandates in the "**Blind Corners**" section: "**Snowmobile Operators must pay attention when operating around tight curves that have limited visibility. When approaching a blind corner on a catwalk or road, and there is down traffic (skiers etc.), slow down and move to the outside of the turn. By doing so you will be able to provide yourself with maximum visibility of oncoming skiers or other traffic, as well as putting your snowmobile in a better position to be seen by others.**" R. 614 (*emphasis added*).

Moreover, Defendant McClure testified at his deposition that VSRI's snowmobile policies required him to "[b]e far enough away from the trees on the uphill side to try to avoid anybody coming out of the trees at any given part of the time ...to move to your left around corners, to not be on an inside corner going uphill." R. 605.

Defendant McClure also confirmed at his deposition that it is "important to follow the policy and procedure rules when operating a snowmobile." R. 608. Correspondingly, Defendant McClure admitted that disregarding VSRI's express snowmobile policies is both "**dangerous**" and "**reckless**" to guests. *Id.* (*emphasis added*).

Despite his knowledge and training of VSRI's policies regarding blind corners, VSRI's internal investigation unequivocally determined Defendant McClure's snowmobile was in a "blind section" at the time of the collision. *R.* 588. Defendant McClure clearly violated the Snowmobile Safety Statute and VSRI's own policies and procedures by failing to give due regard to and yield to Plaintiff.

Accordingly, Plaintiff properly pled his claim for willful and wanton gross negligence because "[g]ross negligence is willful and wanton conduct, that is, action committed recklessly, with conscious disregard for the safety of others." *Hamill*, 262 P.3d, at 954. Moreover, the District Court granted Plaintiff's Motion to Amend Complaint to Add a Claim for Exemplary Damages, confirming prima facie evidence exists that Defendants' conduct was heedless, reckless, and thus rose to the level of willful and wanton gross negligence.

E. CONSISTENT WITH ITS RULING IN *MILLER*, THIS COURT SHOULD HOLD THAT PRIVATE RELEASE AGREEMENTS CANNOT WAIVE A CLAIM FOR GROSS NEGLIGENCE

The Appellate Court held that the 2022-2023 Epic Pass release completely waived Plaintiff's claim for willful and wanton conduct, i.e., gross negligence. *Litterer*, WL 353306, at *5, ¶ 32. The Appellate Court reasoned Plaintiff's purchase of the 2022-2023 Epic Pass, while he was in the midst of this active lawsuit against Defendants, amounted to a voluntary dismissal of his case. *Id.* at *4-5, ¶¶ 23, 32. The Appellate Court's decision is inconsistent with this Court's ruling in *Miller*.

Colorado law is absolutely clear, and Defendants cannot dispute, that claims for willful and wanton negligence can never be waived by an exculpatory agreement. **“In no event will an exculpatory agreement be permitted to shield against a claim of willful and wanton negligence.”** *United States Fire Insurance Co. v. Sonitrol Management Corp.*, 192 P.3d 543 (Colo. App. 2008) (emphasis added). Similarly, **“exculpatory agreements are not a bar to civil liability for gross negligence.”** *Hamill*, 262 P.3d at 954 (*emphasis added*).

This Court has upheld this well-settled rule repeatedly and forcefully, while recognizing willful and wanton conduct and gross negligence are the same: “An exculpatory agreement, which attempts to insulate a party from liability from his own negligence, must be closely scrutinized, **and in no event will such an agreement provide a shield against a claim for willful and wanton negligence.”** *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981) (emphasis added); *See also Boles v. Sun Ergoline, Inc.*, 223 P.3d 724, 726 (Colo. 2010); *Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1191 (Colo. App. 2008).

Importantly, none of the cases that forbid exculpatory agreements from shielding against claims for willful and wanton conduct and gross negligence distinguish between pre-and-post injury releases. “... [W]e made clear that in no event could public policy permit an exculpatory agreement to shield against a claim

for willful and wanton conduct, **regardless of the circumstances or intent of the parties.**” *Boles*, 223 P.3d at 726 (*emphasis added*).

During the *Miller* oral argument, this Court confirmed that, regardless of its ruling, the *Miller* Plaintiff would be able to proceed with her gross negligence claim. The video link to the *Miller* oral argument is provided in the footnote below and the Court’s discussion regarding the Plaintiff’s gross negligence claim begins at **1:31:14**.¹ Notably, Justice Hart stated to the *Miller* Plaintiff’s counsel with respect to the effect of the exculpatory agreement: **“You still have this claim for gross negligence.”** *Oral Argument Video at 1:36:05*.

After this Court’s opinion in *Miller*, the plaintiff proceeded to trial against Crested Butte in August 2025. The jury awarded her \$15,800,000, pending reduction of non-economic damages caps.²

The precedent that exculpatory and release agreements cannot exculpate a party from its own gross negligence is grounded in public policy. “[T]here are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract.” *Cooper v. Aspen Skiing Co*, 48 P.3d 1229, 1232 (Colo. 2002) (quoting *Scott v. Pac. W. Mountain resort*, 119 Wash. 2d 484, 834 P.2d 6, 11, 12 (1992)).

¹ Video Link for Colorado Judicial Branch, *Miller v. Crested Butte LLC*, Oral Arguments <https://cojudicial.ompnetwork.org/embed/sessions/284293/23sa186-22sc712> (last visited July 11, 2024)

² <https://coloradosun.com/2025/09/04/jury-verdict-against-vail-resorts/#:~:text=The%20jury%20found%20Crested%20Butte,total%20award%20was%20%2412.4%20million.>

Colorado ski areas have enjoyed record visitors and profits in recent years, including 13.8 million visitors during the 2024-2025 season, and a record breaking 14.8 million visitors during the 2022-2023 season.³⁴ Colorado residents and out-of-state tourists bring extraordinary volumes of business to Colorado industries. *Id.* Thus, ski area releases such as those VSRI require its guests to enter into when they purchase a ski pass affect millions of Coloradoans and tourists every year. Colorado law and public policy have consistently dictated that those who impose release agreements on their guests must not receive blanket immunity for their reckless actions. *See Hamill*, 262 P.3d at 954.

This Court utilized the same analysis in *Miller*, recognizing that release agreements that bar negligence *per se* claims contradict public policy. *Miller*, 549 P.3d at 236. Consequently, the *Miller* Court’s ruling encompassed all “**private release agreements**” without limitation. *Id.* at 230. To apply a different standard to private release agreements purporting to waive claims for gross negligence would conflict with and undermine a core holding of *Miller*.

Colorado law is abundantly clear that release agreements, regardless of when they are executed, can never bar a willful and wanton gross negligence claim. Plaintiff properly pled his claim for willful and wanton conduct, which is

³ <https://coloradosun.com/2025/06/05/colorado-skier-visits-third-busiest-season/>

⁴ <https://coloradosun.com/2024/06/17/colorado-ski-areas-visits-spending/>

synonymous with a claim for gross negligence. Accordingly, Plaintiff's purchase of the 2022-2023 Epic Pass did not waive his existing and properly pled willful and wanton gross negligence claim, which was in the midst of active litigation. This is particularly true when the District Court determined Plaintiff had established a "triable issue" on his claim for exemplary damages, which was based on Defendants' willful and wanton conduct.

F. THE 2022-2023 EPIC PASS RELEASE DOES NOT WAIVE PLAINTIFF'S ONGOING CLAIMS

Overly broad, generic releases entered into by the mere purchase of a ski pass cannot be enforced to dismiss an ongoing lawsuit. The Appellate Court concluded that Plaintiff's purchase of the 2022-2023 Epic Pass amounted to a voluntary dismissal of his claims. *Litterer*, WL 353306, at *5, ¶ 32. Principles of contract formation and the voluntary dismissal procedures governed by C.R.C.P. 41 affirm that Plaintiffs' mere purchase of the 2022-2023 Epic Pass is not tantamount to a voluntary dismissal of his entire case against Defendants.

There must be a mutual understanding and agreement to the terms and conditions of a binding and enforceable settlement. § 41:3 Form of agreement for settlement, 8 Colo. Prac., Personal Injury Torts And Insurance (3d ed.). "[T]he scope of a general release is dependent upon the intent of the parties who negotiated the release." *Neves*, 729 P.2d at 1053.

Additionally, claims in active litigation are dismissed by “filing a stipulation of dismissal signed by all parties who have appeared in the action or by their attorneys.” C.R.C.P. 41(a)(1)(B). That procedure never occurred in this case. Moreover, in a case where a “global release” purported to dismiss claims held by parties who were not included in an accepted settlement agreement, this Court held “there is no indication that the settlement was intended to release the Defendants in the **instant case** from liability.” *Cruz v. Benine*, 984 P. 2d 1173, 1179 (Colo. 1999) (*emphasis added*).

As stated above, the 9th Circuit Court of Appeals held that a release, authored by a ski area and entered into by a guest by purchasing a lift ticket, which purported to release the ski area “from any and all claims ... that I may now have” was overly broad and therefore unenforceable. *Farina*, 66 F. 233, at 234, 236. This exact same overbroad language is contained in VSRI’s 2022-2023 Epic Pass release. *R. 973*.

Plaintiff never intended to dismiss all of his active claims against Defendants when he simply purchased the 2022-2023 Epic Pass. Plaintiff neither held negotiating power nor intended to release his ongoing claims. Rather, he entered into Defendants’ release simply by virtue of purchasing an online ski pass. Thus, there was no “meeting of the minds” with respect to the overbroad and ambiguous language in VSRI’s Epic Pass release. VSRI’s release is therefore unenforceable and cannot dismiss Plaintiff’s entire, ongoing lawsuit.

III. THE APPELLATE COURT ERRED WHEN IT FAILED TO ADDRESS WHETHER DEFENDANTS' PRIVATE RELEASE AGREEMENTS BAR PLAINTIFF'S CLAIM FOR NEGLIGENCE *PER SE* UNDER THIS COURT'S DECISION IN *MILLER V. CRESTED BUTTE*

A. STANDARD OF REVIEW

Questions of law are reviewed de novo. *Freedom Colo. Infor., Inc. v. El Paso County Sherriff's Dept.*, 196 P. 3d 892, 897 (Colo. 2008).

Because this Court's decision in *Miller v. Crested Butte, LLC* was issued after the District Court had dismissed Plaintiff's claims, this issue was not preserved at the District Court level.

B. THE APPELLATE COURT ERRONEOUSLY HELD *MILLER* ONLY APPLIES TO EXCULPATORY AGREEMENTS

The Appellate Court failed to address the effect of this Court's holding in *Miller* because it concluded that the 2022-2023 Epic Pass barred Plaintiff's claims entirely. *Litterer*, WL 353306, *2, ¶ 10. There, reasoning that *Miller* only prohibits "ski resorts from using exculpatory agreements to bar negligence *per se* claims," the Appellate Court refused to determine whether Plaintiff's negligence *per se* claim was wrongfully dismissed pursuant to *Miller. Id.* Specifically, because the Court held that the 2022-2023 Epic Pass was a release rather than an exculpatory agreement, it analyzed the release pursuant to the rules of contract interpretation. *Id.* at *4, ¶ 23.

This Court did not limit its decision in *Miller* to only apply to exculpatory agreements. In fact, this Court specifically utilized language to confirm its

application to releases when it held “[ski resorts] may not absolve [themselves], by way of **private release agreements**, of liability for violations of the statutory and regulatory duties on which [a Plaintiff’s] negligence *per se* claim is based. *Miller*, 549 P.3d at 230 (*emphasis added*). Clearly, if this Court intended its decision in *Miller* to be limited to exculpatory agreements, it would have expressly specified as such. Instead, this Court explicitly confirmed its intention to prevent all “**private release agreements**” from barring a statutory negligence *per se* claim.

Accordingly, the Appellate Court erred by failing to address the application of this Court’s decision in *Miller* to Plaintiff’s negligence *per se* claim.

IV. THE APPELLATE COURT ERRED WHEN IT UPHELD THE DISMISSAL OF PLAINTIFF’S WILLFUL AND WANTON CONDUCT AND EXEMPLARY DAMAGES CLAIMS

A. STANDARD OF REVIEW

Grants of summary judgment are subject to de novo review. *Edwards v. Bank of Am., N.A.*, 382 P.3d 1272, ¶13 (Colo. App. 2016). “Summary judgment is a drastic remedy that should be granted only when the pleadings and the supporting documents demonstrate that no genuine issue of material fact exists and that the moving party is legally entitled to judgment.” *Preferred Prof’l Ins. Co.*, 419 P.3d at 1023; *W. Elk Ranch, L.L.C.*, 65 P.3d at 481.

Defendants raised this issue in their Reply Motion for Summary Judgment. *R.* 881-884. The District Court ruled on this issue when it dismissed Plaintiffs’ claim

for exemplary damages in its January 16, 2024 Order. *R. 987*. Plaintiff also raised this issue in his Motion pursuant to C.R.C.P. 59(a). *R. 1006*.

B. PLAINTIFF’S CLAIM FOR EXEMPLARY DAMAGES WAS IMPROPERLY DISMISSED BECAUSE HE HAS SURVIVING UNDERLYING CLAIMS

In its January 30, 2025 opinion, the Appellate Court affirmed the District Court’s dismissal of Plaintiff’s claim for exemplary damages. *Litterer*, WL 353306, *2, ¶ 47. There, the Court reasoned that because the release contained in the 2022-2023 Epic Pass barred Plaintiff’s substantive claims, his claim for exemplary damages could not proceed independently. *Id.* at ¶ 48. In reaching its decision, the Appellate Court noted “[e]xemplary damages do not present a separate, distinct cause of action, but rather, depend on an underlying claim for actual damages.” *Id.* at ¶ 47 (*quoting Ferrer v. Okbamicael*, 390 P.3d 836, 848 (Colo. 2017)).

Again, the District Court determined Plaintiff established a “triable issue” on his claim for exemplary damages based on Defendants’ dangerous conduct, which was “willful, wanton, and with reckless disregard.” *R. 381*. Specifically, the District Court held: “The pertinent factual issues presented in the pleadings are: whether McClure was traveling in the middle of the snowmobile route or hugging the right tree line; whether the snowmobile was moving or stopped prior to and at the time of collision; whether McClure was following the standard practices and procedures as established by VSRI; and whether [sic] the Plaintiff was skiing at an extreme or

unreasonable rate of speed around a blind corner. These issues are presented by party and witness depositions, expert affidavits, and accident reports which were incorporated into the Plaintiff's Motion as well as Defendant's Response. **These are factual issues for the jury to decide.**" *Id.* (emphasis added).

Despite the District Court's Order granting Plaintiff's Motion to add a claim for exemplary damages, it subsequently dismissed that claim because it determined the claim "cannot stand" alone. *R. 987*. Plaintiff immediately filed his Motion for Amendment of Findings and Judgment Pursuant to C.R.C.P. 59(a), arguing that his exemplary damages claim was based on Defendants' willful and wanton conduct, (which is the definition of a gross negligence claim), and thus could not be waived pursuant to Colorado law. *R. 1006*; *See Miller*, 549 P.3d at 236 (confirming C.R.S. § 13-22-107(4), "precludes parental waivers of a child's claims for **willful and wanton conduct, reckless acts or omissions, and gross negligence**") (emphasis added). The District Court denied Plaintiff's Rule 59(a) Motion before this Court issued its Opinion in *Miller*. *R. 1207*.

Plaintiff therefore should have been able to proceed to trial for a determination of whether Defendants' conduct was willful and wanton. This is the exact result that was reached in *Hastings v. POWDR-Copper Mountain, LLC*, a nearly factual and legally identical Summit County case involving a snowmobile colliding with a snowboarder, which occurred before Plaintiff's injury. *R. 1004*. In *Hastings*, the

Summit County District Court dismissed all the plaintiff's claims due to Copper Mountain's ski pass release, except for his exemplary damages claim, and yet did not dismiss the plaintiff's entire case. *Id.* Rather, the court concluded "that the [r]elease is enforceable only to the extent that the Defendants were negligent. A jury may find liability under Plaintiffs' claims if it determines that Defendants' conduct was willful and wanton." *Id.* The Summit County District Court consequently determined that an exemplary damages claim is identical to a claim for willful and wanton conduct, which can stand alone.

Similarly, Plaintiff's willful and wanton conduct and exemplary damages claims should have survived dismissal for the jury to determine whether Defendants' conduct was willful and wanton. Therefore, the Appellate Court erred in upholding the dismissal of these claims.

Further, the District Court's and Appellate Court's determination that Plaintiff's "established" exemplary damages claim must be dismissed for lack of an underlying claim for damages leads to an illogical, inequitable, and extremely punitive result. If all of Plaintiff's underlying claims are entirely barred by Defendants' private release agreement, then Plaintiff can never proceed on his "triable issue" for exemplary damages because he will never have an underlying claim to which it can attach. This circular reasoning provides no avenue for an injured guest, who is required to enter into Defendants' release simply by purchasing

a ski pass, to pursue any claims in Colorado against a ski area, even when the guest has established prima facie evidence of willful and wanton conduct. Plaintiff's exemplary damages claim, based on Defendants' willful and wanton conduct, is rendered entirely futile as a result.

Moreover, Colorado law is clear that “**in no event will an exculpatory agreement be permitted to shield against a claim of willful and wanton negligence.**” *United States Fire Insurance Co. v. Sonitrol Management Corp.*, 192 P.3d 543 (Colo. App. 2008). The same is true of Plaintiff's exemplary damages claim, which is entirely based on Defendants' willful, wanton, and reckless conduct.

Plaintiff attempted to plead negligence *per se* and willful and wanton conduct in his original Complaint, which the District Court dismissed. The end result is complete dismissal of a case for which Plaintiff established prima facie evidence of a “triable issue” on his claim for exemplary damages. This result is absurd and nonsensical, especially in light of this Court's ruling in *Miller*, which expanded the claims an injured guest can assert against a ski area.

As detailed above, Plaintiff's claims for negligence *per se* and willful and wanton gross negligence could not be waived by his mere purchase of the 2022-2023 Epic Pass. If these claims are revived, they may serve as underlying claims to which Plaintiff's exemplary damages claim may attach. For these reasons, this Court must reverse the Appellate Court and reinstate Plaintiff's exemplary damages claim.

V. CONCLUSION

The District Court's and Appellate Court's rulings bar any recovery whatsoever for Plaintiff, despite the fact the District Court definitively ruled Plaintiff had established a "triable issue" on his claim for exemplary damages based on Defendants' willful and wanton conduct.

As confirmed by this Court in *Miller*, Defendants' private release agreement may not be used as a complete shield against Plaintiff's negligence *per se* claim. Defendants cannot abrogate their statutory duties pursuant to the Snowmobile Safety Act, which mirrors VSRI's own snowmobile operations manual, by forcing Plaintiff to enter into a private release agreement when he purchased his ski pass.

Moreover, Colorado law is settled that a claim for willful and wanton conduct, which Plaintiff pled and is the definition of gross negligence, may never be barred by a private release agreement. Colorado law does not limit this rule to exculpatory agreements. Therefore, consistent with Colorado law and its decision in *Miller*, this Court should confirm that Defendants' private release agreement cannot preclude claims for willful and wanton conduct or gross negligence. This Court may also determine Defendants' private release agreement is unenforceable as a matter of law because it is overly broad.

If this Court revives Plaintiff's negligence *per se* and/or willful and wanton gross negligence claims, Plaintiff will have the requisite underlying claim to support his exemplary damages claim.

For these reasons, Plaintiff John Litterer respectfully requests that this Court reverse the Appellate Court's January 30, 2025 decision upholding the District Court's dismissal of all of Plaintiff's claims in their entirety, and remand this case to the Summit County District Court.

Respectfully submitted this 30th day of October, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of October, 2025, a true and correct copy of the foregoing **PETITIONER’S OPENING BRIEF** was filed with the Colorado Supreme Court and served on the following via Colorado Courts E-filing:

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