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| **COLORADO SUPREME COURT**<br>2 East 14th Avenue<br>Denver, CO 80203 | DATE FILED<br>December 23, 2025 1:32 PM |
| Colorado Court of Appeals<br>Court of Appeals Case No.: 2024-CA-480<br><br>_____<br><br>District Court, Summit County, Colorado<br>Hon. Reed W. Owens<br>District Court Case Number: 2022-CV-30043 | ▲FOR COURT USE ONLY▲ |
| Petitioner/Plaintiff:<br><br>**JOHN LITTERER**,<br><br>v.<br><br>Respondents/Defendants:<br><br>**VAIL SUMMIT RESORTS, INC**., a corporation, and **DWIGHT MCCLURE**, an individual. | Supreme Court Case No:<br>2025-SC-134 |
| Attorneys for Appellant/Plaintiff:<br>Joseph D. Bloch, Atty. Regis #16783<br>Trenton J. Ongert, Atty. Regis #36602<br>Elan Z. Goldstein, Atty. Regis #62264<br>Bloch & Ongert, LLC<br>1725 Gaylord Street<br>Denver, CO 80206<br>Phone No.: (303) 331-1700<br>Fax No.: (303) 355-0252 | |
| **PETITIONER'S REPLY BRIEF** | |

## 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 4,376 words
☐ It does not exceed 30 pages.

**BLOCH ONGERT, LLC**

*/s/ Trenton J. Ongert*
Joseph D. Bloch, Atty. Regis. #16783
Trenton J. Ongert, Atty. Regis. #36602
Elan Z. Goldstein, Atty. Regis. #62264
1725 Gaylord Street
Denver, CO 80206
(303) 331-1700
*Attorneys for Petitioner/Plaintiff*

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## ARGUMENT

### I. PURSUANT TO *MILLER*, THE 2022-2023 SKI PASS DID NOT DISMISS PLAINTIFF'S CLAIMS

#### A. THE *MILLER* HOLDING APPLIES TO ALL PRIVATE RELEASE AGREEMENTS

This Court has the opportunity to confirm and follow its ruling in *Miller* that broad private release agreements do not confer complete immunity to ski areas. Vail is a multi-billion-dollar corporation that operates ski resorts on public land in Colorado pursuant to government-issued permits. Conferring blanket immunity on Vail and its employees for their willful and wanton bad acts contradicts this Court's decision in *Miller* and is a violation of public policy.

Presumably, this Court did not grant certiorari to simply affirm the District Court's and Appellate Court's dismissal of a "straightforward contract matter." *See* Defendant's Answer Brief ("Ans. Br."), at 2. Plaintiff has repeatedly emphasized this Court's holding in *Miller* that, "as a matter of first impression," a ski area may not evade all liability for violation of its statutory duties "by way of **private release** agreements." *Miller v. Crested Butte, LLC*, 549 P.3d 228, 230 (Colo. 2024) (*emphasis added)*.

Defendants assert the Appellate Court did not err in affirming the dismissal of all Plaintiff's claims when it summarily held Plaintiff forfeited his claims by purchasing the 2022-2023 ski pass, which forced him to enter into Defendants' private release agreement. Additionally, Defendants argue the Appellate Court need

not address *Miller* with respect to the release because *Miller* addressed a prospective exculpatory agreement, rather than a post-injury release. Ans. Br., at 48. Defendants' position ignores this Court's plain language in *Miller*.

As stated in Plaintiff's Opening Brief, prior to *Miller*, Colorado courts had consistently held exculpatory agreements cannot shield a party for its violation of statutory requirements. Op. Br., at 21. Even before *Miller*, Colorado law has been clear that statutory obligations may not be discharged by prospective agreements. *Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 492 (Colo. 1998); *See also Gonzales v. Indus. Comm'n*, 740 P.2d 999, 1002 (Colo. 1987) ("Private parties may not by agreement or rule render ineffectual the rules and standards provided by statute.").

Defendants request that this Court limit its ruling in *Miller* to only exculpatory agreements, but nothing in the *Miller* ruling requires or suggests such a limitation. Rather, this Court included "**private release** agreements" in its carefully worded language in its Opinion. *Miller,* 549 P.3d at 230 (emphasis added). Thus, *Miller* is clear that "**private release** agreements" cannot waive a valid negligence *per se* claim, which is exactly what made *Miller* a "matter of first impression." *Id*. Again, prior to *Miller,* Colorado courts had already determined pre-injury exculpatory agreements cannot bar claims for statutory violations. *Peterman,* 961 P.2d at 492; *Gonzales*, 740 P.2d at 1002. This Court in *Miller* specifically expanded prior caselaw

to include "**private release** agreements," which applies to the 2022-2023 ski pass Plaintiff purchased (emphasis added).

Defendants argue Plaintiff's interpretation of *Miller* "reads too much into the court's use of the world release." Ans. Br., at 36 (internal quotations omitted). Similar to the manner in which the General Assembly legislates, this Court rules with intention and precision. By including "**private release** agreements" (emphasis added), in the precise language of its Opinion, this Court clearly intended its ruling to apply to post-injury release agreements, as well as to pre-injury exculpatory agreements. In *Miller*, this Court intentionally diminished the power of a ski area's exculpatory agreements and releases to ensure the statutory rights and protections afforded to its guests. Defendants now ask this Court to go the opposite direction of *Miller*, expand the enforceability of Vail's releases, and affirm the dismissal of Plaintiff's active lawsuit, for their own benefit.

Further, nothing in *Miller* limits its holding to the Colorado Skier Safety Act or Tramway Act. Instead, this Court reaffirmed long-standing Colorado law that a plaintiff may base a negligence *per se* claim on the violation of any statute that was intended to protect against the type of injury suffered. *Miller,* 549 P.3d at 234. Defendant McClure's alleged violation of the Colorado Snowmobile Safety Statute permits Plaintiff to base his negligence *per se* claim on that statute. *See Bittle v. Brunetti*, 750 P.2d 49, 55 (Colo. 1988) ("A criminal statute may be relied upon to

establish negligence *per se* even though the statute is silent on the issue of civil liability."). Accordingly, Plaintiff asserted a valid negligence *per se* claim that could not be waived by his mere purchase of the 2022-2023 ski pass.

### B. GROSS NEGLIGENCE AND WILLFUL AND WANTON CONDUCT CANNOT BE WAIVED BY A PRIVATE RELEASE AGREEMENT

The District Court rejected Plaintiff's argument that post-injury release agreements cannot bar a claim for willful and wanton conduct. CF, p. 1257. However, there is no exception to Colorado law that a pre-injury exculpatory agreement or a post-injury release agreement can never waive grossly negligent or willful and wanton conduct. *See Boles v. Sun Ergoline, Inc.*, 223 P.3d 724, 726 (Colo. 2010); *see* also *United States Fire Insurance Co. v. Sonitrol Management Corp.*, 192 P.3d 543 (Colo. App. 2008). Defendants cite no binding legal authority that a post-injury release agreement may be utilized to completely release claims for willful and wanton conduct or gross negligence.

The District Court adopted the New Jersey case *Dearnley v. Mountain Creek's* reasoning that Plaintiff completely released all of his claims because the 2022-2023 ski pass "neither eroded the ski operator's duty of care nor did it incentivize negligence." CF, p. 1256 (*quoting Dearnley v. Mountain Creek*, No. A-5517-10T1, 2012 WL 762150 (N.J. Super. Ct. App. Div. Mar. 12, 2012) (unpublished)). The

Appellate Court followed the same logic to uphold the complete dismissal of Plaintiff's case.

The Appellate Court's affirmation of the District Court's dismissal of all of Plaintiff's underlying claims creates a conflict in Colorado law. A pre-injury exculpatory agreement and a post-injury release can never bar a claim for willful and wanton conduct, regardless of when the agreement was entered into or when the claim accrued. *See Forman v. Brown*, 944 P.2d 559, 564 (Colo. App. 1996). Yet, Defendants' exculpatory agreement and private release agreement barred every underlying claim such that Plaintiff, who had established a "triable issue" on willful and wanton conduct, was prevented from ever reaching a jury. CF, p. 381. This is the exact result this Court intended to avoid in *Miller* when it confirmed that injured guests may circumvent exculpatory and private release agreements when ski areas violate their statutory obligations. *See Miller,* 549 P.3d at 230

Colorado law prohibiting exculpatory agreements from barring claims for willful and wanton conduct is rooted in public policy. See *Cooper v. Aspen Skiing Co*, 48 P.3d 1229, 1232 (Colo. 2002) ("[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.") (*internal citation omitted*). Colorado courts have long upheld the public policy that the most egregious conduct, such as gross negligence and willful and wanton conduct can never, under any circumstance,

be waived. This Court expanded that public policy in *Miller* by adding valid claims for negligence *per se* to the claims that cannot be waived by exculpatory and private release agreements.

Defendants' post-injury releases serve no practical purpose other than to punish guests who are injured due to Vail's conduct by broadly prohibiting them from asserting "any and all claims" for "anything that has happened," and as in this case, completely dismissing valid claims in litigation. There is no specific language in Vail's private release agreement that indicates to guests that they are agreeing to release all current claims in litigation. Defendants' retroactive releases are included in the same "agreement" as their exculpatory waivers, and are meant to evade clear Colorado law prohibiting waiver of claims for willful and wanton conduct, and now after *Miller*, negligence *per se*.

The only purpose of Vail's post-injury releases is to extinguish valid, already existing claims. This Court should apply the same scrutiny to post-injury releases as it does to pre-injury exculpatory agreements. As stated above, this Court did exactly that in *Miller*, and if it declines to do so here, it will only incentivize Vail's negligence and willful and wanton conduct.

Plaintiff is precisely the repeat, loyal guest that Defendants intend to punish with their post-injury releases. Plaintiff recovered well enough from his injuries caused by Defendants to snowboard again at Breckenridge, only to have his case

completely thrown out merely because he purchased a ski pass from Vail. Some injured guests may not even realize they have a viable claims against Vail before purchasing another ski pass after they were initially injured, but their valid claims, including claims for willful and wanton conduct and gross negligence, will be barred in their entirety.

Day and multi-day pass purchasers face the same consequence. In a 2024 report, Vail estimated that non-season-pass holders account for approximately 30% of season ski traffic. Similarly, season-pass holders accounted for 55.7% of all skiers in the Rocky Mountain region.[1] Therefore, Vails seeks to prevent loyal, repeat guests from ever bringing a claim to recover from their previously suffered injuries. Knowing that these guests will return to their mountains, Vail's post-injury releases incentivize wrongful conduct in the same manner as prospective exculpatory agreements.

Notwithstanding, Defendants' post-injury release cannot bar Plaintiff's claims for willful and wanton conduct and negligence *per se* claim. This private release agreement should be scrutinized exactly like a pre-injury exculpatory agreement, and should not be governed by lenient contract formation principles.

[1] Jason Blevins, *Vail Resorts watching for new ski areas to buy, sold 2.3M passes and tickets heading into season*, Colorado Sun (Dec. 13, 2024), https://coloradosun.com/2024/12/13/vail-resorts-pass-sales/.

### C. IF THIS COURT DETERMINES THE 2022-2023 SKI PASS DID NOT RELEASE PLAINTIFF'S NEGLIGENCE *PER SE* OR WILLFUL AND WANTON CONDUCT CLAIMS, PLAINTIFF'S CLAIM FOR EXEMPLARY DAMAGES IS REVIVED

A claim for willful and wanton conduct is synonymous with a gross negligence claim. See Op. Br., at 23 ("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). The Appellate Court affirmed the dismissal of Plaintiff's willful and wanton conduct claim because it held that claim was fully released by the 2022-2023 ski pass. COA Opinion at 6, ¶38.

"The rationale behind [Rule 15] is that a substantial right should never be sacrificed to mere form." *Van Schaack v. Phipps*, 558 P.2d 581, 586 (Colo. App. 1976); *See also Jarbough v. Atty. Gen. of U.S.*, 483 F.3d 184, 189 (3rd Cir. 2007) ("We are not bound by the label attached by a party to characterize a claim and will look beyond the label to analyze the substance of a claim. To do otherwise would elevate form over substance and would put a premium on artful labeling.")

Willful and wanton conduct is the exact same as gross negligence, regardless of how Plaintiff titled his claim in his Complaint. A gross negligence claim does not have recognized elements or a jury instruction. Plaintiff did not move to amend his Complaint to add a gross negligence claim because he had already pled a claim for willful and wanton conduct, and the District Court determined he had a viable claim

when it granted Plaintiff's Motion to Add a Claim for Exemplary Damages. CF, p. 381.

Further, Plaintiff's claim for exemplary damages is synonymous with, as well as closely related to, claims for gross negligence and willful and wanton conduct. Plaintiff may recover exemplary damages when "the injury complained of is attended by circumstances of fraud, malice, or **willful and wanton conduct**". C.R.S. § 13-21-102(1)(a) (emphasis added).

Defendants argue Plaintiff's Motion to Add a Claim for Exemplary Damages was meritless and was only granted due to the forgiving standard afforded to such motions. Ans. Br., at 7. Defendants' argument in this regard is untrue and self-serving. Specifically, in his Motion to Amend Complaint to Add a Claim for Exemplary Damages, Plaintiff detailed the exact facts and conduct that constituted Defendants' willful and wanton conduct. CF, pp. 182-193. The facts that establish Defendants' willful and wanton conduct are precisely the circumstances that warrant exemplary damages under C.R.S. § 13-21-102, which the District Court recognized. CF, p. 381. Thus, the District Court quickly granted Plaintiff's Motion to Add a Claim for Exemplary Damages based on Defendants' specific acts of willful and wanton conduct, and not the "forgiving prima facie standard."

The District Court erred when it dismissed Plaintiff's valid claim for willful and wanton conduct, which is the exact same as gross negligence. The Appellate

Court failed to reinstate this claim because it held the claim was dismissed when Plaintiff purchased the 2022-2023 ski pass. If this Court reinstates Plaintiff's claims for negligence *per se* and willful and wanton conduct as discussed above, his claim for exemplary damages must also be reinstated.

## II. THE 2022-2023 SKI PASS DID NOT FORM A BINDING CONTRACT

This Court must reverse the dismissal of all of Plaintiff's claims because Colorado law, including the *Miller* ruling, does not permit Defendants' 2022-2023 ski pass release to bar all of his claims. Additionally, Plaintiff did not enter into a binding contract to release all of his claims when he purchased the 2022-2023 ski pass.

### A. PLAINTIFF DID NOT FORFEIT HIS CONTRACT FORMATION ARGUMENTS

The Appellate Court expressly held Plaintiff properly preserved his argument that the 2022-2023 ski pass did not form a binding contract. COA Opinion, at *3, ¶18. Nonetheless, Defendants argue this Court must "deem Litterer's challenges to contract formation forfeited and affirm [dismissal] on that basis". Ans. Br., at 20. Defendants' position is unfounded.

In determining that Plaintiff properly raised his contract formation arguments in the District Court, the Appellate Court held "[i]n his response to the Defendants' [Motion for Summary Judgment], Litterer argued that the 2022 online waiver was not fairly entered into and that the intention to release the Defendants from liability

was not expressed in clear and unambiguous language… Therefore, we conclude that the issue was adequately preserved." COA Opinion, at *3, ¶18. As the Appellate Court recognized, Plaintiff properly preserved his contract formation arguments in his Response to Defendants' Motion for Summary Judgment.

Defendants did not appeal the Appellate Court's ruling on this issue, nor did this Court designate the preservation of Plaintiff's contract formation arguments as an issue for this appeal. Accordingly, Defendants' argument that Plaintiff failed to preserve his contract formation arguments is incorrect.

### B. THE 2022-2023 SKI PASS RELEASE IS OVERLY BROAD AND AMBIGUOUS

The Appellate Court held that Defendants' private release agreement releasing "any and all claims" was unambiguous. COA Opinion, at *5, ¶26. Defendants argue their release is "clear as a bell" because it release "all claims," "any and all claims," and "anything that has happened." Ans. Br., at 3. However, Defendants' private release agreement is overly broad on its face and does not indicate in any way that Plaintiff was releasing existing, valid claims in active litigation when he purchased the ski pass. Therefore, it is unenforceable and cannot dismiss Plaintiff's case in its entirety.

At the time Plaintiff purchased the 2022-2023 ski pass, his claims were in the midst of contentious litigation. Plaintiff understood that a willful and wanton conduct claim could never be waived, and Colorado law does not distinguish

between pre-injury exculpatory agreements and post-injury private release agreements in this regard. *See* CF, pp. 419, 426.

Plaintiff's Opening Brief cites a 9th Circuit Court of Appeals Opinion holding that a release waiving "any and all claims" was void as a matter of public policy because "the clause exculpates [the ski area] from liability for more than ordinary negligence, including gross negligence and wanton or willful misconduct." *Farina v. Mt. Bachelor, Inc.,* 66 F.3d 233, 234-35 (9th Cir. 1995). Although the 9th Circuit addressed a pre-injury exculpatory agreement, the ruling analyzes the exact same language contained in Defendants' post-injury private release agreement, and again, Colorado law is clear that gross negligence and willful and wanton conduct can never be waived. The 9th Circuit in *Farina* held the agreement was entirely unenforceable because it was "not obvious from the language of the clause that the parties intended the clause to be severable." *Farina,* 66 F.3d 233 at 236.

The same is true here. In 2020, Plaintiff purchased a ski pass from Vail before Defendants caused his injuries. CF, pp. 418-20. The prospective exculpatory agreement language, "WAIVE ANY AND ALL CLAIMS," and the retroactive private release agreement language, "RELEASE AND GIVE UP ANY AND ALL CLAIMS," were contained in entirely separate clauses of the 2020 ski pass. CF, p. 419 ¶¶ 4, 6.

However, in the 2022-2023 ski pass, language to "WAIVE" and "RELEASE" "ANY AND ALL CLAIMS" was all included in the same clause. CF, pp. 427-28 ¶ 7. Thus, as the 9th Circuit determined in *Farina*, ambiguous language in a single clause cannot be severed from that clause, or from the waiver as a whole, because there is no indication that "the parties intended the clause to be severable." *See Farina,* 66 F.3d 233 at 236.

Further, a contract is ambiguous if its terms "are susceptible to more than one reasonable interpretation. *Ad Two, Inc. v. City and Cnty. of Denver ex rel. Manager of Aviation*, 9 P.3d 373, 376 (Colo. 2000). As indicated above, and pursuant to Colorado law, Plaintiff understood that neither the prospective exculpatory agreement nor the retroactive private release agreement in the 2022-2023 ski pass could absolve Defendants of claims for willful and wanton conduct. *See* CF, p. 427. The 2022-2023 ski pass private release agreement language, including "RELEASE AND GIVE UP ANY AND ALL CLAIMS THAT I MAY NOW HAVE," refers to generic "claims," and not active lawsuits, and thus, Plaintiff reasonably believed this private release agreement would have no effect on his ongoing lawsuit against Defendants. This is a reasonable interpretation that is consistent with Colorado law regarding exculpatory and private release agreements. Therefore, the 2022-2023 ski pass was ambiguous as to its effect on Plaintiff's active lawsuit against Defendants.

Moreover, the language in Vail's releases that "snowmobiles…may be encountered at any time," does not specifically warn guests of the danger of Defendants operating Vail's snowmobiles uphill, against snowrider traffic in violation of their own policies and procedures, and in violation of C.R.S. § 33-14-116. CF, p. 1238. Plaintiff and other Breckenridge guests are not provided any warning whatsoever of the actual, potential danger presented by Vail's snowmobiles based on this vague, ambiguous, and overly broad language.

Further, prior to the District Court's complete dismissal of his case, Plaintiff had a valid Premises Liability Act claim against Defendant VSRI pursuant to C.R.S. § 13-21-115. Plaintiff alleged VSRI unreasonably failed to exercise reasonable care to protect against dangers at Breckenridge of which it knew or should have known. CF, p. 8.

Unlike a negligence claim, Plaintiff's Premises Liability claim implicates not only the conduct of VSRI's employees themselves, but also dangers that existed throughout Breckenridge's expansive ski area. Defendants never disputed in this case that they operate snowmobiles daily on open ski runs during guest hours at Breckenridge. Moreover, as Defendants acknowledge, it is undisputed that Defendant McClure was driving his snowmobile to his workstation on the morning of the incident, and not in response to any critical emergency, when he collided with Plaintiff. CF, pp. 203, 209; Ans. Br. at 4. Consequently, a more specific, meaningful

warning to Defendants' guests regarding the potential dangers of its snowmobile operations was not only warranted, but it was also required to satisfy the fourth *Jones* factor that the language in a release must be clear and unambiguous. *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981).

For these reasons, Defendants' private release agreement in the 2022-2023 ski pass is vague, ambiguous, overly broad, therefore unenforceable.

### C. THE PARTIES' CONDUCT DID NOT IMPLY ASSENT TO THE 2022-2023 SKI PASS PRIVATE RELEASE AGREEMENT

When a contract is ambiguous, extrinsic evidence, such as the parties' conduct, is relevant in determining the parties' intent and the meaning of the terms. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911–12 (Colo. 1996); *Union Rural Elec. Ass'n, Inc. v. Pub. Utilities Commn. of State*, 661 P.2d 247, n.6 (Colo. 1983). In its analysis of the 2022-2023 ski pass release, the Appellate Court acknowledged "mutual assent 'may be inferred from the conduct and declarations of the parties.'" COA Opinion, at *4, ¶25 (internal citation omitted).

Plaintiff clearly did not assent to releasing all of his active litigation claims by purchasing the 2022-2023 ski pass. Further, Defendants' conduct does not indicate they believed Plaintiff voluntarily relinquished all his claims and dismissed his entire case the moment he purchased the 2022-2023 ski pass. Plaintiff purchased the ski pass in November 2022, and yet Defendants waited a full year to file their Motion for Summary Judgment in November 2023. CF, p. 533. During that year, Defendants

engaged in considerable discovery, including depositions, retained multiple experts, and expended over $61,000 in costs to defend claims they purportedly believed Plaintiff had voluntarily released. CF, p. 1021.

If Defendants truly believed Plaintiff voluntarily waived all of his claims and dismissed his case the moment he purchased the 2022-2023 ski pass, they would have filed their Motion for Summary Judgment immediately after Plaintiff purchased the ski pass in November 2022, instead of expending considerable time and costs to defend this lawsuit. Defendants' untimely conduct in this regard demonstrates Defendants did not believe for a full year that Plaintiff voluntarily agreed to dismiss his lawsuit.

Moreover, if Defendants actually believed Plaintiff intended to release all of his claims when he purchased the 2022-2023 ski pass, they would have promptly conferred with Plaintiff to file a Stipulation of Dismissal of the lawsuit. *See* Op. Br., at 31 ("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)."). Defendants are fully aware Plaintiff never intended to dismiss his case, and Defendants never believed he voluntarily did so. Again, the sole purpose of Defendants' post-injury private release agreement is to punish their guests.

Moreover, Defendants' reference to *Avemco* is flawed. Ans. Br., at 24-25. In *Avemco*, this Court affirmed the trial court's holding that the parties' negotiation of

a check refunding an insurance premium "accomplished a mutual recission of the insurance contract." *Avemco Ins. Co. v. N. Colorado Air Charter, Inc.*, 38 P.3d 555, 557 (Colo. 2002). Here, there was no negotiation between the parties when Plaintiff purchased the 2022-2023 ski pass online. Plaintiff merely clicked a few buttons online, paid Vail for the pass, and as the District Court and Appellate Court determined, effectively and voluntarily dismissed his entire case. Further, *Avemco* concerned the recission of an insurance policy by the refund of money, not the release of claims in an active lawsuit. *Avemco*, 38 P.3d at 565. Thus, *Avemco* has no bearing on this case.

The 2022-2023 ski pass release is vague, ambiguous, and overly broad, and the parties' conduct immediately after Plaintiff purchased the ski pass does not demonstrate mutual assent. Therefore, no binding contract existed.

## III. A RULING IN FAVOR OF PLAINTIFF DOES NOT DISCOURAGE SETTLEMENT

Defendants assert that a ruling in favor of Plaintiff would result in destroying any avenue for competent parties to release and settle gross negligence and negligence *per se* claims. Ans. Br., at 38. Defendants' assertion is incorrect.

Refusing to enforce Defendants' punitive private release agreement will not jeopardize the ability of competent parties to reach a settlement pursuant to mutual settlement releases and bargained for consideration. If the 2022-2023 ski pass truly constituted a voluntary dismissal of all of Plaintiff's claims, the parties would have

jointly stipulated for dismissal. *See* C.R.C.P. 41(a)(1)(B). As Defendants are well aware, Plaintiff's purchase of the 2022-2023 ski pass was not a mutual and voluntary settlement and dismissal of his active lawsuit.

Defendants' assertion that Plaintiff's position would prohibit competent parties from negotiating and agreeing to mutual settlement agreements is illogical and absurd. Plaintiff simply argues that this Court should find that the 2022-2023 ski pass release was not a mutually bargained for and agreed upon voluntary settlement and dismissal of Plaintiff's claims. This will have no impact on the ability for parties to reach a pre-litigation, mutual settlement or to voluntarily stipulate to dismissal of claims in an active lawsuit.

## IV. THIS COURT SERVES AS THE APPROPRIATE FORUM TO ADDRESS THE VALIDITY OF THE 2022-2023 SKI PASS

Defendants disingenuously argue that because the General Assembly has enacted a limitation on general releases, Plaintiff should lobby for a change of law through the legislature rather than pursuing his claims in court. *See* Ans. Br., at 32-34. Defendants appear to suggest that only the Colorado General Assembly, and not this Court, has the ability to enact and change the law of this State.

Defendants are well aware of the 10th Circuit case *Brigance v. Vail Summit Resorts, Inc.*, 883 F.3d 1243 (10th Cir. 2018). In *Brigance*, a case that upheld the enforceability of Vail's exculpatory agreement, the 10th Circuit Court of Appeals recognized that the Colorado Supreme Court and General Assembly "may someday

'prefer a policy that shifts the burden of loss to the service provider, ensuring compensation for cases like this.'" *Brigance*, 883 F.3d at 1262 (*quoting Espinoza v. Ark. Valley Adventures, LLC*, 809 F.3d 1150, 1153 (10th Cir. 2016).

However, the General Assembly recently refused to enact skier safety legislation due to the powerful, deep-pocketed ski industry lobby.[2] In fact, this most recent proposed skier safety legislation never made it out of the Senate committee. Thus, this Court is the only hope and recourse for guests who have been injured due to a ski area's violation of statutory regulations and willful and wanton conduct. This Court should confirm and follow its ruling in *Miller*, and deny complete immunity to Defendants in this case.

## V. CONCLUSION

The Appellate Court's Order affirming the District Court's dismissal of Plaintiff's claims must be reversed.

Respectfully submitted this 23rd day of December, 2025.

**BLOCH ONGERT, LLC**

/s/ *Trenton J. Ongert*
Joseph D. Bloch, #16783
Trenton J. Ongert, #36602
Elan Z. Goldstein, #62264
1725 Gaylord Street
Denver, CO 80206
Attorneys for Petitioner/Plaintiff

[2] Colorado General Assembly, Committee Meeting Hearing Summary, 75th Gen. Assemb., 1st Reg. Sess. (Apr. 15, 2021) https://leg.colorado.gov/committee_meeting_hearing_summary/12705 (General Assembly Report of Senate Bill 184, a recently proposed ski legislation requiring ski areas to publish safety planning and report injury incidents, was postponed indefinitely despite overwhelming support.)

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2025, a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** was filed with the Colorado Supreme Court and served on the following via Colorado Courts E-filing:

Craig R. May, #32267
Gabrielle L. Lombardi, #55150
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202
Telephone: 303.244.1800
Facsimile: 303.244.1879
may@wtotrial.com
lombardi@wtotrial.com
*Attorneys for Respondents/Defendants.*

Michael J. Hofmann #30207
Kaitlin M. DeWulf, #56548
Bryan Cave Leighton Paisner LLP
1700 Lincoln Street, Suite 4100
Denver, CO, 80203-4541
Telephone: (303) 861-7000
Michael.Hoffmann@bclplaw.com
Kaitlin.Dewulf@bclplaw.com
*Attorneys for Respondents/Defendants*

*/s/ Kaycee E. Ort*
Kaycee E. Ort, Paralegal