ADVANCE SHEET HEADNOTE
September 21, 2026

2026 CO 65

No. 25SC134, *Litterer v. Vail Summit Resorts Inc.*—Waiver and Release—Recreational Activity—Post-Injury Release Agreement

In this case, the supreme court considers whether a plaintiff released claims against a ski resort and its employee when, after commencing litigation, the plaintiff purchased a ski pass from the resort and executed a waiver containing a release of liability covering both defendants. The court further considers whether the plaintiff's claim for willful and wanton conduct and prayer for exemplary damages were properly dismissed.

The court first concludes that the executed waiver operated as an enforceable release agreement. Consequently, the waiver barred the plaintiff's claims against the defendants.

The court next concludes that the plaintiff's willful and wanton conduct claim was properly dismissed because it is not a separate, cognizable claim upon which relief may be granted, but that in any event, plaintiff's claim was released by the waiver. Further, since there is no independent claim for relief to which the prayer for exemplary damages could attach, plaintiff's prayer was also properly dismissed.

Finally, the court distinguishes this case from *Miller v. Crested Butte, LLC*, 2024 CO 30, 549 P.3d 228. *Miller* governs the validity of exculpatory agreements executed prior to an injury, while this case concerns a post-injury release.

Accordingly, the court affirms the dismissal of plaintiff's claims.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2026 CO 65

Supreme Court Case No. 25SC134
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 24CA480

Petitioner:

John Litterer,

v.

Respondents:

Vail Summit Resorts, Inc., a corporation, and Dwight McClure.

Judgment Affirmed
en banc
September 21, 2026

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JUSTICE BERKENKOTTER delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE BOATRIGHT**, and **JUSTICE BLANCO** joined.
JUSTICE GABRIEL, joined by **JUSTICE HOOD** and **JUSTICE SAMOUR**, dissented.

JUSTICE BERKENKOTTER delivered the Opinion of the Court.

¶1 This case requires us to decide whether a division of the court of appeals erred in concluding that John Litterer released the claims he alleged against Vail Summit Resorts, Inc. ("VSRI") and Dwight McClure (collectively "respondents") when he purchased a five-day Epic Pass for the 2022–23 ski season.

¶2 Litterer sustained injuries in a snowboarder-snowmobile collision at Breckenridge Ski Resort ("Breckenridge") in December 2020. Breckenridge is owned by VSRI. McClure, the snowmobile driver, is a VSRI employee. Litterer subsequently brought multiple claims against respondents. While his case was in active litigation, Litterer decided to return to Breckenridge for a ski trip, so he purchased an Epic Pass for the 2022–23 ski season.

¶3 During the online purchasing process, Litterer executed a "Release of Liability, Waiver of Claims, Assumption of Risks[,] and Indemnity Agreement" ("the 2022 online waiver"). It provided that "[i]n consideration for allowing the Participant to participate in the Activity [defined to include snowboarding], I FURTHER RELEASE AND GIVE UP ANY AND ALL CLAIMS AND RIGHTS THAT I MAY NOW HAVE AGAINST ANY RELEASED PARTY." The term "Released Party" is defined as including VSRI and its employees.

¶4 After respondents filed a motion for summary judgment, arguing that Litterer waived his claims against them, the district court agreed and dismissed all of Litterer's then-remaining claims with prejudice. *Litterer v. Vail Summit Resorts, Inc.*, No. 22CV30043, at 23 (Dist. Ct., Summit Cnty., Jan. 16, 2024) (unpublished order). Litterer appealed, and a division of the court of appeals affirmed the judgment. *Litterer v. Vail Summit Resorts, Inc.,* No. 24CA480, ¶ 1 (Jan. 30, 2025).

¶5 We granted certiorari.[1] We now conclude that (1) the 2022 online waiver operates as a release, not an exculpatory agreement; (2) Litterer's claims for willful and wanton conduct and his prayer for exemplary damages were properly dismissed; and (3) the division did not err in declining to address whether *Miller v. Crested Butte, LLC*, 2024 CO 30, ¶ 49, 549 P.3d 228, 237, is applicable here because that case concerns pre-injury exculpatory agreements, not post-injury releases. Accordingly, we affirm the division's judgment.

[1] We granted certiorari to review the following three issues:

1. Whether the court of appeals erred when it held all of petitioner's claims against respondents were waived when he purchased a 2022–2023 Epic Pass.

2. Whether the court of appeals erred when it upheld the dismissal of petitioner's willful and wanton conduct and exemplary damages claim.

3. Whether the court of appeals erred when it failed to address whether Vail's exculpatory agreements bar petitioner's claim for negligence per se under this court's decision in *Miller v. Crested Butte, LLC,* 2024 CO 30, 549 P.3d 228 . . . .

I. Facts and Procedural History

¶6 Litterer was injured in December 2020, while snowboarding at Breckenridge, when he and a snowmobile operated by McClure collided. The parties' characterization of the collision is not particularly relevant to the legal questions before us. Suffice it to say, the parties see things quite differently.

¶7 *Prior to* his injury, Litterer had executed two online agreements in connection with his purchase of a 2020–21 Epic Pass. He electronically signed a "Release of Liability, Waiver of Claims, Assumptions of Risk Warning[,] and Indemnification Agreement" in March 2020. He also agreed to a "Release of Liability & Assumption of Risks Agreement," which was on the back of the Epic Pass.[2]

¶8 Litterer filed several claims against respondents after the collision, which respondents sought to dismiss. The district court dismissed Litterer's common law tort claims against VSRI, finding that the Colorado Premises Liability Act ("PLA"), § 13-21-115, C.R.S. (2025), preempted them. *Litterer v. Vail Summit Resorts, Inc.*, No. 22CV30043, at 12 (Dist. Ct., Summit Cnty., Nov. 14, 2022) (unpublished order). It also dismissed Litterer's willful and wanton conduct and reckless endangerment claims against respondents, concluding that they are not

[2] For simplicity, we refer to the two 2020 agreements as "the 2020 online waivers."

cognizable causes of action in Colorado. Four claims then remained: three against McClure (negligence, negligence per se, and "extreme and outrageous conduct") and one against VSRI (negligence to an invitee under the PLA). The trial court later permitted Litterer to amend his complaint to include a prayer for exemplary damages against respondents.

¶9 *After* he filed the lawsuit, Litterer purchased an Epic Pass for the 2022–23 ski season online. In connection with that purchase, he executed an online form, which stated in part:

> WARNING: PLEASE READ CAREFULLY BEFORE SIGNING! THIS IS A RELEASE OF LIABILITY WAIVER OF CERTAIN LEGAL RIGHTS INCLUDING THE RIGHT TO SUE OR CLAIM COMPENSATION[.]
>
> . . . .
>
> 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.

As noted, the 2022 online waiver defined the term "Released Party" to include VSRI and its employees.

¶10 Respondents moved for summary judgment, arguing that Litterer released all claims against them when he purchased an Epic Pass for the 2022–23 ski season and executed the 2022 online waiver. The district court agreed, emphasizing that the 2022 online waiver—which Litterer signed *after* the collision, *after* he filed suit, and *while* his claims continued to be litigated—operated as a release agreement, not an exculpatory agreement.

¶11 Consequently, the court concluded that the factors set forth in *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981), concerning the validity of an exculpatory agreement, did not apply. Instead, the district court looked to contract principles and determined that adequate consideration supported the waiver. Therefore, it concluded that Litterer validly released all his claims against respondents and granted their motion for summary judgment.

¶12 Litterer appealed, asserting that the district court erred in (1) granting summary judgment on his negligence per se claim against McClure because of this court's decision in *Miller*, ¶ 2, 549 P.3d at 231; (2) concluding that Litterer released all his claims when he purchased the 2022–23 Epic Pass; (3) dismissing his claim for willful and wanton conduct against both respondents; and (4) rejecting what he characterized as his "claim" for exemplary damages.

¶13 The division disagreed. To begin, it declined to address whether this court's decision in *Miller* "announced a blanket rule prohibiting ski resorts from using exculpatory agreements to bar negligence per se claims based on *any* statute."

Litterer, ¶ 10. It did so after concluding that Litterer's claims were barred by the liability waiver he signed when he purchased the 2022–23 Epic Pass. *Id.*

¶14 Turning to the 2022 online waiver, the division agreed with respondents that Litterer had released his existing claims against them because he executed the liability waiver with his purchase of the 2022–23 Epic Pass. *Id.* at ¶ 26. The division was unpersuaded by Litterer's contentions that he did not agree to the waiver because there was no mutual assent, that the waiver was unconscionable, and that it could not bar all his claims. *Id.* at ¶ 21. In reaching its decision, the division first distinguished the 2022 online waiver from the 2020 online waivers, which sought to limit *future* negligence claims against VSRI and its employees.[3] *See id.* at ¶ 24. The 2020 online waivers thus constituted exculpatory agreements that "must be closely scrutinized." *Id.* at ¶ 23 (quoting *Jones*, 623 P.2d at 376).

¶15 The 2022 online waiver, which limited *past* claims, was a different matter. The division concluded that it was a release, rather than an exculpatory agreement, with respect to Litterer's claims against respondents arising out of his 2020 collision with the snowmobile. *Id.* at ¶¶ 24–25. As a *release*, the division

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[3] The pertinent language in the 2020 online waivers provides: "In consideration for allowing the pass holder to participate in the Activity, I AGREE, to the greatest extent permitted by law, TO WAIVE ANY AND ALL CLAIMS AGAINST AND TO HOLD HARMLESS, RELEASE, INDEMNIFY, AND AGREE NOT TO SUE [the Released Party]."

determined that the 2022 online waiver should be analyzed according to "general contractual rules of interpretation and construction." *Id.* at ¶ 23 (quoting *Bunnett v. Smallwood*, 793 P.2d 157, 159 (Colo. 1990)).

¶16 Accordingly, the division turned to address mutual assent and determined that Litterer's "purchase, acceptance, and use of the 2022–23 Epic Pass was sufficient conduct to demonstrate his assent to the terms of the 2022 online waiver." *Id.* at ¶ 25. Litterer electronically signed the waiver, which was a condition of using the ski pass at a VSRI resort. *Id.* at ¶ 26. In doing so, Litterer unambiguously agreed to "waive any and all claims" to access VSRI resorts during the 2022–23 ski season. *Id.* What's more, because a party who signs a contract is presumed to know its contents, Litterer could not avoid his contractual obligations by claiming that he didn't read the agreement. *Id.* at ¶ 27.

¶17 The division also briefly discussed the alleged unconscionability of the 2022 online waiver. *Id.* at ¶ 28. It determined that Litterer's argument was conclusory and underdeveloped and thus declined to resolve the argument. *Id.* As such, the division ultimately held that the 2022 online waiver was enforceable and released all of Litterer's claims against respondents. *Id.* at ¶ 29.

¶18 The division then examined Litterer's contention that the district court erred by dismissing his claim against respondents for willful and wanton conduct. *Id.* at ¶ 32. It disagreed, reasoning that Litterer's arguments regarding his claim for willful and wanton conduct were moot because the 2022 online waiver barred his claims against respondents. *Id.* at ¶ 38.

¶19 Next, the division rejected Litterer's assertion that the district court erred by dismissing his prayer for exemplary damages. *Id.* at ¶ 39. It opined that Litterer's claim for exemplary damages could not stand because it does "not present a separate, distinct cause of action," and is not, in the alternative, synonymous with a gross negligence claim. *Id.* at ¶ 47 (quoting *Ferrer v. Okbamicael*, 2017 CO 14M, ¶ 44, 390 P.3d 836, 848).

¶20 The division thus affirmed the district court's entry of summary judgment in favor of McClure and VSRI. *Id.* at ¶ 49.

¶21 Litterer then petitioned this court for certiorari review, which we granted.

II. Analysis

¶22 We begin by outlining the standard of review before discussing the law governing post-injury releases and exculpatory agreements. We then apply those principles and conclude that the 2022 online waiver operated as an enforceable release agreement that barred Litterer's remaining claims. Next, we explain that the district court did not err in dismissing Litterer's willful and wanton conduct claim because, as pled, it is not a separate, cognizable claim upon which relief may be granted. Thus, the court correctly concluded that since all his claims for relief were dismissed, there was no claim for relief to which Litterer's prayer for exemplary damages could attach. Finally, we address this court's recent decision in *Miller* and explain that the division did not err in declining to address it here because *Miller* governs the validity of waivers that are signed and executed *before* the injury. We therefore affirm the judgment of the court of appeals.

A. Standard of Review

¶23 We review a district court's decision granting summary judgment de novo as it is ultimately a question of a law. *W. Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo. 2002). Questions concerning the interpretation of a contract are also questions of law, and thus also subject to de novo review. *Fed. Deposit Ins. Corp. v. Fisher*, 2013 CO 5, ¶ 9, 292 P.3d 934, 937.

1. The 2022 Online Waiver Released Litterer's Claims Against Respondents

¶24 Litterer challenges the lower courts' characterization of the 2022 online waiver as a release. In his view, the waiver operated as an exculpatory agreement even though he executed the waiver *after* he filed his lawsuit. He additionally contends that the 2022 online waiver is unenforceable because he never intended to dismiss his claims and the terms of the waiver were overly broad. We are not convinced.

¶25 "A release is the relinquishment of a vested right or claim to a person against whom the claim is enforceable." *Neves v. Potter*, 769 P.2d 1047, 1049 (Colo. 1989). Through a release, "one party relinquishes all its claims against another for consideration." *CMCB Enters., Inc. v. Ferguson*, 114 P.3d 90, 96 (Colo. App. 2005). "Once a claim is released, the release bars the injured party from seeking further recovery." *Id.*

¶26 Traditional rules of contract interpretation and construction apply to releases. *Bunnett*, 793 P.2d at 159. To be enforceable, a release requires "mutual assent to an exchange between competent parties for legal consideration." *French v. Centura Health Corp.*, 2022 CO 20, ¶ 26, 509 P.3d 443, 449. The parties' acts, conduct, and words, along with the attendant circumstances, establish assent. *Id.* at ¶ 27, 509 P.3d at 449. It is well-settled that the "subjective, unexpressed intent by either party" is irrelevant when determining whether the parties mutually assented to the agreement. *Id.*

¶27 A release is enforceable when there is "mutual assent to the terms . . . and legal consideration." *Univ. of Denv. v. Doe*, 2024 CO 27, ¶ 47, 547 P.3d 1129, 1139. Colorado, with its "strong policy of freedom of contract," *Ravenstar, LLC v. One Ski Hill Place, LLC*, 2017 CO 83, ¶ 12, 401 P.3d 552, 555, recognizes the existence of an implied contract through "words or conduct that, when objectively viewed, manifests an intent to accept an offer," *Marquardt v. Perry*, 200 P.3d 1126, 1129 (Colo. App. 2008).

¶28 To that end, contracts must be construed in a way that reflects the "intent of the parties and allows each party to receive the benefit of the bargain." *Ravenstar*,

¶ 12, 401 P.3d at 555 (quoting *Allstate Ins. Co. v. Avis Rent-A-Car Sys., Inc.*, 947 P.2d 341, 346 (Colo. 1997)). "Contracts between competent parties, voluntarily and fairly made, should be enforceable according to the terms to which they freely commit themselves." *Id.* (quoting *Keller v. A.O. Smith Harvestore Prods., Inc.*, 819 P.2d 69, 75 (Colo. 1991) (Rovira, C.J., dissenting)).

¶29 In contrast, exculpatory agreements attempt to insulate parties from their own negligence. *Miller*, ¶ 45, 549 P.3d at 237. Such agreements warrant close scrutiny. *Id.* We must, therefore, begin any analysis of exculpatory agreements by considering whether they are valid and enforceable. To do so, we analyze the four factors that we outlined in *Jones*: "(1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language." 623 P.2d at 376.

¶30 Applying all these principles, we conclude that the 2022 online waiver operates as a release. As the division noted, Litterer had vested claims pending in this case when he agreed to the 2022 online waiver. That is, the 2022 online waiver was electronically executed by Litterer *post-injury*, well after he commenced this litigation against VSRI and McClure. The waiver was spelled out in great detail in large capital letters. It warned him to "PLEASE READ CAREFULLY BEFORE SIGNING[]" because the agreement was "A RELEASE OF LIABILITY WAIVER

OF CERTAIN LEGAL RIGHTS." A conspicuous reminder placed roughly halfway through the agreement once again alerted Litterer in all capital letters to the legal ramifications of signing the document. By agreeing to its terms, Litterer "FURTHER RELEASE[D] AND [GAVE] UP ANY AND ALL CLAIMS" that he had against respondents.

¶31 Litterer doesn't dispute that he purchased the 2022–23 Epic Pass, completed the 2022 online waiver, and then used the pass to snowboard at Breckenridge. But he nonetheless contends that the 2022 online waiver is not an enforceable contract because he did not assent to it. This is so, he explains, because he did not intend to release his claims against respondents, and because he lacked negotiating power. We are unpersuaded.

¶32 We need look only at Litterer's actions to determine that he demonstrated his assent to the terms of the 2022 online waiver. His subjective and unexpressed intent or understanding of the waiver is irrelevant to the issue of assent. The requisite meeting of the minds is established by the parties' acts, conduct, and words, along with the attendant circumstances, and not by any subjective, unexpressed intent by either party. *French*, ¶ 27, 509 P.3d at 449.

¶33 And here, as we already explained, Litterer electronically signed the 2022 online waiver, which warned him to "PLEASE READ CAREFULLY BEFORE SIGNING[]" because the agreement was "A RELEASE OF LIABILITY WAIVER

OF CERTAIN LEGAL RIGHTS." If what Litterer means is that he did not assent because he did not read the electronic form, we note simply that one generally cannot avoid contractual obligations by claiming they did not read the contract. *Macasero v. ENT Credit Union*, 2023 COA 40, ¶ 18, 533 P.3d 982, 988. And while Litterer may have lacked the ability to negotiate the terms of the release when obtaining the 2022–23 Epic Pass after his injury, he had options. He could have purchased a ski pass that would have allowed him to snowboard at any of Colorado's many other ski resorts that are not owned by VSRI. Instead, he chose to sign the waiver so he could snowboard at Breckenridge again.

¶34 We also reject Litterer's argument that the 2022 online waiver is overly broad and unenforceable. In so doing, we decline to adopt the reasoning of the sole case he cites in support, *Farina v. Mt. Bachelor, Inc.*, 66 F.3d 233 (9th Cir. 1995). There, the petitioner sued a ski resort after he sustained multiple fractures from skiing into an unmarked boulder. *Id.* at 234. *Prior to the accident*, Farina completed a season pass application, which included the following language:

> In consideration of my participation in skiing, and use of this season pass and Mt. Bachelor's facilities, I agree to release from liability and to indemnify and hold harmless Mt. Bachelor, Inc., and their officers and directors, owners, agents . . . and employees . . . from any and all claims, losses, and liabilities . . . that I may now have or which I may hereafter have for injury or death to myself . . . .

Id.

¶35 Applying Oregon law, the Ninth Circuit held that the release clause violated public policy and was unenforceable because it sought to exculpate Mt. Bachelor from liability "for more than ordinary negligence, including gross negligence and wanton or [willful] misconduct," and for "any and all claims that an injured skier *might bring* against it." *Id.* at 235–36 (emphasis added). And because the parties did not manifest an intent that the release provision be severable, the court held that the entire release was invalid. *Id.* at 236.

¶36 We are not bound by the law of any federal circuit court, *see Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 617 n.11 (Colo. 1999), and we decline to extend *Farina*'s reasoning here because it is materially distinguishable from this case. There, the Ninth Circuit held that the waiver at issue was overbroad because Mt. Bachelor sought to exculpate itself for any and all claims that an injured participant *might* bring against it, including gross negligence and willful misconduct, even though the Oregon Supreme Court had previously concluded that an exculpatory clause is only legal if it seeks to exempt liability for ordinary negligence. *Farina*, 66 F.3d at 236.

¶37 That logic does not extend, however, to the exculpatory clause in the 2022 online waiver, the one that concerns prospective claims against released parties. That waiver, we emphasize, is limited by its express terms "to the greatest extent permitted by law."[4] That is, the waiver applies only to prospective claims to the extent allowed under *Miller*. And notably, *Farina* involved a pre-injury waiver. Unlike here, the *Farina* court was not asked to answer whether a post-injury waiver of claims constitutes an exculpatory agreement.

¶38 Litterer's position with respect to the settlement of post-injury claims is also untenable as a practical matter. At oral argument, counsel argued that no party should be able to release these types of post-injury claims. When pressed about the sweeping and problematic consequences of such a rule, which would prevent parties from ever settling claims, counsel was unable to draw a line that wouldn't wipe out all waivers and thus all settlements. Unsurprisingly, there is no law to support that position.

¶39 Finally, Litterer urges this court to reverse the division because, in his view, the General Assembly has repeatedly been unwilling to enact laws that enhance skier safety and ski resort accountability. That, of course, is not a reason for us to act. Such policy decisions are within the province of the legislature, not this court. So, to the extent the operation of the 2022 online waiver here, as it relates to

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[4] The pertinent language in the 2022 online waiver provides: "In consideration for allowing the pass holder to participate in the Activity, I AGREE, *to the greatest extent permitted by law*, TO WAIVE ANY AND ALL CLAIMS AGAINST AND TO HOLD HARMLESS, RELEASE, INDEMNIFY, AND AGREE NOT TO SUE [the Released Party]." (Emphasis added.)

post-injury waiver of claims, may seem draconian to some, that is a public policy matter best left to the General Assembly.

¶40 For these reasons, we conclude that the 2022 online waiver released Litterer's claims against respondents.

2. Litterer's Claims for Willful and Wanton Conduct and Exemplary Damages Are Not Cognizable

¶41 Litterer contends that the division erred in upholding the district court's dismissal of his willful and wanton conduct and exemplary damages claims. In particular, he relies on settled Colorado law regarding exculpatory agreements: "In no event will an [exculpatory] agreement provide a shield against a claim for willful and wanton negligence." *Jones*, 623 P.2d at 376. Said differently, because a release may not bar a claim for willful and wanton conduct, Litterer asserts that his claim for exemplary damages should also be reinstated. Like the division, we are unconvinced.

¶42 "Willful and wanton conduct" is not an independent tort in Colorado or elsewhere. 3 Stuart M. Speiser et al., *American Law of Torts* § 10:3, Westlaw (database updated Feb. 2026); *see also Carani v. Meisner*, No. 08-cv-02626-MSK-CBS, 2009 WL 2762719, at *4 (D. Colo. Aug. 26, 2009) (explaining that the court could not identify a single case that "recognizes and defines a separate, actionable claim based simply on a party engaging in willful and wanton conduct towards another"). "[W]illful and wanton conduct" as used here is not a separate claim for relief, but rather a descriptive phrase "nested within subsection 13-21-102(1)(b), [C.R.S. (2025)]." *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1085 (Colo. 2011). It thus tends to operate as a circumstance, setting forth the standard by which courts assess the allocation of exemplary damages. § 13-21-102(1)(a) (showing that the underlying civil action must be accompanied "*by* circumstances of . . . willful and wanton conduct") (emphasis added); CJI-Civ. 9:30 (2026) (defining "willful and wanton conduct" and explaining that it should be used *with* the jury instructions governing exemplary damages); CJI-Civ. 5:4 (2026) (explaining that an exemplary damages claim requires proof that the defendant acted in a "willful and wanton manner" beyond a reasonable doubt); *see also Qwest Servs. Corp.*, 252 P.3d at 1092.

¶43 That is to say, rather than functioning as an independent claim, proof of "willful and wanton conduct" may support a claim for exemplary damages when a party prevails on an underlying claim for damages. *Ferrer*, ¶ 44, 390 P.3d at 848 (concluding that section 13-21-102 has no application without a successful underlying claim for actual damages). Likewise, an award of exemplary damages "is not a separate and distinct cause of action," so it must attach to "an underlying and independent 'civil action' in which actual damages are assessed for a legal wrong done to the injured party." *Mortg. Fin., Inc. v. Podleski*, 742 P.2d 900, 903 (Colo. 1987) (quoting *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 213 (Colo. 1984)).

¶44 For these reasons, the district court properly dismissed Litterer's claim for willful and wanton conduct. Additionally, even if we accepted Litterer's contention that he properly pled a claim for gross negligence because it is "synonymous" with willful and wanton conduct, the 2022 online waiver operates as a release, barring all of Litterer's claims. That is to say, there is no independent action to which the exemplary damages may be attached. *Ferrer*, ¶ 44, 390 P.3d at 848.

¶45 Ultimately, Litterer's willful and wanton conduct claim fails as a matter of law because it is not a separate, cognizable cause of action. And because the district court correctly concluded that the 2022 online waiver released all of Litterer's claims, there is no "underlying and independent 'civil action'" to which exemplary damages may attach. *Mortg. Fin., Inc.*, 742 P.2d at 903 (quoting *Palmer*, 684 P.2d at 213). Accordingly, the district court did not err in dismissing Litterer's claim for willful and wanton conduct and his prayer for exemplary damages.

3. *Miller* Does Not Apply to the 2022 Online Waiver

¶46 Litterer next argues that the division erred in failing to consider *Miller*. According to Litterer, *Miller*'s scope was not limited to exculpatory agreements because it explicitly stated that 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] negligence per se claim is based." ¶ 55, 549 P.3d at 238.

¶47 We disagree. *Miller* does not apply here. There, Miller signed two agreements, one for himself and another on behalf of his daughter, when purchasing Epic passes. *Id.* at ¶¶ 6–8, 549 P.3d at 231–32. Miller's daughter subsequently sustained major injuries after falling from a chair lift. *Id.* at ¶ 9, 549 P.3d at 232. Miller sued the ski resort for negligence per se based on violations of the Ski Safety Act of 1979, §§ 33-44-101 to -114, C.R.S. (2023), the Passenger Tramway Safety Act, §§ 12-150-101 to -120, C.R.S. (2023), and regulations promulgated thereunder. *Miller*, ¶ 11, 549 P.3d at 232. This court held that ski areas may not absolve themselves of liability for claims related to certain statutory duties by way of exculpatory agreements executed pre-injury. *Id.* at ¶¶ 36–37, 549 P.3d at 235–36.

¶48 Litterer misreads *Miller* in two regards. First, by claiming that *Miller* applies to post-injury release agreements, Litterer detaches the holding from the reasoning on which it is based, including that "settled precedent from this court has established that a party cannot discharge its obligation to perform a statutory duty by way of an *exculpatory* agreement." ¶ 36, 549 P.3d at 235–36 (emphasis added). Second, *Miller* arises from a factual scenario that does not apply here. *Miller* considers the validity of waivers that are signed and executed *before* the injury. *See* *id.* at ¶¶ 7–10, 549 P.3d at 231–32. As we observed above, the 2022 online waiver operates as a release, not an exculpatory agreement, because it was executed *after* the injury. For these reasons, *Miller* does not apply, and the division below did not err in declining to address it.

III. Conclusion

¶49 We conclude that (1) the 2022 online waiver operates as a release, not an exculpatory agreement; (2) Litterer's claim for willful and wanton conduct and prayer for exemplary damages were properly denied; and (3) *Miller* is inapplicable here because it governs pre-injury exculpatory agreements, not post-injury releases. Accordingly, we affirm the judgment of the court of appeals.

JUSTICE GABRIEL, joined by **JUSTICE HOOD** and **JUSTICE SAMOUR**, dissented.

JUSTICE GABRIEL, joined by JUSTICE HOOD and JUSTICE SAMOUR, dissenting.

¶50 In this action arising from John Litterer's purchase of a ski pass, the majority, purporting to apply settled principles of contract law, provides the ski industry with an extraordinary perpetual pass of its own. Under today's ruling, the ski industry may avoid a limitless range of liability—including liability for damages caused by its gross negligence and willful and wanton conduct and for causes of action that injured parties do not even know that they have—by burying exceptionally broad release language in the click-through, lengthy boilerplate document that unwitting patrons check off when they buy their ski passes.

¶51 Because I believe that under settled principles of law regarding exculpatory agreements, the release at issue is void as against public policy, and because I further believe that the majority's decision is unjust to Litterer and will result in manifest injustice to innumerable unsuspecting ski pass purchasers like him, I respectfully dissent.

I. Factual and Procedural Background

¶52 I need not repeat the majority's recitation of the facts of this case. Instead, I highlight the facts that are most pertinent to my analysis.

¶53 In December 2020, while snowboarding at the Breckenridge Ski Area, Litterer collided with a snowmobile operated by an employee of Vail Summit Resorts, Inc. ("Vail Resorts"). He subsequently sued Vail Resorts and the employee (collectively, "Defendants"), alleging multiple claims, including a premises liability claim against Vail Resorts and a claim for negligence per se against the employee based on alleged violations of section 33-14-116, C.R.S. (2025), of the Colorado Snowmobile Safety Act. In the latter claim, Litterer alleged, as pertinent here, that the employee had operated the snowmobile in such a manner as to indicate a wanton or willful disregard for the safety of persons and property. Litterer also sought exemplary damages from both Vail Resorts and the employee.

¶54 While his lawsuit was pending, Litterer, who had recovered sufficiently from his injuries, purchased a new Epic Pass online. His purchase required him to agree to, among other things, a click-through Release of Liability, Waiver of Claims, Assumption of Risks and Indemnity Agreement ("Release"). This Release was four single-spaced pages long, comprising seventeen paragraphs, and was replete with legal terminology.

¶55 As the majority points out, Maj. op. ¶ 9, the Release begins by stating, in block capital letters, "WARNING: PLEASE READ CAREFULLY BEFORE SIGNING! THIS IS A RELEASE OF LIABILITY WAIVER OF CERTAIN LEGAL RIGHTS INCLUDING THE RIGHT TO SUE OR CLAIM COMPENSATION."

¶56 Immediately following that forward-looking "RELEASE OF LIABILITY WAIVER" are several paragraphs acknowledging that skiing and snowboarding can be dangerous and requiring a signatory to assume "ALL INHERENT DANGERS AND RISKS" of "the Activity" (as defined in the Release). Then, following two paragraphs regarding Hunter Mountain in New York and COVID-19, the Release provides a lengthy paragraph requiring the signatory to "acknowledge and assume all additional risks and dangers that may result in property damage, physical injury and/or death, which may be above and beyond the inherent dangers and risks of the Activity," after which the paragraph sets out a sixteen-line-long list of such risks.

¶57 Following an intervening paragraph stating that a participant assumes responsibility for maintaining control while engaging in the activity, the signer finally arrives at paragraph 7, on the bottom half of the second page of the Release, which is the language on which the majority relies to conclude that Litterer validly released his existing claims against Vail Resorts and its employee. That language reads, in full, as follows:

> 7. In consideration for allowing the Participant to participate in the Activity, I AGREE, to the greatest extent permitted by law, TO WAIVE ANY AND ALL CLAIMS AGAINST AND TO HOLD HARMLESS, RELEASE, INDEMNIFY, AND AGREE NOT TO SUE Vail Resorts, Inc., The Vail Corporation, Trimont Land Company, Heavenly Valley, Limited Partnership, VR US Holdings, Inc., VR US Holdings II, LLC, VR CPC Holdings, Inc., VR NW Holdings, Inc., VR NE Holdings, LLC, Whistler Blackcomb Holdings Inc., Blackcomb Skiing Enterprises Limited Partnership, Whistler Mountain Resort Limited Partnership, Vail Holdings, Inc., Peak Resorts, Inc., VR PA Holdings, Inc., Andermatt-Sedrum Sport AG, each of their affiliated companies and subsidiaries, the resort owner/operator inclusive of

> any partner resort owner/operator, land owner, activity operator, the equipment manufacturer, The Burton Corporation, Beaver Creek Resort Company, TSG Ski Golf, LLC, the family of companies operating Resorts of the Canadian Rockies, Inc., the United States, His Majesty the King In Right Of The Province Of British Columbia and all their respective insurance companies, successors in interest, commercial corporate sponsors, affiliates, agents, employees, representatives, assignees, officers, directors, and shareholders (each a Released Party) FOR ANY INJURY, INCLUDING DEATH, LOSS, PROPERTY DAMAGE OR EXPENSE, WHICH I OR PARTICIPANT MAY SUFFER, ARISING IN WHOLE OR IN PART OUT OF PARTICIPANTS [sic] PARTICIPATION IN THE ACTIVITY, INCLUDING, BUT NOT LIMITED TO, THOSE CLAIMS BASED ON ANY RELEASED PARTYS [sic] ALLEGED OR ACTUAL NEGLIGENCE OR BREACH OF ANY EXPRESS OR IMPLIED WARRANTY OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING IN BRITISH COLUMBIA ANY DUTY OF CARE UNDER THE OCCUPIERS [sic] LIABILITY ACT. I UNDERSTAND THAT NEGLIGENCE INCLUDES FAILURE ON THE PART OF ANY RELEASED PARTY TO TAKE REASONABLE STEPS TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF THE ACTIVITY.
>
> 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.

¶58 The Release then proceeds for ten additional paragraphs, but those are not pertinent to my analysis.

¶59 Notably, the paragraphs of the Release preceding paragraph 7, which comprise the first one and a half pages of the document, would have looked to any reasonable person like the form assumption of risk language that is on the back of every ski pass and, therefore, would not have alerted a reasonable purchaser that by agreeing to the Release, they would be surrendering claims in pending litigation. The following chart is illustrative:

RELEASE	**SKI PASS**
RELEASE OF LIABILITY, WAIVER OF CLAIMS, ASSUMPTION OF RISKS AND INDEMNITY AGREEMENT	RELEASE OF LIABILITY & ASSUMPTION OF RISKS AGREEMENT
1. . . . I understand that . . . skiing [and] snowboarding . . . can be HAZARDOUS AND INVOLVE THE RISK OF PHYSICAL INJURY AND/OR DEATH.	**HOLDER AGREES AND UNDERSTANDS THAT SKIING, SNOWBOARDING AND USING A SKI AREA, INCLUDING LIFTS, CAN BE HAZARDOUS AND INVOLVE THE RISK OF PHYSICAL INJURY AND/OR DEATH.**
2. I understand the dangers and risks of the Activity and that the Participant ASSUMES ALL INHERENT DANGERS AND RISKS of the Activity, including those of a skier (as may be defined by statute or other applicable law) or other winter sports participant.	Under the law, the Holder of this pass assumes the risk of any injury to person or property resulting from any of the inherent dangers and risks of skiing.
7. . . . I AGREE, to the greatest extent permitted by law, TO WAIVE ANY AND ALL CLAIMS AGAINST AND TO HOLD HARMLESS, RELEASE, INDEMNIFY, AND AGREE NOT TO SUE [ski areas and their employees, among others].	HOLDER AGREES NOT TO SUE and to hold the ski area and its employees harmless for claims to person or property.

¶60 When ski pass purchasers finally reach paragraph 7 of the Release, they first read a lengthy exculpatory clause, purporting to agree, "to the greatest extent permitted by law, TO WAIVE ANY AND ALL CLAIMS AGAINST AND TO HOLD HARMLESS, RELEASE, INDEMNIFY, AND AGREE NOT TO SUE" Vail Resorts, its employees, and many others for injuries arising out of the participant's participation in the Activity. This forward-looking exculpatory clause is followed by a separate paragraph purporting to release all claims that the participant may have against any released party, including "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."

¶61 Approximately one year after Litterer purchased his Epic Pass, and notwithstanding the fact that the parties had actively litigated this case throughout that year-long period, Defendants, for the first time, asserted that the second part of the above-quoted paragraph 7 of the Release operated to release the claims that Litterer was asserting in his pending litigation. Defendants moved for summary judgment, the district court granted that motion, a division of our court of appeals affirmed, and the case is now before us.

II. Analysis

¶62 I begin by addressing the majority's fundamental premise that the Release did not operate as an exculpatory agreement because Litterer purchased his Epic Pass after and not before he was injured. Maj. op. ¶¶ 5, 24–30, 49. After concluding that this premise finds no support in the law and that the Release was, in fact, largely an exculpatory agreement, I discuss the settled legal principles concerning exculpatory agreements that are pertinent to my analysis. I then apply those principles to the facts before us.

A. Nature of the Release

¶63 The majority concludes that the Release did not operate as an exculpatory agreement because Litterer purchased his Epic Pass after and not before he was injured. *Id.* I respectfully disagree with this fundamental premise of the majority's opinion.

¶64 To reach its conclusion that the Release did not operate as an exculpatory agreement, the majority ignores much, if not most, of the language of the Release. As discussed at length above, the bulk of the Release's language was forward-looking and purported to exculpate Vail Resorts, its employees, and many others for injuries arising out of a participant's participation in ski or snowboard activities. The release language on which Defendants and the majority rely comprised one sentence following the Release's lengthy exculpatory provisions.

¶65 Rather than focusing on what the Release actually said, the majority focuses on the timing of Litterer's injury. Specifically, the majority concludes that the Release did not operate as an exculpatory agreement because it was entered into after Litterer was injured. *Id.* In so concluding, the majority appears to agree with the division's determination that the timing of Litterer's injury distinguished the Release from the 2020 online waivers, which were entered into before Litterer's injury and thus rendered them exculpatory in nature. *Id.* at ¶¶ 14–15.

¶66 I am aware of no applicable authority supporting the majority's premise that the meaning of contract language changes depending on when a contract is signed, and the majority cites no such authority. To the contrary, in my view, the contract's language controls, and identical language should be construed the same way, regardless of when the contract is signed. *See French v. Centura Health Corp.*, 2022 CO 20, ¶ 25, 509 P.3d 443, 449 (noting that in interpreting a contract our primary goal is to effectuate the intent of the parties and that "[t]he parties' intent is primarily determined from the language of the instrument itself").

¶67 Accordingly, I would conclude that the Release was in large part an exculpatory agreement, and I would analyze Litterer's claims based on that premise.

B. Pertinent Legal Principles

¶68 The sufficiency and validity of an exculpatory agreement presents a question of law for a court's determination. *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981).

¶69 In *Jones*, we said that exculpatory agreements that attempt to insulate a party from liability for their own negligence must be closely scrutinized and that "in no event will such an agreement provide a shield against a claim for willful and wanton negligence." *Id.* We have further concluded that a party may not absolve itself, by way of a private release agreement, from liability for violations of statutory and regulatory duties on which a negligence per se claim may be based. *Miller v. Crested Butte, LLC*, 2024 CO 30, ¶¶ 2, 36, 549 P.3d 228, 231, 235–36.

¶70 In *Jones*, 623 P.2d at 376, we identified four factors that a court must consider in determining the validity of an exculpatory agreement that is not void under the above-described legal principles: "(1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language."

¶71 We have made clear, however, that the first *Jones* factor generally does not invalidate or render unenforceable exculpatory agreements involving recreational activities. *See Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465, 467 (Colo. 2004); *Jones*, 623 P.2d at 376–77. Similarly, we have concluded that recreational services like those at issue here are not practically necessary and do not involve matters in which the service providers owe special duties to the public, which would implicate the second *Jones* factor. *Chadwick*, 100 P.3d at 467. And, as to the third

Jones factor, we have at least implicitly discerned no unfair disparity in bargaining power in contracts with businesses providing recreational services. *See Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 784 (Colo. 1989). Accordingly, those three factors are not pertinent to my analysis.

¶72 As to the fourth *Jones* factor, however, we have said, "To determine whether the intent of the parties is clearly and unambiguously expressed, we have previously examined the actual language of the agreement for legal jargon, length and complication, and any likelihood of confusion or failure of a party to recognize the full extent of the release provisions." *Chadwick*, 100 P.3d at 467.

¶73 Finally, we have observed that when a contract contains multiple provisions, some of which are unenforceable, we must determine whether the contract is severable. *See Reilly v. Korholz*, 320 P.2d 756, 760 (Colo. 1958); *accord CapitalValue Advisors, LLC v. K2D, Inc.*, 2013 COA 125, ¶ 22, 321 P.3d 602, 606. To determine whether a contract is severable, our primary objective is to ascertain the contracting parties' intent, looking not only to the terms and provisions of their contract but also to the surrounding circumstances and the parties' conduct before a dispute has arisen. *John v. United Advert., Inc.*, 439 P.2d 53, 56 (Colo. 1968); *CapitalValue Advisors*, ¶ 24, 321 P.3d at 606. "[W]hether a number of promises constitute one contract, or more than one, is to be determined by inquiring 'whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.'" *John*, 439 P.2d at 56 (quoting *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 298 (1942)); *accord CapitalValue Advisors*, ¶ 24, 321 P.3d at 606–07.

¶74 With these principles in mind, I turn to the facts now before us, addressing the fourth *Jones* factor and then the issue of the Release's validity and severability.

C. The Fourth *Jones* Factor

¶75 As noted above, the fourth *Jones* factor requires a court to consider whether the parties' contractual intentions in an exculpatory agreement were expressed in clear and unambiguous language. *Jones*, 623 P.2d at 376. To determine whether contractual language was so expressed, we have examined the actual language used, including the extent of its legal jargon, the agreement's length and complication, and the likelihood that a contracting party would be confused or fail to recognize the extent of the agreement's release provisions. *Chadwick*, 100 P.3d at 467. Here, I believe that each of these considerations weighs against the Release's validity.

¶76 First, the most cursory review of the above-quoted language of the Release reveals that it is replete with excessive legal jargon. Paragraph 7 of the Release, the provision on which Defendants principally rely, begins with language like "WAIVE," "HOLD HARMLESS," "RELEASE," and "INDEMNIFY." That paragraph then proceeds to discuss concepts of negligence, express or implied warranties, and breaches of statutory or other duties of care.

¶77 Second, the Release is long and complex. It comprises four single-spaced pages rife with legalese and covering eighteen named entities, all of their unnamed affiliated companies and subsidiaries, "His Majesty the King," and all of the foregoing people's and entities' insurers, successors-in-interest, corporate sponsors, affiliates, agents, employees, representatives, assignees, officers, directors, and shareholders. And the lengthy document features numerous portions in block capital letters, the extent of which ironically tends to minimize the importance of any of them.

¶78 Third, in my view, the Release's length, complexity, and legal jargon create a high likelihood of confusion or a failure on the part of a party to recognize the full extent of the Release's provisions. As noted above, the bulk of the six paragraphs that precede paragraph 7 of the Release substantially replicate the form of assumption of risk language that appears on the back of every ski pass and with which most skiers and snowboarders are likely familiar. As a result, I believe that most people buying a ski pass, if they reviewed the Release at all, would reasonably assume that it was simply the standard assumption of risk language. Moreover, much of the Release's language is forward-looking (i.e., it suggests that a party is foregoing rights to sue for future injuries resulting from the inherent risks of skiing). As a result, I do not expect that reasonable ski pass purchasers would recognize that the Release also purports to exonerate Vail Resorts, its employees, and many others from liability for past conduct, and especially claims being pursued in then-pending litigation. My view in this regard finds further support in the fact that the allegedly operative language of the Release does not appear until the bottom of page two of that document, after over ninety lines of single-spaced text.

¶79 For all of these reasons, I would conclude, contrary to the majority, that the Release does not bar Litterer's existing claims against Defendants, and for this reason alone, I would reverse the judgment of the division below.

D. The Release's Validity and Severability

¶80 Even were I to agree, however, that the Release was not rendered unenforceable under the fourth *Jones* factor, I would still conclude that the Release is unenforceable because I believe that it is void as against public policy.

¶81 As noted above, in *Jones*, 623 P.2d at 376, we made clear that in no event will an exculpatory agreement provide a shield against claims for willful and wanton negligence. We then more recently extended this principle to conclude that a party may not absolve itself, by way of a private release agreement, from liability for violations of statutory and regulatory duties on which negligence per se claims may be based. *Miller*, ¶¶ 2, 36, 549 P.3d at 231, 235–36.

¶82 The portion of the Release at issue that comprises an exculpatory agreement facially violates these principles. Specifically, the Release purports to release any and all claims against Vail Resorts, its employees, and many others, including claims that the ski pass purchasers do not even know that they have. The Release nowhere expressly exempts claims for willful and wanton negligence or those, like the claim at issue here, arising from violations of statutory and regulatory duties on which a negligence per se claim is based. Accordingly, I would conclude that this portion of the Release is void as against public policy.

¶83 In reaching this conclusion, for several reasons, I am not persuaded by Defendants' assertion, which the majority embraces, Maj. op. ¶ 37, that the operative language of the Release applies only "to the greatest extent permitted by law" and therefore exempts claims for willful and wanton negligence and claims arising from violations of statutory and regulatory duties.

¶84 First, if Vail Resorts' intent was to create such an exemption, I do not believe that this intent was set forth in clear, unambiguous, and unequivocal language. Indeed, in my view, this language does not read as language *limiting* the release purportedly given to Vail Resorts. To the contrary, it reads as language *expanding* the breadth of that purported release to the greatest extent possible.

¶85 Second, the fact that this language appears only once and in the middle of a lengthy document, after a reader wades through extensive assumption of risk language, tends to diminish its significance to the reader.

¶86 Third, I note that the very same language appeared in the exculpatory agreement at issue in *Miller*, ¶ 7, 549 P.3d at 231, a case involving Crested Butte Mountain Resort, which is owned by Vail Resorts. We did not deem the "to the greatest extent permitted by law" language sufficient to save the exculpatory agreement in that case, and I would reach the same conclusion here.

¶87 Accordingly, I would conclude that the portion of the Release purporting to comprise an exculpatory agreement is void. This does not end my analysis, however, because the fact that the Release's exculpatory provision is void does not necessarily invalidate the portion of the Release at issue here, which purports to release Defendants from the claims that Litterer asserted in his lawsuit against them. I thus turn to that provision's validity.

¶88 As an initial matter, I reject Litterer's contention that our decision in *Miller* precluded a party from releasing existing claims for willful and wanton negligence or claims arising from statutory or regulatory duties and asserted through negligence per se claims. Nothing in *Miller* went so far. Indeed, if Litterer were correct, then no party would ever be able to settle a claim for willful and wanton negligence or negligence per se (based on an alleged violation of a statutory or regulatory duty). That, of course, is not the law.

¶89 The validity of the release provision at issue turns on the question of whether the void portion of the Release may be severed, such that the release provision on which Defendants rely may still be operative. I would conclude that, on the facts of this case, it may not so be severed.

¶90 As noted above, to determine whether a contract is severable, we must ascertain the contracting parties' intent, and we do so by considering the terms and provisions of the contract, the surrounding circumstances, and the parties' conduct before a dispute has arisen. *John*, 439 P.2d at 56; *CapitalValue Advisors*, ¶ 24, 321 P.3d at 606. In particular, we look to whether the parties assented to all of the contract's promises as a single whole. *John*, 439 P.2d at 56.

¶91 Here, for several reasons, I do not believe that the void exculpatory language may be severed from the Release, so as to save the release provision on which Defendants seek to rely.

¶92 First, the language of the Release does not expressly state that any provisions deemed void are severable. Nor do I perceive any language of the Release that implicitly suggests such an intent. To the contrary, the bulk of the Release's language focuses on its forward-looking exculpatory provisions, not on language suggesting a release of past or then-existing claims. As a result, I perceive no basis in the Release's language that would allow me to conclude that the release provisions are severable from the void exculpatory provisions. To the contrary, the record demonstrates that the parties purported to assent to all of the Release's provisions as a single whole. And this is particularly true given that the Release is a one-sided liability exclusion that we construe strictly in considering the rights of the party that drafted it. *See Rosen v. LTV Recreational Dev., Inc.*, 569 F.2d 1117, 1122 (10th Cir. 1978) ("The kind of agreement we have here . . . differs from the contract which results from negotiations on both sides. Here the rules and regulations, Exhibit E, was drafted by the ski area so as to exclude liability. Because of its one-sidedness, it is to be interpreted strictly in considering the rights of the party who has prepared it.").

¶93 Second, the surrounding circumstances suggest to me that the Release is not severable. In their arguments before us, Defendants made clear that this Release is critically important to them and that Litterer, who chose to sue them, could have opted to ski elsewhere. As a result, I perceive no basis for concluding that Defendants would have contracted with Litterer without obtaining this Release. Conversely, Litterer has made abundantly clear that he did not interpret this click-through Release to have released his existing claims, and the record demonstrates that he would not have signed a contract with Defendants had he known that it contained such a release. These circumstances reveal an absence of mutual intent that the Release be severable, so as to save the release provisions at issue.

¶94 Third, regarding the parties' course of conduct, I note that Defendants litigated this case for approximately one year after Litterer signed the Release before moving for summary judgment. This suggests to me that Defendants did not initially view the release provision on which they now rely as a stand-alone term that effectively barred Litterer's claims but rather developed that position as a litigation strategy much later. Had Defendants viewed the release provision as applicable to Litterer's pending claims, there would have been no reason for them to delay raising that defense. For this reason as well, I perceive no basis to conclude that the release provisions at issue could properly be severed from the void exculpatory provisions.

¶95 Accordingly, I would conclude that the release provisions of the Release may not be severed from that document's void exculpatory provisions and, therefore, the Release is void and unenforceable.

¶96 In this regard, I view the Ninth Circuit's reasoning in *Farina v. Mt. Bachelor, Inc.*, 66 F.3d 233, 235–36 (9th Cir. 1995), to be persuasive. There, as here, an exculpatory provision in a ski area's season pass application was unenforceable because it purported to exculpate the ski area from liability for gross negligence and willful misconduct. *Id.* The court then determined that because the ski area had "made an unenforceable bargain in trying to escape liability for gross negligence and willful misconduct, the entire release provision in the season pass application, including the limitation of liability for ordinary negligence, is unenforceable." *Id.* at 236. The court explained:

> In contrast to other release clauses, the language of the release provision in this case does not manifest an intention by [the ski area] or by [the plaintiff] that the provision be severable. In one simple, broad sentence, [the ski area] sought to exculpate itself for any and all claims that an injured skier might bring against it. This attempt rendered [the ski area'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. (citation omitted).

¶97 In my view, Colorado law mandates that the same reasoning should apply here.

III. Conclusion

¶98 Winter sports like skiing and snowboarding are, of course, essential to Colorado's tourism industry and economy. People from around the United States, indeed the world, routinely purchase ski passes online. This simple transaction should not become a game of "gotcha" for unsuspecting ski pass purchasers, but that is precisely what the majority condones today.

¶99 If Defendants wished to settle Litterer's claims against them, then the proper way to proceed would have been to make an offer and engage in negotiations, not to hide release language in a lengthy, one-sided, legalese-laden document that a purchaser is required to click through to purchase a ski pass and in which no reasonable purchaser would expect to find a release of pending litigation.

¶100 Although today will undoubtedly be a day of celebration for Colorado's ski industry, I believe that it is a sad day for the rights of many thousands of unsuspecting ski pass purchasers who are the lifeblood of that industry.

¶101 For the reasons discussed above, I would conclude that the Release is void as against public policy and that, therefore, Litterer's negligence per se and attendant exemplary damages claims survive. Accordingly, I would reverse the division's judgment upholding the district court's grant of summary judgment to Defendants and remand this case for further proceedings on Litterer's negligence per se and exemplary damages claims.

¶102 I therefore respectfully dissent.