Case Comment:

Miller v. Crested Butte, LLC, 2024 CO 30, 549 P.3d 228 (Colo. 2024).

The revival of per se negligence claims under the Colorado Ski Safety Act in actions against ski area operators.

Authors: Jim Chalat, Mike Thomson and Hunter Hatten

ABSTRACT

This article discusses the precedent-setting case of *Miller v. Crested Butte, LLC* ("*Miller*"),[1] in which the Colorado Supreme Court held that a ski area may not absolve itself of statutory duties of care through release agreements or lift ticket waivers.

INTRODUCTION

On May 20, 2024, the Colorado Supreme Court issued its opinion in *Miller*, resolving a question of significant public importance that it had not previously addressed.[2] In its 5-2 decision, the Court ruled that ski area operators cannot absolve themselves of liability under exculpatory agreements or lift ticket waivers for per se negligence claims based upon the Colorado Ski Safety Act of 1979 ("SSA"), C.R.S. § 33–44–101, *et seq*. However, the Court also held that the lift ticket waiver and exculpatory agreement barred Plaintiff's highest duty of care claim.

This article discusses *Miller*'s profound impact on ski operators' duties and liabilities, and skiers' rights and remedies. First, it describes the statutory and

[1] 2024 CO 30, 549 P.3d 228 (Colo. 2024).
[2] *Id*.

regulatory framework of the SSA and Passenger Tramway Safety Act ("PTSA") and both Colorado and Tenth Circuit precedent construing and applying exculpatory waivers before *Miller*. Then, it examines the Colorado Supreme Court's decision in *Miller*. Finally, it explores how *Miller* may impact other skiing-related disputes and other areas of law.

BACKGROUND – THE SSA, PTSA, AND *REDDEN v. CLEAR CREEK*

The Statutory and Regulatory framework of the SSA and the PTSA

The SSA sets standards for lift and passenger safety.[3] The SSA sets out specific statutory mandates for lift safety.[4]

The PTSA, created and empowers the Passenger Tramway Safety Board ("PTSB").[5] The PTSB operates as an agency within the Department of Regulatory Agencies. The PTSB is empowered by the PTSA, to issue rules and regulations, to license, regulate, and discipline lift operators, and to investigate and conduct hearings concerning safety matters relating to lifts.[6]

Moreover, the PTSA specifically allows the PTSB to adopt as regulations the general safety standards for Passenger Tramways by the American National

---

[3]CRS § 33-44-104(1) provides: "A violation of any requirement of this article shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of the person violating such requirement.

[4] CRS § 33-44-106(1)(a)-(e) sets out standardized passenger tramway signage,

[5] CRS§ 12-150-104(1)(a) of the Passenger Tramway Safety Act created the Passenger Tramway Safety Board. This enabling legislation of the PTSA requires that the PTSB be composed of six persons appointed by the Governor, who represent the ski area operators' industry, the public at large, a professional engineer, and a tramway industry representative and a seventh member who is designated by the United States Forest Service.

[6] CRS§ 12-150-105.

Standard Institute ("ANSI").[7] The ANSI rule set which is applicable to lifts, tows, and tramways, is commonly known as the ANSI-B77 Standard, the current iteration of which is denominated ANSI B77.1-2022.[8]

The legislative declaration of the Colorado Ski Safety Act declares that its purpose is to "establish reasonable safety standards for the operation of ski areas and for the skiers using them."[9] The legislative declaration was amended in 2019 to make clear that the SSA is intended to govern the rights, duties, and liabilities of skiers and ski area operators:

> the purpose of this article … is to supplement the passenger tramway safety [Act] to further define the legal responsibilities of ski area operators and their agents and employees; to define the responsibilities of skiers using such ski areas; and to define the rights and liabilities existing between the skier and the ski area operator and between skiers.[10]

---

[7] CRS§ 12-150-105(1)(a) which states: "The board may use as general guidelines the standards contained in the "American National Standard for Passenger Ropeways--Aerial Tramways and Aerial Lifts, Surface Lifts, Tows, and Conveyors--Safety Requirements", as adopted by the American National Standards Institute, as amended from time to time."

[8] ANSI B77.1-2022 Passenger Ropeways - Aerial Tramways, Aerial Lifts, Surface Lifts, Tows and Conveyors - Safety Requirements, establishes a standard for the design, manufacture, construction, operation, and maintenance of passenger ropeways. For this standard, passenger ropeway categories include: aerial tramways (single and double reversible); aerial lifts (detachable lifts, chair lifts, and similar equipment); surface lifts (T-bar lifts, J-bar lifts, platter lifts, and similar equipment); tows (wire rope and fiber rope tows); and conveyors. https://webstore.ansi.org/standards/ansi/ansib772022

[9] CRS § 33-44-102.

[10] *Id.*

Relevant to *Miller*, the SSA establishes duties for ski areas' lift operators.[11] It describes specific requirements for daily inspections and for signs the ski area operator must post at its tramways, chairlifts, and surface tows.[12] Sections 107(8)(b)-(c) require that "every ski lift ticket sold or made available for sale" must contain a warning concerning the inherent dangers and risks of skiing. The provision does *not prohibit* other language, including, for instance, that the skier waives his or her right to sue on any claim and must hold harmless the ski area operator from any claim, damage, or cost connected to a lawsuit filed by the skier, no matter the basis.

The SSA also defines skiers'[13] and passengers'[14] duties of care. Relevant to the defenses in *Miller* and similar cases, passengers must obey instructions in signage and from lift attendants. Passengers must have sufficient physical dexterity, ability, and knowledge to safely load, ride, and unload from the lifts.

The SSA's core operative language is contained in CRS§ 33-44-104. Section 104(1) provides that a breach of a duty set out in the SSA constitutes "negligence." Section 104(2) incorporates within the SSA, as negligence standards of care, the lift safety rules and regulations as adopted by the PTSB.[15]

Existing alongside the safety standards of the PTSA, and the SSA. Colorado Courts developed a common law duty that ski area operators must also exercise the

[11] CRS §§ 33-44-104.
[12] CRS § 33-44-106(1)-(4).
[13] CRS § 33-44-109.
[14] CRS § 33-44-105.
[15] CRS § 12-150-105

highest degree or duty of care commensurate with the safe operations of ski lifts. The highest degree of care doctrine originated in the 1968 lift loading accident case of *Summit County Development v. Bagnoli.*[16] Bagnoli broke her leg while attempting to load a two-person, fixed-grip chairlift at Breckenridge. The trial court instructed the jury that the ski area owed Bagnoli the highest duty of care commensurate with the safe operation of the lift. The highest duty rule was affirmed 30 years later in *Bayer v. Crested Butte* (ironically, involving an incident on the original Paradise lift at Crested Butte).[17]

In *Bayer*, the Supreme Court affirmed and held that ski area operators, in addition to their regulatory burden, also owed their passengers the common law duty to "exercise the highest degree of care commensurate with the practical operation of the ski lift."[18] The Court reasoned that the ski lift was analogous to an amusement park stagecoach ride. The chairlift passengers "had surrendered themselves to the care and custody of the [ski area operator] defendants; they had given up their freedom of movement and actions; [and] there was nothing the passengers could do to cause or prevent the accident."[19] Moreover, in *Bagnoli,* the Court looked at out of state precedent and noted in "other jurisdictions where the sport of skiing has also become highly popular, courts have imposed on ski lift operators a common carrier status, thus requiring that a higher degree of care be exercised in the operation of this type of facility."[20]

The highest duty of care applied even after the enactment in 1979 of the per se duties set out in the SSA. In 1998, *Bayer v. Crested Butte*, the Court held that "[a]

---

[16] 441 P.2d 658 (Colo. 1968).
[17] 960 P.2d 70 (Colo. 1998).
[18] *Id*. at 72.
[19] *Id*. at 75-76.
[20] *Bagnoli*, *supra* note __, at 664.

ski lift operator must exercise the highest degree of care commensurate with the lift's practical operation."[21]

The SSA, PTSA, and the Tramway Board's regulations as written or adopted from ANSI, and the tension between the regulatory framework and the common law highest duty of care, is at the heart of the decision in *Miller*. In *Miller,* the Court found that the statutory and regulatory framework governing skiing, ski lifts and lift regulations "were indisputably adopted for the public's safety" and enforceable as per se negligence, notwithstanding waiver or exculpatory agreements.[22] *Miller* has now settled the question of whether such waiver language is effective. Lift ticket waiver language and concomitant lift pass purchase agreements with exculpatory language, are *ineffective* to the extent an accident is arguably related by plausible allegations to a breach of the SSA or the incorporated provisions of the PTSA and/or the Tramway Board's regulations.

In contrast however, the *Miller* Court also held that season pass waivers and waiver language printed on lift tickets are *effective* to bar claims based upon the common law duties of the highest degree of care.

***Redden v. Clear Creek*, and 10th Circuit precedent upholding waivers and exculpatory agreements.**

Before *Miller*, both the Colorado Court of Appeals and the Tenth Circuit Court of Appeals had held that exculpatory agreements between ski area operators

---

[21] *Id.* at 71–2 (Colo. 1998). *See also Sullo v. Vail Summit Resorts, Inc.,* 14-CV-00449-MSK-NYW, 2015 WL 12967823, at *3 (D. Colo. Feb. 23, 2015). *Bayer* reaffirmed the logic, policy and holding in *Bagnoli,* 441 P.2d at 664 (lift loading accident). Neither the PTSA nor the SSA altered that common law standard. *See Bayer,* 960 P.2d at 80.
[22] *Miller,* 549 P.3d at 235.

and injured skiers that waived ski area operators' liability for per se negligence premised on SSA violations were enforceable.[23]

In *Redden v. Clear Creek Skiing Corporation*, plaintiff Redden had purchased ski boots and had her bindings adjusted at the Loveland ski area shop. At the point of sale, she signed an exculpatory agreement that included broad language releasing Loveland from any liability for her injuries.[24] The lift ticket Redden had bought also contained a small font waiver providing that use of the ticket constituted a waiver of claims and an agreement not to sue.[25] After Redden was injured, she asserted a per se negligence claim against Clear Creek Skiing Corporation. [26]

The Colorado Court of Appeals relied on the Tenth Circuit Court of Appeals' opinion in *Brigance v. Vail Summit Resorts, Inc.*[27] to hold that the waivers effectively barred Redden's per se negligence claims alleged under the SSA and, by reference, the PTSA.

In *Brigance*, which involved a chairlift unloading accident, the plaintiffs argued that the ski operators' statutory duties under the SSA and PTSB could not be limited by small font ticket waivers or exculpatory agreements.[28] The Tenth

---

[23] *See Redden v. Clear Creek Skiing Corporation,* 490 P.3d 1063 (Colo. App. 2020); *Brigance v. Vail Summit Resorts, Inc.,* 883 F.3d 1243 (10th Cir. 2018).
[24] *Redden,* 490 P.3d at 1066. In 2023, the authors published a two-part article that discussed the facts, analysis, holding, and impact of *Redden*. *See* Chalat, Thomson and Hatten "Colorado Ski Law in the 21st Century - Part 1: The no-Duty Doctrine for Ski Area Operators After *Redden*," 52 *Colo. Law.* 42(Apr. 2023); Chalat, Thomson and Hatten "Colorado Ski Law in the 21st Century - Part 2: The no-Duty Doctrine for Ski Area Operators After *Redden*," 52 *Colo. Law.* 54 (July/Aug. 2023).
[25] *Redden,* 490 P.3d at 1066. The font was not so small though as to require a magnifying glass. *Id*. at 1069, n.5.
[26] *Id*. *Id*. at 1066.
[27] *Brigance v. Vail Summit Resorts, Inc.,* 883 F.3d 1243 (10th Cir. 2018).
[28] *Brigance,* 883 F.3d at 1260

Circuit disagreed and held that Brigance's claims failed because, although the "SSA and PTSA identify various duties and responsibilities that, if violated, may subject a ski area operator to liability . . . the acts . . . do nothing to expressly or implicitly preclude private parties from contractually releasing potential common law negligence claims through the use of an exculpatory agreement."[29] Relying on *Brigance*, the Colorado Court of Appeals affirmed summary judgment on Redden's per se negligence claim.[30] The Colorado Supreme Court denied certiorari review.[31]

The holdings in *Brigance* and *Redden* effectively immunized ski area operators from liability for common law highest duty of care, simple negligence, and claims under the SSA and PTSA except where gross negligence was alleged or where the nature of the accident was not included within the waiver's clear and unambiguous language.[32] As a practical matter, these holdings severely limited many ski area operator duties established by the SSA and by reference, the PTSA. *Redden* also relied on *Espinoza v. Arkansas Valley Adventures, LLC.*,[33] a whitewater rafting wrongful death case, in which Justice Neil Gorsuch, then sitting on the Tenth Circuit Court of Appeals, wrote for the *Espinoza* majority to affirm summary judgment against the plaintiff. Justice Gorsuch based his holding on the exculpatory agreement signed by the decedent before the fatal rafting trip during which she was thrown off the raft by high water and drowned.[34] The Tenth Circuit

---

[29] *Brigance,* 883 F.3d at 1260.
[30] *Redden v. Clear Creek Skiing Corp.*, 490 P.3d 1063, 2020 COA 176.
[31] *Redden v. Clear Creek Skiing Corp.*, No. 21SC94, 2021 WL 4099429 2021 Colo. LEXIS 785 (Sept. 7, 2021).
[32] *Redden v. Clear Creek Skiing Corp.*, 2020 COA 176, ¶ 25

[33] *Espinoza v. Arkansas Valley Adventures, LLC,* 809 F.3d 1150, 1154, 1155 (10th Cir. 2016) cited in *Redden v. Clear Creek Skiing Corporation, 2020 COA 176* at ¶'s 43, 61, and n.10.
[34] *Espinoza,* 809 F.3d at 1152.

panel, in a 2-1 holding, held that the exculpatory agreement and warnings signed by the decedent barred her son's wrongful death per se negligence claims against the rafting company based upon the Colorado River Outfitters Act (CROA), which prohibited rafting companies from operating floats and rafts in a careless or imprudent manner. [35] The dissent, by Judge Hartz, would have reversed the summary judgment against Espinoza, not because of CROA, but because the warnings provided may have misled the decedent about the dangers and extraordinarily high whitewater rapids. Judge Hartz noted, "[i]t is not enough to list a risk if the customer has been misled about its probability." [36]

Nonetheless, in his majority opinion in *Espinoza,* Justice Gorsuch observed the trend in Colorado federal and state courts to enforce liability waivers in recreational cases, even in per se negligence cases based upon statute. He reflected, however, that the Colorado Supreme Court had the power to reverse the trend "on this score at any time. And maybe someday they will … But that decision is their decision to make, not ours…" [37]

That "someday" came on May 20, 2024, with the Colorado Supreme Court's decision in *Miller v. Crested Butte.* The Colorado Supreme Court impliedly overruled *Redden*, *Brigance* and other cases that relied on similar logic and precedent. [38]

---

[35] C.R.S. §33-32-107(2)(b).
[36] "In my view, a jury must resolve whether Ms. Apolinar (the decedent) was misled about the danger of the rapids." Judge Harz, concurring and dissenting, *Espinoza,* 809 F.3d at 1158.
[37] *Espinoza*, 809 F.3d at 1153.
[38] *Miller* over-ruled *Redden* and the analytic paradigm employed in *Redden* including: *Patterson v. PowderMonarch, LLC*, 926 F.3d 633 (10th Circ. 2019) (unloading accident at chairlift); *Hart v. Blume,* 2020 WL 1814412 (D. Colo. 2020)

***MILLER V. CRESTED BUTTE*, 2024 CO 30 (May 20, 2024)**

Per se negligence claims survive waivers and exculpatory agreements

Miller set precedent not following the ruling in *Redden*, rejecting the Tenth Circuit's holding in *Brigance*, and limiting former precedent upholding exculpatory agreements and ticket waivers that barred skiers' claims. The *Miller* opinion noted the "broad use of liability releases in the ski industry in Colorado." Every skier in Colorado is skiing under a liability release tied either to their lift pass, their season pass agreement or set out in small font on the reverse of their daily lift ticket.[39] In a "matter of first impression," the Colorado Supreme Court considered the effect of these releases and waivers and held:[40]

> . . . Crested Butte may not absolve itself, by way of private release agreements, of liability for violations of the statutory and regulatory duties on which Miller's negligence per se claim is based. Accordingly, we conclude that the district court erred in dismissing that claim . . .
>
> As to [Miller's claim for negligence-highest duty of care] . . . we conclude that the district court properly applied the *Jones* factors to determine that the release agreements that Miller signed are enforceable and thus bar that claim.[41]

> **However, the long standing doctrine of highest degree of care in lift cases *is* barred by waivers or exculpatory agreements.**

(skier collision with on-duty ski instructor); *Raup v. Vail Summit Resorts, Inc.,* 734 Fed. Appx. 543 (10th Cir. 2018) (lift unloading); *Brigance v. Vail Summit Resorts, Inc.*, 883 F.3d 1243 (10th Cir. 2018) (lift unloading).

[39] See discussion of "The Click-Wrap," Jim Chalat, Mike Thomson & Hunter Hatten, Colorado Ski Law in the 21st Century, Part 1., 52 Colo. Law No. 3, 42, at 44. *Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70,

[40] *Miller,* 549 P.3d at 231.

[41] *Id.,* ¶'s 2 & 3.

Although the *Miller* decision held that per se negligence claims were allowed, the Colorado Supreme Court found that the comprehensive waiver and exculpatory agreement barred Miller's highest duty of care claims.

Whether the doctrine of highest duty of care is still applicable given the standard that every skier is skiing on a waiver, is now a moot question. The doctrine is effectively abolished.

MILLER V. CRESTED BUTTE **– BROOMFIELD COUNTY DISTRICT COURT**

The lift ticket purchase and exculpatory agreement

In November 2021, Mr. Miller purchased internet 3-day Epic Passes for himself and his daughter, Annie (age 17), on the Vail Resorts website.[42] To purchase the passes, Miller had to clicked through a "click-wrap" option, which affirmed his electronic signature to a lengthy "Release of Liability, Waiver of Claims, Assumption of Risks and Indemnity Agreement." He signed twice, once on his behalf and once on Annie's. The Agreement provided:

> 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.,... each of [its] affiliated companies and subsidiaries, the resort owner/ operator inclusive of any partner resort owner/ operator, ... and all their ... successors in interest ...FOR ANY INJURY…[43]

The Incident

The Paradise Express lift at Crested Butte is a High-Speed Quad Detachable chairlift (4-passengers per chair) built by Poma in 1994. It has a capacity of 1960

---

[42] *Miller*, at ¶7.
[43] *Miller, supra,* at ¶7.

passengers per hour. It has a vertical rise of 1302’; a length of 5682’; a transit time of approximately 5:40 minutes; and a maximum line speed of 1100 feet per minute (“fpm”). [44] (*See, Figure 1).*

Figure 1 - The Paradise Lift from above Tower 1 (Photo courtesy of Jason Blevins, The Colorado Sun)

Miller’s Complaint alleged that on March 16, 2022, at about 4:00 PM, Miller and Annie entered the Paradise lower terminal loading area and attempted to board the Paradise lift (see, Figure 3). It also alleged that Annie failed to get seated, her

[44] A high-speed detachable lift is designed for each chair to detach from the high-speed haul wire rope as it enters the loading and unloading terminals. It is mechanically slowed when it is detached, slowly rotates around the bullwheel and approaches the loading board in the terminal. After being loaded, the chair is then accelerated to match the haul rope speed. It then departs the terminal as it reattached to the haul rope for the ride uphill. These actions are all automatically controlled. The attendants and operators can slow or stop the chair but do not control any aspects otherwise of the chairs’ deceleration or acceleration. ANSI B-77, 2022, *passim.*

father grabbed her, and he and others on the chair and in the lift line shouted to attendants to stop or slow the lift, but the lift was not stopped. Annie slipped out and fell approximately thirty feet to the ground, landing directly on her back. The fall caused Annie to sustain a C7 burst fracture, which resulted in her acute, incomplete tetraplegia.[45]

The Crested Butte Incident Investigation was attached to the publicly available pleadings filed in the Colorado Supreme Court. It noted that the lift operator heard Mr. Miller shouting, noticed Annie sliding off the chair and hit the stop button. Moments later, the ski patrol received a report of an injured guest near tower 1. (see, Figure 1). The investigation report stated that Annie's point of rest was "81 yards" from the terminal, which was a point "22 yards" past Tower 1.[46] The investigation further noted that the Paradise Lift Line speed on the date was 1060 fpm. on 3/16/2022 and that its "emergency stopping distance was 76 feet @ 1060 feet per minute."[47] The investigation included some witness statement summaries. One witness stated that he/she "Saw guest leaving the terminal 'with her hips out of the chair…'"[48] Two witnesses suggested Annie fell from the chair just before or as it stopped.[49] The investigation included measurements, and photos of the scene (*Figure 2)* taken after the lift closed. [50]

---

[45] Complaint and Jury Demand, Broomfield County Colorado District Court, Case Number: 2022CV030033 (Dec. 16, 2022).
[46] Respondent's Response to Order and Rule to Show Cause, Ex. 2., *Miller et al. v. Crested Butte, LLC,* Case No. 2023SA186 (September 22, 2023).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50]*Id.*

Figure 2 - Paradise loading area (Ex. 2, Photo 6 Crested Butte Incident Investigation attached to Crested Butte's Response to Order and Rule to Show Cause filed Sept. 22, 2023) Supra, Fn. 19.

Miller's Complaint

Michael D. Miller, Parent and Guardian of Annalea "Annie" Jane Miller, filed the Complaint on December 16, 2022, against the defendant Vail Resorts, Inc., d/b/a Crested Butte Mountain Resort LLC. Vail Resorts, Inc., is the owner and operator of Crested Butte Mountain Resort, LLC. The Complaint alleged three causes of action that, Miller later argued, barred the enforcement against Miller of the "Release of Liability, Waiver of Claims, Assumption of Risks and Indemnity Agreement," which he signed in the internet purchase process.[51] First, Miller claimed that Crested Butte breached its highest duty of care as a ski lift operator.[52] The Complaint alleged that Crested Butte's lift operators were negligent in the loading process, failed to observe that Annie waswas not properly seated and that

[51] Complaint and Jury Demand, Broomfield County Colorado District Court, Case Number: 2022CV030033 (Dec. 16, 2022).
[52] *Id.*

the lift operators failed to see Annie start to slip out of the chair as it accelerated coming out of the terminal.[53]

Second, Miller asserted a per se negligence claim. The per se negligence claim is alleged the per se duty claims under the SSA adaptation of the standards of care under the PTSA and corresponding regulatory framework established by the PTSB regulations and ANSI standards. [54] The Complaint noted that the SSA was enacted in 1979 to define the rights, duties, and liabilities of skiers and ski area operators. It alleged that the SSA established a per se negligence standard for the design, operation, and maintenance of ski area operators' lifts by reference to PTSA followed to the relevant regulations enacted by the Tramway Board.

The per se negligence claim was founded on C.R.S. §33-44-104(2), which provides:

> A violation by a ski area operator of any requirement of this article 44 or any rule promulgated by the passenger tramway safety board pursuant to section 12-150-105 (1)(a) shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of such operator.

Under the Tramway Board's regulations relating to detachable lifts, Miller relied on Rule 3.3.2.3.3 as adopted by the Tramway Board in 2012 from the ANSI B77.1-2011 code.[55] It requires lift attendants:

> [T]o monitor the passengers' use of the aerial lift; including observing, advising and assisting them while they are in the attendant's work area as they embark on or disembark from the aerial lift; and to respond to unusual

---

[53] *Id.*
[54] Petition, *infra* note 34, at APX 13.
[55] Since 1956, the American National Standards Institute ("ANSI") has published the B77 Code which is the Standard for Aerial Tramways and Aerial and Surface Lifts, and Tows, and Safety Requirements. The ANSI B77 code is adopted by most states and regulatory agencies, each with small emendations.

occurrences or conditions, as noted. The attendant should respond by choosing an appropriate action, which may include any of the following:

1) assisting the passenger;
2) slowing the aerial lift (if applicable);
3) stopping the aerial lift;
4) continuing operation and observation.

The third claim for relief alleged by Miller in his complaint was for gross negligence. The complaint alleged that the conduct of the lift attendants was reckless and heedless.

The Motion to Dismiss

On January 27, 2023, Crested Butte filed its Motion to Dismiss alleging that Colorado's Premises Liability Act ("PLA") barred Miller's claims, or alternatively, that Plaintiff's claims were "barred by the terms of two enforceable liability waivers."[56]

Specifically, Crested Butte argued that the PLA pre-empted both the highest duty of care and gross negligence claims on grounds that the PLA was the "exclusive specification of the duties of landowners",[57] abrogating *Bagnoli.*[58] It also repeated the arguments that had succeeded in Brigance, urging that the exculpatory agreements and waivers embedded in a skier's lift pass were enforceable under the

[56] *Miller v. Crested Butte, LLC*, Case No: 2023SA186, Petition For Rule To Show Cause Pursuant To C.A.R. 21 (July 21, 2023); Defendant Vail Resorts, Inc.'s Motion To Dismiss. Appendix p. 21.
[57] *Vigil v. Franklin,* 103 P.3d 322, 328 (Colo. 2004).
[58] *Anderson v. Hyland Hills Park and Recreation Dist.,* 119 P.3d 533, 536 (Colo. App. 2004) (holding that a duty to "exercise the highest degree of care" is preempted by the PLA).

standards of *Jones v. Dressel,* which held that an exculpatory agreement's validity is determined by considering the following four factors: [59]

> … (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.

The Trial Court Order

On April 3, 2022, District Court Judge Sean Finn dismissed Miller's highest duty of care and negligence per se claims. Judge Finn allowed the gross negligence claim to stand. Citing *Redden*, the court noted that a regulation mandating "reasonable care" does not support a negligence per se claim because it simply alleges general negligence, and a negligence per se claim must be based upon a ¶¶1legally prohibited or required act.[60]

Regarding the liability waivers, the trial court applied the *Jones* factors, concluding the contract was fairly entered into as Miller and specifically mentioned risks such as misloading, entanglements, falls from ski lifts, and potential employee negligence.[61] Thus, the trial court held that the waivers were enforceable and barred both the highest duty of care and negligence per se claims.[62]

COLORADO SUPREME COURT REVIEW

Original jurisdiction under C.A.R. 21

[59] *Jones v. Dressel,* 623 P.2d 370, 376 (Colo. 1981) *citing Tunkl v. Regents of University of California,* 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (1963). The *Jones* case and its 4-part test were thoroughly discussed in our 2023 2-part article. *See* cases cited *supra* note 8.

[60] *Redden*, 490 P.3d at 1074.

[61] *Miller*, 2024 CO 30 at ¶15.

[62] *Id.*, at ¶¶14-15.

The Colorado Supreme Court exercised original jurisdiction over the trial court's dismissal of Miller's negligence per se claim pursuant to C.A.R. 21, which allows intervention in cases of significant public importance or where no other appellate remedy exists.[63] The Court found that the dismissal raised "a substantial question as to whether ski resorts may avoid liability for negligence per se, based on violations of the SSA, the PTSA, or the regulations promulgated thereunder, by requiring patrons to sign exculpatory agreements releasing such claims."[64] The Court recognized that it had "[65]" and that "it present[ed] a matter of significant public importance, given the broad use of liability releases in the ski industry in Colorado.[66]

<u>A Ski Area Operator may not, by a lift ticket waiver or exculpatory agreement absolve itself of its statutory duties of care as set out in the SSA</u>

The Colorado Supreme Court analyzed whether Miller's releases barred his negligence per se claim, and ultimately held that private agreements cannot waive statutory and regulatory duties.[67] Citing C.R.S. § 33-44-104(1)-(2), the Supreme Court explained that the SSA and PTSB provisions were meant to protect public safety, and therefore that Miller's claims aligned with the SSA's statutory intent.[68] Therefore, the Court found Miller stated a plausible negligence per se claim based upon the breach of the applicable regulation. [69]

---

[63] *People v. Tafoya*, 434 P.3d 1193, 1995 (Colo. 2019).
[64] *Miller,* 2024 CO 30 at ¶19.

[66] *Miller,* 2024 CO 30 at ¶19.
[67] *Id.*, at ¶2.
[68] *Id.*, at ¶32.
[69] *Id.*

The Colorado Supreme Court noted that:

> Negligence per se "occurs when a defendant violates a statute adopted for the public's safety and the violation proximately causes a plaintiff's injury. (citation omitted) To prevail on a negligence per se claim, a plaintiff "must also demonstrate that the statute was intended to protect against the type of injury she suffered and that she is a member of the group of persons the statute was intended to protect.
>
> If the statute applies to the defendant's actions, then the statute conclusively establishes the defendant's standard of care and violation of the statute is a breach of [its] duty." [70]

The Miller's Complaint alleged each of these elements.[71]The Court disapproved of the district court's conclusion that Rule 3.3.2.3.3 imposed only a general duty of care, emphasizing that the rule outlines specific duties for lift attendants, such as monitoring passengers and responding to conditions.[72] The Court rejected Crested Butte's argument that the rule granted broad discretion to lift attendants to decide how to respond, stating this interpretation would render the rule "virtually meaningless."[73] The Court stated, "the rule specifies actions that lift attendants must take to avoid injuries to those … who entrust their care and safety to the lift attendants." [74] The Court added, "[t]he rule further requires lift attendants to respond to unusual occurrences or conditions by choosing an appropriate action, and it provides" examples.[75] The Court held that "these specifically delineated duties exceed a duty to merely exercise reasonable care." [76]

---

[70] *Id.*, at ¶27.
[71] *Id.*, at ¶35.
[72] *Id.*, at ¶33.
[73] *Id.*, ¶ 34.
[74] *Miller,* at ¶33.
[75] *Id.*
[76] *Id.*

The Court cited Colorado precedent establishing that statutory duties cannot be discharged through exculpatory agreements, rejecting the notion that Crested Butte could use private agreements to discharge its obligations under the SSA and PTSA.[77] Thus, the Court concluded that Crested Butte could not absolve itself of liability for negligence per se via exculpatory agreements.[78]

The Court also rejected Crested Butte’s argument that CRS § 13-22-107(3), which generally permits a parent to waive or release a child’s prospective negligence claims should control.[79] The Court recognized that CRS § 33-44-114 provides that if any law conflicts with article 44, article 44 controls.[80] Because CRS § 13-22-107(3) and *Jones* are inconsistent with article 44, the Court held that article 44 controls.[81] The majority found no indication of legislative intent to permit liability waivers eradicating statutory and regulatory duties. In oral argument, Justice Gabriel, in colloquy with Crested Butte’s lawyer, pointed out that under the statutory waiver defense, the ski area’s position is that “the child is left with no remedy.” Later, Justice Samour, referencing the duties of a ski area described in SSA and PTSA, asked, “[w]hat’s the point of these statutes. Your position renders all these statutes meaningless.”[82]

---

[77] *Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 492 (Colo. 1998) (“Parties may not privately contract to abrogate statutory requirements or contravene the public policy of this state.”); *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.”).

[78] *Id.*, ¶ 37.

[79] *Id.*, at ¶39.

[80] *Id.*

[81] *Id.* at ¶ 38.

[82] *Id.* (39:01).

The Court maintained that ski operators could not override a detailed legislative framework via private contracts.

Justice Marquez (now Chief Justice), writing a dissent that was joined by Justice Hart, would have found for the ski area. Justice Marquez argued that there is "no fundamental distinction between" a negligence per se claim and a negligence claim.[83] "A claim for negligence premised on a statutory or a regulatory standard of care is still just a claim of negligence."[84]

She also opined that the Plaintiff had not alleged a viable negligence per se claim.[85] Much like the district court's conclusion, Justice Marquez felt that Rule 3.3.2.3.3 "ultimately requires nothing more than the exercise of reasonable care."[86]

Finally, in her dissent, Justice Marquez argued the majority had also misread the scope of waivers permitted by C.R.S. § 13-22-107(3), explaining that the legislature could have included negligence per se in the list of exclusions contained in the statute.[87]Justice Marquez and Justice Hart felt that Plaintiff's "allegations [did] not state a viable negligence per se claim", and that even if they had, the claim was waived.[88]

<u>The End of the Highest Duty of Care in the Operation of the Lift</u>

The Colorado Supreme Court also reviewed Miller's claim regarding the district court's application of the third and fourth Jones factors when dismissing his

---

[83] *Miller*, at ¶59.
[84] *Id.*, at ¶62.
[85] *Miller*, at ¶63.
[86] *Id.*, at ¶66.
[87] *Id.*, at ¶73.
[88] *Miller*, at ¶74.

negligence-highest duty of care claim and found no error. Exculpatory agreements are scrutinized under the Jones factors to ensure fairness.

Miller argued that the releases were not fairly entered into because they did not adequately "inform him that Crested Butte's failure to adhere to statutory requirements could cause injury to Annie."[89] However, the Court disagreed, finding that Miller voluntarily signed the releases, which explicitly released claims of lift operator negligence related to Annie's "using the lifts" or "misloading, entanglements, or falls from ski lifts."[90] The Court determined that the release agreements sufficiently informed Miller of the types of risks leading to Annie's injuries and concluded that Miller was not at a disadvantage in bargaining power that placed him and Annie at the mercy of Crested Butte's negligence.[91] The Court explained that, for non-essential recreational activities with injury risks, exculpatory agreements (like those signed by Miller) do not give a defendant a decisive advantage in bargaining strength.[92] Thus, the Court found the agreements fairly entered into for purposes of the third *Jones* factor.[93]

As to the fourth *Jones* factor, which considers whether the parties' intent is expressed in clear and unambiguous language, Miller contended that no experienced skier would have anticipated that the releases were intended to apply where a skier had trouble loading the lift initially, witnesses were yelling for someone to stop the lift, and the skier was left hanging from the lift 30 feet in the air for a significant period of time before falling.[94] The Court, however, disagreed that this level of specificity was required. The proper inquiry, the Court explained,

[89] *Id*. at ¶ 48.
[90] *Id*.
[91] *Id.*, at ¶49.
[92] *Id*.
[93] *Id.*, at ¶50.
[94] *Id.*, at ¶51.

was whether the parties intended to extinguish liability and whether this intent was clearly and unambiguously expressed.[95] Because the releases Miller signed expressly stated that the pass holder assumes the risk of "using the lifts" and of "misloading, entanglements, or falls from ski lifts and the negligence of ski area employees," the majority concluded that the releases clearly and unambiguously expressed the parties' intent and thus satisfied the fourth *Jones* factor.[96]

BEYOND MILLER

In *Miller*, the Colorado Supreme Court determined that the SSA establishes a statutory duty that cannot be waived by private agreement. Ski area operators may and will continue to demand waivers and exculpatory agreements, but to the extent that those Ski area operators have duties under the SSA, those agreements and the ticket language are non-binding. This holding was a lightning bolt to skiers and the ski industry. The holding essentially reinstated the minimum statutory duties of ski areas operators—duties which the industry itself advocated at the time of the enactment of the SSA.

The SSA also establishes safety standards apart from lift operations. For instance, in C.R.S. 13-22-107, the SSA imposes ski area operators' duties regarding signage for ski areas' slopes and trails. This guarantees compliance with standardized industry signage, for example, marking Easiest Slopes with large signs, visible to skiers, displaying a large green circle, intermediate – blue square, advanced – black diamond, and extreme – double black diamond with "EX" depicted. Orange ovals are required at the entrance to freestyle terrain or parks. Closed trails or slopes

---

[95] *Id.*, at ¶52.
[96] *Id.* at ¶53.

must be marked with an octagon, bordered in red, a skier's silhouette, and a black diagonal band.[97]

Moreover, Specific warnings are set out regarding the marking of boundaries.[98] Section 107(8)(a) requires that man-made objects, obstacles or hazards must be marked with a warning visible from 100 feet away. Section 108 establishes additional duties of care of ski area operators, regarding the use of snowmobiles and groomers. [99]

Miller clearly upholds the viability of cases in which skiers are injured due to the breach of one of these downhill-skiing duties of warning, signage and visibility. A breach of those duties exempts the claims from the inherent danger bar under the SSA. Those SSA duties, regulating the safety of skiers, now have viable status as the basis for claims of negligence per se. If properly plead with plausible allegations, such claims can withstand dismissal notwithstanding ticket waivers, or signed exculpatory agreements, and may proceed to trial.

The forward-looking implications of the *Miller* case may have repercussions at the Tramway Board. Industry representatives may ask the Tramway Board to modify regulations with language that does not convert to a duty of care, or otherwise to discourage claims.

Miller may also have implications at the General Assembly. In 2002, the Colorado Supreme Court ruled in *Cooper v. Aspen Skiing Co.,* that the claims of a 17-year old ski racer were not barred by his parent's signature on an exculpatory

---

[97] "Duties of ski area operators - signs and notices required for skiers' information," C.R.S. § 33-44-107(1)-(5).
[98] C.R.S. §33-44-107(6).
[99] "Ski area operators - additional duties," C.R.S. § 33-44-108.

agreement.[100] Before the ink was dry on the *Cooper* case, industry representatives went to the General Assembly and lobbied for the enactment of C.R.S. § 13-22-107(3) which expressly allows a parent to waive their children's prospective negligence claims.[101]

The *Miller* court held that C.R.S. § 13-22-107(3) is ineffective as to per se claims under the SSA and PTSA, in part because the statute does not expressly mention negligence per se claims.[102] If one were to invert the logic applied in *Bayer*,[103] one could argue that the Court would defer to specific legislation. Such legislation could be an amendment to the SSA expressly setting out the intent of the General Assembly to allow the entirety of the SSA and PTSA regulatory and safety framework to be disclaimed and rendered dead letter, under ticket waivers and exculpatory agreements.

Moreover, the *Miller* decision may be the basis to re-examine whether other recreational providers, whose businesses are subject to statutory safety standards, are liable for per se negligence claims under the relevant statutes. Primarily, such cases, apart from ski lift cases such as *Miller* and *Redden*, may embrace rafting and

---

[100] *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1231 (Colo. 2002) overruled by statutory enactment of C.R.S. § 13-22-107. Cited by *Miller v. Crested Butte, LLC*, 2024 CO 30, ¶ 41.
[101] C.R.S. § 13-22-107 (b) which provides "The general assembly further declares that the Colorado supreme court's holding in case number 00SC885, 48 P.3d 1229 (Colo. 2002), has not been adopted by the general assembly and does not reflect the intent of the general assembly or the public policy of this state. Added by Laws 2003, Ch. 262, § 1, eff. May 14, 2003.
[102] *Miller,* at ¶ 41
[103] If the legislature wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent "expressly or by clear implication." *Bayer, supra* at 75.

outfitter cases, and dude ranch/equestrian accidents. [104] Each of the non-liability statutes governing these activities arguably contain specific duties of care and it is an open question whether the duties contained in these statutes rise to the per se negligence duties referred to in *Miller.* [105]

Further, the reasoning that per se cases may not necessarily be barred by waiver would compel us to examine whether claims under the Colorado Premises Liability Act ("PLA") may survive dismissal on the basis of waiver or release agreements. This might affect premises cases at parks, amusement facilities, sports venues, theatres – many of which attach waivers to the back of entry tickets – just like the ticket waiver enforced in *Redden.* After all, the PLA is at its core, a per se liability statute which provides for liability in premises cases.[106] And, similar to the provisions in the SSA and PTSB referenced in Miller, the PLA was meant to ensure a level of public safety.

CONCLUSION

These authors suggested in their article written after the *Redden* decision that the Colorado Ski Safety Act, post-*Redden*, was dead letter.

We were wrong.

---

[104] "When liability is not limited," C.R.S. § 33-41-101, 104; "River outfitters – prohibited operations – penalties," C.R.S. § 33-32-107; Colorado River Outfitters Act (CROA) discussed herein regarding the per se negligence claims dismissed in *Espinoza v. Arkansas Valley Adventures, LLC*, 809 F.3d 1150 (10th Cir. 2016); C.R.S. § 13-21-119. Equine activities--llama activities-- exemption from civil liability.

[105] *See B & B Livery, Inc., v. Riehl,* 960 P.2d 134 (1998) (broad clause in release agreement extinguished claims).

[106] As a landowner, businesses have a statutory duty had a duty of reasonable care to protect against or warn invitees of dangers of which it knew or should have known. C.R.S. § 13-21-115(3)(c)(1).

Miller makes clear that the SSA and PTSA are alive and well. As the Supreme Court held in *Stamp v. Vail*, "[t]he cumulative effect of these provisions gives the SSA primary control over litigation arising from skiing accidents."[107]

[107] *Stamp v. Vail Corp.*, 172 P.3d 437, 444 (Colo. 2007) (co-author Mike Thomson was on the briefs before the Supreme Court in the *Stamp* case).