The Colorado Lawyer
The Colorado Lawyer
August 2003
Vol. 32, No. 8 [Page 77]

Specialty Law Columns
Tort and Insurance Law Reporter

Recreational Waivers in Colorado: Playing at Your Own Risk

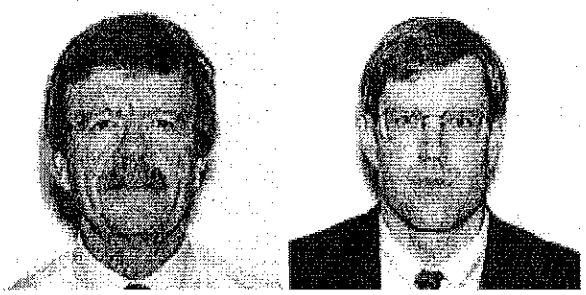
by William R. Rapson, Stephen A. Bain

This column provides information concerning current tort law issues and insurance issues addressed by practitioners representing either plaintiffs or defendants in tort cases. In addition, it addresses issues of insurance coverage, regulation, and bad faith.

Column Editor:

William P. Godsman of the Law Office of William Godsman, Denver—(303) 455-6900, wgodsman@qwest.net

About The Authors:



William R. Rapson *Stephen A. Bain*

This month's article was written by William R. Rapson, brapson@wsmtlaw.com; and Stephen A. Bain, sbain@ wsmtlaw.com. The authors are attorneys with Welborn Sullivan Meck & Tooley, P.C.—(303) 830-2500.

Liability waivers often play an important part in litigation affecting Colorado's recreational industry. This article discusses how to evaluate such waivers.

Over time, Americans have become less tolerant of risk and more likely to sue.1 Not surprisingly, Colorado's recreational industry has come to rely on waivers of liability to stay in business. Almost every recreational operator requires participants to sign some sort of waiver. Determining whether the waiver will be enforced is critical to assessing the viability of many recreational tort cases. Winning or losing a recreational tort case can depend on how counsel fields issues relating to waivers of liability.2 This article discusses the enforceability of liability waivers and how such waivers should be analyzed.

Overview of Liability Waivers in Colorado

Colorado law generally supports waivers of liability in connection with recreational activities, such as skiing, swimming, and softball. However, Colorado courts have stated repeatedly that under well-established Colorado law, agreements attempting to exculpate a party from that party's own negligence are disfavored.3 As a result, liability waiver agreements are closely scrutinized.4 They also are strictly construed against the party seeking enforcement.5

Limitations on the enforcement of recreational waivers have developed in part because waivers are at odds with common law liability for tortious conduct, which is supported by Colorado law and public policy. Other public policy reasons also are significant. By way of example, consumers lacking legal expertise do not really understand that waivers mean they are giving up the right to sue for tortious conduct, as opposed to simply waiving liability for "accidents" that occur without fault. Further, the circumstances under which waivers are executed generally do not lend themselves to a fair and balanced assessment by the consumer of the consequences of executing a waiver.

Two *en banc* decisions by the Colorado Supreme Court illustrate how the tort landscape has changed over the past forty years and how important waivers have become. In the 1960 case of *Hook v. Lakeside Park Co.*,6 the plaintiff suffered back injuries from riding a "Loop-O-Plane," an amusement ride in which she was a passive passenger. Despite testimony that the operator had not properly drawn a restraining strap across her lap, the Court upheld the dismissal of her claim for negligence because "the predominant warranty which the operator offers is not that the passenger shall be safe, but that he shall receive a thrill."7 Although the Court found the "express waiver" printed on the plaintiff's ticket to have no legal significance, it held that she assumed the risk of injury by voluntarily riding on the Loop-O-Plane. The Court concluded its opinion by commenting that "[t]he timorous may stay at home."8

The case of *Cooper v. Aspen Skiing Co.*,9 which was decided in June 2002, reflected a different sensibility. *Cooper* involved a seventeen-year-old competitive ski racer who skied into a tree during a training run and was blinded. The minor plaintiff had raced for several years and was fully aware of the risks involved. Nevertheless, both he and his mother had executed a comprehensive "Acknowledgment and Assumption of Risk and Release." The Colorado Supreme Court held the waiver to be void as against public policy. Because the plaintiff was a minor, neither he nor his mother had the capacity or authority to waive any cause of action he might have had prior to the injury.10

Forty years ago, the recreational industry did not need to rely on liability waivers because common law principles of assumption of risk provided significant protection. Now, the industry depends on waivers, and much litigation focuses on their enforceability.

Three-Prong Analysis of Liability Waivers

In Colorado, the validity of a recreational waiver is tested by a three-pronged analysis. Each prong of the analysis must be completed to evaluate the validity of a waiver. First, the waiver must not be barred because it involves minors, common carriers, willful conduct, or consumer legislation. Second, the waiver must meet all four of the requirements set forth in a 1981 Colorado Supreme Court case, *Jones v. Dressel*,11 relating to: (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 intentions of the parties were expressed in clear and unambiguous language.12 Third, the waiver must be enforceable under general principles of contract law relating to contract formation, interpretation, and affirmative defenses. The following discussion examines the three prongs in detail.

First Prong: Absolute Bar Analysis

The first prong involves an examination of whether there is any prohibition to enforcement of the recreational waiver. The following caveats or prohibitions relating to minors, common carriers, willful and wanton conduct, and consumer protection apply in Colorado.

Minors: As noted with regard to the *Cooper* case,13 as of June 2002, a parent could not waive or release a minor's prospective negligence claim. The Colorado Supreme Court also held that a parent could not indemnify the operator against any liability the operator has to the minor.14 However, on May 14, 2003, Governor Owens signed Senate Bill 03-253, in which the General Assembly declared that *Cooper* "has not been adopted by the [G]eneral [A]ssembly and does not reflect the intent of the [G]eneral [A]ssembly or the public policy of this state."15 CRS § 13-22-107(3) now provides that "[a] parent of a child may, on behalf of the child, release or waive the child's prospective claim for negligence." Although the General Assembly has overruled *Cooper*, it still is important to be careful when dealing with waivers involving minors.16

Common Carriers: Common carriers, such as trains and airlines, owe a duty to exercise the highest degree of care and not simply a duty of ordinary care. As a result, waivers of liability for common carriers are invalid.17 The only exception to the prohibition on the invalidity of common carrier waivers is where statutes override the common law. For example, ski chair lifts and other passenger tramways are defined by statute not to be common carriers for liability purposes.18

A key issue in this area turns on what characterizes common carriers. The applicable statutory and case law generally applies the doctrine where a passenger surrenders himself or herself to an operator to be transported from "point A" to "point B."19 The fact that an element of recreation may be involved does not destroy common carrier status.

Willful and Wanton Conduct: Under Colorado law, an exculpatory agreement will not provide "a shield against a claim for willful and wanton negligence."20 In this context, the main issue is what constitutes willful and wanton conduct. Various courts have defined such conduct in different ways. In *Brooks v. Timberline Tours, Inc.*,21 the Tenth Circuit Court of Appeals stated,

> . . . willful and wanton behavior requires a "mental state of the actor consonant with purpose, intent and voluntary choice." It is "conduct which an actor realizes is highly hazardous and poses a strong probability of injury to another but nevertheless knowingly and voluntarily chooses to engage in."22 (*Citations omitted.*)

Applying this definition, the court in *Rowan v. Vail Holdings, Inc.*23 found there to be sufficient evidence for a claim of willful and wanton conduct to go to the jury. In *Rowan*, there previously had been several close calls by other skiers with an unprotected picnic deck near a race course before Rowan died by skiing into it.

In *Forman v. Brown*,24 the Colorado Court of Appeals stated, "Willful and wanton conduct is purposeful conduct committed recklessly that exhibits an intent consciously to disregard the safety of others. Such conduct extends beyond mere unreasonableness."25 Applying this definition, the court found that a river raft guide's encouraging the plaintiff to jump in the river and swim, which resulted in injury to the plaintiff's ankle, was insufficient to establish willful and wanton conduct.26

Colorado Consumer Protection Act ("CCPA"): Engaging in recreational activities may lend itself to a CCPA claim, which is potentially powerful with its trebling of damages and attorney fees.27 Treating recreational activities as deceptive trade practices under the CCPA could be justifiable where there is a cognizable misrepresentation or nondisclosure of the risks associated

with the product or service. Arguably, the failure of a snowmobile operator to disclose the risk of death or serious bodily injury with riding snowmobiles could generate a claim under the CCPA.28

It is doubtful that a waiver could apply to defeat a viable CCPA claim. Where the strong public policy of Colorado favors consumer legislation, the statutory protection afforded by that legislation generally cannot be waived.29 Further, a waiver is unenforceable even where the applicable statute is silent regarding whether its protection can be waived.30 Given that the strong public policy of Colorado favors the CCPA,31 waivers of claims under the CCPA may be unenforceable.

Second Prong: Jones v. Dressel

For a waiver to avoid being invalid, four requirements imposed in the 1981 case of *Jones v. Dressel* must be met.32 These criteria consist of: (1) the lack of a duty to the public; (2) the nature of the service to be performed and whether it is essential; (3) the fairness with which a contract was entered into; and (4) the clarity and lack of ambiguity of contract terms.33

Lack of Duty to the Public: A "duty to the public" requires that a party is engaged in performing a service of great importance to the public, which often is a matter of practical necessity. As a general rule, recreational activities do not qualify as matters of great practical necessity and thus invite enforceable waivers.34 The *Jones* case35 was one of the first cases in Colorado that addressed the validity of exculpatory agreements. The Colorado Supreme Court provided an extensive discussion regarding what constitutes a duty to the public.

The plaintiff in *Jones* brought suit against an air service to recover damages for personal injuries sustained in a plane crash. The plaintiff had contracted with the defendant to use the defendant's recreational skydiving facilities, which included the use of an airplane to ferry skydivers to the parachute jumping site.

Adopting California case law, the Court enumerated multiple factors to be evaluated when determining whether a contract is imbued with a public interest, including whether it concerns a business of a type generally thought suitable for public regulation and whether the party seeking to be excused is engaged in performing a service of great importance to the public.36 The Court ultimately found that there was no public duty involved in the use of skydiving facilities.

Nature of the Service Performed: This second element of the *Jones* analysis is an extension of the preceding discussion as to whether there is a duty to the public in providing the activity at issue. The case law suggests that only if a service is considered to be essential will the validity of an exculpatory agreement be called into question. For example, skiing and skydiving are not essential services.37

Whether the Contract Was Fairly Entered Into: As a general rule, absent fraud or concealment, the signers of an executed contract are bound by and cannot deny knowledge of its contents.38 Moreover, when the services provided are not essential, such as recreational services, a claim of unfair bargaining power generally is ineffective.39 However, when a waiver is required as a condition of employment,40 it is unlikely that a waiver in this context is valid. Presumably, other factors also could be considered, such as the level of pressure exerted, the amount of time available to read the waiver, the type-size used, the sophistication of the parties, and other similar variables that relate to the issue of fairness.

Existence of Clear and Unambiguous Language: The most litigated element in the four-part *Jones* analysis is whether the intention of the parties is expressed in the waiver in clear and unambiguous language:

> If the plain language of the waiver is clear and unambiguous, it is enforced as a matter of law. If the plain language is unclear or ambiguous, it is void as a matter of law.41

The *Jones* Court noted that the exculpatory agreement at issue used the word "negligence" and included injuries sustained "while upon the aircraft of the Corporation."42 The Court held that the language of the agreement was clear and unambiguous with respect to the injuries sustained by the plaintiff, and it upheld the waiver.

In *Brooks v. Timberline Tours*,43 the plaintiff was injured and her minor son was killed when their snowmobile, driven by the son, went over a steep embankment during a guided snowmobile tour. Prior to the tour, participants had signed an underlying agreement requiring the defendants, among other things, to provide a guide and furnish participants with a safe tour. However, also included in the agreement was a separate paragraph entitled "Release." The plaintiff claimed that the language of the Release was unclear and ambiguous. The court disagreed.

Relying on the standard set forth in *Heil Valley Ranch, Inc. v. Simkin*,44 the court noted that the release provisions of the agreement were written in simple, clear terms and were not inordinately long or complicated; the term "negligence" was used at least four times; and the release provisions specifically excluded "any and all liability, claims, demands, actions or rights of action, which are related to or are in any way connected with the participation" in the activity.45

A waiver is likely to be found to be ambiguous when there are two competing risk standards that are the subject of a release.46 For example, in *Rowan*, the court found the release that the skier had signed was ambiguous because there was a conflict between the release's language and the Ski Safety Act as to what risks had been assumed.47 Furthermore, although reference to the term "negligence" is not strictly required,48 courts have struck waivers where there is no mention of negligence.

In *Day v. Snowmass Stables, Inc.*,49 in ruling on the defendant's motion for summary judgment, the court addressed the validity of a waiver that did not specifically refer to "negligence." The plaintiff was injured when a "neck yoke ring" on a horse-drawn wagon broke. The horses spooked and bumped the wagon ahead of them in which the plaintiff was riding, and the plaintiff was thrown and injured.

The court found that the exculpatory agreement was not sufficiently clear and unambiguous to release the stables from liability for the plaintiff's negligence claim. There was neither reference in the contract to a release for "faulty equipment," nor an inference to an intent to release. Moreover, the court did not view the plaintiff as an individual experienced with horse-drawn wagons. A faulty neck yoke ring was, therefore, not a foreseeable risk, and the court denied the stables' motion for summary judgment.50

Third Prong: Contract Analysis

The third prong of a recreational waiver analysis is a contract analysis. Ultimately, a waiver is a contract. Thus, whether and how it will be enforced requires a garden-variety contract analysis. No attempt will be made here to apply a complete contract analysis to waivers. However, as discussed below, consideration of several issues in this area should serve to illustrate the required approach: (1) formation of contract; (2) interpretation of contract; and (3) affirmative defenses to contract.

Formation of Contract: The following contract formation issues would commonly be considered with respect to a recreational waiver:

1. *Minors:* Under contract law, minors (those under the age of 18) cannot be bound by a contract they sign.51

2. *Lack of Consideration:* In the October 2002 case of *Mincin v. Vail Holdings, Inc.*,52 the plaintiff argued that the waiver was invalid because he had paid for his bicycle rental at the bottom of Vail Mountain but did not receive the bicycle and sign the waiver until after he had taken the gondola to the top of the mountain. The plaintiff claimed that the subsequent presentation and execution of the waiver amounted to a second contract for which there was no consideration.53

Although the plaintiff's argument was not sustained because the court found the events of payment and signature of the waiver were separated by a matter of minutes, it may be successful under other circumstances. For example, suppose a reservation is made and paid for in full in advance of a recreational activity, such as river rafting or snowmobiling. If the purchaser is presented at the last minute with a waiver that must be signed, such a situation may constitute modification of the original agreement for which there was no consideration.

3. *Meeting of the Minds:* No contract is formed where there is no meeting of the minds. Thus, the mere execution of a waiver should not end the relevant inquiry in terms of contract formation. Many consumers (if not most) believe a waiver simply avoids liability where an accident occurs in the absence of fault. Under such circumstances, there can be no meeting of the minds about exonerating the operator of liability for tortious behavior. To overcome this hurdle, a waiver should deal specifically, expressly, and obviously with the issue of tortious behavior or it may be vulnerable to this attack.

Interpretation of Contract: Assuming valid contract formation, the next contractual analysis concerns interpretation of the contract terms. It will be important to look at what the contract (waiver) covers and what it does not cover. In terms of contract interpretation, it is always critical to determine whether the waiver in fact applies to the tortious conduct from which the defendant seeks to be exonerated. Issues to be considered include whether the waiver applies to all relevant risks that are the subject of the injuries, whether it covers injuries suffered by the plaintiff, and whether it covers the type of tortious conduct at issue.

As noted previously, courts have struck waivers that have failed to refer clearly to the fact that the waiver covers negligent behavior.54 However, the *Heil Valley Ranch* court found that a "valid release or exculpatory agreement need not invariably contain the word 'negligence.'"55 In *Heil Valley Ranch*,56 the plaintiff was seriously injured after the horse she mounted reared up and fell backward. The horse in question had been described to the plaintiff as a spirited animal requiring a good rider. The plaintiff responded with "that's the horse for me," and then stated she had worked on a dude ranch.57 Just prior to mounting, the plaintiff had signed a release with the following language: ". . . that the use, handling and riding of a horse involves a risk of physical injury . . . and that a horse . . . may act or react unpredictably at times . . . which . . . is an inherent risk assumed by a horseback rider."58

The waiver did not include the terms "negligence" or "breach of warranty," the basis for two of the plaintiff's claims. In the absence of such language, the court determined that the inquiry should be whether the parties *intended* to extinguish liability and, if so, whether this intent was clearly and unambiguously expressed.59 In light of the plaintiff's experience, and her ability to "foresee" the possibility of such an injury, the court had no difficulty adopting the approach of neighboring jurisdictions: "when the parties adopt broad language in a release, it is reasonable to interpret the intended coverage to be as broad as the risks that are obvious to experienced participants."60 To hold otherwise, the court wrote, would be unreasonable. "[I]t is unreasonable to interpret the agreement in a way that provides virtually no protection to Heil Valley Ranch, and renders the release essentially meaningless."61

Nevertheless, the dissent in *Heil Valley Ranch* noted that the release did not clearly absolve the ranch of negligence. It pointed out that, regardless of the release language in which the participant assumed the "inherent risk" associated with the use, handling, and riding of a horse, the plaintiff grounded her claim on specific negligent conduct of Heil Valley Ranch. She alleged that the defendant knew the horse assigned to her was uncontrollable and dangerous and that on the day of the ride, that horse had shown a particular propensity for acting in a dangerous manner. The dissent stated that although the waiver acknowledged "inherent risks," it did not purport to release the ranch from using care to provide a horse suited to the abilities of the rider, or to ensure that a rider was assigned a horse that had not displayed characteristics making it unsuitable for recreational riding.62

The dissent concluded that without mention of risks that were avoidable by the exercise of due care by the stables, it at least rendered the release ambiguous. The dissent made no mention of the plaintiff's experience with horses, which appeared to be a factor that greatly influenced the majority in its assessment of the parties' intent.63

Affirmative Defenses to Contract: In connection with this third prong of the recreational waiver analysis, other aspects of a typical contract analysis should be applied after considering formation and interpretation issues. By way of example, affirmative defenses need to be considered. The doctrine of equitable estoppel or fraudulent inducement may apply, because the individual who signed the recreational waiver may have been induced into executing it by fraudulent misrepresentations or nondisclosures. To the extent that there is a misrepresentation or nondisclosure of the risks relevant to the recreational activity, this doctrine could operate to bar enforcement of a waiver. Waivers that expressly or impliedly represent that an activity is safe or free of risk are particularly vulnerable to attack because it is easy to identify relevant nondisclosures after the fact.64

An analogous situation occurred in *Dodds v. Frontier Chevrolet Sales & Service, Inc.*65 In that case, the plaintiff had executed a release of a car dealership as part of his purchase of an automobile, and the car dealership urged that this release barred any recovery. The appellate court in *Dodds* upheld the trial court's determination that the release was invalid because it was fraudulently procured—the dealership had induced execution of the release by threatening a lawsuit on a contract it knew to be unenforceable.

Another affirmative defense that may apply to bar enforcement of a waiver concerns illegal overbreadth, such as when a waiver improperly purports to apply to intentional or willful and wanton conduct. Case law outside Colorado appears to be divided on the issue of whether an overly broad waiver will be enforced. Cases holding that exculpatory waivers are enforceable only if they exonerate what the law allows to be exonerated include *Farina v. Mt. Bachelor, Inc.*66 and *Matter of Pacific Adventures, Inc.*67 Both of these cases noted the lack of a severability provision in ruling that overbreadth voids the entire exculpatory effort.

Contrary cases include the Oregon case of *Harmon v. Mt. Hood Meadows, Ltd.*68 and the Kansas case of *Wolfgang v. Mid-American Motorsports, Inc.*69 In the *Harmon* case, the court used an "as applied" test in lieu of a "facially invalid" test.70 The *Wolfgang* court simply concluded, without analysis, that the fact that some terms of the release were void did not make the entire release void.71 It is not clear under what circumstances Colorado courts might also oppose severability and invalidate a waiver for being overbroad.72

Conclusion

Waivers of liability are enforceable in Colorado. Nonetheless, they are susceptible to a wide variety of challenges and often are struck down by the courts. To be upheld, a waiver must be able to withstand scrutiny under three prongs. First, the waiver must not be barred because it

involves minors, common carriers, statutory bars, willful conduct, or consumer legislation. Second, the waiver must meet all four of the requirements set forth in *Jones v. Dressel.*73 Third, the waiver must be enforceable under general principles of contract law.

The benefit of hindsight may make it easier to analyze a waiver after an injury has occurred and all of the relevant circumstances can be probed. Nonetheless, analysis under the three prongs should be undertaken when drafting a waiver, not just when defending it in court.

NOTES

1. *See* Barnes, "The Litigation Crisis: Competitiveness and Other Measures of Quality of Life," 71 *Denv.U. L. Rev.* 71 (1993).

2. The documents used generally are referred to as "waivers," "releases," "assumptions of risk," or a combination of those terms.

3. *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 783 (Colo. 1989).

4. *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981).

5. *Barker v. Colorado Region—Sports Car Club of America, Inc.*, 532 P.2d 372 (Colo.App. 1974).

6. *Lakeside Park Co.*, 351 P.2d 261 (Colo. 1960).

7. *Id.* at 265.

8. *Id.* at 269, *quoting Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929).

9. *Cooper*, 48 P.3d 1229 (Colo. 2002).

10. *Id.* at 1233; *but see* CRS § 13-22-107, discussed below at notes 15-16 and accompanying text.

11. *Jones, supra*, note 4.

12. *Id.* at 376.

13. *Cooper, supra*, note 9.

14. *Id.* at 1237.

15. CRS § 13-22-107(1)(b).

16. The authors are aware of a situation in which the owner of an empty warehouse wanted to let his son's baseball team play indoors during inclement weather and asked an attorney to draw up a simple liability waiver "just in case, because people are so litigious these days." When advised of the *Cooper* decision and the effect it had of invalidating liability waivers and indemnity provisions relating to minors in Colorado, he decided that it would be better for the players to miss practice and watch baseball on television than to expose himself to potential liability and have to take out insurance to cover the additional risk. Although CRS § 13-22-107 should now allow for the enforcement of the liability waiver the baseball parent requested, it is not completely clear

under the new statute whether individuals seeking waivers are automatically covered. CRS § 13-22-107 (1)(a)(II) refers to protecting "public, private, and non-profit entities," but does not explicitly mention individuals. In addition, the new statute does not allow a parent to waive a "child's prospective claim against a person or entity for a willful and wanton act or omission, a reckless act or omission, or a grossly negligent act or omission." CRS § 13-22-107(4).

17. *Jones, supra*, note 4 at 377; *Heil Valley Ranch, supra*, note 3 at 784.

18. CRS § 25-5-717.

19. "Common carrier" is defined in CRS § 40-1-102(3)(a). The leading Colorado case in this area is *Lewis v. Buckskin Joe's, Inc.*, 396 P.2d 933 (Colo. 1964) (plaintiffs were tourists riding on replica of a stagecoach; plaintiffs were injured when coach overturned; instruction that defendant owed duty of ordinary care was error; defendant owed duty to exercise highest degree of care of a common carrier). The court stated:

It is not important whether defendants were serving as a carrier or engaged in activities for amusement. The important factors are, the plaintiffs had surrendered themselves to the care and custody of the defendants; they had given up their freedom of movement and actions; there was nothing they could do to cause or prevent the accident. . . . [T]he defendants had exclusive possession and control of the facilities used in the conduct of their business and they should be held to the highest degree of care, and the court should have so instructed the jury; failure so to do constitutes error dictating a reversal and retrial.

Id. at 939.

20. *Jones, supra*, note 4 at 376; *Brooks v. Timberline Tours, Inc.*, 127 F.3d 1273, 1276 (10th Cir. 1997).

21. *Brooks, supra*, note 20.

22. *Id.* at 1276, *quoting Potter v. Nat'l Handicapped Sports*, 849 F.Supp. 1407, 1411 (D.Colo. 1994); *Lahey v. Covington*, 964 F.Supp. 1440, 1446 (D.Colo. 1996) (inadequate evidence of willful and wanton conduct).

23. *Rowan*, 31 F.Supp.2d 889, 900 (D.Colo. 1998).

24. *Forman*, 944 P.2d 559, 564 (Colo.App. 1996), *cert. denied* (1997).

25. *Id.* at 564.

26. *Id.* at 565. The court also stated, "Although the issue of whether a defendant's conduct is purposeful or reckless is ordinarily a question of fact, if the record is devoid of sufficient evidence to raise a factual issue, then the question may be resolved by the court as a matter of law." *Id.* at 564; *see also Castaldo v. Stone*, 192 F.Supp.2d 1124, 1139-42 (D.Colo. 2001) (discussion of willful and wanton conduct in context of Colorado Governmental Immunity Act).

27. CRS § 6-1-113. The CCPA is codified at CRS §§ 6-1-101 *et seq.*

28. However, to sustain a claim under the CCPA, it will be necessary to show significant impact to the public. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 149 (Colo. 2003) (CCPA may not be used to address private wrong that does not affect public).

29. *Stanley v. Creighton Co.*, 911 P.2d 705, 707-09 (Colo.App. 1996) (exculpatory clause relieving landlord of liability for negligence in residential rental agreement held void for reasons of public policy grounded in Colorado's premises liability act); *Morris v. Towers Financial Corp.*, 916 P.2d 678 (Colo.App. 1996) (forum selection clause agreed to by employee held unenforceable as inconsistent with public policy behind Colorado Wage Claim Act).

30. *Stanley*, *supra*, note 29 at 707.

31. *People ex rel. Dunbar v. Gym of America*, 493 P.2d 660 (Colo. 1972) (upholding constitutionality of CCPA).

32. *Jones, supra*, note 4.

33. *Id.* at 376.

34. *See, e.g., Mincin v. Vail Holdings, Inc.*, 308 F.3d 1105, 1110 (10th Cir. 2002) (upholding waiver in context of mountain biking and commenting on how numerous cases have held that recreational activity does not involve a public duty); *Brooks v. Timberline Tours, Inc.*, 941 F.Supp. 959, 962 (D.Colo. 1996) (providing snowmobile tours to the public does not fall within category of providing service of great importance to the public), *aff'd, supra*, note 20; *Bauer v. Aspen Highlands Skiing Corp.*, 788 F.Supp. 472, 474 (D.Colo. 1992) (upholding waiver in context of ski equipment rental); *Lahey, supra*, note 22 at 1445 (same regarding white water rafting); *Jones, supra*, note 4 at 376-78 (same regarding skydiving).

35. *Jones, supra*, note 4.

36. *Id.* at 376-77.

37. *See Bauer, supra*, note 34 at 474 (as recreational sport, skiing is neither matter of great public importance nor matter of public necessity); *Potter, supra*, note 22 at 1409 (providing disabled ski racers with opportunity to participate in competitive sporting events not an essential service); *Jones, supra*, note 4.

38. *Day v. Snowmass Stables, Inc.*, 810 F.Supp. 289, 293 (D.Colo. 1993).

39. *Id.* at 294; *Bauer, supra*, note 34 (ski equipment rental service not essential service; therefore, did not enjoy unfair bargaining power in requiring release, regardless of whether other ski rental services in area required same release).

40. *See, e.g., Rowan, supra*, note 23 at 897-98 (waiver between ski glide tester and Vail entered into unfairly and therefore invalid).

41. *Anderson v. Eby*, 998 F.2d 858, 862 (10th Cir. 1993).

42. *Jones*, *supra*, note 4 at 375.

43. *Brooks, supra*, note 20.

44. *Heil Valley Ranch, supra*, note 3 at 785.

45. *Brooks, supra*, note 34 at 962. It is interesting to note that the result in *Brooks* would be different if decided after the Colorado Supreme Court's decision in *Cooper, supra*, note 9, which

invalidated waivers signed by minors or their parents, but before the General Assembly overruled *Cooper* on May 14, 2003, *supra*, notes 15-16, and accompanying text.

46. *Rowan, supra*, note 23 at 899, *citing Riehl v. B&B Livery, Inc.*, 944 P.2d 642 (Colo.App. 1997), *rev'd*, 960 P.2d 134 (Colo. 1998).

47. *Rowan, supra*, note 23 at 899.

48. *Heil Valley Ranch, supra*, note 3 at 785.

49. *Day, supra*, note 38.

50. *Id.* at 294-95.

51. CRS § 13-22-101(1); *Jones v. Dressel* 582 P.2d 1057, 1058 (Colo.App. 1978) (contract by minor voidable), *aff'd, supra*, note 4; *Cooper, supra*, note 9 at 1232.

52. *Mincin, supra*, note 34.

53. *Id.* at 1109.

54. *Day, supra*, note 38.

55. *Heil Valley Ranch, supra*, note 3 at 781-82.

56. *Id.*

57. *Id.* at 782.

58. *Id.*

59. *Id.* at 785.

60. *Id.*

61. *Id.*

62. *Id.* at 787-88.

63. *Id.* at 786-88.

64. The authors represented the plaintiff in a recent case involving injuries sustained during a dogsled ride. It was argued that the waiver was fraudulently induced by the nondisclosure of relevant risks. The fraudulent inducement allegedly occurred by: (1) the defendant's statement in the waivers that 3-year-old children could take the dogsled ride; (2) the video depiction of wide-open, flat terrain; (3) the video depiction of dogs licking children's faces; (4) the lack of disclosure regarding injuries that could occur or other risks (*i.e.*, sled flipping into tree, rookie musher, lead dog with cataracts); (5) the lack of helmets or other safety equipment; (6) the silence regarding any serious dangers; and (7) the complete absence in the video of a depiction of what the "sled ride" was actually like (*e.g.*, sledding through trees on a narrow, downhill trail at a high rate of speed). *Bowra v. Krabloonik Inc.* (D.Colo.), Case No. 01-MK-749 (MJW).

65. *Dodds*, 676 P.2d 1237 (Colo.App. 1983).

66. *Farina*, 66 F.3d 233 (9th Cir. 1995) (skiing release unenforceable).

67. *Pacific Adventures*, 5 F.Supp.2d 874, 882 (D.Haw. 1998) (scuba diving release illegal under Hawaii law).

68. *Harmon*, 932 P.2d 92 (Or.App. 1997) (skiing release enforceable).

69. *Wolfgang*, 898 F.Supp. 783 (D.Kan. 1995) (race car release enforceable); *cf. Wheelock v. Sport Kites, Inc.*, 839 F.Supp. 730 (D.Haw. 1993) (while issue was not directly addressed, court upheld overly broad exculpatory clause).

70. *Harmon*, *supra*, note 68 at 96-97.

71. *Wolfgang*, *supra*, note 69 at 788.

72. Established principles of law in Colorado preclude a court from rewriting a contract for parties under normal circumstances. *Jameson v. Foster*, 646 P.2d 955, 958 (Colo.App. 1982). Such principles should apply where an invalid contract exists, because "it is elementary and fundamental law that courts will not enforce, *or aid in the enforcement of*, a contract made in violation of law. . . ." *Warner Bros. Theatres v. Cooper Found.*, 189 F.2d 825, 829 (10th Cir. 1951). (*Emphasis added.*) Moreover, "[a] contract which by its inherent tendency is inimical to public welfare . . . violates public policy and will not be enforced, directly or indirectly." *Id.* at 830, *quoting Scott v. Beams*, 122 F.2d 777, 784 (10th Cir. 1941). Thus, it is arguably just as improper for a court to rewrite an illegal waiver to conform to Colorado law as it would be for a court to rewrite other illegal contracts to get them to conform to the law.

73. *Jones, supra*, note 4 at 376.