STATE OF IDAHO)
County of BONNER)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

MELISSA ADAMS, a single woman,

Plaintiff,

vs.

JAMES J. CONWAY, a single man, and SCHWEITZER MOUNTAIN, LLC, and SCHWEITZER MOUNTAIN SKI OPERATIONS, LLC, Idaho Limited Liability Companies, d/b/a SCHWEITZER MOUNTAIN RESORT, and DOES I-V, and JULIAN FRANKLIN, a single man,

Defendants.

Case No. **BON CV 2013 1213**

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT SCHWEITZER'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion for Summary Judgment filed by defendant Schweitzer Mountain, LLC and defendant Schweitzer Mountain Ski Operations, LLC.

This case is a personal injury action initiated on July 23, 2013, by plaintiff Melissa Adams (Adams). Adams filed suit against defendant James J. Conway (Conway) in his individual capacity, as well as defendant Schweitzer Mountain, LLC and defendant Schweitzer Mountain Ski Operations, LLC (d/b/a Schweitzer Mountain Resort). Complaint, p. 1. For purposes of this decision, Schweitzer Mountain Ski Operations, LLC will be referred to as "Schweitzer".

In her Complaint, Adams alleges on February 8, 2013, she was an invitee participating in a familiarization tour hosted by Schweitzer in an attempt to attract non-

local skiers. *Id.,* p. 3, ¶¶ 2.1-2.2. As part of the familiarization tour, the participants were directed to "Hermits Hollow" for a snow tubing session. *Id.,* ¶ 2.2. Prior to partaking in the snow tubing activity, Adams signed, "Hermits Hollow Snow Tubing and Zipline Release of Liability" (Release). Affidavit of Peter C. Erbland in Support of Defendant Schweitzer's Motion for Summary Judgment, Exhibit A. Adams has no memory of reading and signing the release, but admits that the signature on the bottom of the Release is hers. *Id.*, Exhibit B. The relevant portion of the Release reads:

> B. RELEASE OF LIABILITY
> I accept and understand that the sport of snow tubing . . . involves certain inherent and other risks, dangers, and hazards that may cause serious personal injury or death and that injuries are common and ordinary occurrences in this sport. Risk include, but are not limited to, risk of injury or death from . . . collisions with other snow-tubes or snow-tubers . . . .
>
> I acknowledge that tubing . . . [is a] high impact, high active sports activit[y] and that persons who have bad backs, necks, shoulders, knees, joints, broken bones, heart or lung problems, pregnancy or other conditions should not participate in [this activity]. I have made a voluntary choice to participate in [this activity] despite the risks that [it presents]. In consideration of my being permitted to participate in tubing . . . and renting snow tubing equipment I FREELY ACCEPT AND ASSUME ALL RISKS OF INJURY ASSOCIATED WITH THESE ACTIVITES.
>
> I further agree to RELEASE FROM LIABILITY and to INDEMNIFY, DEFEND AND HOLD HARMLESS Schweitzer Ski Operations, L.L.C. and their owners and agents, landowners, affiliated companies and employees for any damage, injury or death to myself or to any person or property, whether caused by THEIR NEGLIGENCE or for any other reason, in any way connected with my preparation or practice for or my participation in this activity.

Id., Exhibit A (capitalization in original). After signing the release, Adams participated in the snow tubing activity. Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 6.

The area the participants were snow tubing in consisted of two artificial "lanes" formed by snow berms, designed to keep riders within their own lane. Complaint, p. 3 ¶ 2.3. Schweitzer provided stagers or staff at the top of the snow tubing lane and at other

locations to assist with safe participation in the snow tubing activity. Memorandum in Support of Defendant Schweitzer's Motion for Summary Judgment, p. 4. At one point, the stager at the top pf the snow tubing lane stepped away from her position for 30 to 40 seconds. Affidavit of Jeffrey R. Owens in Support of Plaintiff's Memorandum in Opposition to Defendant Schweitzer's Motion for Summary Judgment, Exhibit F, p. 55, Ll. 17-21. While the stager had stepped away, Conway, the co-defendant in this case, assisted Adams and her tubing partner's start down the hill. *Id.*, Exhibit I, p. 39, Ll. 15-19. After reaching the bottom of the tubing run and reaching a run-out area, the tubes containing Adams and her partner started sliding back down the run-out area. *Id.*, Exhibit J, p. 37, Ll. 9-11. While Adams was sliding back into the lane, another tuber, also pushed by Conway, collided with her. *Id.,* Exhibit D. Conway admits he pushed the tuber who collided with Adams. *Id.*, Exhibit I, p. 39, Ll. 15-19.

While both snow tubing and at times prior, Adams alleges that alcohol was served to tour participants. Complaint for Damages, p. 3 ¶ 2.2. Conway admits he had consumed one can of beer at lunch and one and a half cans of beer at Hermits Hollow prior to participating in tubing. Affidavit of Jeffrey R. Owens in Support of Plaintiff's Memorandum in Opposition to Defendant Schweitzer's Motion for Summary Judgment, Exhibit I, p. 24, Ll. 1-10. Schweitzer concedes "[a] comparison of Adams' complaint and Schweitzer's answer shows a lack of any dispute on the basic material facts leading up to this accident." Memorandum in Support of Defendants Schweitzer's Motion for Summary Judgment, p. 2.

On July 18, 2014, Schweitzer Mountain, LLC and Schweitzer Mountain Ski Operations, LLC filed the present motion for summary judgment pursuant to I.R.C.P. 56. In support of their motion, Schweitzer also filed a "Memorandum in Support of Schweitzer's Motion for Summary Judgment", "Affidavit of Peter C. Erbland in Support

of Defendant Schweitzer's Motion for Summary Judgment" and "Affidavit of Tom Chase in Support of Defendant Schweitzer's Motion for Summary Judgment." Summary judgment is sought on all of Adams' claims against Schweitzer. Memorandum in Support of Defendants Schweitzer's Motion for Summary Judgment, p. 2.

On August 1, 2014, Adams filed her "Memorandum in Opposition to Defendant Schweitzer's Motion for Summary Judgment", "Affidavit of Dick Penniman" and "Affidavit of Jeffrey R. Owens in Support of Plaintiff's Memorandum in Opposition to Defendant Schweitzer's Motion for Summary Judgment." Joining Adams in opposition to the motion for summary judgment, on August 1, 2014, Conway filed "Defendant Conway's Memorandum of Points and Authorities in Response to Defendant Schweitzer's Motion for Summary Judgment" and "Affidavit of Paul L. Kirkpatrick in Opposition to Schweitzer's Motion for Summary Judgment."

On August 8, 2014, Schweitzer filed a "Reply Memorandum in Support of Defendants Schweitzer's Motion for Summary Judgment" and an "Affidavit of Joel Martinez in Support of Defendants Schweitzer's Motion for Summary Judgment."

Hearing on Schweitzer's motion for summary judgment was held on August 14, 2014. For the reasons set forth below, the motion for summary judgment is granted in part and denied in part. After oral argument, on September 16, 2014, Julian Franklin was added as a party defendant.

II. STANDARD OF REVIEW.

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA No. 8 Ltd. Partnership,* 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). "The court

may permit affidavits to be supplemented . . . by depositions, answers to interrogatories, or further affidavits. I.R.C.P. 56(e). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.,* 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)).

"Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party," to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer,* 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). "[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." Porter v. Bassett, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008)(citing *Atwood v. Smith,* 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69

(1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). If the non-moving party does not provide such a response, summary judgment, if appropriate, shall be entered against the party. *Id.* "Questions of law are subject to free review." *Halvorson v. North Latah County Highway Dist.,* 151 Idaho 196, 201, 254 P.3d 497, 502 (2011).

III. ANALYSIS OF SCHWEITZER'S MOTION FOR SUMMARY JUDGMENT.

A. Idaho Code §§ 6-1103 and 6-1106 Do Not Bar Adams' Claims.

At oral argument, the Court raised the issue as to whether I.C. § 6-1101 *et seq*. posed a bar to Adams' claims.

Chapter 11, Title 6 Idaho Code, currently known as ""Responsibilities and Liabilities of Skiers and Ski Area Operators", more commonly referred to as the "Idaho Ski Liability Act", creates a public duty for ski areas. I.C. § 6-1101, *et seq*. Specifically it provides, "it is the purpose of [Chapter 11, Title 6 Idaho Code] to define those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury, and to define those risks which the skier expressly assumes and for which there can be no recovery." I.C. § 6-1101. If a ski area fails to meet a public duty under Chapter 11, Title 6 Idaho Code, any release of liability will not shield the ski area from liability for that breach. *See Morrison*, 152 Idaho 660, 661, 273 P.3d 1253, 1254; *Lee,* 107 Idaho 976, 978, 695 P.2d 361, 363. To determine whether a ski area failed to meet a public duty, the Court must "evaluate both the skier's and the operator's duties to determine if either party violated their duties." *Long v. Bogus Basin Recreational Ass'n, Inc.,* 125 Idaho 230, 232, 869 P.2d 230, 232 (1994).

The duties of ski area operators with respect to ski areas are governed by Idaho Code § 6-1103. "Ski area" is defined as "the property owned or leased and under the control of the ski area operator within the state of Idaho." I.C. § 6-1102(4). A "ski area operator" is "any person, partnership, corporation or other commercial entity and their agents, officers, employees or representatives, who has operational responsibility for any ski area or aerial passenger tramway." I.C. § 6-1102(4). Specifically the duties of ski area operators in ski areas are as follows:

> Every ski area operator shall have the following duties with respect to their operation of a skiing area:
>
> (1) To mark all trail maintenance vehicles and to furnish such vehicles with flashing or rotating lights that shall be in operation whenever the vehicles are working or are in movement in the skiing area;
>
> (2) To mark with a visible sign or other warning implement the location of any hydrant or similar equipment used in snowmaking operations and located on ski slopes and trails;
>
> (3) To mark conspicuously the top or entrance to each slope or trail or area, with an appropriate symbol for its relative degree of difficulty; and those slopes, trails, or areas which are closed, shall be so marked at the top or entrance;
>
> (4) To maintain one (1) or more trail boards at prominent locations at each ski area displaying that area's network of ski trails and slopes with each trail and slope rated thereon as to its relative degree of difficulty;
>
> (5) To designate by trail board or otherwise which trails or slopes are open or closed;
>
> (6) To place, or cause to be placed, whenever snowgrooming or snowmaking operations are being undertaken upon any trail or slope while such trail or slope is open to the public, a conspicuous notice to that effect at or near the top of such trail or slope;
>
> (7) To post notice of the requirements of this chapter concerning the use of ski retention devices. This obligation shall be the sole requirement imposed upon the ski area operator regarding the requirement for or use of ski retention devices;
>
> (8) To provide a ski patrol with qualifications meeting the standards of the national ski patrol system;
>
> (9) To post a sign at the bottom of all aerial passenger tramways which advises the passengers to seek advice if not familiar with riding the aerial passenger tramway; and
>
> (10) Not to intentionally or negligently cause injury to any person; provided, that except for the duties of the operator set forth in subsections (1) through (9) of this section and in section 6-1104, Idaho Code, **the operator shall have no duty to eliminate, alter, control or lessen the risks inherent in the sport of skiing**, **which risks include, but are not**

> **limited to, those described in section 6-1106, Idaho Code; and, that no activities undertaken by the operator in an attempt to eliminate, alter, control or lessen such risks shall be deemed to impose on the operator any duty to accomplish such activities to any standard of care.**

I.C. § 6-1103 (emphasis added). As the Idaho Supreme Court stated in *Northcutt v. Sun Valley Co.*, 117 Idaho 351, 787 P.2d 1159 (1990):

> We interpret this portion of I.C. § 6-1103(10) to mean that the duties set forth in subsections (1) through (9) of I.C. § 6-1103 [Duties of ski area operators with respect to ski areas] and in I.C. § 6-1104 [Duties of ski area operators with respect to aerial passenger tramways] are duties to eliminate, alter, control or lessen the inherent risks of skiing. We also interpret this portion to mean that a ski area operator has no other duties to eliminate, alter, control or lessen the inherent risks of skiing beyond those stated in I.C. §§ 6-1103 [Duties of ski area operators with respect to ski areas] and 6-1104 [Duties of ski area operators with respect to aerial passenger tramways]. We construe the last clause of this portion of I.C. § 6-1103(10) to eliminate any standard of care for a ski area operator in carrying out any of the duties described in I.C. §§ 6-1103 [Duties of ski area operators with respect to ski areas] and 6-1104 [Duties of ski area operators with respect to aerial passenger tramways].

Id., at 354-55, 787 P.2d at 1162-63.

Moreover, "ski area operators **shall not be liable** to any passenger or skier acting in violation of their duties as set forth in sections 6-1105 [Duties of passengers] and 6-1106 [Duties of skiers], Idaho Code, where the violation of duty is causally related to the loss or damage suffered. . . ." I.C. § 6-1107 (emphasis added). Among other things, Idaho Code § 6-1106 imposes the following duties upon skiers:

> It is recognized that skiing as a recreational sport is hazardous to skiers, regardless of all feasible safety measures that can be taken.
>
> Each skier expressly assumes the risk of and legal responsibility for any injury to person or property that results from participation in the sport of skiing . . . . **The responsibility for collisions by any skier while actually skiing, with any person, shall be solely that of the individual or individuals involved in such collision and not that of the ski area operator. . . .**

I.C. § 6-1106 (emphasis added). At the time of the accident on February 8, 2013, the term "skier" was defined in I.C. § 6-1102(6) as:

> (6) "Skier" means any person present at a skiing area under the control of a ski area operator for the purpose of engaging in the sport of skiing by utilizing the ski slopes and trails and does not include the use of an aerial passenger tramway.

That section was changed in the 2014 legislative session, and effective July 1, 2014, the term "skier" is now defined by I.C. § 6-1102(6) as:

> "Skier" means any person present at a skiing area under the control of a ski area operator for the purpose of engaging in activities including, but not limited to, **sliding downhill** or jumping on snow or ice on skis, a snowboard, **or any other sliding device**, or who is using any ski area including, but not limited to, ski slopes, trails and freestyle terrain but does not include the use of an aerial passenger tramway.

I.C. § 6-1103(6) (emphasis added). The legislature amended the Idaho Ski Liability Act in February 2014 to "modernize the terms within the Act" and, among other things, clarify the definition of the term "skier" to include snowboarders, tubers, and sledders. 2014 H.B. 462, Statement of Purpose. The Statement of Purpose in its entirety reads:

> This legislation amends the Idaho Ski Liability Act, which has not been amended since its adoption in 1979. The amendments are intended to modernize the terms within the Act. Generally speaking, the amendments clarify the following four issues: (1) the definition of skiers includes snow boarders and tubers/sledders; (2) the definition of a terrain part; (3) a terrain park falls within the inherent risks in skiing; and (4) snow immersions and inbound avalanches qualify as inherent risks.

Id.

Thus, under the statute applicable at the time of Adams' injury, she would not be considered a "skier" because she was not "engaging in the sport of skiing by utilizing the ski slopes and trails." Under the statute now in effect, she would be considered a "skier" as she was "sliding downhill" on a "sliding device." And the new version of the statute does not limit liability only when the skier is on "the ski slopes and trails" (which Adams arguably was not on as there is no evidence skiers are allowed in the Hermits Hollow

snow tubing area), as the old version read, but the new version instead applies to the entire "ski area."

There is no indication that the Idaho legislature intended the 2014 change to I.C. § 6-1103(6) be retroactive. The Idaho Supreme Court has held: "Unless expressly stated, statutes should not be construed to be retroactive." *Stonecipher v. Stonecipher,* 131 Idaho 731, 735, 963 P.2d 1168, 1172 (1998) (*citing Henderson v. Smith,* 128 Idaho 444, 915 P.2d 6 (1996)).

At oral argument, the Court asked counsel for plaintiff and for defendant Schweitzer why the Idaho Ski Liability Act had not been briefed. Counsel for Schweitzer was candid that, in his assessment, the Idaho Supreme Court would likely find that the legislative change expanded the scope of that act, rather than simply clarifying such. After reviewing *Stonecipher,* this Court agrees the change to the definition of "skier" in 2014 is likely an *expansion* of the statute, rather than a mere "clarification" of terms.

The Idaho Supreme Court in *Stonecipher* noted: "In enacting amendments to existing statutes, the legislature must have intended to clarify, strengthen or make some change in existing statutes." 131 Idaho 731, 735, 963 P.2d 1168, 1172 (*citing State ex re. Wright v. Headrick,* 65 Idaho 148, 139 P.2d 761 (1943)). In *Stonecipher,* the Idaho Supreme Court upheld the magistrate judge's determination that an order to show cause for contempt filed against the divorced husband by the divorced wife for non-payment of support constituted an "action or proceeding" under I.C. § 5-245, even though some of those payments occurred prior to 1995, when that statute was modified. 131 Idaho 731, 734-35, 963 P.2d 1168, 1171-72. The Idaho Supreme Court held:

> In the 1995 amendment to I.C. § 5-245, one sentence was added, which reads as follows: "An action or proceeding under this section shall include, but is not limited to, execution on the judgment, order to show cause, garnishment, income withholding, income tax offset or lottery prize offset." No alteration was made to the statute as it previously existed.

> The amended version *simply clarified* the language of the original statute by providing a list, though non-exhaustive, of terms to be encompassed by "an action or proceeding to collect child support arrearages." The 1995 session laws define the act as "amending section 5-245, Idaho Code, to provide the types of proceedings for collection of child support within the purview of the section." 1995 Idaho Session Laws, ch. 264 § 1. Therefore, because Donna's show cause motion was filed within the limitation period of I.C. § 5-245, i.e. within five years of her daughter's eighteenth birthday, that portion of the judgment reflecting arrearages from 1988 forward was properly awarded by the magistrate.

131 Idaho 731, 735, 963 P.2d 1168, 1172 (italics added). Essentially, the Idaho Supreme Court held that an order to show cause is an "action or proceeding" (not an earth shattering pronouncement) under the older version of I.C. § 5-245, and that the addition of the sentence with the 1995 amendment simply clarified that an order to show cause is a "type of" "action or proceeding."

In the present case, the version of I.C. § 6-1102(6) in existence from 1979 to June 30, 2014, defined a "skier" as one who was present at a "ski area" and "engaging in the sport of skiing." In 1979, skiing was the only activity performed at a ski area. Mono-skis existed, but were rare. Snowboards were not yet on the scene. Inner tubing was done on vacant land, but not often on a private ski area open to the public for a fee. In 1979, the word "skier" really needed no other definition than one "engaging in the sport of skiing", because other activities at ski areas did not yet exist. Obviously, snowboards became popular at ski areas prior to July 1, 2014, as has tubing, but statutes often lag with changes in society. Prior to the legislature's statutory change to the definition of "skier" in 2014, it would have been absurd to equate an inner tuber with a "skier", and it would have even been a stretch (at least to skiing purists) to equate a knuckle dragging snowboarder with a "skier". Thus, this Court finds the Idaho Legislature "changed" the definition of "skier", greatly expanding the term beyond its ordinary definition, and with that change, the Idaho Legislature intentionally expanded

the reach of the types of activities covered by the Idaho Ski Liability Act. While the 2014 Statement of Purpose does not use the word "change", but instead uses the words "clarify" and "modernize", the Court cannot help but find the 2014 legislative amendment to I.C. § 6-1103(6) creates significant change to the prior statutory definition of "skier" and drastically modifies the traditional definition of the word "skier", and did so to significantly expand the insulation of liability for Idaho ski area operators. Because there is no retroactive clause, the change effective July 1, 2014, does not apply to the accident in this case which occurred on February 8, 2013.

B. The Hermits Hollow Snow Tubing and Zipline Release of Liability is Valid Because Schweitzer Did Not Violate a "Public Duty" to Adams and There Was No Obvious Disadvantage in Bargaining Power.

"Agreements exempting a party from liability for negligence will be upheld unless the party owes to the other party a public duty created by statute or the other party is at an obvious disadvantage in bargaining power." *Morrison v. Northwest Nazarene University*, 152 Idaho 660, 661, 273 P.3d 1253, 1254 (2012) (citing *Lee v. Sun Valley Co.,* 107 Idaho 976, 978, 695 P.2d 361, 363 (1984)). Again, the Release language at issue only specifically pertains to Schweitzer's negligence:

> I further agree to RELEASE FROM LIABILITY and to INDEMNIFY, DEFEND AND HOLD HARMLESS Schweitzer Ski Operations, L.L.C. and their owners and agents, landowners, affiliated companies and employees for any damage, injury or death to myself or to any person or property, whether caused by THEIR NEGLIGENCE or for any other reason, in any way connected with my preparation or practice for or my participation in this activity.

Affidavit of Peter C. Erbland in Support of Defendant Schweitzer's Motion for Summary Judgment, Exhibit A.

Schweitzer argues Adams' claims for negligence are barred by the Release because (1) there was no disadvantage in bargaining power and (2) Schweitzer did not owe Adams a public duty. Memorandum in Support of Defendant Schweitzer's Motion

for Summary Judgment, p. 11; Reply Memorandum in Support of Defendant Schweitzer's Motion for Summary Judgment, p. 3. The Court will discuss these two arguments in inverse order.

Schweitzer contends the first exception barring agreements exempting a party from liability for negligence where there is a disadvantage in bargaining power, is not present in this case because Adams was not required to participate in snow tubing at Hermits Hollow. Memorandum in Support of Defendant Schweitzer's Motion for Summary Judgment, p. 11. Rather, she desired to participate in the tubing activity, voluntarily signed the Release, and participated in the snow tubing activity. *Id.,* pp. 11-13. The Release signed by Adams specifically stated collisions with other snow tubes or tubers is a risk involved with snow tubing. *Id.,* p. 12. Schweitzer maintains Adams signed the Release "agree[ing] to release from liability and to indemnify, defend and hold harmless defendants Schweitzer and their employees for any injury to herself, whether caused by their negligence or for any other reason, in any way connected with her participation in this activity." *Id.,* p. 12.

The only argument this Court can find in Adams' briefing regarding any disadvantage in bargaining power by Adams as compared to Schweitzer is Adams' claim that:

> The tour participants who have been deposed in this matter agree that they felt expected to attend the planned events, such as the planned snow tube event on February 8, 2013, and that they felt committed to participate in the planned events out of respect for Schweitzer's generosity. (Conway Depo., p. 13-14; Franklin Depo., p. 16-19; Adams Depo., p. 64-65).

Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 5, ¶ 11. Adams seems to counter Schweitzer's argument that she was not required to inner tube with the claim that since Schweitzer was so generous, Adams felt obligated to

participate. Adams' argument she had a disadvantaged bargaining power due her own personal feeling of obligation resulting from Schweitzer's generosity is not at all persuasive. This Court finds there is no issue of unequal bargaining power.

The next issue is whether Schweitzer violated a "public duty." Schweitzer argues the second exception barring agreements exempting a party from liability for negligence, a public duty created by statute, is not present because Schweitzer does not owe a public duty. Reply Memorandum in Support of Defendant Schweitzer's Motion for Summary Judgment, p. 3. In support of this position, Schweitzer maintains, "Idaho courts have never addressed the issue of whether a public duty may be established by common law." *Id.*

The focus of Adams' opposition is that the entire Release is void because "Schweitzer's attempt to release itself from its own reckless or willful misconduct violates public policy and is thus made unenforceable." Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 12. The question for this Court then becomes "If the release purports to release any conduct greater than ordinary negligence, is the entire release invalid, or does the release remain valid as to negligence but invalid as to any greater conduct (gross negligence, intentional or willful conduct, reckless conduct, etc.)?" Specifically, Adams points to the following language from the Release:

> I further agree to RELEASE FROM LIABILITY and to INDEMNIFY, DEFEND AND HOLD HARMLESS Schweitzer Ski Operations, L.L.C. and their owners and agents, landowners, affiliated companies and employees for any damage, injury or death to myself or to any person or property, whether caused by THEIR NEGLIGENCE or *for any other reason*, in any way connected with my preparation or practice for or my participation in this activity.

Id. (capitalization in original, italics supplied). Adams claims that the phrase "for any other reason" makes the Release unenforceable in its entirety (not only for claims of

recklessness, gross negligence, willful or wanton conduct, but ordinary negligence as well), because the Release indemnifies Schweitzer for more than ordinary negligence, in violation of public policy. *Id.* However, the public policy argument Adams bases this position on is from California, Oregon, and Connecticut case law, not a public policy created by an Idaho statute. *Id.,* pp. 11-13. Adams first discusses several cases which have "determined that pre-injury releases seeking to relieve a party of liability for gross negligence or reckless conduct violate public policy." *Id.,* p. 9. Adams cites *Ericksson v. Nunnink,* 191 Cal.App.4th 826, 855, 120 Cal.Rprtr.3d 90, 114 (Cal.App.4th Dist. 2011); *Davis v. Commonwealth Edison Company,* 61 Ill.2d 494, 500-01, 336 N.E.2d 881, 885 (1975). *Id.,* pp. 9-10. *Ericksson* did not state that if the release limits liability beyond simple negligence, then the entire release is invalid. In its discussion of California law, the California Court of Appeal in *Ericksson* seemed to indicate that if a release purports to limit liability even for gross negligence, then simply that portion is invalid, and the portion of the release that limits liability for simple negligence remains valid. The California Court of Appeal held:

> The principle rationale for refusing to enforce releases of liability for future gross negligence is that public policy should " 'discourage' (or at least not facilitate) 'aggravated wrongs.' " (*Santa Barbara, supra,* 41 Cal.4th at p. 762, 62 Cal.Rptr.3d 527, 161 P.3d 1095; see also *id.* at p. 776, 62 Cal.Rptr.3d 527, 161 P.3d 1095.) Thus, the Supreme Court approved of the rule adopted in a majority of states that "an agreement that would remove a party's obligation to adhere to even a minimal standard of care, thereby sheltering aggravated misconduct, is unenforceable as against public policy." (*Id.* at p. 762, 62 Cal.Rptr.3d 527, 161 P.3d 1095; see also *id.* at p. 777, fn. 54, 62 Cal.Rptr.3d 527, 161 P.3d 1095; see also *Allan v. Snow Summit, Inc., supra,* 51 Cal.App.4th at p. 1372, 59 Cal.Rptr.2d 813.)

191 Cal.App.4th 826, 855. *Ericksson* was a wrongful death case arising out of a horse riding accident. As such, *Ericksson* did not involve a statute similar to the Idaho Skier's Liability Act; thus, "public duty" in that case had not been defined by statute as it has, at

least by analogy, in the present case. In *Davis,* there was a specific Illinois statute that required any release to be wholly unenforceable, as against public policy. Thus, an Illinois statute defined public policy, and the Supreme Court of Illinois upheld that public policy. Davis was an injured steelworker who sued the architect of the project and the general contractor. The architect sought indemnification against the general contractor under an indemnification agreement. The Illinois Structural Work Act had a provision which read:

> 'With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.' Ill.Rev.Stat.1971, ch. 29, par. 61.

61 Ill.2d 494, 496, 336 N.E.2d 881, 882-83. The Supreme Court of Illinois held that while in most situations "…agreements indemnifying one against one's own negligent conduct were not void as against public policy" (61 Ill.2d 494, 496, 336 N.E.2d 881, 883), "Work in the construction industry is often hazardous…" 61 Ill.2d 494, 498, 336 N.E.2d 881, 884), the legislature could define a public duty, and such legislation was not "special legislation." 61 Ill.2d 494, 500, 336 N.E.2d 881, 885. In discussing limitations on conduct greater than ordinary negligence, the Supreme Court of Illinois certainly did not hold that the entire indemnification agreement would be stricken. 61 Ill.2d 494, 500-02, 336 N.E.2d 881, 885-86. The only case presented to this Court by Adams which holds the entire release agreement should be stricken in situations where the release attempts to insulate more than ordinary negligence, is *Farina v. Mt. Bachelor, Inc.,* 66 F.3d 233 (9th Cir. 1995). In that case, a federal district judge, applying Oregon state law, granted summary judgment for the defendant ski hill on an injured skier's injury

claims, when the release stated: ""THIS RELEASE AND INDEMNITY AGREEMENT SHALL APPLY TO CLAIMS BASED UPON NEGLIGENCE *AND FOR ANY OTHER THEORY OF RECOVERY.*" 66 F.3d 233, 235 (bold and italic in original decision, italics added by Ninth Circuit to release language). In *Farina*, the Ninth Circuit Court of Appeals reversed the district judge, and struck the entire release and indemnification clause, including any claims for ordinary negligence. The Ninth Circuit held:

> Because Mt. Bachelor 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.

66 F.3d 233, 236. The Ninth Circuit's reasoning for this result was as follows:

> In contrast to other release clauses, the language of the release provision in this case does not manifest an intention by Mt. Bachelor or by Farina that the provision be severable. *See George v. School District No. 8R of Umatilla County,* 7 Or.App. 183, 188, 490 P.2d 1009, 1012 (1971) ("Whether a contract is divisible depends on the intention of the parties. Such intent is determined primarily through construction or interpretation of the contract.") (citations omitted). In one simple, broad sentence, Mt. Bachelor sought to exculpate itself for any and all claims that an injured skier might bring against it. This attempt rendered Mt. Bachelor's entire release clause invalid. It is not our role to enforce only part of the release clause where it is not obvious from the language of the clause that the parties intended the clause to be severable.

Id. Adams has not directed this Court to an Idaho appellate court decision that similarly interpreted the doctrine of severability in a recreational release. Another distinguishing difference between the present case and *Farina* is the fact that in *Farina* there is no Oregon statute similar to Idaho's Skier's Liability Act referenced. That is significant, because the Ninth Circuit Court of Appeals held: "The release clause in the Mt. Bachelor season pass application is unenforceable because it violates public policy." Oregon apparently had no statute which defined Oregon's "public policy", where Idaho did have a statute that defined "public policy" at least as to skiers, at the time, and to inner-tubers by analogy at the time, and explicitly to inner-tubers as of July 1, 2014.

Adams finally cited *Hanks v. Powder Ridge Rest. Corp.,* 885 A.2d 734 (Conn. 2005). Adams notes that "Because Connecticut does not recognize degrees of negligence, this Court made not distinction between grossly negligent or reckless conduct and simple negligence. *Id.* at 747-48." Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 13, n. 2. This Court has read *Hanks*. Due Connecticut's lack of distinction on types of negligent acts, this Court finds *Hanks* to not provide any guidance as to whether this Court should strike the entire release language, or simply limit the release language to ordinary negligence.

Like Adams, Conway also argues the release is contrary to public policy and, as such, is void. Defendant Conway's Memorandum of Points and Authorities in Response to Defendant Schweitzer's Motion for Summary Judgment, p. 9. Conway argues "[t]he 'for any other reason' language in the release exempts Schweitzer from liability for injuries proximately caused by its own reckless conduct. Such provisions void the entire release as a matter of law." Defendant Conway's Response to Defendant Schweitzer's Motion for Summary Judgment, p. 12, citing *Farina*. Conway also bases his argument on *Farina* and *Hanks*. However, as with Adams' arguments, Conway fails to provide the Court with any Idaho law regarding severability, which is what the Ninth Circuit Court of Appeals in *Farina* seized upon. Additionally, Conway cites *Tayar v. Camelback Ski Corp., Inc.,* 616 Pa. 385, 47 A.3d 1190 (Pa. 2012), and *Brown v. Stevens Pass, Inc.,* 97 Wn.App. 519, 524, 984 P.2d 448, 451 (Wash.App.Div.1 1999). *Id.,* pp. 10-12. Tayar was an inner tubing case where the release read, "…I AGREE THAT I WILL NOT SUE AND WILL RELEASE FROM ANY AND ALL LIABILITY CAMELBACK SKI CORPORATION IF I OR ANY MEMBER OF MY FAMILY IS INJURED WHILE USING ANY OF THE SNOWTUBING FACILITIES OR WHILE BEING PRESENT AT THE FACILITIES, EVEN IF I CONTEND THAT SUCH INJURIES ARE THE RESULT OF

NEGLIGENCE OR ANY OTHER IMPROPER CONDUCT ON THE PART OF THE SNOWTUBING FACILITY." In *Tayar*, the Supreme Court of Pennsylvania did not interpret a "Skier's Liability Act", but instead noted in a prior case it had found "public policy" favored some limitation of liability through these releases, even absent such as statute, finding, "Against a public policy challenge, we upheld the release, reasoning that Pennsylvania encourages the sport of skiing, and noting our courts previously upheld such releases for negligence." 616 Pa. 385, 400-01, 47 A.3d 1190, 1200, citing *Chepkevich v. Hidden Valley Resort, L.P.,* 607 Pa. 1, 2 A.3d 1174 (2010). This Court is unable to discern why such a finding of a "public policy" would in essence also define the "public duty." While finding the release could not apply to reckless conduct, the Supreme Court of Pennsylvania in *Tayar* clearly did *not*, as in *Farina*, strike the entire release so as to include claims of ordinary negligence. The Supreme Court of Pennsylvania held:

> Accordingly, we reverse the Superior Court's order in part, affirm in part, and remand. We reverse the order of the Superior Court to the degree it concluded that Monaghan was not covered by the Release. We affirm the order to the degree it reversed the grant of summary judgment on the basis that the Release did not bar claims based on reckless conduct, and remanded for further proceedings; on this latter point, we are affirming on the alternative basis that, to the degree it released reckless conduct, the Release was against public policy.

616 Pa. 385, 406, 47 A.3d 1190, 1203. Conway's citation to *Brown* is of no help to the Court in deciding the present motion for summary judgment, simply because *Brown* did not discuss the distinction between release language for ordinary negligence versus recklessness. *Brown* did involve Washington's skier's statute, which at the time the Washington Court of Appeals found was consistent with common law regarding latent dangers. 97 Wn.App. 519, 524, 984 P.2d 448, 451. As Brown was skiing, he lost control and hit a snow fence which he thought would be flexible, but instead was made

out of metal, and Brown sustained injuries. Brown simply stated that while Brown had a duty to avoid the visible fence, the ski area was not absolved from its duty to avoid latent hazards. 97 Wn.App. 519, 527, 984 P.2d 448, 453.

In *Tayar* and *Chepkevich,* the Supreme Court of Pennsylvania found a "public policy" favoring some limitation on ski area liability to foster the sport of skiing. Due to the importance of the sport in Idaho, such "public policy" would also be found in the State of Idaho. Regarding "public policy" issue, all of the memoranda submitted to this Court on the motion for summary judgment fail to discuss a relevant Idaho statute that creates, limits or defines a "public duty" for ski areas or skiers in Idaho. As stated above, Chapter 11, Title 6 Idaho Code, the Idaho Ski Liability Act, is the basis for the public duty of ski areas and skiers in Idaho. I.C. § 6-1101, *et seq*. However, this Act was not in effect as to anyone other than "skiers" at the time of the accident in this case. Still, by analogy, that Act can provide evidence of "public policy" even as to inner tubing, which existed in the State of Idaho prior to that Act expressly defining "public policy" toward inner tubing after July 1, 2014. Accordingly, the Court is unable to find that the Release is void based on a violation of a "public duty" owed by Schweitzer to Adams.

C. It is "Public Policy" That Assumption of the Risk is a Defense for Claims Based on the Inherent Risks of Skiing, the Hermits Hollow Snow Tubing and Zipline Release of Liability for Ordinary Negligence Claims, Does Not Violate a "Public Policy."

The Court has just discussed why the Release does not violate a "public duty" owed to Adams and others. A distinct, but similar issue is whether the language of the Release violates "public policy."

The Idaho Supreme Court recognizes express assumption of risk in limited circumstances. *See Rountree v. Boise Baseball, LLC*, 154 Idaho 167, 175, 296 P.3d 373, 381 (2013). "[W]here a plaintiff, either in writing or orally, expressly assumes the

risk involved . . . the plaintiff's assumption of the risk will continue to be a complete bar to recovery." *Salinas v. Vierstra*, 107 Idaho 984, 990, 695 P.2d 369, 375 (1985). This is true unless that contract violates public policy. *Id.* "Whether a contract violates public policy is a question of law for the court to determine from all the facts and circumstances of each case. Public policy may be found and set forth in the statutes, judicial decisions or the constitution." *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 189, 108 P.3d 332, 336 (2005) (citing *Quiring v. Quiring,* 130 Idaho 560, 566, 944 P.2d 695, 701 (1997)) (internal citations omitted).

Schweitzer argues the motion for summary judgment should be granted because Adams voluntarily signed the Release. Memorandum in Support of Defendant Schweitzer's Motion for Summary Judgment, p. 15. Specifically, Schweitzer argues that "[b]y its plain language, the Release is an unambiguous express written assumption of the risk by Adams involved with taking part in the Hermit's Hollow snow tubing course." *Id.* Thus, Schweitzer asserts that the express assumption of risk serves as an absolute bar to Adams' claims in this case. *Id.*

In response, Adams argues that assumption of risk only applies when there is a valid contract. Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 19. She maintains contracts which violate public policy are not valid. *Id.* Adams asserts that the conduct of Schweitzer's employees was "…reckless and/or an extreme deviation from the standard of care expected from reasonable people, as opposed to mere inadvertence or neglect." *Id.* Adams claims she could not have "'consented' or 'assumed the risk' of reckless or willful/wanton misconduct by Schweitzer." *Id.* She argues since the conduct of Schweitzer's employees rose to the level of gross negligence or recklessness, allowing Schweitzer to avoid liability would violate public policy. *Id.* As a result, Adams contends the Release should not be

enforced, making the assumption of risk provision also unenforceable. *Id*.

Joining Adams in opposition to the motion for summary judgment, Conway argues that the release is contrary to public policy and, as such, is void. Defendant Conway's Memorandum of Points and Authorities in Response to Defendant Schweitzer's Motion for Summary Judgment, p. 9. Specifically, Conway argues that the "for any other reason" language of the Release exempts Schweitzer from liability for its own reckless conduct, in violation of public policy, which voids the entire Release as a matter of law. *Id.,* p. 12.

In contrast to Conway's arguments, broad language of a Release does not void an agreement. *See Morrison v. Northwest Nazarene University*, 152 Idaho 660, 662-66, 723 P.3d 1253, 1255-59 (2012). In *Morrison*, the Idaho Supreme Court stated that "[t]he decisions of this Court have not held that a hold harmless agreement must describe the specific conduct or omission that is alleged to be negligent in order for it to bar recovery." 152 Idaho 660, 666, 723 P.3d 1253, 1259. The Court found that not requiring specificity is consistent with the general law and that "[t]he parties to a release need not have contemplated the precise occurrence that caused the plaintiff's injuries but rather may adopt language to cover a broad range of accidents by specifying injuries involving negligence on the part of the defendant." *Id.* (quoting 57A Am.Jur.2d *Negligence* § 54 (2004)). The Court went on to hold that the agreement in that case held the defendant harmless because the agreement covered "[a]ny loss, liability, damage or cost she/he might incur due to her/his participation . . . whether caused by the negligence of the Releases or otherwise." *Id.* Thus, even a broad express assumption of risk agreement is sufficient to hold a defendant harmless.

However, in this case, in addition to containing broad language, the language of the Release also specifically indemnifies Schweitzer from liability for "collisions with

other snow-tubes or snow tubers." Affidavit of Peter C. Erbland In Support of Defendant Schweitzer's Motion for Summary Judgment, Exhibit A. The language of the Release covers the act which occurred in this case.

Moreover, the Release does not violate public policy in Idaho because it is entirely consistent with public policy regarding skiing as set forth in Chapter 11, Title 6 Idaho Code, the Idaho Ski Liability Act. Although at the time of the accident Adams was not a "skier" as defined under the Act, the Court finds Act is still evidence of public policy. Adams did not assume the risk as a result of the Act, she assumed the risk as a result of the Release, Exhibit A, and the Act is evidence of Idaho's public policy. And this Court finds Idaho's public policy would allow the release to bar Adams' claims for negligence. However, the Court finds if the Release purports to insulate Schweitzer from reckless conduct, gross negligent conduct, intentional acts or willful acts, then such release would violate public policy. Adams' claims for ordinary negligence against Schweitzer are barred by the language of the release, and such language does not violate public policy. However, it is only Adams' negligence claims which are barred.

The Idaho State Legislature has codified public policy regarding skiing by statute. *See* I.C. §§ 6-1101, *et seq*. In declaring the purpose of the statute, the Legislature declared:

> Since it is recognized that there are inherent risks in the sport of skiing which should be understood by each skier and which are essentially impossible to eliminate by the ski area operation, it is the purpose of this chapter to define those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury, and to define those risks which the **skier expressly assumes** and for which there can be **no recovery**.

I.C. § 6-1101. The United States District Court for the District of Idaho interpreted the Idaho Ski Liability Act such that, "[t]he Idaho legislature, in enacting Section 6-1101, et seq., the skier statute, declared as public policy that assumption of the risk is a defense

for claims based on the inherent risks of skiing." *Collins v. Schweitzer, Inc.*, 774 F. Supp. 1253 (D. Idaho 1991). As previously mentioned above and repeated for ease of reference, I.C. § 6-1106 sets out that "[t]he responsibility for collisions by any skier while actually skiing, with any person, shall be solely that of the individual or individuals involved in such collision and not that of the ski area operator." I.C. § 6-1106. Further, the law provides "[t]hat no activities undertaken by the operator in an attempt to eliminate, alter, control, or lessen such risks [those described in section 6-1106, Idaho Code] shall be deemed to impose on the operator any duty to accomplish such activities to any standard of care." I.C. § 6-1103. Thus, public policy in Idaho is such that a skier expressly assumes certain risks when they choose to participate in the sport of skiing.

One of the risks assumed by a skier is that of collisions with another skier. I.C. §-1106. The fact that Schweitzer provided stagers to minimize the risk of collision between skiers is of no help to Adams because the Legislature has provided that "[n]o activities undertaken by the operator in an attempt to eliminate, alter, control or lessen such risks shall be deemed to impose on the operator any duty to accomplish such activities to **any standard of care**." I.C. § 6-1103(10) (emphasis added). As of July 1, 2014, inner tubers are skiers. Because this accident occurred prior to July 1, 2014, this Court need not decide whether the current statute violates public policy.

Adams claims the Release does not apply to claims of gross negligence or reckless conduct. *Id.,* p. 14. Adams further argues, based on the opinion of her expert Dick Penniman, a skiing and safety expert and consultant, that "the failure of the staging attendant to maintain physical presence and control of the tube riders according to the tubing rules written and posted was 'gross negligence' and willful and wanton reckless action' that put the tube riders in serious danger on the late afternoon of February 8, 2013." *Id.,* p. 17. She claims when Sarah Dunbar, the stager at the top of the snow

tubing lane, left the staging area in violation of Hermits Hollow Handbook, which ensures the safety of the guests, the defendants should have been aware there was a high degree of probability that a guest would be injured. *Id.,* pp. 18-19. Based on this, Adams maintains, "Defendants' conduct constitutes more than mere incompetence or unskillfulness. It was a conscious disregard of a serious risk or harm to another." *Id.,* p. 19. As such, Adams contends viewing the evidence in the light most favorable to her, there is evidence of recklessness on the part of the defendants, which is not covered by the Release. *Id.* Conway also contends there is a question of fact as to whether the employees of Schweitzer acted recklessly. Defendant Conway's Memorandum of Points and Authorities in Response to Defendant Schweitzer's Motion for Summary Judgment, p. 12.

In response, Schweitzer contends that the conduct of Schweitzer's employees was at most simple negligence and was not reckless conduct. *Id.,* p. 6. Moreover, it asserts, "Idaho courts have not ruled on the question of whether a recreational release can avoid a claim of reckless conduct." *Id.,* p. 7.

According to the Affidavit of Dick Penniman, "[i]t is also the North American mountain resort standard custom and practice to assign one or more attendants (as needed) to be present at the staging area to maintain proper rider conduct and to space the tube riders take-offs such that the bottom of the track is clear of any other people before allowing the next rider to begin." Affidavit of Dick Penniman, p. 6 ¶ 13. Based on that, it is clear the purpose of a stager is to eliminate, alter, control, or lessen the risk of tubers colliding with one another. Idaho Code § 6-1103(10) specifically prohibits holding a ski area liable for such conduct, but only for those engaged in "the sport of skiing."

Under the new version of I.C. § 6-1102(3), Adams would be a "skier", and as such, it would not be against public policy or a violation of Schweitzer's public duty for its employee to leave the staging area since it had no duty to have a stager in the first place. Under the new version, there is no duty owed by the operator to the skier and absolutely no standard of care to the skier. I.C. § 6-1103(10). However, under the version applicable at the time of Adams' injury, Adams was not a "skier" under I.C. § 6-1102(3), she was not engaging in "the risks inherent in the sport of skiing" under I.C. § 6-1103(10), and thus, Schweitzer is not accorded the lack of duty and lack of standard of care to Adams.

This Court finds there is a dispute of fact as to whether Schweitzer's actions or omissions arise to the level of "recklessness". Because of the Release, the jury will not be instructed as to "negligence" on the part of Schweitzer. The Court specifically finds the Release does not violate public policy as to other than ordinary negligence claims.

This Court finds that it would violate public policy for Adams' claims of recklessness, gross negligence, willful and wanton or intentional acts to be barred. This precise issue has apparently not been decided by Idaho's appellate courts, but this Court finds the following discussion from *Tayar* to be persuasive:

> This view is supported by the conclusions of courts in other jurisdictions. As Tayar observes in her brief, 28 of our sister states have addressed whether enforcing releases for reckless behavior is against public policy.[9] Brief of Appellee at 16–20. Of those 28 states, only 2 permit recklessness to be released.[10] Of the other 26 states, 23 have determined that recklessness may not be released, and the majority of those cases involved voluntary recreational activities.[11] The remaining 3 states have concluded that, not only is it against public policy to release recklessness, but also that releases of negligence will not be enforced.[12] Accordingly, the overwhelming majority of our sister states find releases for reckless conduct are against public policy. *See generally* Restatement (Second) of Contracts § 195(1) ("A term exempting a party from tort liability for harm caused *intentionally or recklessly* is unenforceable on grounds of public policy." (emphasis added)); 15 Corbin on Contracts § 85.18 (2003) (stating courts generally do not enforce agreements to

exempt parties from tort liability for intentional or reckless conduct); 8 S. Williston, Contracts § 19.24 (1998) ("An attempted exemption from liability for a future intentional tort or crime or for a future willful or grossly negligent act is generally held void."). Moreover, federal courts purporting to apply Pennsylvania law have barred the enforcement of releases for reckless behavior.[13] Similar to our assessment above, these jurisdictions have reasoned that recklessness is more akin to intentional conduct, as recklessness, in contrast to negligence, requires conscious action rather than mere inadvertence. Accordingly, they conclude that permitting recklessness would remove any incentive for parties to act with even a minimal standard of care.

[9] A few states include the term "gross negligence" when concluding actions of greater culpability than that of ordinary negligence may not be released. Yet, in so concluding, these states either cite to cases involving a party's inability to release reckless conduct, or cite to the Restatement (Second) of Contracts § 195(1), which provides that it is against public policy to permit releases of intentional and reckless behavior. *See Moore v. Waller,* 930 A.2d 176 (D.C.App.2007) (in gross negligence case, after surveying other state cases, noting that other courts have generally not enforced exculpatory clauses that limit a party's liability for gross negligence, recklessness, or intentional torts); *Zavras v. Capeway Rovers Motorcycle Club, Inc.,* 44 Mass.App.Ct. 17, 687 N.E.2d 1263 (1997) (in gross negligence case, citing to Restatement (Second) of Contracts § 195); *Alack v. Vic Tanny Int'l of Mo.,* 923 S.W.2d 330 (Mo.1996) (concluding culpable actions greater than ordinary negligence may not be released); *Adams v. Roark,* 686 S.W.2d 73 (Tenn.1985) (discussing gross negligence, but citing to Restatement (Second) of Contracts § 195); *Smith v. Golden Triangle Raceway,* 708 S.W.2d 574 (Tex.Ct.App.1986) (discussing gross negligence, but citing to Restatement (Second) of Contracts § 195).

[10] *See Murphy v. North American River Runners, Inc.,* 186 W.Va. 310, 412 S.E.2d 504, 510 (1991) (in the context of white water rafting, noting a general clause in a pre-injury exculpatory agreement will not be construed to release reckless behavior, unless circumstances indicate that was the plaintiff's intention); *L. Luria & Son, Inc. v. Honeywell, Inc.,* 460 So.2d 521 (Fla.Dist.Ct.App.1984) (dismissing all claims but those involving intentional torts or fraud on the basis of release).

[11] *See Barnes v. Birmingham Int'l Raceway, Inc.,* 551 So.2d 929 (Ala.1989) (raceway); *Kane v. National Ski Patrol System, Inc.,* 88 Cal.App.4th 204, 105 Cal.Rptr.2d 600 (2001) (ski resort); *Chadwick v. Colt Ross Outfitters, Inc.,* 100 P.3d 465 (Colo.2004) (hunting); *McFann v. Sky Warriors, Inc.,* 268 Ga.App. 750, 603 S.E.2d 7 (2004) (simulated aerial combat); *Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. Partnership,* 115 Hawai'i 201, 166 P.3d 961 (2007) (construction contract); *Falkner v. Hinckley Parachute Ctr., Inc.,* 178 Ill.App.3d 597, 127 Ill.Dec. 859, 533 N.E.2d 941 (1989) (parachuting); *Butler Mfg. Co. v. Americold Corp.,* 835 F.Supp. 1274 (D.Kan.1993) (applying Kansas law) (fire alarm installation); *Wolf v. Ford,* 335 Md. 525, 644 A.2d 522 (1994) (action against investment firm); *Lamp v. Reynolds,* 249 Mich.App. 591, 645 N.W.2d 311 (2002) (motorcycle racetrack); *Yang v. Voyagaire Houseboats, Inc.,* 701 N.W.2d 783 (Minn.2005) (houseboat rentals); *New Light Co., Inc. v. Wells Fargo Alarm Serv.,* 247 Neb. 57, 525 N.W.2d 25 (1994) (fire alarm installation); *Hojnowski v. Vans Skate Park,* 187 N.J. 323, 901 A.2d 381 (2006) (skateboarding park); *Sommer v. Federal Signal Corp.,* 79 N.Y.2d 540, 583 N.Y.S.2d 957, 593 N.E.2d 1365 (Ct.App.1992) (fire alarm installation); *Bowen v. Kil–Kare, Inc.,* 63 Ohio St.3d 84, 585 N.E.2d 384 (1992) (stock-car race); *Schmidt v. United States,* 912 P.2d 871 (Okla.1996) (horseback riding); *K–Lines, Inc. v. Roberts Motor Co.,* 273 Or. 242, 541 P.2d 1378 (1975) (products liability with respect to truck); *Kellar v. Lloyd,* 180 Wis.2d 162, 509 N.W.2d 87 (App.1993) (raceway); *Milligan v. Big Valley Corp.,* 754 P.2d 1063 (Wyo.1988) (ski race); *see also supra* note 9.

[12] *Hanks, supra* (Conn.) (snow tubing); *Dalury v. S–K–I, Ltd.,* 164 Vt. 329, 670 A.2d 795 (1995) (skiing); *Hiett v. Lake Barcroft Cmty. Ass'n, Inc.,* 244 Va. 191, 418 S.E.2d 894 (1992) (triathlon).

[13] *See Valley Forge Con. & Visitors v. Visitor's Serv.,* 28 F.Supp.2d 947, 950 (E.D.Pa.1998) (finding Pennsylvania would not apply an exculpatory clause to preclude recovery for willful or wanton misconduct); *Fidelity Leasing Corp. v. Dun & Bradstreet, Inc.,* 494 F.Supp. 786, 789 (E.D.Pa.1980) (finding exculpatory clause in Pennsylvania would not insulate a defendant from liability for gross negligence or recklessness); *Public Serv. Enter. Group, Inc. v. Phila. Elec. Co.,* 722 F.Supp. 184, 205 (D.N.J.1989) (finding that in Pennsylvania an exculpatory clause would not limit liability for grossly negligent, willful, or wanton behavior).

> We agree. As illustrated above, were we to sanction releases for reckless conduct, parties would escape liability for consciously disregarding substantial risks of harm to others; indeed, liability would be waivable for all conduct except where the actor specifically intended harm to occur. There is near unanimity across jurisdictions that such releases are unenforceable, as such releases would jeopardize the health, safety, and welfare of the people by removing any incentive for parties to adhere to minimal standards of safe conduct. *See Hall v. Amica Mut. Ins. Co.,* 538 Pa. 337, 347–48, 648 A.2d 755, 760 (1994). We therefore conclude that, even in this voluntarily recreational setting involving private parties, there is a dominant public policy against allowing exculpatory releases of reckless behavior, which encourages parties to adhere to minimal standards of care and safety.

616 Pa. 385, 403-05, 47 A.3d 1190, 1201-03.

D. Furnishing Alcoholic Beverages Was Not Proximate Cause of Adams' Injuries As There is No Evidence That James Conway Was Obviously Intoxicated.

In her Complaint, Adams claims that Schweitzer is at fault for providing alcohol to individuals it knew or had reason to know were obviously intoxicated and encouraging those intoxicated individuals to participate in snow tubing at Hermits Hollow. Complaint, p. 5 ¶¶ 3.2(d)-(e). Schweitzer claims Adams' alcohol related claims are unsubstantiated. Memorandum in Support of Defendant Schweitzer's Motion for Summary Judgment, p. 16. In support of this, Schweitzer cites to the deposition of Ellie Chatman, Hermits Hollow tubing hill supervisor, Nicolas Reese, Hermits Hollow tubing hill employee, and answers to interrogatories provided by co-defendant Conway, who were all present in the area alcohol was being served and dispute anyone was

obviously intoxicated. *Id.,* pp. 16-18. Adams does not address these claims in her response.

"[I]t is not the furnishing of alcoholic beverages that is the proximate cause of injuries inflicted by intoxicated persons and it is the intent of the legislature, therefore, to limit dram shop and social host liability. . . ." I.C. § 23-808(1). The Dram Shop Act addresses proximate cause, not duty or breach of duty. *Idaho Dep't of Labor v. Sunset Marts, Inc.*, 140 Idaho 207, 211, 91 P.3d 1111, 1115 (2004). "[T]he furnishing of alcoholic beverages may constitute a proximate cause of injuries inflicted by intoxicated persons . . . [if the] intoxicated person was obviously intoxicated at the time the alcoholic beverages were sold or furnished, and the person who sold or furnished the alcoholic beverages knew or ought reasonably to have known that the intoxicated person was obviously intoxicated." I.C. § 23-808(1), (3).

There is no evidence before this Court that Conway was obviously intoxicated. According to the Deposition of Ellie Chatman, Hermits Hollow tubing hill supervisor, she had no information that would have led her to believe Conway was intoxicated, and if he had been intoxicated she would have asked him to leave. Affidavit of Peter C. Erbland In Support of Defendant Schweitzer's Motion for Summary Judgment, Exhibit C, p. 85, Ll. 3-14. Similarly, Nicolas Reese, Hermits Hollow tubing hill employee, disputes that anyone was intoxicated based on his personal observations, and further denied that anyone was breaking the wine and beer rules on the tubing hill. *Id.*, Exhibit E, p.25, Ll. 3-20. Finally, the evidence before this Court from Conway, the individual allegedly obviously intoxicated at the time of the accident, is that he consumed one can of beer at lunch and one and a half cans of beer at Hermits Hollow prior to the accident. *Id.*, Exhibit D. None of this evidence demonstrates that Conway was outwardly manifesting signs of intoxication.

This shifts the burden to Adams to show there is a genuine issue of material fact regarding Conway's level of intoxication. She has failed to provide any evidence to this Court to meet her burden. At oral argument, counsel for Adams stated she had no objection to the dismissal of Adams' dram shop claims. Because Adams has provided no evidence that Conway was obviously intoxicated, the Court finds the furnishing of alcoholic beverages by Schweitzer to Conway was not a proximate cause of Adams' injuries; Adams' dram shop claims against Schweitzer are dismissed.

E. Schweitzer Mountain, LLC is Dismissed as a Defendant.

In her Complaint for Damages Adams alleges "[a]t all times relevant, Defendants SCHWEITZER MOUNTAIN, LLC and SCHWEITZER MOUNTAIN SKI OPERATIONS, LLC were Idaho Limited Liability Companies, doing business as SCHWEITZER MOUNTAIN RESORT (hereinafter 'Schweitzer Mountain'). . . ." Complaint for Damages, p. 2 ¶ 1.3 (emphasis in original). Schweitzer disputes that Schweitzer Mountain, LLC operates Schweitzer Mountain Resort, owns any real or personal property at Schweitzer Mountain Resort, and/or has any employees. Memorandum in Support of Defendant Schweitzer's Motion for Summary Judgment, p. 18. Schweitzer maintains Schweitzer Mountain, LLC has not committed any acts or omission against Adams, and as it has no employees it cannot be held vicariously liable under the doctrine of respondeat superior. *Id.,* p. 19. As such, Schweitzer argues Schweitzer Mountain, LLC should be dismissed from the Complaint. *Id*.

In support of its position, Schweitzer provides the Affidavit of Tom Chase, president of Schweitzer Mountain Ski Operations, LLC and vice president of Schweitzer Mountain, LLC. Affidavit of Tom Chase in Support of Defendant Schweitzer's Motion for Summary Judgment, p. 1 ¶ 1. According to Mr. Chase, Schweitzer Mountain Ski Operations, LLC operates Schweitzer Mountain Resort, including the Hermits Hollow

snow tubing hill and is the employer of all of the employees associated with this incident. *Id.,* p. 2 ¶ 2. In contrast, Schweitzer Mountain, LLC does not operate Schweitzer Mountain Resort, but rather has a membership interest in Schweitzer Mountain Ski Operations, LLC.

Under the doctrine of respondeat superior, "an employer or master is responsible for the torts of its employee or servant when the torts are committed within the scope of the employee's or servant's employment." *Podolan v. Idaho Legal Aid Servs., Inc.*, 123 Idaho 937, 944, 854 P.2d 280, 287 (Ct. App. 1993) (citing *Smith v. Thompson,* 103 Idaho 909, 911, 655 P.2d 116, 118 (Ct.App.1982), *citing Scrivner v. Boise Payette Lumber Co.,* 46 Idaho 334, 268 P. 19 (1928)). The evidence before the Court is that Schweitzer Mountain, LLC does not operate Schweitzer Mountain Resort and has no employees. For respondeat superior to apply, Schweitzer Mountain, LLC must employ those alleged to have committed a tort against Adams. The Affidavit of Tom Chase shifts the burden to Adams to demonstrate there is a genuine issue of material fact as to why Schweitzer Mountain, LLC should be held liable. At oral argument, counsel for Adams stated she had no objection to the dismissal of Schweitzer Mountain, LLC. Because Adams has failed to meet her burden of proof, Adams' claims against Schweitzer Mountain, LLC are dismissed, and Schweitzer Mountain, LLC is dismissed as a party in this lawsuit.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED that while not an issue raised in Schweitzer's Motion for Summary Judgment, this Court finds as a matter of law that the current version of I.C. §§ 6-1103 and 6-1106 do not bar Adams' claims.

IT IS FURTHER ORDERED Adams' claims against Schweitzer for ordinary

negligence are DISMISSED and Schweitzer's Motion for Summary Judgment is GRANTED to that extent alone, the Court finding as a matter of law that the Hermits Hollow Snow Tubing and Zipline Release of Liability is valid and does not violate a "Public Duty" to Adams, there was no obvious disadvantage in bargaining power to Adams, and "public policy" is not violated by the Release.

IT IS FURTHER ORDERED all other claims of Adams based on recklessness, gross negligence, willful or wanton or intentional conduct remain, and to that extent, Schweitzer's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that Adams' claims based on Schweitzer being at fault for providing alcohol to individuals it knew or had reason to know were obviously intoxicated and encouraging those intoxicated individuals to participate in snow tubing at Hermits Hollow are DISMISSED and Schweitzer's Motion for Summary Judgment on that issue is GRANTED.

IT IS FURTHER ORDERED Schweitzer Mountain, LLC is DISMISSED as a defendant in this case and Schweitzer's Motion for Summary Judgment on that issue is GRANTED.

Entered this 26th day of October, 2014.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
R. Bruce Owens and Jeffrey R. Owens	208 667-1939	Peter Erbland	208 664-6338
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_____
Deputy Clerk