

FILED: September 05, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MYLES A. BAGLEY,
individually,
Plaintiff-Appellant,

and

AL BAGLEY,
individually;
and LAUREN BAGLEY,
individually,
Plaintiffs,

v.

MT. BACHELOR, INC.,
dba Mt. Bachelor Ski and Summer Resort,
Defendant-Respondent,

and

JOHN DOES 1-10,
Defendants.

Deschutes County Circuit Court
08CV0118SF

A148231

Stephen P. Forte, Judge.

Argued and submitted on September 06, 2012.

Kathryn H. Clarke argued the cause for appellant. On the opening brief were Bryan W. Gruetter and Joseph S. Walsh. With her on the reply brief was Lisa T. Hunt.

Andrew C. Balyeat argued the cause for respondent. With him on the brief was Balyeat & Eager, LLP.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

SERCOMBE, J.

Affirmed.

1 SERCOMBE, J.

2 Plaintiff Bagley, after suffering serious injuries while snowboarding over a
3 "jump" in defendant Mt. Bachelor, Inc.'s (Mt. Bachelor) "terrain park," brought this
4 action alleging negligence in the design, construction, maintenance, or inspection of that
5 jump.¹ The trial court granted Mt. Bachelor's motion for summary judgment, which was
6 based on the affirmative defense of release, and denied Bagley's cross-motion for partial
7 summary judgment pertaining to that same issue. Bagley appeals, asserting that the trial
8 court erred in (1) concluding that there was no genuine issue of material fact as to
9 whether Bagley ratified, after reaching the age of majority, a release agreement entered
10 into while he was a minor; (2) concluding that the release agreement was not contrary to
11 public policy; and (3) concluding that the release agreement was neither substantively nor
12 procedurally unconscionable. For the reasons that follow, we agree with the trial court
13 and, accordingly, affirm.

14 In reviewing a grant of summary judgment, we view the facts, along with
15 all reasonable inferences that may be drawn from them, in the light most favorable to the
16 nonmoving party--here, Bagley on Mt. Bachelor's motion and Mt. Bachelor on Bagley's
17 cross-motion. ORCP 47 C; *Vaughn v. First Transit, Inc.*, 346 Or 128, 132, 206 P3d 181
18 (2009). On September 29, 2005, just under two weeks before his 18th birthday, Bagley
19 purchased a "season pass" from Mt. Bachelor. Bagley was a skilled and experienced

¹ For ease of reading, notwithstanding additional named parties (Bagley's parents and "John Does 1-10"), we refer throughout this opinion to plaintiff "Bagley" and defendant "Mt. Bachelor."

1 snowboarder, having purchased season passes from Mt. Bachelor for each of the
2 preceding three years and having classified his skill level as of early 2006, immediately
3 prior to the injury, as "advanced expert." Upon purchasing the season pass, he executed a
4 release agreement as required by Mt. Bachelor. That agreement read, in pertinent part:

5 "RELEASE AND INDEMNITY AGREEMENT"

6 "IN CONSIDERATION OF THE USE OF A MT. BACHELOR PASS
7 AND/OR MT. BACHELOR'S PREMISES, I/WE AGREE TO RELEASE
8 AND INDEMNIFY MT. BACHELOR, INC., ITS OFFICERS AND
9 DIRECTORS, OWNERS, AGENTS, LANDOWNERS, AFFILIATED
10 COMPANIES, AND EMPLOYEES (HEREINAFTER 'MT. BACHELOR,
11 INC.') FROM ANY AND ALL CLAIMS FOR PROPERTY DAMAGE,
12 INJURY, OR DEATH WHICH I/WE MAY SUFFER OR FOR WHICH
13 I/WE MAY BE LIABLE TO OTHERS, IN ANY WAY CONNECTED
14 WITH SKIING, SNOWBOARDING, OR SNOWRIDING. *THIS*
15 *RELEASE AND INDEMNITY AGREEMENT SHALL APPLY TO ANY*
16 *CLAIM EVEN IF CAUSED BY NEGLIGENCE.* THE ONLY CLAIMS
17 NOT RELEASED ARE THOSE BASED UPON INTENTIONAL
18 MISCONDUCT.

19 "* * * * *

20 "*THE UNDERSIGNED(S) HAVE CAREFULLY READ AND*
21 *UNDERSTAND THIS AGREEMENT AND ALL OF ITS TERMS ON BOTH*
22 *SIDES OF THIS DOCUMENT. THIS INCLUDES, BUT IS NOT*
23 *LIMITED TO, THE DUTIES OF SKIERS, SNOWBOARDERS, OR*
24 *SNOWRIDERS. THE UNDERSIGNED(S) UNDERSTAND THAT THIS*
25 *DOCUMENT IS AN AGREEMENT OF RELEASE AND INDEMNITY*
26 *WHICH WILL PREVENT THE UNDERSIGNED(S) OR THE*
27 *UNDERSIGNEDS' ESTATE FROM RECOVERING DAMAGES FROM*
28 *MT. BACHELOR, INC. IN THE EVENT OF DEATH OR INJURY TO*
29 *PERSON OR PROPERTY. THE UNDERSIGNED(S),*
30 *NEVERTHELESS, ENTER INTO THIS AGREEMENT FREELY AND*
31 *VOLUNTARILY AND AGREE IT IS BINDING ON THE*
32 *UNDERSIGNED(S) AND THE UNDERSIGNEDS' HEIRS AND LEGAL*
33 *REPRESENTATIVES.*

34 "BY MY/OUR SIGNATURE(S) BELOW, I/WE AGREE THAT THIS
35 RELEASE AND INDEMNITY AGREEMENT WILL REMAIN IN FULL

1 FORCE AND EFFECT AND I WILL BE BOUND BY ITS TERMS
2 THROUGHOUT THIS SEASON AND ALL SUBSEQUENT SEASONS
3 FOR WHICH I/WE RENEW THIS SEASON PASS.

4 "SEE REVERSE SIDE OF THIS SHEET * * * FOR DUTIES OF SKIERS,
5 SNOWBOARDERS, OR SNOW RIDERS WHICH YOU MUST
6 OBSERVE."

7 (Underscoring and capitalization in original; emphases added.) The reverse side of the
8 document detailed the "Duties of Skiers" pursuant to ORS 30.990 and ORS 30.985 and
9 also included printed notification that "Skiers/Snowboarders/Snowriders Assume Certain
10 Risks" under ORS 30.975--namely, the "inherent risks of skiing."² In addition, because
11 Bagley was not yet 18, his father executed a "minor release and indemnity agreement"
12 (capitalization omitted) that read as follows:

13 "I HEREBY AGREE TO RELEASE AND INDEMNIFY MT.
14 BACHELOR, INC., ITS OFFICERS AND DIRECTORS, OWNERS,
15 AGENTS, LANDOWNERS, AFFILIATED COMPANIES, AND
16 EMPLOYEES FROM ANY AND ALL CLAIMS FOR PROPERTY
17 DAMAGE, INJURY, OR DEATH WHICH THE MINOR(S) NAMED
18 BELOW MAY SUFFER OR FOR WHICH HE OR SHE MAY BE
19 LIABLE TO OTHERS, IN ANY WAY CONNECTED WITH SKIING,
20 SNOWBOARDING, OR SNOWRIDING. *THIS RELEASE AND*
21 *INDEMNITY AGREEMENT SHALL APPLY TO ANY CLAIM EVEN IF*
22 *CAUSED BY NEGLIGENCE.* THE ONLY CLAIMS NOT RELEASED
23 ARE THOSE BASED UPON INTENTIONAL MISCONDUCT.

24 "BY MY SIGNATURE BELOW, I AGREE THAT THIS MINOR
25 RELEASE AND INDEMNITY AGREEMENT WILL REMAIN IN FULL
26 FORCE AND EFFECT AND I WILL BE BOUND BY ITS TERMS

² Oregon has promulgated statutes specifically pertaining to skiing and ski areas. See ORS 30.970 - 30.990. Those statutes, *inter alia*, set forth the "duties" of skiers, require that ski area operators inform skiers of those duties, establish notice requirements and a statute of limitations pertaining specifically to injury or death while skiing, and provide that those who engage in the sport of skiing accept and assume the risks inherent in that activity.

1 THROUGHOUT THIS SEASON AND ALL SUBSEQUENT SEASONS
2 FOR WHICH THIS SEASON PASS IS RENEWED.

3 "I HAVE CAREFULLY READ AND UNDERSTAND THIS
4 AGREEMENT AND ALL OF ITS TERMS."

5 (Capitalization in original; emphasis added.)

6 Less than two weeks after purchasing the season pass and executing the
7 above-quoted release agreement, Bagley reached the age of majority--turning 18 on
8 October 12, 2005. Thereafter, on November 18, 2005, Bagley began using the pass, on
9 which the crux of the release agreement was also printed:

10 "READ THIS RELEASE AGREEMENT

11 "IN CONSIDERATION FOR EACH LIFT RIDE, THE TICKET USER
12 RELEASES AND AGREES TO HOLD HARMLESS AND INDEMNIFY
13 MT. BACHELOR, INC., AND ITS EMPLOYEES AND AGENTS FROM
14 ALL CLAIMS FOR PROPERTY DAMAGE, INJURY OR DEATH *EVEN*
15 *IF CAUSED BY NEGLIGENCE*. THE ONLY CLAIMS NOT RELEASED
16 ARE THOSE BASED UPON INTENTIONAL MISCONDUCT."

17 (Capitalization in original; emphasis added.) Further, the following sign was posted at
18 each of Mt. Bachelor's ski lift terminals:

19 "YOUR TICKET IS A RELEASE

20 "The back of your ticket contains a release of all claims against Mt.
21 Bachelor, Inc. and its employees or agents. *Read the back of your ticket*
22 *before you ride any lifts or use any of the facilities of Mt. Bachelor, Inc.* If
23 you purchase a ticket from someone else, you must provide this ticket
24 release information to that person or persons.

25 "Skiers and lift passengers who use tickets at this resort release and agree to
26 hold harmless and indemnify Mt. Bachelor, Inc., its employees and agents
27 from all claims for property damage, injury or death which he/she may
28 suffer or for which he/she may be liable to others, arising out of the use of
29 Mt. Bachelor's premises, *whether such claims are for negligence or any*
30 *other theory of recovery, except for intentional misconduct.*

1 "If you do not agree to be bound by the terms and conditions of the sale of
2 your ticket, please do not purchase the ticket or use the facilities at Mt.
3 Bachelor.

4 "Presentation of this ticket to gain access to the premises and facilities of
5 this area is an acknowledgment of your agreement to the terms and
6 conditions outlined above."

7 (Capitalization in original; emphases added.)

8 Ultimately, beginning on November 18, 2005, *after* his 18th birthday,
9 Bagley used his season pass to ride Mt. Bachelor's lifts at least 119 times over the course
10 of 26 days spent snowboarding at the ski area. However, on February 16, 2006, while
11 snowboarding over a manmade jump in Mt. Bachelor's "air chamber" terrain park, Bagley
12 sustained serious injuries resulting in permanent paralysis.

13 On June 16, 2006, approximately four months later, Bagley provided Mt.
14 Bachelor with formal notice of his injury under ORS 30.980(1), which requires that "[a]
15 ski area operator * * * be notified of any injury to a skier * * * within 180 days after the
16 injury * * *." Nearly two years after the injury, on February 15, 2008, Bagley brought
17 this action--filing a complaint alleging negligence on Mt. Bachelor's part in designing,
18 constructing, maintaining, or inspecting the jump on which Bagley was injured. Mt.
19 Bachelor answered, in part, by invoking the affirmative defense of release--pointing to
20 the above-quoted release agreements signed by Bagley and his father prior to the date of
21 injury.

22 Mt. Bachelor quickly moved for summary judgment on that ground,
23 arguing before the trial court that, by failing to disaffirm the voidable release agreement

1 within a reasonable period of time after reaching the age of majority, and by accepting
2 the benefits of that agreement and "objectively manifest[ing] his intent to affirm" it (*i.e.*,
3 by riding Mt. Bachelor's lifts 119 times over 26 days), Bagley had ratified the release and
4 was therefore bound by it. Mt. Bachelor further noted that Bagley "admittedly
5 understood that he [had] entered into a release agreement and was snowboarding under
6 its terms on the date of [the] accident." Accordingly, Mt. Bachelor argued, because
7 Bagley had ratified a release agreement that unambiguously disclaimed liability for
8 negligence, there was no material issue of fact as to whether that agreement barred
9 Bagley's action, and Mt. Bachelor was entitled to judgment as a matter of law.³

10 Bagley then filed a cross-motion for partial summary judgment as to Mt.
11 Bachelor's affirmative defense of release, arguing that "there [was] no genuine issue of
12 material fact [as to whether] the release [was] void and unenforceable as a matter of law."
13 Specifically, Bagley argued that he timely disaffirmed the release agreement by (1)
14 notifying Mt. Bachelor of the injury pursuant to ORS 30.980(1), (2) filing his complaint
15 for negligence within the two-year statute of limitations "for injuries to a skier"
16 established by ORS 30.980(3), and (3) "plead[ing] infancy as a defense to [Mt.
17 Bachelor's] First Affirmative Defense on the release executed by [Bagley] while an
18 infant." Additionally, in response to Mt. Bachelor's motion, Bagley alternatively argued

³ Mt. Bachelor additionally argued, as pertinent to this appeal, that the release agreement was neither adhesiory nor contrary to public policy under Oregon law. Specifically, it argued that "skiers and snowboarders voluntarily choose to ski and snowboard and ski resorts do not provide essential public services."

1 that "whether [he] disaffirmed the Release within a reasonable time should be determined
2 by the jury as a question of fact" because a material issue of fact existed as to Bagley's
3 knowledge of both the scope of the release (namely, whether it covered claims for
4 negligence) and "of his right to disaffirm" it (*i.e.*, whether it was voidable). He further
5 argued that the release was contrary to public policy and "both substantively and
6 procedurally unconscionable."

7 The trial court agreed with Mt. Bachelor, reasoning that Bagley's "use of
8 the pass following his eighteenth birthday constitute[d] an affirmation of the contract and
9 release agreement each time the pass was used, a total of 119 times over a period of 26
10 different days, up to February 16, 2006[.]" and noting that, "[o]nce there [was] an
11 affirmation, [Bagley could] no longer disaffirm the contract." The court rejected Bagley's
12 public policy and unconscionability arguments, reasoning that "[s]now riding is not such
13 an essential service which requires someone such as [Bagley] to be forced to sign a
14 release in order to obtain the service." Accordingly, having determined that Bagley
15 ratified the release agreement after reaching the age of majority and that "there [was] no
16 basis by which [it could] find the release invalid[.]" the trial court granted summary
17 judgment in Mt. Bachelor's favor and denied Bagley's cross-motion for partial summary
18 judgment. Bagley now appeals, reprising his arguments below.

19 On appeal, we review the trial court's ruling on summary judgment to
20 determine whether we agree "that there is no genuine issue as to any material fact and
21 that the moving party is entitled to prevail as a matter of law." ORCP 47 C; *see O'Dee v.*

1 *Tri-County Metropolitan Trans. Dist.*, 212 Or App 456, 460, 157 P3d 1272 (2007). No
2 genuine issue of material fact exists if, "based upon the record before the court viewed in
3 a manner most favorable to the adverse party, no objectively reasonable juror could
4 return a verdict for the adverse party on the matter that is the subject of the motion for
5 summary judgment." ORCP 47 C.

6 In his first assignment of error, Bagley asserts that "[t]here is a genuine
7 factual dispute as to whether [his] actions or omissions after reaching the age of majority
8 were enough to disaffirm or affirm the contract he entered with [Mt. Bachelor] when he
9 was a minor." More specifically, Bagley argues that "[a] jury could reasonably infer
10 from the facts that merely turning 18 years old and continuing to snowboard was not
11 conclusive evidence of [his] intent to affirm the release and agree to waive all prospective
12 claims for [Mt. Bachelor's] negligence." He argues that a jury "could just as easily find
13 that he promptly disaffirmed the contract" by notifying Mt. Bachelor of the injury
14 approximately four months after it occurred as required by ORS 30.980(1), by filing suit
15 for negligence within the applicable statute of limitations, or by pleading infancy in
16 response to Mt. Bachelor's affirmative defense of release.⁴

17 Mt. Bachelor likewise reprises its arguments below, asserting that Bagley

⁴ Bagley alternatively argues that, "even if there is no genuine dispute of material fact, the inferences arising from the facts in this case are susceptible to more than one reasonable conclusion precluding summary judgment." However, Bagley does not identify any facts that purportedly give rise to inferences susceptible to more than one reasonable conclusion, and, ultimately, his generalized argument to that effect is not materially different from his argument in support of his first assignment of error. Accordingly, we reject that alternative argument without further discussion.

1 admittedly knew that he was snowboarding under the terms of a release agreement, was
2 aware of the inherent risks of snowboarding (particularly given his advanced, aerial style
3 of snowboarding), and, "[u]nderstanding those risks," made "an informed decision to
4 execute the release agreement" and "an informed decision to honor the agreement after
5 reaching the age of majority because he wanted to snowboard." As noted, Mt. Bachelor
6 points to Bagley's use of the pass after reaching the age of majority--arguing that Bagley
7 ratified the release agreement by riding the lifts "no less than 119 times on 26 days before
8 the subject accident."

9 In Oregon, a former minor may disaffirm a contract within a "reasonable
10 time" after reaching the age of majority, *see Highland v. Tollisen*, 75 Or 578, 587, 147 P
11 558 (1915), or, conversely, may ratify a contract after reaching the age of majority by
12 manifesting an intent to let the contract stand, *see Haldeman v. Weeks*, 90 Or 201, 205,
13 175 P 445 (1918); *see also* Richard A. Lord, 5 *Williston on Contracts* § 9:17, 166-70 (4th
14 ed 2009) ("[I]f an infant after reaching the age of majority engages in any conduct that
15 objectively manifests an intent to regard the bargain as binding, the former minor will be
16 held as a matter of law to have ratified the contract."). Further, as particularly relevant
17 here, although what constitutes a reasonable period of time after reaching the age of
18 majority varies widely depending on the circumstances, it is well established that
19 ratification of a voidable contract abolishes a party's power to later disaffirm it. *See*
20 *Brown et ux v. Hassenstab et ux*, 212 Or 246, 256, 319 P2d 929 (1957) ("The two courses
21 of action are inconsistent and the taking of one will preclude the other."); *Snyder v.*

1 *Rhoads*, 47 Or App 545, 553-54, 615 P2d 1058, *rev den*, 290 Or 157 (1980) (similar).

2 Applying those principles to these facts, we agree with Mt. Bachelor and
3 conclude that no objectively reasonable juror could find that Bagley disaffirmed the
4 release agreement within a reasonable time after turning 18. Rather, the record gives rise
5 to only one reasonable conclusion: By using the season pass at least 119 times over the
6 course of 26 days between November 18, 2005 and February 16, 2006, Bagley
7 objectively manifested his intent to let the release stand--affirmatively electing to ride the
8 lifts and snowboard under the terms of the agreement (*i.e.*, to accept the benefits of the
9 agreement). His actions *after* the date of injury--at which time the release had already
10 been ratified and Bagley's power to disaffirm it thereby defeated--are immaterial. *Cf.*
11 *Highland*, 75 Or at 587 (former minor's disaffirmance held valid under circumstances
12 *where she had neither taken any affirmative action on the contract nor received any*
13 *benefit from it*); *see also Restatement (Second) of Contracts* § 85 comment b (1981)
14 (power of disaffirmance may be lost, *inter alia*, "by exercise of dominion over things
15 received"); Lord, 5 *Williston on Contracts* § 9:17 at 170 ("[I]f the infant after attaining
16 majority voluntarily receives performance in whole or in part from the other party to the
17 contract, this will amount to a ratification.").⁵

⁵ Although existing Oregon case law on point is limited, several other states have similarly reasoned that a former minor's acceptance of the benefits of a contract may constitute a ratification. *See, e.g., Jones v. Dressel*, 623 P2d 370, 372-74 (Colo 1981) (holding that a former minor, who had signed a release at age 17 in order to skydive, "ratified the contract, as a matter of law, by accepting the benefits of the contract when he used [the defendant's] facilities" and further stating that the question whether that former minor's subsequent actions constituted disaffirmance of the contract was "not relevant"

1 In reaching that conclusion, we emphasize that Bagley was less than two
2 weeks short of the age of majority when he signed the release agreement and did not
3 begin snowboarding under its terms until well over a month after turning 18. He was also
4 an experienced snowboarder, had signed release agreements at other ski resorts in the
5 past, and had purchased a season pass and signed a release agreement for each of the
6 preceding three years that he spent snowboarding at Mt. Bachelor. *See Haldeman*, 90 Or
7 at 205 (considering former minor's maturity and life experience in determining whether
8 contract had been ratified). Moreover, the language of the release was unambiguous, as
9 discussed further below, and that language was both heavily emphasized and
10 omnipresent--having been reproduced on the back of the physical season pass that Bagley
11 was required to carry at all times and in large part on signage at each of the lift terminals
12 to which Bagley was exposed at least 119 times. Indeed, given the exculpatory language
13 on Bagley's pass and the signage directing his attention to it, it is not implausible that
14 Bagley released Mt. Bachelor from liability for negligence each time that he rode one of
15 the lifts.

16 Nevertheless, Bagley affirmatively chose to accept the benefits of the
17 agreement after reaching the age of majority and, as noted, continued to do so until the
18 date of injury notwithstanding the pass's and signage's continuing reminders of the

because the former minor had already ratified the contract); *Parsons ex rel Cabaniss v. American Family Insurance Co.*, 305 Wis 2d 630, 639, 740 NW2d 399, 403 (Wis Ct App 2007), *rev den*, 307 Wis 2d 294, 746 NW2d 811 (Wis 2008) (former minor ratified release agreement in connection with settlement by retaining funds given as consideration for that release).

1 existence of the agreement and provision of ample exposure to its terms. The following
2 exchange, which occurred during Bagley's deposition, is particularly illustrative:

3 "[Mt. Bachelor's Counsel]: The reason you didn't go to Mt. Bachelor
4 and tell them 'You know what, I signed this agreement when I was 17, now
5 I'm 18, I want to void it, I don't want to be subject to it,' what I'm asking
6 you to acknowledge is the reason you didn't do that is because you wanted
7 [to] continue [to snowboard] and did continue [to snowboard] under the
8 terms of the season pass agreement.

9 "[Bagley]: Yes."

10 Thus, as the trial court correctly reasoned, when Bagley used the season pass 119 times to
11 gain access to Mt. Bachelor's lifts, he objectively manifested his intent to regard the
12 release agreement as binding in order to reap its benefits--thereby ratifying it.

13 However, although he concedes that he was "aware of the release" and
14 "aware of the inherent risks of his sport[.]" Bagley further argues that he did not know
15 that the agreement released Mt. Bachelor from claims related to its own negligence. Nor,
16 he argues, did he know that he had the power to disaffirm the contract upon turning 18.
17 We conclude that such knowledge was not a necessary prerequisite to ratification and,
18 therefore, that Bagley's arguments as to his *subjective* understanding of both the release
19 agreement and the law do not affect our determination that "no objectively reasonable
20 juror could [have] return[ed] a verdict for" Bagley on the issue of ratification. ORCP 47
21 C.

22 Oregon subscribes to the "objective theory of contracts." *Kabil*
23 *Developments Corp. v. Mignot*, 279 Or 151, 156-57, 566 P2d 505 (1977) (citation
24 omitted); *Newton/Boldt v. Newton*, 192 Or App 386, 392, 86 P3d 49, *rev den*, 337 Or 84

1 (2004), *cert den*, 543 US 1173 (2005). Accordingly, although there is undisputed
2 evidence in the record showing that, after reaching the age of majority, Bagley was
3 exposed to language expressly disclaiming liability for negligence on the part of Mt.
4 Bachelor,⁶ his *subjective* understanding of that language and the terms of the release
5 agreement is not relevant to the question of whether he ratified that agreement such that it
6 could be enforced against him. *See, e.g., NW Pac. Indem. v. Junction City Water Dist.*,
7 295 Or 553, 557 n 4, 668 P2d 1206 (1983), *modified on other grounds*, 296 Or 365, 677
8 P2d 671 (1984) ("[F]ailure to read an instrument is not a defense to enforcement.").

9 We similarly reject Bagley's argument regarding his lack of knowledge of
10 the power to disaffirm the release agreement upon reaching the age of majority. In
11 raising that issue, Bagley notes that, "[i]n *some states*, the former infant's knowledge, or
12 lack thereof, of his right to disaffirm a contract *may be taken into consideration*" in
13 assessing whether there has been a ratification or disaffirmance. (Emphases added.)

⁶ For instance, as noted, the season pass that he was required to carry with him at all times expressly disclaimed liability for negligence and drew his attention to that language with the following heading: "READ THIS RELEASE AGREEMENT[.]" (Capitalization in original.) Further, during his deposition testimony, Bagley confirmed that he had read signage posted prominently on the mountain that stated, as pertinent here, that

"[s]kiers and lift passengers who use tickets at this resort release and agree to hold harmless and indemnify Mt. Bachelor, Inc., its employees and agents from all claims for property damage, injury or death which he/she may suffer or for which he/she may be liable to others, arising out of the use of Mt. Bachelor's premises, *whether such claims are for negligence or any other theory of recovery, except for intentional misconduct.*"

(Emphasis added.)

1 However, we have previously stated that "[i]gnorance of the law is not a basis for *not*
2 enforcing a contract." *Shea v. Begley*, 94 Or App 554, 558 n 3, 766 P2d 418 (1988), *rev*
3 *den*, 307 Or 514 (1989) (citation omitted; emphasis added); *see also Walcutt v. Inform*
4 *Graphics, Inc.*, 109 Or App 148, 152, 817 P2d 1353 (1991), *rev den*, 312 Or 589 (1992)
5 (the plaintiff was not entitled to avoid contract due to her and her counsel's "failure to
6 take reasonable measures to inform themselves about her affairs"). Moreover, as Mt.
7 Bachelor correctly points out, Bagley's argument is drawn from the minority view among
8 other jurisdictions. *See Lord*, 5 *Williston on Contracts* § 9:17 at 175-77 (former minor's
9 ignorance of legal defense of infancy treated as irrelevant in a majority of those
10 jurisdictions that have considered the issue). As aptly stated by the Pennsylvania
11 Supreme Court,

12 "[t]o require that one must have knowledge of a right to disaffirm in order
13 to make an effective ratification of a voidable contract made in infancy
14 would be inconsistent with the well-established rule that failure to disaffirm
15 such contract within a reasonable time after coming of age terminates the
16 privilege of disaffirmance."

17 *Campbell v. Sears, Roebuck & Co.*, 307 Pa 365, 371, 161 A 310, 312 (1932).

18 In short, both of Bagley's ancillary arguments are inconsistent with the
19 objective theory of contracts to which Oregon adheres; we look to the parties' objective
20 conduct, and, here, after reaching the age of majority, Bagley objectively manifested his
21 intent to let the contract stand because he "wanted to snowboard[.]"

22 As noted, in his second assignment of error, Bagley asserts that the release
23 agreement was void as contrary to public policy--focusing primarily on the respective

1 bargaining power of the parties and an asserted "public interest [in] protecting a large
2 number of business invitees, including [Bagley], from the negligence of ski area
3 operators."⁷ (Some capitalization omitted.) In evaluating whether a contract disclaiming
4 liability for negligence is contrary to public policy, we assess the language of the
5 agreement under the circumstances in order to determine whether it violates public policy
6 "as applied" to the facts of the particular case. *Harmon v. Mt. Hood Meadows Ltd.*, 146
7 Or App 215, 217-18, 222-24, 932 P2d 92 (1997) (upholding release agreement
8 disclaiming "any and all liability (including claims based upon negligence) for damage or
9 injury" because the plaintiff's action pertained only to ordinary negligence and therefore
10 did not implicate the release's potential coverage of recklessness or intentional
11 misconduct (capitalization and boldface omitted)). Specifically, we stated in *Harmon*
12 that

13 "[t]he question of whether a contract provision is unenforceable as
14 against some general, uncodified public policy must be determined on an
15 'as applied' basis. * * * [A] party seeking to avoid contractual responsibility
16 must demonstrate that enforcement of the contractual provision *as to him or*
17 *her* will offend public policy. *That is so regardless of whether enforcement*
18 *of the same contractual provision against other parties in other*
19 *circumstances would violate public policy."*

20 *Id.* at 222 (emphases added); *see generally Young v. Mobil Oil Corp.*, 85 Or App 64, 69,
21 735 P2d 654 (1987) ("Oregon requires that a public policy be clear and 'overpowering'

⁷ We assume without deciding that the "void as contrary to public policy" doctrine pertaining to this type of case has not been superseded by later-evolved principles concerning substantive unconscionability. *See Restatement* at § 208 comment a (unconscionability analysis generally "overlaps" with public-policy analysis).

1 before a court will interfere with the parties' freedom to contract on the ground of public
2 policy." (Citation omitted.)).

3 Again, the release agreement provided, as pertinent here:

4 "RELEASE AND INDEMNITY AGREEMENT

5 "IN CONSIDERATION OF THE USE OF A MT. BACHELOR PASS
6 AND/OR MT. BACHELOR'S PREMISES, I/WE AGREE TO RELEASE
7 AND INDEMNIFY MT. BACHELOR, INC., ITS OFFICERS AND
8 DIRECTORS, OWNERS, AGENTS, LANDOWNERS, AFFILIATED
9 COMPANIES, AND EMPLOYEES (HEREINAFTER 'MT. BACHELOR,
10 INC.') FROM ANY AND ALL CLAIMS FOR PROPERTY DAMAGE,
11 INJURY, OR DEATH WHICH I/WE MAY SUFFER OR FOR WHICH
12 I/WE MAY BE LIABLE TO OTHERS, IN ANY WAY CONNECTED
13 WITH SKIING, SNOWBOARDING, OR SNOWRIDING. *THIS*
14 *RELEASE AND INDEMNITY AGREEMENT SHALL APPLY TO ANY*
15 *CLAIM EVEN IF CAUSED BY NEGLIGENCE. THE ONLY CLAIMS NOT*
16 *RELEASED ARE THOSE BASED UPON INTENTIONAL MISCONDUCT."*

17 (Underscoring and capitalization in original; emphasis added.) Although that exculpatory
18 language expressly excludes intentional misconduct from its purview, the same cannot be
19 said with respect to gross negligence or recklessness. However, applying *Harmon*,
20 because Bagley alleges only ordinary negligence, the failure to expressly exclude gross
21 negligence or recklessness does not render the agreement contrary to public policy "as
22 applied" to the negligence claim in this case. 146 Or App at 222.

23 Further, in assessing the language of the agreement, our decision in *Steele*
24 *v. Mt. Hood Meadows Oregon, Ltd.*, 159 Or App 272, 974 P2d 794, *rev den*, 329 Or 10
25 (1999), provides substantial guidance. There, the plaintiff in a wrongful death action
26 brought against a ski resort argued that the trial court had erred in granting summary
27 judgment for the ski resort in part because "the terms of the release [were] ambiguous."

1 *Id.* at 276. We concluded that the agreement was ambiguous and stated that, "[w]hen one
2 party seeks to contract away liability for its own negligence in advance of any harm, the
3 intent to do so must be 'clearly and unequivocally expressed.'" *Id.* (quoting *Estey v.*
4 *MacKenzie Engineering Inc.*, 324 Or 372, 376, 927 P2d 86 (1996)). We further
5 elaborated:

6 "In determining whether a contract provision meets that standard, the court
7 has considered both the language of the contract and the possibility of a
8 harsh or inequitable result that would fall on one party if the other were
9 immunized from the consequences of its own negligence. *The latter*
10 *inquiry turns on the nature of the parties' obligations and the expectations*
11 *under the contract.*"

12 *Id.* (citations and internal quotation marks omitted; emphasis added).

13 We conclude that the release agreement's language "clearly and
14 unequivocally" expressed Mt. Bachelor's intent to disclaim liability for negligence. In
15 reaching that conclusion, considering "the nature of the parties' obligations and the
16 expectations under the contract[,]" *id.*, we note that Bagley admittedly understood that he
17 was engaged in an inherently dangerous activity and that the agreement not only
18 disclaimed liability for negligence but specifically stated that the "only" claims not
19 released were those for intentional misconduct. Unlike the ambiguous release agreement
20 in *Steele*, the above-quoted language expressly referred to negligence and was positioned
21 prominently at the beginning of the release agreement; it was not obscured by unrelated
22 provisions. *See id.* at 274-75 (exculpatory provision obscured by, *inter alia*, provision
23 addressing skier's duty to report injuries to the ski resort's medical clinic). Indeed, we are
24 hard-pressed to envision a more unambiguous expression of "the expectations under the

1 contract"--namely, that in exchange for the right to use Mt. Bachelor's facilities to
2 participate in an inherently dangerous activity, Bagley was to release Mt. Bachelor from
3 all claims related to anything other than intentional misconduct (including, of course,
4 negligence).

5 Moreover, we have previously emphasized that a release agreement
6 disclaiming liability for negligence does not necessarily offend public policy where it
7 pertains exclusively to "recreational activities," and, most prominently, where the
8 business seeking to relieve itself of such liability does "not provide an essential public
9 service[.]" *Mann v. Wetter*, 100 Or App 184, 187, 187 n 1, 785 P2d 1064, *rev den*, 309
10 Or 645 (1990) ("[T]here are no public policy considerations that prevent a diving school
11 from limiting liability for its own negligence. The diving school does not provide an
12 essential public service[.]"). A ski resort, like a diving school, primarily offers
13 "recreational activities" (with possible exceptions that do not apply here, *e.g.*, training for
14 search-and-rescue personnel) and does not provide an "essential public service[.]" *Id.*

15 Thus, bearing in mind the principles set forth in *Mann* and the recreational
16 context of this particular case,⁸ because the release agreement "clearly and
17 unequivocally" disclaimed liability for negligence, and because Bagley's claims relate
18 only to ordinary negligence, under Oregon law the agreement was not contrary to public

⁸ Regarding that recreational context, we further note that the legislature has enacted statutes indemnifying landowners from liability in connection with "use of the land for recreational purposes[.]" ORS 105.682; *see* ORS 105.672 - 105.696. Accordingly, we add that, as a general matter, it would be counterintuitive to hold that a contract with the same operative effect as that statutory scheme is void as contrary to public policy.

1 policy "as applied" to Bagley's action. *Steele*, 159 Or App at 276; *Harmon*, 146 Or App
2 at 222.

3 Finally, we reject Bagley's third assignment of error, in which, as noted, he
4 asserts that the release agreement was both procedurally and substantively
5 unconscionable. At the outset, we emphasize the substantive rigor historically applied by
6 Oregon courts in assessing claims of unconscionability:

7 "[T]he doctrine of unconscionability does not relieve parties from all
8 unfavorable terms that result from the parties' respective bargaining
9 positions; it relieves them from terms that are *unreasonably* favorable to the
10 party with greater bargaining power. Oregon courts have been reluctant to
11 disturb agreements between parties on the basis of unconscionability, even
12 when those parties do not come to the bargaining table with equal power.
13 In those rare instances in which our courts have declared contractual
14 provisions unconscionable, there existed serious procedural and substantive
15 unfairness."

16 *Hatkoff v. Portland Adventist Medical Center*, 252 Or App 210, 217, 287 P3d 1113
17 (2012) (quoting *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App 610, 626-27, 156 P3d 156
18 (2007)) (emphasis in *Motsinger*). Further, "each case is decided on its own unique
19 facts[.]" *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or App 553, 567, 152 P3d 940
20 (2007), taking into account both the terms of the contract and the circumstances existing
21 when the contract was signed.

22 In assessing Bagley's claim of procedural unconscionability, we focus on
23 "the conditions of contract formation" and look to "two factors: oppression and surprise."
24 *Id.* at 566-67 (citation and internal quotation marks omitted). More specifically,
25 "[o]ppression arises from an inequality of bargaining power which results in no real

1 negotiation and an absence of meaningful choice. Surprise involves the extent to which
2 the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form
3 drafted by the party seeking to enforce the terms." *Id.* at 566 (citation and internal
4 quotation marks omitted). Bagley addresses only the former, advancing a generalized
5 argument that the agreement "was a contract of adhesion and there was a disparity in
6 bargaining power." (Some capitalization omitted.)

7 As noted, we do not find the release agreement procedurally
8 unconscionable under these circumstances. Although the parties indeed came to the
9 bargaining table with unequal power insofar as Mt. Bachelor required that the release be
10 signed in order to allow Bagley to purchase a season pass, we have, albeit in *dictum* and
11 in the context of addressing public-policy arguments, suggested that standard-form
12 release agreements in the context of recreational activities are not impermissibly
13 adhesive. *See Harmon*, 146 Or App at 219 n 4 (citing cases from other jurisdictions and
14 noting their holdings "that exculpatory provisions in ski-related form agreements were
15 not impermissibly adhesive"); *Mann*, 100 Or App at 187-88 (noting that "customers have
16 a multitude of alternatives" in dealing with providers of "non-essential service[s,]" even
17 where such providers hold an "economic advantage").⁹ Although we limit our holding to

⁹ Many other states, as well as federal courts, have, as Mt. Bachelor points out, "reached the same conclusion." *See, e.g., Chepkevich v. Hidden Valley Resort, L. P.*, 607 Pa 1, 29, 2 A3d 1174, 1191 (2010) (noting that, in the recreational context, "[t]he signer is a free agent who can simply walk away without signing the release and participating in the activity, and thus the contract signed under such circumstances is not unconscionable"); *Silva v. Mt. Bachelor, Inc.*, No CV 06-6330-AA, *2 (D Or July 21, 2008) ("[T]he release from liability is not invalid as a contract of adhesion, because [the]

1 these "unique facts," we rely in part on those principles in addressing both "oppression"
2 and "surprise" (as well as substantive unconscionability, as set forth below).

3 Here, with respect to "oppression," Bagley was free to choose not to
4 snowboard at Mt. Bachelor, was less than two weeks short of the age of majority when he
5 signed the agreement, was an experienced snowboarder who had previously signed
6 release agreements required by at least two other ski resorts, had signed a release
7 agreement in obtaining a season pass at Mt. Bachelor during each of the preceding three
8 years, and was accompanied by his father (who, as noted, signed a nearly identical
9 agreement disclaiming liability for negligence). Each of those facts contributes to our
10 conclusion that, notwithstanding the parties' unequal bargaining power, the circumstances
11 of contract formation were not impermissibly oppressive. Bagley and his father were
12 presented with a "meaningful choice[,]" *Vasquez-Lopez*, 210 Or App at 566, particularly
13 given that, as noted, snowboarding is a recreational activity and Bagley could have
14 simply declined to sign the release without being denied access to an essential public
15 service.

16 With respect to "surprise," as evidenced by the unambiguous language of
17 the release agreement, and particularly given its additional clarification after disclaiming
18 liability for negligence ("THE ONLY CLAIMS NOT RELEASED ARE THOSE

plaintiff voluntarily chose to ski at Mt. Bachelor and the ski resort does not provide essential public services."); *Grbac v. Reading Fair Co., Inc.*, 521 F Supp 1351, 1355 (WD Pa 1981), *aff'd*, 688 F2d 215 (3d Cir 1982) (stock-car racing company's standard-form release provision not adhesionary).

1 BASED UPON INTENTIONAL MISCONDUCT"), this was not a situation where the
2 "terms of the bargain [were] hidden" by Mt. Bachelor. *Id.* To the contrary, the above-
3 quoted paragraph pertaining to the skier's release of claims, including claims for
4 negligence, appeared at the beginning of the release agreement and was highlighted by a
5 centered and underlined introductory heading drawing the skier's attention to the fact that
6 he or she was signing a release ("RELEASE AND INDEMNITY AGREEMENT"). On
7 those facts, we find no indication of surprise and, coupled with our conclusion above as
8 to oppression, cannot say that the release agreement was procedurally unconscionable.

9 In further arguing that the release agreement was substantively
10 unconscionable, Bagley asserts that "[t]he Release term of the contract in question is
11 unreasonably favorable to [Mt. Bachelor], the drafter of the contract and more powerful
12 party." Further, Bagley argues, the terms of the release "unconscionably shift[] the
13 burden to protect [skiers] from [Mt. Bachelor's] negligent behavior to the public that it
14 invites upon its premises, including [Bagley]." In assessing a contract for substantive
15 unconscionability, we focus on the terms of the contract itself in light of the
16 circumstances of its formation; ultimately, "[t]he substantive fairness of the challenged
17 terms" is the "essential issue." *Carey v. Lincoln Loan Co.*, 203 Or App 399, 423, 125
18 P3d 814 (2005), *aff'd on other grounds*, 342 Or 530, 157 P3d 775 (2007); *see Vasquez-*
19 *Lopez*, 210 Or App at 566-69.

20 On these facts, the provision in the release agreement disclaiming liability
21 for negligence was not "unreasonably" favorable to Mt. Bachelor. *Carey*, 203 Or App at

1 422. Indeed, the principal Oregon case touching on the issue upheld a provision--albeit
2 on an "as applied" basis in the context of that particular plaintiff's public-policy
3 argument--that not only disclaimed liability for negligence in connection with skiing but
4 for "*any and all liability*" (presumably including liability related to gross negligence or
5 intentional misconduct on the part of the ski resort). *Harmon*, 146 Or App at 217-22
6 (emphasis added). Moreover, as noted, in *Harmon* we specifically cited cases from other
7 jurisdictions "holding that exculpatory provisions in ski-related form agreements were
8 not impermissibly adhesive." *Id.* at 219 n 4. Returning to the overarching notion that the
9 terms at issue must be read in light of their recreational context, in one of those cases, the
10 New Jersey Superior Court aptly reasoned as follows:

11 "When an individual enters a ski shop to buy ski equipment, s/he
12 does not have a *need* for those goods and services, merely a desire. Should
13 the seller demand exculpation as a condition for the sale of the equipment,
14 the purchaser is free to walk away. This is not so with the consumer of
15 automobile insurance, or the individual who cannot find a place to live
16 during a housing shortage. Unlike the skier, these individuals must face an
17 inability to use their automobile, or the prospect of becoming homeless, if
18 they are not willing to sign on the dotted line and exculpate the provider.
19 The skier merely faces the prospect of a ski-less weekend."

20 *McBride v. Minstar, Inc.*, 283 NJ Super 471, 491, 662 A2d 592, 602 (NJ Super Ct Law
21 Div 1994), *aff'd sub nom McBride v. Raichle Molitor, USA*, 283 NJ Super 422, 662 A2d
22 567 (NJ Super Ct App Div), *rev den*, 143 NJ 319, 670 A2d 1061 (1995) (emphasis in
23 original). As noted, similar release agreements in the context of recreational activities
24 have been upheld (including against claims of unconscionability) in a number of other
25 jurisdictions. *See* ___ Or App at ___ n 9 (slip op at 20 n 9). Finally, ORS 105.682

1 establishes a public policy in favor of indemnification of landowners where the land is
2 used for, *inter alia*, recreational purposes. We fail to see how a private contract to the
3 same effect is substantively unfair as a matter of law.

4 Accordingly, given existing case law and the aforementioned substantive
5 rigor that we apply in assessing claims of unconscionability, *see Hatkoff*, 252 Or App at
6 217, we conclude that the terms of Mt. Bachelor's release were not substantively
7 unconscionable under these circumstances. That is, the inclusion of the release provision
8 did not constitute one of "those rare instances" where the terms of the contract were so
9 "*unreasonably* favorable" to Mt. Bachelor that they were unconscionable. *Id.* (emphasis
10 in original); *see also Restatement* at § 208 comment b (a contract has traditionally been
11 held unconscionable only where "it was such as no man in his senses and not under
12 delusion would make" (citations and internal quotation marks omitted)).

13 In sum, we conclude that Bagley ratified the release agreement prior to the
14 date of injury, nullifying his power to later disaffirm it (whether by notice, filing suit, or
15 pleading infancy), and that the agreement--coupled with the language printed on the
16 season pass and signage at the lift terminals--was sufficiently clear as to its application to
17 claims for negligence. We further conclude that Bagley's lack of knowledge regarding
18 the scope of the unambiguous agreement did not preclude summary judgment, nor did his
19 lack of knowledge of the power to disaffirm it upon reaching the age of majority. As to
20 whether the release agreement was valid in the first instance, we conclude that, *as*
21 *applied*, the release agreement was not contrary to public policy. Nor was the agreement

1 substantively or procedurally unconscionable. Accordingly, no genuine issue of material
2 fact exists as to Mt. Bachelor's affirmative defense of release, and the trial court did not
3 err in granting summary judgment for Mt. Bachelor and denying partial summary
4 judgment to Bagley on that basis.

5 Affirmed.