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Plaintiffs: SAVANNAH BOLES v. **Defendants:** SUN ERGOLINE, INC.	Case Number: 08 SC 970 Div.: Ctrm.:
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BRIEF OF AMICUS CURIAE COLORADO DEFENSE LAWYERS ASSOCIATION

SUPREME COURT, STATE OF COLORADO Court Address: Telephone:	
Plaintiffs: SAVANNAH BOLES **Defendants:** SUN ERGOLINE, INC.	▲ COURT USE ONLY ▲ Case Number: 08 SC 970 Div.: Ctrm.:
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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. This brief complies with C.A.R. 28(g), in that it contains 2,952 words and it does not exceed 30 pages.

2. This brief complies with C.A.R. 28(k) in that, in support of the responding party, it contains a separate heading including a statement of whether it agrees with the petitioner's statements concerning the standard of review and preservation for appeal.

Respectfully submitted this 16th day of July, 2009.

CAMPBELL, LATIOLAIS & RUEBEL, P.C.

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The Colorado Defense Lawyers Association (CDLA), and the Colorado Civil Justice League [CCJL] pursuant to Rule 29 of the Colorado Appellate Rules, submit their Amicus Brief in support of the Respondent's position on the first issue on which this Court has accepted certiorari review.

I. ISSUE ADDRESSED BY AMICUS CDLA

Whether the public policy of Colorado allows enforcement of an exculpatory agreement purporting to release a manufacturer from liability for possible future injuries caused by the manufacturer's defective products?

II. STATEMENT OF THE CASE

Amicus Curiae Colorado Defense Lawyers Association adopts the Respondent's statement of the case, including the nature of the case, course of proceedings, disposition in the court below and statement of facts.

III. STATEMENT OF INTEREST OF AMICI CURIAE

The CDLA is an organization of attorneys, whose members' practices are devoted primarily to the defense of civil cases, including advising businesses and defending individuals and businesses in commercial disputes.

CCJL is a statewide coalition of individuals, businesses, government entities, associations and non-profit organizations. Its purpose is to ensure a fair civil justice system in Colorado. CCJL participates in a number of activities to help

shape the public policies that affect the civil justice system as it relates to the business environment in Colorado. As an amicus, CCJL offers this Court a perspective representing a broad coalition of interests that share a basic concern about the health of Colorado's civil justice system.

This appeal presents an issue of particular concern to the members and clients of CDLA and members of the CCJL, as exculpatory clauses, limitation of liability clauses and liquidated damages clauses are commonly used by manufacturers, businesses, professionals, recreational entities, the ski industry and others. CDLA and CCJL are concerned that expanding the circumstances under which freely entered into contracts can be voided will lead increased litigation, increased burdens on commerce and industry and that the parties will be uncertain whether contractual provisions upon which business decisions are made can be enforced.

IV. SUMMARY OF AMICI CURIAE ARGUMENT

Decisions as to whether contractual clauses are void as to public policy are best left to the Legislature unless the clause clearly violates one of the articulated public policies set forth in ***Jones v. Dressel,*** 623 P.2d 370 (Colo. 1981).

V. ARGUMENT OF AMICI CURIAE

Contract law protects justifiable expectations and the security of transactions and is premised on a bargain freely and voluntarily made through a bargaining process. The law of torts is directed toward compensation of individuals for injuries resulting from the unreasonable conduct of another. Tort law may also serve the 'prophylactic' purpose of preventing future harm by imposing liability for conduct below the acceptable standard of care. ***Merten v. Nathan,*** 108 Wis. 2d 205, 321 N.W.2d 173 (1982); ***Richards v. Richards,*** 181 Wis. 2d 1007, 513 N.W.2d 113 (1994). The juxtaposition of these two competing areas of law, embodied in this case as an exculpatory clause, occasionally requires a balancing of freedom to contract and the desirability of compensation for negligence. The Colorado General Assembly's pronouncements on the validity of exculpatory clauses evidence the legislature's desire and ability to balance the public and private interests with regard to these provisions. Moreover, Colorado jurisprudence evinces the recognition that in policy matters, the Legislature is better suited to resolve complex, competing positions on issues.

i. Exculpatory Clauses at Common Law.

Consistent with common law, Colorado recognizes a strong public policy of freedom of contract. ***City & County of Denver v. District Court,*** 939 P.2d 1353,

1361 (Colo. 1997); ***Allstate Ins. Co. v. Avis Rent-A-Car Sys.,*** 947 P.2d 341, 346 (Colo. 1997). Inherent in the freedom to contract is the presumption that people should be able to manage their own affairs without government interference. With freedom to contract, parties may engage in a bargaining process whereby they can freely and voluntarily allocate the risk and expense of certain transactions between themselves. Notwithstanding the freedom to contract, exculpatory clauses were not favored at common law. This was because it was believed that such clauses tended to allow conduct below the acceptable standard of care applicable to the activity. ***Hyson v. White Water Mountain,*** 265 Conn. 636, 829 A.2d 827 (2003). Further, with the industrialization and urbanization of western society, the fear was that those in weaker positions suffered from unfair results produced by inequality of bargaining power. *Teeven,* A History of the Anglo-American Common Law of Contract (1990). As a result, notions of unconscionability developed as courts reviewed contracts to ensure that contracts were fairly entered into, and were not contrary to equity and good conscience. ***Ace Flying Service, Inc. v. Colorado Dep't of Agriculture,*** 141 Colo. 467, 470, 348 P.2d 962, 964 (Colo. 1960).

However, exculpatory clauses have commercial value, as the clauses can be used to provide certainty as to liabilities, potential damages, and otherwise allocate risks as the parties may reasonably agree. See e.g. ***Orion Refining Corp. v. UOP,***

259 S.W.3d 749 (Tex. App. 2007) (Texas court applied Illinois law, noting that Illinois decisions reflect "a widespread policy of permitting competent parties to contractually allocate business risks as they see fit"). Indeed, exculpatory clauses play a valid role in commercial and business relations. Note, Exculpatory Clauses and Public Policy: A Judicial Dilemma, 52 U. Colo. Law Review 793 (1981). Thus, exculpatory clauses present a unique problem, as such clauses "... stand at the crossroads of two competing principles: freedom of contract and responsibility for damages caused by one's own negligent acts." ***Heil Valley Ranch, Inc. v. Simkin,*** 784 P.2d 781, 784 (Colo. 1989); ***Cooper v. Aspen Skiing Co.,*** 48 P.3d 1229, 1232 (Colo. 2002). At this crossroads, both the courts and legislature have stepped in to provide guidance. If the public interest is involved, it is for the legislature to make such pronouncements. ***Owen v. Vic Tanny's Enterprises,*** 48 Ill. App. 2d 344, 199 N.E.2d 280 (1964). It is peculiarly the province of the judiciary to interpret the constitution and say what the law is Colorado. ***General Assembly v. Lamm,*** 704 P.2d 1371, 1378 (Colo. 1985).

ii. Legislative Pronouncements on Exculpatory Clauses

Not unexpectedly, the Legislature has weighed in on the issue of exculpatory clauses with specific mandates for sale of goods, governmental immunity, health care, construction, et cetera. For example, consequential damages in transactions

involving the sale of goods may be limited or excluded unless the limitation or exclusion is unconscionable. See C.R.S. 4-2-719. In addition, if the court finds, as a matter of law, that a UCC sales contract or any clause of a UCC sales contract was unconscionable at the time it was made, the Legislature has indicated that the courts may refuse to enforce the contract, or limit the application of any unconscionable clause. See C.R.S. 4-2-302.

The drafters of the Uniform Commercial Code stated that the purpose of section 4-2-302, C.R.S. was to make it possible for the courts to police explicitly against contracts and clauses which they find unconscionable. However, the drafters also indicated that, in so doing, courts were to avoid manipulation of the rules of contract law or arguments that that clause was void as to public policy. See ***Threadgill v. Peabody Coal Co.,*** 34 Colo. App. 203, 207, 526 P.2d 676, 678 (Colo. Ct. App. 1974) (drafters comments in the Code are "significant" in interpreting provisions).

It is significant that legislative pronouncements regarding exculpatory clauses are not limited to the Uniform Commercial Code. For example, the General Assembly enacted section 13-21-110, C.R.S., limiting the civil liability of those involved in equine activities. It did the same for persons donating for transfusion and transplants, holding that product liability standards would not

apply, but instead holding that liability is to be determined on general negligence standards. C.R.S. 13-22-104. The Legislature has limited governmental liability to specifically proscribed acts. C.R.S. 24-10-101 *et seq.* It has provided for immunity for independent contractors hired to perform or acting as a state tramway inspectors. C.R.S. 25-5-718. It has also found certain provisions to be void as to public policy. See e.g. C.R.S. 13-20-806 (express waiver of, or limitation on, the legal rights, remedies, or damages provided by the "Construction Defect Action Reform Act"... or provided by the "Colorado Consumer Protection Act" ... as described in this section ... are void as against public policy).

Perhaps most telling, however, is the legislative enactment of the limitations contained in the Health Care Availability Act, C.R.S., 13-64-101 et seq. In that Act, the Legislature limited damages in the manner that a limitation of liability clause in a contract would. See, e.g. C.R.S. 13-64-302. Without express recognition by the legislature, such clauses in a contract would likely not have been valid. See, e.g. ***Kazan v. Comstock,*** 270 F.2d 839 (5th Cir. 1959); ***Tunkl v. Regents of University of California,*** 383 P.2d 441 (Cal. 1963).

Of course, enactments by the Legislature also occasionally reverse a court determination to the contrary. See ***Woodman v. Kera, L.L.C.*** 280 Mich. App. 125,

760 N.W.2d 641 (2008) (commenting that Court holding in *Cooper v. Aspen Skiing Co.,* 48 P.3d 1229, 1234 (Colo. 2002) was superseded by statutory enactment).

From this we can see that the Colorado public policy, as reflected in legislative enactments, does not "disfavor" clauses which exculpate parties or limit damages but instead it has recognized that such clauses do have social utility in some situations. Accordingly, the Legislature has found them to be void under public policy in some cases and in others enacted provisions accomplishing exculpation or damages limitation, notwithstanding common law. The legislative pronouncements evidence the Legislature's desire and ability to balance the public and private interests with regards to exculpatory provisions.

Given that the Legislature actively makes decisions with regards to clauses limiting liability, it follows that the Court's task in this process should be complementary of, not contradictory to, that of the General Assembly. ***Simon v. Coppola,*** 876 P.2d 10 (Colo. Ct. App. 1993). The Legislature, in essence, is indicating that it should set public policy and the Court's role is to review contracts for unconscionability.

iii. *Jones v. Dressel*

Apparently to provide protections to contracting parties and to provide a consistent approach to claims that such clauses should be unenforceable, this Court

developed a four prong test to review contracts for unconscionability in the ***Jones v. Dressel,*** 623 P.2d 370 (Colo. 1981) decision.

Relying upon Colorado jurisprudence, the Court recognized four factors which determine the validity of an exculpatory agreement. Each of the four prongs is a "public policy" limitation, and violation of any of them would make the exculpatory contract term voidable. Those factors are (1) the existence of a duty to the public; (2) the nature of services performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in a clear and unambiguous language. ***Id.*** at 376. These are, of course, in addition to the general rules that an exculpatory agreement cannot shield a party from willful and wanton acts of negligence. ***Chadwick v. Colt Ross Outfitters, Inc.,*** 100 P.3d 465, 467 (Colo. 2004).

There are two general categories under which contracts can be invalidated: 1) procedural unconscionability; and 2) substantive unconscionability[1]. *See* Leff, *Unconscionability and the Code – The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967). Though exculpatory clauses do not easily fit within either category any analysis the test set forth in ***Jones*** can be applied to analyze issues of both

[1] Procedural unconscionability is when there are flaws in the contract formation. Thus, contracts of adhesion, unfair surprise, inability to negotiate – all of these fall within the umbrella of procedural

procedural and substantive unconscionability. In those instances where judicial intervention in the contractual relationship between parties is necessary, the ***Jones*** test has served as a complementary role to the legislative pronouncements on exculpatory clauses for over 28 years. Tests beyond those four prongs invite litigants to seek judicial redress whenever a contract does not result in their desired outcome. The ramifications and issues surrounding an alteration of the ***Jones*** test becomes even more complicated when one considers that limitation of liability clauses and liquidated damages clauses fall within the same policy considerations as exculpatory clauses. ***United States Fire Ins. Co. v. Sonitrol Mgmt. Corp.,*** 192 P.3d 543, 548 (Colo. Ct. App. 2008).

The adoption of additional elements within the ***Jones*** test would be superfluous as the public policy prongs identified in that test are wholly adequate and no new test is needed.

iv. The Sun Ergoline, Inc. Exculpatory Clause

This case presents a prime example of the difficulties a court faces when setting public policy. In this case, a decision consistent with the position urged by the appellant Boles creates a myriad of questions, the full scope of which cannot be

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unconscionability. Substantive unconscionability is where a contract contains a particularly harsh term, such as an excessive price. ***Id.***

addressed in a single opinion. For example, should the ruling be limited to manufacturers, or should it extend to those liable under the Colorado Products Liability statute, C.R.S. 13-21-401 *et seq.*? Should a ban on exculpatory clauses in contracts only apply to products or should it apply to the service industry – i.e. does it apply only to the tanning booth manufacturer or should it apply to the employee of the tanning booth operator? Should the public policy apply to third parties using the product as well as the purchaser? As one can see from this truncated list, there are a myriad of policy decisions involving any public policy decision that affects exculpatory clauses on products.

Amicus urges that the exculpatory clause in this case meets the four policy concerns set forth in ***Jones.*** This holding was the holding found by the District Court and the Court of Appeals and Amicus adopts their reasoning. Since the clause complies with the restrictions of ***Jones,*** this Court should affirm the rulings of the courts below. Any expansion of the policies that have served as the standards for nearly 30 years is fraught with peril, and would be in contravention of the appropriate balance between courts and the legislature.

Sometimes the results in case before the court may seem to yield an unfair result – for example in this case where an injured party is barred from recovery. While it would be tempting to find a public policy argument where such a result is

avoided, this Court has recognized that Colorado's such statements are matters of legislative prerogative. ***Cooper v. Aspen Skiing Co.,*** 48 P.3d at 1233. For example, Amicus notes that this Court recently held that a public policy goal of this State was to protect "third-party tort victims." ***Friedland v. Travelers Indem. Co.,*** 105 P.3d 639, 653 (Colo. 2005), and such a holding could be used to invalidate any exculpatory clause. However, ***Friedland*** cited and relied upon ***Clementi v. Nationwide Mut. Fire Ins. Co.,*** 16 P.3d 223 (Colo. 2001) which did not recognize a universal public policy of compensating tort victims, but instead noted that the **Colorado legislature** has recognized the public interest in compensating accident victims by enacting the Motor Vehicle Financial Responsibility Act, which has since sunset.

The public interest in compensating tort victims is not sufficient to overcome parties' valid contractual agreements. *See e.g.* ***Fire Ins. Exch. v. Sullivan***, ____ P.3d _____ , 2009 Colo. App. LEXIS 994 (Colo. Ct. App. May 28, 2009) (holding that contract which excludes coverage for intentional injuries and public policy supporting that exclusion precludes compensating injured tort victim). Such policies should not be used interfere with contracts freely entered into.

If this Court were to determine that the facts of this case support the voiding of the exculpatory clauses, then Amicus would urge this Court to limit its ruling to

the particular circumstances presented by this case. Significant unintended and adverse consequences may result from any ruling that is not carefully crafted to address the precise question upon which this Court granted certiorari. Any ruling that is not specifically limited to address the question presented could adversely affect the business community throughout the State in multiple and unforeseen ways.

V. CONCLUSION

As set forth above, Amicus agrees that the tort system is directed toward compensating victims who have been injured is the basis of tort law, but that alone does not justify or provide a jurisprudential basis for invalidating contractual provisions.[2]

Further, it is not the proper role of courts to provide a solution to the complex problem of exculpatory clauses in contracts. A consideration of the difficult social issues that arise out of exculpatory clauses, or liquidated damages clauses, or limitations of liability provisions, is beyond the scope of the adversarial "one-on-one" system. Courts do not have the advantages of a legislative body,

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[2] Indeed, compensating victims leads to the threat of liability, which threat has been shown to deter volunteers from volunteering in nonprofit organizations. *Developments in the Law-Nonprofit Corporations – Special Treatment and Tort Law* (1992), 105 Harv. L. Rev. 1667, 1682. For this very reason and the Ohio Supreme Court upheld the enforcement of exculpatory agreements in a child's recreational soccer application, relying, in part, on legislative enactments. ***Zivich v. Mentor Soccer Club, Inc.,*** 82 Ohio St. 3d 367, 696 N.E.2d 201 (1998).

where information relevant to the issues can be obtained. A court proceeding provides only for limited points of view, in the form of the positions of the litigants. The only way a court system can address these questions would be to litigate and re-litigate. As this Court has recognized before, in instances involving such complex policy decision, the issue is more properly the function of the General Assembly. ***Blackwell v. Del Bosco,*** 191 Colo. 344, 348 (Colo. 1976) ("however desirable the adoption of the rule of implied warranty of habitability might be, the resolution of this issue is more properly the function of the General Assembly").

Finally, unlike the court system, the legislative process provides a forum where all necessary information about the costs, risks and possible consequences can be evaluated and informed decisions can be made. A legislative hearing allows **all** parties with an interest have an opportunity to be heard.

In short, the proper forum for debating and discussing conflicting positions and arguments about the social benefit of exculpatory clauses is the Legislature. Only there can the possible consequences of any action be evaluated in a full and fair setting. Only there can alternatives be proposed and discussed. Only that body can make the determination of the type of protections, if any, that are needed by society in instances such as the case at bar.

Respectfully submitted this 16th day of July, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE COLORADO DEFENSE LAWYERS ASSOCIATION** was filed and served by hand with the Court and via U.S. Mail to all parties, this 16th day of July, 2009, as follows:

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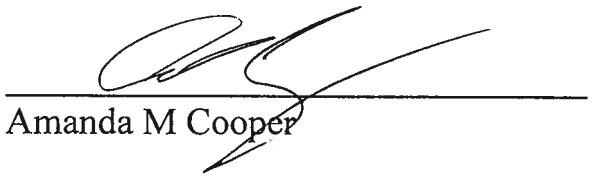

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