

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No.07-cv-01885-MJW-KLM

DAVID J. PFAHLER and,  
MARLENE AMBROGIO

Plaintiffs,

v.

ROBB SWIMM, Custodian for Scott Swimm, and  
SCOTT SWIMM, Individually,

Defendants.

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**PLAINTIFFS' MOTION FOR FORTHWITH INTERIM CIVIL GAG ORDER  
AND MOTION FOR PERMANENT CIVIL GAG ORDER**

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Plaintiffs, by counsel, move the Court for a Civil Gag Order prohibiting the parties to this case and the parties' lawyers from further communicating with representatives of the media, or with any person or entity whom the parties or their attorneys knows or would have reason to know might disseminate information to the public or media. At the heart of plaintiffs' motion is their contention that the defendants' media disclosures have created such substantial negative media coverage concerning the plaintiffs and their claims that the plaintiffs will be unable to have a fair trial.

Plaintiffs also seek a forthwith interim Gag Order containing prohibiting counsel and any party, or Mrs. Susan Swimm, from making media statements or disclosures pending the defendants' briefing and the Court's determination of this motion.

Plaintiffs also respectfully request that this motion be considered by the trial judge, The

Honorable Magistrate Judge Watanabe, as this is a matter integral to the administration of a fair trial.

**Certificate of Conferral Pursuant to D.C.COLO.LCivR 7.1:**

Undersigned counsel for the Plaintiffs certifies that he has conferred with counsel for the Defendants, Michael Wathen. Mr. Wathen indicated that the defendants are not agreeable to having a gag order in place.

**January 12, 2007 Collision**

1. This case arises out of a January 12, 2007 skier / skier collision at Beaver Creek Ski Area. Defendant Scott Swimm, a minor, collided into plaintiff David Pfahler from above and uphill. Mr. Pfahler suffered severe injuries in the collision, including a massive anterior rotator cuff tear requiring surgical repair and extensive rehabilitation.
2. It is undisputed that the skier/skier collision in question occurred on the lower part of *Golden Bear* at the Arrowhead / Beaver Creek ski resort. Plaintiff, David Pfahler was skiing down to the loading area of the *Arrowbahn* lift. His wife, Marlene, was ahead of him. Mr. Pfahler is an experienced and strong recreational skier. He has raced NASTAR, skis regularly in Colorado, and was at all relevant times a well-conditioned, and in-control skier able to make carving, parallel turns on challenging slopes and in challenging conditions.
3. The area of the incident is not a catwalk, as has been widely and incorrectly reported by defendants. As noted in the ski patrol 10-50 report, the incident occurred on *Golden Bear*, near "T 6" which is the convention for indicating Tower 6 of the nearby chair. At this point, *Golden Bear* is a wide run under the *Arrowbahn* chairlift, consisting of a series

of intermediate pitches and terrain changes. The area of the incident is immediately above where the slope begins a long flat runout to the lower terminal of the chairlift.

Attached as **Exhibits 1 & 2** are recent photographs taken as the chair approaches Tower 5, showing the area of the incident. Mr Pfahler will testify that the incident was somewhat below Tower 5 and on skier's left. Undersigned has circled, on **Exhibit 2**, the approximate area where Mr. Pfahler recalls the happening of the incident.

4. For the convenience of the Court and Counsel, attached as **Exhibit 3** is a copy of the Beaver Creek, Arrowhead trail map. The *Golden Bear* trail is circled in red on the trail map for ease of reference.
5. Pfahler's uncontradicted statements and testimony will be that he was making linked and rhythmic, short-radius-parallel turns as he was descending down to the flats. The area is well-known to him and locals as a point where many skiers "point them downhill" in order to gain the necessary momentum to cross the flats below the area of the incident, and to reach the loading area for the *Arrowbahn* chairlift without having to walk or pole across the lower flats.
6. Pfahler never saw what was coming. All he knows is that his legs were suddenly knocked out from under him, and that he was upended by the minor defendant who hit him at high speed from behind. Mr. Pfahler came down very hard on his right shoulder, felt it dislocate, then relocate back into the socket. The defendant - then seven-year-old Scott Swimm - was actually caught up under Pfahler. The minor defendant instantly apologized, and they disentangled. Any suggestion that Pfahler grabbed Scott Swimm's ankles, is totally false, as Mr. Pfahler was suffering at the time with what was later

diagnosed as a "massive rotator cuff tear." To the contrary, his right arm was totally disabled and he was clutching it with his left hand to immobilize it. Mr. Pfahler has never previously injured his right shoulder, as Mr. Swimm now alleges that Mr. Pfahler stated; nor has Mr. Pfahler ever previously been in a skier collision.

7. Nor was there any cussing or "verbal altercation." Pfahler knew he was badly hurt. He asked that ski patrol be called, and another passing skier who may or may not have seen the accident indicated that he would contact ski patrol. Pfahler asked the adult present - Mr. Robb Swimm - to please go uphill of the accident scene in order to prevent Pfahler from being hit again. Robb Swimm did so.
8. Ski patrol arrived, packaged Pfahler up, and took him down by toboggan to the first aid facility, from which he was transferred, x-rayed and then diagnosed. Swimm did not come to the first aid facility. The ski patrol report makes no mention of any harsh words, cussing, or "ski rage." The Eagle County Sheriff was not called. The patrol report consists solely of one 10-50 card, plus one-page standard collision report cards filled in by each party. On the 10-50 card, the attending ski patroller wrote that Pfahler was: "hit from behind by child Scott Swimm."
9. The report filled out for Scott Swimm by his father giving a brief description of the accident states in the father's hand: "Skier in front cut in front my son he was unable to stop in time." [sic] s/ Robb Swimm.
10. Dave Pfahler wrote: "Hit from behind with no warning by son of other party." Copies of the 10-50 card and collision statements which were filled out by the parties at the scene, and immediately following the incident are attached as **Exhibit 4**.

**Applicable law re: validity of Plaintiffs' claims**

11. In *Doering ex rel. Barrett v. Copper Mountain, Inc.*, 259 F.3d 1202, 1212 (10th Cir.

2001) the court held:

The district court found the Ski Safety Act was inconsistent with the common law rule that children under the age of seven cannot be negligent or assume a risk. The district court ruled that the Act thus controlled and the jury could find the Doering children negligent. The Doering children challenge these rulings. This court reviews the district court's interpretation of the Ski Safety Act de novo. . .

At common law, children under the age of seven are incapable of being contributorily negligent. *See Benallo v. Bare*, 162 Colo. 22, 427 P.2d 323, 325 (Colo.1967) (en banc). The common law, however, is inconsistent with the Ski Safety Act, which applies to "any person." Absent clear legislative intent, the common law prevails in any conflict with statutory law. *See Bayer*, 960 P.2d at 74-75. The Ski Safety Act indicates that "[i]nsofar as any provision of law or statute is inconsistent with the provisions of this article, this article controls." Colo.Rev.Stat. § 33-44-114. This provision expresses the Colorado Legislature's clear intent to abrogate the common law when it conflicts with the Act. Accordingly, the district court properly ruled that the Ski Safety Act controls and could render the conduct of the Doering children negligent.

12. Richie and Kimberly Doering were ages four and six respectively at the time they were involved in the accident that the Court considered in *Doering, supra* at 1207. It is therefore settled Colorado law that the age of Scott Swimm is immaterial to his liability.
13. The Colorado Ski Safety Act explicitly provides that the uphill skier has the primary duty to avoid a collision with the downhill skier. C.R.S. § 33-44-109. The Colorado Ski Safety Act provides:

Each skier solely has the responsibility for knowing the range of his own ability to negotiate any ski slope or trail and to ski within the limits of such ability. Each skier expressly accepts and assumes the risk of and all legal responsibility for any injury to person or property resulting from any of the inherent dangers and risks of skiing; except that a skier is not precluded under this article from suing another skier for any injury to person or property resulting from such other skier's acts or omissions. Notwithstanding any provision of law or statute to the contrary, the

risk of a skier/skier collision is neither an inherent risk nor a risk assumed by a skier in an action by one skier against another.

Each skier has the duty to maintain control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and objects. However, the primary duty shall be on the person skiing downhill to avoid collision with any person or objects below him.

C.R.S. §§ 33-44-109(1); (2)

14. Fed. R. Civ. P. 17(c) clearly makes it proper to name the minor child as a party, as well as his custodian/parent, who then has the right to defend.
15. Thus, the claims brought by the Pfahlers are well-founded in fact and law; they are legitimate claims for damages under Colorado law; and they are neither frivolous, groundless nor baseless.

#### **Defendants' media campaign**

16. Notwithstanding these explicit Colorado statutory provisions, first indicating that the risk of a skier/skier collision is not a risk assumed while skiing, and further that the uphill or overtaking skier is responsible to avoid the skier below, the defendants, in concert with an uninformed press, or deliberately ignorant press, have initiated a media campaign to publicly discuss their version of events, in some cases inconsistently, and in other cases by exaggeration, but in any event to try the case by "sound bite." The defendants' actions, combined with media commentary, and uninformed legal opinions as to the liability of minors on Colorado ski slopes, have caused the public to vilify and humiliate the plaintiffs. The widespread media has had significant local impact, making it reasonably probable that the plaintiffs would be unable to have a fair trial.
17. Contending that minors are immune, (*Cf.*, Steve Lynn, *Boy, 8, Sued in Beaver Creek Ski*

*Collision*, THE VAIL DAILY, Dec. 19, 2007, attached here as **Exhibit 5**), or that skier collisions are a risk of skiing, (*Cf.*, William Porter, *8 Year Old Learns Risk of Skiing*, DENVER POST, Dec. 24, 2007, attached here as **Exhibit 6**)(trivializing Pfahler's claims and injuries), the media has published countless articles based upon repeated statements by Mr. & Mrs. Swimm, which have intended to and have embarrassed plaintiffs, caused harassment against plaintiffs, stimulated hateful calls, confrontations, and even jeering messages to plaintiffs.

18. Starting in mid-December, 2007, Robb Swimm and his wife, Susan, began to engage the media in a series of interviews and photo opportunities relating to the Pfahler's lawsuit. The story was first published by The Vail Daily on December 19, 2007. **Exhibit 5**. (It has since been edited on the newspaper's online archive). The article contained several quotes and comments attributed to members of the Swimm family, angrily criticizing plaintiffs for bringing a civil action against their minor child.
19. The Vail Daily article also contained a very damaging and inaccurate statement of law made by Colorado Law School Professor Claire Huntington, which suggested that the plaintiffs' lawsuit was frivolous as to the claims against the minor. The article summarized Professor Huntington's comments as follows:

*"Colorado law says a minor cannot be sued, but his or her parents can, said Claire Huntington, associate professor at the University of Colorado Law School. "This is just a basic rule," she said. The court will likely dismiss Scott from the lawsuit, she said."*

Steve Lynn, *Boy, 8, Sued in Beaver Creek Ski Collision*, THE VAIL DAILY, Dec. 19, 2007, attached as **Exhibit 5**.

20. Professor Huntington's comments were un-researched, uninformed, unknowledgeable

and incorrect. The professor was apparently ignorant of the *Doering* decision, which explicitly held that the doctrine of the diminished duty of care of children was abrogated by the Colorado Ski Safety Act. Following a phone call between Mr. Chalats and Professor Huntington, during which the Professor admitted knowing “nothing about ski cases,” she issued a letter of “clarification,” which was given was given a back page publication. **Exhibit 7.**

21. On December 20, 2007, the Associated Press picked up for national dissemination a summarized version of the Vail Daily article, including the inaccurate statement of law made by Professor Huntington. **Exhibit 8.**
22. Over the next few days, the Vail Daily, the Denver Post, the Rocky Mountain News, the Summit Daily, the Grand Junction Free Press, and the Colorado Springs Gazette carried the story in one form or another. The story has since been featured on local and national television and many other media (including Fox News, ABC, CNN, and AOL web sites), setting off a media firestorm. The focus has been on David Pfahler bringing what is being described as a “frivolous” lawsuit against a minor who “cannot be sued.”
23. Now, undersigned has been contacted by ABC news, for an appearance on Good Morning America, and on 20/20, and by other media outlets, apparently having secured the Swimm’s consent to appear on national television to continue their campaign.
24. Even since the initial interview with the Vail Daily on December 19, 2007, the Swimm have sought out additional media attention in an ongoing effort to encourage the inaccurate and inflammatory media attention surrounding the case, causing the Pfahlers to be subjected to “an electronic tar and feathering.” (quoting Jim Chalats, December 24,

2007, **Exhibit 9**) (*available at*

[http://blogs.rockymountainnews.com/denver/rockytalklive/archives/2007/12/who\\_sues\\_a\\_n\\_8yearold\\_and\\_why\\_n.html](http://blogs.rockymountainnews.com/denver/rockytalklive/archives/2007/12/who_sues_a_n_8yearold_and_why_n.html). Last visited Jan. 8, 2007).

25. Further, on December 24, 2007, Denver Post ran a column by William Porter in which Susan Swimm is quoted as saying:

*“It’s ludicrous. This man [David Pfahler] should be drawn and quartered.”*

William Porter, *8 Year Old Learns Risk of Skiing*, DENVER POST, Dec. 24, 2007, attached here as **Exhibit 6**.

This is the type of statement from a party which is deliberately and intentionally designed and spoken to inflame passions, and prejudices. It is positively inflammatory for a party to suggest that another party should be violently murdered for filing a civil claim. Such statements are not protected. Mrs. Swimm is closely identified with the defendants Scott and Rob Swimm, and as an interested party who is empowered to act on behalf of the minor child. As the minor’s custodial or guardian relationship, the court should be empowered to exercise jurisdiction over her under Fed. R. Civ. Pro. Rule 17(c).

26. Unfortunately, although Mr. Porter had at his fingertips an e-mail from undersigned with the legal authority, Mr. Porter chose not to mention the pertinent law. *Cf. Exhibit 10*.

27. Most recently, in a January 2, 2008 article published in the L.A. Times, Susan Swimm made the following comments:

*“The young skier’s parents, Susan and Robb Swimm, are happy the public shares their outrage. “People are really angry about this, and they should be,” she [Susan Swimm] said.*

Nicholas Riccardi, *Ski Accident Snowballs into a Public Dispute*, LOS ANGELES TIMES, Jan. 2, 2008, attached as **Exhibit 11**.

28. Photographs of Scott Swimm and his father Robb (apparently taken inside their home) have been featured on several news websites and newspapers, indicating that the Swimms are actively and openly maintaining a media campaign to draw sympathy to themselves and create a backlash against David Pfahler. *See e.g.*, **Exhibit 11**. The Swimms have also granted television interviews from their home. One interview has been picked up by news agencies around the world, including reporters as far away as New Zealand. The New Zealand news channel, "TV 3" has posted an interview with the Swimms on their website: [www.tv3.co.nz](http://www.tv3.co.nz). It is unknown whether the Swimms are being paid for these interviews.
29. Not surprisingly, as a consequence of the Swimm's inflammatory media campaign, the Pfhalers have been subjected to extensive criticism here in Colorado and, also, in their hometown in Pennsylvania. Last month, they were forced to leave their home during the holiday season to escape the constant harassment by telephone and email.
30. They were even subjected to threats of bodily harm. The following comments were posted on the internet by a resident of Spinnerstown, PA, which is approximately 20 miles from the Pfahler's home:

*"What is this old guys address???? or info???? anyone know?"*

Other comments include:

*"I'm 61 and think that adult skier is a punk. Someone should whack his OTHER rotator cuff. . . . I'd like to beat him myself!"*

*"Watch out Pfahler, the next time you bump into someone, I hope you get yours in return."*

31. In response, others posted the Pfahler's home address on the internet. The following

comment was posted recently on the Rocky Mountain News website from a Pennsylvania resident:

*“From the people of PA we are very sorry about the mentality of this man. Please feel free to contact him with your thoughts:  
David J. Pfahler  
[Correct address omitted]  
Merry Christmas.”*

And, the following was posted on the website of the Morning Call, a local newspaper in the Pfahlers’ hometown:

*"What’s his address? I think we should all send him our "complements"*

Another Pennsylvania reader responded to the above comment by posting the Pfahler’s home address on the website.

32. Additionally, Mr. Pfahler’s employer, Readers Digest, has received numerous calls from individuals asking that Mr. Pfahler be fired. Several individuals have also posted messages on the internet indicating that they have contacted Readers Digest by email demanding that he be fired.
33. Finally, plaintiffs’ counsel have also received numerous threats by email and phone. The following is perhaps the most disturbing example: *“I hope you and any children in your family get the worst possible cancer there is. Please tell Mrs. Pfahler I hope she gets Ovarian Cancer. And I hope you go to HELL for representing him. You are a bunch of Bush loving rednecks and you are everything that is wrong with the U.S. Because of you we will be wishing each other Happy Ramadan soon. Go out of business and drown in you own retard slobber. Please tell Mr. Pfahler I will pray that he gets a very painful disease and suffers for a long time. I hate you and him and his fat pig wife.”*

34. Other people have found it entertaining to “robocall” undersigned’s office, tying up office phone lines, and have done the same to the Pfahlers’ phone. Undersigned had a conversation with the Allentown Daily Call, the Pfahlers’ local newspaper. The reporter told undersigned that he went to the Pfahler home because “protesters” were staging a demonstration.
35. Plaintiffs are private citizens and have refrained from making statements to the media, opting to refer all requests for comment to their undersigned counsel. Plaintiffs’ counsel has been contacted by major local and national media outlets, including major television networks. Representatives from television shows such as “20/20,” “Inside Edition,” and “The CBS Early Show” have asked undersigned to appear on behalf of the Pfahlers, indicating that the Swimms are intending to make television appearances.
36. To local media, counsel has made general statements about the law in Colorado. Colo. R.P.C. 3.6(a)
37. Pursuant to Colo. R.P.C. 3.6(c) undersigned has made statements to the Los Angeles Times, the Allentown Call, and the Rocky Mountain News in which I conveyed a denial of the heated and exaggerated allegations made by defendants.

#### **Request for a Civil Gag Order**

38. "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges v. State of California*, 314 U.S. 252, 271 (1941).
39. “Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice. But it must not be allowed to divert the trial from the very purpose of a court system to adjudicate controversies, both

criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures. Among these legal procedures is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources.” *Sheppard v. Maxwell*, 384 U.S. 333, 350-351 (1966)(citations omitted).

40. "Trial courts have a wide discretion in being able to protect the judicial process from influences that pose a danger to effective justice." *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986). This would include the authority to issue a Civil Gag Order.
41. A party seeking to impose a gag order on any trial participant must show that there is a “reasonable likelihood” that media attention or extrajudicial commentary will prejudice a fair trial. *U.S. v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969). *See also, U.S. v. Brown*, 218 F.3d 415, 425 (5th Cir. 2000)(“[t]he Supreme Court and other Courts of Appeals have recognized a distinction between participants in the litigation and strangers to it, pursuant to which gag orders on trial participants are evaluated under a less stringent standard than gag orders on the press.”). Here there is a “reasonable likelihood” that ongoing extrajudicial commentary will prejudice a fair trial.
42. The defendants continued proliferation of this media campaign against the Pfahlers will prejudice the Pfahlers’ right to a fair trial. *Tijerina*, 412 F.2d at 666.
43. The effect on potential jurors can be easily measured by the number of internet postings on local websites. In response to the December 20, 2007 article carried by the Denver Post and Rocky Mountain News, there are hundreds of reader comments regarding the story, almost all of which are negatively biased against the Pfahlers. The one-sided portrayal of the facts of the case by the Swimm family, coupled to heated and untrue

allegations that Mr. Pfahler raged, swore at, and grabbed at Scott Swimm, and further buttressed by untrue, inaccurate and uninformed statements of the law, are resonating with large members of the local public. These postings, in which readers (potential jurors) decry one party's position before trial, are specific evidence that there is a reasonable likelihood that the ongoing media blitz poses a real threat that the Pfahlers will be deprived of a just resolution of their dispute.

44. A gag order is also necessary to protect the Pfahlers from physical harm.
45. As noted above, the Pfahlers have received threats of bodily harm and have been the subject of specific, threatening posts on the internet.
46. Despite the obvious importance of the First Amendment right to free speech, this right must by necessity fall in line behind the importance of protecting the Pfahlers' safety as this case progresses.
47. In this civil lawsuit, where free speech concerns are not as great as in a criminal case, *see Journal Pub. Co.*, 801 F.2d at 1236, the Pfahler's right to be free of bodily harm should come before the Swimm's' right to try this case in the court of public opinion. As Judge Matsch noted in *U.S. v. McVeigh*, 918 F.Supp. 1452 (W.D.Okl. 1996): "The news media and the public are spectators, not participants, in the process of adjudication."

**WHEREFORE**, Plaintiffs move the Court for a Civil Gag Order prohibiting the parties to this case and the parties' lawyers from having any further contact with representatives of the media, or with any person or entity whom the parties or their attorneys knows or would have reason to know might disseminate information to the public or media in any form.

Plaintiffs also seek an interim Gag Order containing these same prohibitions pending the

Court's consideration of plaintiffs' motion.

Plaintiffs also respectfully request that this motion be considered by Magistrate Judge Watanabe, who will preside over trial, as this is a matter integral to the administration of a fair trial, and not simply a disclosure/discovery matter.

Dated January 8, 2008.

Respectfully submitted,

**CHALAT HATTEN LAW OFFICES, P.C.**

*/s James H. Chalats*

*/s Russell R. Hatten*

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**CERTIFICATE OF MAILING**

I hereby certify that on January 8, 2008, a true and correct copy of the foregoing was electronically served on:

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*s/ Russell R. Hatten*

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