

DISTRICT COURT, BOULDER COUNTY, STATE OF COLORADO 20th Judicial District 1777 6 th St. Boulder, Colorado 80306	DATE FILED: November 17, 2021 8:04 PM FILING ID: C9F0515ED0083 CASE NUMBER: 2021CV30000
AMBER MARSHALL , a Disabled Minor Child, by and through her duly appointed Conservator, SARA MARSHALL , Plaintiffs, v. BACKCOUNTRY ACCESS, INC. , a Colorado corporation, and K2 SPORTS, LLC , an Indiana limited liability company, Defendants	<p style="text-align: center;">COURT USE ONLY</p>
Attorneys for Plaintiffs: Paul J. Komyatte (No. 22750) David P. Mason (No. 41333) The Komyatte Law Firm LLC 1536 Cole Blvd., Suite 300 Lakewood, CO 80401 Ph: 720-975-8553 Fax: 720-528-8072 paul@komyattelawfirm.com dave@komyattelawfirm.com	Case No.: 2021CV030000 Division: 2
<p style="text-align: center;"><u>SECOND</u> AMENDED COMPLAINT AND JURY DEMAND</p>	

COME NOW, the Plaintiffs, by and through their counsel, The Komyatte Law Firm LLC, and as their Second Amended Complaint against the Defendants and each of them, state and allege as follows:

INTRODUCTION

1. This is a product liability action to recover damages suffered by Plaintiff, Amber Marshall, arising from the wrongful death of her father, Peter Marshall, due to the negligent and unlawful conduct of the Defendants, Backcountry Access, Inc. and K2 Sports, LLC, and the failure

of a defective “Float 32” avalanche airbag that was designed, manufactured, distributed, marketed, and sold by the Defendants in Boulder County, Colorado. Plaintiff, Amber Marshall, through her duly appointed conservator, Plaintiff, Sara Marshall, seeks damages for the wrongful death of the decedent, her father, Peter Marshall.

PARTIES

2. Plaintiff, Amber Marshall, is a disabled minor child and a citizen and resident of the State of Colorado, residing in Longmont, Weld County, Colorado. She brings this action through her duly appointed conservator, Plaintiff, Sara Marshall.

3. Plaintiff, Amber Marshall, is the daughter and wrongful death heir of the decedent, Peter Marshall.

4. Plaintiff, Sara Marshall, is the duly appointed conservator and mother of the disabled minor child, Plaintiff, Amber Marshall. Plaintiff, Sara Marshall, also resides in Longmont, Weld County, Colorado.

5. Plaintiff, Sara Marshall, brings this action solely in her capacity as conservator of Plaintiff, Amber Marshall.

6. Defendant Backcountry Access, Inc. is a Colorado corporation headquartered and with its principal place of business in Boulder, Boulder County, Colorado.

7. Defendant K2 Sports, LLC is believed to be an Indiana limited liability company headquartered and with its principal place of business in Seattle, Washington.

8. Defendants Backcountry Access, Inc. and K2 Sports, LLC may hereinafter be collectively referred to as “Defendants.”

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to C.R.S. § 13-1-124(1)(a), (b),

and (c).

10. This Court has personal jurisdiction over the Defendants because the Defendants have transacted and continue to transact business in Colorado, because the Defendants have committed the tortious acts and omissions complained of herein in Colorado, and because the Defendants may own, use, and possess real property in Colorado.

11. Specifically, the Defendants have purposefully and actively availed themselves of the privileges and benefits of doing business in Colorado, both directly and through agents and subsidiary and related entities, including marketing, distributing, and selling products including the subject “Float 32” avalanche airbag throughout Colorado; maintaining ongoing and contractual warranty repair and recall responsibilities with respect to such products sold and used in Colorado; and marketing and selling defective products in Colorado, including but not limited to the subject “Float 32” avalanche airbag.

12. The Defendants have specifically and intentionally targeted Colorado for the sale of their products, including but not limited to the subject “Float 32” avalanche airbag.

13. The Defendants have specifically, intentionally, and routinely placed their products into the stream of commerce in Colorado and/or with the intent and expectation that their products, including the subject “Float 32” avalanche airbag device, will be purchased and used in Colorado, including in Boulder County.

14. The Defendants know their products, including the subject “Float 32” avalanche airbag device, will reach Colorado, including in Boulder County.

15. The Defendants purposefully serve the Colorado market and conduct business in Colorado, including in Boulder County.

16. The Defendants are believed to have employees who live and/or work in Colorado,

including in Boulder County.

17. The Defendants are believed to have designed, tested (or failed to test), manufactured, fabricated, and distributed the subject “Float 32” avalanche airbag and/or one or more of its components in Boulder County, Colorado.

18. The Defendants advertise, market, distribute, and sell their products, including the subject “Float 32” avalanche airbag device, to Colorado consumers including consumers in Boulder County.

19. A substantial portion of the Defendants’ yearly revenues are generated by sales of products to Colorado consumers, including sales of the subject “Float 32” avalanche airbag device to consumers in Colorado and in Boulder County.

20. The subject “Float 32” avalanche airbag device was marketed and sold by the Defendants in the State of Colorado including in Boulder County.

21. Venue is proper in this Court pursuant to C.R.C.P. 98(c) because one or more of the Defendants reside in Boulder County and because the tortious conduct complained of occurred in Boulder County.

GENERAL ALLEGATIONS

22. Plaintiffs incorporate all other allegations in this complaint as if set forth herein.

23. The decedent, Peter Marshall, participated in an avalanche safety course in the San Juan Mountains of southwestern Colorado on January 5, 2019.

24. At the time of the course, Peter Marshall was properly wearing a Float 32 avalanche airbag designed, manufactured, distributed, marketed, and sold by the Defendants.

25. The subject Float 32 avalanche airbag consisted of a specially-designed backpack housing an inflatable airbag connected to a cylinder of compressed gas and a trigger mechanism.

26. The subject Float 32 avalanche airbag was designed to rapidly deploy and inflate if the user was caught in an avalanche, such that the user would “float” at or near the top of the avalanche debris and snow rather than sinking into the debris and being buried under feet of heavy snow.

27. The subject Float 32 avalanche airbag was designed to prevent or minimize the user’s burial depth in an avalanche, and to create a survival space for the user, so as to protect them and improve their chances of survival in the event of an avalanche.

28. At all relevant times, the Defendants knew or should have known of actual defects with the subject Float 32 avalanche airbag. Shortly before the subject Float 32 avalanche airbag was manufactured, the Defendants recalled, participated in a recall, and/or approved and supported the recall of large numbers of substantially similar Float model avalanche airbags because of a flaw that could lead to failure of the trigger mechanism and failure of the airbag to properly, timely, and fully deploy and inflate. As such, the Defendants knew or should have known of defects in the subject Float 32 avalanche airbag that could lead to failures of deployment and/or inflation, and further knew or should have known that insufficient changes were made to the design of avalanche airbags manufactured after the recall to prevent such failures. As such, the Defendants knew or should have known of the actual defects in the subject avalanche airbag, which was manufactured and sold after this recall.

29. The decedent, Peter Marshall, was caught in an avalanche during the avalanche safety course on January 5, 2019.

30. The subject Float 32 avalanche airbag being properly worn by Peter Marshall failed to properly, timely, and fully deploy and inflate during the subject avalanche.

31. As a result, Peter Marshall was buried under approximately eight to nine feet of

snow.

32. Peter Marshall attempted to trigger his Float 32 avalanche airbag system but it did not fully deploy or inflate.

33. The coroner later concluded that Peter Marshall died of asphyxia secondary to being buried in eight to nine feet of snow for nearly one hour.

34. Some of the allegations herein have been made and/or may be perceived to have been made in the alternative. *Accord* C.R.C.P. 8(e)(2). Plaintiffs will elect which claims and allegations they intend to pursue before the time of trial.

COUNTS AGAINST ALL DEFENDANTS

COUNT I Strict Products Liability

35. Plaintiffs incorporate all other allegations in this complaint as if set forth herein.

36. The subject Float 32 avalanche airbag was defectively designed, manufactured, fabricated, distributed, sold, recommended, tested, inspected, supplied, marketed, and placed into the stream of commerce by the Defendants.

37. The Defendants designed, tested, failed to test, assembled, specified, fabricated, distributed, marketed, and sold the subject avalanche airbag and its components, and placed the subject avalanche airbag and its components into the stream of commerce knowing that the subject avalanche airbag and its components would be used in their intended manner.

38. At the time of the subject incident described above, the subject avalanche airbag and its components were being used in a manner and fashion that were foreseeable to the Defendants and in which they were intended to be used.

39. At the time the subject avalanche airbag and its components left the control of the

Defendants, they were defective and unreasonably dangerous to a person who might reasonably be expected to use them. These defects include but are not limited to the conditions described in this cause of action and also described elsewhere in this Complaint.

40. The subject avalanche airbag was unreasonably susceptible to non-deployment and non-inflation or under-inflation in its design and manufacture. The subject avalanche airbag failed to provide reasonable protection to users in foreseeable avalanche conditions.

41. Specifically, the subject avalanche airbag lacked adequate inflation and triggering systems and also lacked sufficient warnings on the risks of non-deployment and non-inflation or under-inflation.

42. The subject avalanche airbag was unreasonably dangerous in that it failed to provide reasonable protection to users when being used in its intended and foreseeable manner.

43. The subject avalanche airbag contained a manual triggering mechanism that was deficient and that failed to provide reasonable protection to users during foreseeable use, including in foreseeable avalanche conditions. Despite his proper use or attempted proper use of the subject avalanche airbag, the user of the subject avalanche airbag was buried and killed in an avalanche after the avalanche airbag failed to properly and fully deploy and inflate. The avalanche airbag and its components failed to adequately protect Peter Marshall and protect him from being buried and killed.

44. The subject avalanche airbag contained an inflation system that was inadequate to reasonably protect users when exposed to foreseeable avalanche conditions, including the avalanches described herein.

45. The subject avalanche airbag had a dangerous propensity to fail to timely, properly, and fully deploy and inflate in foreseeable avalanche conditions, subjecting the user to

unreasonable risk of serious injury or death from being buried in an avalanche. Peter Marshall was buried and killed after the avalanche airbag failed to timely, properly, and fully deploy and inflate.

46. The subject avalanche airbag lacked adequate and sufficient warnings and instructions about the risks, dangers, and harms presented by the subject avalanche airbag as described in detail herein and the reasonable means to reduce or prevent such risks, dangers, and harms. In particular, the subject avalanche airbag lacked a warning that it could fail to timely, properly, and fully deploy and inflate so as to provide adequate protection during foreseeable avalanche conditions, including the avalanche conditions described herein, and that its triggering and inflation mechanisms were prone to failure in such conditions.

47. The subject avalanche airbag lacked an automatic or remote triggering mechanism which would have provided additional protection to the user in avalanche conditions such as those described herein.

48. The subject avalanche airbag lacked an alternative or backup inflation mechanism which would also have provided additional protection to the user in the event the avalanche airbag failed to timely, properly, and fully deploy and inflate in avalanche conditions such as those described herein.

49. The subject avalanche airbag's design failed to incorporate other designs and technologies which could protect users from foreseeable dangers in foreseeable avalanche conditions. The Defendants were aware of some such designs and technologies, including but not limited to superior designs and technologies used by other manufacturers and/or by the Defendants in other designs, products, or prototypes.

50. The subject avalanche airbag's various systems and components failed to work in conjunction with one another to provide proper and appropriate protection to Peter Marshall.

Despite properly maintaining, assembling, wearing, and using the subject avalanche airbag, the subject avalanche airbag failed to timely, properly, and fully deploy and inflate, resulting in Peter Marshall being buried and killed. The subject avalanche airbag's various systems and components, including but not limited to its triggering and inflation systems, failed to work together and in unison to provide Peter Marshall with effective protection and to prevent injurious impacts including being buried under eight to nine feet of snow.

51. For all the reasons set forth in this Count and throughout this Complaint, the subject avalanche airbag was defective and unreasonably dangerous to a person who might reasonably be expected to use it.

52. The subject avalanche airbag was expected by the Defendants to reach, and did reach, the user without substantial change in the condition in which it was placed on the market.

53. Peter Marshall was a person who would reasonably be expected to use the subject avalanche airbag.

54. The defects in the subject avalanche airbag and its components were a proximate cause of the death of Peter Marshall.

55. The Defendants are strictly liable for the wrongful death of Peter Marshall.

56. As a direct and proximate result and consequence of the defective and unreasonably dangerous condition of the subject avalanche airbag, Plaintiffs suffered injuries, damages, and losses including but not limited to the wrongful death of the decedent, Peter Marshall.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in an amount to be determined at trial and for such other and further relief as the Court deems just and proper.

COUNT II
Negligence

57. Plaintiffs incorporate all other allegations in this complaint as if set forth herein.

58. At all relevant times, the Defendants were engaged in the business of designing, manufacturing, testing, selling, and placing into the stream of commerce the subject Float 32 avalanche airbag and other similar avalanche airbags throughout the United States and throughout Colorado.

59. The Defendants had a legal duty to conform their conduct to the law and to that of a reasonable corporation, which includes adequately and properly manufacturing, designing, testing, and selling their products, including the subject avalanche airbag, and providing adequate warnings and instructions to users of the subject avalanche airbag and acting without negligence or other wrongful conduct in so doing.

60. The Defendants negligently designed, tested or failed to test, approved, manufactured, fabricated, specified, marketed, distributed, and sold the subject avalanche airbag and its components in that they failed to exercise reasonable care to prevent the subject avalanche airbag and its components from creating an unreasonable risk of harm to a person who might reasonably be expected to use it in an expected or reasonably foreseeable manner.

61. The Defendants breached their duties and failed to conform their conduct to the law and to that of a reasonable person, causing the wrongful death of Peter Marshall.

62. At the time of the design and manufacture of the subject avalanche airbag, the Defendants were aware or should have been aware of the defects in the subject avalanche airbag but inserted the subject avalanche airbag into the stream of commerce anyway, without seeking to design out the defects, guard against them, use a safer alternative design, and/or provide reasonable or adequate warnings to consumers such as purchasers and users of the subject avalanche airbag including Peter Marshall.

63. At the time of the design and manufacture of the subject avalanche airbag, the

Defendants were aware or should have been aware of safer alternative designs that were technologically and economically feasible, but the Defendants chose not to incorporate these alternative designs in the subject avalanche airbag. Such designs included but are not limited to remote, automatic, and other triggering and inflation mechanisms that would have resulted in the subject avalanche airbag properly and fully deploying and inflating on the date that Peter Marshall was killed.

64. At the time of the design and manufacture of the subject avalanche airbag, the Defendants knew that it was critical from a safety standpoint to provide proper and adequate triggering and inflation mechanisms to users of their avalanche airbag products so as to avoid serious injuries and death of foreseeable users due to failures of their products to properly and fully deploy and inflate in foreseeable avalanche conditions. The Defendants knew that their avalanche airbag systems and components, including the triggering and inflation mechanisms, needed to work together and in conjunction to achieve this purpose. The Defendants also knew there were available safety technologies that could effectively protect foreseeable users from such dangers, risks, and harms during foreseeable avalanche conditions.

65. At the time of the design and manufacture of the subject avalanche airbag, the Defendants were aware or should have been aware of the susceptibility of the triggering and inflation mechanisms in the subject avalanche airbag to fail to provide reasonable protection to foreseeable users in foreseeable avalanche conditions, and that such failures would subject such users to risk of catastrophic injuries or death. Specifically, the Defendants were aware or should have been aware that the triggering and inflation mechanisms in the subject avalanche airbag would permit a user to suffer injuries or death resulting from being buried under feet of snow during foreseeable avalanche conditions.

66. At the time the subject avalanche airbag was designed and manufactured, the Defendants had only just recently issued a recall of substantially similar avalanche airbags for defects that could lead to a failure of the airbag to properly, timely, and fully deploy and inflate in an avalanche. The experience of this recall should have heightened the Defendants' awareness of the need to ensure a proper design and the employment of proper manufacturing processes to minimize the potential for such failures.

67. The Defendants failed to take reasonable and appropriate steps after the Float avalanche airbag recall to ensure that the post-recall avalanche airbags they designed and manufactured were reasonably safe and reasonably resistant to such failures.

68. The Defendants failed to take reasonable and appropriate steps after the Float avalanche airbag recall to ensure that the post-recall avalanche airbags they designed and manufactured were designed and manufactured in a way and manner that would render them reasonably safe and reasonably resistant to such failures.

69. The Defendants' knowledge as described in this Complaint is believed to be reflected in internal communications, meeting minutes, and/or testing performed by or known to the Defendants.

70. The Defendants' knowledge as described in this Complaint is believed to be reflected in reports of other incidents involving Defendants' other avalanche airbag products.

71. The Defendants' knowledge as described in this Complaint is believed to be reflected in the results of tests, studies, and analyses conducted by the Defendants and by others.

72. The Defendants acted unreasonably and were negligent in designing, manufacturing, marketing, and selling an avalanche airbag that presented a substantial and unreasonable risk of injury and death to users of the avalanche airbag, including Peter Marshall.

73. The Defendants knew or should have known that their actions in designing, manufacturing, marketing, and selling the subject avalanche airbag not only created an unreasonable risk of harm to consumers, but involved a high probability that such harm would actually result.

74. In engaging in the design, manufacture, and sale of the subject avalanche airbag, the Defendants undertook a conscious choice of a course of action with knowledge of the serious danger to others and/or with knowledge of facts which would disclose this danger to any reasonable person or corporation.

75. The Defendants breached their duties and obligations as set forth in this Count and elsewhere in this Complaint by designing, manufacturing, and selling the subject avalanche airbag with the defects set forth in this Count and elsewhere in this Complaint, which defects were known to or should have been known to the Defendants.

76. As a direct and proximate result and consequence of the tortious acts and omissions of the Defendants described herein, Plaintiffs and the heirs of Peter Marshall suffered injuries, damages, and losses including but not limited to the wrongful death of the decedent, Peter Marshall.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in an amount to be determined at trial and for such other and further relief as the Court deems just and proper.

COUNT III
Breach of Express and Implied Warranties

77. Plaintiffs incorporate all other allegations in this complaint as if set forth herein.

78. At all relevant times, the Defendants knew the particular purposes for which the subject avalanche airbag and its components were required and were to be used, and that users such as Peter Marshall would rely on their skill and judgment in designing, engineering, testing,

manufacturing, fabricating, inspecting, and maintaining goods suitable for such purposes and uses.

79. At all relevant times, the subject avalanche airbag and its components were not fit for the particular purposes for which they were intended and for which they were used.

80. At all relevant times, the subject avalanche airbag and its components did not conform to the warranties, affirmations, and representations made by the Defendants.

81. The defective and unreasonably dangerous condition of the subject avalanche airbag and its components constitute breaches by the Defendants of their express and/or implied warranties, rendering them liable for the wrongful death of Peter Marshall due to the defects and inadequacies in the design, engineering, testing, manufacture, fabrication, inspection, and maintenance of the subject avalanche airbag and its components.

82. The Defendants' breach of express and implied warranties was a cause of the wrongful death of Peter Marshall, as set forth elsewhere herein.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in an amount to be determined at trial and for such other and further relief as the Court deems just and proper.

**COUNT IV
WRONGFUL DEATH**

83. Plaintiffs incorporate all other allegations in this complaint as if set forth herein.

84. As a direct and proximate result of the negligent and unlawful conduct of the Defendants as described herein, Plaintiffs have suffered and in the future will suffer the following general and special damages resulting from the wrongful death of Peter Marshall:

- a. Grief, past and future;
- b. Loss of affection, society, companionship, guidance, and counseling, past and future;
- c. Pain and suffering, mental anguish, and emotional distress, past and future;

- d. Funeral and burial expenses;
- e. Loss of financial and pecuniary support of Peter Marshall;
- f. Loss of inheritance from or by Peter Marshall; and
- g. Any and all other losses and damages sustained by Plaintiffs and/or the heirs of Peter Marshall and to which Plaintiffs and/or the heirs of Peter Marshall may be legally entitled either pursuant to statute or the common law.

85. Plaintiffs are precluded from asserting a claim for exemplary damages “in any initial claim for relief.” C.R.S. §§ 13-21-102(1.5)(a), -302(3)(c)(I). Plaintiffs hereby reserve right to seek amendment of their Complaint to assert a claim for exemplary damages against one or more of the Defendants based on prima facie proof of a triable issue after the exchange of initial disclosures as provided by Colorado statute.

WHEREFORE, Plaintiff, Amber Marshall, a disabled minor child, by and through her duly appointed conservator, Plaintiff, Sara Marshall, prays for and demands an award of damages to be fixed by the trier of fact in a reasonable amount. Additionally, Plaintiffs ask for the costs of this action, reasonable attorney fees, all pre-judgment and post-judgment interest as provided by law, and for all such other relief to which they are or may be legally entitled and as the Court deems appropriate.

PLAINTIFFS DEMAND A TRIAL BY JURY.

Dated this 17th day of November, 2021.

Respectfully submitted,

By: s/ David P. Mason
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ATTORNEYS FOR PLAINTIFFS

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 17th day of November, 2021, a true and correct copy of the foregoing was electronically filed with the Court and served upon all counsel of record via CCEF.

s/ David P. Mason, Esq.