THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2019-0354

Theresa A. Ladue

v.

Pla-Fit Health, L.L.C.,
a/k/a Planet Fitness or Planet Fitness, Inc.

---

**BRIEF OF APPELLEE**
**PLA-FIT HEALTH, L.L.C.**
**A/K/A PLANET FITNESS OR PLANET FITNESS, INC.**

---

Submitted by,

Michael R. Mortimer, NH Bar No. 1813
Michael G. Eaton, NH Bar No. 271586
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
(603) 669-4140
mmortimer@wadleighlaw.com

Dated: December 27, 2019

## TABLE OF CONTENTS

**Page**

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page**



**Statutes**



**Other Authorities**

## QUESTIONS PRESENTED FOR REVIEW

1. Is it contrary to public policy for a private business, open only to members who join it, to limit its liability for injuries to members that occur on the premises through the use of an exculpatory clause in the Membership Contract.

   See Defendant's Motion for Summary Judgment, Appellant's App., pp. 7-23; Defendant's Reply to Plaintiff's Objection to Motion for Summary Judgment, Appellant's App., pp. 40-44.

2. In evaluating the sufficiency of an exculpatory contract, will the Appellant's subjective understanding of the contractual terms control or will the Court apply the "reasonable person" standard to clear and unambiguous contract terms?

   See Defendant's Motion for Summary Judgment, Appellant's App., pp. 7-23; Defendant's Reply to Plaintiff's Objection to Motion for Summary Judgment, Appellant's App., pp. 40-44.

3. Does the exculpatory language in the Membership Agreement support the grant of summary judgment?

   See Defendant's Motion for Summary Judgment, Appellant's App., pp. 7-23; Defendant's Reply to Plaintiff's Objection to Motion for Summary Judgment, Appellant's App., pp. 40-44.

## STATEMENT OF CASE AND FACTS

The Appellee, Pla-Fit Health, L.L.C. a/k/a Planet Fitness or Planet Fitness, Inc. ("Planet Fitness") operates a private fitness club located at 18 Northwest Boulevard in Nashua, New Hampshire. The Club contains a variety of exercise machines set up in rows for its Members to use. Only Members who join the Club, enter into a Membership Agreement and pay monthly dues are allowed to use the facility and its exercise machines.

On Apr. 10, 2017, Theresa A. Ladue ("Ladue" or "Appellant") joined the Nashua Planet Fitness club and signed Planet Fitness's Membership Agreement, becoming a member of the Club and entitled to use of all its facilities. Appellee's App. p. 52. The Membership Agreement contained an exculpatory clause which was captioned in bold print and capital letters:

> **RELEASE OF LIABILITY, INDEMNIFICATION, ASSUMPTION OF RISK, CLUB RULES, BUYER'S NOTICE & RIGHT TO CANCEL.**

Appellee's App. p. 52. By signing the Membership Agreement, Ladue expressly agreed to waive all rights of action against Planet Fitness for personal injuries such as those she suffered on Sep. 27, 2017. The exculpatory clause states in pertinent part:

> I understand and expressly agree that my use of this Planet Fitness facility involves the risk of injury to me or my guest *whether caused by me or not*. I understand that these risks are inherent in physical activity and my use of the facilities and can range from minor injuries to major injuries, including death. In consideration of my participation in the activities and use of the facilities, exercise equipment and services offered by Planet Fitness and such use by my guests, if applicable, I understand and voluntarily accept full responsibility on my behalf and on my guest's behalf for the risk of injury or loss *arising out of or related to* my use or my guests use of the facilities *including, without limitation, exercise equipment, tanning, massage beds/chairs, and participation in PE@PF® or other exercise programs or use of other services, equipment and/or programs offered to members.* I further agree that Planet Fitness, PF Corporate, their respective affiliated companies, parents, subsidiaries and the officers, directors, shareholders, employees, managers, members, agents and independent contractors of such entities will not be liable for any injury including, without limitation, personal, bodily, or mental injury, disability, death, economic loss or any damage to me, my spouse or domestic partner, guests, unborn child, heirs, or relatives *resulting from the negligent conduct or omission of Planet Fitness*, PF Corporate, or anyone acting on their behalf, *whether related to exercise or not*. Accordingly, to the fullest extent permitted by law, I do hereby forever release, waive, and discharge Planet Fitness and PF Corporate from any and all claims, demands, injuries, damages, actions or causes of action related *to my use* or my guest's use *of the*

> *facility* (collectively, "Claims") against Planet Fitness, PF Corporate, or anyone acting on their behalf, and hereby agree to defend, indemnify and hold harmless Planet Fitness and PF Corporate from and against any such Claims, including Claims made by my guests. I further understand and acknowledge that neither Planet Fitness nor PF Corporate manufactures fitness or other equipment or products available in its facilities and therefore Planet Fitness and PF Corporate will not be held liable for defective equipment or products.

Emphasis added. See Appellee's Appendix, p. 52. Ladue has acknowledged that she received, reviewed, and signed this document before joining Planet Fitness. Appellant's App. p. 14, Ladue Depo. Transcript at P23 L11-23. By signing this Membership Agreement, both she and her husband were permitted to come into the Club to exercise. *Id*. Ladue has admitted that she understood she was signing an exculpatory clause but claims that she did not understand the extent of the exculpatory clause because she has a seventh grade education. Ladue Affidavit, Appellant's App. p. 28.

On Sep. 27, 2017, Ladue and her husband went to Planet Fitness to exercise. Ladue used one of the Club's treadmills for a period of time. Ladue Affidavit, ¶7, Appellant's App. p. 29. Upon stopping, she wiped the machine down with a disposable towel as required by the Club. She then walked to dispose of the disposable towel in a nearby trash barrel. *Id*. While walking, she tripped and fell and came in contact with a chain link fence that was behind the row of treadmills and which separated the treadmill and exercise area from the general walkway running from the front door to the back of the building and accessing offices, the bathroom, and locker rooms, etc. All of the fitness machines at the Club were within the area that was fenced off from the general walkway area. The walkway between the treadmills and the barrier fence on which Ladue was walking, contained a ramp down to a cross aisle so that people with disabilities could access the fitness machines including the treadmill Ladue used. Ladue was not "merely walking through the Defendant's place of business" as alleged in her Affidavit. Ladue Affidavit ¶6, Appellant's App,. p. 29. Rather, she was participating in an exercise activity and was walking entirely within the area specifically segregated by the fence for exercise activities.

Ladue filed suit against Planet Fitness in a three count Complaint on Apr. 17, 2018. In Count I she alleged breach of a duty to use "reasonable care under all circumstances in the maintenance and operation of its premises." Complaint at ¶16, Appellant's App. p. 3. She claimed Planet Fitness breached its duty by "constructing and/or maintaining an irregular, uneven pedestrian walkway which contained an abrupt change in elevation, thereby constituting a dangerous condition . . .." Complaint at ¶18, Appellant's App. p. 4. The walkway was within the exercise area.

In Count II, Ladue alleged a duty to act as a "reasonable person under all circumstances" and alleged a breach of the duty by "constructing and/or maintaining a chain link fence at its premises containing an unguarded and unprotected hazard in that a bolt was protruding from the fence . . .." Complaint at ¶¶21 and 22, Appellant's App. p. 4.

In Count III, Ladue alleged a duty to act as a reasonable person and claimed that Planet Fitness "failed to take reasonable measures to either design, monitor, and/or make the area safe and/or warn the Plaintiff . . . of a dangerous condition . . .." Complaint at ¶¶25 and 26, Appellant's App. p. 5.

Planet Fitness filed a Motion for Summary Judgment on or about Jan. 9, 2019, in which it alleged that the exculpatory clause in the Membership Agreement was enforceable, was not contrary to public policy, and barred Ladue's claims against Planet Fitness. See Motion for Summary Judgment, Appellant's App. pp. 7-23. Ladue objected to the Motion for Summary Judgment claiming that Planet Fitness was "open to the public" (Obj. at ¶2); that Ladue misunderstood or failed to comprehend the terms of the Membership Agreement including the exculpatory clause (Obj. at ¶¶5-7); that the exculpatory clause violated public policy because it shielded Planet Fitness from liability from an "invitee" (Obj. at ¶10); and that the Membership

Agreement violated RSA 358-A and RSA 358-I:3 (Obj. at ¶12).[1] In connection with her Objection, Ladue submitted an Affidavit stating that because of her seventh grade education, she did not fully understand the scope of the exculpatory clause although she admitted being aware that there was an exculpatory clause in the Membership Agreement. Appellant's App. pp. 28-30. Ladue filed a Supplemental Memorandum of Law in which she relied on Restatement (Second) of Torts §341A; alleging that Planet Fitness had a "special relationship" with Ladue as a common carrier, an innkeeper, or a possessor of land holding itself open to the public; ignoring the fact that Planet Fitness was only open to Members and not to the general public and that a person such as Ladue was required to join the Club in order to be admitted and to use the facilities.

A hearing was held on Mar. 29, 2019 regarding the Motion for Summary Judgment. See Appellee's App. p. 1, Transcript of Hearing. By Order dated May 31, 2019, the Court granted Planet Fitness's Motion for Summary Judgment. Appellee's App. p. 36. The Order only addressed the MSJ filed as to Counts I, II, and III. Appellant's Count IV was not filed until Jan. 25, 2019 and therefore was not addressed in the Motion for Summary Judgment that was filed by Planet Fitness nor was it addressed by the Court in its Order of May 31, 2019. Appellee's App. p. 36. A separate hearing on Planet Fitness's Motion for Summary Judgment as to Count IV was scheduled for Aug. 26, 2019, however, it did not go forward. See Notice of Hearing, Appellee's App. p. 47. Instead, Ladue filed an Assented to Motion to Dismiss Count IV with prejudice on July 19, 2019 (Appellee App. p. 48) and the Motion for Nonsuit was granted by the Court by Order of July 29, 2019. Appellee App. p. 51. The Ladue case was therefore removed from the Aug. 26, 2019 Trial Docket. *Id*. This Appeal followed.

[1] Ladue had moved to amend her Complaint by adding a Count IV for violation of RSA 358-I:3 and RSA 358-A on Apr. 3, 2019. She thereafter took a nonsuit *with prejudice* as to Count IV which alleged a claim for violations of RSA 358-I and RSA 358-A, on July 29, 2019. The allegations contained in Count IV were not subject to the Court's Order on summary judgment because Count IV was filed after the MSJ was filed.

## SUMMARY OF THE ARGUMENT

Planet Fitness's Motion for Summary Judgment was properly granted. Planet Fitness is a private club which is not open to the general public. It is only open to members who join the Club and agree to the terms of the Membership Agreement for the exercise purposes engaged in by Ladue at the time of her accident. Properly drafted, unambiguous exculpatory contracts are valid and enforceable under NH law where there is no special relationship between the parties and where they are not contrary to public policy. Owners of a private club should be free to contract about their affairs with those who opt to become members of the Club.

Ladue's argument that this exculpatory clause is contrary to public policy fails. The Planet Fitness club was not "held open to the public"; it was a private club, open only to members who joined and agreed to be bound by the terms of the Membership Agreement. Exercising in a particular private fitness center is not so indispensable to the public as to create a special relationship between Planet Fitness and Ladue. There is no basis for finding a "special relationship" between Planet Fitness and Ladue. The cases cited by Ladue and by the *Amicus Curiae* are inapposite to this situation and would require this Court to overturn decades of well-established law regarding the validity of exculpatory contracts.

Ladue's argument that her failure to fully understand the scope of the exculpatory contract she signed precludes its enforcement fails because even if she failed to understand the meaning of the document, a "reasonable person" would have understood the clear and unambiguous language of the exculpatory clause. Ladue's claims were within the contemplation of the parties as set forth in the clear and unambiguous language of the contract. Ladue's subjective limits of understanding cannot be the basis for invalidating this exculpatory clause or exculpatory clauses generally would never be enforceable. Ladue raised no genuine issue of material fact to preclude summary judgment. Based upon the relationship between the parties, the clear and unambiguous language contained in the exculpatory clause, Defendant's Motion for Summary Judgment was properly granted and the Superior Court's decision should be upheld by this Court.

## ARGUMENT

### I. EXCULPATORY CONTRACTS ARE JUDGED BY THE "REASONABLE PERSON" STANDARD AND NOT BY APPELLANT'S SUBJECTIVE UNDERSTANDING.

New Hampshire has long held that exculpatory contracts will be enforceable if

(1) They do not violate public policy;
(2) The Appellant understood the import of the agreement or a reasonable person in [Appellant's] position would have understood the import of the agreement; and
(3) The Appellant's claims fall within the contemplation of the parties when they executed the contract.

*Miller v. The Sunapee Difference, LLC*, 308 F.Supp. 3rd, 581, 587 (D.N.H. 2018), citing *McGrath v. SNH Development, Inc.*, 158 N.H. 540, 542 (2009). Here, Ladue makes the argument that *she* did not fully understand the terms of the exculpatory clause in the contract. She has only a seventh grade education and "did not have an understanding that I was waiving or releasing the Defendant from any liability that I would suffer or incur as a result of the Defendant's premises not being maintained in a reasonably safe condition." Affidavit of Ladue at ¶¶3, 4, Appellant's App. p. 28. She understood that there was an exculpatory clause contained within the language of the Membership Agreement and that Planet Fitness was limiting its liability to her in some degree. Her only claim is that she did not understand the full extent of the waiver she signed and therefore it should not be binding on her. *Id.* at ¶¶5, 6, and 10. Ladue's argument that her subjective misunderstanding should control the scope and enforcement of the exculpatory language in the Membership Agreement that she signed is simply inaccurate and contrary to long held New Hampshire case law.

Ladue's *subjective* understanding of the contractual terms is not controlling if the language of the contract is clear and unambiguous. To hold otherwise would render all exculpatory clauses void. The Court must instead examine the language itself to determine "whether a *reasonable* person in [the Appellant's] position would have known of the exculpatory provision." *Wright v.*

*Loon Mtn. Recreation Corp.*, 140 N.H. 166, 169 (1995), citing *Barnes v. N.H. Karting Ass'n, Inc.*, 128 N.H. 102, 107 (1986). The Court went on to say that "a reasonable person would understand the provision if its language "clearly and specifically indicates the intent to release the Defendant from liability for personal injury caused by the Defendant's negligence." *Wright* at 169. Simply put, the contract must clearly state that the Defendant is not responsible for the consequences of its own negligence. *Id*. The language in Planet Fitness's contract clearly advises the parties that it limits Planet Fitness's liability for injuries "arising out of or related to my use . . . of the facilities including, without limitation, exercise equipment . . ."; even for Planet Fitness's own "negligent conduct or omission"; and Appellant makes no good argument to the contrary.

The contractual language in the Membership Agreement clearly and unambiguously limits Planet Fitness's liability to Ladue. The clause indicates that the Member understands that use of the facility "involves the risk of injury to me or my guest *whether caused by me or not.*" Appellee's App. p. 52. It goes on to release Planet Fitness from any liability for injuries "arising out of *or related to* my use of the facilities" including the exercise machines and for all injuries "whether related to exercise or not." Emphasis added. *Id*. The release of liability applies to activities incidental to or arising out of the use of the exercise machines such as walking to and from them. Moreover, the language clearly releases Planet Fitness for accidents and injuries "resulting from the negligent conduct or omission of Planet Fitness." *Id*. "A reasonable person would understand the provision of its language clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant's [own] negligence." *Wright* at 169 citing *Barnes* at 107.

The language used in the contract is to be given its common meaning; "the meaning that would be attached to it by a reasonable person." *Dean v. MacDonald*, 147 N.H. 263, 267 (2001) citing *Barnes* at 109. "As long as the language of the release clearly and specifically indicates the

intent to release the defendant from liability for personal injury caused by defendant's negligence, the agreement will be upheld." *Id*. Citing *Barnes* at 107. "[T]he parties need not, . . . have contemplated the precise occurrence that resulted in plaintiff's injuries. They may adopt language to cover a broad range of accidents . . .." *Barnes* at 107; *MacDonald* at 267. The language utilized by Planet Fitness is quite similar to the language upheld by this Court in *Barnes*, *supra*. In *Barnes*, the Court upheld the validity of an exculpatory contract releasing the association from "all liability to the undersigned . . . for any and all loss or damage . . . on account of injury to the person or property . . . whether caused by the negligence of the releases [sic] or otherwise . . .." *Barnes* at 105. The language used by Planet Fitness should be found to have clearly put Appellant on notice that she released it from even its own allegedly negligent acts.

As in *Barnes*, the plain language utilized by Planet Fitness clearly indicates that liability is being released even for the alleged "negligent conduct or omission" of Planet Fitness. The exculpatory language covers a broad array of exercise and non-exercise injuries that could occur while Ladue was using the gym. It covers injuries "*arising out of or related to* my use of the facilities including, without limitation, exercise equipment, tanning, message [sic] beds/chairs, and participation in PE@PF or other exercise programs or use of other services, equipment, and/or programs offered to members." Emphasis added. Appellee's App. p. 52. The release further stated that it applies to a broad range of injuries "resulting from the negligent conduct or omission of Planet Fitness . . . *whether related to exercise or not*." Emphasis added. *Id*. This language clearly includes walking to and from an exercise machine; especially since Ladue was in the area specifically fenced off for use of the exercise machines. She was not merely walking through the premises. To allow Ladue to invalidate the exculpatory language based on her own subjective understanding of the clear contractual terms would effectively render all exculpatory clauses

invalid. As Planet Fitness's contract is clear and unambiguous, it must be upheld according to the "reasonable person" standard.

## II. THE APPELLANT'S ACCIDENT FALL WITHIN THE CONTEMPLATION OF THE PARTIES WHEN THEY EXECUTED THE CONTRACT AND ARE THEREFORE BARRED.

The Appellant attempts to avoid application of the exculpatory language in the Membership Agreement by claiming that it does not apply because she was "merely walking" through the Club and not actually on and using one of the exercise machines when it occurred. She further seeks to avoid the contract by saying it does not apply to the Planet Fitness alleged failure to properly maintain its facilities.

The exculpatory language is much broader than Ladue admits and reasonably so as exercising in a club involves more than time spent on a machine. It covers all injuries "whether caused by me [Ladue] or not." Appellee's App. p. 52. It covers all injuries incurred in "use of the facilities." *Id*. It covers all injury or loss "arising out of *or related* to" her use of the facilities, "including, without limitation, exercise equipment, tanning, massage beds/chairs" or use of any service offered to members. It covers all injuries "whether related to exercise or not." *Id*. The language is broad and it is meant to be. Use of an exercise facility involves much more than simply walking on a treadmill. A person must walk to and from the exercise machines in order to use them. Injuries can and do occur in a myriad of ways where one is using the facility, walking to and from machines within the fenced in exercise area, and are not just limited to injuries while directly on the equipment.

Planet Fitness used clear and unambiguous language to limit its liability as to accidents that occur to members engaging in exercise activities in its facility. Ladue wiped down the machine after using it and was walking to dispose of the towel. Affidavit at ¶7, Appellant's App. p. 29. It is reasonable to assume that members may slip and fall while walking to or from an exercise

machine and that when doing so, they may impact in an unfortunate way. Planet Fitness utilized this language in its release to cover a broad array of activities involved in the "use of its facility" and injuries "arising out of or related to" use of the exercise equipment. Appellee's App. p. 52. This is not an unreasonable nor an overbroad application of the waiver.

If the ordinary definition of "facilities" were not already clear enough, the Membership Agreement eliminates any doubt that it includes the type of activity Ladue was doing at the time of the accident. Indeed, on page 2 of the Membership Agreement it states that membership allows a person "use of the premises, facilities, equipment, and services . . ." thereby noting that "facilities" is more than merely the exercise machines as Ladue has suggested. Appellee's App. p. 53. The Membership Agreement goes on to state that "Planet Fitness regularly closes its facilities (or portions of its facilities) for maintenance on a temporary basis . . ." *Id*. at ¶7. The court has stated that "[w]e will assess the clarity of the contract by evaluating it as a whole, not by examining isolated words and phrases." *Wright* at 169-70; *Chadwick v. CSI, Ltd.*, 137 N.H. 515, 524 (1993). These additional provisions of the Membership Agreement make clear that "use of the facilities" includes more than just use of the equipment and indeed includes use of the Club premises including walkways to and from the machines.

## III. IT IS NOT CONTRARY TO PUBLIC POLICY FOR A PRIVATE EXERCISE CLUB, OPEN ONLY TO MEMBERS, TO LIMIT LIABILITY THROUGH USE OF AN EXCULPATORY CLAUSE.

### A. Planet Fitness is a Private Club and Not Open to the Public.

Ladue equates her use of the Planet Fitness facilities to use of a "public building" open to all "business invitees" such as shoppers at a mall. Ladue's Brief at p. 2. She is mistaken in her analysis. *Valenti v. NET Properties Mgmt., Inc.*, 142 N.H. 633 (1998), is inapplicable to Ladue's situation. In *Valenti*, the issue was whether an owner of a business that was generally open to all business invitees could shift liability to an independent contractor hired to maintain the premises.

The owner claimed it had satisfied its duties to the Plaintiff/invitee by hiring another to maintain the property where plaintiff fell. It is not merely the facts of *Valenti* that are different. See Ladue Brief at p. 13. The entire relationship between the parties here is different. This case involves a contract with an invitee who becomes a member in which the invitee specifically releases the owner for the owner's own negligence. Only members can use the exercise machines. Ladue was not some "unknowing member of the public aimlessly wandering through the Planet Fitness premises." Superior Court decision, p. 6, Appellee's App. p. 44. Ladue was not just walking through the front door when she fell. She was actively using the exercise machines within the exercise area. Planet Fitness is a private club. The area where Ladue was injured is not open to the general public. Ladue was there only by virtue of having become a member and agreeing to the terms of the Membership Agreement, including the exculpatory clause.

The Appellant seeks to eliminate any distinction between businesses open to the public and private clubs, open to members only. Appellant cites no good reason to collapse these two categories into one. The exculpatory clause does not "put the public in peril and at risk for great harm." Plaintiff's Brief at p. 14. Indeed, if Planet Fitness failed to maintain its premises, its members are free to terminate membership at any time (Agreement, p. 2, Appellee's App. p. 53) and they could "vote with their feet" by leaving. "[A]s a matter of efficiency and freedom of choice, parties should be able to contract freely about their affairs." *Pro Done, Inc. v. Basham*, 172 N.H. 138, 153 (2019), citing *Barnes*, p. 106.

B. Planet Fitness's Facilities Do Not Violate Any Applicable Building Code.

Ladue's claim that Planet Fitness's facilities somehow violate the Nashua Building Code or some other Code is misplaced. There was absolutely no expert evidence presented by Ladue to support her contention that Planet Fitness's facilities were in violation of any applicable code or law. Ladue's submission of pages from a building code and her own opinion that the walkway was

"irregular and uneven," unsupported by any expert opinion is insufficient to find a violation of any applicable building code. *Lemay v. Burnett*, 139 N.H. 633, 634 (1995). Finally, Ladue never raised the issue of an alleged violation of the Building Code in either her Objection to Motion for Summary Judgment or either of her Memos of Law and she should not be allowed to raise it for the first time on appeal.

## IV. THE ARGUMENTS MADE BY *AMICUS CURIAE* IN NEW HAMPSHIRE ASSOCIATION FOR JUSTICE'S BRIEF DO NOT SUPPORT A FINDING THAT EXCULPATORY CONTRACTS ALWAYS VIOLATE PUBLIC POLICY.

*Amicus* argues that the question before this Court is both novel and narrow. *Amicus* Brief at 11. Neither assertion is true. First, it is not novel, as this Court has long made clear that exculpatory contracts will be enforced if "(1) they do not violate public policy; (2) the plaintiff understood the import of the agreement or a reasonable person in his position would have understood the import of the agreement; and (3) plaintiff's claims were within the contemplation of the parties when they executed the contract." *See Dean* pp. 266-67 (2001). *Amicus*'s argument is generally confined to public policy and this Court, too, has repeatedly engaged in the public policy analysis, making clear when public policy renders an exculpatory contract unenforceable. *See*, *e.g.*, *Audley v. Melton*, 138 N.H. 416, 418 (1994). Second, the question before this Court is not narrow. To adopt *Amicus*'s reasoning would be to, in practical effect, make it impossible for businesses such as Planet Fitness, offering recreational activities to their customers, to have exculpatory contracts. Such a result is not consistent with this Court's longstanding jurisprudence with regard to exculpatory contracts and certainly not narrow.

Setting aside the history of how exculpatory contracts such as the one in this case have come to be widely accepted and enforceable in society and by courts, *Amicus* begins with the suggestion that New Hampshire follows a minority rule that contracts exempting a person from liability resulting from her or his own negligence are invalid. *Amicus* Brief at 15 (citing *Wessman*

*v. Boston & M.R.R.*, 84 N.H. 475, 478 (1930)). While it is true that this minority view was expressed to some degree by this Court in 1930, *Amicus*'s contention overlooks the context of *Wessman*, in which that minority rule was expressed, a consideration which more accurately reflects this Court's precedent in the past few decades.

*Wessman*, and many of the other cases upon which *Amicus* relies in arguing that premises liability case law renders the exculpatory clause here invalid, are inapposite. The proper focus is—and should be, according to this Court's well-established precedent—on whether a recreational exercise gym falls into one of the explicitly defined areas in which public policy considerations may render an exculpatory clause unenforceable. When examined within the context of this Court's clear precedent, the answer to the foregoing inquiry is clear: the exculpatory contract in this case is enforceable.

A. This Court's Analysis in Cases Relating to Exculpatory Contracts in Premises Liability Cases is Inapposite. When Examined in the Context of this Court's Structured Public Policy Analysis, it is Clear that the Exculpatory Contract is Valid.

*Amicus* primarily relies on two of this Court's opinions to argue that, despite its contracts with a limited segment of the local population and its provision of recreational services and access to facilities restricted to only those who agree to the contractual terms, Planet Fitness owes some overarching duty to the greater public. This reliance, and its reliance on premises liability doctrines in general, is misplaced.

Both Appellant and *Amicus* attempt to draw the exculpatory contract in this case into the premises liability context by arguing that "landowners in New Hampshire have a non-delegable duty to maintain their premises in reasonably safe condition." Appellant Brief at p. 12; *Amicus* Brief at 22. To do so, however, would be to nullify nearly every exculpatory contract, including those that this Court has enforced in *Barnes*, *Dean*, and other cases. *Amicus* and Appellant cite

*Valenti*, pp. 635-36 for the foregoing proposition. *Valenti*, however dealt with a landowner's attempt to shift liability to an independent contractor. *See id*. This Court held that, "when a possessor of business premises employs an independent contractor to maintain such premises, he is subject to liability for the independent contractor's negligence." *Id*. at 636. When a third party signs a contract to use the business's services, however, and that contract contains an exculpatory clause, the issue is entirely different: although the business may still be subject to liability, it is nonetheless free from liability by virtue of the exculpatory clause.[2] If this Court were to hold as *Amicus* suggests, there would no longer exist any valid exculpatory contracts; private businesses that are not open to the general public would be liable for any injury that occurs on its premises, regardless of any exculpatory contract, and this Court would be forced to overrule decades of precedent upholding such exculpatory contracts. The doctrine of *stare decisis* renders this argument faulty.

Second, the cases that *Amicus* terms "premises liability cases," in which this Court invalidated exculpatory contracts, are distinguishable. Initially, these cases can be easily distinguished on the facts alone. In *Wessman*, for instance, this Court reiterated multiple times the fact that the defendant was performing its "*public duty* of transportation." Emphasis added. *Wessman*, at 482. It was a service that the defendant was "compelled to perform," thus framing the factual and related legal issues as "one of public duty." *Id*. at 482, 484. Here, it cannot credibly be argued that Planet Fitness is performing a public duty or that it is otherwise compelled to provide its service of recreational exercise facilities. Likewise, *Amicus*' and Appellant's reliance on *Papakalos* is misplaced. In that case, not only did the defendant admit that the stairs causing the injury were defective, but perhaps more notably, there was "no evidence of any explicit

[2] Despite *Amicus*'s argument that *Valenti* should be expanded, this Court has restricted its holding to cases involving vicarious liability for the actions of an independent contractor, an issue not involved in this case. *See*, *e.g.*, *Grady v. Jones Lang LaSalle Construction Co., Inc.*, 171 N.H. 203, 213-14 (2018).

agreement whereby the plaintiff undertook to exonerate the defendant from liability." *Papakalos v. Shaka*, 91 N.H. 265, 267-68 (1941). Here, there is no inferred agreement and no admission of a defect; however, there is an explicit agreement whereby Appellant expressly agreed to hold Planet Fitness harmless.

Additionally, the cases upon which *Amicus* and Appellant rely can be distinguished because the gym operated by Planet Fitness was not open to the public. *Wessman* and *Papakalos* make clear that this Court's conclusions were based in part on the fact that the areas in which the plaintiffs were injured were accessible by the public or otherwise freely available for general use. *See Wessman*, at 478-84 (reiterating numerous time the railroad's public character); *Papakalos*, at 267 (noting the general accessibility and use of the common areas of defendant's rented building). Many of the cases, both by this Court and out-of-state courts, and other sources that *Amicus* cites emphasize accessibility of an area or of premises completely open to the public in determining whether a "special relationship," or other ground for rendering an exculpatory contract invalid, exists. *See Amicus* Brief, at 27-29. This only highlights why, because the area in which Appellant was injured on Planet Fitness's property was private, the exculpatory contract here is valid. Perhaps, if Appellant was injured in the front desk area of the gym, or in another area where access was not restricted only to paying, contracted members of the gym, the analysis here might be different.[3] Appellant, however, was injured in an area of the gym where only members who agreed to Planet Fitness's contractual terms—including the exculpatory clause—were permitted. This distinguishes the instant case from many of the cases upon which *Amicus* relies. Because Planet Fitness did not hold its private members-only gym spaces open to the general public, it certainly

[3] This Court has previously differentiated between different areas of a premises in determining whether an exculpatory clause or principles of premises liability apply. *See*, *e.g.*, *Cailler v. Humble Oil & Refining Co.*, 117 N.H. 915, 918-19 (1977).

did not owe a duty of reasonable care to "all members of the public," as *Amicus* and Appellant suggest.

More importantly, however, these cases are legally inapposite. *Amicus* is right: the counter-argument to the applicability of these cases is "easily surmised," primarily because it requires reference to only two of this Court's cases and its sound and consistent precedent. These cases make clear that special relationships such as those involving landlords and common carriers, like in *Wessman* and *Papakalos*—relationships which are not present in this case—are one of several specifically identified circumstances in which exculpatory contracts are invalid. The first case is *Shaer Shoe Corp. v. Granite State Alarm, Inc.*, 110 N.H. 132 (1970) in which this Court made clear that the "minority rule which holds invalid contracts exempting a person from liability for the consequence of his own negligence" does not prohibit all exculpatory clauses and, more specifically, prohibits such clauses only where there exists some "special relationship" or circumstance. This Court stated:

> Cases applying this rule have generally involved landlord-tenant relationships or common carriers. . . . In *Bernardi Greater Shows Inc. v. Boston & Maine RR*, 89 N.H. 490, 1 A.2d 360, an exculpatory clause in a contract was upheld because the railroad was contracting as a private and not as a common carrier and the parties were said to be free to make their own contract. This case indicates that our rule does not prohibit all exculpatory contracts.

*Shaer Shoe Corp.* at pp. 134-35 (internal citations omitted).

The second case is *Audley*, a relatively recent case in which this Court set forth the specific categories or circumstances in which exculpatory contracts are unenforceable. This Court stated that an exculpatory contract is enforceable unless it involves a "special relationship" among the parties, a disparity in bargaining power, monopoly control over an industry or service, or a service that is a "matter of practical necessity." *Audley*, at p. 418 (citation omitted).[4]

[4] This Court has also stated that exculpatory contracts are invalid where they purport to relieve a party for intentional conduct. *See First NH Mortg. Corp. v. Greene*, 139 N.H. 321, 323 (1995). There is no allegation of intentional conduct in this case.

What these two cases—and this Court's precedent upon which these cases rely—stand for is that exculpatory contracts are not deemed invalid for public policy reasons absent the special circumstances articulated in these cases. There is no support for the idea, as *Amicus* claims, that "any principled public policy reason" can invalidate an exculpatory contract; not only is such an open-ended standard unworkable, but it is not how this Court has analyzed exculpatory contracts.[5] *Amicus* Brief, at 27. Outside of the special circumstances articulated in this Court's opinions, this Court has declined to invent additional justifications for prohibiting an exculpatory contract on a public policy basis. Indeed, beyond these identified circumstances, which find their justifications in other areas of law, it is the province of the Legislature, not of courts, to determine what additional circumstances rise to the level of a public policy concern or whether, for instance, use of one of many different recreational gyms is an "matter of practical necessity" or "essential service" such that public policy would render an exculpatory contract invalid. *See Chung Mee Restaurant Co. v. Healy*, 86 N.H. 483, 483 (1934) ("Under the police power the state has authority to legislate for the protection and preservation of the health, safety, morals, and general welfare of its citizens. It is peculiarly the province of the Legislature to determine what rules and regulations are needed to achieve the above ends.").

Although this Court, in *McGrath*, stated that an agreement is against public policy if it "is injurious to the interests of the public, violates some public statute, or tends to interfere with the public welfare," this Court has further defined this broader definition. *See McGrath* at 543. Indeed,

[5] Although *Amicus* bases its argument that the enforceability of an exculpatory contract does not "hinge solely on the categorization of the parties' relationship," by noting that parties may not exculpate liability for intentional harms, this point only reinforces the argument that this Court has only invalidated such contracts in the presence of special, previously articulated circumstances. *See First NH Mortg. Corp.*, 139 N.H. at 323 ("The law is settled that exculpatory agreements . . . which purport to relieve from bad faith or intentional wrongs are considered to be against public policy . . .") (quotation omitted) (emphasis added). Intentional torts involve a unique set of circumstances and elements distinguishable from negligent acts. Just because exculpatory contracts are invalid as to intentional torts, in addition to circumstances involving a special relationship, does not open the door to invalidating other exculpatory contracts based on any other conceivable potential public policy concern.

in that very case, this Court analyzed, in addition to the existence of a statute regulating the activity at issue, only whether there existed a special relationship between the parties, whether there was a disparity in bargaining power, or whether the activity at issue was an essential service. *Id*. at 543-44. This is the scope of the public policy analysis. This Court has impliedly so stated in numerous cases, including *McGrath*, and has, in essence, expressly so provided. *See Barnes* at p. 106 ("A defendant seeking to avoid liability must show that an exculpatory agreement does not contravene public policy; *i.e.*, that no special relationship existed between the parties and that there was no other disparity in bargaining power.")

To be clear: this case does not involve any of the circumstances that this Court has deemed to be in contravention of public policy. It does not involve a special relationship. *See id.* (stating that a special relationship exists "[w]here the defendant is a common carrier, innkeeper or public utility, or is otherwise charged with a duty of public service."). Planet Fitness is not a landlord, common carrier, provider of a public utility or service and does not hold its premises open to the general public. *See McGrath*, 158 N.H. at 544 (stating that "the fact that the ski area is available for public use is not dispositive of a special relationship"); *Barnes*, 128 N.H. at 108 (concluding the exculpatory contract was valid, even though "defendants serve a segment of the public"). Planet Fitness simply does not "fall within any of the commonly-recognized classes of persons charged with a duty of public service." *Barnes*, 158 N.H. at 108.

This case does not involve a disparity in bargaining power. In *Barnes*, this Court stated when a disparity in bargaining power may arise so as to render an exculpatory contract invalid:

> The disparity in bargaining power may arise from the defendant's monopoly of a particular field of service, from the generality of use of contract clauses insisting upon assumption of risk by all those engaged in such a field, so that the plaintiff has no alternative possibility of obtaining the service without the clause; or it may arise from the exigencies of the needs of the plaintiff himself, which leave him no reasonable alternative to the acceptance of the offered terms.

*Barnes*, 128 N.H. at 107. There is no evidence to suggest, nor could one credibly claim, that Planet Fitness has a monopoly on the field of exercise or even on the field of recreational membership gyms. Nor would it be remotely plausible to suggest that Appellant could not possibly obtain the service of exercise elsewhere or that Appellant was in such exigent need of exercise in Planet Fitness's particular gym that her hand was forced to sign the exculpatory contract. Not only did Appellant have numerous alternative gyms in the area with which she could have contracted, had she been unwilling to sign Planet Fitness's exculpatory contract, but she also could have chosen to exercise outside, in a public area, or she could have chosen to exercise at home. Appellant has not presented any evidence that Planet Fitness had a piece of equipment or other feature, which no other gym or outdoor public exercise area had, which required her to imminently exercise in Planet Fitness's facilities. In short, Appellant was under no physical, economic, or other compulsion to sign Planet Fitness's exculpatory contract. She read the contract and, despite her alternatives, chose the benefits of Planet Fitness's services in exchange for, in part, exculpation.

Finally, use of a recreational membership gym is not an essential service or matter of public necessity. It is a voluntary service or, perhaps, a luxury service, provided as an alternative to home or outdoor exercise, or no exercise at all. This Court has not suggested otherwise.

In sum, the circumstances surrounding the exculpatory contract and the service provided in this case do not—in any of the ways articulated in the decades-old precedent of this Court—render the exculpatory contract invalid. Reaching a different result would find insufficient support in this Court's precedent and, in effect, violate the principles of *stare decisis*; if a different conclusion is to be reached on public policy grounds, such is the province of the Legislature.

B. This Court Has Enforced Exculpatory Contracts After *Wessman* and *Papakalos* in Varying Contexts.

To the extent that *Wessman* and *Papakalos* are, in any way, analogous to this case—and they are not, for the many reasons articulated above—their applicability to the exculpatory contract in this case is undermined by the precedent that followed those cases, leading up to and after *Shaer Shoe Corp.*, in which this Court has become much more accepting of exculpatory contracts in a variety of contexts. In fact, as early as 1945 (a mere four years after *Papakalos*), this Court was already considering "whether the rule governing exculpatory contracts has been too broadly phrased in our decisions." *Nashua Gummed & Coated Paper Co. v. Noyes Buick Co.*, 93 N.H. 348, 351 (1945). Although it was not necessary for this Court to answer that question in that particular case, subsequent cases made clear that the rule, to the extent it was interpreted to apply outside of the special circumstances articulated in *Wessman* and *Papakalos* was, indeed, too broadly phrased. *See generally*, *e.g.*, *Merrimack Sch. Dist. v. Nat'l Sch. Bus Service, Inc.*, 140 N.H. 9 (1995); *Audley*, 138 N.H. 416; *Commercial Union Assur. Co. v. Brown Co.*, 120 N.H. 620 (1980).

C. This Court's Precedent Regarding Exculpatory Contracts for Recreational Services is Analogous and Controlling in this Case.

Indeed, this case is much more akin to those cases involving exculpatory contracts in the recreational activity context. Just like three of the cases cited by *Amicus—Barnes*, *Dean*, and *McGrath*, all of which found the exculpatory contracts valid—the issue here involves Appellant "in the midst of recreational activities." *Amicus* Brief, at 20. This case is far more comparable to these "recreational activity" cases (and those out-of-state recreational activity cases cited by *Amicus*[6]) than it is to the premises liability or other cases in which the service provided by the

[6] In fact, one out-of-state case cited by *Amicus* recognized exercise as a recreational activity and a voluntary act. *See Amicus* Brief, at 21 (quoting *Hyson v. White Water Mt. Resorts of Conn.*, 829 A.2d 827, 835 (Conn. 2003) ("[R]ecreational activities are voluntary acts. Individuals participate in them for a variety of reasons, including exercise . . ..") (emphasis added).

defendant is necessary or essential. Like using snowmobiles[7] or going to a racetrack,[8] exercise is a voluntary activity which carries with it an inherent risk of potential injury. This sets it apart from services such as housing or public transportation; exercise is not a necessary activity in the modern world and, more specifically, using gyms is not a necessary activity in the modern world. Even if exercise is medically advised for some people, such exercise can be accomplished without using the services of a membership gym. Indeed, even *Amicus* recognizes that only 14% of the New Hampshire population belongs to gyms. *See Amicus* Brief, at 33.

As a generalized comparison, 69% of New Hampshire residents participate in outdoor recreation each year. *See New Hampshire Outdoor Recreation*, Outdoor Industry Association, https://outdoorindustry.org/wp-content/uploads/2017/07/OIA_RecEcoState_NH.pdf. And, when New Hampshire Motor Speedway still issued attendance figures, the twice-annual races drew crowds of more than 101,000, which together represent approximately 15% of the New Hampshire population (the number of attendees has since dropped). *See* Stoico, Nick, *Despite Exciting NASCAR Race, New Hampshire Motor Speedway Still Struggles to Fill Seats*, CONCORD MONITOR (July 24, 2019). If there are far more people who engage in outdoor recreational activities and (at least at one time) more people who go to the NASCAR race at Loudon each year than people who belong to gyms, surely voluntarily going to a membership-only gym cannot be an "essential service." Use of a gym is much more like the recreational activities for which this Court has enforced exculpatory contracts, than it is the special relationships or other limited circumstances in which this Court has deemed there to exist an essential service or other aspect triggering the public policy limitation.

[7] *See McGrath*, 158 N.H. at 543-44.
[8] *See Barnes*, 128 N.H. at 108; *Dean v. MacDonald*, 147 N.H. 263, 269 (2001).

D. Practically, There is No Reasonable Distinction, For Purposes of Exculpatory Contracts, Between Using Gym Equipment and Walking on Gym Property to Use Gym Equipment. Courts in Other Jurisdictions Have Upheld Such Contracts in Gym Settings.

*Amicus* submits that Appellant "was simply walking when she was injured." *Amicus* Brief, at 30. Appellant was not "simply walking," however. She was using the gym. Use of the gym includes not only engaging in exercise, stimulated by various machines and equipment, but also moving about the gym, between pieces of equipment and as part of one's exercise routine. One's use of the gym for exercise purposes, and thus one's risk, does not end when she steps off the treadmill.

The idea that walking to and from equipment, the water fountain, or other areas of the gym is part of using the gym and one of the risks associated with using a gym is not simply theoretical, either. The reality that exercising changes one's body and its responses, in some cases causing dizziness or lightheadedness, is widely accepted and a common occurrence. *See generally* Halliwill, John R., et al., *Blood Pressure Regulation X: What Happens When the Muscle Pump is Lost? Post-Exercise Hypotension and Syncope*, 114 EURO. J. APP. PSY. 561 (March 2014); *What Causes Dizziness After a Workout*, MEDICAL NEWS TODAY, *available at* https://www.medicalnewstoday.com/articles/326851.php. And it does not take extensive searching to discover a plethora of anecdotal evidence of one's body feeling different, legs feeling numb, or mind feeling disoriented following a workout on the treadmill. *See*, *e.g.*, *How to Avoid Feeling Dizzy When Getting Off the Treadmill*, VERY WELL FIT, *available at* https://www.verywellfit.com/why-do-i-feel-dizzy-when-i-get-off-the-treadmill-2911990; *If Your Hands or Feet Ever Feel Tingly or Numb During a Workout, Here's Why*, SELF, *available at* https://www.self.com/story/why-hands-or-feet-feel-tingly-or-numb-during-workout; *Why Do I Feel Strange After Getting Off a Treadmill*, SPORTSREC, *available at* https://www.sportsrec.com/7124112/why-do-i-feel-strange-after-getting-off-a-treadmill.

Thus, when one takes the risk of using, for example, a treadmill, that person risks their body changing, their legs feeling numb, or their head feeling dizzy, and risks the possibility of tripping or running into something. Such is a risk of exercising in a gym and walking around the gym after using equipment, such is the factual circumstance in this case, and such is one more reason why the exculpatory clause in the instant contract is not invalid.

Finally, courts in other jurisdictions agree that exculpatory contracts for gym memberships are valid and not against public policy, even in circumstances where the Appellant injures herself not when specifically using a piece of equipment, but rather by slipping on the floor of gym facilities. *See*, *e.g.*, *Toro v. Fitness Int'l LLC*, 150 A.3d 968, 974 (Pa. Super. Ct. 2016) ("[The plaintiff] was injured when he slipped in the locker room of a fitness center where he was using the facilities. Where, as here, an individual is engaged in a voluntary athletic or recreational activity, the Supreme Court of Pennsylvania has held that an exculpatory clause in a contract for use of facilities is not contrary to public policy."); *DeAsis v. YMCA of Yakima*, 183 Wash. App. 1018, at *1, *6 (Wash. App. 2014) (finding an exculpatory contract valid where the plaintiff, "who was leaving the building after his workout, slip[ped] and f[e]ll on the wet floor"); *Johnson v. Fit Pro, LLC*, No. A09-1919, 2010 WL 2899661, at *1-3 (Minn. Ct. App. July 27, 2010) (finding an exculpatory contract valid where the plaintiff, while at "Gold's Gym," "stepped on the bench in the sauna, a board slipped or rotated, which caused Johnson to fall backward, injuring his head and neck"); *Owen v. Vic Tanny's Enterprises*, 199 N.E.2d 280, 281-82 (Ill. Ct. App. 1964) (finding an exculpatory contract valid where the plaintiff, a member of the defendant's gym, slipped on the area around the gym's swimming pool).

For all the foregoing reasons, Appellant's and *Amicus*'s argument that a reasonable person would not contemplate potential injury or inherent dangerousness of gym use when that person signs an exculpatory contract similarly fails. Use of a gym—filled with heavy weights, fast-moving

treadmills, dangerous equipment, and the accompanying dizziness, exhaustion, and other effects of exercise—presents certain risks. A reasonable person would so anticipate and any public policy discussion serves only to bolster that expectation.

## CONCLUSION

For the reasons stated herein, this Court should affirm the trial court's order granting summary judgment to Planet Fitness.

## REQUEST FOR ORAL ARGUMENT

Pursuant to New Hampshire Supreme Court Rule 16, the Appellee requests fifteen minutes of oral argument to be presented by Attorney Michael R. Mortimer.

## SUPREME COURT RULE 16(1)(i) COMPLIANCE

The undersigned certifies that the written Order of the Trial Court is included herein at p. 28.

## SUPREME COURT RULE 16(10) COMPLIANCE

The undersigned certifies that on this date a copy of this document, as required by Rules of Court, is being electronically sent through the Court's electronic filing system to Richard C. Follender, Esquire and Israel F. Piedra, Esquire, counsel of record.

## SUPREME COURT RULE 16(11) COMPLIANCE

The undersigned certifies that this document contains no more than the number of words allowed by Rule 16(11).

Respectfully submitted,

Pla-Fit Health, L.L.C. a/k/a
Planet Fitness or Planet Fitness, Inc.

By its attorneys,

Wadleigh, Starr & Peters, P.L.L.C.

Dated: December 27, 2019

By: /s/ Michael R. Mortimer

Michael R. Mortimer, NH Bar No. 1813
Michael G. Eaton, NH Bar No. 271586
95 Market Street
Manchester, NH 03101
Tel: (603) 669-4140
Email: mmortimer@wadleighlaw.com

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## NOTICE OF DECISION

**File Copy**

Case Name: **Theresa A Ladue v Pla-Fit Health, L.L.C.**
Case Number: **226-2018-CV-00195**

Enclosed please find a copy of the court's order of May 30, 2019 relative to:

ORDER ON SUMMARY JUDGMENT

May 31, 2019

Marshall A. Buttrick
Clerk of Court

(293)

C: Richard Charles Follender, ESQ; Michael R. Mortimer, ESQ

**THE STATE OF NEW HAMPSHIRE**

**HILLSBOROUGH, SS**
**SOUTHERN DISTRICT**

**SUPERIOR COURT**
**No. 2018-CV-00195**

Theresa A. Ladue

v.

Pla-Fit Health, LLC, also doing business as Planet Fitness or Planet Fitness, Inc.

**ORDER**

The plaintiff, Theresa Ladue, brought the instant action against the defendant, Pla-Fit Health, LLC, also doing business as Planet Fitness or Planet Fitness, Inc. (hereinafter, "Planet Fitness"), for injuries sustained when she fell at Planet Fitness's Nashua, New Hampshire location. The plaintiff alleges her injuries stem from Planet Fitness's negligent maintenance of its property (counts I–III). Planet Fitness now moves for summary judgment.[1] The plaintiff objects. The Court held a hearing on March 29, 2019. Upon consideration of the evidence, arguments, and applicable law, Planet Fitness's motion is GRANTED.

Background

The Court finds the following relevant facts. At all relevant times, Planet Fitness operated a health and fitness business at 18 Northwest Boulevard in Nashua, New Hampshire. On or about April 10, 2017, the plaintiff joined Planet Fitness, at which time she entered into a membership agreement. (See Def.'s Mot. Summ. J. Ex. B.) The two-page membership agreement contained an exculpatory clause, which read, in pertinent part:

[1] The plaintiff has since amended her complaint to include an additional cause of action, which is not the subject of the instant motion.

RELEASE OF LIABILITY, INDEMNIFICATION, ASSUMPTION OF RISK, CLUB RULES, BUYER'S NOTICE & RIGHT TO CANCEL

I understand and expressly agree that my use of this Planet Fitness facility involves the risk of injury to me or my guest whether caused by me or not. I understand that these risks are inherent in physical activity and my use of the facilities can range from minor injuries to major injuries, including death. In consideration of my participation in the activities and use of the facilities, exercise equipment and services offered by Planet Fitness and such use by my guests, if applicable, I understand and voluntarily accept full responsibility on my behalf and on my guest's behalf for the risk of injury or loss arising out of or related to my use or my guests use of the facilities including, without limitation, exercise equipment, tanning, message beds/chairs, and participation in PE@PF or other exercise programs or use of other services, equipment and/or programs offered to members. I further agree that Planet Fitness, PF Corporate, their respective affiliated companies, parents, subsidiaries and the officers, directors, shareholders, employees, managers, members, agents and independent contractors of such entities will not be liable for any injuries including, without limitation, personal, bodily, or mental injury, disability, death, economic loss or any damage to me, my spouse or domestic partner, guests, unborn child, heirs, or relatives resulting from the negligent conduct or omission of Planet Fitness, PF Corporate, or anyone acting on their behalf, whether related to exercise or not. Accordingly, to the fullest extent permitted by law, I do hereby forever release, waive, and discharge Planet Fitness and PF Corporate from any and all claims, demands, injuries, damages, actions or causes of action related to my use or my guest's use of the facility (collectively, "Claims") against Planet Fitness, PF Corporate, or anyone acting on their behalf, and hereby agree to defend, indemnify and hold harmless Planet Fitness and PF Corporate from and against any such claims, including Claims made by my guests. I further understand and acknowledge that neither Planet Fitness nor PF Corporate manufactures fitness or other equipment or products available in its facilities and therefore Planet Fitness and PF Corporate will not be held liable for defective equipment or products.

(Def.'s Ex. B.)

On September 27, 2017, the plaintiff went to Planet Fitness to exercise. After she had used a treadmill, she began walking in the direction of the women's locker room and exit. As she was walking her foot got caught on an "irregular and uneven walkway," causing her to lose her balance. (Def.'s Ex. A, p. 27; Theresa Ladue Aff. ¶ 7.) The plaintiff attempted to catch her balance by reaching for an interior chain link

fence; however, her right arm struck an uncovered, unprotected bolt extending from the fence. (Ladue Aff. ¶ 8.) As a result of the fall, the plaintiff sustained a gash to her right arm and a broken wrist. The plaintiff thereafter filed the instant action, alleging Planet Fitness was negligent in its maintenance of its facility.

Standard

In deciding whether to grant summary judgment, the court considers the pleadings, affidavits, and other evidence, as well as all inferences properly drawn from them, in the light most favorable to the non-moving party. See Amica Mut. Ins. Co. v. Mutrie, 167 N.H. 108, 111 (2014). In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath sufficient to indicate that a genuine issue of material fact exists." Brown v. Concord Grp. Ins. Co., 163 N.H. 522, 527 (2012). An issue of fact is "material" for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law. Macie v. Helms, 156 N.H. 222, 224 (2007) (quoting VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006)). "If there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the grant of summary judgment is proper." Town of Barrington v. Townsend, 164 N.H. 241, 244 (2012) (quoting Bates v. Vt. Mut. Ins. Co., 157 N.H. 391, 394 (2008)); see RSA 491:8-a, III.

Analysis

As stated above, Planet Fitness moves for summary judgment, contending the plaintiff released it of any liability to the plaintiff, regardless of fault, pursuant to the exculpatory clause in the membership agreement. The plaintiff objects, arguing: (1) the exculpatory clause violates public policy; (2) the plaintiff did not understand the exculpatory clause to extend beyond injuries suffered as a result of her use of

the exercise equipment; and (3) the exculpatory clause violates RSA 358-A and is therefore constitutes an unfair and deceptive trade practice.

## I. Public Policy

"Although New Hampshire law generally prohibits exculpatory contracts, [the Court] will enforce them if: (1) they do not violate public policy; (2) the plaintiff understood the import of the agreement or a reasonable person in his position would have understood the import of the agreement; and (3) the plaintiff's claims were within the contemplation of the parties when they executed the contract." McGrath v. SNH Dev., Inc., 158 N.H. 540, 542 (2009).

The plaintiff first asserts the membership agreement's exculpatory clause is unenforceable because it violates public policy. "A defendant seeking to avoid liability must show that an exculpatory agreement does not contravene public policy; *i.e.*, that no special relationship existed between the parties and that there was no other disparity in bargaining power." Id. at 543. The Supreme Court has found an exculpatory agreement "to be against public policy if, among other things, [it is] injurious to the interests of the public, violates some public statute, or tends to interfere with the public welfare or safety." Id.

The plaintiff contends that as an owner or occupier of a public business, Planet Fitness "had a non-delegable duty to exercise reasonable care under all circumstances in the maintenance and operation of its premises." (Pl.'s Obj. p. 3 (citing Valenti v. NET Properties Mgmt., Inc., 142 N.H. 633 (1998).) However, the Court finds Valenti inapplicable to the instant case. The issue in Valenti was whether a property owner could avoid or shift liability to an independent contractor who the property owner hired to maintain its business premises. See Valenti, 142 N.H. at 636 ("Although a possessor of business premises is free to delegate the duty of

performance to another . . . he cannot thereby avoid or delegate the risk of non-performance of the duty."). Valenti did not, however, address whether a business owner could enter into a contract with an invitee in which the invitee releases liability to the landowner for any injuries caused to the invitee by the landowner's negligence.

The plaintiff next relies on the Restatement (Second) of Torts § 314A, which states, in relevant part:

> (1) A common carrier is under a duty to its passengers to take reasonable action
>
> a. to protect them against unreasonable risk of physical harm, and
>
> b. to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
>
> (2) An innkeeper is under a similar duty to his guests.
>
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

The plaintiff contends the exculpatory clause violates public policy because a special relationship was created between the plaintiff and Planet Fitness under the third category. Planet Fitness counters, arguing the plaintiff's reliance on section 314A is misplaced, as Planet Fitness is not a common carrier, innkeeper, or a possessor of land holding itself open to the public. Specifically, with regard to the third category, Planet Fitness asserts that it is not open to all members of the general public; rather, access to its premises is reserved to private members who have signed a membership agreement. Indeed, it draws attention to the fact that the plaintiff was such a member and was injured in a portion of the facility accessible to members only.

The Court finds this distinction persuasive. The plaintiff was not an unknowing member of the public aimlessly wandering through the Planet Fitness premises. Instead, she was a private member of the fitness club who voluntarily entered into the membership agreement with Planet Fitness. In analyzing whether a relationship has the characteristics of a special relationship, the Supreme Court has looked at the voluntariness of the interaction. For example, in Marquay v. Eno, the Supreme Court found a special relationship existed between schools and students and stated that a major factor influencing its conclusion was "the compulsory character of school attendance." 139 N.H. 708, 717 (1995). On the flip side, in Dupont v. Aavid Thermal Techs., Inc., 147 N.H. 706, 711 (2002), the Supreme Court held that an employer-employee relationship did not constitute a special relationship, noting that the specific employment relationship was not compulsory and employees "are generally free to terminate their employment relationship at any time and for any reason." Id. Similar to the employee in Dupont, the plaintiff was not required to be a member at Planet Fitness, voluntarily chose to become one, and was free to cancel her membership at any time. Therefore, because Planet Fitness was a private club and not accessible to the general public, the Court finds a special relationship was not created under section 314A.

The plaintiff also argues the exculpatory clause violates public policy because allowing an owner or operator of a public business to shield itself from liability would be injurious to the public interests. The Court is unpersuaded by this argument.

In McGrath v. SNH Dev., Inc., 158 N.H. 540, 547 (2009), the Supreme Court analyzed whether a ski resort's exculpatory clause with an individual who purchased a lift ticket to snowboard on the mountain violated public policy. In finding the exculpatory clause did not violate public policy, the McGrath Court noted, in relevant

part, that "the fact that the ski area [was] available for public use [was] not dispositive of a special relationship" as the activity of snowboarding was not of "such great importance or necessity to the public that it create[d] a special relationship between the ski area and the plaintiff." Id. at 544; see Barnes, 128 N.H. at 108 (finding Enduro kart racing was not of great public importance or necessity). Like snowboarding and kart racing, the Court finds exercising in a private fitness center is not a matter of such great importance or necessity to the public as to create a special relationship between Planet Fitness and the plaintiff.

Therefore, because the Court finds a special relationship did not exist between the parties, and the plaintiff does not assert that the membership related to a "matter of practical necessity," Barnes, 128 N.H. 102, 108 (1986), or that there was disparate bargaining power between them, the Court finds the exculpatory clause does not violate public policy. See Seigneur v. Nat'l Fitness Inst., Inc., 752 A.2d 631, 641 (Md 2000) (noting the "great weight of authority" favored finding exculpatory clauses in fitness club contracts not against public policy) (collecting cases); Moore v. Waller, 930 A.2d 176, 183 (D.C. 2007) ("We agree with the Maryland Court of Special Appeals and with numerous other courts which have held that it does not violate public policy to enforce exculpatory clauses contained in membership contracts of health clubs and fitness centers.").

**II. Scope**

The plaintiff next asserts the exculpatory clause is unenforceable because she understood the clause to relate to use of Planet Fitness's exercise equipment, not to releasing it from liability with regard to its duty to reasonably maintain its premises. "The plaintiff's understanding presents an issue of fact, and the plaintiff should have an opportunity to prove the fact at trial unless the exculpatory language

was clear and a misunderstanding was unreasonable." Wright v. Loon Mountain Recreation Corp., 140 N.H. 166, 169 (1995).

The Court therefore "examine[s] the language of the release to determine whether a reasonable person in the plaintiff's position would have known of the exculpatory provision." Id. "To determine the scope of the release, [the Court] examine[s] its language." Dean v. MacDonald, 147 N.H. 263, 267 (2001). "In interpreting a release, [the Court gives] the language used by the parties its common meaning and give the contract itself the meaning that would be attached to it by a reasonable person." Id. "As long as the language of the release clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant's negligence, the agreement will be upheld." Id. The Court "strictly construe[s] exculpatory contracts against the defendant." Id.

Upon review of the instant exculpatory clause, the Court finds it clearly and specifically indicates an intent to release Planet Fitness from liability for its own negligence and covers a broad range of exercise and non-exercise related injuries that could occur at the facility. The Supreme Court has held that "the parties need not have contemplated the precise occurrence that caused the plaintiff's injuries." Id. Instead, "they may adopt language to cover a broad range of accidents . . . by specifying injuries involving negligence on the part of the defendants." Id. Here, the exculpatory clause's title included "RELEASE OF LIABILITY, INDEMNIFICATION, [and] ASSUMPTION OF RISK." (Def.'s Ex. B.) It then informed the plaintiff, in relevant part, that: there were certain risks inherent with her use of the facility; the plaintiff voluntarily accepted full responsibility for the risk of injury or loss related to her use of the facility; and the plaintiff agreed that the defendant would not be liable for any injuries resulting from its negligence, "whether related to exercise or not."

(Id.) Although the plaintiff contends she thought the clause pertained only to the use of exercise equipment, in light of the exculpatory clause expressly stating that Planet Fitness would not be liable for any injury, regardless of whether it was related to exercise, the Court finds this interpretation unreasonable. See Wright, 140 N.H. at 169 ("A reasonable person would understand the provision if its language clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant's negligence."); see also Dean, 147 N.H. at 268 (holding a similarly worded exculpatory clause valid). Moreover, the plaintiff's conduct of walking within the facility falls within the broad range of non-exercise related activities that would be likely to occur within the facility. As a result, the Court finds the exculpatory clause was sufficiently clear and understandable.

**III. RSA 358-I**

The plaintiff finally argues that the exculpatory clause violates RSA 358-I:3 and therefore constitutes an unfair or deceptive trade practice and is unenforceable. Specifically, the plaintiff contends the membership agreement does not adequately set out the required warnings and, the warnings it does contain, are not in the correct font size. RSA 358-I:3 states, in relevant part:

> II. Each prepaid contract shall state in at least 10 point boldface type the following:
>
> (a) **"NOTICE TO BUYER: DO NOT SIGN THIS CONTRACT UNTIL YOU HAVE READ ALL OF IT. ALSO, DO NOT SIGN THIS CONTRACT IF IT CONTAINS ANY BLANK SPACES."**
>
> (b) **"STATE LAW REQUIRES THAT THIS HEALTH CLUB REGISTER WITH THE BUREAU OF CONSUMER PROTECTION AND ANTITRUST OF THE DEPARTMENT OF JUSTICE AND MAY REQUIRE THAT THIS CLUB POST A BOND TO PROTECT CUSTOMERS WHO PAY IN ADVANCE FOR MEMBERSHIP OR SERVICES IN THE EVENT THIS CLUB CLOSES. YOU SHOULD ASK TO SEE EVIDENCE THAT THIS CLUB HAS EITHER POSTED A BOND IN COMPLIANCE WITH THE LAW OR HAS BEEN EXEMPTED**

**FROM THIS REQUIREMENT BY THE ATTORNEY GENERAL BEFORE YOU SIGN THIS CONTRACT. IF THIS CLUB HAS NOT POSTED SUCH A BOND, AND YOU PAY THIS HEALTH CLUB FOR MORE THAN ONE MONTH'S MEMBERSHIP OR SERVICES IN ADVANCE, THEN YOU ARE PAYING FOR FUTURE SERVICES, AND YOU MAY BE RISKING THE LOSS OF YOUR MONEY IN THE EVENT THAT THE CLUB CEASES TO CONDUCT BUSINESS."**

IV. Each prepaid contract shall contain in at least 10 point boldface type a statement in substantially the following form:

**"YOU MAY CANCEL THIS TRANSACTION IN WRITING ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION."**

Even assuming Planet Fitness violated this section in drafting the membership agreement the plaintiff signed, the plaintiff has provided no law or authority supporting the proposition that such a violation would result in the contract being unenforceable. Rather, RSA 358-I:8, titled "Remedies," makes available to an aggrieved party a cause of action under RSA 358-A:10. Therefore, regardless of the availability of a personal injury suit, the plaintiff, or another similarly-aggrieved consumer, would be able to hold Planet Fitness accountable for any violation of RSA 358-I:3 by means of filing a claim for a consumer protection violation.

The Court also notes that, upon review of RSA 358-I:3, it does not appear to even apply to the instant membership agreement, as it only applies to "prepaid" contracts. RSA 358-I:1, IV defines "prepayment" as:

> [A]ny payment for services or the use of facilities made before the services or facilities are made available by the health club. It is not a prepayment if a payment for services or the use of facilities is made on the same day the services or use of the facilities is provided. Money or other consideration received by a health club from a financial institution upon the assignment or sale of a contract shall be considered a prepayment to the extent the member is required to make prepayments to the financial institution pursuant to the contract.

Here, the membership agreement did not require the plaintiff to make any prepayments. (Def.'s Ex. B.) Rather, the plaintiff entered into the agreement on or about April 10, agreed to pay a monthly membership fee, and appears to have become a member that day, with immediate access to the facility. (Def.'s Ex. B; Def.'s Ex. A, p. 23–24.) Therefore, because the plaintiff did not enter into a prepaid contract, the requirements of RSA 358-I:3 did not apply.

Accordingly, for the foregoing reasons, Planet Fitness's motion for summary judgment on counts I, II, and III is GRANTED.

So ordered.

Date: May 30, 2019

Hon. Charles S. Temple,
Presiding Justice