THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2019-0354

THERESA A. LADUE

v.

PLA-FIT HEALTH, LLC

APPEAL FROM
HILLSBOROUGH COUNTY SUPERIOR COURT – SOUTHERN DIVISION

BRIEF ON BEHALF OF *AMICUS CURIAE*

NEW HAMPSHIRE ASSOCIATION FOR JUSTICE

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Oral Argument requested per Sup. Ct. R. 30(4)

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INTEREST OF AMICUS CURIAE

The amicus is a statewide professional association of trial attorneys working to ensure injured persons have a fair chance to receive justice through the legal system when they have been harmed by the negligence of others.

A growing threat to the rights of injured persons are exculpatory contracts, also called liability releases. These releases were once only found in limited contexts (mostly inherently dangerous activities such as skiing). Their use, however, has greatly expanded. Exculpatory contracts are quickly becoming ubiquitous in everyday activities.

These exculpatory contracts are harmful for many reasons. To list a few: (a) they are broadly written and purport to absolve for-profit businesses from any and all liability due to negligence, (b) consumers have no ability to negotiate the terms, (c) most likely, all similar businesses require liability releases, and so the consumer has no real choice if they want to engage in a particular activity, (d) the lay consumer does not realize they are signing away all of their legal rights, including negligence liability, (e) the release removes incentives for the businesses to utilize due care, even though they are in the best position to safeguard their customers, and (f) the impact of the waiver is "brought home" less than ever to the

consumer because waivers are commonplace and increasingly presented in small print, electronic formats, on the backs of tickets, and in other non-traditional documents.

More and more, the membership of the amicus encounters injured persons who have been injured by the negligence — or even gross negligence — of large businesses, but are left completely without remedy due to these exculpatory contracts. Such a result is unjust.

This case, involving a customer who was simply walking when she tripped-and-fell due to the defendant's negligence in maintaining its premises, provides this Court an opportunity to reach a modest result: a business cannot completely abdicate its centuries-old responsibility of ordinary care based on a contract of adhesion. The amicus advocates for that conclusion.

The focus of this brief is the public policy prong of the exculpatory contract test.

SUMMARY OF THE ARGUMENT

Exculpatory contracts were historically used in very limited contexts. Gradually, however, different types of businesses employed them, and courts began to enforce them regularly.

The New Hampshire Supreme Court, however, has always held that liability releases are "generally prohibited." In fact, it has only upheld three such releases in business-consumer cases.

Public policy is a sliding scale and courts must balance the totality of many different factors and considerations. This case involves circumstances very different from the cases in which the Court has upheld exculpatory contracts. Here, the scales of public policy weigh in favor of non-enforcement, because enforcement would allow a for-profit business to wholly disregard its basic duties of reasonable care.

ARGUMENT

Exculpatory contracts[1] —agreements prospectively barring a negligence claim for personal injury —are now ubiquitous in modern society. *See* Douglas Leslie, *Sports Liability Waivers and Transactional Unconscionability*, 14 SETON HALL J. SPORTS & ENT. L. 341, 341 (2004); Paul Sullivan, *Who's at Fault? Read the Fine Print to Make Sure You're Not at Risk*, N.Y. TIMES, Apr. 12, 2019 (*available at* https://www.nytimes.com/2019/04/12/your-money/liability-waivers.html). This case involves an exculpatory contract signed by a member of a fitness club (Planet Fitness). The member, Theresa Ladue, was seriously injured in a trip-and-fall type incident on the club's premises.

The question before the Court is both novel and narrow. The Court has defined the outer limits of its exculpatory contract jurisprudence; this case lies somewhere in the middle.

In New Hampshire, exculpatory contracts are "generally prohibited." *Barnes v. NH Karting Ass'n*, 128 N.H. 102, 106 (1986). That should be the context in which the Court undertakes its inquiry: enforceable exculpatory contracts are the exception, not the rule.

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[1] These provisions are also known as "liability releases," "liability waivers," "exculpatory clauses," and "exemption contracts." This brief uses the terms interchangeably; all of them refer to prospective (i.e., pre-injury) waivers of liability.

Indeed, this Court has only upheld three (3) exculpatory contracts in the consumer-business context. The first involved a plaintiff who was driving a go-kart at a motorsports park, and collided with a disabled go-kart on the track. *Barnes*, 128 N.H. at 105. The second case concerned a racecar mechanic who walked across the racetrack and was struck by a racecar. *Dean v. Macdonald*, 147 N.H. 263, 266 (2001). The final case involved a snowboarder who was struck by a snowmobile while she was snowboarding. *McGrath v. SNH Dev., Inc.*, 158 N.H. 540, 541 (2009).

The case at bar is very different than that trio of cases. This is a "slip-and-fall" incident in which a business invitee was injured due to a business owner's negligently-maintained premises. The cause of Ms. Ladue's injury had no relation to exercising, recreation, or other "risky" activities. Rather, she was simply the victim of a business owner's negligent failure to carry out its basic common law duties. It is contrary to public policy to enforce an exculpatory contract in such a situation.

A. EXCULPATORY CONTRACTS, GENERALLY

"Exculpatory agreements call into conflict two tenets of the law. First, a party should be liable for the consequences of the negligent breach of a duty owed another. . . . Contraposed against this basic rule of tort law is the principle that, as a matter of

efficiency and freedom of choice, parties should be able to contract freely about their affairs." *Barnes*, 128 N.H. at 106.

Exculpatory contracts have been in use for almost two hundred years. Emlin McCain, *Contractual Limitation of Liability for Negligence*, 28 HARV. L. REV. 550, 552 n.1 (1915). For decades, they only appeared in narrow contexts. By far, the most prevalent application was with regard to common carriers, especially railroads, because of the high degree of care imposed upon them by the common law. *See* Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1158 (1990); *see Taylor v. Grand T. Ry.*, 48 N.H. 304, 310, 316 (1869).

Carriers sought to limit the extent of this stringent liability through exculpatory contracts. McCain, *supra* at 552. Initially, these contracts merely reduced a carrier's responsibilities to an ordinary negligence standard. *See* Kaczorowski, *supra* at 1151. American courts mostly rejected attempts to entirely disclaim liability for negligence. Comment, *Exculpatory Clauses: The Historical Impact of Common-Carrier Law and the Modern Relevance of Insurance*, 24 U. CHI. L. REV. 315, 323 (1957).

Besides common carriers, telegraph companies were the primary early users of waivers.[2] *See id*., at 346. Other applications included warehouses, coat checks, and parking lots. *Id.* at 325 n.70. As these examples indicate, many early attempts to utilize exculpatory contracts — at least in business-consumer environments — were in the context of property loss. *See id.* Into the mid-to-late 19th century, courts continued to state generally that attempts to limit liability for negligence were void. *See, e.g., Johnson's Adm'x v. Richmond & D.R. Co.,* 11 S.E. 829, 829-30 (Va. 1890) ("[F]or one party to put the other parties to the contract at the mercy of its own misconduct . . . can never be lawfully done where an enlightened system of jurisprudence prevails.").

However, by the early twentieth century, the use of exculpatory contracts had expanded. Courts began to enforce the releases, even against claims of negligence. The extent of this dramatic change was reflected in the Restatement of Contracts, which was first published in 1932. The Restatement annunciated the rule that a "bargain for exemption from liability for the consequences of negligence . . . is legal." RESTATEMENT OF CONTRACTS, § 574, at 1079 (1932).

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[2] Telegraph companies could be liable for negligence for failing to properly transmit messages. *Primrose v. Western Union Tel. Co.,* 154 U.S. 1, 14 (1894).

B. NEW HAMPSHIRE AND THE CONCEPT OF PUBLIC POLICY

New Hampshire, however, did not follow this trend. In 1930, this Court explained:

> The policy of this state with reference to contracts designed to relieve a party from the consequences of the non-performance of his common-law duty to exercise ordinary care has been so plainly stated as to permit of only one conclusion. . . . It is against the policy of the law to permit anyone, be he common carrier or not, to relieve himself by contract for the performance of his common law duty to use ordinary care to avoid injuring those with whom he knew or should have known his business would bring him in contact.

Wessman v. Boston & M.R.R., 84 N.H. 475, 478 (1930) (citations omitted); *see also Clairmont v. Cilley*, 85 N.H. 1, 4 (1931); *Kenney v. Wong Len*, 81 N.H. 427, 438 (1925). The Court recognized that its approach to exculpatory contracts was somewhat of a "minority view." *Ahearn v. Roux*, 96 N.H. 71, 73 (1949).

Of course, this "general rule" of unenforceability is subject to exceptions. *See Tanguay v. Marston*, 127 N.H. 572, 577 (1986). The Court has decided that, in some situations, enforcement of a liability

release against negligence does not violate public policy. *See Barnes*, 128 N.H. at 108.

The Court has stated that an exculpatory agreement is "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." *McGrath*, 158 N.H. at 543. It is the defendant's burden to demonstrate that a liability release is valid from a public policy perspective. *See id.*

The term "public policy" is not conducive to mechanistic definitions. As one commentator noted:

> The validity of a particular exculpation contract depends on the whole complex of considerations bearing on the question [of] whether it is socially desirable to allow escape from liability in the situation under scrutiny. Consequently, no single element can be relied upon to explain all the cases.

Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 COLUM. L. REV. 248, 249 (1937); *see also Heath v. Heath*, 85 N.H. 419, 425 (1932) (discussing the concept of public policy).

Thus, "it is impossible to state with specificity a strict and invariable formula or test that will apply in every factual context or even to attempt a partial list of elements – let alone a comprehensive

or exhaustive one – that will embrace all or even most of the relevant public policy concerns that might be raised by any given set of facts." 8 WILLISTON ON CONTRACTS § 19.22 (4th ed.). Despite this caveat, it may be broadly said that:

> [W]hether a particular agreement or provision is void as contrary to public policy depends on all the facts and circumstances surrounding the making of the agreement; society's expectations; the identity and nature of the parties involved, including their relative education, experience, sophistication, and economic status; and the nature of the transaction itself, including the subject matter, the existence or absence of competition, the relative bargaining strength and negotiating ability of the economically weaker party, and the terms of the agreement itself, including whether it was arrived at through arm's length negotiation or on terms dictated by the stronger party and on an adhesive, take-it-or-leave-it basis.

Id. Other factors include whether the liability release was used in furtherance of a profit motive, *Applegate v. Cable Water Ski, L.C.*, 974 So.2d 1112, 1115 (Fla. Dist. Ct. App. 2008), whether the injury was to person (more objectionable) or property (less objectionable),

Anderson v. Old Nat'l Bancorp, 675 F. Supp. 2d 701, 709 (W.D. Ky. 2009), and whether the tortious conduct violated a safety statute.[3] 57A AM. JUR. 2D NEGLIGENCE, §55; *see Spencer v. Laconia Sch. Dist.*, 107 N.H. 125, 130 (1966) (if a "provision . . . of the contract would in effect permit the defendant to nullify the . . . statute [it] cannot be held valid."). There exist many other potentially relevant considerations. "The public policy to which a court may refer may be statutory or nonstatutory in origin." *Harper v. Healthsource N.H.*, 140 N.H. 770, 775 (1996).

In short: "Public policy is variable. [N]o fixed rules can be given by which to determine what is public policy." *Fidelity & Deposit Co. v. Davis*, 284 P. 430, 433 (Kan. 1930).

C. THE SLIDING SCALE OF PUBLIC POLICY

As the above discussion indicates, there is a "sliding scale" of enforceability of liability releases. *See* 8 WILLISTON ON CONTRACTS § 19.23 (4th ed.). The Court's task, therefore, is to determine where this case lies on that spectrum.

This Court has tacitly defined the extreme end of the "unenforceability" side of the scale: liability for *intentional* injury

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[3] "Only infrequently does legislation [expressly] provide that a term is unenforceable": that fact is not dispositive. RESTATEMENT (SECOND) OF CONTRACTS, § 178; *see Trefethen v. Amazeen*, 96 N.H. 160, 161 (1950); *Noble v. Alis*, 474 N.E.2d 109, 111 (Ind. Ct. App. 1985).

cannot be disclaimed. *See First N.H. Mortg. Corp. v. Greene*, 139 N.H. 321, 323 (1995) ("[E]xculpatory agreements . . . which purport to relieve from bad faith or intentional wrongs are considered to be against public policy and will not be enforced."); *PK's Landscaping v. New Eng. Tel. & Tel. Co.*, 128 N.H. 753, 757 (1986) ("[W]anton and willful conduct intended to harm is not subject to [a] limitation of liability."). Almost as objectionable are attempted waivers of reckless conduct. *See Tayar v. Camelback Ski Corp.*, 47 A.3d 1190, 1201-03 (Pa. 2012); *cf. Migdal v. Stamp*, 132 N.H. 171, 176 (1989).

On the other end of the spectrum are arms-length commercial transactions between businesses or sophisticated businesspeople. *Shaer Shoe Corp. v. Granite State Alarm*, 110 N.H. 132, 135 (1970); *see, e.g.*, *Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1191 (Colo. Ct. App. 2008) ("As a general rule, courts will uphold an exculpatory provision in a contract between two established and sophisticated business entities that have negotiated their agreement at arm's length."). These commercial exculpatory clauses are enforced because (1) the parties have equal bargaining power, *Shaer Shoe Corp.*, 110 N.H. at 135, and (2) the parties' legal relationship arises "by reason of their private contract and not by virtue of any duty owed by either party to the public." *South Carolina Electric & Gas Co.*

v. Combustion Engineering, Inc., 322 S.E.2d 453, 459 (S.C. Ct. App. 1984).

The vast majority of exculpatory contract cases lie somewhere between those two poles.

1. Recreational Activity Cases

As mentioned above, this Court has only enforced three exculpatory contracts in the business-consumer context. All have been recreational activity-related injuries.

The Court determined that a liability waiver is effective against a plaintiff go-kart driver at a motorsport park who takes a practice run and collides with a disabled kart on the racetrack. *Barnes*, 128 N.H. at 105-06. Similarly, a racecar mechanic is bound by an exculpatory contract when he crosses a racetrack and is struck by a racecar. *Dean*, 147 N.H. at 266. And an exculpatory contract is enforceable against a snowboarder's claim that she was struck by a snowmobile while downhill-skiing at a ski resort. *McGrath*, 158 N.H. at 541.

The three cases above involved plaintiffs in the midst of recreational activities. "To properly balance the public-policy interests" relevant to exculpatory contract enforceability, courts "consider the nature of the activity and the inherent risks involved." *Stelluti v. Casapenn Enters., LLC*, 1 A.3d 678, 693 (N.J. 2010).

"[R]ecreational activities are voluntary acts. Individuals participate in them for a variety of reasons, including: to exercise, to experience a rush of adrenaline, and to engage their competitive nature." *Hyson v. White Water Mt. Resorts of Conn.*, 829 A.2d 827, 835 (Conn. 2003) (dissent). Generally, public policy favors participation in athletics and recreational activities. *Reardon v. Windswept Farm, LLC*, 905 A.2d 1156, 1161 (Conn. 2006). "The risk of injury, in varying degrees, is inherent in every sport or recreational activity." *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 662 (Tex. 1999) (dissent). As such, when an injury occurs while participating in a recreational activity, there is no strong public policy militating against enforcement of an exculpatory contract. *McGrath*, 158 N.H. at 544.

2. Premises Liability Cases

The amicus submits that *Barnes* and its progeny — all injuries sustained while in the midst of a dangerous recreational activity — lie near one end of the "public policy spectrum." Ms. Ladue's injury, caused by simply walking on an unsafe floor, implicates much stronger policy concerns.

"[W]here a business operator extends a general invitation to enter and engage in activities on its premises that is accepted by large numbers of the public, and those invitees are subject to risks of harm from conditions of the operator's creation, their safety is a

matter of broad societal concern." *Bagley v. Mt. Bachelor, Inc.*, 340 P.3d 27, 43 (Or. 2014). "[T]hose who own or operate business premises are in the best position to protect against risk of personal injury on their premises . . . ." *Grady v. Jones Lang Lasalle Constr. Co.*, 171 N.H. 203, 213 (2018). Premises liability provides an important inventive for land owners/occupiers to safely maintain their properties, "with the ultimate goal of keeping accidents to the minimum level possible." *See Umali v. Mount Snow, Ltd.*, 247 F. Supp. 2d 567, 573 (D. Vt. 2003); *Estate of Cargill v. Rochester*, 119 N.H. 661, 666 (1979) ("The threat of tort liability acts as an incentive for persons engaged in various activities to take steps to reduce the risk of injuries."). Enforcement of a liability release runs contrary to that goal. *Bagley*, 340 P.3d at 45.

Because of the importance of premises safety, landowners in New Hampshire have a non-delegable duty to maintain their premises in reasonably safe condition. *Valenti v. NET Props. Mgmt.*, 142 N.H. 633, 635-36 (1998). The non-delegation rule states that when business entities "invite the public onto their premises for business purposes, policy concerns counsel against allowing them to shield themselves from liability . . . ." *Id.* at 636. This policy exists to protect "persons who enter public buildings expecting them to be safe." *See id.* The *Valenti* case involved an attempt by a landowner to

shield liability by delegating to an independent contractor; however, the same public policy considerations should apply to attempts to exculpate liability through a release. *See id.*; *see also Pamperin v. Trinity Mem'l Hosp.*, 423 N.W.2d 848, 858 (Wis. 1988) ("The theory underlying the nondelegable duty exception is that certain responsibilities of a principal are so important that the principal should not be permitted to bargain away the risks of performance."); *Johnson v. Home Lines, Inc.*, 48 Misc. 2d 1090, 1091 (N.Y. Civ. Ct. 1965) (noting that defendant could not avoid liability through exculpatory clause because its duties were nondelegable).

Two of the Court's prior premises liability cases are analogous to the case at bar:

i. *Wessman*

The first is *Wessman v. Boston & M.R.R.*, 84 N.H. 475, 478 (1930). In *Wessman*, the plaintiff was a passenger on a train traveling from Concord to Manchester. *Id.* at 475 (syllabus). After disembarking the train, she slipped and fell on the train platform due to the icy condition of the platform. *Id.* The plaintiff established that the cause of the unsafe premises was the defendant's negligence. *Id.* at 477.

The train operator moved for a directed verdict based on an exculpatory clause signed by the plaintiff. *See id*. The trial court denied that motion, and the defendant appealed. *Id.* at 476-77.

The Supreme Court held that the exculpatory clause was invalid. *Id.* at 478. It stated that, "contracts designed to relieve a party from the consequences of the non-performance of his common-law duty to exercise ordinary care . . . [are] against the policy of the law . . . ." *Id.* Whether "common carrier or not . . . it is not permissible for me to agree to release you from liability to me for injuries caused by [future] misconduct." *Id.*

The Court explained that the reason for this "rule of policy" is "the cardinal importance attached to the doctrine of ordinary care in this state." *Id.* at 478-79. "Everyone in the conduct of his lawful business is bound to act with this degree of care, and if he fails to do so is responsible for the consequences." *Id.* at 479. As such, held the Court, the duty of reasonable care "shall not be interrupted by private contract." *Id.*

ii. *Papakalos*

The second analogous case is *Papakalos v. Shaka*, 91 N.H. 265 (1941). In *Papakalos*, the plaintiff rented an apartment from the defendant. *Id.* at 266. The plaintiff was walking down the stairway to

his apartment when he fell and broke his leg. *Id.* at 265 (syllabus). The stairway was admittedly in bad repair. *Id.* at 266.

The defendant alleged that the "plaintiff agreed to forego any right of action for personal injuries which might accrue to him by reason of the defendant's failure to maintain the common stairway in reasonably safe and suitable condition." *Id.* at 268. On those grounds, the defendant moved to dismiss the case. *See id.* at 265, 266.

The Court noted the stairs were common area, and as such, the landlord was "under a duty to use ordinary care to keep them in reasonably safe condition for any use which might be found to be contemplated." *Id.* at 268. The defendant did "not deny that the stairs were defective." *Id.* at 266.

The Court found the purported exculpatory agreement invalid because of the "rule that one may not by contract relieve himself from the consequences of the future non-performance of his common-law duty to exercise ordinary care." *Id.* at 268. As such, the Court affirmed judgment for the plaintiff. *Id.* at 269.

D. THE RELEASE IN THIS CASE IS CONTRARY TO PUBLIC POLICY

Ms. Ladue's case is much more similar to *Papakalos* and *Wessman* than *Barnes*, *Dean*, and *McGrath*.

The latter three cases involved injuries directly caused by a recreational activity: the go-kart and racecar collisions in *Barnes* and *Dean*, and the snowboard/snowmobile crash in *McGrath*. Those cases made clear that "recreational activit[ies]" do not implicate public policy concerns. *See McGrath*, 158 N.H. at 544.

The negligence and injuries in *Papakalos* and *Wessman* are factually similar to the instant case. Mr. Papakalos and Ms. Wessman were injured, respectively, by tripping on defective stairs and slipping on an icy platform; Ms. Ladue was injured tripping on a defective floor.

The Defendant's counter-argument to this comparison is easily surmised: *Papakalos* and *Wessman* both involved so-called "special relationships" or "disparities in bargaining power" between the plaintiffs and defendants. Ms. Ladue may have no such relationship with the Defendant in this case. *But see* RESTATEMENT (SECOND) OF TORTS § 314A ("possessor of land who holds it open to the public" holds a special relationship with "members of the public who enter in response to his invitation").

At the trial level, Defendant argued that if there were no special relationship or disparity in bargaining power between the parties, the exculpatory contract was *per se* enforceable. However, although those tests may be the classic examples of public policy

violations, they are by no means the exclusive examples.[4] *See McGrath*, 158 N.H. at 543 (an exculpatory agreement is "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."); 8 WILLISTON ON CONTRACTS § 19.22 (4th ed.). Enforceability or unenforceability of an exculpatory contract does not hinge solely on the categorization of the parties' relationship. That much is clear from the rule that parties may not exculpate liability for intentional harms, even in arms-length commercial transactions. *See, e.g.*, *First N.H. Mortg. Corp.*, 139 N.H. at 323; *PK's Landscaping*, 128 N.H. at 757; *see also* 8 WILLISTON ON CONTRACTS § 19.22 (4th ed.) (with regard to public policy, "it is impossible to state with specificity a strict and invariable formula or test that will apply in every factual context").

The proper question: is there any *principled public policy reason* to distinguish *Papakalos* and *Wessman*, given their similarities to the case before the Court?

No, the amicus would submit.

In New Hampshire, common carriers owe passengers the "highest degree of care and diligence." *Taylor*, 48 N.H. at 314.

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[4] "Special relationship" and "disparity of bargaining power" also overlap to a considerable extent. *See* 8 WILLISTON ON CONTRACTS § 19.28 (4th ed.).

However, that heightened duty applies only on the train itself, not the platform, where only ordinary care is required. *See Byron v. Boston & M.R.R.*, 82 N.H. 434, 436 (1926); *see Indianapolis S.R. Co. v. Wall*, 101 N.E. 680, 682 (Ind. Ct. App. 1913). This reasonable care is owed to all members of the public, not merely alighting passengers. *Kansas C.S.R. Co. v. Watson*, 144 S.W. 922, 924 (Kan. 1912).

Thus, when Ms. Wessman slipped and fell on the icy station platform, it was due to railroad's breach of its duty to the public to "exercise ordinary care" in keeping its premises "in a reasonably safe condition." *Wessman*, 84 N.H. at 477.

Similarly, Mr. Papakalos's landlord breached his "duty to use ordinary care" to keep the building's common areas in a "reasonably safe condition." *Papakalos*, 91 N.H. at 267. This duty is owed to any person "rightfully using the premises," not just tenants. *Burelle v. Pienkofski*, 84 N.H. 200, 201 (1929); *see Sargent v. Ross*, 113 N.H. 388, 392 (1973) ("The ground of liability upon the part of a landlord . . . . has nothing special to do with the relation of landlord and tenant.").

The *Papakalos* case also demonstrates that disparity of bargaining power is not a dispositive factor: a residential tenant has more opportunity to dicker over his lease with an individual landlord than does a customer faced with an adhesion contract from

a large international corporation. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 32 n.2 (1st Cir. 2006) (defining adhesion contract).

In sum, the public policy underlying this Court's holdings in *Wessman* and *Papakalos* did not stem from any special relationship between the parties. Rather, the duties violated by the defendants were duties owed to the public at large: the responsibility to keep their premises in a reasonably safe condition.[5]

The Defendant in this case has allegedly breached the same duty. *See Rallis v. Demoulas Super Markets*, 159 N.H. 95, 99 (2009). The Defendant's negligence resulted in harm to a business invitee who was simply walking on its premises. This case, therefore, is very unlike the risky activities considered in *Barnes* and its progeny, and very similar to the slip-and-fall injuries in *Papakalos* and *Wessman*. This Court should come to same conclusion it did in the latter two cases: the exculpatory contract is contrary to public policy and unenforceable. *See Papakalos*, 91 N.H. at 268; *Wessman*, 84 N.H. at 479 (New Hampshire attaches a "cardinal importance . . . to the doctrine of ordinary care.").

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[5] Relevant here, the defendants in *Wessman* and *Papakalos* had nondelegable duties — just as the Defendant does. *See Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.*, 71 N.H. 522, 530 (1902) (describing "absolute duties," such as those of a railroad, which cannot be delegated); *Proal v. Camman*, 87 N.H. 389, 390 (1935) (landlord has duty, which "he cannot delegate or avoid" to keep premises in safe condition).

E. THIS IS A UNIQUE CASE AND THE RULING OF THE COURT CAN BE NARROW

The facts of this case are unusual in the consumer-business liability release arena. Almost all the reported cases involve injuries suffered *while* engaging in a bargained-for recreational activity. *See, e.g., Trainor v. Aztalan Cycle Club, Inc.*, 432 N.W.2d 626, 631 n.1 (Wis. App. Ct. 1988). Ms. Ladue, in contrast, was simply walking when she was injured. As such, the result advocated for by the amicus would be narrow in scope and have relatively minimal ramifications, because "premises defect" cases make up such a small portion of recreational activity lawsuits.[6] Slip-and-fall injuries are also likely to be less serious in nature than many other gym injuries, which are often severe and traumatic due to the strenuous nature of weightlifting and other fitness activities. *See* Gray & Finch, *supra* note 6, at 7. The outcome of this case will not affect the treatment of the most serious gym injury claims — i.e., the ones that most

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[6] *See* Shannon E. Gray & Caroline F. Finch, *The causes of injuries sustained at fitness facilities presenting to Victorian emergency departments – identifying the main culprits*, 2 INJURY EPIDEMIOLOGY, no. 6, 2015, at 3-5 (*available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5005555/). This study included "trip/fall through facility (including group exercise)" and "trip/fall in change rooms" as injury causes. *Id.* at 3 (emphasis added). Of almost 3,000 cataloged cases, the authors found zero "change rooms" slips/trips and falls. *Id.* at 4. Additionally, only 12.5% of the catalogued injuries were "trip/fall throughout the facility (including group exercise)," and of those it appears that at least 30% were still sustained while exercising. *See id.* at 5. This seems to indicate that only a very small percentage of gym-related injuries are of the type sustained by Ms. Ladue here.

increase loss runs and therefore affect insurance premiums.[7] *See Stelluti*, 1 A.3d at 693 (discussing different public policy considerations between exercise-connected injuries and premises liability injuries).

The uniqueness of this case is evidenced by the dearth of directly comparable case law. However, courts in other jurisdictions considering the issue do support the position of the amicus: as a matter of public policy, ordinary premises liability should not be waivable via exculpatory contracts. *See, e.g.*, *Martinez-Santiago v. Public Storage*, 38 F.Supp. 3d 500, 514 (D. N.J. 2014) (slip and fall outside storage unit, *held*, "the Amended Complaint states a plausible claim that the exculpatory provision is not enforceable, because Defendant has a legal duty to maintain its premises, and relieving businesses from that duty to business invitees allegedly adversely affects the public interest."); *Walters v. YMCA*, 96 A.3d 323, 328 (N.J. Super. Ct. App. Div. 2014) (slip and fall near pool, *held*, "the exculpatory clause here . . . would eviscerate the common law duty of care owed by defendant to its invitees . . . . Such a contract must be declared unenforceable as against public policy."); *Ver Weire v. Styles*, 427 S.W.3d 112, 116-17 (Ark. Ct. App. 2013) (patron fell due

[7] That is not to imply that the amicus agrees that exculpatory contracts *should* be enforced in other gym-related contexts, such as defective equipment injuries. Quite to the contrary. But that question is not before the Court today.

to loose plank in bleachers at raceway, *held*, "Ms. Ver Weire was a business invitee . . . under these facts [] the release was inapplicable . . . To hold otherwise would be to grant a *carte blanche* release to a racetrack owner from the exercise of due care related to every aspect of its operation, thus insulating it from all premises-liability actions."); *Rahuba v. 5 D's, Inc.*, 2004 Conn. Super. LEXIS 2575, at *16-18 (Conn. Super. Ct. Sep. 16, 2004) (trip and fall on defective carpet at roller skating rink, *held*, "this injury was not caused while in the sporting context . . . . Under the circumstances of this case the court finds that the waiver would not be enforceable on public policy grounds."); *see also Corwin v. NYC Bike Share, LLC*, 238 F. Supp. 3d 475, 497-98 (S.D.N.Y. 2017) (bicyclist injured by obstacle on pavement in bike station, *held*, "[city has] non-delegable duty to keep streets and roadways safe . . . enforcement of such a waiver . . . is contrary to [] public policy . . . ."); *Hallman v. Dover Downs, Inc.*, 1986 U.S. Dist. LEXIS 15708, at *16-18 (D. Del. Dec. 31, 1986) (plaintiff was injured due to collapse of defective wooden railing at stock car race, summary judgment denied because the release might be contrary to public policy or unconscionable).

Finally, it should be pointed out that although exercising is a voluntary, arguably "recreational," activity, it is very different from go-karting, stock car racing, or snowboarding. "The benefits of

exercise are beyond dispute." *Stelluti*, 1 A.3d at 701 (dissent) (citing to United States Surgeon General and DHHS). Unlike the activities in the *Barnes* line of cases, exercising at the gym is a regular occurrence (weekly or even daily) for many ordinary Americans. *See New Hampshire Health Clubs by the Numbers*, IHRSA, https://www.ihrsa.org/industry-leadership/state-advocacy/new-hampshire/ (accessed Nov. 10, 2019) (over 222,000 New Hampshire residents visit health clubs); Active Marketing Group, *2007 Health Club Industry Review* 6 (2007), *available at* http://www.activenetworkrewards.com/assetfactory.aspx?did=32 (estimating that 14% of NH state population belonged to health club in 2007). Therefore, although a gym membership *may* not (*but see*, supra note 7) be considered "an essential service" sufficient to create a substantial disparity in bargaining power and invalidate a liability release on that basis alone, the widespread use should at least tip the scales of public policy more towards non-enforcement. *See Barnes*, 128 N.H. at 108.

F. SCOPE OF THE RELEASE

The primary purpose of this brief is to discuss the public policy considerations outlined above. Obviously, if the Court determines that the release fails either of the latter two prongs of the *McGrath* test, it need not undertake a public policy analysis.

The amicus will make one observation regarding the scope of the release, in particular the requirement that "the plaintiff's claims were within the contemplation of the parties when they executed the contract." *McGrath*, 158 N.H. at 542.

The "contemplation" prong is undertaken by examining the language of the release. *Id.* at 545. It is an objective test. *See id.* at 546. The Court has stated that "the parties need not have contemplated the precise occurrence that resulted in the plaintiff's injuries, and may adopt language that covers a broad range of accidents." *Id.* at 545.

To determine what the parties contemplated, however, the Court should not *solely* look at the language of the release. *See Dean*, 147 N.H. at 268 ("Although we hold that the Release was intended to apply to a broad range of accidents occurring in automobile racing, we observe that this range is not without limitation."). This is in accord with the objective "meeting of the minds" test applicable to contracts generally: the agreement is interpreted "according to what a reasonable person would expect it to mean *under the circumstances*." *Behrens v. S.P. Constr. Co.*, 153 N.H. 498, 502 (2006) (emphasis added); *see Haines v. St. Charles Speedway, Inc.*, 874 F.2d 572, 575 (8th Cir. 1989) (using a "total transaction" approach to

determine expectations of the parties, "rather than looking only to the literal language of the document.").

The amicus submits that the public policy discussion above informs and helps define what a "reasonable person" would contemplate when they sign an exculpatory contract on a gym. [8] Business invitees enter business premises "expecting them to be safe." *Valenti*, 142 N.H. at 636. That expectation is not displaced by a contract of adhesion in fine print at the bottom of a gym membership agreement. Any assertion to the contrary is legal fiction.

G. CONCLUSION

Ultimately, if the Court considers this a close case, the determining factor may be New Hampshire's general and historical attitude towards exculpatory contracts. States have varying philosophies towards the enforcement of liability releases. *Jaffe v. Pallotta TeamWorks*, 374 F.3d 1223, 1226 (D.C. Cir. 2004) ("Given the tradeoffs and policy issues presented by preinjury releases, it is no surprise that different jurisdictions have varied positions on their validity.").

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[8] In that vein, courts have declared that "an overbroad exculpatory contract contravenes public policy" because the "very breadth of the release raises questions about its meaning." *Fisher v. Stevens*, 584 S.E.2d 149, 152-53 (S.C. Ct. App. 2003).

Some states have no animus towards liability releases. *See, e.g.*, *Copeland v. HealthSouth/Methodist Rehab. Hosp.*, 565 S.W.3d 260, 271 n.15 (Tenn. 2018) ("Exculpatory provisions are not disfavored in Tennessee."); *Espinoza v. Ark. Valley Adventures, LLC*, 809 F.3d 1150, 1153 (10th Cir. 2016) ("This relatively permissive public policy toward recreational releases may not be unique to Colorado common law but it does seem to be one of its distinguishing features."); *BJ's Wholesale Club, Inc. v. Rosen*, 80 A.3d 345, 352 (Md. 2013) ("exculpatory clauses are generally valid").

Indeed, some states actually *favor* them from a public policy perspective. *Sharon v. City of Newton*, 769 N.E.2d 738, 744 (Mass. 2002) ("Massachusetts law favors the enforcement of releases."); *O'Connor v. United States Fencing Ass'n*, 260 F.Supp.2d 545, 552 (E.D.N.Y. 2003) ("California courts look favorably on contractual waivers of liability even where such devices permit recreational establishments to wholly escape liability while blithely supplying defective equipment or services.").

New Hampshire is not one of those states. Rather, in New Hampshire "exculpatory contracts are generally prohibited." *Barnes*, 128 N.H. at 105. This general rule is founded on the "cardinal importance attached to the doctrine of ordinary care in this state." *Wessman*, 84 N.H. at 478; *see Sargent*, 113 N.H. at 396 (discussing

"overriding social view" that landowners should be subject to liability).

For all these reasons, including the totality of the public policy factors discussed above and New Hampshire's general disfavor for exculpatory contracts, the Court should reverse the trial court and find the liability release unenforceable.

REQUEST FOR ORAL ARGUMENT

Pursuant to Supreme Court Rule 30(4), the amicus curiae requests the opportunity to present oral argument, and therefore asks that the Court grant each side time beyond the standard 15 minutes. Attorney Israel F. Piedra to present oral argument.

STATEMENT OF COMPLIANCE

This document complies with the word limitation set out in Supreme Court Rule 16(11). Undersigned counsel hereby certifies that this brief contains 6,378 words.

Respectfully submitted,

NEW HAMPSHIRE ASSOCIATION FOR JUSTICE

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Dated: November 12, 2019 /s/ Israel Piedra

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DELIVERY CERTIFICATION

I certify that the foregoing brief will be served on this date to all counsel via the Court's e-file system.

Dated: November 12, 2019 /s/ Israel Piedra

Israel F. Piedra, Esq.