THE STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE NO. 2019-0354

THERESA A. LADUE

vs.

PLA-FIT HEALTH, L.L.C.

BRIEF FOR PLAINTIFF/APPELLANT – THERESA A. LADUE

APPEAL FROM DECISION OF THE HILLSBOROUGH COUNTY SUPERIOR COURT, SOUTHERN DISTRICT

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Oral argument is requested
Mr. Follender will argue for the Plaintiff

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QUESTIONS PRESENTED

I. WHETHER A BUSINESS THAT REQUIRES A PATRON TO BECOME A MEMBER OF ITS HEALTH AND FITNESS CLUB CAN SHIELD ITSELF FROM LIABILITY, THROUGH THE USE OF AN EXCULPATORY CLAUSE, FROM A CLAIM FOR INJURIES AND DAMAGES DUE TO THE PREMISES NOT BEING MAINTAINED OR OPERATED IN A REASONABLY SAFE CONDITION.

See Plaintiff's Objection To Motion For Summary Judgment, Apx. 24; Plaintiff's Memorandum Of Law In Opposition To Defendant's Motion For Summary Judgment, Apx. 31; Plaintiff's Supplemental Memorandum Of Law In Opposition To Defendant's Motion For Summary Judgment, Apx 45.

II. WHETHER IT IS AGAINST PUBLIC POLICY FOR A BUSINESS, WHETHER OPEN TO THE PUBLIC OR NOT, TO SHIELD ITSELF FROM ITS DUTY TO MAINTAIN ITS PREMISES IN A REASONABLY SAFE CONDITION THROUGH THE USE OF AN EXCULPATORY CLAUSE.

See Plaintiff's Objection To Motion For Summary Judgment, Apx. 24; Plaintiff's Memorandum Of Law In Opposition To Defendant's Motion For Summary Judgment, Apx. 31; Plaintiff's Supplemental Memorandum Of Law In Opposition To Defendant's Motion For Summary Judgment, Apx 45.

III. WHETHER A BUSINESS SUCH AS A HEALTH AND FITNESS CLUB IS OPEN TO THE PUBLIC ALTHOUGH IT REQUIRES ITS PATRONS TO ENTER INTO A MEMBERSHIP AGREEMENT IN ORDER TO USE FACILITIES.

See Plaintiff's Objection To Motion For Summary Judgment, Apx. 24; Plaintiff's Memorandum Of Law In Opposition To Defendant's Motion For Summary Judgment, Apx. 31; Plaintiff's Supplemental Memorandum Of Law In Opposition To Defendant's Motion For Summary Judgment, Apx 45.

IV. WHETHER THE EXCULPATORY CLAUSE SHIELDING THE DEFENDANT FROM LIABILITY WAS LEGALLY SUFFICIENT TO PUT THE PLAINTIFF ON NOTICE, OR A REASONABLE PERSON IN THE POSITION OF THE PLAINTIFF, THAT THE EXCULPATORY CLAUSE CONTAINED IN ITS MEMBERSHIP AGREEMENT APPLIED TO AN INJURY, DAMAGE OR RISK OF HARM THAT MAY OCCUR TO THE PLAINTIFF DUE TO THE DEFENDANT'S UNSAFE PREMISES.

See Plaintiff's Objection To Motion For Summary Judgment, Apx. 24; Plaintiff's Memorandum Of Law In Opposition To Defendant's Motion For Summary Judgment, Apx. 31; Plaintiff's Supplemental Memorandum Of Law In Opposition To Defendant's Motion For Summary Judgment, Apx 45.

STATEMENT OF THE CASE

The Plaintiff, Theresa A. Ladue (hereinafter "Theresa"), sued the Defendant, Pla-Fit Health, LLC, doing business as Planet Fitness (hereinafter "Planet Fitness") for damages she suffered on September 27, 2017 when, after finishing using a treadmill at Planet Fitness' place of business, she went to dispose of a towel that she had used to clean the treadmill with, and on her way to the trash barrel, tripped and fell due to an "irregular and uneven walkway" inside Planet Fitness' place of business at 18 Northwest Boulevard, Nashua, New Hampshire. Theresa brought a 3-Count Complaint against Planet Fitness alleging injuries due to Planet Fitness' negligent maintenance of its property. Add. 29, Trial Court Order.

Planet Fitness filed a Motion For Summary Judgment alleging that the exculpatory clause contained in its Membership Agreement shielded it from liability against the Plaintiff's claims for not maintaining its premises in a reasonably safe condition. Theresa filed her Objection To Defendant's Motion For Summary Judgment, along with the Affidavit of Theresa Ladue, and Plaintiff's Memorandum of Law In Opposition To Defendant's Motion For Summary Judgment. Thereafter, Planet Fitness filed Defendant's Reply To Plaintiff's Objection To Motion For Summary Judgment. Theresa then filed Plaintiff's Supplemental Memorandum of Law In Opposition To Defendant's Motion For Summary Judgment. The Trial Court held a hearing on March 29, 2019 on the Defendant's Motion For Summary Judgment.

After a hearing held on March 29, 2019, the Trial Court issued its Order on May 31, 2019, granting Planet Fitness' Motion For Summary Judgment, finding that: 1) Planet Fitness' exculpatory clause did not violate a public policy; 2) Planet Fitness' exculpatory clause was legally sufficient to put a reasonable person on notice that it was shielding itself from all claims that a person may suffer while on its premises; and 3) Planet Fitness' health club was not "open to the public" because a membership was required to join it. See: Add. 29, Trial Court Order.

STATEMENT OF FACTS

The Defendant, Pla-Fit Health, LLC, also doing business as Planet Fitness (hereinafter "Planet Fitness"), operated a health and fitness business at 18 Northwest Boulevard in Nashua, New Hampshire. On or about April 10, 2017, the Plaintiff, Theresa A. Ladue (hereinafter "Theresa"), joined Planet Fitness, at which time she entered into a Membership Agreement. Theresa has a 7th grade education. Apx. 28. The two-page Membership Agreement contained an exculpatory clause, which is, as follows:

> 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 guest's 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 by 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. Apx. 21.

Theresa read the Defendant's Membership Agreement and understood it to prevent her from claiming damages if she were injured while using the exercise machines, doing physical exercise, or participating in one of Planet Fitness' exercise programs. Theresa did not understand from reading the Membership Agreement that she was waiving any right that she had to make a claim against Planet Fitness for injuries that she might have suffered by merely walking through Planet Fitness' place of business. Apx. 28-29.

On September 27, 2017, Theresa went to Planet Fitness to exercise. After she had used the 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. Theresa attempted to catch herself and regain her balance by reaching to an interior chain link fence; however, her right arm struck an uncovered, unprotected bolt extending from the fence. As a result of the fall, Theresa sustained a gash to her right elbow, fractured her right wrist, and suffered permanent scarring to her elbow and loss of range of motion to her

right wrist. Theresa's medical expenses exceeded $25,000.00 for the care and treatment of her injuries. Apx. 1-3.

Theresa thereafter sued Planet Fitness for negligence in its maintenance of the facility. Planet Fitness subsequently filed a Motion For Summary Judgment claiming that the exculpatory clause contained in its Membership Agreement shielded it from liability for any claim that Theresa brought against it for its negligence in maintaining the premises at the Planet Fitness health club in a reasonably safe condition. The Trial Court granted Planet Fitness' Motion For Summary Judgment, ruling inter alia, that: 1) that Planet Fitness' exculpatory contract did not violate public policy; 2) that Planet Fitness' exculpatory clause was legally sufficient to put a reasonable person on notice that was shielding itself from all claims that a person may suffer while on its premises; and 3) that Planet Fitness' health club was not "open to the public" because a membership was required to join it. Add. 29.

SUMMARY OF ARGUMENT

The trial court erred as a matter of law when it granted the Defendant's Motion For Summary Judgment. The trial court improperly applied the facts of this case to the law in failing to find that public policy prohibits a business owner from shielding itself from a premises liability claim from a business invitee through the use of an exculpatory clause.

The Defendant's exculpatory clause failed to inform a reasonable person that they were waiving any and all claims against the Defendant should they suffer injuries on the premises due to it not being maintained in a reasonably safe condition.

The trial court improperly applied the facts of this case to phrase "open to the public" as defined by common usage, New Hampshire law, and other authorities.

The trial court's decision should be reversed as the Defendant should not be able to shield itself from liability for failing to maintain its business premises in a reasonably safe condition and the matter remanded for trial.

ARGUMENT

I. STANDARD OF REVIEW

A Motion For Summary Judgment may be granted only where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact, and that the party moving is entitled to judgment as a matter of law." RSA 491:8-a. A party seeking summary judgment bears the initial burden of establishing a lack of genuine issue of material fact. See: Concord Group Insurance Companies vs. Sleeper, 135 N.H. 67 (1991). In determining whether to grant a Motion For Summary Judgment, the court considers the affidavits and any other evidence, as well as all inferences reasonably drawn therefrom in a light most favorable to the non-moving party. See: Gould vs. George Brox, Inc., 137 N.H. 85, 87-88 (1993). If there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment will follow. See: RSA 491:8-a, III; Id. at 88. An issue of fact is "material" if it "affects the outcome of the litigation . . . ". Horse Pond Fish and Game Club vs. Cormier, 133 N.H. 648, 653 (1990) (citations omitted).

The trial court granted the Defendant's Motion For Summary Judgment finding, inter alia, that the Defendant's exculpatory contract did not violate public policy, that the Defendant's exculpatory contract was legally sufficient to put a reasonable person on notice that it was shielding the Defendant from all claims that a person may suffer while on the Defendant's premises, and that the Defendant's fitness health club was not "open to the public" because a membership was required to join it.

The New Hampshire Supreme Court will review the trail court's application of law to the facts *de novo*. Dent v. Exeter Hospital, Inc., 155 N.H. 787 (2007). Determining the standard of care, i.e., the duty placed upon a defendant under given circumstances, is a question of law. Young v. Clogston, 127 N.H. 340 (1985).

II. IT IS AGAINST PUBLIC POLICY FOR A BUSINESS OPEN TO THE PUBLIC TO SHIELD ITSELF FROM RESPONSIBILITY TO MAINTAIN ITS PREMISES IN A REASONABLY SAFE CONDITION.

"All persons have a duty to exercise reasonable care not to subject others to an unreasonable risk of harm." Grady v. Jones Lang LaSalle Construction Co., Inc., 171 N.H. 203, 207 (2018).

Exculpatory contracts are generally prohibited by New Hampshire law. They will only 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) the plaintiff's claims were within the contemplation of the parties when they executed the contract.

Dean v. MacDonald, 147 N.H. 263, 266-67 (2001); and Barnes v. New Hampshire Karting Association, Inc., 128 N.H. 102 (1986).

In limited circumstances this Honorable Court has permitted the owners or occupiers of land or premises to shield itself from liability through the use of an exculpatory contract. Those cases have been limited to activities that are generally inherently dangerous or sporting events where it is unlikely that the risk of harm can be safely avoided due to the nature of the activity, and that

participating in the activity is not of such great importance or necessity to the public that it would create a special relationship between the parties. McGrath v. SNH Development, Inc., 158 N.H. 540 (2009), (enforcing an exculpatory contract relative to snowboarding). Also see: Barnes v. New Hampshire Karting Association, Inc., 128 N.H. 102 (1986), (upholding an exculpatory contract with respect to kart racing); and Dean v. MacDonald, 147 N.H. 264 (2001), (finding Defendant's exculpatory contract valid with respect to racing cars). Due to the nature of the activity, a party cannot be an insurer of risk for those who want to participate in it.

A defendant seeking to avoid liability has the burden of showing that exculpatory clause does not violate public policy. Id. at 106, citing Restatement (Second) of Torts §496B, comment g (1965).

An exculpatory clause is against public policy if it is injurious to the interests of the public, contravenes some established interest in society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and is in conflict with the morals of the time. McGrath, supra; and Harper v. HealthSource New Hampshire, Inc., 140 N.H. 770, 775 (1996), citing 17A Am. Jur. 2d Contracts §263, at 267-68 (1991). The public policy which a court may refer to may be statutory or non-statutory in origin. Cloutier v. A. & P. Tea Co., Inc., 121 N.H. 915, 927 (1981).

1. Enforcement of the exculpatory contract would violate the public policy embodied in statutes and regulations

Statutory authority exists in New Hampshire to support the Plaintiff's claim that the Defendant's exclusionary clause violates public policy. To protect and preserve the safety and welfare of the public, the New Hampshire Legislature has enacted RSA 155 et. seq., Factories, Tenements, Schoolhouses, And Places Of Public Accommodation, Resort Or Assembly, and RSA 155-A et. seq., The New Hampshire Building Code.

As set forth in RSA 155:1:

> Towns and village districts may make bylaws requiring factories, hotels, tenement houses, public buildings, school houses, places of assembly as defined in RSA 155:17, I, and other buildings used as places of public resort in their towns, to be so erected as not to endanger the health and safety of persons who may occupy them . . . (emphasis added).

RSA 155:17 defines "places of assembly" as follows:

> I. "Places of assembly" shall mean a room or space in which provision is made for the congregation or assembly of 100 or more persons for religious, recreational, educational, political, social or amusement purposes . . . RSA 155:17, I.

RSA 155-A establishes a state building code applicable to "[a]ll building, building components, and structures constructed in New Hampshire." RSA 155-A:2, I. The statute governs the "construction, design, structure, maintenance, and use of all buildings or structures." Id. The statute also authorizes municipalities to enact their own building code regulations. Id. at §V. The purpose of building codes "is to protect the health and secure the safety of

occupants of buildings." Island Shores Estates Condominium Association v. City of Concord, 136 N.H. 300, 307 (1992).

Pursuant to the statutory authority of RSA 155-A:2 and RSA 674:51, the City of Nashua has adopted the International Building Code (2000) (hereinafter "Nashua Building Code") relative to the construction, maintenance, and renovation of structures, buildings, commercial space, and places of assembly for properties within the City. See City of Nashua, REVISED ORDINANCES, Part II, ch. 105, Art. II, §105-8 (*available at* https://ecode360.com/8729766).

The Nashua Building Code, in turn, incorporates other documents by reference. Apx. 50. It provides that the "provisions of the *International Property Maintenance Code* [hereinafter *IPMC*] shall apply to existing structures and premises." Id.

The *IPMC*, in turn, dictates the precise regulations relevant here. First, it requires that "[a]ll interior surfaces" of buildings "be maintained in good, clean and sanitary condition." Apx. 52. Further, "[e]very stair, ramp, landing . . . or other walking surface shall be maintained in sound condition and good repair." Id.

These city regulations have the force of statutory law and impose a statutory duty upon property owners/occupiers. See Broughton v. Proulx, 152 N.H. 549, 553 (2005); and State v. McKeown, 151 N.H. 95 ("[R]ules and regulations promulgated by administrative agencies under a valid delegation of authority have the force and effect of laws.").

The allegations made by Ms. Ladue implicate those statutory duties. Add. 29. (allegation that plaintiff tripped-and-fell "on an irregular and uneven walkway" caused by Planet Fitness' negligent maintenance of its facility); RSA 155-A; RSA 155; *IPMC*, Apx. 55 ("walking surface[s] shall be maintained in sound condition and good

repair"). Allowing Planet Fitness to exculpate itself for violations of public safety regulations would violate public policy. See McGrath, 158 N.H. at 543 (exculpatory agreement against public policy if it "violates some public statute, or tends to interfere with the public welfare or safety"); Santiago v. Truitt, 23 Pa. D. & C. 3d 313, 316 (C.P. 1982) (citing Boyd v. Smith, 94 A.2d 44 (Pa. 1953)) (liability for violation of building code cannot be prospectively waived); *see also* Zerby v. Warren, 210 N.W. 2d 58, 64 (Minn. 1973) ("Any agreement which relieves the defendants of the consequences of the violation of the public duty imposed by [statute] is against public policy."); 57A Am. Jur. 2d Negligence §55 ("[I]f an injury results from a violation of a statute that establishes a certain standard of conduct for the protection and benefit of the members of a class, an immunity contract or clause exculpating a defendant from liability for negligence is unenforceable as contrary to public policy.").

2. Enforcement of the exculpatory contract would violate public policy found in the common law

Under the common law, when a person enters a public building they have a reasonable expectation to be safe. Valenti v. NET Properties Management, Inc., 142 N.H. 633, 635 (1998); and Grady, supra. Planet Fitness' use of an exculpatory clause to shield itself from liability contravenes public policy. To allow Planet Fitness' exculpatory clause to be enforceable would put in jeopardy the safety of business invitees throughout New Hampshire. The owners and occupiers of land or premises, open to the public, provide an essential service to the public in maintaining their premises in a reasonably safe condition. This is particularly true when the property owner/occupier has a profit motive. Business invitees are not in a

reasonable position to inspect or ascertain defects or dangerous conditions that may not be open and obvious, thereby, being able to protect themselves from injury or harm.

The trial court found the Valenti case to be inapplicable. While the facts of Valenti are different from the case at bar, the principles embodied therein are extremely relevant.

In Valenti, this Court held that a property owner who "holds open [his property] to the entry of the public as his place of business" cannot avoid liability to third parties by delegating responsibility to an independent contractor. Id. at 636.

> "Moreover, those who own or operate business premises are in the best position to protect against the risk of personal injury on their premises." Id. at 635, citing Sears Roebuck & Company v. Philip, 112 N.H. 282, 284-86 (1972).

As held in the Valenti case, the duty owed by the owner or occupier of premises is for the reasonable protection of its guests and business invitees because the proprietor is in control of the premises. To uphold Planet Fitness' exculpatory clause would result in the abrogation of this important statutory and common law responsibility and imperil the safety and welfare of public. See: McGrath, supra at 543 (exculpatory agreement against public policy if it is "injurious to the interests of the public . . . or tends to interfere with the public welfare or safety").

Other New Hampshire case law reinforces the sanctity of ordinary premises liability and the principle that occupiers or possessors of property have a non-delegable duty to exercise reasonable care under all circumstances in the maintenance and operation of its premises. See: Ouellette v. Blanchard, 116 N.H. 552

(1976),(holding that owners and occupiers of land owe a duty to exercise reasonable care in all circumstances); Papakalos v. Shaka, 91 N.H. 265 (1941),(holding that a landlord is prohibited from using an exclusionary clause to shield itself from liability for a tenant's injuries on the leased premises); Tanguay v. Marston, 127 N.H. 572 (1986), (holding that in a landlord and tenant relationship exculpatory contracts are prohibited); and Sargent v. Ross, 113 N.H. 388 (1973) holding:

> ... landlords, as other persons, must exercise reasonable care and not subject others to an unreasonable risk of harm (citation omitted). A landlord must act as a reasonable person under all circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding risk. (citation omitted). We think this basic principal of responsibility for landlords as for others "best expresses the principal's of justice and reasonableness upon which our law of torts is founded." (citation omitted). Id. at 397-398. (emphasis added).

The principles embodied in the above case law signify a strong public policy in New Hampshire to hold premises owners liable in the maintenance of their property. Just as a business owner's delegation of duty to an independent contractor would violate public policy, an exculpatory clause relieving an owner/operator of a business of this obligation would be inimical to the public's welfare and safety.

To allow Planet Fitness, the owner and operator of a health fitness club, to shield itself through the use of an exculpatory contract from responsibility and its duty to maintain its premises in a reasonably safe condition would certainly put the public in peril and at risk for great harm.

3. Case law nationally supports the Plaintiff's position

The trial court supported its ruling, upholding the Defendant's exculpatory clause does not violate public policy, by relying on Seigneur v. Nat'l Fitness Inst., Inc., 752 A.2d 631, 641 (Md. 2000) and Moore v. Waller, 930 A.2d 176, 183 (D.C. 2007), two cases involving fitness club injuries. Rather than support the trial court's ruling, the facts in these cases help demonstrate the trial court's error. In both cases, the plaintiff was injured while exercising. See Seigneur 752 A.2d at 634 (injured using weight machines); Moore, 930 A.2d at 179 (injured while kickboxing). The exculpatory clause in these cases did not address the issue whether it was against public policy for the Defendant to shield itself from liability because a person was injured due to the premises itself being unsafe. Rather, the courts held only that exercising at a health club was not "essential" activity resulting in a public policy reason for ruling the clause invalid. See Seigneur, at A.2d 521; Moore, 930 A.2d at 180 n.3 (plaintiff admitted that "kickboxing is an inherently dangerous activity").

The present case is more aligned with Ver Weire v. Styles, 427 S.W. 3d 112, 2013 Ark. App. 208 (2013), where the Plaintiff brought suit for negligence when she was injured while walking across the bleachers at the Defendant's racetrack. The Arkansas Court of Appeals overturned the trial court's granting of summary judgment in favor of the Defendant based on an exculpatory clause releasing the Defendant from liability that the Plaintiff signed, ruling that:

> "Ms. Ver Weire's negligence claims are completely unrelated to the unique and obvious dangers associated with automobile racing, as the claims relate only to the lack of care in maintaining safe bleachers

> . . . Ms. Ver Weire was a business invitee of the appellees and therefore, the appellees owed Ms. Ver Weire the duty to maintain the premises in a reasonably safe condition . . . The protection from liability as contemplated by the release must be limited to injuries that rationally associated with the dangerous nature of the activity. To hold otherwise would be to grant a *carte blanc* 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." Id. at 116-117.

Walters v. YMCA, 96 A.3d 323 (N.J. Super. Ct. App. Div. 2014) is directly on point. In Walters, the plaintiff was a member of a local YMCA. Id. at 326. He had signed an exculpatory contract as part of his membership sign-up process. The plaintiff was injured when he slipped and fell on the steps leading from the club's pool. He brought a lawsuit against YMCA for damages.

Just four years before Walters, the New Jersey Supreme Court had considered an exculpatory clause in the context of a fitness club. In that case, the plaintiff had been injured while participating in a bicycle spinning class at her gym. Stelluti v. Casapenn Enters., LLC, 1 A.3d 678, 683 (N.J. 2010). The New Jersey court concluded that the liability waiver in question did not violate public policy. Id. at 694-95.

Returning to Walters, the defendant gym argued that, based on Stelluti, enforcing the exculpatory contract would not violate public policy. Walters, 96 A.3d at 325. However, the New Jersey appeals court disagreed, and distinguished Stelluti, explaining:

> Plaintiff did not injure himself while swimming in the pool or using any physical fitness equipment. The type of accident involved here could have occurred in any business setting. The inherently risky nature of defendant's activities as a physical fitness club was

> immaterial to this accident. Stated in the vernacular of the personal injury bar, this is a "garden variety slip and fall case." . . .
>
> [B]usiness establishments in New Jersey have well-established duties of care to patrons that come upon their premises. . . . Given the expansive scope of the exculpatory clause here, we hold that if applied literally, it would eviscerate the common law duty of care owed by defendant to its invitees, regardless of the nature of the business activity involved. Such a prospect would be inimical to the public interest because it would transfer the redress of civil wrongs from the responsible tortfeasors to either the innocent injured party or to society at large, in the form of taxpayer-supported institutions. . . . [W]e conclude the language in defendant's exculpatory clause is void and unenforceable as against public policy for the reasons expressed here. Id. at 327-29 (citations omitted).

The reasoning of Walters is directly applicable here. Even more so than in that case, Ms. Ladue's activities at the time of injury were disconnected from exercising. She was merely walking on the uneven floor when she fell and was injured, allegedly due to the defendant's negligent maintenance. That sort of injury "could have occurred in any business setting." Id. at 327. The premises occupier should not be able to immunize itself from its most basic of responsibilities to keep its patrons safe. [1]

[1] The State of New York, by statute, prohibits, as against public policy, agreements exempting pools, gymnasiums, places of public amusement or recreation from liability for negligence, and are, by law, void and unenforceable. N.Y. Gen. Oblig. Law §5-326. The Supreme Court of Connecticut takes the position that even a well-drafted exculpatory agreement is unenforceable to shield a provider of recreational activity from liability for injury as a result of its negligence because it would violate public policy. Reardon v. Windswept Farm, LLC, 208 Conn. 153, 905 A.2d 1156 (Conn. 2006).

4. The parties have a special relationship, and thus the exculpatory clause is void as a matter of public policy

An exculpatory contract will violate public policy if a "special relationship" exists between the parties. Barnes, 128 N.H. at 106. A "special relationship exists where the defendant is a common carrier, innkeeper or public utility, or is otherwise charged with a duty of public service." McGrath, supra at 544 (citation omitted).

This Court has not delineated what relationships constitute "special" ones for the purposes of exculpatory contracts. However, in other contexts, the Court has adopted Section 314A of the Restatement (Second) of Torts. Marquay v. Eno, 139 N.H. 708, 717 (1995). Specifically, Section 314A governs special relationships which give rise to an affirmative duty to give aid or protect another party. *See id.* "The existence of a special relationship requires a fact-specific inquiry." Sintros v. Hamon, 148 N.H. 478, 483 (2002).

The Restatement provides that "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." Restatement (Second) of Torts §314A.

The phrase "open to the public" has not been defined by this Court as it relates to the facts of this case. The trial court based its ruling granting the Defendant's Motion For Summary Judgment, in part, by finding that the Defendant's business is not "open to the public" because a person needs to be a member of the club in order to enter the premises. This is too strict a ruling in light of analogous law and the modern day consumer/business world.

The Defendant's fitness club is "open to the public" for all to join. At the hearing on the Defendant's Motion For Summary Judgment, defense counsel admitted that the Defendant's club is "open to the public:"

> "Yes, this club is open to the public if they sign the contract. In other words, it is not like it's a gym, and it's set out in the middle of the park that anyone can go to and sit and watch their kids play around on. That's not what this is. This is a private enterprise where there is a contract. Yes, it is open to anyone who comes and wants to pay and sign the contract." T. 21.

Theresa was a business invitee of the Planet Fitness health club. Whether she was required to pay a membership fee to use the health club has no relevance since the club was open for all members of the public to join.

Further, the Defendant's club is required by law to be "open to the public" for anyone to join. See: RSA 354-A:16. Equal Access To Public Accommodation A Civil Right. As defined by statute, the Defendant's club is a place of public accommodation.

> "Place of public accommodation" includes any . . . use of accommodations of those seeking health, recreation or rest . . . health care providers . . . which caters or offers its services or facilities or goods to the general public. RSA 354-A:2, XIV. Also see: Franklin Lodge of Elks v. Marcoux, 149 N.H. 581 (2003).

This interpretation of "open to the public" is supported by the Restatement itself. One of the illustrations to Section 314A demonstrates that "open to the public" includes areas where admission is required for entrance: illustration 5 involves a "patron attending a play in B's theatre," and imposes upon "B" an affirmative

duty because of their special relationship. Restatement (Second) of Torts §314A, cmt. f, illus. 5.

Further, other sections of the Restatement that "open to the public" should be understood broadly. Section 332 defines invitees:

> (1) An invitee is either a public invitee or a business visitor.
>
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
>
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

With respect to "public invitee," the Restatement's comments further provide that, "Where land is held open to the public, there is an invitation to the public to enter for the purpose for which it is held open. Any member of the public who enters for that purpose is an invitee." Restatement (Second) of Torts, § 332, cmt. d. The Restatement goes on to emphasize that "[w]here land is held open to the public, it is immaterial that the visitor does not pay for his admission." Id. These definitions clearly indicate that "open to the public" does not hinge on whether the property in question is "accessible to members only," as the trial court erroneously concluded. See Id.; see also §344 (discussing liability of owners of business premises "open to the public" and including example of ticket-buying theater patron. (See: Sims v. Strand Theatre, 29 A.2d 208, 209 (Pa. Super. Ct. 1942); § 359 (discussing liability of lessors who lease land for purpose of "admission of the public"; noting at comment "c." that whether the member of the public is a "paying

customer" is irrelevant); See also: Lyons v. City of Phila., 1998 U.S. Dist. LEXIS 17281, at *25-27 (E.D. Pa. Nov. 3, 1998) (holding that an "open to the public" special relationship exists under Restatement §314A despite the fact that the property "was not held open to the entire public," but rather only "the taxi driving public . . . for a fee").

As such, Planet Fitness is directly responsible for the safe operation of its premises as is an innkeeper, common carrier, or public utility. Similar to a guest in a hotel or a passenger on a bus, a business invitee has no control over their environment. A person in that position must completely rely on the operator or proprietor of the business to maintain its premises in a reasonably safe condition. Also see: Dupont v. Aavid Thermal Technologies, Inc., 147 N.H. 706 (2002); Berry v. Watchtower Bible and Tract Society of New York, Inc., 152 N.H. 407 (2005); and Kellner vs. Lowney,145 N.H. 195 (2000).

In this matter, the Defendant has failed to prove that its exculpatory clause does not contravene public policy. Barnes at 106. The cases that uphold exculpatory clauses involve activities that can be inherently dangerous, wherein, the owner or operator of the property cannot be responsible to prevent all undesired outcomes to avoid injuring a person engaged in that activity. Being an invitee to a place of business does not involve an inherently dangerous activity and the owner or proprietor of the business must be required to monitor and maintain the premises in a reasonably safe condition to prevent injury. To allow Defendant's interpretation of its exclusionary clause to allow it to shield itself from liability from claims arising for injuries due to unsafe conditions on its premises would allow every business enterprise, such as a restaurant, hotel, supermarket, department store, etc., to be able to do the same.

That would be completely in conflict with the principle that those who operate businesses are in the best position to protect against the risk of injury to those invitees on their premises. See: T. 25-26.

This Court should declare the exculpatory clause in this case unenforceable as contrary to public policy, based on the common law and statutory principles discussed above, and in accordance with the Restatement and case law in New Hampshire and other jurisdictions.

III. THE DEFENDANT'S EXCULPATORY CLAUSE WAS NOT UNDERSTOOD BY THE PLAINTIFF TO ENCOMPASS THE DEFENDANT'S PREMISES. A REASONABLE PERSON WOULD NOT UNDERSTAND THE PROVISION AS AN EXCULPATORY CLAUSE.

The Barnes case requires – if the exculpatory clause passes scrutiny as not violating public policy – that the agreement either be understood by the plaintiff or that a reasonable person understand the import of its meaning. Further, the plaintiff's claim for injury must have been within the contemplation of the parties. Id at 107. The terms of the document are strictly construed against the defendant. As well, the exclusionary clause must clearly state that the defendant is not responsible for the consequence of its negligence. Id at 107.

The Agreement is written in legalese and is unintelligible. It fails to convey to a reasonable person that they are waiving their right to make a claim for damages if they are injured due to the premises not being maintained in a reasonably safe condition. By law the release language must be plain and a careful reading is not required to learn the Defendant's intent. Wright v. Loon Mountain Recreation Corporation, d/b/a Loon Mountain Equestrian Center, 140 N.H. 166, 171 (1995).

Nothing in the Membership Agreement prohibits a claim by Theresa against Planet Fitness for any injuries she has or may suffer due to the condition of the premises. The first half of the pertinent language refers to "risk of injury" that ". . . are inherent in physical activity and . . . use of the facilities . . . in consideration of my participation in the activities and use of the facilities, exercise equipment and services offered by Planet Fitness . . . I understand and voluntarily accept full responsibility on my behalf for the risk of injury or loss arising out of or related to my use . . . of the facilities including without limitation, exercise equipment, tanning, massage beds/chairs, and participation in PE@PF® or other exercise program or use of other services, equipment and/or programs offered to members."

Theresa did not understand the exculpatory clause to cover and extend to any claim for injuries she may suffer due to Planet Fitness' premises to be in an unsafe condition. She understood the clause to apply only to exercise or the use of Planet Fitness' equipment, machines, or programs. Apx. 28-29.

This Agreement would not cause a person to have a reasonable understanding that Planet Fitness was shielding itself from liability should that person suffer injury while walking through the premises due to the unsafe condition(s) of the property (i.e., a "slip and fall" injury). The provisions of the exclusion only refer to injuries incurred in the course of exercising or using Planet Fitness' exercise machines, equipment, or programs. Nothing releases Planet Fitness from injuries suffered by Theresa due to an unsafe condition on the premises.

The repeated use of the words of "use" and "facilities" here are of critical importance in examining this provision. Theresa

understood the words to refer to the equipment and services provided by Planet Fitness since it was used in connection and described by "use of . . . exercise equipment and services." When the word "facility" later appears in the exculpatory provision, Theresa reasonably believed it once again referred to the "use" of "exercise equipment and services." It is, again, followed in that provision by language referring to "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." Never is there a specific or vague mention that this provision is meant to shield Planet Fitness from any claim for injuries due to the its negligence arising from an unsafe condition on the premises or injuries that Theresa may suffer in occupying the premises as she walks about it. At best, the use of the words "facilities" and "facility" are ambiguous. The interpretation of their meaning to include Planet Fitness' premises is impermissible. There is no language in the exculpatory clause explaining the reason(s) for switching from the plural to the singular.

Exculpatory clauses are strictly construed against the drafter. The clause must clearly state that the defendant is not responsible for the consequences of its negligence. Barnes, supra at 107. Nowhere does the exculpatory clause specifically or explicitly refer to the negligence of Planet Fitness due to the condition of the premises. There is no clear expression of intent to release Planet Fitness from any claim of responsibility for injuries suffered due to the condition of the premises.

This Court has previously ruled that an exculpatory clause was invalid because it contained the word "therefore," which the Court found significant because it limited the range of activity that the defendant could shield itself from liability.

> "In this case, the term "therefore" is significant. A common definition of "therefore" is "for that reason: because of that: on that ground . . ." Webster's Third New International Dictionary 2372 (unabridged ed. 1961) (Webster's). A clause that is introduced by the term "therefore" cannot be understood without reading the antecedent language.
>
> The paragraph preceding the exculpatory clause emphasizes the inherent hazards of horseback riding. Because the exculpatory clause is prefaced by the term "therefore," "a reasonable person might understand its language to relate to the inherent dangers of horseback riding and liability for injuries that occur "for that reason." Being kicked by a horse is a danger inherent to horseback riding; receiving an injury that would not have occurred but for a tour guide's negligence, however, is not. Wright, supra at 170.

The Court reached this conclusion despite the fact that the exculpatory clause purported to release "any and all liability . . . resulting from negligence." Id. at 168.

In many respects the exculpatory clause in this case is similar to the exculpatory clause in the Wright case. After defining the inherent risks in "physical activity" and the "use of the facilities, exercise equipment and services offered by Planet Fitness . . .," and ". . . use of the facilities including without limitation, exercise equipment, tanning, massage beds/chairs . . . exercise programs or use of other services, equipment and/or programs . . .," the subject clause uses the word "accordingly" before the exculpatory language is written.

> "Accordingly, . . . I do hereby forever release, waive, and discharge Planet Fitness . . . from any and all claims, demands, injuries, damages, actions or causes of action related to my . . . use of the facility . . . against Planet Fitness . . ."

"Accordingly" is a synonym for "therefore." Roget's 21st Century Thesaurus (Third Ed.) It is defined as: "in conformity with a given set of circumstances; as a consequence . . . " Webster Third World New International Dictionary (unabridged ed. 1993). Due to the wording of Planet Fitness' clause, the harm or risk of injury Theresa is releasing Planet Fitness from liability for refers back to the preceding list of activities involved in using Planet Fitness' facilities – but has no relationship to the premises.

The relied upon language by Planet Fitness that Theresa release Planet Fitness "from the negligent conduct or omission . . . whether related to exercise or not," is overly broad and, again, does not put Theresa on notice that she waives any claim she has against Planet Fitness for injuries arising from the defects of the premises. A reasonable person in the position of Theresa would not have known from reading the exculpatory clause that it applies to any injury or risk of harm that may have occurred to Theresa due to Planet Fitness' unsafe premises. See: Wright, supra at 171. As well, Theresa did not understand, from reading Planet Fitness' Membership Agreement, that the exculpatory clause to relieve Planet Fitness of liability due to a defective or unsafe condition present in or on Planet Fitness' premises. At the very least, the language is ambiguous, and should be construed against the drafter-defendant. Id. at 170 (exculpatory language strictly

construed); Allen v. Dover Co-Recreational Softball League, 148 N.H. 407, 414 (2002) (exculpatory contract not enforced if the "language of the contract raises any doubt"); cf. Barking Dog v. Citizens Ins. Co. of America, 164 N.H. 80, 84 (2012) (insurance policy construed against insurer if policy language ambiguous and one reasonable interpretation favors coverage).

CONCLUSION

For the foregoing reasons stated above, this Court should vacate the trial court's order granting Summary Judgment to Pla-Fit Health, L.L.C., and remand this matter for trial.

ORAL ARGUMENT

Plaintiff requests 15 minutes of oral argument.

SUPREME COURT RULE 16(1)(i) COMPLIANCE

The undersigned hereby certifies that the written Order of the Trial Court is included in the Addendum at pages 29 through 40.

SUPREME COURT RULE 16(10) COMPLIANCE

The undersigned hereby certifies that on this date a copy of the this document as required by the rules of court is being electronically sent through the Court's electronic filing system to Michael R. Mortimer, Esquire, counsel of the record for the Defendant, and to Israel F. Piedra, Esquire, counsel of record for the Amicus.

SUPREME COURT RULE 16(11) COMPLIANCE

The undersigned hereby certifies that this document contains the number of words as allowed by Rule 16(11).

Respectfully submitted,

THERESA A. LADUE

By Her Attorneys,

FOLLENDER LAW OFFICES,
P.L.L.C.

Dated: November //, 2019

BY: _____

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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

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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