THE STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE NO. 2019-0354

THERESA A. LADUE

vs.

PLA-FIT HEALTH, L.L.C

REPLY BRIEF FOR PLAINTIFF/APPELLANT THERESA A. LADUE

APPEAL FROM DECISION OF THE HILLSBOROUGH COUNTY SUPERIOR COURT SOUTHERN DISTRICT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NH Case Law

Out of State Case Law

Secondary Sources

ARGUMENT

I. SCOPE OF THE RELEASE

In Sections I and II of the opposing brief, Planet Fitness argues that a reasonable person in Ms. Ladue's position would have understood the import of the Release, and further that Ms. Ladue's claims were "within the contemplation of the parties when they executed" the Release. See Def.'s Br. at 7-11.

In response, Ms. Ladue will make no further comment besides to repeat the following: at a minimum, the language of the release creates sufficient ambiguities to preclude summary judgment. See Holmes v. Clear Channel Outdoor, Inc., 644 S.E.2d 311, 314 (Ga. App. Ct. 2007) ("Ambiguities in exculpatory clauses are construed against the drafters."); McGrath v. SNH Dev., Inc., 158 N.H. 540, 545 (2009) ("We strictly construe exculpatory contracts against the defendant."); see also Ledgends, Inc. v. Kerr, 91 P.3d 960, 960 (Alaska 2004)[1] ("Paragraphs 1 and 2 of the release . . . both emphasize the inherent risks of climbing and thus suggest that the document is intended to assure that customers are aware of the inherent risks of climbing over which the Gym, by definition, could have no control. . . . Read as a whole, the release does not

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[1] Similarly to the waiver in Ledgends, the release in the case at bar discusses "inherent risks" in its introductory section, see Def.'s App. at 52, and refers to Planet Fitness's commitment to safety elsewhere in the document. Id. at 53 ("Planet Fitness strives to provide a safe and comfortable environment for all members."). The Alaska court reached its conclusion despite the fact that the exculpatory language itself was broad and purported to release the defendant from "any injury or loss of any kind, regardless of whether the injury was allegedly caused by the negligence of the Gym or its staff, other users of the Gym, a defect in the equipment, structures, building or parking lot, or any other cause." Ledgends, 91 P.3d at 963.

conspicuously and unequivocally alert climbers that they are giving up claims against the Gym beyond those associated with the inherent risk of bouldering.").

Planet Fitness has inadvertently highlighted another ambiguity in the release. The exculpatory language waives claims "related to my use . . . of the facility." Def.'s App. at 52 (emphasis added). The opening brief argued that the term "facility" was ambiguous given the context of the release and was reasonably understood to refer to the gym's fitness paraphernalia and services. Plt.'s Br. at 24. In response, Planet Fitness states that "'use of the facilities' includes more than just use of the equipment and indeed includes use of the Club premises including walkways to and from machines." Def.'s Br. at 11. But, as the Defendant itself points out, "page 2 of the Membership Agreement [] states that membership allows a person 'use of the premises, facilities, equipment, and services . . . .'" Id. This provision suggests that "premises" and "facilities" are distinct terms under the contract. See United States ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency, 456 F. Supp. 2d 46, 59 (D.D.C. 2006) ("The Court strives to give each term of a contract independent meaning, so that no word or clause is rendered nugatory."); United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, 970 F.2d 1132, 1136 (2d Cir. 1992) ("[W]e must avoid an interpretation of an agreement that renders one of its provisions superfluous."); Hoyle, Tanner & Assocs. v. 150 Realty, LLC, 215 A.3d 491, 499 (N.H. 2019) (a reading which would render contract language "superfluous . . . is contrary to our canons of

contract interpretation."). At the very least, it creates an ambiguity that must be resolved against the drafter. See McGrath, 158 N.H. at 545, 547; Holmes, 644 S.E.2d at 314.

II. PUBLIC POLICY ARGUMENTS FROM THE OPENING BRIEF

A. "Open to the Public"

Planet Fitness does not dispute that Restatement (Second) of Torts §314A supplies non-exclusive examples of "special relationships" sufficient to invalidate an exculpatory contract. However, Planet Fitness does argue that it is not "open to the public" under the Restatement §314A, because the situs of the injury was a "members only" area. Def.'s Br. at 12. Planet Fitness states that "Appellant seeks to eliminate any distinction between businesses open to the public and private clubs, open to members only. Appellant cites no good reason to collapse these categories into one." Id.

But there is a good reason. A landowner's duty of care under the common law is the same whether an area is members-only or not. See Ouellette v. Blanchard, 116 N.H. 552, 557 (1976). As such, there is no basis for Planet Fitness's contention that "open to the public" under the Restatement recognizes a distinction based on the business's admission requirements. The Appellee also does not respond to the substantial authority provided by Ms. Ladue in her opening brief, which demonstrates that the "open to the public" designation includes areas to which admission/membership is required.

B. Building Code

Planet Fitness makes only a cursory response to the argument that it violated the Nashua Building Code and that liability for violations of the building code cannot be prospectively waived.

The Plaintiff's argument was preserved. To preserve an argument on appeal, the appellant need "not have articulated his argument to the trial court in precisely the same manner as he has on appeal." In the Matter of McAndrews & Woodson, 171 N.H. 214, 220 (2018). Rather, the argument will be preserved if it is "subsumed" within a "basic and broader" argument made to the trial court. Id.

Here, Ms. Ladue's "broader" argument is that the exculpatory contract violates public policy; this argument was made to the trial court. The building code argument is an example of how the release violates public policy. As such, the argument on appeal is preserved. See id.

III. PUBLIC POLICY ARGUMENTS FROM THE AMICUS BRIEF

The Appellee spends a considerable portion of its brief responding to the brief of amicus curiae New Hampshire Association for Justice.

Much of Planet Fitness's brief derives from one contention: that an exculpatory contract can only violate public policy if there is a disparity of bargaining power, a special relationship, or the defendant is providing an "essential service." See Def.'s Br. at 19-20. These three concepts are so closely related that, in effect, the

Defendant is arguing that there is only one possible theory under which a liability release can be invalid against public policy.[2] And that theory imposes an almost impossibly high bar: the release is only against public policy if the service offered by the defendant is a "practical necessity" and the defendant has "monopoly control over this service such that the plaintiff could not have gone elsewhere." Audley, 138 N.H. at 418.

Planet Fitness's rigid formulation leads it to conclude that all liability releases in the "recreational" context are enforceable, because the only relevant public policy factor is the parties' legal relationship.

This position is unprincipled and void of nuance. As the *amicus* brief discussed, the public policy test is not so inflexible. See e.g., 8 WILLISTON ON CONTRACTS § 19.22 (4th ed.) ("[I]t is impossible to state with specificity a strict or invariable formula or test that will apply to every factual context . . . that will embrace all or even most of the relevant public policy concerns that might be raised by any given set of facts."). Rather, the inquiry is broader: a liability release is "against public policy if, among other things, it is injurious to the interests of the public, violates some public statute, or tends to

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[2] The three concepts (bargaining power, special relationship, and essential service) are essentially mirror images of each other. See e.g., Barnes v. New Hampshire Karting Ass'n, 128 N.H. 102, 108 (1986) ("Since the defendants' service is not an essential one, the defendants had no advantage of bargaining strength over Barnes or others who sought to participate in Enduro kart racing."); McGrath, 158 N.H. at 544 (stating that "snowboarding is [not] of such great importance or necessity to the public that it creates a special relationship . . . ."); Audley v. Melton, 138 N.H. 416, 418 (1994) ("This case does not have any hallmarks of a disparity in bargaining power. The photography service offered by the defendant is not a matter of practical necessity.") (emphasis added in all).

interfere with the public welfare or safety." McGrath, 158 N.H. at 543. As this Court has explained:

> The duty of the courts to declare and apply public policy is not doubtful. . . . [P]ublic policy . . . may be said to be the community common sense and common conscience, extended and applied throughout the state to matter of public morals, public health, public safety, public welfare and the like . . . The idea of public policy may be loosely expressed in the generalization of the greatest good for the greatest number, or more definitely in the platitude that "No one can lawfully do that which has a tendency to be injurious to the public, or is detrimental to the public good."

Heath v. Heath, 85 N.H. 419, 425 (1932). "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). Public policy should be adjudged on case-by-case basis. Cf. Plourde Sand & Gravel Co. v. JGI E., Inc., 154 N.H. 791, 796 (2007) (special relationship determined on case by case basis); Chemical Bank v. Rinden Professional Ass'n, 126 N.H. 688, 697 (1985) (unconscionability determined on case by case basis).

The absolutist approach espoused by Planet Fitness (i.e., a public policy violation can only exist if there is a "physical, economic, or other compulsion to sign [the] exculpatory contract") is not consistent with the common law in New Hampshire or across the

country. This is particularly true given this Court's deep-rooted distrust of liability releases.

The proper inquiry is whether it would "interfere with the public welfare or safety" to enforce the liability release in this case. Ms. Ladue submits that it would. Patrons enter a business premises "expecting them to be safe." Valenti v. NET Props. Mgmt., 142 N.H. 633, 636 (1998). Having "induced [patrons] to come" to the business premises, the business "is under a duty to use reasonable care to see to it that the premises are safe." Jack v. Public Serv. Co., 86 N.H. 81, 82 (1932); see Rallis v. Demoulas Super Markets, 159 N.H. 95, 99 (2009). Indeed, "those who own or operate business premises are in the best position to protect against the risk of personal injury on the premises . . . ." Valenti, 142 N.H. at 636.

When a premises owner conducts a recreational activity on a business premises, the landholder is held to a lower standard of care with regard to the recreational activity. See Allen v. Dover Co-Recreational Softball League, 148 N.H. 407, 417 (2002). This is because recreational activities, by their nature, give rise to increased risk of injury. Id. at 418. Since participants voluntarily engage in that risky activity, it makes sense for courts to conclude that public policy does not prohibit an exculpatory contract waiving liability for injuries sustained during the activity. In fact, public policy arguably favors releases in that context because imposing liability for voluntarily-risky activity could have a chilling effect on businesses. See Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647, 649 (Cal. Ct. App. 1990).

The same considerations do not apply to the circumstances of this case. Ms. Ladue was not injured during a recreational activity. She was injured walking across the floor of the Defendant's business. The Defendant's negligent conduct – failure to safely maintain its floor – was not peculiar to the recreational/entertainment services it offers. The negligence and injury could just have easily occurred in a department store, country club, or movie theater. Put another way, the duty allegedly violated by Planet Fitness was the same duty owed by every business to its patrons; it has nothing to do with recreational or dangerous activities.[3] Public policy treats this sort of ordinary premises liability differently than recreational activity injuries. See Rossman v. 740 River Drive, 241 N.W.2d 91, 92 (Minn. 1976) ("The public policy favoring freedom of contract is weighed against the policy favoring the [defendant's] observance of the particular duty he is alleged to have breached. Thus, the balance depends on the nature of the particular duty breached. If the . . . duty is basic and his observance of it is of extreme importance (for example, a duty to maintain the stairs of a common area in safe condition so as to avoid personal injury to tenants), then the policy

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[3] The Defendant claims that to "adopt Amicus's reasoning would be to, in practical effect, make it impossible for businesses such as Planet Fitness, offering recreational activities to their customers, to have exculpatory contracts." Def.'s Br. at 13. This argument demonstrates the oversimplification and lack of nuance in the Defendant's analysis. There is an evident distinction between a trip-and-fall injury while walking on a walkway and injuries sustained while in the act of exercising. Additionally, only a very small percentage of gym injuries fall into the category found in this case. Sekendiz, et al., *An Examination of Waiver Usage and Injury-Related Liability Claims in Health/Fitness Facilities in Australia*, 26 J. OF LEGAL ASPECTS OF SPORT 144, 155 (2016) (only 2% of fitness club injuries are product of slips, trips, and falls).

favoring his observance of that duty may well be stronger than the policy favoring freedom of contract.").

It would be inimical to the public welfare to allow businesses to shirk their basic obligations of premises safety. Maintaining walking surfaces is a fundamental and essential responsibility for business owners. As the amicus brief explained, the threat of civil liability is a strong incentive for businesses to properly maintain their premises. See Amicus Br. at 22. Furthermore, patrons – rightfully so – expect walkways to be safely maintained. Enforcing the liability release in this case would essentially absolve similarly situated businesses from all responsibilities of ordinary care.

In addition to the public safety ramifications, other factors militate against enforcement from a public policy perspective. The exculpatory contract was pre-printed and presented on a take-it-or-leave it basis. Planet Fitness is a large international company; Ms. Ladue was merely an individual customer. And, as the amicus points out, public policy supports regular exercising: working out at the gym is more "important" (or "essential") than go-kart riding and many other "recreational" activities. Finally, anecdotal and scientific evidence indicates that prospective gym members have no real choice: essentially all gyms and fitness clubs require liability waivers. See Sekendiz, supra n. 4 (100% of surveyed gym operators reported using liability waivers).

For all these reasons, and under the particular circumstances of this case, the liability release violates public policy. The judgment of the trial court should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse 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 oral argument before the full Court.

SUPREME COURT RULE 16(10) CERTIFICATION

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

SUPREME COURT RULE 16(11) CERTIFICATION

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

Respectfully submitted,

THERESA A. LADUE

By her Attorneys,

FOLLENDER LAW OFFICES, P.L.L.C

Dated: January 16, 2020 BY: _____

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