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NO. 67773-0-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

CHELSEY M. KVIGNE,

Appellant,

vs.

L.A. Fitness International, LLC; and
UNKNOWN JOHN DOES,

Respondents.

BRIEF OF APPELLANT

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A. INTRODUCTION

Health clubs are a common reality in many people's lives. There are more than three times as many health clubs in the United States as there are FDIC insured banks.¹ There are almost four times as many health clubs as there are parking garages.² They are a commonly used service that for many people are as necessary for staying healthy as a hospital is for getting well.

Chelsey Kvigne became a member of L.A. Fitness ("LAF") to get healthy. Instead, her face was seriously injured and permanently disfigured as a result of the gross negligence of one of LAF's personal trainers. It is not merely Kvigne's opinion that LAF was grossly negligent, it is the uncontroverted opinion of an expert whose declaration she offered.

Nevertheless, the trial court here dismissed Kvigne's claim on summary judgment. LAF successfully argued that it should be excused from liability for its actions because, buried within its membership agreement, there was an exculpatory clause excusing it from liability for ordinary (but not gross) negligence.

¹<http://www.atg.wa.gov/ConsumerIssues/HealthClubs/default.aspx>;
http://www.fdic.gov/bank/analytical/working/wp2003_07/index.html#fig04.

² <http://www.ibisworld.com/industry/default.aspx?indid=1739>.

LAF should not have been allowed – in principle or on these facts – to avoid a trial on Kvigne’s claims. Kvigne raised genuine issues of material fact in support of her claims, which were un rebutted by LAF. Also, health clubs should be held to the same standard as banks, parking garages, buses, and hotels, and should not be allowed to disclaim liability for their negligence on public policy grounds.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

The trial court erred in granting summary judgment in favor of the defendant and dismissing Kvigne’s claims in its order dated September 16, 2011.

(2) Issues Relating to Assignments of Error

1. Is an exculpatory clause potentially inapplicable, and therefore summary judgment inappropriate, when Kvigne offered expert testimony raising a genuine issue of material fact regarding LAF’s gross negligence, especially when the evidence was uncontroverted?
2. Is an exculpatory clause in a health club contract invalid as a matter of law based on public policy, when health clubs hold the same status as banks, hotels, parking garages, and buses in terms of their importance to the public?
3. Is an exculpatory clause potentially inapplicable, and therefore summary judgment inappropriate, when the clause is in small font, buried on the second page of a dense contract, has no separate signature line, and does not indicate that it is a waiver of liability for negligence?

C. STATEMENT OF THE CASE

Kvigne, seeking to improve her health and lose weight, sought membership at the LAF facility that was near her work. CP 29. She was given a tour, and then directed to a cubicle to discuss membership. The sales representative told her all of the “incentives” of membership, and showed her a list of classes and services. CP 29, 41-42, 45. He talked to her about the cost, the cancellation policy, and the financial aspects of membership. *Id.*

The representative then presented Kvigne with a contract. CP 32-34. The three-page contract is filled with tiny writing in various font sizes, none of which exceed 8.5. *Id.* There is very little spacing between paragraphs. The only language in capital letters is the title “Important, Release and Waiver of Liability and Indemnity,” which gives no indication what it is a release of liability for. CP 33. The clause is not on the first page, and the clause is long. *Id.* The only place on the agreement for a signature is in the first page, which gives no indication of the important rights Kvigne was giving up by signing. *Id.* at 32. The signature line is both preceded and followed by language regarding the member’s financial rights. *Id.*

Kvigne needs glasses, but was not wearing them that day. CP 46-47. She felt “rushed” and “pushed” by the sales representative. CP 44,

47. She said that she read some of the language of the contract, including a box that started with the word “Important,” but she did not understand the wording of it all. CP 45, 67. It is undisputed that she only had a “minute” to read the three-page contract, which was printed in mostly 5 point font. CP 29. Kvigne described the writing as very small and compact. She stated that she paid more attention to the first page, because that was the page she was asked to sign. CP 66-67.

Kvigne signed the contract, and later returned to LAF for the personal training session included in her membership price. The trainer showed Kvigne the weight machines, but did not have her use any of them. CP 51-52, 67. He then took her into the free weights room and instructed her to lay down on a bench to do a bench press. CP 49, 67. He stood behind her where she could not see him, and lifted a 45-pound barbell from its rest. He asked Kvigne if she was “ready” to receive the barbell, but she had not yet put her hands on it. *Id.* While he was holding the barbell directly over her head, he let go of it to “adjust” his grip. CP 30, 54, 55. The barbell fell directly onto Kvigne’s face, seriously injuring and permanently disfiguring her. CP 30, 46, 49.

Kvigne filed a claim for damages against LAF in King County Superior Court in May 2010. CP 1. The case was assigned to the Honorable Douglass North. CP 115. LAF moved for summary judgment,

arguing that Kvigne's claim failed as a matter of law, because LAF's contract contained an exculpatory clause which relieved them of liability for their negligence. CP 13-27. In support, LAF offered as evidence the contract itself, and excerpts of Kvigne's deposition testimony, most of which focused on the circumstances under which she signed the contract. CP 28-55.

Kvigne opposed LAF's motion. CP 56-67. In addition to pointing out many undisputed facts, Kvigne offered her own declaration and the declarations of two experts. One expert analyzed the contract itself and explained how the small font size and layout made it difficult to read, even for a computer program designed to do just that. CP 69-71. The other was the declaration of a personal trainer with 25 years experience, including time as a professional athlete and a trainer of professional athletes. CP 72. He worked in health clubs and had done so for many years. *Id.* He declared that the act of changing one's grip on a 45-pound barbell while holding that barbell over a client's head is an action that falls greatly below ordinary negligence. CP 74. He said that it was "impossible" to safely change one's grip under such circumstances, and was particularly egregious in light of the fact that the trainer could simply have replaced the bar on the available rest, changed his grip, and lifted the bar again. CP 73-74.

The trial court granted summary judgment in LAF's favor, and Kvigne timely appealed. CP 116-17.

D. SUMMARY OF ARGUMENT

The summary judgment procedure was improperly used here, where there was a disputed issue of material fact for trial regarding LAF's gross negligence. Summary judgment is not a mini-trial, and courts should not use the procedure to prematurely extinguish valid claims. There is no controlling case law regarding gross negligence on these facts, and Kvigne presented an uncontroverted expert declaration that LAF's actions fell greatly below even ordinary negligence.

Summary judgment was also improper because health clubs should not be allowed to disclaim liability for their negligence based on public policy. If banks, parking garages, hotels, and buses – none of which are “necessities” in everyday life – cannot disclaim their liability, then a commonly used service such as a health club should not be allowed to do so either.

Finally, summary judgment was also improper because reasonable minds could disagree as to whether the exculpatory clause in this case was sufficiently conspicuous. Surveying cases in which this Court has examined these clauses, the clause at issue shares characteristics with clauses that have been struck down as well as those that have been upheld.

Also, Kvigne presented an uncontroverted expert declaration that the clause was insufficiently conspicuous compared with similar clauses in other health club membership contracts. It was improper for the trial court to rule that this clause was conspicuous as a matter of law.

E. ARGUMENT

(1) Standard of Review

When reviewing the grant of a motion for summary judgment, the standard of review is *de novo*. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). In reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court and considers the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c).

The purpose of a summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c);

Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 639, 9 P.3d 787 (2000). A motion for summary judgment “should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Summary judgment is not a mini-trial; the court should not weigh evidence. *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 392-93, 558 P.2d 811, 814 (1976). Summary judgment can be beneficial in dismissing unfounded claims, but courts have recognized they must be used cautiously to avoid improper dismissal of “worthwhile causes.” *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960). A defendant’s request of dismissal on summary judgment *must be denied* if a right of recovery is indicated under any provable set of facts. *Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964).

(2) Washington Law on Exculpatory Clauses

An exculpatory clause, which may also be referred to as an exclusionary clause, is a contract clause which releases one of the parties from liability for his or her wrongful conduct. *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 339, 35 P.3d 383 (2001). In other words, it is a contract provision which protects a party by waiving liability and denying an injured party the right to recover damages. *Johnson v. UBAR, LLC*, 150 Wn. App. 533, 210 P.3d 1021 (2009). In general,

Washington law allows a person to contract to exculpate himself or herself from the consequences of ordinary negligence. *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010). However, as discussed *infra* section E(4), Washington courts have limited the applicability of exculpatory clauses to situations involving voluntary high-risk sporting activities.

Exculpatory clauses are unenforceable in three circumstances. *Chauvlier*, 109 Wn. App. at 339. First, inconspicuous releases are unenforceable. *Id.* Second, releases cannot limit liability for acts falling greatly below the standard established by law for protection of others.” *Id.* Where a party has contracted against liability for negligence and the negligent act which results falls greatly below the standard established by law, which constitutes gross negligence, then the exclusion will not apply. *Blide v. Rainier Mountaineering, Inc.*, 30 Wn. App. 571, 636 P.2d 492 (1981). Third, releases must not violate public policy. *Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 110 Wn.2d 845, 850, 758 P.2d 968, 970 (1988). Exculpatory agreements are void as against public policy where they provide a pardon from consequences of willful, intentional, or reckless breach of duty, simple breach of duty arising out of an employment relationship, or breach of duty by a person charged with a duty of public service. *Id.*

Here, all three exceptions to the imposition of the exculpatory clause apply to defeat summary judgment. There is a genuine issue of material fact regarding LAF's gross negligence, the exculpatory clause is void based on public policy, and there is a genuine issue of material fact as to whether the clause was conspicuous.

(3) Summary Judgment Dismissal Here Was Inappropriate Because There Is a Disputed Issue of Material Fact Regarding Gross Negligence, Which Would Render the Exculpatory Clause Inapplicable

If there is a disputed issue of material fact regarding whether LAF's actions constitute gross negligence, summary judgment must be reversed. Gross negligence is defined by the Washington Pattern Instructions as "the failure to exercise slight care. It is negligence which is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care." *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 79, 151 P.3d 243, 248 (2007) *aff'd as modified*, 168 Wn.2d 444, 229 P.3d 735 (2010).

For a plaintiff to raise a genuine issue of material fact regarding gross negligence requires competent evidence that the defendant's actions fell far below the standard of ordinary negligence. *Boyce v. West*, 71 Wash. App. 657, 666, 862 P.2d 592, 597 (1993). In *Boyce*, the plaintiff

neither alleged gross negligence, nor had any evidence to support that claim. *Id.* In fact, the plaintiff's expert testified merely that the defendant acted negligently, saying nothing about whether the defendant's actions were far below the negligence standard or lacked slight care. *Id.*

LAF argued below that as a matter of law, the trainer's actions did not constitute gross negligence. CP 20-21. It relied principally on a recent health club case from this Court, *Johnson*, 150 Wn. App. 533.³ In *Johnson*, the plaintiff alleged that a personal trainer improperly instructed a member and was inattentive. LAF claims that in *Johnson*, this Court examined the facts and found them so benign that "it did not even *consider* the trainer's conduct to fall within the realm of gross negligence." CP 20 (emphasis in original). Thus, LAF reasons, if the facts of *Johnson* did not rise to the level of gross negligence, then there was no gross negligence here "as a matter of law." CP 21.

LAF mischaracterized *Johnson*; it does *not* stand for the proposition that a personal trainer's inattentiveness does not constitute gross negligence as a matter of law. The *Johnson* court did not even

³ LAF also relied on an unpublished opinion from 1997. Unpublished opinions of this Court may not be cited as authority. GR 14.1(a). However, if LAF again attempts to violate the rules and relies upon that opinion, it is easily distinguishable. In *Craig v. Lake Shore Athletic Club, Inc.*, 1997 WL 305228 (1997), the plaintiff offered no evidence, and certainly no expert opinion, that the defendant's actions demonstrated not even slight care.

consider gross negligence; that issue was not before it. *Johnson* was decided *solely* on whether the liability waiver was conspicuous. *Johnson*, 150 Wn. App. at 542. In fact, the plaintiff in *Johnson* never even *argued* gross negligence: the sole argument made at summary judgment and on appeal was that the waiver was inconspicuous. *Id.* at 537.

LAF simply cannot argue that the trainer's actions here were not grossly negligent as a matter of law, because no case has so held. Even if *Johnson* stood for the proposition that the trainer's actions in that case were not grossly negligent (which it does not) the trainer's actions here were not identical to those of the trainer in *Johnson*. *Id.*

Therefore, the question of whether summary judgment was proper turns on whether Kvigne has "set forth specific facts showing that there is a genuine issue for trial." CR 56(e). Again, this means that Kvigne must show that the trainer "failed to exercise slight care. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care." Washington Pattern Instruction 10.07; *Yousoufian*, 137 Wn. App. at 79.

Kvigne here presented an *uncontroverted expert opinion* that the trainer failed to exercise slight care. CP 74. It is undisputed that the trainer attempted to "change his grip" on a 45 pound weight as he held it suspended over Kvigne's head. CP 30, 54. Kvigne's expert, a personal

trainer himself, explained in great detail why a trainer should never – under any circumstances – release his or her grip on a weight being held above a client’s body. *Id.* The expert opined that doing so without first replacing the weight safely in its rest – which he could easily have done – showed that Kvigne’s trainer did not exercise even slight care. CP 73. He also noted that the trainer had not bothered to inquire as to Kvigne’s fitness level or strength before offering her a 45-pound barbell for her to hold over her head. *Id.* He explained that a trainer should never start a client on free weights without first ascertaining how much weight the client can handle. CP 74. This, he stated, is done safely using weight machines first. *Id.*

LAF provided *no evidence whatsoever* that the trainer’s actions were not grossly negligent. Instead, LAF relied solely on legal argument, and on the fact that the trainer only dropped a 45-pound weight on Kvigne’s face *once* during the session. CP 16-21, 30.⁴ LAF also misstated a critical material fact, repeatedly claiming that the trainer merely “lost his grip” on the barbell. CP 18-21. Again, LAF does not dispute that the trainer purposely and intentionally “changed his grip” on

⁴ There is no support in law for the proposition that an act is not grossly negligent simply because the defendant committed it only once.

the barbell, which Kvigne's expert stated should *never* be done over a client's head. CP 30, 74.

Therefore, a party offering *no evidence* (except factual misrepresentations) managed to obtain summary judgment against a party offering substantial, expert evidence on the sole disputed issue of material fact for trial.

No court may weigh evidence on summary judgment. Whether or not the trial court, or this Court, agrees with Kvigne's expert's opinion on the level of care is immaterial. It would appear that the trial court weighed evidence in discarding Kvigne's expert opinion, and allowing LAF to rely solely on legal argument to obtain summary judgment.

This case represents a classic misuse of the summary judgment procedure. Faced with a fact pattern that has not yet been ruled upon as a matter of law, the trial court nonetheless ignored an expert opinion raising a genuine issue of material fact that should have defeated summary judgment. The trial court's ruling was error and should be reversed.

(4) Summary Judgment Dismissal Here Was Inappropriate Because the Exculpatory Clause Violates Public Policy

LAF argued below that health clubs are not subject to the public policy exception for exculpatory clauses. CP 17-18. It relied solely on the

analysis of *Shields v. Sta-Fit, Inc.*, 79 Wn. App. 584, 591, 903 P.2d 525, 529 (1995) in its argument. *Id.*

Courts are usually reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract. *Wagenblast*, 110 Wn.2d at 849-50; *Vodapest v. MacGregor*, 128 Wn.2d 840, 849-50, 913 P.2d 779, 783 (1996). Thus, where the defendant is a common carrier, an innkeeper, a professional bailee, a public utility, or the like, an agreement discharging the defendant's performance will not ordinarily be given effect. Implicit in such decisions is the notion that the service performed is one of importance to the public, and that a certain standard of performance is therefore required. *Id.*

The most prominent area where exculpatory clauses arise – and the one where most courts are comfortable enforcing them – are voluntary high-risk activities. “Voluntary high risk sports” are such dangerous recreational activities as tobogganing, scuba diving, mountain climbing, automobile demolition derby, and ski jumping. *Wagenblast*, 110 Wn.2d at 849. Limiting liability for negligence in voluntary high-risk situations is logical, because the law has always acknowledged that in such situations, parties assume certain risks for which defendants should not be held liable.

Kirk v. Washington State Univ., 109 Wn.2d 448, 453, 746 P.2d 285, 288 (1987).

However, even in voluntary high-risk situations, our courts have held a plaintiff's assumption of known risks does not preclude recovery for "risks not known or voluntarily encountered." *Id.* at 456. *See also, Regan v. Seattle*, 76 Wn.2d 501, 458 P.2d 12 (1969) (driver of "go-cart" on race course does not assume unknown risk of spilled water on the course); *Wood v. Postelthwaite*, 6 Wn. App. 885, 496 P.2d 988 (1972), *aff'd*, 82 Wn.2d 387, 510 P.2d 1109 (1973) (golfer does not assume unknown, unforeseen risk of being hit by golf ball due to inadequate warning but may assume other known risks inherent in the game).

Outside of voluntary high-risk sports situations, our courts have often found preinjury releases for negligence to violate public policy. *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 486 P.2d 1093 (1971) (striking down a landlord's exculpatory clause relating to common areas in a multifamily dwelling complex); *Thomas v. Housing Auth.*, 71 Wn.2d 69, 426 P.2d 836 (1967) (voiding a lease provision exculpating a public housing authority from liability for negligence); *Reeder v. Western Gas & Power Co.*, 42 Wn.2d 542, 256 P.2d 825 (1953) (finding a contractual limitation on the duty of a gas company against public policy); *Sporsem v. First Nat'l Bank*, 133 Wash. 199, 233 P. 641 (1925) (holding a

bank which rents safety deposit boxes cannot, by contract, exempt itself for liability for negligence). Additionally, courts have not allowed those charged with a public duty, which includes the obligation to use reasonable care, to insulate themselves from that obligation by contract. *Wagenblast*, 110 Wn.2d at 849-50 n.8 (where a defendant is a common carrier, an innkeeper, or a public utility, an agreement discharging the defendant's performance will usually not be given effect); *see also*, *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 230, 232, 797 P.2d 477 (1990) (professional bailees may not limit their liability for negligence, but nonprofessional bailees may contract to limit their liability for negligence); *Scott*, 119 Wn.2d at 494-95 (preinjury release of a party's liability for negligence which releases a child's cause of action for personal injuries, even in the context of high-risk sports, violates public policy and is unenforceable).

Also, there is support in the case law for the proposition that health-related contracts are not proper subjects for exculpatory clauses even in high-risk situations. For example, in *Vodopest*, the plaintiff was a nurse and experienced mountain climber who agreed to go on a Himalayan climb that would be the subject of a study of a certain high-altitude breathing technique. *Vodopest*, 128 Wn.2d at 845. The plaintiff signed an exculpatory agreement, but then was injured by the defendant

conducting the study. The defendant suggested the plaintiff continue climbing despite the onset of symptoms of altitude sickness. *Id.* at 846-47. Our Supreme Court held the exculpatory clause invalid, because the breathing experiment qualified as “medical research,” which provides benefits to society and thus cannot be the subject of exculpatory agreements. *Id.* at 854.

As it does with health-related activities that serve the public welfare, as it does with common conveniences of life such as buses, banks, hotels, and parking garages, public policy should prohibit health clubs from eliminating their risk of liability for negligent acts. A health club falls more naturally into the category of common carrier, innkeeper, garage, or bank than it does into high-risk voluntary sports activities. For many people, going to the gym is a standard part of daily life, without which they could not remain healthy and active. Going to the gym may have risks, but is those risks are not generally high as a demolition derby or ski jumping. Also, just as persons are not required to use banks, hotels, or parking garages, they are not required to use health clubs. But when they do, there is a public interest in holding those facilities liable for their negligent acts.

The *Wagenblast* court devised a six-part test for examining whether an exculpatory agreement violates public policy. They include

whether (1) the agreement concerns the type of endeavor usually deemed suitable for public regulation, (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is also a matter of practical necessity for some members of the public, (3) such party holds itself out as willing to perform this service for almost any member of the public, (4) the party invoking the exculpation possesses a decisive advantage of bargaining strength against any member of the public seeking such services, (5) an adhesion contract is used in the transaction, and (6) as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to risk of carelessness. *Wagenblast*, 110 Wn.2d at 851-52. The more of these characteristics that appear in a given exculpatory agreement case, the more likely the agreement is to be declared invalid on public policy grounds.

Id.

Applying the *Wagenblast* factors directly to the facts of this case, summary judgment was inappropriate. Although health clubs are not highly regulated, their services are important to the public. As our own Attorney General proclaims:

Nearly 40 million people belong to more than 26,000 health clubs in the United States today, according to the International Health, Racquet & Sportsclub Association. Personal fitness is important, and joining gyms or fitness centers can be a key to better health.

<http://www.atg.wa.gov/ConsumerIssues/HealthClubs/default.aspx>. LAF does not dispute how vital its services are, and indeed describes itself as a community service organization: “LAF has steadily increased its presence by focusing on the one lifelong benefit valued by everyone: good health. ..Our strong and successful growth stems from our commitment to understanding and meeting the distinct needs of each community we serve.” <https://www.lafitness.com/Pages/about.aspx?Source=1>. LAF offers its services to any member of the public who wishes to join: “Because we know that a healthy society depends on the wellbeing of all those who comprise it, our emphasis is on giving our members the most for their dollars to make the LAF experience accessible to more segments of the community.” *Id.* It is undisputed that contracts such as these are contracts of adhesion, in that their terms may not be changed or negotiated. CP 17; *Shields*, 79 Wn. App. at 590. Finally, Kvigne was most decidedly in the control of LAF during her time there, particularly with the personal trainer. In fact, she was vulnerable: trusting in LAF to keep her safe as she engaged in activities with machines and heavy weights with which she had little experience. CP 49, 53.

LAF relied on this Court’s decision in *Shields* in support of its argument that the public policy exception should not apply to health clubs.

In *Shields*, Division Three of this Court ostensibly applied the *Wagenblast* test to health clubs and concluded that public policy did not prohibit them from requiring their members to sign exculpatory clauses. *Shields*, 79 Wn. App. at 587-90.

However, the *Shields* court rested its analysis almost exclusively on an incorrect premise: that the public policy exception only applies to “essential public services” that are “indispensible necessit[ies],” “such as hospitals, housing, public utilities, and public education.” *Id.* at 589. This assumption dictates the Court’s reasoning for *four out of the six factors* of the *Wagenblast* test:⁵

Service of Great Importance to the Public. ...Health clubs are a good idea and no doubt contribute to the health of the individual participants and the community at large. But ultimately they are not essential to the welfare of the state or its citizens. And any analogy to schools, hospitals, housing (public or private) and public utilities therefore fails. Health clubs do not provide essential services.

...

Bargaining Advantage. ...Again, as we have noted, health studios are not essential. People interested in weight lifting clearly do not need to be Sta-Fit members.

...

Standardized Adhesion Contract. ...As we have discussed, the services are not essential and the bargaining

⁵ The *Shields* court found that of the other two *Wagenblast* elements one weighed in the club’s favor, and one weighed against. *Id.* at 589-90.

power therefore is not so disparate as to trigger the application of this *Wagenblast* factor.

...

Control.

This is not like the school, the hospital, housing or other necessary public services. As we have noted, other options were available, the most important of which was not to join in the first place. Mr. Shields could have done something else to further his physical fitness. With other public services, however, choices are limited.

Id. at 589-90.

What the *Shields* court did not acknowledge are the many “non-essential entities” to which the public policy exception has been applied, including parking garages, buses, hotels, and banks. Parking garages surely do not provide “essential public services.” Hotels are not “indispensible necessities.” No one is required to deposit money in a bank, and if one chooses to, there are many, many options. If such optional, voluntary, non-essential services are worthy of the public policy exception, then health clubs also qualify.

Thus, the *Shields* opinion is fatally flawed and should not be followed because it conflicts with Supreme Court precedent.

Applying the *Wagenblast* test in the context of existing Supreme Court authority, the trial court erred in concluding that the public policy exception did not apply. The exculpatory clause should be invalidated as

a matter of law, and Kvigne should have the right to a trial on her negligence claim.

(5) Summary Judgment Was Inappropriate Because There Is a Disputed Issue of Material Fact Regarding Whether the Liability Waiver Was Conspicuous

Summary judgment in favor of LA Fitness was also inappropriate here if Kvigne raised a genuine issue of material fact regarding whether the exculpatory clause was inconspicuous, causing Kvigne to agree to the clause unwittingly.

Inconspicuous liability releases are void. *McCorkle v. Robert Hall*, 56 Wn. App. 80, 782 P.2d 574 (1989); *Johnson*, 150 Wn. App. at 538. If reasonable persons could reach a different conclusion as to whether the document was unwittingly signed, summary judgment on the issue is inappropriate, and the case will be remanded for trial. *Johnson*, 150 Wn. App. at 542.

In *Johnson*, this Court conducted analysis of the exculpatory clause by comparing it to other cases examining exculpatory language. *Id.* at 538. It identified the relevant factors as:

[W]hether the waiver is set apart or hidden within other provisions, whether the heading is clear, whether the waiver is set off in capital letters or in bold type, whether there is a signature line below the waiver provision, what the language says above the signature line, and whether it is clear that the signature is related to the waiver.

Id.

In *Baker v. City of Seattle*, 79 Wn.2d 198, 484 P.2d 405 (1971), the releasing language was in the middle of a paragraph in exactly the same print as the rest of the rental agreement. *Baker*, 79 Wn.2d at 200. Our Supreme Court held that the disclaimer clause in the rental agreement was void because “the disclaimer was contained in the middle of the agreement and was not conspicuous. To allow the respondent to completely exclude himself from liability by such an inconspicuous disclaimer, would truly be unconscionable.” *Baker*, 79 Wn.2d at 202.

In *McCorkle*, the “Application for Membership” included a provision entitled “LIABILITY STATEMENT,” which provided that members of the club were liable for property damage, used the equipment at their own risk, and would not hold the club liable for any loss, injury, or damage resulting from an act of any employee. *McCorkle*, 56 Wn. App. at 81. On appeal, this Court held that “whether the disclaimer language was so conspicuous that he could not have unwittingly signed the application” was a question for the trier of fact and reversed the trial court's summary judgment dismissal. *McCorkle*, 56 Wn. App. at 84.

By contrast, in *Chauvlier*, the release was clearly entitled in all capital letters, “LIABILITY RELEASE & PROMISE NOT TO SUE. PLEASE READ CAREFULLY,” and the words “RELEASE” and

“HOLD HARMLESS AND INDEMNIFY” were printed in capital letters. *Chawlier*, 109 Wn. App. at 342. The release was not hidden within a larger agreement and the signature line directly below the release stated, “I have read, understood, and accepted the conditions of the Liability Release Printed Above.” *Chawlier*, 109 Wn. App. at 342.

In *Stokes v. Bally's Pacwest, Inc.*, 113 Wn. App. 442, 445, 54 P.3d 161 (2002), this Court noted that the Waiver and Release provision in the agreement had the title “WAIVER AND RELEASE” in bold, capital letters, the provision only addressed Stokes's agreement “to release Bally's from liability for its negligence” and that the Waiver and Release provisions were “conspicuously displayed within the larger document.” *Stokes*, 113 Wn. App. at 449. Immediately below Stokes's signature line was a line stating, “**WAIVER AND RELEASE: This contract contains a WAIVER AND RELEASE in Paragraph 10 to which you will be bound.**” *Stokes*, 113 Wn. App. at 448. This Court held that reasonable persons could only conclude that the content was “quite clearly a waiver and release of liability for negligence, not financial obligations.” *Stokes*, 113 Wn. App. at 448-49.

Looking at all of these cases, the *Johnson* court then examined the exculpatory clause at issue and concluded that summary judgment on the issue of conspicuousness was inappropriate. It noted that the agreement

(1) consisted of mostly small, page-wide, justified print, (2) had some portions bolded and in boxes, (3) had the exculpatory clause on the first page, (4) had an independent signature line directly under the waiver and release, (5) was set apart by blank lines, and (6) did not make clear that the release was a waiver of liability for negligence. *Johnson*, 150 Wn. App. at 542.

Here, as in *Johnson*, the disclaimer shares attributes of clauses that have been upheld as conspicuous, as well as attributes of clauses that have been rejected as inconspicuous. The clause is not on the first page. CP 32-34. It is in the middle of a page that is filled with tiny writing in various font sizes, none of which exceed 8.5. *Id.* There is very little spacing between paragraphs. The only language in capital letters is the title “Important, Release and Waiver of Liability and Indemnity,” which gives no indication what it is a release of liability for. *Id.* The paragraph is exceedingly long, and even if Kvigne noticed it, she could not have read the entire paragraph – let alone the entire agreement – in the undisputed “full minute” she had to look at it. *Id.*, CP 29. The only place on the agreement for a signature is in the first page, which gives no indication of the important rights Kvigne was giving up by signing. *Id.* at 32. The signature line is both preceded and followed by language regarding the member’s financial rights. *Id.*

In addition, Kvigne presented expert opinions raising a genuine issue of material fact that the clause was inconspicuous. A text recognition expert examined the contract with text recognition software programs. CP 70. She opined that the font sizes on the contract were abnormally small, resulting in a document that appeared three pages long, but if presented in standard 12 point font would be a 12-page contract. CP 70-71. Some of the characters in the contract were so small that “the program couldn’t even recognize some of them.” CP 70-71. In fact, “there were entire sentences in the contract that the program could only recognize one word of.” *Id.* at 71.

The personal trainer who opined on the standard of care also offered his opinion about the waiver. CP 75. Having worked in health clubs for many years, he was familiar with the membership contracts they offer. He stated that the waiver was “buried” on the second page of the contract, had no second signature line for the member to indicate understanding of the waiver, and that clients may not know where to look for these important provisions, particularly when they are rushed. *Id.*

Thus, reasonable minds could disagree as to whether the exculpatory clause here was conspicuous or inconspicuous, and summary judgment was inappropriate. The trial court’s ruling should be reversed.

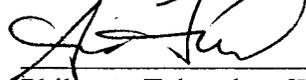
F. CONCLUSION

The trial court erred here in granting LAF summary judgment when so many facts were disputed, and when Kvigne offered so many specific factual grounds to support her claims, both her gross negligence claim, and her argument that the clause was inconspicuous. Also, there is a strong public policy basis for this Court to invalidate these kinds of exculpatory clauses altogether. Health clubs – a pervasive and crucial service for many people – should not be allowed to disclaim their negligence while hotels, parking garages, banks and buses cannot.

This Court should reverse the trial court's summary judgment order and remand this case for trial.

DATED this 27th day of February, 2012.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the following document: Brief of Appellant in Court of Appeals Cause No. 67773-0-I to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 27, 2012, at Tukwila, Washington.


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