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Division II
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No. 54400-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CAROL J. McCOY, Respondent,

v.

PFWA LACEY, LLC, a Washington limited liability company,
dba PLANET FITNESS, Appellant/Defendant,

and

BRUNSWICK CORPORATION, a foreign corporation, Defendant.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

PFWA Lacey, LLC (Appellant and hereafter, PFWA Lacey) is a defendant in an underlying matter pending in Thurston County Superior Court with Case No. 18-2-03929-34. This Court granted PFWA Lacey's Motion for Discretionary Review on February 11, 2020.

The trial court incorrectly denied the Motion for Summary Judgment and the Motion for Reconsideration. The trial court failed because PFWA Lacey established as a matter of law that the liability waiver signed by Respondent (Plaintiff Carol J. McCoy and hereafter, Ms. McCoy) was conspicuous and enforceable.¹

This Court should reverse the trial court's obvious error, because the trial court's Orders denying PFWA Lacey's Motion for Summary Judgment and denying the Motion for Reconsideration of the same are contrary to current, established Washington case law.

II. ASSIGNMENTS OF ERROR

1. Assignments of Error

a. The trial court erred when it denied PFWA Lacey's Motion for Summary Judgment on October 25, 2019².

b. The trial court erred when it denied PFWA Lacey's Motion for Reconsideration on November 14, 2019³.

¹ Appendix A1 - A2 and B1. Orders Denying Summary Judgment and Reconsideration.

² Appendix A1 - A2. Order Denying Summary Judgment.

³ Appendix B1. Order Denying Reconsideration.

2. Issues Pertaining to Assignments of Error

Ms. McCoy signed a conspicuous, valid, and binding liability waiver.⁴ Thick, black lines top a broad, highlighted banner containing bolded, capitalized words warning of release of liability and assumption of risk.⁵ Directly below the banner is a paragraph repeatedly explaining Ms. McCoy's waiver of legal rights and agreement to accept full responsibility for any injury or death.⁶ Wide signature blocks sit immediately below the release of liability section, separating the liability section from the wording beneath.⁷

As such, the issues pertaining to assignments of error are as follows:

- a. Whether this Court should determine the waiver clause at issue is enforceable as a matter of law upon applying the enforceability test outlined in *Stokes*⁸ (Division I), in *Johnson*⁹ (Division III), or outlines and applies its own test?
- b. Whether the trial court's denial of summary judgment should be reversed, when the liability waiver signed by Ms. McCoy is enforceable; and

⁴ Appendix C1 - C2. Membership Agreement.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ *Stokes v. Bally's Pacwest, Inc.*, 113 Wn. App. 442, 54 P.3d 161 (2002).

⁹ *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 458 9, 309 P.3d 528 (2013).

c. Whether the trial court's denial of reconsideration of its summary judgment denial should be reversed, when the liability waiver signed by Ms. McCoy is enforceable?

III. STATEMENT OF THE CASE

1. Background

The trial court action arises out of a July 28, 2016 incident at Planet Fitness, Lacey, where Ms. McCoy allegedly fell from a stair machine. She has alleged the emergency stop button on the stair machine failed to stop the machine, causing her injury.¹⁰

On January 14, 2019, Ms. McCoy filed an Amended Complaint, including PFWA Lacey, LLC, as a defendant, alleging claims of negligence and failure to provide a safe product.¹¹

On February 1, 2016, Ms. McCoy entered into a Membership Agreement – a binding contract clearly and repeatedly warning her of waivers and conditions, while subsequently allowing access to the Planet Fitness gym facility in Lacey.¹²

The first part of the Membership Agreement contract includes Ms. McCoy's personal information, membership rate, and fee schedule.¹³ A box breaking up the first page calls attention to Ms. McCoy's payment authorization.¹⁴

¹⁰ Appendix D1 - D3. Plaintiff's Complaint.

¹¹ Appendix E1 - E3. Plaintiff's Amended Complaint.

¹² Appendix C1 - C2. Membership Agreement.

¹³ Id.

¹⁴ Id.

Subsequently, a liability waiver sits below thick, black lines over a broad, highlighted banner containing the bolded, capitalized words “**RELEASE OF LIABILITY**” “**ASSUMPTION OF RISK**” “**CLUB RULES**” and “**BUYER’S NOTICE & RIGHT TO CANCEL.**”¹⁵ Directly below the banner is a paragraph repeatedly explaining Ms. McCoy’s waiver of legal rights, her agreement to accept full responsibility for any injury or death, and her waiver of liability for any injury resulting from the negligent conduct or omission of Planet Fitness.¹⁶ Ms. McCoy’s dated signature and a Planet Fitness Authorized Signature sit immediately below the release of liability section.¹⁷

Additionally, Ms. McCoy had the option to not be bound by the binding contract she had entered into on February 1st. In big, bold, capital letters, not two inches from where she signed the contract to release PFWA Lacey from all liability, the Agreement clearly provides the process for canceling the contract.¹⁸ To PFWA Lacey’s knowledge, Ms. McCoy has never wished to, or even attempted to, cancel the contract.

Between entering into the Agreement and the day of the incident, Ms. McCoy checked into PFWA Lacey eight times; her last known date of attendance was July 28, 2016.¹⁹

¹⁵ Appendix C1 - C2. Membership Agreement.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Appendix G1. Check-in History.

2. Accident Facts

Ms. McCoy arrived at PFWA Lacey on July 28, 2016,²⁰ checked in, and decided to use a PowerMill stair machine.²¹ Ms. McCoy's testimony conflicts between the first and second halves of her deposition.

On July 17, 2019, Ms. McCoy testified she had never before used a stair-climber-type machine and did not seek instruction or read any warning labels.²² Ms. McCoy stated she started the machine by pressing "the slow button."²³ When shown a picture of the control console, she was unable to identify which button she pushed to start the machine.²⁴ The machine started slowly after Ms. McCoy pressed an unknown button,²⁵ then sped up "super fast," and did not stop when she pushed the stop button.²⁶

3. On October 25, 2019, PFWA Lacey Moved for Summary Judgment.

Because Ms. McCoy refused to dismiss PFWA Lacey from this suit on the grounds of liability, PFWA Lacey was forced to file a motion for summary judgment.²⁷ On September 27, 2019, PFWA Lacey filed a motion for summary judgment²⁸ and on October 18, 2019, PFWA Lacey filed a reply in support of its motion for summary judgment.²⁹

²⁰ Appendix F1 - F7. Select Pages of Plaintiff's Deposition Transcript, at 62:5-9.

²¹ Appendix F1 - F7. Select Pages of Plaintiff's Deposition Transcript, at 62:12-17.

²² Appendix F1 - F7. Select Pages of Plaintiff's Deposition Transcript, at 57:7-21; 59:9-10.

²³ Appendix F1 - F7. Select Pages of Plaintiff's Deposition Transcript, at 69:4-20.

²⁴ Appendix F1 - F7. Select Pages of Plaintiff's Deposition Transcript, at 69:12-20.

²⁵ Appendix F1 - F7. Select Pages of Plaintiff's Deposition Transcript, at 71:19-22.

²⁶ Appendix F1 - F7. Select Pages of Plaintiff's Deposition Transcript, at 73:11-12.

²⁷ Appendix H1 - H20. Motion for Summary Judgment.

²⁸ Id.

²⁹ Appendix I1 - I11. Reply in Support of Summary Judgment.

Despite the above-outlined facts, the trial court denied PFWA Lacey's motion for summary judgment. The court found questions remained regarding whether the liability waiver was conspicuous and whether Ms. McCoy signed the waiver unwittingly.

4. On November 14, 2019, PFWA Lacey Moved for Reconsideration.

PFWA Lacey sought and filed a motion for reconsideration.³⁰ On November 4, 2019, PFWA Lacey filed a motion for reconsideration,³¹ but the trial court denied the motion on November 14, 2019.

5. PFWA Lacey Filed and Served Its Notice of Discretionary Review.

The trial court's October 25, 2019, and November 14, 2019 Orders effectively were forcing PFWA Lacey into a needless trial, demanding great time and financial expenditure.³² To avoid the necessity of trial, PFWA Lacey filed and served a Notice of Discretionary Review on December 11, 2019.³³ PFWA Lacey wished the summary judgment and reconsideration denials to be reviewed before it was forced to proceed to trial. This Court granted discretionary review on February 11, 2020. A motion to stay proceedings in the superior court until June 14, 2020, has been filed. An extension of the stay will be filed as required.

³⁰ Appendix J1 - J9. Motion for Reconsideration.

³¹ Id.

³² See Appendix A1 - A2 and B1. Orders Denying Summary Judgment and Reconsideration.

³³ Appendix K1 - K3. Notice of Discretionary Review.

IV. SUMMARY OF ARGUMENT

Ms. McCoy signed a conspicuous and valid liability waiver. The liability waiver distinctly stands out in the Membership Agreement. The eye is drawn to the thick, black lines atop a ¼-inch highlighted banner above the liability waiver. The large, bolded and capitalized letters within the highlighted banner demand attention, causing a reasonable person to be aware of their presence, and thus, the presence of the liability waiver.

The law dictates conspicuous waivers are valid and binding. Whether or not Ms. McCoy read the liability waiver for whatever personal reasons before signing the liability waiver is immaterial to the conspicuousness analysis. The liability waiver Ms. McCoy signed is conspicuous. Justice requires reversal of the trial court's Orders.

V. ARGUMENT

1. Standards of Review.

a. PFWA Lacey, LLC Seeks De Novo Review.

The Washington Courts of Appeal review denials of summary judgment de novo. "Our review of the denial of a summary judgment motion is de novo."³⁴ This case turns on a question of law; whether the liability waiver is enforceable. "Questions of law are reviewed de novo."³⁵

The Washington Court of Appeals, Divisions I and III, have each recently produced case law speaking to the characteristics of what makes a liability waiver conspicuous. The Supreme Court of Washington last

³⁴ *Stokes v. Bally's Pacwest, Inc.*, 113 Wn. App. 442, 444, 54 P.3d 161 (2002) (citations omitted).

³⁵ *Id.*, at 445.

touched on liability waiver conspicuousness in *Baker*, and provided characteristics of what makes a liability waiver not conspicuous.³⁶

The Washington Court of Appeals, Division II, should review this case de novo, utilizing current, controlling Washington case law found in *Stokes*³⁷ or *Johnson*³⁸. Whether this Court follows the factors considered by the other Divisions or utilizes its own test, this Court should find the liability waiver is enforceable and reverse the lower court.

b. PFWA Lacey Seeks Review For Abuse of Discretion.

The Washington Courts of Appeal review denials of motions for reconsideration for abuse of discretion. “A motion for reconsideration... [is] to be decided by the trial court in exercise of its discretion and its decision will be overturned only if the court abused its discretion.”³⁹ “Discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reason.”⁴⁰ This court should reverse the lower court’s Order denying the Motion for Reconsideration.

³⁶ *Baker v. City of Seattle*, 79 Wn.2d 198, 484 P.2d 405 (1971).

³⁷ *Stokes v. Bally’s Pacwest, Inc.*, 113 Wn. App. 442, 448, 54 P.3d 161 (2002).

³⁸ *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 458-9, 309 P.3d 528 (2013).

³⁹ *Rivers v. Wash. State Conf. of Mason Contrs.*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002) (citations omitted).

⁴⁰ *Id.*, at 684,

2. The Court Should Reverse the Trial Court’s Denial of Summary Judgment and Reconsideration as A Matter of Law.

The Commissioner decided on February 11, 2020 that discretionary review was proper. The Commissioner agreed the lower court’s Order and findings were contrary to the law of the land. The Commissioner found “[t]he waiver... was set apart from the other provisions beneath a fourth of an inch thick highlighted banner.”⁴¹ “[t]wo signature lines that span the entire width of the page, further separate[e]... the waiver from the rest of the contract.”⁴² “The heading of the waiver is clear.”⁴³ “Finally, McCoy’s signature is clearly related to the waiver.”⁴⁴ “Given the sufficiently clear language of the waiver, and the analysis of the waiver under the Six Johnson factors, this court concludes that the trial court committed obvious error in denying PFWA’s motion for summary judgment.”⁴⁵

Even if all evidence is viewed in favor of Ms. McCoy, Washington case law dictates the liability waiver she signed was conspicuous and was signed freely. Instead, the trial court seemingly added additional requirements that go beyond well-established Washington jurisprudence when it denied the Motions.⁴⁶

⁴¹ Ruling Granting Review, at 5.

⁴² Ruling Granting Review, at 5.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Ruling Granting Review, at 3, citing Mot. For Disc. Rev., Appendix J at 3.

a. The Trial Court Erred in Finding the Liability Waiver Was Not Conspicuous.

The trial court denied PFWA Lacey's motion for summary judgment on the grounds the enforcement of the signed liability waiver, and whether or not it was conspicuous, was a matter for a jury to decide. However, the conspicuousness of the waiver is matter of law, not fact, and a court, not a jury, must determine matters of law.

i. The Liability Waiver Meets Five of the Six Established Factors Used by Washington Courts to Determine Whether a Waiver is Conspicuous.

The Washington Court of Appeals, Division III, pondered six factors in deciding whether a liability waiver and release provision was conspicuous, including:

Whether 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.⁴⁷

The Court found all six factors need not be present for a release of liability to be conspicuous. The Court found three of the factors made the liability waiver in *Johnson* so conspicuous reasonable minds could only reach one conclusion on the question of whether the document was unwittingly signed.⁴⁸

The *Johnson* Court found:

⁴⁷ See, *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 458-9, 309 P.3d 528 (2013).

⁴⁸ *Johnson*, 176 Wn. App. 453, at 462.

The release executed by Ms. Johnson [electronically] on line clearly sets apart the release language in either italicized letters or in all capital letters or both. The document was conspicuous with a header stating, ‘WAIVER AND RELEASE OF LIABILITY, ASSUMPTION OF RISK AND INDEMNITY AGREEMENT.’⁴⁹ The waiver repeatedly warned Ms. Johnson that she was giving up her legal rights by signing the waiver, with this clearly indicated above the signature line.⁵⁰

Here, the same three factors are present in this case. Moreover, the two more of the six factors are present in this case. The following five of six factors are present in the liability waiver at issue:

(1) whether the waiver is set apart or hidden within other provisions,

The waiver is set apart. Bolded, black lines separate a ¼-inch thick, highlighted, dividing banner, clearly setting apart the release language. Two signature blocks, under the release language, span the entire width of the page, separating the liability waiver from the rest of the contract.

(2) whether the heading is clear,

The heading is very clear. Bolded, black lines top a thick, highlighted banner containing the bolded, capitalized words “**RELEASE OF LIABILITY**” “**ASSUMPTION OF RISK**” “**CLUB RULES**” and “**BUYER’S NOTICE & RIGHT TO CANCEL.**”

(3) whether there is a signature line below the waiver provision,

There is a signature line below the waiver provision. Two signature blocks, under the release language, span the entire width of the page, separating the liability waiver from the rest of the contract.

(4) what the language says above the signature line, and

The language indicates acknowledgment and agreement to all terms. The last sentence above the signature block states,

⁴⁹ *Johnson*, 176 Wn. App. 453, at 461.

⁵⁰ *Id.*

“By signing below, I acknowledge and agree to all of the terms contained on the front and back of this agreement.”⁵¹

(5) whether it is clear that the signature is related to the waiver.

It is clear the signature is related to the waiver. The paragraph above the two signature blocks states, “I understand my release of liability, assumption of risk, and agreement to indemnify, defend, and hold harmless and I have been given the opportunity to review and ask questions....” The wording directly above the signature blocks indicates acknowledgment and agreement to all terms in the agreement. The two signature blocks delineate the flow of the contract, separating the liability waiver from writing below.

The Washington Court of Appeals, Division III, also analyzed conspicuousness characteristics in the unpublished opinion in *DeAsis*.⁵²

Whether an exculpatory clause can be found conspicuous as a matter of law turns on how many of the characteristics that make a provision conspicuous are present: characteristics such as setting it apart from other provisions, using a heading or caption that makes the purpose of the provision clear, whether the provision or its heading or caption set forth in capital letters or in bold type, whether there is a signature line, and whether it is clear that the required signature is related to the exculpatory provision.

Here, the liability waiver includes a heading or caption, making the provision clear. The heading or caption is set forth in capital letters and bold type. There is a signature line spanning the entire width of the page. Language above the signature line makes it clear signing will bind the signor to the liability waiver.

⁵¹ Membership Agreement

⁵² *DeAsis v. Young Men’s Christian Ass’n of Yakima*, Not reported in P.3d, 183 Wn. App. 1018 (2014), See *Baker v. City of Seattle*, 79 Wn.2d 198, 484 P.2d 405 (1971); *McCorkle v. Hall*, 56 Wn. App. 80, 782 P.2d 574 (1989); *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 35 P.3d 383 (2001); *Stokes v. Bally’s Pacwest, Inc.*, 113 Wn. App. 442, 448, 54 P.3d 161 (2002).

Ms. McCoy signed a legally binding liability waiver that was conspicuous by all standards and tests utilized by Division III. Whether the waiver is or is not conspicuous is a question of law. Defendant PFWA Lacey's Motions should have been granted as a matter of law.

ii. The Liability Waiver in the Present Case Mirrors Liability Waivers Washington Courts Have Found to Be Conspicuous.

The Division III Court in *Johnson* and *DeAsis* utilized case law for its decisions from the Washington Court of Appeals, Division I, which analyzed similar factors in *Stokes*.⁵³ Stokes signed a signature block below the following wording:

NOTICE TO BUYER: (a) Do not sign this Contract before you read it or if any of the spaces intended for the agreed terms, except as to unavailable information, are blank.... THIS IS A RETAIL INSTALLMENT CONTRACT, THE RECEIPT OF AN EXECUTED COPY OF WHICH, AS WELL AS A COPY OF THE CLUB RULES AND REGULATIONS AND A WRITTEN DESCRIPTION OF THE SERVICES AND EQUIPMENT TO BE PROVIDED, IS HEREBY ACKNOWLEDGED BY THE BUYER.⁵⁴

Unlike the present case, nothing in the language above where Stokes signed spoke about a liability waiver. Instead, a notice under Stokes' signature block read "**WAIVER AND RELEASE**: This contract contains a **WAIVER AND RELEASE** in Paragraph 10 to which you will be bound."⁵⁵ Found above Paragraph 10 was the title, "**WAIVER AND RELEASE**." Paragraph 10 then "discusses only Stokes' agreement to

⁵³ *Stokes v. Bally's Pacwest, Inc.*, 113 Wn. App. 442, 54 P.3d 161 (2002).

⁵⁴ *Id.*, at 448.

⁵⁵ *Id.*

release Bally's from liability for its negligence.” The court found the language to be conspicuous and enforceable, even though the language warning of a liability waiver was below the signature block and the waiver itself was in a completely different paragraph. “Bally’s owe[d] no duty to Stokes for his injuries.”⁵⁶ The court ruled summary judgment was required and directed entry of summary judgment in favor of Bally’s on remand.

Here, Ms. McCoy executed a release with a bold dividing line followed by a ¼-inch thick, highlighted banner clearly alerting a reasonable reader and setting apart the release language. The highlighted banner contains the bolded, capitalized words “**RELEASE OF LIABILITY**” “**ASSUMPTION OF RISK**” “**CLUB RULES**” and “**BUYER’S NOTICE & RIGHT TO CANCEL.**”

Directly below the banner is the liability waiver, discussing only Ms. McCoy's agreement to release PFWA Lacey from liability for its potential negligence. The waiver dictates a shift of full liability onto Ms. McCoy for any injury, loss, or death. The language in this paragraph is clear and unambiguous.

A following paragraph fully explains Ms. McCoy was “not obligated to sign and should not do so if there are any unfilled blanks.” The next sentence states, “I understand my release of liability, assumption of risk, and agreement to indemnify, defend, and hold harmless and I have been given the opportunity to review and ask questions....” The last

⁵⁶ *Stokes*, 113 Wn. App. 442, at 450.

sentence above the signature block states, “By signing below, I acknowledge and agree to all of the terms contained on the front and back of this agreement.” The wording is strikingly similar to the verbiage found above the signature block in *Stokes*.⁵⁷

Immediately following the second paragraph are two signature blocks, spanning the entire width of the page. One signature block is for the Member (signed by Ms. McCoy) and one is for a Planet Fitness authorizing signature. These two signature blocks span the entire width of the printed page and separate the release of liability and assumption of risk section from the remaining payment and cancelation information found at the bottom of the page. The waiver found in the Membership Agreement signed by Plaintiff is conspicuous and unambiguous.

Other similar cases are as follows:

Hewitt v. Miller, 11 Wn. App 72, 521 P.2d 244 (1974), capital letters followed by lower case release language in two, separate paragraphs made the liability waiver conspicuous; and

Conradt v. Four Star Promotions, Inc., 45 Wn. App 847, 728 P.2d 617 (1986), release on a clipboard partially covered by other materials still rendered the liability waiver conspicuous.

⁵⁷ *Stokes*, 113 Wn. App. 442, at 448.

The distinguishing case showing a waiver was not conspicuous is *Baker v. City of Seattle*, 79 Wn.2d 198, 484 P.2d 405 (1971). The waiver in *Baker* contained no title, no capital lettering, no bold lettering, and was buried in the contract.⁵⁸ The Washington Supreme Court found the liability waiver to be inconspicuous. This decision further supports that the question in the present case is one of law, not fact.

b. The Liability Waiver Was Not Unwittingly Signed.

The Court of Appeals, Division I, found a liability waiver can be conspicuous and wittingly signed in *Chauvlier*,⁵⁹ even though the signor never reviewed the waiver prior to signing.

Ms. McCoy's claim that she did not have time to read the liability waiver of the contract does not create a material issue for the jury to decide. "It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents."⁶⁰ Furthermore, when there is ample opportunity to examine a liability waiver and a party fails to do so or ask for time to do so, the party is bound by its terms.⁶¹

Chauvlier bought a specially priced Spring Ski Pass after waiting in a line with a "frenzied feeling amongst many people about getting the reduced price ski pass" for 15 - 20 minutes.⁶² Chauvlier claimed that there

⁵⁸ *Baker*, 79 Wn.2d 198, at 199.

⁵⁹ *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 35 P.3d 383 (2001) (citations omitted).

⁶⁰ *Nat'l Bank of Washington v. Equity Inv'rs*, 81 Wn.2d 886, 912, 506 P.2d 20, 36 (1973).

⁶¹ *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 341, 35 P.3d 383, 386 (2001).

⁶² *Id.* at 338.

was no time or opportunity to read anything during the transaction.⁶³ However, he offered no evidence he was rushed to sign the document, nor even if he had asked for more time to read the document, he would not have been given the opportunity.⁶⁴

Here, an employee of PFWA Lacey, LLC went over the terms of the contract with Ms. McCoy. Ms. McCoy admits she did not read the contract and offered no evidence that she asked for more time to read through the document.⁶⁵ The fact Ms. McCoy chose to not take the time to read the liability waiver does not equate to her being denied the opportunity to read through the contract. Ms. McCoy signed the contract on her own volition and is responsible for honoring the contract she committed to. Ms. McCoy did not unwittingly sign the liability waiver. She simply chose, for her own personal reasons, to not read the conspicuous waiver and sign her name on the large signature block below the waiver.

Whether or not Ms. McCoy read the liability waiver in the contract prior to signing has no bearing on whether or not the liability waiver was conspicuous. Once this Court finds the liability waiver is conspicuous, the issue of whether Ms. McCoy unwittingly signed the liability waiver will be moot.

⁶³ *Chawlier*, 109 Wn. App. 334, at 338.

⁶⁴ *Id.*, at 341.

⁶⁵ Appendix F1 - F7. Select Pages of Plaintiff's Deposition Transcript, at 150:1-15.

F. CONCLUSION

This Court should reverse the trial court's rulings denying PFWA Lacey's Motion for Summary Judgment and Motion for Reconsideration for the reasons set forth above. This Court should also direct the lower court to enter an Order for PFWA Lacey's dismissal with prejudice.

Respectfully submitted this 23rd of April, 2020.

TYSON & MENDES, LLP

/s/ Michael Kutzner

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PFWA Lacey, LLC

CERTIFICATE OF SERVICE

The undersigned hereby declares under the penalty of perjury under the laws of the State of Washington:

That he is a citizen of the United States of America; that he is over the age of 18 years, not a party to the above-entitled action, and competent to be a witness therein; that on April 24, 2020, he e-filed and e-served:

1. Opening Brief of Appellant, including the Appendix and supporting documents, through the Washington State Appellate Courts' Secure Portal to the following recipients:

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DATED this 23rd day of April, 2020.

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APPENDIX A

1 Hearing date: October 25, 2019
2 Hearing time: 9:00 a.m.
3 Judge/Calendar:
4 The Honorable James Dixon,
5 Civil Motions Calendar

FILED

OCT 25 2019

Superior Court
Linda Myhre Enlow
Thurston County Clerk

6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 IN AND FOR THURSTON COUNTY

8 CAROL J. McCOY, a single person,

9 Plaintiff,

10 v.

11 PFWA LACEY, LLC, a Washington
12 limited liability company, dba PLANET
13 FITNESS; and BRUNSWICK
14 CORPORATION, a foreign corporation,

15 Defendants.

NO. 18-2-03929-34

ORDER DENYING PFWA
LACEY'S MOTION FOR
SUMMARY JUDGMENT
REGARDING LIABILITY AND
DAMAGES

~~(Proposed)~~

16 THIS MATTER having come on regularly for hearing upon defendant's motion for
17 summary judgment, and the court having considered the records and files herein,
18 including:

- 19 1. Defendant PFWA Lacey's Motion for Summary Judgment Regarding
20 Liability and Damages;
21 2. Defendant Brunswick's Joinder in Defendant PFWA Lacey's Motion for
22 Summary Judgment Regarding Liability and Damages;
23 3. Plaintiff's Response to PFWA Lacey, LLC'S Motion for Summary Judgment
Regarding Liability and Damages;
4. Declaration of Thomas J. West and attached exhibits;

ORDER DENYING PFWA LACEY'S MOTION FOR SUMMARY
JUDGMENT REGARDING LIABILITY AND DAMAGES - 1

WEST LAW FIRM, P.S.
524 Tacoma Avenue South
Tacoma, Washington 98402
(253) 383-4704

ORIGINAL

APPENDIX B



FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2019 NOV 14 AM 10:34

Linda Myhre Enlow
Thurston County Clerk

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

<p>CAROL J MCCOY, vs. BRUNSWICK CORPORATION; PFWA LACEY, LLC, Defendants.</p>	<p>No. 18-2-03929-34 ORDER DENYING MOTION FOR RECONSIDERATION</p>
--	--

I. BASIS

This matter came before the Court upon Defendant PFWA LACEY, LLC's Motion for Reconsideration of Order Denying Motion for Summary Judgment entered October 25, 2019. This matter was decided *without* argument. The Court having reviewed all relevant pleadings makes the following:

II. FINDINGS/CONCLUSIONS OF LAW

This Court has jurisdiction to hear this matter.

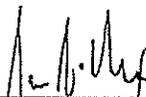
Based upon the foregoing Findings/Conclusions of Law, the Court enters the following:

III. ORDER

IT IS ORDERED that:

Defendant PFWA LACEY, LLC's Motion for Reconsideration is DENIED.

Dated: 14 of November, 2019



Judge James J Dixon

APPENDIX C



720 Sleater Kinney Rd SE, Lacey, WA 98503 • (360) 339-5188
www.planetfitness.com

MEMBERSHIP AGREEMENT

DATE 02/01/2016 Club # 8334 MEMBERSHIP # 8334-01334 EXPIRATION _____
Name Carol Mccoy T-shirt Size: _____ Date of Birth 09/16/1955
Address 1440 Fones Rd SE City Olympia State WA Zip 98501
HomePhone (360) 349-7014 WorkPhone/Cell _____
Email Address mooopoc@msn.com Referring Member _____
Membership Type BLACK CARD MEMBER How did you hear about us? _____ Post Card _____
Have you been a member of a gym before? _____ Club Access: Black Card Reciprocal Access

Membership Fees: \$ 1.00 \$ 0.00 \$ 0.00 \$ 0.00 \$ 1.09
START-UP PRORATE ANNUAL FEE PRORATE PREPAY (TERM) TOTAL

- Your Monthly Membership Fee will be billed to the account below on or around the 17th beginning on 03/17/2016 for \$ 21.73 per month plus applicable taxes until you cancel in accordance with this agreement.
- This membership has a 12 month minimum term (minimum term not to exceed 12 months).
- If you have a minimum term, your account below will be billed for a minimum of 12 months and will continue on a month-to-month basis at the monthly rate above until you cancel in accordance with the terms of this agreement.
- Your Monthly Membership Fee is guaranteed so long as you remain a member in good standing including payment of all monthly dues and your Annual Membership Fee.
- An Annual Membership Fee will be billed to your account below on or around the 1st beginning on 09/01/2016 for \$ 42.99, plus applicable taxes and will continue to be billed on or around the anniversary of that date each year thereafter until you cancel in accordance with the terms of this agreement.
- To cancel your monthly membership and stop the billing of the Monthly Membership Fee on or around the 17th of the month, the club must receive written notification delivered to the club by the 10th of the month either in person or preferably via certified mail to the club address listed above. Please note it may take up to seven (7) business days for any membership or billing changes to take effect. In order to cancel your membership prior to the billing of the Annual Membership Fee, the club requires written notice delivered as described above no later than the 25th of the month before such billing. The Annual Membership Fee is fully earned when received and is non-refundable.
- If your monthly membership has a minimum term, and you wish to cancel your membership before the end of the term for reasons other than those listed in Section 9 of this agreement, a \$58 buyout fee is required.
- If you provide us with more than one method of payment, you authorize us to charge any amounts you may owe us including, but not limited to, any membership-related obligations, retail transactions, and/or online purchases to any form of payment which you have provided us until such time as you revoke your authorization for that method of payment by written notification delivered to the club in person or preferably via certified mail to the address listed above.
- If your credit or debit card expires, you authorize us to obtain a new expiration date from the card issuer, if we choose to do so, and/or to continue billing the card in accordance with the terms of this agreement (whether or not we have obtained a new expiration date).
- In accordance with applicable law, if our first attempt to collect any fee under this Agreement is unsuccessful, we may make additional attempts to collect from any/all payment methods you provide us, and a \$10 service fee will be applied for each instance we submit or re-submit such payment request and it is returned uncollectable for any reason including, but not limited to, insufficient funds, expired or cancelled payment cards, overdraws and closed accounts. We are not liable for any fees charged by your financial institution in the event a payment request is returned as uncollectable.
- Cancellation & Billing Policies:** I have read and understand the cancellation rights and billing policies on the front and back of this agreement. Carol McCoy (Member Initials)

PAYMENT AUTHORIZATION	PRIMARY PAYMENT ACCOUNT	ALTERNATIVE PAYMENT ACCOUNT
	NAME ON ACCOUNT: <u>Carol Mccoy</u> <u>XXXXX0597</u> <u>325170835</u>	NAME ON ACCOUNT: _____ _____ _____
<p>By initiating below and signing this agreement, I authorize PF Growth Partners, LLC, d/b/a Planet Fitness® ("Planet Fitness" or "we") (an independently owned and operated franchisee of Planet Fitness LLC) its assigns, affiliates and other parties authorized by Planet Fitness including, but not limited to, Planet Fitness Franchise, LLC, its parents, subsidiaries and affiliates (collectively, "PF Corporate") to make transactions from the Primary Payment Account designated above for the purpose of billing all or a portion of the recurring Monthly Membership Fee I owe to Planet Fitness on or around the 17th of each month and the Annual Membership Fee on or around the date indicated above until all of my obligations are paid under this agreement. I understand that my obligation under this agreement includes the Monthly Membership Fee, Annual Membership Fee, service fees for uncollectable monthly dues, applicable taxes, charges and any other unpaid fees or dues. I also understand that the Alternative Payment Account designated above may be used by Planet Fitness to bill for any retail transactions and/or online purchases initiated by me. If at any time Planet Fitness is unable to successfully bill the Primary Payment Account for any fee or other obligation mentioned above, I further understand that Planet Fitness may re-submit the fee to the Primary Payment Account and/or bill the Alternative Payment Account for any fee or obligation (including service charges), or any portion thereof. I agree that transfers of partial payments of an overdue balance are authorized. This authorization will remain in full force and effect until all of my obligations are paid in full under this agreement. I understand that the amounts debited from my account may vary each month based on additional amounts owed to us in accordance with the terms of this agreement. I confirm that I am authorized under the terms of the applicable agreement with my financial institution to use the accounts designated above for the purpose of paying and services from Planet Fitness and agree to comply with my financial institution's requirements at all times while this authorization is in effect. <u>Carol McCoy</u> (Member Signature)</p>		

Designer Authorization & Waiver

- Parent/Guardian:** Planet Fitness does not accept members under the age of 13. In exchange for Planet Fitness allowing my minor child who is 13 years or older to purchase a membership, I agree to the Release of Liability and Assumption of Risk clauses in this agreement and I agree to defend, indemnify and hold harmless Planet Fitness and PF Corporate to the fullest extent permitted by law for any claim brought by my minor child against Planet Fitness and/or PF Corporate. I also promise to pay any financial obligation that my minor child does not pay for any reason and acknowledge that the payment information provided above is my account. I understand and agree that if my minor child is under the age of 16, he or she must be accompanied by a parent or guardian at all times while at any Planet Fitness facility.
- Financial Cosigner:** I promise to pay any financial obligation that the member does not pay for any reason and acknowledge that the payment account information provided above correctly identify my accounts. I also agree to defend, indemnify and hold harmless Planet Fitness and PF Corporate to the fullest extent permitted by law for any claim brought against Planet Fitness and/or PF Corporate by the member.

Name: _____ Phone: _____ Authorized Signature: Carol McCoy

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

I understand I am not obligated to sign this agreement and should not do so if there are any unfilled blanks. I understand my right of cancellation and the billing and refund policies. I understand my release of liability, assumption of risk and agreement to indemnify, defend and hold harmless and I have been given the opportunity to review and ask questions related to my use of the facilities, exercise equipment, tanning, massage beds/chairs and other equipment, as well as my participation in exercise programs or other services and/or programs offered to members. I agree to comply with Planet Fitness' membership policies and club rules that may be communicated to me from time to time, whether in writing, electronically, through club signage or verbally. Planet Fitness may, in its sole discretion, modify any policy or club rule at any time and from time to time without advance notice. Planet Fitness reserves the right, in its sole discretion, to refund the pro-rated cost of unused services and terminate my membership immediately for violation of any membership policy or club rule. By signing below, I acknowledge and agree to all of the terms contained on the front and back of this agreement.

Carol McCoy 02/01/2016 _____ 02/01/2016
Member's Signature Date Planet Fitness Authorized Signature Date

NONREFUNDABLE AMOUNT: I UNDERSTAND THAT I HAVE PAID OR AM OBLIGATED TO PAY \$ _____ AS AN INITIATION OR MEMBERSHIP FEE, AND THAT UNDER NO CIRCUMSTANCES IS ANY PORTION OF THIS AMOUNT REFUNDABLE.

I have received a written description of the health studio services and equipment to be provided. Initials Carol McCoy
I have received a complete copy of the rules. Initials Carol McCoy

IF YOU WISH TO CANCEL THIS CONTRACT WITHOUT PENALTY, YOU MAY CANCEL IT BY DELIVERING OR MAILING A WRITTEN NOTICE TO THE HEALTH STUDIO. THE NOTICE MUST SAY THAT YOU DO NOT WISH TO BE BOUND BY THE CONTRACT AND MUST BE DELIVERED OR MAILED BEFORE MIDNIGHT OF THE THIRD BUSINESS DAY AFTER YOU SIGN THIS CONTRACT. THE NOTICE MUST BE MAILED TO PLANET FITNESS, 720 SLEATER KINNEY RD SE, SUITE N, LACEY, WA 98503. IF YOU CANCEL WITHIN THE THREE DAYS, THE HEALTH STUDIO WILL RETURN TO YOU WITHIN THIRTY DAYS ALL AMOUNTS YOU HAVE PAID.

PLEASE READ AND UNDERSTAND THIS AGREEMENT BEFORE SIGNING.

1. Parties

Planet Fitness (as previously defined) and you agree that by signing this agreement, you are purchasing a membership or services and agree to all the terms contained in this agreement. The terms "you" and "Planet Fitness" include heirs, estates, agents, representatives, officers, directors, shareholders, managers, members, successors, affiliates, parents, subsidiaries and employees. Both parties make this agreement on behalf of, and it binds, all these included persons and entities. It is your responsibility to notify Planet Fitness of any change in your mailing address, billing information or contact information.

2. Representations

A) Physical Condition & No Medical Advice. You represent that you are in good physical condition and have no medical reason or impairment that might prevent you from your intended use of Planet Fitness' facilities. You acknowledge that Planet Fitness did not give you medical advice before you joined, and cannot give you medical advice after you join. We do not give members advice relating to their physical condition or ability to use the facilities, so if you have any health or medical concerns now or after you join, please discuss them with your doctor before using the facilities.

B) Liability for Property. Neither Planet Fitness nor PF Corporate (as previously defined) is liable to you or your guest for any personal property that is damaged, lost, or stolen while on or around Planet Fitness's premises including, but not limited to, a vehicle or its contents or any property left in a locker. If you or your guest cause any damage to Planet Fitness' facilities, you are liable to Planet Fitness for its cost of repair or replacement.

C) Entire Agreement & Enforcement: You acknowledge that neither Planet Fitness, nor anyone else, made any representations nor promises upon which you relied that are not stated in this agreement. This document contains the entire agreement between you and Planet Fitness and replaces any oral or other written agreement. If a court declares any part of this agreement invalid, it will not invalidate the remaining parts, which continue unaffected. If Planet Fitness does not enforce any right in this agreement for any reason, Planet Fitness does not waive its right to enforce it later. This agreement and all physical or electronic copies hereof will be deemed to be valid and authentic and you intend and agree that such copies will be given the same legal effect as the original signed agreement.

3. Membership

A) General: Your membership permits you to use Planet Fitness' premises, facilities, equipment and services and your dues are in exchange for such access whether you use the facilities or not. Your membership is subject to all current company policies, rules, terms, conditions and limitations including, but not limited to, PF Black Card® benefit rules, transferability rules, guest privilege rules, and dress code. Your membership gives you no rights in Planet Fitness, PF Corporate, its management, ownership, property or operation. Planet Fitness may assign or transfer your membership in its sole discretion. You have no right to assign your membership or this agreement. Planet Fitness can sell memberships at different rates and terms than yours. Any special promotional membership or rate regarding privileges, usage, hours, benefits or facilities is valid only at your home club, unless otherwise provided by Planet Fitness in a signed writing.

B) Group Fitness Instruction (PF@PF®): Planet Fitness may offer pre-scheduled group fitness instruction from time to time. The number of participants in group sessions may be limited. Group sessions will be made available either on an appointment basis or on a "first come, first served" basis. These classes are strictly informational and instructional in nature and not intended as personal training.

C) PF Black Card Reciprocal Access: If you purchase a PF Black Card Membership, there are additional rules and limitations governing reciprocal access, including the requirement to sign in at any visiting (non-home club) location. Reciprocal access is limited to 10 visits per month to a visiting location. Additional fees may apply if you exceed 10 visits to the same visiting club in a month. Each time you visit a club outside of the country in which your home club is located, an additional fee may apply.

D) PF Black Card Guest Privileges and Other Benefits: PF Black Card members may bring one guest per day for free to any location. All guests must be 18 years old or at least 13-14 years old if accompanied by a parent/guardian and must sign a guest registry. Adult guests must present photo identification when signing in. The PF Black Card member must accompany the guest and remain on the premises during the entire visit. PF Black Card guests are not entitled to use tanning or any other PF Black Card benefit or amenity. PF Black Card members must be 18 years old to use the tanning facilities. Tanning may be further restricted by your state and/or local laws, ordinances and regulations, which include, among other things, that you must acknowledge that you (A) have read and understand the warnings before using the tanning machine; and (B) agree to use the protective eyewear that Planet Fitness provides. You agree to abide by all such tanning restrictions.

E) Transfer of Location: If you are a monthly member, you can transfer your membership from your home club to another club provided you are current on your monthly dues and have been a member for at least ninety (90) days. Prepaid memberships are not transferable. A transfer fee may apply.

F) Membership Freeze: Your membership can be frozen for verified medical reasons only at time of illness, injury or medical condition. Your freeze will be limited to the time indicated as necessary by your physician, up to a maximum of three (3) months. Your monthly dues will be automatically reinstated at the end of your freeze and billed to the account on file with Planet Fitness unless you cancel your membership or you are approved for a longer freeze. Please note that you will still be billed for your Annual Membership Fee when it is due, even if your account is frozen.

G) Non-Discrimination: It is the policy of Planet Fitness not to discriminate against any person on the basis of race, national origin, ancestry, color, creed, religion, sex, sexual orientation, age or disability.

H) Changes to Membership Agreement: Planet Fitness may, from time to time, make changes to this agreement, other than to your guaranteed Monthly Membership Fee. Such revisions will be effective immediately, provided, however, such revisions shall, unless otherwise stated, be effective thirty (30) days after notice. Your continued use of Planet Fitness' facilities and/or services shall constitute acceptance of these changes.

I) Privacy: Planet Fitness and PF Corporate collect, use and disclose certain personal information of members in accordance with their Privacy Policies, which are available free of charge upon request. The PF Corporate Privacy Policy is available at www.PlanetFitness.com. Please review the Privacy Policy before signing this agreement as it contains important information relating to your personal information. Either may contact you from time to time by telephone, email, text message or other means with information and offers related to your membership which may be of interest to you. If you do not wish to receive such messages, you can opt out at any time.

J) Dispute Resolution: In the unlikely event that Planet Fitness and/or PF Corporate is unable to resolve a complaint you may have to your satisfaction (or is

unable to resolve a dispute with you after attempting to do so informally), we each agree to resolve such disputes through binding arbitration or small claims court rather than a court of general jurisdiction. For simplicity and fairness, arbitration will be conducted on an individual basis in accordance with the American Arbitration Association's rules for consumer arbitration. By signing this agreement, you acknowledge and agree that you, Planet Fitness, and PF Corporate are each waiving the right to a trial by jury and the right to participate in a class action, either in court or in arbitration. This Dispute Resolution provision shall apply to this contract unless, within thirty (30) days of signing this contract, you notify Planet Fitness in writing that you reject this provision. Such notification must be made in writing delivered to the club address listed on the first page. Rejection of this provision shall have no effect on the remaining provisions of this contract.

4. Rules & Regulations

You agree to follow Planet Fitness' membership policies and club rules. Planet Fitness may, in its sole discretion, modify the policies and any club rule without notice at any time. Club rules vary by location and all signs posted in a club or on the premises and any verbal communication from Planet Fitness shall be considered a part of the club rules. Planet Fitness reserves the right, in its sole discretion, to terminate your membership at any time, effective immediately, for violation of any membership policy or club rule.

5. Dress Code

Planet Fitness strives to provide a safe and comfortable environment for all members. As such, Planet Fitness management and staff may enforce, and you agree to abide by, a dress code in all areas of the club. Clothing that may be perceived as intimidating, revealing or offensive, as well as clothing that may present a safety hazard or damage equipment, is not allowed.

6. Account Information Notifications

Planet Fitness may contact you via telephone, email, text message or other means from time to time for the purpose of notifying you of issues related to your membership or billing information or for automatic payment processing issues. By providing us with your contact information and signing this agreement, you give your prior express written consent to receive membership and billing-related communications from us or our authorized delegate to the extent permitted by applicable law, including without limitation the Telephone Consumer Protection Act and the Fair Debt Collection Practices Act.

7. Facilities & Services

A) Planet Fitness reserves the right at any time to remove, discontinue, repair or replace the equipment available to members without any effect on this agreement. Planet Fitness also reserves the right to make changes to the type or quantity of equipment, programs or services offered to members and to alter the hours of operation in Planet Fitness' sole discretion. You acknowledge and agree that the equipment, programs and services currently available at the facility are subject to change from time to time and are offered on a "first come, first served basis."

B) Planet Fitness regularly closes its facilities (or portions of its facilities) for maintenance on a temporary basis and also closes on selected holidays, etc. and such temporary closures will have no effect on this agreement so long as such temporary closures are reasonable. If your home club is permanently closed, moved or sold, Planet Fitness reserves the right to assign and transfer your membership to another club within eight (8) miles of your home club, in accordance with your rights under applicable law as set forth in Section 11 below.

8. Dues, Fees, Charges & Taxes

A) Payment Authorization: You have full control over the payment authorization and can stop it at any time by notifying Planet Fitness as set forth on the front page of this agreement. You are responsible for notifying your bank or credit card company of any error that appears on your statement in a timely manner. You must notify Planet Fitness within sixty (60) days of a claimed error on your statement.

B) Charges & Taxes: Planet Fitness has the right to add to your prepaid dues or to your monthly dues any applicable tax imposed by the government as well as any utility charges or surcharges related to the facility.

9. Cancellation Rights (Buyer's Rights)

1. This contract may be cancelled if the buyer dies or becomes totally disabled. The disability must be confirmed by an examination of a physician agreeable to the buyer and the health studio.

2. This contract may be cancelled if the buyer moves his or her permanent residence to a location more than twenty-five miles from the health studio or an affiliated health studio offering the same or similar services and facilities at no additional expense to the buyer and the buyer cancels after one year from signing the contract if the contract extends for more than one year. The health studio may require reasonable evidence of relocation. If at the time of signing the contract requiring payment of an initiation or membership fee the buyer lived more than twenty-five miles from the health studio, the buyer may cancel under this subsection only if the buyer moves an additional five miles or more from the health studio.

3. If the contract extends for more than one year, the buyer may cancel the contract for any reason upon thirty days' written notice to the health studio.

4. This contract may be cancelled if the health studio facilities are permanently closed and comparable facilities owned and operated by the seller are not made available within a ten-mile radius of the closed facility.

5. This contract may be cancelled if a facility, construction, or improvement is not completed by 3/4/2016.

6. This contract may be cancelled within the first five business days the facility opens for use of the buyer and the health studio begins to provide the agreed upon health studio services.

7. If a buyer is entitled to a pro rata refund under this section, the amount shall be computed by dividing the contract price by the number of weeks in the contract term and multiplying the result by the number of weeks remaining in the contract term. If no term is stated in the contract, a term of thirty-six months shall be used.

10. Limitation of Liability

Unless controlling legal authority requires otherwise, any award by an arbitrator or a court is limited to actual compensatory damages. Specifically, neither an arbitrator nor a court can award either party any indirect, special, incidental, consequential or punitive damages, even if one party told the other party that they might suffer these damages.

APPENDIX D

1 18-2-03929-34
CMP 3
Complaint
3631183



FILED
SUPERIOR COURT
THURSTON COUNTY, WASH
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Linda Myhre Enlow
Thurston County Clerk

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

CAROL J. McCOY, a single person,
Plaintiff,

v.

CHRIS CAVOLO and JANE DOE
CAVOLO, husband and wife, and
VICTOR BRICK and JANE DOE
BRICK, husband and wife, dba PLANET
FITNESS, and BRUNSWICK
CORPORATION, a foreign corporation,
Defendants.

NO. 18-2-03929-34
COMPLAINT FOR PERSONAL
INJURY AND DAMAGES

COMES NOW the plaintiff and for complaint alleges as follows:

I.

Defendants Cavolo are husband and wife, and defendants Brick are husband and wife and all acts and/or omissions by the individuals, or either of them, were done for and on behalf of their respective marital communities.

COMPLAINT FOR PERSONAL
INJURY AND DAMAGES - 1

ORIGINAL

WEST LAW FIRM, P.S.
524 Tacoma Avenue South
Tacoma, Washington 98402
(253) 383-4704

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II.

All acts and/or omissions were done by the aforementioned individuals doing business as Planet Fitness in Lacey, Thurston County, Washington.

III.

Brunswick Corporation and/or one of its subsidiaries controlled by Brunswick Corporation, at all times herein material, was doing business in Thurston County, Washington, and had placed products made by Brunswick Corporation, or one of its controlled subsidiaries, in the stream of commerce, which product was defective and caused plaintiff's injury.

IV.

On or about July 29, 2016 plaintiff, an invitee of Planet Fitness of Lacey, was using a piece of exercise equipment in a proper manner that had been manufactured by Brunswick Corporation or one of its controlled subsidiaries, i.e. a Life Fitness stair machine, which failed to operate properly including, but not limited to, an emergency stop button that failed to work, causing plaintiff serious injury.

V.

The above referenced accident was caused by the negligence of the individual defendants, d/b/a Planet Fitness of Lacey, including, but not limited to, failure to properly maintain and repair the stair machine.

VI.

The above mentioned injury sustained by the plaintiff was also caused and/or

1 contributed to by the product manufactured by Brunswick Corporation or one of its
2 controlled subsidiaries by their violation of RCW 7.72.010, *et seq.*, including, but not
3 limited to, breaches of warranty and failure to provide a safe product as per RCW
4 7.72.030, Laws of the State of Washington.

5
6 VII.

7 As a result of the foregoing negligence of the individual defendants dba Planet
8 Fitness, and/or the negligence of their agents and/or employees, and the failure of
9 Brunswick Corporation and/or one of its controlled subsidiaries to provide a safe
10 product as per the allegations above, plaintiff incurred past and future medical expenses,
11 past and future income loss, disability, impaired earning capacity, scarring and
12 disfigurement, general damages for pain and suffering, loss of enjoyment of life, and
13 other damages, all in amounts to be proven at the time of trial.

14 WHEREFORE, plaintiff prays for judgment against the individual defendants, and
15 their respective marital communities, and against Brunswick Corporation and/or
16 involved subsidiaries, for damages as alleged, plus costs.

17 DATED this 24th day of July, 2018.

18
19 WEST LAW FIRM, P.S.

20
21 By: 
22 Thomas J. West, WSBA #5857
23 Attorney for Plaintiff

APPENDIX E

Hearing date: _____
Hearing time: _____
Judge/Calendar: _____

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

CAROL J. McCOY, a single person,

Plaintiff,

v.

PFWA LACEY, LLC, a Washington
limited liability company, dba PLANET
FITNESS; and BRUNSWICK
CORPORATION, a foreign corporation,

Defendants.

NO. 18-2-03929-34

AMENDED COMPLAINT FOR
PERSONAL INJURY AND
DAMAGES

COMES NOW the plaintiff and for complaint alleges as follows:

I.

Defendant PFWA Lacey, LLC is a Washington limited liability company doing
business in Thurston County, Washington as Planet Fitness and at all times material was
the owner of the Planet Fitness where the incident occurred that is the subject of this
suit.

II.

All acts and/or omissions were done by the aforementioned defendant doing
business as Planet Fitness in Lacey, Thurston County, Washington.

AMENDED COMPLAINT FOR PERSONAL
INJURY AND DAMAGES - 1

WEST LAW FIRM, P.S.
524 Tacoma Avenue South
Tacoma, Washington 98402
(253) 383-4704

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III.

Brunswick Corporation and/or one of its subsidiaries controlled by Brunswick Corporation, at all times herein material, was doing business in Thurston County, Washington, and had placed products made by Brunswick Corporation, or one of its controlled subsidiaries, in the stream of commerce, which product was defective and caused plaintiff's injury.

IV.

On or about July 29, 2016 plaintiff, an invitee of Planet Fitness of Lacey, was using a piece of exercise equipment in a proper manner that had been manufactured by Brunswick Corporation or one of its controlled subsidiaries, i.e. a Life Fitness stair machine, which failed to operate properly including, but not limited to, an emergency stop button that failed to work, causing plaintiff serious injury.

V.

The above referenced accident was caused by the negligence of defendant PFWA Lacey, LLC, d/b/a Planet Fitness of Lacey, including, but not limited to, failure to properly maintain and repair the stair machine.

VI.

The above mentioned injury sustained by the plaintiff was also caused and/or

1 contributed to by the product manufactured by Brunswick Corporation or one of its
2 controlled subsidiaries by their violation of RCW 7.72.010, *et seq.*, including, but not
3 limited to, breaches of warranty and failure to provide a safe product as per RCW
4 7.72.030, Laws of the State of Washington.

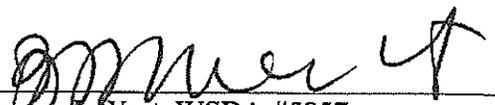
5
6 VII.

7 As a result of the foregoing negligence of defendant PFWA Lacey, LLC, dba
8 Planet Fitness, and/or the negligence of their agents and/or employees, and the failure of
9 Brunswick Corporation and/or one of its controlled subsidiaries to provide a safe
10 product as per the allegations above, plaintiff incurred past and future medical expenses,
11 past and future income loss, disability, impaired earning capacity, scarring and
12 disfigurement, general damages for pain and suffering, loss of enjoyment of life, and
13 other damages, all in amounts to be proven at the time of trial.

14 WHEREFORE, plaintiff prays for judgment against the defendant PFWA Lacey,
15 LLC dba Planet Fitness, and against Brunswick Corporation and/or involved
16 subsidiaries, for damages as alleged, plus costs.

17 DATED this 14th day of January, 2019.

18
19 WEST LAW FIRM, P.S.

20 By: 
21 Thomas J. West, WSBA #5857
22 Attorney for Plaintiff
23

APPENDIX F

1 Q What kind of exercises would you do when you were at the
2 gym?

3 A I mostly worked -- walked on the treadmill and rode on
4 the bike.

5 Q Did you ever have any workout partners?

6 A No, sir.

7 Q Did you ever use any personal trainers at Planet
8 Fitness?

9 A No, sir.

10 Q Did you ever ask for instruction on how to use the
11 machines there?

12 A No, sir.

13 Q Was there anyone at Planet Fitness, any of their
14 employees that you regularly communicated with?

15 A No, sir.

16 Q Had you ever used a stair-climber-type machine generally
17 before your incident?

18 A No, sir.

19 Q Never used them in any other facilities or homes,
20 anything like that?

21 A No, sir.

22 Q Had you ever observed other people using
23 stair-climber-type machines?

24 A I seen people.

25 Q Did you ever see anyone using it, specifically the power

1 Q And to your right, if you were standing in front of
2 them, what was to the right, do you remember?

3 A (No audible response.)

4 Q I'll clarify that. If you were standing to the front
5 and looking at where the stairs -- the stairs are facing
6 you, right, like the individual steps, not the back of
7 the machine where there are no stairs, right? So if
8 you're standing from the front, to the right of you at
9 that time, what would have been located on that side?

10 MR. WEST: Object to the form.

11 You can go ahead and answer if you understand.

12 A I don't remember.

13 Q If you were standing in front of the stair machines and
14 the stairs are facing to you, do you remember what was
15 to your left?

16 A No, sir.

17 Q One second.

18 (Discussion between attorneys.)

19 MR. ZOLFO: I'm going to mark as Exhibit 3
20 some photographs that were produced to us. Hand a copy
21 here for the court reporter.

22 (Exhibit 3 marked for identification.)

23 Q Ms. McCoy, do you recognize this photos?

24 A Kind of, sort of.

25 Q Do you know who took them?

1 immediate left on a PowerMill machine, correct?

2 A Yes, sir.

3 Q Let's just back up a little bit. What did you do that
4 day at the gym before you used the PowerMill?

5 A Went to lunch.

6 Q What time did you arrive at the gym?

7 A Don't remember.

8 Q It was after lunch?

9 A Yes, sir.

10 Q When you arrived at the gym itself, what did you do?

11 A Walked in, looked around.

12 Q Did you do any exercises prior to going on the PowerMill
13 machine?

14 A No, sir.

15 Q So the PowerMill machine was the first exercise of your
16 day?

17 A Yes, sir.

18 Q Ms. McCoy, do you wear glasses?

19 A I'm supposed to.

20 Q You have been told to wear them by a doctor?

21 A No.

22 Q When you say you're supposed to, what do you mean by
23 that?

24 A I had my eyes checked a long time ago, and I broke my
25 glasses and never got 'em fixed and never went back.

1 Q Can you go ahead and mark in the red where your hands
2 went once you were on the very top?

3 A (Witness indicating.)

4 Q After that, what's the next thing that you do?

5 A I press the button to start.

6 Q When you say you press the button, what button are you
7 referring to?

8 A The slow button.

9 Q So if we go to page 1, see that there's, this is a
10 photograph of a console, correct?

11 A Yes, sir.

12 Q Can you circle in red which button you pressed?

13 A I don't remember.

14 Q But you said it was a --

15 A It was a slow button.

16 Q Do you remember what color the button was?

17 A No, sir.

18 Q But you did press a button on this console itself,
19 correct?

20 A Yes, sir.

21 Q You didn't press the red or green button that was on the
22 handle?

23 A No, sir.

24 Q So you pressed a button somewhere on this console,
25 correct?

1 A By the buttons.

2 Q Right. Then you hit the start button, correct?

3 A Yes.

4 Q Or a button?

5 A Yes.

6 Q Did you move your hands after that?

7 A No.

8 Q So your hands stayed here where you've marked with the
9 X?

10 A Yes.

11 Q Then the machine started, correct?

12 A Yes.

13 Q About how long were you on the machine in total?

14 A I have no clue.

15 Q Do you remember pressing the console that was depicted
16 on page 1 there in front of you after the machine
17 started?

18 MR. WEST: Object to the form.

19 Q So after the machine started, what did you do next?

20 A Walked.

21 Q And what rate of speed were you going at?

22 A Very slow.

23 Q Do you remember seeing anything on the console
24 indicating what speed?

25 A No, sir.

1 Q While you were on the machine, what were you doing?

2 A Walking.

3 Q Were you watching TV?

4 A No, sir.

5 Q Were you speaking to anyone around you?

6 A No, sir.

7 Q Can you, then, describe the process by which you came to
8 come off of the machine?

9 A You mean fell off the machine?

10 Q Yes. Can you describe how that occurred?

11 A It decided to speed up super fast, and I hit the stop
12 button, and it did not work.

13 Q So let's just back up a little bit. Do you remember -
14 estimate - how long you were on the machine --

15 A No, sir.

16 Q -- before that sequence of events occurred?

17 A No, sir.

18 Q Can you describe what it felt like as the machine began
19 to go faster?

20 A Uncomfortable.

21 Q Can you describe what you were doing with your feet?

22 A Trying to keep up.

23 Q Did you feel that you were stepping up more quickly than
24 you were before?

25 A Very quickly.

1 Q. And what type of paperwork did you sign?

2 A. He just said this is just for the membership
3 so we can access in and out whenever we want. And I
4 didn't have time to read it because he was in a hurry,
5 because he had another appointment. And he said he was
6 going to mail me my copy, which I have not received.

7 Q. You said that you didn't have time to read the
8 membership agreement; is that correct?

9 A. Yes, sir.

10 Q. But you did sign it?

11 A. Yes, sir. He told me it was just a formality
12 so me and my son could use the machines.

13 Q. Do you remember anything specifically in the
14 paperwork that you signed that sticks out in your mind?

15 A. No, sir.

16 Q. All right.

17 MR. BARTON: Can you mark this Exhibit 1?

18 THE COURT REPORTER: Exhibit 7.

19 MR. BARTON: Mr. Zoflo, I know you're on the
20 phone. I'll get you a copy of the exhibits when I get
21 back to my office. Okay?

22 MR. ZOFLO: Okay, thank you. I have my
23 computer here, so if it's a specific document I can
24 probably pull it up.

25 MR. WEST: You know, it may have been marked

APPENDIX G

RECEIVED
 JUL 10 2019
 TYSON & MENDES LLP

Member : Check In History

Name		Value			
Member		CAROL MCCOY			
Check In Date Time	Club	Alert Message	Service Used	Employer Assigned	User Name
07/28/2016 12:40 PM	8334				
07/27/2016 01:58 PM	8334				
07/15/2016 10:12 AM	8334	ALREADY CHECKED IN			
07/15/2016 10:11 AM	8334		PE@PF	Catrina Hills	Natalia Jaronick
07/14/2016 01:35 PM	8334				
07/08/2016 12:24 PM	8334				
07/03/2016 10:13 AM	8334				
06/26/2016 11:31 AM	8334	NO CHECK IN IN 145 DAYS			
02/01/2016 04:10 PM	8334	NEED PHOTO			

APPENDIX H

1 Hearing Date: October 25, 2019
Hearing Time: 9:00 a.m.
2 The Honorable James Dixon, Civil Motions Calendar
3
4
5
6
7

8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 IN AND FOR THE COUNTY OF THURSTON

10 CAROL J. MCCOY, a single person,
11 Plaintiff,

12 v.

13 PFWA LACEY, LLC, a Washington limited
14 liability company, dba PLANET FITNESS;
and BRUNSWICK CORPORATION, a
15 foreign corporation,
Defendants.

No. 18-2-03929-34

DEFENDANT PFWA LACEY'S
MOTION FOR SUMMARY JUDGMENT
REGARDING LIABILITY AND
DAMAGES

16 I. RELIEF REQUESTED

17 Liability

18 Plaintiff joined a gym, Planet Fitness, in Lacey, Washington. She signed a valid and
19 binding liability waiver, releasing Defendant PFWA Lacey, LLC (Defendant) from any and all
20 liability for any injury or death. Plaintiff had three days to rescind the contract containing a valid
21 and binding liability waiver. Plaintiff did not attempt to cancel the contract at any time. The only
22 other way the waiver of liability would be invalid were if Defendant had been grossly negligent.
23 Plaintiff filed suit eight months ago, but has provided no evidence of any kind showing the signed

1 release of liability is not binding in this case. As such, Defendant should be dismissed form this
2 suit.

3 Claims for Injuries and Damages

4 Plaintiff has alleged injuries and damages, but has not provided the required expert
5 opinions or declarations supporting the same. As such, all claims against Defendant not supported
6 by expert opinion or testimony should be dismissed as a matter of law.

7 **II. STATEMENT OF FACTS**

8 A. Background

9 On February 1, 2016, Plaintiff entered into a Membership Agreement -- a binding contract
10 clearly and repeatedly warning Plaintiff of waivers and conditions, while subsequently allowing
11 access to the Planet Fitness gym facility in Lacey.¹

12 The first part of the contract includes Plaintiff's personal information, membership rate,
13 and fee schedule.² A box breaking up the first page calls attention to Plaintiff's payment
14 authorization.³

15 Thick, black lines then top a broad, highlighted banner containing the capitalized words
16 "RELEASE OF LIABILITY" "ASSUMPTION OF RISK" "CLUB RULES" and 'BUYER'S
17 NOTICE & RIGHT TO CANCEL."⁴ Directly below the banner is a paragraph repeatedly
18 explaining the waiver of legal rights, Plaintiff's agreement to accept full responsibility for any
19 injury or death, and Plaintiff's waiver of liability for any injury resulting from the negligent
20
21

22 ¹ Ex. 1: Membership Agreement.

² Ex. 1: Membership Agreement.

23 ³ Ex. 1: Membership Agreement.

⁴ Ex. 1: Membership Agreement.

1 conduct or omission of Planet Fitness.⁵ Plaintiff's dated signature and a Planet Fitness Authorized
2 Signature sit immediately below the release of liability section.⁶

3 Additionally, Plaintiff had the option to not be bound by the binding contract she had
4 entered into on February 1. In big, bold, capital letters, not 2 inches from where Plaintiff signed
5 the contract to release Defendant from all liability, the Agreement clearly provides the process for
6 canceling the contract. To Defendant's knowledge, Plaintiff has never wished to or even attempted
7 to cancel the contract.

8 Further, Plaintiff signed an *additional* release of Defendant's liability.⁷ Plaintiff also joined
9 the Black Card Membership on February 1, 2016. This extended service included another release
10 of liability, again releasing Defendant of liability for any injury or death.⁸ This additional release
11 is titled in bold and the substantive text is written in large font.⁹ This second release again
12 repeatedly warns Plaintiff of the legal rights she will be giving up by signing the contract.¹⁰

13 Prior to February 1, 2016, Plaintiff had never attended or used a gym facility nor recalled
14 being involved in any prior athletic activities.¹¹ Subsequent to February 1, Plaintiff checked into
15 the gym 8 times.¹² Plaintiff brought this lawsuit for personal injuries and damages allegedly
16 sustained on July 29, 2016, while Plaintiff attempted to use a stair exercise machine.¹³ Plaintiff

20 ⁵ Ex. 1: Membership Agreement.

21 ⁶ Ex. 1: Membership Agreement.

22 ⁷ Ex. 1: Membership Agreement.

23 ⁸ Ex. 1: Membership Agreement.

⁹ Ex. 1: Membership Agreement.

¹⁰ Ex. 1: Membership Agreement.

¹¹ Ex. 2: Select Pages of Plaintiff's Deposition Transcript, at 53:17-24.

¹² Ex. 3: Plaintiff's Check-In History.

¹³ Ex. 4: Plaintiff's Complaint.

1 alleged the stair machine failed to operate properly.¹⁴ Defendant has no record of Plaintiff entering
2 the gym on July 29, 2016. Plaintiff's last recorded date of entry was July 28, 2016.¹⁵

3 B. Facts of the Accident

4 Plaintiff arrived at Defendant's gym after lunch on the date of loss.¹⁶ After checking in,
5 Plaintiff decided to use a PowerMill stair machine.¹⁷ Plaintiff had never used a stair-climber-type
6 machine prior to the date of loss and did not seek instruction or read any warning labels prior to
7 the incident.¹⁸ When asked how she started the machine, Plaintiff stated she pressed "the slow
8 button."¹⁹ Plaintiff was shown a picture of the control console at her deposition, but was unable
9 to identify which button she pushed to start the machine.²⁰ Plaintiff testified the PowerMill started
10 slowly after she pressed an unknown button.²¹ Plaintiff then testified the PowerMill sped up "super
11 fast," to which she responded by pushing the stop button.²² Plaintiff has alleged the stop button
12 did not work as it should.

13 **III. ISSUES**

14 A. Whether Plaintiff entered a valid and binding contract containing a waiver of
15 liability, when (1) the waiver did not violate public policy; (2) the alleged negligent act did not fall
16 greatly below the standard established by law for protection of others; or (3) the waiver was not
17 inconspicuous?

18
19
20 ¹⁴ Ex. 4: Plaintiff's Complaint.

¹⁵ Ex. 3: Plaintiff's Check-In History.

21 ¹⁶ Ex. 2: Select Pages of Plaintiff's Deposition Transcript, at 62:5-9.

¹⁷ Ex. 2: Select Pages of Plaintiff's Deposition Transcript, at 62:12-17.

22 ¹⁸ Ex. 2: Select Pages of Plaintiff's Deposition Transcript, at 57:7-21; 59:9-10.

¹⁹ Ex. 2: Select Pages of Plaintiff's Deposition Transcript, at 69:4-20.

²⁰ Ex. 2: Select Pages of Plaintiff's Deposition Transcript, at 69:12-20.

23 ²¹ Ex. 2: Select Pages of Plaintiff's Deposition Transcript, at 71:19-22.

²² Ex. 2: Select Pages of Plaintiff's Deposition Transcript, at 73:11-12.

1 B. Whether all of Plaintiff's claims for injuries or damages must be dismissed as a
2 matter of law, when Plaintiff has provided no expert opinions or declarations supporting her
3 claims?

4 C. Whether all of Plaintiff's claims for wage loss and loss of earning capacity must be
5 dismissed as a matter of law, when Plaintiff has provided no expert opinions or declarations
6 supporting her wage loss and loss of earning capacity claims?

7 D. Whether any additional claims pled now or in the future not currently supported by
8 expert declaration or opinion should be dismissed as a matter of law, when Plaintiff has not met
9 her burden of providing necessary evidence to substantiate her claims?

10 IV. EVIDENCE RELIED UPON

11 This motion relies upon the files and pleadings herein and the declaration of Michael
12 Kutzner, provided below with the following attached exhibits:

13 **Exhibit 1:** Membership Agreement.

14 **Exhibit 2:** Select Pages of Plaintiff's Deposition Transcript, from pg. 53 - 73.

15 **Exhibit 3:** Plaintiff's Check-In History.

16 **Exhibit 4:** Plaintiff's Complaint.

17 V. LEGAL AUTHORITY AND ARGUMENT

18 A. Summary Judgment Standard

19 1. Purpose of Summary Judgment Procedure

20 The purpose of summary judgment is to isolate and terminate claims that are factually
21 unsupportable—it is to be viewed *not* as a disfavored technical shortcut, but rather as an integral
22 component of the civil rules.²³ Summary judgment should be denied only if the evidence is such

23 ²³ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

1 that a reasonable jury could return a verdict for the nonmoving party.²⁴ Summary judgment is
2 appropriate where reasonable minds could reach but one conclusion.²⁵

3 **2. Defendant's Burden When Moving for Summary Judgment**

4 A defendant moving for summary judgment meets his or her burden by showing the
5 plaintiff lacks sufficient evidence to support a claim.²⁶

6 **3. Plaintiff's Burden in Order to Avoid Summary Judgment**

7 The burden then shifts to the plaintiff to produce affidavits setting forth specific facts
8 showing a genuine issue for trial.²⁷ A plaintiff has the burden of presenting evidence to support
9 each element of the cause of action, and a defendant is entitled to summary judgment if it is shown
10 that plaintiff is unable to carry this burden.²⁸

11 **4. Instances When Plaintiff Does Not Meet Burden**

12 *i. Plaintiff may not Rely on the Pleadings to Avoid Summary Judgment*

13 The plaintiff may not rely on the pleadings, but must set forth specific facts to show a
14 genuine issue exists.²⁹ Affidavits containing conclusory statements—without sufficient factual
15 support—are insufficient to defeat a motion for summary judgment.³⁰

16 *ii. Inability to Demonstrate or Recall Facts is Insufficient to Avoid Summary 17 Judgment*

18 If one party presents its version of the facts on a key issue and the opposing party cannot
19 demonstrate or recall the facts in sufficient detail to either confirm or deny the presented version,

20 ²⁴ *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 251, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

²⁵ *Ruff v. County of King*, 125 Wn.2d 697, 887 P.2 886 (1995).

21 ²⁶ *Guile v. Ballard Comm. Hosp.*, 70 Wn. App. 18, 22, 851 P.2d 689 (1993); *Young v. Key Pharmaceuticals, Inc.*,
112 Wn.2d 216, 770 P.2d 182 (1989).

²⁷ CR 56(e); *Hiatt v. Walker Chevrolet*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

22 ²⁸ *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *Las v. Yellow Front Stores*, 66 Wn.
App. 196, 831 P.2d 744 (1992).

23 ²⁹ *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

³⁰ CR 56(c); *Guile v. Ballard Community Hosp.*, 70 Wn.App. 18, 25, 851 P.2d 689 (1993).

1 the failure to demonstrate specific facts and/or lack of memory does not create a factual issue
2 sufficient to preclude summary judgment.³¹

3 *iii. Affidavits Setting Forth Feigned or Immaterial Issues of Fact are*
4 *Insufficient to Avoid Summary Judgment*

5 In order to preclude summary judgment, the issue of fact must be both *genuine* and
6 *material*. Feigned issues will not preclude summary judgment.³² A material fact is one on which
7 the outcome of the litigation depends.³³

8 *iv. Affidavits Setting Forth Broad Generalizations and Vague Conclusions are*
9 *Insufficient to Avoid Summary Judgment*

10 Broad generalizations and vague conclusions on the part of the nonmoving party are
11 insufficient to resist a motion for summary judgment.³⁴ In *Robinson*, the fact that car rental
12 companies' training manuals for its agents wrongly referred to concession fees as "taxes" was
13 determined to be irrelevant to issue of whether the car rental companies' practice of billing a
14 separate airport concession fee, in addition to the quoted rental rate, was deceptive because there
15 was no evidence that lessees ever saw the manuals.

16 **B. Washington Enforces Waiver Provisions**

17 Waiver provisions in a contract are enforceable "unless (1) they violate public policy; (2)
18 the negligent act falls greatly below the standard established by law for protection of others; or (3)
19 they are inconspicuous."³⁵ Each of the three are analyzed below.

20 ³¹ *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002); *Robinson v. Avis Rent A Car System, Inc.*,
21 106 Wn.App. 104, 22 P.3d 818 (2001) (deposition testimony by lessees of rental cars at airport that they could not
22 recall whether car rental companies told them they would be charged a concession fee in addition to the rental
23 charge at the time they were quoted a car rental price, was insufficient to raise a genuine issue of material fact.)

³² See, for example, *Nabhani v. Coglianese*, 552 F. Supp. 657, 8 Ed. Law Rep. 276 (1982).

³³ *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 850 P.2d 1298 (1993).

³⁴ *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn.App. 104, 22 P.3d 818 (2001); *Thompson v. Everett Clinic*, 71
Wn.App. 548, 860 P.2d 1054 (1993).

³⁵ *Stokes v. Bally's Pacwest, Inc.*, 113 Wn. App. 442, 445, 54 P.3d 161 (2002).

1 **1. Public Policy**

2 In Washington, contracts releasing liability for negligence are valid unless a public interest
3 is involved.³⁶

4 Six factors are considered in determining whether exculpatory agreements violate
5 public policy. The court considers whether (1) the agreement concerns an endeavor
6 of a type generally thought suitable for public regulation; (2) the party seeking
7 exculpation is engaged in performing a service of great importance to the public,
8 which is often a matter of practical necessity for some members of the public; (3)
9 such party holds itself out as willing to perform this service for any member of the
10 public who seeks it, or at least for any member coming within certain established
11 standards; (4) because of the essential nature of the service, in the economic setting
12 of the transaction, the party invoking exculpation possesses a decisive advantage of
13 bargaining strength against any member of the public who seeks the services; (5)
14 in exercising a superior bargaining power, the party confronts the public with a
15 standardized adhesion contract of exculpation, and makes no provision whereby a
16 purchaser may pay additional reasonable fees and obtain protection against
17 negligence; and (6) the person or property of members of the public seeking such
18 services must be placed under the control of the furnisher of the services, subject to
19 the risk of carelessness on the part of the furnisher, its employees or agents.³⁷

20 Here, none of these public policy factors is present as follows:

21 (1) The agreement concerns an endeavor of a type generally thought suitable for public
22 regulation.

23 Private gyms are not publicly regulated, such as schools would be.

(2) The party seeking exculpation is engaged in performing a service of great importance
to the public, which is often a matter of practical necessity for some members of the public.

 Defendant is not performing an important public service such as a school would.

(3) Such party holds itself out as willing to perform this service for any member of the
public who seeks it, or at least for any member coming within certain established standards.

 Not all members of the public participate in gym activities, such as they do in schools.

³⁶ *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 458-9, 309 P.3d 528 (2013); quoting, *Hewitt v. Miller*,
11 Wash.App. 72, 521 P.2d 244 (1974).

³⁷ *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 458-9, 309 P.3d 528 (2013).

1 (4) Because of the essential nature of the service, in the economic setting of the transaction,
2 the party invoking exculpation possesses a decisive advantage of bargaining strength against any
3 member of the public who seeks the services.

3 Defendant had no control over how Plaintiff exercised or what machines she chose to use.

4 (5) In exercising a superior bargaining power, the party confronts the public with a
5 standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may
6 pay additional reasonable fees and obtain protection against negligence.

6 There is no inequality of bargaining since Plaintiff could have (1) chosen to join a different
7 gym, or not joined a gym at all, and (2) chosen not to use the stair machine and instead selected a
8 different machine or exercise.

9 (6) The person or property of members of the public seeking such services must be placed
10 under the control of the furnisher of the services, subject to the risk of carelessness on the part of
11 the furnisher, its employees or agents.

11 None of the above six public policy factors exist in this case. While Defendant did set up
12 and provide the facility, it did not control in what manner in which Plaintiff utilized the facility to
13 properly exercise. Washington courts have not favored finding a public interest in adult
14 recreational activities.³⁸

15 **2. The Negligence Alleged Is Not Below The Law For Protection of Others**

16 Defendant recognizes “A preinjury waiver and release will not exculpate a defendant from
17 liability for damages resulting from gross negligence.”³⁹ “‘Gross negligence’ is ‘negligence
18 substantially and appreciably greater than ordinary negligence,’ i.e., ‘care substantially or
19 appreciably less than the quantum of care inhering in ordinary negligence.’”⁴⁰ “A plaintiff seeking
20 to overcome an exculpatory clause by proving gross negligence must supply ‘substantial evidence’
21

22 _____
³⁸ *Id.* at 459.

23 ³⁹ *Id.*

⁴⁰ *Id.* (citations omitted).

1 that the defendant's act or omission represented care appreciably less than the care inherent in
2 ordinary negligence."⁴¹

3 Here, Plaintiff is unable to meet this heightened burden. Specifically, this case was filed
4 eight months ago. Plaintiff has answered interrogatories and requests for production. Plaintiff has
5 even provided deposition testimony for Co-Defense counsel. However, Plaintiff has not provided
6 facts for, nor asserted, such claims in this case. Defendant can only assume such facts do not exist.

7 3. The Waiver Provision Is Conspicuous

8 Washington court use several factors in deciding whether a waiver and release provision is
9 conspicuous, including:

10 Whether the waiver is set apart or hidden within other provisions, whether the
11 heading is clear, whether the waiver is set off in capital letters or in bold type,
12 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.⁴²

13 Defendant executed a release with a bold dividing line and banner clearly setting apart the
14 release language in all capital letters.⁴³ Black lines top a thick, highlighted banner containing the
15 capitalized words "RELEASE OF LIABILITY" "ASSUMPTION OF RISK" "CLUB RULES"
16 and "BUYER'S NOTICE & RIGHT TO CANCEL."⁴⁴

17 Directly below the banner is a paragraph repeatedly warning Plaintiff she was giving up
18 her legal rights by signing the waiver.⁴⁵ The language in this paragraph is clear and unambiguous.

19
20
21
22 ⁴¹ *Id.* (citations omitted).

⁴² *Johnson*, Wn. App. 453, 461..

⁴³ Membership Agreement.

⁴⁴ Membership Agreement.

⁴⁵ Membership Agreement.

1 A following paragraph fully explains Plaintiff was not obligated to sign the waiver if she did not
2 fully understand her release of liability and assumption of risk.⁴⁶

3 Immediately following the second paragraph are two signature blocks.⁴⁷ One signature
4 block is for the Member (signed by Plaintiff) and one is for a Planet Fitness authorizing signature.⁴⁸
5 These two signature blocks span the entire width of the printed page and separate the release of
6 liability and assumption of risk section from the remaining payment and cancelation information
7 found at the bottom of the page.⁴⁹ The waiver found in the Membership Agreement signed by
8 Plaintiff is conspicuous and unambiguous.

9 C. Defendant is entitled to Summary Judgment Regarding Damages Claims Lacking Support
10 to the Appropriate Legal Standard

11 Should the court not dismiss Defendant as a matter of law as argued above, it should
12 dismiss any injuries and damages claims not properly supported by expert medical testimony as
13 follows:

14 The legal standard for a personal injury action consists of a three-step process: (1)
15 causation; (2) reasonableness and necessity of medical treatment; and (3) reasonableness of cost
16 of treatment. All three must be supported by medical testimony (a) under oath (affidavit,
17 declaration, or deposition testimony), and (b) given on a-more-probable-than-not basis.

18 **1. Legal Standard Regarding Causation.**

19 Plaintiff has the burden of proving each condition for which she seeks damages was
20 proximately caused by Defendant.⁵⁰ A plaintiff is not entitled to recover damages for any alleged

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22 ⁴⁶ Membership Agreement.
23 ⁴⁷ Membership Agreement.
⁴⁸ Membership Agreement.
⁴⁹ Membership Agreement.
⁵⁰ See WPI 30.01.

1 condition not proven to be proximately caused by Defendant.⁵¹ Before a plaintiff can recover
2 damages for a medical condition allegedly caused by a negligent act, she must present competent
3 medical testimony to establish the causal relationship between the negligent act and the alleged
4 physical condition.⁵²

5 In *Miller*, the Washington Supreme Court stated that the causal relationship between an
6 accident and an alleged injury must be established by medical testimony:

7 The causal relationship of an accident or injury to a resulting
8 physical condition must be established by medical testimony beyond
9 speculation and conjecture. The evidence must be more than that the
10 accident "might have," "may have," "could have," or "possibly did,"
11 cause the physical condition. It must rise to the degree of proof that
12 the resulting condition was probably caused by the accident, or that
13 the resulting condition more likely than not resulted from the
14 accident, to establish a causal relation.⁵³

15 A plaintiff's own lay testimony, by itself, is insufficient to support a judgment in the
16 plaintiff's favor.⁵⁴ In *Carlos*, the trial judge properly refused to allow the plaintiff or the plaintiff's
17 dentist to testify about the plaintiff's dental condition, Bruxism, because "the proffered evidence
18 was not legally sufficient to establish the causal relationship between the accident and the
19 condition complained of."⁵⁵ The dentist could not say, "with reasonable medical probability," that
20 the automobile accident between the parties was the cause of the plaintiff's dental condition.⁵⁶
21 Moreover, the plaintiff did not have the medical expertise to establish the necessary causal

22 ⁵¹ See WPI 30.01.

23 ⁵² See *Miller v. Staton*, 58 Wn.2d 879, 886, 365 P.2d 333 (1961); *Ugolini v. States Marine Lines*, 71 Wn.2d 404,
407, 429 P.2d 213 (1967); *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968); see also *Medcalf v.*
Dept. of Licensing, 133 Wn.2d 290, 311, 944 P.2d 1014 (1997) (Madsen, J., concurring), ("[M]edical opinion
testimony that an accident caused a physical condition 'must rise to the degree of proof that the resulting condition
was probably caused by the accident...").

⁵³ 58 Wn.2d at 886 (emphasis added).

⁵⁴ See *Carlos v. Cain*, 4 Wn. App. 475, 477, 481 P.2d 1945 (1971).

⁵⁵ *Id.* at 477.

⁵⁶ *Id.*

1 relationship.⁵⁷ Regarding causation, the court stated that “[it was not an] error to refuse to allow
2 [the plaintiff] to testify as a lay witness on the subject. Her testimony, if believed, would establish
3 the condition, but *it could not establish the necessary causal relationship* in terms of reasonable
4 medical probability.”⁵⁸

5 Medical testimony stating Defendant was the probable cause of the alleged injuries is
6 necessary to prevent a jury from resorting to improper speculation and conjecture: “To establish
7 causation between a defendant’s wrongful acts and a plaintiff’s injuries the medical testimony
8 must be convincing enough to remove the issue from the realm of speculation and conjecture.”⁵⁹
9 A plaintiff cannot rely on speculation to establish cause in fact.⁶⁰ Here, Plaintiff has failed to
10 produce such evidence.

11 **2. Legal Standard Regarding Reasonableness and Necessity**

12 After establishing causation between the allegedly negligent event and alleged injury, a
13 plaintiff must prove medical treatment received was reasonable and necessary.⁶¹ Here, Plaintiff
14 has failed to produce such evidence.

15 **3. Legal Standard Regarding Reasonable Cost of Medical Treatment**

16 A plaintiff may only recover the reasonable value of medical services received, not the
17 total of all bills paid.⁶² Thus, a plaintiff must prove medical costs were reasonable and, in doing
18 so, cannot rely solely on medical records and bills.⁶³ In other words, medical records and bills are
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⁵⁷ *Id.* at 476-477.

21 ⁵⁸ *Id.* at 477 (emphasis added).

22 ⁵⁹ *Xieng v. Peoples Nat’l. Bank*, 63 Wn. App. 572, 582, 821 P.2d 520 (1991), *aff’d*, 120 Wn.2d 512, 844 P.2d 389 (1993).

23 ⁶⁰ *Hiner v. Bridgestone/Firestone*, 138 Wn.2d 248, 258, 978 P.2d 505 (1999).

⁶¹ *See Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997).

⁶² *Id.*

⁶³ *Id.*

1 relevant to prove past medical expenses only if supported by additional evidence that the treatment
2 and the bills were both necessary and reasonable.⁶⁴ Here, Plaintiff has failed to produce such
3 evidence.

4 **4. Legal Standard Regarding Necessity of Expert Testimony**

5 When presenting expert medical opinions in an affidavit or declaration, a party must
6 include a statement of the expert's qualifications and any other foundational facts that would be
7 necessary if the expert were testifying at trial.⁶⁵ An expert may establish the scope of his expertise
8 through knowledge, skill, experience, training, or education.⁶⁶

9 The expert's testimony must be based on the facts of the case and not speculation.⁶⁷ It
10 must also be based on a reasonable degree of medical certainty.⁶⁸ Expert medical testimony must
11 demonstrate proximate cause.⁶⁹

12 A witness qualified as an expert may only express an opinion with respect to issues covered
13 by that expertise.⁷⁰ Even the issues that are logically related to the witness's area of expertise may
14 call for sufficiently different qualifications so that testimony by that witness should be excluded.⁷¹
15 Here, Plaintiff has failed to produce such evidence.

16 D. Defendant is Entitled to Summary Judgment Regarding Damages Claims Lacking
17 Reasonable Certainty in Calculation

18 The fact of loss must be established with sufficient certainty to provide a reasonable basis
19 for estimating Plaintiff's alleged loss.⁷² Damages will not be awarded where the evidence is

20 ⁶⁴ *Id.*

⁶⁵ See *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997).

21 ⁶⁶ See *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 663 P.2d 113 (1983).

⁶⁷ See *Seybold v. Neu*, 105 Wn. App. at 677, 19 P.3d 1068 (2001).

22 ⁶⁸ See, *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989).

⁶⁹ See *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 177 P.3d 1152 (2008).

23 ⁷⁰ See *Norris v. State*, 46 Wn. App. 822, 733 P.2d 231 (1987).

⁷¹ *Harris*, 99 Wn.2d 438.

⁷² See *Pugel v. Monheimer*, 83 Wn. App. 688, 922 P.2d 1377 (1996).

1 *insubstantial or speculative.*⁷³ Damages do not require mathematical precision; they are required,
2 however, to be based on evidence that is sufficient to afford reasonable basis for estimating
3 losses.⁷⁴ Damages must be proven with reasonable certainty or be supported by competent
4 evidence in the record. *Id.* In other words, the damages need not be precise but must be supported
5 by competent evidence and not subject the trier of fact to mere speculation or conjecture.⁷⁵

6 The Court of Appeals dealt with the question of speculative damages in *ESCA*.⁷⁶ In *ESCA*,
7 the defendant moved for a directed verdict in an action for negligent misrepresentation on the basis
8 that the plaintiff had not presented sufficient evidence of damages or a reasonable basis for
9 calculating its damages.⁷⁷ The trial court denied the motion, but the Court of Appeals overturned,
10 holding the evidence of damages was insufficient.⁷⁸

11 The Court of Appeals stated that the plaintiff's proof of damages was speculative and "self-
12 serving at best."⁷⁹ In its holding, the *ESCA* Court indicated that the goal of awarding money
13 damages is to compensate for losses that are *actually suffered*.⁸⁰ It is plaintiff's burden to prove
14 those damages.⁸¹ It is the plaintiff's burden to reasonably show how economic damages are
15 calculated.⁸²

16 As in *ESCA*, Plaintiff has not met her burden establishing any of her alleged damages.

17 F. Plaintiff's Unsupported Damages and Injury Claims should be Dismissed as a Matter of
18 Law

19 ⁷³ See *Sherrell v. Selfors*, 73 Wn. App. 596, 871 P.2d 168 (1994) (emphasis added).

20 ⁷⁴ *Id.*

⁷⁵ See *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 631, 939 P.2d 1228 (1997).

21 ⁷⁶ This matter was reviewed by the Supreme Court of Washington on appeal from co-plaintiff Sea-First regarding a
separate question of law. The Supreme Court did not review the question of sufficiency of proof of damages. See
ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820 (1998).

22 ⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 639.

⁸⁰ *Id.*

23 ⁸¹ *Id.*

⁸² *Id.* at 640.

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1. Personal Injury Claims: Past Medical Treatment and Expenses

Plaintiff is claiming various physical and mental injuries as a result of the subject accident. In order for any of these claims to survive, Plaintiff is required to provide medical testimony that (1) such injuries were caused by the accident; (2) that the treatment provided was reasonable and necessary; and (3) that the amounts charged for such treatment was reasonable.

Defendant has requested the facts, opinions, and summary of ground for the same, for any experts Plaintiff has retained. To date, Plaintiff has provided no information regarding any expert testimony. Accordingly, unless Plaintiff presents competent medical testimony supporting *each* of her alleged claims for damages, they are legally deficient and must be dismissed as a matter of law.

2. Ongoing Injury, Future Medical Treatment, and Expenses

Plaintiff alleges various ongoing injuries and conditions as a result of the subject accident. Yet, Plaintiff has not sufficiently identified or specified (1) the nature and extent of the alleged ongoing injuries and conditions, (2) what future medical treatment or expenses he believes are necessary as a result of the accident, or (3) the nature and amount of such future medical treatment with reasonable certainty.

For any such claims to survive summary judgment, Plaintiff is required to provide competent medical testimony the accident caused or exacerbated her alleged injuries. Plaintiff has failed to provide any competent testimony regarding her alleged injuries and, as such, her future damages claims must be dismissed as a matter of law.

3. Psychological Injury or Disorder

1 Plaintiff has alleged psychological injury from alleged depression sustained following the
2 subject accident. Plaintiff, however, has failed to provide any competent medical testimony to
3 support such claims.

4 As with physical injury claims, Plaintiff faces the burden of proof to produce testimony
5 from a psychologist or qualified mental health professional to opine on the causation,
6 reasonableness, necessity, and relatedness of any treatment with respect to diagnosable
7 psychological conditions or disorders. Plaintiff has not disclosed any opinions or reports to support
8 any claims that her alleged injuries/conditions are related to the subject accident. Plaintiff's own
9 lay statements and testimony are insufficient to causally link physical, mental, emotional,
10 cognitive, and/or psychological injury, medical treatment, and/or medical conditions to a particular
11 event and are insufficient to preclude summary judgment. Accordingly, any claims of any
12 psychological injury or disorder should be dismissed as a matter of law.

13 **4. Other Non-Specified Injuries, Conditions, and Losses Must Be Excluded**

14 Because Plaintiff has not disclosed any other potential injuries, future medical treatment,
15 or bills to date, any claims for other non-specified, undisclosed injuries, conditions, and/or losses
16 should be dismissed as a matter of law.

17 F. Defendant Faces Material Prejudice if Plaintiff's Inappropriate and Unsupported Claims
18 are Not Dismissed

19 Defendant should not be forced to defend against amorphous and unsupported claims. The
20 purpose of a summary-judgment motion is to dismiss claims that cannot properly be supported at
21 trial. If Plaintiff is withholding adequate evidence to support any of her claims, Defendant should
22 be entitled to review and evaluate such evidence prior to trial and retain the necessary rebuttal
23 experts. A timely ruling on Defendant's motion is therefore needed in order to determine which

1 issues will remain at the time of trial and provide Defendant adequate time to mount a proper
2 defense.

3 It is incumbent on Plaintiff, not Defendant, to carry the burden of proof by evidencing what
4 claims are legitimate and what questions of fact will exist at the time of trial. It should not fall to
5 Defendant to hire numerous experts and expend exorbitant costs in order to blindly probe
6 Plaintiff's allegations to determine the legitimacy of her claims. Depending on Plaintiff's possible
7 evidential support, Defendant may need to submit further interrogatories and requests for
8 production and conduct further discovery. Plaintiff should not be allowed to lie in wait until the
9 eve of the discovery cut-off before she produces supporting evidence for her previously
10 unsupported claims.

11 VI. CONCLUSION

12 Washington case law strongly supports enforcement of valid and enforceable contracts.
13 Plaintiff signed a valid and enforceable contract waiving her legal rights and releasing Defendant
14 from all liability for any injury. For the reasons stated herein, Defendant respectfully requests the
15 court to dismiss Defendant from this case on the grounds of liability and alternatively,
16 unsubstantiated injury claims by Plaintiff.

17 VII. DECLARATION OF MICHAEL KUTZNER

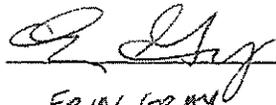
18 I, Michael Kutzner, am an attorney representing Defendant PFWA Lacey, LLC in this
19 matter. I declare under penalty of perjury under the laws of the State of Washington the facts
20 asserted in this motion are true and correct to the best of my knowledge and recollection. The
21 following attached exhibits are true and correct copies:

22 **Exhibit 1:** Membership Agreement.

23 **Exhibit 2:** Select Pages of Plaintiff's Deposition Transcript, from pg. 53 - 73.

CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury under the laws of the State of Washington that I have served a true and correct copy, except where noted, of the foregoing upon the individual(s) listed by the following means:

<p>Clerk of the Court: Thurston County Superior Court</p>	<p><input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/> E-Filed</p>
<p>Judge's Working Copy The Honorable James J. Dixon</p>	<p><input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/> E-Filed</p>
<p>Counsel for Plaintiff: Thomas J. West West Law Firm, P.S. 524 Tacoma Avenue South Tacoma, WA 98402</p>	<p><input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> E-Filed</p>
<p>Counsel for Co-Defendant Michael A. Yoshida, WSBA 47581 MB Law Group LLP 117 SW Taylor St Ste 200 Portland, OR 97204-3029</p>	<p><input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> E-Filed</p>
<p>DATED: <u>9/27/2019</u></p>	<p>By: <u></u> Name: <u>ERIN GRAY</u> Title: <u>LEGAL ASSISTANT</u></p>

APPENDIX I

1 Hearing Date: October 25, 2019
Hearing Time: 9:00 a.m.
2 The Honorable James Dixon, Civil Motions Calendar

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6
7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

8 CAROL J. MCCOY, a single person,

9 Plaintiff,

10 v.

11
12 PFWA LACEY, LLC, a Washington limited
liability company, dba PLANET FITNESS;
13 and BRUNSWICK CORPORATION, a
foreign corporation,

14 Defendants.

No. 18-2-03929-34

DEFENDANT PFWA LACEY'S REPLY
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT REGARDING
LIABILITY AND DAMAGES

15 I. INTRODUCTION

16 Plaintiff's Response Should Be Ignored and Stricken, As Her Response Was Not Timely

17 Plaintiff failed to timely serve Defendant with a response under Thurston County LCR 56.

18 Plaintiff's Response is tantamount to a Non-Opposition and should be stricken.

19 Liability

20 Plaintiff signed a valid and binding liability waiver, releasing Defendant from any and all
21 liability for any injury or death. On July 17, 2019, Plaintiff testified she had no recollection of
22 ever seeing the liability waiver. Plaintiff, now – almost four years after signing the liability waiver,
23 14 months after filing her Complaint, and when confronted with a motion for summary judgment

1 – recalls signing the liability waiver. Plaintiff now expects the court and Defendant to stomach
2 this dichotomy and proceed to trial. Plaintiff voluntarily signed the conspicuous liability waiver.
3 Defendant emailed her a copy after signing. Plaintiff has not provided proper evidence supporting
4 her allegations and thus has not met the burden of proof required to prevail on summary judgment.

5 Claims for Injuries and Damages

6 Plaintiff continues to allege past and ongoing injuries and damages, but has not provided
7 the required expert opinions or declarations supporting the same. Plaintiff again blankly asserts
8 her claims without any support. As such, all claims against Defendant not supported by expert
9 opinion or testimony should be dismissed as a matter of law.

10 Defendant Has Been Cooperative Throughout Discovery

11 On September 30, 2019, 14 months after she filed her initial Complaint and eight and a
12 half months after she filed her Amended Complaint, Plaintiff requested the name of Defendant's
13 manager and the employee who prepared an incident report on the alleged date of loss. Defendant
14 received the final name Plaintiff requested and furnished Plaintiff with the requested information
15 two weeks later on October 14th. On October 16th, Defendant received additional contact
16 information and furnished Plaintiff with the same.

17 II. DISCUSSION

18 A. Plaintiffs Untimely Response Is Tantamount To A Non-Opposition, And Any Late Filing 19 Should Be Stricken

20 Plaintiff admits she was required to respond to Defendant's motion on October 11.¹
21 Thurston County LCR 56(c) states, "The adverse party... may file *and serve* opposing affidavits,
22 memoranda of law, or other documentation not later than 14 calendar days before the hearing."
23

¹ Ex. 1: Plaintiff's Response, at 3:7-8.

1 Defendant was not served with Plaintiff's Response until October 14, 11 calendar days before the
2 hearing.²

3 It is axiomatic that "[w]here no authorities are cited in support of a proposition, the court
4 is not required to search out authorities, but may assume that counsel, after diligent search, has
5 found none." *State v. Young*, 89 Wn.2d 613, 625 (1978) (citing *DeHeer v. Seattle Post-*
6 *Intelligencer*, 60 Wn.2d 122, 126 (1962)). Thus, it is proper for the Court to ignore an inadequately
7 briefed argument, which necessarily encompasses situations in which there is no contrary briefing
8 or argument. *See, e.g., Norean Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486
9 (2011) ("We will not consider an inadequately briefed argument"); *Holland v. City of Tacoma*, 90
10 Wn. App. 533, 538 (1998) (holding that "lack of reasoned argument is insufficient to merit judicial
11 consideration").

12 Any Response served on Defendant post-October 11 should be stricken as untimely under
13 LCR 56. *Davies v. Holy Fam. Hosp.*, 144 Wn. App. 483, 500 (2008) (holding the trial court did
14 not abuse its discretion by denying plaintiff's motion to submit an untimely response, and
15 affirming summary judgment).

16 B. Liability

17 On July 17, 2019, Plaintiff testified she had no recollection of ever seeing the liability
18 waiver. However, Plaintiff now, conveniently, recalls the liability waiver. She argues she should
19 not be bound by the signed liability waiver because she did not read, nor was provided time to
20 review, the liability waiver. Plaintiff's decision to not read or review the conspicuous liability
21 waiver prior to signing the liability waiver in no way alleviates her of now being bound by the
22 liability waiver.

23

² Ex. 1: Plaintiff's Response.

1 **1. The law requires more than Plaintiff simply stating she unwittingly signed.**

2 Plaintiff misinterprets *McCorkle*³ by saying the court ruled a plaintiff's signature is
3 unwittingly made if he states the language was not conspicuous and was not pointed out at the time
4 of signing. The plaintiff's statement was hardly the crux of the court's analysis. In *McCorkle*, the
5 court compared the format of the waiver in question to other waivers, which had been found to be
6 conspicuous. Because the waiver was titled and written in plain script, attention was not easily
7 drawn to the liability waiver, and the court remanded the case for trial. Such is not the case here.

8 Conversely, the liability waiver here follows a ¼ inch thick banner. Black lines top the ¼
9 inch thick banner, which contains the bolded, capitalized words "RELEASE OF LIABILITY"
10 "ASSUMPTION OF RISK" "CLUB RULES" and 'BUYER'S NOTICE & RIGHT TO
11 CANCEL."⁴ This stark difference setting the liability waiver apart from the rest of the contract is
12 what courts find as effective in making a liability waiver conspicuous. Plaintiff has not provided
13 persuasive authority or argument to sustain her assertions the liability waiver is inconspicuous.

14 **2. The liability waiver is conspicuous under Washington law.**

15 Plaintiff next cites (as Defendant did) *Johnson*,⁵ and states the liability waiver does not
16 align with "the **five** factors set forth in"⁶ *Johnson*. However, Plaintiff does not effectively argue
17 how the liability waiver does not align with *Johnson*.

18 The *Johnson* court used **six** factors in deciding whether a waiver and release provision is
19 conspicuous, including:

- 20 (1) Whether the waiver is set apart or hidden within other provisions,
21 (2) whether the heading is clear,
22 (3) whether the waiver is set off in capital letters or in bold type,
 (4) whether there is a signature line below the waiver provision,

23 ³ *McCorkle v. Hall*, 56 Wn. App 80, 782 P.2d 574 (1989).

⁴ Ex. 2: Membership Agreement.

⁵ *Johnson v. UBAR, LLC*, 150 Wn. App 533, 210 P.3d 1021 (2009),

⁶ Ex. 1: Plaintiff's Response, at 11:8-9.

- 1 (5) what the language says above the signature line, and
2 (6) whether it is clear that the signature is related to the waiver.⁷

3 Plaintiff and Defendant executed a liability waiver with a ¼ inch thick, bold dividing
4 banner clearly setting apart the release language.⁸ Black lines top a thick, highlighted banner
5 containing the capitalized words “RELEASE OF LIABILITY” “ASSUMPTION OF RISK”
6 “CLUB RULES” and ‘BUYER’S NOTICE & RIGHT TO CANCEL.’⁹

7 Directly below the banner is a paragraph unequivocally and repeatedly warning Plaintiff
8 she was giving up her legal rights by signing the liability waiver.¹⁰ The language in this paragraph
9 is clear and unambiguous. A following paragraph fully explains Plaintiff was not obligated to sign
10 the waiver if she did not fully understand her release of liability and assumption of risk.¹¹

11 Immediately following the second paragraph are two signature blocks. One signature block
12 is for the Member (signed by Plaintiff) and one is for a Planet Fitness authorizing signature.¹² Both
13 blocks were signed, solidifying the agreement. These two signature blocks span the entire width
14 of the printed page and separate the release of liability and assumption of risk section from the
15 remaining payment and cancelation information found at the bottom of the page. The liability
16 waiver signed by Plaintiff and Defendant is distinct, conspicuous, and unambiguous.

17 **3. Plaintiff had ample opportunity to examine the liability waiver before signing.**

18 Plaintiff argues she was not given an opportunity to read or even review the liability waiver.
19 Plaintiff’s blank assertion is completely contrary to Defendant’s policies and training programs.
20 Defendant has strict training and protocols in place directing employees in proper client service.¹³

21 ⁷ *Id.* at 538.

22 ⁸ Ex. 2: Membership Agreement.

23 ⁹ Ex. 2: Membership Agreement.

¹⁰ Ex. 2: Membership Agreement.

¹¹ Ex. 2: Membership Agreement.

¹² Ex. 2: Membership Agreement.

¹³ Ex. 3: Defendant’s Training Materials.

1 Plaintiff also argues a Planet Fitness employee insisted she must sign the liability waiver
2 before using the fitness center. It escapes Defendant how this is improper. All members are
3 required to sign the liability waiver before using the fitness center.

4 **4. Plaintiff knowingly and voluntarily signed the liability waiver.**

5 Plaintiff argues she did not voluntarily sign the liability waiver. However, Defendant does
6 not force anyone to sign liability waivers. Plaintiff could have asked clarifying questions prior to
7 signing, gone for a walk, or home, to think about signing, or found a different gym not requiring a
8 liability waiver. Plaintiff's continued blank assertion "There was nothing about the waiver that
9 was so clear that plaintiff should have seen it immediately" is grossly inaccurate, as argued
10 above.¹⁴

11 **5. Plaintiff was provided with a copy of the Membership Agreement.**

12 Plaintiff claims she did not read any of part of the Membership Agreement, including the
13 liability waiver, and did not receive a copy of the rules therein. On February 1, 2016, three
14 paragraphs under her signature waiving liability, Plaintiff acknowledged, with her signature, she
15 received a complete copy of the rules.¹⁵ Additionally, Defendant emailed Plaintiff a copy of her
16 signed contract at 4:10 p.m. on February 1, 2016.¹⁶

17 **6. *Wagenblast* is inapplicable.**

18 Plaintiff asks the court to consider *Wagenblast*.¹⁷ Assuming Plaintiff actually read
19 *McCorkle*, she would see the court found *Wagenblast* inapplicable.¹⁸ "We do not find *Wagenblast*
20 applicable. [] *Wagenblast* did not deal with the issue presented here."¹⁹ Here, the present case

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22 ¹⁴ Ex. 1: Plaintiff's Response, at 12:21-23.

¹⁵ Ex. 2: Membership Agreement.

¹⁶ Ex. 4: Email History From Plaintiff's Gym File.

23 ¹⁷ *Wagenblast v. Odessa Sch. Dist.* 105-157-166J, 110 Wash.2d 845, 758 P.2d 968 (1988).

¹⁸ *McCorkle v. Hall*, 56 Wn. App 80, 782 P.2d 574 (1989).

¹⁹ *McCorkle v. Hall*, 56 Wn. App 80, 782 P.2d 574 (1989).

1 parallels the gym contract nature of *McCorkle* and the court should not consider factors irrelevant
2 to the facts of this case.

3 C. Plaintiff Has Not Produced Any Expert Testimony or Evidence

4 CR 11 requires a signature on every pleading filed to certify it is well-grounded in fact.²⁰
5 This incident allegedly occurred on July 29, 2016. Approximately two years later on August 9,
6 2018, Plaintiff filed her Complaint. On January 14, 2019, Plaintiff filed her Amended Complaint.
7 After three years, and almost 14 months since filing, Plaintiff is unable to present *even one* expert
8 declaration, suggesting Plaintiff's case is not well-grounded in fact. The court should dismiss any
9 injuries and damages claims not properly supported by expert medical testimony.

10 **1. Legal Standard Regarding Causation.**

11 Plaintiff has the burden of proving each condition for which she seeks damages was
12 proximately caused by Defendant.²¹ In *Miller*, the Washington Supreme Court stated the causal
13 relationship between an accident and an alleged injury must be established by medical testimony
14 beyond speculation and conjecture.²² Plaintiff's own lay testimony, by itself, is insufficient to
15 support a judgment in Plaintiff's favor.²³ Here, Plaintiff has failed to produce the required medical
16 expert testimony.

17 **2. Legal Standard Regarding Reasonableness and Necessity**

18 Plaintiff must prove medical treatment received was reasonable and necessary.²⁴ Here,
19 Plaintiff has failed to produce such evidence.

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²⁰ CR 11(a)(1).

²¹ See WPI 30.01.

23 ²² *Miller v. Staton*, 58 Wn.2d 879, 886, 365 P.2d 333 (1961) (emphasis added).

²³ See *Carlos v. Cain*, 4 Wn. App. 475, 477, 481 P.2d 1945 (1971).

²⁴ See *Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997).

1 **3. Legal Standard Regarding Reasonable Cost of Medical Treatment**

2 Plaintiff must prove medical costs were reasonable.²⁵ Here, Plaintiff has failed to produce
3 such evidence.

4 **4. Legal Standard Regarding Necessity of Expert Testimony**

5 When presenting expert medical opinions in an affidavit or declaration, a party must
6 include a statement of the expert’s qualifications and any other foundational facts that would be
7 necessary if the expert were testifying at trial.²⁶ Here, Plaintiff has failed to produce such evidence.

8 **D. Plaintiff’s Unsupported Damages and Injury Claims should be Dismissed as a Matter of**
9 **Law**

10 **1. Personal Injury Claims: Past Medical Treatment and Expenses**

11 Plaintiff has provided no expert testimony to date. Accordingly, *each* of her alleged claims
12 for damages are legally deficient and should be dismissed as a matter of law.

13 **2. Ongoing Injury, Future Medical Treatment, and Expenses**

14 Plaintiff is required to provide competent expert testimony regarding ongoing injuries and
15 future treatment. Plaintiff has failed to provide any expert testimony regarding the same.

16 **3. Other Non-Specified Injuries, Conditions, and Losses Must Be Excluded**

17 Because Plaintiff has not disclosed any other potential injuries, future medical treatment,
18 or bills to date, any claims for other non-specified, undisclosed injuries, conditions, and/or losses
19 should be dismissed as a matter of law.

20 **E. Plaintiff Is Not Entitled To CR 56(f) Relief**

21 Plaintiff has not provided the necessary evidence required by law to overcome summary
22 judgment. Plaintiff now asks for CR 56(f) relief so she may have more time to prepare her case.

23 _____
²⁵ See *Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997).

²⁶ See *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997).

1 Plaintiff was presented with an opportunity by Defendants to stay litigation because of health
2 issues.²⁷ Plaintiff declined. Plaintiff may not now seek additional time at Defendant's expense.
3 Additionally, a two-week wait for witness information can hardly be called uncooperative and
4 surely is not a basis for CR 56(f) relief.

5 F. Defendant Faces Material Prejudice if Plaintiff's Inappropriate and Unsupported Claims
6 are Not Dismissed

7 Defendant should not be forced to defend against amorphous and unsupported claims. The
8 purpose of a summary-judgment motion is to dismiss claims that cannot be properly supported at
9 trial. Washington law requires Plaintiff to produce expert declaration or testimony supporting her
10 claims, but, to date, Plaintiff has not produced any such evidence.

11 It is incumbent on Plaintiff, not Defendant, to carry the burden of proof by evidencing what
12 claims are legitimate and what questions of fact will exist at the time of trial. It should not fall to
13 Defendant to hire numerous experts and expend exorbitant costs in order to blindly probe
14 Plaintiff's allegations to determine the legitimacy of her claims. Plaintiff has not provided any
15 evidentiary support for her claims and therefore, her unsupported claims should be dismissed.

16 **III. CONCLUSION**

17 Plaintiff signed a valid and enforceable contract waiving her legal rights and releasing
18 Defendant from all liability for any injury. Defendant respectfully requests the court to dismiss
19 Defendant on the grounds of liability. In the alternative, the court should dismiss any claims not
20 supported by medical testimony.

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²⁷ Ex. 5: Email From Co-Defendant Suggesting Plaintiff Stay Litigation.

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IV. DECLARATION OF MICHAEL KUTZNER

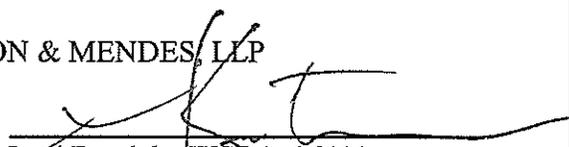
I, Michael Kutzner, am an attorney representing Defendant PFWA Lacey, LLC, in this matter. I declare under penalty of perjury under the laws of the State of Washington the facts asserted in this motion are true and correct to the best of my knowledge and recollection. The following attached exhibits are true and correct copies:

- Exhibit 1:** Plaintiff's Response.
- Exhibit 2:** Membership Agreement.
- Exhibit 3:** Defendant's Training Materials.
- Exhibit 4:** Email History From Plaintiff's Gym File.
- Exhibit 5:** Email From Co-Defendant Suggesting Plaintiff Stay Litigation.

I certify this memorandum contains 10 pages, in compliance with the Local Civil Rules.

Respectfully submitted October 18th, 2019.

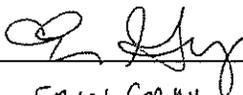
TYSON & MENDES, LLP

By: 

Levi Bendele, WSBA 26411
Michael Kutzner WSBA 50744
Attorneys for Defendant PFWA Lacey

CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury under the laws of the State of Washington that I have served a true and correct copy, except where noted, of the foregoing upon the individual(s) listed by the following means:

<p>Clerk of the Court: Thurston County Superior Court</p>	<p><input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/> E-Filed</p>
<p>Judge's Working Copy The Honorable James J. Dixon</p>	<p><input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/> E-Filed</p>
<p>Counsel for Plaintiff: Thomas J. West West Law Firm, P.S. 524 Tacoma Avenue South Tacoma, WA 98402</p>	<p><input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> E-Filed</p>
<p>Counsel for Co-Defendant Michael A. Yoshida, WSBA 47581 MB Law Group LLP 117 SW Taylor St Ste 200 Portland, OR 97204-3029</p>	<p><input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> E-Filed</p>
<p>DATED: <u>10/18/2017</u></p>	<p>By: <u></u> Name: <u>ERIN GRAY</u> Title: <u>LEGAL ASSISTANT</u></p>

APPENDIX J

1 Hearing Date: Friday, November 15, 2019 at 9:00 a.m.
The Honorable James Dixon
2 Civil Motions Calendar
Hearing Date at Court's Discretion Per CR 59
3 Oral Arguments at Court's Request
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9 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

10 CAROL J. MCCOY, a single person,,
11

Plaintiff,
12

v.
13

14 PFWA LACEY, LLC, a Washington limited
liability company, dba PLANET FITNESS;
and BRUNSWICK CORPORATION, a
15 foreign corporation,

16 Defendants.

No. 18-2-03929-34

**DEFENDANT PFWA LACEY, LLC'S
MOTION FOR RECONSIDERATION
OF DENIAL OF ORDER ON ITS
MOTION FOR SUMMARY
JUDGMENT REGARDING
LIABILITY AND DAMAGES**

17 I. INTRODUCTION AND RELIEF REQUESTED

18 Defendant PFWA Lacey, LLC ("PFWA"), moves the Court for reconsideration of the
19 Order on Denial of its Motion for Summary Judgment. At the hearing on October 25, 2019,
20 Defendant argued that the exculpatory provision of the contract that plaintiff signed when she
21 joined Planet Fitness was clear and conspicuous.

22 The Court ruled that reasonable minds could differ as to whether the liability waiver clear
23 and conspicuous denied Defendant's Motion for Summary Judgment.

DEFENDANT PFWA LACEY, LLC'S MOTION
FOR RECONSIDERATION OF DENIAL OF ORDER
ON ITS MOTION FOR SUMMARY JUDGMENT
REGARDING LIABILITY AND DAMAGES
(Page 1 of 9)

TYSON & MENDES LLP
200 West Mercer Street, Suite 411
Seattle, WA 98119
TEL: (206) 420-4267
FAX: (206) 420-4375

1 II. STATEMENT OF FACTS

2 A. Background

3 On February 1, 2016, Plaintiff entered into a Membership Agreement with the Planet Fitness
4 gym facility in Lacey.¹ Said Membership Agreement included a section warning Plaintiff of
5 waivers and conditions, while subsequently allowing access to the Planet Fitness gym facility in
6 Lacey.²

7 The relevant portion of the contract included thick, black lines then top a broad, highlighted
8 banner containing the capitalized words "RELEASE OF LIABILITY" "ASSUMPTION OF
9 RISK" "CLUB RULES" and "BUYER'S NOTICE & RIGHT TO CANCEL."³ Directly below
10 the banner is a paragraph repeatedly explaining the waiver of legal rights which states as follows:

11 I further agree that Planet Fitness, PF Corporate, their respective affiliated
12 companies, parents, subsidiaries and the officers, directors, shareholders,
13 employees, managers, members, agents and independent contractors of such
14 entities will not be liable for any injury including, without limitation, personal,
15 bodily, or mental injury, disability, death, economic loss or any damage to me, my
16 spouse or domestic partner, guests, unborn child, heirs or relatives resulting from
17 the negligent conduct or omission of Planet Fitness, PF Corporate, or anyone acting
18 on their behalf, whether related to exercise or not. Accordingly, to the fullest extent
19 permitted by law, I do hereby forever release, waive and discharge Planet Fitness
20 and PF Corporate from Any and all claims, demands, injuries, damages, actions or
21 causes of action related to my use or my guest's use of the facility (collectively,
22 "Claims") against Planet Fitness and PF Corporate or anyone acting on their behalf,
23 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.⁴

¹ See Exh. 1 to Defendant's Motion for Summary Judgment.

² See Exh. 1 to Defendant's Motion for Summary Judgment.

³ See Exh. 1 to Defendant's Motion for Summary Judgment.

⁴ See Exh. 1 to Defendant's Motion for Summary Judgment.

1 Plaintiff's dated signature and a Planet Fitness Authorized Signature sit immediately below the
2 release of liability section.⁵

3 Plaintiff brought this lawsuit for personal injuries and damages allegedly sustained on July 29,
4 2016, while Plaintiff attempted to use a stair exercise machine.⁶ Plaintiff alleged the stair exercise
5 machine failed to operate properly.

6 B. October 25, 2019 Hearing

7 On October 25, 2019, Defendant's counsel articulated arguments showing the liability
8 waiver was clear and conspicuous. Plaintiff simply articulated her own assertions, including the
9 blank assertions the liability waiver was not conspicuous. She also argued she was not given time
10 to read the liability waiver and even if she would have been given time, she was unable to read the
11 small print on the page. Plaintiff further alluded to the fact she was essentially "forced" to sign
12 the contract and Plaintiff's employee told her the liability waiver was "only a formality."

13 The court decided the liability waiver was not clear and conspicuous as a matter of law,
14 finding reasonable minds may be able to differ on the matter. One reason the court offered for its
15 decision was a lack of testimony from the person who had signed the waiver with Plaintiff. It also
16 appeared the court's reasoning was due to a lack of information on the circumstances surrounding
17 Plaintiff signing the liability waiver.

18 **III. STATEMENT OF ISSUES**

19 Was the Court's decision to deny Defendant's Motion for Summary Judgment contrary to
20 the law?

21 //

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23 ⁵ See Exh. 1 to Defendant's Motion for Summary Judgment.

⁶ See Exh. 4 to Defendant's Motion for Summary Judgment.

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IV. EVIDENCE RELIED UPON

This motion relies on the files and pleadings on record, with the Court, and the (subjoined) Declaration of Rachel Marshall, with exhibits attached hereto.

V. AUTHORITY

A. Reconsideration should be granted because there is no reasonable inference from the evidence to justify the decision and substantial justice has not been done.

A motion for reconsideration must be filed and served not later than 10 days after the entry of the judgment, order, or other decision.⁷ A motion for reconsideration is appropriate when there is error in the assessment of the amount of recovery in an action on a contract, or when there is no evidence or reasonable inference from the evidence to justify a court’s decision or it is contrary to law.⁸

(a) Grounds for New Trial or Reconsideration. On the motion of a party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties; . . .

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law; and. . .

(9) That substantial justice has not been done.

(emphasis added).

B. *Chauvlier* upheld the waiver provision supporting Defendant’s claim that the waiver language was clear and unambiguous.

A party to a contract which he has voluntarily signed will not be heard to declare that he

⁷ See CR 59(b).

⁸ See CR 59(a).

1 did not read it, or was ignorant of its contents.⁹ Furthermore, when there is ample opportunity to
2 examine a contract, and she fails to do so for her own personal reasons, she is bound by its
3 terms.¹⁰

4 Plaintiff relied on the rule in *Chauvlier* in her response to Defendant's MSJ, claiming that
5 she was never given an opportunity to read the documents.¹¹ However, this is contradictory to her
6 Declaration wherein she stated that she did not "read all the language."¹² This is similar to
7 *Chauvlier*, the Plaintiff claimed that there was no time or opportunity to read anything during the
8 transaction.¹³ However, Plaintiff offered no evidence that he was rushed to sign the document, nor
9 that if Plaintiff asked for more time to read the document, he would not have been given the
10 opportunity.¹⁴ The Court in *Chauvlier* upheld the waiver provision of the contract, despite
11 plaintiff's claim, when taken together with the fact that the waiver was clearly titled, set off in
12 capital letters, and contained language below the signature line that the signing party
13 acknowledged and accepted the conditions of the liability release.¹⁵

14 The facts in this case are more like *Chauvlier*. Plaintiff offered no evidence that she asked
15 for more time to read through the document and was not given the opportunity to do so. Plaintiff
16 signed the contract, which was clearly title, set off from the rest of the contract and contained a
17 signature line just below language that the party acknowledge and accepted the conditions of the
18 liability release. The fact that she claims to have told the PFWA employee that she had not finished
19

20 ⁹ *Nat'l Bank of Washington v. Equity Inv'rs*, 81 Wn.2d 886, 912, 506 P.2d 20, 36 (1973).

21 ¹⁰ *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 341, 35 P.3d 383, 386 (2001).

22 ¹¹ See Declaration of Carol J. McCoy re: Waiver/Contractual Issues in Support of Plaintiff's Response to PFWA
23 Lacey's MSJ.

¹² *Id.*

¹³ See *Chauvlier* at 386.

¹⁴ *Id.*; See also Declaration of Carol J. McCoy re: Waiver/Contractual Issues in Support of Plaintiff's Response to
PFWA Lacey's MSJ.

¹⁵ *Id.*

1 reading the entire contract does not equate to her being denied the opportunity read through the
2 contract.

3 Plaintiff's argument that she did not have an opportunity to read the contract should not be
4 left to the jury to decide because she was not denied the opportunity to read the contract, and the
5 waiver language was clearly titled, set apart from the rest of the contract and included a signature
6 line immediately following the waiver language.

7 **C. *Baker* supports a finding that the Defendant's language was not inconspicuous and
8 unclear.**

9 Plaintiff argued that even if she did read the documents, that she would not have been able
10 to because the font size of the language in the release was too small print and difficult to read. In
11 *Baker v. City of Seattle*, the Court voided the contract where the font size of the waiver language
12 was the same as the rest of the language, not because of the font size, but because the waiver
13 language was contained within the middle of the rental agreement making it inconspicuous.¹⁶ This
14 case is not like *Baker* because the waiver language was set apart in its own section and clearly
15 labeled.¹⁷ Additionally, each section of the contract contained signature lines for the Plaintiff to
16 read, acknowledge and sign, including the release of liability section. Plaintiff acknowledged this
17 section by providing her signature.¹⁸

18 Instead, the facts of this case are more like *Chauvlier*, where the exculpatory language in
19 the signed contract was not hidden within a larger agreement, was clearly titled "LIABILITY
20 RELEASE & PROMISE NOT TO SUE," and the signature line was just above the release
21 language.¹⁹ Here, like in *Chauvlier*, the section is entitled "RELEASE OF LIABILITY"

22 ¹⁶ *Baker v. City of Seattle*, 79 Wn.2d 198, 484 P.2d 405 (1971).

23 ¹⁷ Exh. 1 Membership Agreement.

¹⁸ *Id.*

¹⁹ See *Chauvlier* at 386.

1 "ASSUMPTION OF RISK" "CLUB RULES" and "BUYER'S NOTICE & RIGHT TO
2 CANCEL."²⁰ Additionally, the exculpatory provision was set apart in a separate section of the
3 document and set apart by highlighting the section. Finally, there is a signature line immediately
4 following the section, unlike *Baker*, where there was only one signature line at the end of the
5 rental agreement and the exculpatory provision was hidden in the middle of the agreement. Thus,
6 the font size is of no consequence and should not have been considered in determining whether
7 there was a genuine issue of a material fact.

8 **C. Clear, cogent and convincing evidence was necessary to prove that Plaintiff was
9 forced to sign the Membership Agreement.**

10 Plaintiff argued that she was essentially forced to sign the contract because she was not
11 given time to read through the contract fails. A party may rescind a contract on the ground of
12 duress if the party proves by clear, cogent and convincing evidence that she agreed to the contract
13 because of an improper threat by the other party that left no reasonable alternative.²¹ A threat is
14 improper if:

- 15 (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a
16 tort if it resulted in obtaining property,
17 (b) what is threatened is a criminal prosecution,
18 (c) what is threatened is the use of civil process and the threat is made in bad faith,
19 or
20 (d) the threat is a breach of the duty of good faith and fair dealing under a contract
21 with the recipient.

22 A threat is also improper under section 176 (2) if the resulting exchange is not on
23 fair terms and

- (a) the threatened act would harm the recipient and would not significantly benefit
the party making the threat,
(b) the effectiveness of the threat in inducing the manifestation of assent is
significantly increased by prior unfair dealing by the party making the threat, or

²⁰ See Exh. 1 to Defendant's Motion for Summary Judgment

²¹ See WPI 301.10

1 (c) what is threatened is otherwise a use of power for illegitimate ends.²²

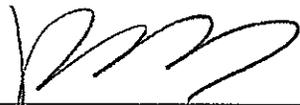
2 Plaintiff did not present clear, cogent or convincing evidence that she was forced to sign
3 the Membership Agreement. Plaintiff argued that Defendant had an unfair bargaining advantage
4 because she had to sign the Membership Agreement to join the gym. Yet, plaintiff provided no
5 evidence that she was forced or threatened to do so. Critically, the waiver language itself stated "I
6 understand I am not obligated to sign this agreement and should not do so if there are any unfilled
7 blanks."²³ Plaintiff knowingly signed the agreement which contained that language. If Plaintiff did
8 not have enough time to review the document fully, she could have refused to sign the agreement
9 until she completed reading all of the terms.

10 VI. CONCLUSION

11 The Court should reverse its decision denying Defendant's summary judgment. PFWA
12 Lacey, LLC, has established that the waiver language was conspicuous and unambiguous
13 regardless of the font size. Furthermore, Plaintiff had ample opportunity to read the contract
14 language and/or ask for additional time to read it before signing the provision, and was not forced
15 or threatened to sign the agreement. Plaintiff, therefore, is still bound to the terms of the contract
16 even though she failed to read all of the provisions.

17 Respectfully submitted this 4th day of November, 2019.

18 TYSON & MENDES, LLP

19
20 By: 

21 Levi Bendele, WSBA # 26411
22 Bryan Scholnick, WSBA # 42741
Michael Kutzner, WSBA # 50744
Rachel Marshall, WSBA # 54169
Attorneys for Defendant PFWA Lacey, LLC

23 ²² *Id.*

²³ See Exh. I to Defendant's Motion for Summary Judgment.
DEFENDANT PFWA LACEY, LLC'S MOTION
FOR RECONSIDERATION OF DENIAL OF ORDER
ON ITS MOTION FOR SUMMARY JUDGMENT
REGARDING LIABILITY AND DAMAGES
(Page 8 of 9)

CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury under the laws of the State of Washington that I have served a true and correct copy, except where noted, of the foregoing upon the individual(s) listed by the following means:

<p>Clerk of the Court: Thurston County Superior Court</p>	<input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/> E-Filed
<p>Judge's Working Copy The Honorable James J. Dixon</p>	<input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/> E-Filed
<p>Counsel for Plaintiff: Thomas J. West West Law Firm, P.S. 524 Tacoma Avenue South Tacoma, WA 98402</p>	<input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> E-Filed
<p>Counsel for Co-Defendant Michael A. Yoshida, WSBA 47581 MB Law Group LLP 117 SW Taylor St Ste 200 Portland, OR 97204-3029</p>	<input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> E-Filed
<p>DATED: <u>11-4-2019</u></p>	<p>By: <u></u> Name: <u>Kevin R. Smith</u> Title: <u>Legal Assistant</u></p>

APPENDIX K

1 The Honorable James Dixon

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SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

8

9 CAROL J. MCCOY, a single person,

No. 18-2-03929-34

10

Plaintiff,

NOTICE OF DISCRETIONARY
REVIEW TO COURT OF APPEALS
DIVISION II

11

v.

12

PFWA LACEY, LLC, a Washington limited
liability company, dba PLANET FITNESS;
13 and BRUNSWICK CORPORATION, a
foreign corporation,

14

Defendants.

15

PFWA Lacey, LLC, defendant, seeks review by the designated appellate court of the Order
16 Denying Motion For Reconsideration On Its Motion For Summary Judgment Regarding Liability
17 entered on November 14, 2019.

18

A copy of the decision is attached to this notice.

19

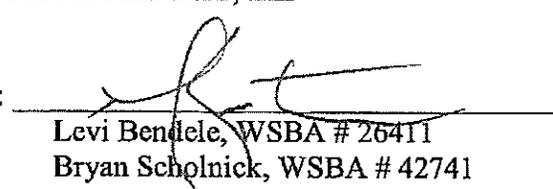
Respectfully submitted this ¹⁴ day of December, 2019.

20

TYSON & MENDES, LLP

21

22

By: 
Levi Bendele, WSBA # 26411
Bryan Scholnick, WSBA # 42741

23

NOTICE OF DISCRETIONARY REVIEW TO
COURT OF APPEALS
(Page 1 of 3)

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CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury under the laws of the State of Washington that I have served a true and correct copy, except where noted, of the foregoing upon the individual(s) listed by the following means:

Clerk of the Court: Court of Appeals, Division II Derek Byrne, Clerk/Administrator 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/> E-Filed
Clerk of the Court: Thurston County Superior Court	<input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/> E-Filed
Judge's Working Copy The Honorable James J. Dixon	<input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/> E-Filed
Counsel for Plaintiff: Thomas J. West West Law Firm, P.S. 524 Tacoma Avenue South Tacoma, WA 98402	<input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> E-Filed
Counsel for Co-Defendant Michael A. Yoshida, WSBA 47581 MB Law Group LLP 117 SW Taylor St Ste 200 Portland, OR 97204-3029	<input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to <input type="checkbox"/> _____ Express Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> E-Filed
DATED: <u>12/16/2019</u>	By: <u><i>AW Wallery</i></u> Name: <u>Anne Wallery</u> Title: <u>Paralegal</u>

TYSON & MENDES

April 23, 2020 - 3:59 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54400-8
Appellate Court Case Title: Carol J. McCoy, Respondent v. Brunswick Corporation, et al, Petitioner
Superior Court Case Number: 18-2-03929-8

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- patrick@westlawtacoma.com
- rmarshall@tysonmendes.com

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Filing on Behalf of: Michael Richard Kutzner - Email: mkutzner@tysonmendes.com (Alternate Email:)

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