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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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CAROL J. MCCOY,

*Respondent/Plaintiff,*

v.

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

*Appellant/Defendant,*

and

BRUNSWICK CORPORATION, a foreign corporation,  
Defendant.

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**RESPONDENT'S OPPOSITION TO APPELLANT'S  
OPENING BRIEF**

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## I. INTRODUCTION

This appeal arises from a summary judgment motion filed by appellant/defendant PFWA Lacey, LLC (“PFWA”) and denied by the Thurston County Superior Court on October 25, 2019.

PFWA’s motion for summary judgment was based on a signed Planet Fitness membership agreement that contained a liability waiver and release provision in the body of the agreement. The respondent/plaintiff Carol McCoy (“Ms. McCoy”), signed the subject agreement on February 1, 2016 in order to workout at the Planet Fitness center in Lacey, WA. Ms. McCoy then suffered injuries at the fitness center on July 29, 2016 and subsequently filed suit against the respondent. At the summary judgment hearing, Ms. McCoy presented evidence that she was unable to read the agreement because it contained extremely fine print, that the Planet Fitness representative who presented the agreement to her mischaracterized the content of it, that he did not provide her with an opportunity to read the agreement, and failed to provide her with a copy.

The trial court properly denied PFWA’s motion for summary judgment because there were genuine issues of material fact for trial as to whether the liability waiver contained in the membership agreement was conspicuous and whether the plaintiff unwittingly signed it. The trial court’s decision was supported by well-established Washington law and this Court should affirm the trial court’s decision.

## II. RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether this Court should affirm the trial court's denial of PFWA's motion for summary judgment because there are genuine issues of material fact for trial whether the liability waiver contained in the membership agreement was conspicuous and whether Ms. McCoy unwittingly signed it?

## III. RESTATEMENT OF THE CASE ON APPEAL

### A. Ms. McCoy Signed The Planet Fitness Membership Agreement.

On or about February 1, 2016, respondent, Carol McCoy, signed up for a membership at the Planet Fitness located in Lacey, WA.<sup>1</sup> Ms. McCoy was there for only a short time and spoke with a Planet Fitness employee who presented her with documents to sign, which he presented as "mere formalities" in order to join the fitness center.<sup>2</sup> The Planet Fitness employee directed Ms. McCoy to provide her signature on the agreement, but she was unable to read the contents of the agreement because it contained extremely fine print.<sup>3</sup> The Planet Fitness employee then told Ms. McCoy that he would send her copies of the agreement in the mail to her home address, but she never received them.<sup>4</sup>

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<sup>1</sup> CP at 142, ¶ 2.

<sup>2</sup> Id. at ¶ 3.

<sup>3</sup> CP at pp.142-143, ¶ 3-4.

<sup>4</sup> CP at p. 143, ¶ 5.

**B. The Liability Waiver Contained In The Membership Agreement Is Virtually Impossible To Read.**

The “Membership Agreement” signed by Ms. McCoy contained extremely fine print throughout, including the liability waiver provision underneath a block and title  $\frac{3}{4}$  of the way down the first page of the agreement.<sup>5</sup> The language underneath the title contained contract language regarding liability waiver and financial obligations of the member.<sup>6</sup> There was no bold language preceding the signature line and Ms. McCoy stated that she was unable to read the print because it was so small.<sup>7</sup> The language preceding the signature line is as follows (with font size increased to facilitate reading): “By signing below, I acknowledge and agree to all of the terms contained on the front and back of this agreement”.<sup>8</sup> The signature line clearly didn’t apply to any separate liability waiver provision, but the membership agreement as a whole.

**C. Ms. McCoy Is Injured Using Equipment at Planet Fitness.**

On or about July 29, 2016, Ms. McCoy decided to use a stair machine at Planet fitness.<sup>9</sup> Ms. McCoy pressed a button to start up the machine and operated the machine well for some time, but then the machine began to speed up, so it became harder for her to stay on it and

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<sup>5</sup> CP at 165.

<sup>6</sup> Id.

<sup>7</sup> Id.; CP at 141, ¶ 4.

<sup>8</sup> Id.

<sup>9</sup> CP at 138, ¶ 2.

otherwise hold on.<sup>10</sup> Ms. McCoy pressed the emergency stop button, but it failed and she was thrown off the machine and sustained injuries.<sup>11</sup>

#### **IV. LEGAL ARGUMENTS IN OPPOSITION TO APPELLANT'S OPENING BRIEF.**

##### **A. Standard of Review.**

This Court reviews orders of summary judgment de novo and engages in the same inquiry as the trial court. *Heath v. Uraga*, 106 Wn. App. 506, 512, 24 P.3d 4 (2001). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. *Heath*, 106 Wn.App. at 512, 24 P.3d 4; CR 56(c).

The court must consider all facts and all reasonable inferences from them in the light most favorable to the nonmoving party. *Heath*, 106 Wn.App. at pp. 512-13. Thereafter, a summary judgment motion will be granted only after considering the evidence in the light most favorable to the nonmoving party, and only if reasonable minds could reach but one conclusion.” *Von Noy v. State Farm Mutual Insurance Co.*, 142 Wn.2d 784, 790, 16 P.3d 574 (2001).

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<sup>10</sup> CP at pp.138-39, ¶ 4.

<sup>11</sup> Id.

**B. The Trial Court Correctly Denied PFWA's Motion For Summary Judgment.**

The trial court properly denied PFWA's motion for summary judgment and ruled that there were genuine issues of material fact for trial, including but not limited to whether the subject liability waiver provision in the agreement was conspicuous, and thus whether plaintiff signed the waiver unwittingly.

**i. General Law Regarding Exculpatory Clauses.**

The general rule in Washington is that exculpatory clauses are enforceable unless (1) they violate public policy; (2) the negligent act falls greatly below the standard established by law for protection of others; or (3) they are inconspicuous. *Scott v. Pac. W. Mt. Resort*, 119 Wn.2d 484, 492, 834 P.2d 6 (1992); *Stokes v. Bally's Pacwest, Inc.*, 113 Wn. App. 442, 445, 54 P.3d 161 (2002).

**ii. There Are Genuine Issue Of Material Fact As To Whether The Liability Waiver Was Conspicuous.**

While exculpatory clauses may be enforceable, enforcement is not automatic just because the agreement is signed. *Scott*, 115 Wn.2d at 490, 834 P.2d 6. The test is whether the releasing language is "so inconspicuous that reasonable persons could reach different conclusions as to whether the document was unwittingly signed." *Baker v. Seattle*, 79 Wash.2d 198, 200, 484 P.2d 405 (1971). If reasonable minds could reach

different conclusions as to whether the waiver provision was inconspicuous and the document was unwittingly signed, summary judgment should be denied. *McCorkle v. Hall*, 56 Wn.App. 80, 83, 782 P.2d 574 (1989); see also *Johnson v. UBAR, LLC*, 150 Wn.App. 533, 210 P.3d 1021 (Div. 1 2009).

In *Baker*, *Johnson* and *McCorkle*, the Washington Supreme Court (*Baker*) and Court of Appeals (*Johnson*, Div. 1, and *McCorkle*, Div. 3) held that the exculpatory clauses were not “conspicuously displayed,” and thus “reasonable persons” could conclude that the signatures to the clause were “made unwittingly.” See *Baker*, 79 Wn.2d at 202, 484 P.2d 405; *Johnson*, 150 Wn.App. at 542, 210 P.3d 1021; *McCorkle*, 56 Wn.App. at 84, 782 P.2d 574. Accordingly, the Courts determined that it was improper to dismiss the plaintiff’s injury claims on summary judgment.

In *Baker*, the plaintiff signed a printed form entitled “Golf Cart Rental Agreement” and took possession of an electric golf cart that ultimately malfunctioned and caused plaintiff’s injuries. *Baker*, 79 Wn.2d at 198-199, 484 P.2d 405. The “Golf Cart Rental Agreement” contained a liability waiver provision in the middle of the agreement without any bold print and the Court ruled that it was not conspicuous and therefore not enforceable. *Id.* at 199-202. However, this is simply the most blatant, unconscionable example of an inconspicuous waiver provision and not the standard courts use to determine whether or not there is a genuine issue of material fact for trial as to whether a provision is inconspicuous.

In *McCorkle*, the Court of Appeals reviewed a membership agreement that had the liability provision under the heading “LIABILITY STATEMENT” and in the first few sentences of the provision declared that the member accepted liability for damages that the member or the member’s guests caused. *McCorkle*, 56 Wn.App. at 575. The last sentence of the provision stated that the member waived any claim for damages as a result of any act of a Club employee or agent with the signature of plaintiff McCorkle directly below it. *Id.* The plaintiff in *McCorkle* stated that although he did not read the application, the language was not so conspicuous as to draw his attention to it, nor was it pointed out to him at the time he signed it. *Id.* at p.77. The Court in *McCorkle* ruled that “reasonable persons in the circumstances presented could agree his signature was unwittingly made”, particularly where the waiver provision itself was not in bold or capital letters. *Id.*

In *Johnson v. UBAR, LLC*, the plaintiff/gym member sued the fitness center after she fell and injured herself on one of the machines while working with a personal trainer. *Johnson v. UBAR, LLC*, 150 Wn. App. at 536, 210 P.3d 1021. Ms. Johnson had signed a “60 Day Contractual Agreement” (membership agreement) and said that the gym employee was in a hurry to sign her up and the employee did not ask her to read the membership agreement or explain the agreement to her. *Id.* at 535. Ms. Johnson also testified that she was in a hurry and did not ask the

employee to slow down or explain the document to her. *Id.* Ms. Johnson further stated that she could not remember whether she read the Waiver and Release provision when she signed the membership agreement. *Id.*

The waiver provision in *Johnson v. UBAR, LLC* did have a waiver and Release set apart by blank lines and included a signature line below it, however, the actual waiver provision was in the same small font size as the rest of the agreement and, unlike the financial provisions in the membership agreement, the Waiver and Release provision itself did not include any capital letters, or bold print. *Id.* at 541. In addition, the court determined that the location of the Waiver and Release, three quarters of the way down the page, in the middle of financial terms, could create the impression that the paragraph also related to the financial obligations. *Id.* at 541-42.

In *Johnson v. UBAR, LLC* the Court identified five factors relevant to whether a waiver or release provision is “conspicuous” and thus enforceable:

1. Whether the waiver is set apart or hidden within other provisions;
2. Whether the heading is clear;
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;  
and
5. Whether it is clear that the signature is related to the waiver.

*Id.* at 538.

The Court then reversed the trial court's decision and determined that reasonable persons could disagree as to whether the waiver provision in the membership agreement was conspicuously displayed, and remanded for trial. *Id.* at 542.

Here, similarly, the only factor that PFWA arguably meets is the heading in the middle of the first page of the subject Membership Agreement because it includes the following titles: "Release of Liability" and "Assumption of the Risk"; however, that same heading also includes "Club Rules," and "Buyer's Notice & Right To Cancel". However, the actual liability waiver provision below it is in such fine print it is nearly impossible to read. Also, the capital and bolded language in the contract relates to financial obligations and the buyer's right to cancel the contract, not the liability waiver.

Further, the line preceding the plaintiff's signature states in extremely fine print: "By signing below, I acknowledge and agree to all of the terms contained on the front and back of this agreement", which clearly indicates that this was not actually a separate signature line for a

liability waiver, but actually encompassed all the terms of the membership agreement, including compliance with all “Club Rules” and financial obligations. In short, not only was the liability waiver itself extremely difficult to see because it was in extremely fine print, it was not separate and apart from the other terms of the contract, and the respondent’s signature actually pertained to all terms of the membership agreement.

In support of its argument that the contract is conspicuous, PFWA relies primarily on two Court of Appeals (Div. 3) cases, one unpublished, and the other *Johnson v. Spokane to Sandpoint, LLC*, a case involving an attorney (plaintiff), Ms. Johnson, involved in running the 2010 Spokane to Sandpoint race who sustained an injury during the race. *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 309 P.3d 528 (2013).

In *Johnson*, the plaintiff registered on line for the 2010 Spokane to Sandpoint race and acknowledged signing the waiver, which specifically included the provision: “waive and release Spokane to Sandpoint ... from any and all claims or liability of any kind arising out of my participation in this event, even though that liability may arise out of negligence or carelessness on the part of persons on this waiver.” *Johnson*, 176 Wn. App. at 456, 309 P.3d 528. The plaintiff also agreed that she read the agreement carefully and understood the terms when she signed the agreement, “FREELY AND VOLUNTARILY, WITHOUT ANY

INDUCEMENT, ASSURANCE OR GUARANTEE” and that her signature was “TO SERVE AS CONFIRMATION OF MY COMPLETE AND UNCONDITIONAL ACCEPTANCE OF THE TERMS, CONDITIONS, AND PROVISIONS OF THIS AGREEMENT.” *Id.* Further, Spokane to Sandpoint asked Ms. Johnson if she understood that the release she signed “would ... release the entities for any personal injury that might occur to you during the activity?” and she replied, “Yes, I understand that from a legal perspective completely.” *Id.* at 457.

Here, the respondent was entirely unaware that she had signed a liability waiver because it was nearly impossible to read. There also was no bold, large font above the signature line that drew attention to the language of the liability waiver as in the *Johnson* case referenced above.

PFWA also cites to two other cases: *Hewitt v. Miller*, 11 Wn. App. 72, 521 P.2d 244 (1974) and *Conradt v. Four Star Promotions, Inc.*, 45 Wn. App. 847, 728 P.2d 617 (1986). Both of these cases are also easily distinguished from the present case. In *Hewitt*, the liability waiver provision was actually separate and apart from the agreement and entitled “SAFETY AFFIRMATION AND RELEASE,” and the first sentence of the last paragraph in the provision stated in bold, large print: “I HAVE FULLY INFORMED MYSELF OF THE CONTENTS OF THIS AFFIRMATION AND RELEASE BY READING IT BEFORE I

SIGNED IT." *Hewitt*, 11 Wn. App. at 78-79, 521 P.2d 244. The Court determined that no reasonable person could argue that the waiver provision was inconspicuous.

Similarly, in *Conradt*, a husband and wife brought personal injury and loss of consortium claims against the operators of a racetrack for injuries the husband sustained in an automobile demolition race. *Conradt*, 728 P.2d at 619, 45 Wash. App. 847. Prior to the race, Mr. Conradt signed a release in which he assumed the risk of injury, and released the promoters and others from liability to himself, his personal representatives, his heirs and his next of kin. *Id.* at 620. The document at issue was entitled "Voluntary Waiver and Release from Liability and Indemnity Agreement" that was addressed entirely to the obvious and inherent risks and danger in racing, the voluntary assumption of those risks, and the waiver and release of the promoters and others from liability, with boldface emphasis throughout. *Id.* Additionally, above each signature line on the lower portion of the form was printed the conspicuous statement "I have read this release." *Id.*

Here, the waiver provision was not separate and apart and did not contain such bold, capitalized language above the signature line; in fact, it is clear to see that the fine print of the waiver provision itself is extremely difficult to read and coupled with financial obligations. In short, the

liability provision in this case is more similar to the liability waivers contained in *Baker, McCorkle, and Johnson v. UBAR, LLC*, than the waivers contained in the cases cited by PFWA. The trial court's denial of PFWA's motion for summary judgment is clearly supported by the above case law.

**iii. There Are Genuine Issue Of Material Fact As To Whether The Plaintiff "Unwittingly" Signed The Liability Waiver.**

A person who signs an exculpatory agreement must have ample opportunity to examine the contract. *Stokes*, 113 Wn. App. 442, 445, 54 P.3d 161, citing *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn.App. 334, 341, 35 P.3d 383 (2001). Even in a case where a person did not remember reading the waiver and release provision of the contract, this admission does not end the review, and the court must still determine whether the waiver and release language is inconspicuous so as to invalidate the release. *Stokes*, 113 Wn. App. at 446, 54 P.3d 161.

Here, it is unclear if PFWA is arguing that the trial court denied its motion solely on the basis that the plaintiff "unwittingly" signed the liability waiver provision. To clarify, as stated above, the trial court determined that reasonable persons could disagree as to whether the waiver provision in the membership agreement was conspicuously displayed, and therefore enforceable. The court further determined that it

was an issue for the trier of fact whether or not Ms. McCoy “unwittingly” signed the liability waiver, given her testimony that the employee identified the membership agreement as a mere formality and that signature was required to join the club, and further that she was not given an opportunity to review the document, and that a copy of the same was not provided to her. Whether or not Ms. McCoy “unwittingly” signed the inconspicuous waiver provision in the agreement is appropriately an issue for the trier of fact.

**V. CONCLUSION**

The liability waiver contained in the membership agreement is undeniably difficult to read and does not fulfill the criteria set forth by prior case law to establish conspicuousness. The trial court properly determined that there are genuine issues of fact for trial in this case as to whether the liability waiver provision was conspicuous and whether it was unwittingly signed. This Court should affirm the trial court’s decision.

Dated May 25, 2020.

Respectfully submitted,

  
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**DECLARATION OF SERVICE**

I hereby declare under penalty of perjury under the laws of the State of Washington that on this day, I caused to be served the foregoing document on the following person(s) at the address(s) listed below via the method indicated.

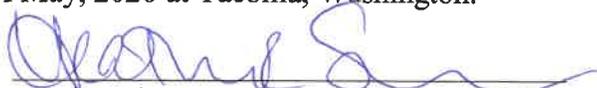
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Heather Sims, Paralegal to Thomas J. West

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**May 26, 2020 - 2:56 PM**

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