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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

DANNY DeASIS,

Appellant,

v.

YOUNG MEN'S ASSOCIATION OF YAKIMA (YMCA),

Respondents.

APPELLANT'S OPENING BRIEF

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APPENDIX 1 (Transcript of Proceedings - 11/7/12)

I. Introduction

This matter comes before the Court following summary judgment granted in favor of defendant. The Court provided significant explanation from the bench of the reasoning for granting the motion which is attached as Appendix 1¹.

Plaintiff requests that the matter be remanded for trial.

II. Assignments of Error

- A. Granting defendant's motion for summary judgment was reversible error
- B. Denying plaintiff's motion for partial summary judgment was reversible error

¹ The trial court issued a written memorandum opinion (CP 0283-0285) explaining the basis for granting defendant's motion and denying plaintiff's motion, which would supersede oral comments from the bench. However, the attached transcript also clearly shows the court intended to grant plaintiff's motion to amend the Complaint to allege gross negligence.

III. Issues Pertaining to the Assignments of Error

- A. Did plaintiff present substantial evidence of gross negligence?
- B. Is the issue of whether facts rise to gross negligence a jury question and, therefore, do not provide a basis to grant defendant's motion for summary judgment?
- C. Is the YMCA waiver and release clause unenforceable as a violation of public policy?
- D. Is the YMCA waiver and release clause unenforceable because it was inconspicuous?
- E. Is the YMCA waiver and release clause unenforceable because it is an adhesion contract?
- F. Did the trial court improperly weigh issues in granting summary judgment?
- G. Did defendant owe an enhanced duty to plaintiff who was a business invitee?

IV. Statement of the Case

Plaintiff Danny Boy DeAsis applied for membership to the Yakima YMCA on November 17, 2010. The application form consisted of a 2-sided preprinted form (CP 00018-00019). Plaintiff completed the first side which included background information and credit card information. When he turned in the form he was not told that he was required to sign the back. (CP 0151-0152 ¶3).

Mr. DeAsis returned the following day but his card did not open the locker room door. He was eventually told by a YMCA employee that he could not enter the door until he signed another document. This is the protocol that YMCA has put into place. (CP 0229-0233). Access is denied until the release and waiver is signed. (CP 0193-0195 [Lindsay Jacobson deposition p. 20:21 – p.29:32]).

Mr. DeAsis did not understand that he was signing a document that waived or released his rights in the event of an injury. He believed he was agreeing to allow YMCA to make automatic charges to his credit card (CP 0151 ¶4; CP 0161-0162). It was clearly apparent to anyone watching, including the YMCA employee, that Mr. DeAsis did not read the document because he was not told what it was and signed it immediately when he was told it was the only way he could access the facilities.

On August 30, 2011 he was leaving the building after his workout, and fell on a wet floor, dislocating his kneecap. A YMCA employee called for a wheelchair and he was taken to the hospital. (CP 0152 ¶¶6-7-8).

As a direct and proximate result of the injury, Mr. DeAsis has been unable to perform his work as a farmer. (CP 0152 ¶9).

YMCA does have mats to protect against slips and falls when swimmers walk in the tile floor hallways, but only uses them on certain occasions. (CP 0169-0170).

In this case, a female swimmer was walking down the hallway, possibly lost. A YMCA employee, Nathan Vanderhoof, followed her down the hall, and she was dripping all the way. (CP 172 [Vanderhoof Deposition p. 30:15 – p. 31:2]). Mr. Vanderhoof knew the floor was wet and slippery but chose to leave the area to search for towels to clean the mess, instead of posting a warning cone, or staying on guard and calling for assistance.(CP 0172-0174).

Mr. Vanderhoof testified that he could have called for another YMCA to come help using the office phone (CP0173-0174 [Vanderhoof deposition p. 37-37 and 40-41]) or using the cell phone in his pocket (CP 0174 [Vanderhoof deposition p. 40]). However he was not trained by YMCA how to respond to emergency hallway slipping hazards. (CP0172 [Vanderhoof deposition p. 31:18-20]).

YMCA does own “wet floor” warning cones that are located in various locations in the building (CP 0168 [Vanderhoof deposition p.17]; CP 0187 [Bob Romero deposition p. 90]; CP 195-196 [Lindsay Jacobson deposition p. 37-41])), and does instruct employees to post a warning cone

when the floor is wet. (CP0195-096 [Lindsey Jacobson deposition p.37:20 – p.38:7]). The YMCA also owns non-slip mats that are used in some hallways in the aquatics area. (CP 0169-0170 [Vanderhoof deposition p. 21-23]).

V. Argument

A. Summary Judgment Should Have Been Denied Because Plaintiff Provided Substantial Evidence of Gross Negligence.

The trial court granted defendant's motion for Summary Judgment on the grounds that plaintiff failed to produce substantial evidence of gross negligence, based on the conclusion that the plaintiff signed a valid waiver and release². However, the court erred because there was sufficient evidence presented to preclude summary judgment.

The trial court expressly determined that *Boyce v. West*, 71 Wn. App. 657, 862 P.2d 592 (1993) was controlling (CP 283-285). However, the ruling in that case is not applicable.

Boyce involved a Gonzaga student that successfully completed the elementary scuba diving class, but died while taking the advanced course. The Complaint did not allege gross negligence, and did not file an

² Validity of the waiver and release is disputed, and discussed herein.

amendment to assert that theory. The *Boyce* Court also found that the only liability evidence was in support of a negligence theory. *Boyce* at p. 597

In this case, however, the trial court granted plaintiff's motion to amend the Complaint to include a claim of Gross Negligence (CP 258). The evidence presented was sufficient to deny defendant's motion because the evidence and reasonable inferences therefrom, would allow a trier of fact to conclude that the defendant was grossly negligent. This is particularly true because Mr. DeAsis was a business invitee³.

Gross negligence is the failure to exercise slight care. It is not, however, the total absence of care but merely less than the quantum of care inhering in ordinary negligence. *Nist v. Tudor*, 67 Wn.2d 322, 407 P.2d 798 (1965).

“The term gross negligence to have practical validity should be related to and connected with the law's polestar on the subject, ordinary negligence. *Nist v. Tudor*, *supra* at 331, 407 P.2d 798. Gross negligence, like ordinary negligence, must arise from foreseeability and the hazards out of which the injury arises. *Nist v. Tudor*, *supra* at 331, 407 P.2d 798.

Ordinarily the question of negligence is one of fact for the jury to determine from all the evidence presented. [citations omitted]. The jury's function is also to decide the foreseeability of the danger. [citations omitted]. Additionally, proximate cause (cause in fact) that is, a determination of what actually occurred, is generally left to the jury.[citation omitted].”

³ It is important to note that the *Boyce* case on which the trial court based its decision did not involve a defendant that owed the highest degree of care. *Boyce* was not a business invitee, but it is undeniable that DeAsis was a business invitee.

Bader v. State of Washington, 43 Wn.App. 223, 228, 716 P.2d 925 (1986).

B. The Issue of Gross Negligence Presents a Question of Fact and Was Not Properly Decided on Summary Judgment.

The trial court, again relying exclusively on *Boyce v. West*, 71 Wn. App. 657, 862 P.2d 592 (1993), improperly weighed evidence to conclude that the actions of the defendant were likely negligent, but were not grossly negligent. This clearly was reversible error.

“To impose liability for gross negligence, plaintiffs must show duty, breach causation and damages.” *Liberty Furniture v. Sonitrol*, 53 Wn.App. 879, 881, 770 P.2d 1086 (1989).

There are literally dozens of Washington cases that specifically hold that the issue of whether negligence rises to gross negligence presents a question of fact for the jury, and is not properly decided by the judge on summary judgment⁴. Some of those cases are:

- *Blood v. Austin*, 149 Wash 41, 270 Pac. 103 (1928)
- *Saxe v. Terry*, 140 Wash. 503, 250 Pac. 27 (1926)
- *Eastman v. Silva*, 156 Wash. 613, 287 Pac. 656 (1930)
- *Wolden v. Gardner*, 159 Wash. 665, 294 Pac. 574 (1930)
- *Welch v. Ausetz*, 156 Wash. 652, 287 Pac. 899 (1930)

➤ ⁴ Note that in 1974 the Washington legislature repealed RCW 46.08.080 (the host-guest statute), and the Supreme Court overruled all cases that required a gratuitous vehicle guest to prove the driver was grossly negligent. *Roberts v. Johnson*, 91 Wn.2d 182, 588 P.2d 201 (1978). However, the distinction between the standard of care for negligence (ordinary care) and gross negligence (slight care) has never changed.

- *Trunk v. Wilkes*, 162 Wash. 114, 297 Pac. 1091 (1931)
- *Gough v. Smalley*, 160 Wash. 193, 294 Pac. 1007 (1931)
- *Pickering v. Steans*, 182 Wash. 234, 46 P.2d 394 (1935)
- *Cotten v. Wilson*, 27 Wn.2d 314, 178 P.2d 287 (1947)
- *Miller v. Treat*, 57 Wn.2d, 358 P.2d 143 (1960)
- *Emery v. Milk*, 62 Wn.2d 617, 384 P.2d 133 (1963)
- *Nist v. Tudor*, 67 Wn.2d 322, 407 P.2d 798 (1965)
- *Hanson v. Pauley*, 67 Wn.2d 345, 407 P.2d 811 (1965)
- *Grace v. Edds*, 4 Wn.App. 798, 484 P.2d 441 (1971)
- *Bader v. State*, 43 Wn.2d 223, 716 P.2d 925 (1986)

It is apparent that the trial court in this case believed that because the YMCA employee claimed to have exercised a small amount of care there was no basis on which to find gross negligence. This was a reversible error, however. In *Dole v. Goebel*, 67 Wn.2d 337, 407 P.2d 807 (1965) the Supreme Court explained that the distinction between negligence and gross negligence was to be determined by the jury.

“We have had a succession of appeals in which trial judges have taken cases from the jury because there was evidence of some care, and it was reasoned that if there was any care there was slight care, hence, no gross negligence (*Nist v. Tudor* [citation omitted]; *Trudeau v. Haubrick* [citation omitted]; *Miller v. Treat* [citation omitted]). In *Nist v. Tudor*, supra, written by Judge Hale, ‘another study of gross negligence’ was made in an effort to suggest to counsel and to trial judges certain guide lines which, if followed, would amplify our definition of gross negligence so it might be more readily applied by the trial court in given situations. Briefly stated, we there suggest that gross negligence should be closely related to the more readily understandable concept of ordinary negligence. We say:

“It means ...gross or great negligence.... substantially and appreciably greater than ordinary negligence. It’s correlative, **failure to exercise slight care, means not the total absence of care but care substantially or appreciably less than the**

quantum of care inhering in ordinary negligence.”” [emphasis added]

Dole v. Goebel, supra, at 342.

Clearly, therefore, a plaintiff avoids summary judgment when there is substantial evidence that the defendant’s act or omission indicates appreciably less care than mere negligence. However, a defendant that exhibits only some care is not entitled to summary judgment, because the issue is one for the jury, not for the court.

Ordinarily the question of negligence is one for the jury to determine, not the court. *Shea v. Spokane*, 17 Wn.App. 236, 562 P.2d 264 (1977, aff’d, 90 Wn.2d 43, 578 P.2d 42 (1978)). Furthermore, deciding the inferences to be drawn from facts are jury questions and not susceptible to summary judgment. *Bernethy v. Walt Failor’s Inc.*, 97 Wn. 2d 929, 653 P.2d 280 (1982); *Bader v. State*, 43 Wn.2d 223, 716 P.2d 925 (1986).

Whether the facts indicate a defendant’s negligence may rise to gross negligence presents a jury question. *Peter Kiewit & Son’s Co.v. Wash. State D.O.T.*, 30 Wn.App. 424, 635 P.2d 740 (1981); *Peterson v. Littlejohn*; 56 Wn.App. 1, 781 P.2d 1329 (1989).

Construing all facts in favor of the plaintiff (as the nonmoving party) the defendant’s motion for summary judgment should have been denied.

C. The YMCA Waiver and Release is Unenforceable.

Under Washington law an exculpatory contract clause is valid unless it (a) violates public policy, or (b) the defendant's breach constitutes gross negligence, or (c) the clause is so inconspicuous that a reasonable person could find it was signed unwittingly. *McCorkle v. Hall*, 56 Wn.App. 80, 782 P.2d 574 (1989).

Exculpatory clauses are construed narrowly, and against the drafter. *Markel American Insur. Co. v Dagmar's Marina, LLC*, 139 Wn.App. 469, 161 P.3d 1029 (2007).

Gross negligence is negligence substantially and appreciably greater than ordinary negligence, and an exculpatory clause is invalid when the defendant was grossly negligent. *Liberty Furniture v. Sonitrol of Spokane*, 53 Wn.App. 879, 882, 770 P.2d 1086 (1989).

"There are degrees of negligence based on the quantum of care required by a person in a given circumstance. In this state gross negligence lies somewhere between negligence and willful or wanton misconduct. ...However, by applying the standard of gross negligence, the jury should understand there is a quantum of care somewhere between ordinary negligence and that defined as willful or wanton misconduct noted earlier."

Liberty Furniture v. Sonitrol of Spokane, at p. 882.

1. Waiver and Release Violated Public Policy.

Generally, exculpatory clauses are enforceable when the plaintiff is engaged in high risk sports⁵. However, this rule does not usually apply to situations that do not involve high risk sports.

“Outside of these voluntary high-risk sports situations, our courts have often found preinjury releases for negligence to violate public policy. *McCutcheon v. United Homes Corp.*, 79 Wash.2d 443, 486 P.2d 1093 (1971) (striking down a landlord's exculpatory clause relating to common areas in a multifamily dwelling complex); *Thomas v. Housing Auth.*, 71 Wash.2d 69, 426 P.2d 836 (1967) (voiding a lease provision exculpating a public housing authority from liability for negligence); *Reeder v. Western Gas & Power Co.*, 42 Wash.2d 542, 256 P.2d 825 (1953) (finding a contractual limitation on the duty of a gas company against public policy); *Sporsem v. First Nat'l Bank*, 133 Wash. 199, 233 P. 641 (1925) (holding a bank which rents safety deposit boxes cannot, by contract, exempt itself for liability for negligence). Additionally, courts have not allowed those charged with a public duty, which includes the obligation to use reasonable care, to insulate themselves from that obligation by contract. *Wagenblast*, 110 Wn.2d 845 at 849-50, n. 8, 758 P.2d 968 (1988) (where a defendant is a common carrier, an innkeeper, or a public utility, an agreement discharging the defendant's performance will usually not be given effect); *see also American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 230, 232, 797 P.2d 477 (1990) (professional bailees may not limit their liability for negligence, but nonprofessional bailees may contract to limit their liability for negligence); *Scott*, 119 Wn.2d at 494-95, 834 P.2d 6 (preinjury release of a party's liability for negligence which releases a child's cause of action for personal injuries, even in the context of high-risk sports, violates public policy and is unenforceable).”

⁵ *Garretson v. US*, 456 F.2d 1017 (9th Cir. 1972) [ski jumping (applying Washington law)]; *Hewett v. Miller*, 11 Wn.App. 72, 521 P.2d 244, *rev. den.* 84 Wn.2d 1007 (1974) [ski racing]; *Blide v. Rainier Mountaineering, Inc.*, 30 Wn.App. 571, 636 P.2d 492 (1981) [mountain climbing]; *Conrad v. Four Star Promo. Inc.*, 45 Wn.App. 847, 728 P.2d 617 (1986) [demolition derby auto racing]; *Boyce v. West*, 71 Wn.App. 657, 862 P.2d 592 (1993) [scuba diving];

Vodapest v. MacGregor, 128 Wn.2d 840, 849, 913 P.2d 779 (1996).

Preinjury exculpatory clauses are not enforceable when they violate public policy, are inconspicuous, or the defendant is grossly negligent. *Eelbode v. CHEC Medical Centers, Inc.*, 97 Wn.App. 462, 984 P.2d 436 (1999). The elements of the public policy exception are articulated in *Wagenblast v. Odessa School Dist.*, 110 Wn.2d 845 P.2d 968 (1988).

The *Wagenblast* decision is succinctly summarized as: “An agreement contravenes public policy if ‘the contract as made has a tendency to evil, to be against the public good, or to be injurious to the public.’ ” *Hanks v. Grace*, 167 Wn.App. 542, 549, 273 P.3d 1029 (2012)⁶.

Plaintiff is aware this court considered the question of whether health clubs fit within the *Wagenblast* definition of a public policy exception to enforceability of exculpatory clauses. However, *Shields v. Sta-Fit, Inc.*, 79 Wn.App. 584, 903 P.2d 525 (1995) was decided nearly 20 years ago, and it is respectfully submitted that the issue bears reexamination.

⁶ Citing *Marshall v. Higginson*, 62 Wn.App. 212, 216, 813 P.2d 1275 (1991).

Shields was a case in which the plaintiff hired a personal trainer who encouraged him to remove safety equipment, thereby rendering the activity high risk for injury. In contrast to that high risk activity, Mr. DeAsis was merely walking through the hallway where he had a reasonable belief the defendant would maintain safe surface. Mr. DeAsis was engaged in simple low risk activity, and, therefore, *Shields* should be reconsidered.

There are multiple statutes cited in *Shields* that apply to health clubs (primarily Title 19.142 RCW). There are also regulations that apply expressly to defendant YMCA⁷ which make it a unique entity, and therefore the public policy exception to enforcing a release/waiver is properly applied.

2. Plaintiff Did Not Knowingly Sign a Waiver and Release Because the Acts and Omissions of YMCA Caused It To Become Inconspicuous.

A pre-accident waiver and release is unenforceable when it is inconspicuous. *Baker v. Seattle*, 79 Wn.2d 198, 484 P.2d 405 (1971). In this case the defendant's actions created a scenario that caused the plaintiff to become unaware that he was signing a waiver. It was, therefore, inconspicuous as a result of the circumstances created by YMCA.

⁷ WAC 296-17A-6203; WAC 388-832-0315.

Mr. DeAsis testified that he was unaware he was signing a release/waiver (CP 0151-0162). When the plaintiff testifies that the exculpatory clause is inconspicuous, a question of fact is created. *Johnson v. UBAR, LLC*, 150 Wn.App. 533, 210 P.3d 1021 (2009).

This court has previously explained that when the plaintiff presents evidence that an exculpatory clause in a health club was inconspicuous, there is a jury question presented and summary judgment is inappropriate.

“Whether reasonable persons in the circumstances presented could agree his signature was unwittingly made **presents an issue for the trier of fact** as does the question of whether the disclaimer language was so conspicuous that he could not have unwittingly signed the application.” [emphasis added]

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

McCorkle involved a release document for a health club member injured while using exercise equipment. The plaintiff testified that he was unaware of that he signed the application he was also signing a release. Similarly, here Mr. DeAsis testified that he was unaware that he was being asked to sign a release or waiver of his rights.

Summary judgment was inappropriate, and this matter should be remanded for trial.

3. Waiver and Release is an Unenforceable Adhesion Contract.

Furthermore, YMCA takes the surprising position that the waiver/release is enforceable because the membership agreement is an adhesion contract.

An adhesion contract is, typically, a preprinted form presented on a “take it or leave it” basis, and the other party has no bargaining power. *Yakima County (W.V.) Fire Prot. Dist. V. City of Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993); *Standard Oil of Calif. v. Perkins*, 347 F.2d 379 (9th Cir. 1965).

An adhesion contract is unconscionable where one party lacks meaningful choice. *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004). When there is no meaningful choice the bargaining is unfair. *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 544 P.2d 20 (1975); *Torgerson v. one Lincoln Tower, LLC*, 166 Wn.2d 510, 201 P.3d 318 (2009).

Here, Mr. DeAsis had no option and no bargaining power. He signed the membership application one day, and denied entrance the next day unless and until he signed a document that he thought was a credit card charge authorization. (CP 0151-0162). There is no question that the waiver/release was an adhesion contract, because YMCA admitted it was

non-negotiable and could not be revised or amended; admittance was allowed only after signing the document “take it or leave it.” (CP 0163-0196 [exhibit 2]).

It is also important to note that Mr. DeAsis received no additional consideration for signing the waiver/release. He paid his membership fee when he submitted an application, and was forced to sign the second document a day later, with no explanation other than he was denied entrance until he signed.

D. Trial Court Improperly Weighed Evidence to Grant Summary Judgment.

It is well established that a trial court is not permitted under CR 56 to weigh the evidence in deciding a motion for summary judgment. *Fleming v. Smith*, 64 Wn. 2d 181, 390 P.2d 990 (1964). A summary judgment must be reversed if the trial court fails to evaluate all evidence in favor of the nonmoving party. *Herron v. KING Broadcasting Co.*, 112 Wn.2d 762, 776 P.2d 98 (1989)⁸.

In the context of summary judgment the plaintiff has only a burden of production, not a burden of persuasion. *Barker v. Advanced Silicone Materials, LLC*, 131 Wn.App. 616, 128 P.3d 633 (2006). Because the

⁸ Citing to *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

court concluded there was more than sufficient evidence to find defendant negligent, the only question was whether the evidence would support a finding that defendant was grossly negligent. This, of course, presents a jury question, not a question of law. *Nist v. Tudor*, 67 Wn.2d 322, 407 P.2d 798 (1965).

The trial court recognized that

- ✓ defendant knew there was a slipping hazard when tile floors were wet
- ✓ defendant had mats available but chose not to use them
- ✓ the defendant had used mats in the past
- ✓ the defendant had no protocol established to respond to a foreseeable and known slipping hazard in the tile floor hallway outside the swimming pool
- ✓ the defendant failed to provide adequate instructions to swimmers how to access locker rooms without leaving hazardous puddles down a tile floor hallway
- ✓ the defendant had “wet floor” warning cones available but chose not to use them
- ✓ the defendant had used “wet floor” warning cones in the past
- ✓ the defendant could have remained at the hazard and called for assistance but chose instead to leave the area unprotected to search for a towel
- ✓ the defendant knew members used the locker room exit door where the hazard existed but chose not to take any action to warn members of the wet floor

It was reversible error for the trial court to grant summary judgment. The matter should be remanded to allow a jury to decide the issue of gross negligence.

E. Defendant Owed Highest Duty of Care to Plaintiff as a Business Invitee

The trial court completely overlooked the fact that Mr. DeAsis was a business invitee, and, therefore, the YMCA had a duty to both discover and cure the hazardous condition created by allowing patrons to leave puddles of water on a slippery tile floor.

The common law classification of persons entering a property determines the scope of duty owed by the owner/occupier. *Younce v. Ferguson*, 106 Wn.2d 658, 724 P.2d 991 (1986). In this case, plaintiff was a business invitee because he entered the YMCA premises for the purpose connected with the defendant's business. See *McKinnon v. Washington Fed. S. & L. Ass'n*, 68 Wn.2d, 414 P.2d 773 (1966).

A possessor of land owes a duty of reasonable care to invitees with respect to dangerous conditions on the land, including "an affirmative duty to discover dangerous conditions." *Jarr v. Seeco Const. Co.* 35 Wn.App. 324, 326, 666 P.2d 392 (1983). This duty is adopted by Washington courts from Restatement 2nd of Torts (1965)⁹. See: *Ford v. Red Lion Inns*, 67 Wn.App. 766, 840 P.2d 198 (1993).

As a customer of YMCA the defendant owed Mr. Deasis the duty owed to all business invitees. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d

⁹ *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wash.2d 127, 132, 606 P.2d 1214 (1980).

192, 943 P.2d 286 (1997). This is the highest level of duty owed to persons coming onto property, and includes the duty to exercise care for the plaintiff's safety. *Johnston v. State*, 77 Wn.App. 934, 894 P.2d 1366 (1995). This includes the duty to investigate, discover the hazard, and warn the plaintiff. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn. 2d 43, 914 P.2d 728 (1996).

Defendant admits it knew its floors become slippery when swimmers drip water walking down the halls, and it admits it places non-skid mats on the floors along with warning cones, sometimes but not regularly. In this instance the YMCA employee charged with keeping the area safe failed to place mats, failed to post a warning cone (although he walked right by the closet where they are kept) and left the area without curing the hazard, calling for assistance, or posting a warning. He may have been looking for a towel to clean the mess, but leaving the area unprotected was a direct and proximate cause of plaintiff's injury, and resulted from gross negligence.

In this case, therefore, YMCA had a duty to protect Mr. DeAsis from the hazardous condition that resulted from the defendant's failure to prevent a foreseeable and predictable hazardous condition, and also to make the area safe by removing the hazard or providing adequate warning. The actions that were taken would allow a trier of fact to conclude that the

acts and omissions of YMCA breached its duty, and the breach was a proximate cause of the plaintiff's injury.

Whether such breach was the result of gross negligence presents a jury question and summary judgment is reversible error.

VI. Conclusion

Mr. DeAsis was acting reasonably when he was leaving the YMCA using an approved and designated exit route. He had no reason to know or even suspect that the floor was wet and, therefore, hazardous, because the YMCA employee left the hazard unguarded.

There were warning cones available, and the YMCA employee could have remained at the spill while he called for assistance. This is, of course, standard protocol for every grocery store and should have been the rule here, but YMCA provided no training to its employees on how to respond to this type of emergency.

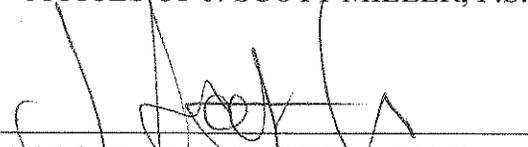
There is no dispute that YMCA was negligent, or that it was the proximate cause of Mr. DeAsis' dislocated kneecap. It was reversible error for the trial court to weigh the evidence and conclude that a trier of fact would not find the acts and omissions of YMCA were grossly negligent.

Plaintiff requests that this matter be remanded for trial.

DATED: August 2, 2013.

LAW OFFICES OF J. SCOTT MILLER, P.S.

By:



J. SCOTT MILLER, WSBA #14260
Attorney for Appellant DeAasis

CERTIFICATE OF SERVICE

I declare, pursuant to RCW 9A.72.085 and under penalty of perjury under the laws of the State of Washington, on August 2, 2013, that a true and correct copy of the foregoing was duly served on all parties entitled to service by the method listed below, addressed as follows:

<input checked="" type="checkbox"/>	Hand delivery	Patrick J. Cronin
<input type="checkbox"/>	Overnight mail	Winston & Cashatt
<input type="checkbox"/>	U.S. Mail	601 W. Riverside, Suite 1900
<input type="checkbox"/>	Fascimile	Spokane, WA 99201
<input type="checkbox"/>	Email	838-1416- fax


LISA S. MITTLEIDER, Paralegal
Law Offices of J. Scott Miller, PS

APPENDIX 1

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MAY 22 2013

**LAW OFFICES OF
J. SCOTT MILLER, P.S.**

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

DANNY BOY DeASIS,)	
)	CAUSE NO. 12-2-00862-0
Plaintiff,)	COA CAUSE NO. 315312
)	
vs.)	
)	
YMCA,)	
Defendant.)	

TRANSCRIPT OF PROCEEDINGS
November 7, 2012

Proceedings had before the HONORABLE RICHARD BARTHELD, Judge,
Yakima County Superior Court, Yakima, Washington, on November 7, 2012.

<u>APPEARANCES:</u>	<u>FOR</u>
J. SCOTT MILLER	DeAsis
201 W. North River Drive	
Suite 500	
Spokane, WA 99201	
PATRICK CRONIN	YMCA
601 W. Riverside Avenue	
Suite 1900	
Spokane, WA 99201	

Transcriber:	Brittingham Transcription Service
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	P.O. Box 321
	Moses Lake, WA 98837
	509/594-2196

PROCEEDINGS

1
2 BE IT REMEMBERED that on the 7th of November, 2012, in the
3 Superior Court of the State of Washington in and for Yakima County,
4 the matter of the *Danny Boy DeAsis v. YMCA*, was heard, before the
5 Honorable Richard Bartheld. The following proceedings took place:

6 CLERK: The Honorable Richard Bartheld presiding.

7 CRONIN: Good morning, Your Honor.

8 JUDGE: Good afternoon gentlemen.

9 CRONIN: Or good afternoon, excuse me. I'm Pat Cronin
10 from Spokane.

11 MILLER: Scott Miller, Your Honor.

12 JUDGE: It's a pleasure to meet both of you gentlemen.

13 CRONIN: Thank you.

14 JUDGE: Gentlemen, this is the matter of --- how do you
15 pronounce your client's name?

16 MILLER: DeAsis, Your Honor.

17 JUDGE: DeAsis, Danny DeAsis, Plaintiff versus Young
18 Men's Christian Association of Yakima, otherwise known as the YMCA,
19 cause number 12-2-00862-0. This matter comes on for hearing before
20 the Court on a Motion for Summary Judgment filed by the Defendant in
21 this case, and a counter motion for Summary Judgment filed by the
22 Plaintiff.

23 Gentlemen, I want you to be advised, I have read the
24 materials in this case. I have reviewed the statutory and case law
25

1 authority that you cited and so forth, Mr. Cronin, I'll give you the
2 floor.

3 CRONIN: Thank you very much, Your Honor. It's a pleasure
4 being here. At the start, Your Honor, I'd like to just recite a brief
5 bit of procedural history. We were here in Yakima County Superior
6 Court for oral argument on the same issue back in June and at that
7 time, Mr. Miller had filed a motion under CR 56(f) for a continuance
8 to obtain more discovery and he did obtain that discovery. And that
9 included the deposition facilities director of our local Y and two
10 employees at the Y, one involved with the membership application, as
11 it relates to Mr. DeAsis and the other, a young man who cleaned up the
12 water in the area where Mr. DeAsis fell. And then, subsequent to that
13 in Spokane, I deposed the Plaintiff back in July, I think it was the
14 end of July.

15 Really, here's --- here's what we have. We have a
16 situation where Mr. DeAsis became a member of the Y and as an absolute
17 requirement of becoming a member there, he is required to sign a
18 release and liability waiver that includes indemnification language
19 and also includes a covenant not to sue.

20 Now, there's no question in this case that he did --- other
21 than he signed it, there's no dispute that it is not his signature.
22 There's some question about as to what date it might be, but there's
23 no question that his signature, in fact, is on it.

24 Washington law provides that there is, you know, generally
25 a person doesn't owe a duty to another, unless there is a law that

1 provides that there is such a duty and negligence. And here, our
2 courts have told us that you can contract away any, otherwise at law,
3 duty by the way of an exculpatory clause, which is the type of clause
4 that was used here in the contract. And our courts have looked at
5 these exculpatory clauses and they've given us some instructions and
6 they have basically told us that we can use these clauses so long as
7 the language is in it conspicuous, a word I know we all mean and
8 sometimes we interchange with conspicuousness, but one that --- one
9 that means that the information is clear. That it --- it speaks to
10 the kind of harm that is being avoided by contract.

11 Our courts tell us that the language must be inconspicuous;
12 that the clause itself must not be void as against public policy and
13 that the terms of the release, generally, must apply to the type of
14 harm that eventually is suffered.

15 And here, I think that there's no question that the
16 language is inconspicuous. It is bolded, capitalized, set apart from
17 other language. It is clear when one reads it as to what it is saying
18 and it is saying that the party who signs it agrees that they are
19 releasing all claims in negligence against the YMCA, as well as
20 holding them harmless and covenanting separately not even to sue the
21 YMCA.

22 As the Court knows, the issue of inconspicuousness is a
23 question of law. It is not a question of fact. It is therefore,
24 proper for this Court to determine, by looking at that language, that
25 reasonable minds cannot differ but that it is so clear that it

1 inconspicuous and I might add, as you see in the multiple pages of
2 briefing, this same exact language has been found to be inconspicuous
3 in other courts around the nation. We use the same language this YMCA
4 used and this type of language has also been found to be inconspicuous
5 by a Division III decision in this court in the *Shields v. Stay Fit*
6 matter, a case that originated in Spokane.

7 JUDGE: Let me interrupt you counsel. Do you mean
8 conspicuous?

9 CRONIN: Conspicuous, excuse me.

10 JUDGE: Okay, you used the word inconspicuous several
11 times.

12 CRONIN: Yes, you're right. Well ---

13 JUDGE: I wasn't sure if you were ---

14 MILLER: You should continue.

15 CRONIN: That's why I said, I think I said at the
16 beginning that sometimes we might interchange them, but thank you.
17 The language here is conspicuous by its being set off in different
18 type, by being not buried within a contract, not hidden between other
19 language, not being printed in small type, but by being set forth in
20 fact in a --- you know, as I said, in bold and capital letters calling
21 attention to itself, making it by fact, conspicuous and that it has,
22 as well, a signature line underneath it where the person who signs
23 says that they acknowledge that they actually have read it and that
24 they are making this act as a free and voluntary act.

25

1 Now, some would argue that these types of releases may not
2 be favored under public policy or in another way of saying it, might
3 be void as against public policy, but this Court or our Courts in this
4 State have already looked at that issue in terms of public policy
5 factors with respect to health clubs using releases like here and I
6 don't know that one can find a case more on point than the *Shields v.*
7 *Stay Fit* case out of Spokane, a Division III case in which Chief Judge
8 Sweeney analyzed that language and then went through various factors
9 of discussing the public policy implications and basically said,
10 health clubs are free to make these kind of contracts. The services
11 they provide are not essential services, like a school would provide,
12 like a monopoly utility would provide or like a hospital would provide
13 and a person, while a contract can be viewed as having some
14 adhesiveness to it, a person is not bound to sign it. They can choose
15 to go to another health club facility. They can choose not to work
16 out. They can choose to buy their own weights and the kind of things
17 that Judge Sweeney said in that case were they could buy their own
18 treadmill, they could buy their own stair master, weights, etc.

19 And I think you'll see in the case law that since the
20 *Shields* case and going into the *Bally's* case, another health club case
21 where they found language like this, not inconspicuous, that the
22 Courts quit discussing in these cases, the public policy arguments
23 because it's well established in Washington law.

24 One of the other things, one of the other factors you look
25 at when looking at exculpatory clauses like this, are whether they are

1 directed at the kind of injury that ultimately occurs. And in this
2 case, I can read you word for word for it, but it's clear that the
3 language here applies to the type of injury that Mr. DeAsis allegedly
4 suffered or actual injury that he did suffered by slipping and falling
5 on the premises. The language in the YMCA release talks about any
6 injuries that occur on its premises and it uses the actual word,
7 negligence.

8 Other factors that help even cement further the
9 conspicuousness of it because it talks about releasing claims, waiving
10 claims that go to negligence or injuries that occur on the premises.
11 I might add that we also state in there that as a consideration for
12 even entering the premises, we use the word consideration, one must
13 sign this agreement. So, there really is no choice if you want to
14 become a member, you must sign the agreement.

15 With respect to there being consideration for these types
16 of agreement, which is talked about in Mr. Miller's brief, our Courts
17 have held that the agreement itself is enough to provide a
18 consideration, the regular agreement that Mr. DeAsis entered here.

19 Now, one other way of collaterally attacking these types of
20 agreements is by argument that the kind of harm suffered amounts to
21 gross negligence. And our Courts and Am Jur, etc., have defined gross
22 negligence for us as cases that involved --- that involved not even
23 slight care. In fact, I think the scale that one of the cases sets
24 forth is having simple negligence on one end, willful and wontedness
25

1 in the middle and essentially torts or criminal intent at the other
2 end.

3 And in this particular case, the facts are that Mr. DeAsis
4 was walking or excuse me that a patron of the Y was walking down a
5 hallway and was slightly dripping after coming out of the pool area
6 and being disoriented as to where to go. As it so happens, a YMCA
7 employee was in the same hallway with her. He noticed that she was
8 dripping and he immediately went to the best place to remedy the
9 situation, to the pool aquatics office to grab a couple of towels to
10 go back and to wipe this up, to take care of the spill.

11 Believe it or not, during the time that he walked a few
12 steps, as he testifies in his deposition, to the aquatics office to
13 grab the towels and turns around and looks out the glass window of the
14 door of the aquatics office, Mr. DeAsis, unfortunately, comes up
15 another entrance, walks down the same hallway, feet away from the YMCA
16 employee, and slips and falls and becomes injured.

17 I think there is, in my opinion, but there's --- there's no
18 substantial evidence here that there is any gross negligence on behalf
19 of the Y. The Y person acted appropriately in immediately going to
20 grab towels to remedy the situation and did it, as I said, but just
21 walking a mere number of feet to get the towels. So, therefore, I
22 think that there's no question that there is no substantial evidence
23 of anything other than an allegation of a slight negligence.

24 Separate of the release and waiver provision is a covenant
25 not to sue and we've not spent a lot of time on briefing that, other

1 than to re-inform the Court that the covenants not to sue are also
2 valid under Washington Law when they are contained in contracts and
3 one could argue that Mr. DeAsis suit should not even be here because
4 of this covenant not to sue.

5 Now, the heart of the matter is this, that Mr. DeAsis
6 doesn't remember signing the agreement. He has not said that we
7 forced him to sign it. He has not said that tricked him into signing
8 it. He has not said that we covered up the essential terms of it. He
9 simply sets forth his subjective believe that he thinks that what he
10 signed was perhaps a credit card application.

11 The law doesn't protect adults as against not reading their
12 contracts. Mr. DeAsis is over the age of eighteen, he is educated, he
13 understands the English language, he's familiar with contracts and he
14 was given the opportunity to read the agreement before signing. He
15 has admitted in his deposition that the signature is his and it was
16 signed on the 18th.

17 Now, anecdotally, there's evidence in the record that he
18 can't even enter the facility until he has signed the agreement and
19 since it apparently it wasn't signed on the 17th, the day before, a
20 computer code was entered and he was not allowed to even enter the
21 building to go to the exercise area until he remedied that situation
22 and he admits that on the 18th, in deposition, he tried to get into the
23 building, his card would not work, he went to the front desk, a
24 computer code was generated that said that he needed to sign the
25 agreement, it was given to him and he signed it.

1 And on that subject, he has attested, in writing, by
2 signing above the line and below the language that he was read and
3 understands the agreement. I think we have to hold Mr. DeAsis to his
4 contract here, Your Honor, and that is the contract of --- the release
5 that he has signed and I think that's what Washington law tells us we
6 must do as well. Thank you.

7 JUDGE: Thank you, Mr. Cronin. Mr. Miller?

8 MILLER: Thank you, Your Honor. Mr. Cronin and I agree
9 that Mr. DeAsis was not allowed to do anything at the YMCA without
10 signing a document. That's about as much as we agree on at this
11 point. Your Honor, I think that if we stop from the top of the issue
12 it is that a property owner owes a certain responsibility to business
13 invitees and there's no question about it, the YMCA owned the property
14 and that Mr. DeAsis was a business invitee.

15 Then, there is an exception to the general rule that the
16 business invitee owes a duty to not only know what is wrong with the
17 property, but to investigate and cure errors in the property. So, in
18 this particular instance, we're faced with a waiver agreement that the
19 YMCA wants the Court to enforce to the point where Mr. DeAsis and
20 others would not be allowed to protect themselves from the errors of
21 the YMCA.

22 I believe that the intent of the --- this type of waiver,
23 if one looks at all of the cases around the country and the cases that
24 have been cited to you, that the intent of this waiver is with respect
25 to people who are working out and the weight falls on their foot or

1 they strain themselves or something of that nature, not that the
2 facilities themselves are unsafe, that the owners of the facilities
3 have failed to maintain them in a way that a business invitee would
4 reasonably expect them to be maintained. So, when Mr. DeAsis goes in
5 and signs his application, he is not told that there's any kind of a
6 waiver attached to this. As a matter of fact, it's a two sided
7 document and I don't think there's any dispute that --- I'm not aware
8 of a dispute that the one side was signed on the day that Mr. DeAsis
9 was there and then when he returned and tried to swipe his card that
10 the card didn't work and that's the point of which he turns around ---
11 it's actually just literally turn around and the desk is right there.
12 So, he's trying to swipe his card through the card machine, it doesn't
13 work, he turns around, they call up his name and find out that there's
14 a flag on the account, that he hasn't signed something. Well, he
15 isn't told what it is he signed. He hasn't been given any additional
16 information that he needs to sign a waiver or a release of any kind.
17 Instead, they simply say, you gotta sign this.

18 Well, that raises two issues for me. The first one is,
19 whether or not he was aware of what it was he was signing. As Ms.
20 Jacobson testified in her deposition, the protocol at the YMCA was to
21 go through it with them when they're done to make sure they filled
22 everything out and that didn't happen here. Clearly, it didn't happen
23 here because they had to ask for a second day. That's issue number
24 one that they violated their own protocol or failed to comply with it.

25

1 Secondly is, it raises a question in my mind about whether
2 or not the Court ought to be asking if there is a requirement for
3 additional consideration. I would agree with Mr. Cronin that if one
4 sits down and there is a waiver associated with a contract and it's
5 part of the contract that you're discussing, you're aware of it, you
6 know what it is you're signing, that's one thing or you leave, come
7 back the next day and they hand you another piece of paper, in this
8 case, the backside, and say sign here or you can't use your card,
9 don't we have a situation now where they've asked him to take an
10 additional step beyond what he thought he was doing and they haven't
11 told him what it is.

12 Now, I would agree with Mr. Cronin that Mr. DeAsis is not
13 asserting he can't read and write. That's not an issue. You know,
14 and to the extent that he has an obligation to read what he's signing,
15 I have to agree. Certainly, that's true. But under these particular
16 circumstances, I think the question then is either to be found in
17 favor of the Plaintiff, to allow the Plaintiff to have summary
18 judgment at this point or at the very minimum, find that there's a
19 question of fact as to whether the YMCA has given additional adequate
20 information to Mr. DeAsis at the time.

21 So, step number one, the property owner owes a business
22 invitee an obligation to keep the premises safe. Step number two, a
23 waiver is inherently a problem and the owner of the waiver who is
24 asserting that they have the right to stand immune as a result of that
25 waiver has a certain obligation to show that they've done what they

1 can do in order to convince the Court and a jury perhaps, that Mr.
2 DeAsis knew what he was signing. That at least they followed their
3 own protocol, which, as Ms. Lindsey Jacobson said, to go through it
4 with them and when they're done, to make sure they filled everything
5 out. Well, he hadn't, nor did they do it the second time. They just
6 said, sign here. That's --- that is what happened. I mean there's no
7 question about that. So, is that enough?

8 Let's assume the failure to disclose is enough. That gets
9 us then to the next question about gross negligence. Even if a waiver
10 is in place, it does not waive gross negligence. Now, the question
11 becomes have they waived anything other than negligence? I don't
12 believe that the waiver is intended or should it be applied to this
13 kind of a circumstance. It would apply if he hurt himself working
14 out, if he had bonked his head on the side of the pool, something
15 along those nature --- along those lines, but failing to clean up the
16 floors. Now, if we were a grocery store and we were talking about a
17 grocery store clerk that saw a problem on an aisle and left the scene
18 in order to find the cleanup, we all know how that's going to come
19 out. That's going to say the grocery store has an obligation to
20 inspect, find, cleanup and not leave the problem behind.

21 Here, Mr. Vanderhouf had the capability not only of picking
22 up the cone, because remember, he's following this lady down the hall
23 and he walked right by the closet where the cones are kept. He could
24 have grabbed one of those slippery floor cones if he intended to go
25 get the cleanup and do it himself. Instead, he just left the scene.

1 It doesn't matter how far away he went, you know, it's gonna happen.
2 If he's gone for ten seconds or ten minutes, somebody's going to come
3 back down that hall and it's either Mr. DeAsis or it's going to be
4 somebody else.

5 So, as he's gone from the scene, he left the hazard behind,
6 which he knew was there and had never been trained on. So, there's
7 another question about gross negligence. Number one, he had an option
8 to pick up a cone. Number two, he chose not to stand there and guard
9 that until another employee came. He had a cell phone in his pocket,
10 which he used later to call for a wheelchair. So, he could have
11 called for somebody to come help him then.

12 Instead, he took it on himself to make a decision to go
13 find a towel and come back and clean up the mess. By the way, it's
14 dripping all the way down the hall. So, we're not sure how many
15 towels it would take. And to refer to it as slightly dripping, I
16 would take issue of Mr. Cronin's characterization. That isn't what
17 Mr. Vanderhouf described.

18 At any rate, if we get to the waiver question and if we
19 then get to the question about whether or not YMCA was negligent in
20 not using a cone, not leaving a guard behind and calling for
21 additional help, not bringing a floor mat out to an area that --- they
22 have floor mats. They put them out there when they know people are
23 going to be dripping. There are floor mats nearby. He could have
24 gotten a floor mat. There are any number of things that could have
25 happened. The question then is, would a jury find that that was mere

1 negligence or gross negligence. That's a jury question, Your Honor,
2 about we all know what they did and didn't do. Does that rise to
3 gross negligence or not. That, I would submit, is at the very
4 minimum, a jury question. I would suggest that it's probably
5 appropriate to find in favor of the Plaintiff on these issues. Given
6 the circumstances that there was no training, there was no indication
7 that there was any urgency that called Mr. Vanderhouf away, another
8 emergency of some kind and he could have taken different action had he
9 been properly trained.

10 To say that Mr. DeAsis signed the document and is therefore
11 bound by it, ignores the reality of the fact that the circumstances
12 were such that he wasn't given an opportunity to sit down and read it.
13 If he was given that opportunity, we wouldn't be here. I would have
14 to agree with Mr. Cronin under those circumstances. If Mr. DeAsis was
15 given a chance to sit down and as Ms. Jacobson testified, go through
16 it with them and make sure they filled everything out. Okay, I would
17 be unhappy with it, but I would have to say, under those
18 circumstances, they at least followed their own protocol. Here they
19 didn't.

20 So, when we go through the wagon blast factors, as I
21 believe the Court can do under these circumstances, I think you end up
22 with a conclusion that this is a waiver that should not be enforced at
23 this time.

24 Now, perhaps under circumstances where somebody was injured
25 under, you know, in the weight room or in the pool or doing what the

1 YMCA is there to be done, that's one thing, but this is different.
2 So, therefore, I think that preventing the Plaintiff from proceeding
3 to trial at this point would be incorrect.

4 And I think that's all I have, Your Honor, unless you have
5 any questions for me.

6 JUDGE: Well, thank you very much. Mr. Cronin, any
7 follow up comments?

8 CRONIN: Yes, just a few, Your Honor, thank you. First,
9 we don't really analyze this case based on whether there's invitee law
10 that applies. We examine this case on the basis of whether there was
11 a valid exculpatory clause. I take issue with an argument otherwise
12 than that.

13 Next, Mr. Miller talked about cases and he says that it's
14 his belief that some of those cases, that exculpatory clauses are only
15 for, you know, dangerous activity. That's just untrue. There's no
16 case that says that exculpatory clauses only apply to parachuting,
17 only apply to scuba diving, only apply to archery or inherently
18 dangerous activities. In fact, when the Court looks at the language
19 used and all kinds of language is set out in this briefing, the Courts
20 going to great pains to talk about these exculpatory clauses applying
21 to any harm and under the "any" is simple negligence and premises
22 liability and a slip and fall. Why would we put the word premises in
23 if we didn't intend that the kind of harm that we wanted to bargain
24 away by an exculpatory clause would be a slip and fall on our
25 premises.

1 Mr. Miller talks about there being some kind of protocol.
2 Well, that may be fine, but sometimes we ask them to read and sign all
3 the documents in one way and perhaps another time we give them the
4 documents and don't make comment, but there is no law that says in
5 Washington that you must explain a release line by line. Cases that
6 say that, *Stokes* faced a similar issue. *Stokes* said that, *Shields v.*
7 *Stokes* or *Stay Fit*, excuse me, it was *Stokes* that said that and
8 *Shields* case talks about that as well that you don't have to explain a
9 release line by line.

10 We are not required to explain what the word waiver means,
11 what the word release means. Those are questions for you. Not
12 questions for Mr. Miller and me, as they are questions of law.

13 Mr. Miller talked about additional consideration. Well,
14 first let me make this point. If in fact the release was signed on a
15 different day and in fact it's not just a dating error on the 17th on
16 one side of the release and the 18th on the other, then wouldn't that
17 make the release by itself even more conspicuous because here it is,
18 take a look at it. It doesn't say credit card agreement on it.

19 We are not required to determine how much time it takes a
20 person to read a release, to sit them down and say oops you signed
21 that too fast. We're required to give it to them. Give them to the
22 opportunity to read it and your --- the decision you have to make is,
23 is the language conspicuous? And I believe that there's --- that all
24 the case law and this release here establishes that it is conspicuous
25 as a matter of law.

1 Next, trying to get this out on summary judgment, away from
2 summary judgment by alleging that there might be gross negligence and
3 therefore it's a jury to decide is just not as genuine as the facts
4 are that are presented themselves. The question is whether you can
5 sit here and look at this and determine if there is any substantial
6 evidence of gross negligence, like shooting at someone, like driving
7 ninety miles an hour down Second Street in town here, but the mere act
8 of an employee noticing that there's water and going to take care of
9 it by walking a few steps to get a towel, I think is the very
10 demonstration of slight care or even care that is adequate under the
11 circumstances, as such that the release should not be voided on any
12 grounds approaching gross negligence.

13 Your Honor, I think that all of us here are really truly
14 bound by the decision of the Division III Court of Appeals in *Shields*
15 *v. Stay Fit* in finding this kind of release under these facts as valid
16 and enforceable and on a separate ground that we have the covenant
17 issue where Mr. DeAsis signed the covenant. Absent any questions,
18 I'll sit down.

19 JUDGE: Okay, thank you. Mr. Miller, I actually do have
20 a question.

21 MILLER: Yes.

22 JUDGE: You had indicated that on the 17th of November he
23 came in, completed the membership application and signed it and then
24 was called upon to sign another agreement the next day and you address
25 that issue primarily as it dealt with consideration.

1 MILLER: Yes.

2 JUDGE: And the suggestion that perhaps the second
3 signing should have been supported by additional consideration. I
4 have looked at the Affidavit of Mr. Cronin originally filed in this
5 case in May and there is attached to as Exhibit 1, which appears to be
6 the membership application, the front side and the reverse side, and
7 that is substantially similar to your Exhibits 1 and 2 attached to ---

8 MILLER: Should be Plaintiff's brief, Your Honor.

9 JUDGE: Plaintiff's brief, yes. I don't see that he
10 signed the front half of that.

11 MILLER: Thank you and that was --- he didn't.

12 JUDGE: Okay.

13 MILLER: The testimony from both Mr. DeAsis and Lindsey
14 Jacobson was that she signed the front page on the 17th. That when
15 they then --- when Mr. DeAsis then came back and tried to use the
16 facility the following day, the computer said, no you can't get
17 through and that's the point in which he signed it and dated it.

18 JUDGE: Okay and that's what I understood the evidence
19 was in this case, but I just wanted to make sure I was looking at the
20 same instrument.

21 MILLER: You are. Thank you for correcting me on that.

22 JUDGE: Okay, is there any other comments you want ---
23 you also have a Motion for Partial Summary Judgment in this case and
24 I'll give you the last word on this matter.

25

1 MILLER: Thank you, Your Honor. The only other thought
2 that I had in the process of this was looking back to Mr. DeAsis'
3 Affidavit in which he --- he said I was handed a piece of paper and
4 told I could sign it or not get in. That by definition is an adhesion
5 contract.

6 JUDGE: Thank you. Gentlemen, the Court has reviewed the
7 various declarations in this case, which includes the declarations of
8 the Plaintiff, it includes excerpts from various depositions in this
9 case, including the Plaintiff himself, Ms. Jacobson, Mr. Vanderhouf
10 and Mr. Romero, in trying to determine what the facts were in this
11 case.

12 The Court is mindful that on a Motion for Summary Judgment
13 that the Court has to look at the facts in a light most favorable to
14 the non-moving party. And the Court finds that the undisputed facts,
15 looking at it in a light most favorable to the Plaintiff is that he
16 was a member of the YMCA of Yakima in 2008, that he reapplied for
17 membership on November 17, 2010, that he completed an application for
18 membership which appeared on a front side of a two sided agreement.
19 He did not review or complete the reverse side of the agreement, which
20 contained a release and waiver of liability indemnity agreement. The
21 front side of the application does not bear a signature line for the
22 applicant, however, it does bear the staff initials of Lindsey
23 Jacobson and is dated November 17, 2010.

24 On November 18, 2010, the Plaintiff attempted entry into
25 the facility by swiping his membership card. He was denied access. A

1 YMCA employee explained the card was not activated as he had not ---
2 as he had additional paperwork to complete. He was handed the reverse
3 side of a membership application and was asked to sign it. The
4 Plaintiff did not read the document before signing it and he believed
5 he was signing a document authorizing the YMCA to charge his credit
6 card for membership dues. The YMCA employee did not request him to
7 read the document first before signature. Lindsay Jacobson ordinarily
8 requests new members to read and sign the document when handed the
9 membership agreement.

10 On August 30, 2011, Plaintiff slipped and fell on water in
11 the hallway next to the aquatic center office. Then, Mr. Vanderhouf,
12 an employee of the YMCA had followed another member down this hallway.
13 She was wearing a bathing suit that was dripping water and apparently
14 she had stopped at the aquatic center office to inquire or make
15 inquiry on how to get back to the dressing room. He happened to be
16 following her and he noticed, as she was standing there by the office,
17 that she was dripping water and that water was accumulating on the
18 floor.

19 He entered the office to retrieve towels to wipe up the
20 water in the hallway. He, as he reached for the doorknob to exit the
21 office into the hallway to wipe up the water, he observed through the
22 glass window, the Plaintiff slip and fall.

23 The Plaintiff brought suit against the YMCA alleging
24 negligence for failing or refusing to make the area safe or provide
25 adequate and effective warnings of hazardous or unsafe exit, was the

1 word used by the Plaintiff in this case. The Plaintiff does not
2 allege gross negligence, nor has the Plaintiff sought to amend its
3 complaint to allege gross negligence.

4 The Defendant in this case moves for Summary Judgment
5 arguing that the membership application includes a valid waiver
6 releasing the YMCA from liability for loss, damage, injury or death.
7 The Plaintiff argues that the release and waiver is unenforceable for
8 a variety of reasons, which include failure of consideration, that it
9 is an adhesion contract, that the waiver is unenforceable because it
10 was rendered inconspicuous by the staff's failure to instruct him to
11 read the document, that the acts or omissions of the YMCA constitute
12 gross negligence and that the waiver violates public policy when
13 applied to low risk adult activities.

14 The Court finds in this case that really the undisputed
15 materials issues in this case --- undisputed materials issues of fact
16 in this case are that the Defendant or excuse me, the Plaintiff admits
17 that he signed the release provided to him on November 18, 2010. The
18 Plaintiff does not allege that he was given insufficient time to read
19 or sign it. He does not allege that he was pressured to sign without
20 reading or that the Defendant's staff misrepresented the document to
21 him or that the release was hidden in the document or printed in a
22 fashion that was not conspicuous. He asserts that he did not read the
23 document because he wasn't told to read it and he assumed that he ---
24 it referred to an authorization to charge dues to his membership or
25

1 excuse me that it referred to authorization to charge his credit card
2 for his membership dues.

3 The waiver in this case states in bold print, capital
4 letters, set apart from other provisions, the words release and waiver
5 of liability and indemnification agreement. The Plaintiff fell on
6 water that had been on the floor for a short time. Staff entered into
7 the office to obtain the towels to wipe it up and the --- Mr.
8 Vanderhouf also testified that it would have taken longer for him to
9 secure the warning sign to place on the floor than to gather the
10 towels and wipe up the water outside the office.

11 On the issue of consideration, the Court is convinced that
12 the waiver is supported by consideration. The membership contract
13 contains the release of liability and in itself states that that
14 release is given in consideration of being permitted to use the
15 facilities, services and programs of the YMCA and this is a
16 requirement of all members that join the YMCA in this case. As a
17 result of allowing the Plaintiff into the facility, he agreed to pay
18 for those services and he agreed to sign a release of liability and
19 that is sufficient under Washington Law to constitute consideration.

20 The next issue deals with adhesion contract and when I
21 analyzed the issue of adhesion contract, in my mind clearly this is an
22 adhesion contract. But the concept of an adhesion contract is really
23 addressed in the analysis of whether or not the exculpatory contract
24 violates public policy because if you look at the factors four and
25 five in the *Wagon Blast* decision, that's specifically what they deal

1 with. Public policy considerations are the real issue that *Wagon Blast*
2 deals with and public policy considerations, as they apply to health
3 and fitness clubs and exculpatory clauses were addressed by the Court
4 in the *Shields* case.

5 This Court found Judge Sweeney's analysis of the six
6 factors in *Wagon Blast* to specifically find that exculpatory clauses
7 do not, as a matter of law, violate public policy as they relate to
8 health and fitness clubs. Judge Sweeney's decision addressed each of
9 the six *Wagon Blast* factors, including the issue of adhesion contracts
10 and concluded that services provided by health and fitness clubs are
11 not essential and the issue of "bargaining power therefore is not so
12 disparate as to trigger the application of this *Wagon Blast* factor."

13 The next suggestion is is that the actions of the
14 Defendant's staff rendered the release of liability inconspicuous. I
15 note that the Plaintiff did not reference a single case that stands
16 for the proposition that failure to direct somebody to read a document
17 before they signed it renders that document inconspicuous and in fact,
18 the one case that is cited by the Plaintiff, the *Johnson v. UBAR LLC*,
19 case actually addresses the requirements that waivers and releases in
20 fitness club memberships must be conspicuously displayed and the Court
21 reviewed, in that case, a number of cases identifying cases where the
22 Court upheld conspicuous display and other cases where the Court found
23 that those releases and waivers were not conspicuously displayed in
24 the agreement.

25

1 The factors that the Court found in this particular waiver
2 are is that number one, the waiver and release was set apart from the
3 application. It appeared on the reverse side of it. The hearing or
4 the heading in this case was in capital letters, bold print and in
5 larger font size in the body of the waiver itself. There's a
6 signature line for the Plaintiff's signature immediately following the
7 exculpatory agreement that the line above the signature line states in
8 capital letters, "I HAVE READ AND UNDERSTAND THIS DOCUMENT AND
9 RELEASE." The Court also finds that it was clear that it applied to
10 the release and waiver of liability.

11 The document was signed the day following the application
12 submission and presumably was not assembled with other documents and
13 was presented to the Defendant on November 18th as a single document.
14 The Court also found interesting the initial paragraph of that waiver
15 and that waiver or that initial language actually specifically deals
16 with the issue of business invitees and latent and paten defects and
17 specifically sets out that the person signing the agreement
18 acknowledges that they have inspected and found the premises to be in
19 proper condition and they accept the liability of any paten or latent
20 defects. I'm paraphrasing the language, I'm not quoting it
21 specifically, but then after that paragraph in very bold print then we
22 have the issue of the heading and so forth. And actually, when I
23 looked at the cases cited in that *UBAR LLC* case, the *Schvalia (ph) v.*
24 *Booth Creek's Ski Holdings*, case, the *Stokes v. Bally's PAC West Inc.*,
25 and the *Condura (ph) v. Four Star Promotions*, case in all of those,

1 the Court found that the release and waiver of liability was
2 conspicuous and it was conspicuous in this case because the factors
3 were substantially similar that I have just gone through, the fact
4 that it was set apart, that it was --- it had bold print, capital
5 letters and so forth.

6 If you look at the factors in those three cases, *Schvalia*,
7 *Stokes*, and *Condura*, the findings of the Court are almost identical to
8 the findings that this Court makes in this particular release.
9 Clearly, the language would have been conspicuous to Mr. DeAsis.

10 MILLER: DeAsis.

11 JUDGE: DeAsis, if he'd have read it and that's really
12 the bottom line. He chose not to read it and the Court cannot find a
13 circumstance where the case law requires that he has to be told to
14 read it before he reads and signs a waiver.

15 The next issue is whether or not the acts constitute gross
16 negligence and this area gave the Court some considerable trouble
17 because at first glance, I thought if the --- somebody's going to have
18 to determine whether it's ordinary negligence or gross negligence.
19 Isn't that really a question for the jury?

20 Well, my inquiry led me first stop to the Washington Jury
21 Pattern Instructions and WPI 10.07 defines gross negligence as "the
22 failure to exercise slight care. It is negligence that is
23 substantially greater than ordinary negligence. Failure to exercise
24 slight care does not mean the total abstinence of care, absence of
25 care, but care substantially less than ordinary care." And it cites

1 the *Boyce v. West* case as standing for that proposition. The *Boyce v.*
2 *West* was cited in the Defendant's Reply Memorandum, but it was also
3 discussed in this WPI instruction and I went to that case and *Boyce*
4 stands for the proposition that to raise an issue of gross negligence,
5 there must be substantial evidence of serious negligence. And
6 interestingly, the *Boyce v. West* case involved an exculpatory clause
7 and the Court dealt with the rule of law that gross negligence may
8 render a release of liability agreement unenforceable and that's the
9 *Bly v. Rainier Mountaineering* case. In other words, if there's gross
10 negligence, then you can get around those exculpatory clauses.

11 The case goes onto state to defeat summary judgment, the
12 Plaintiff alleged Defendants were grossly negligent and contended that
13 there was a material issue of fact concerning the Defendant's conduct
14 in that case. In other words, it was an allegation and substantiated
15 by argument of counsel. And the Court held and I found this
16 incredibly instructive, "a Defendant can point out to a trial court
17 that the Plaintiff lacks competent evidence to support an essential
18 element of the Plaintiff's case, is entitled to summary judgment
19 because a complete failure of proof concerning an element necessarily
20 renders all other facts immaterial. Evidence of negligence is not
21 evidence of gross negligence. To raise an issue of gross negligence,
22 there must be substantial evidence of serious negligence." And so the
23 Court held in that *Boyce* case that not only is gross negligence a
24 basis to avoid an exculpatory clause, but there has to be specific
25 evidence of gross negligence.

1 The facts in this case are pretty similar to that in *Boyce*
2 *v. West*. In that case, in *Boyce v. West*, the Plaintiff neither
3 alleged gross negligence in his complaint nor amended it to make that
4 allegation. They supplied no evidence suggesting an allegation of
5 gross negligence and the Court found that without some showing of
6 substantial non-compliance or substantial non-compliance with a duty
7 owed, that there --- it is something subject to summary judgment.

8 I went through the allegations in this case and counsel
9 very distinctly sets forth the factors and the facts that he believes
10 in this case would substantiate gross negligence. And in this
11 particular circumstance, the Court clearly agrees that the conduct, as
12 alleged in this case, may violate a standard of ordinary negligence,
13 but simply cannot find any facts in this case which substantially
14 supports a theory of gross negligence.

15 The deposition testimony of Mr. Vanderhouf in this case is
16 pretty clear that there were small drops of water down the hallway,
17 but there was substantial drops of water right by the aquatic center
18 office where the woman had stopped and was seeking assistance. When
19 she left, he entered the office, he testified, when asked why didn't
20 you pick up a cone, he said it would have taken me more time to pick
21 up a cone then to go a step into the office, grab two towels and come
22 out and wipe it up. He also testified in response to the question,
23 would two towels wipe up the hall or was it your intent to wipe up the
24 entire hallway? He said yes.

25

1 The unfortunate part is is that in that very small lapse of
2 time that the Plaintiff in this case came down the hallway, obviously
3 did not appreciate the fact that there was a puddle of water in that
4 particular area or several drops of water in that area, which made it
5 slippery, didn't see it and slipped and fell on the particular
6 flooring. But, the fact that Mr. Vanderhouf had stepped into the
7 office simply to secure the towels and step back out to wipe it up, I
8 don't believe rises to the level anywhere close of gross negligence in
9 this case.

10 In summary, the case law is pretty clear in this State that
11 if there is an exculpatory clause that is alleged in these types of
12 cases, the Court can avoid that exculpatory clause or the Plaintiff
13 can avoid that exculpatory clause if the Court finds that that clause
14 violates public policy or that the negligent acts fall greatly below
15 the legal standard for protection of others or that it is --- that it
16 was inconspicuous and under the circumstances of this case and the
17 facts of this case, which the Court finds are generally not disputed,
18 and again, looking at them in a light most favorable to the Plaintiff,
19 the Court finds that there is not a violation of public policy, nor is
20 there evidence that the negligent acts fall greatly below the legal
21 standard for protection of others, in this case, business invitees, or
22 that the language of this particular exculpatory clause was
23 inconspicuous. The Court simply can't find from the facts that are
24 undisputed, that these clauses were hidden or somehow that the
25 Plaintiff was misled or anything of that nature. It seems clear to

1 the Court that had he read the agreement, he would have known exactly
2 what he was signing.

3 So, I'm going to deny the Plaintiff's Motion for Summary
4 Judgment in this case. I will grant Defendant's Motion for Summary
5 Judgment. Do you have a proposed order?

6 CRONIN: I did not bring one today, Your Honor and in fact
7 I was without a secretary for the last couple days and then I thought
8 oh my gosh. Can I sent it exparte through the clerk or do I send it
9 to you or how do I do that?

10 JUDGE: You can actually just send it to the Court
11 Administrator's Office and they'll forward it to me. Actually,
12 they'll just put it in my box and I'll sign it and we'll get it filed.

13 MILLER: Can we do a combined order?

14 JUDGE: That would perhaps be the best thing and I know
15 that you're going to need to include in the order what I have
16 considered and basically, I've looked at the entire file. I started
17 with the summons and complaint and walked through all of that except
18 for the service documents, obviously, but I considered the Motion for
19 Summary Judgment, the Memorandum in Support, the Motion to Continue,
20 the Affidavit of Mr. Miller in Support of the Request for Continuance,
21 the Affidavit of Plaintiff in that regard, Mr. Cronin's Declaration,
22 Mr. Romero's Declaration, the Deposition testimony of the four
23 individuals that I named and the follow up memorandums also. So, the
24 records clear on that.

25

1 And the Court frankly sees this as effectively terminating
2 this case, so that effectively makes this case unavailable for appeal
3 on that issue. So, perhaps Judge Sweeney will take a little different
4 view under this circumstance.

5 MILLER: Your Honor, if I might, because of a couple of
6 comments that you made from the bench, we would move at this time to
7 amend the complaint to include an allegation of gross negligence.

8 JUDGE: Okay, the Court would ordinarily grant that
9 because I don't see any prejudice to the Plaintiff, but again, the
10 Court can't find any evidence of gross negligence in this case and
11 that was the basis upon which I grant the Motion for Summary Judgment.
12 I just found it curious that in the *Boyce* case that that was one of
13 the very facts that they found in that case that there hadn't been
14 that amendment. So, and it was just a similarity between this case
15 and that case.

16 MILLER: I appreciate that. I'm just trying to tie up a
17 loose end.

18 JUDGE: Alright, that's fine. Any other matters,
19 gentlemen?

20 CRONIN: So, I will prepare the order, get your signature
21 and mail it --- I just mail it to the clerk?

22 JUDGE: Yes and if you want to send an extra ---

23 CRONIN: Copies ---

24 JUDGE: Yeah, we can and self-addressed stamped envelopes
25 I think is the procedure. My clerk here could probably tell you more

1 about that procedure. Mr. Miller, I'm going to --- actually, I'm not.
2 I'm going to hold onto this just in case we have any other post order
3 motions in this. Thank you gentlemen.

4 -----ADJOURNED-----

5 (END OF TRANSCRIPT)

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C E R T I F I C A T E

1
2 STATE OF WASHINGTON)
3) ss:
4 County of Grant)

5 THIS IS TO CERTIFY that I, AMY M. BRITTINGHAM, Notary
6 Public in and for the State of Washington, residing in Moses Lake,
7 Washington, transcribed the within and foregoing transcript of
8 proceedings; said proceedings was transcribed from CD, and the same is
9 a full, true and correct record of the testimony of said witnesses,
10 including all questions, answers and objections, if any, of counsel.

11 I further certify that I am not a relative or employee or
12 attorney or counsel of any of the parties, nor am I financially
13 interested in the outcome of the cause.

14 IN WITNESS WHEREOF, I have hereunto set my hand and affixed
15 my official seal this 20th day of May, 2013.

16
17
18 AMY M. BRITTINGHAM
19 NOTARY PUBLIC
20 STATE OF WASHINGTON
21 COMMISSION EXPIRES
22 SEPTEMBER 15, 2015
23
24
25

AMY M. Brittingham
Notary Public in and for the
State of Washington
at Yakima, Washington
My commission expires: 9/15/2015