

No. 67773-0-I

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

CHELSEY M. KVIGNE,

Appellant,

vs.

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

Respondents.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

L.A. Fitness, (“LAF”) a nationwide health club chain, has all of its potential customers waive any liability for injuries caused by its own negligence. LAF’s employee dropped a 45-pound barbell on the face of one such member, Chelsey Kvigne. The employee failed to simply step away from her or set the barbell on a nearby rest while “changing his grip” on it, resulting in serious injury to Kvigne.

The trial court dismissed Kvigne’s claim against LAF on summary judgment, finding that, as a matter of law, Kvigne knowingly and intentionally waived LAF’s liability for this kind of injury.

Despite the trial court and LAF’s suggestion that this case is black and white, Kvigne’s claim should go to a jury. The evidence and public policy dictate that LAF should not be able to avoid trial on claims of this type, where the activity is not a high-risk adult sport, there is evidence of gross negligence, and the exculpatory clause is arguably inconspicuous, confusing, and unwittingly signed.

B. REPLY ON STATEMENT OF THE CASE

LAF’s fact recitation does not differ starkly from Kvigne’s except with respect to the characterization of the facts. LAF’s description of its contract notwithstanding, the document -- with its 12 pages worth of

information crammed into three pages of small, single space font – speaks for itself. CP 32-34, Appendix A.

It is notable, however, that LAF felt it necessary to *add emphasis* to certain words in its agreement for this Court’s benefit, but did not provide the same helpful emphasis when presenting the contract to Kvigne. Br. of Resp’t at 3.

Kvigne only had *one minute* to read the long agreement, including the exculpatory clause. CP 29. However, LAF claims, based on the declaration of its own lawyer, that Kvigne “recalls reading” the “Important: Release and Waiver of Liability and Indemnity” provision. Br. of Resp’t at 4. This is an exaggeration of Kvigne’s deposition statement. Kvigne actually stated that she read “the ‘Important’ box.” However, she immediately emphasized that she “didn’t understand” a lot of what she was looking at. CP 45. She also noted that she was “speed reading” and could not read any of the provisions thoroughly, because she was being rushed and “didn’t feel like I could actually just sit there and take the time.” She also noted that she needed, but was not wearing, glasses when she looked at the agreement. CP 46-47.

LAF claims that the trial court ruled that Kvigne’s expert “conclusory opinions” on the conspicuousness of the exculpatory clause and the legal issue of gross negligence would not be considered. Br. of

Resp't at 5. While the trial court did so rule, it is important to clarify that all of the factual assertions on the standard of care for personal trainers, as well as descriptions of the common practices in health clubs were admissible, and the trial court only excluded the express statements by the experts on ultimate issues of fact. RP 4-5.¹

LAF acknowledges that its clubs do not offer high-risk sports activities that adults undertake at their own peril, but are places where “highly trained staff...can provide fun and effective workout options to family members of all ages and interests.” <https://www.lafitness.com/page/about.aspx?Source=1>. LAF also admits that its services are integral to society, and that it seeks to increase accessibility to a wider range of customers:

Because we know that a healthy society depends on the wellbeing of all those who comprise it, our emphasis is on giving our members the most for their dollars to make the LA Fitness experience accessible to more segments of the community.

Id.

¹ Although there is certainly an argument to be made that the trial court abused its discretion in refusing to admit the experts' opinions on ultimate issues of fact, *see, e.g., Davis v. Baugh Industrial Contractors, Inc.*, 159 Wn.2d 413, 420, 150 P.3d 545 (2007), that claim of error is not dispositive of the issues in this appeal, because all of the underlying facts necessary to defeat summary judgment were admitted into evidence.

Finally, LAF admits that its employee attempted to change his grip on a 45-pound barbell while holding it directly over Kvigne's head, injuring her. Br. of Resp't at 4-5.

C. SUMMARY OF ARGUMENT

LAF has not, and cannot, refute Kvigne's evidence and arguments showing that a trial is required on her claims. First, LAF does not controvert Kvigne's application of the Supreme Court's legal test for whether public policy should preclude a health club from disclaiming liability against its members. Instead, LAF relies on flawed reasoning from a case out of Division III of this Court. Unfortunately for LAF, this Division has recently rejected the entire premise upon which that Division III analysis is based.

In addition to her public policy arguments, Kvigne has also raised genuine issues of material fact for trial regarding whether letting go of a 45-pound barbell while holding it directly over someone's head is gross negligence, and whether the exculpatory clause here was inconspicuous. There is no definitive, indistinguishable case law on either point: it is up to a jury to make these factual determinations.

Summary judgment was inappropriate, and should be reversed.

D. ARGUMENT

(1) Standard of Review

Kvigne in her opening brief points to the fact that she presented undisputed expert evidence from a highly experienced personal fitness trainer that the LAF trainer here failed to exercise even slight care. Br. of Appellant at 10-14. Kvigne explained that this admissible evidence tends to show that LAF engaged in gross negligence, which would negate the exculpatory clause upon which they relied at summary judgment. *Id.*

Citing the summary judgment burden and standard of review, LAF takes issue with Kvigne's statements that the expert declaration submitted was "uncontroverted," and that LAF's failure to have it excluded means that summary judgment was inappropriate. Br. of Resp't at 6. LAF responds that Kvigne "does not understand her burden" on summary judgment, and that LAF was not required to controvert or dispute her evidence. *Id.*

LAF is wrong about its need to dispute Kvigne's expert testimony in order to prevail on summary judgment. If a defendant moves for summary judgment, and a plaintiff responds with expert testimony that creates a genuine issue of material fact for trial, the defendant must discredit and defeat that evidence or face trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

In *Young*, for example, a medical malpractice defendant presented evidence on summary judgment that it had acted with due care. *Young*, 112 Wn.2d at 226. When the plaintiff responded with differing expert testimony, the defendant argued that the plaintiff's expert should be excluded. *Young*, 112 Wn.2d at 220. *Because the defendant succeeded in excluding the plaintiff's expert as unqualified, summary judgment was proper. Id.* at 227.

Here, LAF's summary judgment motion was predicated upon the exculpatory clause in its contract. LAF did not argue that Kvigine failed to establish the elements of a negligence claim, only that its contract precluded Kvigine's suit. Kvigine responded that the exculpatory clause would not protect LAF if it engaged in gross negligence, and presented admissible expert testimony of that fact. This raised a genuine issue of material fact for trial, which LAF could only defeat by demonstrating Kvigine's expert declaration was inadmissible. *Young*, 112 Wn.2d at 227.

Thus, LAF did have a burden to challenge Kvigine's evidence, which it failed to meet. LAF did not succeed in excluding or otherwise controverting Kvigine's expert declaration.

- (2) The Trial Court Improperly Weighed Evidence and Took a Fact Issue Away from the Trier of Fact

Kvigne explained in her opening brief that, in the face of Kvigne's evidence taken in the light most favorable to her, the trial court erred in granting LAF summary judgment. Br. of Appellant at 10-14. Kvigne noted that the trial court may not replace the jury by weighing facts or deciding factual issues. *Id.*

LAF responds that a trial court may dispose of a claim of this type if it feels that the evidence presented does not rise to the level of gross negligence. Br. of Resp't at 7-10. As analogous authority, LAF cites *O'Connell v. Scott Paper Co.*, 77 Wn.2d 186, 189, 460 P.2d 282 (1969), and *Conradt v. Four Star Promotions, Inc.*, 45 Wn. App. 847, 852, 728 P.2d 617 (1986). However, LAF does not describe the *facts* of these cases, it only recites their holdings. *Id.*

LAF's omission of facts from its case analysis is notable, because our Supreme Court has long held that the gross negligence determination is *fact-specific and generally best left to juries*. *Nist v. Tudor*, 67 Wn.2d 322, 407 P.2d 798 (1965). In *Nist*, the plaintiff was a passenger in a car driven by her friend. *Nist*, 67 Wn.2d at 324. On a clear day, at an intersection of two flat roads, the defendant driver suddenly turned left into the path of an oncoming truck, injuring her passenger. *Id.* The Court concluded that turning a vehicle into the path of a clearly visible oncoming truck was substantial evidence of gross negligence, and reversed the trial

court's summary judgment order. *Id.* After a long discussion about the inconsistent historical application of the gross negligence standard, our Supreme Court noted that it was increasingly "inclined toward leaving the question of gross negligence to the jury." *Id.* at 326. The Court went on to explain that the analysis is very fact-specific: "In determining the degree of negligence, the law must necessarily look to the hazards of the situation confronting the actor." *Id.* at 331.

Given LAF's reluctance to describe the facts of *O'Connell* and *Conradt*, it is unsurprising that neither case bears any resemblance to the facts of this case, and are thus unhelpful in applying the *Nist* standard for evidence of gross negligence. In *O'Connell*, a vehicle driver was waiting for passengers to get into his car. *O'Connell*, 77 Wn.2d at 187. After hearing doors slam, he began to pull away, injuring a passenger who still had one foot outside the car. *Id.* Our Supreme Court concluded that this was evidence of negligence, but not gross negligence. *Id.* at 189. In *Conradt*, a voluntary participant in an inherently risky demolition derby race was injured. He claimed that the race promoter was grossly negligent for running the race in a clockwise, rather than counterclockwise, direction. *Conradt*, 45 Wn. App. at 850. However, he had admitted that he had successfully competed in prior races run in both directions, and knew the risk. *Id.* Division III of this Court concluded that the activity

was inherently risky and running the race in either direction was not sufficient evidence of gross negligence. *Id.* at 852.

Here, the evidence shows that LAF's employee failed to exercise even slight care when he attempted to change his grip on a 45-pound barbell while he was holding it directly over the head of a client. CP 74. As Kvigne's expert explained, the trainer could have easily lowered the barbell onto the rest rather than changing his grip on the barbell while it was directly over her head. He said that the trainer's actions were "dangerous and stupid" because it is "impossible" to safely change grips on a barbell while holding it over a client's head. Kvigne's expert, who has many years of experience in the profession, declared that dropping the barbell on Kvigne was the result of a failure to exercise even slight care. CP 74. Even without this expert opinion, the extreme risk of letting go of a 45-pound weight poised over a person's head is manifest. This is particularly true when the simple solution is to step away, or to return the weight to its rest.

Also, no case LAF cites involved expert testimony, which is "essential" in cases where juries are asked to determine gross negligence and lay witnesses cannot adequately testify to the standard of care:

[W]hen the jury is asked to determine a higher degree of negligence...it becomes essential that the jury obtain the best available assistance in determining whether the

negligence is substantially or appreciably greater than ordinary negligence.

Talley v. Fournier, 3 Wn. App. 808, 816-17, 479 P.2d 96, 101 (1970).

The guiding principle is whether resort to inferences is necessary to assist the jury in understanding matters outside the common ken. *Palmer v. Massey-Ferguson, Inc.*, 3 Wn. App. 508, 476 P.2d 713 (1970). Thus, Kvigne more than met her burden of proof to survive summary judgment.

In an attempt to gloss over the trial court's weighing of evidence, LAF attacks Kvigne's expert, claiming that he engaged in "speculation" when he stated that LAF's trainer let go of the barbell to switch his grip, and that no "eyewitness" confirms this. Br. of Resp't at 9 n.1.

Experts are not required to be eyewitnesses, and like juries are allowed to draw inferences from the evidence provided. *Tokarz v. Ford Motor Co.*, 8 Wn. App. 645, 653-54, 508 P.2d 1370, 1375 (1973). An expert may testify in terms of inference if, under the circumstances, resort to inferences is necessary to convey to the jury the full import of the factual testimony. *Id.* Moreover, the expert may express an opinion on the ultimate fact to be determined by the jury, so long as the inference drawn is not misleading or a matter of common knowledge. *Parris v. Johnson*, 3 Wn. App. 853, 479 P.2d 91 (1970).

Here, Kvigne’s expert reviewed the testimony of both Kvigne and LAF’s trainer. From the trainer’s testimony that he tried to “switch grips,” the expert drew a reasonable inference: that one cannot change grip on something without letting go of the current grip. CP 73. However, regardless of whether the trainer completely let go of the barbell, or just attempted to shift his hands, a reasonable juror could conclude that continuing to hold the barbell above Kvigne’s head while he was not in full control of it was gross negligence.

Here, expert testimony was needed—and was admitted by the trial court—to establish the standard of a care for a personal trainer in these circumstances. Being a personal trainer, and knowing what does and does not constitute a failure of slight care in that profession, are not matters within the common knowledge of the ordinary person. Therefore, the trial court should not have weighed and rejected Kvigne’s evidence in favor of LAF’s position.

(3) The Trial Court Did Not Exclude Kvigne’s Factual Statements that Show LAF Committed Gross Negligence, Only His Express Legal Conclusion that LAF Committed Gross Negligence

Kvigne argued in her opening brief that all of the evidence, including her expert’s declaration, raised a genuine issue of material fact

regarding gross negligence that should have gone to the jury. Br. of Appellant at 10-14.

LAF responds by suggesting that the trial court excluded any evidence tending to show that LAF's trainer was grossly negligent. Br. of Resp't at 10. LAF claims that despite the trial court's admission of her expert declaration, Kvigne is somehow precluded from relying upon that declaration on appeal, or that the declaration does not raise a genuine issue of material fact regarding whether the trainer failed to exercise even slight care. *Id.* at 10-12. LAF cites to the trial court's oral ruling on the matter. *Id.* at 10.

LAF misconstrues the trial court's ruling regarding certain testimony by Kvigne's expert. The only portions of the expert declaration the trial court excluded were his *conclusory observations* that LAF's action were "substantially and appreciably greater than ordinary negligence," (CP 74) and that the language of the release of liability was "inconspicuous" (CP 75). RP 4.

What LAF omits from its citation to the report of proceedings is the trial court's key distinction, that all of Kvigne's expert evidence regarding the standard of care, and what actions were or were not appropriate for a personal trainer, was admissible:

Mr. Faalooa's declaration could be useful to the Court if he were explaining to the Court from his perspective in having been in athletics and -- and in clubs how clubs operate, what standards they have, things that -- that would be things the Court wouldn't know that would -- that would be helpful in evaluating what's going on.

RP 4. Thus, all of the expert evidence was admitted regarding whether it was safe and appropriate for the trainer to change his grip, based on the expert's experience, and whether the actions in this case failed to meet that standard of even slight care.

Also, LAF is misguided when it suggests there is any flaw in Kvigne's expert declaration because it employs legal terminology such as "failure to exercise slight care." Br. of Resp't at 9-10. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. "It should not be fatal to a party's claim or defense that an expert used legal jargon, so long as an appropriate foundation for the conclusion can be gleaned from the testimony." *Davis*, 159 Wn.2d at 420. Expert opinions that help establish the elements of negligence are admissible. ER 704; *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990); *Everett v. Diamond*, 30 Wn. App. 787, 638 P.2d 605 (1981).

Thus, the trial court here did not strike the declaration altogether, but merely disregarded conclusory statements.² An expert in a negligence case can and must testify to the standard of care. “[T]o establish the standard of care required of professional practitioners, that standard must be established by the testimony of experts who practice in the same field.” *McKee v. Am. Home Products, Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989). Bare statements of legal conclusion can be disregarded, as they are unhelpful to the factfinder. *Davis*, 159 Wn.2d at 420-21 (“Mere legal conclusions, such that an act was or was not ‘negligent’ or a ‘proximate cause’ of an injury is not likely to be helpful to the meaningful evaluation of the facts, as it runs the risk of substituting the expert’s judgment for the fact finder’s”). However, an expert can testify to ultimate issues of fact for the jury, provided they establish adequate foundation. *Id.*

However the trial court’s correct ruling regarding Kvigne’s expert did not lead to the appropriate legal conclusion, which was to send this case to the jury. Despite the fact that she met her burden of creating a genuine issue of material fact for trial, Kvigne was denied her right to

² It appears that the trial court misstated the law when it suggested that the question of whether gross negligence occurred was a matter of law for the Court. RP 5. However, the Court’s next statement that the trainer could not state what was or was not “gross negligence” because that was a “legal standard” appears to be in keeping with the *Davis* analysis, despite the misstatement that the issue was for the finder of fact rather than the “Court.” However, the fact remains that the trial court appropriately admitted the bulk of Kvigne’s expert declaration.

present her case to a jury and have them draw the ultimate conclusions of fact. Instead, the trial court improperly weighed and disregarded Kvigne's evidence. That decision should be reversed.

(4) The Public Policy Argument Raised by LAF Below Is Properly Before this Court on Appeal, and Should Be Applied to Negate LAF's Liability Waiver

Kvigne argued in her opening brief that the public policy exception established in *Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 110 Wn.2d 845, 850, 758 P.2d 968 (1988), which can negate liability releases, should apply to health club releases. Br. of Appellant at 14-23. Kvigne argued that health clubs serve the public welfare, and shares more in common with buses, banks, hotels, and parking garages, than with high-risk sports, which understandably require liability waivers. *Id.*

LAF first responds by claiming that this Court should refuse to review this issue, even though LAF raised it below. Br. of Resp't at 13. LAF claims that, despite having devoted four pages of its summary judgment motion to this issue, Kvigne is precluded from arguing it on appeal under RAP 2.5 because she did not offer her response below. *Id.*

RAP 2.5 is a permissive, rather than mandatory, standard. *State v. Ford*, 137 Wn.2d 472, 477, 484-85, 973 P.2d 452 (1999), *review denied*, 142 Wn.2d 1003 (2000). This Court has discretion to entertain an issue. *Obert v. Environmental Research & Dev. Corp.*, 112 Wn.2d 323, 333, 771

P.2d 340 (1989) (“rule precluding consideration of issues not previously raised operates only at the discretion of [the] court”). Washington courts have given some leeway to parties who have not argued issues as fully and directly as their opponents would like, particularly when those same opponents raised the issues first. *See, e.g., Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338-39, 160 P.3d 1089 (2007), *affirmed*, 166 Wn.2d 264, 268, (2009) (“if an issue raised for the first time on appeal is ‘arguably related’ to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal”); *In re Dependency of D.F.M.*, 157 Wn. App. 179, 186, 236 P.3d 961 (2010), *review denied*, 170 Wn.2d 1026 (2011) (issue argued at hearing by respondent, but not by appellant, was nonetheless “before the [trial] court” and could be raised by the appellant on appeal).

Kvigne did note in her summary judgment response that a health club exculpatory clause could be rejected as a matter of public policy (CP 59), although she did not flesh out the argument in response to LAF’s summary judgment motion. Instead, she focused on the factual issues that precluded summary judgment in LAF’s favor, rather than on public policy, which is a matter of law. CP 59-65.

Also, when LAF raised the public policy argument at the summary judgment hearing, the trial court declined to engage on the issue or entertain any argument by the parties:

[Counsel for LAF] MR. LAWRENCE: So, the first issue is whether there's any sort of public policy issue that would bar the contracts themselves before we get into these issues of conspicuousness and gross negligence. There's already cases out there that have said that these kinds of contracts if you use the *Wagonblast* factors, which the Court no doubt is familiar with, are not considered public policy impact, they don't involve essential services. They might be essential for my health –

JUDGE NORTH: Yeah. If you were -- if you were the sole source water supplier or something or other that might be a little bit different.

MR. LAWRENCE: That's true. That's true.

JUDGE NORTH: (Inaudible).

MR. LAWRENCE: So I -- I don't that's an issue. If it is I'll -- I'll spare some time on that but –

JUDGE NORTH: Yeah. No, I don't think we need to go into that.

RP 6. It appears that the trial court was not interested in hearing the public policy argument, and that any attempt by Kvigne to engage on the issue would have been futile. In any event, the crucial fact is that the issue was before the trial court, brought to the court's attention by LAF.

In these circumstances, where the public policy issue was raised below by LAF but not ruled upon by the trial court, Kvigne should be allowed to engage on the issue more fully on appeal.

Addressing the substance of Kvigne's public policy argument, LAF claims that the issue here is "well-settled," and that health club exculpatory clauses do not violate public policy. Br. of Resp't at 14-15. LAF does not directly address or refute Kvigne's analysis of the six-part test established in *Wagenblast*, but instead relies solely on a flawed opinion of Division III of this Court.

LAF's statement that the law at issue here is "well-settled" is an exaggeration. While there are many cases regarding exculpatory clauses relating to high risk adult sports activities such as mountain climbing or demolition derbies, which both LAF and Kvigne acknowledged, no Court has held that health clubs are the equivalent of a high risk adult sports activity.³ Thus, these "well-settled" cases are inapplicable to this case.

The one court that has addressed the public policy issue with respect to health clubs, Division III of this Court, did so using a flawed premise: that the public policy exception only applies to "essential public

³ In fact, LAF advertises its clubs as family friendly health facilities designed to be integrated into everyday life. <https://www.lafitness.com/page/about.aspx?Source=1>.

services” that are “indispensible necessit[ies],” “such as hospitals, housing, public utilities, and public education.” *Shields v. Sta-Fit, Inc.*, 79 Wn. App. 584, 589, 903 P.2d 525 (1995), *review denied*, 129 Wn.2d 1002 (1996). This assumption dictated the *Shields* court’s reasoning for *four out of the six factors* of the *Wagenblast* test, inappropriately tipping the analysis in favor of health clubs. *Id.*

This Court has very recently rejected Division III’s “essential services” reading of *Wagenblast*. In *Hanks v. Grace*, __ Wn. App. __, 273 P.3d 1029, 1033 (2012) this Court applied the *Wagenblast* test to real estate agents and brokers, and concluded that they may not disclaim liability as a matter of public policy. Critically, this Court noted that real estate services are not “essential,” but they are “important as a matter of practical necessity.” *Id.* Thus, this Court has again properly recognized and applied the *Wagenblast* test to preclude non-essential public services from disclaiming liability.

Again, the *Wagenblast* six-part test includes whether (1) the agreement concerns the type of endeavor usually deemed suitable for public regulation, (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is also a matter of practical necessity for some members of the public, (3) such party holds itself out as willing to perform this service for almost any

member of the public, (4) the party invoking the exculpation possesses a decisive advantage of bargaining strength against any member of the public seeking such services, (5) an adhesion contract is used in the transaction, and (6) as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to risk of carelessness. *Wagenblast*, 110 Wn.2d at 851-52. The more of these characteristics that appear in a given exculpatory agreement case, the more likely the agreement is to be declared invalid on public policy grounds. *Id.*

Applying the *Wagenblast* factors directly to the facts of this case, summary judgment was inappropriate. Kvigne laid out this analysis in her opening brief (Br. of Appellant at 18-19) and LAF does not respond. Thus, should this Court choose to apply the analysis independently based on the *Wagenblast* factors, LAF has not made its case that it should be treated like high-risk adult activities.

Comparing health clubs to the various other enterprises previously analyzed in case law after *Wagenblast*, leads to the conclusion that health clubs are more like buses, banks, hotels, and parking garages than they are like high-risk adult sports activities like tobogganing, scuba diving, mountain climbing, automobile demolition derby, and ski jumping. LAF's exculpatory clause violates public policy, and should be invalidated.

(5) There Is A Genuine Issue of Material Fact Regarding the Inconspicuousness of the Exculpatory Clause

Kvigne argued in her opening brief that she raised a genuine issue of material fact that the exculpatory clause was inconspicuous, and that she waived her right to a remedy for LAF's negligence unwittingly. Br. of Appellant at 23-27. She focused on the layout and format of LAF's agreement, and compared it to aspects of similar agreements analyzed in existing case law. *Id.* Noting that LAF's agreement shares traits of agreements that have been struck down, as well as agreements that have been upheld, Kvigne argued that the trial court erred in ruling the exculpatory clause conspicuous as a matter of law. *Id.*

LAF responds by arguing that reasonable minds could not differ regarding whether the clause was agreed to unwittingly, because Kvigne testified that during the minute she was given to review the agreement, one of the things she "remembered" was the "Important" box. Br. of Resp't at 16. LAF also argues that the exculpatory clause was conspicuous as a matter of law, comparing its format to those in other cases such as *Stokes v. Bally's Pacwest Inc.*, 113 Wn. App. 442, 54 P.3d 161 (2002), *review denied*, 149 Wn.2d 1007 (2003) and *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 339, 35 P.3d 383 (2001). *Id.*

LAF's claim that Kvigne understood and assented to the exculpatory language as a matter of law because she remembered the box titled "Important" is not supported even by LAF's own cited authority. In *Stokes*, one argument raised by the plaintiff was that he noticed the exculpatory clause, but thought it was related to a release of liability from financial obligations, rather than injury claims. This Court analyzed that argument by reviewing the content of the clause for clarity. *Stokes*, 113 Wn. App. at 449. The clause in *Stokes* was exceedingly clear and written in plain language, not legalese. *Id.* This Court enforced the provision because the language was plain and clear even to a person of ordinary intelligence. *Id.*

Thus, even if a plaintiff "remembers" seeing a provision in a contract, that does not mean the provision was knowingly assented to. If the language is so dense or confusing that a person of ordinary intelligence could not understand it, it may not be sufficiently conspicuous.

The content of the waiver here is not clear like the waiver in *Stokes*. It is full of long, run-on sentences and legal jargon. *One sentence* of the exceedingly long clause reads in 8.5 point font:

In consideration of being permitted to enter any facility of L.A. Fitness (a "Club") for any purpose including, but not limited to, observation, use of facilities, services, or equipment, or participation in any way, Member agrees to the following: Member hereby releases and holds L.A. Fitness, its directors, officers, employees, and agents harmless from all liability to Member and Member's personal representatives, assigns, heirs, and next of kin for any loss of damage, and forever gives up any claims or demands therefore, on account of injury to Member's person or property, including injury leading to the death of Member, whether caused by the

active or passive negligence of L.A. Fitness or otherwise, to the fullest extent permitted by law, while Member is in, upon, or about L.A. Fitness premises or using any L.A. Fitness facilities, services or equipment.

CP 33, Appendix A. Also, the release here does not have clear, bolded language like **“You are waiving any right that you may have to bring a legal action to assert a claim against us for our negligence,”** as was the case in *Stokes*. *Stokes*, 113 Wn. App. at 449.

LAF’s reliance on *Stokes* and *Chauvlier* overlooks this Court’s multi-pronged analysis for conspicuousness laid out in *Johnson v. UBAR, LLC*, 150 Wn. App. 533, 210 P.3d 1021 (2009). In that case, this Court noted that exculpatory clauses must be examined for whether: (1) the waiver is set apart or hidden within other provisions, (2) the heading is clear, (3) the waiver is set off in capital letters or in bold type, (4) there is a signature line below the waiver provision, (5) the language above the signature line relates to, and (6) it is clear that the signature is related to the waiver. *Johnson*, 150 Wn. App. at 538. This Court also emphasized other factors, such as whether the clause consists of mostly small, page-wide, justified print, has some portions bolded and in boxes, is set apart by blank lines, and makes clear that the release is a waiver of liability for negligence. *Johnson*, 150 Wn. App. at 542. When some of these attributes tend to show the clause was conspicuous, but others do not, the right result is to allow the case to go to trial. *Id.*

Because LAF's clause shares attributes with clauses that have been upheld and clauses that have been struck down, LAF's claim that *Stokes* and *Chauvlier* control here is unpersuasive. The exculpatory clause at issue is not identical to the clause at issue in either of those cases. In *Stokes*, 113 Wn. App. at 445, this Court noted that the Waiver and Release provision in the agreement had the title "WAIVER AND RELEASE" in bold, capital letters, the provision only addressed Stokes's agreement "to release Bally's from liability for its negligence" and that the Waiver and Release provisions were "conspicuously displayed within the larger document." *Stokes*, 113 Wn. App. at 449. Immediately below Stokes's signature line was a line stating, "**WAIVER AND RELEASE:** *This contract contains a WAIVER AND RELEASE in Paragraph 10 to which you will be bound.*" *Stokes*, 113 Wn. App. at 448. This Court held that reasonable persons could only conclude that the content was "quite clearly a waiver and release of liability for negligence, not financial obligations." *Stokes*, 113 Wn. App. at 448-49.

In *Chauvlier*, the release was clearly entitled in all capital letters, "LIABILITY RELEASE & PROMISE NOT TO SUE. PLEASE READ CAREFULLY," and the words "RELEASE" and "HOLD HARMLESS AND INDEMNIFY" were printed in capital letters. *Chauvlier*, 109 Wn. App. at 342. The release was not hidden within a larger agreement and the

signature line directly below the release stated, “I have read, understood, and accepted the conditions of the Liability Release Printed Above.” *Chauvlier*, 109 Wn. App. at 342.

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

In addition, Kvigne presented expert opinions raising a genuine issue of material fact that the clause was inconspicuous.⁴ A text

⁴ As with the trial court’s ruling regarding expert evidence of gross negligence, LAF overstates the scope of the trial court’s ruling regarding her expert evidence on conspicuousness. The trial court admitted both of Kvigne’s expert declarations, but noted that any ultimate conclusions of law, such as express statements that the clause was not conspicuous, would be disregarded. RP 4-5. However, the trial court admitted all of the factual foundations for those opinions, including the problems with font size, the fact that fitness club members are often rushed to sign (as happened to Kvigne) and other facts tending to show that the clause was unwittingly signed. CP 69-75.

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

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

Thus, reasonable minds could disagree as to whether the exculpatory clause here was conspicuous or inconspicuous, and whether Kvigne unwittingly assented to the waiver when she signed the first page of the agreement. Summary judgment was inappropriate. The trial court’s ruling should be reversed, and this case remanded for trial.

E. CONCLUSION

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

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

DATED this 15th day of June, 2012.

Respectfully submitted,



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DECLARATION OF SERVICE

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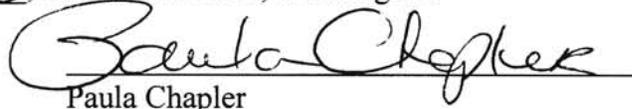
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 13, 2012, at Tukwila, Washington.



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