COLORADO COURT OF APPEALS **2016COA189M**

Court of Appeals No. 15CA0598
City and County of Denver District Court No. 14CV33637
Honorable R. Michael Mullins, Judge

Wendy Jane Stone,

Plaintiff-Appellant,

v.

Life Time Fitness, Inc., a Minnesota corporation doing business in the State of Colorado, d/b/a Life Time Fitness; Life Time Fitness Foundation; and LTF Club Operations Company, Inc.,

Defendants-Appellees.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE MILLER
Taubman and Fox, JJ., concur

Opinion Modified
On the Court's Own Motion

Announced December 29, 2016

Charles Welton P.C., Charles Welton, Denver, Colorado, for Plaintiff-Appellant

Markusson Green & Jarvis, John T. Mauro, H. Keith Jarvis, Denver, Colorado, for Defendants-Appellees

OPINION is modified as follows:

Added the following sentence to paragraph seven:

Stone contends that the Agreement's exculpatory language does not validly apply to her claims.

¶ 1 In this action seeking recovery for personal injuries sustained at a fitness club, plaintiff, Wendy Jane Stone, appeals the summary judgment entered in favor of defendants, Life Time Fitness, Inc.; Life Time Fitness Foundation; and LTF Club Operations Company, Inc. (collectively, Life Time), on Stone's negligence and Premises Liability Act (PLA) claims based on injuries sustained when she tripped on a hair dryer cord after washing her hands. The principal issue presented on appeal is whether the district court correctly ruled that Stone's claims are contractually barred based on assumption of risk and liability release language contained in a member usage agreement (Agreement) she signed when she became a member of Life Time.

¶ 2 We disagree with the district court's conclusion that the exculpatory provisions of the Agreement are valid as applied to Stone's PLA claim. Consequently, we reverse the judgment as to that claim and remand the case for further proceedings. We affirm the district court's judgment on the negligence claim.

I. Background

¶ 3 Stone was a member of a Life Time fitness club located in Centennial. According to the complaint, she sustained injuries in

the women's locker room after finishing a workout. Stone alleged that she had washed her hands at a locker room sink and then "turned to leave when she tripped on the blow dryer cord that was, unbeknownst to her, hanging to the floor beneath the sink and vanity counter top." She caught her foot in the cord and fell to the ground, fracturing her right ankle.

¶ 4 Stone alleged that allowing the blow dryer cord to hang below the sink counter constituted a trip hazard and a dangerous condition and that, by allowing the condition to exist, Life Time failed to exercise reasonable care. She asserted a general negligence claim and also a claim under Colorado's PLA, section 13-21-115, C.R.S. 2016.

¶ 5 Life Time moved for summary judgment, relying on assumption of risk and liability release language contained in the Agreement Stone signed when she joined Life Time. Life Time argued that the Agreement was valid and enforceable, that it expressly covered the type and circumstances of her injuries, and that it barred Stone's claims as a matter of law. A copy of the Agreement appears in the Appendix to this opinion.

¶ 6 After full briefing, the district court granted Life Time's motion, concluding that the Agreement was "valid and enforceable" and that Stone had released Life Time from all the claims asserted in the complaint.

II. Discussion

¶ 7 Stone contends that the Agreement's exculpatory language does not validly apply to her claims. She contends that the district court, therefore, erred in entering summary judgment and dismissing her action.

A. Summary Judgment Standards

¶ 8 Summary judgment is appropriate if the pleadings and supporting documents establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Gagne v. Gagne*, 2014 COA 127, ¶ 24; *see* C.R.C.P. 56(c). We review de novo an order granting a motion for summary judgment. *Gagne*, ¶ 24; *see Ranch O, LLC v. Colo. Cattlemen's Agric. Land Tr.*, 2015 COA 20, ¶ 12.

B. Negligence Claim

¶ 9 In her complaint, Stone alleged common law negligence and PLA claims, and she pursues both claims on appeal. The trial

court's summary judgment ruled in favor of Life Time without distinguishing between Stone's negligence and PLA claims. It simply concluded that the exculpatory clauses in the Agreement were "valid and enforceable" and released Life Time from all claims asserted against it.

¶ 10 We turn to the negligence claim first because we may affirm a correct judgment for reasons different from those relied on by the trial court. *English v. Griffith*, 99 P.3d 90, 92 (Colo. App. 2004).

¶ 11 The parties agree that the PLA applies to this case. In section 13-21-115(2), the statute provides:

> In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property, the landowner shall be liable only as provided in subsection (3) of this section.

The PLA thus provides the sole remedy against landowners[1] for injuries on their property. *Vigil v. Franklin*, 103 P.3d 322, 328-29

[1]Section 13-21-115(1), C.R.S. 2016, defines "landowner" as including "a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property." In its answer, Life Time admitted that it owned and operated the club where Stone was injured and that the PLA governs her claims.

(Colo. 2004); *Wycoff v. Grace Cmty. Church of Assemblies of God*, 251 P.3d 1260, 1265 (Colo. App. 2010). Similarly, it is well established that the PLA abrogates common law negligence claims against landowners. *Legro v. Robinson*, 2012 COA 182, ¶ 20, *aff'd*, 2014 CO 40.

¶ 12 Accordingly, albeit for reasons different from those expressed by the trial court, we conclude that Stone could not bring a claim for common law negligence, and the trial court therefore correctly ruled against her on that claim. We now turn to the effect of the exculpatory clauses in the Agreement on Stone's PLA claim.

C. Application of Exculpatory Clauses to PLA Claim

¶ 13 As we understand Stone's contentions, she does not dispute that the exculpatory language in the Agreement would preclude her from asserting claims under the PLA for any injuries she might sustain when working out on a treadmill, stationary bicycle, or other exercise equipment or playing racquetball. We therefore do not address such claims. Instead, Stone argues that the exculpatory clauses do not clearly and unambiguously apply to her injuries incurred after washing her hands in the women's locker room. We agree.

1. Law

¶ 14 "Generally, exculpatory agreements have long been disfavored." *B & B Livery, Inc. v. Riehl*, 960 P.2d 134, 136 (Colo. 1998). Determining the sufficiency and validity of an exculpatory agreement is a question of law for the court. *Id.*; *Jones v. Dressel*, 623 P.2d 370, 375 (Colo. 1981). This analysis requires close scrutiny of the agreement to ensure that the intent of the parties is expressed in clear, unambiguous, and unequivocal language. *Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465, 467 (Colo. 2004). Our supreme court has explained:

> To determine whether the intent of the parties is clearly and unambiguously expressed, we have previously examined the actual language of the agreement for legal jargon, length and complication, and any likelihood of confusion or failure of a party to recognize the full extent of the release provisions.

Id.

¶ 15 Under *Jones*, a court must consider four factors in determining whether an exculpatory agreement is valid: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4)

whether the intention of the parties was expressed in clear and unambiguous language. 623 P.2d at 375.

2. Analysis

a. The First Three *Jones* Factors

¶ 16 The first three *Jones* factors provide little help for Stone's position. The supreme court has specified that no public duty is implicated if a business provides recreational services. *See Chadwick*, 100 P.3d at 467 (addressing guided hunting services and noting that providers of recreational activities owe "no special duty to the public"); *Jones*, 623 P.2d at 376-78 (skydiving services); *see also Hamill*, 262 P.3d at 949 (addressing recreational camping services and noting supreme court authority).

¶ 17 With regard to the second factor, the nature of the services provided, courts have consistently deemed recreational services to be neither essential nor a matter of practical necessity. *See Chadwick*, 100 P.3d at 467; *Hamill*, 262 P.3d at 949; *see also Brooks v. Timberline Tours, Inc.*, 941 F. Supp. 959, 962 (D. Colo. 1996) (snowmobiling not a matter of practical necessity), *aff'd*, 127 F.3d 1273 (10th Cir. 1997); *Lahey v. Covington*, 964 F. Supp. 1440, 1445 (D. Colo. 1996) (whitewater rafting not an essential service),

aff'd sub nom. Lahey v. Twin Lakes Expeditions, Inc., 113 F.3d 1246 (10th Cir. 1997). Stone attempts to distinguish those cases by asserting that people join fitness centers "to promote their health, not for the thrill of a dangerous recreational activity." She cites no authority for such a distinction, and we are not persuaded that such activities as camping and horseback riding, at issue in the cases cited above, are engaged in for a dangerous thrill as opposed to the healthful benefits of outdoor exercise. Consequently, the recreational nature of the services Life Time provides does not weigh against upholding or enforcing the Agreement.

¶ 18 With respect to the third factor, a contract is fairly entered into if one party is not at such an obvious disadvantage in bargaining power that the effect of the contract is to place that party at the mercy of the other party's negligence. *See Hamill*, 262 P.3d at 949; *see also Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 784 (Colo. 1989). Possible examples of unfair disparity in bargaining power include agreements between employers and employees and between common carriers or public utilities and members of the public. *See Heil Valley Ranch, Inc.*, 784 P.2d at 784. However, this type of unfair disparity is generally not implicated when a person contracts

with a business providing recreational services. *See id.*; *see also Hamill*, 262 P.3d at 949-50.

¶ 19 In evaluating fairness, courts also examine whether the services provided could have been obtained elsewhere. *Hamill*, 262 P.3d at 950. Nothing in the record indicates that Stone could not have taken her business elsewhere and joined a different fitness club or recreation center. Nor is there any other evidence that the parties' relative bargaining strengths were unfairly disparate so as to weigh against enforcing the Agreement.

¶ 20 We therefore turn to the fourth prong of the *Jones* test — whether the intention of the parties was expressed in clear and unambiguous language.

b. The Fourth *Jones Factor*

¶ 21 The validity of exculpatory clauses releasing or waiving future negligence claims usually turns on the fourth *Jones* factor — whether the intention of the parties is expressed in clear and unambiguous language. *Wycoff*, 251 P.3d at 1263 (applying the *Jones* factors to a PLA claim). This case also turns on that factor.

¶ 22 The issue is not whether a detailed textual analysis would lead a court to determine that the language, even if ambiguous,

ultimately would bar the plaintiff's claims. Instead, the language must be clear and unambiguous and also "unequivocal" to be enforceable. *Chadwick*, 100 P.3d at 467; *see also Threadgill v. Peabody Coal Co.*, 34 Colo. App. 203, 209, 526 P.2d 676, 679 (1974), *cited with approval in Jones*, 623 P.2d at 378.

¶ 23 We conclude that the Agreement fails this test for numerous reasons.

¶ 24 *First*, as explained by the New York Court of Appeals, "a provision that would exempt its drafter from any liability occasioned by his fault should not compel resort to a magnifying glass and lexicon." *Gross v. Sweet*, 400 N.E.2d 306, 309 (N.Y. 1979), *cited with approval in Jones*, 623 P.2d at 378. Here, the Agreement consists of extremely dense fine print, for which a great many people would require a magnifying glass or magnifying reading glasses.

¶ 25 *Second*, the two clauses are replete with legal jargon, using phrases and terms such as "affiliates, subsidiaries, successors, or assigns"; "assumption of risk"; "inherent risk of injury"; "includes, but is not limited to"; and "I agree to defend, indemnify and hold Life Time Fitness harmless." The use of such technical legal

language militates against the conclusion that the release of liability was clear and simple to a lay person.

¶ 26 *Third*, the first of the two clauses relied on by Life Time bears the following heading: "under Chapter 458, 459, 460, or Chapter 461 ASSUMPTION OF RISK." At oral argument, counsel for Life Time conceded that the reference to multiple chapters was ambiguous and confusing, and he could not explain to what the chapters referred. Our research has not enlightened us on the subject. Conscientious lay persons could reasonably have skipped over the fine print appearing under that heading, believing it did not apply to them because they would have no reason to understand that chapters 458, 459, 460, or 461 had any relevance to their situation. Thus, the assumption of risk heading was not clear and unambiguous.

¶ 27 *Fourth*, the dominant focus of the Agreement is on the risks of strenuous exercise and use of exercise equipment at the fitness center:

- The opening paragraph of the Agreement contains the following warning: "All members are strongly encouraged to have a complete physical examination by a medical doctor prior to

beginning any work out program or strenuous new activity. If I have a history of heart disease, I agree to consult a physician before becoming a Life Time Fitness member."

- Under the confusing assumption of risk heading, the first sentence states, "I understand that there is an inherent risk of injury, whether caused by me or someone else, in the use of or presence at a Life Time Fitness Center, the use of equipment and services at a Life Time Fitness Center, and participation in Life Time Fitness' programs."
- There then follows a listing of types of risks, including the use of "indoor and outdoor pool areas with waterslides, a climbing wall area, ball and racquet courts, cardiovascular and resistance training equipment," and other specified programs, as well as "[i]njuries arising from the use of Life Time Fitness' centers or equipment" and from activities and programs sponsored by Life Time; "[i]njuries or medical disorders resulting from exercise at a Life Time Fitness center, including, but not limited to heart attacks, strokes, heart stress, spr [sic] broken bones and torn muscles or ligaments"; and "[i]njuries resulting from the actions

taken or decisions made regarding medical or survival procedures."

¶ 28 *Fifth*, the term "inherent risk of injury" that appears in the assumption of risk clause has been applied in various Colorado statutes and case law to address waivers of liability only for activities that are dangerous or potentially dangerous. Thus, the General Assembly has provided for releases from liability in circumstances such as activities involving horses and llamas, section 13-21-119, C.R.S. 2016; being a spectator at baseball games, section 13-21-120, C.R.S. 2016; agricultural recreation or agritourism activities (including hunting, shooting, diving, and operating a motorized recreational vehicle on or near agricultural land), section 13-21-121, C.R.S. 2016; skiing, section 33-44-109, C.R.S. 2016; and spaceflight activities, section 41-6-101, C.R.S. 2016. Significantly, not one of these statutory exemptions from liability extends to the use of locker rooms, rest rooms, or dressing rooms associated with these activities. Rather, the releases of liability extend only to the dangerous or potentially dangerous activities themselves.

¶ 29 Colorado's published cases concerning the term "inherent risks" similarly concern dangerous or potentially dangerous activities. For example, the term "inherent risks" has been addressed in cases involving skiing, *Graven v. Vail Assocs., Inc.*, 909 P.2d 514, 519 (Colo. 1995); horseback riding, *Heil Valley Ranch, Inc.*, 784 P.2d at 782; medical procedures or surgical techniques, *Mudd v. Dorr*, 40 Colo. App. 74, 78-79, 574 P.2d 97, 101 (1977); and attendance at roller hockey games, *Teneyck v. Roller Hockey Colo., Ltd.*, 10 P.3d 707, 710 (Colo. App. 2000). Thus, in reported cases, the term "inherent risks" has been limited to dangerous or potentially dangerous activities, rather than accidents occurring in more common situations, such as using locker rooms.

¶ 30 In light of this statutory and case law backdrop, the use of the inherent risk language in the assumption of risk clause, and the Agreement's focus on the use of exercise equipment and facilities and physical injuries resulting from strenuous exercise, one could reasonably conclude that by signing the Agreement he or she was waiving claims based only on the inherent risks of injury related to fitness activities, as opposed to washing one's hands. Indeed, Stone

so stated in her affidavit submitted in opposition to the motion for summary judgment.

¶ 31 *Sixth*, Life Time contends that the only relevant language we need consider is that set forth in the second exculpatory clause, labeled "RELEASE OF LIABILITY." That provision begins by stating that "I waive any and all claims or actions that may arise against Life Time . . . as a result of any *such* injury." (Emphasis added.) The quoted language, however, is the first use of the term "injury" in the release of liability clause. So the scope of the release can be determined only by referring back to the confusing assumption of risk clause. It is not surprising then that Life Time's counsel characterized the release's reference to "such injury" as "squirrely." In any event, all of the ambiguities and confusion in the assumption of risk clause necessarily infect the release clause.

¶ 32 *Seventh*, the exculpatory clauses repeatedly use the phrases "includes, but is not limited to" and "including and without limitation," as well as simply "including." The repeated use of these phrases makes the clauses more confusing, and the reader is left to guess whether the phrases have different meanings. The problem is compounded by conflicting views expressed by divisions of this

court on whether the similar phrase "including, but not limited to" is expansive or restrictive. *Compare Maehal Enters., Inc. v. Thunder Mountain Custom Cycles, Inc.*, 313 P.3d 584, 590 (Colo. App. 2011) (declining to treat the phrase as restrictive and citing Bryan A. Garner, *A Dictionary of Modern Legal Usage* 432 (2d ed. 1995)), *with Ridgeview Classical Sch. v. Poudre Sch. Dist.*, 214 P.3d 476, 483 (Colo. App. 2008) (declining to conclude that the phrase took the statute out of the limiting rule of *ejusdem generis*). For purposes of deciding this case we need not resolve this conflict; the relevance of the conflict for present purposes is that it creates another ambiguity.

¶ 33 That ambiguity — expansive versus restrictive — is critical because nothing in the Agreement refers to risks of using sinks or locker rooms. The assumption of risk clause refers to the "risk of loss, theft or damage of personal property" for the member or her guests while "using any lockers" at a Life Time fitness center. That is quite a separate matter, however, from suffering a physical injury in a locker room.

¶ 34 Significantly, when Life Time intends to exclude accidental injuries occurring in locker rooms, it knows how to draft a clear

waiver of liability doing so. In *Geczi v. Lifetime Fitness*, 973 N.E.2d 801, 803 (Ohio Ct. App. 2012), the plaintiff entered into a membership agreement with Life Time in 2000 (eleven years before Stone entered into the Agreement), which provided in relevant part:

> [T]he undersigned agrees to specifically assume all risk of injury while using any of the Clubs[']s facilities, equipment, services or programs and hereby waives any and all claims or actions which may arise against LIFE TIME FITNESS or its owners and employees as a result of such injury. The risks include, but are not limited to
>
> . . . .
>
> (4) Accidental injuries within the facilities, including, but not limited to the locker rooms, . . . showers and dressing rooms.

Id. at 806. Life Time chose not to include similar language in the Agreement signed by Stone.

c. The Agreement Is not Clear, Unambiguous, and Unequivocal

¶ 35 Based on the foregoing discussion, and after scrutinizing the exculpatory clauses, we conclude that the Agreement uses excessive legal jargon, is unnecessarily complex, and creates a likelihood of confusion or failure of a party to recognize the full extent of the release provisions. *See Chadwick*, 100 P.3d at 467. Accordingly,

the Agreement does not clearly, unambiguously, and unequivocally bar Stone's PLA claim based on the injuries she alleges she sustained after she washed her hands in the women's locker room.

III. Conclusion

¶ 36 The judgment on Stone's negligence claim is affirmed, the judgment on her PLA claim is reversed, and the case is remanded for further proceedings on that claim.

JUDGE TAUBMAN and JUDGE FOX concur.

Appendix

LIFETIME FITNESS

Member Usage Agreement

Member Name: Wendy Stone
Member Number: 105058945

Additional Members:

I wish to become a Life Time Fitness member. I understand that I will not be allowed to use a Life Time Fitness center until I have executed and complied with the terms of this Member Usage Agreement. All members are strongly encouraged to have a complete physical examination by a medical doctor prior to beginning any work out program or strenuous new activity. If I have a history of heart disease, I agree to consult a physician before becoming a Life Time Fitness member.

RULES AND REGULATIONS

All matters affecting or relating to members are under the complete control of Life Time Fitness. Life Time Fitness may terminate my membership or any member at any time for failure to comply with any of the rules and regulations adopted by Life Time Fitness or for conduct Life Time Fitness determines to be improper or contrary to the best interests of Life Time Fitness. I will comply with Life Time Fitness' rules and regulations (which may be amended as necessary), including, but not limited to:

Access to Centers. I will present my membership card each time I use a Life Time Fitness center. Onyx Executive and Onyx members may access Life Time Fitness' Onyx centers and the tennis facilities located within those centers (court fees apply). Onyx Junior Executive members may access Life Time Fitness' Onyx centers, but not the tennis facilities located within those centers. Onyx Executive, Onyx and Platinum members may access Life Time Fitness' Platinum centers and the tennis facilities located within those centers (court fees apply). Onyx Junior Executive members may access Life Time Fitness' Platinum centers, but not the tennis facilities located within those centers. Onyx Executive, Onyx and Platinum members may access Life Time Fitness' Gold centers and the tennis facilities located within those centers (court fees apply). Onyx Junior Executive and Gold members may access Life Time Fitness' Gold centers, but not the tennis facilities located within those centers. Onyx Executive, Onyx, Onyx Junior Executive, Platinum, Gold, and Bronze members may access any of Life Time Fitness' Bronze centers, except that no male member may access any Bronze centers designated to be specifically for the use of women. Short Term members may access centers in the membership level (Onyx, Platinum or Gold) specified in their General Terms Agreements.

Guests. A membership advisor must authorize all guest visits and give each adult guest a tour of the Life Time Fitness center. All adult guests (i.e.; guests 18 years of age or older) must sign a Guest Register and present a valid government-issued photo identification with a date of birth. All minor guests (i.e., guests under 18 years of age) must be accompanied on the premises by an adult sponsoring member who is at least 18 years of age. The sponsoring member, and the minor guest's parent or legal guardian, must sign all documents required by Life Time Fitness before the minor guest may use the center. Guests may use the center only during designated guest hours and may be charged a guest fee for each visit to the center. Life Time Fitness reserves the right to limit guest usage. Guests must comply with all Life Time Fitness guest policies, which are subject to change in Life Time Fitness' discretion.

Child Centers. Only a junior member child between the ages of 3 months and 11 years may be checked into a Life Time Fitness child center and only by a parent or legal guardian. The same parent or legal guardian must remain on-site while the junior member child is in the child center and check the junior member child out of the Life Time Fitness child center. No junior member child is allowed to stay in a child center over 2 hours. No person between the ages of 3 months and 11 years is allowed into any area other than a Life Time Fitness child center except during designated family hours.

Family Hours. Only a junior member child between 3 and 11 years of age may use a center's family locker room and indoor or outdoor pool area during designated family hours if accompanied by a parent or legal guardian at all times. A parent or legal guardian must accompany a junior member child of the same gender while in an adult locker room. A parent or legal guardian may bring a maximum of 3 junior member children during family hours.

No Weapons. No weapons of any kind (as may be determined by Life Time Fitness in its sole discretion), including, but not limited to firearms, are allowed in any area of a Life Time Fitness center at any time or for any reason.

Membership Freezes. A membership can only be frozen for medical or military purposes. Life Time Fitness requires a statement from the treating physician if for a medical purpose or orders from a military branch of service if for a military purpose. The freeze on membership is effective for a period of up to 90 days from the date your notification and appropriate professional documentation were received by Life Time Fitness either in person or received by certified mail, return receipt requested. No retroactive freezes are permitted. If no other action is taken, upon expiration of the freeze period, the membership will activate and Membership Dues will again be charged to your designated account.

Changes to Membership. A primary member may transfer an Onyx Executive membership to another party no sooner than 18 months from the date of purchase of the membership. A transfer fee must accompany each Onyx Executive transfer and both the primary member and transferee must be present at the time of transfer to sign any required documents. All other membership types are not transferable. Only a primary or partner member or a person assuming financial responsibility for a membership may terminate a membership and only a primary member may remove a primary member from a membership. A fee must be paid for each member that is added to a membership, whether or not that person is a new member or had previously been a member. Upon reaching the age of 12, a junior member must become a partner or secondary member and, upon reaching the age of 21, any member who is not already a primary member must obtain his or her own membership.

under Chapter 458, 459, 460 or Chapter 461 ASSUMPTION OF RISK

I understand that there is an inherent risk of injury, whether caused by me or someone else, in the use of or presence at a Life Time Fitness center, the use of equipment and services at a Life Time Fitness center, and participation in Life Time Fitness' programs. This includes, but is not limited to, indoor and outdoor pool areas with waterslides, a climbing wall area, ball and racquet courts, cardiovascular and resistance training equipment, personal training and nutrition classes and services, member programs, a child center, and spa and cafe products and services. This risk includes, but is not limited to:

1) Injuries arising from the use of any of Life Time Fitness' centers or equipment, including any accidental or "slip and fall" injuries;
2) Injuries arising from participation in supervised or unsupervised activities and programs within a Life Time Fitness center or outside a Life Time Fitness center, to the extent sponsored or endorsed by Life Time Fitness;
3) Injuries or medical disorders resulting from exercise at a Life Time Fitness center, including, but not limited to heart attacks, strokes, heart stress, sprains, broken bones and torn muscles or ligaments; and
4) Injuries resulting from the actions taken or decisions made regarding medical or survival procedures.

I understand and voluntarily accept this risk. I agree to specifically assume all risk of injury, whether physical or mental, as well as all risk of loss, theft or damage of personal property for me, any person that is a part of this membership and any guest under this membership while such persons are using or present at any Life Time Fitness center, using any lockers, equipment, or services at any Life Time Fitness center or participating in Life Time Fitness' programs, whether such programs take place inside or outside of a Life Time Fitness center.

RELEASE OF LIABILITY

I waive any and all claims or actions that may arise against Life Time Fitness, Inc., its affiliates, subsidiaries, successors or assigns (collectively, "Life Time Fitness") as well as each party's owners, directors, employees or volunteers as a result of any such injury, loss, theft or damage to any such person, including

and without limitation, personal, bodily or mental injury, economic loss or any damage to me, my spouse, my children, or guests resulting from the negligence of Life Time Fitness or anyone else using a Life Time Fitness center I agree to defend, indemnify and hold Life Time Fitness harmless against any claims arising out of the negligent or willful acts or omissions of me, any person that is a part of my membership, or any guest under this membership

I HAVE READ AND AGREE TO THE TERMS AND CONDITIONS ABOVE, INCLUDING, BUT NOT LIMITED TO, THE ASSUMPTION OF RISK AND RELEASE OF LIABILITY, AND I HAVE RECEIVED A COMPLETE COPY OF MY MEMBER USAGE AGREEMENT.

Signed by Member: Wendy Stone

Sun Jul 2011 07/17/11 14:56:22

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the women's locker room after finishing a workout. Stone alleged that she had washed her hands at a locker room sink and then "turned to leave when she tripped on the blow dryer cord that was, unbeknownst to her, hanging to the floor beneath the sink and vanity counter top." She caught her foot in the cord and fell to the ground, fracturing her right ankle.

¶ 4 Stone alleged that allowing the blow dryer cord to hang below the sink counter constituted a trip hazard and a dangerous condition and that, by allowing the condition to exist, Life Time failed to exercise reasonable care. She asserted a general negligence claim and also a claim under Colorado's PLA, section 13-21-115, C.R.S. 2016.

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¶ 11 The parties agree that the PLA applies to this case. In section 13-21-115(2), the statute provides:

> In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property, the landowner shall be liable only as provided in subsection (3) of this section.

The PLA thus provides the sole remedy against landowners[1] for injuries on their property. *Vigil v. Franklin*, 103 P.3d 322, 328-29 (Colo. 2004); *Wycoff v. Grace Cmty. Church of Assemblies of God*, 251 P.3d 1260, 1265 (Colo. App. 2010). Similarly, it is well

[1]Section 13-21-115(1), C.R.S. 2016, defines "landowner" as including "a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property." In its answer, Life Time admitted that it owned and operated the club where Stone was injured and that the PLA governs her claims.

established that the PLA abrogates common law negligence claims against landowners. *Legro v. Robinson*, 2012 COA 182, ¶ 20, *aff'd*, 2014 CO 40.

¶ 12 Accordingly, albeit for reasons different from those expressed by the trial court, we conclude that Stone could not bring a claim for common law negligence, and the trial court therefore correctly ruled against her on that claim. We now turn to the effect of the exculpatory clauses in the Agreement on Stone's PLA claim.

C. Application of Exculpatory Clauses to PLA Claim

¶ 13 As we understand Stone's contentions, she does not dispute that the exculpatory language in the Agreement would preclude her from asserting claims under the PLA for any injuries she might sustain when working out on a treadmill, stationary bicycle, or other exercise equipment or playing racquetball. We therefore do not address such claims. Instead, Stone argues that the exculpatory clauses do not clearly and unambiguously apply to her injuries incurred after washing her hands in the women's locker room. We agree.

1. Law

¶ 14 "Generally, exculpatory agreements have long been disfavored." *B & B Livery, Inc. v. Riehl*, 960 P.2d 134, 136 (Colo. 1998). Determining the sufficiency and validity of an exculpatory agreement is a question of law for the court. *Id.*; *Jones v. Dressel*, 623 P.2d 370, 375 (Colo. 1981). This analysis requires close scrutiny of the agreement to ensure that the intent of the parties is expressed in clear, unambiguous, and unequivocal language. *Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465, 467 (Colo. 2004). Our supreme court has explained:

> To determine whether the intent of the parties is clearly and unambiguously expressed, we have previously examined the actual language of the agreement for legal jargon, length and complication, and any likelihood of confusion or failure of a party to recognize the full extent of the release provisions.

Id.

¶ 15 Under *Jones*, a court must consider four factors in determining whether an exculpatory agreement is valid: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4)

whether the intention of the parties was expressed in clear and unambiguous language. 623 P.2d at 375.

2. Analysis

a. The First Three *Jones* Factors

¶ 16 The first three *Jones* factors provide little help for Stone's position. The supreme court has specified that no public duty is implicated if a business provides recreational services. *See Chadwick*, 100 P.3d at 467 (addressing guided hunting services and noting that providers of recreational activities owe "no special duty to the public"); *Jones*, 623 P.2d at 376-78 (skydiving services); *see also Hamill*, 262 P.3d at 949 (addressing recreational camping services and noting supreme court authority).

¶ 17 With regard to the second factor, the nature of the services provided, courts have consistently deemed recreational services to be neither essential nor a matter of practical necessity. *See Chadwick*, 100 P.3d at 467; *Hamill*, 262 P.3d at 949; *see also Brooks v. Timberline Tours, Inc.*, 941 F. Supp. 959, 962 (D. Colo. 1996) (snowmobiling not a matter of practical necessity), *aff'd*, 127 F.3d 1273 (10th Cir. 1997); *Lahey v. Covington*, 964 F. Supp. 1440, 1445 (D. Colo. 1996) (whitewater rafting not an essential service),

aff'd sub nom. Lahey v. Twin Lakes Expeditions, Inc., 113 F.3d 1246 (10th Cir. 1997). Stone attempts to distinguish those cases by asserting that people join fitness centers "to promote their health, not for the thrill of a dangerous recreational activity." She cites no authority for such a distinction, and we are not persuaded that such activities as camping and horseback riding, at issue in the cases cited above, are engaged in for a dangerous thrill as opposed to the healthful benefits of outdoor exercise. Consequently, the recreational nature of the services Life Time provides does not weigh against upholding or enforcing the Agreement.

¶ 18 With respect to the third factor, a contract is fairly entered into if one party is not at such an obvious disadvantage in bargaining power that the effect of the contract is to place that party at the mercy of the other party's negligence. *See Hamill*, 262 P.3d at 949; *see also Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 784 (Colo. 1989). Possible examples of unfair disparity in bargaining power include agreements between employers and employees and between common carriers or public utilities and members of the public. *See Heil Valley Ranch, Inc.*, 784 P.2d at 784. However, this type of unfair disparity is generally not implicated when a person contracts

with a business providing recreational services. *See id.*; *see also Hamill*, 262 P.3d at 949-50.

¶ 19 In evaluating fairness, courts also examine whether the services provided could have been obtained elsewhere. *Hamill*, 262 P.3d at 950. Nothing in the record indicates that Stone could not have taken her business elsewhere and joined a different fitness club or recreation center. Nor is there any other evidence that the parties' relative bargaining strengths were unfairly disparate so as to weigh against enforcing the Agreement.

¶ 20 We therefore turn to the fourth prong of the *Jones* test — whether the intention of the parties was expressed in clear and unambiguous language.

b. The Fourth *Jones Factor*

¶ 21 The validity of exculpatory clauses releasing or waiving future negligence claims usually turns on the fourth *Jones* factor — whether the intention of the parties is expressed in clear and unambiguous language. *Wycoff*, 251 P.3d at 1263 (applying the *Jones* factors to a PLA claim). This case also turns on that factor.

¶ 22 The issue is not whether a detailed textual analysis would lead a court to determine that the language, even if ambiguous,

ultimately would bar the plaintiff's claims. Instead, the language must be clear and unambiguous and also "unequivocal" to be enforceable. *Chadwick*, 100 P.3d at 467; *see also Threadgill v. Peabody Coal Co.*, 34 Colo. App. 203, 209, 526 P.2d 676, 679 (1974), *cited with approval in Jones*, 623 P.2d at 378.

¶ 23 We conclude that the Agreement fails this test for numerous reasons.

¶ 24 *First*, as explained by the New York Court of Appeals, "a provision that would exempt its drafter from any liability occasioned by his fault should not compel resort to a magnifying glass and lexicon." *Gross v. Sweet*, 400 N.E.2d 306, 309 (N.Y. 1979), *cited with approval in Jones*, 623 P.2d at 378. Here, the Agreement consists of extremely dense fine print, for which a great many people would require a magnifying glass or magnifying reading glasses.

¶ 25 *Second*, the two clauses are replete with legal jargon, using phrases and terms such as "affiliates, subsidiaries, successors, or assigns"; "assumption of risk"; "inherent risk of injury"; "includes, but is not limited to"; and "I agree to defend, indemnify and hold Life Time Fitness harmless." The use of such technical legal

language militates against the conclusion that the release of liability was clear and simple to a lay person.

¶ 26 *Third*, the first of the two clauses relied on by Life Time bears the following heading: "under Chapter 458, 459, 460, or Chapter 461 ASSUMPTION OF RISK." At oral argument, counsel for Life Time conceded that the reference to multiple chapters was ambiguous and confusing, and he could not explain to what the chapters referred. Our research has not enlightened us on the subject. Conscientious lay persons could reasonably have skipped over the fine print appearing under that heading, believing it did not apply to them because they would have no reason to understand that chapters 458, 459, 460, or 461 had any relevance to their situation. Thus, the assumption of risk heading was not clear and unambiguous.

¶ 27 *Fourth*, the dominant focus of the Agreement is on the risks of strenuous exercise and use of exercise equipment at the fitness center:

- The opening paragraph of the Agreement contains the following warning: "All members are strongly encouraged to have a complete physical examination by a medical doctor prior to

beginning any work out program or strenuous new activity. If I have a history of heart disease, I agree to consult a physician before becoming a Life Time Fitness member."

- Under the confusing assumption of risk heading, the first sentence states, "I understand that there is an inherent risk of injury, whether caused by me or someone else, in the use of or presence at a Life Time Fitness Center, the use of equipment and services at a Life Time Fitness Center, and participation in Life Time Fitness' programs."
- There then follows a listing of types of risks, including the use of "indoor and outdoor pool areas with waterslides, a climbing wall area, ball and racquet courts, cardiovascular and resistance training equipment," and other specified programs, as well as "[i]njuries arising from the use of Life Time Fitness' centers or equipment" and from activities and programs sponsored by Life Time; "[i]njuries or medical disorders resulting from exercise at a Life Time Fitness center, including, but not limited to heart attacks, strokes, heart stress, spr [sic] broken bones and torn muscles or ligaments"; and "[i]njuries resulting from the actions

taken or decisions made regarding medical or survival procedures."

¶ 28 *Fifth*, the term "inherent risk of injury" that appears in the assumption of risk clause has been applied in various Colorado statutes and case law to address waivers of liability only for activities that are dangerous or potentially dangerous. Thus, the General Assembly has provided for releases from liability in circumstances such as activities involving horses and llamas, section 13-21-119, C.R.S. 2016; being a spectator at baseball games, section 13-21-120, C.R.S. 2016; agricultural recreation or agritourism activities (including hunting, shooting, diving, and operating a motorized recreational vehicle on or near agricultural land), section 13-21-121, C.R.S. 2016; skiing, section 33-44-109, C.R.S. 2016; and spaceflight activities, section 41-6-101, C.R.S. 2016. Significantly, not one of these statutory exemptions from liability extends to the use of locker rooms, rest rooms, or dressing rooms associated with these activities. Rather, the releases of liability extend only to the dangerous or potentially dangerous activities themselves.

¶ 29 Colorado's published cases concerning the term "inherent risks" similarly concern dangerous or potentially dangerous activities. For example, the term "inherent risks" has been addressed in cases involving skiing, *Graven v. Vail Assocs., Inc.*, 909 P.2d 514, 519 (Colo. 1995); horseback riding, *Heil Valley Ranch, Inc.*, 784 P.2d at 782; medical procedures or surgical techniques, *Mudd v. Dorr*, 40 Colo. App. 74, 78-79, 574 P.2d 97, 101 (1977); and attendance at roller hockey games, *Teneyck v. Roller Hockey Colo., Ltd.*, 10 P.3d 707, 710 (Colo. App. 2000). Thus, in reported cases, the term "inherent risks" has been limited to dangerous or potentially dangerous activities, rather than accidents occurring in more common situations, such as using locker rooms.

¶ 30 In light of this statutory and case law backdrop, the use of the inherent risk language in the assumption of risk clause, and the Agreement's focus on the use of exercise equipment and facilities and physical injuries resulting from strenuous exercise, one could reasonably conclude that by signing the Agreement he or she was waiving claims based only on the inherent risks of injury related to fitness activities, as opposed to washing one's hands. Indeed, Stone

so stated in her affidavit submitted in opposition to the motion for summary judgment.

¶ 31 *Sixth*, Life Time contends that the only relevant language we need consider is that set forth in the second exculpatory clause, labeled "RELEASE OF LIABILITY." That provision begins by stating that "I waive any and all claims or actions that may arise against Life Time . . . as a result of any *such* injury." (Emphasis added.) The quoted language, however, is the first use of the term "injury" in the release of liability clause. So the scope of the release can be determined only by referring back to the confusing assumption of risk clause. It is not surprising then that Life Time's counsel characterized the release's reference to "such injury" as "squirrely." In any event, all of the ambiguities and confusion in the assumption of risk clause necessarily infect the release clause.

¶ 32 *Seventh*, the exculpatory clauses repeatedly use the phrases "includes, but is not limited to" and "including and without limitation," as well as simply "including." The repeated use of these phrases makes the clauses more confusing, and the reader is left to guess whether the phrases have different meanings. The problem is compounded by conflicting views expressed by divisions of this

court on whether the similar phrase "including, but not limited to" is expansive or restrictive. *Compare Maehal Enters., Inc. v. Thunder Mountain Custom Cycles, Inc.*, 313 P.3d 584, 590 (Colo. App. 2011) (declining to treat the phrase as restrictive and citing Bryan A. Garner, *A Dictionary of Modern Legal Usage* 432 (2d ed. 1995)), *with Ridgeview Classical Sch. v. Poudre Sch. Dist.*, 214 P.3d 476, 483 (Colo. App. 2008) (declining to conclude that the phrase took the statute out of the limiting rule of *ejusdem generis*). For purposes of deciding this case we need not resolve this conflict; the relevance of the conflict for present purposes is that it creates another ambiguity.

¶ 33 That ambiguity — expansive versus restrictive — is critical because nothing in the Agreement refers to risks of using sinks or locker rooms. The assumption of risk clause refers to the "risk of loss, theft or damage of personal property" for the member or her guests while "using any lockers" at a Life Time fitness center. That is quite a separate matter, however, from suffering a physical injury in a locker room.

¶ 34 Significantly, when Life Time intends to exclude accidental injuries occurring in locker rooms, it knows how to draft a clear

waiver of liability doing so. In *Geczi v. Lifetime Fitness*, 973 N.E.2d 801, 803 (Ohio Ct. App. 2012), the plaintiff entered into a membership agreement with Life Time in 2000 (eleven years before Stone entered into the Agreement), which provided in relevant part:

> [T]he undersigned agrees to specifically assume all risk of injury while using any of the Clubs[']s facilities, equipment, services or programs and hereby waives any and all claims or actions which may arise against LIFE TIME FITNESS or its owners and employees as a result of such injury. The risks include, but are not limited to
>
> . . . .
>
> (4) Accidental injuries within the facilities, including, but not limited to the locker rooms, . . . showers and dressing rooms.

Id. at 806. Life Time chose not to include similar language in the Agreement signed by Stone.

c. The Agreement Is not Clear, Unambiguous, and Unequivocal

¶ 35 Based on the foregoing discussion, and after scrutinizing the exculpatory clauses, we conclude that the Agreement uses excessive legal jargon, is unnecessarily complex, and creates a likelihood of confusion or failure of a party to recognize the full extent of the release provisions. *See Chadwick*, 100 P.3d at 467. Accordingly,

the Agreement does not clearly, unambiguously, and unequivocally bar Stone's PLA claim based on the injuries she alleges she sustained after she washed her hands in the women's locker room.

III. Conclusion

¶ 36 The judgment on Stone's negligence claim is affirmed, the judgment on her PLA claim is reversed, and the case is remanded for further proceedings on that claim.

JUDGE TAUBMAN and JUDGE FOX concur.

Appendix

LIFETIME FITNESS

Member Usage Agreement

Member Name: Wendy Stone
Member Number: 105058945

Additional Members:

I wish to become a Life Time Fitness member. I understand that I will not be allowed to use a Life Time Fitness center until I have executed and complied with the terms of this Member Usage Agreement. All members are strongly encouraged to have a complete physical examination by a medical doctor prior to beginning any work out program or strenuous new activity. If I have a history of heart disease, I agree to consult a physician before becoming a Life Time Fitness member.

RULES AND REGULATIONS

All matters affecting or relating to members are under the complete control of Life Time Fitness. Life Time Fitness may terminate my membership or any member at any time for failure to comply with any of the rules and regulations adopted by Life Time Fitness or for conduct Life Time Fitness determines to be improper or contrary to the best interests of Life Time Fitness. I will comply with Life Time Fitness' rules and regulations (which may be amended as necessary), including, but not limited to:

Access to Centers. I will present my membership card each time I use a Life Time Fitness center. Onyx Executive and Onyx members may access Life Time Fitness' Onyx centers and the tennis facilities located within those centers (court fees apply). Onyx Junior Executive members may access Life Time Fitness' Onyx centers, but not the tennis facilities located within those centers. Onyx Executive, Onyx and Platinum members may access Life Time Fitness' Platinum centers and the tennis facilities located within those centers (court fees apply). Onyx Junior Executive members may access Life Time Fitness' Platinum centers, but not the tennis facilities located within those centers. Onyx Executive, Onyx and Platinum members may access Life Time Fitness' Gold centers and the tennis facilities located within those centers (court fees apply). Onyx Junior Executive and Gold members may access Life Time Fitness' Gold centers, but not the tennis facilities located within those centers. Onyx Executive, Onyx, Onyx Junior Executive, Platinum, Gold, and Bronze members may access any of Life Time Fitness' Bronze centers, except that no male member may access any Bronze centers designated to be specifically for the use of women. Short Term members may access centers in the membership level (Onyx, Platinum or Gold) specified in their General Terms Agreements.

Guests. A membership advisor must authorize all guest visits and give each adult guest a tour of the Life Time Fitness center. All adult guests (i.e.; guests 18 years of age or older) must sign a Guest Register and present a valid government-issued photo identification with a date of birth. All minor guests (i.e., guests under 18 years of age) must be accompanied on the premises by an adult sponsoring member who is at least 18 years of age. The sponsoring member, and the minor guest's parent or legal guardian, must sign all documents required by Life Time Fitness before the minor guest may use the center. Guests may use the center only during designated guest hours and may be charged a guest fee for each visit to the center. Life Time Fitness reserves the right to limit guest usage. Guests must comply with all Life Time Fitness guest policies, which are subject to change in Life Time Fitness' discretion.

Child Centers. Only a junior member child between the ages of 3 months and 11 years may be checked into a Life Time Fitness child center and only by a parent or legal guardian. The same parent or legal guardian must remain on-site while the junior member child is in the child center and check the junior member child out of the Life Time Fitness child center. No junior member child is allowed to stay in a child center over 2 hours. No person between the ages of 3 months and 11 years is allowed into any area other than a Life Time Fitness child center except during designated family hours.

Family Hours. Only a junior member child between 3 and 11 years of age may use a center's family locker room and indoor or outdoor pool area during designated family hours if accompanied by a parent or legal guardian at all times. A parent or legal guardian must accompany a junior member child of the same gender while in an adult locker room. A parent or legal guardian may bring a maximum of 3 junior member children during family hours.

No Weapons. No weapons of any kind (as may be determined by Life Time Fitness in its sole discretion), including, but not limited to firearms, are allowed in any area of a Life Time Fitness center at any time or for any reason.

Membership Freezes. A membership can only be frozen for medical or military purposes. Life Time Fitness requires a statement from the treating physician if for a medical purpose or orders from a military branch of service if for a military purpose. The freeze on membership is effective for a period of up to 90 days from the date your notification and appropriate professional documentation were received by Life Time Fitness either in person or received by certified mail, return receipt requested. No retroactive freezes are permitted. If no other action is taken, upon expiration of the freeze period, the membership will activate and Membership Dues will again be charged to your designated account.

Changes to Membership. A primary member may transfer an Onyx Executive membership to another party no sooner than 18 months from the date of purchase of the membership. A transfer fee must accompany each Onyx Executive transfer and both the primary member and transferee must be present at the time of transfer to sign any required documents. All other membership types are not transferable. Only a primary or partner member or a person assuming financial responsibility for a membership may terminate a membership and only a primary member may remove a primary member from a membership. A fee must be paid for each member that is added to a membership, whether or not that person is a new member or had previously been a member. Upon reaching the age of 12, a junior member must become a partner or secondary member and, upon reaching the age of 21, any member who is not already a primary member must obtain his or her own membership.

under Chapter 458, 459, 460 or Chapter 461 ASSUMPTION OF RISK

I understand that there is an inherent risk of injury, whether caused by me or someone else, in the use of or presence at a Life Time Fitness center, the use of equipment and services at a Life Time Fitness center, and participation in Life Time Fitness' programs. This includes, but is not limited to, indoor and outdoor pool areas with waterslides, a climbing wall area, ball and racquet courts, cardiovascular and resistance training equipment, personal training and nutrition classes and services, member programs, a child center, and spa and cafe products and services. This risk includes, but is not limited to:

1) Injuries arising from the use of any of Life Time Fitness' centers or equipment, including any accidental or "slip and fall" injuries;
2) Injuries arising from participation in supervised or unsupervised activities and programs within a Life Time Fitness center or outside a Life Time Fitness center, to the extent sponsored or endorsed by Life Time Fitness;
3) Injuries or medical disorders resulting from exercise at a Life Time Fitness center, including, but not limited to heart attacks, strokes, heart stress, sprains, broken bones and torn muscles or ligaments; and
4) Injuries resulting from the actions taken or decisions made regarding medical or survival procedures.

I understand and voluntarily accept this risk. I agree to specifically assume all risk of injury, whether physical or mental, as well as all risk of loss, theft or damage of personal property for me, any person that is a part of this membership and any guest under this membership while such persons are using or present at any Life Time Fitness center, using any lockers, equipment, or services at any Life Time Fitness center or participating in Life Time Fitness' programs, whether such programs take place inside or outside of a Life Time Fitness center.

RELEASE OF LIABILITY

I waive any and all claims or actions that may arise against Life Time Fitness, Inc., its affiliates, subsidiaries, successors or assigns (collectively, "Life Time Fitness") as well as each party's owners, directors, employees or volunteers as a result of any such injury, loss, theft or damage to any such person, including

and without limitation, personal, bodily or mental injury, economic loss or any damage to me, my spouse, my children, or guests resulting from the negligence of Life Time Fitness or anyone else using a Life Time Fitness center I agree to defend, indemnify and hold Life Time Fitness harmless against any claims arising out of the negligent or willful acts or omissions of me, any person that is a part of my membership, or any guest under this membership

I HAVE READ AND AGREE TO THE TERMS AND CONDITIONS ABOVE, INCLUDING, BUT NOT LIMITED TO, THE ASSUMPTION OF RISK AND RELEASE OF LIABILITY, AND I HAVE RECEIVED A COMPLETE COPY OF MY MEMBER USAGE AGREEMENT.

Signed by Member: Wendy Stone

Sun Jul 2011 07/17/11 14:56:22