Club Member’s Claims of Willful and Wanton Conduct to Proceed Against Personal Trainer and Health Club

Avoiding Liability Bulletin - August 2018

As we have recommended several time in this column, pre-activity waivers of liability often protect fitness professionals and fitness facility from injury claims based upon negligence – at least in those states where those documents are recognized as being legally effective. However, as we have also previously pointed out, claims beyond mere negligence – ones for gross negligence, willful/wanton conduct or even criminal activity will not be barred by executing a pre-activity waiver document.

Due to the foregoing, some personal injury claims are being put forth alternatively based upon claims of negligence and gross negligence or willful/wanton conduct in efforts to avoid the effectiveness of pre-activity waivers of liability. In some cases, based upon the proof of specific facts and the so-called standards of the industry, court decisions regarding the effectiveness of pre-activity waivers of liability will allow cases to proceed to trial on willful wanton or gross negligence allegations.

In a very recent case from Illinois for example,[i] the plaintiff, while exercising at the defendant club under the supervision of the club’s personal trainer, slipped and fell of an unsecured piece of equipment, specifically a plyometric step.

Her complaint alleged that:

. . . during seven weeks of workouts before the date of the accident, Drake had instructed plaintiff to use the plyometric step, but “only in the rubber floor area of the fitness facility,” where “the plyometric step was secured against a solid surface, e.g., . . . a wall, as to prevent it from moving while being utilized.” But on the day of the accident— November 29, 2012—Drake placed the plyometric step “in the carpeted area” of the fitness facility, where it “was not secured against a solid surface,” nor did the step contain “anti-slip or anti-skid feet” or “ridges on the bottom of it.” And due to its age, “the bottom of the plyometric step was worn off and it had a smooth surface.”

The complaint alleges that Drake knew the step was unsecured and knew about all of these aspects of the step that made it prone to slipping. It also alleges that, before starting the step exercises, “[p]laintiff told Chad Drake that she did not feel safe performing the exercise and utilizing the plyometric step” because it “was freestanding and not secured against a flat surface” as it always had been in the past; she also told Drake that she did not feel safe using the step “on the carpeted area” of the facility. The complaint alleges, however, that “Drake insisted that Plaintiff utilize the plyometric step” and “assured Plaintiff that she would be safe even though he knew the step was unstable.” After plaintiff performed one set of exercises, she “again expressed her

concern for her safety" to Drake, but Drake "insisted that what Plaintiff was experiencing was just a mental block and instructed her to 'get over it' and continue performing the exercise."

Plaintiff alleged that during the third set of repetitions, the plyometric step "moved backwards, causing [her] to fall and make contact with the fitness center floor with great force." She alleged that Drake had moved away from her at that moment—he was putting away another piece of equipment—and thus failed to brace her or catch her.

The plaintiff alleged that the club's personal trainer employee:

. . . created an unsafe condition, an unbraced plyometric step, made unsecured because he moved it from a rubber mat against a wall to a carpeted area out in the - 9 No. 1-17-0388 open gym, and because the step had no anti-skid features and was worn smooth on the bottom due to age. Drake knew it was unsecured and unsafe. Plaintiff told him she did not feel safe using it. Drake "insisted" that she use it, anyway. When plaintiff stopped after the first round of exercise, again expressing concern for her safety, he again "insisted" she continue and told her to "get over" her concern. And then he walked away, so when she fell, he was not there to stabilize her or catch her.

As a result of the foregoing, the plaintiff filed suit against the health club and the personal trainer for both negligence as well as willful and wanton conduct. She also sued the club under a theory of *respondeat superior* for the conduct of the trainer which she contended rendered it liable for the actions of its employee.

The trial court determined that the pre-activity waiver barred the negligence claims against the defendants and also dismissed the willful and wanton claims against the club while leaving those claims against the personal trainer in place. The plaintiff appealed and contended that the club should be liable for the personal trainer's willful and wanton actions.

The appeals court ruled that there were more than sufficient allegations pled by the plaintiff to withstand the club's motion to dismiss the plaintiff's willful and wanton allegations. In this specific regard, the court ruled that the allegations set for "a conscious disregard for the plaintiff's welfare" or an "utter indifference" to her safety as well as a "failure to take reasonable precautions after knowledge of impending danger."

The appeals court thereafter ruled "if [the allegations] . . . are good enough for a direct claim against [the personal trainer] . . . , they are good enough for a *respondeat superior* claim against his employers for that very same conduct." Although certain "buzzwords" associated with such conduct were not stated in the complaint, the appeals court ruled that the complaint factually set forth sufficient facts to state a cause of action.

Putting aside the legal issues of this action, personal trainers and other fitness professionals should wonder why there was any deviation from what was normally done in the placement of the

plyometric step which is alleged to be contrary to what appears to have been established policy. If so, why the deviation? Assuming the allegations are true, were there clear and supportable reasons for such a deviation? If so, what are they, particularly as to a step which based upon the court's description, should perhaps not have been used at all, no matter where placed?

While this case is awaiting proof of facts at trial and a final verdict, personal trainers and other fitness professionals should take note of the appellate court's decision. Any deviations from clear facility policy as to the use of exercise/activity equipment should be carefully considered. If deviations are to occur, supportable and justifiable reasons must be documented in facility records and set in accordance with industry standards of care.

[i] Papadakis v Fitness 19 IL 116, LLC, et al., No. 1-17-0388 (Court of Appeals, Illinois, First District, Fourth Division, June 28, 2018).

This publication is written and published to provide accurate and authoritative information relevant to the subject matter presented. It is published with the understanding that the author and publisher are not engaged in rendering legal, medical or other professional services by reason of

the authorship or publication of this work. If legal, medical or other expert assistance is required, the services of such competent professional persons should be sought. Moreover, in the field of personal fitness training, the services of such competent professionals must be obtained.

Adapted from a Declaration of Principles of the American Bar Association and Committee of Publishers and Associations

Author:
David Herbert