

# RAWLE'S REPORTS

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## Pennsylvania Superior Court Affirms Summary Judgment



**John C. McMeekin II**



**John Ehmann**

Plaintiff Charles Toro was a member of an L.A. Fitness Center. As part of his membership, he signed a Membership Agreement which included a “Release and Waiver of Liability and Indemnity Clause.” Additionally, immediately above the signature line on the Membership Agreement was the following statement: “By signing this Agreement, Buyer acknowledges that Buyer . . . has read and understands the entire agreement including . . . the Release and Waiver of Liability and Indemnity [clause]. . . .”

Subsequently, while he was at the gym, Toro claimed that he slipped and fell on a “wet and slippery floor” in the men’s locker room and filed suit against L.A. Fitness Center. **John C. McMeekin II** and **John Ehmann** of Rawle & Henderson

LLP represented L.A. Fitness Center in Toro’s lawsuit and filed a motion for summary judgment on two grounds: 1) that Toro’s claim was precluded by the Release and Waiver of Liability clause in the Membership Agreement; and 2) that Toro could not meet his burden of proving negligence, i.e., showing that L.A. Fitness Center knew and/or should have known of the slippery area prior to his accident. The trial court granted L.A. Fitness Center’s motion on both grounds, and Toro filed an appeal to the Pennsylvania Superior Court.

**Carl D. Buchholz, III**, and **Angela M. Heim** represented L.A. Fitness Center in the appeal. Carl Buchholz presented oral argument on behalf of L.A. Fitness before a three-judge panel of the Superior Court, and in an unanimous opinion, the Superior Court affirmed the trial court’s dismissal of Toro’s lawsuit.

The Superior Court initially addressed and rejected Toro’s arguments that the Release and Waiver Clause in the Membership Agreement was an invalid and/or unenforceable exculpatory clause. First, the Court held the Release and Waiver Clause, although exculpatory in nature, did not violate public policy. Quoting the Superior Court’s prior *en banc* decision in



**Carl D. Buchholz, III**



**Angela M. Heim**

*Hinkal v. Pardoe*, 133 A.3d 738 (Pa. Super. 2016), the Court stated: “[t]he exculpatory language at issue cannot be said to violate public policy because it was an agreement between a private individual and entities, and because it did not address matters of interest to the public or the state.” Moreover, citing to the Pennsylvania Supreme Court’s opinion in *Chepkevich v. Hidden Valley Resort*, 2 A.3d 1174 (Pa. 2010), the Court stated: “[w]here, as here, an individual is engaged in a voluntary athletic or recreational activity, the Supreme Court of Pennsylvania has held that an exculpatory clause in a contract for use of facilities is not contrary to public policy.”

Second, the Superior Court held that the Membership Agreement is not a contract of adhesion. Again, quoting from *Chepkevich*, the Court stated that an exculpatory agreement involving the use of a commercial facility for voluntary athletic or recreational activities is not considered a contract of adhesion because “[t]he signer is under no compulsion, economic or otherwise, to participate, much less to sign the exculpatory agreement, because it does not relate to essential services....”

Third, the Superior Court rejected Toro’s argument that the Release and Waiver Clause is unenforceable because he does not remember reading it. In this regard, the Court, citing to *Hinkal*, stated: “Failure to read an agreement before signing it does not render the agreement either invalid or unenforceable.”

Lastly, the Superior Court rejected Toro’s argument that the exculpatory clause was unenforceable because it was not sufficiently conspicuous to put him on notice of the terms. The Court agreed with the trial court’s analysis regarding the conspicuousness of the Release and Waiver Clause (namely that it was emphasized in a box, had bold capitalized letters and was sufficiently conspicuous to have placed Plaintiff on notice of its exculpatory nature in any event), but the Superior Court affirmed this particular issue on an alternative ground. Specifically, the Court stated that the clause’s conspicuity was irrelevant because in *Hinkal*, the Court held that “an exculpatory clause in a signed fitness center agreement ... is enforceable even in the member did not read it.” Therefore, by signing the Membership Agreement attesting that he has

read and understands the entire agreement, including the Release and Waiver of Liability and Indemnity, “there is no need to resort to proof of notice of an analysis of the clause’s conspicuity to determine if there was a meeting of the minds. Toro’s signature on the Membership Agreement formed a valid contract, and he is bound by its terms.”

The Superior Court then addressed Toro’s argument that the trial court erred in entering summary judgment on the ground that he had failed to establish that L.A. Fitness Center was negligent. The Court stated that Toro was required to “show that the property owner either created or had actual or constructive notice of the dangerous condition” and had failed to do so as a matter of law. The Court acknowledged that Toro had failed to argue on appeal that L.A. Fitness Center had created or had actual knowledge of the condition on which he slipped and fell but, rather, focused on constructive notice. As to constructive notice, however, the Court stated that the condition at issue was transitory, and Toro offered no evidence whatsoever as to how long the condition had existed prior to his accident. The Court noted that Toro’s own testimony that he had never before observed similar conditions in the men’s locker room discredits his argument that L.A. Fitness Center should have been aware of wet floor conditions in the men’s locker room prior to his accident. Lastly, the Court rejected Toro’s argument that L.A. Fitness Center was negligent for not using floor mats in the men’s locker room as supported by the law or the facts because he “offered no evidence that the floor on which he fell had a tendency to be wet on a regular basis, or that Fitness had any other reason to now that the floor would be wet when Toro fell.”

The Superior Court’s holding in *Toro* regarding the validity and enforceability of the Release Waiver of Liability Clause will provide gyms and other recreational facilities with some measure of assurance that the enforceability of a waiver of liability clause in an executed membership agreement cannot be avoided by a plaintiff simply denying that he/she read the clause or that the clause was not sufficiently conspicuous.

*Toro v. Fitness International a/k/a L.A. Fitness International, LLC*, 378 EDA 2016 (Pa. Super. Nov. 10, 2016)

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## ABA TIPS



**John C. McMeekin II**

**John C. McMeekin II**, a member of the firm's Executive Committee, was elected **Section Secretary of the Tort Trial & Insurance Practice Section of the American Bar Association**. John was elected at the American Bar Association 2017 Mid-Year meeting in Miami, Florida. His two-year term as Section Secretary will commence at the end of the Annual Meeting in August 2017. Until then he will continue to serve in the role of a Council Member. He also served as the Section Revenue Officer, Chair of the Toxic Tort & Environmental Law Committee, Chair of the International Law Committee, Chair of the CLE Board and is currently co-Chairing the Corporate Counsel Initiative Task Force. In addition to dedication and service to the profession with the American Bar Association, John chaired the Philadelphia Bar Association Environmental and Toxic Tort Law Committee and been a member of the Delaware Valley Environmental Inn of Court.

John follows in a long line of Rawle & Henderson partners who have dedicated themselves to the profession. In 1878, Francis Rawle, a leader of the Rawle law offices, became one of the founders of the American Bar Association, and its first secretary and treasurer. In 1902, Francis Rawle became the American Bar Association's president.

John represents clients as local, national and trial counsel in environmental, toxic and mass torts product and related class actions, products liability, insurance coverage and aviation litigation. He graduated *magna cum laude* from the University of Baltimore School of Law. John is admitted to practice in Pennsylvania, New Jersey and Maryland and related U.S. District Courts. John is a former firefighter and emergency medical technician, and is Hazmat certified. He has been published in professional and law review journals on a variety of topics related to toxic tort and environmental litigation. His significant cases can be found in the *BNA Law Reports* and Law 360. He has been rated AV Preeminent by Martindale-Hubbell and has been selected as a Pennsylvania Super Lawyer.

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## ABA TRANSPORTATION MEGACONFERENCE



**Nigel A. Greene**

**Nigel A. Greene** will speak at the **American Bar Association Transportation Megaconference XIII** on March 9, 2017, in New Orleans, Louisiana. Nigel will speak in a session titled "*The Top Ten List—2017*," which will provide an update on the most significant legal developments impacting trucking companies and litigation over the last two years.

Nigel is a partner in our Philadelphia office. He focuses his practice on the defense of commercial motor vehicles, municipalities, commercial general liability, and premises liability matters. In addition, he serves as an arbitrator in Philadelphia County. He is admitted to practice in the state courts of Pennsylvania, the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania and the U.S. Courts of Appeals for the Third Circuit. He received his J.D. from Georgetown University Law Center in 1994 and his B.A. from the Virginia Polytechnic and State University in 1989. He has been appointed Vice-Chair of the ABA Tort Trial and Insurance Practice Section (TIPS) Commercial Transportation Litigation General Committee for the 2016-2017 fiscal year. His appointment is in recognition of his professional abilities and reputation among 24,000 TIPS members. This will be the third one-year term that Nigel has served in this position.

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## DEPARTMENT OF DEFENSE BREAST CANCER RESEARCH PROGRAM



**Patrice S. O'Brien**

**Patrice S. O'Brien** recently participated in the evaluation of research applications submitted to the Breast Cancer Research Program (BCRP) sponsored by the Department of Defense. Patrice was nominated for participation in the program by Susan G. Komen Philadelphia. As a consumer reviewer, she was a full voting member, along with prominent scientists, at meetings to help determine how the \$120 million appropriated by Congress for Fiscal Year 2016 will be spent on future breast cancer research.

Consumer reviewers are asked to represent the collective view of breast cancer survivors and patients, family members, and persons at risk for the disease when they prepare comments on the impact of the research on issues such as disease prevention, screening, diagnosis, treatment, and quality of life after treatment.

Patrice has a strong commitment to breast cancer research. For the past nine years, she has been the captain of Rawle & Henderson LLP's race team for the annual Komen Philadelphia Race for the Cure, helping to raise funds to find a cure for breast cancer. Rawle & Henderson LLP has raised over \$71,000 for Komen Philadelphia.

Patrice is Of Counsel to the firm in our Philadelphia office. She has practiced as a civil trial lawyer for over 20 years in the areas of medical malpractice, products liability and environmental, toxic and mass torts. She received her undergraduate degree from Delaware Valley College, *magna cum laude*, in 1983, and law degree from Columbus School of Law at Catholic University in 1986. Patrice is also currently co-chair of the Medical–Legal Committee of the State Civil Litigation Section of the Philadelphia Bar Association.

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## PHILADELPHIA BUSINESS JOURNAL

The *Philadelphia Business Journal* has ranked Rawle & Henderson LLP 26th among the top 100 Philadelphia area law firms in its January 13, 2017 edition. The results were based on a 2016 survey. Ranking were by total number of area attorneys.

In addition, the firm was ranked 7th among the oldest area businesses. Rawle & Henderson LLP was founded in 1783. The six older businesses are Saint-Gobain Corp. (1665), Christ Church and Burial Ground (1695), The Library Company of Philadelphia (1731), The Rowland Company (1732), The Philadelphia Contributionship (1752) and Penn Medicine (1765). Rawle & Henderson has been recognized by the *ABA Journal* as the oldest law firm in continuous practice in the United States.

**RAWLE'S REPORTS** is a monthly publication of Rawle & Henderson LLP. Previous issues are available on our website. If you would like **hard copies** of past issues, please email your request to [info@rawle.com](mailto:info@rawle.com).