Volume 22 • Number 6

RAWLE'S REPORTS

THE NATION'S OLDEST LAW OFFICE

RAWLE & HENDERSON LLP

The Nation's Oldest Law Office
~Established in 1783~

www.rawle.com

Philadelphia, PA
215. 575. 4200
Fax 215. 563. 2583

New York City, NY
212. 323. 7070
Fax 212. 323. 7099

Long Island, NY
516. 294. 2001
Fax 516. 294. 2006

Marlton, NJ
856. 596. 4800
Fax 856. 596. 6164

Pittsburgh, PA
412. 261. 5700
Fax 412. 261. 5710

Harrisburg, PA
717. 234. 7700
Fax 717. 234. 7710

Wilmington, DE
302. 778. 1200
Fax 302. 778. 1400

Wheeling, WV
304. 232. 1203
Fax 304. 232. 1205

@1783Rawle

PENNSYLVANIA APPELLATE

Superior Court Affirms Validity of Exculpatory Clause in Gym Membership Agreement

John C. McMeekin II

Carl D. Buchholz, III

John Ehmann

Angela M. Heim

On May 4, 2018, a three-judge panel of the Pennsylvania Superior Court issued an unanimous Opinion affirming the trial court's order granting summary judgment to *Fitness International, LLC, et al.* (*"L.A. Fitness"*) in a lawsuit filed by an L.A. Fitness member for personal injuries the member allegedly sustained at an L.A. Fitness facility as she walked from the swimming pool to the showers adjacent to the pool.

Plaintiff Dolores Vinson filed suit against L.A. Fitness in the Court of Common Pleas of Philadelphia County claiming she tripped and fell on a wet floor mat which was "worn" at the time of her accident. Plaintiff's Complaint alleged L.A. Fitness was negligent for failing to remove the worn floor mat that caused her to fall; failing to reasonably inspect or maintain the premises; and failing to warn her of a defective condition of the floor mat.

Rawle & Henderson partner **John C. McMeekin II** and Of Counsel attorney **John Ehmann** defended L.A. Fitness in the lawsuit. They filed an Answer to plaintiff's Complaint with New Matter claiming, *inter alia*, that Vinson's claim was barred by the Release and Waiver Clause in the Membership Agreement she had signed when she joined L.A. Fitness. When Vinson originally joined L.A. Fitness, she had been given a three page Membership Agreement which contained L.A. Fitness' Membership Policies and Club Rules and Regulations, as well as a Release and Waiver of Liability and Indemnity Clause. The Release and Waiver of Liability Clause specifically stated that the Clause released L.A. Fitness from claims for bodily injury

occurring on or about the L.A. Fitness' premises, including those "caused by the active or passive negligence of L.A. Fitness." In addition, the Clause specifically listed the types of risks covered by the Clause, including "accidental injuries occurring anywhere in Club dressing rooms, showers, or other facilities."

Plaintiff filed an Answer opposing L.A. Fitness' Motion for Summary Judgment, arguing that the Release and Waiver Clause was void against public policy. The trial court rejected plaintiff's argument and granted L.A. Fitness' Motion for Summary Judgment based on the Waiver of Liability Clause.

Plaintiff filed an appeal of the trial court's order granting summary judgment to the Pennsylvania Superior Court. Rawle & Henderson partner **Carl D. Buchholz, III**, and Of Counsel attorney **Angela M. Heim** represented L.A. Fitness in plaintiff's appeal to the Superior Court. In her appeal, plaintiff again contended that the Release and Waiver of Liability Clause was invalid because it contravened public policy since it involved "a vital matter of public health and safety." In their brief opposing plaintiff's appeal, attorneys Buchholz and Heim relied extensively on a prior opinion that they had obtained from the Superior Court regarding the enforceability of this exact same Exculpatory Clause in *Toro v. Fitness International LLC*, 150 A.3d 968 (Pa. Super. 2016).

Plaintiff's counsel tried to distinguish the Superior Court's prior holding in *Toro*, which involved a slip and fall on an alleged transitory slippery condition on a bathroom floor, by arguing that Vinson's claim involved "a systemic problem with facility maintenance" which "involved a vital matter of public health and safety." Vinson's attorney also argued that Vinson might not have even have been given the Exculpatory Clause to review because it was printed on the second page of the Membership Agreement and she had only signed the first page of the Agreement.

The three-judge panel of the Superior Court rejected plaintiff's argument that the allegedly defective mat made her claim a matter of "public policy" which would have invalidated the Exculpatory Clause. Rather, the panel held that plaintiff's claim was barred by the Superior Court's prior decision in *Toro* "because both cases involve private individuals engaged in recreational activity, which is not classifiable as a matter of public or state interest."

The panel also specifically noted its support for a prior holding of an *en banc* panel of the Superior Court in *Hinkal v. Pardo*, 133 A.3d 738 (Pa. Super. 2016), appeal denied, 141 A.3d 481 (Pa. 2016), that personal training services also do not concern "health and safety" to the extent necessary to invalidate a Waiver of Liability Clause in a gym membership agreement.

Further, the panel specifically found that Vinson's claim that she might not have even been given the Exculpatory Clause to review because it was printed on the second page of the Membership Agreement since she only signed the first page of the Agreement was without any merit because she signed the first page of the Membership Agreement under language which stated that she "has received a filled-in and completed copy of the Agreement has read and understands the entire agreement including but not limited to . . . the Release and Waiver of Liability and Indemnity". The panel then cited the Superior Court's prior holding in *In re Estate of Olson*, 291 A.2d 95, 98 (Pa. 1972):

> [F]ailure to read [the contract] is an unavailing excuse for defense and cannot justify an avoidance, modification or nullification of the contract or any provision thereof.

Vinson is an important expansion of the Superior Court's prior holdings enforcing the waiver of liability clauses in gym memberships in *Toro* and *Hinkal* by holding that an alleged defective condition on the gym property "is not classifiable as a matter of public or state interest." The Superior Court's enforcement of the Waiver of Liability Clause in gym membership agreements in *Hinkal*, *Toro*, and *Vinson* allows gyms and recreational facilities in Pennsylvania to reduce their insurance premiums and to offer lower membership fees to consumers.

Although the Superior Court panel initially issued its decision as an "Unpublished Opinion" which could not be cited as authority in future cases, the panel granted Rawle & Henderson's motion to reissue its opinion as "Published" so it could be cited as binding authority in future cases.

Vinson v. Fitness International, LLC, No. 2875 EDA 2016, PA Superior Court

For more information, contact John C. McMeekin II, (215) 575-4324 • jmcmeekin@rawle.com or Carl D. Buchholz, III, (215) 575-4235 • cbuchholz@rawle.com

NEW YORK APPELLATE

Summary Judgment Affirmed for Defendant Architect

The First Department Appellate Division recently affirmed a lower court decision awarding summary judgment and dismissal of all claims in favor of Rawle & Henderson LLP's client, the defendant architect, in a case venued in Bronx County Supreme Court.

Robert A. Fitch, **Derek E. Barrett** and **Bryan J. Ferrara** of Rawle & Henderson LLP represented the defendant architect.

Plaintiff claimed that, while working as a cook in the kitchen of a restaurant, he was injured due to the collapse of a drop ceiling. Plaintiff claimed that the ceiling did not contain lightweight fireproof tiles as required but instead contained heavier pieces of sheetrock. Plaintiff also testified that the drop ceiling was not properly secured to the main ceiling and that after the accident, the general contractor performed repair work to the ceiling.

As a result of the accident, plaintiff alleged, among other injuries, herniated discs and radiculopathy in his cervical spine requiring a cervical spinal fusion surgery, herniated discs and radiculopathy in his lumbar spine requiring a lumbar spinal fusion surgery, and a torn right rotator cuff requiring arthroscopic right shoulder surgery.

Plaintiff brought an action against the owner of the premises, the architect, a plumbing contractor, and a general contractor involved in renovation work at the premises.

By agreement, the tenant of the premises entered into a contract with the architect for consultation services for the interior renovation of approximately 500 square feet of commercial space for a new restaurant. The contract with the architect was limited to the preparation of drawings for the renovation work and did not include structural design. The contract did not require the architect to return to the site during the construction or post construction phases of renovation. Further, the architect was not required to return to the site in order to confirm that the renovation work was performed pursuant to the drawings. The subject ceiling suspension system in the kitchen area consisted of a two by four acoustic ceiling tile and suspension system that was drawn pursuant to the New York City Code. The suspended system was to be attached to the underside of the existing structure by an expansion bolt.

The tenant also retained a general contractor to perform the construction work during the renovation, which included providing and installing a drop ceiling system throughout the kitchen area.

We filed a motion on behalf of the defendant architect to dismiss the complaint and cross-claims on the grounds that the architect's plans were in compliance with good and accepted architectural standards, and that the architect was not negligent and did not otherwise cause or create the alleged defective condition or launch an instrument of harm. In granting our motion, the lower court found that plaintiff did not allege a significant structural or design defect that is contrary to a specific code provision. Furthermore, the Court found that plaintiff's expert architect failed to cite any code provisions violated by the defendant architect.

Robert A. Fitch

Derek E. Barrett

Bryan J. Ferrara

In order to prove negligence or malpractice in the design of a structure, the plaintiff was required to put forth testimony that the architect deviated from the accepted industry standards and that such deviation was a proximate cause of plaintiff's injuries. See *Columbus v. Smith & Mahoney P.C.*, 259 A.D.2d 857, 686 N.Y.S.2d 535 (3rd Dept. 1999). The

lower court determined that plaintiff's expert's conclusions were equivocal and were insufficient to establish that the defendant architect was negligent and/or that the defendant's design plans caused or contributed to the collapse of the ceiling.

Plaintiff appealed the decision.

On appeal, we successfully argued that plaintiff could not bring a claim against the architect since (1) defendant did not launch an instrument of harm, (2) plaintiff did not detrimentally rely upon the architectural contract, and (3) the defendant architect did not entirely displace the property owner's duty to maintain the premises. Directly on point with the facts of the instant action, in *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138 (2002), the Court of Appeals held that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." As a general rule, a contractor does not owe a duty of care in tort to non-contracting third-parties like plaintiff *unless* these parties can establish that at least one of the following three exceptions to the general rule (precluding tort liability against third-party contractors) applies to the factual circumstances surrounding the accident: (1) the contractor "launched a force or instrument of harm," thereby creating or exacerbating a hazardous condition; (2) the party detrimentally relied on the continued performance of the contractor's duties; or (3) the contractor entirely displaced the landowner's duty to maintain the premises safely. See *Espinal*, 98 N.Y.2d at 140; see also *Fung v. Japan Airlines Co., Ltd.*, 9 N.Y.3d 351, 360-361 (2007); *Church v. Callanan Indus.*, 99 N.Y.2d 104, 111 (2002).

Plaintiff had argued that the defendant architect had launched a force of harm by negligently designing the plans that the general contractor used to construct the drop ceiling. However, the appellate division found that pursuant to its contract with the restaurant owner, the defendant architect had no obligations in connection with providing and installing the drop ceiling, for which the general contractor was responsible. *87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540 (1st Dept. 2014). The appellate division also found that plaintiff did not raise an issue of fact through his expert affidavit, since the record showed that the defendant architect had no control over the drop ceiling that would be installed. *Davies v. Ferentini*, 79 A.D.3d 528 (1st Dept. 2010).

Robert A. Fitch is the resident partner in our New York City office. He concentrates his practice on the defense of architects and engineers, construction, medical and oral surgery malpractice claims, and commercial motor vehicle litigation. He received his undergraduate degree from Syracuse University and his J.D. from Syracuse University College of Law. He is admitted to practice in New York since 1974, as well as in Federal Courts in Southern, Eastern and Northern Districts of New York and the Second Circuit Court of Appeals. Bob has tried over 100 cases to verdict and is a member of the Defense Research Institute, Federal Bar Council, PIAA and Trucking Industry Defense Association. Bob was named a New York Metro Super Lawyer in 2013, 2014, 2015, 2016 and 2017 by the publishers of ***Law & Politics***. He has a peer review rating by Martindale-Hubbell of AV (the highest). Bob is a member of Rawle & Henderson LLP's Executive Committee.

Bob can be reached directly at (212) 323-7070 • rfitch@rawle.com

Derek E. Barrett, Counsel to the Firm in our Long Island office, is an active trial lawyer whose practice is concentrated in the areas of commercial motor vehicle litigation, construction and premises liability as well as medical and dental malpractice. He is admitted to practice in New York and New Jersey, and before the U.S. District Court for the District of New Jersey and the United States District Courts for the Southern and Eastern Districts of New York. Derek obtained his law degree from New York Law School in 1991. He graduated with a B.S. degree from Queens College of the City University of New York.

Derek can be reached directly at: (516) 294-2004 • dbarrett@rawle.com

Bryan J. Ferrara is an associate in our New York City office. Bryan concentrates his practice in the areas of insurance coverage, medical professional liability, and casualty and premises liability. Bryan earned his J.D. from St. John's University School of Law in 2008 and his B.A. in Psychology from SUNY College at Old Westbury in 2004. He is admitted to practice in New York, as well as the U.S. District Courts for the Southern and Eastern Districts of New York.

Bryan can be reached directly at: (212) 323-7062 • bferrara@rawle.com

Rawle's Reports is a monthly client newsletter of Rawle & Henderson LLP with recent case law updates. If you would like hard copies of past issues, or would like to request PDF copies from us, please email info@rawle.com. Past issues are also available and downloadable from our website, www.rawle.com.