References, Raising The Bar 2.0: Legal Issues in Strength Coaching, Brodie M. Butland

[1] https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf

[2] https://www.linkedin.com/pulse/what-we-can-learn-from-145-million-verdict-against-personal-butland. The jury found that the physician was 25% comparatively negligent, but the personal trainer and gym were still saddled with over $10 million of the total verdict.

[3] Hussein v. LA Fitness Int'l, LLC, 987 N.E.2d 460 (Ill. App. 2013) (dismissing plaintiff's claim of negligent maintenance of assisted dip/chin station); Stelluti v. Casapenn Enters., LLC, 1 A.3d 678 (N.J. 2010) (dismissing plaintiff's claim of negligent maintenance of exercise bike).

[4] Herren v. Sucher, 750 S.E.2d 430, 433-34 (Ga. App. 2013).

[5] Pineda v. Town Sports Int'l, Inc., No. 113493/05, 2009 N.Y. Misc. LEXIS 5082, at *6 (Nov. 5, 2009).

[6] Shields v. Sta-Fit, Inc., 903 P.2d 525 (Wash. App. 1995), review denied, 129 Wn. 2d 1002 (1996).

[7] Lund v. Bally's Aerobic Plus, Inc., 78 Cal. App. 4th 733 (2000).

[8] McNearney v. LTF Club Ops. Co., 486 S.W.3d 396 (Mo. App. 2016).

[9] DeAsis v. YMCA of Yakima, 2014 Wash. App. LEXIS 2201 (Wash. App. Sept. 4, 2014).

[10] McNearney v. LTF Club Ops. Co., 486 S.W.3d 396 (Mo. App. 2016) (waiver clause preceded by heading "waiver of liability" in capital letters, bold, and underlined type was conspicuous); Quintana v. Crossfit Dallas, LLC, 347 S.W.3d 445, 451 (Tex. App. 2011) (waiver clause in a two-page contract was conspicuous where the word "release" was in larger, bold type before the two-paragraph waiver provision).

[11] Evans v. Fitness & Sports Clubs, LLC, No. 15-4095, 2016 U.S. Dist. LEXIS 133490, at *3-5, *19-20 n.6 (E.D. Pa. Sept. 28, 2016).

[12] Leon v. Family Fitness Center, Inc., 61 Cal. App. 4th 1227, 1233 (1998) (holding that release clause in "undifferentiated type located in the middle of a document," without any heading prefacing it or any other distinguishing characteristics, was not sufficiently conspicuous).

[13] Kang v. LA Fitness, No. 2:14-cv-7147, 2016 U.S. Dist. LEXIS 179934 (D.N.J. Dec. 29, 2016).

[14] No. A-0504-05T5, 2006 N.J. Super. Unpub. LEXIS 1774, at *12-13 (N.J. App. Div. July 27, 2006).

[15] No. H021263, 2002 Cal. App. Unpub. LEXIS 3288 (Cal. App. Mar. 8, 2002).

[16] Offord v. Fitness Int'l, LLC, 44 N.E.3d 479 (Ill. App. 2015) (waiver clause applying to "use of . . . facilities, services, equipment or premises" did not waive liability for injury

from slipping on water on floor due to a leaky roof); Stone v. Life Time Fitness, Inc., 2016 Colo. App. LEXIS 1866 (Colo. App. Dec. 29, 2016) (waiver clause warning of inherent risk of injury "in the use of or presence at [the gym]" did not apply to injury from tripping on power cord in bathroom); Fresnedo v. Porky's Gym III, Inc., 271 So. 3d 1185 (Fla. App. 2019).

[17] 61 Cal. App. 4th 1227 (1998).

[18] Crossing-Lyons v. Towns Sports Int'l, Inc., 2017 N.J. Super. Unpub. LEXIS 1703 (July 11, 2017); Walters v. YMCA, 96 A.3d 323, 328-29 (N.J. Super. 2014).

[19] Robinson v. Bailey's Gym, Inc., 2017 Fla. Cir. LEXIS 10855 (Dec. 13, 2017) (enforcing premises liability waiver); Geczi v. Lifetime Fitness, 973 N.E.2d 801 (Ohio App. 2012) ("[T]he undersigned agrees to specifically assume all risk of injury while using any of the Club['s] facilities, equipment, services or programs and hereby waives any and all claims which may be asserted against [the gym] . . . includ[ing] . . . [a]ccidental injuries within the facilities, including, but not limited to the locker rooms, . . . showers and dressing rooms" held to apply to premises liability claims);

[20] 150 A.3d 968, 2016 Pa. Super. LEXIS 655 (Pa. Super. Nov. 10, 2016).

[21] McNearney v. LTF Club Ops. Co., 486 S.W.3d 396 (Mo. App. 2016) ("[G]eneral language will not suffice. As a result, the words 'negligence' or 'fault' or their equivalents must be used conspicuously so that a clear and unmistakable waiver and shifting of risk occurs."); Gallant v. Hilton Hotels Corp., 988 N.Y.S.2d 522 (N.Y. Sup. Ct. 2014) ("I assume and accept full responsibility for any and all injuries or damages that may occur" did not waive negligence); Kim v. Harry Hanson Inc., 122 A.D.3d 529 (2014) (release of "all claims . . . which may occur in connection with my participation" did not waive negligence); Blankenship v. Spectra Energy Corp., No. 13-12-546, 2013 Tex. App. LEXIS 10169, at *2-3 (Tex. App. Aug. 15, 2013) (waiving "any and all liability and/or damages" did not waive negligence); Bailey v. Palladino, No. A-504-05T5, 2006 N.J. Super. Unpub. LEXIS 1774, at *13-14 (N.J. Super. July 27, 2006) ("I do hereby waive, release and forever discharge [the gym's] instructors, officers, agents, employees, [etc.] for all responsibilities or liability for injuries or damages" did not waive negligence).

[22] Quintana v. Crossfit Dallas, LLC, 347 S.W.3d 445 (Tex. App. 2011).

[23] Anderson v. McOskar Enters., 712 N.W.2d 796 (Minn. App. 2006).

[24] Kotcherquina v. Fitness Premier Mgmt., LLC, No. 4:11-cv-342, 2012 U.S. Dist. LEXIS 27675 (E.D. Ark. Mar. 2, 2012); Pruitt v. Stron Style Fitness, LLC, No. 96332, 2011 Ohio App. LEXIS 4343 (Ohio App. Oct. 13, 2011); Lund v. Bally's Aerobic Plus, Inc., 78 Cal. App. 4th 733 (2000).

[25] Anderson v. McOskar Enters., 712 N.W.2d 796 (Minn. App. 2006) ("[A] release of liability will not be enforced if . . . it 'purports to release the benefited party from liability for intentional, willful or wanton acts[.]'"); Pruitt v. Stron Style Fitness, LLC, No. 96332, 2011 Ohio App. LEXIS 4343 (Ohio App. Oct. 13, 2011) ("[A] [waiver] clause is ineffective where the party seeking protection failed to exercise any care whatsoever [or] where there was willful or wanton misconduct[.]");Lund v. Bally's Aerobic Plus, Inc., 78 Cal. App. 4th

733 (2000); Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920 (Minn. 1982) ("[Waiver] clauses [are] invalid if they purport to exonerate a party from willful or wanton recklessness or intentional torts.").

[26] Stelluti v. Casapenn Enters., LLC, 1 A.3d 678 (N.J. 2010). The court held that this rule was a "fair and proper balance" between respecting contractual rights and public policy considerations, and that the court's "decision cannot reasonably be read to signal that health clubs will be free to engage in 'chronic or repetitive patterns of inattention to the safety of the[ir] equipment.'"

[27] Geczi v. Lifetime Fitness, 973 N.E.2d 801 (Ohio App. 2012).

[28] Chavez v. 24 Hour Fitness USA, Inc., 238 Cal. App. 4th 632 (2015). Although not directly on point, a New York case used similar reasoning four years later in permitting a gym patron's claim to proceed to trial when he was injured on a malfunctioning treadmill. Although the gym claimed that it performed regular maintenance on the treadmill, it offered no maintenance or repair records demonstrating that it in fact performed such maintenance. The court held that this failure created a genuine dispute as to whether the gym had negligently failed to maintain the treadmill. Salerno v. Bally Total Fitness Corp., 2019 N.Y. Misc. LEXIS 874 (Jan. 18, 2019).

[29] Brian P. Hamill, Relative Safety of Weightlifting and Weight Training, 8 J. of Strength and Conditioning Research 53, 56 (1994). The study found that recreational weight training had approximately .0035 injuries per 100 participation hours, which was lower than soccer (6.2 injuries/100 hours), rugby (1.92), basketball (1.03), cross country (0.37), physical education class (0.18), football (0.10), squash (0.10), and badminton (0.05).

[30] Mark Rippetoe and Dr. Jonathon Sullivan, M.D., have suggested that coaches should avoid training individuals with these and other illnesses due to the potential for serious injury. See http://www.startingstrength.com/resources/forum/showthread.php?t=42858.

[31] Dr. Jonathon Sullivan, M.D., Ph.D., has written of a disturbing legal case suggesting that strength coaches could potentially be liable for failing to warn of the potential dangers of stroke while using a Valsalva maneuver—even though there is little to no data or a credible physiological model suggesting that weightlifting under Valsalva poses any meaningful danger of cerebrovascular incidents (indeed, Dr. Sullivan notes that the Valsalva maneuver is likely protective). Jonathon Sullivan, The Valsalva and Stroke: Time for Everyone to Take a Deep Breath, The Aasgaard Company (2013). Nonetheless, because a strength coach can still be sued, Dr. Sullivan recommends including a written assumption of risk of cardiovascular, ocular, pulmonary, or cerebrovascular complications from exercising under the Valsalva. Id. at 14-15.

I agree with Dr. Sullivan's recommendation in principle, but note that a well-written waiver clause that covers a strength coach's own negligence also should absolve him of liability for any alleged "failure to warn" of the dangers of stroke under Valsalva, since "failure to warn" is a subspecies of negligence claims. I offer the caveat, however, that this presumes no knowledge or suspicion of prior cardiovascular or intracranial pathologies that could contraindicate weight training generally or a Valsalva maneuver specifically, for the reasons discussed earlier.

Interestingly, I could only locate a single case available in electronic databases where a court considered any potential link between a Valsalva maneuver and stroke. In Thomopoulos v. Tom Cat Restaurant, No. A-2954-06T1, 2008 N.J. Super. Unpub. LEXIS 2614 (N.J. Super. Ct. June 10, 2008), a worker had a cerebral vascular accident (CVA) shortly after lifting a grill at a restaurant. The worker argued that his lifting the grill directly caused his CVA, and, therefore, he should be covered under New Jersey's workers' compensation fund. The State argued that the worker's pre-existing health problems caused the stroke. A medical expert on behalf of the worker argued that the worker would have used a Valsalva maneuver to lift the heavy grill, and because of the Valsalva maneuver's elevation of blood pressure, "a person who has [an] underlying condition can and does sometime[s] dislodge a larger part of a clot that goes on and blocks one of the important vessels, usually in the brain." Id. at *12. The State's medical expert testified that the worker's stroke was brought on by a series of pre-existing conditions and poor life decisions by the worker—including a failure to take his medications. The trial court found the State's expert more persuasive given the worker's medical history. Though not directly presented with the question of whether lifting under Valsalva, in itself, could lead to a stroke, the worker's expert opinion is consistent Dr. Sullivan's conclusion that there is "no indication that resistance training increases the risk of ICH in the absence of severe uncontrolled hypertension, coagulopathy, congenital aneurysm or other underlying cerebrovascular pathology." Sullivan, supra, at 6.

[32] La. Civil Code art. 2004.

[33] Johnson's Adm'x v. Richmond & Danville R.R. Co., 11 S.E. 829 (Va. 1890).

[34] Hanks v. Power Ridge Restaurant Corp., 885 A.2d 734 (Conn. 2005); Reardon v. Windswept Farm, LLC, 905 A.2d 1156 (Conn. 2006).

[35] Mont. Code Ann. § 27-1-753.

[36] Roer v. 150 West End Ave. Owners Corp., 30 Misc. 3d 1211(A), 924 N.Y.S.2d 312 (2010).

[37] As lamented by a New York trial court: "In assessing whether a facility is instructional or recreational, courts have examined, inter alia, the organization's name, its certificate of incorporation, its statement of purpose and whether the money it charges is tuition or a fee for use of the facility. . . . In some cases, courts have found that [New York law] voids the particular release where the facility provides instruction only as an "ancillary" function, even though it is a situation where the injury occurs while receiving some instruction. In other mixed-use cases, courts focused less on a facility's ostensible purpose and more on whether the person was at the facility for the purpose of receiving instruction." Mellon v. Crunch and Agt Crunch Acquisition, LLC, 32 Misc. 3d 1214(A), 2011 N.Y. Misc. LEXIS 3379 (July 8, 2011) (citations omitted).

[38] See, e.g., Evans v. Pikeway, Inc., 7 Misc. 3d 348 (2004).

[39] Debell v. Wellbridge Club Mgmt., Inc., 40 A.D.3d 248 (2007) (emphasis in original).

[40] See Lemoine v. Cornell Univ., 2 A.D.3d 1017 (2003) (mixed-use facility was instructional given that the defendant was an educational institution and that "the brochure and

course materials in the record indicating that the purpose of the climbing wall facility was 'for education and training in the sport of rockclimbing'").

[41] Haw. Rev. Stat. § 663-1.54(a).

[42] Haw. Rev. Stat. § 663-1.54(b)(3).

[43] Dalury v. S-K-I, Ltd., 670 A.2d 795 (Vt. 1995); Spencer v. Killington, Ltd., 702 A.2d 35 (Vt. 1997).

[44] 101 A.D.3d 1540, 1541-42 (2012).

[45] Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920 (Minn. 1982).

[46] See, e.g., Ark. Code § 16-55-213(a)(1); Miss. Code § 11-11-3(1)(a)(i); Ohio R. Civ. P. 3(B)(6); Tex. Civ. Prac. Code § 15.002(a); 28 U.S.C. § 1391(b).

[47] See, e.g., Cal. Civil Code § 395(a).

[48] To illustrate, suppose that two citizens of Ohio get into a car accident in Indiana. One then brings a personal injury suit against the other in an Ohio state court (since, after all, they both live in Ohio). Although the lawsuit concerns two Ohio citizens, it involves conduct on Indiana's roadways, which implicates public interests of Indiana. Because of this, an Ohio court, out of deference to Indiana's state interests, would be more likely to apply Indiana law to the dispute instead of Ohio law. See Restatement (Second) of Conflict of Laws § 146 cmt. d.

[49] See, e.g., Middleton v. Caterpillar Indus., 979 So. 2d 53 (Ala. 2007).

[50] Restatement (Second) of Conflict of Laws §§ 145(2), 146.

[51] Compare Carematrix of Mass., Inc. v. Kaplan, 385 F. Supp. 2d 195 (S.D.N.Y. 2005); Pong v. Am. Capital Holdings, Inc., No. 2:06-cv-2527, 2007 WL 657790 (E.D. Cal. Feb. 28, 2007).

[52] Compare Caton v. Leach Corp., 896 F.2d 939 (5th Cir. 1990); English Mt. Spring Water Co., Inc. v. AIDCO Int'l, Inc., No. 3:07-cv-324, 2008 U.S. Dist. LEXIS 43478 (E.D. Tenn. May 30, 2008).

[53] See, e.g., Kostelac v. Allianz Global Corp. & Specialty AG, 517 F. App'x 670, 675 (11th Cir. 2013) (stating rule and citing cases); In re Exide Techs., 544 F.3d 196, 218 n.15 (3d Cir. 2007).

[54] Caton v. Leach Corp., 896 F.2d 939 (5th Cir. 1990); English Mt. Spring Water Co., Inc. v. AIDCO Int'l, Inc., No. 3:07-cv-324, 2008 U.S. Dist. LEXIS 43478 (E.D. Tenn. May 30, 2008).

[55] Allowing a business to represent itself in court would necessarily entail the unauthorized practice of law. Unlike an individual who can represent himself in court, a business can only speak through agents. Thus, to defend itself, an agent would have to advocate on behalf of the business in court—and if that agent is not a licensed attorney, such would constitute the unauthorized practice of law. Although most states allow limited exceptions for small claims court matters, the damages usually at stake for personal injury lawsuits generally exceed the jurisdiction of a small claims court. Further, even the states that allow

businesses to "represent themselves" in small claims court generally limit their ability to engage in advocacy that would normally be the province of an attorney.

[56] See, e.g., Tex. Bus. & Comm. Code tit. 3, §§ 24.001 et seq.; Ohio Rev. Code §§ 1336.01 et seq.; Neb. Rev. Stat. §§ 36-801, et seq.

[57] See, e.g., Alaska Stat. §§ 34-40-10, et seq.; La. Rev. Stat. §§ 22:2021 et seq.

[58] See, e.g., City of Cleveland v. Embassy Realty Invs., Inc., 8th Dist. No. 105091, 2018-Ohio-2513; DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681 (4th Cir. 1976).

[59] North Dakota, Ohio, Washington, and Wyoming have single-payer workers' compensation systems. Other states promulgate requirements for workers' compensation insurance policies, which the business is responsible for obtaining.

[60] In this section, I use references to Delaware statutory law as examples because most limited liability companies and corporations are formed in Delaware. Delaware is a popular place for incorporation because its general corporate law allows for a significant amount of flexibility in corporate form and practice. Further, the Delaware Chancery Court, which has existed since 1792, has created a wealth of precedent interpreting nearly every portion of Delaware's business code, and it is widely considered to be one of the most consistent and best state judicial forums in the country to litigate business disputes.

[61] 6 Del. Code § 15-306(a).

[62] 6 Del. Code § 17-403(a), (b).

[63] 6 Del. Code § 17-303(a).

[64] See, e.g., Japan Petrol. Co. (Nigeria), Ltd. v. Ashland Oil Co., 456 F. Supp. 831 (D. Del. 1978); Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) ("A basic tenant of American corporate law is that the corporation and its shareholders are distinct entities.").

[65] 6 Del. Code § 18-303(a).

[66] This answer could change if you signed these contracts in your personal capacity, or otherwise agreed to personally guarantee the contracts. Personal guarantees are not that uncommon—indeed, many banks will require owners of small businesses to personally guarantee loans, and often personal guarantees allow you to get better loan deals. You could also lose limited liability protection if you haven't been treating your business as a separate entity—for example, if you have been routinely commingling your business and personal assets.

[67] See, e.g., Spaulding v. Honeywell Int'l, Inc., 185 N.C. App. 317 (2007) (stating rule and holding that members were not liable because they did not personally commit tort); Ventres v. Goodspeed Airport, LLC, 275 Conn. 105 (2005) (member of LLC was personally liable for violation of state environmental laws where he personally directed clear-cutting of trees); Gonzales v. Pollution Control Bd., 960 N.E.2d 772 (Ill. App. 2011) (member of LLC was personally liable for dumping where he took deliberate actions in violation of the statute).

[68] McFarland v. Va. Retirement Servs. of Chesterfield, LLC, 477 F. Supp. 2d 727 (E.D. Va. 2007), provides a good example of this principle. There, the court considered whether officers and directors of an LLC were liable for a wrongful termination. The court held that plaintiff could bring an action against both the company and the manager who personally participated in the wrongful termination. However, since there were no allegations that the remaining managers or officers personally participated in or otherwise directed the company's tortious actions, they were dismissed from the suit.

[69] See Ramsey v. Gamber, No. 3:09-cv-919, 2011 U.S. Dist. LEXIS 11893 (M.D. Ala. Feb. 7, 2011) ("[T]he mere fact that an injury has occurred is not evidence of negligence and . . . in negligent supervision cases negligence will not be found by inference.").

[70] See, e.g., id. ("Managers can be held directly liable for negligent supervision of subordinates."); Lerner v. Soc'y for Martial Arts Instruction, No. 106366/11, 2013 N.Y. Misc. LEXIS 4292 (Sept. 26, 2013).

[71] See, e.g., Rice v. Brakel, 310 P.3d 16 (Ariz. App. 2013); Voyager Ins. Cos. v. Whitson, 867 So. 2d 1065 (Ala. 2003); Delfino v. Agilent Techs., Inc., 145 Cal. App. 4th 790 (2006).

[72] Okay, not really—it actually translates to "let the master answer." Lawyers traditionally have used Latin to sound more intelligent, though this tactic ironically backfires with some frequency since very few lawyers outside Vatican City know how to correctly pronounce many Latin words (e.g. amici, ejusdem generis, or ipse dixit).

[73] See Ramsey v. Gamber, No. 3:09-cv-919, 2011 U.S. Dist. LEXIS 11893 (M.D. Ala. Feb. 7, 2011).

[74] Courts look to all sorts of factors to make this legal determination, including the degree of control the employer retains over the employee's performance of his duties, the method that the employee is paid (and how taxes are paid), whether the employer or employee furnishes equipment used for the work, and the extent to which the employer may terminate the employment relationship. See Restatement (Second) of Agency § 220; Lathan Roof Am., Inc. v. Hairston, 828 So. 2d 262 (Ala. 2002); Benner v. Wichman, 874 P.2d 949 (Alaska 1994); Simon v. Safeway, Inc., 173 P.3d 1031 (Ariz. App. 2007).

[75] Restatement (Second) of Torts § 245 (1958); Tyus v. Pugh Farms, Inc., No. W2011-826, 2012 Tenn. App. LEXIS 176 (Tenn. App. Mar. 19, 2012); Kirlin v. Halverson, 758 N.W.2d 436 (S.D. 2008); Regions Bank & Trust v. Stone Cty. Skilled Nursing Facility, Inc., 345 Ark. 555 (2001); Wellman v. Pacer Oil Co., 504 S.W.2d 55 (Mo. 1973).

[76] Some cases have held employers vicariously liable for strange actions by employees. For example, South Dakota law holds that it is reasonably foreseeable that construction workers will get into physical altercations with each other—and, therefore, their employer is vicariously liable for injuries caused by those altercations. See Kirlin v. Halverson, 758 N.W.2d 436 (S.D. 2008).

[77] Jessica H. v. Equinox Holdings, Inc., No. 103866/08, 2010 N.Y. Misc. LEXIS 1215 (N.Y. Sup. Ct. Jan. 6, 2010) ("Sexual assaults committed by an employee are not in furtherance of an employer's business, and the employer will not thereby be held vicariously liable for the employee's actions.").

[78] Jessica H. v. Equinox Holdings, Inc., No. 103866/08, 2010 N.Y. Misc. LEXIS 1215 (N.Y. Sup. Ct. Jan. 6, 2010) (plaintiff alleged that her personal trainer, an employee of a fitness club, repeatedly sexually assaulted her at club's premises; the court dismissed the negligent hiring claim against the club because the club had no indication of personal trainer's propensity to engage in sexual assault, and there were no allegations prior to the plaintiff's that the trainer had committed any sexual offenses against the health club's members or employees); Geiger v. McClurg Court Assocs., No. 86-cv-4419, 1987 U.S. Dist. LEXIS 11971 (N.D. Ill. Dec. 4, 1987) (plaintiff claimed that a masseuse sexually molested her while she was using spa facilities; the court dismissed plaintiff's negligent hiring and retention claim because the spa had no knowledge of any allegations of sexual misconduct by the masseuse, a background check and prior references failed to disclose any such prior misconduct, and the masseuse had not been accused of sexual misconduct or assault prior to plaintiff's lawsuit).

[79] Regions Bank & Trust v. Stone Cty. Skilled Nursing Facility, Inc., 345 Ark. 555 (2001); Heard v. Mitchell's Formal Wear, Inc., 549 S.E.2d 149 (Ga. App. 2001).