2016 IL App (1st) 151551-U

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THIRD DIVISION
March 30, 2016

NO. 1-15-1551

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

KEVIN KEEVIL and WENDY AUSTIN, Plaintiffs-Appellants, v. LIFE TIME FITNESS, INC., a foreign corporation, Defendant-Appellee, SPRI PRODUCTS, INC., an Illinois corporation, Defendant.	Appeal from the Circuit Court of Cook County, Illinois. No. 11L10318 The Honorable John P. Callahan, Jr., Judge Presiding.
SPRI PRODUCTS, INC., an Illinois corporation, Third-Party-Plaintiff, v. PRIME RESOURCES CORPORATION d/b/a PRIMELINE INDUSTRIES, a foreign corporation, Third-Party-Defendant.	
SPRI PRODUCTS, INC., an Illinois corporation, Counter-Plaintiff,	

v.)
)
LIFE TIME FITNESS, INC., a foreign corporation,)
)
Counter-Defendant.)

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 Held: Finding no genuine issue of material fact, summary judgment for defendants is affirmed where fitness membership agreement is valid and enforceable; exculpatory provisions bar plaintiffs' negligence claims; exculpatory provisions bar plaintiff's spoliation claims which are mere derivatives of the negligence claims; and there is no genuine issue of material fact regarding whether fitness center's conduct constituted an utter indifference to or conscious disregard for patron's safety. Affirmed.

¶ 2 Plaintiffs-Appellants Kevin Keevil and Wendy Austin sued defendant-appellee Life Time Fitness, Inc. (Life Time) for injuries Keevil sustained in October 2009 while exercising in a Life Time fitness facility. Life Time filed a motion for summary judgment under section 2-1005 of the Code of Civil Procedure. (735 ILCS 5/2-1005 (West 2012)). After a full briefing, the trial court granted summary judgment for Life Time. Plaintiffs appeal, contending summary judgment was improper because: (1) plaintiffs' membership contract with Life Time Fitness is void and unenforceable and, therefore, the exculpatory provisions of the contract do not bar plaintiffs' claims; (2) there are genuine issues of material fact regarding whether plaintiffs' spoliation claim is outside the scope of the exculpatory provisions of the membership contract; and (3) there are genuine issues of material fact regarding whether Life Time's conduct constituted an utter indifference to or conscious disregard for Keevil's safety. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 The record reveals the following facts and procedural history. On October 6, 2009, Keevil was working out at the Life Time Fitness club in Burr Ridge, Illinois. According to Keevil, he sustained an eye injury when the exercise resistance band (hereinafter "exertube")[1] he was using in the swimming pool broke and struck him in the eye.

¶ 5 Keevil testified at his deposition that he joined Life Time Fitness in 2004 or early 2005. He then exercised at Life Time approximately five or six times per week up until his injury. He generally worked out in the swimming pool and the weight room. He never worked with a personal trainer nor received any sort of instruction at Life Time regarding using any of the equipment. He never asked any questions of any person at Life Time Fitness regarding how to use particular exercise equipment. Keevil testified that his wife joined Life Time approximately a year and a half before he joined. The two did not work out together. His wife, Wendy, had a personal trainer at Life Time and also worked at Life Time.

¶ 6 Keevil began using a Spri exertube during his workouts around April 2007. He first used a blue colored exertube. Starting in April 2007, he used an exertube "almost every time" he swam, or approximately four or five times per week. Keevil testified that he would get the exertube from the "pool deck." He testified that, although he had never taken any sort of water exercise class in the swimming pool, he had seen a trainer using the band in the swimming pool while training an individual. Keevil said:

[1] The parties use various terms in to this resistance equipment, including exercise band, exertube, Xertube, and resistance band. We will refer to it herein as an exertube or, when appropriate, a band. This product differs from the wide, stretchable band also used in workout facilities. The exertube at issue here is a thin rubber-feeling tube with a white core and foam-covered handles on either end.

> "[WITNESS KEEVIL:] [Watching the trainer is] where I got the idea to use it. There was a trainer in the pool and he was training another individual. And I kind of glanced over to see - - he's a well-built guy, a trainer. And I got the idea from him using the bands. He would use those in a similar way."

He never saw any other Life Time employee doing these exercises.

¶ 7 Keevil explained that he would do "fly" movements with the exertube in the swimming pool. To do so, he would wrap the exertube around the swimming pool ladder that comes from the ground on the pool deck. It was stationary and attached to the pool deck. The part of the ladder he wrapped the exertube around was above the water. Then, with his back toward the ladder, he put his feet "against the inside of the pool stretched out to get as much tension on the band as I could. And I would go forward and meet my hands in the middle." Then, he would turn around and face the ladder with his feet "straight out against the inside of the pool. And I would cross my arms in a manner from shoulder to shoulder, opposite shoulder to opposite shoulder." He would lean as far back as possible during this exercise. Keevil explained that the swimming pool is three and one-half feet to four feet deep where he was exercising. Keevil testified that, after he started doing these exercises with the band in the swimming pool, other members started doing them, as well.

¶ 8 Keevil described the exertube as being four to five feet long, smooth rubber with handles on either end. The exertubes were available in a variety of colors. The colors demark the level of resistance offered by the exertube. The first time he did this exercise in the swimming pool, he used a sky blue exertube. He used many different colors of exertubes during through the years, but his preference was the purple. Keevil opined that the purple had the "heaviest" tension. Keevil testified that, when he would go to the Life Time Fitness

swimming pool, there would sometimes be "only two or three" exertubes near the pool, and sometimes there would be more. He described the exertubes as "hanging on the rack" near other aquatic equipment such as the kickboards. Before using an exertube, Keevil would stretch it "just to see that there was tension" and that "it seemed to be working fine." He would not "thoroughly" examine the exertube for cuts or worn areas, but would only stretch it. In the months that he used these exertubes, Keevil never encountered one that was worn that he rejected; he never "put one back." In fact, he never found one that was "worn in any way." Sometimes the exertubes were wet and Keevil would wipe the water off before using the band.

¶ 9 Prior to his injury, Keevil neither read nor asked to read any information on the Spri exertubes. Nor had he ever used a different brand of resistance band prior to his injury. Keevil never talked to a Life Time employee or personal trainer about using the Spri exertubes. Keevil also never talked to any other Life Time member about using the exertubes.

¶ 10 When asked if he knew "whether or not the exercise tube was made in such a way for an exercise using a ladder in a pool like you were doing on the day of the accident?" Keevil responded, "I don't know if that is what it was for."

¶ 11 Prior to his injury, Keevil had never heard of an exertube snapping and injuring somebody.

¶ 12 On the day of his injury, Keevil arrived at Life Time Fitness around 3:20 in the afternoon. His wife was not there. He swam about one mile. After swimming, he got out of the swimming pool and retrieved a blue Spri exertube that was "hanging on the rack." He stretched the exertube several times as he walked back to the pool. He did not feel any

problem with the exertube. He did not see anybody else using an exertube in the pool. He reentered in the water and wrapped the exertube around the ladder posts. Holding both handles, he then did the "back to the ladder fly," or "open fly." He did three sets of 10 to 12 repetitions each. During those exercises, he did not feel any problem with the exertube. Then, he turned to face the ladder and did an "inward arm curl." Because he was now facing the ladder, he was now looking at the exertube as he exercised and he did not see any "stretching or wear of any kind on the band." He was planning to do three sets of 10 to 12 repetitions each. Partway through, however, the exertube broke. Keevil testified it "lost tension" and he heard a snapping noise. He fell backward, still holding both handles. He felt dizzy and had a "tremendous headache." Keevil clarified that his feet were not on the ground during the exercise he was doing when the exertube broke, but were instead "planted" against the side of the pool. There was, therefore, "a lot of tension on the band." Keevil specifically described his position:

> "[WITNESS KEEVIL:] My legs were stretched out against the wall. So I am almost horizontal with the top of the ladder. So I'm stretched out in the pool like this and I'm not standing - - and I'm crossing like this with my feet right out in front of me. So almost laying like I was on a bed (Indicating)."
>
> [ATTORNEY MCFADDEN:] Q. So if you had let go of the handles, your body would have fallen backwards into the pool?
>
> A. Correct.
>
> Q. And you believe your head was about even with the top of the rails?
>
> A. It was even with about - - it was about the - - it was even with the band, with the band was toward the bottom of the rungs to the ladder or the form of the

> ladder. As I'm going like this, my eyes would have been inches away from the ladder because I went shoulder height with my arms (Indicating)."

After a moment, Keevil realized that when the exertube broke, the recoil of the band snapped it into his face, hitting his right eye. Another swimmer approached to ask if he was alright. Keevil walked to the side of the pool. He put the exertube, which was now in two pieces, on the deck beside the pool, and climbed out via the ladder. He sat down on a nearby bench.

¶ 13 Life Time lifeguard Brian approached Keevil while he was sitting on the bench and asked him if he was okay. Keevil told him he could not see out of one eye. Brian brought Keevil an ice pack. Keevil also testified that Brian had an "incident" or "accident" form to fill out. Keevil does not remember explaining to Brian what had happened, although he admitted he "probably eventually" talked to Brian about what happened. Keevil was asked:

> "[ATTORNEY MR. SHAUGHNESSY:] Q. Did you tell him you were working with an aqua stretch band?
>
> [WITNESS KEEVIL:] A. I did not tell him that.
>
> Q. Did you tell him it snapped and hit you in the right eye?
>
> A. I may have said that the band snapped or the band broke or something like that."

Keevil could not recall having told Brian immediately after the injury that he had not checked the exertube before using it that day. Keevil told Brian he did not want an ambulance, as his wife was upstairs at the fitness center and could take him to the hospital herself. While they were talking, Keevil had head down with his face in his hands. He was not bleeding.

¶ 14 Another lifeguard, John, also approached Keevil and asked him what happened. Keevil told him the exertube snapped and that he could not see. Keevil went to the locker room, retrieved his things from the gym locker, and walked by himself to the lobby, where he met up with his wife. He was holding his eye the whole time. He believes he spoke only with Brian and John in the 10 to 15 minutes between injury to the time he left the fitness center with his wife. He then went directly to the hospital. He did not examine the broken exertube at any time. Keevil could not remember whether he told hospital personnel that he was using an exertube when he was injured.

¶ 15 Keevil was admitted to the hospital and stayed for two nights. He testified that he was unable to lay down for weeks after the injury. He wore an eye patch over his right eye for several days and underwent several operative procedures on his eye over the next months. Initially, Keevil was only able to see shadows and light from his right eye. His vision improved over the following months and years. At the time of his deposition in April 2012, Keevil testified he still struggled with depth perception. Keevil testified that, at the time of deposition, his vision in the right eye was blurry and could not be corrected with lenses, and he sees small black spots in his vision field. His eye specialists had informed him his eyesight would not improve further.

¶ 16 Keevil testified he missed two months of work with the Department of Transportation due to his eye injury.

¶ 17 Keevil testified that, while he was exercising with the exertube that day, he did not see any Life Time Fitness employees on the pool deck. When asked if, prior to the day of injury, any representative of Life Time saw him using the exertube in the way he was, he responded, "many I'm sure had." He believed lifeguards named Brian and John had seen him using the

exertube, as well as other people whose names he did not know. Regarding Life Time employees' ability to observe him using the exertube in the pool before the day he was injured, Keevil explained:

> "[WITNESS KEEVIL:] [Life Time employees] walk past the lap pool to get to the family pool. Are they looking my way when I'm using it, I couldn't tell you. Because their office is on this side, on the right side; they have to walk all the way across the lap pool to get to the family pool. If they glance over to the ladder, then they would see me. But if they walk straight across, they would not see me."

¶ 18 At no time, either the day of the injury or thereafter, did Keevil ask Life Time what happened to the exertube he was using when injured. After his injury, Keevil did not tell any Life Time employee that he had left the band on the pool deck.

¶ 19 Life Time Fitness group fitness department head Debra Simonson testified she works at the Life Time Burr Ridge location. She has taken numerous workshops that focus on strength training with the use of exertubes. She testified that Life Time used bands like the one in question in October 2009. During that time, Simonson conducted training at Life Time regarding ways to preserve the life of the exertubes. For example, Simonson instructed the exercise instructors not to put the exertube underneath a group fitness step because the friction would cause "feathering" on the plastic and cause them to wear out more quickly. Simonson testified that the only instruction members would receive on the use of exertubes was instruction in proper use if they took a group exercise class. When using an exertube in a group fitness class, instructors would "instruct [members] to run their fingers along the band and make sure there were no rips or tears in it." If the member found a rip or a tear, the member would bring the exertube to the instructor who would throw it away. When asked

why she would throw the exertube away if it had a tear in it, she responded, "[b]ecause it's useless. If it's got a tear in it, it's going to break." When asked if she had ever seen any exertubes break at Life Time Fitness before October 6, 2009, she responded, "Yes. They'd broken in class a few times. The member would just come up and throw it out, and I'd give them a new one."

¶ 20 Simonson also testified that, at the time of Keevil's injury, Life Time had nine aquatics group fitness classes per week. Some of these classes included a "strength portion" in which members would use the exertubes. She clarified that "most" instructors did not use the bands, but that she and one other instructor did. The exertubes used were the green and red bands "because the members are older, average age about 65 to 80, and green and red would be the resistance that they could tolerate." When using the exertubes in the pool, the member, standing in the swimming pool, would brace the band under his foot and, for example, do biceps curls or "side raises." She testified that, in October 2009 and before, the exertubes were stored in a mesh bag and inside of a crate on a shelf on the loading dock adjacent to the pool area. To access this area, a person would go through a door just off of the pool. This area was for employees only. She testified that the exertubes were not stored on the pool deck with other aquatic equipment. She said that, "[o]ccasionally, a stray band or two would make its way to the rack [where other aquatic exercise equipment was located]. There's a lone rack over by the windows next to the lap pool, and that houses kickboards or just spare noodles, and occasionally a band or two would be hanging there, if a member left one out."

¶ 21 Simonson testified that in October 2009 and before, she was responsible for ordering the exertubes, and all exercise bands were from SPRI. She would order red exertubes for the

aquatic group fitness classes. When the exertubes would arrive at Life Time, she would put some in the group fitness area and some in the "employees only" loading dock by the swimming pool. She testified that in October 2009 and before, there were no instructions or warnings posted in the aquatics area regarding the SPRI exertubes. When asked if the exertubes that Life Time was using were intended to be used in the pool, she responded:

> "[WITNESS SIMONSON:] They weren't intended specifically to be used in the pool, but they weren't *** excluded from being used in the pool."

¶ 22 Simonson testified that, when she would see exertubes near the swimming pool, she would pick them up and return them to the "employees only" loading dock storage area. She would check the bands to see that they were in a safe condition "at least" three times per week. She testified that when exertubes are exposed to chlorine, they fade and become "softer and less resistant," and she has to replace them more frequently. She agreed that exertubes "were not regularly stored and left hanging and available in the aquatic area for anyone that was just going to be in the pool" and that if she "were downstairs in the aquatic area and *** observed exercise tubes hanging near kickboards or noodles," she would "gather those tubes and bring them back upstairs to the studio" because the bands "weren't supposed to be kept down there."

¶ 23 Simonson testified that, when Keevil was injured, he had been using the exertube in a manner in which it was not intended to be used. She explained that the type of exertube Keevil was using was not supposed to be anchored to a fixed object; there is another type of band with a protective sleeve on it that is made to be anchored to a fixed object. She said that using a regular exertube like Keevil was using attached to a fixed object "causes the rubber to tear. First the outer layer, the color will peel off and you see the exposed core in

the center, and that eventually will break, too." When Simonson sees somebody attaching the exertubes to a fixed object, she tells them it is unsafe and that the band is liable to break. She could not recall if she ever gave such warning to Keevil. Prior to October 2009, Simonson had never seen a personal trainer or Keevil himself use an exertube in the way Keevil was using it when injured.

¶ 24 Kimberly Lichtenwalter, aquatic department head at Life Time at the time of Keevil's injury, testified that, prior to Keevil's injury, she had never heard of somebody being injured in connection with the use of an exertube. She had observed aqua group fitness instructors using the exercise bands in their group fitness classes. Although she had seen members using the exertubes in the water for movements such as biceps curls and triceps extensions, she had never seen anyone other than Keevil attach an exertube to any fixed object to perform any exercise in the swimming pool.

¶ 25 Lichtenwalter recalled that, more than a year prior to Keevil's injury, she warned Keevil it was unwise to anchor the exertube to the railing and perform the type of exercise he was performing. She testified she specifically told him:

> "[WITNESS LICHTENWALTER:] That[it is] not advisable to have the tubing anchored and pulling it towards [you] out of the water * * * because the tubing can snap * * * and hurt you."

When asked if her concern was that the chlorinated water might affect the tubing, she clarified that her concern about Keevil's exercise stemmed from "the angle from here the railing [and] how he was pulling back" and explained that, because the railing was higher than Keevil's face or at his face level, "if it were to break around where it's anchored either in front of it or behind it, then *** the only place that it could hit would be your head."

¶ 26 Keevil laughed at her warning and continued performing exercises in the same manner. Lichtenwalter observed him doing so on many occasions. She did not recall seeing the broken exertube after Keevil was injured and did not know what happened to it after the injury.

¶ 27 Life Time Fitness Burr Ridge facility general manager Annie Vincic submitted an affidavit by which she averred that Wendy Austin-Keevil executed a General Terms Agreement with Life Time Fitness (hereinafter "Keevil General Terms Agreement"). Further:

> "5. That the Keevil General Terms Agreement was for a 'VIP Family Platinum' membership with Life Time's Burr Ridge facility. This family membership plan covered Wendy M. Austin-Keevil as the primary member, and Kevin M. Keevil and Ashley M. Austin as additional members.
>
> 6. That for a family membership with Life Time, only the primary member must execute a General Terms Agreement.
>
> 7. That each additional adult member who is included in a family membership must execute a separate Member Usage Agreement before using Life Time's facilities."

¶ 28 The record includes a copy of the Keevil General Terms Agreement, executed in December 2008 and electronically signed by Wendy Austin. As an additional member, Keevil was required to execute a separate Member Usage Agreement before using the facility. The last time he signed the Member Usage Agreement was on January 3, 2009, nine months prior to injury. This signed document is included in the record on appeal. That

document includes a section titled "assumption of risk." "Assumption of risk" is in all capital letters and is written in bold print. It reads:

"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 café products and services. This risk includes, but is not limited to:

1) Injuries arising from the use of any 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."

¶ 29 Keevil's signed Member Usage Agreement also includes a section titled "release of liability." "Release of liability" is written in all capital letters and in bold print. It reads:

"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."

Above Keevil's signature is the following statement, again written in bold print with all capital letters:

"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."

¶ 30 In Life Time's answer and affirmative defense to plaintiffs' first amended complaint, Life Time admitted "its employees took possession of an exercise band after an alleged incident allegedly involving Plaintiff," but offers no further information.

¶ 31 Plaintiffs filed their initial complaint against Life Time and Spri in October 2011, and their first amended complaint against the same parties in June 2014. Counts I, VII, and IX are asserted against Life Time Fitness by Keevil. Counts II, VIII, and X are asserted against Life Time Fitness by Austin, and allege loss of consortium. In February 2013, Spri filed a third party complaint against Prime Resources Corporation, the manufacturer of the Xertube.

¶ 32 Count I of the first amended complaint (hereinafter "the complaint") alleges negligence against Life Time, claiming: Life Time failed to train, educate, advise and supervise its fitness instructors and members in a safe and proper method of using exertubes; failed to warn and instruct or adequately warn and instruct patrons and customers of the dangerous nature of the exertubes; negligently supplied plaintiff Keevil with a defective and unreasonably dangerous exertube when Life Time knew or should have known it was defective and dangerous under the conditions and circumstances under which it was being utilized by Keevil. Count II realleges the above on the part of Austin, and adds that Austin suffered a loss of consortium.

¶ 33 Count VII alleges spoliation of evidence against Life Time for failure to preserve the exertube involved in the alleged incident, arguing that a "reasonable person in Life Time's position immediately following Plaintiff's injury should have foreseen that the subject exercise band was material to a potential civil action" and preserved the band. Count VIII realleges the above on the part of Austin, and adds that Austin suffered a loss of consortium.

¶ 34 Counts IX alleges willful and wanton conduct on the part of Life Time Fitness in that, knowing exposure to chlorinated water would weaken the exertubes, Life Time Fitness nonetheless provided, authorized, encouraged, and/or permitted use of the exertubes by Keevil. Count X realleges the above on the part of Austin, and adds that Austin suffered a loss of consortium. In all, plaintiffs asked the court to award in excess of $100,000 plus costs.

¶ 35 Life Time filed motions for summary judgment as to all counts asserted against it by Keevil and Austin. In September 2014, the trial court, finding no genuine issues of material fact, granted Life Time's motions for summary judgment as to plaintiffs Keevil and Austin. The court did not provide the finality language of Rule 304(a), as the case continued as to other parties. In October 2014, the trial court dismissed with prejudice Spri's counterclaim for contribution against Life Time. In May 2015, the trial court, finding "settlement with Plaintiffs made in good faith," dismissed with prejudice plaintiffs' claims against the remaining defendants and dismissed the case in its entirety as final and appealable.

¶ 36 Plaintiffs appeal.

¶ 37 ANALYSIS

¶ 38 I. The General Terms Agreement is Binding and the Exculpatory Provisions of the Member Usage Agreement Signed by Keevil Bar Plaintiffs' Negligence Claims

¶ 39 On appeal, plaintiffs first argue that summary judgment was improper because plaintiffs' membership contract with Life Time is void and unenforceable and, therefore, the exculpatory provisions of the contract do not bar plaintiffs' claims. Specifically, plaintiffs argue the Member Usage Agreement (the contract) between Life Time and Keevil is void and unenforceable because it does not comply with the Illinois Physical Fitness Services Act (the

Act) (815 ILCS 645/1, *et seq*. (West 2012)). According to plaintiffs, Keevil is not bound by the terms of the contract because the General Terms Agreement was signed only by Austin at the beginning of the family membership and, accordingly, is not binding to him. Plaintiffs also argue that the contract is void because, contrary to the requirements of the Act, it does not contain information about facility membership costs or cancellation and refund provisions. We disagree.

¶ 40 Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). A party opposing a motion for summary judgment "must present a factual basis that would arguably entitle him to a judgment." *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). "Although the burden is on the moving party to establish that summary judgment is appropriate, the nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law." *Morissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010). When determining whether a genuine issue of material fact exists, courts construe the pleadings liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts. *Morrissey*, 404 Ill. App. 3d at 724. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists. *Williams*, 228 Ill. 2d at 417; *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 462 (2003),

¶ 41 "Summary judgment is to be encouraged in the interest of prompt disposition of lawsuits, but as a drastic measure it should be allowed only when a moving party's right to it is clear and free from doubt." *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). "If the plaintiff fails to establish any element of the cause of action asserted, summary judgment for the defendant is proper." *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 215 (2006). We review summary judgment rulings *de novo* (*Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995)) and we will only disturb the decision of the trial court where we find that a genuine issue of material fact exists. *Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988).

¶ 42 The Act requires a physical fitness contract to be in writing, disclose all costs associated with the fitness services, and provide information regarding cancellation and refunds. 815 ILCS 645/1, *et seq.* (West 2012). Specifically, the Act provides:

> "Contract requirements: written contract. Every contract for physical fitness services shall be in writing and shall be subject to this Act. All provisions, requirements and prohibitions which are mandated by this Act shall be contained in the written contract before it is signed by the customer. A copy of the written contract shall be given to the customer at the time the customer signs the contract. Physical fitness centers shall maintain original copies of all contracts for services for as long as such contracts are in effect and for a period of 3 years thereafter." 815 ILCS 645/4 (West 2012).

The Act also requires the contract to include the disclosure of all costs associated with the fitness services, as well as disclosure of cancellation and refund provisions via the contract. 815 ILCS 645/5, 6 (West 2012).

¶ 43 The parties do not dispute that, as a fitness center, Life Time Fitness is subject to the Act.

¶ 44 Plaintiffs do not direct this court to any portion of the Act, nor to any case law—Illinois or otherwise—that prohibits family memberships. Nor has this court's research of relevant law revealed such precedent. Rather, the Act requires every contract for physical fitness services to be in writing with all provisions, requirements and prohibitions mandated by the Act contained in the written contract before it is signed. 815 ILCS 645/4 (West 2012) ("Every contract for physical fitness services shall be in writing *** [and all] provisions, requirements and prohibitions which are mandated by this act shall be contained in the written contract before it is signed by the customer."]. Section 8 of the Act, in fact, lists the "prohibited contract provisions," which include various cost prohibitions including:

> "(b) No contract for family or couple memberships for basic physical fitness services shall require payment in excess of $2,500 per year per person covered under the membership." 815 ILCS 645/8 (West 2012).

Rather than prohibiting family memberships, then, the Act allows family memberships subject to particular cost regulations. Family memberships with a primary member are not prohibited by the Act.

¶ 45 Keevil's wife, Wendy Austin, worked at the Burr Ridge Life Time Fitness facility. She was the primary member of the family's "VIP Platinum Family" membership at Life Time. Additional members on the family's membership were Kevin Keevil and Ashley Austin. Austin, as the primary member, executed the General Terms Agreement which, in part, contained written information about the fees, cancellation, and refund policies. As an additional member, Keevil signed the Member Usage Agreement discussed above. The most

recent time Keevil signed the Member Usage Agreement was on January 3, 2009. This document is included in the record on appeal.

¶ 46 This court finds no Illinois law or precedent disallowing family memberships to fitness facilities, nor prohibiting additional members on a family membership to sign only the Member Usage Agreement rather than the General Terms Agreement where the primary member has already signed the General Terms Agreement. As such, Keevil's Member Usage Agreement was a valid and enforceable agreement on the date of injury, that is, October 6, 2009.

¶ 47 Having determined that the agreements are valid and enforceable, we now consider the exculpatory provision. Initially, plaintiffs contended that the exculpatory provisions were not binding on them because the Member Usage Agreement with Keevil was null and void. Plaintiffs concede, however, that if this court finds the Member Usage Agreement binding and enforceable, then Counts I and II of the first amended complaint would properly be barred by the exculpatory provisions contained in the Member Usage Agreement signed by Keevil. We agree that the exculpatory provisions bar plaintiffs' negligence claims. Because Counts VII and VIII of plaintiffs' first amended complaint also relate to the exculpatory provisions, we will briefly address the issue here for clarity.

¶ 48 "Courts construe contracts to give effect to the intention of the parties as expressed in the language of the agreement." *Cox v. U.S. Fitness, LLC*, 2013 IL App (1st) 122442, ¶ 13. Illinois law upholds the freedom of individuals to enter into mutually binding contracts, including those with exculpatory provisions. *Harris v. Walker*, 119 Ill. 2d 542, 548 (1988); *Johnson v. Salvation Army*, 2011 IL App (1st) 103323, ¶ 19 (In Illinois, parties may contractually release liability for their own negligence). "Although exculpatory agreements

are not favored and are strictly construed against the party they benefit [citation], parties may allocate the risk of negligence as they see fit, and exculpatory agreements do not violate public policy as a matter of law." *Evans v. Lima Lima Flight Team, Inc*., 373 Ill. App. 3d 407, 412 (2007).

¶ 49 "An exculpatory agreement constitutes an express assumption of risk wherein one party consents to relieve another party of a particular obligation." *Platt v. Gateway Intern. Motorsports Corp.*, 351 Ill. App. 3d 326, 330 (2004). Generally, exculpatory agreements are enforceable unless: (1) it would be against the settled public policy of the state to do so; or (2) there is something in the social relationship of the parties which militates against upholding the agreement. *Harris v. Walker*, 119 Ill. 2d 542, 548 (1988); *Tyler Enterprises of Elmwood, Inc. v. Skiver*, 260 Ill. App. 3d 742, 750 (1994) (Although exculpatory agreements releasing parties form future liability are not favored, a court will enforce an exculpatory clause unless it is against public policy or there is something in the social relationship between the parties militating against enforcement). Exculpatory agreements are contrary to public policy if they are: (1) between an employer and employee; (2) between the public and those charged with a duty of public service, such as a common carrier or a public utility; or (3) between parties where there is a disparity of bargaining power such that the agreement does not represent a free choice on the part of the plaintiff, such as a monopoly. *White v. Village of Homewood*, 256 Ill. App. 3d 354, 358-59 (1993). An agreement in the nature of release or exculpatory clause is a contract, and the legal effect is to be decided by the court as a matter of law. *Hamer v. Segway Tours of Chicago, LLC*, 402 Ill. App. 3d 42, 44 (2010).

¶ 50 "An exculpatory agreement must contain clear, explicit, and unequivocal language referencing the type of activity, circumstance, or situation that it encompasses and for which

the plaintiff agrees to relieve the defendant from a duty of care. [Citation.] However, the parties need not have contemplated the precise occurrence which results in injury. [Citation.] The injury must only fall within the scope of possible dangers ordinarily accompanying the activity and, therefore, reasonably contemplated by the parties. [Citation.]" *Evans*, 373 Ill. App. 3d at 415; also see *Spears v. Association of Illinois Electric Co-Op*, 2013 IL App (4th) 120289, ¶ 25. "The foreseeability of a specific danger defines the scope. *Hellweg v. Special Events Management*, 2011 IL App (1st) 103604, ¶ 6. *** 'The relevant inquiry * * * is not whether plaintiff foresaw defendants' exact act of negligence,' but 'whether plaintiff knew or should have known' the accident 'was a risk encompassed by his [or her] release.' *Hellweg*, 2011 IL App (1st) 103604, ¶ 7." *Cox*, 2013 IL App (1st) 122442, ¶ 14.

¶ 51 In the membership agreement, Keevil released Life Time from liability for any and all claims or actions "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 [or] my spouse *** resulting from the negligence of Life Time Fitness[.]" He agreed to the following assumption of risk terms:

> "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 *** resistance training equipment ***. This risk includes, but is not limited to:
>
> 1) Injuries arising from the use of any of Life Time Fitness' centers or equipment ***;

> 2) Injuries arising from participation in *** unsupervised activities *** within a Life Time Fitness center ***, to the extent sponsored or endorsed by Life Time Fitness;
>
> * * *
>
> I understand and voluntarily accept this risk. I agree to specifically assume all risk of injury, whether physical or mental, ***."

¶ 52 The injury sustained by plaintiffs could have been contemplated by Keevil upon signing the Member Usage Agreement. We find no question of fact raised by the circumstances of plaintiff's signing of the release, and the court could properly find the release enforceable and grant summary judgment as to plaintiffs' negligence claims in Counts I and II. See *Falkner v. Hinckley Parachute Center, Inc.*, 178 Ill. App. 3d 597, 603 (1989) ("The risk of unsafe equipment, negligent instruction, and death can be contemplated by a participant, and the terms of the exculpatory clause are broad enough to cover these situations" and "[m]isuse [of equipment] is foreseeable and therefore covered in the release.").

¶ 53 II. Summary Judgment was Properly Granted as to Plaintiffs' Spoliation Claims

¶ 54 Plaintiffs also contend that the trial court erred in granting summary judgment as to the spoliation claims, Counts VII and VIII. Specifically, plaintiffs argue there remains a genuine issue of material fact as to whether plaintiffs' spoliation claims are outside the scope of the contract's exculpatory provisions, that is, whether Keevil and Life Time fitness contemplated that, by signing the Member Usage Agreement, Keevil was contracting away his right to bring a claim for spoliation of evidence. We affirm summary judgment here, where the

answer lies not in what rights Keevil may have been "contracting way" by signing the Member Usage Agreement, but in the underlying tort asserted.

¶ 55 Spoliation of evidence is not an "independent tort," but instead "a spoliation claim can be stated under existing negligence principles." *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335 (2004) (citing *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 192-93 (1995) (Spoliation of evidence is a derivative action that arises out of other causes of action). The same procedural and substantive rules that apply to the underlying action apply to the spoliation action. See *Babich v. River Oaks Toyota*, 377 Ill. App. 3d 425, 426 (2007) (citing *Boyd*, 166 Ill. 2d at 193) (In products liability action, court found that, "[b]ecause this is a products action and because a negligent spoliation action is a derivative cause of action, the same procedural and substantive rules that apply to this products action apply to this spoliation action.").

¶ 56 Here, we have determined that the exculpatory provisions in Keevil's Member Usage Agreement bar plaintiffs' negligence claims. Counts VII and VIII of plaintiffs' first amended complaint allege spoliation related to negligence claims (*e.g.*, that, had Life Time properly preserved the broken exertube and any videos of the occurrence, plaintiffs "would be able to provide this court with sufficient evidence of the unreasonably dangerous and unmerchantable condition of the subject exercise band that caused Plaintiff's injury"). This claim, therefore, sounds in negligence. See, *e.g.*, *Boyd*, 166 Ill. 2d at 192-93 (spoliation of evidence is not an independent tort, but is a derivative action that arises out of other causes of action). By signing the Member Usage Agreement Keevil waived "any and all claims or action that may arise against Life Time Fitness, Inc. *** resulting from the negligence of Life Time Fitness" and agreed to assume the risk of injury in the use of equipment at Life Time Fitness, including but not limited to "pool areas with *** resistance training

equipment[.]" As determined above, the exculpatory clause bars plaintiffs' negligence claims. Under Illinois law, then, it also bars the derivative spoliation claim. See, *e.g.*, *Babich*, 377 Ill. App. 3d at 426 (the same procedural and substantive rules that apply to the underlying action apply to the spoliation action). The trial court did not err in granting summary judgment as to the spoliation claims.

¶ 57 III. Summary Judgment was Properly Granted to Plaintiffs' Willful and Wanton Claims

¶ 58 Finally, plaintiffs contend summary judgment was improper as to the willful and wanton claims (Counts IX and X) because there is a question of fact regarding whether defendant Life Time exhibited a conscious disregard for Keevil's safety. Counts IX and X allege Life Time had knowledge of Keevil using the exertube in a dangerous manner, knew that chlorine from the swimming pool could damage the tube, and, despite such knowledge and with an "utter indifference to or conscious disregard for the safety of Keevil," willfully and wantonly authorized, permitted or encouraged Keevil's use of the exertube. We disagree.

¶ 59 "[G]enerally, to be guilty of willful and wanton conduct, a defendant ' " 'must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will *naturally and probably result in injury*' " ' *Leja v. Community Unit School District 300*, 2012 IL App (2nd) 120156, ¶ 11 (quoting *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 122-23 (2010) (quoting *Bartolucci v. Falleti*, 382 Ill. 168, 174 (1943))). Willful and wanton conduct involves not only intentional acts, but acts which exhibit a reckless disregard for the safety of others, such as a failure " 'after knowledge of impending danger, to exercise ordinary care to prevent' the danger, or a 'failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.' " *Ziarko*

v. Soo Line Railroad Company, 161 Ill. 2d 267, 273 (1994) (quoting *Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 583 (1946)).

¶ 60 Plaintiffs do not allege that defendant intentionally harmed Keevil, but argue that genuine issues of material fact exist regarding whether defendant acted with conscious disregard for his well-being. This court has described nonintentional willful or wanton conduct in the following manner:

> "A nonintentional willful or wanton act is committed under circumstances showing a reckless disregard for the safety of others such as, for example, when a party (a) fails, after knowledge of an impending danger, to exercise ordinary care to prevent the danger or (b) fails to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care. [Citation.] 'More than mere inadvertence or momentary inattentiveness which may constitute ordinary negligence is necessary for an act to be classified as willful and wanton misconduct.' *Stamat v. Merry*, 78 Ill. App. 3d 445, 449 (1979). The party doing the wanton act or failing to act 'must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury.' *Bartolucci v. Flleti*, 382 Ill. 168, 174 (1943). Whether conduct amounts to willful and wanton negligence is generally a question of fact for the jury to determine. [Citation.]" *Oelze*, 401 Ill. App. 3d at 122-23.

¶ 61 In their argument, plaintiffs rely heavily on an email sent by Life Time group fitness department head Simonson to Kimberly Lichtenwalter and Nissa Munger on November 1,

2011, to argue that Life Time's conduct was "systemic" rather than momentary. The subject of the email is: "RE: Investigative Question on Fitness Bands—Kevin Keevil v. LTF." The email reads:

> "Thanks for the response, Kim. I would like to add a couple of things as well. The exertubes are not made to be tied or anchored to an object, as the object would cause friction tears in the material. This is one of my biggest pet peeves. I often see members, sometimes even trainers, tie these exertubes to fixed equipment, such as a machine or a post, and then stretch it way back to make it super tight. That is not what the exertube is intended for. In fact, there are special exertubes that are made for such use, and they have a padded, protective & covered center, where you would anchor it to such a fixed object. If a regular exertube is used that way repeatedly, it will certainly tear or break.
>
> When the exertubes are used in the water, the chlorine does eat away at the rubber & make them more likely to snap. We now order special exertubes made by Performance Systems, which are made especially for the pool. It is supposed to last longer, and not be so susceptible to chlorine erosion. An exertube is made to be used by the person, either anchored under their own feet, or wrapped around their own hands in order to make the band taught. In our 9 weekly aqua aerobics classes, I would say that we probably use exertubes in maybe 2-3 classes per week, for about 5-10 minutes per class. We use them minimally, but we use them as they are intended to be used (i.e. bicep curls, lat pull downs, tricep kickbacks, etc). Hopefully this helps a little bit."

¶ 62 In her deposition testimony, Simonson clarified that the anchoring of exertubes to stationary objects was "one of [her] biggest pet peeves" specifically because she would have to order more when they wore out, which affected her budget at Life Time. She testified she had personal knowledge about the exertubes used at Life Time Fitness because she used them in group fitness classes she taught and was also responsible for ordering the exertubes used at Life Time. At the time of Keevil's injury, there were nine aquatic fitness classes per week. Some of those classes used exertubes for 5-10 minutes per class. Simonson regularly inspected the exertubes in the pool area for damage. She opined that exposure to chlorine faded the exertubes and weakened their stretching capabilities.

¶ 63 In his deposition, Keevil testified that he exercised at Life Time fitness five or six times per week from late 2004 or early 2005 until October 2009. He generally worked out in the swimming pool and the weight room, and had been doing the pool exercise with the exertube since approximately April 2007.

¶ 64 Keevil never worked out with a trainer at Life Time Fitness, and he never asked any questions of Life Time personnel. Although he testified had had no recollection of any employee speaking with him about his manner of using the exertube, Life Time aquatics department head Lichtenwalter testified she warned Keevil that the exercise he was performing with the exertube was dangerous. He laughed her off and continued doing the exercise.

¶ 65 Keevil testified that, in all the months he had used the exertubes, he had never encountered a band that was worn and had to be rejected. Keevil had never heard of an exertube snapping and injuring anybody. On the day of his injury, Keevil examined the exertube he used by stretching it and wiping off the water, and did not discover any problems

with it. Keevil testified that, on the day of injury, he chose a blue exertube to use. He did not testify that it was faded by chlorine or damaged in any way.

¶ 66 The trial court did not err in granting summary judgment as to the willful and wanton counts, as there is no genuine issue of material fact that Life Time acted with conscious disregard for Keevil's well-being where Life Time group fitness department head Simonson regularly inspected the exertubes three times per week; the exertubes were generally kept in an area marked "employees only;" Keevil performed an unauthorized exercise the dangers of which he was specifically warned of by Life Time aquatics department head Lichtenwalter; Keevil ignored the department head's warning regarding the dangers of anchoring the exertube to a stationary object; Keevil failed to seek out any instruction regarding the proper use of exertubes in the swimming pool; and the exertube Keevil was using on the day of injury appeared to be undamaged prior to use. We find no error in the grant of summary judgment as to Counts IX and X.

¶ 67 CONCLUSION

¶ 68 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed.

¶ 69 Affirmed.