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YOU AND THE LAW

The Underlying Truth: Performance Supplements and Membership Provisions in the Fitness Industry

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Herren v. Sucher, 325 Ga. App. 219 (2013)

Prior to Court

The plaintiff in this case (Herren) is seeking a review of an order from a Georgia trial court that awarded summary judgment to defendants (Gregory Paul Sucher, Nonstop Fitness Incorporated, and Club Management Services Incorporated) and the original seller of a dietary supplement known as R.A.G.E RV-5. The plaintiff filed an amended complaint, seeking to recover damages under theories of ordinary and gross negligence. The underlying facts of the case are undisputed. Herren began training with a personal trainer a few weeks after joining the gym. The plaintiff brought suit after suffering a stroke following an exercise session with a personal trainer at the gym. The plaintiff alleged that the stroke was at least partly attributable to the non-FDA approved dietary supplement and overexercising. The defendants filed a motion for summary judgment, contending that the exculpatory clauses in the Membership Agreement, Fitness Assessment Agreement, and Personal Training

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Program Service Agreement release them from liability. Further, Herren assumed the risk of injuries.

The plaintiff responded, asserting that the exculpatory clauses within the three separate agreements did not bar his claims against the gym defendants for gross negligence. Further, Herren stated that a material issue of fact exists concerning whether Nonstop Fitness or Club Management Services was operating the health club at the time the agreements were executed. Herren also stated that the agreements were unenforceable because the agreements had not been approved by state legislation OCGA § 10-1-393.2 of the Fair Business Practices Act. The trial court found that the exculpatory clauses did not bar claims against the defendants based on allegations of gross negligence. However, the exculpatory clauses were binding and enforceable for claims based on allegations of ordinary negligence. Herren filed a notice of appeal.

The original seller of the dietary supplement, Barrin Innovations, also filed a motion for summary judgment. Barrin Innovations contended that it was not a proper party to the proceedings because its assets and liabilities had been transferred to William Mellor in a purchase agreement executed prior to the time Herren was injured. The trial court found that Mellor had assumed Barrin's liabilities. As a result, the trial court granted summary judgment in favor of Barrin Innovations. Herren filed a notice of appeal.

The key issue is to determine whether the Georgia trial court erred in granting summary judgment on the evidence in favor of defendants (Gregory Paul Sucher, Nonstop Fitness Incorporated, and Club Management Services Incorporated) and the original seller of a dietary supplement in a negligence action.

Court Action

The Court of Appeals of Georgia held that the trial court properly granted summary judgment to the gym defendants, but erred in granting summary judgment to the original seller of the dietary supplement. The court concluded that the exculpatory clauses were binding and enforceable. Herren signed a Membership Agreement at the time he joined Nonstop Fitness. The agreement included a section titled "WAIVER AND RELEASE LIABILITY" (*Herren v. Sucher*, 2013):

> The Club urges you and all members to obtain a physical examination from a doctor before using any exercise equipment or participating in any exercise class. All exercises . . . shall be at the member's sole risk. Member understands that the agreement to use, or selection of exercise programs, methods and types of equipment shall be member's entire responsibility, and the Club shall not be liable to member for any claims, demands, injuries, damages, or actions arising due to injury to member's person or property arising out of or in connection with the use by member of the services, facilities, and premises of the Club. Member hereby holds the Club, its officers, owners, agents and employees harmless from all claims which may be brought against them by member or on member's behalf for any such injuries or claims. (para. 7)

Herren also signed a Fitness Assessment agreement that contained the following waiver (*Herren v. Sucher*, 2013):

> MEMBERS ACKNOWLEDGMENT, ASSUMPTION OF RISK AND FULL RELEASE FROM LIABILITY OF NONSTOP FITNESS:
>
> Member acknowledges that the fitness assessment hereunder includes participation in the strenuous physical activities, including but not limited to, aerobics dance, weight training, stationary bicycling, various aerobic conditioning machines and various nutritional programs offered by Nonstop Fitness. Member agrees to assume all risks and responsibility involved with participation in the physical activities. Member affirms that member is in good physical condition and does not suffer from any disability that would prevent or limit participation in physical activities. Member acknowledges that participation will be physically and mentally challenging, and member agrees that it is the responsibility of the member to seek competent medical or other professional advice regarding any concerns involved with the ability of member to take part in the Nonstop Fitness physical activities. Member

> agrees to assume any and all risks and take responsibility for not exceeding his/her own physical limits. (para. 9)

The final document that Herren signed was a Personal Training Program Service Agreement and Release of Liability that contained the following provisions (*Herren v. Sucher*, 2013):

> IMPORTANT NOTE: Buyer . . . agrees [to] release . . . Nonstop Fitness, Inc. from liability due to participation. Buyer is urged to have this release agreement reviewed by an attorney before signing. By signing this Agreement, Buyer acknowledges that Buyer has read, understood and agreed with all terms and conditions of this agreement, after having the opportunity to have it reviewed by an attorney at the discretion of Buyer.
>
> BUYER AGREES TO ASSUME ALL RISK AND RESPONSIBILITY INVOLVED WITH PARTICIPATION IN THE PHYSICAL ACTIVITIES. . . . BUYER . . . AGREES TO FULLY RELEASE TO NONSTOP FITNESS, INC. (AS WELL AS ANY OF ITS OWNERS, EMPLOYEES, OR OTHER AUTHORIZED AGENTS, INCLUDING INDEPENDENT CONTRACTORS) FROM ANY AND ALL LIABILITY, CLAIMS AND OR LITIGATION ACTIONS THAT BUYER MAY HAVE FOR INJURIES, DISABILITY OR DEATH OR OTHER DAMAGES OF ANY KIND, INCLUDING, BUT NOT LIMITED TO THE PERSONAL TRAINING/NUTRITIONAL PROGRAMS AND THE PHYSICAL ACTIVITIES. (paras. 10–11)

Herren argued that the exculpatory clauses were ambiguous and therefore not legally binding or enforceable. The Court of Appeals of Georgia disagreed. The court provided that the contractual provisions constituted clear and express waivers and releases from liability. The use of exculpatory clauses by health and fitness facilities does not render the contract unenforceable.

The plaintiff also argued a material issue of fact existed concerning whether Nonstop Fitness or Club Management Services was operating the health club at the time the agreements were executed. Herren argued that if the wrong corporate entity was listed, the

exculpatory clauses are unenforceable. The plaintiff pointed to the gym owner's deposition testimony in support of his argument. In his deposition, Sucher testified that the gym was initially operated under Club Management Services Incorporated but was transitioning to Nonstop Fitness. Although Sucher testified that he was unsure which corporate entity was operating the gym at the time the plaintiff executed the agreements, he later clarified that the transition must have been complete because the agreements Herren signed had the corporate name Nonstop Fitness and had been approved by state legislation OCGA § 10-1-393.2. It was undisputed that Club Management Services and Nonstop Fitness were both registered with the Georgia Secretary of State as closely held corporations. It was also undisputed that the services provided remained substantially the same throughout the transition period. The court found the plaintiff's argument that the uncertainty concerning which corporate entity was operating the health club at the time the agreements were executed brought into question the enforceability of the agreements unavailing.

Herren also argued that the agreements were unenforceable because they had not been approved by the state. After determining that the record showed otherwise, the plaintiff recast his argument. In his reply brief, the plaintiff contended that the agreements on file did not list the correct corporate entity operating the gym. As such, the contract was void because it had never been approved by the state. The court dismissed this argument for the reasons listed above.

The plaintiff also argued that the trial court erred in granting summary judgment to Barrin Innovations on their negligence and strict liability claims. The trial court found that Mellor assumed Barrin's liabilities as a result of the following provision in the Purchase Agreement: "Buyer shall indemnify and hold harmless Seller from any liability arising from the actions of the business including but not limited to liabilities incurred, outstanding debts, harm caused by products and/or machinery owned or produced by the businesses" (*Herren v. Sucher*, 2013, para. 19).

The Court of Appeals reversed the trial court's decision that Mellor was the proper party in this case. The appellate court stated that an agreement to indemnify is not the same as an agreement to assume liabilities. The court held that indemnification of liabilities

means reimbursement or compensation for loss or damage. There was no express agreement between Mellor and Barrin that Mellor assumed all liabilities and obligations of Barrin. Therefore, the trial court's order granting summary judgment to Barrin was reversed.

Discussion

The results of this decision were decided on November 6, 2013. The outcome of this case is significant in relation to consumer use of fitness facilities. New members are often required to sign membership agreements and contractual provisions before gaining access to the facility. The specific coverage of contractual agreements in the health and fitness industry is set in precedent by the court system. The outcome in *My Fair Lady v. Harris* (1987) and *Lovelace v. Figure Salon* (1986) established that the inclusion of exculpatory clauses in health and fitness club agreements is valid and binding in the state of Georgia. All individuals listed in the contract are presumed to have read the provisions and understood the contents. It is important that fitness professionals and consumers are aware of the contract conditions and provisions before engaging in exercise training.

An additional discussion of contract law is also relevant to the current case. The fitness marketplace has an increasing number of sport nutrition, weight loss, and vitamin supplements distributed for retail sale. When the assets of an organization are purchased, it is important to have clear and unambiguous provisions in the purchase agreement. In the state of Georgia, there must be an express agreement between the buyer and the seller that the buyer assumed all liabilities and obligations of the seller. There is a distinct difference between agreements that create an assumption of liabilities and agreements that indemnify for loss, damage, or liability. State and local laws can differ between each state. Therefore, it is important for health and fitness professionals to be aware of the differences in state law and the provisions applicable to the state in which they reside or work.

This case could have broad implications for professionals in physical education, fitness, and recreation. For professionals in the fitness industry, it is important to review state laws and ensure that membership agreements have clear and unambiguous terms, to avoid liabilities resulting from claims of ordinary negligence. Personal trainers may also use personal training agreements to wave

and release liability. In an effort to improve fitness safely and appropriately, fitness professionals executing such agreements should provide full disclosure of all of the information within the contract and encourage members to read it carefully.

Further implications involve the use of non-FDA regulated dietary supplements. Sport nutrition and fitness supplements are used by consumers for a variety of reasons, including to enhance performance, to build muscle mass, to aid in recovery, to stimulate weight loss, and to increase energy and focus. According to the U.S. Food and Drug Administration (FDA, n.d.), dietary supplements can improve overall health—but the use of supplements can also involve health risks. The FDA is not authorized to review the safety or effectiveness of dietary supplements. Manufacturers are required to produce quality supplements that do not contain impurities or contaminants. Manufacturers must also label supplements according to the current Good Manufacturing Practice and labeling regulations before they go to market. Many supplements contain ingredients that have strong biological effects that could result in health complications (FDA, n.d.). Therefore, it is important for students and professionals to be knowledgeable of the potential benefits and drawbacks of supplement use when working with clients to enhance overall health and improve fitness. This case further illustrates the significance of preexercise screening and the administration of a proper and thorough health history questionnaires to protect not only the personal trainer but also the client.

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