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LEGAL LIABILITY FOR THIRD-PARTY INJURY CLAIMS AGAINST HOME GYM OWNERS

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As the holidays approach, many people are faced with the convergence of the need to purchase gifts (and the corollary hope of taking advantage of discounts) and the desire to take care of the few extra pounds that have crept up during seasonal festivities. Recognizing the opportunity to check two boxes at once, buyers frequently flood home gym retailers with the intent of fulfilling long unrequited goals and the ever-alluring New Year's Resolution.

The COVID-19 pandemic has further ignited national interest in home gyms. As gyms were forced to close and then reopen under changed circumstances, people began looking at unused basement and garage space with fresh eyes. Home gym patron saint Cooper "Coop" Mitchell, owner of the popular Garage Gym Reviews website[1], is quoted as saying that his home-gym-centered Facebook group increased from 15,000 members to more than 100,000 following the onset of COVID-19.[2]

The newfound interest in health and self-betterment presents a great opportunity. The pandemic that has garnered so much national attention has only worsened a much older epidemic – that of obesity.[3] The home gym presents perhaps the perfect opportunity for busy professionals with high-demand jobs and growing families to limit their time out of the home while still improving their health.

However, with these greater opportunities also come the potential for increased liability. To be clear, lifting weights and other home gym activities are safe and effective[4] and, according to some studies, may be more effective for overall health and cardiovascular conditioning than running.[5] But injuries do sometimes happen. And when home gym owners allow others to use their facilities, it is reasonable to ask whether the potential liability exposure outweighs the camaraderie and health benefits for friends and family. The entrepreneurs who see their home gym as a cash flow opportunity by charging for use have even more liability concerns to consider.

PREMISES LIABILITY AND THE APPLICABILITY OF THE "OPEN AND OBVIOUS" DOCTRINE

One claim that an injured party could assert against a home gym owner is premises liability. Under the Restatement (Third) of Torts, possessors of land owe a duty of reasonable care to entrants on the land regarding (a) conduct by the land possessor that creates risk, (b) artificial conditions on the land that pose a risk to entrants, (c) natural conditions on land that pose a risk to entrants, and (d) other risks to entrants when certain affirmative duties are applicable.[6]

The risk of a premises liability claim is straightforward: When an individual invites another person over to his or her house to engage in an exercise activity that could cause

injury, the guest may assert a claim that the conditions presented by the gym environment presented risks and caused injury. In a home gym environment, this could manifest itself in several ways, such as a dropped barbell, an injury caused by misused or overloaded equipment, or even the classic "slip and fall" caused by an overfilled water bottle.

Two factors play a significant role in ascertaining a home gym owner's liability in a premises liability claim: (1) whether the risk causing the harm is considered open and obvious and (2) whether an individual is invited to use the home gym as a business invitee or merely to engage as a licensee in a recreational activity.

Regarding the first point, a risk is considered open and obvious if it is readily apparent or reasonably discoverable by casual inspection by "an average user of ordinary intelligence."[7] Whether a risk in a home gym is open and obvious will likely determine if a homeowner has a duty to warn. Unfortunately, application of the open and obvious doctrine in situations not involving fire, water, or heights is "unclear at best."[8]

A home gym owner might reasonably ask why he or she would have any liability exposure for allowing another person to exercise in his or her home gym. After all, unlike some hidden dangers, the risk of picking up or pressing a 45-pound barbell loaded with potentially hundreds of pounds of weights seeks to be the definition of "open and obvious." However, liability risk nevertheless is present.

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Kentucky case law does not provide much guidance in evaluating open and obvious risks in the gym context, but the Illinois Court of Appeals faced the issue in its 2009 opinion in *Qureshi v. Ahmed*, where a 10-year-old child suffered severe hand injuries after she fell on a treadmill at a friend's house. The trial court granted the defendants summary judgment on the grounds that they did not owe a duty to the child because the danger posed by the treadmill was open and obvious, and the plaintiffs appealed. On review, the Illinois Court of Appeals reversed and remanded the trial court's decision to grant summary judgment – thereby leaving it to the jury to determine whether the treadmill posed an open and obvious danger.

Further, a land possessor's

general duty of care is not always eliminated even if a danger is open and obvious.[9] The Kentucky Supreme Court, in line with the Restatement, has held that liability is suspended when the "danger is known or obvious to the invitee, unless the invitor should anticipate or foresee harm resulting from the condition despite its obviousness or the invitee's knowledge of the condition." [10]

In *Shelton*, a woman caring for her husband in a hospital fell over wires strung along the side of his bed and suffered a broken kneecap. In the ensuring lawsuit, the trial court granted summary judgment in favor of the defendants, reasoning that the wires were an open and obvious condition of which the plaintiff was aware. The Kentucky Supreme Court reversed the Court of Appeals' decision and remanded for further proceedings because material facts remained uncertain regarding whether the hospital exercised reasonable care. The court stated a defendant can escape liability if they fulfill their duty of care, and the obviousness of the condition is only a "circumstance to be factored under the standard of care."[11]

That last point is critical: "The open-and-obvious nature of a hazard is, under comparative fault, no more than a circumstance that the trier of fact can consider in assessing the fault of any party, plaintiff or defendant."[12] Therefore, it is foreseeable that a jury could find circumstances in a home gym to be open and obvious but nevertheless decide to hold the home gym owner liable for his or her own negligent contributions to the dangerous circumstances.

Liability exposure increases when the home gym owner charges for admission. In Kentucky, "[a]s a general rule, land possessors owe a duty to invitees to discover unreasonably dangerous conditions on the land and to either correct them or warn of them."[13] This is a heightened standard versus a mere guest (a licensee): With a licensee, the premises owner is "under no duty of reasonable care to discover the existence on their premises of a dangerous condition, as would be the case with a business invitee."[14]

In addition to premises liability, a more traditional negligence claim could also give rise to liability. A claimant could argue that the owner did not exercise reasonable care in setting up the equipment, showing how it should be used, or ensuring that a guest was in adequate condition to operate it. There are various ways that a home gym owner could violate the reasonable care standard. Of course, in comparative fault states such as Kentucky, the fault of the injured party would also be a factor in evaluating liability.[15]

Unfortunately, the nature of training in a home gym environment means that the risks of injury, even when all moves are performed safely, cannot be eliminated. This should not necessarily dissuade home gym owners from inviting others to use their home gyms. But they should be aware of the risks and how potential defenses might come into play should a claim be asserted.

POTENTIAL DEFENSES

A home gym owner facing a premises liability, negligence, or other claim has various defenses to consider. As referenced above, the "open and obvious rule," while not bulletproof, is a good starting point for defense of a home gym injury claim.[16]

If the home gym owner has pro-

cured a release, this is can be another helpful tool. Traditionally, exculpatory agreements with adults containing a liability release provision were considered an adequate source of protection for commercial gym owners. This principle applied in *Ladue v. Pla-Fit Health*, where a member was injured while walking toward a trash bin to dispose of a towel in a gym and sued for negligence.[17] The lower court granted the gym owner's motion for summary judgment, ruling the plaintiff's claim was barred by the liability release she signed when she entered into her membership agreement. The New Hampshire Supreme Court upheld the lower court's summary judgment and stated that recreational use of a private gym does not create a special relationship that justifies prohibiting the release in favor of public policy.[18]

However, exculpatory agreements have long been disfavored in Kentucky.[19] While preinjury waivers are not per se invalid in Kentucky, they are strictly construed against the parties relying on them. Under Kentucky law, an exculpatory contract exempting future liability for negligence will only be upheld if (1) it explicitly expresses an intention to exonerate by using the word "negligence;" (2) it clearly and specifically indicates an intent to release a party from liability for a personal injury caused by that party's own conduct; (3) protection against negligence is the only reasonable construction of the contract language; or (4) the hazard experienced was clearly within the contemplation of the provision.[20] In other words, the waiver must expressly state the negligence for which liability is to be avoided.

Importantly, liability waivers become less effective when dealing with minor children. In its recent opinion in *Miller v. House of Boom Kentucky, LLC*, the Kentucky Supreme Court held that pre-injury exculpatory agreements between for-profit entities and parents on behalf of their children are invalid, and the Court dismissed any public policy arguments attempting to justify abrogating the common law.[21] Some jurisdictions have adopted a more lenient approach and agreed to uphold waivers between parents and non-profit entities. However, case law in this regard is circumstantial at best and it is unlikely a gym owner could definitively escape liability with a waiver even if they do not charge a fee for admission.[22]

Depending on the nature of the injury and its cause, a products liability analysis might also become relevant. Under the Restatement (Third) of Torts, one engaged in the business of selling or distributing products is subject to liability for any harm to persons or property caused by a defective product.[23] If an injury is caused by defective equipment, then a home gym owner faced with a third-party claim might rightfully look to the equipment manufacturer for indemnity or negligence allocation.

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However, under Kentucky law, comparative fault must be apportioned among all parties in each claim in "all tort actions, including products liability actions."[24] In other words, even if the products liability defense is valid, it is still necessary to conduct a comparative negligence analysis to determine if the home gym owner contributed to the defect through faulty installation, poor maintenance, or other conditions under their control. If home gym owners are found to have contributed to the defect, they are responsible for their apportionment of damages.

Kentucky case law is not definitive regarding the applicability of the doctrine of products liability to workout equipment, but case law from other jurisdictions provides some guidance. In *Smith v. AMLI Realty Co.*, a child was injured by a weight machine in an apartment complex, but the court held the weight machine was not unreasonably dangerous for purposes of strict liability under the applicable product liability act because the machine functioned properly.[25]

Additionally, the New York Supreme Court dismissed a strict products liability claim against a manufacturer of treadmills as there was no evidence that the treadmill was defective.[26] Furthermore, the court also dismissed the negligence claim in the case because the gym member's familiarity with treadmills (she had used treadmills at the facility at least ten times) established that she assumed the obvious and inherent risks in using the product. Therefore, gym owners may be able to escape liability if the product is in good working order and can demonstrate the injured party was an experienced user.

Importantly, gyms used for commercial purposes are precluded from recovering any economic losses under products liability claims (repair or replacement of the product, lost profits, etc.).[27] Under Kentucky law, the economic loss rule applies to claims arising from a defective product sold in a commercial transaction and applies regardless of whether the product fails over a period of time or destroys itself in a "calamitous event," including both negligence and strict liability claims. The Kentucky Supreme Court has held that economic losses deprive commercial purchasers of the benefit of their bargain, and such claims are best addressed by analyzing the contract and the relevant provisions under the Uniform Commercial Code.[28] Any losses for injuries to people or property are still subject to traditional products liability (assuming a claim remains after conducting a contributory negligence analysis), but commercial gym owners and homeowners using a home gym for commercial purposes must recover any economic losses resulting from a defective product under contract law.

APPLICABILITY OF INSURANCE COVERAGE

Of course, any defense attorney knows that the corollary discussion point for any negligence liability question is the equally important question of whether there is insurance coverage. Many home gym owners believe

that any injuries sustained in their gyms would be covered by insurance under a homeowner's policy.

But it is standard for most homeowner's insurance policies to include an exclusion precluding coverage of injuries arising out of businesses conducted at an insured location.[29] Therefore, any home gym owners charging guests a fee for use of their gym will likely be barred from coverage under this exclusion in traditional homeowner policies. Commercial gym insurance may be available and could present a viable alternative to protect individuals operating a business out of their home gyms, although it is likely that, in many instances, it would be cost-prohibitive.

Further, coverage for home gyms used for recreational purposes may also available. Gym and fitness equipment in the home will likely be covered under most homeowner policies if the equipment is stolen or lost to fire. However, additional coverage may be needed to cover accidental damage or damage while in use. Homeowners may be able to obtain additional specialized insurance that could cover potential liability resulting from a home gym's recreational use.

The key takeaway is that charging a fee for admission to a home gym will likely be considered a business pursuit, which will negate coverage under most homeowner policies (to the extent it otherwise exists). If a homeowner would like to use their gym for commercial endeavors, they can purchase additional insurance covering their commercial pursuits. Furthermore, home gym owners utilizing their gyms only for recreational purposes can also obtain specialized coverage to cover the additional liability. Therefore, it is paramount for home gym owners to consult a professional insurance advisor to discuss their goals and desired use for their gyms and assess their options in purchasing additional liability insurance specific to their home gym and the equipment therein.

CONCLUSION

An easy conclusion of this article would be that home gym owners should never allow others to use their gym and equipment. And yet this overstates the point. The author has gotten great enjoyment by inviting others, including individuals who had never previously picked up a barbell, over to learn basic lifting techniques.

But there are some basic things that a home gym owner can do to avoid the risk of a guest sustaining an injury. Home gym owners should ensure that their gyms are kept clean and organized in a safe manner to avoid fall risks. Additionally, the oft-quoted mantra of lifters to "never ego lift" – i.e., lift more than you are capable of safely controlling to stroke your ego – should apply even more to visitors. An experienced gym owner who invites a less experienced person over to train is taking on risk and, to some degree, vouching for the person's safety.

As attorneys, the same defenses and principles that we see in other cases, such as negligence, premises liability, releases, and the "open and obvious" doctrine, likewise are applicable here. But if home gym operators take basic safety steps,and ensure that they have adequate insurance coverage, they can minimize liability and the risk of litigation.

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3 *See* Meera Senthilingham, *COVID-19 has made the obesity epidemic worse, but failed to ignite enough action*, British Medical Journal, (March 4, 2021), https://www.bmj.com/content/372/bmj.n411; Leana S. Wen, *Opinion: The deadly covid-19 pandemic is obscuring another – obesity*, The Washington Post (online) (April 11, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/04/11/deadly-covid-19-pandemic-is-obscuring-another-obesity/.
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6 Restatement (Third) of Torts: Phys. & Emot. Harm § 51 (Am. Law Inst. October 2021 Update).
7 *Kaminski v. Libman Company*, 748 Fed.App'x. 1, 3 (6th Cir. 2018).
8 *Qureshi v. Ahmed*, 916 N.E.2d. 1153, 1157-58 (Ill. App. Ct. 2009).
9 *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 907 (Ky. 2013).
10 *Id.* at 911; Restatement (Second) of Torts § 343A Known or Obvious Dangers (1965).
11 *Id.* at 911.
12 *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288, 297 (Ky. 2015)
13 *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385, 388 (Ky. 2010).
14 *Perry v. Williamson*, 824 S.W.2d 869, 875 (Ky. 1992)
15 *Id.*
16 This should be differentiated from the assumption of the risk doctrine, which would not provide a valid defense under Kentucky law. *See Parker v. Redden*, 421 S.W.2d 586 (Ky. 1967).
17 *Ladue v. Pla-Fit Health, LLC*, 247 A.3d 367, 369-70 (N.H. 2020).
18 *Id.* at 372.
19 *Coughlin v. T.M.H. Intern Attractions, Inc.*, 895 F.Supp. 159, 161 (W.D. Ky 1990).
20 *Hargis v. Baize*, 168 S.W.3d 36, 47 (Ky. 2005).
21 *Miller v. House of Boom Kentucky, LLC*, 575 S.W.3d 656, 663 (Ky. 2019). For a thorough discussion of the *House of Boom* case and its implications, see *Ian Loos, Miller v. House of Boom: Analyzing Enforceability of Pre-Injury Liability Waivers for Minors, Common Defense*, Fall/Winter 2020, at 12.
22 For examples where waivers were held to be enforceable when signed on behalf of minor children, see: *Kelly v. United States*, 809 F. Supp.2d 429, 437 (E.D. N.C. 2011) (waiver enforceable as it allowed plaintiff to "participate in a school-sponsored enrichment program that was extracurricular and voluntary"); *Hohe v. San Diego Unified Sch. Dist.*, 224 Cal.App.3d 1559, 274 Cal. Rptr. 647, 649-50 (1990) (upholding a pre-injury release executed by a father on behalf of his minor child which waived claims resulting from an injury during a school sponsored activity); *Sharon v. City of Newton*, 437 Mass. 99, 769 N.E.2d 738, 747 (2002) (upholding a public school extracurricular sports activities waiver signed by a parent on behalf of a minor); *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 696 N.E.2d 201, 205 (1998) (holding that public policy supporting limiting liability of volunteer coaches and landowners who open their land to the public "justif[ied] giving parents authority to enter into [pre-injury liability waivers] on behalf of their minor children").
23 Restatement (Third) of Torts: Products Liability § 1 (1998).
24 KRS § 411.182; *see also Caterpillar, Inc. v. Brock*, 915 S.W.2d 751, 753 (Ky. 1996).
25 *Smith v. AMLI Realty Co.*, 614 N.E.2d 618, 622-23 (Ind. Ct. App. 1993).
26 *Ingram v. Life Fitness*, 140 A.D.3d. 628, 628-29 (NY. App. Div. 2016).
27 *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 733 (Ky. 2011).
28 *Id.* at 738.
29 2 Peter M. Lencsis, *New Appleman Law of Liability Insurance* § 13.06(2) (2d. 2020).