2018 IL App (2d) 170168-U
No. 2-17-0168-U
Order filed March 2, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PATRICIA CIZEK, Plaintiff-Appellant, v. NORTH WALL, INC., d/b/a NORTH WALL ROCK CLIMBING GYM, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 15-LA-56 Honorable Thomas A. Meyer, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff validly waived any cause of action stemming from defendant's alleged negligence and failed to identify facts from which willful and wanton conduct could be inferred; therefore, trial court's grant of summary judgment was proper.

¶ 2 I. INTRODUCTION

¶ 3 Plaintiff, Patricia Cizek, appeals an order of the circuit court of McHenry County granting summary judgment in favor of defendant, North Wall, Inc. (doing business as North Wall Rock Climbing Gym). For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Defendant operates an indoor rock climbing gym; plaintiff was a customer at the gym when she was injured. Plaintiff and a friend, Daniel Kosinski, attended the gym. Plaintiff had never been climbing before. At some point, after having been climbing for a while, plaintiff became tired and jumped down or fell from the climbing wall. Plaintiff's right foot landed on a mat, but her left foot landed on the floor. Plaintiff's left ankle broke.

¶ 6 In her deposition (taken December 23, 2015), plaintiff testified as follows. She stated that she had been a member of a health club for 10 years, where she primarily swam and did yoga. Prior to February 14, 2013, plaintiff had no experience rock climbing or bouldering, though she had observed people rock climbing in the past. She agreed that she understood that rock climbing involved being at a height higher than the ground.

¶ 7 On February 14, 2013, she attended respondent's gym with Kosinski, a coworker. She characterized Kosinski as a "good climber, experienced." Kosinski told her climbing was one of his hobbies. She did not think climbing would involve any risk because "[k]ids were doing it." Further, climbing occurred at a gym, which she viewed as a "safe zone." Also, based on what she saw on television, she believed she would be using a harness. She and Kosinski did not consume any alcohol prior to arriving at North Wall, and she was not taking any medication at the time.

¶ 8 When they arrived, Kosinski paid the fee. Plaintiff signed and returned a waiver form. Kosinski had climbed at North Wall before. At the time, plaintiff did not know whether Kosinski was a member at North Wall, though she later learned that he had been at the time she was injured. Plaintiff acknowledged that she did, in fact, read and understand the waiver form. She did not look at the back of the form, but she recalled that she was given only one sheet of paper. She was provided with a pair of climbing shoes.

¶ 9 When she first arrived, she observed "children in harnesses with ropers." There were two large green pads that covered most of the floor. Plaintiff did not recall seeing any bulletin boards or posters. She also did not recall seeing a black line running "continuously around the parameter [*sic*] of the climbing wall." At the time of the deposition, she was aware that such a line existed. Beyond signing the waiver when she arrived, she had no further interaction with respondent's staff. Plaintiff reviewed a number of pictures of the facility and testified that it had changed since her accident. She also identified a photograph taken in October 2013 that showed where she was injured.

¶ 10 She and Kosinski then proceeded to the climbing wall. She asked, "What about my harness?" Kosinski said that harnesses were "more trouble than they were worth." Plaintiff stated that she "kind of was dumbfounded." Plaintiff proceeded to climb without a harness. Kosinski went first. He told her to follow some yellow markers, as they were for beginners. While she watched Kosinski, she did not see a black, horizontal line on the wall. Prior to climbing, Kosinski placed a mat below the area in which he intended to climb. Plaintiff found climbing "very difficult," explaining that "[y]ou use your core." Plaintiff would "shimmy" down when she got "sore." She added, "[i]ts tough work getting up there, so I need[ed] to get down." She would jump down from two to three feet off the ground. Plaintiff made three or four climbs before she was injured.

¶ 11 Large green mats covered almost the entire floor of the gym. There were also smaller black mats that could be placed in different locations by climbers. Kosinski was not near plaintiff when she was injured. Before being injured, plaintiff had moved to a new climbing area. She placed a black mat where she planned on climbing. A green mat also abutted the wall in that area. The black mat was three to six inches away from the wall.

¶ 12 Plaintiff was injured during her third attempt at climbing that day, and she did not feel comfortable climbing. She explained that she was not wearing a harness, but was trying to do her best. There was a part of the floor that was not covered by a green mat in this area, which is where plaintiff landed when she was injured. Plaintiff stated she jumped off the wall and when she landed, her right foot was on a green mat, but her left foot landed on the uncovered floor. She felt pain in her left ankle and could not put weight on it. Kosinski and an employee came over to assist plaintiff. Kosinski got plaintiff some ibuprofen. Plaintiff felt "a little dizzy." An employee called the paramedics. The paramedics stated that plaintiff's ankle was broken. They assisted plaintiff to Kosinski's car, and he drove her to St. Alexius hospital. At the hospital, they x-rayed plaintiff's ankle and confirmed that it was broken. She was given some sort of narcotic pain killer, and her ankle was placed in a cast. Plaintiff was discharged and told to follow up with an orthopedic surgeon.

¶ 13 She followed up with Dr. Sean Odell. Odell performed a surgery six days after the accident. He installed eight pins and a plate. Plaintiff had broken both leg bones where they intersect at the ankle. She took Norco for months following the surgery. She engaged in physical therapy for years, including what she did at home. The hardware was removed in December 2013. Her ankle continues to be stiff, she has trouble with many activities, and she takes ibuprofen for pain several times per week.

¶ 14 On cross-examination, plaintiff stated that she read the wavier form before she signed it (though, she added, she did not "study" it). Other climbers were climbing without ropes, and the only people she saw using ropes were children. She was not offered a rope or harness. Plaintiff still takes prescription pain killers on occasion. However, she does not like to take it due to its side effects.

¶ 15 A discovery deposition of Daniel Kosinski was also conducted. He testified that he knew plaintiff from work. She was a travel agent that did "all the travel arrangements for [his] company." He and plaintiff were friends, though they do not associate outside of work.

¶ 16 Kosinski stated that rock climbing is one of his hobbies. He started climbing in 2008. He initially climbed at Bloomingdale Lifetime Fitness. They eventually offered him a job, and he worked there for four or five years. His title was "[r]ock wall instructor." He described bouldering as climbing without a rope. He stated that it "is a little more intense." Generally, one climbs at lower levels, and there are mats, as opposed to ropes, for protection. He added that "[t]here's not really much instruction [to do] in terms of bouldering." He explained, "bouldering, there's just—okay, this is how high you can go and that's pretty much it." There was no bouldering line at Lifetime Fitness. However, they did have a rule that you should not climb above the height of your shoulders. A spotter is not typically required when bouldering.

¶ 17 He and plaintiff went to North Wall on February 14, 2013. He was a member and had been there "multiple times" previously. When he first went to North Wall, he signed a waiver and viewed a video recording that concerned safety. Due to height considerations, Kosinski characterized North Wall as "pretty much a dedicated bouldering gym." North Wall offers top rope climbing, which Kosinski said was often used for children's parties.

¶ 18 Kosinski believed he was aware that plaintiff did not have any climbing experience prior to their trip to North Wall. He could not recall whether there were any safety posters displayed. He and plaintiff had a conversation about the risks involved in rock climbing. He also explained to her what bouldering entailed and that a rope was not used. He noted that plaintiff was "shaky" or "nervous" on her first climb. Kosinski told plaintiff that if she was not comfortable, she should come down. He did not recall a bouldering line at North Wall and believed it was

permissible to climb all the way to the top when bouldering. He did not recall whether plaintiff had been provided with climbing shoes. Plaintiff was in better than average physical condition.

¶ 19 When plaintiff was injured, she was climbing on a wall called Devil's Tower. It was toward the back, right of the facility. During the climb on which plaintiff was injured, Kosinski observed that plaintiff was "stuck" at one point and could not figure out what to do next. He walked over to assist her. She was four or five feet off the ground. Plaintiff's left foot and hand came off the wall, and her body swung away from the wall (counterclockwise). She then fell and landed on the edge of a mat. Kosinski stated she landed "half on the mat" and was rotating when she landed. After plaintiff landed, Kosinski went over to check on her. Plaintiff said she believed she had broken her ankle. He did not know whether plaintiff had applied chalk to her hands before, nor did he recall what she was wearing. It did not appear that plaintiff had control of herself before she fell off the wall and injured herself. It also did not appear to him that plaintiff was attempting to get down from the wall or that she deliberately jumped.

¶ 20 Kosinski told an employee of respondent's to call the paramedics. Kosinski recalled an employee offering plaintiff ice. Plaintiff declined a ride to the hospital in an ambulance, and Kosinski drove her there instead.

¶ 21 Kosinski testified that he and plaintiff had never been romantically involved. He recalled that plaintiff used crutches following the injury and took some time off from work. According to Kosinski, she used crutches for "quite a while."

¶ 22 On cross-examination, Kosinski explained that a spotter, unlike a belayer, only has limited control over a climber. A spotter "just direct[s] them to fall onto a mat and not hit their head." It would have been possible for plaintiff to use a rope while climbing (assuming one was available). Kosinski stated that use of a rope might have prevented plaintiff's injury; however, it

might also have caused another injury, such as plaintiff hitting her head on something. Kosinski agreed that he climbed twice a week or about 100 times per year. He did not recall an employee ever advising him about not climbing too high when bouldering. An automatic belayer might have lessened the force with which plaintiff landed and mitigated her injury. It was about 25 to 30 feet from the front desk to the place where plaintiff fell. The safety video new customers had to watch was about two minutes long. He did not observe plaintiff watching the video.

¶ 23 Prior to climbing, Kosinski told plaintiff that climbing was a dangerous sport and that they would be climbing without ropes. He did not recall any employee of respondent testing plaintiff with regard to her climbing abilities. After refreshing his recollection with various documents, Kosinski testified that they had been climbing for about half an hour when plaintiff was injured. He agreed that plaintiff was an inexperienced climber.

¶ 24 On redirect-examination, he confirmed that he was not present when plaintiff first checked in at North Wall. He had no knowledge of what transpired between plaintiff and respondent's employees at that point.

¶ 25 Jason R. Cipri also testified via discovery deposition. He testified that he had been employed by respondent as a manager for two years, from 2012 to 2014. His immediate supervisor was Randy Spencer (respondent's owner). When he was hired in 2012, Cipri was trained on office procedures, logistics, how to deal with the cash register, where to put the mail, and the use of a computer system. He was also trained on dealing with customers. Cipri started climbing in 2000 and had worked for respondent for about a year around the time of plaintiff's injury.

¶ 26 Novice climbers were supposed to sign a waiver and view a video. Spencer trained Cipri to go over "any and all safety procedures" with new climbers. Cipri was trained to "interact with

the customers to decide and figure out their climbing ability." Three types of climbing occurred at North Wall: bouldering, top-rope climbing, and lead climbing (also known as sport climbing). Plaintiff was bouldering when she was injured. Bouldering does not involve the use of ropes. Cipri estimated about 90 percent (or at least the "vast majority") of the climbing at North Wall is bouldering. Cipri received very specific training regarding how to execute waiver forms. Customers were instructed to read the waiver form.

¶ 27 There was a "bouldering line" on the climbing wall. People engaged in bouldering were not supposed to bring their feet above that line. The bouldering line is described in the waiver. However, Cipri explained, having a bouldering line is not common. He added, "We all kind of thought it was cute, but it didn't really serve a purpose."

¶ 28 Cipri was working as a manager on the day plaintiff was injured. He recalled that an employee named Miranda, whom he called a "coach," came and told him that someone had been injured. He called the paramedics, as that was what plaintiff wanted. He brought plaintiff some ice. He described Kosinski (whom he initially called Eric) as a "pretty novice climber." Cipri did not know whether plaintiff was above the bouldering line when she fell. Plaintiff did not appear intoxicated or smell of alcohol. She did not appear to have any injuries besides the one to her ankle. Plaintiff would not have been allowed to use a rope because "you have to be certified and taken through a lesson to use the ropes."

¶ 29 To the left side of the customer-service counter, there were posters addressing "safety and such." Cipri filled out an accident report concerning plaintiff's injury. Cipri denied that he was terminated by respondent and that the owner ever accused him of using drugs on the job. There was no manual on "how to run North Wall," but there was an "unofficial manual" kept on the front desk. This was comprised of a couple of binders that concerned how to teach climbing, use

of the telephone, memberships, employee conduct, and various rules. He did not recall anything specific relating to dealing with novice climbers. There was a copy of the Climbing Wall Association manual in a file-cabinet drawer; however, he never used it for anything. Cipri did not recall Spencer instructing him to use this manual. Spencer did train employees on climbing, particularly new hires. Cipri described Spencer as an "absentee" manager." He would come in early in the day, and Cipri typically would not see him.

¶ 30 Aside from ascertaining a customer's age and climbing experience, they did nothing else to assess his or her proficiency. They would show new climbers a video and explain the rules of the gym to them. Cipri could not say whether a copy of a manual shown to him was the manual they were actually using when he worked for respondent. However, he stated various forms shown to him, including one concerning bouldering orientation, were not used when he was there. Spencer never told Cipri to get rid of any document; rather, he was adamant about keeping such material. Weekly inspections of the premises were conducted, but no records documenting them were maintained.

¶ 31 On cross-examination, Cipri stated that his sister had been hired to rewrite the operations manual. One document stated, "If the facility allows bouldering, the staff provides an orientation before novice climbers are allowed to boulder without assistance or direct supervision." Cipri testified that this was not generated by respondent, but they followed it. Employees working the counter were trained to have new customers watch a video, instruct them on safety procedures, and assess their abilities. To the left of the front door, posters from the Climbing Wall Association were displayed. There was also one near the back door. Cipri did not remember what they were about beyond that they concerned "stable rules" of the Climbing Wall Association.

¶ 32 Cipri did not witness plaintiff's accident, and he did not recall being present when she was checked in. He never had rejected a customer previously, but he had the authority to do so. He never encountered a situation where he felt it was necessary.

¶ 33 On redirect-examination, Cipri agreed that beyond verbal questioning, they did not test new customers. They did not "inspect or observe climbers while they were actually climbing to determine competency." They did "orientate climbers" and show them the video. Further, new climbers read the waiver forms. Climbers were instructed on general and bouldering safety rules. Cipri was aware of an earlier incident where a young boy cut his head while climbing. Cipri stated that it was arguable that climbing with a rope was more dangerous than bouldering because a person could get tangled in the rope. Cipri did not give plaintiff an orientation, and he had no recollection of anyone giving her one.

¶ 34 Randall Spencer, respondent's owner, also testified via discovery deposition. Spencer testified that North Wall is "pretty much run by employees" and he does not "have much of a role anymore." The business is run by a manager, Eric Paul. Spencer did not have an independent recollection of plaintiff's accident. Cipri was the manager at the time. There was another manager as well named Chuck Kapayo, who Spencer described as co-managing with Cipri. Anything Spencer knew about plaintiff's accident he learned from Cipri or another employee named Terri Krallitsch. Usually, two people worked at any given time, although, sometimes, only one would be present.

¶ 35 Spencer identified the waiver form signed by plaintiff. However, he acknowledged that it was not the original. The purpose of the waiver was to inform a customer about the danger involved in rock climbing. Further, employees were "trained to talk about the rules and safety items when [customers] first come into the gym." In addition, there were posters, four of which

were visible at the entrance. The posters were produced by the Climbing Wall Association as part of their Climb Smart Program. Spencer added that they say "[c]limbing is [d]angerous." One says "Bouldering is Dangerous Climb Smart." These were the only ways customers were informed of the dangers of rock climbing. Customers are not tested as to their climbing proficiency, and they are not trained unless they sign up for a class. Customers were told not to climb above the bouldering line when bouldering.

¶ 36 Employees were instructed to follow the policies of the Climbing Wall Association. If an employee did not spend time with a new customer "explaining the policies and procedures of bouldering, that would be a violation of company policy." This is true even if the new customer is accompanied by a more experienced climber.

¶ 37 Spencer explained that bouldering is climbing without a rope. The bouldering line is a "little bit over three feet" from the floor. Climbers were to keep their feet below the bouldering line. The accident report prepared by Cipri states plaintiff's feet were six feet off the floor when she fell. The only equipment provided by respondent to plaintiff was climbing shoes. Respondent could have provided a harness, and plaintiff could have been belayed. They did not provide chalk to plaintiff.

¶ 38 Spencer testified that the waiver form states that it "is not intended to provide a description of all risks and hazards." He explained that this means it is possible to get hurt in a manner not described in the waiver. There was no formal training program for employees. Managers trained new employees, and managers themselves came to respondent already having climbing experience. In 2013, respondent had no auto-belay system in place. Spencer testified that he fired Cipri because of "suspected drug use."

¶ 39 The released signed by plaintiff states, in pertinent part, as follows. Initially, it states that plaintiff is giving up any right of actions "arising out of use of the facilities of North Wall, Inc." Plaintiff then acknowledged that "the sport of rock climbing and the use of the facilities of North Wall, Inc., has inherent risks." It then states that plaintiff has "full knowledge of the nature and extent of all the risks associated with rock climbing and the use of the climbing gym, including but not limited to" the following:

> "1. All manner of injury resulting from falling off the climbing gym and hitting rock faces and/or projections, whether permanently or temporarily in place, or on the floor or loose. 2. Rope abrasions, entanglement and other injuries ***. 3. Injuries resulting from falling climbers or dropped items ***. 4. Cuts and abrasions resulting from skin contact with the climbing gym and/or the gym's devices and/or hardware. 5. Failure of ropes, slings, harnesses, climbing hardware, anchor points, or any part of the climbing gym structure."

Plaintiff then waived any cause of action "arising out of or in any way related to [her] use of the climbing gym whether that use is supervised or unsupervised, however the injury or damage is caused."

¶ 40 The trial court granted summary judgment in favor of defendant. It noted that case law indicates that a competent adult recognizes the danger of falling from a height. It next observed that the waiver plaintiff signed stated that she was releasing defendant from "all manner of injury resulting from falling off the climbing gym." The trial court then rejected plaintiff's argument that this language was too general to be enforced. It further found that plaintiff had set forth no facts from which willful and wanton conduct could be inferred. This appeal followed.

¶ 41 III. ANALYSIS

¶ 42 We are confronted with two main issues. First is the effect of the waiver form signed by plaintiff. Second, we must consider whether plaintiff's count alleging willful and wanton conduct survives regardless of the waiver (an exculpatory agreement exempting liability for willful and wanton conduct would violate public policy (*Falkner v. Hinckley Parachute Center, Inc.*, 178 Ill. App. 3d 597, 604 (1989))). Plaintiff's brief also contains a section addressing proximate cause; however, as we conclude that the waiver bars plaintiff's cause of action, we need not address this argument.

¶ 43 A. THE WAIVER

¶ 44 The trial court granted summary judgment on all but the willful and wanton count of plaintiff's complaint based on plaintiff's execution of a waiver. As this case comes to us following a grant of summary judgment, our review is *de novo*. *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 50 (1999). Under the *de novo* standard of review, we owe no deference to the trial court's decision and may freely substitute our judgment for that of the trial court. *Miller v. Hecox*, 2012 IL App (2d) 110546, ¶ 29. Summary judgment is a drastic method of resolving litigation, so it should be granted only if the movant's entitlement to judgment is clear and free from doubt. *Bier*, 305 Ill. App. 3d at 50. It is appropriate only where "the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmovant, show that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law." *Id*. Finally, it is axiomatic that we review the result to which the trial court arrived at, rather than its reasoning. *In re Marriage of Ackerley*, 333 Ill. App. 3d 382, 392 (2002).

¶ 45 Though we are not bound by the trial court's reasoning, we nevertheless find ourselves in agreement with it. Like the trial court, we find great significance in the proposition that the

danger of falling from a height is "open and obvious" to an adult. *Ford ex rel. Ford v. Narin*, 307 Ill. App. 3d 296, 302 (1999); see also *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448 (1996); *Mount Zion Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 118 (1995) ("In Illinois, obvious dangers include fire, drowning in water, or falling from a height."). Thus, for the purpose of resolving this appeal and in the absence of evidence to the contrary, we will presume that plaintiff was aware that falling off the climbing wall presented certain obvious dangers.

¶ 46 We also note that, in Illinois, parties may contract to limit the liability for negligence. *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 117 (2010). Absent fraud or willful and wanton negligence, exculpatory agreements of this sort are generally valid. *Id.* An agreement may be also vitiated by unequal bargaining power, public policy considerations, or some special relationship between the parties (*Id.*); however, such issues are not present here. This court has previously explained that "[a]n exculpatory agreement constitutes an express assumption of risk insofar as the plaintiff has expressly consented to relieve the defendant of an obligation of conduct toward him [or her]." *Falkner*, 178 Ill. App. 3d at 602.

¶ 47 Agreements of this nature "must be expressed in clear, explicit and unequivocal language showing that such was the intent of the parties." *Calarco v. YMCA of Greater Metropolitan Chicago*, 149 Ill. App. 3d 1037, 1043 (1986). That is, it must "appear that its terms were intended by both parties to apply to the conduct of the defendant which caused the harm." *Id.*, (quoting Restatement (Second) of Torts, Explanatory Notes § 496B, comment d, at 567 (1965)). Nevertheless, "The precise occurrence which results in injury need not have been contemplated by the parties at the time the contract was entered into." *Garrison v. Combined Fitness Centre, Ltd.*, 201 Ill. App. 3d 581, 585 (1990). Thus, an exculpatory agreement will excuse a defendant

from liability only where an "injury falls within the scope of possible dangers ordinarily accompanying the activity and, thus, reasonably contemplated by the plaintiff." *Id*. The foreseeability of the danger defines the scope of the release. *Cox v. U.S. Fitness, LLC*, 2013 IL App (1st) 122422, ¶ 14.

¶ 48 Numerous cases illustrate the degree of specificity required in an exculpatory agreement necessary to limit a defendant's liability for negligence. In *Garrison*, 201 Ill. App. 3d at 583, the plaintiff was injured when a weighted bar rolled off a grooved rest on a bench press and landed on his neck. The plaintiff alleged that the bench press was improperly designed and that the defendant-gym was negligent in providing it when it was not safe for its intended use. *Id*. The plaintiff had signed an exculpatory agreement, which stated, *inter alia*:

> "It is further agreed that all exercises including the use of weights, number of repetitions, and use of any and all machinery, equipment, and apparatus designed for exercising shall be at the Member's sole risk. Notwithstanding any consultation on exercise programs which may be provided by Center employees it is hereby understood that the selection of exercise programs, methods and types of equipment shall be Member's entire responsibility, and COMBINED FITNESS CENTER [*sic*] *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 and facilities of the Center or the premises where the same is located and Member hereby holds the Center, its employees and agents, harmless from all claims which may be brought against them by Member or on Member's behalf for any such injuries or claims aforesaid." *Id.* at 584.

The plaintiff argued that the agreement did not contemplate a release of liability for the provision of defective equipment. The trial court granted the defendant's motion for summary judgment based on the exculpatory agreement.

¶ 49 The reviewing court affirmed. *Id.* at 586. It explained as follows:

> "Furthermore, the exculpatory clause could not have been more clear or explicit. It stated that each member bore the 'sole risk'; of injury that might result from the use of weights, equipment or other apparatus provided and that the selection of the type of equipment to be used would be the 'entire responsibility' of the member." *Id.* at 585.

It further noted that the defendant "was aware of the attendant dangers in the activity and, despite the fact that plaintiff now alleges that the bench press he used was unreasonably unsafe because it lacked a certain safety feature, the injury he sustained clearly falls within the scope of possible dangers ordinarily accompanying the activity of weight-lifting." *Id.*

¶ 50 Similarly, in *Falkner*, 178 Ill. App. 3d at 603, the court found the following exculpatory clause exempted the defendant from liability following a parachute accident: "The Student exempts and releases the [defendant] *** from any and all liability claims *** whatsoever arising out of any damage, loss or injury to the Student or the Student's property while upon the premises or aircraft of the [defendant] or while participating in any of the activities contemplated by this agreement." The plaintiff's decedent died during a parachute jump. The court placed some significance on the fact that the decedent had been a pilot in the Army Air Corp. *Id.*

¶ 51 Another case that provides us with some guidance is *Oelze*, 401 Ill. App. 3d 110. There, the plaintiff had signed an exculpatory agreement stating, "I hereby release SCORE Tennis & Fitness and its owners and employees from any and all liability for any damage or injury, which I may receive while utilizing the equipment and facilities and assume all risk for claims arising

from the use of said equipment and facilities." *Id.* at 118. The plaintiff, who was playing tennis, was injured when she tripped on a piece of equipment that was stored behind a curtain near the tennis court she was using while she was trying to return a lob. *Id.* at 113. The plaintiff argued that this risk was "unrelated to the game of tennis" and thus outside the scope of the release. *Id.* at 120. However, the court found that the broad language of the release encompassed the risk, relying on the plaintiff's agreement "to assume the risk for her use of the club's 'equipment and facilities.' " *Id.*

¶ 52 Finally, we will examine *Calarco*, 149 Ill. App. 3d 1037. In that case, the plaintiff was injured when weights from a "Universal" gym machine fell on her hand. *Id.* at 1038. The trial court granted summary judgment based on an exculpatory clause. *Id.* at 1038-39. The clause read:

> " 'In consideration of my participation in the activities of the Young Men's Christian Association of Metropolitan Chicago, I do hereby agree to hold free from any and all liability the [defendant] and do hereby for myself, *** waive, release and forever discharge any and all rights and claims for damages which I may have or which may hereafter accrue to me arising out of or connected with my participation in any of the activities of the [defendant].
>
> I hereby do declare myself to be physically sound, having medical approval to participate in the activities of the [defendant].' " *Id.* at 1039.

The reviewing court reversed, finding that the language of the release was not sufficiently explicit to relieve the defendant from liability. *Id.* at 1043. It explained, "The form does not contain a clear and adequate description of covered activities, *such as 'use of the said gymnasium or the facilities and equipment thereof,' to clearly indicate that injuries resulting from*

negligence in maintaining the facilities or equipment would be covered by the release." (Emphasis added.) *Id*.

¶ 53 In the present case, plaintiff waived any cause of action "arising out of or in any way related to [her] *use of the climbing gym* whether that use is supervised or unsupervised, however the injury or damage is caused." (Emphasis added.) This is remarkably similar to the language, set forth above, that the *Calarco* court stated would have been sufficient to shield the defendant in that case. *Id*. Likewise, in *Garrison*, 201 Ill. App. 3d at 585, the language that was found sufficient to protect the defendant stated that each member bore the 'sole risk; of injury that might result from the use of weights, equipment or other apparatus provided and that the selection of the type of equipment to be used would be the 'entire responsibility' of the member." Again, identifying the activity involved along with an expressed intent to absolve the defendant from any liability prevailed. Here, the activity was clearly defined and plaintiff's intent to waive any cause related to that activity was clear. Furthermore, plaintiff's injury was of the sort that a participant in that activity could reasonably expect. As *Oelze*, 401 Ill. App. 3d at 120, indicates, language encompassing assumption of "the risk for her use of the club's 'equipment and facilities' " is broad and sufficient to cover accidents of the sort that are related to the primary activity. See also *Falkner*, 178 Ill. App. 3d at 603. Here, falling or jumping off the climbing wall are things a climber can clearly expect to encounter.

¶ 54 Plaintiff cites *Locke v. Life Time Fitness, Inc.*, 20 F. Supp. 3d 669 (N.D. Ill. 2014), a case from the local federal district court. Such cases merely constitute persuasive authority (*Morris v. Union Pacific R. Co.*, 2015 IL App (5th) 140622, ¶ 25); nevertheless, we will comment on it briefly. In that case, the plaintiff suffered a heart attack and died during a basketball game at a gym operated by the defendant. *Id.* at 671. There was an automatic defibrillator on site, but no

employee retrieved it or attempted to use it. *Id*. The plaintiff had signed a waiver, which included the risk of a heart attack. *Id.* at 672. However, the waiver did not mention the defendant's failure to train its employees in the use of the defibrillator. *Id*. The *Locke* court held that by advancing this claim as a failure to train by the defendant, the plaintiff could avoid the effect of the waiver. *Id*. at 674-75.

¶ 55 We find *Locke* unpersuasive. Following the reasoning of *Locke*, virtually any claim can be recast as a failure to train, supervise, or, in some circumstances, inspect. Allowing such a proposition to defeat an otherwise valid exculpatory agreement would effectively write such agreements out of most contracts. See *Putnam v. Village of Bensenville*, 337 Ill. App. 3d 197, 209 (2003) ("Limiting the disclaimer in the manner suggested by the plaintiffs would effectively write it out of the contract. Virtually every error in construction by a subcontractor could be recast and advanced against [the defendant] as a failure to supervise or inspect the project."). Here, plaintiff promised to release defendant from any liability resulting from her use of the climbing wall. Moreover, we fail to see how providing additional training to employees would have impacted on plaintiff's perception of an obvious risk. Allowing her to avoid this promise in this manner would be an elevation of form over substance.

¶ 56 At oral argument, plaintiff relied heavily on the allegation that the spot where she landed was uneven due to the placement of mats in the area. As noted, one of plaintiff's feet landed on a mat and the other landed directly on the floor. According to plaintiff, the risk of landing on an uneven surface was not within the scope of the waiver she executed. This argument is foreclosed by two cases which we cite above. First, in *Oelze*, 401 Ill. App. 3d 113, the plaintiff was injured while, during a game of tennis, she tripped on a piece of equipment stored behind a curtain near the tennis court. This arguably dangerous condition was found to be within the scope of her

waiver. *Id.* at 121-22. Furthermore, in *Garrison*, 201 Ill. App. 3d at 584, the plaintiff argued that an alleged defect in gym equipment rendered ineffective an exculpatory agreement which stated that the plaintiff "bore the 'sole risk' of injury that might result from the use of weights, equipment or other apparatus provided and that the selection of the type of equipment to be used would be the 'entire responsibility' of the member." *Id.* at 585. In this case, assuming arguendo, there was some unevenness in the floor due to the placement of the floor mats, in keeping with *Oelze* and *Garrison*, such a defect would not vitiate plaintiff's waiver.

¶ 57 In sum, the release here is clear, pertains to use of defendant's climbing gym, and is broad enough to encompass falling or jumping from the climbing wall.

¶ 58 B. WILLFUL AND WANTON CONDUCT

¶ 59 In an attempt to avoid the effect of the exculpatory agreement, plaintiff also contends that defendant engaged in willful and wanton conduct. Conduct is "willful and wanton" where it involves a deliberate intention to harm or a conscious disregard for the safety of others. *In re Estate of Stewart*, 2016 IL App (2d),151117 ¶ 72. It is an "aggravated form of negligence." *Id*. Plaintiff contends that defendant should have followed its own policies and evaluated her abilities. However, plaintiff does not explain what such an evaluation would have shown or what sort of action it would have prompted one of defendant's employees to take that would have protected plaintiff from the injury she suffered. Plaintiff also points to defendant's failure to advise her not to climb above the bouldering line. As the trial court observed, the risk of falling from a height is "open and obvious" to an adult. *Ford ex rel. Ford*, 307 Ill. App. 3d at 302. Plaintiff cites nothing to substantiate the proposition that failing to warn plaintiff of a risk of which she was presumptively already aware rises to the level of willful and wanton conduct. Indeed, how a defendant could *consciously* disregard the risk of not advising plaintiff of the

dangers of heights when she was presumptively aware of this risk is unclear (plaintiff provides no facts from which an intent to harm could be inferred).

¶ 60 In short, the conduct indentified by plaintiff simply does not show a willful and wanton disregard for her safety.

¶ 61 IV. CONCLUSION

¶ 62 In light of the foregoing, the judgment of the circuit court of McHenry County is affirmed.

¶ 63 Affirmed.