IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

TRACEY L. SHORT-KARR and
MICHAEL P. KARR, as husband and wife,
Plaintiffs, C.A. No. S15C-05-018 RFS

v.

RB GYMS, INC. d/b/a CLUB FITNESS,
Defendant.

***MEMORANDUM OPINION***

Upon Defendant's Motion for Judgment on the Pleadings. **DENIED.**

Date Submitted: August 20, 2015
Date Decided: November 20, 2015

Chase T. Brockstedt, Esq., Baird Mandalas Brockstedt, LLC, Lewes, DE, 19958, Attorney for Plaintiffs.

Jennifer D. Smith, Esq. and Armand J. Della Porta, Jr., Esq., Marshall Dennehey Warner Coleman Goggin, Wilmington, DE, 19899, Attorneys for Defendant.

**STOKES, J.**

Before the Court is Defendant's Motion for Judgment on the Pleadings regarding a claim for damages filed by Tracey Short-Karr and Michael Karr ("Plaintiff").[1] However, because Plaintiff submitted matters outside of the pleadings, the Motion for Judgment on the Pleadings becomes a Motion for Summary Judgment pursuant to Superior Court Civil Rules 12(b)(6) and 56. This is my decision denying the motion.

## FACTS AND PROCEDURAL POSTURE

The Complaint alleges the Defendant, RB Gyms, Inc. d/b/a Club Fitness ("Defendant") is responsible, through negligence, for the injuries to Plaintiff. Plaintiff was injured in Defendant's gym when she fell, and Plaintiff alleges the injury was proximately caused by an unreasonably dangerous condition on Defendant's property.

According to the complaint, on or about September 30, 2013, Plaintiff Short-Karr entered Club Fitness with her son to exercise. Plaintiff began her workout on one of the Defendant's treadmills. Following that she began walking to the locker room to use the restroom, and while walking Plaintiff tripped and fell over the black support leg of a "Bow-Flex" machine. Plaintiff fell against the door of the ladies locker room and landed on her left side and face. Following the fall, Plaintiff was

[1]This decision addresses Tracy Short-Karr's claims for the most part. Michael Karr's claim is for loss of consortium. Hence, I reference plaintiff in the singular.

taken to the hospital in an ambulance. According to Plaintiff, she suffered severe, painful and permanent physical injuries to her arm and shoulder.

Plaintiff filed a complaint with this Court on May 15, 2015, claiming her injuries were the result of the negligence of Defendant. Defendant filed a Motion for Judgment on the Pleadings pursuant to Superior Court Civil Rule 12(c). Defendant filed the motion on the grounds that Plaintiff failed to state a claim upon which relief can be granted as she had not alleged that Defendant acted willfully or wantonly. According to Defendant, Plaintiff was a guest without payment, and the only duty Defendant owed her was to refrain from wilful or wanton conduct. Plaintiff responded in opposition thereto. Her response included an affidavit, which turned the motion into one for summary judgment.[2]

Plaintiff's accompanying affidavit to her response was made by Garett Short ("Garett"), the son of Tracey Short-Karr. In his affidavit, Garett said the primary reason he joined Defendant's gym was because Defendant had a policy which allowed him to bring guests to work out with him without being charged. He was aware of this policy when he joined the gym. This policy was important to him because he wanted to bring his mother with him as she was trying to lose weight. According to Garett his mother was a frequent workout partner of his. Defendant's

[2]Super. Ct. Civ. R. 12(b)(6) and 56.

gym encouraged members to bring a workout partner with them, and this policy was included in the gym membership agreement. In the affidavit, Garett states that while he is the named member on the membership agreement, his mother in fact pays the membership fee and has done so since he joined the gym. Garett concludes his affidavit by saying he would not have joined Defendant's gym if they did not have a free guest policy.

## STANDARD OR REVIEW

Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.[3] Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact.[4] Where the moving party produces an affidavit or other evidence sufficient under Super. Ct. Civ. R. 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[5] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, then

[3] *Moore v. Sizemore,* 405 A.2d 679, 680 (Del. 1979).

[4] *Id.* at 681.

[5] Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

summary judgment must be granted.[6] If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate.[7]

## DISCUSSION

### *Whether Plaintiff was a business invitee or a guest without payment when she was on the property of Defendant*

Key to the motion is the duty owed to Plaintiff. The Court first must determine the status of the Plaintiff and then the subsequent duties the Defendant owed Plaintiff. "A landowner's duty toward a Plaintiff in a negligence action is a matter of law for the Court to decide."[8] A landowner owes a duty of reasonable care to his business invitees to maintain the premises in a reasonably safe condition, or to warn the invitees of any latent or concealed danger.[9] A business invitee is entitled to expect that the premises would be free of any dangerous condition known or discoverable by the possessor.[10] A landowner owes a trespasser or a guest without payment only

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[6]*Burkhart v. Davies*, Del. Supr., 602 A.2d 56, 59 (1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp. v. Catrett, supra*.

[7]*Ebersole v. Lowengrub*,180 A.2d 467, 470 (Del. 1962).

[8]*Argoe v. Commerce Square Apartments Ltd. P'ship*, 745 A.2d 251, 254 (Del. Super 1999).

[9]*Id*.

[10]*Kovach v. Brandywine Innkeepers Ltd. Partnership*, 2000 WL 703343, at *5 (Del. Super. April 20, 2000).

the duty to refrain from willful or wanton conduct.[11]

When determining the status of an individual on land of another in the context of negligence claims, the Supreme Court of Delaware has traditionally adhered to the classifications defined in the Restatement (Second) of Torts.[12]

The Restatement (Second) of Torts defines a licensee as "a person who is privileged to enter or remain on the land only by virtue of the possessor's consent."[13] Pursuant to the Restatement (Second) of Torts § 330 comment h there are three types of licensees:

> (1) one whose presence on the land is solely for his own purposes, in which the possessor has no interest, and to whom the privilege of entering is extended as a mere personal favor to the individual
> (2) the members of the possessor's household, and
> (3) social guests of the possessor.[14]

The Restatement (Second) of Torts defines an invitee as follows:

> (1) an invitee is either a public invitee or a business visitor.
> (2) a public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
> (3) a business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with

[11]*Simpson v. Colonial Parking, Inc*., 36 A.3d 333, 335 (Del. 2012).

[12]*Johnson v. Westminster Presbyterian Church,* 1993 WL 389316, at *2 (Del. Super. Aug. 25, 1993).

[13]Restatement (Second) of Torts § 330 (1965).

[14]Restatement (Second) of Torts § 330 comment h (1965).

business dealings with the possessor of the land.[15]

An invitee requires an invitation. Comment (b) of § 332 defines the difference between mere permission and an invitation; "an invitation is conduct which justifies others in believing that the possessor desires them to enter the land; permission is conduct justifying others in believing that the possessor is willing that they shall enter if they desire to do so."[16]

The distinguishing factor between a licensee and an invitee is whether the possessor of the property receives any benefit from the use of the property by the licensee or the public invitee.[17] Another key factor in evaluating whether or not a party is an invitee or a licensee is if their status on possessor's property is related to possessor's business on that property.[18]

In this case, Defendant argues it received no benefit from Plaintiff's presence on the property. Defendant is a business, not a charity;[19] there would be some

[15]Restatement (Second) of Torts § 332 (1965).

[16]Restatement (Second) of Torts § 332 comment b (1965).

[17]*Kovach v. Brandywine Innkeepers Ltd. Partnership, supra* at *4.

[18]*Davenport v. D&L Construction, LLC*, 2015 WL 4885069, at *3 (Del. Super. Aug. 14, 2015)("Davenport"); Restatement (Second) of Torts § 332 (1965).

[19]*Johnson v. Westminster Presbyterian Church, supra*. (In this case Westminster Presbyterian Church, ("defendant") established and began operating a weekly breakfast program, free of charge, to meet the needs of the hungry and homeless. On November 9, 1991, Ms. Sallah A. Johnson ("plaintiff") attended defendant's breakfast program for the first time, and while there she was injured when a table collapsed on top of her. Defendant argued the premises were held

financial benefit to Defendant in allowing non-paying guests to accompany paying members. Garett's affidavit stating he would not have joined the gym but for this policy provides at least one financial benefit[20] to Defendant: because of this policy, Defendant acquires members it otherwise might not.

Thus, Plaintiff has established Defendant benefitted from her presence at the gym. I conclude Plaintiff was a business invitee. Defendant owed Plaintiff the duty to make the premises reasonably safe or to warn her of any latent or concealed dangers.[21] Consequently, only ordinary negligence needs to be pled as opposed to intentional, willful, or wanton conduct.[22] Plaintiff has pled ordinary negligence. The pleadings are sufficient to allow the action to proceed.

In light of the foregoing, the motion for summary judgment is **DENIED**.

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open gratuitously for purely charitable purposes with no hope or expectation of receiving any tangible benefit from the invitation. This Court ruled that despite plaintiff's arguments to the contrary, the purpose for which she attended the defendant's program did not confer upon her the status of a business invitee.).

[20]There may be other benefits, such as the non-paying guests pay to participate in classes or enjoy other amenities the gym offers.

[21]*Kovach v. Brandywine Innkeepers Ltd. Partnership*, 2000 WL 703343, at *3 (Del. Super. April 20, 2000).

[22]*Davenport v. D&L Construction, LLC, supra* at *3.

**IT IS SO ORDERED**.

***/s/ Richard F. Stokes***

Richard F. Stokes