[Cite as *Bennington v. Ladies Super Fitness, Inc.*, 2010-Ohio-1645.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARTHA BENNINGTON	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellant	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009 CA 0085
LADIES SUPER FITNESS, INC.	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 08 CV 1992 H
JUDGMENT:	REVERSED AND REMANDED
DATE OF JUDGMENT ENTRY:	April 6, 2010

APPEARANCES:

For Plaintiff-Appellant:

JANET L. PHILLIPS
6 W. 3rd St., Suite 200
Mansfield, OH 44902

For Defendant-Appellee:

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101 Prospect Ave. W.
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Delaney, J.

{¶1} Plaintiff-Appellant, Martha Bennington appeals the May 28, 2009 judgment entry of the Richland County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee, Ladies Super Fitness, Inc.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On August 28, 2006, Appellant filed a complaint against Appellee for injuries she sustained on August 30, 2004 at Appellee's facility. Appellant voluntarily dismissed her complaint and re-filed the action on October 30, 2008.

{¶3} In her complaint, Appellant stated that due to Appellee's negligence, Appellant fell off the treadmill she was walking on, causing her injury. Appellant claimed that Appellee was negligent in its failure to properly instruct, warn, and supervise Appellant as to the operation of the treadmill.

{¶4} Appellee moved for summary judgment on April 1, 2009. Appellant filed her memorandum in opposition on May 18, 2009. The parties established the following facts in their briefs.

{¶5} On or about August 25, 2004, Appellant visited Appellee's facility located in Mansfield, Ohio. Appellant was 68 years old at the time and interested in getting in shape. Appellant signed up for a promotional offer advertised by Appellee wherein she would receive 20 workouts for $20.00. After filling out the necessary paperwork, Appellant scheduled an appointment with Appellee where Appellant would return for a fitness evaluation and workout regimen by one of Appellee's instructors.

{¶6} Appellant returned to Appellee's facility on August 30, 2004. Appellant met with an instructor, Cassandra McKinney. McKinney took Appellant to the back of

the facility where McKinney took Appellant's weight and discussed Appellant's fitness goals.

{¶7} After the assessment, McKinney brought Appellant to a treadmill. Appellant stated she had never been on a treadmill before and she expressed that to McKinney. (Bennington Depo., p. 26). In her deposition, McKinney testified that when Appellant got on the treadmill, McKinney stood beside her and gave her instructions on how to operate the treadmill. (McKinney Depo., p. 15). She told Appellant to make sure her shoes were tied tightly so the laces could not catch in the treadmill belt while she was walking and that Appellant should hold onto the bar on the treadmill. Id. McKinney entered a program into the treadmill where Appellant was to walk at a speed of 1.5 miles per hour for five minutes. (McKinney Depo., p. 16). 1.5 miles per hour is the slowest speed on the treadmill. McKinney said the treadmill was programmed to stop after five minutes.

{¶8} McKinney testified that she showed Appellant where the stop button was on the treadmill. Id. McKinney showed Appellant the button to increase the speed on the treadmill and told Appellant not to touch that button. McKinney stated that she warned Appellant that if she touched that button to increase the speed, she might fall off if she was not prepared. Id. McKinney cautioned Appellant not to increase the speed unless she asked McKinney or another trainer. (McKinney Depo., p. 16-17).

{¶9} When Appellant told McKinney she felt comfortable, McKinney said she went to the desk finish writing Appellant's fitness program. (McKinney Depo., p. 17). The desk was close to the treadmill and McKinney could see Appellant. Id.

{¶10} Appellant testified in her deposition that McKinney put her on the treadmill, pushed a button, and the treadmill started moving at the speed of a very slow walk. (Bennington Depo., p. 27). Appellant did not know what button McKinney pushed to start the treadmill. Id. Appellant stated that McKinney did not give her any instructions on how to operate the treadmill; McKinney only showed her the button to increase the speed and did not explain any of the other buttons. Id. Because McKinney showed Appellant the button to increase the speed, Appellant did not feel the need to look at any of the other buttons to control the treadmill. (Bennington Depo., p. 29).

{¶11} After McKinney got Appellant started on the treadmill, McKinney walked away. (Bennington Depo., p. 29). Appellant was walking on the treadmill for approximately five to ten minutes. (Bennington Depo., p. 30). Appellant felt that the treadmill was barely moving, so she pushed the button to increase the speed. (Bennington Depo., p. 27). Appellant testified that when she pushed the button to increase the speed, the treadmill "took off" and the treadmill threw Appellant off onto the floor. (Bennington Depo., p. 33, 35). Appellant landed on her stomach. (Bennington Depo., p. 36).

{¶12} As a result of the incident, Appellant suffered a dislocated shoulder requiring physical therapy and possible surgery.

{¶13} On May 28, 2009, the trial court granted summary judgment in favor of Appellee.

{¶14} It is from this decision Appellant now appeals.

ASSIGNMENT OF ERROR

{¶15} Appellant raises one Assignment of Error:

{¶16} "UPON DUE CONSIDERATION OF THE EVIDENCE PRESENTED AND CONSTRUED MOST FAVORABLY FOR MS. BENNINGTON-APPELLANT, THE NON-MOVING PARTY, THE TRIAL COURT ERRED IN FINDING AS A MATTER OF LAW THAT THERE WAS AN ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT ON THE ESSENTIAL ELEMENTS OF A TORT."

{¶17} We review Appellant's Assignment of Error pursuant to the standard set forth in Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶18} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶19} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶20} The question before this Court is whether there is a genuine issue of material fact as to Appellee's negligence in relation to Appellant's use of the treadmill.

In order to show negligence, a plaintiff must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom. It is undisputed that Appellant was a "business invitee" while she was on Appellee's property and utilizing the treadmill.

{¶21} While a business owner is not an insurer of the safety of his business invitees, an owner owes such invitees "a duty of ordinary care in maintaining the premises in a reasonably safe condition so that his customers are not unnecessarily and unreasonably exposed to danger." *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E.2d 474. Included in this duty is the obligation to warn business invitees of latent or concealed defects of which the owner has or should have knowledge. *Kubiszak v. Rini's Supermarket* (1991), 77 Ohio App.3d 679, 686, 603 N.E.2d 308. However, an occupier or a premise is under no duty to protect a business invitee against dangers that are known to such invitee or are so obvious and apparent to such invitee that she may be reasonably be expected to discover them or protect herself against them. *Gutierrez v. Paramount Kings Island*, Warren App. No. CA2002-10-102, 2003-Ohio-4469, ¶10 citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus.

{¶22} The obligation of reasonable care is extensive, and includes "the duty to warn patrons of dangerous conditions known to, or reasonably ascertainable by, a proprietor which a patron should not be expected to discover or protect himself against." *Darling v. Fairfield Medical Center* (2001), 142 Ohio App.3d 682, 685, 756 N.E.2d 754. Accordingly, the proprietor's duty is normally predicated upon his superior knowledge of a dangerous condition on his premises. Id. Since a warning eliminates the disparity

between the proprietor's and patron's knowledge of the dangerous condition, it is usually sufficient to discharge the proprietor of his duty to exercise reasonable care. Id.

{¶23} Appellee argues that it had no duty to warn Appellant about the dangers of increasing the speed on the treadmill because it was open and obvious that increasing the speed of the treadmill would pose a risk of falling. Under the Civ.R. 56 evidence presented in this case when viewed in favor of the non-moving party, we disagree.

{¶24} In summary judgment, we must view the facts in a light most favorable to Appellant, the non-moving party. The only evidence before this Court is the deposition testimony provided by Appellant and McKinney. Appellant testified in her deposition that at 68 years of age, Appellant had never operated a treadmill before. Appellant stated she expressed her inexperience to McKinney. On August 30, 2004, McKinney gave Appellant her first introduction to the use of a treadmill. Their testimony gives differing views on what amount of instruction Appellant received as to the operation of the treadmill. The only consensus is that McKinney showed Appellant the acceleration button.

{¶25} McKinney stated that she instructed Appellant in all manners of the use of the treadmill before she left Appellant to work at the desk. Appellant stated that McKinney only showed Appellant how to use the acceleration button before McKinney walked away from Appellant. There is no testimony to show if McKinney showed Appellant how to push the acceleration button to increase the speed. We know that Appellant pushed the acceleration button because she felt the treadmill was going too slow. It is unknown how long she pushed the button, but the speed of the treadmill

increased to such an amount that Appellant fell off the treadmill and dislocated her shoulder.

{¶26} We agree that it was Appellant's voluntary act to accelerate the speed of the treadmill. We also find there is no allegation that the treadmill was defective in operation or design. However, we find there is a genuine issue of fact as to whether the acceleration of the speed of the treadmill was an open and obvious danger to one who had never operated a treadmill before and who may or may not have been instructed on how to decelerate or stop the treadmill.

{¶27} Appellee next argues that a person who increases the speed on a treadmill has assumed the risk of the results of that act. The assumption of the risk defense requires a defendant to present evidence the plaintiff knew of the dangerous condition, knew the condition was patently dangerous, and voluntarily exposed himself to the condition. *Carrel v. Allied Products Corporation* (1997), 78 Ohio St.3d 284, 1997-Ohio12, 677 N.E.2d 795. A plaintiff must have voluntarily and unreasonably assumed a known risk. *Syler v. Signode Corporation* (1992), 76 Ohio App.3d 250, 601 N.E.2d 225.

{¶28} As we found above, in this case there is a genuine issue of fact whether Appellant knew of the dangerous condition of accelerating the speed of a treadmill. Appellant had never used a treadmill before and reasonable minds could come to differing conclusions as to the amount of instruction Appellant received before her first, and probably last, walk on the treadmill.

{¶29} For these reasons, we sustain Appellant's Assignment of Error.

{¶30} The judgment of the Richland County Court of Common Pleas is reversed and the matter remanded to the trial court for proceedings consistent with this opinion and judgment.

By: Delaney, J. and

Gwin, J. concur,

Edwards, P. J. dissents

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. W. SCOTT GWIN

PAD:kgb

Edwards, J., dissenting

{¶31} I respectfully dissent from the majority's analysis and disposition of appellant's sole assignment of error.

{¶32} The majority, in its Opinion, finds that "there is a genuine issue of fact as to whether the acceleration of the speed of the treadmill was an open and obvious danger to one who had never operated a treadmill before and who may or may not have been instructed on how to decelerate or stop the treadmill."

{¶33} However, as the court explained in *Goode v. Mt. Gillion Baptist Church,* Cuyahoga App. No. 87876, 2006-Ohio-6936, at paragraph 25: "The law uses an objective, not subjective, standard when determining whether a danger is open and obvious. The fact that a particular appellant herself is not aware of the hazard is not dispositive of the issue. It is the objective, reasonable person that must find that the danger is not obvious or apparent." See also *Aycock v. Sandy Valley Church of God*, Tuscarawas App. No.2006 AP 09 0054, 2008-Ohio-105.

{¶34} "A dangerous condition does not actually have to be observed by the claimant to be an open-and-obvious condition under the law." *Lykins v. Fun Spot Trampolines*, 172 Ohio App.3d 226, 2007-Ohio-1800, 874 N.E.2d 81 at paragraph 24. "Rather, the determinative issue is whether the condition is observable." Id.

{¶35} In the case sub judice, it is undisputed that appellant was shown the button to increase the speed of the treadmill. An objective, reasonable person would know that, if you pushed the button, the speed of the treadmill would increase. On such basis, I would find that the acceleration of the speed of the treadmill was an open and obvious danger and that the trial court, therefore, did not err in granting summary

judgment to appellee. I would, for such reason, overrule appellant's sole assignment of error.

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HON. JULIE A. EDWARDS

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FIFTH APPELLATE DISTRICT

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-vs-	:	JUDGMENT ENTRY
	:	
LADIES SUPER FITNESS, INC.	:	
	:	
	:	Case No. 2009 CA 0085
Defendant-Appellee	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Richland County Court of Common Pleas is reversed and remanded to the trial court for further proceedings consistent with this opinion and judgment. Costs assessed to Appellee.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. W. SCOTT GWIN