IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO



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| SHIRLEY SZLAMAS, et al. | ) | CASE NO. CV 14-833092 |
| | ) | |
| Plaintiffs | ) | JUDGE PAMELA A. BARKER |
| | ) | |
| v. | ) | |
| | ) | **OPINION AND JOURNAL ENTRY ON** |
| CURVES, et al. | ) | **DEFENDANTS' MOTION FOR** |
| | ) | **SUMMARY JUDGMENT** |
| Defendants | ) | |
| | ) | |

This matter is before the Court on the Motion For Summary Judgment of Defendants Curves, Curves dba Curves Fitness, Curves dba Curves for Women and Curves International dba Curves (hereinafter "Defendants") filed on July 16, 2015 ("Defendants' Motion"), Plaintiffs' Brief in Opposition filed on August 11, 2015 ("Plaintiffs' Brief), and Defendants' Reply filed on August 17, 2015 ("Defendants' Reply").

**The evidence**

On May 23, 2014, Plaintiff Shirley Szlamas ("Plaintiff") was at the Strongsville Curves and as part of her workout in the fitness circuit, worked on the curl machine and then moved to the aerobic mat next to it, started jogging in place on the mat, when according to her testimony, "something grabbed her foot" and she tripped.[1] Plaintiff testified that the wires connecting the machines ran under the aerobic mats, she tripped on the wires that ran underneath the mat she was jogging on, and that after she fell she felt the wires underneath her butt.[2]

[1] Plaintiff's deposition, at pages 29-38.
[2] *Id.* at

Michael Doyle, part-owner of the Strongsville Curves testified that the manager of that location, Melinda Foote, had been instructed to place or route the wires in front of and behind the aerobic mats, and the wires had guards or sleeves on them.[3] According to Mr. Dolan, this instruction had been given because: 1.) "[t]he mats were flexible, about half-inch thick so anything that's under it would cause the mat to buckle, which would, at the very least, cause discomfort to a member trying to do floor exercise";[4] and 2.) Mr. Dolan acknowledged or supposed as correct that wires underneath the mats could "potentially cause a tripping hazard."[5]

According to Melinda Foote, the Strongsville Curves manager at the time of the incident, the guard-covered wires or cords were placed either in front of or behind the mat, depending on what put them out of the way best.[6] She testified that it was because of the fact that running the cords under the mat would create a bump and would "potentially" be a tripping hazard that the cords were not placed under the mats.[7] According to Melinda, after she heard Plaintiff fall and went to her location, the mat was not covering the cord guard, and she did not observe in that area anything that struck her as something that might have caused Plaintiff to fall.[8]

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[3] Deposition of Michael Doyle, page 29, lines 13-25; page 26, lines 3-16.
[4] *Id.* page 30, lines 1-13.
[5] *Id.*, lines 14-20.
[6] Deposition of Melinda Foote, page 32, lines 22-25, page 33, lines 1-25.
[7] *Id.*, page 34, lines 2-13.
[8] *Id.*, page 47, lines 17-25, page 48, lines 1-17.

Plaintiff had signed an "Agreement and Release of Liability" and placed her initials after each paragraph included therein, on January 20, 2014 ("the Release").[9] The Release reads in relevant part as follows:

1) In consideration of being allowed to participate in any activities, programs, and/or nutritional programs of any Curves franchise and/or to use the facilities, equipment and/or machinery of any Curves franchise, in addition to the payment of any fee or charge and subject only to the statutory rights and implied warranties which cannot be excluded, I do hereby waive, release and forever discharge Curves International, Inc., its officers, affiliates, subsidiaries, agents, employees, representatives, executors and all others and Curves franchisees, their officers, affiliates, subsidiaries, agents, employees, representatives, executors, and all others ("Curves Representatives") from any and all responsibilities or liabilities from injuries or damages arising out of or connected with my participation in any nutritional program of any Curves franchise and/or my attendance at any Curves franchise, including my participation in all activities, my use of equipment and/or machinery, passive or active, any omission or commission, including any liability arising from the negligence of Curves representatives on any premises owned, operated, controlled and/or leased by Curves.
2) I understand and am aware that strength training, flexibility and aerobic exercise, including the use of equipment, are a potentially hazardous activity. I also understand that fitness activities and nutritional programs involve a risk of injury and even death. If I engage in any type of exercise and/or nutritional programs in any Curves franchise, I acknowledge that I am voluntarily participating in these activities and using equipment and machinery with knowledge of the dangers involved. Subject only to the statutory rights and implied warranties which cannot be excluded, I hereby agree to expressly assume and accept any and all risks of injury or death in respect of myself and caused directly by me as a result of my conduct, omissions or negligence to others. I hereby further agree to expressly assume all responsibility for any injury or death caused directly or indirectly through my conduct, omissions or negligence to any third person (including Curves representatives) through my attendance and/or participation in any nutritional programs at any Curves franchise and any premises owned, operated, controlled and/or leased by Curves representatives.

**Summary Judgment Standard**

Civ. R. 56(C) provides in relevant part as follows:

[9] Exhibit "B" and page 22, lines 10-25, and page 23, lines 1-4, of Plaintiff's Deposition.

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"In order to properly grant a summary judgment motion pursuant to Civ. R. 56(C), a trial court must review the pleadings, deposition testimony, and other evidentiary materials and determine 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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; ***.'" *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless v. Willis Day Warehousing Company, et al.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46, 47. Civ. R. 56(E) requires that the adverse or non-moving party set forth specific facts showing that there is a genuine issue for trial and the non-moving party must so perform if he is to avoid summary judgment. *Id.*, 54 Ohio St.2d at 65.

"Although a party seeking summary judgment must inform the trial court of the basis for its motion, the movant need not necessarily support its motion with evidentiary materials

which *directly negate* its opponent's claim. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323. Rather, the movant may sometimes meet its burden by pointing out to the trial judge 'that there is an absence of evidence to support the nonmoving party's case.' *Id.* at 325. See, also, *Hodgkinson v. Dunlop Tire & Rubber Corp.* (1987), 38 Ohio App.3d 101, 526 N.E.2d 89." *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

A summary judgment motion must be overcome by specific and provable facts and not mere allegations; evidence of a possible inference is insufficient. *Leach v. City of Toledo*, 6th Dist. No. L-98-1227, 1999 Ohio App. LEXIS 94, at *6, citing *Jackson v. Alert Fire and Safety Equip. Inc.* (1991), 58 Ohio St.3d 48, 52, 567 N.E.2d 1027; *Cox v. Commercial Parts & Serv.* (1994), 96 Ohio App.3d 417, 421, 645 N.E.2d 123. As explained by the Court in *Leach, supra* at *6-7:

> "The key to the grant of a summary judgment motion is that there must be no genuine issue as to a *material* fact. Material facts are determined by substantive law. Only disputes over facts that might affect the outcome of a suit under governing law will properly preclude the grant of a motion for summary judgment. Irrelevant and unnecessary factual disputes will not be counted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 91 L. Ed. 2d 202, 106 S. Ct. 2505; *Perez v. Scripps-Howard Broadcasting* (1988), 35 Ohio St.3d 215, 520 N.E.2d 198.

**Discussion**

In Defendants' Motion, they argue that they are entitled to summary judgment in their favor and against Plaintiffs because: 1.) the Release bars any claim of negligence against Curves; 2.) Plaintiff expressly assumed the risk of injury; and 3.) the alleged hazard of the wires underneath the mat[10] was an open and obvious condition and therefore, Defendants owed no

[10] Defendants concede that the evidence presented by Plaintiff, specifically her deposition testimony that the wires/cords ran underneath the mat she was jogging on and caused her to fall, creates a genuine issue of fact, because Defendants, through Mr. Dolan and Ms. Foote, testified that the cords/guards were supposed to be placed and were placed either in front of or behind the mats.

duty of care to Plaintiff. And because Plaintiff's claim fails as a matter of law, so, too, does her husband's derivative loss of consortium claim.

This Court is guided by the precedent established by the Eighth District Court of Appeals in *Pruitt v. Strong Style Fitness* (8th Dist. No. 96332), 2011-Ohio-5272, and *Lamb v. University Hospitals Health Care Enterprises, Inc.* (8th Dist. No. 73144), 1998 Ohio App. LEXIS 3740, where the court upheld the validity of Releases to prohibit recovery against the Defendant fitness centers.

In *Pruitt*, the Eighth District set forth the standard for review of cases involving releases:

> Generally in Ohio, exculpatory clauses, which relieve a party from its own negligence, are not against public policy despite being disfavored in the law. *Lamb v. Univ. Hosp. Health Care Ent., Inc.* (Aug. 13, 1998), Cuyahoga App. No. 73144, 1998 Ohio App. LEXIS 3740. Valid exculpatory clauses or releases constitute express assumptions of risk. *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110, 114, 6 Ohio B. 170, 451 N.E.2d 780. As with contracts in general, these clauses are to be strictly construed against the drafter unless the language is clear and unambiguous. **When the terms of the contract are clear and unambiguous, the interpretation is a matter of law.** *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246, 374 N.E.2d 146.
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> A party waiving his right to recover for another's negligent acts must make a conscious choice to accept the consequences of the other party's negligence. *Lamb*, Cuyahoga App. No. 73144, 1998 Ohio App. LEXIS 3740, [**7] citing *Cain v. Cleveland Parachute Training Ctr.* (1983), 9 Ohio App.3d 27, 28, 9 Ohio B. 28, 457 N.E.2d 1185. If the terms of the contract are ambiguous, the intention of the parties is a factual inquiry for the trier of fact. *Id.* **Recovery for willful or wanton misconduct cannot be waived. *Id.***
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> **Moreover, as with all contracts, the party against whom the contract is being enforced may seek rescission of the contract if the terms are unconscionable.** "Unconscionability is generally recognized as the absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party." (Internal citations and quotations omitted.) Short v. Resource Title Agency, Inc., Cuyahoga App. No. 95839, 2011 Ohio 1577, ¶ 21. **Whether a clause is unconscionable is a question of law. Id.** The party challenging the enforceability of the contract has

the burden to establish both procedural and substantive unconscionability. *Id* at ¶ 22.

*Pruitt v. Strong Style Fitness*, 2011-Ohio-5272, P. 8-10 (Ohio Ct. App., Cuyahoga County Oct. 13, 2011) (Emphasis Added).

In the present matter, despite Plaintiffs' argument to the contrary, this Court finds that the language of the Release is "clear and unambiguous", and as such, interpretation of the Release is a matter of law. Additionally, this Court finds that the Plaintiff has failed to establish that the actions of the Defendants or their agents constituted willful or wanton misconduct.[11] Further, although Plaintiffs argue that the Release is ambiguous, they fail to offer any evidence that the terms are unconscionable and present no discussion on the factors to consider when evaluating if a release is unconscionable.[12] As this Court finds that the Release is enforceable, no further analysis is required as the Release prohibits recovery.[13]

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[11] "**Willful misconduct** implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. *Tighe v. Diamond*, 149 Ohio St. at 527, 80 N.E.2d 122; *see also Black's Law Dictionary* 1630 (8th Ed.2004) (describing willful conduct as the voluntary or intentional violation or disregard of a known legal duty). **Wanton misconduct** is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. *Hawkins*, 50 Ohio St.2d at 117-118, 363 N.E.2d 367; *see also Black's Law Dictionary* 1613-1614 (8th Ed.2004) (explaining that one acting in a wanton manner is aware of the risk of the conduct but is not trying to avoid it and is indifferent to whether harm results)". *Anderson v. City of Massillon*, 134 Ohio St. 3d 380, 388 (Ohio 2012). (Emphasis Added).

[12] "Substantive unconscionability involves those factors which relate to contract terms themselves, and whether they are commercially reasonable. Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties. **These factors may include age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, and whether the terms were explained to the weaker party." (Emphasis added).** *Pruitt, supra*, HN8.

[13] "Because the release provision of the agreement is enforceable, we need not determine whether Pruitt established a prima facie claim of negligence. Even if he did, the release prohibits recovery". *Pruit, supra* at ¶21

Accordingly, the Court finds that there are no genuine issues of material fact and that the material facts presented demonstrate that as a matter of law, Defendants are entitled to judgment in their favor. Therefore, Defendants' Motion for Summary Judgment is **GRANTED** and this matter is removed from the Court's active docket.

IT IS SO ORDERED.

There is no just reason for delay.

Pamela A. Barker 9-4-15

Judge Pamela A. Barker Dated