

**IN THE COUNTY COURT OF HARRISON COUNTY, MISSISSIPPI  
FIRST JUDICIAL DISTRICT**

**RODRIGO DIAZ**

**PLAINTIFF**

**VERSUS**

**CAUSE NO. 24CO1:16-cv-00166**

**FRANK OLAIVAR d/b/a  
THE ENERGY CLUB**

**DEFENDANT**

**MEMORANDUM OPINION CONCERNING MOTIONS [16], [20] AND [22]**

BEFORE THE COURT are Defendants' Motion for Summary Judgment [16] and Motion to Strike Affidavit [22] filed by G C Fitness Inc. (incorrectly named in the Complaint as Frank Olaivar d/b/a The Energy Club), seeking dismissal of all claims made by Plaintiff, Rodrigo Diaz, pursuant to M.R.C.P. 56. In his Response [20], Plaintiff moved for a continuance. The Court, having reviewed submissions of the parties and hearing oral arguments on November 2, 2016, is ready to rule and finds the following:

**Background and Procedural History**

This is a premises liability case stemming from an injury sustained by Plaintiff on October 6, 2015<sup>1</sup> at Defendants' fitness club in Long Beach, Mississippi, while Plaintiff was using a piece of Defendants' exercise equipment.

Plaintiff filed his Complaint [1] on February 5, 2016, alleging Plaintiff was a business invitee and Defendant failed to keep the equipment in a reasonably safe condition, and further, Defendant failed to warn Plaintiff of hidden dangers which Defendant knew or, in the exercise of reasonable care, should have known. Plaintiff claims he was injured while using a weight machine, the result of which was Defendant's negligent failure to properly maintain the equipment. Finally, Plaintiff claims the malfunctioning of the equipment was reasonably

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<sup>1</sup> Although Plaintiff's Affidavits [20] and [30] do not contain this injury date, Plaintiff had already admitted via Request for Admission No. 2 [16-3] that the injury occurred on October 6, 2015. See *DeBlanc v Stancil*, 814 So.2d 796, 802 (Miss. 2002) (an affidavit cannot be used to contradict admissions, because matters deemed admitted are conclusive).

foreseeable and Defendant's actions, inactions, failures and negligence resulted and caused Plaintiff's injuries.

Defendants filed their Answer [5] on April 13, 2016, denying all liability to Plaintiff and further stating they did not cause any dangerous condition, had no knowledge of any dangerous condition, and did not have any reason to know of any dangerous condition, if any such condition existed, among other defenses.

On September 1, 2016, Defendants filed their Motion for Summary Judgment [16], seeking dismissal of all claims. Plaintiff filed his Response [20] on September 9, 2016, providing only an affidavit of Plaintiff to oppose Defendants' Motion, and alternatively, seeking a continuance of the hearing pending completion of discovery. Defendants' filed a Rebuttal [21] and a Motion to Strike Plaintiff's Affidavit [22]. On November 1, 2016, Plaintiff filed a Corrected Affidavit [30]. The Court heard oral arguments on November 2, 2016. Subsequent to the hearing, both sides presented the Court with letters further addressing case law discussed at the November 2 hearing. The Court has considered the submissions of the parties and oral arguments of the attorneys and now makes its findings of facts and conclusions of law.

### **Analysis**

#### **A. Summary Judgment Standard**

Summary judgment is properly granted when there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. *Rogers v. Barlow Eddy Jenkins P.A.*, 22 So.3d 1219, 1222 (Miss.App. 2009) (quoting M.R.C.P. 56(c)). If there is a dispute in the facts, the dispute has to be a material one, since the focal point for the standard for summary judgment is on material facts. *Simmons v. Thompson Mach. Of Mississippi, Inc.*, 631 So.2d 798, 801 (Miss. 1994). Additionally, "the party opposing summary judgment 'may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as

otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, will be entered against him.” *Karpinsky v. Am. Nat. Ins. Co.*, 109 So.3d 84, 88 (Miss. 2013) (quoting M.R.C.P. 56(e)).

Plaintiff’s sole claim against Defendants is for premises liability. “In a premises-liability action, the plaintiff must prove the familiar elements of duty, breach of duty, proximate cause, and damages in order to establish a prima facie case.” *McCullar v. Boyd Tunica, Inc.*, 50 So.3d 1009, 1011 (Miss. Ct. App. 2010) (citing *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So.2d 1186, 1189 (Miss. 1994)). “To survive summary judgment, the party with the burden of proof must show a genuine issue of material fact exists as to every element of his claim.” *Id.* (citing *Davis v. Christian Bhd. Homes of Jackson, Miss., Inc.*, 957 So.2d 390, 398–99 (Miss.Ct.App. 2007)). Failure of proof on a single element is fatal to a premises liability action. *Id.* at 1012.

## **B. Findings of Fact**

The following facts have not been disputed by the parties or have been conceded by Plaintiff:

1. Defendants’ business is a fitness facility.
2. Plaintiff began using Defendants’ work out facility on or about April 14, 2015.
3. Plaintiff was an invitee on Defendants’ premises on October 6, 2015, when he was injured while using a weight machine.
4. Prior to October 6, 2015, Plaintiff never experienced a problem with the machine or reported to Defendants a problem with the machine.
5. On October 6, 2015, Plaintiff arrived Defendant’s gym and started working out by using other machines, because the subject machine was being used by two individuals.

6. Once the subject machine was available, Plaintiff went to the machine, checked the weights, set the pin and started doing repetitions; he finished and then went to use other machines before using the subject machine a second time.
7. After using the subject machine a second time, Plaintiff used other machines before coming back to the machine for a third time.
8. When Plaintiff began using the subject machine for the third time, he was injured during his second repetition.
9. Plaintiff believes that, since a customer uses equipment, the owner of the gym will keep the equipment well maintained and keep it from hurting him.
10. Plaintiff claims the subject machine was defective or malfunctioned stating, "The machine in [Defendants'] business which [Defendants] placed for me to use was broke and caused my accident and my injuries."
11. Plaintiff claims Defendants knew or should have known the subject machine was defective or posed a dangerous condition, stating, "Because the machine was in [Defendants'] business which [Defendants] placed for my use and [Defendants] have a duty to keep me from getting hurt when using it."
12. Plaintiff's only evidence to oppose summary judgment is his own testimony.
13. Defendants did not have any notice of any defect in the machine.
14. Defendants' employee, Stephen L. Walker, inspected the subject machine after the accident and found no defects or broken parts.
15. Gym member David Patton inspected the subject machine after Plaintiff's accident and found no defects or broken parts, and he used the machine without a problem shortly after Plaintiff's accident.

16. Plaintiff did not attempt to conduct any discovery between the time Defendants filed their Answer on April 13, 2016 and the November 2, 2016 hearing on Defendants' Motion for Summary Judgment.

**C. Conclusions of Law**

**1. Plaintiff's Request for Continuance [20]**

In his Response [20], Plaintiff alternatively requested that the Court stay consideration of the Motion [16] pending the conclusion of discovery. Rule 56(f) of the Mississippi Rules of Civil Procedure governs continuance of a summary judgment hearing; it states:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

M.R.C.P. 56(f). The granting of a continuance is within the court's discretion. *Stanley v. Scott Petroleum Corp.*, 184 So.3d 940, 942 (Miss. 2016). However, "the party resisting summary judgment must present specific facts why he cannot oppose the motion and must specifically demonstrate how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Id.* (citations and internal quotation marks omitted). Additionally, the party seeking a continuance must "show what steps they have taken to obtain access to the information allegedly within the exclusive possession of the other party," and the party must have been diligent and acted in good faith. *Id.* (citation omitted).

The Court finds that the subject accident occurred on October 6, 2015. Plaintiff's lawsuit was filed February 5, 2016, and as such, the lawsuit had been on file for almost seven (7) months by the time Defendants filed their Motion [16] on September 1, 2016. The lawsuit was on file for nearly nine (9) months by the time Defendants' Motion [16] came on for hearing on November

2, 2016, a hearing date agreed to by Plaintiff. During that period of time, Plaintiff never took any steps to conduct discovery. Additionally, in his request for continuance, Plaintiff did not reveal any specific facts needed or state specifically the additional information needed and how that evidence would generate a genuine issue of material fact for trial. Therefore, Plaintiff's request for a continuance is DENIED.

**2. Defendants' Motion to Strike Affidavit [22]**

Not every affidavit presented for the court's consideration is competent summary-judgment evidence. *Karpinsky*, 109 So.3d at 91. In *Karpinsky*, the Mississippi Supreme Court noted that it has "clearly held that conclusory, self-serving affidavits are not a sufficient basis for granting summary judgment." *Id.* When a party "wishes to attack one or more of the affidavits upon which the motion is based, he must file in the trial court a motion to strike the affidavit. Failure to file the motion to strike constitutes waiver of any objection to the affidavit." *Cont'l Ins. Co. v. Transamerica Rental Fin. Corp.*, 748 So.2d 725, 731 (Miss. 1999) (internal quotations and citations omitted); see also *Moore v. M & M Logging, Inc.*, 51 So.3d 216, 220 (Miss. Ct. App. 2010). Nevertheless, whether to strike an affidavit is within the sound discretion of the Court. *Trustmark Nat. Bank v. Meador*, 81 So.3d 1112, 1116 (Miss. 2012).

In this case, Plaintiff's affidavits mirror his interrogatory responses. As for the date of the accident, the date had already been admitted and could not be contradicted by subsequent affidavit. See *DeBlanc v Stancil*, 814 So.2d 796, 802 (Miss. 2002). For the remainder of the testimony within the affidavits, while the testimony is redundant, the Court will not strike the affidavits. Therefore, Defendants' Motion to Strike [22] is DENIED.

**3. Defendants' Motion for Summary Judgment [16]**

As sated previously, Plaintiff's cause of action is for premises liability. "[T]he basis of liability is negligence and not injury." *Rod v. Home Depot USA, Inc.*, 931 So.2d 692, 695 (Miss.

Ct. App. 2006) (citation omitted). Business owners are not strictly liable for accidents on their premises and the doctrine of *res ipsa loquitor* does not apply to premises liability claims. *McCullar*, 50 So.3d at 1014.

“Mississippi applies a three-step process to determine premises liability.” *Leffler v. Sharp*, 891 So.2d 152, 156 (Miss. 2004) (citing *Massey v. Tingle*, 867 So.2d 235, 239 (Miss. 2004)). First, the court must determine whether the injured party was an invitee, licensee, or a trespasser; next, the court must determine what duty was owed to the injured party; and third, the court must determine whether that duty was breached. *Id.* The parties here agree Plaintiff was an invitee. Turning to duty, the premises owner “is not an insurer of the invitee’s safety, but does owe to an invitee the duty to keep the premises reasonably safe, and when not reasonably safe, to warn only where there is hidden danger or peril that is not in plain and open view.” *Id.* (quoting *Massey*, 867 So.2d at 239). For breach of duty, Plaintiff “must (1) show that some negligent act of the defendant caused his injury; or, (2) show that the defendant had actual knowledge of a dangerous condition and failed to warn the plaintiff; or, (3) show that the dangerous condition existed for a sufficient amount of time to impute constructive knowledge to the defendant, in that the defendant should have known of the dangerous condition.” *Downs v. Choo*, 656 So.2d 84, 86 (Miss. 1995) (citations omitted).

Plaintiff argues there is a genuine issue of fact whether the machine malfunctioned, causing Plaintiff’s injury. The Court finds there is an issue of fact as to whether the machine malfunctioned or was working properly, but such a fact is not a genuine issue of *material* fact upon which summary judgment may be denied. Plaintiff concedes Defendants had no notice of a dangerous condition, and Plaintiff presents no evidence or testimony that Defendants caused a dangerous condition. Rather, Plaintiff argues Defendants should have known of a dangerous condition by conducting reasonable inspections to discover a dangerous condition, citing *Pigg v.*

*Express Hotel Partners, LLC*, 991 So.2d 1197 (Miss. 2008). As stated in the *Pigg* case, “To survive summary judgment, [plaintiff] must produce more than evidence of an injury.” *Id.* at 1200 (Miss. 2008).

In *Pigg*, the Mississippi Supreme Court reversed a summary judgment in the defendant’s favor, finding there was a genuine issue of material fact concerning whether defendant should have known of a defectively attached mirror and whether defendant was negligent in inspecting its premises. 991 So.2d 1197. The defendant hotel claimed it inspected its premises regularly in addition to random corporate inspections; however, plaintiff presented circumstantial evidence of loosely attached mirrors in two adjacent hotel rooms and the location of the glass on the floor. *Id.* at 1200. Thus, the circumstantial evidence rebutted defendant’s claim that it met its duty to inspect the premises. Such circumstantial evidence is not present in the case *sub judice*.

In *Calhoun v. Leaf River Cellulose, LLC*, the court assumed for summary judgment purposes that a dangerous condition existed by way of a metal tube on the floor that caused plaintiff’s trip and fall injury. 2011 WL 5872897 (S.D. Miss. Nov. 23, 2011). The court noted there was no evidence that the defendant caused – by action or inaction – the hazard at issue; in response, plaintiff argued a jury could draw an inference as to the origin of the metal tube based on circumstantial evidence, citing *Pigg*. *Id.* at \*2. The court addressed *Pigg* and distinguished it, noting the plaintiff did not present any evidence of other hazards suggesting a pattern of negligence like in the *Pigg* case. *Id.* The court went on to note that plaintiff’s circumstantial evidence argument was essentially a *res ipsa loquitur* argument, which is inapplicable to premises liability cases. *Id.* at \*3. Summary judgment was ultimately granted because there was no evidence the defendant caused the hazard, knew (had actual knowledge) of the hazard or should have known (constructive knowledge due to passage of time) of the hazard. *Id.* at \*3-4.



The Court agrees with Defendant that the case of *Bouldin v. Lipscomb Oil Co.* is applicable to the facts in this case. In *Bouldin*, plaintiff filed a premises liability lawsuit alleging injuries from gasoline hitting him in the face, neck, and chest areas even though plaintiff never activated the gas nozzle by depressing the hose's "trigger." 962 So.2d 64, 65 (Miss. Ct. App. 2007). Plaintiff argued that "gas discharging from the hose was a defect in the gas station premises, and [defendant] should have either warned the customers of or corrected the defect." *Id.* Defendant moved for summary judgment arguing it had no notice of any gas pump defect. *Id.* Defendant offered the affidavit of the store manager, who testified she

was on duty at the time of [plaintiff's] accident and, although she did not witness the event, she did survey the pump when [plaintiff] reported the incident. By the time [the store manager] arrived at the pump, another customer had reactivated it for use and that pump continued to be used without incident.

*Id.* at 65-66. Additionally, the manager was unaware of any other similar incidents. *Id.* at 66. The Mississippi Court of Appeals upheld summary judgment for the defendant, because defendant did not have actual or constructive notice: the Court refused to impose a strict liability standard. *Id.* at 67.

Turning to the case *sub judice*, a patron used the subject weight machine shortly after Plaintiff's accident, just as the patron in *Bouldin* used the gasoline pump shortly after the alleged incident. While the parties disagree the machine had a defect which caused it to malfunction and injure Plaintiff, same is not a material fact, and therefore, the Court will assume for purposes of summary judgment that the machine did malfunction, causing Plaintiff's injury.

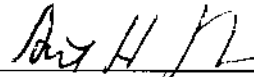
The legal concept of strict liability does not apply. As such, Plaintiff was required to present some evidence to create a genuine issue of fact as to whether Defendant caused the defect, knew of the defect and failed to warn, or should have known of the defect. Plaintiff concedes Defendants did not have notice of any defect in the machine. Furthermore, Plaintiff's

affidavit does not establish Defendant created or caused a defect in the machine, causing it to malfunction, or that Defendant should have known of a defect. Without any evidence to create a genuine issue of material fact, the Court finds the facts of this case are in line with *Bouldin* and summary judgment in Defendants' favor is warranted. Therefore, Defendants' Motion for Summary Judgment [16] is GRANTED.

**Conclusion**

Upon review of the submissions of the parties and oral arguments of counsel presented on November 2, 2016, the Court finds Plaintiff's Motion for Continuance [20] is DENIED, Defendants' Motion to Strike Affidavits [22] is DENIED, and Defendants' Motion for Summary Judgment [16] is GRANTED. Therefore, Plaintiff's lawsuit and all claims made by him against Defendants will be dismissed with prejudice. A separate Order and Judgment will be entered accordingly.

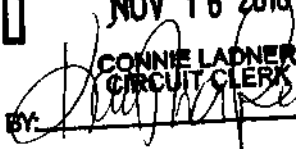
This 16<sup>th</sup> day of November, 2016.



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GASTON H. HEWES, JR.  
COUNTY COURT JUDGE

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