DIVISION ONE
FILED: 05/07/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SHIRLEY SKOGLUND, a widow,	)	1 CA-CV 12-0429
	)	
Plaintiff/Appellant,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
NESTE DEVELOPMENT NEVADA, L.L.C.,	)	Rule 28, Arizona Rules
doing business as Gold's Gym	)	of Civil Appellate
Ahwatukee, a limited liability	)	Procedure)
company; FITNESS ALLIANCE,	)	
L.L.C., a limited liability	)	
company,	)	
	)	
Defendants/Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-009049 and CV2010-022929 (Consolidated)

The Honorable Arthur T. Anderson, Judge

REVERSED AND REMANDED

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And
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O R O Z C O, Judge

¶1 Shirley Skoglund (Skoglund) appeals the trial court's granting of a motion for summary judgment (MSJ) in favor of Neste Development Nevada, L.L.C., doing business as Gold's Gym Ahwatukee, and Fitness Alliance, L.L.C. (collectively, Gold). For the following reasons, we reverse and remand for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Gold operates a fitness center where Skoglund was a member. On the day of the incident, Skoglund was using a women's workout room at Gold. There was a television (TV) mounted on a bracket bolted into the wall approximately eight feet off the floor. Skoglund attempted to change the channel on the TV by stepping up onto the bottom rung of a dumbbell weight rack located below the TV. While changing the channel, the bracket holding the TV came loose, causing the TV to fall and strike Skoglund on the head, which in turn resulted in her falling into exercise equipment and onto the floor. Skoglund suffered a concussion and multiple broken bones in her face and spine.

¶3 Skoglund filed a complaint against Gold alleging that

Gold was negligent in failing to maintain a safe environment, free of dangerous conditions on its premises. The complaint stated that Gold failed to adequately or properly warn or inform Skoglund of the dangerous condition of the TV.

¶4 Gold filed a MSJ asserting that Skoglund's negligence claim failed as a matter of law because she had not produced sufficient evidence that Gold breached a duty to her. Gold alleged that Skoglund had become a trespasser on the premises by engaging in unpermitted activities and had thus eliminated any duty that Gold owed her as an invitee. In the alternative, Gold also argued that even if Skoglund retained the status of invitee at the time of her injury, there was no evidence to show that the mounted TV constituted an unreasonably dangerous condition or that Gold was on notice of this condition.

¶5 In her answer to Gold's MSJ, Skoglund attached deposition excerpts from multiple witnesses. Skoglund's daughter-in-law, who is also a member at Gold, testified that she had seen other women change the channel of the TV by stepping up on the weight rack. Jose Gonzales (Gonzales), Gold's general manager, testified that he was aware that customers were using gym equipment such as "stretch bars" to change the channel of the TV in the women's workout room. He also testified that he was unaware as to whether Gold had a policy to keep the TV on one channel. However, he did indicate that customers were allowed to

make requests at the front desk that the channel be changed by use of a remote. Gonzales indicated that at the time of the incident, there were no signs in the workout room that prohibited members from changing the channel on the TV. Also, Skoglund testified in her deposition that she did not recall seeing a sign posted at the time of the incident, and her son testified that he took photographs directly after the incident indicating that there were no signs below the TV.

¶6 The trial court agreed with Gold, granted its MSJ and dismissed Skoglund's case with prejudice. It concluded that Skoglund's status at the time of her injury is a question of law for the court because it relates to whether Gold owed Skoglund a duty under the negligence framework. The court stated that Skoglund went beyond her scope as an invitee and thus became a trespasser on Gold's premises. Therefore, it held that Gold did not breach its duty to Skoglund when she was injured.

¶7 Skoglund timely appealed. We have jurisdiction under Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003) and -2101.A.1 (Supp. 2012).

DISCUSSION

¶8 We review the trial court's entry of summary judgment de novo. *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, 249, ¶ 14, 129 P.3d 966, 971 (App. 2006). Summary judgment is proper when there is no genuine issue of material fact and the

moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990) (citing Arizona Rule of Civil Procedure 56(c)). "[W]e view all facts and reasonable inferences therefrom in the light most favorable to the party against whom [summary] judgment was entered." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, 315, ¶ 2, 965 P.2d 47, 49 (App. 1998).

¶9 The trial court held that Skoglund became a trespasser when she climbed onto the dumbbell rack to change the channel of the TV, and as a matter of law, Gold did not breach its duty to her. Skoglund argues that the trial court erred in determining her status as a trespasser at the time of her fall; she contends that her status as a business invitee, licensee or trespasser is a question of fact for the jury to decide. We agree.

¶10 To be successful on a negligence claim, "a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). Duty is an obligation requiring the defendant to conform to a certain standard of conduct in order to protect others against unreasonable risks. *Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983). "Whether the defendant owes

the plaintiff a duty of care is a threshold issue . . . ." *Gipson*, 214 Ariz. at 143, ¶ 11, 150 P.3d at 230. "The existence of a duty is a question of law that we review de novo." *Diaz v. Phx. Lubrication Serv., Inc.*, 224 Ariz. 335, 338, ¶ 12, 230 P.3d 718, 721 (App. 2010). "[H]owever, the existence of a duty may depend on preliminary questions that must be determined by a fact finder." *Diggs v. Ariz. Cardiologists, Ltd.*, 198 Ariz. 198, 200, ¶ 11, 8 P.3d 386, 388 (App. 2000); *see Estate of Maudsley v. Meta Servs., Inc.*, 227 Ariz. 430, 437 n.9, ¶ 23, 258 P.3d 248, 255 n.9 (App. 2011) (whether a relationship that may give rise to a duty actually exists may be a factual question for a fact finder to decide before a court can analyze duty); *see also State v. Juengel*, 15 Ariz. App. 495, 499, 489 P.2d 869, 873 (1971) (child plaintiff's status "as trespasser, licensee or invitee was contested and properly treated as a question of fact for the jury's determination"), *disagreed with on other grounds by New Pueblo Constructors, Inc. v. State*, 144 Ariz. 95, 108-09, 696 P.2d 185, 198-99 (1985); *see also McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, __, ¶ 35, 293 P.3d 520, 531-32 (App. 2013) (holding that whether the hotel guest exceeded the scope of her invitation and became a trespasser by climbing out of the window in her room to smoke on a balcony was a material question of fact for the jury to decide).

¶11 There is no question that as a member of Gold, Skoglund

was a business invitee before the incident. The question before us is whether Skoglund, as a business invitee, exceeded the scope of her invitation by engaging in an alleged unpermitted activity. "The status of an invitee who goes beyond the scope of invitation changes to a licensee or a trespasser depending on the circumstances." *Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 143, 639 P.2d 330, 333 (1982). Furthermore, the duty owed by the landowner to the invitee can be diluted if the invitee engages in explicitly or impliedly unpermitted activities or goes beyond the area into which the invitee was invited. *Id.*

¶12 In this case, Skoglund was injured in a workout room, an area of the premises in which she was permitted to be. She presented evidence that she may have engaged in a permissible activity because she had changed the channel in a similar manner multiple times, and other customers had changed the channel by standing on the weight rack, as well. In addition, Gonzales testified that he was aware that gym members had been using gym equipment to reach the TV in order to change the channel. Skoglund also denied having any knowledge that a remote control for the TV was available for members at the front desk. "Where a proprietor of a place of amusement knows, or in the exercise of ordinary care should have known, that areas of his premises not originally intended for the use of patrons are being so used, he extends to them implied invitation for such use." *M.G.A.*

Theaters, Inc. v. Montgomery, 83 Ariz. 339, 341, 321 P.2d 1009, 1010 (1958). In that instance, "the duty of the proprietor to maintain a reasonably safe place then extends to those areas." *Id.*

¶13 Gold, on the other hand, argues that Skoglund presented no evidence that Gold invited or permitted her to use the dumbbell rack to change the channel. In fact, Gold argues that there was no express or implied invitation to scale the dumbbell rack to change the channel because the TV was installed eight feet above the ground and Gold did not provide any normal equipment designed for stepping and climbing or ready access to a remote control device within the workout room.

¶14 We find that there are material issues of fact regarding whether Skoglund engaged in an unpermitted activity when she attempted to access the TV by stepping on the dumbbell rack placed below the TV and whether this activity changed her status from that of an invitee to a licensee or trespasser. A jury may find that because Gold knew its customers were using gym equipment to change the channel, Gold impliedly allowed this activity. Or it may also find that because there was no step or ladder to change the channel, there was no implied invitation to use the dumbbell rack in order to reach the TV. Either way, these questions of fact are strictly within the purview of the

finder of fact and not the trial court.[1]

¶15 Gold argues *Nicoletti* and *Shiells v. Kolt*, 148 Ariz. 424, 714 P.2d 1319 (App. 1986) are persuasive. However, we are not persuaded by Gold's reliance on these authorities.

¶16 In *Nicoletti*, an employee of a retail store in a shopping center sought damages for injuries sustained when she fell while walking through ornamental shrubbery in a parking lot on the perimeter of the shopping center. 131 Ariz. at 141, 639 P.2d at 331. This state's supreme court determined that the employee's status as an invitee had changed to that of a licensee or trespasser because she had gone beyond the scope of her invitation. *Id.* at 143-44, 639 P.2d at 333-34. It found that a "reasonable person could not have thought the planter was an appropriate means of egress" and that the shopping center owner did not have a duty to maintain the decorative planter so that adult employees could safely walk through it. *Id.* at 144, 639 P.2d at 334. In reaching that conclusion, the court emphasized that the employee had received a map indicating the location of the temporary employee parking, knew or should have known of the

[1] Gold argued that Skoglund did not raise the issue to the trial court that Gold may have breached its duty to her as a licensee and therefore has waived it. The trial court also noted that Skoglund had not specifically raised the argument that Gold breached its duty to her as a licensee and declined to address it. However, we need not address this issue because on remand, prior to determining whether there was a breach, Skoglund's status as an invitee, licensee, or trespasser must be decided.

illuminated sidewalk providing a path to the parking lot, and voluntarily attempted a shortcut through the planter. *Id.* Unlike *Nicoletti*, as stated above, Skoglund presented sufficient evidence to create material issues of fact as to whether her actions went beyond the scope of her invitation as an invitee.

¶17 In *Shiells*, after a customer paid for his gas, he exited the cashier's office and "vaulted" over a railing along a walkway in front of the office. 148 Ariz. at 424, 714 P.2d at 1319. The railing collapsed, and the customer was injured. *Id.* This court found that although the railing had been previously damaged and one or more of the rails to the anchors was loose, the "condition [of the railing] was not obvious to anyone, and the [customer] was not aware of it." *Id.* However, we stated that "[t]he purpose of the railing was to provide a safe route to the cashier's office from the gas pumps by separating the walkway from the driveway," and the railing was not meant to be used as a "shortcut" upon the customer's exit. *Id.* at 424-25, 714 P.2d at 1319-20. This court found that the customer created the situation that resulted in his injury, and the store owners had no legal obligation to protect him. *Id.* at 425, 714 P.2d at 1320. We stated that "[n]o evidence showed that anyone else had ever attempted to vault over the railing or that such conduct had ever been permitted." *Id.* Unlike the customer in *Shiells* who did not present evidence that others had engaged in similar

activity, Skoglund has presented evidence that other Gold members changed the TV channel in the same manner she did. Therefore, we do not find *Shiells* to be persuasive.

¶18 In this case, as previously stated, there is evidence that Gonzales knew that others were using gym equipment to change the channel and that Gold impliedly allowed this conduct. However, there is also no evidence that Gold explicitly consented to this conduct. Therefore, we find that Skoglund's status at the time of the injury and whether Gold impliedly permitted this type of conduct are jury questions. As stated in Restatement (Second) of Torts § 332 cmt. *l* (1965), "Since the status of the visitor as an invitee may depend upon whether the possessor should have known that the visitor would be led to believe that a particular part of the premises is held open to him, the question is often one of fact for the jury . . . ."

Attorney Fees

¶19 Because we are reversing the trial court's order granting Gold's MSJ, we must also vacate its award of costs to Gold. Once the merits of the case have been resolved, the trial court may award costs to the successful party. Gold requests an award of its costs on appeal pursuant to A.R.S. § 12-341 (2003); however, as the non-prevailing party on this appeal, we decline to award costs. As the prevailing party on appeal, Skoglund is entitled to costs upon compliance with Arizona Rule of Civil

Appellate Procedure 21.

CONCLUSION

¶20 For the foregoing reasons, the trial court's summary judgment ruling and award of costs in favor of Gold is reversed, and this case is remanded for further proceedings consistent with this decision.

/S/
_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
PETER B. SWANN, Judge

/S/
_____
KENT E. CATTANI, Judge