**COURT OF COMMON PLEAS**
**CLERMONT COUNTY, OHIO**

| | | |
|---|---|---|
| **EMMA SOWDER, et al.,** | **:** | |
| Plaintiffs | **:** | **CASE NO. 2011 CVH 00143** |
| vs. | **:** | **Judge McBride** |
| **MAC DADDY & MOMMY, LLC, et al.** | **:** | **DECISION/ENTRY** |
| Defendants | **:** | |

O'Connor, Acciani & Levy LPA, Kory A. Veletean, attorney for the plaintiff Emma Sowder, 2200 Kroger Building, 1014 Vine Street, Cincinnati, Ohio 45202.

Smith, Rolfes & Skavdahl Co., L.P.A., Jerome F. Rolfes, attorney for the defendant Mac Daddy & Mommy, LLC, 600 Vine Street, Suite 2600, Cincinnati, Ohio 45202.

This cause is before the court for consideration of a motion for summary judgment filed by the defendant Mac Daddy & Mommy, LLC.

The court scheduled and held a hearing on the motion for summary judgment on January 9, 2012. At the conclusion of that hearing, the court took the issues raised in the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

## FACTS OF THE CASE

At approximately 6:45 a.m. on Monday, February 9, 2009, the plaintiff Emma Sowder exited her apartment building at the Berry Lane Apartments and walked down the steps toward the parking lot.[1] Although it was dark outside due to the early hour, the plaintiff testified that she was able to see and that the area in which she walked was lit by overhead lights.[2] While approximately six inches of snow fell the prior Thursday, the lot had been cleared and plowed.[3]

The plaintiff recalls that "everything looked normal" on the morning of February 9th.[4] The plaintiff entered the parking lot, turned to the right, walked toward her vehicle, and suddenly slipped and fell backwards.[5] The plaintiff quickly stood up and looked down to see what caused her fall and observed a patch of ice.[6] The plaintiff admits that when she stood up after her fall, she could see the patch of ice on the blacktop and that it shimmered.[7] She also states that she looked down and "followed the trail" of ice and that the trail appeared to come from around parking space number six toward the spot where she fell.[8]

The plaintiff testified that, on the day prior to her fall, she observed another tenant in the parking lot detailing vehicles.[9] She did not specifically see what the tenant

---

[1] Deposition of Emma Louise Sowder at pgs. 47, 82, and 87.
[2] Id. at pgs. 135-136.
[3] Id. at pgs. 49, 55, 62, and 86-87.
[4] Id. at pg. 86.
[5] Id. at pgs. 88-92.
[6] Id. at pgs. 93-94.
[7] Id. at pg. 95.
[8] Id. at pgs. 137-138.
[9] Id. at pg. 96.

was using on that Sunday; however, she recalls that on prior occasions he would use water to wash the outside of vehicles and shampoo the inside of those vehicles.[10] Faye Smith, the property manager of the Berry Lane Apartments, testified that a tenant named Uri would detail cars in the parking lot and that he was allowed one bucket of water from the laundry room to use in this detailing work.[11]

Faye Smith testified that she walks the grounds of the apartment complex each morning and, if she finds conditions which require snow removal, salting, etc., she calls Yard Design to perform those services.[12] Smith recalls that Yard Design cleared the parking lot twice on February 3rd due to a large snowfall.[13]

## WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[14]

[10] Id. at pgs. 103-104 and 132.
[11] Deposition of Faye E. Smith at pgs. 59-62.
[12] Id. at pgs. 8-11.
[13] Id. at pg. 24.
[14] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[15] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[16]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[17]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[18] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be

---

[15] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.
[16] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.
[17] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[18] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.

resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[19]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[20] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[21]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[22] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[23] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[24]

---

[19] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[20] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[21] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.
[22] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.
[23] Id.
[24] Id.

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[25] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[26] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[27] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[28]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[29] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[30]

---

[25] Id.
[26] Id.
[27] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[28] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.
[29] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[30] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[31]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[32]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[33] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must

---

[31] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[32] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.
[33] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.

be resolved in favor of the nonmoving party.[34] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[35]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[36]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[37]

## LEGAL ANALYSIS

### I. MOTION TO STRIKE

The defendant has moved to strike the photographs, video recording, and weather report filed by the plaintiff. At the hearing on this matter, the defendant withdrew its objection to the video and reiterated its stance in its written motion that it

[34] *Davis v. Loopco Indus., Inc.,* 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[35] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.
[36] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[37] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

was not objecting to the photographs that were part of the plaintiff's deposition evidence.

The court finds that the photographs which were not offered and authenticated at the plaintiff's deposition and the weather report are not proper Civ.R. 56(C) evidence and must be stricken. This evidence was not properly authenticated via an affidavit as required by the Civil Rule. The court would note, however, that this evidence is not dispositive of the ultimate issues in this case, as explained in the analysis below.

## II. MOTION FOR SUMMARY JUDGMENT

"Generally, in order to establish negligence, a plaintiff has the burden to show the existence of a duty on the part of the defendant, a breach of that duty, and that the breach proximately caused the aggrieved party's injury."[38]

In the case at bar, the plaintiff was a tenant of the defendant-landlord. The duty of care a landlord owes a tenant is substantially the same as the duty a business owner owes to a business invitee.[39]

"For cases relating to the accumulation of ice and snow, it is settled that an owner or occupier generally owes neither a duty to remove nor a duty to warn business invitees of the dangers associated with the natural accumulation of ice and snow."[40]

---

[38] *Couture v. Oak Hill Rentals, Ltd.* (Sept. 24, 2004), 6th Dist. No. OT-03-048, 2004-Ohio-5237, ¶ 14.
[39] *Burress v. Associated Land Group* (May 26, 2009), 12th Dist. No. 2008-10-096, 2009-Ohio-2450, ¶ 11.
[40] *Luft v. Ravemor, Inc.* (Dec. 29, 2011), 10th Dist. No. 11AP-16, 2011-Ohio-6765, ¶ 13.

This is known as the "no-duty winter rule."[41] "The rationale is that individuals are assumed to appreciate and protect themselves against the inherent dangers associated with ice and snow during Ohio winters."[42]

"The general rule in Ohio is that landlords are not liable for failing to clear naturally accumulated ice and snow from common areas on leased property because '[t]he dangers from natural accumulations of ice and snow are ordinarily so obvious and apparent that a landlord may reasonably expect that a tenant * * * will act to protect himself against them.' "[43] "A landlord does have a duty, however, 'to refrain from creating or allowing the creation of an unnatural accumulation of ice or snow, if that accumulation results in a condition that is substantially more dangerous than would have resulted naturally.' "[44]

Ohio courts recognize two exceptions to this rule, "[t]he first exception regards the 'unnatural' accumulation of ice and snow, while the latter regards the 'improper' accumulation."[45]

"An unnatural accumulation of snow and ice refers to 'causes and factors other than the inclement weather conditions of low temperature, strong winds and drifting snow.' "[46] An unnatural accumulation is man-made and "created by a person doing

---

[41] Id.
[42] Id.
[43] *Burress* at ¶ 12, citing *Barner v. Continent Apt. Homes* (May 3, 2005), 10th Dist. No. 04AP-774, 2005-Ohio-2133, ¶ 16, quoting *DeAmiches v. Popczun* (1973), 35 Ohio St.2d 180, 299 N.E.2d 265, paragraph one of the syllabus.
[44] Id., quoting *Saunders v. Greenwood Colony* (Feb. 28, 2001), 3rd Dist.. No. 14-2000-40, 2001-Ohio-2099, 2001 WL 196498 at *3, citing *Myers v. Forest City Ent., Inc.*, 92 Ohio App.3d 351, 353-354, 635 N.E.2d 1268 (Ohio App. 5th Dist., 1993); *Mitchell v. Parkridge Apts., Ltd.* (Jan. 11, 2002), 8th Dist. No. 81046, 2002-Ohio-5357, ¶ 13.
[45] Id. at ¶ 14.
[46] Id. at ¶ 13.

something that would cause ice and snow to accumulate in an unexpected place or way."[47]

In the case at bar, the plaintiff argues that the ice which caused her fall was an unnatural accumulation created by a fellow tenant who used water to wash and/or detail vehicles in the parking lot of the apartment complex. "However, even when a plaintiff's resulting slip and fall was due to unnatural accumulations of snow and ice, numerous appellate districts have found the open and obvious doctrine applicable, thus absolving the duty of care on the part of the landowner."[48] "The open and obvious doctrine, which is based on a common-law duty to warn invitees of latent or hidden dangers, applies to common law premises liability even when it involves claims against a landlord."[49] "As a result, '[w]here a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises.' "[50]

"A person does not need to observe the dangerous condition for it to be an 'open and obvious' condition under the law; rather, the determinative issue is whether the condition is observable."[51] "Even in cases where the plaintiff did not actually notice the

[47] Id., quoting *Porter v. Miller*, 13 Ohio App.3d 93, 95, 468 N.E.2d 134 (Ohio App. 6th Dist., 1993).
[48] Id. at ¶ 14. See, also, *Prexta v. BW-3 Akron, Inc.* (Dec. 29, 2006), 9th Dist. No. 23314, 2006-Ohio-6969, ¶ 14.
[49] Id., citing *Mounts v. Ravotti* (Sept. 26, 2008), 7th Dist. No. 07MA182, 2008-Ohio-5045, ¶ 50.
[50] Id., citing *Armstrong v. Best Buy Co., Inc.,* 99 Ohio St.3d 79, 788 N.E.2d 1088, 2003-Ohio-2573, syllabus.
[51] *Sherlock v. Shelly Co.* (Sept. 4, 2007), 10th Dist. No. 06AP-1303, 2007-Ohio-4522, ¶ 11, citing *Lydic v. Lowe's Cos., Inc.* (Sept. 24, 2002), 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶ 10.

condition until after he or she fell, this court has found no duty where the plaintiff could have seen the condition if he or she had looked."[52]

As set forth above, the plaintiff testified at her deposition that she was able to see on the morning in question and the area where she fell was sufficiently well-lit. While she did not see the ice until after her fall, she testified that when she stood up and looked down she saw the patch of ice on the blacktop and that it shimmered. She also explained that, after she fell, she looked and "followed the trail" of ice and saw that it extended some length from parking space number six to the spot where she fell.

At the oral argument on this matter, neither party specifically referenced or discussed a matter that is of particular importance to the open and obvious analysis. In an affidavit filed with the court on December 19, 2011, several months after the plaintiff's deposition, the plaintiff states that "[t]he ice that I stepped on causing me to fall was not discernible from my perspective as I was walking across the parking lot at the Barry (*sic*) Lane Apartments."[53] However, at her deposition, the plaintiff stated that when she stood up and looked to see what caused her fall, she was able to clearly see the patch of ice on the blacktop and she further testified that she was able to see the trail of ice extending to the spot where she fell.

"When contradictions exist between a party's statements in an affidavit submitted in summary judgment proceedings and statements contained in depositions or other supporting Civ.R. 56(C) evidence, 'and the affidavit neither suggests affiant was confused at the deposition nor offers a reason for the contradictions in [her] prior

[52] Id. See also, *Grimmer v. Rocky River* (Sept. 30, 2010), 8th Dist. No. 94271, 2010-Ohio-4683, ¶ 21.
[53] Affidavit of Emma Sowder at ¶ 11.

testimony, the affidavit does not create a genuine issue of fact which would preclude summary judgment .' "[54] In the case at bar, the plaintiff testified that she was able to look while standing in the parking lot and see both the patch of ice on which she fell and a trail of ice leading to that patch. Contrary to the plaintiff's counsel's argument at the hearing on this matter, the plaintiff was not only able to see the ice when she was lying on the ground, but instead was able to see it when she "jumped up" after her fall. There is no explanation in the affidavit as to how the plaintiff was able to stand up and look back at the ground after her fall, both directly down and back toward the other cars, and see ice on the ground and yet at the same time state that the ice was not discernible to her from her perspective walking across the parking lot. The court finds that this statement in the plaintiff's affidavit contradicts her prior deposition testimony with no explanation or reason given and, as such, this portion of the affidavit will not be considered by the court.

Therefore, the evidence in the record, even making all inferences in favor of the plaintiff, clearly establishes that the ice was an open and obvious condition. When the plaintiff actually looked at the ground where she had been walking, she was able to observe the patch of ice and a trail of ice a certain length back. The ice was therefore readily discernible and the plaintiff could have seen the condition had she looked at the ground ahead of her prior to her fall. Therefore, the defendant had no duty to warn the plaintiff of this open and obvious condition.

[54] *Sherlock*, supra, ¶ 15, quoting, *McDowell v. Target Corp.* (Dec. 30, 2004), 10th Dist. No. 04AP-408, 2004-Ohio-7196, ¶ 12.

## CONCLUSION

The motion to strike filed by the defendant is well-taken and is hereby granted as to photographs not presented at the plaintiff's deposition and the weather report filed by the plaintiff. The motion to strike is not well-taken and is hereby denied as to the photographs offered at the plaintiff's deposition and the video filed by the plaintiff.

The motion for summary judgment filed by the defendant Mac Daddy & Mommy, LLC is well-taken and is hereby granted.

**IT IS SO ORDERED.**

DATED:_____ _____
Judge Jerry R. McBride

## CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile this 13th day of February 2012 to all counsel of record and unrepresented parties.

_____