COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

JOANN MCFARLAND	:	
Plaintiff,	:	**CASE NO. 2016 CVC 01137**
vs.	:	**Judge McBride**
JESSICA L. KEMPLIN, ET AL.,	:	**DECISION/ENTRY**
Defendants.	:	

John H. Phillips, counsel for the plaintiff Joann McFarland, 9521 Montgomery Road, Cincinnati, Ohio 45242

Stephen M. Yeager, counsel for the defendants Jessica L. Kemplin and Jessie Kemplin, 205 West Fourth Street, Suite 1280, Cincinnati, Ohio 45202

This cause is before the court for consideration of the defendants Jessica L. Kemplin and Jessie Kemplin's motion for summary judgment filed on June 30, 2017. Neither party requested oral argument, and the court took the motion under advisement on August 31, 2017.

Upon consideration of the motion, the evidence before the court, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

This case involves a slip and fall accident involving a ball that occurred in August 2012.[1] The defendants invited the plaintiff to their home that day because of a family gathering and a garage sale that was being hosted there.[2] The defendants, Jessica Kemplin and Jessie Kemplin, are the plaintiff's granddaughter and her granddaughter's husband.[3] At the time of the accident, the defendants had a three-year-old son, Jessie, the plaintiff's great grandson.[4]

After the yard sale concluded, the family members at the defendants' home planned on having dinner and then playing a card game.[5] The plaintiff was sitting at the defendants' kitchen table in an open kitchen and dining space for about 40 minutes, chatting with her sisters and other family members, when she stood up to go to the restroom.[6] The plaintiff took a few steps in the kitchen dining area when her right foot stepped on a ball.[7] Her right foot extended in front of her, and unable to stop it, the plaintiff landed on the floor in a "splits position."[8] Following her fall, the plaintiff suffered a fractured pelvis, a pulled hamstring, and a problem with her Achilles tendon.[9]

The plaintiff had not seen Jessie playing with the ball earlier that day, nor had she seen the ball at all prior to stepping on it.[10] Most of Jessie's toys were kept in his

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[1] Compl., ¶ 6.
[2] Joann McFarland Dep., pg. 39 (May 6, 2015); Compl., ¶ 6.
[3] J. McFarland Dep., pgs. 20-21.
[4] J. McFarland Dep., pg. 21.
[5] J. McFarland Dep., pg. 39.
[6] J. McFarland Dep., pgs. 11-12, 19.
[7] J. McFarland Dep., pg. 27.
[8] J. McFarland Dep., pgs. 27-28.
[9] J. McFarland Dep., pgs. 53-54.
[10] J. McFarland Dep., pgs. 23-24.

bedroom.[11] The ball was bigger than a tennis ball, but the plaintiff could not recall other details of the ball's appearance.[12] The plaintiff averred that the ball must have rolled towards her as she stepped on it because she had not seen it when she stood up from the table to head towards the restroom.[13]

PROCEDURAL BACKGROUND

On August 16, 2016 the plaintiff filed a complaint against the defendants alleging a single cause of action, negligence. The defendants filed a motion for summary judgment on June 30, 2017, along with a deposition of the plaintiff as the sole evidentiary support for the motion. The plaintiff filed her memorandum in opposition to the summary judgment motion on July 27, 2017. The defendants filed their reply in support on August 21, 2017. Neither party requested oral argument on the motion. The court took the motion under advisement on August 31, 2017.

LEGAL STANDARD

The court must grant summary judgment, as requested by a moving party when:

> "(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

[11] J. McFarland Dep., pg. 23.
[12] J. McFarland Dep., pgs. 24-26.
[13] J. McFarland Dep., pgs. 34-35, 48-49.

> against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."[14]

The court must view the evidence in a light most favorable to the nonmoving party.[15] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[16] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[17]

Whether a genuine issue exists 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] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[19]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[20] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in

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[14] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).
[15] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).
[16] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).
[17] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).
[18] Id. at 251-52.
[19] Id. at 250.
[20] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

order to allow the opposing party a meaningful opportunity to respond."[21] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[22]

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in the pleadings, demonstrating that a "triable issue of fact" remains.[23] The duty of the nonmoving party is more than that of resisting the motion's allegations.[24] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[25] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[26] It may not rely on the pleadings or unsupported allegations.[27]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[28] The trial court maintains the sound discretion to admit or exclude relevant evidence.[29] When a document falls outside the enumerated categories

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[21] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[22] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).
[23] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).
[24] *Wells Fargo*, 2013-Ohio-855 at ¶ 25.
[25] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[26] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[27] Id.
[28] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[29] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[30]

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[31] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[32] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[33] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[34]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[35] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[36]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents

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[30] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).
[31] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).
[32] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[33] Id., citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[34] Id.
[35] Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[36] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

referenced in the affidavit "must be attached to the affidavit."[37] If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[38]

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 be resolved in favor of the nonmoving party.[39] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[40]

LEGAL ANALYSIS

At common law, it is axiomatic that to establish a negligence claim a plaintiff "must demonstrate that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the defendant's breach proximately caused the plaintiff to be injured."[41]

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[37] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).
[38] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[39] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[40] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[41] *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 10, citing *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 21. *See McLoughlin v. Williams*, 12th Dist. Clermont No. CA2015-02-020, 2015-Ohio-3287, ¶ 8, citing *Johnston v. Filson*, 12th Dist. Clinton No. CA2014-04-007, 2014-Ohio-4758, ¶ 9 (the plaintiff "must demonstrate a duty owed by the defendant to the plaintiff, a breach of that duty, and that the plaintiff's injury proximately resulted from the defendant's breach of duty.").

Whether a defendant owes a duty to the plaintiff is "fundamental to establishing actionable negligence."[42] Moreover, whether a duty exists is a question of law.[43] "Negligence is never presumed."[44] Without a duty, "then no legal liability can arise on account of negligence. * * *"[45] Then, "[o]nce the existence of a duty is found, a plaintiff must show that the defendant breached its duty of care * * *."[46]

Under the common law, "the status of the person who enters upon the land of another * * * defines the scope of the legal duty that the responsible party owes the entrant."[47] Generally, the classifications of those upon the land are invitee, licensee, or trespasser.[48]

"An 'invitee' is a business visitor, that is, one who rightfully comes upon the premises of another by invitation, express or implied, for some purpose that is beneficial to the owner."[49] A land owner "* * * owes to an invitee the common-law duty of ordinary care and to protect the invitee by maintaining the premises in a safe condition."[50]

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[42] *McLoughlin*, 2015-Ohio-3287 at ¶ 8 quoting *Uhl v. Thomas*, 12th Dist. Butler No. CA2008-06-131, 2009-Ohio-196, ¶ 10.
[43] *Wall v. Sprague*, 12th Dist. Clermont No. CA2007-05-065, 2008-Ohio-3384, ¶ 11, citing *Midwestern Indemn. Co. v. Wiser*, 144 Ohio App.3d 354, 358 (2001). *See Galinari v. Michael Koop*, 12th Dist. No. CA2006-10-086, 2007-Ohio-4540, ¶ 10, citing *Yahle v. Historic Slumber Ltd.*, 12th Dist. Clinton No. CA2001-04-015, 2001-Ohio-8667.
[44] *Biery v. Pennsylvania R. Co.*, 156 Ohio St. 75, 99 N.E.2d 895 (1951), at paragraph two of the syllabus. *See Zieger v. Burchwell*, 12th Dist. Clermont No. CA2009-11-077, 2010-Ohio-2174, ¶ 18 ("Further, negligence is never presumed, it must be proven.") (Citation omitted.)
[45] *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142, 539 N.E.2d 614, 54 Ed. Law Rep. 287 (1989), quoting 70 Ohio Jurisprudence 3d (1986) 53-54, Negligence, Section 13.
[46] *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 646, 597 N.E.2d 504 (1992), citing *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).
[47] *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 417, 644 N.E.2d 291 (1994).
[48] *Re v. Kessinger*, 12th Dist. Butler No. CA2007-02-0044, 2008-Ohio-167, ¶ 21, citing *Gladon v. Greater Cleveland Reg. Transit Auth.*, 75 Ohio St.3d 312, 315 (1996).
[49] *Re*, 2008-Ohio-167 at ¶ 21, citing *Gladon*, 75 Ohio St.3d at 315.
[50] *Re*, 2008-Ohio-167 at ¶ 21, citing *Gladon*, 75 Ohio St.3d at 315. *See Rossel v. Wolf*, 12th Dist. Butler No. CA2003-09-250, 2004-Ohio-5090, ¶ 11, quoting *Gladon*, 75 Ohio St.3d at 317 ("A landowner owes a duty to an invitee to exercise ordinary care for the invitee's safety and protection.").

In addition to the above three classifications, "Ohio law also recognizes the additional classification of 'social guest.'"[51] A person is a social guest when such person "* * * does not come to the property for a purpose, directly or indirectly, connected to business dealings with the possessor; rather, the use of the premises is extended to the individual merely as a personal favor."[52]

When a host invites a social guest to the premises, the host owes the guest the following two duties:

> (1) to exercise ordinary care not to cause injury to his guest by an any act of the host or by any activities carried on by the host while the guest is on the premises, and (2) to warn the guest of any condition of the premises which is known to the host and which one of ordinary prudence and foresight in the position of the host should reasonably consider dangerous, if the host has reason to believe that the guest does not know and will not discover such dangerous condition."[53]

The defendants argue that the plaintiff was a social guest at their home, and as such, they owed her a lesser duty than that owed to an invitee. The plaintiff counters that she was an invitee and was owed a higher duty of care than a social guest because she had been at the defendants' home for the family garage sale prior in the day. The plaintiff's deposition testimony was that she had been at her granddaughter's home for a garage sale earlier in the day, but at the time of her fall, she had been sitting with her

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[51] *Re*, 2008-Ohio-167 at ¶ 21, citing *Scheibel v. Lipton*, 156 Ohio St. 308, 330, 102 N.E.2d 453 (1951).
[52] *Re*, 2008-Ohio-167 at ¶ 22, citing *Doelker v. Ohio State University*, 61 Ohio Misc.2d 69 (C.C. 1990).
[53] *Brennan v. Schappacher*, 12th Dist. Butler No. CA2008-09-231, 2009-Ohio-927, ¶ 11, quoting *Scheibel*, 156 Ohio St. at paragraph three of the syllabus. *See Gentry v. Collins*, 12th Dist. Warren No. CA2012-06-048, 2013-Ohio-63, ¶ 19, quoting *Scheibel*, 156 Ohio St. at paragraph one of the syllabus ("One of the duties a social host owes a guest is a duty to 'warn of any condition of the premises which is known to the host and which one of ordinary prudence and foresight in the position of the host should reasonably consider dangerous.'").

family chatting at the kitchen table for forty minutes. Her role, if any, in the earlier garage sale is unclear.

"The status of an individual upon another's land may change while that individual remains on the land."[54] Accordingly, the court finds that, at the time of the accident, the plaintiff was a social guest of the defendants. Even if the court assumes *arguendo* the plaintiff was originally an invitee for garage sale purposes, by the time of the accident she was a social guest. As such, the defendants owed her a duty to (1) exercise ordinary care not to cause the plaintiff injury through their acts or activities, and (2) to warn the plaintiff of premises conditions they knew of and which a person of ordinary prudence and foresight in their positions should reasonably consider dangerous, if they have reason to believe that the plaintiff does not know and will not discover such dangerous condition.

Having resolved that the plaintiff was a social guest, and that the defendants owed her a duty of care, the next issue is whether the defendants breached that duty. Although the determination of whether a defendant owes a duty to the plaintiff is a question of law, whether such duty was breached is a question of fact.[55] "Only when the material facts are undisputed and admit of no rational inference but negligence or want of due care does the issue become a question of law."[56]

In arguing that the defendants did not breach their duty of care, the defendants highlight the case of *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453 (1951). *Scheibel* dealt with a social guest who walked through the defendants' yard and injured

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[54] *Burgin v. Hunting*, 12th Dist. Clermont No. CA93-12-086, 1994 WL 447391, *2 (Aug. 22, 1994), citing *Sweet v. Clare-Mar Camp*, 38 Ohio App.3d 6, 9 (8th Dist. 1987).
[55] *Tarkany v. Board of Trustees*, 10th Dist. Franklin No. 90AP-1398, 1991 WL 101593, *2 (June 4, 1991).
[56] *Tarkany*, 1991 WL 101593 at *2, citing *Curtis v. Ohio State Univ.*, 29 Ohio App.3d 297, 299 (10th Dist. 1986).

himself after stepping in a saucer shaped depression.[57] The Ohio Supreme Court heavily analyzed cases throughout the U.S. in formulating the duties a host owes to a social guest. One case it reviewed was a Minnesota case, *Page v. Murphy*, 194 Minn. 607, 261 N.W. 433, 455 (1935). *Page* involved a grandmother who died after falling down the basement stairs while visiting the defendants.[58] Small children had been playing with beans on the floor near the hall by the bathroom.[59] The floor was wet from rain, and on her return from the bathroom the grandmother slipped on the beans and fell down the stairs off of the hallway.[60] The *Page* Court held that the defendants were not liable for negligence because it stretched the homeowners' duty of care beyond reasonable limits.[61]

In turning to the present case, the defendants' first duty to the plaintiff as their social guest was to exercise ordinary care not to injure the plaintiff through their acts or activities on their premises.[62] To meet their burden on summary judgment, the defendants need to demonstrate that the plaintiff's case fails by showing that the defendants did not breach this duty owed to the plaintiff. However, based on the record before it, there is no evidence regarding the defendants' activities in relation to the ball or other toys in their home. Furthermore, there is no evidence before the court indicating whether the defendants or their child caused the ball to be present in the kitchen dining area. There were many relatives present at the defendants' home on the day of the

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[57] *Lipton*, 156 Ohio St. at 331.
[58] Id. at 321.
[59] Id.
[60] Id.
[61] Id. at 322.
[62] *Brennan*, 2009-Ohio-927 at ¶ 11, quoting *Scheibel*, 156 Ohio St. at paragraph three of the syllabus.

accident. Once the court construes all possible inferences in a light most favorable to the plaintiff, there is simply too little information before the court about the defendants' conduct to decide whether the defendants exercised ordinary care as a matter of law.

The second duty that the defendants owed to the plaintiff was to warn the plaintiff of any condition of the premises they knew of and which a person of ordinary prudence and foresight in their positions should reasonably consider dangerous, if they have reason to believe that the plaintiff does not know and will not discover such dangerous condition.[63] The defendants did not warn the plaintiff of the ball, but the record is silent on whether the defendants knew of the presence of the ball in the kitchen dining area. In order for the defendants to have had a duty to warn their social guests of the ball, they must first have been aware of the reasonably dangerous condition.[64] The record is silent on whether the defendants knew of the ball, but because the court must draw all reasonable inferences in a light most favorable to the plaintiff, the court cannot draw the inference that the defendants were unaware of the ball.

The defendants also argue that they are not negligent because they were only required to warn of dangerous conditions under their second duty. The ball, they posit, was not a dangerous condition. The defendants' invocation of *Page v. Murphy*, discussed above, which is a Minnesota case from 1935, is unpersuasive. The court has not identified modern Ohio case law in which courts have found that toys upon a homeowner's floor, including balls, are not unreasonably dangerous as a matter of law. As such, the court declines to find, as a matter of law, that a ball on the floor cannot be an unreasonably

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[63] *Brennan*, 2009-Ohio-927 at ¶ 11, quoting *Scheibel*, 156 Ohio St. at paragraph three of the syllabus.
[64] *Brennan*, 2009-Ohio-927 at ¶ 11, quoting *Scheibel*, 156 Ohio St. at paragraph three of the syllabus.

dangerous condition. Whether the ball was unreasonably dangerous is a genuine issue of material fact that for the fact finder to resolve.

On a summary judgment motion, if the "defendant points to evidence illustrating that the plaintiff will be unable to prove any one of the * * * elements [for negligence], and if the plaintiff fails to respond as Civ.R. 56 provides, the defendant is entitled to judgment as a matter of law."[65] In the present case, the defendants have attempted to show that the plaintiff cannot demonstrate a breach of the duties they owed to her as a social guest. Although they are correct that negligence will not be presumed,[66] they also have to meet their burden of showing that there could be no breach.

In this regard, the defendants do not have a burden of presenting evidence since the plaintiffs have the burden of proof. However, they do have the burden of pointing to the portions of the record that demonstrate that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. It is unknown what knowledge the defendants had regarding the ball on the floor, or how and when the ball came to be in the place where the plaintiff stepped on it. It is not clear that the plaintiff will be unable to prevail on her claim, and the record does not demonstrate that the defendants are entitled to judgment as a matter of law at this point in the proceedings.

Counsel for the defendants, for whatever reason, did not present the court with supporting affidavits which would demonstrate the lack of any genuine material issue of fact. If they had presented such evidence, the burden may have shifted to the plaintiff, which has the burden of proof in the case, to present evidence to counter the affidavit of

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[65] *Nelson v. Sound Health Alternatives Intern., Inc.*, 4th Dist. Athens No. 01CA24, 2001 WL 1085298, *3 (Sep. 6, 2001).
[66] *Boles v. Montgomery Ward*, 153 Ohio St. 3181, 388, 92 N.E.2d 9 (1950).

the defendants. Based on the only evidence that the defendants submitted in support of their motion for summary judgment, the plaintiff's deposition, the court cannot find that the defendants have satisfied their burden of showing that the plaintiff will be unable to show that they breached their duties as a social host to her as their guest.

The defendants alternatively argue that summary judgment in their favor is appropriate because of the open and obvious doctrine. The open and obvious doctrine is a significant defense to premises liability, which dictates that a landowner owes no duty of care to individuals lawfully on the premises where a danger is open and obvious.[67] The rationale underlying this doctrine is "that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves."[68] If the open and obvious doctrine applies it "obviates the duty to warn and acts as a complete bar to any negligence claims."[69] Therefore, the landowner would owe no duty of care to a person on the premises.[70]

The inquiry into whether a given condition is open and obvious is an objective one.[71] "'[T]he determinative question is whether the condition is *discoverable* or *discernable* by one who is acting with ordinary care under the circumstances."[72] Further,

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[67] *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E. 2d 1088, at the syllabus.
[68] *Armstrong*, 2003-Ohio-2573 at ¶ 5, quoting *Simmers*, 64 Ohio St.3d at 644.
[69] *Armstrong*, 2003-Ohio-2573 at ¶ 5. *See Galinari*, 2007-Ohio-4550 at ¶ 12, citing *Armstrong*, 2003-Ohio-2573 at ¶ 14.
[70] *Armstrong*, 2003-Ohio-2573 at ¶ 14, citing *sidle v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968).
[71] *Gentry*, 2013-Ohio-63 at ¶ 21, quoting *Lykins v. Fun Spot Trampolines*, 172 Ohio App.3d 226, 2007-Ohio-1800, ¶ 24, 874 N.E.2d 811 (12th Dist.).
[72] (Emphasis original) *Gentry*, 2013-Ohio-63 at ¶ 21, quoting *Earnsberger v. Griffiths Park Swim Club*, 9th Dist. No. 20882, 2002-Ohio-3739, ¶ 24. *See Galinari*, 2007-Ohio-4550 at ¶ 13 (holding same.)

"a dangerous condition does not actually have to be observed by the claimant to be an open and-obvious condition under the law."[73] Instead, the issue is whether the condition is observable.[74]

The determination of whether the open and obvious doctrine applies is a matter of law.[75] However, evidence is "vital" to resolving whether the doctrine applies.[76]

In turning to the case at bar, the determinative issue is whether the condition, in this case, a ball, was readily observable. Based on the record before it, the court cannot determine that the ball that caused the plaintiff's fall was, as a matter of law, open and obvious. The record does not illuminate much information regarding the ball, except to indicate that it was larger than a tennis ball and it may have been rolling when the plaintiff stepped on it. Its color and texture are unknown, its location just before the fall is unknown, and whether any of the other people in the kitchen dining area saw the ball before the fall is unknown. In short, there is insufficient information for the court to decide whether the ball's presence in the kitchen dining area was observable and discernable at the time of the fall. Although the application of the open and obvious doctrine is a question of law, as explained its applicability hinges on facts, and here there are very little facts about the ball in the record. As such, the court cannot determine on summary judgment whether the open and obvious doctrine applies.[77]

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[73] *Gentry*, 2013-Ohio-63 at ¶ 21, quoting *Lykins*, 2007-Ohio-1800 at ¶ 24.
[74] *Gentry*, 2013-Ohio-63 at ¶ 21, quoting *Lykins*, 2007-Ohio-1800 at ¶ 24.
[75] *Gentry*, 2013-Ohio-63 at ¶ 20, citing *Galinari*, 2007-Ohio-4550 at ¶ 12.
[76] *Strevel v. Fresh Encounter, Inc.*, 4th Dist. Highland No. 15CA5, 2015-Ohio-5004, ¶ 32.
[77] *See Lykins*, 2007-Ohio-1800 at ¶ 27 (finding that the granting of summary judgment had been made in error because there were genuine issues of material fact regarding whether a particular hazard that gave rise to the plaintiff's injuries was open and obvious).

CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment is not well-taken and is hereby denied.

Counsel shall conference and call the Assignment Commissioner (513-732-7108) within five days of the date of this Decision/Entry in order to schedule a trial setting conference.

IT IS SO ORDERED.

DATED: 3-15-18

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 15th day of March 2018 by e-mail to John H. Phillips, Attorney for the Plaintiff, at jhp@phillipslawfirm.com, and to Stephen M. Yeager, Attorney for the Defendant, at syeager@pyplaw.com.

Judicial Assistant to Judge McBride