2010 WL 1821304 (Okl.Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of Oklahoma.
Canadian County

Dorothy SMITH, Plaintiff,

v.

WESTERN PROPERTY MANAGEMENT, INC. and El Reno Housing Associates Limited Partnership d/b/a Ashton on the Greens, Defendants.

No. CJ-2007-675.
March 5, 2010.

Plaintiff's Response to Defendants' Combined Motion for Summary Judgment and Brief in Support

Respectfully submitted, Wayer & Leonard OBA# 21933, Meyer & Leonard, PLLC, 116 E. Sheridan, Ste.207, Oklahoma City, OK 73104, 405-702-9900; fax 405-605-8381 And Justin W. Perry, Ben T. Lampkin, 41 East 15th, Edmond, OK 73103, Attorneys for Plaintiff.

COMES NOW the Plaintiff, Dorothy Smith ("Smith"), and in response to Defendant's Combined Motion for Summary Judgment, states as follows:

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EVIDENTIARY REFERENCES

References to evidentiary material include a reference to the Exhibit ("Ex._"), and in the case of depositions, include the deponent's last name, page and line numbers ("Smith Dep. 5:10-20" indicates Smith's deposition, page 5, lines 10-20).

I. *INTRODUCTION*

Plaintiff, Dorothy Smith, age 72 at the time of the incident at issue, was at that time and is still a resident of Defendants' apartment complex which caters exclusively to senior citizens. Smith suffered extensive injuries on Defendants' property when she slipped on an inclined walkway following a five-day ice storm during which Defendants rejected its **elderly** tenants' pleas for assistance and barred the **elderly** residents from employing self help by forbidding them from salting the area to remove ice.

Defendants' Motion for Summary Judgment unnecessarily injects complexity, confusion, and ambiguity onto simple facts and issues. The three proper issues presented for analysis are:

(1) Whether, *at the precise time of Smith's fall,* did she recognize and appreciate the dangerous condition -- a genuine issue of fact for the jury;

(2) Whether Defendants' action of *forbidding its **elderly** tenants* from employing self-help to remove the ice and snow was reasonable -- a genuine issue of fact for the jury; and,

(3) Whether Defendants' action of *forbidding its **elderly** tenants* from employing self-help to remove the ice and snow had the foreseeable result of exasperating the dangerous conditions -- a genuine issue of fact for the jury.

II.

THE SUMMARY JUDGMENT STANDARD

Rule 13 of the Rules for District Courts of Oklahoma provides that "... [i]f it appears that there is no substantial controversy as to any material fact and that one of the parties is entitled to judgment as a matter of law, the Court shall render judgment to said party...."

However, a motion for summary judgment must be denied if the facts concerning any issue raised by the pleadings, as set forth in discovery, and affidavits on file, both in support and in opposition of a summary judgment motion, are in conflict. *Northrip v. Montgomery Ward & Co.,* 1974 OK 142, 529 P.2d 489. All inferences and conclusions to be drawn from the underlying facts contained in such materials as affidavits, admissions, depositions, pleadings, exhibits and the like must be viewed in a light most favorable to the party opposing the motion. *Ross By and Through Ross v. City of Shawnee,* 1984 OK 43, 683 P.2d 535. Summary judgment is *especially inappropriate where there is conflicting evidence on whether the Defendants have exercised ordinary care. Malson v. Palmer Broadcasting Group,* 1997 OK 42, 936 P.2d 940. In a negligence action, the *burden is not upon the Plaintiff to prove the Defendants were negligent* in order to avoid a motion for summary judgment; rather, the *Defendants must carry the burden of showing the absence of any genuine issue of fact. White v. Wynn,* 1985 OK 89, 708 P.2d 1126.

III.

MATERIAL FACTS IN DISPUTE

Of Defendants' fourteen "Undisputed Facts," Smith has no dispute with those numbered 1-2, 4-6, 9-10, and 12; the remaining six, however: (1) are subject to considerable dispute; (2) are misleading characterizations; (3) are material to Smith's claim; and (4) are addressed as follows:

• *Defendants' "Undisputed Fact" No. 3:* "As a result of the ice on the premises, Plaintiff stayed in her apartment in order to avoid the risks presented by the ice on the premises."

Throughout the five-day ice storm, Smith, and countless thousands of Oklahomans, remained in their homes; however, Defendants' characterization that Smith did so only to avoid risks is misleading. As discussed, *infra,* Smith stated in deposition

that she is retired, does not work, and remained in her home during the storm because she had nowhere to go. (*See* D.Smith Dep., Ex.1, 7:7-8, 21-22, 48:20-22.) Further, the reason Smith remained in her home is irrelevant to the three issues presented in this Motion.

• *Defendants' "Undisputed Fact" No. 7:* "At all relevant times before Plaintiff fell, she had knowledge of the ice, snow and slush on the premises."

Doubtless Smith, and everyone else in Oklahoma, had knowledge of the ice and snow storm of January 2007; however, Defendants' "Undisputed Fact" is misleading and self-serving with respect to Defendants' "Open and Obvious" theory of defense. As discussed, *infra*, the only "relevant time" at issue, legally, is the precise time of Smith's fall. *See, e.g., Lingerfelt v. Winn-Dixie Texas, Inc.*, 1982 OK 44, 645 P.2d 485; *J. J. Newberry Co. v. Lancaster*, 1964 OK 21, 391 P.2d 224; *Rogers v. Hennessee*, 1979 OK 138, 602 P.2d 1033; *Phelps v. Hotel Management, Inc.*, 1996 OK 114, 925 P.2d 891; *Spirgis v. Circle K. Stores, Inc.*, 1987 OK CIV APP 45, 743 P.2d 682. Moreover, the issue itself is not solely one of "knowledge" of ice and snow, but rather whether Smith recognized and appreciated the danger at the precise time of her injury. *Id.*

• *Defendants' "Undisputed Fact" No. 8:* "Plaintiff was aware the ice on the sidewalk and apartment premises created a dangerous condition."

As discussed, *infra*, the issue for the Court, and ultimately for the jury, is whether Smith, at the time of her falling, appreciated the danger which did in fact cause her injuries, not whether Smith was aware that ice can be a dangerous condition. *Id. (See* D.Smith Dep., Ex.1, 69:9-16, 83:1-25.)

• *Defendants' "Undisputed Fact" No. 11:* "Prior to walking upon the sidewalk to her apartment, Dorothy Smith exited her car and noticed the ground was icy and slick when she slipped a little bit getting out of her car."

Defendants' implication, that because Smith may have slipped when exiting her car she therefore knew of the danger which ultimately caused her injuries, blatantly overlooks key facts and considerations, including: Smith's injuries occurred on the walkway, not the parking lot (*See* D.Smith Dep., Ex.1, 83:1-25); when Smith left earlier in the day it was sunny (*See* Weather History, Ex.12), the prior days' ice had substantially melted (*See* D.Smith Dep., Ex.1, 66:17-22), and she was therefore returning with the recent memory of being able to readily walk down the walkway (*See* D.Smith Dep., Ex.1, 69:9-16). Defendants' incomplete fact recitation ignores the salient, material question of whether, at the time of the fall, considering all circumstances (i.e., earlier recollection, experience driving the roads, etc.), coupled with poor lighting, Smith appreciated the danger that caused her injuries.

• *Defendants' "Undisputed Fact" No. 13:* "The ice on the premises was the result of a natural accumulation; Defendants did not do anything to worsen the condition on the premises."

Defendants' assertion they "did not do anything to worsen the condition" is self-serving and ignores the fact that not only did Defendants *fail to take any responsibility for removing ice and snow* in the days before Smith's accident (*See* Farris Dep., Ex.2, 22:1-4), but Defendants never even visited the property during the storm (*See* Green Dep., Ex.5, 17:19-21, 22:19-23; Farris Dep., Ex.2, 8:15-20, 12:1-11, 28:17-22, 35:7-11, 19-23) and *forbid its tenants from spreading salt to melt the ice* (*See* Green Dep., Ex.5, 16:18-25, 29:1-9, 30:18-23; G.Smith Dep., Ex.4, 10:16-25, 11:1-12; Cagle Dep., Ex.3, 5:21-25, 6:1-3, 20:2-6; Farris Dep., Ex.2, 23:1-21, 49:23-25, 50:1-2), thereby exercising express, explicit possession and control of the premises and unreasonably subjecting Smith and other **elderly** tenants to a continued, foreseeable hazard.

• *Defendants' "Undisputed Fact" No. 14:* "Defendants did not have notice or knowledge of the 'black ice' Plaintiff claims to have slipped on."

Over the course of the multi-day storm when Defendants' **elderly** residents were effectively entrapped indoors, Defendants were contacted by many of those residents who pleaded for assistance in getting snow and ice removed. (*See* Green Dep., Ex.5, 13:15-25, 16: 18-25, 42:1-11; G.Smith Dep., Ex.4, 10:16-25, 11:1-12, 15:4; Cagle Dep., Ex.3, 5:21-25, 6:1-3; Hogan Dep., Ex.6, 34:22-25, 35:1-2, 38:9-21; D.Smith Dep., Ex.1, 20:9-14, 21:4-21, 22:23-25, 23:1-22). Defendants were doubtless aware of the ice and snow conditions on the premises, were certainly aware of the fact that all Defendants' tenants are **elderly** (*See* Farris Dep., Ex.2, 7:1-2), and indeed did not likely see *the exact patch* of ice on which Smith slipped because of gross, deliberate ignorance (i.e., *Defendants' staff never visited* the premises during the multi-day ice storm (*See* Green Dep., Ex.5, 17:19-21, 22:19-23; Farris Dep., Ex.2, 8:15-20, 12:1-11, 28:17-22, 35:7-11, 19-23), *disclaimed any responsibility* for removing the ice and snow (*See* Farris Dep., Ex.2, 22:1-4, 27:14-17, 58:10-20), and *forbid the residents* from spreading salt to help themselves (*See* Green Dep., Ex.5, 16:18-25, 29:1-9, 30:18-23; G.Smith Dep., Ex.4, 10:16-25, 11:1-12; Cagle Dep., Ex.3, 5:21-25, 6:1-3, 20:2-6; Farris Dep., Ex.2, 23:1-21, 49:23-25, 50:2).

IV.

PLAINTIFF'S ADDITIONAL UNDISPUTED FACTS

1. Defendants had notice of the conditions of the property and reasonable time in which to respond. (*See* Green Dep., Ex.5, 17:6-11, 28:1-6, 21-25, 29:1-16; Cagle Dep., Ex.3, 20:2-6, 29:18-20; Farris Dep., Ex.2, 20:8-17, 24:1-5, 28:1-6).

2. Defendants cater exclusively to **elderly** tenants (age 62 and older) by providing specialized residential property including promotion of Defendants' meeting governmental regulations for such properties. (*See* Farris Dep., Ex.2, 6:8-25, 7:1-20; *See* Defendants' Web page, Ex.7).

3. Defendants prioritized its property over its **elderly** tenants' safety by forbidding them from exercising commonly-employed self-help. (*See* Green Dep., Ex.5, 16:18-25, 29:1-9, 30:18-23; G.Smith Dep., Ex.4, 10:16-25, 11:1-12; Cagle Dep., Ex.3, 5:21-25, 6:1-3, 20:2-6; Farris Dep., Ex.2, 23:1-21, 49:23-25, 50:2).

4. If Defendants' **elderly** tenants had been allowed to spread salt on the property, more evaporation would have occurred, less ice would have remained, and the resulting hazard would have been mitigated by a reasonable, no-cost, no-effort action by Defendants. (*See* Expert Report Summary, Ex. 10).

5. Defendants did not visit or make personal inspection of the property. (*See* Green Dep., Ex.5, 17:19-21, 22:19-23; Farris Dep., Ex.2, 8:15-20, 12:1-11, 28:17-22, 35:7-11, 19-23).

V.

ARGUMENT AND AUTHORITY

Defendants' Motion for Summary Judgment attempts to make the issues in this case complex, confusing, and ambiguous, arguing no duty existed and therefore no liability can apply. To that end, Defendants' Motion asserts that the danger was open and obvious, that Defendants were not aware of the danger, and that the fact that 100% of the residents are **elderly** presents no increased duty. In Response, Smith responds and asserts as follows:

PROPOSITION 1:

Whether a condition is Open and Obvious is a question for the jury.

In the context of relationship between landlord and tenant, the Oklahoma Supreme Court could not have made the issue more clear when it recently stated the “openness and obviousness of the dangerous condition and whether Tenant appreciated those

risks *are questions for the jury."* *Miller v. David Grace, Inc.*, 2009 OK 49, ¶ 31, 212 P.3d 1223, 1231 (emphasis added). Whether a condition is open and obvious is not a simple matter of classifying an object; rather, the question goes to whether the Plaintiff, at the time of the injury, recognized and appreciated the danger which caused the harm. *See, e.g., Lingerfelt v. Winn-Dixie Texas, Inc.*, 1982 OK 44, 645 P.2d 485; *J: J. Newberry Co. v. Lancaster*, 1964 OK 21, 391 P.2d 224; *Rogers v. Hennessee*, 1979 OK 138, 602 P.2d 1033; *Phelps v. Hotel Management, Inc.*, 1996 OK 114, 925 P.2d 891; *Spirgis v. Circle K. Stores, Inc.*, 1987 OK CIV APP 45, 743 P.2d 682.

Further, a hidden danger is not necessarily totally out of sight, as explained in *Jack Healey Linen Service Company v. Travis*, 1967 OK 213, 434 P.2d 924. The meaning of hidden depends on the circumstances. *Id.; Dunagan v. Bledsoe*, 1954 OK 32, 267 P.2d 586. It is left up to juries to decide whether the hazard was obvious.
There exists *no fixed rule* for determining whether or not a defect in the premises is in the nature of a trap.

Plaintiffs familiarity with the general physical condition which may be responsible for her injury does not of itself operate to transform the offending defect into an apparent and obvious hazard... While the general physical condition might be familiar to the actor, a particular risk from the known defect could nevertheless, under the circumstances of a given occasion, be incapable of appreciation.

Jack Healey, 1967 OK 213, ¶¶ 8-9, 434 P.2d at 927-928 (emphasis added).

Here, the day before and day of the accident the temperature had reached 49 and 50 degrees, respectively, the sun had been out, and ice and snow had melted. (*See* Weather Report, Ex. 12). Conditions were conducive to allowing residents to leave their apartments, which Smith did in the sunny late afternoon. (*See* D.Smith Dep., Ex.1, 22:23-24; Weather Report, Ex.12). Upon her return later that night, she had certain knowledge that she had hours earlier been able to leave her apartment, drive to and visit her family's home, and return without incident. (*See* D.Smith Dep., Ex.1, 24:6-11, 25:20-23). Upon exiting her car she recognized the parking lot still had slick spots, so she navigated carefully to the walkway leading up to her apartment door. (*See* D.Smith Dep., Ex.1, 58:3-8) Upon reaching the walkway leading up to her apartment door, she slipped on ice *she did not see*, an unappreciated hazard that had apparently refrozen after earlier melting in the day. (*See* D.Smith Dep., Ex.l, 83:10-15).

The issue is whether Smith, *at the precise time of her fall*, recognized and appreciated that ice had reformed on her walkway. It cannot be concluded that Smith, as a matter of law, under all the circumstances, recognized and appreciated the danger. The question is one of fact, for the jury.

Smith's contention is additionally supported by the fact that the apartment complex lighting around her apartment unit is poor, thus making it more difficult for Smith to recognize and appreciate the refrozen ice, (*See* Green Dep., Ex.5, 38:1-13; D.Smith Dep., Ex.1, 82:12-25, 83:1-25, 84:1-13; Farris Depo., Ex.2, 55:23-25, 56:1-8; Expert Report Summary, Ex.10), and that but for Defendants' forbidding residents from earlier spreading salt, there would have been much less water remaining to reform the ice on which Smith was ultimately injured (*See* Expert Report Summary, Ex.10).

PROPOSITION 2:

Defendants forbid its elderly tenants from self-help and thereby assumed a duty by exercising possession and control of the premises in a situation with foreseeable danger.

The Oklahoma Supreme Court has stated "the basic rule that *possession and control* of real property is the fundamental requirement for ascribing liability for injury suffered thereon." *Scott v. Archon Group, L.P.*, 2008 OK 45, ¶ 25, 191 P.3d 1207 (emphasis added). The Court has stated:

Duty of care is a question of law. The court decides whether a defendant stands in such a relationship to a plaintiff that the defendant owes an obligation of reasonable conduct for the benefit of the plaintiff. "[D]uty is ... only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Wofford*, 795 P.2d at 519, quoting Prosser, Law on Torts (3d ed. 1964) at pp. 332-333. *The most important consideration in establishing duty is foreseeability. Wofford*, 795 P.2d at 519.

Delbrel v. Doenges Bros. Ford, Inc. 1996 OK 36, ¶ 7, 913 P.2d 1318, 1320-1321 (emphasis added).

The Oklahoma Supreme Court has also stated succinctly the difference between cases denying liability and those where liability ascribes:
The *cases denying liability* of the [owner] all disclose the *presence of a physical fact* or circumstance *not* occasioned by, or *within the possible control* of the premises, i.e., the act of the injured plaintiff in partially obscuring her own view....

The *cases wherein liability has been held to attach* recognize the *presence of some physical fact* or circumstance occasioned by *an act or omission* of the [owner] which, although obvious and not dangerous within itself, forms an *integral part of an eventuality* out of which injury arose.

J.J. Newberry Co., v. Lancaster, 1964 OK 21, 1 22, 391 P.2d 224,228 (emphasis added).

Defendants argue that, because no act of Defendants created a greater hazard than existed as a result of the ice and snow, Defendants therefore had no duty to Smith or its **elderly** residents. Defendants admit they made no effort to remove ice and snow from the premises and do not dispute that they *forbid their **elderly** tenants from employing the common method of ice and snow removal - i.e., spreading of salt.* By such action Defendants exercised possession and control of the real property, "the fundamental requirement for ascribing liability for injury suffered thereon." *Scott v. Archon Group*, 2008 OK 45, ¶ 25, 191 P.3d 1207.

Whether Defendants had a duty requires the Court to decide whether the "defendant stands in such a relationship to a plaintiff that the defendant owes an obligation of reasonable conduct for the benefit of the plaintiff." *Delbrel v. Doenges Bros. Ford*, 1996 OK 36, T 7, 913 P.2d 1318, 1320-1321. All facts and circumstances must be considered as duty is an "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Wofford*, 795 P.2d at 519, *quoting* Prosser, Law on Torts (3d ed. 1964) at pp. 332-333. Quite recently, in considering the specific relationship between landlord and tenant, the Oklahoma Supreme Court stated clearly:

> The evolving nature of residential leases demand the reformation of an archaic rule, and today *this Court supplants the caveat emptor doctrine of landlord tort immunity.* In its place, this Court imposes a *general duty of care upon landlords* to maintain the leased premises, including areas under the tenant's exclusive control or use, in a reasonably safe condition. *This duty requires a landlord to act reasonably* when the landlord knew or reasonably should have known of the defective condition and had a reasonable opportunity to make repairs.

Miller, 2009 OK 49 ¶ 24 (emphasis added).

The "most important consideration in establishing duty is *foreseeability," Delbrel*, at ¶ 7 (emphasis added). Defendants' relationship with and duty to the tenants is defined by Defendants' actions in light of the "sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Id.* Defendants' deliberate disregard of the **elderly** tenants' pleas for help and then forbidding them from spreading salt on the premises was not only unreasonable, but

had the foreseeable result of contributing to the dangerous condition ultimately causing Smith's injury. Under these conditions, as a matter of law, the Court cannot conclude that no duty to act reasonably existed.

PROPOSITION 3:

Defendants' duty to the elderly tenants was, in addition to the common law, prescribed by contract and regulation.

The Restatement of Torts (Second) § 361 provides an instructive framework in assessing Defendants' duty under the circumstances presented here:
A possessor of land who leases a part thereof and retains in his own control any other part which is necessary to the safe use of the leased part, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care:

(a) could have discovered the condition and the risk involved, and

(b) could have made the condition safe.

Defendants' lease agreement states “Owner shall not be liable to any Resident(s) ... for any personal injury ... caused by ... ice, snow ... acts of God ... *unless same is directly caused by acts or omissions, whether intentional or negligent,* on the part of the Owner or the Owner's authorized representative,” and that “when conditions are created which are hazardous to life, health or safety of Resident(s), the Resident(s) shall immediately notify the Owner of the conditions.” (*See* Lease, Ex.13, ¶ 3). Under the lease, the tenant covenants to keep “that part of the premises, which such Tenant occupies and uses as safe, clean and sanitary.” (*See* Lease, Ex. 13, 6.A).

Defendants' apartment complex purports to comply with the United States Housing and Urban Development (“HUD”) Housing Quality Standards (“HQS”) so as to qualify for applicable tax benefits and rent subsidies for the **elderly** (i.e., Section 8 housing administered through the Oklahoma Housing **Finance** Authority (“OHFA”)). The OHFA includes responsibilities of the tenant as “do your part to keep the unit safe and sanitary,” and to “cooperate with the owner by informing him or her of any necessary repairs.” OHFA responsibilities of the landlord include that landlord should “cooperate with tenant by responding promptly to requests for needed repairs.” (*See* OHFA documents, Ex.8)

HUD HQS “Access Performance Requirements” prescribes: “(2) Acceptability criteria. The site and neighborhood may not be subject to serious adverse environmental conditions, natural or manmade, such as dangerous walks or steps; instability; flooding, poor drainage, septic tank back-ups or sewage hazards; mudslides; abnormal air pollution, smoke or dust; excessive noise, vibration or vehicular traffic; excessive accumulations of trash; vermin or rodent infestation; or fire hazards.” (*See* 24 C.F.R. § 982.401(k)(2); *See also* Ex.9).

Here, Defendants purport and hold out to the general public their safety and fitness for the unique purpose of catering to **elderly** tenants, have designed their lease agreements and public image accordingly, and has taken advantage of government tax and rent subsidies in accord. When, however, Defendants were notified by their **elderly** residents of the danger created by the ice and snow, Defendants deliberately disregarded the residents' pleas for assistance, and forbid them from even exercising common self-help under the circumstances.

Smith relied on Defendants' assertions, paid her rent throughout her residency, and is accordingly well grounded in asserting Defendants breached their duty under the lease agreement, and arguably as imposed by federal and state regulations. Therefore, Defendants' duty and actions cannot, under these circumstances, be dismissed at Summary Judgment.

PROPOSITION 4:

Defendants' actions were unreasonable.

The Oklahoma Supreme Court has stated it is *mandatory, not discretionary,* that a landlord act reasonably: Oklahoma law *"requires* a landlord to *act reasonably* when the landlord knew or reasonably should have known of the defective condition and had a reasonable opportunity to make repairs." *Miller,* at ¶ 24 (emphasis added).

Here, there is no dispute as to whether Defendants knew of the potential danger to its **elderly** tenants existing on its premises, or whether Defendants had reasonable opportunity to take some action to mitigate the danger. The issue Defendants face is a question of fact: i.e., whether their actions were reasonable.

Smith asserts Defendants were unreasonable because:

1. Defendants unreasonably placed their property value ahead of their tenants' safety and wellbeing. (*See* Cagle Dep., Ex.3, 5:21-25, 6:1-3; Farris Dep., Ex.2, 14:5-7, 15:1-3, 34:14-16, 57:13-24).

2. Defendants unreasonably retained an on-site manager after knowing of an investigation of her by the Oklahoma Department of Human Services ("DHS") Adult Protective Services, and have yet to produce documents Plaintiff requested in that regard. (*See* Green Dep., Ex.5, 38:16-25, 39:1-12; G.Smith Dep., Ex.4, 22:25; Farris Dep., Ex.2, 44-47).

3. Defendants created a **financial** incentive for their on-site manager to hold down outside service costs (e.g., costs of replacing exterior lighting, costs of snow and ice removal), and have yet to produce documents Plaintiff requested in that regard. (*See* Farris Dep., Ex.2, 14:5-7, 15:1-3, 34:14-16, 57:13-24).

Whether these actions constitute an unreasonable disregard of its **elderly** tenants' safety and wellbeing is a question of fact. Accordingly, Defendants' Motion for Summary Judgment is improper and should therefore be denied.

PROPOSITION 5:

The constellation of material circumstances and events produced a foreseeable hidden trap not subject to Summary Judgment -- i.e., "Black Ice".

A hidden danger is not necessarily totally out of sight, as explained in *Jack Healey Linen Service Company v. Travis,* 1967 OK 213, 434 P.2d 924. The meaning of hidden depends on the circumstances. *Id.; Dunagan v. Bledsoe,* 1954 OK 32, ¶ 15, 267 P.2d 586, 589 ("What is or is not a hidden danger depends not solely upon the obvious physical condition of premises, but must be in part resolved by the peculiar use employed by the possessor at the time of the injury sustained by the invitee."). The question of whether Defendants actions were reasonable and whether the condition was open and obvious is a "question in every case [that] must be initially resolved by the jury." *Id.* at ¶18.
There exists *no fixed rule* for determining whether or not a defect in the premises is in the nature of a trap.

Plaintiffs familiarity with the general physical condition which may be responsible for her injury does not of itself operate to transform the offending defect into an apparent and obvious hazard.... While the general physical condition might be familiar to the actor, a particular risk from the known defect could nevertheless, *under the circumstances of a given occasion,* be incapable of appreciation.

Jack Healey, 1967 OK 213, ¶¶ 8-9, 434 P.2d at 927-928 (emphasis added).

Here, a constellation of material circumstances and events combined to create the hazard causing Smith's injuries:

1. Defendants made no effort to remove any ice or snow from common areas.

2. Defendants forbid the **elderly** tenants from employing the common self-help measure of spreading salt.

3. The storm passed and the sun shined for two days, thawing the ice and snow enough for Smith to believe she could leave safely, and to actually do so.

4. The common area lighting near Smith's house was poor.

5. The thawing occurring during the day of Smith's accident flowed downhill on her walkway, and refroze.

6. Smith's mindset at the time of her fall was comprised of her memory hours earlier, safely leaving and readily navigating roads and walkways to her family's home, dinner, and entertainment.

Even with Smith navigating carefully from the parking lot to her home in the poor light, Smith could not reasonably have been expected to see, expect, and appreciate the trap that had manifest on her walkway. (See Nelson Dep., Ex.11, 71:11-16, 76:20-22, 77:11-18, 78:8-11, 22-24). The refrozen water was not readily visible; i.e., it was "black ice," which is "clear and virtually invisible" and "not an ordinarily perceptible hazard, nor is it within ordinary knowledge such as an ordinary accumulation of ice and snow." *Brown v. Alliance Real Estate Group,* 1999 OK 7, ¶ 5, 976 P.2d 1043, 1045; (*See also,* Nelson Dep., Ex.11, 158:23-25).

Following review of all available evidence including all depositions taken to date, Plaintiffs expert, Dr. Nelson, concluded there was "Black Ice" at the bottom of Smith's walkway that would not have formed had salt been earlier used. (*See* Nelson Dep., Ex.11, 60:18-22, 106:21-25, 107:1). Further, with regards to Defendant's claim they were unaware of the hazard (specifically the "Black Ice"), Plaintiffs expert notes, "[b]ut what [Defendants] did know about, they failed to act upon. And had they acted upon it, the black ice wouldn't have been there." (*See* Nelson Dep., Ex.11, 159:24-25, 160:1). Recognizing the individual elements ultimately contributing to the constellation of circumstances causing Plaintiffs fall, Dr. Nelson opined that a simple act, at no cost or effort to Defendants, would have circumvented the accident:
In this case, either the management should have salted the sidewalk as common space or they should have allowed residents to do it themselves. Had that been done with a high degree of scientific certainty, this accident would not have occurred. (*See* Nelson Dep., Ex. 11, 60:18-22).

Had they done that [i.e., allowed residents to put down salt], this accident would not have occurred. There would not have been black ice there. And whether it was [Plaintiff Smith] that fell or a guest or the manager herself, that wouldn't happen had salt been allowed to be -- been put on by management or allowed to be put on by residents. (*See* Nelson Dep., Ex.11, 106:21-25, 107:1).

The constellation of material circumstances and events formed a trap which, but for Defendants' failure to take any mitigating action and forbiddance of spreading salt, would not have existed. Accordingly, the ice causing Smith's injuries is "an exception to the ordinary accumulations of ice and snow dealt with in Buck," and not subject to summary judgment. *Brown v. Alliance Real Estate Group,* 1999 OK 7, ¶ 5, 976 P.2d 1043, 1045.

PROPOSITION 6:

Defendants had superior knowledge of the hazardous conditions and, by their actions, enhanced the naturally hazardous conditions.

Defendants admit "black ice is not an open and obvious condition" (*See* Def. Mot. Sum. J. p.14), and argue, pursuant to *Dover v. Braum*, 111 P.3d 243 (Okla. 2005), that because Defendants had no "specific knowledge of the black ice" they cannot be held liable.

Defendants' reliance on *Dover* is misplaced because the facts in the current case are readily distinguishable. First, in *Dover*, there was no suggestion that the defendant "knew that any ice had accumulated on the steps or elsewhere." *Dover* at 11 12 (*See* also, *Dover* fn.1, "[a]t no time prior to the time plaintiff fell had anyone else fallen or complained about the ice in front of the store"). Here, Defendants were notified by many of their **elderly** residents of the ice and snow. Secondly, in *Dover*, the defendant "did not create the hazard or enhance a natural hazard to make it more dangerous." *Id.* Here, two actions by the Defendants arguably enhanced the natural hazard resulting from the ice and snow: (1) Defendants took no action to remove any ice or snow, or spread any salt or material which would have increased the rate of evaporation and traction; and (2) Defendants forbid its **elderly** tenants from helping themselves by spreading salt. The result was an elongated and extended period of time in which thawing would occur with the foreseeable prospect of refreezing into smooth black ice; i.e., an enhancement to the natural hazard resulting from the ice and snow which, but for Defendants' actions, would not have refrozen into the black ice on which Smith fell. Lastly, in *Dover*, the plaintiffs mindset was not the same as Smith's in that the *Dover* plaintiff "knew that an ice store was predicted, she knew that it had started misting while she was in the store and that [defendant] had not placed de-icer on the outside steps." *Dover* at ? 12. Here, Smith's mindset was dominated by the fact that it had been sunny for two days, at or near 50 degrees, with enough of the ice and snow melting to enable her to walk down her walkway, visit her family, and return without incident; i.e., there were no signals requiring Smith to anticipate the possibility of black ice.

Because Defendants knew of the many complaints and consciously decided to *not act*, and then *expressly forbid* its **elderly** tenants from common self-help measures which would have significantly minimized or eliminated the hazard altogether, Defendants can be charged with superior knowledge of the hazardous conditions and proximately enhancing the hazardous conditions. Accordingly, Defendants cannot rely on the rationale of *Dover* to escape liability.

PROPOSITION 7:

Summary judgment cannot be granted on an Assumption Of The Risk Defense.

Article 23, § 6 of the Oklahoma Constitution, codified at 23 O.S. § 12, states:

> The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and *shall, at all times, be left to the jury.*

Defendants' Motion for Summary Judgment turns on the hazardous conditions at the time of Smith's fall being open and obvious, claiming that Plaintiff therefore "assumed all normal and ordinary risks associated with walking on the icy premises." (*See* Def. Mot. Sum. J., p.13)

Here, Defendants' mischaracterize the set of conditions and circumstances of the situation as discussed, *supra*, and ignore what is clearly set forth in Article 23 § 6 of the Oklahoma Constitution. To the extent Defendants' defense relies on Smith's assumption of the risk, it "shall, at all times, be left to the jury," and is accordingly not subject to summary judgment. *See Byford v. Town of Asher*, 1994 OK 46, ¶ 6, 874 P.2d 45, 47 ("The Oklahoma Constitution provides in Article 23, Section 6, that '[t]he defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury.' *We have honored the plain meaning of these words, and have repeatedly required the issue of assumption of risk to be submitted to the jury. Foster v. Harding*, 426 P.2d 355 (Okla.1967); *C.R. Anthony Co v. Williams*, 185 Okla. 564,

94 P.2d 836 (1939); *Joy v. Pope*, 175 Okla. 540, 53 P.2d 683 (1936); *Cosden Pipe Line Co. v. Berry*, 87 Okla. 237, 210 P. 141 (1922); *Dickinson v. Cole*, 74 Okla. 79, 177 P. 570 (1919).") (emphasis added).

VI.

CONCLUSION

The Oklahoma Supreme Court has unequivocally stated that the question of whether a condition is open and obvious is a question of fact for the jury. *See, e.g.*, *Lingerfelt v. Winn-Dixie Texas, Inc.*, 1982 OK 44, 645 P.2d 485; *J. J. Newberry Co. v. Lancaster*, 1964 OK 21, 391 P.2d 224; *Rogers v. Hennessee*, 1979 OK 138, 602 P.2d 1033; *Phelps v. Hotel Management, Inc.*, 1996 OK 114, 925 P.2d 891; *Spirgis v. Circle K. Stores, Inc.*, 1987 OK CIV APP 45, 743 P.2d 682. Notwithstanding Defendants' lengthy argument, the question of whether Smith recognized and appreciated the danger at the precise moment of her fall is not complex, confusing, or ambiguous; rather, it is a question of fact, not subject to Summary Judgment.

The Oklahoma Supreme Court has also clearly stated that a landlord's duty is to "act reasonably" when the landlord knew or reasonably should have known of the hazard, and when the landlord had "a reasonable opportunity to" mitigate the hazard. *Miller*, 2009 OK 49, ¶ 24.

Defendants took no action in response to the **elderly** tenants' pleas for help in removing ice and snow, did not even visit the premises they managed for days, and forbid the **elderly** tenants from spreading salt, a no-cost, no-effort act with the foreseeable result of significantly lessening the amount of ice, snow and danger on the premises. By such forbiddance, Defendant exercised possession and control of the premises, the fundamental element necessary to ascribe liability.

Smith, therefore, asserts that this Court may not, after considering all the circumstances, conclude as a matter of law that there are no material issues of genuine fact, and that, *ergo*,

Defendants were reasonable in:

(1) Assuming no duty to take any action to remove ice and snow while,

(2) ignoring the **elderly** residents' pleas for assistance, and

(2) forbidding the **elderly** residents from applying common self-help methods to the dangerous conditions,

(3) which resulted in a foreseeable danger,

(4) that Defendants knew or should have known.

Accordingly, Smith respectfully requests this Court deny Defendant's Motion for Summary Judgment.

Respectfully submitted,

<<signature>>

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