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| ADAMS COUNTY DISTRICT COURT STATE OF COLORADO  Court Address: D  1100 Judicial Center Drive FI  Brighton, Colorado 80601 C  **Plaintiff(s):**  **Defendant(s):**  *Attorneys for Plaintiff:*  FIRM NAME:  ADDRESS:  Phone Number:  Fax Number: | ATE FILED: September 19, 2018 8:38 PM  LING ID: C237CCo4uF7rtDU74s9e9Only ASE NUMBER: 2018CV30347  Case Number: 18 CV 030347  Division/ Courtroom: W |
| **PLAINTIFF’S RESPONSE TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT** | |

**COMES NOW,** the Plaintiff, Judith Makowski, by and through her counsel, Anderson Hemmat, LLC, and for her Response to Defendants’ Motion for Summary Judgment, states and alleges as follows:

# INTRODUCTION

1. This case arises out of an incident that occurred on February 2, 2017 wherein Edward J. Makowski (“Decedent”) was looking for an apartment with an employee/agent for the Oslo Apartments located at 11501 North Washington Street in the City of Northglenn, County of

Adams, State of Colorado. During the tour conducted by Defendants’ employee/agent, Decedent slipped on stairs on the property that were either icy or which had ice melt placed on them without need, resulting in a slippery condition.

1. The employee/agent conducting the tour of the apartments observed Decedent’s frail condition, had reservations about his ability to ascend the stairs leading to the model apartment located on the second floor of one of the apartment buildings, but led him up those stairs regardless.
2. For unknown reasons, Defendants did not have a model apartment on the first floor of the apartment complex.
3. It was on the stairs leading up to the second-floor model apartment that Decedent fell, resulting in his death.
4. Defendants now seek summary judgment in this case. For the reasons enumerated below, this request must be denied.

# LEGAL STANDARD

1. Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Peterson v. Halsted*, 829 P.2d 373, 375-76 (Colo. 1992). “A material fact is simply a fact that will affect the outcome of the case.” *Id.* at 375. “Even where ‘it is extremely doubtful that a genuine issue of fact exists,’ summary judgment is not appropriate.” *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991) *citing Abrahamsen v. Mountain States Tel. & Tel. Co.*, 494 P.2d 1287, 1290 (Colo. 1972). The moving party has the initial burden to show that there is no genuine issue of material fact, however once the moving party has met its initial burden of production, the burden shifts to the non-moving party to establish that there is a triable issue of fact. *Schneider v. Midtown Motor Co.*, 854 P.2d 1322 (Colo. 1992).
2. In determining whether summary judgment is proper, a court must accord to the non-moving party the benefit of all favorable inferences that may be reasonably drawn from all the undisputed facts and must resolve all doubts as to whether an issue of fact exists against the moving party. *Taply v. Golden Big O Tires*, 676 P.2d 676 (Colo. 1983). A motion for summary judgment must be denied where reasonable people might reach different conclusions regarding the evidence presented. *Graven v. Vail Associates, Inc.*, 888 P.2d 310 (Colo. App. 1994); *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992).

# COUNTERSTATEMENT OF UNDISPUTED MATERIAL FACTS

1. Decedent visited Defendants’ apartments on February 2, 2017 where he met with Ms. Sandra Roe. *See* Transcript of Deposition of Sandra Roe attached as **Exhibit 1** at 22:22-24. At that time, Ms. Roe was the leasing consultant for Defendants. *See id.* at 14:3-5. When potential tenants would arrive, she would greet them and conduct tours of the apartment complex. *See id.* at 14:6-12.
2. Ms. Roe testified that she wore boots on the morning the incident, and that it had to have been either cool or cold the day of the incident. *See id.* 35:10-13, 16, 63:22-24. Gregory Makowski, Decedent’s son, similarly testified that that the weather that morning was “icy” and “cold,” and that there was precipitation in the form of “sleet” and “ice.” *See* Transcript of Gregory Makowski attached as **Exhibit 2** at 20:19-19-25 – 21:1-4.
3. At the time of the subject incident, the model apartment which potential tenants could tour was located on the second floor of the apartment complex. *See* **Exhibit 1** at 21:9-14. There were no other model apartments, and none located on the first floor. *See id.* at 21:15-16, 61:5-6.
4. When Decedent arrived, he informed Ms. Roe that he was looking for a new apartment for himself and his wife. *See id.* at 22:25 – 23:1-3.
5. During her deposition, Ms. Roe agreed that “the instant” she saw Decedent, in her own words, it was “very apparent” that he had a “walking problem.” *See id.* 23:7-8, 24:8-9, 44:18- 21, 44:18-25 – 45:1. More specifically, Ms. Roe testified that Decedent walked very slowly, that he seemed unstable as he walked, that he had a hard time lifting his feet up, that he dragged his feet as he walked, and that his feet were angled inwards. *See id.* at 45:18-25 – 46:1-2, 6-10, 76:25

– 77:1-3, 82:22-23. She agreed that she believed Decedent’s “ability to walk was impaired.” *See id.* at 47:20-23. She further stated that he “looked elderly and feeble,” and described him as having an “impairment.” *See id.* at 50:11, 98:11-12. She also testified that she thought he should not have come by himself due to his physical condition. *See id.* at 107:25 – 108:1-2.

1. Decedent specified that he was looking for an apartment on the bottom floor. *See id.* at 23:4-6. Ms. Roe testified that Decedent’s explanation for this was that he had difficulty walking. *See id.* at 23:7-8.
2. Before even leaving for the model apartment, Ms. Roe was concerned about Decedent’s ability to climb up stairs. *See id.* at 52:25 – 53:1-4. As they walked over to the stairs leading up to the model apartment, Ms. Roe again observed that Decedent moved slowly, and that he was having trouble walking, and she testified that she had to walk slowly to stay with him. *See id.* at 67:19-25 – 68:1, 5-6.
3. Upon arriving at the bottom of the stairs, Decedent warned Ms. Roe that it would take him time to get up the stairs. *See id.* at 68:17-18, 74:9-13, 75:16-17. Ms. Roe then testified, “I could tell that something was wrong…he was walking slower than normal, his feet [were] not straight, he was having trouble walking.” *See id.* at 83:19-21.
4. Ms. Roe began ascending the stairs leading to the model apartment, and Decedent followed her. *See id.* at 74:14-18. Ms. Roe testified that the stairs had salt on them. *See id.* at 38:5- 10, 104:10-15, 105:16-19. This is corroborated by the Sand/Salt Log kept by Defendants, which indicates that “all steps and sidewalks” were salted that morning. *See* Trinity Property Consultation Sand/Salt Log attached as **Exhibit 3**.
5. After starting up the stairs, Decedent slipped and fell backward, his head hitting the concrete at the bottom of the stairs. *See* **Exhibit 1** at 74:14-18. Ms. Roe testified that she was informed that he died on impact. *See id.* at 92:23-25 – 93:1-2.
6. Ms. Roe then testified, “if I had…to do it over again, I don’t care if they would have fired me, I wouldn’t have let him go up those stairs.” *See id.* at 82:25 – 83:1-3. However, she also agreed that she was “in charge of the tour.” *See id.* at 53:6-8.

# ARGUMENT

1. In their brief two-page argument in their Motion for Summary Judgment, Defendants claim that summary judgment is proper with respect to Plaintiff’s claims in this action. The majority of Defendants’ analysis centers around the issue of causation, and Defendants argue that there is no disputed material fact as to whether Defendants’ conduct caused the death of Decedent, and that they are therefore entitled to judgment as a matter of law.
2. Under Colorado law, a wrongful death claim can be pursued as the result of a landowner’s conduct that violates Colorado’s Premises Liability Act (“PLA”). *See, e.g., Nordin v. Madden*, 148 P.3d 218 (Colo. App. 2006). In order to prevail on a claim for either wrongful death or premises liability, it must be shown that conduct in question was the cause of the claimed damages. C.R.S. § 13-21-202; C.R.S. § 13-21-115(3)(c)(I).
3. In Colorado, the test for causation is whether the conduct was the “proximate cause” of the claimed injuries, though courts at times refer to this as “but-for causation,” and at other times hold that proximate cause is had when the but-for test is satisfied. *See Vititoe v. Rocky Mountain Pavement Maintenance, Inc.*, 412 P.3d 767, 777 (Colo. App. 2015); *Boulders at Escalante, LLC v. Otten Johnson Robinson Neff and Ragonetti, PC*, 412 P.3d 751, 759 (Colo. App. 2015). However it is phrased, the test appears to amount to the same thing, as “‘[p]roximate cause’ is a cause which in natural and probable sequence produced the claimed injury and without which the claimed injury would not have been sustained” (*People v. Clay*, 74 P.3d 473, 475 (Colo. App. 2003)) and “[t]he requirement of ‘but for’ causation is satisfied if the negligent conduct in a natural and continued sequence, unbroken by any efficient, intervening cause, produce[s] the result complaint of, and without which that result would not have occurred” (*Smith v. State Compensation Ins. Fund*, 749 P.2d 462, 464 (Colo. App. 1987)).
4. “The issue of causation is ordinarily a question for the jury, but if…facts are undisputed and reasonable minds could draw but one inference from them, causation is a question of law for the court.” *Smith*, 749 P.2d at 464. However, “cause is a question of law for the court only in the clearest cases when the facts are undisputed and it is plain that all intelligent persons can draw but one inference from them.” *Moon v. Platte Valley Bank*, 634 P.2d 1036, 1037 (Colo. App. 1981).
5. Here, Defendants contend that “there is no evidence to make any causal connection between Mr. Makowski’s fall and subsequent death and any conduct on the part of the Defendants.” *See* Defendants’ Motion at p. 6. Citing the bulk of Defendants’ analysis here, Defendants argue,

The undisputed evidence in this case conclusively shows that: (1) despite having rained the night before, the covered stairs were dry before, during and after the

incident; (2) there was no ice, snow or any other dangerous condition on the stairs at the time of the incident; (3) Mr. Makowski had trouble walking; (4) Mr. Makowski had a history of falling; (5) the only eyewitness to the fall, Sandra Roe, testified that Mr. Makowski tripped over his feet which caused him to fall; (6) Ms. Roe ascended the stairs immediately in front of Mr. Makowski and has personal knowledge that they were dry at the time of the incident; and (7) there were no complaints of snow or ice on the stairs prior to the incident.

*See id.* at pp. 6-7. Of this “undisputed evidence,” (7) is irrelevant, as Plaintiff does not claim, at this time, that incidents of this kind occurred prior to the subject incident. (1), (2), and half of (6) amount to the same thing, that Defendants contend that there was no slippery substance on the stairs in question. However, this claim is far from undisputed. It is unclear why the stairs in question would have been salted if they were free of ice and water. That they were salted is shown by the Sand/Salt Log kept by Defendants, which indicates that “all steps and sidewalks” were salted that morning. *See* **Exhibit 3**. Ms. Roe similarly testified that she observed that the stairs had salt on them. *See* **Exhibit 1** at 38:5-10, 104:10-15, 105:16-19. It is of course well-established law in Colorado that a jury is entitled to all reasonable inferences that can be drawn from the evidence. *See, e.g., People v. Marin*, 686 P.2d 1351, 1355-56 (Colo. App. 1983). One inference from this evidence that is certainly reasonable is that the stairs in question were salted precisely because they were icy, and that this salting was performed unsatisfactorily. This inference is further strengthened by Ms. Roe’s statement that she wore boots on the morning the incident, and that it had to have been either cool or cold the day of the incident, and by Mr. Gregory Makowski’s statement that the weather that morning was “icy” and “cold,” and that there was precipitation in the form of “sleet” and “ice.” *See* **Exhibit 1** at 35:10-13, 16, 63:22-24; **Exhibit 2** at 20:19-19-25

– 21:1-4.

1. The other half of (6), that Ms. Roe ascended the stairs before Plaintiff, is undisputed. Plaintiff similarly agrees with (3), that Decedent had difficulty walking. It is unclear

what is meant by (4), as, presumably, most individuals have “a history of falling”; without additional detail, it is hard to know what to make of this assertion by Defendants.

1. “Undisputed fact” (5), that Ms. Sandra Roe testified that Decedent tripped over his feet and this caused him to fall, is a blatant attempt by Defendants to mislead the Court. Defendants double down on this version of Ms. Roe’s testimony, arguing that “Ms. Roe testified that she saw the fall, and most importantly, saw that Mr. Makowski’s fall was caused by Mr. Makowski tripping over his feet and losing his balance.” *See* Defendants’ Motion at p. 7. However, during her deposition Ms. Roe was very careful to state that it “appeared” to her that Decedent lost his footing on the stairs, but then quickly retracted even this modest assertion, stating, “***I’m not going to speculate that he was losing his footing***.” *See* **Exhibit 1** at 79:6-8, 82:7-8. Therefore, Defendants’ bold assertion that Ms. Roe testified that she saw Decedent trip over his feet is a simple instance of Defendants cherry picking favorable statements from Ms. Roe’s deposition, rather than considering her entire testimony. It is thus far from undisputed that Decedent simply tripped over his own feet and that that is what caused his fall.
2. Therefore, it remains disputed whether the stairs were icy or wet at the time of Decedent’s fall and what it was that caused his fall. As these are material facts about which there are genuine disputes, summary judgment is precluded due to these disputes alone. However, there remain additional facts which support Plaintiff’s claims.
3. Several undisputed facts in this case, which go unaddressed by Defendants in their Motion, include:
4. At the time of the subject incident, the model apartment which potential tenants could tour was located on the second floor of the apartment complex, and there were no other model apartments, and none located on the first floor. *See* **Exhibit 1** at 21:9-16, 61:5-6.
5. Ms. Roe testified that “the instant” she saw Decedent it was “very apparent” that he had a “walking problem,” that he walked very slowly, that he seemed unstable as he walked, that

he had a hard time lifting his feet up, that he dragged his feet as he walked, and that his feet were angled inwards. *See id.* at 23:7-8, 24:8-9, 44:18-21, 44:18-25 – 45:1, 18-25 – 46:1-2,

6-10, 76:25 – 77:1-3, 82:22-23.

1. Ms. Roe testified that she believed Decedent’s “ability to walk was impaired,” that he “looked elderly and feeble,” that he appeared to have an “impairment,” and that she thought he should not have come by himself due to his physical condition. *See id.* at 47:20-23, 50:11, 98:11-12, 107:25 – 108:1-2.
2. Decedent also specified that he was looking for an apartment on the bottom floor and that this was because he had difficulty walking. *See id.* at 23:4-8.
3. Ms. Roe testified that before even leaving for the model apartment, she was concerned about Decedent’s ability to climb up stairs, and as they walked over to the stairs leading up to the model apartment, Ms. Roe again observed that Decedent moved slowly, and that he was having trouble walking. *See id.* at 52:25 – 53:1-4, 67:19-25 – 68:1, 5-6.1
4. The Colorado Supreme Court has recently clarified the scope of the PLA, and the kinds of claims that may be brought thereunder. In *Larrieu v. Best Buy Stores, L.P.*, The court held that claims brought under the PLA are not restricted to activities that are “directly or inherently related to the land,” but include “conditions, activities, and circumstances on the property that the landowner is liable for in its legal capacity as a landowner.” 303 P.3d 558, 563 (Colo. 2013). In *Larrieu*, the court found that the PLA applied to a claim by a plaintiff wherein a Best Buy employee was helping the plaintiff load a freezer he had purchased from Best Buy onto his truck and the plaintiff sustained injuries when he tripped over a curb. *Id.* at 564. The court agreed with the plaintiff that Best Buy “in its capacity as a landowner, was responsible for the activities conducted and conditions on its premises.” *Id.* Even more recently, the *Larrieu* case was upheld by the court

1 These facts, included in Plaintiff’s Second Amended Complaint, are nowhere addressed in Defendants’ Motion for Summary Judgment, despite the fact that Plaintiff filed her Motion for Leave to File this Amended Complaint, detailing the facts to be included therein, well before Defendants filed the present Motion. To the extent Defendants address these facts in their Reply, when they ought to have done so in their initial Motion, Plaintiff reserves the right to seek leave of this Court to file a sur-reply to address those arguments.

in *Tancrede v. Freund*, which held that the PLA applied to injuries which “occurred because of activities conducted on the property.” 401 P.3d 132, 135 (Colo. App. 2017).

1. Here too Defendants were responsible for the activities that were conducted on their property, which included conducting a tour of a model apartment, when a prospective tenant slipped on the stairs, and for the condition their property was in when those activities were conducted. Moreover, Decedent’s death occurred because of an activity conducted on Defendants’ property: a tour of the apartment complex.
2. From the facts enumerated above, it is clear that Defendants failed to have a model apartment on the first floor of their complex, which would have provided ready access for any tenants and prospective tenants with difficulty ambulating. Additionally, Ms. Roe took Decedent to the stairs leading up to this model apartment, despite what can only be characterized as extreme concerns about his ability to safely navigate those stairs. Underscoring this sentiment, Ms. Roe testified during her deposition, “I could tell that something was wrong…he was walking slower than normal, his feet [were] not straight, he was having trouble walking.” *See* **Exhibit 1** at 83:19-
3. Ms. Roe then led Decedent up those stairs, and Decedent subsequently slipped, falling to his death.
   1. The undisputed fact that Defendants did not have a model apartment on the first floor of their complex, and the undisputed fact that Ms. Roe elected to take Decedent up those stairs, in spite of her concerns of his ability to do so safely, constitute a failure on the part of Defendants to “exercise reasonable care to protect against dangers of which [they] actually knew or should have known.” C.R.S. § 13-21-115(3)(c)(I). That there is evidence that this activity was undertaken amidst adverse weather conditions and that the stairs may even have been slick with water or ice only exacerbates Defendants’ culpability.
   2. Near the end of her deposition, Ms. Roe testified, “if I had…to do it over again, I don’t care if they would have fired me, I wouldn’t have let him go up those stairs.” *See* **Exhibit 1** at 82:25 – 83:1-3. However, she also agreed that she was “in charge of the tour.” *See id.* at 53:6- 8.
   3. Not only do these facts bring the conduct from the date in question within the ambit of the PLA, they certainly constitute evidence from which reasonable minds could draw the inference that such conduct was the proximate cause of Decedent’s death. A natural and probable result of leading an individual who appears to be physically impaired up stairs in adverse weather conditions is that that individual could fall and sustain serious bodily injury or death. And in this case, but for this conduct, Decedent’s death would not have occurred. It is surely not the case here that “all intelligent persons can draw but one inference” from these facts, if it is the reference Defendants urge. *Moon*, 634 P.2d at 1037. Thus the question of causation in this matter a question of fact for the jury, rendering summary judgment improper.
   4. Defendants have therefore failed to show either that there is no genuine dispute as to any material fact in this matter, or that they are entitled to judgment as a matter of law. As such, their request for summary judgment must be denied.
   5. Defendants’ request for costs and fees associated with the defense of this claim is similarly without merit. *See* Defendant’s Motion at p. 8. C.R.S. § 13-17-102(4) provides that a court may impose attorneys’ fees if a claim is brought that “lacked substantial justification,” or in other words, was “substantially frivolous, substantially groundless, or substantially vexatious.” However, “[a] claim or defense is frivolous if the party asserting it can present ***no rational argument*** based on the evidence or law in support of that claim or defense,” and “[t]his standard does not apply to legitimate but unsuccessful attempts to establish a new theory of law, or to

extend, modify, or reverse existing law.” *Frisone v. Deane Auto. Ctr., Inc.*, 942 P.2d 1215, 1218 (Colo. App. 1996)(emphasis added), *as modified on denial of reh'g* (Jan. 23, 1997) *citing Haney*

*v. City of Empire,* 779 P.2d 1312 (Colo.1989). Moreover, “such fees should not be awarded simply because a party does not prevail.” *Swanson v. Precision Sales & Serv., Inc.*, 832 P.2d 1109, 1112 (Colo. App. 1992) *citing State Farm Mut. Auto. Ins. Co. v. Sanditen*, 701 P.2d 876 (Colo. App. 1985). Finally, “when awarding attorney fees, the trial court must specifically set forth the reasons for the award.” *Stearns Mgmt. Co. v. Missouri River Servs., Inc.*, 70 P.3d 629, 633 (Colo. App. 2003) citing C.R.S. § 13–17–103 and *Board of Commissioners v. Eason,* 976 P.2d 271 (Colo. App. 1998). “If the trial court fails to provide findings sufficient to afford review of the reasons for the award, an appellate court must reverse the award and remand for further proceedings.” *Id. citing Bob Blake Builders, Inc. v. Gramling,* 18 P.3d 859 (Colo. App. 2001).

* 1. Here, Defendants make no argument as to why its request for attorneys’ fees and costs should be granted, and only include the request, seemingly as an afterthought, in the “wherefore” clause of its Response. The reasons for this request are not set forth with specificity, and it is not the Court’s responsibility to advance arguments on behalf of parties before it. *Oldershaw, et. al. v. Davita Healthcare Partners, Inc. et. al.*, 2018 WL 3648059, at \*16 (D. Colo. 2018)(“The Court is loathe to form arguments for parties where the parties themselves have failed to do so”); *Kadingo v. Johnson*, 2017 WL 3478494, at \*14 (D. Colo. 2018)(“it is not this court’s duty to make arguments for litigants who have not made them on their own behalf”).
  2. Moreover, as the foregoing illustrates, Defendants certainly have not shown that Plaintiff has presented “no rational argument” in this matter. To contrary, as noted above, Defendants hardly interact with the facts set forth by Plaintiff in her Second Amended Complaint. Therefore, Defendants’ request for costs and fees should also be denied.

**WHEREFORE,** Plaintiff respectfully requests that this Court deny Defendant’s Motion for Summary Judgment and request for costs and fees, and for such other and further relief as this Court deems proper.

Respectfully submitted this 19th day of September, 2018.

FIRM NAME

*s/ LAWYER NAME, Esq.*

*Attorneys for Plaintiff*