|  |  |
| --- | --- |
| DISTRICT COURT, ADAMS COUNTY, COLORADO  Court Address:  1100 Judicial Center Drive, Brighton, CO, 80601 DATE FILED | : November 20, 2018 9:03 PM BER: 2018CV30347  **COURT USE ONLY** |
| **Plaintiff(s)** CASE NUM  v.  **Defendant(s)** |
| Case Number: 2018CV30347 Division: W Courtroom: |
| **Order: Defendants' Motion for Summary Judgment** | |

The motion/proposed order attached hereto: DENIED.

The court finds that there are genuine issues of material fact and, thus, summary judgment would be inappropriate. Accordingly, defendant's motion is denied.

Issue Date: 11/20/2018

ROBERT WALTER KIESNOWSKI JR

District Court Judge

Page1 of1

|  |  |
| --- | --- |
| DISTRICT COURT, ADAMS COUNTY, COLORADO  1100 Judicial Center Drive Brighton, Colorado 80601 | ▲ **COURT USE ONLY ▲** |
| **Plaintiff:** JUDITH MAKOWSKI as lineal heir to EDWARD R. MAKOWSKI (deceased) as well as Personal Representative of the ESTATE OF EDWARD R. MAKOWSKI  **v.**  **Defendants:** FPA5 WASHINGTON PARK, LLC a/k/a THE OSLO APARTMENTS and TRINITY PROPERTY CONSULTANTS, LLC |
| Case No: 18CV030347  Division: |
| *Attorneys for Defendants:*  Andrew D. Peterson, No. 33081 Amy L. Twohey, No. 33414 Jachimiak Peterson, LLC  1819 Denver West Drive, Suite 265  Golden, CO 80401  Phone: 303-863-7700  E-mail: apeterson@jpfirm.law; [atwohey@jpfirm.law](mailto:atwohey@jpfirm.law) |
| **DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT** | |

Defendants FPA5 Washington Park, LLC a/k/a The Oslo Apartments and Trinity Property Consultants, LLC, by and through their attorneys, Jachimiak Peterson, LLC, pursuant to

C.R.C.P. 56, hereby submit their Motion for Summary Judgment, and state as follows:

# RULE 121 CERTIFICATION

The undersigned has conferred with counsel for Plaintiff. Plaintiff is opposed to the relief sought herein.

# INTRODUCTION

Plaintiff Judith Makowski brings this wrongful death action in connection with a fall suffered by the decedent, Edward Makowski, on February 2, 2017 at The Oslo Apartments located at 11501 North Washington Street in Northglenn, Colorado. This case should be dismissed. There is no evidence in the record to support Plaintiff’s assertion that the stairs Mr. Makowski was ascending at the time of the fall had any ice or snow on them, or that the condition of the stairs contributed in any way to his fall and subsequent death.

Conversely, the record is replete with evidence demonstrating that the stairs were absent any ice or snow and were dry at the time of the incident. Without any evidence in the record to show that: (1) the stairs constituted a dangerous condition that the Defendants knew or should have known about; and (2) that the alleged dangerous condition caused Mr. Makowski’s fall and subsequent death, the wrongful death claim cannot survive.

# STANDARD OF REVIEW

The purpose of summary judgment is to “save the litigants the expense and time connected with trial when, as a matter of law, based upon the admitted facts, one of the parties could not prevail.” *Peterson v. Halsted,* 829 P.2d 373, 375 (Colo. 1992). Summary judgment should be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* C.R.C.P. 56(c); *Bebo Construction Co. v. Mattox & O’Brien, P.C.,* 990 P.2d 78, 83 (Colo. 1999).

The non-moving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must

be resolved against the moving party. *Martini v. Smith,* 42 P.3d 629 (Colo. 2002). A material fact is defined as a fact which would affect the outcome of the case. *Peterson*, 829 P.2d at 375. Summary judgment is appropriate where the record discloses no dispute of material facts. *Crouse*

*v. City of Colorado Springs,* 766 P.2d 660 (Colo. 1988).

# UNDISPUTED MATERIAL FACTS

1. Edward Makowski fell at The Oslo Apartments on February 2, 2017 at approximately 9:35 a.m. while attempting to ascend stairs to the second floor to view a model apartment (Exhibit A, Incident Report).
2. Plaintiff does not have any knowledge about the condition of the property at the time of the incident (Exhibit B, Plaintiff Judith Makowski’s deposition at 56:23–57:1).
3. No one has ever told Plaintiff that there was ice on the stairs at the time of the incident and she did not see any ice on the stairs in photos taken by her son, Greg Makowski, and her nephew on the date of the incident (Ex. B at 60:11-13; 78:16–79:7).
4. Plaintiff does not know what caused Mr. Makowski to fall, how the incident happened, or which step Mr. Makowski was on at the time of his fall (Ex. B at 57:18-24; 61:9-

11; 80:8-11; 82:15-17).

1. Plaintiff’s son, Greg Makowski, and nephew were not able to determine the cause of Mr. Makowski’s fall when they inspected the property on the day of the incident (Ex. B at

56:18-22; Exhibit C, Greg Makowski’s deposition at 36:20-22).

1. Mr. Makowski had a history of falling (Ex. B at 15:7–18:21; Ex. C at 13:1–14:4).
2. Plaintiff does not know whether or not Mr. Makowski stumbled going up the stairs (Ex. B at 60:23-25; 63:4-6).
3. Plaintiff is not aware of any witnesses to the condition of the property at the time of the incident or anyone who would know which step Mr. Makowski was on at the time of the fall other than employees of the Defendants (Ex. B at 57:13-17; 80:12-14).
4. Mr. Makowski met with Sandra Roe, The Oslo Apartments Leasing Agent, on the morning of the incident because he was looking for a new apartment (Exhibit D, Sandra Roe’s

deposition at 22:22–23:3).

1. Mr. Makowski was looking for a bottom floor apartment because he had difficulty walking (Ex. D at 23:4-13; 24:2-17).
2. Ms. Roe personally observed Mr. Makowski having difficulty walking as he walked with his feet turned inward (Ex. D at 68:2-6; 76:20–77:10).
3. Ms. Roe is the only person who saw Mr. Makowski fall when he lost his footing on the third step going up the stairs (Ex. D at 78:3–79:16; 82:13-15).
4. Ms. Roe went up the stairs ahead of Mr. Makowski and did not have any trouble (Ex. D at 81:2-8; 107:3-6).
5. Ms. Roe offered to go up the stairs beside Mr. Makowski, but he declined and insisted that she go ahead of him (Ex. D at 61:20–62:4; 66:2-4; 68:11-15).
6. Gary Thomas, Maintenance Supervisor, began spreading salt over icy areas on the property at approximately 7:30 a.m. on the date of the fall (Exhibit E, Sand and Salt Log; Exhibit

F, Gary Thomas’ deposition at 36:23–37:2).

1. Mr. Thomas inspected and salted the pathway leading to the stairs where the incident occurred at approximately 7:30 a.m. on the day of the incident (Ex. F at 59:14-25).
2. The salt that was spread the morning of the incident was a preventative measure because it had rained the night before (Exhibit G, Lauren Lampe’s deposition at 75:6-11).
3. Mr. Thomas did not put salt on the stairs where Mr. Makowski fell because they were dry (Ex. F at 40:12–42:17).
4. The stairs were dry the morning of the incident when Ms. Roe traversed them to check on the model apartment at the start of her day (Ex. D at 38:19–39:16; 106:19–107:2).
5. The stairs were dry and did not have any ice on them at the time of Mr.

Makowski’s fall (Ex. D at 80:24–81:1; 105:1-12; 107:7-11; Ex. G at 69:1-8; 75:3-5).

1. Ms. Lampe, the Property Manager, took photos of the stairs after the paramedics left and noticed that the stairs were dry (Ex. G at 55:15-19; 58:21-23; 60:24– 61:2; 75:19–76:4;

Exhibit H, photos of the stairway in the breezeway under the building roof).

1. Mr. Thomas inspected the stairway before and immediately after the incident and noticed that there was no ice on the stairs (Ex. F at 50:13–51:14; 53:10-20).
2. There were no complaints of snow or ice on the property prior to the incident (Ex.

G at 78:15-18).

# ARGUMENT

To prevail on her wrongful death claim, Plaintiff must show that Defendants’ tortious conduct proximately caused Mr. Makowski’s death. *Leake v. Cain*, 720 P.2d 152, 155 (Colo. 1986). Proximate cause is the cause without which the claimed injury—Mr. Makowski’s death— would not have occurred. *City of Aurora v. Loveless*, 639 P.2d 1061, 1063 (Colo. 1981). In Colorado, the trial court may decide the issue of causation as a matter of law where the alleged chain of causation is too attenuated to impose liability. *See Largo Corp. v. Crespin*, 727 P.2d

1098, 1103 (Colo. 1986). Here, proximate cause requires conduct that produced Mr. Makowski’s death “in the natural and probable sequence of things.” *See Loveless*, 639 P.2d at 1063; *Schgneider v. Midtown Motor Co.*, 854 P.2d 1322 (Colo. App. 1992).

The test for causation is the “but for” test—whether, but for the alleged negligence, the harm would not have occurred. *Moore v. Standard Paint & Glass Co.*, 358 P.2d 33 (Colo. 1960). The “but for” requirement is satisfied only if the negligent conduct in a “natural and continued sequence, unbroken by any efficient, intervening cause, produce[s] the result complained of, and without which that result would not have occurred.” *Stout v. Denver Park & Amusement Co.*, 287 P. 650 (Colo. 1930).

Wrongful death claims are derivative in nature. *Stamp v. Vail Corp.*, 172 P.3d 437, 447 (Colo. 2007). Absent a causal link to the underlying accident that is the subject of the alleged negligence, the claim for wrongful death does not exist. *Id.* Thus, in order to prevail on her claim for wrongful death, Plaintiff must prove that Mr. Makowski’s death had a proximate causal connection to the actions or omissions of the Defendants. Here, 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.

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. It is undisputed that Mr. Makowski fell while trying to climb the stairs to the second floor; however, his fall was not in any way, shape or form caused by any dangerous condition on the Defendants’ property. The uncontroverted evidence in the record not only fails to support Plaintiff’s claim, but refutes it.

Ms. Roe is the only witness to the fall. 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. The combined testimony of Ms. Roe, Gary Thomas, and Lauren Lampe demonstrates that the stairs were dry immediately before, during and after the incident. There is no evidence to dispute their testimony. There is no evidence in the record to suggest that Defendants—or any condition on the property—are in any way responsible for Mr. Makowski’s death.

It is unfortunate that Mr. Makowski tripped over his own feet and fell backwards, resulting in his death. But instead of accepting the undisputed facts, Plaintiff and her counsel have continued to pursue a case that lacks any merit. Sometimes an accident is just that—an accident. Under the circumstances of this case, there is no one to blame. Therefore, the wrongful death claim must be dismissed.

# CONCLUSION

There are no genuine issues of material fact for trial. The lack of evidence supporting Plaintiff’s allegations is uncontroverted. Plaintiff has no evidence to link the fall and Mr. Makowski’s death to any conduct, or lack thereof, of the Defendants. Plaintiff cannot satisfy the proximate cause requirement—that Mr. Makowski’s death was a natural and probable sequence

of acts or omissions on the part of the Defendants. There simply is no evidence to even support the allegation that Mr. Makowski slipped on ice or snow on the stairs when he fell, or that the stairs otherwise constituted a dangerous condition. Accordingly, Defendants are entitled to judgment as a matter of law.

WHEREFORE, Defendants FPA5 Washington Park, LLC a/k/a The Oslo Apartments and Trinity Property Consultants, LLC, respectfully request an order granting their Motion for Summary Judgment, dismissing Plaintiff’s wrongful death claim with prejudice, and awarding Defendants their costs and fees associated with the defense of this case, and for any other relief this Court deems just and proper.

Dated this 29th day of August, 2018.

*Pursuant to C.R.C.P. 121 §1-26 the duly signed original remains on file at the office of the undersigned*

*/s/LAWYER NAME*

*Attorneys for Defendants*

# CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2018, a true and correct copy of the foregoing **DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT** was electronically served via Colorado Courts E-Filing upon all counsel of record.

*Pursuant to C.R.C.P. 121 §1-26 the duly signed original remains on file at the office of Jachimiak Peterson, LLC*

/s/ Donna Sommerfield