

STATE OF OHIO                     )  
  )ss:  
COUNTY OF WAYNE            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

SUSAN LLOYD

Appellant

v.

JUSTIN ROGERSON

Appellee

C.A. No.       18AP0024

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF WAYNE, OHIO  
CASE No.     2016 CVC-H 000321

DECISION AND JOURNAL ENTRY

Dated: June 28, 2019

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CALLAHAN, Judge.

{¶1} Appellant, Susan Lloyd, appeals from the judgment of the Wayne County Common Pleas Court granting summary judgment in favor of Appellee, Justin Rogerson. For the reasons set forth below, this Court affirms in part and reverses in part.

I.

{¶2} In July 2014, Ms. Lloyd signed a one-year lease with Redwood Living, Inc. (“Redwood”) for an apartment in a complex in Wooster. The apartment complex consisted of single story apartments, with attached garages and separate driveways, arranged in rows of five to seven apartments adjoining one another. Ms. Lloyd leased an end apartment and, thus, had one adjoining neighbor, Mr. Rogerson, who resided in the apartment complex prior to Ms. Lloyd moving in.

{¶3} Ms. Lloyd chose this specific apartment complex because it was advertised as being a smoke-free environment. She believed this meant smoking was prohibited everywhere

on the apartment complex property. Ms. Lloyd sought a smoke-free living environment because she suffered from a heart condition, which was worsened by smoke.

{¶4} On the day that she moved in, Ms. Lloyd saw Mr. Rogerson smoking in the driveway and immediately notified him that smoking was prohibited in the apartment complex and that she has a heart condition and could not be subjected to smoke. Ms. Lloyd claimed Mr. Rogerson responded with profanity and was belligerent to the point that she had to call the police because she was afraid for her safety. Sometime thereafter, Mr. Rogerson approached Ms. Lloyd to discuss his smoking and her health condition. Mr. Rogerson claimed Ms. Lloyd ignored him and continued talking on her phone and “bad mouthing [him] for approximately three minutes.” Mr. Rogerson left without speaking to her. And so began their tumultuous relationship as neighbors wherein they each claimed they were being harassed by the other.

{¶5} A few days after moving in, Ms. Lloyd notified Redwood that multiple residents were in violation of the lease by smoking in their garages. Thereafter, Ms. Lloyd routinely notified Redwood of the ongoing smoking violations and other sundry lease violations. Ms. Lloyd documented all of these violations by keeping a diary and a log and taking photographs and videos of the other tenants and the lease violations.

{¶6} In addition to smoking in the driveway and in his garage, Ms. Lloyd also claimed that Mr. Rogerson was smoking inside his apartment and that her apartment “reek[ed] of cigarette smoke” because of Mr. Rogerson. Due to the infiltration of cigarette smoke into her apartment and her heart condition, Ms. Lloyd would leave her apartment and sleep in her car.

{¶7} Dissatisfied with Redwood’s response to her complaints, Ms. Lloyd began escrowing her rent payments with the Wayne County Municipal Court in September 2014. In October 2014, Redwood filed an eviction proceeding against Ms. Lloyd for disturbing the other

tenants' peaceful enjoyment. Redwood called Mr. Rogerson to testify against Ms. Lloyd at the eviction hearing in November 2014.

{¶8} Mr. Rogerson moved out on January 31, 2015. Unrelated to the eviction proceedings, Ms. Lloyd moved out on April 30, 2015. Thereafter, Redwood and Ms. Lloyd reached a global settlement as to the eviction and rent escrow proceedings and other claims filed by Ms. Lloyd.

{¶9} Ms. Lloyd filed a complaint against Mr. Rogerson asserting two causes of action: negligence and willful and wanton misconduct. Ms. Lloyd claimed that Mr. Rogerson's smoking exacerbated her pre-existing health conditions, caused her to develop asthma, and damaged her property. After conducting discovery, Mr. Rogerson filed a motion for summary judgment and Ms. Lloyd responded. The trial court granted summary judgment in favor of Mr. Rogerson as to both of the claims.

{¶10} Ms. Lloyd timely appeals from this judgment entry, asserting ten assignments of error. To facilitate the analysis, this Court will consolidate and address the assignments of error out of order.

## II.

### **ASSIGNMENT OF ERROR NO. 1**

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DISMISSING [MS. LLOYD'S] CASE WITH PREJUDICE AND GRANTING [MR. ROGERSON'S] MOTION FOR SUMMARY JUDGMENT AFTER [MS. LLOYD] SUBMITTED SUFFICIENT EVIDENCE TO ESTABLISH A GENUINE MATERIAL FACT. \* \* \*

### **ASSIGNMENT OF ERROR NO. 6**

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING [MR.] ROGERSON TO SMOKE IN A SMOKE FREE COMMUNITY MAKING IT WORSE WITH THE KNOWLEDGE [MR.] ROGERSON WAS

AWARE SINCE JULY 18[,] 2014 HE WAS CAUSING INJURY TO [MS.] LLOYD[.]

**ASSIGNMENT OF ERROR NO. 9**

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY STATING [MS.] LLOYD DID NOT PRESENT ENOUGH EVIDENCE TO ESTABLISH NEGLIGENCE[.] \* \* \*

**ASSIGNMENT OF ERROR NO. 10**

THE TR[IA]L COURT COMMITTED REVERSIBLE ERROR BY STATING [MS.] LLOYD DID NOT PRESENT ENOUGH EVIDENCE TO ESTABLISH WILLFUL AND WANTON MISCONDUCT BY [MR.] ROGERSON[.]

{¶11} Ms. Lloyd's first, sixth, ninth, and tenth assignments of error address the merits of the trial court's order granting summary judgment in favor of Mr. Rogerson. This Court agrees that the trial court erred in granting summary judgment as to the negligence claim with respect to Ms. Lloyd's property damages. However, the trial court did not err in granting summary judgment as to the negligence claim regarding Ms. Lloyd's medical damages and the willful and wanton misconduct claim.

**Summary Judgment Standard**

{¶12} This Court reviews an order granting summary judgment de novo. *See Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶ 24, citing *Doe v. Shaffer*, 90 Ohio St.3d 388, 390 (2000). Summary judgment is proper under Civ.R. 56(C) when: (1) no genuine issue as to any material fact exists; (2) the party moving for summary judgment is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can only reach one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977).

{¶13} Summary judgment consists of a burden-shifting framework. The movant bears the initial burden of demonstrating the absence of genuine issues of material fact concerning the essential elements of the nonmoving party’s case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* at 292-293. Once the moving party satisfies this burden, the nonmoving party has a “reciprocal burden” to “set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 293, quoting Civ.R. 56(E).

{¶14} “The substantive law involved controls which facts are considered material.” *Elyria v. Elbert*, 143 Ohio App.3d 530, 532 (9th Dist.2001), citing *Orndorff v. Aldi, Inc.*, 115 Ohio App.3d 632, 635 (9th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is material when it has the potential to impact the outcome of the case and preclude summary judgment. *Elbert* at 532. Conversely, factual disputes that cannot affect the outcome of the case are “irrelevant” and have no bearing on summary judgment. *Id.*

### **The Evidence**

{¶15} In his appellee brief, Mr. Rogerson asserts for the first time that the summary judgment decision should be affirmed because Ms. Lloyd failed to submit proper evidence in accordance with Civ.R. 56(C) and (E) in support of her brief in opposition to summary judgment and thus she failed to satisfy her *Dresher* burden. During oral argument, Mr. Rogerson conceded that he did not raise this issue in the trial court. However, Mr. Rogerson argued that he should be permitted to raise the issue for the first time on appeal because the trial court ruled on the summary judgment motion two days after Ms. Lloyd filed her brief in opposition and exhibits. Ms. Lloyd did not respond to either of these arguments.

{¶16} It is unnecessary to consider Mr. Rogerson’s alternative arguments for affirming the trial court’s decision because we are able to review the summary judgment order without consideration of the evidence Mr. Rogerson is now challenging.<sup>1</sup> As explained in the analysis below, relying solely upon all of the non-challenged evidence,<sup>2</sup> there is evidence creating a genuine issue of material fact as to Ms. Lloyd’s negligence claim relating to property damage. As to Ms. Lloyd’s negligence claim regarding her medical damages, there is no genuine issue of material fact because her two medical expert letters, even assuming without deciding that they were proper Civ.R. 56(C) and (E) evidence, fail to establish proximate cause. Further, it is unnecessary to consider any of the evidence relative to the willful and wanton misconduct claim because that claim fails as a matter of law.

{¶17} Additionally, this Court will not consider Ms. Lloyd’s videos that she references in her appellate brief.<sup>3</sup> These videos were filed with her motion for reconsideration, and not with her summary judgment evidence. “[A] reviewing court cannot consider evidence that a party added to the trial court record after that court’s judgment and then decide an appeal from that judgment based on the new evidence.” *Fifth Third Mtge. Co. v. Salahuddin*, 10th Dist. Franklin No. 13AP-945, 2014-Ohio-3304, ¶ 13. This Court’s review is limited to the record as it existed when the trial court rendered judgment. *Loeschner v. Clark Material Handling Co.*, 9th

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<sup>1</sup> Mr. Rogerson contends Ms. Lloyd’s affidavit and exhibits, with the exception of exhibit 2, are nonconforming evidence.

<sup>2</sup> This includes Mr. Rogerson’s affidavit, Ms. Lloyd’s deposition transcript, the eviction and rent escrow hearing transcript (Ms. Lloyd’s exhibit 2), the complaint and its attachments, and Ms. Lloyd’s answers to interrogatories.

<sup>3</sup> Ms. Lloyd also filed these videos with her initial appellant brief, both of which were stricken by this Court. See *Walker v. Allen*, 9th Dist. Summit No. 17466, 1996 WL 170369, \*1 (Apr. 10, 1996) (“Materials appended to briefs which are not part of the record of appeal may not be considered pursuant to App.R. 12(A).”).

Dist. Lorain No. 97CA006856, 1998 WL 646661, \*6 (Sept. 16, 1998), fn. 1, citing *State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus.

### **NEGLIGENCE**

{¶18} To prevail on a claim of negligence, the plaintiff must establish the existence of a duty, a breach of the duty, and an injury proximately resulting from the breach of duty. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984). In order to defeat a summary judgment motion on a negligence claim, the nonmoving party must point to record evidence that would permit reasonable minds to find each of the elements. *Williams v. Portage Country Club Co.*, 9th Dist. Summit No. 28445, 2017-Ohio-8986, ¶ 13, citing *Thewlis v. Munyon*, 9th Dist. Medina No. 2262-M, 1994 WL 57787, \*2 (Feb. 16, 1994). Failure to meet the evidentiary burden on any of the elements will entitle the moving party to judgment as a matter of law. *Id.* To the extent both parties have argued alleged factual disputes regarding the harassment of each other and Ms. Lloyd’s history of filing lawsuits, such facts are irrelevant and unnecessary to the claim of negligence and will not be addressed. *See Elbert*, 143 Ohio App.3d at 532, citing *Orndorff*, 115 Ohio App.3d at 635, citing *Anderson*, 477 U.S. at 248.

### **Duty**

{¶19} A fundamental aspect of establishing negligence is determining whether the defendant owed the plaintiff a duty. *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142 (1989). In a negligence claim, the existence of a duty “depends upon the relationship between the parties and the foreseeability of injury[.]” *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 645 (1992). Thus, “[o]nly when the injured person comes within the circle of those to whom injury may reasonably be anticipated does the defendant owe him a duty of care.” *Gedeon v. East Ohio Gas Co.*, 128 Ohio St. 335, 338 (1934).

{¶20} Whether a duty exists is a question of law. *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989). However, there is no expressed formula for determining whether a duty exists. *Id.* Typically, a duty may be established by common law, legislative enactment, or by the particular facts and circumstances of the case. *Eisenhuth v. Moneyhon*, 161 Ohio St. 367 (1954), paragraph one of the syllabus. When deciding whether the particular circumstances warrant the imposition of a duty, courts consider “the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgments as to where the loss should fall.” *Mussivand* at 319, quoting *Weirum v. RKO Gen., Inc.*, 15 Cal.3d 40, 46 (1975).

{¶21} Mr. Rogerson argued that Ms. Lloyd failed to establish a duty to not smoke around her. Mr. Rogerson pointed out that there are neither laws, nor social or moral codes prohibiting him from smoking. Ms. Lloyd argued the existence of a duty based upon common law and the facts and circumstance of the case, namely that Mr. Rogerson, as a tenant residing in a smoke-free apartment complex, owed Ms. Lloyd, who had a heart problem which was exacerbated by cigarette smoke, a duty to not smoke in accordance with Redwood’s no-smoking policy contained in the lease.

{¶22} Mr. Rogerson is correct that there are no statutes in Ohio prohibiting smoking or creating a duty to not smoke in or outside of an apartment. In 2006, Ohio voters approved a ballot initiative which allowed the Ohio legislature to regulate smoking with respect to proprietors of public places and places of employment. *See* R.C. 3794.01 et seq.; *Ohio Licensed Beverage Assn. v. Ohio Dept. of Health*, 10th Dist. Franklin No. 07AP-490, 2007-Ohio-7147, ¶ 2. While R.C. 3794.03(A) governs smoking in residences that are also used for child or adult care or the operation of a business, the Ohio legislature has not yet limited a person’s right to



smoke in his or her own home that is used solely for private residential purposes. *See Deer Park Inn v. Ohio Dept. of Health*, 185 Ohio App.3d 524, 2009-Ohio-6836, ¶ 11 (10th Dist.).

{¶23} In order to establish that a duty exists under common law and that there are genuine issues of material fact as to a breach of that duty, Ms. Lloyd relied upon three Ohio cases. These cases involved a tenant suing the landlord under the Ohio Landlord-Tenant Act and analyzed the statutory duties owed by a landlord to a tenant regarding smoke infiltrating the tenant's apartment. *See Heck v. Whitehurst Co.*, 6th Dist. Lucas No. L-03-1134, 2004-Ohio-4366, ¶ 5-7, 26-30; *Dworkin v. Paley*, 93 Ohio App.3d 383, 385-388 (8th Dist.1994); *Lloyd v. Roosevelt Properties, Ltd.*, 8th Dist. Cuyahoga No. 105721, 2018-Ohio-3163, ¶ 1, 3, 7, 9-10, 15, 20-21, 23. Those cases are distinguishable, because in this matter Ms. Lloyd is suing another tenant, and not the landlord, regarding cigarette smoke.

{¶24} Mr. Rogerson cited four cases, all outside of Ohio, to support his position that “[c]ourts have not found an obligation from smoking or preventing \* \* \* cigarette smoke from permeating walls.” While three of the cases<sup>4</sup> relied upon by Mr. Rogerson stand for that proposition, he failed to mention an important distinguishing fact: there was no rule or restriction on smoking in those communities. *See DeNardo v. Corneloup*, 163 P.3d 956, 958 (Alaska 2007); *Schuman v. Greenbelt Homes, Inc.*, 212 Md.App. 451, 455-457, 69 A.3d 512 (2013); *Nuncio v. Rock Knoll Townhome Village, Inc.*, 2016 OK CIV APP 83, 389 P.3d 370, ¶ 1, 4.

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<sup>4</sup> Mr. Rogerson's fourth case, *America v. Sunspray Condominium Assn.*, 2013 ME 19, 61 A.3d 1249, is not on point because the lawsuit was filed by the condominium owner against the condominium association and the board members, and did not include any offending neighbors. *Id.* at ¶ 1.

{¶25} As to the question of whether there is a duty, this Court has not found any cases in Ohio directly on point with the facts in this case. However, the out-of-state cases cited by Mr. Rogerson, as well as *Ewen v. Maccherone*, 32 Misc.3d 12, 927 N.Y.S.2d 274 (2011), support the position that a duty exists in this case based upon its specific facts, i.e. smoking restrictions in the lease agreement. In each of the out-of-state cases there was no duty imposed upon the neighbor to not smoke or to prevent the infiltration of smoke into a neighboring unit because there was no rule or restriction in the lease or the condominium by-laws nor was there a state statute prohibiting smoking. See *Ewen* at 15-16; *DeNardo* at 961; *Schuman* at 466-467; *Nuncio* at ¶ 7. Finding the reasoning of these jurisdictions persuasive, we apply that rationale to the facts of this case.

{¶26} Mr. Rogerson and Ms. Lloyd were both tenants of Redwood which was advertised as being a “smoke-free community.” Ms. Lloyd’s lease contained a provision prohibiting smoking inside the apartment, the garage, and the common areas. However, the lease permitted outdoor smoking at locations a “sufficient distance from the building.” Both the area supervisor and the leasing agent of Redwood confirmed the above smoking rules in their testimony during the rent escrow hearing.

{¶27} Mr. Rogerson’s lease was not submitted as evidence for our review. Instead, Ms. Lloyd submitted Mr. Rogerson’s testimony from the eviction hearing to establish that the smoking rules applied to him. Through his testimony, Mr. Rogerson acknowledged that he was aware of the smoking rules in place by Redwood because he specifically inquired with the area supervisor at Redwood about the rules to insure his compliance with them. Additionally, Mr.

Rogerson and Ms. Lloyd testified that upon moving in, Ms. Lloyd advised Mr. Rogerson of her heart problem and her concerns regarding his smoking relative to her health.

{¶28} Based upon the foregoing, Ms. Lloyd presented evidence of facts and circumstances specific to this case creating a genuine issue of material fact as to the existence of a duty by Mr. Rogerson.

### **Breach of Duty**

{¶29} Mr. Rogerson argued that there was no evidence that he smoked around Ms. Lloyd or her residence. He relied upon Ms. Lloyd's deposition testimony that he was never physically inside her apartment. Mr. Rogerson averred in his affidavit that he did not smoke inside his apartment or his garage and his outdoor smoking was in compliance with Redwood's rules.

{¶30} Mr. Rogerson testified at the eviction hearing that he inquired with the area supervisor of Redwood about the smoking rules. He learned that he could not smoke inside the apartment or the garage, but he could smoke outside as long as he was 10 feet away from the buildings. Mr. Rogerson estimated the length of the driveway was 20 to 25 feet. By smoking at the end of the driveway, by the street, Mr. Rogerson believed he was in compliance with Redwood's smoking rules. He testified that he made it a habit to be sure he was 10 feet from the buildings when he smoked. Ms. Lloyd testified at the eviction hearing that the sidewalks were less than 10 feet from the garages and that she observed Mr. Rogerson smoking outside on his driveway and by the street and inside his garage.

{¶31} Redwood's area supervisor testified at the rent escrow hearing regarding the outdoor smoking rule: "Redwood's policy [is] that you are allowed to smoke as long as it is [a] sufficient enough distance away from the building. By our standards that is 10 feet." The area

supervisor conceded the “10 feet” standard was not written in the leases or any advertising materials. Instead, the “10 feet” standard was communicated verbally to a tenant when Redwood was put on notice of a smoking problem. The area supervisor testified that she relayed this information to Ms. Lloyd when Redwood received Ms. Lloyd’s smoking complaints.

{¶32} The leasing agent for Redwood also testified at the rent escrow hearing regarding the rules for smoking outdoors. She explained that smoking is permitted “[o]utside on the sidewalk and road.” She further testified that while smoking was prohibited inside the apartment and garage and in the common areas, the entire property was not smoke-free.

{¶33} Ms. Lloyd argued that because it was a “smoke-free community” Mr. Rogerson was precluded from smoking anywhere on the premises. However, Ms. Lloyd’s lease, in conjunction with the testimony of the area supervisor and leasing agent, reflect that Redwood permitted smoking outdoors, but not in the “common areas.” Neither the lease, nor the leasing agent, defined “common areas.”

{¶34} Further, the lease indicated outdoor smoking was allowed at locations a “sufficient distance from the building.” The phrase “sufficient distance from the building” is ambiguous. Redwood’s “10 feet” standard was not in writing and was only shared with tenants when there was a complaint made about smoking.

{¶35} Based upon the evidence, there is no dispute that Mr. Rogerson smoked outdoors. Construing the evidence in the light most favorable to Ms. Lloyd, there exist genuine issues of material fact as to where outdoor smoking was permitted and whether Mr. Rogerson’s outdoor smoking was in compliance with Redwood’s smoking rules. There are also genuine issues of material fact as to whether Mr. Rogerson smoked inside the garage. Accordingly, there are genuine issues of material fact as to whether Mr. Rogerson breached a duty.

### **Proximate Cause**

{¶36} To establish proximate cause, the plaintiff must prove that her injuries were the “natural and probable consequence” of the negligent act. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 287 (1981). *See also Waugh v. Chakonas*, 9th Dist. Summit Nos. 25417, 25480, 2011-Ohio-2764, ¶ 8.

{¶37} “The Ohio Supreme Court has held that, ‘[e]xcept as to questions of cause and effect which are so apparent as to be matters of common knowledge, the issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry and must be established by the opinion of medical witnesses competent to express such opinion.’” *Scott v. Hong*, 9th Dist. Wayne Nos. 08CA0010, 08CA0018, 2009-Ohio-780, ¶ 13, quoting *Darnell v. Eastman*, 23 Ohio St.2d 13, 17 (1970). The development of a medical condition is typically not within the knowledge of a layperson, thus requiring a medical expert to establish causation of the medical condition. *Schadhauser v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin Nos. 17AP-794, 17AP-795, 17AP-796, 2018-Ohio-3282, ¶ 11. “In the absence of an expert medical opinion, summary judgment on the issue of causation is proper.” *Bogner v. Titleist Club, LLC*, 6th Dist. Wood No. WD-06-039, 2006-Ohio-7003, ¶ 15, citing *Darnell* at syllabus.

{¶38} An expert testifying on the issue of proximate cause must state an opinion as to the causative event in terms of probability. *Mounts v. Malek*, 9th Dist. Summit No. 23638, 2007-Ohio-5112, ¶ 15, quoting *Stinson v. England*, 69 Ohio St.3d 451 (1994), paragraph one of the syllabus. “‘An event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue.’” *Mounts* at ¶ 15, quoting *Stinson* at paragraph one of the syllabus. Otherwise stated, proximate cause requires evidence that the plaintiff’s injury was more likely

than not caused by the defendant's negligence. *See Eck v. State Farm Mut. Ins. Co.*, 9th Dist. Lorain No. 95CA006238, 1996 WL 336946, \*3 (June 19, 1996). Thus, an expert letter that fails to state the doctor's opinion in terms of the probability that the plaintiff's medical condition was caused by the negligent act does not create a genuine issue of material fact as to proximate cause. *See George v. Miracle Solutions, Inc.*, 5th Dist. Stark No. 2009-CA-00088, 2009-Ohio-3659, ¶ 17.

### ***Medical Damages***

{¶39} With regard to Ms. Lloyd's negligence claim for her medical damages, Mr. Rogerson argued there was no evidence from a medical expert establishing causation that Mr. Rogerson's smoking exacerbated her existing health condition and caused her to develop asthma.

{¶40} Ms. Lloyd presented two letters from her doctors, which she relied upon as expert evidence regarding proximate cause between Mr. Rogerson's smoking and her health conditions. As indicated earlier, it is unnecessary to address whether these letters comply with Civ.R. 56(C) and (E), because the letters fail to state an expert opinion as to the causal connection between Mr. Rogerson's acts and Ms. Lloyd's medical condition in terms of the required degree of medical certainty and thus do not create a genuine issue of material fact. *See George* at ¶ 17.

{¶41} The first letter from Dr. Olbrych, a pulmonologist at Cleveland Clinic Respiratory Institute, diagnosed Ms. Lloyd with asthma, and listed its various symptoms. Dr. Olbrych stated "[t]riggers of these symptoms may include environmental tobacco smoke, and environmental irritants, among others." Dr. Olbrych indicated Ms. Lloyd advised him that her neighbor in the adjoining apartment was a smoker and then concluded "[c]learly this can aggravate her cough for medically confirmed reasons."

{¶42} Ms. Lloyd contends on appeal that Dr. Olbrych states that “[Mr. Rogerson] was the sole cause of her developing asthma.” Ms. Lloyd has mischaracterized Dr. Olbrych’s letter. Nowhere in Dr. Olbrych’s letter did he make such a definitive conclusion. On the contrary, Dr. Olbrych stated there are multiple triggers for asthma symptoms and her neighbor’s tobacco smoke “can” aggravate her cough, which is a symptom of asthma.

{¶43} Moreover, Dr. Olbrych did not state his opinion as to the causative event in terms of probability, i.e. “a greater than fifty percent likelihood[.]” *see Stinson*, 69 Ohio St.3d 451 at paragraph one of the syllabus, or “more likely than not.” *See Eck*, 1996 WL 336946, at \*3. Instead, Dr. Olbrych’s opinion stated alternative causes without any one alternative being more likely than not the cause of Ms. Lloyd’s asthma. Accordingly, Dr. Olbrych’s opinion failed to state with any degree of medical probability that Mr. Rogerson’s smoking was the proximate cause of Ms. Lloyd’s new health condition.

{¶44} The second letter from Dr. Elderbrock, Ms. Lloyd’s family doctor at the Cleveland Clinic, consisted of one sentence: “This is to certify that Ms. Susan M[.] Lloyd has medical conditions that are greatly affected by exposure to cigarette smoke, so she needs to live in a smoke[-]free environment.” Dr. Elderbrock’s letter failed to 1) identify Ms. Lloyd’s pre-existing medical conditions, 2) opine that Ms. Lloyd suffered an exacerbation of her pre-existing medical conditions, and 3) opine that Mr. Rogerson’s smoking was more likely than not the cause of the exacerbation of her medical conditions.

{¶45} Additionally, Ms. Lloyd testified at the eviction hearing that her heart issues were exacerbated by cigarette smoke and that she sought medical treatment with various doctors and emergency rooms. While Ms. Lloyd testified as to her pre-existing heart conditions and the worsening of her conditions, she could not rely solely upon her own testimony because the

development of a medical condition falls outside of the realm of common knowledge of a layperson. *See Schadhauser*, 2018-Ohio-3282, at ¶ 11. Thus, Ms. Lloyd was required to submit evidence from a medical expert to establish causation of the exacerbation of her medical conditions and her asthma diagnosis, but has failed to do so.<sup>5</sup> *See id.*

{¶46} In construing the evidence in the light most favorable to Ms. Lloyd, we conclude that she has failed to establish a genuine issue of material fact relating to the proximate cause of her medical damages. *See George*, 2009-Ohio-3659, at ¶ 17; *Bogner*, 2006-Ohio-7003, at ¶ 15, citing *Darnell* at syllabus.

### ***Property Damages***

{¶47} As for Ms. Lloyd’s property damage, Mr. Rogerson argued that “the record [was] \* \* \* void of any evidence of property damage allegedly caused by Mr. Rogerson.” However, Ms. Lloyd testified in deposition that Mr. Rogerson’s cigarette smoke infiltrated her apartment and caused damage to her furniture and her dogs.

{¶48} On appeal, Mr. Rogerson seeks to exclude evidence regarding damages to Ms. Lloyd’s dogs because her complaint failed to “make any claims for property damage, specifically damage relating to her dogs.” Contrary to Mr. Rogerson’s argument, the complaint contained a general claim for property damage. *See* Civ.R. 8(A). While the complaint did not specify the types of property damage, Ohio statutorily recognizes pets as personal property. R.C. 955.03. Accordingly, Mr. Rogerson’s argument is not well-taken as Ms. Lloyd’s complaint asserted a claim for property damage, which included her dogs.

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<sup>5</sup> Contrary to Ms. Lloyd’s position, Mr. Rogerson was not required to conduct depositions or other discovery of her medical experts in order to adduce the proper and necessary expert evidence that she failed to produce.



{¶49} In construing the evidence in the light most favorable to Ms. Lloyd, we conclude that she has presented evidence creating a genuine issue of material fact as to the proximate cause of her property damages.

### **WILLFUL AND WANTON MISCONDUCT**

{¶50} Ms. Lloyd's second cause of action alleged that Mr. Rogerson's smoking was willful and wanton misconduct. However, Ohio law does not recognize a stand-alone cause of action for willful and wanton misconduct. *See Griggy v. Cuyahoga Falls*, 9th Dist. Summit 22753, 2006-Ohio-252, ¶ 8. "Willful, wanton, and reckless conduct is technically not a separate cause of action, but a level of intent which negates certain defenses which might be available in an ordinary negligence action." *Id.*, quoting *Cincinnati Ins. Co. v. Oancea*, 6th Dist. Lucas No. L-04-1050, 2004-Ohio-4272, ¶ 17. For instance, allegations of willful, wanton, and reckless conduct by a defendant can be raised as a defense to liability when immunity has been established. *See Griggy* at ¶ 8; *Caraballo v. Cleveland Metro. School Dist.*, 8th Dist. Cuyahoga No. 99616, 2013-Ohio-4919, ¶ 34. Mr. Rogerson has not alleged any defense that could be negated by proof of willful and wanton misconduct.

{¶51} Willful, wanton, and reckless misconduct are also elements in other causes of action. *Doe v. Springfield-Clark Career Technology Ctr.*, S.D. Ohio No. 3:14-cv-00046, 2015 WL 5729327, \*25 (Sept. 30, 2015). In this case, Ms. Lloyd's only other cause of action is negligence, which does not include willful and wanton misconduct as an element. *See Menifee*, 15 Ohio St.3d at 7.

{¶52} Because willful and wanton misconduct is not a recognized separate cause of action in Ohio, Mr. Rogerson is entitled to summary judgment as a matter of law as to Ms. Lloyd's second cause of action. *See Rodriguez v. Cleveland*, 619 F. Supp.2d 461, 485

(N.D.Ohio 2009), *rev'd in part on other grounds*, 439 Fed.Appx. 433 (6th Cir.2011); *Ward v. Cty. of Cuyahoga*, 721 F.Supp.2d 677, 694 (N.D.Ohio 2010).

### **CONCLUSION**

{¶53} For the reasons articulated above, this Court concludes that genuine issues of material fact exist with regard to Ms. Lloyd's negligence claim relating to property damages. Accordingly, the trial court erred by rendering summary judgment in favor of Mr. Rogerson on this claim.

{¶54} We further conclude that no genuine issues of material fact exist as to Ms. Lloyd's negligence claim regarding her medical damages. Additionally, Mr. Rogerson was entitled to judgment as a matter of law as to Ms. Lloyd's second cause of action for willful and wanton misconduct. Accordingly, the trial court properly granted summary judgment in favor of Mr. Rogerson as to these claims.

{¶55} In addition to overturning the trial court's summary judgment decision, Ms. Lloyd requests that a new judge be assigned to her case. This Court, however, does not have the authority to disqualify the trial court judge. *Beer v. Griffith*, 54 Ohio St.2d 440, 441 (1978); *Shih v. Byron*, 9th Dist. Summit No. 25319, 2011-Ohio-2766, ¶ 24. Accordingly, Ms. Lloyd's request for the assignment of a new judge is overruled.

{¶56} Ms. Lloyd's first, sixth, and ninth assignments of error are sustained in part and overruled in part. Ms. Lloyd's tenth assignment of error is overruled.

### **ASSIGNMENT OF ERROR NO. 3**

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DISMISSING  
[MS.] LLOYD'S CASE AFTER AN EX PARTE COMMUNICATION[.]

**ASSIGNMENT OF ERROR NO. 4**

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY TELLING ATTORNEY SEAN KENNEALLY TO FILE A MOTION FOR SUMMARY JUDGMENT BEFORE HEARING ANY OF [MS. LLOYD’S] EVIDENCE AND WITHOUT [MR. ROGERSON] ASKING FOR TIME TO FILE A MOTION FOR SUMMARY JUDGMENT[.]

**ASSIGNMENT OF ERROR NO. 5**

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO LOOK AT [MS.] LLOYD’S EVIDENCE IN ITS ENTIRETY[.]

{¶57} In these assignments of error, Ms. Lloyd asserts that the trial judge violated the judicial canons and was biased against her when it instructed Mr. Rogerson’s counsel to file a summary judgment motion and then granted the motion without reviewing her brief in opposition and exhibits. Ms. Lloyd argues the trial court’s summary judgment ruling against her was based upon an ex parte communication with Mr. Rogerson’s counsel regarding her Facebook posting. This Court disagrees.

{¶58} Ms. Lloyd relies upon “canon 3 (5)” of the Ohio Code of Judicial Conduct for the proposition that “a judge shall perform judicial duties without bias or prejudice.” Ms. Lloyd seeks to overturn the summary judgment decision and to have a new trial court judge appointed because of alleged bias demonstrated by the trial court judge relative to the summary judgment proceedings. This Court, however, is precluded from addressing Ms. Lloyd’s bias arguments. *See Smith v. Cindy Lucky 7’s LLC*, 9th Dist. Summit No. 29065, 2019-Ohio-1157, ¶ 19.

{¶59} The Ohio Supreme Court has held that “[s]ince only the Chief Justice or his [or her] designee may hear disqualification matters, the Court of Appeals [is] without authority to pass upon disqualification or to void the judgment of the trial court upon that basis.” *Beer*, 54 Ohio St.2d at 441. *Accord Smith* at ¶ 19, quoting *In re Estate of Durkin*, 9th Dist. Summit No. 28661, 2018-Ohio-2283, ¶ 42, quoting *King v. Rubber City Arches, L.L.C.*, 9th Dist. Summit No.

25498, 2011-Ohio-2240, ¶ 6. “It is not the role of this Court to make a determination as to whether the trial court exhibited a bias against a party.” *Shih*, 2011-Ohio-2766, at ¶ 24. Thus, this Court lacks the authority to address Ms. Lloyd’s arguments regarding the trial judge’s bias toward her or to overturn the summary judgment on that basis. *See In re Estate of Durkin* at ¶ 42.

{¶60} Ms. Lloyd also contends that Mr. Rogerson’s counsel had an *ex parte* communication with the trial court judge regarding her Facebook post inquiring about the judge. Ms. Lloyd concludes that the trial court judge dismissed her case the next morning based upon this *ex parte* communication.

{¶61} “To prevail on a claim of prejudice due to an *ex parte* communication, the complaining party must first produce some evidence that an *ex parte* proceeding occurred.” (Emphasis in original.) *In re Swader*, 12th Dist. Warren No. CA2000-04-036, 2001 WL 121084, \*4 (Feb. 5, 2001), citing *State v. Jenkins*, 15 Ohio St.3d 164, 236-237 (1984). While Ms. Lloyd made allegations of an *ex parte* communication in her appellate brief, she has failed to cite to anything in the record to prove its occurrence. *See App.R. 16(A)(7)*. “Since a reviewing court can only reverse the judgment of a trial court if it finds error in the proceedings of such court, it follows that a reviewing court should be limited to what transpired in the trial court as reflected by the record made of the proceedings.” *Ishmail*, 54 Ohio St.2d at 405-406. This Court’s review is limited to the record before us. *Reitz v. Akron Aerie No. 555 Fraternal Order of Eagles*, 9th Dist. Summit No. 20454, 2001 WL 1379445, \*3 (Nov. 7, 2001). *See App.R. 9; see also App.R. 12(A)(1)(b)*. In light of the absence of any record evidence of an *ex parte* communication, we cannot consider this argument. *See Chase Manhattan Mtge. Corp. v. Locker*, 2d Dist. Montgomery No. 19904, 2003-Ohio-6665, ¶ 10.

{¶62} Ms. Lloyd’s claim that the trial court never reviewed her brief in opposition and exhibits is also unsupported by the record. On the contrary, the trial court’s order stated it “ha[d] reviewed the evidentiary materials and the arguments of counsel.” Ms. Lloyd did not point to any record evidence contradicting this statement. Instead, she has only presented conjecture that the trial court did not review her brief and exhibits because it entered a ruling within two days of her filing a brief and hours after an alleged ex parte communication. “[A]bsent an affirmative demonstration on the record that the trial court failed to review all of the summary judgment materials before it, an appellate court will presume that it did.” *B.F. Goodrich Co. v. Commercial Union Ins.*, 9th Dist. Summit No. 20936, 2002-Ohio-5033, ¶ 42. Based upon the record, this Court presumes that the trial court reviewed Ms. Lloyd’s brief and exhibits.

{¶63} Ms. Lloyd’s third, fourth, and fifth assignments of error are overruled.

#### **ASSIGNMENT OF ERROR NO. 7**

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING  
[A] MOTION FOR SUMMARY JUDGMENT [TO] BE FILED TWO DAYS  
AFTER THE DEADLINE WITHOUT ASKING THE COURT[’]S  
PERMISSION TO EXTEND THE DEADLINE[.]

{¶64} Ms. Lloyd’s seventh assignment of error argues that the trial court erred in granting summary judgment because Mr. Rogerson filed the summary judgment motion after the deadline and without requesting an extension. This Court disagrees.

{¶65} “‘It is well-settled that a trial court has the inherent power to control its own docket and the progress of the proceedings in its court.’” *Business Data Sys., Inc. v. Gourmet Cafe Corp.*, 9th Dist. Summit No. 23808, 2008-Ohio-409, ¶ 21, quoting *Pavarini v. Macedonia*, 9th Dist. Summit No. 20250, 2001 WL 390070, \*3 (Apr. 18, 2001). This Court reviews a trial court’s docketing decisions, including a decision to accept an untimely filed summary judgment motion, for an abuse of discretion. *Pavarini* at \*3; *Cooper v. Valvoline Instant Oil Change*, 10th

Dist. Franklin No. 07AP-392, 2007-Ohio-5930, ¶ 8, citing *State ex rel. Avalon Precision Casting Co. v. Indus. Comm.*, 109 Ohio St.3d 237, 2006-Ohio-2287, ¶ 7. An abuse of discretion connotes that the court was unreasonable, arbitrary, or unconscionable in its judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). An appellate court cannot interfere with the trial court's decision to accept a summary judgement motion filed after the deadline absent a clear showing that the acceptance of the late motion was prejudicial to the appellant. *Juergens v. Strang, Klubnik & Assoc., Inc.*, 96 Ohio App.3d 223, 234 (8th Dist.1994).

{¶66} The trial court initially scheduled a dispositive motion deadline of October 15, 2017 and a jury trial for February 12, 2018. Following a February 7, 2018 status conference, the trial court continued the trial date for two months. Another order followed wherein the trial court canceled the new trial date and granted Mr. Rogerson leave until March 7, 2018 to file a motion for summary judgment. Mr. Rogerson filed his motion on March 9, 2018, two days late, and without requesting leave to file beyond the deadline.

{¶67} In response to Mr. Rogerson's summary judgment motion, the trial court issued another order accepting Mr. Rogerson's late filing and setting forth a cut-off date for the filing of additional briefs and supporting evidence. Ms. Lloyd did not file a motion to strike Mr. Rogerson's untimely brief or object to the untimely filing. Instead, in her factual and procedural history section of her brief in opposition, Ms. Lloyd only noted the summary judgment deadline and the date Mr. Rogerson actually filed the motion. Ms. Lloyd did not argue for the denial of the motion due to its untimeliness, nor did she assert any prejudice to her by the untimely motion.

{¶68} On appeal, Ms. Lloyd relies upon Civ.R. 12(A) and Civ.R. 6(B) to argue, for the first time, that the untimely filing of the motion was a basis to deny the summary judgment motion. “It is axiomatic that a litigant who fails to raise an argument in the trial court forfeits his right to raise that issue on appeal.” *Stefano & Assocs., Inc. v. Global Lending Group, Inc.*, 9th Dist. Summit No. 23799, 2008-Ohio-177, ¶ 18. By not raising this argument below, Ms. Lloyd failed to preserve it for appeal and has forfeited all but a plain error argument. *Brunke v. Ohio State Home Servs., Inc.*, 9th Dist. Lorain No. 13CA010500, 2015-Ohio-2087, ¶ 47, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121 (1997). While Ms. Lloyd could have argued plain error, she has not done so, and we are not inclined to create a plain error argument on her behalf. *Brunke* at ¶ 47.

{¶69} Based upon the foregoing, we conclude the trial court did not abuse its discretion in accepting Mr. Rogerson’s motion for summary judgment filed two days late and without leave of court. *See Huntington Natl. Bank v. Payson*, 2d Dist. Montgomery No. 26396, 2015-Ohio-1976, ¶ 38-40. Ms. Lloyd’s seventh assignment of error is overruled.

### **ASSIGNMENT OF ERROR NO. 8**

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY CALLING  
[MS.] LLOYD FRIVOLOUS IN HIS RULING TO DISMISS [THE] CASE  
WITH PREJUDICE[.]

{¶70} Ms. Lloyd argues that the trial court’s reference to her as “frivolous” was error. This Court disagrees with Ms. Lloyd’s stated assignment of error.

{¶71} First, Ms. Lloyd has misconstrued the language in the trial court’s judgment entry. The trial court did not “call[] [Ms.] Lloyd frivolous.” Instead, the judgment entry referred to her claims as being frivolous: “There is no basis in fact or law for [Ms. Lloyd’s] claims. *They* are frivolous.” (Emphasis added.)

{¶72} Second, Ms. Lloyd relies upon R.C. 2323.51, the frivolous conduct statute, to argue that she was not frivolous in this case. Ms. Lloyd’s reliance upon R.C. 2323.51 is misplaced. In order for R.C. 2323.51 to be applicable, a motion must be filed within 30 days after the final judgment in a civil action or appeal, a hearing held, and a monetary award ordered. *See* R.C. 2323.51(B). While the trial court referenced Ms. Lloyd’s claims as being frivolous, it did not make such a finding pursuant to the statute, nor could it based upon the procedural posture of this matter: the “frivolous” statement was made in the final judgment entry, no motion was filed, no hearing was held, and no monetary award was issued against Ms. Lloyd.

{¶73} Upon review of the record and the judgment entry, the trial court’s reference to Ms. Lloyd’s claims as being frivolous was not a legal determination pursuant to R.C. 2323.51, but instead an observation or opinion regarding the merits of Ms. Lloyd’s claim. *See Davis v. Eachus*, 4th Dist. Pike No. 04CA725, 2004-Ohio-5720, ¶ 18. “Those observations are essentially dicta and, even if improper, constitute at most harmless error.” *Id.*, citing Civ.R. 61.

{¶74} Ms. Lloyd’s eighth assignment of error is overruled.

### **ASSIGNMENT OF ERROR NO. 2**

THE TR[IA]L COURT COMMITTED REVERSIBLE ERROR BY ALLOWING  
[MR. ROGERSON] AND HIS ATTORNEY TO COMMIT PERJURY[.] \* \* \*

{¶75} Ms. Lloyd argues that the trial court erred by allowing Mr. Rogerson and his counsel to commit perjury in support of the summary judgment motion. This Court disagrees.

{¶76} Ms. Lloyd’s perjury argument is premised upon her disagreement with multiple statements made by Mr. Rogerson and his counsel in support of the motion for summary judgment. This argument infers that Mr. Rogerson and his counsel were untruthful and thus was a challenge to their credibility. “The trial court is not permitted to weigh evidence or resolve issues of credibility on summary judgment.” *Cook v. Reising*, 181 Ohio App.3d 546, 2009-Ohio-



1131, ¶ 15 (9th Dist.). *See McKinney v. Stoltzfus*, 9th Dist. Summit No. 11964, 1985 WL 10704, \*2 (Apr. 24, 1985) (“In a motion for summary judgment credibility is not a factor[.]”). Accordingly, Ms. Lloyd’s perjury arguments in this context are not well-taken.

{¶77} Additionally, as noted above, many of the statements that Ms. Lloyd labeled as perjury are improper in the summary judgment analysis because they concern facts that are irrelevant and not material to Ms. Lloyd’s negligence claim. *See Elbert*, 143 Ohio App.3d at 532, citing *Orndorff*, 115 Ohio App.3d at 635, citing *Anderson*, 477 U.S. at 248. Further, statements made by Mr. Rogerson’s counsel in the summary judgment motion regarding Ms. Lloyd’s lack of evidence were legal arguments necessary to satisfy the initial *Dresher* burden and not perjury.

{¶78} To the extent that Ms. Lloyd is attempting to establish the existence of a genuine issue of material fact based upon alleged discrepancies in the testimony and averments by Mr. Rogerson regarding his smoking, this argument is moot in light of the above analysis regarding the trial court’s summary judgment decision as to the negligence claim. *See App.R. 12(A)(1)(c)*.

{¶79} Ms. Lloyd’s second assignment of error is overruled.

### III.

{¶80} Ms. Lloyd’s second, third, fourth, fifth, seventh, eighth, and tenth assignments of error are overruled and her first, sixth, and ninth assignments of error are sustained in part and overruled in part. The judgment of the Wayne County Common Pleas Court is affirmed in part and reversed in part and the cause is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,  
reversed in part,  
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

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LYNNE S. CALLAHAN  
FOR THE COURT

TEODOSIO, P. J.  
CARR, J.  
CONCUR.

APPEARANCES:

SUSAN LLOYD, pro se, Appellant.

TERRENCE J. KENNEALLY and SEAN M. KENNEALLY, Attorneys at Law, for Appellee.