[Cite as *MacKeigan v. Salvation Army*, 2011-Ohio-515.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

WILLIAM MACKEIGAN	C. A. No. 10CA009766
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
SALVATION ARMY	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellee	CASE No. 08CV159294

DECISION AND JOURNAL ENTRY

Dated: February 7, 2011

CARR, Judge.

{¶1} Appellants, William and Joanne MacKeigan, appeal the order of the Lorain County Court of Common Pleas, which granted summary judgment in favor of appellees, Salvation Army and the Estate of Jack Lance. This Court reverses.

I.

{¶2} On November 3, 2008, the MacKeigans filed a negligence/personal injury complaint against Salvation Army and Charles Lance, fiduciary of the estate of Jack Lance ("the Estate"). The allegations were as follows. The decedent Jack Lance owned property which was leased to Salvation Army. Mr. MacKeigan was on the property as a business invitee for the purpose of delivering mail when he stepped on a concrete curb which broke away, causing him to fall and sustain bodily injuries. Mrs. MacKeigan alleged a loss of consortium due to her husband's injuries. Both Salvation Army and the Estate answered, generally denying the allegations.

{¶3} Both the Estate and Salvation Army filed motions for summary judgment, arguing alternatively that the defect in the sidewalk was an open and obvious defect and a latent defect of which they had no notice. The MacKeigans filed a response in opposition to the motions for summary judgment. The trial court granted summary judgment in favor of both the Estate and Salvation Army, finding that the hazard was either a latent defect or an open and obvious condition, in either event obviating the defendants' duty to warn Mr. MacKeigan. The MacKeigans filed a timely appeal in which they raise one assignment of error for review.

II.

ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO THE DEFENDANTS-APPELLEES; FINDING THAT THE DEFECT IN THE SIDEWALK THAT CAUSED PLAINTIFF'S FALL WAS EITHER A HIDDEN DEFECT OR AN OPEN AND OBVIOUS HAZARD; NEITHER OF WHICH WOULD MAKE THE DEFENDANTS LIABLE TO THE PLAINTIFF FOR NEGLIGENCE." (sic)

{¶4} The MacKeigans argue that the trial court erred by granting summary judgment in favor of Salvation Army and the Estate. This court agrees.

{¶5} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶6} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for

> summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶7} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶8} It is axiomatic that the non-moving party's reciprocal burden does not arise until after the moving party has met its initial evidentiary burden. To do so, the moving party must set forth evidence of the limited types enumerated in Civ.R. 56(C), specifically, "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]" Civ.R. 56(C) further provides that "[n]o evidence or stipulation may be considered except as stated in this rule."

{¶9} In this case, in support of the defendants' respective arguments, both motions for summary judgment made numerous references to the deposition testimony of Mr. MacKeigan and a Linda Tyree. Neither defendant, however, filed any depositions as part of the record. While the Estate filed a notice of service of interrogatories on the MacKeigans, it failed to append the plaintiffs' answers to the interrogatories. The sole evidence appended to the Estate's motion was the affidavit of the fiduciary of the Estate.

{¶10} Civ.R. 56(E) mandates that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." The fiduciary averred that the decedent Jack Lance (and now his estate) owned the property where Mr. MacKeigan was injured, and that Jack Lance and Salvation Army had an oral lease agreement. The fiduciary averred as to various provisions, as well as the manner of performance, of the oral contract between the decedent and Salvation Army without, however, averring how, or even that, he had any personal knowledge of the details of either the oral contract's provisions or its performance. For example, the fiduciary did not aver that Salvation Army or the decedent prior to death discussed the terms of the oral contract with him. He did not aver that he has assumed Jack Lance's role in the performance of the contract between the decedent and Salvation Army. In addition, the fiduciary did not make any averments regarding the condition of the sidewalk or that any condition was either open or obvious or a latent defect of which the Estate had no knowledge. Accordingly, there is nothing to demonstrate that the fiduciary's affidavit comports with the requirements set forth in Civ.R. 56(E).

{¶11} Neither defendant appended any evidence of the type permitted and required by Civ.R. 56 in support of the respective motions for summary judgment. The rule requires that summary judgment be premised on appropriate evidence which demonstrates that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Bare, unsubstantiated allegations of what the evidence is are insufficient to support an order awarding summary judgment. By failing to present any appropriate evidence, neither the Estate nor Salvation Army met its respective initial burden pursuant to *Dresher*. Accordingly, the trial

court erred by granting summary judgment in favor of both defendants against the plaintiffs. The MacKeigans' assignment of error is sustained.

III.

{¶12} The MacKeigans' sole assignment of error is sustained. The judgment of the Lorain County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

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 Lorain, 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(E). 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 to Appellees.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

CARL J. ROSE, Attorney at Law, for Appellant.

WILLIAM LANG, Attorney at Law for Appellant.

SHANNON FOGARTY, Attorney at Law, for Appellee.

JOSEPH K. OLDHAM, and CARYN L. PETERSON, Attorneys at Law, for Appellee.