IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

HARRY J. WALLACE,	:	
Plaintiff,	:	
-vs-	:	Case No. 17CV C 10 0581
DELAWARE COUNTY AGRICULTURAL SOCIETY,	:	
Defendant.	:	
-vs-	:	
ALEX LYON & SONS SALES MANAGERS AND AUCTIONEERS, INC.	:	
Third-Party Defendant.	:	

Judgment Entry Granting Defendant DCAS's 10/25/18 Motion for Summary Judgment and Addressing Defendant Lyon's 1/29/19 Motion for Summary Judgment and for Sanctions

This matter is before the Court on (1) Defendant Delaware County Agricultural Society's ("DCAS") October 25, 2018 motion for summary judgment and (2) Third-Party Defendant Alex Lyon & Sons Sales Managers and Auctioneers, Inc.'s ("Lyon") January 29, 2019 motion for summary judgment and for sanctions.

I. Factual and Procedural History

On November 17, 2015, DCAS entered into a facility lease agreement with Lyon. (Third-Party Compl. ¶ 4.) The lease agreement allowed Lyon – an equipment sales and auction company – to use the Delaware County Fairgrounds (the "Fairgrounds") for an auction on January 16, 2016. (Third-Party Compl. Ex. A.)

On December 15, 2015, Plaintiff Harry J. Wallace traveled to the Fairgrounds to

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photograph a piece of equipment – a Skidsteer – that his cousin was interested in purchasing at the upcoming auction. (Compl. ¶ 2; Wallace Dep. 7-8.) Wallace arrived at the Fairgrounds between 6:45 and 7:15 p.m. *Id.* at 9. Wallace alleges that as he exited the driver's side door of his truck, his left foot or left pant leg was caught by an object. *Id.* at 12, 16. He stumbled forward, tripped on another object – either a pile of rocks or a slab of concrete – and crashed face-first into the Skidsteer. *Id.* at 12.

The collision broke Wallace's jaw and knocked out several of his teeth. (Compl. ¶ 8.) Despite his injuries, Wallace was able to drive himself to an emergency medical station located near the Fairgrounds. (Wallace Dep. 24.) The staff at the station called an ambulance, and the ambulance transported Wallace to Grady Memorial Hospital. *Id.*

On October 10, 2017, Wallace filed a negligence action against DCAS. Wallace's complaint alleges that DCAS had a duty to Wallace, a business invitee, to warn him of any unreasonably dangerous conditions at the Fairgrounds.

DCAS then filed a motion – on November 11, 2017 – requesting the Court's leave to file a third-party complaint against Lyon. The Court granted DCAS's motion, and DCAS filed the third-party complaint on December 13, 2017. DCAS, however, neglected to attach a copy of the facility lease agreement to the third-party complaint, and Lyon filed a motion for a more definite statement. The Court granted Lyon's motion, and DCAS filed an amended complaint on August 27, 2018. The third-party complaint includes claims for indemnification and contribution.

On October 25, 2018, DCAS filed a motion for summary judgment. Wallace filed a memorandum in opposition, and DCAS filed a reply thereto. On January 29, 2019, Lyon filed a motion for summary judgment and for sanctions. DCAS filed a memorandum in opposition, and Lyon filed a reply thereto.

II. The Law Governing Motions for Summary Judgment

The Court must make disposition of DCAS's motion for summary judgment within the confines of Civil Rule 56(C), as well as the interpretation of that rule by the Supreme Court of Ohio. *See, e.g., State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 663 N.E.2d 639 (1996). Under Civil Rule 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). The moving party cannot discharge its burden with a conclusory assertion that the nonmoving party has no evidence to prove its case; the moving party must point to evidence of the type listed in Civil Rule 56(C), affirmatively demonstrating that the nonmoving party has no evidence to support the claims. *Vahila v. Hall*, 77 Ohio St.3d 421, 674 N.E.2d 1164 (1997). In doing so, the moving party must rely exclusively on "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact" to establish that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Civ.R. 56(C).

If the moving party satisfies its burden, the burden then shifts to the nonmoving party to set forth specific facts demonstrating that there is a genuine issue of material fact for trial. *Vahila*, 77 Ohio St.3d at 429. Summary judgment should be granted where the nonmoving party does not respond with – or fails to set forth, by affidavit or as otherwise provided in Civil Rule 56 – specific facts showing that there is a genuine issue for trial. *Dresher*, 75 Ohio St.3d at 293; Civ.R. 56(E).

A motion for summary judgment may not be granted unless the court determines

that: (1) no genuine issue as to any material fact remains for litigation; (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 the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Tompkins*, 75 Ohio St.3d at 448.

III. DCAS's motion for summary judgment is granted.

DCAS offers three arguments in support of its motion for summary judgment. First, DCAS submits that because Wallace cannot identify the cause of his fall, he cannot establish that DCAS failed to exercise due care. Second, DCAS contends that that even if Wallace did indeed trip on the object that he believes he tripped on – a piece of wire protruding from the ground – DCAS has no duty to protect against open and obvious dangers. Finally, DCAS asserts that even if it did owe a duty to Wallace, Wallace cannot show that DCAS breached that duty. For the following reasons, the Court finds that DCAS is entitled to summary judgment in its favor.

To prevail on a negligence claim, a plaintiff must demonstrate that (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; and (3) the plaintiff suffered injury proximately caused by the defendant's breach of duty. *See Simmons v. Quarry Golf Club, LLC*, 2016-Ohio-525, 60 N.E.3d 454, ¶ 19 (5th Dist.).

The duty owed by a property owner to an individual who enters the owner's property depends on the relationship between the property owner and that individual. *See Davis v. Smith*, 5th Dist. Licking No. 16–CA–50, 2017-Ohio-113, ¶ 13 (citations omitted). In premises-liability cases, such as this one, Ohio adheres to the common-law classifications of invitee, licensee, and trespasser. *Id.* An invitee is a visitor who rightfully enters and remains on the premises of another at the express or implied

invitation of the owner and for a purpose beneficial to the owner. *Broka v. Cornell's IGA Foodliner Inc.*, 5th Dist. Richland No. 12CA100, 2013-Ohio-2506, ¶ 20 (citations omitted).

Here, the parties do not dispute that Wallace was a business invitee at the time of the accident. "The owner or occupier of the premises owes the invitee a duty to exercise ordinary care to maintain its premises in a reasonably safe condition, such that its invitees will not unreasonably or unnecessarily be exposed to danger." *Broka*, 2013-Ohio-2506 at ¶ 20. This duty includes the obligation to maintain the premises in a reasonably safe condition and to warn invitees of any latent or hidden dangers if the owner knows or has reason to know of the hidden dangers. *See Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5.

a. Wallace cannot identify the cause of his fall.

First, DCAS argues that because Wallace cannot identify the object that caused him to fall, he cannot establish that DCAS failed to exercise due care. In response, Wallace contends that he need not specifically identify the cause of his accident, and that a jury may reasonably infer that a piece of wire was the cause.

"The mere fact that a person slipped and fell, standing alone, is not sufficient to create an inference that the floor was unsafe or to establish negligence, there must be evidence showing that some negligent act or omission caused the plaintiff to slip and fall." *Flowers ex rel. Estate of Kelley v. Penn Traffic Co.*, 10th Dist. Franklin No. 01AP-82, 2001 WL 921427, *4.

"To establish negligence in a slip and fall case, it is incumbent upon the plaintiff to identify or explain the reason for the fall." *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 67-68 (1989), citing *Cleveland Athletic Assn. Co. v. Bending*, 129 Ohio

St. 152, 154-155, 194 N.E. 6 (1934). "A finding of negligence is precluded when the plaintiff, either personally or with the use of outside witnesses, cannot identify what caused the fall." *Id.* "Speculation or conjecture by the plaintiff as to the culpable party who caused his fall and what caused his fall is not sufficient, as a matter of law, since the issue of proximate cause is not open to speculation." *Id., see also Hildebrandt v. Kroger Co.*, 5th Dist. Licking No. 01-CA-114, 2002-Ohio-2544, ¶ 7.

In *Gibbs v. Speedway, LLC*, 2nd Dist. No. 26026, 2014-Ohio-3055, 15 N.E.3d 444, ¶ 3, the plaintiff visited a gas station to purchase kerosene. After making his purchase, the plaintiff exited the gas station and began to cross the parking lot – which may have been iced over – to return to his vehicle. *Id.* at ¶ 4. As he did so, he slipped and fell. *Id.*

The plaintiff filed suit against the gas station, claiming that he had stepped into a pothole on the gas station's lot. *Id.* at ¶ 6. During the course of discovery, however, the plaintiff stated that he did not know what caused him to fall.

> Q. Am I correct that in Paragraph 9 of the Complaint, you've alleged that you stepped into a pothole in the parking lot of the Speedway store and that's what caused you to fall?
>
> A. I don't know what it was. I don't know what I stepped on or stubbed my toe on. I don't know—I saw the red cap when I went by later, and I thought maybe that was it. But I don't even know if that was it or if it was just—it was so rutted up and iced over and thick with all that in the lot, that I might have just tripped in the ice, you know, in the rut in the ice, or I might have tripped on that cap right there. I'm not sure.
>
> Q. So you just don't know?
>
> A. It was dark. It was pitch dark. I couldn't tell you.
>
> Q. You just don't know why you fell?
>
> A. All I know is I stubbed my left foot on something. And

> that's when I went down. But I don't know what it was. Because I couldn't see anyway. All I wanted to do after that was get up and go home. I mean, I was laying in a cold parking lot, sweating all over, you know, in pain.

Id.

The gas station filed a motion for summary judgment, arguing that the plaintiff could not identify the cause of his fall. *Id.* at ¶ 7. The trial court granted the motion. *Id.* The appellate court affirmed the trial court's decision, explaining that the plaintiff's inability to identify the cause of his fall precluded a finding of negligence on the gas station's behalf. *Id.* at ¶ 21.

Similarly, in *Meyer v. Dayton*, 2nd Dist. No. 27002, 2016-Ohio-8080, 74 N.E.3d 921, ¶ 2, the plaintiff parked her vehicle in a long-term parking lot at the Dayton International Airport. After returning from her trip, the plaintiff – pushing a four-wheeled suitcase – exited the airport, walked through a parking garage, and entered the parking lot. *Id.* at ¶ 3. As she approached her car, the suitcase stopped abruptly, causing her to fall forward onto the asphalt and break her leg. *Id.*

The plaintiff sued the City of Dayton and the airport. *Id.* at ¶ 6. Dayton filed a motion for summary judgment, arguing that the plaintiff was unable to identify the cause of her fall. *Id.* The trial court granted the motion. *Id.* On appeal, the court affirmed the trial court's decision, explaining that the plaintiff was unable to identify what caused her suitcase to stop abruptly. *Id.* at ¶ 26. She "speculate[d] that it was one of the suitcase wheels catching in a rut or divot, but she was unsure." *Id.* at ¶ 29. Moreover, the plaintiff could not "point to a particular rut or crack as the culprit," and photos taken of the scene did not show any "substantial" ruts or divots. *Id.*

Here, Wallace testified that the Fairgrounds were well lit on the night of his

accident and that he could have seen potential obstacles in his path.

Q: Did you have any trouble seeing anything?

A: No.

Q: Anything you looked down, you would be able to see fine?

A: Yes.

Q: So in other words, the lighting was sufficient for you to visualize any potential –

A: I felt it was.

Q: In retrospect, do you think that was correct?

A: Yes.

(Wallace Dep. 10.)

Despite the conditions of the Fairgrounds, however, Wallace did not see what he tripped over. Immediately after the accident, Wallace "assumed" that he had tripped over a mound of dirt.

Q: Let's talk about – tell me what you remember of the fall.

A: I remember pulling up to the site. My driver's door was facing the equipment. I opened my door and stepped out. I was looking at where I was going, the machine I was wanting to take pictures of. Shut my door, went to take a step, and my left foot got drug on something. I assumed it was a dirt mound at the time. And I stumbled forward, tried to regain my footing, and I kind of jogged. Then I tripped over something else. By then I was more than walking; it was a brisk walk. And I went face first into the side of the bucket.

Q: You tripped over two things?

A: Yes.

Q: Do you know – do you recall what the two things were?

A: No. When I woke up from the fall, I immediately went

to the EMS.

Id. at 12.

Indeed, Wallace told the staff at the emergency medical station located just outside the Fairgrounds that he "thought" or "figured" that he had tripped over a mound of dirt.

> Q: Do you recall being questioned about what occurred?
>
> A: Yes, by EMS, I do.
>
> Q: Okay. Do you recall what you told them?
>
> A: Yes. At the time I thought I tripped over dirt mounds or something that was on the property.

Id. at 11.

> Q: And Delaware EMS records where it says the patient stated he fell over a dirt mound on to some type of steel, striking his face, that would be accurate as to what you told them?
>
> A: Yes. I figured I tripped over a dirt hill.

Id. at 15.

Two days after the accident, Wallace's mother visited the Fairgrounds and took photographs of a piece of wire protruding from the ground near where Wallace had parked his truck.

> Q: So it sounds like the next day someone went out to take photos.
>
> A: I don't know if it was the next day or two days later. I'm not sure.
>
> Q: Okay. Who went out to take the photos?
>
> A: My mother and brother.

Id. at 17-18.

After seeing the pictures that his mother took, Wallace's story changed. He now believes that he must have tripped over the piece of wire shown in the photos, rather than over a dirt mound.

> Q. What is your understanding as to how your fall occurred sitting here today?
>
> A: From the pictures of – where my truck was parked, there is no dirt mounds in site [sic]. Just that wire and broken up concrete.
>
> Q: What do you believe happened?
>
> A: I believe when I stepped out of my truck, I don't know if the wire was under my truck slightly hanging out. When I shut the door, I turned to walk and it might have hooked my shoelace or my pant leg, I'm not sure which. I stumbled forward, and trying to regain my balance, I believe I tripped over the concrete in the picture.
>
> . . .
>
> Q: Is Exhibit B the wire you think you fell on?
>
> A: Okay. From the pictures, yes.

Id. at 16-19.

Wallace readily admits, however, that his conclusion is based entirely upon the photos that his mother took.

> Q: Your belief that that occurred is based on looking at photos afterwards?
>
> A: I tripped over something, yes. And there was no dirt mounds in sight. So yes.
>
> . . .
>
> Q: Sure. What you are telling me is you think your foot got caught under the wire in Exhibit B?
>
> A: I believe so, yes, after seeing the pictures of that area.

Id.

As in *Gibbs* and *Meyer*, the variations in Wallace's account of his accident show that he is unable to identify the cause of his fall. Despite his admission that the lighting at the Fairgrounds was sufficient for him to see any potential obstacles in his path, he can do nothing more than speculate as to what he tripped over. Initially, he believed that he tripped on a dirt mound. Only after seeing the photos taken by his mother – who did not witness the accident – did Wallace conclude that he must have tripped over a piece of wire. Wallace's inability to pinpoint the cause of his fall precludes a finding of negligence on the DCAS's behalf.

b. Both the dirt mound and the wire were open and obvious hazards.

In the alternative, even if Wallace could identify the dirt mound or wire as the cause of his accident, DCAS is correct that it did not owe a duty to protect Wallace from such open and obvious dangers. Wallace's counterargument – that the open-and-obvious doctrine is an affirmative defense that DCAS waived – is without merit.

Where a danger is open and obvious, a landowner owes no duty of care to warn invitees about that danger or to protect them from it. *Id.* at ¶ 14. *See also Sidle v. Humphrey*, 3 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus (1968) ("An occupier of premises is under no duty to protect a business invitee against dangers which are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them"); *Armstrong v. Lakes Golf and Country Club, Inc.*, 5th Dist. Delaware No. 17CA-E-08-0054, 2018-Ohio-1018, ¶ 25 ("Invitees are expected to take reasonable precautions to avoid dangers that are patent or obvious"); *Au v. Waldman*, 5th Dist. Richland No. 2010 CA 112, 2011-Ohio-2233, ¶ 41 (finding no duty is owed to an invitee if the invitee

encounters an open and obvious condition). A danger is open and obvious if it is "reasonably observable" and would therefore be seen by someone "acting with ordinary care under the circumstances." *Andler v. Clear Channel Broadcasting, Inc.*, 670 F.3d 717, 725 (6th Cir.2012) (applying Ohio law).

The open-and-obvious doctrine addresses only the question of duty, without analyzing the particular actions of the landowner or of the plaintiff. *Jacobsen v. Coon Restoration & Sealants, Inc.*, 5th Dist. Stark No. 2011-CA-00001, 2011-Ohio-3563, ¶ 16. "A court should consider the nature of the condition itself as opposed to the plaintiff's conduct in encountering it, and the fact that the plaintiff may have been unreasonable in choosing to encounter the danger is not what relieves a property owner of liability." *Id.* at ¶ 18. "This means the question of whether a given hazard is open and obvious is an objective one, requiring a court to determine whether a reasonable invitee exercising ordinary care would have been able to observe and appreciate the dangerous condition." *Id.* at ¶ 19; *see also Armstrong*, 2018-Ohio-1018, ¶ 28 ("The law uses an objective, not subjective, standard when determining whether a danger is open and obvious").

Even when the plaintiff did not notice the danger until after he or she fell, courts have found that no duty exists where the plaintiff could have seen the danger if only he or she had looked. *See Benton v. Cracker Barrel Old Country Store, Inc.*, 10th Dist. No. 02AP-1211, 2003-Ohio-2890, ¶ 15; *Lydic v. Lowe's Cos.*, 10th Dist. Franklin No. 01AP-1432, 2002-Ohio-501, ¶ 10. In most situations, whether a danger is open and obvious presents a question of law. *Ryan v. Guan*, 5th Dist. Licking No. 2003CA00110, 2004-Ohio-4032, ¶ 11.

Here, as discussed, Wallace initially believed that he tripped on a dirt mound. Now, he believes that he tripped over the wire shown in his mother's photograph.

Regardless of what he actually tripped on, Wallace's own testimony demonstrates that – had he looked down – he would have been able to see any obstacles in his path, including the piece of wire depicted in the photograph. Moreover, Wallace admits that the wire would have been observable to anyone else passing by.

> Q: If you looked down, would you be able to see the wire?
>
> A: I guess if you were looking for it, yes.
>
> Q: If you looked down where your feet are, would be [sic] able to see the wire?
>
> A: I don't know. With the contrast of the ground and wire it would be hard to say.
>
> Q: Certainly it's visible on the photo?
>
> A: Yes. I think that photo was taken in the morning.
>
> Q: You told me earlier that the light was sufficient.
>
> A: I believe it was, yes.

(Wallace Dep. 22.)

> Q: I understand. If a member of the fairgrounds were walking by and the wire was on the ground, would you expect them to be able to see the wire?
>
> A: Yes.

Id. at 45.

Even if Wallace could identify the cause of his fall – be it dirt or wire – this testimony cuts against his argument that the cause of his fall was not an open and obvious hazard. Wallace admits that the Fairgrounds were well lit, that he could have seen the wire if he had looked down, and that anyone else who looked down would have been able to see the wire.

Wallace's argument that the open-and-obvious doctrine is an affirmative defense

is simply without merit. The open-and-obvious doctrine is not an affirmative defense. *See Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 10 (2003); *Leiner v. Brewster Dairy, Inc.*, 5th Dist. Stark No. 2003-CA-00259, 2004-Ohio-3260, ¶ 28 ("Lack of a duty owed to the plaintiff is not an affirmative defense, and under notice pleading, an answer which denies the allegation places this at issue for the plaintiff to prove"); *Hissong v. Miller*, 2nd Dist. No. 2009-CA-37, 186 Ohio App.3d 345, 2010-Ohio-961, 927 N.E.2d 1161, ¶ 37 ("Unlike the open-and-obvious doctrine, the step-in-the-dark rule is an affirmative defense").

Given the Court's conclusions as to DCAS's first and second arguments, the Court need not address the remaining breach-of-duty argument. DCAS is entitled to summary judgment in its favor on Wallace's claim.

IV. Lyon's motion for summary judgment is moot, and no sanctions against DCAS are warranted.

In its motion for summary judgment on DCAS's third-party claims for indemnification and contribution, Lyon argues that (1) it agreed to hold DCAS harmless for the use of the Fairgrounds only on January 16, 2016, (2) Lyon did not deliver equipment to the Fairgrounds prior to the auction, (3) DCAS was in exclusive possession and control of the Fairgrounds at the time of Wallace's accident, and (4) Lyon did not place or leave the piece of wire. Lyon also alleges that DCAS has engaged in frivolous conduct, and requests that the Court award attorney's fees under R.C. 2323.51.

a. Lyon's motion for summary judgment is moot.

The Court has concluded that Wallace cannot show that DCAS is liable for his injuries. As a result, DCAS has no need to seek indemnification or contribution from Lyon. In other words, the very occurrence underlying DCAS's third-party complaint

against Lyon – "in the event that DCAS is found to have any liability to [Wallace]" – has failed to materialize. (Third-Party Compl. ¶ 8, 14, 17.) Lyon's motion for summary judgment is moot. *See Keller v. Foster Wheel Energy Corp.*, 163 Ohio App. 3d 325, 2005-Ohio-4821, 837 N.E.2d 859, ¶ 19 ("Because a derivative claim cannot afford greater relief than that relief permitted under a primary claim, a derivative claim fails when the primary claim fails"); *Qualchoice, Inc. v. Paige-Thompson*, 8th Dist. Cuyahoga No. 88233, 2007-Ohio-1712, ¶ 46 ("a third-party claim under Civ.R. 14(A) . . . must be derivative of the outcome of the main claim").

b. DCAS did not engage in frivolous conduct.

R.C. 2323.51 allows a trial court to award court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with a civil action or appeal to any party to that civil action or appeal who was adversely affected by frivolous conduct. *Miller v. Andrews*, 5th Dist. Richland No. 12CA44, 2013-Ohio-2490, ¶ 73-74. Frivolous conduct is defined as conduct that "obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation." R.C. 2323.51.

A trial court must hold a hearing before granting a motion for sanctions but need not hold a hearing when denying a motion for sanctions. *Giusti v. Felten*, 9th Dist. Summit No. 26611, 2014-Ohio-3115, ¶ 28; *Cleveland v. Abrams*, 8th Dist. Cuyahoga No. 97814, 2012-Ohio-3957, ¶ 12

Lyon first alleges that DCAS's refusal to dismiss the third-party complaint – despite the lack of any "credible and/or admissible evidence to support the false and baseless allegations" raised in the complaint – constitutes frivolous conduct. Lyon

contends that contrary to DCAS's "false and baseless" allegation, it did not move equipment to the Fairgrounds prior to the auction.

To be sure, Lyon does present evidence indicating that it had not moved any equipment to the Fairgrounds by the time of Wallace's accident. (Third-Party Def. Mot. for Summ. J. Ex. 5; Lyon Aff. ¶ 4.) The Court disagrees with Lyon's contention, however, that DCAS has not presented any evidence to the contrary. (Lowe Dep. 31, 34, 72; Kuhn Dep. 49, 50.)

Lyon also alleges that Mr. Kasson, counsel for DCAS, insulted Mr. Elzeer, counsel for Lyon, in an email exchange between the two. Mr. Elzeer asked – in a firm yet civil email to Mr. Kasson – that DCAS voluntarily dismiss the third-party claims. Mr. Elzeer also told Mr. Kasson that if DCAS did not dismiss the third-party claims, he would proceed in filing a motion for summary judgment and requesting attorney's fees. Mr. Kasson replied:

> As a final note, I would hope you understand, lawyers at my stage of their career, aren't intimated [sic] by emails like yours. While perhaps OK in Cleveland, down here stuff like that makes lawyers just think much less of the writer.

(Third-Party Def. Mot. for Summ. J. Ex. 7.)

Nothing in Mr. Kasson's statement rises to the level of frivolous conduct that would warrant an award of attorney's fees to Lyon. Lyon's motion for sanctions is denied.

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DCAS's motion for summary judgment in its favor on Wallace's claim for negligence is granted. Lyon's motion for summary judgment on DCAS's claims for contribution and indemnification is moot, and Lyon's motion for sanctions is denied.

Any court costs must be paid by Plaintiff Wallace.

THIS IS A FINAL APPEALABLE ORDER.
THERE IS NO JUST CAUSE FOR DELAY.

DAVID M. GORMLEY, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by ☑ Regular Mail, ☐ Mailbox at the Delaware County Courthouse, ☐ Facsimile transmission

Michael D. Shroge, *Counsel for Plaintif Wallace*, Plevin & Gallucci Co., LPA; 55 Public Sq., Ste. 2222, Cleveland, OH 44113

George R. Oryshkewych, *Counsel for Plaintiff Wallace*, 6100 Oak Tree Blvd., Ste. 200, Independence, OH 44131

Paul W. Flowers, *Counsel for Plaintiff Wallace*, Terminal Tower, Suite 1910, 50 Public Sq., Cleveland, OH 44113

Patrick Kasson, *Counsel for Defendant DCAS*, Reminger Co., LPA; 200 Civic Center Dr., Ste. 800, Columbus, OH 43215

Jeffrey M. Elzeer, *Counsel for Third-Party Defendant Lyon*; Seeley, Savidge, Ebert & Gourash Co., LPA; 26600 Detroit Rd., Ste. 300, Cleveland, OH 44145

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