IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

YOLANDA OLIVER,	:	APPEAL NO. C-250541 TRIAL NO. A-2203192
Plaintiff-Appellant,	:	
vs.	:	*JUDGMENT ENTRY*
COBCO ENTERPRISES, LLC, d.b.a MCDONALDS,	:	
PICKARD ENTERPRISES, LLC,	:	
and	:	
PROLINE STRIPING SERVICE, INC.,	:	
Defendants-Appellees,	:	
and	:	
MOLINA HEALTHCARE OF MICHIGAN,	:	
Defendant.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

For the reasons set forth in the Opinion filed this date, the judgment of the trial court is affirmed in part and reversed in part, and the cause is remanded.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs be taxed 50% to Appellant and 50% to Appellee Proline.

The court further orders that (1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and (2) the mandate be sent to the trial court for execution under App.R. 27.

OHIO FIRST DISTRICT COURT OF APPEALS

To the clerk:

Enter upon the journal of the court on 8/26/2026.

Pursuant to App.R. 30, the clerk is directed to send all parties, or their counsel if represented, a copy of the court's judgment and note such action on the docket.

By: Jennifer A. Hensley
Administrative Judge

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YOLANDA OLIVER,	:	APPEAL NO. C-250541 TRIAL NO. A-2203192
Plaintiff-Appellant,	:	
vs.	:	*O P I N I O N*
COBCO ENTERPRISES, LLC, d.b.a MCDONALDS,	:	
PICKARD ENTERPRISES, LLC,	:	
and	:	
PROLINE STRIPING SERVICE, INC.,	:	
Defendants-Appellees,	:	
and	:	
MOLINA HEALTHCARE OF MICHIGAN,	:	
Defendant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: August 26, 2026

O'Conner Acciani & Levy, LPA, and *Robert B. Acciani*, for Plaintiff-Appellant,

Weston Hurd, LLP, Kaitlyn L. Madigan and *Steven G. Carlino*, for Defendants-Appellees Cobco Enterprises, LLC, and Pickard Enterprises, LLC,

Smith, Warnecke, Meredith & Clark Law, LLC, *Dalton J. Smith* and *J. Alan Smith*, for Defendant-Appellee Proline Striping Service, Inc.

MOORE, Judge.

{¶1} Plaintiff-appellant Yolanda Oliver appeals from the judgment of the Hamilton County Court of Common Pleas granting defendants-appellees' motions for summary judgment on the issue of whether the defendants were liable for Oliver's slip and fall.

{¶2} In her sole assignment of error, Oliver asserts that the trial court erred in granting summary judgment to three parties. Two parties, Cobco Enterprises, LLC, d.b.a. McDonalds ("Cobco") and Pickard Enterprises, LLC, ("Pickard") are the premises owners, and Proline Striping Service, Inc., ("Proline"), is the company that performed painting services on the parking lot, which was then owned by Cobco. Cobco and Pickard will jointly be referred to as "McDonalds" hereafter. For the reasons set forth below, the trial court's grant of summary judgment in favor of McDonalds is affirmed and its grant of summary judgment in favor of Proline is reversed.

I. Factual and Procedural History

{¶3} In September 2022, Oliver filed a complaint alleging that she fell in a parking lot. Her complaint alleged that the injuries sustained were the result of defendants negligently maintaining the premises, creating a dangerous condition, failing to ensure the premises was free of dangerous conditions, and failing to correct a known dangerous condition on the premises.

{¶4} During Oliver's deposition, she explained that on October 23, 2017, she and her family were driving from Michigan to Alabama when they stopped at a McDonalds in Cincinnati, Ohio. Oliver recalled that it had been raining sporadically that day and the parking lot was wet. Oliver testified that although she usually used an electric wheelchair because of her mobility issues, she used a cane the day of the fall. Oliver stated that while she was walking through the parking lot, across the "drive-

thru" lane, her cane slipped on the word "thru" painted on the ground and she fell. Oliver injured her right arm in the fall.

{¶5} During her deposition, Oliver testified that while she was on the ground after she slipped, a McDonalds employee approached and said that "someone recently had a similar incident." Oliver did not otherwise identify this individual.

{¶6} Heather Kephart, Pickard's office manager, testified in an affidavit that she reviewed the company records for the year prior to Oliver's fall and found no reports or information concerning any prior slip-and-fall incidents.

{¶7} Jared Marr, the owner of Proline, testified in an affidavit that Proline was hired by Pickard to paint the parking lot in July 2017. Marr also stated that Proline used paint manufactured by the Sherwin-Williams Company, which was specifically designed for traffic marking, and that the paint's composition was not altered or modified in any way.

{¶8} In March 2024, in response to Oliver's complaint, McDonalds moved for summary judgment and Proline filed its own motion for summary judgment. Oliver then filed responses in opposition to both summary-judgment motions, supported with a report from her expert, David Collette. Proline filed a motion to strike the report because it claimed the report was deficient under Evid.R. 702. Following this, Oliver submitted a motion to supplement the report and did so by attaching Collette's affidavit to the report. The substance of the report remained unchanged.

{¶9} The trial court denied both motions for summary judgment and ordered that further discovery was necessary regarding Collette's expert report. The trial court found that Collette's expert report relied heavily on hearsay and was deficient under Evid.R. 702. The court, however, viewed the report as a preliminary document that needed a "meticulous explanation." After denying the motions for summary judgment,

the court set the trial date for September 30, 2024.

{¶10} Oliver did not supplement the substance of the expert report following the trial court's order. On August 30, 2024, Proline filed a motion in limine regarding the expert report, asserting that the report should be barred at trial because Oliver had not supplemented the report with information necessary to cure the Evid.R. 702 deficiencies within 30 days of trial.

{¶11} In December 2024, the trial court held a *Daubert* hearing regarding Oliver's expert. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) (holding that courts must ensure that any scientific testimony and evidence that is to be admitted is both relevant and reliable); *see also Terry v. Caputo*, 2007-Ohio-5023, ¶ 24 (recognizing that *Daubert's* reliability and relevance requirements have been adopted by Ohio courts). The trial court then granted Proline's and McDonalds's requests for another opportunity to file motions for summary judgment. The court's entry stated,

> In light of this, the Court GRANTS the motions to file motions for summary judgment of which the standards under Evid. R. 702 and *Daubert* may be directly at issue.

The trial court did not issue an order regarding the use of the expert report following the *Daubert* hearing.

{¶12} In January 2025, Proline and McDonalds filed their second motions for summary judgment. In its motion, Proline argued it was entitled to summary judgment on two bases: first, Oliver failed to surmount the open-and-obvious doctrine, and second, she failed to support her claim that the letters in the parking lot were more dangerous than other areas of the parking lot. The motion filed on behalf of McDonalds argued that Oliver did not introduce any evidence establishing that it

created the alleged hazard or that it had actual notice of the hazard. McDonalds also argued that the condition was open and obvious.

{¶13} The trial court entered an order granting the motions for summary judgment in August 2025. The trial court found that Oliver's claims against McDonalds were barred by the open-and-obvious doctrine and that, even if the hazard was not open and obvious, there was no duty owed under premises-liability theory. The trial court also found that the open-and-obvious doctrine barred Oliver's claims against Proline because Proline did not create a dangerous condition and the injury was not reasonably foreseeable.

{¶14} This appeal followed.

II. Analysis

{¶15} In her sole assignment of error, Oliver contends that the trial court erred in granting summary judgment in favor of McDonalds and Proline.

A. The Court Properly Excluded Hearsay Testimony Regarding McDonalds

{¶16} A trial court's grant of summary judgment is reviewed de novo. *R&R Family Invests. v. Plastic Moldings Corp.*, 2016-Ohio-8125, ¶ 7 (1st Dist.), citing *Schmidt v. Village of Newtown*, 2012-Ohio-890, ¶ 6 (1st Dist.). Summary judgment is appropriately granted when there exists no genuine issue of material fact, the party moving for summary judgment is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion that is averse to that party. *Id.*

{¶17} A trial court's evidentiary rulings, including its determination on the admissibility of hearsay, are reviewed under an abuse-of-discretion standard. *Kelley v. Horton*, 2025-Ohio-5252, ¶ 19 (1st Dist.). Under this deferential standard, a

reviewing court will not disturb the trial court's decision absent the court exercising its judgment in an "unwarranted way, in regard to a matter over which it has discretionary authority." *Worley v. Durrani*, 2025-Ohio-2245, ¶ 13 (1st Dist.), citing *Adams v. Durrani*, 2022-Ohio-60, ¶ 16 (1st Dist.).

{¶18} Oliver argues that the court's grant of summary judgment in favor of McDonalds was inappropriate because the hazard was not open and obvious and McDonalds was given notice of the parking lot's dangerous condition by an employee. McDonalds argues that summary judgment was appropriate under the open-and-obvious doctrine. We do not need to determine if there was a material question of fact regarding whether the hazard was open and obvious because Oliver failed to introduce any admissible evidence that McDonalds had notice of the dangerous condition.

{¶19} To establish a claim for personal injuries caused by a property owner's negligence, a plaintiff must establish either "(1) that a defendant through its officers or employees is responsible for the hazard complained of; or (2) that at least one of such persons have actual knowledge of the hazard and neglect to give adequate notice of its presence or remove it promptly; or (3) that such danger exists for a sufficient length of time reasonably to justify the inference that the failure to warn against it or remove it is attributable to a want of ordinary care." *Besack v. Kroger Co.*, 2023-Ohio-2497, ¶ 52 (10th Dist.), quoting *Johnson v. Wagner Provision Co.*, 141 Ohio St. 584, 589 (1943).

{¶20} Here, Oliver argues that there is a material question of fact as to whether McDonalds had notice based on her claim that a McDonalds's employee told her that the owners knew of a similar accident in the recent past. The trial court found, however, that this testimony was inadmissible hearsay and could not be used to establish notice. We agree.

{¶21} Hearsay is any out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. *State v. Wilson*, 2026-Ohio-1178, ¶ 4 (1st Dist.). However, Evid.R. 801(D)(2) provides that a statement by a party opponent is not hearsay. *State v. Durbin*, 2025-Ohio-5724, ¶ 59 (1st Dist.), citing Evid.R. 801(D)(2). If a party seeks to have a statement that is otherwise hearsay admitted pursuant to Evid.R. 801(D)(2), that party has the burden of establishing that the statement "was made by an agent or employee of the party-opponent, during the existence of the relationship, concerning a matter within the scope of employment or agency." *Davis v. Sun Refining & Marketing Co.*, 109 Ohio App.3d 42, 53 (2d Dist. 1996); *accord RWS Bldg. Co. v. Freeman,* 2005-Ohio-6665, ¶ 37 (4th Dist.) (holding that statements by an unidentified employee are inadmissible under Evid.R. 801(D)(2)).

{¶22} Oliver contends that McDonalds possessed actual knowledge of the allegedly dangerous condition based on her claim that while she was on the ground after her fall, a McDonalds employee approached her and stated that "someone recently had a similar incident" and that management was told it was not a good idea to have "that paint" in a walkway. Notably, Oliver never obtained the name of the individual who allegedly made the statement about McDonalds's knowledge of the condition. Oliver testified that she never saw the individual until being presented a photograph during her deposition that supposedly showed him blurred in the background. The photograph contained nothing identifying the individual as a McDonalds employee. For its part, McDonalds submitted the affidavit of its office manager, Kephart, who testified that she reviewed the company's records for the year prior to the fall and found no records of any other slip and falls occurring on the property.

{¶23} Oliver argues that the alleged employee's statement is admissible under Evid.R. 801(D)(2) as an admission by a party opponent. Oliver, however, failed to identify the declarant, "by name or position, or established that the statement concerned a matter within the scope of that person's employment." *Shreves v. Meridia Health Sys.*, 2006-Ohio-5724, ¶ 24 (8th Dist.), citing *RWS Bldg. Co.* at ¶ 38. Moreover, Oliver presented no admissible evidence that established the declarant's identity, employment status, or authority to speak on matters relating to premises safety. As a result, Oliver failed to lay the necessary foundation for admission of the alleged statement under Evid.R. 801(D)(2), rendering the statement inadmissible hearsay. Thus, the trial court did not abuse its discretion in excluding the alleged statement.

{¶24} Absent admissible evidence establishing that McDonalds had actual knowledge of the alleged hazard and failed to provide a warning or remedy it, Oliver has failed to demonstrate a genuine issue of material fact.

{¶25} Accordingly, the claim against McDonalds cannot survive summary judgment. The assignment of error is overruled as to McDonalds.

B. The Court Erred in Granting Proline's Motion for Summary Judgment

1. The open-and-obvious doctrine does not apply to independent contractors

{¶26} Oliver argued that the court erred in extending the open-and-obvious doctrine to Proline because it is an independent contractor. She is correct.

{¶27} The open-and-obvious doctrine states that "an owner or occupier of property owes no duty to warn invitees entering the property of open and obvious dangers on the property." *Simmers v. Bentley Constr. Co.,* 64 Ohio St.3d 642, 644 (1992). The doctrine, however, applies only to the scope of a *landowner's* duty. The doctrine "arose out of premises liability law and extends only to those with the

requisite property interest in the premises." *Eschmann v. RLA Invests., Inc.*, 2016-Ohio-3331, ¶ 5 (1st Dist.), citing *Simmers* at 645. It governs "a landowner's duty to persons entering the property -- property over which the landowner has the right and power to admit or exclude persons as invitees, licensees, or trespassers." *Simmers* at 645. It does not provide freestanding defense to independent contractors. "An independent contractor who creates a dangerous condition on real property is *not* relieved of liability under the doctrine which exonerates an owner or occupier of land from the duty to warn those entering the property concerning open and obvious dangers on the property." (Emphasis added.) *Id.* In the case of an independent contractor, the ordinary laws of negligence must be looked at to determine the contractor's duty of care. *Id.*

{¶28} In this case, it is undisputed that Proline did not own the property where the fall occurred but was only an independent contractor. As a result, the open-and-obvious doctrine does not shield Proline from liability.

2. Appellant's expert's opinion is sufficient to create a material question of fact and defeat summary judgment

{¶29} To survive summary judgment, Oliver needed to present evidence to create a material question of fact with respect to each of the elements of her claim against Proline. *Mid-Century Ins. Co. v. Stites,* 2021-Ohio-3839, ¶ 16 (1st Dist.) (holding that to survive summary judgment, a plaintiff must produce affirmative, non-speculative evidence supporting the elements of duty, breach, and proximate causation). Specifically, because Oliver brought a negligence claim against Proline, she needed to present admissible evidence that Proline breached the applicable standard of care, and that that breach caused her injuries. *Id.* Oliver argues that the opinions provided by her expert through his deposition, report, and testimony at the *Daubert*

hearing created material questions of fact that defeated a motion for summary judgment. We agree.

{¶30} The parties dispute whether Collette's opinions were stricken by the trial court. Considering the trial court's lack of an order expressly striking or excluding Collette's reports or opinions following the *Daubert* hearing, they remained part of the record. "Basic to the operation of the judicial system is the principle that a court speaks through its judgments and orders." *Bell v. Thompson*, 545 U.S. 794, 805 (2005), quoting *Murdaugh Volkswagen, Inc. v. First Natl. Bank*, 741 F.2d 41, 44, (4th Cir. 1984). In fact, in its entry granting summary judgment, the trial court assumed arguendo that the expert report was admissible for purposes of ruling on the motion, went on to examine the opinions of Oliver's expert and concluded that his opinions were insufficient to create a material question of fact with respect to Proline's liability.

{¶31} The trial court's criticism of Collette's opinions goes to the weight and credibility of his testimony, questions that should be left to the trier of fact and are not proper considerations for the court at the summary-judgment stage. *Pitts v. Children's Hosp. Med. Ctr.*, 2002-Ohio-2039, ¶ 9 (1st Dist.) (opining that the credibility of experts' conclusions and the relative weight expert opinion should enjoy are determinations left to the trier of fact). Instead, in evaluating whether a motion for summary judgment should be granted, the trial court must view all the evidence in the light most favorable to the nonmoving party, which in this case is Oliver.

{¶32} Here, Collette opined that the ground being "unreasonably painted" with "traffic marking paint that can become slippery when wet" "over a large area" "contrary to the product's safety precaution information" "without any secondary product to increase slip resistance" was a dangerous condition caused by Proline's negligence and was "more likely than not the cause of Oliver's incident and injuries."

{¶33} If believed, as it must be at the summary-judgment stage, Collette's opinion was sufficient to create a material question of fact and allow Oliver's claim against Proline to proceed to trial.

{¶34} Thus, we sustain Oliver's assignment of error as it relates to the court's grant of summary judgment for Proline and remand the cause to the trial court.

III. Conclusion

{¶35} Therefore, the trial court's grant of summary judgment in favor of McDonalds is affirmed and the trial court's grant of summary judgment in favor of Proline is reversed, and the cause is remanded to the trial court for further proceedings consistent with this opinion and the law.

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

KINSLEY, P.J., and **CROUSE, J.,** concur.