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| COLORADO COURT OF APPEALS<br>Colorado State Judicial Building<br>2 E. 14th Avenue<br>Denver, CO 80203<br>Phone number: (720) 625-5150 | |
| Appeal from District Court<br>Summit County, Colorado<br>Mark D. Thompson, District Judge<br>Case Number: 2013 CV 101, Division T | ▲ **COURT USE ONLY** ▲ |
| **Appellant:**<br>ANNE MARGARET HESFORD<br>v.<br>**Appellee:**<br>VAIL SUMMIT RESORTS, INC. | Case Number: 2015 CA 285 |
| Attorneys for Defendant/Appellee<br>VAIL SUMMIT RESORTS, INC.<br>Samuel N. Shapiro, #44459<br>Legal Department<br>Vail Resorts Management Company<br>390 Interlocken Crescent<br>Broomfield, CO 80021<br>Telephone: 303.404.1895<br>Email: sshapiro@vailresorts.com | |

**ANSWER BRIEF**

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 5,172 words. (5,700 max per C.A.R. 28(g)).

The brief complies with C.A.R. 28(k).

For each issue raised by Appellee, it contains under a separate heading (1) a statement of whether Appellee agrees with Appellant's statement concerning the standard of review and preservation for appeal, and (2) if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

By: */s/ Samuel N. Shapiro*
Samuel N. Shapiro, #44459
Attorney for Defendant/Appellee,
Vail Summit Resorts, Inc.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**RULES**

## OTHER AUTHORITIES

## STATEMENT OF THE ISSUES

Defendant/Appellee, Vail Summit Resorts, Inc. ("VSRI"), agrees with the Statement of the Issues set forth by Plaintiff/Appellant, A. Margaret Hesford ("Hesford").

## STATEMENT OF THE CASE AND FACTS

### A. Nature of the Case

Hesford seeks review of the dismissal of her premises liability claim for personal injuries resulting from a December 9, 2010 slip and fall incident in the Airport Satellite Parking Lot ("Airport Lot") at Breckenridge Ski Resort. The Airport Lot sits at 9,600 feet above sea level and is a dirt parking lot that VRSI leases for its Breckenridge ski area. The fall occurred during a heavy snow storm while Hesford was wearing cat tracks on her ski boots which she specifically wore to allow for better traction on what she believed at the time to be a slippery parking lot. Hesford fell while loading her skis on the shuttle bus and injured her shoulder.

### B. Course of Proceedings and Disposition

Hesford filed suit against VSRI on October 25, 2012, asserting a claim under the Colorado Premises Liability Act, C.R.S. §13-21-115 (the "CPLA"), and a claim for negligence. (R. CF, p. 76.) Upon motion by VSRI, the trial court granted

summary judgment in favor of VSRI, holding that Hesford's negligence claim was preempted by the CPLA (to which Hesford agreed) and that Hesford's CPLA claim failed as a matter of law as there was no evidence that VSRI breached any standard of care, there was no evidence that Hesford fell on anything other than a natural accumulation of snow and ice and Hesford failed to present any facts and evidence demonstrating a triable issue existed as to whether VSRI had actual or constructive knowledge of a danger. (R.CF, pp. 89-99.) Hesford moved for reconsideration of the dismissal of her CPLA claim (R. CF, p. 53.) which was denied pursuant to C.R.C.P. 59(j) (R. CF, p. 5.) This appeal follows, challenging only the entry of summary judgment on Hesford's CPLA claim.

### C. Statement of Facts

On December 9, 2010, Hesford, an invitee, slipped and fell in the Airport Lot at Breckenridge, which was leased by VSRI from the Town of Breckenridge. (R. CF, pp. 77-78.) VSRI used the Airport Lot as a free parking lot for the public to access the Breckenridge Ski Resort (*Id.* at 77.) VSRI provided a bus service, free of charge, to the public between the Airport Lot and the Breckenridge Ski Resort (*Id.* at 77.) VSRI retained Stan Miller, Inc. to perform snow removal operations (plowing) at the Airport Lot. (R.Tr.(3/21/14), p.23, l.3-13.)

Other ski areas in Summit County, such as Keystone and Copper Mountain, which also have dirt parking lots like the Airport Lot, maintain their lots during the winter in a similar manner and likewise do not put down ice melt or mats in those lots in the winter (*Id.* at 98:2-23.) Hesford has no witness, either lay or expert, who will testify that VRSI breached any standard of care.

Hesford has been coming to Colorado to ski since 1994, and 99.9% of that time she skied at Breckenridge. (R.Tr.(12/10/13), p.13, l.23-p.14, l.14.) The Airport Lot was well known to Hesford because for years prior to her fall, she parked there when she came to Breckenridge to ski. (*Id*. at 22:21 – 23:20.) For example, when Hesford was at Breckenridge between February 21 and 27, 2010 (10 months before the accident), she wore cat tracks on her boots when she walked in the Airport Lot during that visit. (*Id*. at 25:13 – 27:13.) She did the same on December 7 and 8, 2010, the two (2) days immediately prior to her fall. (*Id*. at CF 22:21 - 23:6, 28:18-22.)

On December 9, 2010, it snowed so heavily that Hesford actually decided to go skiing later in the day and it was still snowing when Hesford pulled into the Airport Lot. (*Id*. at 30:12 –31:1.) The road that went into the Airport Lot was covered in snow. (*Id*. at 43:8-11.)

There was a sign at the entrance to the Airport Lot that said, among other things "USE CAUTION SLIPPERY CONDITIONS MAY EXIST". (R.Tr. (3/13/14 p.34, l.1-16; p.96, l.20 – p.97, l.10.) ( R.Ex. D, p. 487.) Hesford does not deny that sign was there. (C p.48, l.1 – 25.) Knowing that the Airport Lot was also covered in snow, Hesford drove with more care than she would have if the lot had not been covered in snow. (*Id*. at 44:3-6.) Actually, it was her practice, on December 9, 2010 and during prior visits to Colorado in the winter, to drive an SUV with snow tires, which she views as a matter of common sense in being careful of slick conditions, which she equates to having cat tracks on her ski boots. (*Id*. at 41:15 – 43:3.)

Hesford knew that she was going to be walking on snow in the Airport Lot and that there was the risk that the walking surface would be slippery (*Id*. at 51:15-23) so she specifically put studded cat tracks on her ski boots to provide her with better traction on any snowy or icy surface that she would have to traverse. (*Id*. at 52:1-14.)[1] After successfully walking from her car to stand and wait for the free bus, she observed that the area where she was standing was uneven, thick ice covered by snow. (*Id.* at 36:20-25, 55:9-25.) It was still snowing hard when she

[1] A true and accurate photograph of the cat tracks that Hesford wore on her ski boots is found in the record at (R.Ex. B, p.496.) (*See* R.Tr.(12/10/13), p.50, l.23 – p.51, l.5; p.101, l.16 – p.102, l.14.)

began the process of loading her skis on the bus (*Id*. at 37:4-9) and as she lifted her skis off the ground to load them on the bus, she fell. (*Id*. at 57:11.)

There is no evidence that Hesford fell near any barricade in the parking lot nor is there any evidence that VRSI or Stan Miller, Inc. caused snow or ice to unnaturally accumulate where she was standing when she fell. There is likewise no evidence of how long the ice had been there before she fell. (*Id*. at 77:13-15.) VRSI had no prior knowledge of any person slipping and falling in the Airport Lot while boarding a bus, de-boarding a bus, or loading ski and/or snowboard equipment onto the external racks of a bus. (R.Ex E, p. 482.) (R.Tr.(3/13/14), p.40, l.17 – p.4, l.19.)

## STANDARD OF REVIEW AND ISSUE PRESERVATION CITATION

VSRI agrees with Hesford's statement as to Standard of Review and agrees that Hesford has preserved the dismissal of her CPLA claim for appeal. VSRI believes that Hesford may have mistyped the citation to the record for the preservation of the issue as the citation in her brief is to her Response to the Motion for Summary Judgment.

## SUMMARY OF THE ARGUMENT

This Court should affirm the entry of summary judgment in favor of VSRI. There was no evidence that VSRI breached a duty to use reasonable care to protect against a danger on the property. Actually, Hesford provided no evidence as to what that standard of care required of VRSI in the maintenance of a high alpine dirt parking lot during a heavy snow storm would be. The only evidence in the record was that VSRI maintained the parking lot the ***same*** way that other similar lots in Summit County are maintained during the winter months. All of the evidence before the Trial Court showed that Hesford slipped and fell on naturally occurring snow and/or ice. There was no evidence that any of the plowing activities of VRSI's contractor, Stan Miller, Inc., caused an unnatural build up of snow or ice where Hesford fell or in any other way caused or contributed to her fall. There was likewise no evidence of the second element under the CPLA, i.e., that VSRI had actual or constructive knowledge of the alleged danger.

## ARGUMENT

### I. This Court Should Affirm the Entry of Summary Judgment in Favor of VRSI

Under the CPLA, there are two (2) separate elements for landowner liability that must be proven: (1) breach of a duty to use reasonable care to protect against a

danger on the property, ***and*** (2) actual or constructive knowledge of the danger. *Sofford v. Schindler Elevator*, 954 F. Supp. 1459, 1461 (D. Colo. 1997) (citations omitted). There was no evidence to show the presence of either element. Thus, the granting of summary judgment in favor of VRSI was appropriate.

### A. There is no evidence that VRSI breached a duty to use reasonable care

As was true in Hesford's briefing at the Trial Court level, in her current briefing on appeal she still fails to set forth what "reasonable care" is beyond what was actually done by VRSI. Instead, Hesford relies upon the factually distinguishable case of *King Soopers, Inc. v. Mitchell*, 342 P.2d 1006 (Colo. 1959). *King Soopers* is not applicable to this case because in *King Soopers*, the crux of the court's findings were based upon facts not present in our case, i.e., that the grocery store made no effort to clear the parking lot where the plaintiff fell and there were no signs warning of slippery conditions. *Id*. at 1009 ("The additional fact that [grocery store] here seemingly made no effort to clear the areas or to give warning convinces us that neither *Brent v. Bank of Aurora*, *supra*, nor the decision of the Court in *F. W. Woolworth v. Peet*, 132 Colo. 11, 284 P. (2d) 659 (which was relied on in the Brent case) are here applicable."). Importantly, the *King Soopers* court relied upon *Prosser on Torts*, p. 459, quoting, in pertinent part, "Ordinarily nothing more than a warning is required." *Id*. In our case, the subject parking lot where Hesford fell was

regularly plowed by Stan Miller, Inc. (R.Tr.(3/21/14), p.23, l.3-13) and there was a warning sign at the entrance to the Airport Lot that stated, among other things "USE CAUTION SLIPPERY CONDITIONS MAY EXIST". (R.Tr.(3/13/14) p.34, l.1-16; p.96, l.20 – p.9, l.10.) (R.Ex.D, p.487.) Hesford does not deny that sign was there. (R.Tr.(12/10/13), p. 48, l.1 – p.49, l.1.)[2]

In addition, while in the *King Soopers* case there was "intermittent snowfall and freezing temperatures during the entire period preceding the injury" (*King Soopers*, 342 P.2d at 1007), it is further distinguishable because in our case, at the time Hesford fell, it was snowing so heavily that Hesford decided to go skiing later in the day because of the weather (R.Tr.(12/10/13), p.30, l.12 –p.31, l.1; p.37, l.4-9.) The *King Soopers* case also appears to involve an incident in and around Denver, which has a significantly different winter climate than Summit County.[3] Accordingly, the facts of *King Soopers* are readily distinguishable and do not control.

Hesford further argues that the Trial Court erred in granting Summary Judgment because Hesford believes it held that VRSI cannot be held to have breached

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[2] Hesford's implication that the warning is somehow immaterial because she claims she did not see the sign is simply absurd.

[3] As the Trial Court correctly noted "[i]t is certainly true that snow and ice are a fact of life in a high alpine environment during the winter months. To some extent, it is indeed these very conditions that attract visitors like Hesford to Breckenridge to partake in skiing and other winter recreational pursuits." (R.CF, p95.)

a duty of reasonable care as a matter of law because the incident occurred in a high alpine environment during the winter. Hesford misinterprets the Trial Court's ruling. The Trial Court did not hold that there could never be liability for a slip and fall in Summit County during the winter but rather that Hesford failed to provide any facts that would set forth a triable issue as to whether VRSI violated either element required to send a claim of violation of the CPLA to a jury. In support of her argument, Hesford relies upon the 1969 case from Alaska styled *Kremer v. Carr's Food Center, Inc.*, 462 P.2d 747 (1969). *Kremer* is also distinguishable (beyond the fact that it utilizes Alaskan law) in that the Alaskan parking lot had not been plowed, the rut upon which Mr. Kremer fell was caused by an automobile tire rather than natural accumulation, the fall did not happen in the middle of a heavy snow storm and at least one employee of the Alaskan shopping center had slipped and fallen on the parking lot earlier that same day. *Id*. at 748. Even with those facts, the *Kremer* court held "[o]ur decision today does not represent the adoption of a flat requirement that the possessor's duty requires that he attempt to keep his land free of ice and snow." *Id*. at 752 (citing Restatement (Second) of Torts §343A (1965)).

If there is going to be liability of a "landowner," there must be evidence of a standard to adhere to – a landowner must know what is required of it. *Sofford v. Schindler Elevator*, 954 F. Supp. 1459, 1461 (D. Colo. 1997). On this appeal,

Hesford again fails to articulate what, if anything, VRSI should have done differently to have prevented snow and ice from being in the unpaved parking lot during a heavy snowstorm. As the Trial Court correctly opined

> It is certainly true that snow and ice are a fact of life in a high alpine environment during the winter months. To some extent, it is indeed these very conditions that attract visitors like Hesford to Breckenridge to partake in skiing and other winter recreational pursuits. Other than simply arguing that the boarding area should be clear of ice, Hesford failed to present any evidence that tended to show it was feasible, or even possible, to keep that area (or the remaining parking lot) clear of ice under the prevailing weather conditions at the time of the accident. And, to support the existence of a "reasonable" duty of care, Hesford failed to provide any evidence as to what reasonable steps should have been taken by VSRI to prevent the accident. Likewise, she failed to provide evidence regarding the existence of some other custom or practice in the industry as to dirt parking lots that demonstrates a lack of reasonable care by VSRI under the circumstances. Accordingly, the Court finds as a matter of law that Hesford failed to show VSRI breached a duty of reasonable care, simply and solely by pointing to the presence of naturally accumulating ice during the winter months in the boarding area of the Airport Lot, which is located in a high alpine environment.

(R.CF, p. 95.)

1. <u>The undisputed evidence showed that VRSI maintained the Airport Lot with reasonable care and in the same manner as other similar lots in Summit County</u>.

Importantly, also lacking from Hesford's brief is any evidence that in any way contradicts the fact that VRSI did, in fact, maintain the Airport Lot consistent with the industry standard of reasonable care as it was maintained in the same way

as other ski areas in Summit County maintain comparable unpaved lots (R.Tr.(3/13/14),p.9, l.2-23.) Even Hesford herself admitted that during a heavy snowstorm "[m]aybe it is not reasonable to expect them to remove all the ice . . ." (R.Tr.(12/10/13), p.150, l.11-12.) Accordingly, Summary Judgment was properly granted.

2. Hesford fell on naturally occurring snow and ice during a heavy snow storm.

Hesford contends, without factual support, that the snow and ice upon which she fell was not naturally occurring but, instead, was caused to exist due to the plowing activities of Stan Miller, Inc. First, there was no evidence that the manner in which Stan Miller, Inc. performed its plowing duties caused an unnatural build-up of snow and ice in the precise location where Hesford fell. Second, there was no evidence that any snow or ice was actually built up in the precise location where Hesford fell. Third, there is no evidence Hesford actually slipped and fell on an unnatural build-up of ice or that such an unnatural build-up in any way caused or contributed to her fall – rather, instead, she testified that when she fell she was standing next to the bus, loading her skis. (*Id.* at 57:11-21.)[4] Thus, the Trial Court

[4] Hesford's argument that the ice and snow upon which she fell had been present for "several days" is pure speculation. Not only is that speculation irrelevant to Hesford's failure to set forth any dispute as to a material fact, examining the factual record shows that she contradicts herself as she first claims,

correctly held that no triable issue existed and that summary judgment in favor of VSRI was warranted. *See Gemaehlich v. Holyoke*, 486 P.2d 34, 36 (Colo. 1971) ("The record here reveals no evidence that the sidewalk in question was made more dangerous after being cleared by Safeway. There was merely evidence that it was cleared or partially cleared, and the clearing of a portion of the sidewalk, without more, cannot be a basis for defendant's liability.").

In her brief, the inadmissible photographs Hesford references (R.CF, p. 408-09) do not depict the condition of the area where Hesford fell at any time relevant to the occurrence but rather on March 8, 2011, one year and three months ***after*** her fall. Additionally, Mr. Hoerter from Stan Miller, Inc. testified that he did not even recall whether the barricades in those photos were present in December of 2010. (R.Tr.(3/21/14) p. 395,l.21-23.) Thus, those photographs are irrelevant and certainly do not create a triable issue of fact.

3. Expert testimony is required to establish a breach of the standard of care

Hesford's only evidence to attempt to prove liability is the fact that she slipped and fell. However, the law is very clear that the happening of an accident

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that the day before she fell, the parking lot "pretty much was cleared to the pavement because of the sun" (*Id.* at 67:19 – 68:3). Logically, if the lot was clear of snow and ice the day before she fell, the ice upon which she claims she fell could not have been around for more than a single day, let alone "several days."

in and of itself is not enough to establish liability. *See* CJI-Civ 9:12 ("The occurrence of an accident does not raise any presumption of negligence on the part of either the plaintiff or the defendant."); *Perry Lumber Co. v. Ruybal*, 297 P.2d 531, 533 (Colo. 1956); *F.W. Woolworth Co. v. Peet*, 284 P.2d 659, 661 (Colo. 1955); *Martin K. Eby Constr. Co. v. Neely*, 344 F.2d 482, 485 (10th Cir. 1965). Additionally, the "[f]ailure to guard against the bare possibility of accident is not actionable negligence." *Mendoza v. White Stores, Inc*., 488 P.2d 90, 92 (Colo. 1971) (citations omitted). Hesford's burden of proof is also not sustained by evidence that is surmise, speculation or conjecture.[5] *Neely*, 344 F.2d at 485.

As discussed above, there is no evidence that the Airport Lot was made more dangerous by the way it was plowed or that any action or inaction by VRSI or Stan Miller, Inc. caused Hesford to fall, which supports the affirmation of Summary Judgment in favor of VRSI. *See Gemaehlich v. Holyoke*, 486 P.2d 34, 36 (Colo. 1971) ("The record here reveals no evidence that the sidewalk in question was made more dangerous after being cleared by Safeway. There was merely evidence that it was cleared or partially cleared, and the clearing of a portion of the sidewalk, without more, cannot be a basis for defendant's liability.").

[5] For example, she testified at her deposition that she did not know what it meant to make it "safe" and was "totally hypothesizing" when she guessed that there could have been a mat made of cat tracks in the Airport Lot. (R.Tr. (12/10/13), p.150, l.4 – p.151, l.24.)

When the standard of care is outside the common knowledge and experience of ordinary persons, expert testimony is required to prove breach of duty. *Oliver v. Amity Mut. Irrigation Co.*, 994 P.2d 495, 497 (Colo. 1999) (citation omitted). "Whether the standard is a matter of common knowledge is a determination committed to the sound discretion of the trial court". *Id*. While jurors in Summit County may presumably have knowledge of what is required of them as they remove snow from their personal driveways and sidewalks, what is required to operate large ski area parking lots in Summit County during winter storm cycles is not something that is in the field of commonplace knowledge, and therefore requires expert testimony. *See Squires ex rel. Squires v. Goodwin*, 829 F. Supp. 2d 1041, 1060 (D. Colo. 2011) ("Here, the court finds that expert testimony would be essential for lay jurors to fully appreciate the existence of any duty owed by [ski manufacturer regarding design of ski] and any breach of that duty." (citations and quotation marks omitted)); *see also Milne v. USA Cycling Inc.*, 575 F.3d 1120, 1133 (10th Cir. 2009) ("Although Mr. Collinsworth had experience organizing and supervising paved road bike races, the district court reasonably concluded that his experience was insufficient to qualify him to testify about mountain bike races. . . . Given the differences between road races and mountain bike races, we conclude that the district court's finding that Mr. Collinsworth was unqualified to offer

expert testimony on the standard of care for mountain bike races was not 'arbitrary, capricious, whimsical, or manifestly unreasonable.'" (citation omitted) (applying Utah law)). Hesford has no such expert testimony.

Hesford does not articulate what she means by clearing the ice but if it is her contention that some sort of ice melt or other chemical should have been put down during a heavy snowfall, she certainly would need expert testimony to establish what type of ice melt, if any, would actually work (and not worsen the conditions), with the below-freezing temperatures, the amount of precipitation, the water content of the precipitation as well as the vehicle traffic present in the Airport Lot at the time Hesford fell as the functionality of such substances under different temperatures, precipitation and weather conditions is clearly outside the common knowledge and experience of ordinary persons. *Oliver*, 994 P.2d at 497 (citation omitted). To the extent that Hesford contends that VRSI should have done something else, whatever that may be, there will be no evidence that any other commercial establishment, ski resort or otherwise, removes all ice from its parking lots or does anything different than VRSI during heavy snowstorms.

Hesford cannot establish any breach of duty for failure to warn her of the conditions. VRSI provided a sign at the entrance to the Airport Lot acknowledging the reality of winter at 9,600 feet and changing weather conditions – a sign that

said "USE CAUTION SLIPPERY CONDITIONS MAY EXIST". (R.Tr. (3/13/14), p.34, l.1-16; p.96, l.20 –p.97, l.10.) (R.Ex. D, p.487.) Moreover, Hesford admitted that she knew such conditions in fact existed. (R.Tr. (3/13/14), p.30, l.14 – p.31, l.1, p.51, l.15-23.) That is why she put on cat tracks and drove a car with snow tires. (*Id*. at 41:15 – 43:3, 44:3-6, 52:1-14.)

Hesford's lack of an expert to testify that VRSI breached a duty or acted unreasonably in maintaining the lot as well as her lack of any admissible evidence suggesting that VRSI breached any duty of care required the dismissal of her claims as there could be no legitimate basis for any jury to find that VRSI acted unreasonably or breached a duty of care. *See Fair v. Red Lion Inn*, 943 P.2d 431, 436-37 (Colo. 1997). *See also Peet*, 284 P.2d at 661-62.

Realizing the fatal error in not having expert testimony to set forth a breach of a duty to use reasonable care, Hesford reiterates her same arguments citing to the goal of the Civil Access Pilot Project ("CAPP") to reduce litigation costs, claiming that it would be bad policy to require expert testimony in this case. That argument fails as Hesford, herself, admitted in her District Court Civil Case Cover Sheet for Initial Pleading of Complaint that this lawsuit is ***not*** governed by CAPP and that C.R.C.P. 16.1 does ***not*** apply to this case.

In sum, VRSI maintained a gravel parking lot in the middle of winter in Breckenridge, a high alpine town at 9,600 feet above sea level. It had a plowing company regularly plow the lot. It provided a sign warning people of potentially slippery conditions in the lot. It maintained the parking lot the same way as other similar lots. Hesford has no expert to testify that VRSI breached a duty or acted unreasonably in maintaining the lot. In fact, Hesford has no admissible evidence at all suggesting that VRSI breached any duty of care. In light of the above, there could be no legitimate basis for a jury to find that VRSI breached a duty of care to Hesford, warranting the affirmation of summary judgment in favor of VRSI. *See Red Lion Inn*, 943 P.2d at 436-37. *See also Peet*, 284 P.2d at 661-62.

### B. There is no evidence that VRSI had actual or constructive knowledge

Even assuming that the issue of whether VRSI breached the undefined duty could somehow go to a jury, there will be no evidence submitted to the jury of the ***second*** element under the CPLA, i.e., that VRSI had actual or constructive knowledge of the ***specific*** danger of which Hesford complains - general knowledge of the possibility is not sufficient.

The law is clear that a defendant's lack of actual or constructive knowledge of the specific alleged danger warrants the dismissal of the case. *Sofford*, 954 F. Supp. at 1462 (declining to hold defendant liable for an injury sustained in an

elevator when the defendant had no actual or constructive knowledge of a danger associated with the elevator); *Dougherty v. Home Depot, U.S.A., Inc*., 2007 U.S. Dist. LEXIS 72779 (Sept. 28, 2007) (granting summary judgment where there was no genuine issue of fact to show that defendant had constructive knowledge of physical danger to customers sitting on glue on bathroom toilet seat)[6]; *Brent v. Bank of Aurora*, 291 P.2d 391, 395-96 (Colo. 1955) (issue of negligence resolved as a matter of law and case dismissed when undisputed material facts show that defendant did not have constructive notice of the ice on its parking lot in time to have remedied it or to have warned of its existence); *Atkinson v. Ives*, 255 P.2d 749, 752 (Colo. 1953) (dismissing case where there was no evidence that loose patio stone which caused plaintiff to fall was apparent or discernible before the accident).[7] Furthermore, ice, in and of itself, is not a dangerous condition. *Denver v. Dugdale*, 256 P.2d 898, 900-01 (Colo. 1953) ("the mere slipperiness of a sidewalk occasioned by ice, not accumulated so as to cause an obstruction, will not ordinarily make a city liable, because, where there is snow on the sidewalk and it is rendered slippery, there is danger of injury from slipping and falling even on the

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[6] A copy of the *Dougherty* Court's opinion is found at R.Ex.G, p.477.

[7] *Compare with Jacobs v. Commonwealth Highland Theatres, Inc*., 738 P.2d 6 (Colo. 1986) (finding that evidence of similar incidents in the same location of the plaintiff's fall showed constructive knowledge of the dangerous condition); *Denver v. Brubaker*, 51 P.2d 352 (Colo. 1935) (same).

best constructed walks, and that at such times, there is imposed upon foot travelers the necessity of exercising increased care").

There is no evidence in the record that VRSI had actual or constructive knowledge of the specific danger of which Hesford complains. As is the case here, when a defendant moves for summary judgment on an issue upon which it would not bear the burden of persuasion at trial, summary judgment is appropriate by showing an absence of evidence in the record to support the plaintiff's case. *Casey v. Christie Lodge Owner's Ass'n*, 923 P.2d 365, 366 (Colo. 1996).

In *Casey*, a case brought under the CPLA, the plaintiff was injured while a guest at the defendant's lodge when a storage door under a bunk bed opened and struck her in the shin as she was walking by. *Id.* The award of summary judgment in favor of the defendant was affirmed because both deposition testimony and responses to interrogatories confirmed there had never been an accident at the specific location similar to that alleged by the plaintiff. *Id*. at 366-67. As was true in *Casey* is true in this case: there had been no prior similar slip and fall incidents in the Airport Lot. (R.Tr. (3/13/14), p.40, l.17 – p.4, l.19; *see also* R.Ex. F, p.481 (consistent interrogatory response).)

There is likewise no evidence that VRSI knew or should have known that there was ice, which posed a danger to the public[8], in the area where Hesford fell. There is no evidence as to how long the ice was present before Hesford fell and Hesford, herself, cannot say. (R.Tr.(12/10/13), p.77, l.13-15.) Hesford testified that the day before she fell, the parking lot was "pretty much was cleared to the pavement because of the sun" (*Id*. at 67:19 – 68:3) and the day she fell, it was snowing hard (*Id*. at 30:12-23) and the Airport Lot was covered in snow (*Id*. at 51:15 - 53:16, 43:21 - 44:6). As stated above, logically, the ice upon which Hesford claims she fell could not have been there for sufficient time to impute constructive knowledge on VRSI. *See Gemaehlich v. Holyoke*, 486 P.2d 34, 36 (Colo. 1971) (slip and fall lawsuit properly dismissed where there was no evidence presented from which the length of time ice was on the sidewalk beyond 24 hours was presented even though the sidewalk was only partially cleared of snow and ice the day prior to the plaintiff's fall); *Dugdale*, 256 P.2d at 900 (defendant had no constructive knowledge of the icy condition upon which the plaintiff fell because "the slippery, icy condition could not have been observed on account of a light covering of snow, as the testimony discloses, then we are at a loss to understand how [the defendant] could be almost instantly aware of such a condition and be

[8] Ice, in and of itself, is not a dangerous condition. *Dugdale,* 256 P.2d at 900-01.

charged with constructive notice thereof"). The same analyses in *Atkinson, Gemaehlich and Dugdale* apply here, warranting a finding that VRSI could not have had constructive knowledge of the alleged ice where Hesford fell.

As the Trial Court correctly pointed out, Hesford relies solely upon general knowledge that snow and ice can be slippery; however, that general knowledge does not legally equate to actual or constructive knowledge of a danger in the Airport Lot for purposes of liability under the CPLA. *Casey*, 923 P.2d at 366-67. Thus, affirmation of the grant of Summary Judgment in favor of VRSI is appropriate. *See also Atkinson*, 255 P.2d at 752 ("Where there is no evidence of the existence of a faulty condition prior to the accident, it follows there is no violation of defendant's duty and consequently, no liability attached.").

## CONCLUSION

VRSI respectfully requests that this Court affirm the Trial Court's entry of Summary Judgment in favor of VRSI.

Respectfully submitted this 12th day of August, 2015.

Respectfully submitted,

*Original signature on file at Vail Resorts Management Company*

s/ Samuel N. Shapiro

Samuel N. Shapiro (#44459)

*Attorney for Defendant/Appellee*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF** was filed and served via manner indicated below this 12th day of August, 2015, to the following:

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