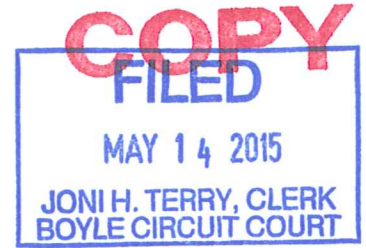


COMMONWEALTH OF KENTUCKY
50th JUDICIAL CIRCUIT
BOYLE CIRCUIT COURT
CIVIL ACTION NO. 14-CI-00314



CONNIE GOODLETT

PLAINTIFF

DEFENDANT AGE ENGINEERING SERVICE, INC.'S
MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT

v.

DANVILLE EYE CENTER, PLLC and
DREW RICE CONTRACTING, LLC and
AGE ENGINEERING SERVICE, INC.

DEFENDANTS

* * * * *

Defendant, AGE Engineering Service, Inc. ("AGE"), by counsel, for its Motion for Summary Judgment and supporting Memorandum, states as follows:

FACTUAL BACKGROUND

In her Complaint, the Plaintiff alleges that, while she was visiting property owned by the Danville Eye Center, PLLC ("the Eye Center"), she fell over a "hazard" constructed at the entrance of the building (Complaint, Paragraph 5) and was injured. She alleges that AGE Engineering Services, Inc. ("AGE") designed the curbing and parking lot on which she fell, and that AGE breached its duty to design the curbing and parking lot so as not to create a hazard or unsafe condition. (Complaint, Counts III and IV). She asserts similar claims against the Eye Center and against the construction companies that built the curb (D.R. Contracting, LLC, and Drew Rice Contracting, LLC).

During the Plaintiff's deposition, photographs of the curb at issue were introduced as exhibits, and copies of those photographs are attached hereto as collective Exhibit A. The

photographs show a concrete handicap ramp extending from the entrance of the building into the paved parking lot. Each side of the ramp is formed by a curb, which then slopes downward toward the surface of the ramp. The area immediately in front of the ramp is marked with blue paint in slashed lines, indicating that it is not to be used for parking. Handicap parking spaces are on either side of the ramp.

The Plaintiff testified that, on the date of the accident, she brought her elderly mother to the Eye Center for an appointment with Dr. Smith. (February 5, 2015, deposition of Connie Goodlett (“Goodlett depo.”), p. 59). The Plaintiff was a relatively frequent visitor to the Eye Center; her mother had appointments every six months, and that the Plaintiff had been taking her to those appointments for approximately three years. (*Id.*, p. 64). She believes that she arrived early for the appointment, and therefore was in no hurry to get to the office. (*Id.*, p.60). On prior visits, she had parked on the left side of the handicap ramp so that her mother would be closer to the door to the building. (*Id.*, p. 61). On this occasion, however, a car was already parked in that spot, so she parked in the spot on the right side of the ramp. She told her mother to wait, got out of the car, stepped onto the curb forming the side of the ramp, and then lost her footing on the sloped portion and fell “downhill.” (*Id.*, p. 65).

The Plaintiff admitted that there was no shadow on the curb at the time of the accident, and the weather was fine. (*Id.*, p. 66). She knew from prior visits that the curb was present. (*Id.*). She further admitted that nothing about the curb had changed from those prior visits. (*Id.*, p. 61). Until the accident, the ramp remained the same for the entire time she had visited the Eye Center. (*Id.*, p. 69). She acknowledged that the left and right sides of the curb were constructed in the same way, with a slope on both sides. (*Id.*, p. 70-71). Nothing about the condition of the curb surprised her on the date of the accident. (*Id.*). She also admitted that the curb is not hidden or

concealed in any fashion. Instead, the sloped area would have been in plain sight, had she looked down. (*Id.*, p. 82-83).

During examination by her counsel, the Plaintiff claimed that she had “forgotten” that the curb was sloped. (*Id.*, p. 81). On re-examination by counsel for the Eye Center, however, she affirmed her familiarity with the curb:

Q. With your experience with that particular ramp, is there any reason you couldn't have seen that sloping had you looked down before your accident?

A. If I had looked down, probably I would have seen it, but...

Q. Okay. I mean, it's not hidden or concealed in any fashion?

A. No.

Q. It's there and you can see it if you look at the sloped area, correct?

A. Yes.

(*Id.*, p. 82, line 20 - p. 83, line 6).

ARGUMENT

A. Summary Judgment Standard

When the pleadings and evidence show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Ky. R. Civ. P. 56.03. Although entry of a summary judgment requires the record to suggest that it is impossible for the respondent to produce evidence at trial warranting a judgment in his or her favor, *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991), “impossible” is used only in a practical sense. *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). While “*Steelvest* made it more difficult to gain a summary, it did not exclude it from our trial procedures.” *Wallace v. Scott*, 844 S.W.2d 439 (Ky. App. 1992). A

properly supported summary judgment motion cannot be defeated without presenting at least some affirmative evidence showing a genuine issue of material fact. *Steelvest, Inc.*, 807 S.W.2d at 482.

B. AGE Fulfilled Its Duty of Care

Even assuming, for the limited purposes of this motion, that AGE owed a duty of care to Eye Center's visitors, and that its duty is tantamount to the duty owed by the possessor of land to its invitees, the Defendants are not liable to the Plaintiff based upon her own testimony and Kentucky law.

A possessor of land owes a duty to an invitee to eliminate or warn against only "unreasonably dangerous conditions." *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 909 (Ky. 2013), as corrected (November 25, 2013). Kentucky's Supreme Court defines an "unreasonable risk" as one that is "recognized by a reasonable person in similar circumstances as a risk that should be avoided or minimized" or one that is "in fact recognized as such by the particular defendants." *Id.* at 914. On the other hand, "a risk is not unreasonable if a reasonable person in the defendant's shoes would not take action to minimize or avoid the risk." *Id.* "Normally, an open-and-obvious danger may not create an unreasonable risk. Examples of this may include a small pothole in the parking lot of a shopping mall; steep stairs leading to a place of business; or perhaps even a simple curb." *Id.* (emphasis added).

Certainly, there are some factors which may create a circumstance in which a property owner "should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger" *Id.* at 914. The *Shelton* Court noted that, in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), it had adopted "the

factors listed in Section 343A of the Restatement (Second) where a defendant may be found liable despite the obviousness of the danger”:

To recap, those factors are: when a defendant has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious or will forget what he has discovered, or fail to protect himself against it; and when a defendant has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. These factors dovetail with what constitutes an unreasonable risk.

Id. at 914. The Court made clear that “summary judgment remains a viable concept under this approach.” *Id.* at 916.

As a matter of undisputed fact, the ramp on which the Plaintiff slipped was an open and obvious condition, and the Plaintiff’s own testimony confirms that none of the above-listed factors are present in this case.

This is not a case in which any of the defendants had any reason to expect that the Plaintiff’s attention would be distracted, so that she would not discover what is obvious or would forget what she had previously discovered or otherwise fail to protect herself against it. The Plaintiff was familiar with the curb. She had encountered and safely navigated it on the left side. Indeed, she was accustomed to stepping on to the curb and ramp while holding on to her elderly mother – a distraction that did not hinder her on the date of the accident, when she told her mother to remain in the car while got out. She testified that the left and right hand sides of the curb were constructed in the same way. Nothing about the curb had changed between her previous visits and the date of the accident. She conceded that she was not in any hurry to enter the building. The weather was good, and there were no shadows falling across the curb. Cf. *McIntosh*, 319 S.W.3d at 393 (hospital had a good reason to expect that the plaintiff, a paramedic, would be distracted by tending to a patient transported by ambulance while encountering an emergency room entrance).

Nor is this a case in which any defendant could have a reason to expect that the Plaintiff would proceed to encounter any danger attendant to the curb because a reasonable person in her position would conclude that the advantages of doing so would outweigh the apparent risk. Cf. *Shelton*, 413 S.W.3d at 917 (a reasonable juror might conclude that a hospital had reason to foresee that the plaintiff, who tripped on wires beside her husband's hospital bed while leaning over to kiss him goodnight, would proceed to encounter the wires despite the risk because her compassion for her husband outweighed the danger); *McIntosh*, 319 S.W.3d at 394 (where plaintiff, a paramedic, was rushing a critically ill patient into the hospital in an effort to save his life, "the benefits of her rushing to the door (at the risk of tripping over the curb) outweighed the costs of her failing to do so (at the risk of the patient's condition worsening, perhaps to the point of death, on the Hospital doorstep)").

Instead, this case is far more analogous to *Smith v. Grubb*, 2014 WL 4782937, -- S.W.3d --, (Ky. App. 2014), where a store patron fell on eroded blacktop in a parking lot. The record established that the area where the plaintiff fell was well-lit. "[T]he depression was not uncommonly deep or shielded from view" *Id.* at *12. There was nothing special about the area that would pose an unreasonable risk "to an observant invitee." *Id.* The plaintiff in *Smith*, like the Plaintiff in this case, acknowledged that the alleged defect was not concealed; instead, she simply failed to observe it. "There is no evidence [the defendant] knew or should have known an invitee on its premises would blindly walk through its parking lot oblivious to common imperfections. The erosion was only a danger to the unwary." *Id.* at *12. The Court of Appeals upheld summary judgment in the defendant's favor.

Summary judgment was also upheld for similar reasons in *Ward v. JKP Investments, LLC*, 2015 WL 293332 (Ky. App. Jan. 23, 2015). There, the plaintiff fell on deteriorated steps

leading up from the sidewalk to the front lawn while attending a party at the defendant's tenant's home. The Court acknowledged that the "obviousness of the condition" is only one factor to consider in analyzing a premises liability case. However, "[t]o survive summary judgment, [the plaintiff] needed to come forward with affirmative evidence, viewed in a light favorable to her, showing that [the defendant] should have reasonably foreseen that visitors would be distracted, would be engaging in some activity while traveling on the deteriorating step, or would otherwise not proceed with caution given the surrounding area." *Id.* at *3 (emphasis added). The plaintiff failed to make that showing. She had previously traversed the stairs three times without difficulty; it was daylight; "she was not looking or paying attention to where she was stepping" *Id.* "Nothing in the record indicates that under the circumstances, [the defendant] had reason to expect visitors' attention might be distracted or that visitors would proceed to encounter an obvious danger." *Id.*

The Plaintiff admits that the "danger" in this case was open and obvious. The Defendants thus owed a duty to eliminate or warn against that danger only if one of the factors identified in *Shelton, supra*, and Section 434A of the Restatement (Second) existed. As a matter of undisputed fact, none of those factors are present. Nothing in the record indicates that any defendant had any reason to expect that the Plaintiff might be distracted, that some special circumstances existed which made it likely that she would forget the nature of the curb, or that a reasonable person would conclude that the advantages to encountering the risk outweighed the disadvantages. On the contrary, the Plaintiff testified that she was quite familiar with the sloping nature of the curb, that she had safely encountered it numerous times prior to the accident, that the weather was fine, that there were no shadows, and that she was not in any hurry. She simply paid no attention to where and how she stepped on a ramp with which she was familiar: "If I had

looked down, probably I would have seen it.” (Goodlett depo., p. 82, lines 24-25.) Kentucky law will not impose liability upon a possessor (or a design engineer or a contractor) under these circumstances.

CONCLUSION

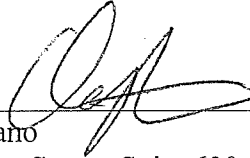
The Plaintiff’s testimony makes clear that there are no undisputed material facts as to the Defendants’ compliance with any duty owed by them to an invitee and as to the non-existence of any “unreasonable” risk: the curb and the ramp were open and obvious conditions, there was no reason to expect that the Plaintiff’s attention might be distracted, or that she would reasonably proceed to encounter any “danger” created by the curb and ramp because the advantages of doing so would outweigh the apparent risk. The Plaintiff’s self-serving testimony that she had simply “forgotten” about the curb is defeated by her admission that familiar with it and, indeed, had safely navigated it while holding on to her mother on previous visits. This is the type of open and obvious danger, unaccompanied by any special distractions or emergencies, which cannot constitute an unreasonable risk which the possessor (or engineer or contractor) must eliminate or warn against.

For the reasons set forth above, AGE respectfully requests the entry of summary judgment in its favor on all claims asserted against it.

NOTICE

The foregoing shall come on for hearing before the Boyle Circuit Court on the 3rd day of June, 2015, at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard.

MILLER, GRIFFIN & MARKS, P.S.C.



Don A. Pisacano
271 West Short Street, Suite 600
Lexington, Kentucky 40507-1292
Telephone: (859) 255-6676
Facsimile: (859) 259-1562

COUNSEL FOR DEFENDANT,
AGE ENGINEERING SERVICE, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following counsel of record via U.S. first class mail, this the 13th day of May, 2015:

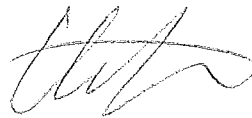
Ephraim W. Helton, Esq.
Helton, Erwin & Associates
P.O. Box 137
Danville, KY 40423-0137

J. Hadden Dean, Esq.
Sheehan, Barnett, Dean, Pennington, Little & Dexter, P.S.C.
P.O. Box 1517
Danville, KY 40423-1517

Daniel E. Murner, Esq.
Landrum & Shouse, LLP
P.O. Box 951
Lexington, KY 40588-0951

Courtesy copy to:

Hon. Darren W. Peckler
Courthouse
321 W. Main St., Suite 38
Danville, KY 40422-9048



Don A. Pisacano

Ex 1



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EXHIBIT #1
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Date 2-5-15 Rptr SP
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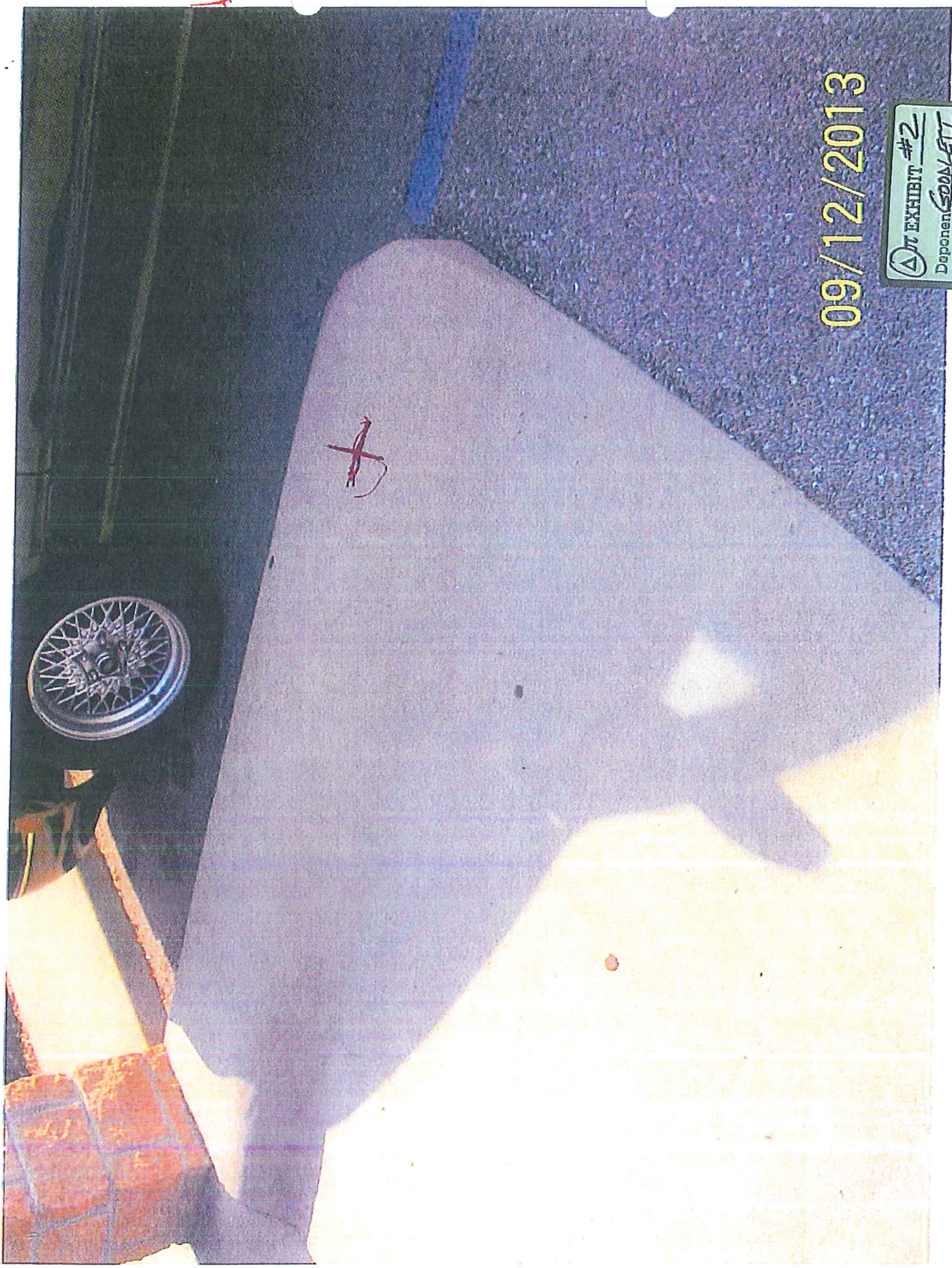
EXHIBIT

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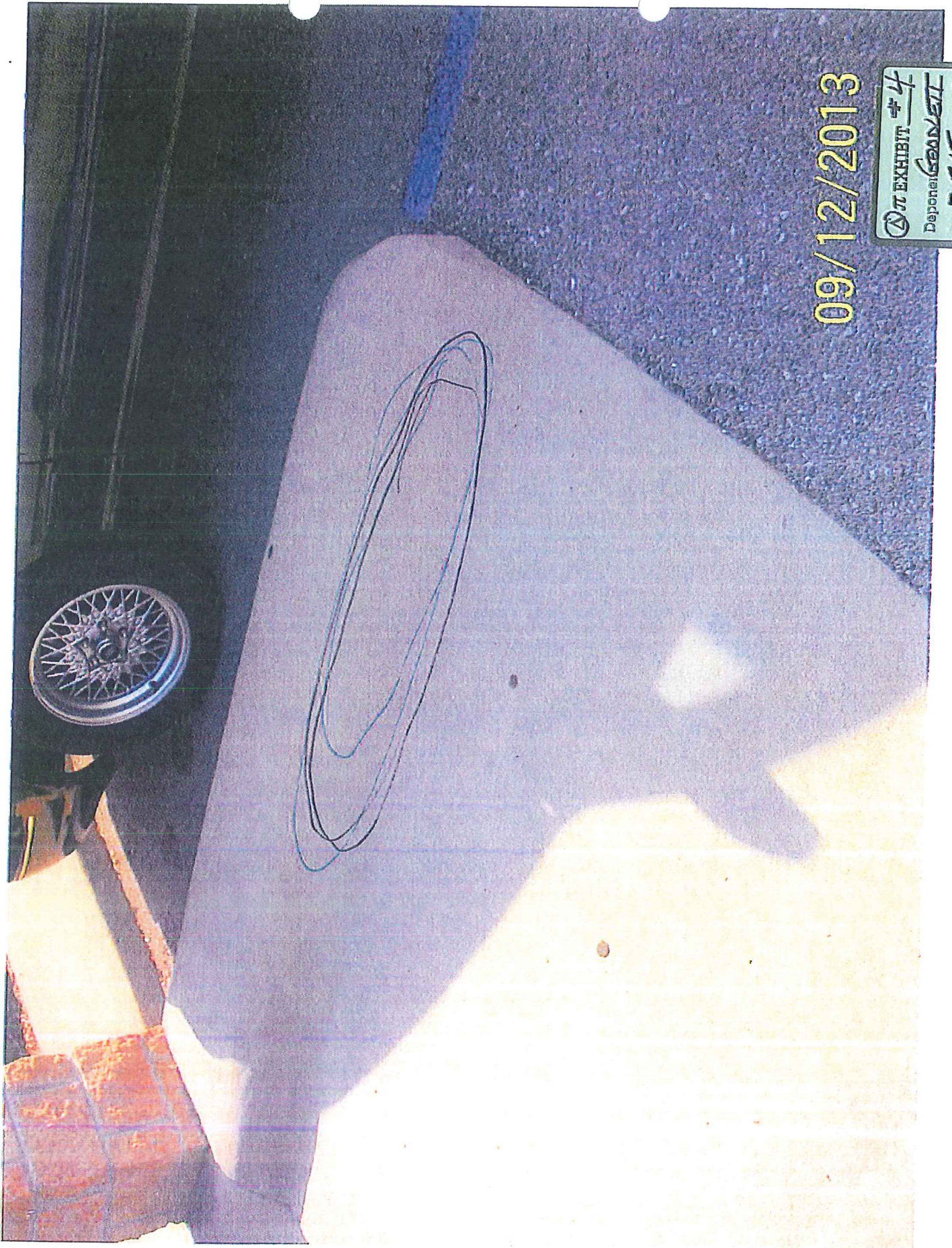


09/12/2013

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Ex 3

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