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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201–2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Sylvia Rivera, Plaintiff v. Edgar and Ruby Deitrich, Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Civil Action No. 2012-3435

HEADNOTES

Summary Judgment Opinion

1. Summary judgment is designed to dispose of cases where, though the pleadings may state a valid cause of action, a party fails to make out a claim or defense after completion of relevant discovery. Miller v. Sacred Heart Hosp., 753 A.2d 829, 833 (Pa. Super. Ct. 2000); Amiable v. Auto Kleen Car Wash, 376 A.2d 247, 250 (Pa. Super. Ct. 1977).

2. A party may move for summary judgment in part or in whole after the relevant pleadings are closed but within such time as to not unreasonably delay trial. PA. R. CIV. P. 1035.2.

3. A party bearing the burden of proof at trial is entitled to summary judgment if "there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report." PA. R. CIV. P. 1035.2(1).

4. A party who will not have the burden of proof at trial is entitled to summary judgment "if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." PA. R. CIV. P. 1035.2(2).

5. A party responding to a motion for summary judgment cannot rest upon the pleadings, but rather must identify one or more issues of material fact (1) arising from evidence in the record controverting the evidence cited in support of the motion; (2) by challenging the credibility of the witness or witnesses testifying in favor of the motion; or (3) identifying record evidence essential to the claim or defense that the motion avers was not produced. PA. R. CIV. P. 1035.3(a).

6. In determining whether summary judgment is appropriate, the Court must view the record in the light most favorable to the non-moving party. Manzetti v. Mercy Hosp. of Pittsburgh, 776 A.2d 938, 945 (Pa. 2001).

7. "Negligence is the absence of ordinary care that a reasonably prudent person would exercise in the same or similar circumstances." Merlini ex rel. Merlini v. Gallitzin Water Auth., 980 A.2d 502 (Pa. 2009).

8. In a cause of action based on negligence a plaintiff must show: (1) the defendant owed a duty of care to the plaintiff; (2) the duty was breached; (3) a causal connection between the breach and the plaintiff's injury; and (4) the plaintiff suffered an actual loss or damages. Merlini ex rel. Merlini v. Gallitzin Water Auth., 980 A.2d 502 (Pa. 2009).

9. The duty of care owed by possessors of land to those who enter upon their property depends on whether the entrant is an invitee, a licensee, or a trespasser. Cresswell v. End, 831 A.2d 673, 675 (Pa. Super. Ct. 2003).

10. An invitee is classified as either a public invitee or a business visitor. Cresswell v. End, 831 A.2d 673, 675 (Pa. Super. Ct. 2003). "A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public," while "[a] business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Id. (citing Restatement (Second) of Torts § 332 (1965)).

11. A licensee is "a person who is privileged to enter or remain on land only by virtue of the possessor's consent." Cresswell v. End, 831 A.2d 673, 675 (Pa. Super. Ct. 2003) (citing Restatement (Second) of Torts § 330 (1965)).

12. When a person only has permission, i.e., the entrant believes they may enter if they desire, as opposed to invitation, i.e., the possessor desires that the entrant come upon the land, the entrant is a licensee. Cresswell v. End, 831 A.2d 673, 675 (Pa. Super. Ct. 2003).

13. A trespasser is "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Palange v. City of Philadelphia, Law Dep't, 640 A.2d 1305, 1308 (Pa. Super. Ct. 1994) (citing Restatement (Second) of Torts § 329 (1965)).

14. The standard of care a possessor of land must abide by differs depending on the status of the entrant.

15. When the entrant is an invitee "[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger." Carrender v. Fitterer, 469 A.2d 120, 123 (1983) (citing Restatement (Second) of Torts § 343 (1965)).

16. When the entrant is a licensee "[a] possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and (c) the licensees do not know or have reason to know of the condition and the risk involved." Cresswell v. End, 831 A.2d 673, 677 (citing Restatement (Second) of Torts § 342 (1965)).

17. When the entrant is a trespasser, the duty owed by a possessor of land "is only to refrain from willful or wanton misconduct." Graham v. Sky Haven Coal, Inc., 563 A.2d 891, 896 (Pa. Super. Ct. 1989).

18. Generally, whether an entrant is an invitee, a licensee, or a trespasser is a question of fact for the jury. However, where the evidence does not support an issue as to the entrant's status, the Court may remove the issue from the jury. Palange v. City of Philadelphia, Law Dep't, 640 A.2d 1305, 1307 (Pa. Super. Ct. 1994).

19. Plaintiff occupied status of licensee where she was walking on sidewalk outside Defendant's house despite Defendant's lack of knowledge. Palange v. City of Philadelphia, Law Dep't, 640 A.2d 1305, 1309 (Pa. Super. Ct. 1994).

20. "[P]roperty owners have a duty to keep their sidewalks in a reasonably safe condition for travel by the public." Mull v. Ickes, 994 A.2d 1137, 1140 (Pa. Super. Ct. 2010). The determination of whether a property owner has met the duty is assessed by the totality of the circumstances on a case-by-case basis. Id.

21. Property owners are not responsible for "trivial defects." Mull v. Ickes, 994 A.2d 1137, 1140 (Pa. Super. Ct. 2010). "[E]levation, depression, or irregularity in a sidewalk or in a street or highway may be so trivial that, as a matter of law, courts are bound to hold that there was no negligence in permitting such depression or irregularity to exist." Id.

22. The defendant has the burden of proof in establishing that a defect is trivial as a matter of law. Mull v. Ickes, 994 A.2d 1137, 1140 (Pa. Super. Ct. 2010). Where the defect in the sidewalk is not obviously trivial in nature the issue of negligence must be submitted to the jury. Id.

23. When viewed in the light most favorable to Plaintiff, the evidence shows that Defendants should have known that the sidewalk had a crack and posed an unreasonable risk of harm to licensees using the sidewalk, where Defendant admitted to replacing a portion of the sidewalk where maple tree roots raised it, putting him on notice of potential further defects, and Defendant failed to inspect the area following the repair.

24. A crack in a sidewalk is not trivial as a matter of law where it is located within the direct line of pedestrian travel and no evidence was presented as to the physical characteristics of the crack.

25. Defendants failed to exercise reasonable care to make the condition on the sidewalk safe or warn Plaintiff of the crack and the risk involved, as the existence of the crack itself is patent evidence of a failure to correct an unsafe condition.

26. A plaintiff may not recover if she knows or has reason to know of a dangerous condition and the risk involved. The issue must be submitted to a jury if reasonable minds could disagree. Carrender, 469 A.2d at 123-24.

27. A danger is "obvious" when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence, and judgment." Carrender, 469 A.2d at 123-24.

28. A danger is "known" if it is known to exist and it is recognized that it is dangerous and the probability and gravity of the threatened harm is appreciated. Carrender, 469 A.2d at 123-24.

29. "A pedestrian is not required to keep his vision fixed continually on the ground immediately in front of him to discover possible points of danger . . ." Sculley v. City of Philadelphia, 112 A.2d 321, 325 (Pa. 1955).

30. Reasonable minds can differ on whether a crack, with unknown dimensions, in a sidewalk is an obvious danger that would be apparent to and recognized by a reasonable person and therefore the issue must be submitted to the jury.

31. When a plaintiff has established that a defendant breached a duty of care owed to the plaintiff, the plaintiff must then establish a causal connection between the defendant's conduct and the plaintiff's injury, also known as proximate cause. We Polett v. Pub. Commc'ns, Inc., 83 A.3d 205, 212 (Pa. Super. Ct. 2013).

32. Proximate cause may be established by evidence showing that the defendant's negligent act or omission was a substantial factor in causing the plaintiff's injury. We Polett v. Pub. Commc'ns, Inc., 83 A.3d 205, 212 (Pa. Super. Ct. 2013). In making this determination the Court will look to the following factors:(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and (c) lapse of time. Id.

33. Plaintiff's fall caused by tripping from a crack in Defendant's sidewalk establishes proximate cause.

34. Damages may be shown by injuries to a person and costs of medical bills therefrom that are the result of the negligence of another.

Appearances:

Nicole T. Matteo, Esq., *Counsel for Plaintiff*

Stephen L. Dugas, Esq., *Counsel for Defendants*

OPINION

Before Herman, J

This is a personal injury case involving a slip, a fall, and a sidewalk. Sylvia Rivera ("Plaintiff") claims that Edgar Deitrich ("Mr. Deitrich") and Ruby Deitrich ("Mrs. Deitrich") (collectively "Defendants") were negligent in failing to maintain in a reasonably safe condition the sidewalk outside their premises in Chambersburg, Pennsylvania which resulted in injuries to Plaintiff. Before the Court is Defendants' Motion for Summary Judgment. Defendants assert that based on the record Plaintiff cannot establish its claim of negligence. For the reasons set forth below, the Court denies Defendants' motion.

PROCEDURAL HISTORY

Plaintiff filed a Complaint in Civil Action on September 17, 2012 to which Defendants filed an Answer on October 1, 2012. The parties subsequently conducted depositions on May 30, 2013. Defendants filed a Motion for Summary Judgment on August 29, 2013 and a brief in support of their motion on September 26, 2013. Plaintiff filed a Response in Opposition to Defendant's Motion for Summary Judgment on September 23, 2013 and a brief in support of her response on September 26, 2013. Also on September 26, 2013 Defendants filed a Praecipe to List their Motion for Summary Judgment for Argument. However, on January 6, 2014 with counsel in agreement the Court issued an Order removing the matter from oral argument as the Court would be able to decide the matter on briefs alone.

FACTUAL BACKGROUND

On September 20, 2010 at approximately 9 a.m. Plaintiff allegedly hit her toe on a crack in the sidewalk, slipped and fell, and was injured. (Mot. for Summ. J. ¶ 4). [1] The sidewalk in question is located at 403 South Second Street, Chambersburg, Pennsylvania which is owned by Defendants. (Edgar Deitrich Dep. 7:7-9, 14:9-18, May 30, 2013; Rivera Dep. 12:16-22, May 30, 2013). At that time Plaintiff lived "around the corner" at 307 South Main Street, Chambersburg, Pennsylvania. (Rivera Dep. 12:16-25). Plaintiff testified that on the day of the accident: it was sunny outside; the sidewalk was dry and there was nothing else on the sidewalk at the time she fell; she was looking where she was walking; there was nothing to distract her attention; and she was walking normally. (Id. at 29:8-13, 30:3-5,

1 Paragraph 4 of Defendants' Motion for Summary Judgment refers to Plaintiff's Answers to Defendants' Interrogatories.

31:21-23, 32:11-14, 34:25-35:2, 35:18-20). Plaintiff was in the area where the accident occurred because she "had got[ten] a call from a person that [her] dog was seen in that area." (Id. at 14:15-22). As a result of the phone call, Plaintiff and her boyfriend walked to the location where she allegedly slipped and fell. (Id. at 14:22-15:4). Plaintiff testified that while she was walking on the sidewalk where the accident happened "[she] tripped on a crack. [Her] toe hit that and [she] fell." (Id. at 36:2-3). Attached to Plaintiff's deposition are photographs of the "crack" in the sidewalk. (Id. Ex. 1, 2).

Plaintiff testified that she was taken to the Chambersburg Hospital Emergency Room by ambulance after she fell onto the sidewalk. (Id. at 40:19-23). Plaintiff injured the side of her right knee and also her right hip and now feels pain in those areas that she did not feel before she fell. (Id. at 40:8-18, 45:22-46:11). Furthermore, Plaintiff claims the fall has impaired her ability to walk, which impairment she did not have before the accident. (Id. at 45:6-10). Attached to Plaintiff's brief is a document from Chambersburg Hospital dated October 12, 2010 indicating the presence of pain since Plaintiff slipped and fell. (Pl.'s Br. in Supp. of the Resp. in Opp'n to the Mot. for Summ. J. of Defs. Ex. C).

In his deposition Mr. Deitrich testified that at some point prior to September 2010 he had "replaced a square or two [on the sidewalk] where a maple tree raised it up." (Edgar Deitrich Dep. 34:4-11). Mr. Deitrich replaced the squares himself. (Id. at 37:3-8). The repair was done because "[a] root had growed [sic] up and raised the concrete up probably two and a half three inches out at the end, so we took the section of concrete out and cut the root out, laid new concrete in." (Id. at 37:17-21). After Mr. Deitrich replaced this section of the sidewalk he did not inspect it at any time after that to see if other areas needed to be replaced. (Id. at 60:11-16). During the time Defendants owned the property "the sidewalk passed every borough inspection." Mr. Deitrich also alleges that no one ever complained to him about the condition of the sidewalk, no one ever reported tripping or falling on the sidewalk, and no one ever discussed any raised areas of the sidewalk with him. (Id. at 57:16-58:9). Mrs. Deitrich similarly testified that prior to September 2010: no one ever complained to her about the sidewalk; no one ever indicated to her that there was anything wrong with the sidewalk; she was never aware of anyone falling on the sidewalk; and she never noticed any raised areas of the sidewalk. (Ruby Deitrich Dep. 21:11-22:24, May 30, 2013).

DISCUSSION

Based on her injuries allegedly caused by the sidewalk, Plaintiff

claims that Defendants were negligent in failing to maintain the sidewalk in a reasonably safe condition. Defendants move the Court for summary judgment alleging that based upon the record Plaintiff cannot make out her claim of negligence. The matter is now ripe for decision.

I. Summary Judgment Standard

Summary judgment is designed to dispose of cases where, though the pleadings may state a valid cause of action, a party fails to make out a claim or defense after completion of relevant discovery. Miller v. Sacred Heart Hosp., 753 A.2d 829, 833 (Pa. Super. Ct. 2000); Amiable v. Auto Kleen Car Wash, 376 A.2d 247, 250 (Pa. Super. Ct. 1977).

A party may move for summary judgment in part or in whole after the relevant pleadings are closed but within such time as to not unreasonably delay trial. PA. R. CIV. P. 1035.2. A party bearing the burden of proof at trial is entitled to summary judgment if "there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report." PA. R. CIV. P. 1035.2(1). A party who will not have the burden of proof at trial is entitled to summary judgment

> if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

PA. R. CIV. P. 1035.2(2). A party responding to a motion for summary judgment cannot rest upon the pleadings, but rather must identify one or more issues of material fact (1) arising from evidence in the record controverting the evidence cited in support of the motion; (2) by challenging the credibility of the witness or witnesses testifying in favor of the motion; or (3) identifying record evidence essential to the claim or defense that the motion avers was not produced. PA. R. CIV. P. 1035.3(a); see Phaff v. Gerner, 303 A.2d 826, 829 (Pa. 1975); Accu-Weather, Inc. v. Prospect Commc'ns, Inc., 644 A.2d 1251, 1254 (Pa. Super. Ct. 1994).

In determining whether summary judgment is appropriate, the Court must view the record in the light most favorable to the non-moving party. Manzetti v. Mercy Hosp. of Pittsburgh, 776 A.2d 938, 945 (Pa. 2001). Furthermore, "[A] motion for summary judgment cannot be supported or defeated by statements that include inadmissible hearsay evidence." Turner v. Valley Hous. Dev. Corp., 972 A.2d 531, 537 (Pa. Super. Ct.

2009). In granting summary judgment the Court may not rely solely on oral testimony.[2] Penn Center House, Inc. v. Hoffman, 553 a.2d 900, 903 (Pa. 1989). However, summary judgment may be granted if the oral testimony upon which it is based constitutes an adverse admission by a nonmoving party. Com., Office of Atty. Gen. ex rel. Corbett v. Richmond Twp., 2 A.3d 678, 681 (Pa. Commw. Ct. 2010).

II. Negligence

Defendants are moving for summary judgment against Plaintiff who bears the burden of proof at trial. Discovery relevant to the motion has been completed as the parties took depositions and served interrogatories. Therefore, in order to avoid summary judgment Plaintiff must show sufficient evidence of facts essential to her negligence claim which in a jury trial would require the issues to be submitted to a jury.

"Negligence is the absence of ordinary care that a reasonably prudent person would exercise in the same or similar circumstances." Merlini ex rel. Merlini v. Gallitzin Water Auth., 980 A.2d 502 (Pa. 2009). In a cause of action based on negligence a plaintiff must show: (1) the defendant owed a duty of care to the plaintiff; (2) the duty was breached; (3) a causal connection between the breach and the plaintiff's injury; and (4) the plaintiff suffered an actual loss or damages. Id.

A. Duty of Care and Breach of Duty

In order to determine whether one owes another a duty of care we must examine the relationship of the parties involved. The duty of care owed by possessors of land to those who enter upon their property depends on whether the entrant is an invitee, a licensee, or a trespasser. Cresswell v. End, 831 A.2d 673, 675 (Pa. Super. Ct. 2003). Pennsylvania follows the standards set forth in the Restatement (Second) of Torts. An invitee is classified as either a public invitee or a business visitor. Id. "A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public," while "[a] business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Id. (citing Restatement (Second) of Torts § 332 (1965)). A licensee is "a person who is privileged to enter or remain on land only by virtue of the possessor's consent." Id. (citing Restatement (Second) of Torts § 330 (1965)). When a person only has permission, i.e.,

2 A party is not entitled to summary judgment if the motion is based upon its own witnesses' testimony. Pa. R.C.P. 1035.3(a) (citing Nanty-Glo v. Am. Sur. Co., 163 A. 523 (Pa. 1932)); Porterfield v. Trs. Of Hosp. of Univ. of Pa. 657 A.2d 1293, 1294-95 (Pa. Super. Ct. 1995).

the entrant believes they may enter if they desire, as opposed to invitation, i.e., the possessor desires that the entrant come upon the land, the entrant is a licensee. Id. A trespasser is "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Palange v. City of Philadelphia, Law Dep't, 640 A.2d 1305, 1308 (Pa. Super. Ct. 1994) (citing Restatement (Second) of Torts § 329 (1965)).

The standard of care a possessor of land must abide by differs depending on the status of the entrant. When the entrant is an invitee:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Carrender v. Fitterer, 469 A.2d 120, 123 (1983) (citing Restatement (Second) of Torts § 343 (1965)). When the entrant is a licensee:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and (c) the licensees do not know or have reason to know of the condition and the risk involved.

Cresswell, 831 A.2d at 677 (citing Restatement (Second) of Torts § 342 (1965)). Finally, when the entrant is a trespasser, the duty owed by a possessor of land "is only to refrain from willful or wanton misconduct." Graham v. Sky Haven Coal, Inc., 563 A.2d 891, 896 (Pa. Super. Ct. 1989).

In determining whether Plaintiff has established that Defendants owed a duty of care to Plaintiff we must first decide what status Plaintiff occupied in relation to the sidewalk. Generally, whether an entrant is an invitee, a licensee, or a trespasser is a question of fact for the jury. However, where the evidence does not support an issue as to the entrant's status, the Court may remove the issue from the jury. Palange, 640 A.2d at 1307. The only evidence as to why Plaintiff was on the sidewalk came from Plaintiff

herself. Plaintiff testified at her deposition that she was in the area where the accident occurred because she "had got[ten] a call from a person that [her] dog was seen in that area." As a result Plaintiff and her boyfriend Hakeem Shamir walked up to the location of the sidewalk where the accident happened. Clearly the evidence establishes that Plaintiff was a licensee. Defendants did not invite Plaintiff to their property nor did they have any desire for her to occupy the sidewalk. As such, Plaintiff was not an invitee upon the sidewalk. However, Plaintiff did have permission to occupy the sidewalk. A person's belief that they have permission to use or occupy a sidewalk is a fundamental belief in our society. See Palange, 640 A.2d at 1309 (pedestrians on a public sidewalk occupied the status of licensee where the possessor of the sidewalk did not actively invite, encourage, or desire the general public to use the sidewalk and the entrant uses the sidewalk for her own purposes). Therefore, at the time of the accident Plaintiff's status was that of a licensee.

Since it is established that Plaintiff's status at the time of the accident was a licensee, we must apply the elements set forth in Cresswell and the Restatement (Second) of Torts § 342. Plaintiff must show that Defendants knew or had reason to know of the dangerous condition on the sidewalk and should have realized that it involved an unreasonable risk of harm to licensees and such licensees would not discover the danger. "[P] roperty owners have a duty to keep their sidewalks in a reasonably safe condition for travel by the public." Mull v. Ickes, 994 A.2d 1137, 1140 (Pa. Super. Ct. 2010). The owners must maintain their sidewalks so as to prevent an unreasonable risk of harm to pedestrians using the sidewalk. The determination of whether a property owner has met the duty is assessed by the totality of the circumstances on a case-by-case basis. Id. While property owners are obligated to maintain safe conditions on their sidewalks, they are not responsible for "trivial defects." Id. "[E]levation, depression, or irregularity in a sidewalk or in a street or highway may be so trivial that, as a matter of law, courts are bound to hold that there was no negligence in permitting such depression or irregularity to exist." Id. "'No definite or mathematical rule can be laid down as to the depth or size of a sidewalk depression' to determine whether the defect is trivial as a matter of law." Id. (citing Breskin v. 535 Fifth Ave., 381 Pa. 461, 113 A.2d 316, 318 (Pa. 1955)). The defendant has the burden of proof in establishing that a defect is trivial as a matter of law. Where the defect in the sidewalk is not obviously trivial in nature the issue of negligence must be submitted to the jury. Id.

An examination of prior case law discussing trivial defects reveals the fact intensive nature of the inquiry. Examples of cases where the Court has found defects to be not trivial include:

> . . . Breskin, 113 A.2d at 316 (Court found that a break in the sidewalk that was 5 inches wide and 1 ½ inches deep was not trivial as a matter of law); Henn v. City of Pittsburgh, 343 Pa. 256, 22 A.2d 742 (1941) (finding that an irregular contoured hole in the sidewalk that was one-and-a-half to two inches in depth and that was in the direct line of travel on a well populated street was not trivial as a matter of law); Massman v. City of Philadelphia, 430 Pa. 99, 241 A.2d 921, 924 (1968) (case sent to the jury where plaintiff was injured on a one-half inch deep, six inch wide, twenty-eight inch long crack in the sidewalk); Aloia v. Washington, 361 Pa. 620, 65 A.2d 685 (1949) (issue of negligence must be submitted to the jury where the plaintiff stepped into a hole two to three inches deep on an unlighted street); Burns v. City of Philadelphia, 350 Pa.Super. 615, 504 A.2d 1321 (1986) (liability determination for the jury where plaintiff injured herself when she stepped into a large recessed tree well in the middle of a walkway); Shafer v. Philadelphia, 60 Pa.Super. 256 (1915) (plaintiff tripped on a three to four inch depression in the sidewalk and the Court found that the matter must be submitted to a jury).

Id. at 1141. Conversely,

> [e]xamples of elevations, depressions or irregularities upon which courts have held no liability could be predicated are: McGlinn v. Philadelphia, supra; (1 1/2″ difference between the levels of two abutting curbstones); Newell v. Pittsburgh, 279 Pa. 202, 123 A. 768 (1 1/2″ between adjoining ends of flagstones at street crossing); Foster v. West View Borough et al., 328 Pa. 368, 195 A. 82 (uneven, rough, unpaved step between curb and sidewalk 2′ wide and 2″ to 4″ lower than sidewalk level); Harrison v. Pittsburgh, 353 Pa. 22, 44 A.2d 273 (manhole cover which projected 2″ *564 above surrounding sidewalk); Magennis et vir. v. Pittsburgh, 352 Pa. 147, 150, 42 A.2d 449, 450 (hole 1 1/8″ below level of pavement and 12″ x 15″ in area termed by this Court ‘a defect that was little more than a break in the surface of the street paving’).

Bosack v. Pittsburgh Railways Co., 189 A.2d 877, 881 (Pa. 1963).

The evidence, when viewed in the light most favorable to Plaintiff, shows that Defendants had reason to know that the sidewalk had a crack and posed an unreasonable risk of harm to licensees using the sidewalk such as

Plaintiff. Preliminarily, Mr. Deitrich admitted that he owned the property abutting the sidewalk and so he was responsible for its repairs. During the time that Mr. Deitrich owned the property no one ever complained to him about the condition of the sidewalk, no one ever reported tripping or falling on the sidewalk, and no one ever discussed any raised areas of the sidewalk with him. Furthermore, Defendants' property passed every borough inspection since they owned it. Mrs. Deitrich's testimony echoed that of Mr. Deitrich in that she was not aware of any problems with the sidewalk either by her own sight or discussions with other people. The evidence fails to establish that Defendants had knowledge of the crack in the sidewalk as they did not receive complaints about the sidewalk from anyone or view the crack themselves. However, there is sufficient evidence evincing that Defendants should have known about the crack. Mr. Deitrich testified that at some prior to September 2010 he had "replaced a square or two [on the sidewalk] where a maple tree raised it up." Mr. Deitrich had done the repair himself. The reason for the repair was that a nearby tree had grown a root up towards the surface and raised the concrete up 2.5 to 3 inches. Mr. Deitrich subsequently took the section of concrete out, cut the root, and laid new concrete in. Significantly, Mr. Deitrich admits that he failed to inspect the area at any point following his repair to determine whether any other areas needed to be replaced. Once Mr. Deitrich made a repair to the sidewalk he was on notice that the tree may cause further defects in the sidewalk. It is not the case where corrective action perpetually cures the defect, such as cleaning up spilled milk in the kitchen. Roots of trees continually grow and consequently can cause similar defects in a sidewalk. The fact that Defendants' property passed borough inspections every time does not relieve them of their obligation to inspect the sidewalk. Accordingly, the maple tree that compelled Mr. Deitrich to replace a section of the sidewalk obligated him to make subsequent inspections of the sidewalk to ensure no further defects came about from his trees.

Defendants contend that the crack Plaintiff allegedly tripped over is trivial as a matter of law and thus Plaintiff's claim must fail. As previously alluded to, we will not conclude the crack in the sidewalk is trivial as a matter of law without obvious proof thereof. Thus, it is Defendants burden to establish the crack's trivial nature. The evidence before us pertaining to the crack itself consists of pictures identified as Exhibits 1 and 2 attached to Plaintiff's deposition and various Exhibits attached to Mr. Deitrich's deposition. There is no testimony relating to the measurements of the crack, such as the depth, the width, or the length. However, even without the benefit of exact measurements we can clearly recognize from the exhibits the inapt presence of the crack in the sidewalk. We reiterate that there is no mathematical equation to determine whether a defect is trivial. Furthermore,

it is apparent from the pictures that the crack was located directly in the line of travel as would customarily be used by pedestrians walking down the street. Aside from the pictures there is nothing more for us to consider in determining whether the crack is trivial as a matter of law. The cases that Defendants cite in support of their position are factually different than those presented in this case. In Davis v. Potter which involved an elevation in pavement the court held that the elevation was trivial because such an elevation was not uncommon in the city and any danger it posed was lessened by the fact that it was covered by two or more inches of snow at the time of the accident. 17 A.2d 338, 339 (Pa. 1941). Here, there was no snow or anything else that lessened the danger of the crack in the sidewalk. Defendants also urge us to consider Harrison v. City of Pittsburgh where the Court held that a manhole cover that elevated 2 inches above the ground was trivial in nature. 44 A.2d 273, 273-74 (Pa. 1945). Unlike Harrison and much of the prior case law, we were not provided with dimensions of the crack. The exhibits alone are simply not sufficient to establish that the crack is obviously trivial. Accordingly, the question of whether the crack poses an unreasonable risk of harm to licensees using the sidewalk is an issue properly left to the jury.

Plaintiff must also establish that Defendants failed to exercise reasonable care to make the condition safe or warn Plaintiff of the condition and the risk involved. This component of the Restatement (Second) test directly correlates to the breach of duty requirement in a negligence action. When resolving all doubts in favor of Plaintiff the evidence demonstrates that Defendants failed to exercise reasonable care to make the condition on their sidewalk safe and therefore Defendants breached their duty of care. The very existence of the crack in the sidewalk is patent evidence that Defendants failed to exercise reasonable care to correct the defect. While Defendants may have repaired the sidewalk after Plaintiff slipped and fell from the crack, our inquiry is limited to the condition of the sidewalk on the day of the accident. The evidence when looked at in the light most favorable to Plaintiff shows that on September 20, 2010 the sidewalk was in disrepair because Defendants failed to repair the cracked sidewalk in front of their property. Consequently, Plaintiff has established that Defendants breached their duty of care owed to Plaintiff.

Plaintiff is also required to show that she did not know or have reason to know of the dangerous condition and the risk involved. A danger is "obvious" when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence, and judgment." Carrender, 469 A.2d at 123-24 (citing Restatement (Second) of Torts § 343A (1965) cmt. b). A danger is "known" if it is known to exist and it is recognized that

it is dangerous and the probability and gravity of the threatened harm is appreciated. Id. A Court may only find that a danger is known or obvious when reasonable minds cannot differ on the issue. Otherwise the issue must be submitted to the jury. Id; see also O'Brien v. Martin, 638 A.2d 247, 249 (1994 Pa. Super. Ct.) (holding that comparative negligence "may not be found by the court as a matter of law unless the facts so clearly reveal the plaintiff's negligence that reasonable minds could not disagree as to its existence) O'Brien, 638 A.2d at 249.

The evidence when viewed in the light most favorable to Plaintiff establishes that Plaintiff did not know or have reason to know of the crack in the sidewalk and the risk involved. Plaintiff testified that on the day of the accident: it was sunny outside; the sidewalk was dry and there was nothing else on the sidewalk at the time she fell; she was looking where she was walking; there was nothing to distract her attention; and she was walking normally. Plaintiff further testified that while she was walking on the sidewalk where the accident happened "[she] tripped on a crack. [Her] toe hit that and [she] fell." The evidence when viewed in the light most favorable to Plaintiff establishes that Plaintiff did not know of the defect in the sidewalk.

However, we must also ascertain whether the crack in the sidewalk and the risk involved was obvious to a reasonable person. Defendants assert that Plaintiff was at fault for not observing and avoiding a condition which ordinary care for her own safety would have disclosed. See Yukusky v. The Caldwell Store, 151 A.2d 839 (Pa. Super. Ct. 1959). However, although it was sunny outside the day of the accident and the sidewalk was clear, "[a] pedestrian is not required to keep his vision fixed continually on the ground immediately in front of him to discover possible points of danger . . ." Sculley v. City of Philadelphia, 112 A.2d 321, 325 (Pa. 1955). Even if we were to accept Defendant's assertion that Plaintiff was also at fault, comparative negligence is a question for the jury, which compels us to rule in favor of Plaintiff at the summary judgment stage. Reasonable minds can certainly differ as to whether a crack in a sidewalk, even on a clear sunny day with no distractions, is an obvious danger that would be apparent to and recognized by a reasonable person in Plaintiff's position. For example, some may decide a 3 inch wide defect in a sidewalk is obvious while other may believe a defect needs to be at least 1 foot wide to be obvious. Such questions when reasonable minds can surmise distinct interpretations are for the jury to decide. Therefore, Plaintiff has established that she did not know or have reason to know of the crack in the sidewalk and the risk involved. Accordingly, Plaintiff has met the elements of the Restatement (Second) land possessor liability test and therefore demonstrated Defendants owed Plaintiff a duty of care and breached that duty.

B. Causation

To withstand summary judgment Plaintiff must show that the injury was caused by Defendants' breach of duty. When a plaintiff has established that a defendant breached a duty of care owed to the plaintiff, the plaintiff must then establish a causal connection between the defendant's conduct and the plaintiff's injury, also known as proximate cause. We Polett v. Pub. Commc'ns, Inc., 83 A.3d 205, 212 (Pa. Super. Ct. 2013). Proximate cause may be established by evidence showing that the defendant's negligent act or omission was a substantial factor in causing the plaintiff's injury. Id. The defendant's negligent conduct will not be found to be a substantial factor if the plaintiff would have sustained injury regardless of the defendant's negligence. Id. In making this determination the Court will look to the following factors:

> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; (c) lapse of time.

Id. (citing Restatement (Second) of Torts § 433 (1965)).

Here, Plaintiff testified that while she was walking on the sidewalk where the accident occurred "[she] tripped on a crack. [Her] toe hit that and [she] fell." Defendants' failure to exercise reasonable care in repairing the sidewalk was the proximate cause of Plaintiff's injury. Plaintiff fell because her toe hit the crack in the sidewalk causing her to fall down onto her right knee and right hip. Defendant's failure to maintain the sidewalk was a substantial factor in Plaintiff's injury. Therefore, Plaintiff has established a causal connection between Defendants' negligence and Plaintiff's injury.

C. Damages

In a negligence action Plaintiff must also show that she suffered damages resulting from Defendants' negligence. Plaintiff was injured as a result of tripping from the crack on Defendants' sidewalk. Plaintiff testified that she was taken to the Chambersburg Hospital Emergency Room by ambulance after she fell onto the sidewalk. Plaintiff injured the side of her right knee and also her right hip and now feels pain those areas that she did not feel before she fell. Furthermore, Plaintiff claims the fall has impaired

her ability to walk, which impairment she did not have before the accident. Attached to Plaintiff's brief is also a document from Chambersburg Hospital dated October 12, 2010 indicating in Plaintiff the presence of pain since she slipped and fell. Viewing the evidence in the light most favorable to Plaintiff, it is plain that Plaintiff suffered damages consisting of injuries to her person and cost of medical bills. In light of such evidence we find that Plaintiff has established *prima facie* evidence of damages sufficient for a negligence claim.

CONCLUSION

Plaintiff, who bears the burden of proof at trial, has produced sufficient evidence to establish a *prima facie* case of negligence that would require the issues to be submitted to a jury. Accordingly, Defendant's Motion for Summary Judgment will be DENIED.

ORDER OF COURT

AND NOW, this 16th day of April, 2014, upon consideration of Defendants' Motion for Summary Judgment, Plaintiff's answer thereto, the parties' briefs in support of their positions, and the record in this matter,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment is **DENIED**.

Pursuant to the requirements of Pa. R. Civ. P. 236 (a)(2),(b) and (d), the Prothonotary shall give written notice of the entry of this Order of Court, including a copy of this Opinion and Order of Court, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.