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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.

Franklin County Legal Journal
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Rachel Seibel v.

Abraxas Academy D/B/A Abraxas, Group Company, Abraxas Youth & Family Services And Abraxas Youth Center

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action No. 2018-00297

HEADNOTES

Summary Judgment

1. Summary judgment may only be granted when the record demonstrates there are no disputed material facts and as a matter of law the moving party is entitled to judgment. *Estate of Swift v. Ne. Hosp. of Philadelphia,* 690 A.2d 719, 721-22 (Pa.Super. 1997); Pa.R.C.P. 1035.2.

2. The Court is to review the record in favor of the non-moving party, assuming all inferences in their favor. *Estate of Swift v. Ne. Hosp. of Philadelphia*, 690 A.2d 719, 721-22 (Pa.Super. 1997).

3. Whether a duty exists under a particular set of facts is a question of law. *Herczeg v. Hampton Twp. Mun. Auth.*, 766 A.2d 866, 871 (Pa.Super. 2001).

Negligence, Elements

4. The elements of a negligence suit are well established. "(1) the existence of a duty or obligation recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure on the part of the defendant to conform to that duty, or a breach thereof; (3) a causal connection between the defendant's breach and the resulting injury; and (4) actual loss or damage suffered by the complainant." *Atcovitz v. Gulph Mills Tennis Club, Inc.,* 812 A.2d 1218, 1222 (Pa. 2002).

Known and Obvious Conditions

5. An owner of land owes no duty to invitees to warn them of dangers that are obvious to the invitee. *Repyneck v. Tarantino*, 202 A.2d 105, 107 (Pa. 1964).

6. When a condition is known and obvious, a possessor of land is not liable, even to an invitee, for failing to warn them of the danger. *McMillan v. Mountain Laurel Racing Inc.,* 367 A.2d 1106, 1109 (Pa. Super 1976); *Restatement (Second) of Torts* §§ 328–343B (1965).

7. A danger is obvious when a reasonable person would recognize the condition and risk. *Carrender v. Fitterer,* 469 A.2d 120, 123 (1983); *Baran v. Pagnotti Enterprises Inc.*, 586 A.2d 978, 982 (Pa. Super. 1991).

8. A visitor must know the "probability and gravity" of the harm for a danger to be known. *Carrender v. Fitterer*, 469 A.2d 120, 123 (1983).

9. Minors can also appreciate the known and obvious nature of dangers. *Long v Manzo*, 682 A.2d 370, 372 (Pa.Super. 1996).

Premises Liability, General

10. Owners of land must protect invitees from known and foreseeable dangers. *Emge v. Hogosky*, 712 A.2d 315, 317 (Pa.Super. 1998).

11. Duty is in proportion to the apparent risk. *Beary v Pa. Electric Co.*, 469 A.2d 176 (Pa. Super. 1983).

Constructive Notice

12. An owner has constructive notice of defects if the defect exists for a length of time that an exercise of reasonable care would discover the defect. *Myers v. Penn Traffic Co.*, 606 A.2d 926, 929 (Pa.Super. 1992).

13. An owner has constructive notice of defects if in the normal course of events an owner would discover the danger. *Green v. Prise*, 170 A.2d 318, 320 (Pa. 1961).

Appearances:

Jason Fine, Esquire, *Counsel for Plaintiff*

David Bercovitch, Esquire, *Counsel for Plaintiff*

John P. Gonzales, Esquire, *Counsel for Defendants*

Monica Simmons, Esquire, *Counsel for Defendants*

OPINION OF COURT

Before Meyers, P.J.

Before the Court is Defendant's *Motion for Summary Judgment* filed September 13, 2019. For the reasons stated below, the Court grants the Defendant's *Motion*.

I. Factual Background

In April of 2014, the Plaintiff was sent to The Defendant's facility[1] after violating her probation. *Transcript of Deposition of Rachel Seibel March 8, 2019* (hereinafter *Tr. Seibel*) pg. 12, ln. 1-23. She was to be at the facility for 60 days. *Tr. Seibel*, pg. 14, ln. 10, 17. Those at the facility were occasionally given recreation time. *Tr. Seibel*, pg. 15, ln. 7-10. During these recreation times, they had the option of doing the assigned activity in the designated area, or not participating. *Tr. Seibel*, pg. 15, ln. 16-24; pg. 16, ln. 1-9. The Plaintiff was normally given recreation time in a parking lot behind the main facility. *Tr. Seibel*, pg. 16, ln. 12-15. Upon seeing the parking lot the first time, the Plaintiff realized the pavement was cracked and broken. *Tr. Seibel*, pg. 17, ln. 4-7. The Plaintiff did not feel she was in a position to raise concerns about the condition of the parking lot to the

1 The Leadership Development Program, located at 10058 South Mountain Drive, South Mountain, Franklin County, Pennsylvania. *See Tr. Schmidt*, pg. 19, ln. 8-9.

staff of the facility. *Tr. Seibel*, pg. 17, ln. 11-18.

On May 31, 2014 the Plaintiff was sent out to the parking lot at the Defendant's facility for a period of physical activity. *Tr. Seibel*, pg. 43, ln. 16. The Plaintiff does not remember who was supervising her, nor how many supervisors there were the day of the accident. *Tr. Seibel*, pg. 19, ln. 8-14. The Plaintiff does recall that the assigned activity was jump rope, *Tr. Seibel*, pg. 19, ln. 16. The Plaintiff was "jumping up and down. When [she] came down, [her] foot hit off a piece of the crack and a piece of ground ripped off, and [her] leg just went straight and [she] felt sharp pains all up and down [her] leg." *Tr. Seibel*, pg. 23, ln. 14-18. She is adamant that the pavement itself cracked, and the cracked pavement caused her fall. *Tr. Seibel*, pg. 24, ln. 6-10.

Employees of the Defendant regularly inspected the area for "foreign objects and obstructions." *Transcript of Deposition of Craig Schmidt*, April 30, 2019 (hereinafter *Tr. Schmidt*), pg. 54, ln. 13-21. The Defendant's policy is to have a minimum of one staff for every eight clients. *Tr. Schmidt*, pg. 33, ln. 8-9. Each staff member undergoes 80 hours of training, including training on activity facilitation. *Tr. Schmidt*, pg. 35, ln. 14-18. The Plaintiff's accident is the only incident of its kind the Defendant has records of. *Tr. Schmidt*, pg. 67, ln. 15-20

II. Procedural History

On June 16, 2017, the Plaintiff commenced a civil suit in the Court of Common Pleas of Philadelphia County against the Defendant over her fall on May 31, 2014. The Defendant filed preliminary objections on September 6, 2017. An *Amended Complaint* was filed on September 27, 2017.[2] The Defendant filed preliminary objections to the *Amended Complaint* on October 16, 2017. The Plaintiff's *Answer* to those objections was filed November 6, 2017. On December 27, 2017, a stipulation was filed to transfer venue to the Franklin County Court of Common Pleas. The Defendant filed their *Answer to Plaintiff Rachel Seibel's Amended Complaint with New Matter* on July 23, 2018. On September 13, 2019, the Defendant filed the instant *Motion for Summary Judgment* and *Memorandum of Law in Support*. The Plaintiff's *Response in Opposition to Defendant's Motion for Summary Judgment* and *Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment* was filed on October 11, 2019. Oral argument was held December 5, 2019. This matter is now ready for decision.

III. Analysis

2 The *Amended Complaint* is functionally identical to the original *Complaint*.

The Plaintiff's *Amended Complaint* contains twelve causes of action.[3] However, broadly speaking these claims fall into two categories: the area itself was unsafe, and the Defendant's staff were improperly trained. The majority of the claims are the former.

A. Standard of Review

The Defendant has moved for summary judgment. Summary judgment may only be granted:

> when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law… in cases that are clear and free from doubt; a reviewing court must examine the record in the light most favorable to the non-moving party, accepting as true all well-pled facts and giving that party the benefit of all reasonable inferences drawn from those facts."

Estate of Swift v. Ne. Hosp. of Philadelphia, 690 A.2d 719, 721-22 (Pa. Super. 1997).

The elements of a negligence suit are well established. "(1) the existence of a duty or obligation recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure on the part of the defendant to conform to that duty, or a breach thereof; (3) a causal connection between the defendant's breach and the resulting injury; and (4) actual loss or damage suffered by the complainant." *See, e.g., Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1222 (Pa. 2002). The Defendant's motion challenges the duty prong, by asserting the inapposite positions that the condition of the parking lot was known and obvious, or that the

3 (a) failing to inspect, correct or have corrected, repair or protect from defective and/or hazardous conditions existing in the area used by invitees, independent contractors, licensees, guest and/or member of the public on defendant' premises;
(b) allowing a defective condition to exist which defendants knew of should have known created a dangerous condition and hazard to invitees, independent contractors, licensees, guests and/or members of the public;
(c) failure to properly and adequately maintain the premises, in particular, the aforementioned area where Plaintiff, Rachel Seibel, was caused to fall;
(d) failure to warn invitees, independent contractors, licensees, guests and/or the general public of the dangerous, hazardous and unsafe conditions on said premises;
(e) failure to take reasonable precautions against the dangerous, hazardous and unsafe conditions on said premises;
(f) failure to train Plaintiff on the correct/safe way to jump rope;
(g) failure to properly and adequately hire and/or instruct the agents, servants, workmen, employees and/or representatives, of defendants herein, as to safe and proper procedures for their students jumping rope at defendant's facility.
(h) failure to provide safe conditions for invitees, independent contractors, guests, licensees and/or members of the general public on the premises, specifically an area to jump rope;
(i) failure to act with due care and regard for the position and safety of others, in particular, Plaintiff, Rachel Seibel;
(j) failure to provide and maintain proper supervision of said premises;
(k) failure to provide and maintain proper safety precautions at said premises;
(l) failure to respond in a timely manner to an insecure or dangerous condition or situation upon said premises; and
(m) failure to provide a safe area for Rachel Seibel to jump rope

Defendant did not have proper notice of the condition of the parking lot. *See Defendant's Motion for Summary Judgment*, at 5.

"Whether a duty exists under a particular set of facts is a question of law." *Petrongola v. Comcast–Spectacor, L.P.*, 789 A.2d 204, 209 (Pa. Super. 2001) (quoting *Herczeg v. Hampton Twp. Mun. Auth.*, 766 A.2d 866, 871 (Pa.Super. 2001). As such, this case can be resolved on a motion for summary judgment.

The Plaintiff claims that summary judgement is inappropriate as there are still factual issues in dispute. *See generally, Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment.* However, the Plaintiff failed to raise any specific facts that remain in dispute. Their *Answer* is replete with responses indicating that they feel any disputes are legal in nature. The parties are not contesting what happened, merely how the law fits the facts. This Court finds no disputed issues of fact remain.

B. Known and Obvious

With respect to the claims relating to premises liability, the Defendant does not contest that Plaintiff was a business invitee. *See Motion for Summary Judgment* at 4. This subjected the Defendant to a high level of duty to the Plaintiff, to protect her from known and foreseeable dangers. *See Emge v Hogosky*, 712 A.2d 315, 317 (Pa.Super. 1998). However, this duty is not absolute; "there is no duty incumbent on a landowner to warn business invitees of a danger which was at least as obvious to them as it was to him." *Repyneck v. Tarantino*, 202 A.2d 105, 107 (Pa. 1964). When a condition is known and[4] obvious, a possessor of land is not liable, even to an invitee, for failing to warn them of the danger. *McMillan v. Mountain Laurel Racing Inc.*, 367 A.2d 1106, 1109 (Pa. Super 1976).

> A danger is deemed to be '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…For a danger to be 'known,' it must not only be known to exist, but ... also be recognized that it is dangerous and the probability and gravity of the threatened harm must be appreciated.

Carrender v. Fitterer, 469 A.2d 120, 123 (1983) *citing Restatement (Second) of Torts* §§ 328–343B (1965). Visitors are held to a reasonable person standard, if a reasonable person in the same position as the Plaintiff should

4 The *Restatement of Torts* § 343A actually says "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them." Courts have been less clear on whether both must be proven to obviate liability, and in the interests of avoiding error, this Court examined the record for evidence of both.

have seen the danger, and would have appreciated it, the danger is known and obvious. *Baran v. Pagnotti Enterprises Inc.*, 586 A.2d 978, 982 (Pa. Super. 1991). The Court, rather than a jury, can determine these qualities so long as reasonable minds could not differ as to the outcome. *Carrender*, 469 A.2d at 123.

In *Carrender*, the Plaintiff slipped on ice in the Defendant's parking lot. 469 A.2d at 121-22. After reviewing the record, the *Carrender* court concluded visitors should have been aware of the ice, there was no need to cross the ice to use the parking lot, and thus the Defendant was given no indication people would traverse the ice. *Id*, at 124. As the danger was obvious, it was reasonable for the Defendant to assume people would avoid it. *Id*. The *Carrender* Plaintiff testified she was aware of ice before she fell, and that she knew the ice was a danger. *Id*. The Plaintiff's testimony was proof the danger was obvious and known to her. *Id*. Thus the Defendant had no duty to prevent the Plaintiff's injury. *Id*.

In the present case the only thing in the record evidencing that the Defendant would think people would be unaware of the cracked pavement is the Defendant's own arguments that they did not have notice of the cracks. The Plaintiff's first observation of the area was that the pavement was cracked, and she reiterates several times in her deposition that she was aware of the cracks before jumping rope. Her deposition testimony proves the cracks were obvious to her.

The more complicated question for this Court is if the Plaintiff was aware of the danger the cracked pavement posed. Unlike the Plaintiff in *Carrender* the Plaintiff here has not testified that she was aware that jumping on cracked pavement was dangerous. However, nothing in the record indicates the Plaintiff is below average intelligence. Nothing in the record indicates that the cracked section of the parking lot was the only area she could jump rope, or that moving a few feet away was impossible. It is a simple, reasonable assumption that jumping on a cracked, broken, and uneven surface is dangerous. No reasonable person would say that jumping rope on cracked pavement is safe. At the very least, the Plaintiff should have known that jumping rope on an area that is not broken is safer than jumping in an area that is. The danger of falling because one is jumping on cracked pavement is a danger a reasonable person would anticipate. Thus, the danger posed by the cracked pavement was known.

In opposition to the conclusion that the cracked pavement was an known and obvious condition, the Plaintiff cites to a series of unreported, federal cases including *Lissner v Wal-Mart*, No. 07-414, 2009 U.S. Dist. LEXIS 15425, 2009 WL 499462 (W.D. Pa. Feb. 27, 2009). The Plaintiff's reliance on this case and others of its ilk is misplaced. In *Lissner*, the danger

was a small post hidden underneath a refrigeration unit. *Id* at *1. This Plaintiff placed her foot underneath it, causing her to trip when she moved away. *Id*. The Plaintiff did not admit to knowing of the danger, and the danger was not in a location that was obvious. *Id*. Thus the Court concluded *Carrender* was inapplicable. *Id*. These facts are clearly inapplicable when, as is the case here, a Plaintiff has testified they were aware of the condition before the accident.

The Plaintiff next cites to cases arguing that minors have a different standard of knowledge that must go to the factfinder. In support of this claim, the Plaintiff cites *Long v Manzo*, 682 A.2d 370 (Pa.Super. 1996) and *Jesko v Turk*, 215 A.2d 274 (Pa.Super. 1965). These cases relate to attractive nuisance and trespassing children, and are thus inapplicable. Both sides have agreed that the Plaintiff was an invitee, and thus the Defendant is already subject to a higher duty. The *Long* Court also considered the known and obvious nature of the hazard to minors, and concluded that the Plaintiff could appreciate the danger. 682 A.2d 375.

The Plaintiff's final argument relates to the nature of the land. Certain areas are inherently dangerous, and thus owners of these areas must take extra care, and be aware of these extreme dangers. *See Starke v Long*, 292 A.2d 440 (Pa.Super. 1972), *see also Beary v Pa. Electric Co.*, 469 A.2d 176 (Pa.Super. 1983). "Thus, an invitee in certain circumstances must be protected even from obvious dangers… The standard of conduct required by this duty is in proportion to the apparent risk." *Beary*, 469 A.2d at 180. However, while "the location of the accident is the most relevant consideration… no duty exists if the invitee knows: (1) the actual conditions; (2) the activities carried on; and (3) the dangers involved in either." *Campisi v. Acme Markets, Inc.*, 915 A.2d 117, 120 (Pa.Super. 2006).

In *Beary*, the location was a power plant undergoing construction. 469 A.2d at 178. While both parties were aware of the dangers of the area, due to their contractual relationship it was unclear how much each party knew about the site, and who was responsible for what safety precautions. *Id*, at 178-80. The case was not appropriate for summary judgment. *Id*. at 180.

In *Campisi*, the Plaintiff tripped over a blind employees cane after rounding the end of an aisle. 915 A.2d at 118. The Court concluded that encountering a disabled person was something reasonable people should expect to happen in public places such as grocery stores, they thus constitute a known and obvious danger, and Defendants do not owe a duty to warn people of them. *Id*, at 121.

As discussed above, The Plaintiff knew the actual condition of the pavement before she began jumping rope. She was aware of the activities

in a parking lot, which normally involve cars but during the relevant period was only jump rope. We can assume a reasonable person such as the Plaintiff was aware of the dangers of jumping rope in a cracked parking lot. This Court does not need a jury to determine that a parking lot is not an inherently dangerous area akin to the electric plant in *Beary*. In this context, it could even be a safer area than the grocery store in *Campisi*. Her knowledge of the area is not in dispute. The nature of the dangers the Plaintiff faced were clear, and she should have been aware of them. The cracked pavement was a known and obvious danger, and the Defendant owed Plaintiff no duty to prevent her injuries in the area.

C. Constructive Notice

"An invitee must prove either the proprietor of the land had a hand in creating the harmful condition, or he had actual or constructive notice of such condition." *See Moultrey v. Great Atlantic & Pacific Tea Co.*, 422 A.2d 593, 598 (Pa.Super. 1980). The Defendant has asserted it lacked notice of the cracked pavement.

The Plaintiff does not need to prove that the Defendant was actually aware of the specific crack that caused the Plaintiff's injury, only "that the condition existed for such a length of time that in in the exercise of reasonable care the owner should have known of it." *Porro v. Century III Assocs.*, 846 A.2d 1282, 1286 (Pa.Super. 2004) *citing Myers v. Penn Traffic Co.*, 606 A.2d 926, 929 (Pa.Super. 1992); *see also Carrender*, 469 A.2d at 123 (subjecting possessors of land to liability if the dangerous condition could be discovered by reasonable care).[5] "The defendant would be chargeable with constructive notice if the defective condition existed for such a period of time that in the normal course of events the condition would have come to his attention." *Green v. Prise*, 170 A.2d 318, 320 (Pa. 1961).

The record does not indicate how long the pavement was cracked. However, as discussed above, the Plaintiff noticed the pavement was cracked well before her fall. As the Defendant's corporate designee has stated that its employees regularly inspected the area, they would have seen the cracks at the same time Plaintiff did, if not before. Assuming the reasonable care required by law, and the inspections the Defendant claims its employees make, the Defendant would have had notice of the cracked pavement.[6]

The Defendant cites cases where the Court granted summary judgment based on the Plaintiff's failure to prove Defendant was aware of a transitory condition, such as a grape on a grocery store floor. *See, e.g., Martino v Great Atlantic & Pacific Tea Co.*, 213 A.2d 608 (Pa. 1965);

5 It should be noted that **Defendant** cited and quoted these cases in their *Motion for Summary Judgment*.

6 If there were facts in the record questioning how long the cracks existed, or alleging some reason the Defendant would not notice the cracks during regular inspections, then we would need to present these disputed facts to the jury.

Myers v. Penn Traffic Co., 606 A.2d 926 (Pa.Super. 1992). Unlike a grape on the floor, cracked pavement is not a "transitory" condition. It would be disingenuous for this Court to find that the cracked pavement was a known and obvious danger recognized by the Plaintiff, and then determine that the Defendant did not have notice of the condition of its parking lot. If the Plaintiff could figure out soon after arriving that the parking lot was cracked, the Defendant, whose employees saw the parking lot on a daily basis long before the Plaintiff arrived, should have been well aware of the condition of the parking lot. The reasonable care the Defendant was expected to undertake would have put the Defendant on constructive notice of the danger well before the accident.[7]

D. Negligent Supervision

The Plaintiff has not presented any evidence about who supervised her, or any way that the supervision, or lack thereof, lead to her injuries. She has not cited any law supporting allegations that the Defendant failed to "adequately hire and/or instruct" its employees. She has not given any specific information on these claims at all. The Defendant had training and policies in place that the Plaintiff has not challenged. This is the only incident of its kind the Defendant has any record of. Without either facts or law in support of these allegations, claims of negligent supervision, if such a claim was meant to be presented by the Plaintiff, cannot be maintained.

IV. Conclusion

As the Court finds that the condition of the pavement was known and obvious to the Plaintiff, she cannot establish that the Defendant owed her a duty to prevent her injuries, irrespective of the constructive notice the Defendant had of the conditions of the pavement. The Plaintiff has failed to support any other claim upon these facts. The Court **GRANTS** the Defendant's *Motion for Summary Judgment*. An appropriate order follows.

7 While almost certainly a typographical error, the following statement by the Defendant adequately reflects the Court's position on this claim: "Defendants had actual notice or constructive notice of any prior incidents or any alleged dangers or hazards related to the pavement in question at the time of Plaintiff's fall." *Memorandum of Law in Support of Defendant's Motion for Summary Judgement*, at 5.

ORDER OF COURT

AND NOW, this 10th day of February, 2020, upon review of the Defendant's *Motion for Summary Judgment* filed September 13, 2019, and the record,

IT IS ORDERED that Defendant's *Motion for Summary Judgment* is **GRANTED**.

This Order is pursuant to the attached *Opinion*.

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