NANCY S. McKEE, Plaintiff	)	IN THE COURT OF COMMON PLEAS OF CLARION COUNTY, PENNSYLVANIA
v.	)	(Civil Action - Law)
JOHN E. BECK and TENA J. BECK, husband and wife, Defendants	)	Civ. No. 2003-00409 **TRIAL BY JURY OF 12 DEMANDED**

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS, JOHN E. BECK AND TENA J. BECK

I. PROCEDURAL HISTORY

Plaintiff, Nancy McKee commenced this action against Defendants, John E. Beck[1] and Tena J. Beck, his wife, by filing a praecipe for writ of summons on or about April 1, 2003. Thereafter, on or about June 10, 2003, Ms. McKee filed a Complaint in which she alleged a negligence claim against the Becks, asserting that she had sustained personal injuries when she fell on a sidewalk adjacent to the Becks' house. The pleadings have closed, and the depositions of the parties have been taken. A motion for summary judgment has been filed on behalf of the Becks, and this brief is respectfully submitted in support thereof.

II. STATEMENT OF FACTS

This is an action for personal injuries that Ms. McKee alleges she sustained in connection with a fall that occurred on April 6, 2001. Ms. McKee alleges that on that date, she was traveling across the Becks' premises along a sidewalk running parallel to Liberty Street, in

[1] Defendant, John E. Beck is deceased, having died on April 14, 2003.

Clarion Borough, when she fell due to a defect in the sidewalk and sustained injuries.[2] Ms. McKee was the only witness to this accident. Accordingly, the only record evidence as to how this fall occurred is found in the deposition of Ms. McKee taken on September 9, 2004. She testified, in pertinent part, as follows:

The accident occurred on April 6, 2001.[3] Ms. McKee was very familiar with the area in which her fall occurred: the sidewalk located in the 7th block of Liberty Street in Clarion, Pennsylvania. She was familiar with this area because it was the route she often took when she walked into town and this area was just down the street from her home.[4] In fact, prior to the accident, Ms. McKee had recently walked along the very section of sidewalk on which the accident occurred.

At the time the accident occurred, Ms. McKee was walking either to the drug store or the post office from her home on Liberty Street.[5] Ms. McKee testified that it was afternoon, but that it was overcast.[6] Ms. McKee recalled that she was wearing her raincoat, but did not recall whether or not the sidewalk was wet.[7]

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[2] Complaint, ¶3.

[3] McKee depo., p. 8. [References to the transcript of Ms. McKee's September 9, 2004 deposition testimony will be made as "McKee depo., p.___." For the convenience of the Court, a copy of the transcript has been appended as an exhibit to Defendants' Motion for Summary Judgment.]

[4] McKee depo., p.8-9.

[5] McKee depo., p.14.

[6] McKee depo., p. 5.

[7] McKee depo., p.15-16.

Ms. McKee further testified that at the time of the fall, she was looking straight ahead and that she was not looking down.[8] Ms. McKee did not see anything on the sidewalk before she fell.[9] In her words, "I was just walking along and then the next thing I knew I was down on the sidewalk . . . ."[10] At the time of the fall, she was not aware of what caused her fall, she just knew that she had fallen.[11]

Ms. McKee did observe some loose gravel on the sidewalk after the fall occurred.[12] The gravel was located on a patch of the sidewalk that Ms. McKee believed was in need of repair.[13] Ms. McKee testified that this patch of sidewalk was adjacent to the area in which she fell.[14] Ms. McKee does not recall whether the gravel extended beyond the patch of sidewalk.[15] Though Ms. McKee observed a patch of gravel near the area of her fall, she has no recollection of feeling her foot slip on any gravel prior to her fall.[16] In fact, Ms. McKee admitted that she does not know whether her foot caught on the sidewalk or whether she slid on anything on the sidewalk before her fall.[17]

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[8] McKee depo., p.15.

[9] McKee depo., p.17-18.

[10] McKee depo., p.14-15.

[11] McKee depo., p.17-18.

[12] McKee depo., p.18.

[13] McKee depo., p.37.

[14] McKee depo., p.18.

[15] McKee depo., p.37.

[16] McKee depo., p.18-19.

[17] McKee depo., p.22-23, 40.

Ms. McKee knows of no landmarks or reference points with regard to the area in which she fell. She only knows that she was on the sidewalk in front of the Becks' house when she fell.[18] Ms. McKee has alleged that she fell in an area adjacent to a triangular section of the Beck's sidewalk that was allegedly covered in gravel and was in need of repair. This triangular section was open and obvious. Ms. McKee stated that the pavement was broken in that area and that she had no trouble seeing the broken pavement when she pointed it out to Officer Means on the morning following the accident.[19] Her belief that this was the area in which she fell is based upon the presence of gravel in that area.[20] She admitted during her deposition, however, that the photographs taken of that area do not show the presence of any gravel.[21]

III. QUESTIONS PRESENTED

A. WHETHER DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT WHERE PLAINTIFF IS UNABLE TO IDENTIFY THE CAUSE OF HER FALL?

Brief Response: Yes. Plaintiff, the only witness to her accident, is unable to say what caused her to fall. This inability to prove the cause of her fall is fatal to her claim, as proof of causation is a necessary element of any claim based upon negligence.

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[18] McKee depo., p.20-21.

[19] McKee depo., p.32.

[20] McKee depo., p.35-36.

[21] McKee depo., p.36.

B. WHETHER DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT WHERE THE ONLY POSSIBLE CAUSE OF PLAINTIFF'S FALL WAS OPEN AND OBVIOUS?

Brief Response: Yes. As a licensee, Plaintiff was owed no duty by Defendants to protect her from open and obvious conditions. Even if the alleged defect in the sidewalk was the cause of her fall, Plaintiff has admitted that it was readily visible and on a location that she frequented. As such, Defendants owed no duty to repair or warn her of the condition.

IV. DISCUSSION

STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine issue of material fact as to a necessary element of the cause of action . . . which could be established by discovery or expert report." Pa.R.C.P. 1035.2(1). Summary judgment should be granted if the "party who will bear the burden of proof at trial has failed to produce sufficient evidence of facts essential to the cause of action . . . which in a jury trial would require issues to be submitted to a jury." Pa.R.C.P. 1035.2(2).

Once the moving party has met his burden of establishing the absence of disputed facts, the nonmoving party may not rest upon mere allegations in the pleadings, but must produce sufficient evidence such that a jury could return a verdict in his favor. The failure to adduce this quantum of evidence establishes that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ertel v. Patriot-News Co., 674 A.2d

1038 (Pa. 1996), *U.S. cert. denied*, 519 U.S. 1008 (1996). Summary judgment serves to eliminate the waste of time and resources of both litigants and the court in cases where a trial would be a useless formality. Liles v. Balmer, 567 A.2d 691, 692 (Pa. Super. 1989).

A. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF CANNOT ESTABLISH THE CAUSE OF HER FALL.

Under Pennsylvania law, a defendant is not an insurer, and the mere happening of an accident is not evidence or proof of negligence. Watkins v. Sharon Aerie No. 327 Fraternal Order of Eagles, 223 A.2d 742, 743 (Pa. 1966). In addition, the mere existence of negligence and the occurrence of injury are insufficient to impose liability upon anyone. There remains to be proved the vitally important link of causation, and the plaintiff bears the burden of proving that the defendant's negligence was the proximate cause of the plaintiff's injury. Cuthbert v. City of Philadelphia, 209 A.2d 261, 263 (Pa. 1965). A jury is not permitted to speculate or guess; conjecture, guess or suspicion do not amount to proof. Freund v. Hyman, 102 A.2d 658, 659 (Pa. 1954).

In order to establish a case for negligence, a plaintiff must prove the following elements: 1) the existence of a duty or obligation recognized by law, 2) a breach of that duty by the defendant, 3) a causal connection between defendant's breach of duty and plaintiff's resulting injury, and 4) actual loss or damage suffered by the plaintiff. Reilly v. Tiergaren, Inc., 633 A.2d 208, 210 (Pa. Super. 1993). It is the duty of the trial court to determine whether proof

of every element has been established before the issue of negligence can be submitted to the jury. Cuthbert, *supra.* at 264. If Plaintiff fails to establish any element of the cause of action for negligence, Defendants are entitled to summary judgment as a matter of law.

In addition, a finding of negligence *per se* does no more than satisfy plaintiff's burden of establishing that defendant's conduct was negligent; the burden remains on the plaintiff to establish that his complained of injuries were proximately caused by the statutory violation. Congini by Congini v. Portersville Valve Co., 470 A.2d 515, 518 (Pa. 1983).

The Pennsylvania Supreme Court has consistently held that a plaintiff cannot recover for injuries sustained in a fall where the plaintiff fails to prove that the alleged negligence of the defendant was the proximate cause of the plaintiff's injuries.

For example, in Reddington v. City of Philadelphia, 98 A. 601 (Pa. 1916), a case factually quite similar to the instant matter, the Supreme Court upheld the trial court's entry of a judgment of nonsuit on the basis that the plaintiff failed to meet her burden of proving the allegation that her fall was caused when her foot slipped in a depression in the pavement. The plaintiff had alleged that her injuries were caused when her foot slipped in a 2-3 inch deep hole caused by a waterbox or vent left in the pavement and she fell to the ground. The plaintiff testified that, as she was walking on the pavement, she caught her toe and fell. She further

testified that she did not know what she tripped in or fell over. After she fell, someone told her where the hole was in which she allegedly tripped.

The Court found that the plaintiff's case was barren of any testimony to sustain the allegation that the negligence of the defendant was the cause of the plaintiff's injuries. The evidence did not disclose how far plaintiff was from the hole when she fell, and was conflicting as to the place in which she fell. The Court found that there were no facts that would warrant the jury in finding what caused the plaintiff to fall, and that the jury could not be permitted to find that simply because there was a depression in the pavement, it caused her to fall. *Id.*

Similarly, in Harrison v. City of Pittsburgh, 44 A.2d 273 (Pa. 1945), the Supreme Court affirmed the Superior Court's upholding the trial court's entry of judgment notwithstanding the verdict on the basis that the testimony failed to establish that the alleged negligence of the defendant was the proximate cause of plaintiff's accident. In that case, the plaintiff testified that there was a sewer manhole in the center of the sidewalk that projected slightly above the walk. Plaintiff stated that she was walking along and she slipped. She said it was slick and that she knew she slipped on something higher than the sidewalk, but that she did not know what she slipped on.

Based upon this testimony, the Court found that the plaintiff made it clear that she did not know what caused her fall until after she had fallen and even then it was obvious from her testimony that no real inference could be drawn that it was the depression of the manhole that

caused her fall. Since the plaintiff was unable to prove what caused her fall, a grant of judgment notwithstanding the verdict in favor of the defendant was proper. *Id.*

In Freund v. Hyman, 102 A.2d 658 (Pa. 1954), the plaintiff brought an action for injuries resulting from a fall on the pavement of the defendant. The plaintiff testified that she fell forward on a step located near a tree. Plaintiff was also observed lying on the pavement close to a tree. The photographic evidence showed that near the tree, one block of the pavement was slightly raised or that another block was slightly lowered causing an uneven surface.

The Court found that the plaintiff had the burden of proving that a defect or unsafe condition existed, and of proving that her fall was caused by that defect or unsafe condition. The plaintiff failed to produce sufficient evidence to sustain this burden. As in our case, there was no evidence that the plaintiff was looking where she was going, or why she would not have observed the difference in elevation in broad daylight had she been looking. More importantly, there was no evidence that the elevation caused her fall. The plaintiff merely stated that she fell on the step; there was no testimony that she turned her ankle or slipped or stumbled or tripped or what caused her to fall. As a result, the judgment of nonsuit in favor of the defendant was affirmed.

Finally, in Cuthbert v. City of Philadelphia, 209 A.2d 261 (Pa. 1965), the plaintiff alleged that she was injured when she fell while crossing a public street in Philadelphia and that her fall was caused by a defect in the roadway. The testimony established that trolley rails ran

through the middle of the subject roadway and that alongside an eighteen-inch portion of the rails, located within the crosswalk, ran a depression in the street of 2-4 inches deep. The plaintiff testified that as she was hurrying to cross the intersection, she tripped and fell, causing the injuries for which the suit was instituted.

The plaintiff testified that before she fell, she got caught in the hole by the rail. She also stated she knew she had tripped over the depression and she identified the depression on a photographic exhibit. Despite this testimony, however, the plaintiff admitted that she did not see the depression before she tripped, nor immediately thereafter and that she could not identify the exact portion of the crosswalk upon which she was walking at the time of the accident. The plaintiff did not see the depression until she returned to the scene to see what had caused her fall. *Id.*

Based upon plaintiff's testimony and photographic evidence, the Court ruled that the plaintiffs had failed to prove that the defect in the roadway was the proximate cause of the wife-plaintiff's injuries. While the plaintiff testified that at the time she fell and thereafter, she "knew" that it was as a result of the depression in the road, there was absolutely no evidentiary fact upon which this conjecture could have been based, nor upon which the jury could have weighed it. The jury could not be permitted to reach its verdict on the basis of speculation or conjecture; there must be some evidence upon which its conclusion may be logically based. As a result, the Court found that judgment must be entered in favor of the defendants. *Id.*

These cases are highly instructive in the instant matter, as they are so similar on the facts. In this case, Ms. McKee admitted that at the time of the fall, she was not aware of what caused her fall, she just knew that she had fallen.[22] She testified that, at the time of the fall, she was looking straight ahead and that she was not looking down.[23] She did not see anything on the sidewalk before she fell.[24] *In her own words,* "I was just walking along and then the next thing I knew I was down on the sidewalk . . . "[25]

While after the fall Ms. McKee did observe some loose gravel on the sidewalk adjacent to the area in which had fallen, she has no recollection of feeling her foot slip on any gravel prior to her fall.[26] She stated that it happened so fast that she does not know if her shoe caught on the sidewalk or slid on anything on the sidewalk prior to her fall.[27]

It is also questionable, based on Ms. McKee's testimony, whether the area of the sidewalk she now points to as being in need of repair is even the exact area in which she fell. Ms. McKee testified that she knows of no landmarks or reference points with regard to the area in which she fell. She only knows that she was on the sidewalk in front of the Becks' house

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[22] McKee depo., p.17-18.

[23] McKee depo., p.15.

[24] McKee depo., p.17-18.

[25] McKee depo., p.14-15.

[26] McKee depo., p.18-19.

[27] McKee depo., p.22-23,40.

when she fell.[28] Although she testified about a gravel-covered triangular section of the Becks' sidewalk, Ms. McKee admitted that her belief that this area caused her fall was based upon the presence of gravel in that area that she saw *after the fall occurred.*[29] She admitted, however, that the photographs taken of that area do not show the presence of any gravel.[30] In light of the fact that she was not even certain what caused her fall (*i.e.* whether she slipped, tripped or fell for some other reason), Ms. McKee's after-the-fact observation of gravel in or around the triangular area of the sidewalk where she may or may not have been walking is certainly not sufficient to demonstrate the proximate cause of her fall, and impose liability upon the Defendants in this matter.

Ms. McKee was the only witness to her fall. As demonstrated above, she is unable to offer sufficiently specific testimony upon which a jury could reasonably conclude that the proximate cause of her fall was any particular condition of the sidewalk in question. Under the above-cited authorities, there simply are no facts of record which could warrant a finding that Ms. McKee's fall was caused by the alleged defective patch of the Beck's sidewalk. Since a jury would not be permitted to speculate or guess regarding the cause of Ms. McKee's fall, or to find that simply because there was a "defective" patch of sidewalk that it must have caused Ms. McKee to fall, Ms. McKee cannot meet her burden of proving causation in this matter, and a jury trial on the issue would be a "useless formality." Summary judgment is the appropriate remedy.

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[28] McKee depo., p.20-21.

[29] McKee depo., p.35-36.

[30] McKee depo., p.36.

B. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT SINCE THE UNDISPUTED EVIDENCE ESTABLISHES THAT THE ALLEGED SIDEWALK DEFECT WAS A KNOWN AND OBVIOUS CONDITION.

The standard of care a possessor of land owes to one who enters upon the land depends upon whether the person entering the land is a trespassor, licensee or invitee. Carrender v. Fitterer, 469 A.2d 120, 123 (Pa. 1983). Under Pennsylvania law, those who utilize the sidewalks of others for their own purposes are considered licensees. *See, e.g.*, Palange v. City of Philadelphia, 640 A.2d 1305 (Pa. Super. 1994). The duty owed to a licensee in Pennsylvania was established by our Supreme Court in Sharp v. Luska, 269 A.2d 659 (Pa. 1970), when it adopted the language of section 342 of the Restatement (Second) of Torts, which provides as follows:

> 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.

Restatement (Second) of Torts § 342.

The conjuctive wording of section 342 indicates that a possessor of land is subject to liability only if all three criteria are present. The determination may be made by the court where reasonable minds could not differ as to the conclusion. Cresswell v. End, 831 A.2d 673, 677 (Pa. Super. 2003).

In Cresswell, the plaintiff sued for injuries she sustained when she fell into a window well on defendants' property while in the performance of her duties as a water meter reader. The trial court granted summary judgment for defendants because it found that the condition in question was open and obvious, since defendants kept the shrubs located in the area around the window well trimmed and maintained, and therefore the plaintiff was charged with knowing of the condition and the risk involved. *Id.* at 678.

The same result should be reached in the instant matter. Ms. McKee testified that she was very familiar with the area in which her fall occurred: the sidewalk located in the 7th block of Liberty Street in Clarion, Pennsylvania. [31] She was familiar with this area because it was the route she often took when she walked into town, and this area was just down the street from her home.[32] In fact, Ms. McKee had walked along this very section of sidewalk in the weeks preceding the subject accident.[33]

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[31] McKee depo., p.8-9.

[32] McKee depo., p.9.

[33] McKee depo., p.41.

At the time of the fall, Ms. McKee was not looking down at the sidewalk on which she was walking, but instead was looking straight ahead.[34] As a result, Ms. McKee did not see anything on the sidewalk before she fell.[35] The only reason she did not see the defect in the sidewalk, however, was because she was not looking; Ms. McKee herself testified that she had no trouble seeing the broken pavement when she pointed it out to Officer Means on the morning following the accident.[36] Therefore, even if the Court should find that there is sufficient evidence to go to a jury that the "defect" in the sidewalk was the cause of Ms. McKee's fall, the Becks cannot be held liable, as a matter of law, because the alleged condition was open and obvious.

Since the undisputed facts show that Ms. McKee knew or should have known of the existence of the defective sidewalk and that the Becks, therefore, were under no duty to take precautions against or to warn her of the alleged defect, the Becks are entitled to judgment as a matter of law with regard to Ms. McKee's claims for negligence and negligence *per se*.

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[34] McKee depo., p.15.

[35] McKee depo., p.17-18.

[36] McKee depo., p.32.

V. CONCLUSION

For the foregoing reasons, Defendants are entitled to summary judgment in their favor, and Plaintiff's claims should be dismissed as a matter of law.

Respectfully submitted,

ELDERKIN, MARTIN, KELLY & MESSINA

By _____

Robert C. LeSuer, Esquire
Attorney for Defendants, John E. Beck and Tena J. Beck
150 East Eighth Street
Erie, Pennsylvania 16501
(814) 456-4000

CERTIFICATE OF SERVICE

A true and correct copy of the within paper or pleading was served on all parties or their counsel of record by hand delivery or first class mail on the 15TH day of JANUARY, 2005.

ELDERKIN, MARTIN, KELLY & MESSINA

BY: _____

NANCY S. McKEE, Plaintiff	:	IN THE COURT OF COMMON PLEAS OF CLARION COUNTY, PENNSYLVANIA
vs.	:	CIVIL DIVISION - LAW
JOHN E. BECK and TENA J. BECK, husband and wife, Defendants	:	Civ. No. 2003-00409

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATEMENT OF FACTS

On April 6, 2001, the Plaintiff was utilizing a sidewalk which ran in front of property owned by the Defendants. At the time of the accident in question, the Defendants' house had been vacant for approximately three months. At some point prior to the Plaintiff's fall, a neighbor of the Defendants, acting on behalf of and at the request of the Defendants, engaged in snow removal work with a snow blower. The sidewalk in question was damaged in the course of the snow removal work resulting in the creation of a triangular-shaped defect, which caused the Plaintiff to fall.

The Plaintiff has testified that she was walking along the sidewalk in question, when she suddenly fell face first. The Plaintiff stated that immediately after the fall and prior to getting up, she noticed a triangular-shaped defect on the sidewalk over which she had fallen.

DISCUSSION

I. STANDARD OF REVIEW

As this Honorable Court is well aware, summary judgment is appropriate where there is no genuine issue of material fact as to a necessary element of a cause of action, which should be established by discovery or expert report. (Pa.R.C.P. §1035.2(1)). In considering Defendants' Motion for Summary Judgment, the court must examine the entire record in the light most

favorable to the non-moving party and resolve all doubts against the moving party when determining if there is a genuine issue of material fact. Pennsylvania Rules of Civil Procedure 1035(b).

II. ARGUMENT

In the case presently before the court, the Defendants are contending that the Plaintiff is unable to establish the cause of her fall within or to the required degree of specificity and that in order a jury to find for the Plaintiff, the jury would have to engage in speculation. The case of First vs. ZemZem Temple, 686 A.2d 18 (Pa. Super., 1996) deals with the concept of causation as it relates to slip and fall cases. The trial court granted Defendant's motion for summary judgment on the basis that the plaintiff could not prove that a defect in a dance floor caused her injuries. Specifically, the trial court held that the plaintiff could not show that one of two identified dangerous areas which were in existence on the dance floor at the time of the fall, actually caused her to fall. The two defective conditions were not only different in nature, they were located in different areas of the dance floor. Hence, there was not only an issue as to why the plaintiff fell, there was also an issue of where she fell.

The Superior Court reversed the trial court finding that there was sufficient circumstantial evidence for a jury to infer that one of the two defects had caused the plaintiff to fall. The Superior Court, citing Frazier vs. City of Pittsburgh, 15 A.2d 499, 500 (Pa. Super., 1940) stated:

> Negligence may be established by circumstantial evidence, and where a plaintiff described the nature and location of a fall, it is for the jury to determine whether a defect which existed in the small area described was the cause of the injury, and if the defect was of sufficient consequence to charge Defendants with negligence . . . is for the jury.

Although it is clear that a jury is not permitted to reach a verdict based upon guess or speculation, it is equally clear that a jury may draw inferences from all the evidence presented. Cade vs. McDanel, 451 Pa. Super. 368, 679 A.2d 1266 (1996).

> It is not necessary, under Pennsylvania law, that every fact or circumstance point unerringly to liability; it is enough that there be sufficient facts for the jury to say reasonably that the preponderance favors liability . . . The facts are for the jury in any case, whether based upon direct or circumstantial evidence, where a reasonable conclusion can be arrived at which would place liability on the defendant. It is the duty of the plaintiffs to produce substantial evidence, which, if believed, warrants the verdict they seek. The right of a litigant to have the jury pass upon the facts is not to be that a reasonable man might properly find either way. A substantial part of the right to trial by jury is taken away when judges withdraw close cases from the jury. Smith vs. Bell Telephone Company of Pennsylvania, 397 Pa. 134, 153 A.2d 477, 480 (1959).

The Defendants in the case at bar make much of the fact that the Plaintiff is unsure as to whether she slipped on gravel in the triangular defect or caught her toe in it and stumbled. In light of this, the Defendants say that for a jury to choose one mechanism or the other would be to permit the jury to engage in speculation. However, the Plaintiff "need not negate all other possible causes of an occurrence . . . or prove with mathematical certainty, to the exclusion of other possibilities, that an occurrence could only have been caused in one manner consistent with . . . liability." Agriss vs. Roadway Express Inc., 334 Pa. Super. 295, 483 A.2d 456, 466 (1984).

In the First case, there was testimony that the dance floor contained two "hazardous" conditions and that the plaintiff fell after she had passed through these "hazardous" areas. The Superior Court stated, "From this, we find that the jury could reasonably conclude that the plaintiff fell either because the dance floor was slippery or because it was raised in a certain area. First at 22.

The facts of the case at bar are virtually identical to those in the First case. Mrs. McKee has testified that immediately after the fall she noticed a triangular patch in the area

immediately adjacent to where she ended up immediately after the fall. The defect existed in the small area described by the Plaintiff. There is no doubt that the defect which existed in the small area was on the sidewalk in front of the Defendants' property. Much like the Plaintiff in the First case, the Plaintiff in the case at bar has testified that she was unsure as to exactly how she fell. It should be noted that in the First case, there were two separate hazards in two distinct locations. In the case at bar, it is abundantly clear that there is one defect in one location. The Defendants are trying to argue that because the Plaintiff is unsure as to the exact mechanism of her fall, summary judgment should be entered. However, in the First case, the plaintiff was not even sure as to the location or type of hazard that caused her fall and yet the trial court's granting of the defendant's motion for summary judgment was overturned on appeal, the Superior Court stating:

> Without resort to conjecture, the jury would have had a rational basis to choose, over any other inference suggested by the evidence, the inference that there was a defect in the dance floor, that the dance floor was unsafe and that Marilyn fell as a result thereof. First at 554, 555.

The second basis for the Defendants' Motion for Summary Judgment is that because the defect in question was allegedly "open and obvious", the Defendants cannot be held liable to the Plaintiff. The Defendants' argument seems to essentially be that the Plaintiff was not watching where she was going, and if she had, she would have seen the triangular patch. The Defendants make much of the fact that the Plaintiff at the time of the fall or immediately prior thereto was not looking down. A property owner has a duty to keep his sidewalk in a safe condition for travel by the public. Peaire vs. Home Association of Enola Legion No. 751, 430 A.2d 665 (Pa. Super., 1981). Also there is no duty imposed on the Pennsylvania law to anticipate and guard against another party's lack of ordinary care, Jordan vs. Kennedy, 119 A.2d 679, Pa. Super., 1956, and in fact, a person has the right to assume that a duty owed to her

retrospect. The Defendants as much as admit this when they point to the fact that the Plaintiff could clearly identify the defect upon returning to the site of the accident after it had happened. What is open and obvious after the fact may not be, and in this case was not, open and obvious just prior to the Plaintiff's fall. While a person in the position of the Plaintiff may be able to perceive the existence of a defect from a distance, the hazardous nature of said defect may not be, and in this case was not, readily apparent. The precise configuration, depth and composition of the defect could only be ascertained if the Plaintiff were to walk while looking directly down at her feet.

The Defendants cite the case of Cresswell vs. End, 831 A.2d 673, 677 (Pa. Super., 2003) in support of their argument. In Cresswell, the plaintiff sued for injuries she sustained when she fell into a window well on the defendant's property while performing her duties as a water meter reader. The Defendants in this case contend that the trial court in Cresswell granted summary judgment because it found that the condition in question was open and obvious since the defendants kept the shrubs located in the area around the window well trimmed and maintained thereby making the plaintiff chargeable with knowing of the condition and risk involved. However, a closer reading of the opinion reveals that the basis for the court's finding that the hazard was open and obvious was that the plaintiff had been to the defendant's premises on numerous occasions prior to the accident without incident. The court also noted that the "hazardous condition" in question had been in existence for approximately eight years.

In the case at bar, there is no evidence that indicates that the triangular patch over which the Plaintiff fell had been encountered by the Plaintiff prior to the fall in question. Therefore, the Plaintiff indicates that she did not have the degree of knowledge that the plaintiff in the Cresswell case had at the time of her fall. Accordingly, Cresswell is inapplicable to the case at bar.

CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests this Honorable Court to deny Defendants' Motion for Summary Judgment.

Respectfully submitted,

Joseph J. Liotta, III
Attorney for Plaintiff

IN THE COURT OF COMMON PLEAS
OF CLARION COUNTY, PENNSYLVANIA

NANCY S. McKEE,
Plaintiff,

vs.

JOHN E. BECK and TENA J. BECK, husband and wife,
Defendants.

CIVIL DIVISION

NO. 409 CD 2003

OPINION AND ORDER OF COURT

Arner, J.

May 10, 2005

On April 6, 2001, the Plaintiff, Nancy McKee (Ms. McKee) was walking west on the sidewalk on the south side of Liberty Street in Clarion Borough at about 4:00 p.m. when she fell face forward onto the sidewalk, injuring her teeth and face. During her deposition on September 9, 2004, Ms. McKee described her fall by saying "I was just walking along and then the next thing I knew I was down on the sidewalk..." She said she does not remember whether the sidewalk was wet and she was probably looking straight ahead at the time she fell. When asked whether there was any object on the sidewalk that caused or contributed to her fall, Ms. McKee responded "Well, I know there was gravel on the sidewalk." She said she did not see what caused her to fall, "I just went down." Upon further questioning by counsel on her knowledge of what actually caused her to fall, Ms.

McKee stated "The sidewalk was in need of repair." She said she first became aware of what did cause her to fall when she was sitting there on the sidewalk. At that time, she became aware there was "loose gravel—a patch of the sidewalk that was in bad repair." She testified that the place of the fall was "in front of the Becks' house." She said there was a "triangle...full of gravel." When asked whether she has any specific recollection of anything about her shoe catching in the sidewalk and causing her to fall or sliding on the sidewalk and causing her to fall, Ms. McKee responded "It was fast so I probably can't tell you."

The matter before the court is the Defendants' Motion for Summary Judgment. The Defendants argue that in order to prevail in this case, the Plaintiff must establish among other things that the cause of her fall was a defective condition of the sidewalk. They say that based upon the evidence of record, she cannot prove such causation.

In Pennsylvania, the standards for summary judgment are clear:

> First, the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, must demonstrate that there exists no genuine, triable issue of fact. Second, the record must show that the moving party is entitled to judgment as a matter of law. The court must examine the record in the light most favorable to the non-moving party, resolving all doubts against the moving party....After thoroughly examining the record, the trial court must determine whether there is a genuine issue of material fact. If no genuine, triable issue of fact exists and the moving party is entitled to judgment as a matter of law, then the court may enter summary judgment in favor of the moving party.

Kelly v. Thackray Crane Rental, Inc., 2005 WL 1039275 (Pa.Super.2005).

To determine "if no genuine, triable issue of fact exists and the moving party is entitled to judgment as a matter of law," it is first necessary to determine what

facts must be proven to establish the element of causation. In *Kardibin v. Associated Hardware*, 426 A.2d 649, 652 (Pa.Super.1981), the court stated "It has long been the law in Pennsylvania in 'fall-down' cases that the pedestrian has the burden of proving the existence of a defective condition..." In that case, Mrs. Kardibin and her daughter were looking in the hardware store window and several feet from the door to the store, Mrs. Kardibin caught her foot and fell to the sidewalk. The defendant contended that the Kardibins failed to present sufficient evidence to make out a prima facie case. The defendant argued primarily that the Kardibins failed to establish the actual cause of Mrs. Kardibin's fall. The court found that Mrs. Kardibin had testified that the sidewalk caused her fall and that she found her foot still in the offending defect after she arose. Her daughter had testified that she saw her mother's foot in the defective spot just as Mrs. Kardibin was falling. The court stated "From the testimony in plaintiff's case there would clearly seem to be enough evidence to place the question before the jury."

In the case of *Hyatt v. County of Allegheny*, 547 A.2d 1304 (Pa.Cmwlth.1988), the court decided that whether an upturned edge of a mat at an airport caused an airline employee's fall and resulting injuries presented a question for the jury; in the employee's suit against the airport maintenance company, where the employee testified that, as she was unhurriedly proceeding to her job as a customer service agent, her right toe caught on something in the airport lobby, causing her to fall forward, and that when she turned around to see what had made her fall, she saw that the edge of the mat placed beyond the lobby door was

not lying flat on the floor and that the mat itself was not secured by tape. The court stated:

> Although it is clear that a jury is not permitted to reach a verdict based upon guess or speculation, it is equally clear that a jury may draw inferences from all of the evidence presented.

The defendants in that case cited the cases of *Reddington v. Philadelphia*, 98a.601 (Pa.1916), *Freund v. Hyman*, 103 A.2d 658 (Pa.1954), *Ley v. Bowman & Co.*, 46 Dauphin 135 (1938), *Cuthbert v. Philadelphia*, 209 A.2d 261 (Pa.1965) and *Farnese v. SEPTA*, 487 A.2d 887 (Pa.Super.1985). In those cases, the circumstantial evidence regarding the cause of the injuries at issue was found insufficient to allow the case to go to the jury. The court in *Hyatt*, distinguished those cases on the facts, in that the plaintiff had established that her toe caught on something or went into something which was consistent with the cause she sought to establish, that she was able to identify an object capable of causing her to trip and fall forward immediately after her fall, and she was not hurrying, and immediately saw the sole noticeable defect to which she attributed her fall.

From a review of the cases, it is clear that a court should not allow a case to go to a jury if the jury could only guess the cause of the fall from the evidence presented. A court should not allow impermissible speculation. On the other hand, a court should allow a case to be decided by the jury if a jury verdict can be the result of logical inference and just conclusions, based upon reliable circumstances.

In the present case, the evidence shows that Ms. McKee was walking unhurriedly on the sidewalk, looking straight ahead, when suddenly she fell forward onto the sidewalk. While she was still sitting on the sidewalk, she noticed that the

sidewalk in the immediate area where she fell was in poor condition. There was a triangular area of the sidewalk which was broken and contained loose gravel. Although Ms. McKee was unable to state that she felt her toe catch in the defect or felt her foot slip on the gravel, she was able to clearly identify one possible cause of her fall. From these facts, a jury could draw reasonable inferences, without having to guess or speculate that the broken or worn sidewalk and the loose gravel condition caused Ms. McKee to fall.

The Defendants in this case have not established that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law. Therefore, their Motion for Summary Judgment must be denied.

Hence, the following order:

IN THE COURT OF COMMON PLEAS
OF CLARION COUNTY, PENNSYLVANIA

NANCY S. McKEE, **Plaintiff,**	:	
	:	**CIVIL DIVISION**
vs.	:	
	:	**NO. 409 CD 2003**
JOHN E. BECK and TENA J. BECK, husband and wife, **Defendants.**	:	

ORDER OF COURT

AND NOW, May 10, 2005, it is hereby ORDERED that the Defendant's Motion for Summary Judgment is denied.

BY THE COURT:

JAMES G. ARNER **P.J.**