

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DONNA ROSAS, plenary guardian of the person and	:	
estate of LONSHYA BRADLEY, a minor and	:	
incompetent,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 03-5071
	:	
MAURICE O'DONOGHUE, COLUMBIA LIGHTING-	:	
LCA, INC., and BURGER KING CORPORATION,	:	
Defendants.	:	

**MEMORANDUM & ORDER**

YOHN, J.

August \_\_\_\_, 2005

This lawsuit arises out of a collision between a pedestrian and a motor vehicle along Route 13 in Bristol, Pennsylvania. Plaintiff Lonshya Bradley was struck by a car while crossing Route 13 soon after she left a Burger King restaurant that adjoins the highway. The accident left Bradley in a coma, and her guardian ad litem, Donna Rosas, brought separate counts of negligence on behalf of Bradley against the driver of the vehicle, a second driver who allegedly waved Bradley into oncoming traffic, and Burger King Corporation, the franchisor of the restaurant. Presently before the court is Burger King's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). For the reasons set forth below, I will grant the motion.

## I. BACKGROUND<sup>1,2</sup>

The accident occurred at the intersection of Route 13 and Beaver Dam Road in Bristol Township, Bucks County, Pennsylvania. Route 13 is a four-lane state highway<sup>3</sup> with a raised cement median strip that divides the two northeast-bound lanes from the two southwest-bound lanes. (Pl.'s Accident Report at 2.) Beaver Dam Road is a small two-lane road intersecting Route 13 at an angle. (*Id.*) Traffic signals control the vehicular traffic at the intersection, but there are no crosswalks for pedestrians. (*Id.*) There are also no sidewalks along this portion of Route 13. (*Id.*)

A Burger King restaurant is located adjacent to Route 13 on its easterly side. (*Id.*) The restaurant is owned and operated by U.S. Restaurants, Inc., which is not party to this suit.<sup>4</sup> U.S.

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<sup>1</sup>The following account contains undisputed facts and Rosas's factual allegations because on summary judgment courts must view all facts and inferences in the light most favorable to the non-moving party. See *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255 (1986).

<sup>2</sup>Because I described the underlying facts in this case in a previous opinion, I will only provide a brief overview of the factual background. See *Bradley v. O'Donoghue*, No. 03-5071, 2005 U.S. Dist. LEXIS 4716, (E.D. Pa. Mar. 23, 2005).

<sup>3</sup>Counsel for Rosas disputes that Route 13 is designated as a state highway and claims that Bristol Borough and Bristol Township are also responsible for its maintenance. (Pl.'s Statement of Disputed Facts at ¶ 7.) However, Rosas's own expert contradicts this claim (Pl.'s Accident Report at 2), and she has failed to come forward with any additional evidence to support this assertion. For these reasons, and because "unsworn statements of counsel in memoranda submitted to the court" are insufficient to sustain a plaintiff's burden at summary judgment, *Schoch v. First Fid. Bancorp.*, 912 F.2d 654, 657 (3d Cir. 1990), I will assume that Route 13 is a state highway for the purposes of this motion.

<sup>4</sup>Rosas initially filed a separate suit in this court naming U.S. Restaurants as an additional defendant. However, because U.S. Restaurants and Bradley are both Pennsylvania citizens, they fail to satisfy 28 U.S.C. 1332's complete diversity requirement, and I dismissed the case for lack of subject matter jurisdiction. See *Bradley & Rosas v. O'Donoghue, et al.*, No. 02-2338 (E.D. Pa. Aug. 19, 2002) (order).

Restaurants uses the Burger King name and trademarks pursuant to a franchise agreement with defendant Burger King Corporation. (Dep. of Henry F. White, Jr. (“White Dep.”) at 16.)

There is no paved pedestrian walkway connecting the restaurant with Route 13. (Pl.’s Accident Report at 2.) However, there is a driveway on the restaurant’s property that opens onto the highway. (*Id.*)

On the day of the accident, April 26, 2000, around 10:00 pm, plaintiff Lonshya Bradley and three friends stopped at the restaurant. (Dep. of Agnes Sungbeh (“Sungbeh Dep.”) at 49–50.) The girls entered the restaurant, but left without making a purchase. (Dep. of Maggie Sharpe (“M. Sharpe Dep.”) at 40–41.) After leaving the restaurant, the girls walked down the driveway to the intersection of Route 13 and Beaver Dam. (Sungbeh Dep. at 49–50.)

When the girls reached the intersection, motorists on Beaver Dam had a green light, and motorists on Route 13 had a red light. (Sungbeh Dep. at 75–77.) The girls ran across the two northeast-bound lanes onto the median strip and stopped. (*Id.* at 75.) By the time they reached the median strip, the light had turned red for Beaver Dam traffic and green for traffic on Route 13. (*Id.* at 85.)

At this point, Brian Patterson, who was operating a tractor for defendant Columbia Lighting, was waiting in the southwest-bound passing lane to turn left into the restaurant’s driveway. (Police Report at 4.) Patterson made a hand motion to the girls and they crossed in front of his truck. (Dep. of Sweetie Sharpe (“S. Sharpe Dep.”) at 86.) After crossing the passing lane, Bradley continued into the southwest-bound traveling lane (the fourth travel lane), where she was struck by defendant Maurice O’Donoghue’s vehicle, which was traveling southwest in that lane. (M. Sharpe Dep. at 113–14.) O’Donoghue had a green light at the time. (Dep. of

Maurice O'Donoghue ("O'Donoghue Dep.") at 34.)

The accident left Bradley completely incapacitated and she is incapable of any communication. On September 9, 2003, Rosas filed this diversity suit on behalf of Bradley against O'Donoghue, Columbia Lighting,<sup>5</sup> and Burger King Corporation. The complaint alleges that Burger King is vicariously liable<sup>6</sup> for U.S. Restaurants' failure to provide a crosswalk or warning signs to protect pedestrians such as Bradley from the dangerous condition of the intersection of Route 13 and Beaver Dam Road. (Compl. at ¶ 27.) Burger King filed the instant motion on June 17, 2005, and the matter is now ripe for disposition.

## II. STANDARD OF REVIEW

A court may only grant a motion for summary judgment, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted).

When a court evaluates a motion for summary judgment, "[t]he evidence of the non-

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<sup>5</sup>Rosas has already reached amicable settlements with O'Donoghue and Columbia Lighting.

<sup>6</sup>The complaint does not actually use the term vicarious liability, but it alleges that Burger King is liable "through their agents, servants and employees," who allegedly controlled the design and layout of the restaurant property. (Compl. at ¶ 22.)

movant is to be believed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In addition, “[a]ll justifiable inferences are to be drawn in [the non-movant’s] favor.” *Id.* “Summary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed.” *Ideal Dairy*, 90 F.3d at 744 (citation omitted). However, “an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The non-movant must show more than “[t]he mere existence of a scintilla of evidence” for elements on which she bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

### **III. DISCUSSION**

Burger King makes two arguments in support of its motion. First, it contends that regardless of its relationship with U.S. Restaurants, it is not liable for Bradley’s injuries because under Pennsylvania law, U.S. Restaurants had no duty to maintain the highway or warn travelers of dangerous conditions on the highway. Second, it argues that even if U.S. Restaurants, as possessor of the restaurant, owed a duty to Bradley, Burger King is not vicariously liable for U.S. Restaurants’ negligence under agency theory.

In Pennsylvania,<sup>7</sup> to maintain a negligence cause of action, the plaintiff must establish:

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<sup>7</sup>The parties do no dispute that Pennsylvania law governs this diversity action.

“(1) a duty recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure of the actor to conform to that standard; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damages to the interests of another.” *Fazio v. Fegley Oil Co.*, 714 A.2d 510, 512 (Pa. Commw. Ct. 1998) (citation omitted). Burger King argues that U.S. Restaurants had no duty to warn Bradley of the dangerous conditions of the intersection pursuant to the Restatement (Second) of Torts § 349 (1965). This section provides that:

A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care

(a) to maintain the highway or way in safe condition for their use, or

(b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover.

Because the Pennsylvania Supreme Court has not explicitly adopted this section of the Restatement, I must predict whether that court would follow § 349's no liability rule before I may apply it. *See W. Coast Franchising Co. v. WCV Corp.*, 30 F. Supp. 2d 498, 500 (E.D. Pa. 1998) (“Where there is no binding precedent on an issue of state law, a federal district court sitting in diversity must predict how the state’s highest court would rule.”). Although the Pennsylvania Supreme Court has not addressed this issue, at least three separate appellate courts in Pennsylvania have cited § 349 with approval. In *Allen v. Mellinger*, 625 A.2d 1326, 1327 (Pa. Commw. Ct. 1993), the plaintiff was injured when her vehicle collided with a truck while it was attempting to make a left turn from a public highway into the parking lot of the defendant’s store. The site where the plaintiff stopped to turn was a dangerous location where several accidents had previously occurred. *Id.* & n.2. Nonetheless, the highway was marked with broken double yellow lines indicating that it was an appropriate place to turn. *Id.* at 1327. The plaintiff alleged

that the defendants breached their duty of care by failing to warn her of the dangerous condition of the road. *Id.* The court applied § 349 and determined that the defendants, “as abutting landowners, owed no duty to [the plaintiff], . . . to maintain a public highway in a safe condition.” *Id.* at 1329. The court also observed that it was the exclusive responsibility of the Commonwealth, not private landowners such as the defendants, to erect signs or paint lines indicating where it was safe to turn. *Id.* n.6.

The Commonwealth Court followed § 349 five years later in *Fazio*, 714 A.2d 510. In *Fazio*, the plaintiff was injured when she slipped and fell on ice in a public alleyway, which was adjacent to a store operated by the defendants. *Id.* at 511. The plaintiff alleged that the defendants were liable for her injuries because the contours of their land caused the unreasonable runoff of water into the alleyway. *Id.* The court disagreed and reaffirmed that under § 349 and *Allen*, landowners whose property abuts public roadways owe no duty to travelers on those thoroughfares. *Id.* at 514. Finally, in *Walinsky v. St. Nicholas Ukrainian Catholic Church*, 740 A.2d 318 (Pa. Commw. Ct. 1999), the Commonwealth Court again followed § 349. This time it held that a church could not be held liable for injuries sustained by a pedestrian when she slipped on ice while crossing a public street on her way to the church. *Id.* at 320.

Along with these decisions of Commonwealth Court, various courts in other jurisdictions have adopted § 349's non-liability rule to relieve landowners of liability for injuries sustained by travelers on public highways. For instance, in *MacGrath v. Levin Props.*, 606 A.2d 1108, 1109 (N.J. Super. Ct. 1992), a case with strikingly similar facts to this case, the plaintiff attempted to hold the defendant shopping center liable when she was struck by a passing car on a state highway where the highway intersected with a “jug handle” that fed traffic into the shopping

center. The court, relying on § 349's no liability rule, held that the shopping center “owed no duty to maintain the public way or warn pedestrians of the apparent dangers of crossing [the] well-travelled highway.” *Id.* at 1111. Similarly, in *Kopveiler v. N. Pac. Ry. Co.*, 160 N.W.2d 142, 144 (Minn. 1968), the plaintiff suffered injuries when he fell in a hole on a public street immediately after he stepped off the defendant railroad’s depot platform, which was located fifteen to sixteen inches from the hole. The plaintiff argued that the railroad had a duty to prevent its customers from stepping off the platform in the area of the hole. *Id.* The court, relying on § 349, held that a public street could not be characterized as an “exit” from the railroad’s property, and determined that the railroad owed no duty to the plaintiff under these circumstances. *Id.* at 145. *See also Lacey v. Bekaert Steel Wire Corp.*, 799 F.2d 434, 437 (8th Cir. 1986) (relying on §349 to determine that a property owner had no duty to erect guardrails or warning signs on a public road that ran across its property and dead-ended at a river bank) (applying Arkansas law); *Dudley v. Prima*, 445 P.2d 31, 32–33 (Nev. 1968) (relying in part on § 349 to hold that the defendant leaseholder was not liable for damage sustained after the plaintiff’s trailer struck water pipes on a public road that extended into the defendant’s rented property); *Dawson v. Ridgley*, 554 So.2d 623, 624–25 (Fla. Dist. Ct. App. 1989) (concluding that the owner of a shopping center owned no duty to a passing motorist on a public highway, where a vehicle exiting the shopping center collided with the motorist because the driver’s view while exiting the shopping center was partially obstructed).

Because Pennsylvania lower courts and courts in other jurisdictions have uniformly adhered to § 349's no liability rule, I conclude that the Pennsylvania Supreme Court would adopt this rule, and I will follow it accordingly. Under § 349, U.S. Restaurants (and thereby Burger

King) owed no duty to warn Bradley of the dangerous conditions of the intersection. Like the shopping center in *MacGrath*, and the railroad in *Kopveiler*, U.S. Restaurants had no duty to ensure that its customers exited its property in a safe location on the highway. As *Allen* made clear, it was the exclusive duty of the Commonwealth, not U.S. Restaurants, to erect signs or paint crosswalks to protect travelers on a state highway such as Route 13. See 625 A.2d at 1329 n.6; see also *Swank v. Bensalem Township*, 472 A.2d 1065, 1066 (Pa. 1984) (“The exclusive authority and jurisdiction over all state designated highways rests with the Department of Transportation.”) (citing 71 Pa. Cons. Stat. § 512(10)).

Rosas counters that because the Pennsylvania Supreme Court has yet to adopt § 349, it is not binding authority, and instead, the court should adopt the reasoning of the New Jersey Superior Court in *Warrington v. Bird*, 499 A.2d 1026 (N.J. Super. Ct. 1985). In *Warrington*, the plaintiffs were injured by a passing motorist as they crossed a public road. At the time of the accident, the plaintiffs were returning to a parking lot provided by the defendant restaurant after dining at the restaurant, which was located across the road from the parking lot. The court concluded that under these circumstances, the defendant owed pedestrians such as the plaintiffs a legal duty to ensure safe passage across the highway. *Id.* at 1030. It held that “when a business provides a parking lot across the roadway from its establishment, the duty of the proprietor to exercise reasonable care for the safety of its patrons extends to the conditions obtaining at the parking lot and requires that the patrons not be subjected to an unreasonable risk of harm in traversing the expected route between the two locations.” *Id.* Rosas contends that in light of *Warrington*, it was Burger King’s responsibility to ensure safe passage for Bradley across Route 13.

Rosas's reliance on *Warrington* is unpersuasive because New Jersey courts have clearly limited *Warrington*'s holding to its particular factual setting. See *Ross v. Moore*, 533 A.2d 398, 401 (N.J. Super Ct. 1987) ("*Warrington* is a precedent only that a commercial establishment which provides parking facilities for its patrons across a public roadway has a duty to exercise reasonable care for their safe passage from there to the commercial establishment and back."); see also *MacGrath*, 606 A.2d at 1111 (observing that "*Warrington* makes no reference to the 'no liability' rule under § 349 of the Restatement.") Here, unlike *Warrington*, Bradley was not crossing Route 13 to return to a parking lot operated by Burger King or U.S. Restaurants.

Alternatively, Rosas asserts that notwithstanding § 349's no liability rule, U.S. Restaurants owed a duty to Bradley under Restatement (Second) of Torts §§ 343<sup>8</sup> and 364<sup>9</sup> (1965), which impose a duty on possessors of land to exercise reasonable care to protect

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<sup>8</sup>This section provides that:

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 invitees, 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.

<sup>9</sup>This section provides that:

A possessor of land is subject to liability to others outside of the land for physical harm caused by a structure or other artificial condition on the land, which the possessor realizes or should realize will involve an unreasonable risk of such harm, if

- (a) the possessor has created the condition, or
- (b) the condition is created by a third person with the possessor's consent or acquiescence while the land is in his possession, or
- (c) the condition is created by a third person without the possessor's consent or acquiescence, but reasonable care is not taken to make the condition safe after the possessor knows or should know of it.

“business invitees” and “others outside of the land” from physical harm caused by unreasonable risks and artificial conditions on the land. Pennsylvania courts have readily imposed legal duties on landowners under these sections of the Restatement. For instance, in *Colangelo v. Penn Hills Ctr., Inc.*, 292 A.2d 490, 491 (Pa. Super. Ct. 1972), the Pennsylvania Superior Court, relying on § 343, held that a shopping center owed the plaintiffs a legal duty where the shopping center erected curbing at a location that had formerly served as an entrance to the shopping center, and the plaintiffs sustained injuries when their car collided with the curbing. Similarly, in *McCarthy v. Ference*, 58 A.2d 49, 53–55 (Pa. 1948), the Pennsylvania Supreme Court followed § 364 to impose liability on the owner of a hillside adjoining a public highway, where a rock fell from the hillside and injured the occupants of a bus traveling on the highway.

Rosas claims that the dangerous condition that caused Bradley’s injuries was not the intersection itself, but rather the driveway on the restaurant’s property that led pedestrians into the intersection. Even if I accept the dubious claim that the driveway was an artificially dangerous condition, the Pennsylvania Supreme Court has made clear that neither section of the Restatement imposes a duty on landowners in circumstances such as these. In *Gardner ex rel. Gardner v. Consol. Rail Corp.*, 573 A.2d 1016, 1017 (Pa. 1990), a boy was injured by a train on land owned by a third party after he climbed through a hole in a fence on land owned by the City of Philadelphia. The plaintiff argued that the City owed him a duty to maintain the fence under Restatement §§ 343 and 365, which is analogous to § 364.<sup>10</sup> *Id.* at 1019. The court rejected these theories of liability and determined that the city owed no duty of care to persons such as the

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<sup>10</sup>Section 365 imposes liability on possessor’s of land for physical harm caused to others outside of the land by “the *disrepair* of a structure or other artificial condition” on the land, rather than the structure or artificial condition itself. (Emphasis added).

plaintiff because the suspect condition on the city's land did not proximately cause the plaintiff's injury.<sup>11</sup> *Id.* The court observed that "[the plaintiff] [was] not injured by the fence; [he] merely passed through it." *Id.* Here, unlike *Colangelo* and *McCarthy*, and similar to *Gardner*, Bradley was not injured by the driveway on U.S. Restaurants' land, and was "merely pass[ing] through it." The proximate cause of her injuries was the collision on the highway, which occurred after Bradley had crossed three of the four travel lanes and a raised median strip, and which was caused by the negligence of O'Donoghue, Patterson, Bradley, and arguably the state and local authorities, which are charged with responsibility for the road's maintenance. Hence, because the driveway was not the proximate cause of Bradley's injuries, Rosas cannot invoke §§ 343 and 364 of the Restatement to hold U.S. Restaurants liable for Bradley's injuries. *See Gardner*, 573 A.2d at 1019. Because U.S. Restaurants cannot be held liable for Bradley's injuries, Burger King cannot be held vicariously liable for these injuries, and I will grant Burger King's motion for summary judgment.<sup>12</sup>

#### IV. CONCLUSION

For the reasons explained above, I will grant Burger King's motion for summary judgment and enter judgment in its favor. An appropriate order follows.

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<sup>11</sup>In so holding, the court observed that "the concepts of duty and proximate cause ultimately involve similar policy considerations." 573 A.2d at 1020 n.6.

<sup>12</sup>Because U.S. Restaurants cannot be held liable for Bradley's injuries, I need not determine whether Burger King could be held liable for U.S. Restaurants' conduct under agency theory.

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v.	:	NO. 03-5071
	:	
MAURICE O'DONOGHUE, COLUMBIA LIGHTING-	:	
LCA, INC., and BURGER KING, CORPORATION,	:	
Defendants.	:	

**ORDER**

AND NOW, this \_\_\_\_\_ day of August, 2005, upon consideration of defendant Burger King Corporation's motion for summary judgment (Doc. No. 142), plaintiff Donna Rosas's memoranda of law in opposition thereto (Doc. No. 149), and Burger King's reply brief in further support thereof (Doc. No. 150), it is hereby ORDERED that:

1. Burger King's motion for summary judgment is GRANTED and judgment is ENTERED in favor of defendant Burger King Corporation and against plaintiff Donna Rosas.
2. The trial scheduled for October 31, 2005 is cancelled.

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William H. Yohn, Jr., J.

