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

MILDRED OZER, DAVID OZER,	:	CIVIL ACTION
Plaintiffs.	:	
v.	:	
METROMEDIA RESTAURANT GROUP, STEAK & ALE OF PENNSYLVANIA, INC. AND PHILADELPHIA CENTER ASSOCIATES,	:	
Defendants	:	
v.	:	
WIDE WORLD TRAVEL, INC. t/a WORLD WIDE TRAVEL, INC.,	:	
Third Party Defendant	:	No. 04-940

Gene E.K. Pratter, J. Memorandum and Order March 7, 2005

Defendants Philadelphia Center Associates ("PCA") and Steak and Ale of Pennsylvania, Inc. ("Steak and Ale") move for summary judgment in their favor in this personal injury case. Steak and Ale has also filed a motion in limine to preclude lay opinion testimony related to the curb area where the injury occurred. For the reasons that follow, both motions for summary judgment are denied. The motion in limine will be resolved separately.

FACTUAL BACKGROUND

This case arises from an incident that occurred late in the evening on August 10, 2002, when Mildred Ozer, a woman in her seventies and her husband, David Ozer, returned from a day trip by bus to Atlantic City. The trip was apparently arranged by third party defendant Wide World Travel. Earlier that day, before boarding the bus, the Ozers parked their car in a parking lot adjacent to a Bennigan's restaurant at the Great Northeast Plaza, a shopping mall located at Bustleton and Cottman Avenues in Philadelphia. Bennigan's is operated by Steak and Ale, which leased retail space in the Great Northeast Plaza from PCA.

When the Ozers returned from Atlantic City at approximately 11:00 p.m., they decided to get something to eat at Bennigan's. As the couple was walking toward the restaurant, Mrs. Ozer tripped and fell, sustaining serious injuries, including a displaced fracture of the right hip and right femur. Her injuries required surgery and a lengthy hospital stay.

Mr. and Mrs. Ozer filed their complaint on February 9, 2004 in state court, asserting claims for negligence against Steak and Ale and PCA.[1] With the consent of PCA, Steak and Ale removed the case to this Court on March 3, 2004. Answers by Steak and Ale and PCA were filed promptly thereafter. PCA also initiated a cross-claim against Steak and Ale, asserting that pursuant to the lease for the property, Steak and Ale, and not PCA, is responsible for the safety of its customers. PCA asserts that the lease obligates Steak and Ale to indemnify PCA for losses "arising out of or

[1] The complaint includes four counts. Two counts are on behalf of Mrs. Ozer - one alleging negligence and a second alleging personal injury that was proximately caused by the negligence of the defendants. The remaining two counts were filed on behalf of Mr. Ozer for (1) loss of consortium and (2) financial expenses and losses incurred for the medical attention and care of Mrs. Ozer.

based upon any condition, use, happening, accident, injury or damage, . . . which . . . may happen on or about . . . the streets, sidewalks or curbs in front of or bordering on Cottman or Bustleton Avenues." Thus, PCA asserts that if it is found liable, Steak and Ale would be liable over to PCA.[2] Steak and Ale filed an answer to the cross-claim on July 12, 2004, in which it asserts that PCA retained responsibility for the maintenance of the parking lot site where Mrs. Ozer fell.

The parties conducted discovery, including depositions of Mr. and Mrs. Ozer. As part of discovery, the Ozers presented a report prepared by an expert engineering consultant, David H. Fleisher, dated April 29, 2004 (the "Fleisher Report I").[3] In his initial report, Mr. Fleisher stated that: (1) there was a ridge of blacktop pavement in the area that Mrs. Ozer fell, (2) this ridge was a hazard to pedestrians, (3) the ridge was not competently and reasonably constructed, (4) the hazard could have been corrected "by constructing and maintaining the blacktop pavement . . . reasonably even and planar with the adjoining pavement," (5) the condition of the blacktop pavement failed to comply with reasonable practices and violated requirements of the City of Philadelphia, and (6) the

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[2] PCA also filed a third party complaint against Wide World Travel, in which it makes similar assertions with respect to the lease held between PCA and Wide World Travel. Wide World Travel filed an answer to PCA's complaint on May 25, 2004, in which it denies liability and asserts various affirmative defenses, including those contained in the lease between Wide World Travel and PCA. Wide World Travel did not file a dispositive motion, and filed no response to either of the summary judgment motions presently before the court.

[3] The Fleisher Report was, apparently a preliminary report. After the Fleisher Report was issued, PCA obtained a "technical report" prepared by Matthew J. Burkart of Aegis Corp. In his report, Mr. Burkart opines that "Mrs. Ozer's trip and subsequent fall were not caused by any defect which existed in the parking lot of the Bennigan's Restaurant." The Fleisher Report was supplemented on July 7, 2004 (the "Fleisher Report II"), after Fleisher reviewed the deposition testimony of several witnesses, the July 23, 2003 statement of Mrs. Ozer, and Mr. Burkart's report.

raised blacktop ridge was a dangerous condition that created a foreseeable risk that someone would trip or fall over it.

On July 12, 2004, Steak and Ale and PCA each filed motions for summary judgment (Docket Nos. 16, 17). Steak and Ale also filed a Motion in Limine to Preclude Lay Opinion Testimony, arguing that any testimony related to the curb (rather than the parking lot) should be excluded because this evidence is not relevant to the issue in this case (Docket No. 15).[4] The Plaintiffs responded to each of the summary judgment motions on August 2, 2004 (Docket Nos. 27, 28), and Steak and Ale filed a reply brief in support of its motion on September 21, 2004 (Docket No. 29). PCA also filed a response to Steak and Ale's Motion for Summary Judgment (Docket No. 25) and to Steak and Ale's Motion in Limine (Docket No. 24). Counsel presented oral argument on both motions on December 16, 2004.

DISCUSSION

A. Jurisdiction

Jurisdiction is grounded upon the diversity of the parties. The Ozers are citizens of Pennsylvania, Steak and Ale is incorporated in Nevada and has a principal place of business in Texas, and PCA is an Illinois partnership with no partners who are citizens of Pennsylvania.[5]

[4] The Motion in Limine will be considered separately from the summary judgment motions.

[5] Third party defendant Wide World Travel is a Pennsylvania corporation. However, the only claim against Wide World Travel was filed by PCA as a Defendant/Third Party Plaintiff. The Ozers are not asserting a claim against Wide World Travel.

B. Summary Judgment Standard

Summary judgment is appropriate "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 a judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has carried its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented in the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

C. Summary Judgment Motions

Steak and Ale asserts that summary judgment should be granted in its favor because (1) Mrs. Ozer has not presented sufficient evidence from which a jury could conclude that there was a defect in the parking lot that caused her to fall; (2) even if such evidence were present, the alleged defect in the parking lot is so trivial that there was no duty breached; and (3) PCA, and not Steak and Ale, is responsible for maintaining and repairing the parking lot.

PCA agrees with Steak and Ale's first two assertions, but, not surprisingly, disagrees that it should be held liable. Rather, PCA argues that if liability does lie, Steak and Ale is responsible because Steak and Ale assumed the responsibility pursuant to the terms of its lease to ensure the safety of its patrons visiting the entire premises, including the parking lot. PCA also argues that summary judgment should not be entered in favor of Steak and Ale with respect to its cross claim against PCA because the parties' lease requires Steak and Ale to indemnify PCA for all costs (including legal defense costs) arising from patronage of the premises.

1. Evidence of Cause in Fact and Proximate Cause

Both Steak and Ale and PCA assert that Mr. and Mrs. Ozer cannot recover in this case because the Ozers have not presented evidence that the raised asphalt in the parking lot was both the cause in fact and proximate cause of Mrs. Ozer's fall. The basic elements of a negligence claim under Pennsylvania law include (1) a duty by the defendant, (2) breach of the duty, (3) actual loss or harm and (4) a causal connection between the breach and the harm. Redland Soccer Club, Inc. v. Dep't of the Army of the United States, 55 F.3d 827, 851 (3d Cir. 1995). Plaintiffs seeking to

recover under this theory must prove that the alleged negligence was both the cause in fact and the proximate cause of their injury. Redland Soccer Club, 55 F.3d at 827.

Cause in fact means that "but for" a defendant's negligence, no injury would have occurred. This is a quintessential factual inquiry typically left to a jury to decide. Redland Soccer Club, 55 F.3d at 827. Proximate cause is described as a "natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." Id. Proximate cause is generally a question of law requiring a court to determine whether a defendant's negligence was "so remote that, as a matter of law" no liability for the harm may lie. Kennedy v. Lankenau Hospital Jefferson Health System, No. 97-5631, 2000 WL 1367998 (E.D. Pa. Sept. 12, 2000); Redland Soccer Club, 55 F.3d at 827. However, there are some exceptions to this rule.

The Pennsylvania Supreme Court applies the "substantial factor test" to determine whether proximate cause has been established in a case. Under this test, a defendant's negligent conduct cannot be considered the proximate cause of a plaintiff's injury unless "the alleged wrongful acts were a substantial factor in bringing about the plaintiff's harm." Kennedy v. Lankenau Hospital Jefferson Health System, No. 97-5631, 2000 WL 1367998, at * 4 (E.D. Pa. Sept. 12, 2000) (quoting E.J. Stewart, Inc. v. Aitken Prods., Inc., 607 F. Supp. 883, 889 (E.D. Pa. 1985)). Although the issue of proximate cause is a question of law, the Pennsylvania Supreme Court has instructed that the question of whether a defendant's conduct was a substantial or an insignificant cause of a plaintiff's harm "should not be taken from the jury if the jury may reasonably differ" as to the question. Ford v. Jeffries, 379 A.2d 114 (Pa. 1977).

In support of their respective arguments, both Steak and Ale and PCA assert that Galullo v. Federal Express Corp., 937 F. Supp. 392 (E.D. Pa. 1996) is analogous to the Ozer claim and should be relied on by the Court to dispose of this case. In Galullo, the plaintiff, an 86 year-old woman, responded to a knock at her door and, finding no one there upon opening the door, stepped out of the door, fell and was seriously injured. In the subsequent lawsuit, the plaintiff alleged that she had slipped and fallen on a Federal Express envelope that had been placed on a step outside of the door.

Although the Galullo plaintiff asserted that she slipped on the envelope, the court, upon examination of the plaintiff's deposition, concluded that the plaintiff could not recall seeing what she slipped on, and could only recall that she felt something wet under her foot before she fell. The record also reflected that there were other items near the doorway, such as leaves and an old rug, that could have caused the plaintiff to slip. In concluding that the plaintiff had not presented sufficient evidence of proximate causation, the court reasoned that there were several other possible causes of the fall, and the plaintiff had produced no evidence that it was the envelope, as opposed to the other items, that caused her to fall.

Steak and Ale and PCA assert that Galullo is dispositive here because, as in Galullo, the record is not only devoid of any evidence that Mrs. Ozer's injuries were caused by the ridge in the asphalt, but also includes statements by Mrs. Ozer that there was debris in the area that might have caused her fall. Steak & Ale further points out that Mrs. Ozer admitted during her deposition that she did not see the raised asphalt before she fell. Moreover, at his deposition Mr. Ozer stated that his wife "just tripped," that he was unsure what caused his wife to fall, and that prior to his deposition, he had never heard about the raised asphalt at issue in this case. Based on this

deposition testimony, Steak & Ale argues that, as was the case in Galullo, there is insufficient evidence in the record to support proximate causation of the Ozers' injuries.

In response, the Ozers argue that Galullo is inapposite because in that case, the plaintiff asserted that a transient condition caused her fall and was "unable to specify what condition caused her injury." In contrast to Galullo, the Ozers contend that the record here is replete with statements by Mrs. Ozer that the cause of her fall was tripping over a stone. The Ozers attempted to additionally bolster their case by filing Mrs. Ozer's affidavit in which she stated that because her deposition lasted for six and one-half hours, and the questions were repetitive, she became confused in answering the questions. In her affidavit, Mrs. Ozer endeavors to clarify that she "definitely tripped over part of the blacktop surface next to the curb," that "[t]he reason my foot struck the curb and I fell was due to the condition of the asphalt parking lot," and that upon reviewing the photographs taken after her fall, Mrs. Ozer "learned that there was a raised lip of the asphalt . . . which I could not appreciate at the time and which caused me to fall." Mildred Ozer Affidavit at ¶¶ 5, 6, 7. Aside from presenting these facts and arguing that Galullo does not apply, the Plaintiffs do not cite any other cases with respect to this issue.

Because the Court is obliged to consider the evidence in a light most favorable to the Ozers, the Court is not persuaded that Defendants are correct when they assert that the record is devoid of evidence that Mrs. Ozer tripped over the raised asphalt near to the curb. The Court acknowledges that Pennsylvania courts have stated clearly that juries may not be permitted to reach a verdict based upon guess or speculation. However, Pennsylvania courts also have stated with equal clarity that a jury may draw inferences from the evidence presented to determine whether the facts support a

finding of factual causation. See First v. Zem Zem Temple, 686 A.2d 18, 21 (Pa. Super. Ct. 1996) ("it is enough that there be sufficient facts for the jury to say reasonably that the preponderance favors liability"). Moreover, a plaintiff may recover even if the evidence of proximate cause is wholly circumstantial. Of particular significance here, conventional case law instructs that inconsistencies in a witness's testimony should be left to a jury to decide. Strother v. Binkele, 389 A.2d 1186, 1191 (Pa. Super. Ct. 1978) (reversing nonsuit because "apparent conflicts in a witness's testimony must on a motion for nonsuit be resolved in the plaintiff's favor, it being left to the jury to make the final resolution").

In the present case, there is both conflicting testimony and some circumstantial evidence that the raised asphalt caused Mrs. Ozer to trip and fall.[6] For example, while Mrs. Ozer seems to have had moments of confusion during her deposition experience,[7] there is circumstantial evidence that the asphalt was raised in the area that Mrs. Ozer tripped, and Mrs. Ozer does repeatedly refer to having tripped over "a stone." Mildred Ozer Dep. at 125, 126, 129, 130;Mildred Ozer Affidavit at ¶¶ 5, 6, 7. In a recorded statement dated July 23, 2003, Mrs. Ozer states that "the asphalt there was

[6] At one point in her deposition, Mrs. Ozer recalled that there may have been "debris" (described by Mrs. Ozer as "dirt") in the parking lot, on which she might have slipped or tripped. Mildred Ozer Dep. at 199. However, in their complaint, the Ozers assert that the Defendants' negligence arose from a defective condition in the asphalt and/or curb, and/or inadequate lighting. Complaint at ¶ 9. Mrs. Ozer's deposition also included numerous references to the darkness of the parking lot where she was walking toward Bennigan's.

[7] Indeed, on more than one occasion during the deposition, the witness expressed confusion by the process, by the inter-lawyer sparring, by temporary lack of memory, or by her inability to "think clearly" under the circumstances. There is no indication that those references were calculated or untrue. See e.g., Mildred Ozer Dep. at 65-66, 84, 90 and 94.

raised and . . . the crack and it caused by [sic] foot to catch and trip." Mildred Ozer Recorded Statement at 5.[8]

Further, although Mr. Ozer testified that he might not be sure as to what caused Mrs. Ozer to fall, he also stated more than once that "she tripped over *this*." Mr. Ozer Dep. at 53:23-24; 54:4 (emphasis added). Without knowing what "this" was, the Court finds it difficult, if not impossible, to determine from this record whether Mr. Ozer was stating that his wife tripped over the raised lip in the asphalt, a curb, or some other item. Because a reasonable juror could, based on the jury's receipt of all of the testimony presented, distinguish among and sift through the evidence to infer that the raised asphalt did both factually and proximately cause Mrs. Ozer to fall, summary judgment is not appropriate in this case.

The Court appreciates that the Defendants, and particularly PCA, having provided the Court with a copy of the entire transcript from the deposition of Mrs. Ozer, which apparently lasted for more than six hours and is comprised of more than two hundred pages, strenuously contend that the record lacks evidence of causation. However, the Court also observes that in the affidavit Mrs. Ozer filed after her deposition was completed, Mrs. Ozer acknowledged being confused when many of the deposition questions were posed. Without second-guessing Plaintiffs' counsel's strategic choices,

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[8] In its reply brief, Steak and Ale, citing Cuthbert v. City of Philadelphia, 209 A.2d 261, 263 (Pa. 1965), asserts that a plaintiff may not return to the scene of an accident at a later date and search the accident scene for any and all possible causes so as to concoct a personal injury claim. While Steak and Ale does not misstate the holding in Cuthbert, there are more recent cases from the Pennsylvania Superior Court which suggest that proximate cause may be inferred from wholly circumstantial evidence and, where there are conflicts in a witness's testimony, the issue should be decided by a jury. See, e.g., Strother v. Binkele, 389 A.2d 1186, 1191 (Pa. Super. Ct. 1978). Although Mrs. Ozer did make conflicting statements in an affidavit filed after her deposition, the Court finds that Mrs. Ozer's credibility is a matter that should be addressed by the jury fact finder. Id.

the Court finds that, given the length of her deposition, as well as the style and presentation of questions,[9] it is possible the Mrs. Ozer became confused during the deposition. (See footnote 7, supra). Moreover, upon review of the various, sometimes tangled lines of questioning of Mrs. Ozer, as well as the corresponding photographs she was repeatedly asked to mark, the Court finds that a reasonable juror could conclude that Mrs. Ozer tripped with her right foot over the raised asphalt, and then caught the same foot on the curb. Indeed, the jury could determine that Mrs. Ozer's testimonial tripping bespeaks a flaw in her evidence or merely her vulnerability to aggressive lawyering that the jury considers fair, or unfair or of no moment one way or the other. In any case, the credibility of Mrs. Ozer is not a matter for the Court, but rather a matter for the jury, to decide. To be sure, the various renditions of Mrs. Ozer's recollections will provide considerable cross-examination material at trial.

2. **Triviality of Defect**

The Defendants also assert that even if there is sufficient evidence from which causation might be inferred, no liability should lie against either of them because the alleged defect is so slight as to be deemed trivial. In support of this proposition, the Defendants note several Pennsylvania

[9] Mrs. Ozer's deposition reflects that she was presented many specific questions with respect to her health, past employment and social life, including questions such as whether she received a discount at Sears, her former employer, to purchase the shoes she was wearing on the date of the incident. M. Ozer Dep. at 75. While the Court recognizes the Defendants' right to vigorously and rigorously question to the point of grilling a plaintiff about the relevant details with respect to these topics and the allegations the Defendants face, it recognizes that such questions and questioning techniques, particularly when interspersed with questions about the event underlying the cause of action, might have been distracting and confusing to Mrs. Ozer, a woman in her seventies who likely is not a practiced witness or adept at verbal volleys as can occur at depositions..

cases which provide examples of "elevations, depressions or irregularities upon which courts have held no liability could be predicated."

Under Pennsylvania law, a business owner is obligated to (1) keep the premises in a "reasonably safe condition" and (2) to warn an invitee or business visitor of latent defects or dangers which it knows exist or in the exercise of reasonable care should have known. See Watkins v. Sharon Aerie No. 327 Fraternal Order of Eagles, 223 A.2d 742 (Pa. 1966); Restatement (Second) of Torts § 341A (1965). A business visitor is considered "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings." Restatement (Second) of Torts § 332(3) (1965).[10]

While business owners are obliged to maintain pavement and sidewalks in a reasonably safe condition, there is no duty to insure that a pedestrian is protected from any and all accidents. See Magennis v. City of Pittsburgh, 42 A.2d 449, 450 (Pa. 1945); Davis v. Potter, 17 A.2d 338, 339 (Pa. 1941). If a court concludes that a defect is so trivial that no reasonable juror could impose liability, summary judgment can be appropriate. See Davis v. Potter, 17 A.2d 338, 339 (Pa. 1941) (finding alleged defect "so trifling that . . . the court, as a matter of law, is bound to hold that there was no negligence"). However, unless a defect is obviously trivial, its gravity should be a fact determined in light of the circumstances of the particular case. See Massman v. City of Philadelphia, 241 A.2d 921, 923 (Pa. 1968) (finding that circumstances required question of triviality of defect should be decided by jury); Breskin v. 535 Fifth Avenue, 113 A.2d 316, 318 (Pa. 1955) (noting that "except

[10] PCA notes that there is a dispute among the parties as to whether Mrs. Ozer was an invitee or a licensee on the property. However, for purposes of the summary judgment motion, PCA is willing to assume that Mrs. Ozer was an invitee, as PCA believes that even under a higher standard of care, no legal claim can succeed.

where the defect is obviously trivial" question as to whether defect was sufficient to render liability should be decided by jury).

In the instant case, as the Defendants point out, examples of defects which have been found to be so obviously trivial as to preclude imposing liability include: (1) a one and one-half inch difference between the levels of two abutting curbstones, McGlinn v. City of Philadelphia, 186 A. 747 (Pa. 1936); (2) a one and one-inch space between the adjoining ends of flagstones at a street crossing, Newell v. City of Pittsburgh, 123 A. 768 (Pa. 1924); (3) an uneven, rough, unpaved step between a curb and sidewalk, that was two to four inches below the sidewalk level, Foster v. Borough of West View, 195 A .82 (Pa. 1937); (4) a manhole cover that projected two inches above the surface of the street, Harrison v. City of Pittsburgh, 44 A.2d 273 (Pa. 1945), and (5) a hole that was one and one-eighth inches below the level of pavement and was in a twelve-by-fifteen inch area, Magennis v. City of Pittsburgh, 42 A.2d 449 (Pa. 1945).[11]

The Fleisher Report I states that the alleged defect, a ridge in the parking lot asphalt, was raised from the pavement by approximately seven-sixteenths to three-fourths of an inch and was within six inches from the sidewalk curb. According to Mr. Fleisher, this "change in elevation of the blacktop ridge was excessive." Further, although not specifically stated in the Fleisher Report,

[11] Not all of these cases cited were decided as a matter of law by the court, but rather were appeals from trials in which a jury concluded as to liability. Of the cases cited, Foster and McGlinn were decided as a matter of law (nonsuit) by the trial court. Harrison and Newell were appeals from judgment non obstante veredicto, and Magennis was an appeal from a trial court's refusal to grant judgment non obstante veredicto. Thus, only two of the five cases were decided at the summary judgment stage.

some language in the report appears to imply that the elevation was more dangerous because of its proximity to the curb.[12]

In response to the Complaint, the Plaintiffs do not cite any case law or other authority that would support an argument that the alleged defect was not trivial.[13] Rather, the Plaintiffs argue that there is no need to consider whether the defect was trivial because under Pennsylvania law, the Defendants' violation of a city safety ordinance constitutes negligence per se. Therefore, the Plaintiffs assert that because Mr. Fleisher concluded that the conditions present in the parking lot violated the City of Philadelphia Property Maintenance Code, the elevation in the pavement constituted negligence per se, rendering the parking lot area defective.

In Pennsylvania, the violation of a statute is considered negligence per se, and liability may be imposed, if the violation can be shown to have been a substantial factor in causing a plaintiff's injury. Gravlin v. Fredavid Builders and Developers, 677 A.2d 1235, 1238 (Pa. Super. Ct. 1996).[14] To recover under a theory of negligence per se, a plaintiff must establish a direct connection between the harm meant to be prevented by the statute and the injury incurred. Id.

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[12] Presumably, this proximity would make it more likely that a person who tripped on the ridge might be more likely to then stumble on the adjacent curb, causing the person to fall.

[13] There does not appear to be a wealth of case law supporting an argument that the alleged defect is not trivial. However, at least one lower level court in Pennsylvania has concluded recently that the triviality of a one-fourth inch wide crack that was seven to eight feet long was an issue that was appropriate for a jury to decide. Smith v. Southeastern Pennsylvania Transportation Authority, 707 A.2d 604, 610 (Pa. Commw. Ct. 1998).

[14] In Gravlin, the case cited by the Plaintiffs in support of this proposition, the court addressed the issue of whether the defendants' use of incorrect silt strainer covers for sewer inlets, which violated the state Clean Streams Act and certain municipal ordinances, might constitute negligence per se. The court did not decide the issue of negligence per se in that case.

The Plaintiffs assert that the Defendants are negligent for violating Section 302.5 of the City of Philadelphia Property Maintenance Code, which states rather generally that "[a]ll walkways, stairs, driveways, parking spaces and similar areas shall be maintained free from hazardous conditions." Because the alleged defect in the parking lot pavement supposedly violated this ordinance, the Plaintiffs assert that no further proof of negligence need be presented.

This argument does not squarely address the Defendants' assertion that any alleged defect here was trivial - that is, that the alleged defect would not have affected the reasonable safety of the parking area and would not constitute a violation of any ordinance. The ordinance simply appears to require that the area be kept clear of "hazardous conditions," a term which is not well defined. Thus, to the extent that the defect would be trivial, it would not likely be hazardous and no violation of the statute or ordinance would arise. The Plaintiffs also have not presented any evidence that either of the Defendants (or anyone) had been cited ever for a violation of the ordinance.

Despite the absence of negligence per se here, the Court finds there to be a sufficient dispute of fact with respect to whether the alleged defect was trivial. The Court must observe for the benefit and consideration of the parties that the issue of triviality of the defect makes summary judgment in this case a very close call. However, considering the facts and evidence in a light most favorable to the Ozers, the Court finds that the proximity of the raised asphalt to the curb could be found by a jury to be less than trivial because a stumble over the raised asphalt potentially could be exacerbated by an individual's inability to recover his or her bearings before confronting the curb. Thus, even after rejecting the notion of negligence per se, the question as to whether the alleged defect was trivial in the context of the conditions confronted by Mrs. Ozer is one best left for the jury to decide.

D. Responsibility under Lease

Steak and Ale also argues that even if the Ozers have met their prima facie burden of proving that Mrs. Ozer's fall was caused by a defective condition in the parking lot, Steak and Ale could not be liable because PCA, its landlord, is responsible for "maintaining and repairing the paved parking area . . . including striping and painting . . .[and] hard surface repair." Steak and Ale asserts that under the terms of its lease with PCA, Steak and Ale's legal responsibility ended at the curb of the sidewalk. Because the Ozers allege that a defect in the pavement, and not a defect in the condition of the curb or sidewalk, caused Mrs. Ozer to fall, Steak and Ale contends that it cannot be held ultimately liable for Mrs. Ozer's injuries.

In response, PCA first argues that to the extent negligence is found, the curb was as much a part of the cause of Mrs. Ozer's fall as the raised asphalt was. PCA also argues that when the terms of the lease are considered in their entirety, Steak and Ale has assumed all of the duties of a possessor of land, including the parking area, and should therefore be responsible for any liability that may arise.

1. Allocation of Responsibility Based on Source of Injury

Steak and Ale argues that the lease expressly states that PCA is responsible for the repair and maintenance of the parking lot and, therefore, bears responsibility for the raised asphalt that allegedly caused Mrs. Ozer's injury. Steak and Ale specifically argues that pursuant to Section 5.02 of the lease, PCA is responsible to "maintain and repair the paved parking area of the Demised Premises, excluding: (a) access ways from adjoining streets, (b) sidewalks, and (c) landscaped areas, in good order and condition at all times," and that this included "ice and snow removal, striping and

painting, hard surface repair, electricity for and maintenance of existing lighting, and no more." Lease at § 5.02.[15]

While PCA does not disagree that these were its responsibilities, it first argues that the curb, which would be included in Steak and Ale's responsibilities, may ultimately be found to have played a leading role in causing Mrs. Ozer's fall. Thus, PCA argues that it would be inappropriate to grant Steak and Ale's motion for summary judgment without granting its own such motion.

In this instance, PCA has the better argument, as Mrs. Ozer's testimony allows for several conclusions on this point. During a recorded statement about the accident that was taken on July 23, 2003, Mrs. Ozer stated that it was the cracked asphalt that caused her foot to "catch and trip." Nine months later, at her deposition on April 22, 2004, Mrs. Ozer repeatedly stated that she "tripped over the stone," and circled a portion of the curb when asked to identify where it was that her foot got caught immediately before her fall. Moreover, as discussed supra, Fleisher Report I appears to suggest that the proximity of the raised asphalt to the curb resulted in an increased risk of a more serious injury, as someone could trip on the raised asphalt and trip again over the curb while trying to regain his or her balance. Because there appears to be a lack of clarity or certainty over the actual cause of Mrs. Ozer's fall, it is not appropriate to grant summary judgment in favor of Steak and Ale on the lease provisions.

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[15] The lease also states that "[m]aintenance and repair of the parking area on the Demised Premises shall include only ice and snow removal, striping and painting, hard surface repair, electricity for and maintenance of existing lighting, and no more." Id.

2. **Whether Steak and Ale Bears Responsibility for the Parking Area**

PCA secondly argues that, when considered as an entire document, the lease should be interpreted to mean that Steak and Ale has assumed responsibility for maintaining the parking area. In support of this assertion, PCA notes that Section 10.04 of the lease requires the tenant to "keep and maintain all portions of the Demised Premises, including, without limitation, . . . the accessways and sidewalks forming part of or adjoining the Demised Premises, in a clean and orderly condition, free of accumulation of dirt, rubbish, snow and ice."[16] PCA argues that this provision, when considered in conjunction with Section 5.01 of the lease, which provides that Steak and Ale could retain the property "for the use of parking for motor vehicles," that "[p]arking for motor vehicles and all other facilities for customers, invitees and employees" was to be provided by Steak and Ale, and that Steak and Ale was responsible to "construct, provide for, repair, restore and maintain, in good, clean condition . . . such access to the Demised Premises from the adjoining street, with the appropriate curb cuts, and lighting," demonstrates that Steak and Ale had assumed the responsibilities of a possessor of land and thereby would be responsible for falls on any part of the premises, including the parking lot.

Steak and Ale responds that there is no ambiguity in the lease with respect to the provision requiring PCA to maintain and repair the hard surface of the parking area. Moreover, Steak and Ale seems to discern that PCA is arguing that it was a "landlord out of possession," and therefore does

[16] The lease defines the term "Demised Premises" to include "[a]ll that certain real property with all easements and facilities appurtenant thereto situate at the Southwest corner of Cottman and Bustleton Avenues, Philadelphia, Pennsylvania, more fully described on the plan attached hereto as Exhibit A and being part hereof." Lease at § 1.01. The referenced exhibit appears to include the entire property upon which the restaurant is situated, including the parking lot.

not bear any responsibility for third party invitees. In this regard, Steak and Ale asserts that because PCA retained control over these areas, it was not a "landlord out of possession" and may, therefore, be held liable for any injuries resulting from alleged defects in the parking lot.

a. **Interpretation of the Lease**

To interpret a contract under Pennsylvania law, a court must try to ascertain the intention of the parties that executed the contract. Z&L Lumber Co. of Atlasburg v. Nordquist, 502 A.2d 697, 700 (Pa. Super. Ct. 1985). If the terms of a contract are clearly expressed, the intention of the parties must be determined from the language of the contract. Id. However, if the language is ambiguous, a court must consider extrinsic evidence to determine the parties' intent. Id.

A contract is ambiguous "if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning." Metzger v. Clifford Realty Corp., 476 A.2d 1, 5 (Pa. Super. Ct. 1984). While it is a court's responsibility to determine whether the terms of a contract are ambiguous, it is the fact finder's responsibility to resolve ambiguities and find the parties' intent. Metzger, 476 A.2d at 5.

In this case, there does not appear to be any ambiguity in the lease with respect to what party was responsible for repairing the hard surface of the parking lot – Section 5.02 appears to place that obligation squarely on PCA. However, Article 10 of the lease, which addresses repairs to the property, states that the tenant (Steak and Ale), not the landlord (PCA), bears the responsibility to "keep and maintain all portions of the Demised Premises, in a clean and orderly condition, free of accumulation of dirt, rubbish, snow and ice." This language might be ambiguous with respect to

what constitutes a "clean and orderly condition." While one party may construe this term to require that Steak and Ale keep the area generally clean, it is feasible that another party (such as PCA), might construe the term to include more, such as identifying hazards. Moreover, Section 5.01 of the lease appears to allocate responsibility for lighting – a feature that the Ozers assert in the complaint was deficient – to Steak and Ale. The Court finds that there is sufficient ambiguity in the lease to preclude summary judgment in favor of Steak and Ale at this time.[17]

b. **Whether PCA is a Landlord Out of Possession**

Steak and Ale argues that PCA may be held liable for injuries to third parties on the land it leased because PCA is not a landlord "out of possession." As a general rule, a landlord out of possession is not responsible for injuries suffered by third parties on leased premises. Kobylinski v. Hipps, 519 A.2d 488, 490-91 (Pa. Super. Ct. 1986). However, liability may attach if a landlord has "retained control over a portion of the property which is necessary to the safe use of the leased property." Kobylinski, 519 A.2d at 491. In this case, there is evidence to suggest that PCA did retain such control. For example, Steak and Ale points out that Neil Sydnor, a manager employed by PCA, testified that he had arranged for repairs to the asphalt in the past. Neil Sydnor Dep. at 12. At

[17] At oral argument and in its supplemental filings, PCA argues that it cannot be held responsible for duties that were assumed through the lease by Steak and Ale. In support of this assertion, PCA repeatedly cites to Feld v. Merriam, 485 A.2d 742 (Pa. 1984), in which the court considered whether a landlord could be held responsible for criminal acts that took place in the parking garage of a private apartment building. Aside from the primary point that there appears to be some material disagreement as to (1) the cause of Mrs. Ozer's fall and (2) the precise responsibility between the parties, the Court does not believe that Feld is applicable here. The Feld court addressed whether a landlord bore a duty to protect tenants from foreseeable criminal acts of third persons. Feld, 485 A.2d at 745. Moreover, the Feld court specifically noted the distinction between an area in which the public is invited and the private, "invitation-only" nature of an apartment complex. These issues are not involved here. For these reasons, the Court finds that Feld is not determinative.

a minimum, there appears to be a question of fact as to whether PCA retained control of the parking lot area. Summary judgment in favor of PCA on the basis of it being a landlord out of possession is inappropriate.

E. **PCA's Cross-claim against Steak and Ale**

In its motion for summary judgment Steak and Ale does not address the cross-claim filed against it by PCA. However, in its answer to Steak and Ale's summary judgment motion, PCA argues that granting summary judgment in favor of Steak and Ale with respect to the cross-claim would not be proper, even if the Ozers have failed to provide enough evidence to support their claim. PCA explains this assertion by stating that pursuant to Section 11.14 of the lease, PCA would be entitled to contractual indemnification from Steak and Ale for PCA's defense costs.

Section 11.14 of the lease provides that Steak and Ale agrees to "defend, indemnify and save [PCA] harmless against and from any and all liability, loss, damage and expense (including reasonable attorneys' fees) and from and against any and all suits, claims and demands of every kind and nature, made by or on behalf of any and all persons. . . arising out of or based upon any condition, use, happening, accident, injury or damage, however occurring, . . . on or about the Demised Premises or the streets, sidewalks or curbs in front of or bordering on Cottman or Bustleton Avenues." This language does suggest that, to the extent liability is found, Steak and Ale is responsible for PCA's legal fees. Therefore, summary judgment with respect to the cross-claim will not be granted.

CONCLUSION

For the reasons discussed above, the Court finds that, although this is indeed a very close case for summary judgment purposes, there are sufficient disputes of material fact between the parties to preclude granting summary judgment to either Steak and Ale or PCA. Therefore, both summary judgment motions will be denied. An appropriate Order follows.

/S/_____
Gene E.K. Pratter
United States District Judge

March 7, 2005

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

MILDRED OZER, DAVID OZER,	:	CIVIL ACTION
Plaintiffs.	:	
v.	:	
METROMEDIA RESTAURANT GROUP, STEAK & ALE OF PENNSYLVANIA, INC. AND PHILADELPHIA CENTER ASSOCIATES,	:	
Defendants	:	
v.	:	
WIDE WORLD TRAVEL, INC. t/a WORLD WIDE TRAVEL, INC.,	:	
Third Party Defendant	:	No. 04-940

O R D E R

AND NOW, this 7th day of March, 2005, upon consideration of the Motion for Summary Judgment of Defendant Steak and Ale of Pennsylvania, Inc. (Docket Nos. 16, 18), the Motion for Summary Judgment of Defendant Philadelphia Center Associates (Docket Nos. 17, 22), the responses to both motions (Docket Nos. 25, 27, 28), Defendant Steak and Ale's Reply Brief in Support of its Motion for Summary Judgment (Docket No. 29), oral argument with respect to the

motions, and the supplemental responses filed thereafter (Docket Nos. 34, 35, 36), it is hereby ORDERED that the Motion for Summary Judgment of Defendant Steak and Ale is DENIED and the Motion for Summary Judgment of Defendant Philadelphia Center Associates is DENIED.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE