NATHAN KREITZER, SR. and JOYCE E. KREITZER, his wife, Plaintiffs,	:	**IN THE COURT OF COMMON PLEAS**
	:	**LAWRENCE COUNTY, PENNSYLVANIA**
vs.	:	**NO. 10767 of 2016, C.A.**
MADISON ACQUISITIONS, LLC, MADISON ACQUISITIONS CALLS PLAZA ASSOCIATES, LP, Defendants.	:	

OPINION

This case was before the Court for oral argument on the Defendants' Motion for Summary Judgment in their favor on the Complaint asserted by the Plaintiffs against the respective Defendants.

The question presented by the Defendants' Motion for Summary Judgment is as follows:

> Must Plaintiff's claim against Madison fail such that Madison is entitled to judgment as a matter of law where Plaintiff's alleged fall was caused by a trivial defect, where Plaintiff cannot show that Madison created the condition or that it had actual or constructive notice of that condition, and where Plaintiff cannot show beyond speculation and guesswork that he even fell because of that condition?

The basic facts as alleged by the Plaintiff's' Complaint are that on October 20, 2014, Plaintiff, Nathan Kreitzer, Sr. went to the Social Security Administration Building in New Castle, Pennsylvania, which is located on the Defendants' premises known as Calls Plaza, located at 1702 Wilmington Road, New Castle, Pennsylvania 16105. At that time, Plaintiff, Nathan Kreitzer, Sr. alleges that he was caused to fall on a dangerous and defective sidewalk and/or roadway located on the premises at 1702 Wilmington Road. Plaintiff alleges that the Defendants were negligent and careless in failing to maintain the sidewalk and/or roadway in a safe manner, in failing to completely repair the defect in the sidewalk and/or roadway, in allowing it to exist for

an unreasonable amount of time after they knew or should have known of the existence of said disrepair, and for failing to warn business invitees such as the Plaintiff of the dangerous condition presented by the disrepair of the sidewalk and/or roadway.

Plaintiff goes on to further allege that as a result of the fall, Plaintiff, Nathan Kreitzer, Sr., was caused to suffer a tearing of the mid to posterior supraspinatus of the right shoulder and a thickening of the coracoacromial ligament of the right shoulder, which resulted in surgery to the right shoulder of the Plaintiff, Nathan Kreitzer, Sr.

Plaintiff, Joyce E. Kreitzer, has joined in the Complaint by filing a claim for loss of consortium as a result of the injury suffered by her husband.

Defendants dispute that there is a defect in the sidewalk, or even if there were a defect in the sidewalk, that it was anything more than a "trivial defect". In addition, the tenant is unsure how the accident happened, and that there is no evidence that the Defendants knew or had reason to know about any uneven area on the walkway that might present a danger to others on the property.

Pennsylvania Rule of Civil Procedure No. 1035.2 states that a party may move for summary judgment when: (1) there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report; or (2) an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. Pa.R.C.P. No 1035.2(1), (2). The moving party bears the burden of proving the non-existence of genuine issues of fact. Thompson Coal Company v. Pike Coal Co., 488 Pa. 198, 204, 412 A.2d 466 (1979). All doubts are to be resolved in favor of the non-moving party. Id. at 204, 412 A.2d at 468-69.

> Pennsylvania courts long have recognized that a land owner owes a duty to business invitees to keep premises safe. See Kulka v. Nemirovsky, 314 Pa. 134, 170 A. 261, 262 (1934). "The standard of care a possessor

of land owes to one who enters upon the land depends upon whether the person entering is a trespassor, licensee, or invitee." Carrender v. Fitterer, 503 Pa. 178, 469 A.2d 120, 123 (1983). In Carrender, our

Supreme Court explained:

> Possessors of land owe a duty to protect invitees from foreseeable harm. Restatement [(Second) of Torts], §§ 341A, 343 & 343A. With respect to conditions on the land which are known to or discoverable by the possessor, the possessor is subject to liability only if he,
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger."

Restatement, supra, § 343. Thus, as is made clear by Section 343A of the Restatement,

> "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

Restatement, supra, § 343A.

> For a danger to be "known", it must "not only be known to exist, but...also be recognized that it is dangerous and the probability and gravity of the threatened harm must be appreciated." Id. at 124 (quoting Restatement (Second) of Torts, § 343A, comment b).

"The duty owed to a business invitee is the highest owed to any entrant upon land. The landowner is under an affirmative duty to protect a business visitor not only against known dangers but also against those which might be discovered with reasonable care." Campisi v. Acme Markets, Inc., 915 A.2d.

117, 119 (Pa. Super. 2006) (citation omitted). Further:

> An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonable safe by repair or to give warning of the actual condition and the risk involved therein. Therefore an invitee is not required to be on the alert to discover defects which, if he were a mere licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to discover a defect, as well as in determining whether the defect is one which the possessor should believe that his visitor would not discover, and as to which, therefore, he must use reasonable care to warn the visitor.

It is well-settled that a sidewalk defect may be so trivial that a court must hold, as a matter of law, that the property owner was not negligent in allowing its existence. See Bosack v. Pittsburgh Railways Company, 410 Pa. 558, 563, 189 A.2d. 877, 880 (1963); Henn v. City of Pittsburgh, 343 Pa. 256, 258, 22 A.2d 742, 744 (1941). "What constitutes a defect sufficient to render the property owner liable must be determined in the light of the circumstances of the particular case, and except where the defect is obviously trivial, that question must be submitted to the jury." Breskin v. 535 Fifth Avenue, 381 Pa. 461, 463, 113 A.2d 316, 318 (1955) (internal quotations and citation omitted). However, there is no mathematical or bright-line rule that can be used to determine "the depth or size of a sidewalk depression necessary to convict an owner of premises of negligence in permitting its continued existence." Id. at 464, 113 A.2d at 318. The surrounding circumstances must be examined in each case. McGlinn v. City of Philadelphia, 322 Pa. 478, 480, 186 A. 747, 748 (1936).

Our Supreme Court has consistently stated that questions of whether a sidewalk defect is trivial and whether a defendant has been negligent in permitting the sidewalk defect to exist should be submitted to the jury when there are genuine issues of material fact based on the surrounding circumstances. See Massman v. City of Philadelphia, 430 Pa. 99, 241 A.2d 921 (1968) (denying the defendant city's motion

for judgment n.o.v. because the dimensions of the defect and the surrounding circumstances provided questions for the trier of fact to decide); Breskin (granting a new trial because the surrounding circumstances prevented judgment as a matter of law that the sidewalk defect was trivial); Henn (affirming that, based on the surrounding circumstances, the question of whether the city was negligent in permitting a sidewalk defect to exist was for the jury to decide).

The Plaintiff has raised various issues of fact in its brief which preclude the Court from granting the Defendant's Motion for Summary Judgment. At this stage of the proceedings, the Court is making no comment on whether the Plaintiff will be able to prove the respective factual matters, only that the Plaintiff has raised sufficient factual matters which preclude the Court's granting of the Motion for Summary Judgment, those issues being as follows:

> Plaintiff testified that the uneven pavement and difference in elevation from the uneven pavement to the sidewalk area caused him to trip and fall; (see deposition testimony page 35);
>
> Plaintiff testified that where the roadway meets the cement pad, it was very uneven and rough, it did not look like they finished paving the roadway correctly and left it as is; (see deposition transcript page 20);
>
> Plaintiff testified that he went to the area where he had fallen and took photographs of the unevenness, there was an inch-and-a-half gap between where the cement is nice on the sidewalk, level and flat, and the walkway;
>
> Plaintiff testified he believes that where the pavers did not make it nice and smooth that caused it to be uneven, it's more like a gutter that brings it up to that area; (see deposition transcript, page 38);
>
> Pursuant to the photographs, it appears that construction was underway with regard to the pavement in front of the Social Security Administration building where the Plaintiff fell, and that the pavement was uneven and not completed; photographs later determined that new concrete had been placed in front of the Social Security Administration office and a mat and a yellow line were painted which were obviously not there at the time of the Plaintiff's fall.

From reviewing the various cases cited by the attorneys in their briefs, it is apparent that each case presents a unique set of circumstances that must be evaluated on an individual basis. See McGlinn v. City of Philadelphia, 322 Pa. 478, 480, 186 A. 747, 748 (1936).

As a result, the Court will enter an order attached hereto denying the Defendants' Motion for Summary Judgment.

NATHAN KREITZER, SR. and JOYCE E. KREITZER, his wife, Plaintiffs,	:	**IN THE COURT OF COMMON PLEAS**
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ORDER OF COURT

AND NOW, this 9th day of April, 2020, after consideration of the Defendants' Motion for Summary Judgment, the Plaintiffs' Response to the Motion, and the respective briefs filed by counsel for both parties, the Defendants' Motion for Summary Judgment is hereby denied.

The Prothonotary shall provide notice of entry of this Order to counsel of record and the Lawrence County Court Administrator.

BY THE COURT:

_____ **J.**
John W. Hodge, Judge

53RD JUDICIAL DISTRICT

LAWRENCE COUNTY PENNSYLVANIA