SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET
Suite 10400
WILMINGTON, DE 19801
PHONE: (302) 255-0656
FASCIMILE: (302) 255-2274

Date Submitted: January 11, 2008
Date Decided: February 4, 2008

Charles Snyderman, Esquire
Charles Snyderman, P.A.
Stoney Batter Office Building
5301 Limestone Road, Suite 214
Wilmington, DE 19808

Robert F. Kuhn, Esquire
Dashevsky, Horwitz, Disandro, Kuhn,
Dempsey & Novello, P.C.
1315 Walnut Street, 12th Floor
Philadelphia, PA 19107

Phillip T. Edwards, Esquire
Murphy & Landon
1011 Centre Road, Suite 210
Wilmington, DE 19805

Re: McCarnan v. Investors Realty, Inc.,
C. A. No. 06C-10-107 JRS

Dear Counsel:

As you know, plaintiff, Sheila McCarnan, has brought claims of negligence against defendant, Investment Realty, Inc. ("IRI"), after she fell and sustained serious

injuries while carrying bags of groceries from her car into her mobile home. The mobile home was located within a mobile harm park owned by IRI on a lot leased to Ms. McCarnan by IRI. According to Ms. McCarnan, IRI allowed a "depression, irregularity or defect" to exist on the access roadway that ran beside her mobile home by permitting pavement of the roadway to be several inches higher than the ground on her adjoining lot.[1] The fall occurred when Ms. McCarnan lost her balance after accidentally stepping off the roadway while walking into her home. She alleges that IRI owed her a duty to repair this dangerous condition of which it was aware, or to warn her of its existence.

IRI has moved for summary judgment. It contends that the undisputed facts of record reveal that Ms. McCarnan was fully aware of the allegedly defective condition and that she cannot, therefore, claim that IRI was negligent for failing to warn her of it or to repair it. IRI also contends that the record is devoid of any evidence that the raised roadway was defective or dangerous, and the mere fact that Ms. McCarnan fell is not, alone, evidence of a dangerous condition. Finally, IRI contends that assuming *arguendo* that the roadway was defective or dangerous, the lease signed by Ms. McCarnan required her, as tenant, to make any necessary "improvements" to the "Parking Apron, Concrete Footers or Pad, ... [or] Grading and Filling of the Lot."[2]

In opposition to IRI's motion, Ms. McCarnan argues that the question of whether the raised roadway constituted a dangerous condition is a question of fact for the jury to decide at trial. She contends that she need do no more than show the jury pictures of the condition, describe it to them, and then allow them to determine

[1] *See* D.I. 1, at ¶14.

[2] *See* D.I. 12, Ex. A, at ¶21 C.

whether the condition is dangerous or defective. She also argues that her knowledge of the dangerous condition (of which she does not contest) does not diminish or negate IRI's duty to repair a dangerous/defective condition of which it also is aware. Finally, with respect to the lease, Ms. McCarnan argues that her obligation to "make improvements" to various aspects of her lot does not require her to "make repairs" when conditions on the lot become dangerous.

The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist.[3] Summary judgment will be granted only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[4] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record *sub judice*, then summary judgment will not be granted.[5]

The moving party bears the initial burden of demonstrating that the undisputed facts support his legal claims.[6] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder and/or, in the case of a defense motion, that the defendant's attack on the legal viability of the plaintiff's claim is unfounded.[7] When reviewing the record, the Court must view the evidence in the light most favorable

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[3] *Oliver B. Cannon & Sons, Inc.* v. *Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973).

[4] *Id.*

[5] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[6] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)(citing *Ebersole*, 180 A.2d at 470).

[7] *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

to the non-moving party.[8]

In an oral ruling, the Court already has determined that IRI did not owe the plaintiff a duty to warn her of a danger or defect of which she already was aware.[9] The Court left open the question of whether IRI owed a duty to Ms. McCarnan to repair a dangerous or defective condition even after Ms. McCarnan became aware of the condition. The parties had not addressed this issue in their initial submissions so the Court asked for supplemental submissions. These were timely filed and the matter is now ripe for decision.

Ms. McCarnan was an invitee upon IRI's property. The Supreme Court of Delaware recently restated the three elements the plaintiff/invitee must prove to prevail on a negligence claim against a possessor of land:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, 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 the invitee 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.[10]

The Court is satisfied that Ms. McCarnan cannot sustain a *prima facia* claim of negligence against IRI on the undisputed facts of record. First, she has failed to adduce any evidence that would support the notion that the elevated roadway adjacent to her lot was a "condition" that created "an unreasonable risk of harm" to her or to

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[8] *See United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997); *Brzoska*, 668 A.2d at 1364.

[9] *See* D.I.11; *DiSabatino Bros., Inc. v. Baio*, 366 A.2d 508, 510 (Del. 1976).

[10] *Ward v. Shoney's, Inc.*, 817 A.2d 799, 802 (Del. 2003)(citing RESTATEMENT (SECOND) OF TORTS §343).

any other invitee who might visit her mobile home lot.[11] By all accounts, the raised roadway was very similar to a curb that might run along a sidewalk elevated above an adjoining street. It was not the result of damage or even wear and tear to the roadway or adjoining lot. Moreover, the raised roadway was not hidden in any way and was well known to Ms. McCarnan and other residents of the mobile home park. The mere fact that Ms. McCarnan fell while accidentally stepping off the raised roadway does not, itself, suggest that the raised roadway was dangerous, nor does it otherwise indicate that IRI was negligent in connection with Ms. McCarnan's fall.[12] Without more, no reasonable jury could conclude that IRI allowed a dangerous condition to exist on or adjacent to Ms. McCarnan's lot.[13]

Even if the Court was to conclude that the question of whether the raised roadway was dangerous should be determined by the jury, Ms. McCarnan still could not, as a matter of law, recover against IRI in negligence. The record is clear and undisputed that Ms. McCarnan *had* "discover[ed] or realize[d] the danger" prior to her fall. The undisputed record also suggests no reason for IRI to have believed that

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[11] Having made this determination, the Court will not address IRI's argument that the lease signed by Ms. McCarnan required her, not IRI, to address the raised roadway condition.

[12] *See Wilson v. Derrickson*, 175 A.2d 400, 402 (Del. 1961); *Jackson v. Capano Inv., LLC*, 2006 Del. Super. LEXIS 12, *5 ("The fact that a person trips does not mean that someone else is liable.").

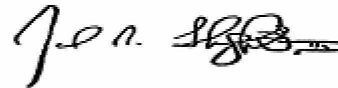
[13] *See Jackson,* supra, at *6 (granting summary judgment to landowner defendants upon determining that "Plaintiff has not marshaled evidence, especially expert opinion, from which a reasonable jury could conclude that Defendants are liable. A verdict for plaintiff could only reflect speculation, prompted by sympathy."). *See also Ward,* 817 A.2d at 802 (recognizing, and not disturbing, the trial judge's determination that expert testimony was necessary to establish that landscaping adjacent to a restaurant where plaintiff tripped and fell was a dangerous condition). The Court likely would be inclined to allow plaintiff additional time to develop evidence (including expert testimony) to support an argument that the elevated roadway was dangerous if not for the irreparable defect in plaintiff's *prima facie* evidence, as described below.

Ms. McCarnan "would fail to protect [herself] against" the danger prior to her fall.[14] Consequently, even under a view of the undisputed facts most favorable to Ms. McCarnan, she cannot establish the second element of her *prima facie* negligence claim against IRI.[15]

Based on the foregoing, IRI's motion for summary judgment must be **GRANTED.**

IT IS SO ORDERED.

Very truly yours,



Joseph R. Slights, III

Original to Prothonotary

[14] *Id.* (reciting elements of an invitee's negligence claim against a possessor of land).

[15] *Id.*