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COURT OF COMMON PLEAS OF MONROE COUNTY  
FORTY-THIRD JUDICIAL DISTRICT  
COMMONWEALTH OF PENNSYLVANIA

BEVERLY KARTEN,	:	No. 4416 CV 2016
	:	
Plaintiff	:	
	:	
v.	:	
	:	
SHOPRITE, INC. d/b/a SHOPRITE OF	:	
STROUDSBURG and MARTIN'S	:	
POWER SWEEPING, INC. and	:	
MARK FOUR REALTY, L.P. d/b/a	:	
THE LIGHTSTONE GROUP, LLC.,	:	
	:	
Defendants	:	MOTIONS FOR SUMMARY
	:	JUDGMENT

OPINION

This case comes before us on Defendants Shoprite, Inc. d/b/a Shoprite of Stroudsburg ("Shoprite"), Martin's Power Sweeping, Inc. (Martin's Power Sweeping), and Mark Four Realty, L.P. d/b/a The Lightstone Group, LLC.'s ("Mark Four") Motions for Summary Judgment against Plaintiff Beverly Karten ("Karten"), as well as, Co-Defendant Mark Four's Motion for Summary Judgment against Co-Defendant Martin's Power Sweeping. Karten filed a Complaint with this Court on August 11, 2016, sounding in negligence and premises liability against all named Defendants, both individually and jointly. Mark Four filed a Crossclaim to Karten's Complaint, against Martin's Power Sweeping on September 9, 2016, sounding in contribution, indemnity, and breach of contract. After reviewing all Defendants' Motions for

Summary Judgment against Karten, as well as, Mark Four's Motion for Summary Judgment against Martin's Power Sweeping, and all parties' respective briefs, we are now prepared to render our decision.

### **FACTS AND PROCEDURAL HISTORY**

On June 30, 2014, in the hour of 10:30 – 11:30 a.m., Karten was leaving the Shoprite grocery store after grocery shopping with her late husband. (Pl.[s] Compl. ¶ 6-9). She slipped and fell on the main walkway of the parking lot after exiting the store. (*Id.* at ¶ 12). At first, Karten was not aware of the specific kind of debris upon which she slipped. (Pl. Dep. 52) She described the substance as “gooey, dark grey and almost black and again somewhat liquid and slippery.” (Pl. Compl. ¶ 11,13). She further describes the debris as approximately eight inches long, two inches wide, and smelling of rotten banana. (Pl. Dep. 52) Karten is unaware how the substance got onto the ground and how long it remained on the ground before it was the cause of her fall. (*Id.* at 53)

Following her accident, another customer who witnessed her fall, went inside to get help. (Pl. Dep. 51). The manager came out to assist Karten and inspect the situation, while Virginia Rubino, a Shoprite parking lot attendant employee, brought Karten a chair. (*Id.* at 58). As a result of her fall, Karten sustained injuries to her right knee, left ankle, and lower back. (Pl. Compl. ¶ 14).

A Complaint was filed by Karten on July 5, 2016. Shoprite was the first of the Defendants to file a Motion for Summary Judgment on March 5, 2018. Mark Four

next filed their Motions for Summary Judgment against Karten and against Martin's Power Sweeping on March 20, 2018. Lastly, Martin's Power Sweeping filed a Motion for Summary Judgment against Karten on March 22, 2018.

## DISCUSSION

We are mindful that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial," a party may request summary judgment.

Pa.R.C.P. No. 1035.2. Pursuant to Pa.R.C.P. No. 1035.2, movants may proceed with such a motion following one of two methods:

(1) whenever 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) if, after the completion of discovery relevant to the motion, including the production of expert reports, 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.

Although both subdivisions necessarily require the court to find that the evidentiary record allows for judgment as a matter of law, the court's analysis varies depending on the method asserted by the moving party.

Subdivision (1) requires that after examining all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . there exists *no genuine issue as to any material fact*." *Community Medical Services of Clearfield Inc. v. Local 2665, AFSCME*, 437 A.2d 23, 25 (1981) (emphasis added). "A 'material fact' . . . is one that directly affects the outcome of the case." *Bartlett v.*

*Bradford Publishing, Inc.*, 885 A.2d 562, Super.2005. This analysis results in the court comparing the allegations, pleadings, and statements made by each party to determine whether a material factual discrepancy exists. "It is not the court's function upon summary judgment to decide issues of fact, but only to decide whether there is an issue of fact to be tried." *Krepps v. Snyder*, 112 A.3d 1246, Super.2015, appeal denied 125 A.3d 778, 633 Pa. 757.

Similar to subdivision (1), subdivision (2) requires that there be no question to be decided by the trier of fact. However, subdivision (2) necessitates the court make a finding as to "whether a plaintiff has alleged facts sufficient to establish a *prima facie* case." *Ack v. Carroll Twp. Auth.*, 661 A.2d 514, 516–17 (Pa. Commw. Ct. 1995). Instead of comparing the allegations, pleadings, and statements made by each party to one another, the court examines the allegations, pleadings, and statements made by each party to adjudge whether the adverse party, who must bear the burden of proof, has made sufficient allegations on the record to meet said burden. See Pa.R.C.P. No. 1035.2.

We are further mindful that summary judgment may only be granted "in cases where it is clear and free from doubt that movant is entitled to judgment as a matter of law." *Ney v. Axelrod*, 723 A.2d 719, Super.1999. It is the court's duty to "examine the record in the light most favorable to the non-moving party," and to "resolve any doubt against the moving party." *Pocono International Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 470 (1983); *Zimmerman v. Zimmerman*, 469 A.2d 212,

213 (1983); *Chorba v. Davlisa Enterprises, Inc.*, 450 A.2d 36, 38 (1982). With all of these standards in mind, we are now prepared to render our decision.

***I. Defendants Shoprite, Martin's Power Sweeping, And Mark Four's, Motions For Summary Judgment Against Karten Are Granted Pursuant To Pa.R.C.P. No. 1035.2, Subdivision (2), Insufficient Evidence Essential To The Cause Of Action.***

To succeed in presenting a prima facie negligence action, a plaintiff must properly allege against a defendant or defendants the existence of (1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the breach and resulting injury; and (4) actual damages. *Pittsburgh National Bank v. Perr*, 637 A.2d 334 (Pa. Super. 1994). The case before the Court today involves negligence under the theory of premises liability, and more specifically, one alleging the existence of a dangerous condition on the land, which in this case, was the cause of injury following a "slip and fall."

Duty in a "slip and fall" case where a dangerous condition is alleged to have harmed an invitee is governed by The Restatement (Second) of Torts § 343.<sup>1</sup> Pursuant to case law interpreting The Restatement (Second) of Torts § 343, the plaintiff must present in their prima facie case some showing of either actual or constructive notice, differing dependent upon whether the dangerous condition is of

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<sup>1</sup> Section 343 has been cited with approval in this jurisdiction. *Neve v. Insalaco's*, 2001 PA Super 71, 771 A.2d 786, 792 (2001) (citing *Lonsdale v. Joseph Horne Co.*, 403 Pa.Super. 12, 587 A.2d 810, 811 (1991); also citing *Winkler v. Seven Springs Farm*, 240 Pa.Super. 641, 359 A.2d 440, 442 (1976)).

an inherently sustained duration or of a transitory nature. See *Neve v. Insalaco's*, 771 A.2d 786, 791 (2001).

As a preliminary matter, the distinction between the two is explored in detail by the court in *Neve*, with the court ultimately holding that while a "spill or piece of fruit on the floor" is a common transitory danger, a defective grate is distinguishable as a defect in the building itself, and therefore, a dangerous condition of an inherently sustained duration. 771 A.2d 786, 791 (2001). The *Neve* court defines transitory dangers as "(1) those in which a patron slipped on debris; and (2) those in which a patron was struck by falling goods that had been stacked properly for display." *Id.* at 789 (citing *Dougherty v. Great Atlantic & Pacific Tea Co.*, 221 Pa.Super. 221, 289 A.2d 747, 748 (1972) (falling jar of olives struck plaintiff); *Cohen v. Penn Fruit Co.*, 192 Pa.Super. 244, 159 A.2d 558, 560 (1960) (falling can of fruit struck plaintiff); *Jones v. Sanitary Market Co.*, 185 Pa.Super. 163, 137 A.2d 859, 860 (1958) (plaintiff slipped on banana peel); and *DeClerico v. Gimbel Bros.*, 160 Pa.Super. 197, 50 A.2d 716, 717 (1947) (plaintiff slipped on soft substance). In doing so, the *Neve* court cites to multiple Pennsylvania cases which have similarly held that a piece of dropped fruit or other debris have traditionally been considered a transitory spill. *Id.*

Karten's argument that a gooey, brown/black, odorous banana and banana remains should be considered a dangerous condition of a lasting duration, misunderstands well-documented case law to the contrary. See (Pl. Compl. ¶¶ 11,13). We hold that the banana and banana remains are a transitory spill under Pennsylvania law. As such, the prima facie requirements laid out by the court in *Neve*

for a dangerous condition of lasting duration are inappropriate. Instead, this Court looks, in the light most favorable to Karten, to see whether her prima facie case complies with Pennsylvania law regarding a dangerous condition on the land—transitory spill. For the following reasons, we hold that Karten has not met her burden.

The Restatement (Second) of Torts § 343, defines the duty of the land possessor in relation to a dangerous condition on the land, as follows:

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 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.

This duty does not make a land possessor the “insurer of its patrons.” *Zito v. Merit Outlet Stores*, 436 Pa.Super. 213, 647 A.2d 573, 574–75 (1994). Rather, The Restatement (Second) of Torts § 343(a) places liability only on a land possessor for a dangerous condition, if the possessor, “knows or by the exercise of reasonable care would discover the condition.” Pennsylvania courts have historically interpreted the Restatement (Second) of Torts § 343(a) to require a plaintiff invitee to show that the land possessor had either actual or constructive notice of the offending transitory spill. See *Moultrey v. Great A & P Tea Co.*, 281 Pa. Super. 525, 527, 422 A.2d 593, 594 (1980); See also Restatement (Second) of Torts § 343 (1965).

A. *Actual Notice*

Karten argues Shoprite had actual notice of the dangerous condition because Shoprite had, in the past, received general complaints regarding debris near parking lot garbage cans. Furthermore, Shoprite instructed employees to empty garbage cans when necessary and to clean any visible debris on the ground throughout the day. Since Karten in fact slipped on a type of debris in the location generally complained about, Karten concludes Shoprite had actual notice of the dangerous condition and negligently maintained the parking area. However, general knowledge of a frequent occurrence alone is not enough to show actual notice of a current transitory spill. *See Martino*, 213 A.2d at 610.

In *Martino*, employee testimony revealed that fruit frequently fell on the floor, specifically grapes, which were then stepped on by customers and squished by cart wheels, leaving black stains on the floor. 213 A.2d at 609. It was further revealed that it was the duty of an employee to remove any and all debris when it was noticed. *Id.* Nevertheless, the court in *Martino* concluded that general knowledge that grapes and other refuse frequently fell onto the floor did not impute the store with actual knowledge and refusal to correct a current unsafe condition. *Id.* at 610. The court held that the lack of evidence as to the cause of the grape being on the floor, the store's awareness as to the presence of the grape, and the store's lack of response, required a non-suit. *Id.*



We conclude that *Martino* is factual indistinguishable from the present case, and we reject Karten's attempt to impute actual notice to Shoprite or any of the Defendants. In examining the record as a whole, there is no evidence the Defendants had actual notice as to the banana's presence, nor is there any evidence as to the cause of the banana's presence, nor any evidence that the store lacked sufficient response to the presence of the banana debris. Pursuant to the precedent in *Martino*, we must hold that under this theory, there is no question for the jury that would not improperly require the jury to reach a conclusion based on speculation.

*B. Constructive Notice*

Before properly addressing constructive notice in this case, it is necessary to discuss the following two issues: 1) Karten's March 29, 2018 Affidavit, and 2) Karten's argument that Shoprite failed to produce witness Virginia Rubino, and failed to produce surveillance film of the incident. The Court finds that these issues were manufactured by Karten for the sole purpose of defeating summary judgment. Therefore, we hold that the Affidavit is not wholly credible, and the arguments regarding the alleged discovery failures are untimely. Nevertheless, we discuss our reasoning for rejecting each issue raised in turn.

First, we turn to Karten's March 29, 2018 Affidavit. According to *Jiminez v. All American Rathskeller, Inc.*, "if it is clear that an affidavit is offered solely for the purpose of defeating summary judgment, it is proper for the trial judge to conclude that no reasonable jury could accord that affidavit evidentiary weight and that

summary judgment is appropriate.” C.A.3 (Pa.) 2007, 503 F.3d 247. In this case, Shoprite’s Motion for Summary Judgment was filed on March 5, 2018. Karten filed her Affidavit soon after, on March 29, 2018. The Court finds that Karten’s Affidavit pointedly addresses the concerns Shoprite raises in a manner that is directly contradictory to prior pleadings and/or deposition testimony, and is not purely supplemental. Therefore, the Court holds the Affidavit is not wholly credible, and should not defeat summary judgment.

According to Pa.R.C.P. No. 1035.3(b), when encountering a Motion for Summary Judgment, “[a]n adverse party may supplement the record.” While supplementation may include the use of an affidavit, a trial court may disregard such affidavit when it is not “wholly credible”—the trial court must determine whether the information contained in the affidavit is inherently credible, i.e. not directly contradictory. *Compare Burger v. Owens Illinois, Inc.*, 2009 PA Super 26, ¶ 22, 966 A.2d 611, 620 (2009) (holding that because Defense counsel never asked Plaintiff in deposition if he could specifically identify trade names of the products he used, Plaintiff was properly allowed to supplement the record with an affidavit defeating a Motion for Summary Judgment, whereby he indicated using a specific product known to contain asbestos), *with Stephens v. Paris Cleaners, Inc.*, 2005 PA Super 315, ¶ 13, 885 A.2d 59, 64 (2005) (holding that Plaintiff’s affidavit in opposition to a Motion for Summary Judgment was not “wholly credible,” when during earlier deposition testimony he indicated he could not remember the uniform he was wearing, then

subsequently named the uniform manufacturer in his affidavit after refreshing his recollection by browsing through the manufacturer's catalogs).

The Court finds that this case factually similar to *Stephens*. See 885 A.2d 59, 64 (2005). In Karten's Affidavit, she states, "this banana or banana remains were located on the surface area of the parking lot and in the area where I fell at least 24 hours or 1 day prior to my fall." However, her deposition testimony clearly states that she never learned how long the debris had been present. (Pl. Dep. 53). In regards to the actions and location of Ms. Virginia Rubino, Karten's Affidavit states, that an employee later identified as Virginia Rubino, was "working with the shopping carts in the parking lot," and "[Karten] believe[s] she saw [her] fall." However, her earlier deposition testimony states she believed only one person saw her fall, a lady who she assumed was a customer, who went in to get her help then left. (Pl. Dep. 58). Karten further indicates in her deposition testimony that she is unsure of where Ms. Rubino was at the time of her fall and only became aware of her presence when Ms. Rubino brought her a chair. (*Id.* at 58). These notable discrepancies between Karten's Affidavit and her earlier deposition testimony are not mere supplementations or details added to an otherwise ambiguous record, but rather, they are direct contradictions to finite facts provided in earlier deposition testimony.

Additionally, and again similar to the affidavit in *Stephens*, the Court holds Karten's Affidavit is not made on personal knowledge, but rather on information gleaned from outside sources and contains statements of opinion, not fact, inappropriate for an affidavit. Karten's Affidavit speculates that because the banana

was dark, slick, and odorous, it must have been present in the parking lot for at least 24 hours. Her conclusion as to the duration of the existence of the transitory spill is based on her personal observations of the condition of the banana itself. However, Karten's speculation does not actually reveal any personal knowledge of the duration of the banana/banana remains in that specific area, but rather reveals general personal knowledge of the decay timeline of a fruit. A rotten fruit on the ground is not evidence (circumstantial or otherwise) alone that said fruit rotted where it now lies. Such a leap in logic is pure speculation and not a fact based on personal knowledge as admissible in evidence pursuant to Pa.R.C.P. 1035.4.

For these reasons, the Court finds that Karten's March 29, 2018 Affidavit is self-serving and not "wholly credible." Plaintiff directly contradicts her earlier deposition testimony and does so by including information in her affidavit based on speculation, not personal knowledge pursuant to Pa.R.C.P. 1035.4. As such, the information in the Affidavit is disregarded for the purposes of deciding all Defendants' Motions for Summary Judgment against Karten.

Next, we turn to Karten's argument that Shoprite acted in bad faith during discovery by failing to provide employee Virginia Rubino as a witness for deposition and by failing to provide Karten with the surveillance footage. For the following reasons, the Court holds that these arguments are untimely and should have properly been raised during discovery through a motion to compel. Due to Karten's failure to timely raise the issue through the proper procedural means, and subsequent decision

to raise only such arguments when facing the prospect of summary judgment, we hold the arguments are dismissed as untimely.

According to this Court's Order dated January 9, 2017, final discovery was originally to be completed by the parties by June 21, 2017—including the filing of all motions to compel. Prior to the final discovery deadline, the deadlines were extended by this Court twice upon Defendants' requests, with the new final date for discovery to be completed by all parties by January 21, 2018. Having over a year to complete discovery, Karten at no point requested the Court to extend deadlines for discovery or filed a motion to compel the testimony of Virginia Rubino and/or to compel the production of the surveillance footage. It is not until her brief in opposition to Shoprite's Motion for Summary Judgment, three months following the final discovery deadline extension, that Karten even mentions that Defendants obstructed discovery.

However, in her argument, Karten does not provide the Court with any evidence to show Defendants stonewalled her discovery or deposition requests. Furthermore, Karten does not present evidence that her discovery or depositions requests are coming in light of new evidence that was previously unavailable during the period allotted for discovery. Therefore, the Court finds that Karten failed to raise timely discovery and deposition requests. The Court further finds that these arguments are now being raised in the eleventh hour for the sole purpose of defeating summary judgment. For these reasons, the Court holds that Karten's arguments regarding discovery are untimely and made in bad faith to solely to defeat

summary judgment. The Court disregards such claims when determining the Defendants' Motions for Summary Judgment.

The Court now turns to the primary issue of this case, whether or not Karten has presented sufficient evidence to show a prima facie case of constructive notice pursuant to The Restatement (Second) of Torts § 343(a). Constructive notice is determined on a case-by-case basis. *Neve*, 771 A.2d 786, 791. When proving constructive notice, "one of the most important factors to be taken into consideration is the time elapsing between the origin of the defect or hazardous condition and the accident." *Rogers v. Horn & Hardart Baking Co.*, 183 Pa. Super. 83, 86, 127 A.2d 762, 764 (1956). For the following reasons, we hold Karten has not met her burden, and has presented insufficient evidence on the record to support a prima facie case for constructive notice, specifically due to the lack of evidence regarding the origin or duration of the banana and banana remains in the parking lot.

Karten presents her observations of the banana and banana remains (dark color, gooey consistency, and rotten odor) as circumstantial evidence that the banana and banana remains were present on the ground for a long duration. "Negligence need not be proved by direct evidence, but may be inferred from attendant circumstances if the facts and circumstances are sufficient to reasonably and legitimately impute negligence." *Lanni v. Pennsylvania R. Co.*, 371 Pa. 106, 110, 88 A.2d 887, 888 (1952) (citing *Rockey v. Ernest*, [367] Pa. [538], 80 A.2d 783; *Bills v. Zitterbart*, 363 Pa. 207, 69 A.2d 78; *Turek v. Pennsylvania R. R. Co.*, 361 Pa. 512,

64 A.2d 779; *Randolph v. Campbell*, 360 Pa. 453, 62 A.2d 60; *Wright v. Straessley*, 321 Pa. 1, 182 A. 682).

However, Pennsylvania case law does not support the presumption that soft, squished, or otherwise damaged debris serves as sufficient circumstantial proof for duration of a transitory spill. See *Moultrey*, 422 A.2d at 535 (affirming entry of nonsuit in favor of defendant market where plaintiff failed to present any evidence as to the length of time the squashed cherry upon which she slipped was on the floor); See also *Jones v. Sanitary Mkt. Co.*, 185 Pa.Super. 163, 137 A.2d 859, 861 (Pa.Super.1958) (en banc) (affirming directed verdict for the defendant market in negligence action for slip and fall on a piece of a banana peel because “[t]here is nothing whatsoever in her testimony when viewed in its most favorable light nor in the testimony of any other witness as to how long the offending substance had been in the aisle nor where it had come from”). While a question of duration may typically be considered a jury question, “[a] jury is not permitted to speculate, or guess; conjecture, guess or suspicion do not amount to proof. *Lanni*, 371 Pa. 106, 110, 88 A.2d 887, 889 (1952) (citing *De Reeder v. Travelers Insurance Co.*, 329 Pa. 328, 198 A. 45; *Sharble v. Kuehnle-Wilson, Inc.*, 359 Pa. 494, 59 A.2d 58).

In this case, the dark colored, gooey, and odorous banana and banana remains were located in an outdoor parking lot, near a garbage can. Because Karten has presented no evidence as to the origin of the banana and banana remains, the limited circumstantial evidence of the banana’s decaying nature cannot allow a jury to reach a conclusion that would not require them to resort to conjecture, guess, or

speculate. Without further evidence of duration, the jury could not know whether the banana was dropped from passing vehicle mere minutes before Karten slipped, or whether the banana had been decaying in that location for hours or even days.

Therefore, we necessarily hold that all Defendants' Motions for Summary Judgment are **GRANTED** against Karten, pursuant to Pa.R.C.P. No. 1035.2(2). Karten failed her burden of presenting a prima facie case for constructive notice, necessary for negligence under The Restatement (Second) of Torts § 343(a).

***II. Co-Defendant Mark Four's Motion For Summary Judgment Against Co-Defendant Martin's Power Sweeping Pursuant To Pa.R.C.P. No. 1035.2 Is Denied.***

Co-Defendant Mark Four filed an Answer and New Matter to Plaintiff's Complaint on September 2, 2016, seeking contractual damages for contribution and indemnity claims against Co-Defendant Martin's Power Sweeping. Subsequently Mark Four filed this Motion for Summary Judgment on March 20, 2018. After reviewing the Motion for Summary Judgment, and the parties' respective briefs, the Court finds that summary judgment in favor of Mark Four is inappropriate.

Mark Four's Answer and New Matter, and subsequent Summary Judgment Motion against Martin's Power Sweeping are replete with issues, some of which are beyond mere curable procedural defects. However, the primary issue inhibiting the Court from considering Mark Four's pending Summary Judgment Motion is that the original pleading, in the form of an Answer and New Matter, does not allege the cause of action for which Mark Four now seeks summary judgment.



Mark Four's Answer and New Matter alleges two alternative theories of liability against Martin's Power Sweeping: 1) common law contribution and/or indemnification; and 2) contractual contribution and/or indemnification. Def. New Matter ¶ 3-4. However, Mark Four's Motion for Summary Judgment exclusively argues breach of contract against Martin's Power Sweeping for violation of the indemnification and duty to defend provision. Def. Mot. Summary Judgment ¶ 71-78. Violation of the alleged contractual duty to defend was never alleged or cited to in the original pleading. "The purpose of the pleadings is to place a defendant on notice of the claims upon which he will have to defend." *City of New Castle v. Uzamere*, 829 A.2d 763, Cmwlt.2003. Accordingly Pa.R.C.P. No. 1019(a) requires, "[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form." In this case, since the contractual duty to defend was never alleged in the pleadings, and no facts were provided, we hold that the Defendant Martin's Power Sweeping was not properly put on notice to defend against such claim. As such, we cannot and will not consider it.

The second issue which precludes summary judgment in this matter is Mark Four's failure to properly alert the Court whether the agreement underlying the breach of contract action was oral or in writing, and to attach said contract to their pleading. See Pa.R.C.P. 1019(h-i). In this case, Mark Four alleges breach of contract, but never specifies whether the contract was written or oral, nor provides a copy of the contract or the material portions thereof to the Court in its original pleadings. To sustain a claim for breach of contract, the plaintiff must establish: (1)

the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. *CoreStates Bank, Nat'l Assn. v. Cutillo*, 723 A.2d 1053 (Pa.Super.1999). We hold that by failing to comply with Pa.R.C.P. 1019(h-i), Mark Four has failed their prima facie burden showing the existence of the contract, and therefore, failed to properly state a breach of contract claim.

The third issue precluding summary judgment in this matter goes to the unviability of Mark Four's indemnity claim. "Where the indemnity is against the consequences of negligence or carelessness on the part of the indemnitor, the indemnitee must, in order to recover, show that the damage for which he seeks to be indemnified was caused by some negligent act of the indemnitor." *Perry v. Payne*, 217 Pa. 252, 66 A. 553 (1907). In this case, the Court never addressed the merits of the underlying negligence claim against Defendants; this in turn, never triggered the indemnity obligation between the Co-Defendants. Therefore, we hold the indemnity claim is premature.

The fourth and final issue inhibiting summary judgment in favor of the movant, Mark Four, in this matter is a procedural defect. According to Pa.R.C.P. 1023.1(b), "every pleading . . . shall be signed by at least one attorney of record. . ." Typically, such a small procedural defect is corrected. See *Howard v. Bentley*, 48 Wash.Co. 19, 43 Pa. D. & C.2d 144 (1967). However, in this case Mark Four's unsigned pleading is just one of too many errors that prevent this Court from granting their Motion for Summary Judgment.

Therefore, and for the reasons detailed above, Mark Four's Motion for Summary Judgment against Martin's Power Sweeping is **DENIED**.

Accordingly, we enter the following **ORDER**.

COURT OF COMMON PLEAS OF MONROE COUNTY  
FORTY-THIRD JUDICIAL DISTRICT  
COMMONWEALTH OF PENNSYLVANIA

BEVERLY KARTEN,	:	No. 4416 CV 2016
	:	
Plaintiff	:	
	:	
v.	:	
	:	
SHOPRITE, INC. d/b/a SHOPRITE OF	:	
STROUDSBURG and MARTIN'S	:	
POWER SWEEPING, INC. and	:	
MARK FOUR REALTY, L.P. d/b/a	:	
THE LIGHTSTONE GROUP, LLC.,	:	
	:	
Defendants	:	MOTIONS FOR SUMMARY JUDGMENT

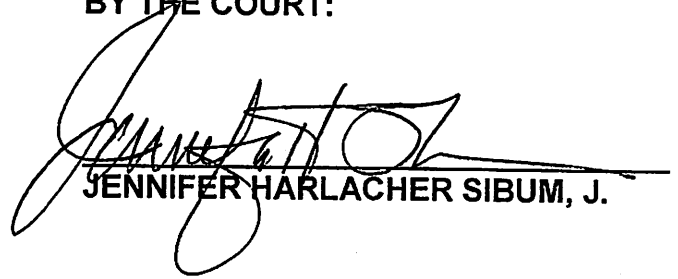
**ORDER**

AND NOW, this 3rd day of December, 2018, upon consideration of all Defendants' Motions for Summary Judgment against Plaintiff Beverly Karten, as well as, Co-Defendant Mark Four's Motion for Summary Judgment against Co-Defendant Martin's Power Sweeping, and all parties' respective briefs, **IT IS ORDERED** as follows:

1. Defendants Shoprite, Martin's Power Sweeping, And Mark Four's Motions for Summary Judgment against Beverly Karten are **GRANTED** pursuant to Pa.R.C.P. No. 1035.2(2). Judgment on Plaintiff's claims is entered in favor of Defendants and against Plaintiff.

2. Co-Defendant Mark Four's Motion for Summary Judgment against Co-Defendant Martin's Power Sweeping pursuant to Pa.R.C.P. No. 1035.2 is **DENIED.**

BY THE COURT:



JENNIFER HARLACHER SIBUM, J.

cc: Lawrence A.J. Spegar, Esq.  
Thomas J. Bradley, Esq.  
Matthew S. Decker, Esq.  
Chris J. Carling, Esq.  
Katelyn Czarnik, Esq.

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