IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LINDA and WILLIAM BUCKLEY,	**:**	**No. 2017-1546**
Plaintiffs	**:**	
	:	
vs.	**:**	**CIVIL ACTION - LAW**
	:	
CITY OF WILLIAMSPORT and BRAD LENIG,	**:**	**MOTION FOR**
Defendants	**:**	**SUMMARY**
	:	**JUDGEMENT**

O P I N I O N AND O R D E R

Procedural History

Plaintiffs Linda and William Buckley filed a Complaint on October 26, 2017, seeking to recover damages for injuries sustained by Linda Buckley when she was stuck by a vehicle driven by Brad E. Lenig on January 19, 2017. The incident in question occurred on Hepburn Street between Little League Boulevard and West Edwin Street in Williamsport, Pennsylvania. Plaintiff Linda Buckley alleges that she was walking across Hepburn Street from east to west when she was struck by Defendant Lenig. Defendant Lenig turned left out of the Hepburn Plaza parking lot to travel north on Hepburn Street, at which point he struck Linda Buckley as she was crossing. Plaintiff Linda Buckley was not in a crosswalk at the time of the incident. Both Brad Lenig and Linda Buckley's deposition testimony state that they did not see each other until the point of impact. Linda Buckley, during her deposition testimony, admitted that she had been looking to her right while crossing Hepburn Street, and was struck from her left by Brad Lenig's vehicle. The Defendant City of Williamsport denies any liability for the happening of the accident. Written discovery has been exchanged between the parties, depositions have been taken, and export reports have been produced. Defendant City of Williamsport contends that there is no genuine issue as to any material fact regarding the necessary elements of the alleged negligence cause of action against City of Williamsport, and has filed a Motion for Summary Judgement. Plaintiffs Linda and William Buckley contend that the threshold matter is the City of Williamsport's failure to design and maintain Hepburn Street and its surrounding sidewalks in a safe condition. Furthermore, Plaintiff's argue that Defendant City negligently designed the traffic pattern, failed to inspect or supervise

the design, did not provide a safe pedestrian crossing, failed to remove dangerous conditions, and failed to implement traffic control devices that would have decreased the risk of harm to pedestrians.

Summary Judgment

Pursuant to Pa. R.C.P. 1035.2, the Court may grant summary judgment at the close of the relevant proceedings if there is no genuine issue of material fact or if an adverse party has failed to produce evidence of facts essential to the cause of action or defense. *Keystone Freight Corp. v. Stricker*, 31 A.3d 967, 971 (Pa. Super. Ct. 2011). A non-moving party to a summary judgment motion cannot rely on its pleadings and answers alone. Pa. R.C.P. 1035.2; 31 A.3d at 971. When deciding a motion for summary judgment, the Court must view the record in the light most favorable to the non-moving party, with all doubts as to whether a genuine issue of material fact exists being decided in favor of the non-moving party. 31 A.3d at 971. If a non-moving party fails to produce sufficient evidence on an issue on which the party bears the burden of proof, the moving party is entitled to summary judgment as a matter of law. *Keystone*, 31 A.3d at 971 (citing *Young v. Pa. Dep't of Transp.*, 744 A.2d 1276, 1277 (Pa. 2000)). "In determining the existence or non-existence of a genuine issue of a material fact, courts are bound to adhere to the rule of *Nanty-Glo v. American Surety Co*., 309 Pa. 236, 163 A. 523 (1932) which holds that a court may not summarily enter a judgment where the evidence depends upon oral testimony. *Penn Ctr. House, Inc. v. Hoffman*, 520 Pa. 171, 176, 553 A.2d 900, 903 (Pa. 1989). The Pennsylvania Supreme Court held that in order to defeat a Motion for Summary Judgment, Plaintiff must show sufficient evidence on any issue essential to his case and in which he bears the burden of proof such that a jury could return a verdict in his favor. *Ertel v. Patriot-News Co*., 544 Pa. 93, 674 A.2d 1038 (1996) rearg. den., 117 S.Ct. 512. With this standard in mind, the Court provides the following discussion.

Discussion

Defendant City of Williamsport's Motion for Summary Judgement raises two distinct issues, the first of which is detailed below:

Should Summary Judgement be entered in favor of Defendant City of Williamsport and against Plaintiffs due to City of Williamsport having immunity under the Political Subdivision Tort Claims Act?

The Political Subdivision Tort Claims Act. 42 Pa. C.S §8541 *et seq.* provides for governmental immunity, except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

The Political Subdivision Tort Claims Act creates specific exceptions to immunity where the dangerous condition of a sidewalk creates a reasonably foreseeable risk of harm provided that the sidewalk in question is within the rights-of-way of streets owned by the municipality, and where the municipality had notice or could be charged with notice. 42 Pa. C.S §8542(b)(7). The City of Williamsport asserts that as a result of the legislative intention to protect government entities from tort liability, the aforementioned exceptions are to be strictly construed. *Lockwood v. City of Pittsburgh*, 561 Pa. 515, 751 A.2d 1136 (2000). Defendant City denies the existence of dangerous conditions which would meet the exception standard set out in The Political Subdivision Tort Claims Act. In order to establish the streets exception to municipal immunity the Plaintiffs must establish: (a) there was a dangerous condition of streets owned by the local agency that created a reasonably foreseeable risk of the harm alleged; (b) that the municipality had "actual notice" of the "dangerous condition of streets" and; (c) the municipality had actual notice or could reasonably be charged with notice under the circumstances "of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition." Defendant City of Williamsport contends that none of these elements are present in the above-captioned matter, and that the harm alleged by Plaintiffs William and Linda Buckley were not caused by any condition of Hepburn Street. The City of Williamsport cites *Gohrig v. County of Lycoming*, 2018 Pa. Commw. Unpub. LEXIS 516, 2018 WL 4515960 (2018) in support of their Motion for Summary Judgement. In *Gohrig,* the plaintiff was injured while cycling on a trail owned by Lycoming County and maintained by the City of Williamsport; summary judgement was granted after plaintiff failed to establish the real property exception to governmental

immunity. The Commonwealth Court affirmed, holding that the presence of gravel did not rise to the level of the exception, and that if the matter had proceeded to trial then the fact-finder would have to speculate as to the essential factual issues in ascertaining negligence. "A plaintiff cannot survive summary judgement when the mere speculation would be required for the jury to find in their favor." *Krauss v. Trane U.S. Inc.,* 2014 Pa. Super. 241, 104 A.3d 556, 568 (Pa. Super. 2014) The Plaintiffs allege not only the existence of a dangerous condition, but that Defendant City had actual or constructive notice of said defect.

Defendant City of Williamsport argues that Plaintiffs have not provided evidence of a dangerous condition of the sidewalk on Hepburn Street; rather, that the testimony of Linda Buckley and Brad Lenig establish that individual or combined negligence caused the accident. Plaintiffs Linda and William Buckley contend that the design of the sidewalk rises to the level of the sidewalk exception pursuant to The Political Subdivision Tort Claims Act, 42 Pa. C.S §8542(7), which provides for the imposition of liability on a local agency where there is a dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition. When a local agency is liable for damages under this paragraph by reason of its power and authority to require installation and repair of sidewalks under the care, custody and control of other persons, the local agency shall be secondarily liable only and such other persons shall be primarily liable. The Commonwealth Court of Pennsylvania has held that when "the walkway itself was improperly designed, the sidewalk exception to governmental immunity…applies." *Bullard v. Lehigh-Northampton Airport Auth.,* 668, A.2d 223, 226 (Pa. Commw. 1995). Defendant City interprets *Bullard* to mean that the alleged negligent act involving the use of government owner or controlled sidewalks must be an actual defect of the land, street, or sidewalk in question and that the rule of immunity can only be waived in those cases where it is alleged that the artificial condition or defect causes the injury. This Court concurs with Plaintiff Linda and

William Buckley's interpretation of *Bullard,* wherein the design of a sidewalk can give rise to the sidewalk exception to government immunity. "What is necessary, therefore, to pierce the Commonwealth agency's immunity is proof of a defect of the sidewalk itself. Such proof might include an improperly designed sidewalk, an improperly constructed sidewalk, or a badly maintained, deteriorating, crumbling sidewalk." *Finn v. City of Phila,* 664 A.2d 1342, 1346 (Pa. 1994). *Finn* addressed the question of whether the accumulation of grease on a sidewalk is a dangerous condition; in coming to its decision the Superior Court of Pennsylvania cited *Snyder v. Harmon,* 552 Pa. at 433, 562 A.2d at 311, which construed "a dangerous condition of Commonwealth real estate" to mean "that a dangerous condition must derive, originate from or have as its source the Commonwealth realty." In relation to the case at bar, this Court finds that Plaintiff's interpretation of *Finn* to more adequately address the threshold issues of the matter at bar.

In *Gilson v Doe,* 600 A.2d 267 (Pa. Commw. Ct. 1991), the Commonwealth Court found that the Williamsport Area School District could be liable for the negligent design of its sidewalks, even where no "intrinsic" defect existed; it was immaterial that there was no "intrinsic" defect in the sidewalk because "we have never limited dangerous conditions solely to 'intrinsic defects,' and decline to do so here." *Id.* at 271. The *Gilson* court denied summary judgement, and remanded the case in order for a jury to determine whether the potential existence of a dangerous condition could have contributed to plaintiff's harm. "When the Commonwealth agency or subdivision has a legal duty, the question of what is a dangerous condition is one of fact which must be answered by the jury". *Bendas v. Twp. Of White Deer*, 611 A.2d 1184 (Pa. 1992). Plaintiff Linda Buckley alleges that she was injured when the design of the sidewalk on Hepburn Street induced her to cross at a location that the City did not intend to be used as a crossing. At the location in question there is a ramp which extends from the sidewalk and into the roadway, directing pedestrians toward Hepburn Plaza on the other side of Hepburn Street. The fence behind the aforementioned ramp, previously an entrance to the Genetti Hotel, prevents the passage of motor vehicles so that only pedestrians have the possibility of using it. There are embedded ADA tactile plates on the Hepburn Plaza side of the street, which are slightly angled to into Hepburn Street as opposed to running parallel to the roadway. Linda and William Buckley contend that the condition of the sidewalk induced

the Plaintiffs to cross Hepburn Street at that location, and that inducing pedestrians to cross at a location not intended for that use created a reasonably foreseeable risk of harm. Plaintiffs rely on *Gilson* in contending that the City of Williamsport should be held liable for failing to remove a ramp which constitutes a dangerous sidewalk condition. This Court does not agree with City's contention that liability is limited to instances where an individual is injured due to an intrinsic defect in the sidewalk, and holds that the question of what amounts to a dangerous condition must be answered by a jury.

The City of Williamsport avers that it had no actual or constructive notice of the allegedly dangerous conditions on Hepburn Street. John Grado, the City's engineer from 1978 to 2017, testified that there was no crosswalk at the site of the accident, Grado Dep. T., 68-79, and that that area of Hepburn Street was never intended to be a crosswalk. Grado Dep. T., 76. Liability for breach of duty of care related to the installation of traffic measures can be assigned to a municipality who had "actual or constructive notice of the dangerous condition that caused the plaintiff's injuries." *Starr*, 747 A.2d at 872. Constructive notice can be established where a reasonable investigation would have uncovered the dangerous conditions. *Angell*, 134 A.3d at 1182-83. Plaintiffs provided surveillance footage of Hepburn Street taken on May 10, 2017 and September 21, 2018. On each of these dates, the Community Arts Center held public events, as was the case on the date Linda Buckley was struck by Brad Lenig's vehicle. Plaintiff's proposed expert, Kevin Johnson, viewed the videos and asserted that on May 10, 2017, 123 people crossed Hepburn Street in the hour preceding the event at the Community Arts Center, 30 of whom used the ramp to cross. Kevin Johnson's Expert Report, Plaintiff's Exhibit C, p. 6. The surveillance footage taken on September 21, 2018 shows a similar pattern; 116 people crossed Hepburn Street in a 45 minute period, 27 of whom used the aforementioned ramp. *Id.* Plaintiffs Linda and William Buckley contend that if the City of Williamsport had performed routine inspections, it would have been made aware of the pedestrian propensity to cross Hepburn Street at locations not specifically designed for crossing. Constructive notice can be established where "the danger should have been identified on a routine inspection by the Municipalities." *Angell*, 134 A.3d at 1184. John Grado admitted during his deposition testimony that the City of Williamsport had never evaluated traffic safety for Hepburn Street. Grado Dep. T., 35:12-17. He went on to state

that the City had never considered how to get pedestrians across Hepburn Street. Grado Dep. T., 45:3-14. Plaintiffs contend that the City of Williamsport cannot argue that they did not have notice after viewing the provided surveillance footage. “Whether a municipality has had actual or constructive notice is a question for the jury to decide” *Angell*, 134 A.3d at 1183.

Defendant City of Williamsport opposes Plaintiff’s expert report, which relies on accident reports of incidents in the vicinity of Hepburn Street to establish that City had notice. City avers that Kevin Johnson’s evidence does not constitute notice of a dangerous condition, and that Johnson’s criticisms concerning the lack of an engineering study does nothing to prove what such a study would have produced. City’s expert, Steven Schorr, comments on Plaintiff’s lack of notice; “There is absolutely no date in the materials reviewed and/or in the report by Mr. Johnson that allows for a conclusion that the City had or should have had notice that there were pedestrian incidents in this area that warranted a study.” Plaintiffs aver that Steven Schorr establishes constructive notice during his deposition testimony. While addressing Kevin Johnson’s opinion that the ramp induces pedestrians to cross, Mr. Schorr stated that “it is no surprise that many of the crossings are in a southeasterly direction across the roadway”, and goes on to state that “the video data shows that individuals exiting the west side parking lot … tend to cross immediately where they reach the street, rather than walking to a particular point.” Steven Schorr’s Expert Report, Defendant’s Exhibit B, p.8-10. Defendant City of Williamsport assert that pedestrians should not cross Hepburn Street at the scene of Linda Buckley’s accident, and that City had no notice that pedestrians were crossing in this manner; Plaintiff’s contend that constructive notice has been established, and that if City had performed an evaluation of the area it would have discovered the allegedly dangerous conditions.

The City of Williamsport renovated areas including Hepburn Street in association with the Larson Design Group as a part of the 2007 Hometown Streets Project. This project included the location of the at-issue accident; Plaintiffs contend that the City, through its agents, employees, and representatives, would have been made aware of the traffic patter, lack of pedestrian crossing, and configuration of traffic control devices.

Kevin Johnson's Expert Report, Plaintiff's Exhibit C, p. 7-8. John Markley, one of the City of Williamsport's designees, testified that he was aware of the ramp/driveway on Hepburn Street, and that he was aware that "years ago it was a driveway going in and out of the parking lot, years ago." Markley Dep. T., 43:22-44:5. The Plaintiffs argue that, based upon Markley's deposition and the Hometown Streets Project, that there can be no dispute that the City had notice of the dangerous condition caused by the ramp. This Court holds that whether City had actual or constructive notice shall be a question for a jury.

Plaintiffs allege that Defendant City of Williamsport selectively produced accident reports to establish a lack of notice. Notice of dangerous conditions of streets and sidewalks is still possible in the absence of reportable accidents; actual accidents at a specific location are not required to establish notice with regard to dangerous roadways. Pursuant to Pa.R.C.P. 4009.1, Plaintiffs requested that the City produce all accident reports since January 1, 2000 in the vicinity of Hepburn Street. The City of Williamsport's initial Answer included a screen shot of a website as opposed to crash reports, at which point Plaintiffs re-phrased their request for the production of crash reports to include all reportable and non-reportable crash or towing reports. On or about September 27, 2018, City of Williamsport's response to Plaintiff's Request referred back to its Answer to the First Request for Production of Documents. Plaintiff's expert, Kevin Johnson, addressed this in his report and noted that the City was required to complete a detailed report on each accident before submitting that crash report to PennDOT. Kevin Johnson's Expert Report, Plaintiff's Exhibit C, p.9. The screen shot provided by the City of Williamsport showed that there were accidents at three intersections, as opposed to three accidents. Kevin Johnson established that "stating that there were three crashes at two intersections as Williamsport did is significantly different than the facts shown on this document that there were pedestrian related crashes at three intersections." *Id.* at p.9-10. Kevin Johnson utilized the Pennsylvania Crash Information Toll (PCIT) to replicate the search, and found that there were six crashes at the three intersections, including "two crashes involving injuries to pedestrians after being struck by an automobile at an unsignalized intersection without marked crosswalks yet having handicapped accessible curb ramps which is the exact case of what happened with Linda Buckley." Kevin

Johnson's Expert Report, Plaintiff's Exhibit C, p.10. City's expert reports were due on November 28, 2018, at which time City provided Plaintiffs with three crash reports. City of Williamsport provided two further crash reports on February 28, 2019 along with a letter to this Court requesting that City's Motion in Limine to exclude the accident reports produced in discovery also include the two supplemental accident reports produced as exhibits to Defendant City of Williamsport's Response to Plaintiff's Motion to Compel which was filed on February 22, 2019. Defendant City of Williamsport contend that all five of the accident reports pertain to accidents and locations irrelevant to the accident and location involved.

The second substantive question raised in Defendant City of Williamsport's Motion for Summary Judgement is:

Should Summary Judgement be entered in favor of Defendant City of Williamsport and against Plaintiffs as the Plaintiff's testimony and the testimony of Defendant Lenig demonstrate that there is no factual dispute as to how the accident occurred and there is no causal connection between the alleged actions on the part of Defendant City of Williamsport and the happening of the Plaintiff's accident?

Defendant City of Williamsport asserts that Linda Buckley and Brad Lenig's testimony show that their negligence was a substantial factor in bringing about the accident, and that the presence or absence of a crosswalk at the accident site was irrelevant to the happening of the accident itself. Defendant City cites *Mucowski v. Clark,* 404 Pa. Super. 197, 590 A.2d 348 (1991), in which it was held that "it is true of course, though ordinarily issues of legal causation are for the trier of facts. Where only one conclusion may be drawn from the established facts, however, the question of legal cause may be decided as a matter of law." In *Mucowski* the plaintiff's injuries were sustained after he dove into shallow water from the rim of an above-ground pool; it was held that plaintiff's own conduct was the legal cause of the injuries, and not the absence of warnings pertaining to diving into shallow water. Defendant City of Williamsport avers that the legal cause of the accident was the negligent conduct admitted to by Linda Buckley and Brad Lenig. "In trying to recover for an action in negligence, a party must prove four elements. They are: (1) a duty or obligation recognized by law; (2) a breach of

the duty; (3) causal connection between the actor's breach of duty and the resulting injury; (4) actual loss or damage suffered by complainant." *Lux v. Gerald E. Ort Trucking, Inc.,* 2005 Pa. Super. 400, 887 A.2d 1281, 2005 Pa. Super. LEXIS 4170 (2005). "In order to establish causation, the plaintiff must prove that the breach was "both the proximate and actual cause of the injury. Proximate cause is a question of law to be determined by the court before the issue of actual cause may be put to the jury. A determination of legal causation, essentially regards whether the negligence, if any, was so remote that as a matter of law, the actor cannot be held legally responsible for the harm which subsequently occurred. Therefore, the court must determine whether the injury would have been foreseen by an ordinary person as the natural and probable outcome of the act complained of." *Reilly v. Tiergarten, Inc.,* 430 Pa. Super. 10, 633 A.2d at 210 (1993).

In addition to the authorities set forth in the City's Brief of Defendant City of Williamsport in Support of Motion for Summary Judgement, City provided argument on *Hoover v. Stine,* 2016 Pa. Commw. LEXIS 566, 153 A.3d 1145, 2016 WL 6694622. The court in *Hoover* held that dimished sight distance was not a substantially contributing factor to the cause of an accident because the truck driver admitted he did not see the Rectangular Rapid Flashing Beacons (RRFBs) or the pedestrian until after hitting her. The *Hoover* court went on to assert that because the crosswalk where the pedestrian was hit was not in the Commonwealth's real estate, the 'real estate exception' of 42 Pa.C.S. §8522(b)(4) was not met. Plaintiffs oppose Defendant's reliance on *Hoover,* arguing that the plaintiff was struck in a well-known, marked crosswalk and that 42 Pa.C.S. §8522 (b)(4) has no application to the instant matter. The *Hoover* court concluded that alterations to the traffic control devices would not have prevented the accident as "No matter the required sight distance, the driver's deposition testimony was clear that he did not see the flashing beacons at any distance." *Hoover,* 153 A.3d at 1153. In the case at bar Plaintiff Linda Buckley did not have the benefit of any official pedestrian crossings at the site of the accident; this Court interprets *Hoover* as addressing instances where driver had not seen a traffic control device, so the traffic control device was not the cause of the accident. Issues of notice, causation, and the potential existence of a dangerous condition shall be reserved for a jury.

Defendant City of Williamsport cites 75 Pa.C.S.A. § 3542(a), which states that when traffic-control signals are not in place or not in operation, the driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection. Defendant then cites The Pennsylvania Vehicle Code, 75 Pa.C.S.A. § 3542(b), which states that no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute a hazard. In addition, 75 Pa.C.S.A. § 3543(c) requires that between adjacent intersections in urban districts at which traffic-control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk. Defendant City contends that Linda Buckley's violation of these statutory provisions constitutes negligence, and any attempt on Plaintiff's part to incorporate City of Williamsport into said negligence is not factually supported.

Plaintiffs intend to pursue claims against both Brad Lenig, as a negligent driver, and a municipality simultaneously; "a dispute on the factual question of whether the dangerous condition or negligent driving or both caused the crash…defeats the Municipalities' motions for summary judgement on the issue of causation." *Angell,* 134 A.3d at 1181 (citing *Drew v. Laber*, 383 A.2d 941 (Pa.1978). City of Williamsport's contends that as there is no dispute as to the facts surrounding the incident where Brad Lenig drove his car into Linda Buckley, City could not have contributed to the accident. Plaintiffs oppose this notion, and assert that City's failure to design, supervise, and maintain its roads and sidewalks contributed to Linda Buckley's accident. The question of what constitutes a dangerous condition is an issue for a jury. Evidence of Linda Buckley and Brad Lenig's negligence does not preclude liability against Defendant City. Accordingly, the Defendant City of Williamsport's Motion for Summary Judgement is denied.

The Court enters the following order.

ORDER

AND NOW, this **25th** day of **March, 2019** it is ORDERED and DIRECTED that summary judgment is DENIED.

BY THE COURT,

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Senior Judge, Specially Presiding

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