IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JOSEPH A. GRACE, JR.	:	
Plaintiff	:	CV 22-00546
v.	:	
	:	
PINE TOWNSHIP AND WS RIDGE ROAD, LLC	:	
Defendants	:	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

I. Introduction:

This matter came before this Court for argument on the Motion for Summary Judgment filed by Defendant Pine Township on October 19, 2023.

II. The Test for Summary Judgment:

In Pennsylvania, a party may move for summary judgement "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action…" Pa.R.C.P. No. 1035.2(1). In response, the adverse party may not rest on denials but must respond to the motion. Pa.R.C.P. No. 1035.3(a). The non-moving party can avoid an adverse ruling by identifying "one or more issues of fact arising from evidence in the record" Pa.R.C.P.1035.3(a)(1).

In considering a motion for summary judgment, it is not the Court's function to decide issues of fact. Rather, is it our function to decide whether an issue of fact exists. *Fine v. Checcio,* 582 Pa. 253, 273, 870 A.2d 850, 862 (2005).

> Summary judgment is appropriate only when the record clearly shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment.
> *Hovis v. Sunoco, Inc.,* 2013 Pa.Super. 54, 64 A.3d 1078, 1081, quoting *Cassel-Hess v. Hoffer*, 44 A.3d 84-85 (Pa.Super. 2012).

In the matter of *Accu-Weather, Inc. v. Prospect Commc'ns, Inc.*, 435 Pa. Super. 93, 644 A.2d 1251 (Pa. Super. Ct. 1994), the Court described the proper test for a grant of summary judgment as follows:

> First, the pleadings, depositions, answers to interrogatories, admissions on file, together with any affidavits, must demonstrate that there exists no genuine issue of fact. Pa.R.C.P. 1035(b). Second, the moving party must be entitled to judgment as a matter of law. *Id.* The moving party has the burden of proving that no genuine issue of material fact exists. *Overly v. Kass,* 382 Pa.Super. 108, 111, 554 A.2d 970, 972 (1989). However, the non-moving party may not rest upon averments contained in its pleadings; the non-moving party must demonstrate that there is a genuine issue for trial. The court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party. *Stidham v. Millvale Sportsmen's Club,* 421 Pa.Super. 548, 558, 618 A.2d 945, 950 (1992), *appeal denied,* 536 Pa. 630, 637 A.2d 290 (1993) (citing *Kerns v. Methodist Hosp.,* 393 Pa.Super. 533, 536–37, 574 A.2d 1068, 1069 (1990)). Finally, an entry of summary judgment is granted only in cases where the right is clear and free of doubt. *Ducko v. Chrysler Motors Corporation,* 433 Pa.Super. 47, 48, 639 A.2d 1204, 1205 (1993) (citing *Musser v. Vilsmeier Auction Co., Inc.,* 522 Pa. 367, 370, 562 A.2d 279, 280 (1989)). We reverse an entry of summary judgment when the trial court commits an error of law or abuses its discretion. *Kelly by Kelly v. Ickes,* 427 Pa.Super. 542, 547, 629 A.2d 1002, 1004 (1993) (citing *Carns v. Yingling,* 406 Pa.Super. 279, 594 A.2d 337 (1991).

III. Factual Background:

The facts of this matter appear to be substantially undisputed. The Court will review the facts in the light most favorable to the non-moving party. Pine Township (hereinafter "Township") maintains a gravel public road situate in Pine Township, Lycoming County, known as Big Run Road (hereinafter the "Road"). On June 3, 2020, at approximately 6:30 p.m. Plaintiff (hereinafter "Grace") was driving along the Road, and saw what he believed to be an animal run across the Road. Out of curiosity, Grace stopped his vehicle and walked along the Road, in order to investigate the animal. He walked to an area that had "an opening" which permitted him to look into the surrounding wooded area. While Grace was standing very near the edge of the Road, the surface of the roadway gave out, causing Grace to fall and tumble approximately 20 feet or more down into a roadside ditch. As a result of the fall, Grace suffered injury. Several days thereafter, Grace advised the Township of his fall.

Grace testified that he was very familiar with the Road, having owned the nearby Second Chance Farm from 2001 through 2019. Grace testified that, during those years, he never noticed any problem with the Road.

Approximately one week after his fall, Grace returned to the site of the fall to investigate how he fell. He noticed that a drainage pipe that was formerly across the

roadway had become detached from the Road. He returned to the same location several times. After a year after his fall, Grace noticed that the Township had performed a repair near the location of his fall, either replacing the drainage pipe or installing a new pipe, installing more rip rap stone, and installing a post with a reflector.

Township has little basis to dispute Grace's claim that he fell on the Road, or that Grace suffered injury. Rather, Township seeks summary judgment on the bases that: (1) Grace has produced no written report of any expert who is prepared to testify in support his claim, and (2) Grace has produced no evidence that the Township has notice of any defect in the condition of the Road.

IV. Questions Presented:

1. Whether Township is entitled to summary judgment on Grace's claims, due to the fact that Grace has produced no written report of any expert who is prepared to testify in support his claim.
2. Whether Township is entitled to summary judgment on Grace's claims, due to the fact that Grace has produced no evidence that the Township has notice of any defect in the condition of the Road.

V. Brief Answer:

1. Township is entitled to summary judgment on Grace's claims regarding design of the Road, since Grace has no expert to testify in support of that claim. Township is not entitled to summary judgment on Grace's claim of defective maintenance of the Road, since that issue is within the scope of the knowledge of a layman.
2. Township is not entitled to summary judgment on Grace's claims based upon lack of constructive notice, since that issue presents a material issue of fact for the jury.

VI. Discussion:

1. Township is entitled to summary judgment on Grace's claims regarding design of the Road, since Grace has no expert to testify in support of that claim. Township is not entitled to summary judgment on Grace's claim of defective maintenance of the Road, since that issue is within the scope of the knowledge of a layman.

At Paragraph 29 (i) of the Complaint, Grace alleges that Township was negligent in "failing to properly design build and or improve the area of the roadway over the sluice pipe under Big Run Road where Plaintiff Grace fell."

In the matter of *Tennis v. Federowicz*, 140 Cmwlth, 7, 592 A.2d 116 (Pa. Cmwlth. 1991), Plaintiff appealed from the Order of summary judgment entered by Judge Thomas Raup, contending that a layman can comprehend the question of whether negligent highway design caused inadequate visibility. The Court affirmed the trial court, and observed that:

> Generally, expert testimony is necessary to establish negligent practice in any profession. *Powell v. Risser,* 375 Pa. 60, 99 A.2d 454 (1953). In *Storm v. Golden,* 371 Pa. Super. 368, 538 A.2d 61 (1988), the Superior Court held that expert testimony is necessary whenever the subject matter of the inquiry involves special skills and training not common to the lay person.
>
> *Tennis v. Federowicz*, 140 Cmwlth, 7,9, 592 A.2d 116 (Pa. Cmwlth. 1991)

Grace has produced no report of any expert prepared to support Grace's claim that the Road was not properly designed or built. Thus, summary judgment will be entered in favor of Township on those claims.

In the view of this Court, Grace's claims related to the maintenance of the Road require a different result. Maintenance of a roadway, unlike design, is within the scope of knowledge of an ordinary juror. Further, the obligation of the township to keep a road in good repair is established by statute. 53 Pa.C.S. Section 67308 provides that:

> a) Public roads in townships shall, as soon as practicable, be effectually opened. All public roads shall at all seasons be kept in repair and reasonably clear of all impediments to easy and convenient traveling at the expense of the township.
>
> (b) The board of supervisors may temporarily close any township road when it determines that conditions have rendered that road unfit or unsafe for travel and immediate repair or maintenance, because of the time of year or other conditions, is impracticable. The road or portion of road closed shall be properly marked at its extremities, and a means of passage for the customary users of the road shall, when possible, be provided.

While gravel roadways are subject to wear and erosion, it is not reasonable to expect the surface of a gravel roadway to collapse under the weight of one adult. In the matter *of Ovitsky v. Capital City Economic Development Corporation*, 2004 Pa.Super. 41, 846 A.2d 124, 126 (2004), the trial court entered summary judgement in favor of the defendant, based upon plaintiff's failure to provide expert testimony in support of his claim that the Ramada Inn failed to provide adequate security. On appeal, the Court reversed, and observed that:

> a jury would be capable, absent expert direction, to decide whether Ramada Inn took reasonable measures to provide for the safety of its guests, and specifically Ovitsky. Staying in hotels is quite common and we think such familiar experiences, along with common sense notions of safety and security, are sufficient to allow a jury to conclude whether Ramada Inn's security measures were reasonable.

Here, Grace asserts that proper inspection and maintenance of the Road by Township would have prevented the Road from collapsing under his weight, and thereby causing his fall. While the jury may or may not find the Township negligent, the Court is not convinced that the question is so unique as to require expert testimony.

2. Township is not entitled to summary judgment on Grace's claims, based upon lack of constructive notice, since that issue presents a material issue of fact for the jury.

Township is a local agency and therefore entitled to limited governmental immunity. There are some exceptions to that immunity, imposed by 42 Pa.C.S. Section 8542. One such exception is negligence which results in a dangerous condition of a roadway.

> **6)** *Streets.*--**(i)** A dangerous condition 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.

Grace has produced no evidence to support the assertion that Township had actual notice of a dangerous condition to the Road. Rather, Grace claims that Township may be charged with constructive notice of the unstable condition of the surface of the Road, since: (1) the nearby pipe was not attached to the Road, suggesting water erosion, and (2) there was no post with a reflector, warning motorists of the drainage pipe and narrowing of the Road.

In the view of this Court, Grace's evidence of notice to the Township is underwhelming. Grace identified no evidence that the Township had any actual notice of the unstable condition of the Road. On the contrary, Township representatives Duane Herlocher and Paula Summers provided compelling testimony that the Road was regularly inspected and property maintained. If the Court had the discretion to resolve this issue of fact on the record, the Court would likely be compelled to find that the Township cannot be charged with notice.

As it occurs, the Court does not have the discretion to resolve this disputed issue of fact. In the unreported matter of *Irizarry v. City of Reading*, 297 A.3d 452 (Pa.Cmwlth April 18, 2023), the trial court granted defendant's motion for summary judgment, observing that the plaintiff had failed to produce any evidence that City has either actual or constructive notice of the dangerous street condition. On appeal, the Commonwealth Court reversed, holding that:

> Constructive notice requires that the dangerous condition be apparent upon reasonable inspection." *Dep't of Transp. v. Patton*, 686 A.2d 1302, 1304 (Pa. 1997). "The question whether a landowner had constructive notice of a dangerous condition . . . is a question of fact. As such, it is a question for the jury, and may be decided by the court only when reasonable minds could not differ as to the conclusion." *Id.* at 1305. "If there is any dispute created by the evidence, the court is not permitted to decide the issue." *Id.*

> We recognize that what constitutes a "reasonable inspection" is not the same for a municipality as it is for a residential landowner. Many municipalities have miles upon miles of roadways to maintain, and our Court has recognized frequent inspections of those roadways are not practical. *See Gramlich v. Lower Southampton Twp.*, 838 A.2d 843, 847 n.3 (Pa. Cmwlth. 2003) (explaining "it is unreasonable to require a municipality to patrol its streets every day for possible defects created by its citizens that may subject it to liability"). Our Court has not, however, *completely absolved* municipalities from a responsibility for conducting reasonable inspections.

Grace's evidence of notice to the Township of the defective condition of the Road is far short of compelling. That is not the test, however. The question presented at this stage of this proceeding is whether the unstable condition of the surface of the Road, and condition of the old pipe near the location of Grace's fall, and the absence of a warning reflector, all taken together, are so insignificant that reasonable minds cannot differ on the subject of constructive notice. The Court cannot reach that conclusion, as a matter of law.

ORDER

For the foregoing reasons the Court hereby ORDERED as follows:

1. The Motion of Pine Township seeking summary judgment on Grace's claim that Big Run Road was defectively designed or built is granted.
2. As to the balance of Grace's claims, including, but not limited to claims related to the inspection or maintenance of Big Run Road, the Motion of Pine Township seeking summary judgment is denied.

IT IS SO ORDERED this 11th day of December, 2023.

By the Court,

Hon. William P. Carlucci, Judge

cc: Court Administrator

David C. Raker, Esquire

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