IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

RHONDA JENNINGS,	:	
Plaintiff,	:	CV 2021-CV-00391
VS	:	
	:	
JONATHAN GARNER,	:	CIVIL ACTION-LAW
Defendant.	:	

ORDER ON MOTION FOR SUMMARY JUDGMENT

I. Introduction:

This matter came before this Court for argument on January 19, 2023, on Defendant's Motion for Summary Judgment, filed December 15, 2023.

II. Statement of the Case:

Plaintiff Rhonda Jennings (hereinafter "Jennings") filed a Complaint on August 30, 2022 (hereinafter the "Complaint"). The Complaint alleges that Jennings was jogging at night on the sidewalk in front of the home of Defendant Jonathan T. Garner (hereinafter "Garner") on September 10, 2020. The Complaint alleges that Jennings tripped and fell on uneven sidewalk in front of Garner's home, sustaining injuries. The Complaint alleges that Garner was negligent for failure to maintain the sidewalk in a safe condition.

The extent to which the sidewalk was uneven is the subject of some debate. Plaintiff points to the deposition testimony of Garner, in which Garner refers to the sidewalks as "kind of hideous." A color photograph of the sidewalk attached to Jennings' brief in Opposition to Summary Judgement reveals an uneven sidewalk joint of approximately two (2) inches. In the opening section of Garner's Motion for Summary Judgement, Garner refers to "the alleged defect, approximately two inches," and asserts that the defect "can be classified as *de minimis*."

On December 15, 2023, Garner filed a Motion for Summary Judgment. Simply stated, Garner asserts that the Complaint should be dismissed, either because the alleged defect in the sidewalk was *de minimis*, or because Jennings assumed the risk of her injuries by jogging on the sidewalk, at night.

III. Questions Presented:

A. Whether Garner is entitled to summary judgment on the Complaint, on the basis that an uneven sidewalk defect of approximately two (2) inches is *de minimis*, as a matter of law.
B. Whether Garner is entitled to summary judgment on the Complaint, on the basis that Jennings assumed the risk of her injuries as a matter of law, by jogging on the sidewalk at night.

IV. Brief Answer:

A. Garner is not entitled to summary judgment on the Complaint, because an uneven sidewalk defect of approximately two (2) inches is not *de minimis*, as a matter of law, and the question of whether the defect constitutes negligence is a material issue of fact.
B. Garner is not entitled to summary judgment on the Complaint, on the basis that Jennings assumed the risk of her injuries as a matter of law, because the fact that Jennings was jogging on the sidewalk at night is an issue to be weighed by the finder of fact.

V. Discussion:

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" P.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 (Pa. 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. Ct. 2013).

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. O*verly 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 K*erns 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. D*ucko v. Chrysler Motors Corporation*, 433 Pa.Super. 47, 48, 639 A.2d 1204, 1205 (1993) (citing M*usser 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. K*elly by Kelly v. Ickes*, 427 Pa.Super. 542, 547, 629 A.2d 1002, 1004 (1993) (citing C*arns v. Yingling*, 406 Pa.Super. 279, 594 A.2d 337 (1991).

Accu-Weather, Inc. v. Prospect Commc'ns, Inc., 435 Pa. Super. 93, 644 A.2d 1251 (Pa. Super. Ct. 1994)

A. Garner is not entitled to summary judgment on the Complaint, because an uneven sidewalk defect of approximately two (2) inches is not *de minimis*, as a matter of law, and the question of whether the defect constitutes negligence is a material issue of fact.

In the matter of *Aloia v. City of Washington*, 361 Pa. 620, 65 A.2d 685 (Pa. 1949), plaintiff sought recovery for injuries she sustained from a fall as a result of stepping into a hole in the street, fourteen (14) inches in diameter and three (3) inches deep. The Court noted that, while a slight defect in pavement cannot impose municipal liability, "what constitutes a defect sufficient to render the city liable must be determined in the light of the character of the traffic for which the use of the street is intended and, except where the

defect is obviously trivial, that question must be submitted to the jury. *Magennis v. City of Pittsburgh,* 352 Pa. 147, 42 A.2d 449*; Henn v. City of Pittsburgh,* 343 Pa. 256, 22 A.2d 742." *Aloia v. City of Washington*, 361 Pa. 620, 622-623, 65 A.2d 685, 686 (Pa. 1949).

In the matter of *Breskin v. 535 Fifth Avenue*, 381 Pa. 461, 113 A.2d 316 (Pa. 1955), the Court cited *Aloia* and *Henn* to support the Court's conclusion that:

> 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'. *Aloia v. City of Washington,* 361 Pa. 620, 623, 65 A.2d 685, 686. "An elevation, depression or irregularity in a sidewalk may be so trivial that the court, as a matter as law, is bound to hold that there was no negligence in permitting it to exist' * * *. But 'there is a shadow zone where such question must be submitted to a jury whose duty it is to take into account all the circumstances. To hold otherwise would result in the court ultimately fixing the dividing line to the fraction of an inch, a result which is absurd". *Henn v. City of Pittsburgh,* 343 Pa. 256, 258, 22 A.2d 742, 743. No definite or mathematical rule can be laid down as to the depth or size of a sidewalk depression necessary to convict an owner of premises of negligence in permitting its continued existence: *Emmey v. Stanley Co. of America,* 139 Pa.Super. 69, 72, 10 A.2d 795.

Breskin v. 535 Fifth Avenue, 381 Pa. 461, 463, 113 A.2d 316, 318 (Pa. 1955).

More recently, our Superior Court has articulated the appropriate test as follows:

> Pennsylvania law provides that property owners have a duty to keep their sidewalks in a reasonably safe condition for travel by the public. *Peair v. Home Ass'n of Enola Legion No. 751,* 287 Pa.Super. 400, 430 A.2d 665, 667 (1981). Property owners must maintain their sidewalks so that they do not present an unreasonable risk of harm to pedestrians. *Bromberg v. Gekoski,* 410 Pa. 320, 189 A.2d 176, 177 (1963); *German v. City of McKeesport,* 137 Pa.Super. 41, 8 A.2d 437, 440 (1939). Whether a property owner has complied with this duty must be determined on a case-by-case basis by looking at all of the surrounding circumstances. *McGlinn v. City of Philadelphia,* 322 Pa. 478, 186 A. 747, 748 (1936).
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> Although property owners have a duty to maintain their sidewalks in a safe condition, property owners are not responsible for trivial defects that exist in the sidewalk. Our courts have held that an elevation, depression, or irregularity in a sidewalk or in a street or highway may be so trivial that, as a matter of law, courts are bound to hold that there was no negligence in permitting such depression or irregularity to exist. *Davis v. Potter,* 340 Pa. 485, 17 A.2d 338 (1941); *see Bosack v. Pittsburgh Railways Co.,* 410 Pa.

> 558, 189 A.2d 877 (1963) (no liability where plaintiff tripped on depression or irregularity outside normal pedestrian crossing); *see also Harrison v. City of Pittsburgh,* 353 Pa. 22, 44 A.2d 273, 274 (1945) (finding that property owners could not be negligent because slightly elevated manhole cover in middle of sidewalk was slight and trivial).
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> "No definite or mathematical rule can be laid down as to the depth or size of a sidewalk depression" to determine whether the defect is trivial as a matter of law. *Breskin v. 535 Fifth Ave.,* 381 Pa. 461, 113 A.2d 316, 318 (1955); *Emmey v. Stanley Co. of America,* 139 Pa.Super. 69, 10 A.2d 795, 797 (1940). Thus, if the defect is not obviously trivial, the question of negligence must be submitted to a jury. *Breskin,* 113 A.2d at 318.

Mull v. Ickes, 2010 Pa.Super. 80, 994 A.2d 1137, 1140 (Pa. Super. Ct. 2010); *Accord Shaw v. Thomas Jefferson University*, 80 A.3d 540, 542-543 (Pa. Commw. Ct. 2013); *Reinoso v. Heritage Warminster SPE, LLC,* 2015 Pa.Super. 8, 108 A.3d 80, 86-87 (Pa. Super. Ct. 2015).

Thus, our courts have consistently held that, unless a surface defect in sidewalk is trivial as a matter of law, the question of whether the defect is sufficient to support a claim of negligence is a material issue of fact. On this record, the Court cannot conclude that a two (2) inch irregularity in the surface of a sidewalk is trivial as a matter of law.

B. Garner is not entitled to summary judgment on the Complaint, on the basis that Jennings assumed the risk of her injuries as a matter of law, because the fact that Jennings was jogging on the sidewalk at night is an issue to be weighed by the finder of fact.

In the matter of *Hardy v. Southland Corporation*, 435 Pa. Super. 237, 239, 645 A.2d 839 (Pa. Super. Ct. 1994), our Superior Court observed that "the exact status of the assumption of the risk doctrine as valid law in Pennsylvania is less than clear." In the matter of *Kaplan v. Exxon Corporation*, 126 F.3d 221, 224-225 (3d Cir. 1997), the United States Court of Appeals for the Third Circuit described the state of the law as follows:

> Although it has addressed this issue on different occasions in recent years, the Pennsylvania Supreme Court has not provided a definitive statement on the assumption of risk doctrine. In 1981, a plurality of the court sought to abolish the doctrine of assumption of risk "except where specifically preserved by statute; or in cases of express assumption of risk, or in cases brought under ... a strict liability theory." *Rutter v. Northeastern Beaver County Sch. Dist.*, 496 Pa. 590, 437 A.2d 1198, 1209 (1981). It adopted this position because it believed juries were confused by the doctrine and because it was bad public

> policy. The plurality also noted that, as a complete bar to recovery, the affirmative defense of assumption of risk frustrated the purpose of the state's comparative negligence statute, which was to allow plaintiffs to recover some damages despite some unreasonable or negligent conduct. The *Rutter* court observed that in most cases where assumption of risk is invoked to deny recovery, the court could reach the same result by holding the defendant owed the plaintiff no duty.
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> Two years later a majority of the court breathed new life into the assumption of risk doctrine. In *Carrender v. Fitterer*, 503 Pa. 178, 469 A.2d 120 (1983), the plaintiff parked her car on a sheet of ice on a parking lot even though the remainder of the parking lot was ice-free. The court held that because the danger was both obvious and known to the plaintiff, the defendant owed no duty to the plaintiff. The court stated it would reach the same result whether through analysis of the defendant's duty or application of the affirmative defense of assumption of risk…Furthermore, the court held that, although "the question of whether a danger was known or obvious is usually a question for the jury, the question may be decided by the court where reasonable minds could not differ as to the conclusion." *Id*. at 124.
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> In 1993, the court once again considered the doctrine of assumption of risk, but this time was able to rule only as a plurality. In *Howell v. Clyde*, 533 Pa. 151, 620 A.2d 1107 (1993), a three judge plurality noted that the status of the affirmative defense was unclear after *Rutter* and *Carrender*. The plurality found the reasoning of the plurality in *Rutter* persuasive, holding that assumption of risk should be abolished "in essence" as an affirmative defense, except in cases where the defense is preserved by statute, is assumed expressly, or in strict liability cases. *Id*. 620 A.2d at 1113 n. 10. The *Howell* plurality decided, however, that because "it is desirable to preserve the public policy behind assumption of risk ... but to the extent possible, remove the difficulties of application of the doctrine and the conflicts which exist with our comparative negligence statute, to the extent that an assumption of risk analysis is appropriate in any given case, it shall be applied by the court as part of the duty analysis, and not as part of the case to be determined by the jury." *Id*. at 1112–13. The court went on to hold that a "court may determine that no duty exists only if reasonable minds could not disagree that the plaintiff deliberately and with the awareness of specific risks inherent in the activity nonetheless engaged in the activity that produced his injury." *Id*. at 1113.

Kaplan v. Exxon Corporation, 126 F.3d 221, 224-225 (3d. Cir. 1997)

Thus, the Court in *Kaplan* concluded that consideration of the defense of assumption of risk must be based in an analysis of duty. *Id*. at 225; *see, generally, Ott v. Unclaimed Freight Co.*, 395 Pa. Super. 483, 488, 577 A.2d 894, 896 (Pa. Super. 1990) (noting that

before a court can ascertain what duty of care was owed, a court must first determine whether the Plaintiff was a "trespasser, licensee, or invitee.").

In the matter of *Thompson v. Ginkel*, 2014 Pa. Super. 125, 95 A.3d 900, 906 (Pa. Super. 2014), the Court concluded that the trial court erred in granting summary judgment based upon assumption of the risk, and quoted the decision of our Supreme Court in the matter of *Hughes v. Seven Springs Farm, Inc.*, 563 Pa. 501, 762 A.2d 339 (Pa. 2000), for the proposition that:

> [a]s a general rule, the doctrine of assumption of the risk, with its attendant 'complexities' and 'difficulties,' has been supplanted by the Pennsylvania General Assembly's adoption of a system of recovery based on comparative fault in the Comparative Negligence Act, 42 Pa.C.S. § 7102(a)-(b).

It appears to this Court that if the defense of assumption of the risk has any continuing vitality, it requires a finding that the plaintiff fully understood the specific risk and chose to encounter it under circumstances that manifest a willingness to accept that risk. *Fish v. Gosnell*, 316 Pa.Super. 565, 575, 463 A.2d 1042, 1047 (Pa. Super. Ct. 1983); *Ott v. Unclaimed Freight Co.*, 395 Pa. Super. 483, 493 (Pa. Super. Ct. 1990) (noting that, regardless of whether the plaintiff was a trespasser or licensee, the plaintiff was found to have assumed the risk when she unequivocally confirmed, during depositions, that she knew the ice was slippery, that she could slip and fall, and that, while she knew of an alternative route, she chose to cross the icy parking lot where she fell and sustained injuries).

Garner claims that, because Jennings had walked over the uneven sidewalk many times, and because she was jogging at night without a flashlight, she assumed the risk of her injury. In the view of this Court, those facts alone fall short of the threshold for a pre-trial finding of assumption of the risk. While it appears that Jennings was on notice of the general condition of the sidewalk, her choice to jog at night is insufficient to justify summary judgment. Rather, her decision to jog on uneven sidewalk at night without a flashlight must be judged at trial, together with the condition of the sidewalk, and all other relevant factors.

The Court notes the following discussion of assumption of the risk within the Subcommittee Note to 13.220 of the Pennsylvania Suggested Standard Jury Instructions: "Assumption of the risk remains a viable defense when the court can say to a certainty that

the plaintiff's comparative negligence is 100 percent. In that case, a nonsuit should be granted."

Here, Garner invites the Court to predict that Jennings' evidence at trial will be such that the Court will conclude with certainty that her comparative negligence is 100 percent. The Court declines that invitation.

ORDER

And now, this 2nd day of February, 2024, for the reasons more fully set forth above, Defendant's Motion for Summary Judgment, filed December 15, 2023, is denied.

By The Court,

Hon. William P. Carlucci, Judge

WPC/aml

CC: Gregory A. Stapp, ESQ

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