

SYLVIA TINKHAM, : **IN THE COURT OF COMMON PLEAS**
Plaintiff : **BRADFORD COUNTY, PENNSYLVANIA**
 :
vs. :
 : **Civil Action - Law**
BURLINGTON ASSOCIATES INC.:
Defendant : **No. 04 CV 000403**

PLAINTIFF’S BRIEF IN OPPOSITION TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF FACTS

This lawsuit began by Plaintiff, Sylvia Tinkham, filing a Complaint alleging that the Defendant, Burlington Associates, Inc., was negligent in the maintenance of the parking lot to a convenience store for which Defendant owned. The Complaint alleges, and Ms. Tinkham confirmed during her deposition, that she often stopped by the store before going to the county prison where she worked as a self-employed prisoner mental health advocate. (Tinkham Dep. at 7, 43-46). On March 3, 2006, after exiting the store and walking back to her vehicle, Ms. Tinkham slipped and fell on an accumulation of ice in the parking lot. (*See* Complaint at ¶¶5-6 and Tinkham Dep. At 45-50). This fall caused serious injuries from which Ms. Tinkham still suffers.

The pertinent set of facts in this case relate to two arguments presented by Defendant to support Summary Judgment: 1) the “hills and ridges” doctrine; and 2) Defendant’s allegation that Ms. Tinkham assumed the risk of an “open and obvious” danger. The pertinent fact as it relates to the first issue is that Ms. Tinkham testified that the patch of ice on which she fell was isolated and that the rest of the parking lot was clear of ice and snow. (Tinkham Dep. at 50-51). The pertinent fact as it relates to the

second, “open and obvious” issue is that although Ms. Tinkham testified that she saw the ice when she first opened her door to get out of the car, she also stated the following:

Q. When you went in to the store, did you mention to anybody, hey, you've got ice in your parking lot?

A. No.

Q. Did you consider it a dangerous condition at that point in time?

MR. CARROLL: When?

Q. When you went in to the store.

A. I don't think I considered it a dangerous -- I mean, I didn't focus on that. My focus was not falling, okay? Okay. Be careful where you step here. There's ice on the parking lot. Yeah. **After I fell, then, you know, I realized there was much more ice there than what I had first noticed.**

Id. at 55, lines 12-25 (emphasis added).

Further, the only witness for the Defendant and the co-owner of Defendant, Daniel Thorp, testified that he does not know what the parking lot looked like on the day of the fall. (Thorp Dep. at 11). So, the only evidence that can be considered by the Court is Ms. Tinkham's deposition testimony. And nothing in the Summary Judgment record disputes Ms. Tinkham's testimony as to the condition of the parking lot at the time of the fall.

II. QUESTIONS PRESENTED

A. ARE THERE MATERIAL QUESTIONS OF FACT, THUS PRECLUDING SUMMARY JUDGMENT, AS TO WHETHER THE HILLS AND RIDGES DOCTRINE APPLIES?

Suggested Answer: Yes

B. ARE THERE MATERIAL QUESTIONS OF FACT, THUS PRECLUDING SUMMARY JUDGMENT, AS TO WHETHER THE PLAINTIFF ASSUMED THE RISK OF AN OPEN AND OBVIOUS DANGER?

Suggested Answer: Yes

III. DISCUSSION

Defendant has filed a Motion for Summary Judgment, arguing that there are no material issues of fact as to Plaintiffs' negligence claim, and that, based upon these facts, it is entitled to judgment as a matter of law. Defendant clearly and concisely summarizes the law of summary judgment in its Brief and Plaintiff will not repeat it here. Plaintiff would like to stress, however, that all facts and *inferences* must be viewed in light most favorable to the plaintiff. *Salerno v. Philadelphia Newspapers*, 546 A.2d 1168, 1170-71 (Pa. Super. 1988). Plaintiff merely has to make clear that there are disputed facts on each element of negligence, that when viewed in light most favorable to the Plaintiff, would cause a reasonable jury to hold in Plaintiff's favor on that particular element.

A. THERE ARE MATERIAL QUESTIONS OF FACT, THUS PRECLUDING SUMMARY JUDGMENT, AS TO WHETHER THE HILLS AND RIDGES DOCTRINE APPLIES.

In Pennsylvania, a property owner, either commercial or private, will be held responsible for known dangerous conditions on its property. However, as Judge Mott succinctly wrote, the "hills and ridges doctrine protects an owner or occupier of land from liability for generally slippery conditions resulting from ice and snow, where the owner has not permitted the ice and snow to unreasonably accumulate in ridges or elevations. *Flanagan v. Schultz*, 4 Brad. Co. L. J. 189 (2002)(citing *Morin v. Traveler's Rest Motel, Inc.*, 704 A.2d 1085, 1087 (Pa. Super. 1997). "In order to recover for a fall on an ice or snow covered surface . . . a plaintiff is required to prove: (1) that snow and ice had accumulated on the sidewalk in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians traveling thereon;

(2) that the property owner had notice, either actual or constructive, of the existence of such condition; (3) that it was the dangerous accumulation of snow and ice which caused the plaintiff to fall.” *Morin* at 1088 (citations omitted).

However, as a prerequisite to the application of the hills and ridges doctrine is a finding of generally slippery conditions in the community as opposed to isolated icy patches. *Tonik v. Apex Garages, Inc.*, 275 A.2d 296 (Pa. 1971). In *Tonik*, the Pennsylvania Supreme Court held that “[p]roof of hills and ridges is necessary only when it appears that the accident occurred at a time when general slippery conditions prevailed in the community” *Id.* at 298. “Where . . . a specific, localized patch of ice exists on a sidewalk otherwise free of ice and snow, the existence of ‘hills and ridges’ need not be established.” *Id.* This rationale was based upon the Court’s holding in *Williams v. Shultz*, 240 A.2d 812 (Pa. 1968), a few years earlier where it stated, “it is comparatively easy for a property owner to take the necessary steps to alleviate the condition, while at the same time considerably more difficult for the pedestrian to avoid it even exercising the utmost care.” *Id.* at 814.

Tonik is still good law and is cited often. See *Bacsick v. Barnes*, 341 A.2d 157 (Pa. Super. 1975), see also *Morin, supra*, at 1088. In *Liggett v. Pennsylvania’s Northern Lights Shoppers City, Inc.*, 75 Pa. D & C4th 322 (Beaver Co. 2005), Judge Kwidis relied upon *Tonik* and its progeny. In that case, the weather experts agreed that significant snow fall occurred the day before the plaintiff fell. However, both plaintiff and defendant agreed that the parking lot in which the plaintiff fell was “generally free from snow with the exception of a few areas between the stalls.” *Id.* at 329. Because of this, the Court

applied the *Tonik* rationale and denied the defendant's motion for summary judgment based upon the hills and ridges doctrine. *Id.*

In applying the above rationale to the present set of facts, it is clear that Defendant's Summary Judgment Motion should be denied. The only evidence in the record regarding the condition of the parking lot is provided by Ms. Tinkham in her deposition. Therein, she testified that the parking lot was clear and that the only icy spot she could see was the one on which she fell. Despite the fact that Defendant has presented weather data showing snow showers around the time of Plaintiff's fall, it was obvious that Defendant had either already attempted to clear the snow from the parking lot or it had yet to snow at the time of the fall and the ice was from a previous snow melting. In support of this theory, Defendant admitted that he had invoices from the plowing company that indicated the parking lot was cleared on or around the day Plaintiff fell. (Thorp Dep. at 11). Therefore, in applying the rationale of *Tonik*, Plaintiff slipped on an isolated patch of ice; therefore, the "hills and ridges" doctrine cannot be applied. As a result, Defendant's Motion for Summary Judgment should be denied.

B. THERE ARE MATERIAL QUESTIONS OF FACT, THUS PRECLUDING SUMMARY JUDGMENT, AS TO WHETHER THE PLAINTIFF ASSUMED THE RISK OF AN OPEN AND OBVIOUS DANGER.

Defendant's second argument for summary judgment is that Plaintiff assumed the risk of an open and obvious danger, thus Defendant is not liable for her injuries. In *Carrender v. Fitterer*, 469 A.2d 120 (Pa. 1983), the Court stated that "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor

should anticipate the harm despite such knowledge.” *Id.* at 123. Further, the Court declared that an open and obvious dangerous condition is where “both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence, and judgment.” *Id.* Citing to comments from the Restatement 2d of Torts §328B, the Court stated that in order for a danger to be known, it must be known to exist, be recognized as dangerous, and the invitee must appreciate the probability and gravity of the threatened harm. *Id.*

In *Hadar v. Avco Corp, et al.*, 886 A.2d 225 (Pa. Super. 2005), the Court stated that “Pennsylvania appellate decisions ‘reflect a reluctance to find assumption of the risk applicable unless it is quite clear that the specific risk that occasioned injury was both fully appreciated and voluntarily accepted.’” *Id.* at 229 (*quoting Bullman v. Giuntoli*, 761 A.2d 566, 571(Pa. Super. 2000)). Further, merely appreciating a “general risk” is not enough for the support of summary judgment. *Id.* at 572

In the present case, the Defendant insists that the holding and facts in *Carrender* compel the granting of a summary judgment. However, the facts in *Carrender* are different than here. There, the plaintiff admitted that she saw the ice next to her car, appreciated the danger that she might fall, and chose to step onto the ice instead of moving her car to a clear spot in the parking lot. *Carrender, supra* at 122. First, the plaintiff had an artificial leg she indicated that, yes, ice was a special problem for her due to her missing leg. *Id.* Second, the plaintiff fell on the same ice patch that she initially saw when exiting her vehicle. She did not come in contact with another patch of ice or another dangerous condition for which she was not aware. *Id.*

In the present case, Ms. Tinkham did not appreciate danger of the ice on which she fell. Despite the fact that most of the facts in the present case are similar to *Carrender*, there is one salient difference. During her deposition, Ms. Tinkham testified as to the following:

Q. When you went in to the store, did you mention to anybody, hey, you've got ice in your parking lot?

A. No.

Q. Did you consider it a dangerous condition at that point in time?

MR. CARROLL: When?

Q. When you went in to the store.

A. I don't think I considered it a dangerous -- I mean, I didn't focus on that. My focus was not falling, okay? Okay. Be careful where you step here. There's ice on the parking lot. Yeah. **After I fell, then, you know, I realized there was much more ice there than what I had first noticed.**

Id. at 55, lines 12-25 (emphasis added).

Based upon this testimony, it is clear that the ice on which Ms. Tinkham fell was different than the ice she first noticed when getting out of her car. After she fell, she “realized there was much more ice there than what I had first noticed.” When taking this testimony in light most favorable to the Plaintiff, this clearly establishes, at the very least, a material question of fact as to whether Ms. Tinkham truly appreciated the risks of the ice. Ms. Tinkham might have understood a “general risk” of slippery ice, but she did not appreciate that there would be ice when she fell in front of her car, as opposed to by her car door. Based upon these facts, Defendant cannot defeat this claim using the open and obvious doctrine.

IV. CONCLUSION

Based upon the foregoing, Plaintiff, Sylvia Tinkham, respectfully requests that Defendant's Motion for Summary Judgment be denied.

Respectfully Submitted,

CARROLL & CARROLL, P.C.

Date: _____

By _____

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