IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

LALLY SPADY, Plaintiff, Vs. ACME MARKETS, INC., FHG COMPANIES, LLC, d/b/a/ ABOUT TIME SNOW REMOVAL, AND DeMASI LANDSCAPING, Defendants.	:	Case No. 141001354 1900 EDA 2016

OPINION

Plaintiff Lally Spady appeals the trial court's order granting the motions for summary judgment filed by Defendants Acme Markets, Inc., FHG Companies, LLC, d/b/a/ About Time Snow Removal, and DeMasi Landscaping.

On appeal, Plaintiff asserts that the trial court erred in granting summary judgment because (1) a genuine issue of material fact exists as to whether Plaintiff was contributorily negligent in choosing which route to walk to Defendant Acme's store, (2) it applied the "choice of ways" doctrine, which is usually for the jury to determine, (3) it decided that Plaintiff assumed the risk and thereby incorrectly absolved Defendants of the duty of care that they owed to Plaintiff, and (4) it relied upon a video of the incident, which allegedly was not part of the pleadings, depositions, answers to interrogatories, admissions of record, or affidavits on file. For the reasons stated below, the Superior Court should affirm the trial court's order granting summary judgment for Defendants.

FACTUAL BACKGROUND

Plaintiff slipped and fell on a pile of snow in the parking lot of Defendant Acme's supermarket located at 920 Red Lion Road in Philadelphia on February 18, 2014. Plaintiff asserts that Defendants were negligent because they (1) failed to properly remove snow from the entire parking lot, and (2) failed to warn him of the dangerous condition of the parking lot.

Video from an Acme security camera shows the entire incident including the condition of the parking lot as well as how and where Plaintiff fell. More specifically, the video shows that all of the parking spaces and travel lanes were completely clear of snow and ice and that there are isolated mounds of snow at the ends of each row of parked cars. The video also shows Plaintiff arriving at the location in a vehicle, and then exiting the vehicle which was parked in a parking spot that was totally clear of snow. If Plaintiff took the shortest route to the store entrance from his car, he would have taken a straight, snow-free route to the store. Instead of taking the shortest and also snow-free route to the store, Plaintiff walked in a direction that required him to take a longer route to the store by walking parallel to the store and crossing to the next row of parked cars. When he reached the next row of parked cars, he then climbed over a mound of snow, during which he slipped and fell causing injuries. *See* Defendants' Memorandum of Law in Support of Motion for Summary Judgment, Exhibit "A" Acme Security Video Footage.[1]

In his deposition, Plaintiff was asked why he did not take the shortest, most direct and snow-free route to the store after he got out of the car but instead took a longer route toward a mound of snow in the next row of parked cars. Plaintiff explained that, in hindsight, he walked toward the handicapped parking sign in the next row of parked cars because he figured that "if anything is going to be clear, it's going to be that part." *Id.* at 44. Plaintiff admitted that he did not really know what he was thinking that day or why he chose the longer, snow covered route rather than the shortest, most direct, snow free route to the store: "I don't know. I had tunnel vision. I just got out and kept straight and walked. That's the only thing I can tell you." *Id.* at 47.

[1] Defendant's motion for summary judgment lists the eight different camera angles that are captured by the Acme security cameras. *See* Defendants' Motion for Summary Judgment, ¶4. Video from these eight camera angles was attached collectively as Exhibit A to the Motion. The video contains approximately 32 minutes of footage from various cameras positioned both inside and outside the store.

Plaintiff acknowledged that the parking lot was clear of snow and ice other than a mound of snow at the end of each row of parked cars. *Id.*

DISCUSSION

"Summary Judgment is proper only where there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law." *Bailets v. Pennsylvania Turnpike Commission*, 123 A.3d 300, 304 (Pa. 2015). "In considering a motion for summary judgment, the record must be viewed in the light most favorable to the non-moving party, and all doubts as to whether a genuine issue exists are resolved against the moving party." *Id.* The question of "whether there are material facts in issue and whether the moving party is entitled to summary judgment are matters of law." *Id.* (Citation omitted). As such, the scope of review by the appellate court is *de novo*. *Id.*

1. Duty of Care Generally And The Duty Of Care Owed To An Invitee

In order to prevail in a negligence action, a plaintiff must establish that (1) the defendant owed him or her a duty of care, (2) the duty was breached, (3) the breach resulted in the plaintiff's injury, and (4) the plaintiff suffered actual loss or damages. *Merlini ex rel. Merlini v. Gallitzin Water Authority*, 980 A.2d 502, 506 (Pa. 2009). Establishing a breach of a legal duty is a condition precedent to a finding of negligence. *Estate of Swift v. Northeastern Hospital of Philadelphia*, 690 A.2d 719, 722 (Pa. Super. Ct. 1997). The duty of care owed depends "primarily upon the relationship between the parties at the time of plaintiff's injury." *Id.*

The standard of care that a possessor of land owes to one who enters upon the land depends upon whether the entrant is a trespasser, a licensee, or an invitee. *Carrender v. Fitterer*, 469 A.2d 120, 123 (Pa. 1983). "A business [invitee] is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *Palange v. City of Philadelphia Law Dep't*, 640 A.2d 1305, 1308 (Pa. Super. Ct.

1994). Generally, under Pennsylvania law, a possessor of land owes a duty of care to protect his invitees from foreseeable harm. *Carrender*, 469 A.2d at 123. Thus, an owner or possessor of land is subject to liability for harm that befalls his invitee due to a condition on his land if he (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee, and (2) should expect that they will not discover or realize the danger, or fail to protect themselves against it, and (3) fails to exercise reasonable care to protect them against the danger. *Estate of Swift, supra,* 690 A.2d at 722; *Wentz v. Pennswood Apartments,* 518 A.2d 314, 315 (Pa. Super. Ct. 1986). "An invitee must demonstrate that the proprietor deviated from its duty of reasonable care owed under the circumstances" and therefore, "the particular duty owed to a business invitee must be determined on a case-by-case basis." *Campisi v. Acme Markets, Inc.*, 915 A.2d 117, 119 (Pa. Super. Ct. 2006). The "mere existence of a harmful condition in a public place of business, or the mere happening of an accident due to such a condition is neither, in and of itself, evidence of a breach of the proprietor's duty of care to his invitees, nor raises a presumption of negligence." *Myers v. Penn Traffic Co.*, 606 A.2d 926, 928 (Pa. Super. Ct. 1992).

2. A Defendant Is Not Liable To An Invitee When A Condition Or Danger Is Known And Obvious Such That A Reasonable Person May Be Expected To Discover It

"A possessor of land is not liable to his invitees for his 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 or obviousness." Restatement (Second) of Torts, § 343A. (Emphasis added). For a danger to be "known," the invitee must not only be aware of its existence, but must also recognize that it is dangerous and appreciate the probability and gravity of the threatened harm. *Carrender*, 469 A.2d at 124 (citing Restatement (Second) of Torts, § 343A, comment b). "A danger is deemed to be 'obvious' when '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.*

While a determination of whether a dangerous condition is "known" and "open and obvious" is ordinarily a question of fact for the jury, the trial court may decide the question as a matter of law "where reasonable minds could not differ as to the conclusion." *Id.* Examples of obvious dangers as found by the courts include uneven steps and clearly visible patches of ice. *See Carrender*, 469 A.2d at 124 (danger posed by the isolated patch of ice was both obvious and known); *Ott v. Unclaimed Freight Co.*, 577 A.2d 894 (Pa. Super. Ct. 1990) (condition of the icy lot was known and obvious); *Villano v. Sec. Sav. Ass'n.*, 407 A2d 440, 443 (Pa. Super. Ct. 1979) (first step that was three inches higher than the opposite end due to a sloping sidewalk was an obvious and known condition and was not concealed).

In *Carrender,* our Supreme Court directed that judgment be entered in favor of the defendant clinic owners because the evidence presented by the plaintiff was insufficient to support a verdict in her favor. There, the plaintiff sued the defendants after she slipped and fell on an isolated patch of ice in their parking lot. The plaintiff alleged that the defendants were negligent in failing to maintain the parking lot properly. The plaintiff testified that she parked her car in the lot, which was covered in a smooth sheet of ice. She also testified that she was aware of several convenient parking spaces that were free of ice and available for her to use as parking. The jury found the defendants sixty-five percent negligent and the plaintiff thirty-five percent negligent. After setting forth the duty of harm owed to an invitee by a possessor of land, the Supreme Court found that the plaintiff's "own testimony showed not only that the existence of the ice was obvious to a reasonably attentive invitee, but also that [she] herself was aware of the ice and appreciated the risk of traversing it." *Id.* at 124.

In addition, the Court held that:

> there was nothing presented on the record to indicate that, notwithstanding the obviousness of the danger, [defendants] should have anticipated that the patch of ice might go unnoticed by [plaintiff] or any other patient; on the contrary, [defendants] could reasonably expect that, in light of the number of clear, convenient spaces available, [plaintiff] and other invitees would recognize the danger posed by the ice and choose to park in another, ice-free space to avoid it.

Id. In directing a verdict in favor of the defendants, the Court wrote: "[i]n light of [the plaintiff's] uncontradicted testimony, it must be concluded that the danger posed by the isolated patch of ice was both obvious and known, and that [the defendants] could have reasonably expected that the danger would be avoided." *Id.*

Similarly, in *Ott v Unclaimed Freight Co.*, 577 A.2d 894 (Pa. Super. Ct. 1990), the Superior Court affirmed a trial court's order granting summary judgment in favor of the defendants where the plaintiff slipped and fell on an isolated patch of ice in a private parking lot. The plaintiff claimed that the defendants owed her a duty to maintain the parking lot free of snow and ice. The defendants filed a motion for summary judgment which the trial court granted, concluding that they owed no duty to the plaintiff because she assumed the risk of crossing the ice covered parking lot. In affirming the trial court, the Superior Court held that, "[a]lthough snow and ice were present on the surface of the parking lot and were readily apparent to [plaintiff], she attempted to cross the parking lot." *Id.* at 895. In its discussion of the duty of care owed to the plaintiff, the Superior Court concluded:

> based on [the plaintiff's] own testimony, it is clear that [she] was aware of the hazard, but nevertheless proceeded to encounter it in spite of the fact that an alternative route was readily available to her. Because the condition of the parking lot was made known to [the plaintiff] and because she was well aware of the risks involved in attempting to cross the ice, we hold that [the defendants] owed no duty to [the plaintiff] . . . .

Id. at 898.

3. A Possessor Of Land Owes No Duty To An Invitee If The Invitee Voluntarily Assumes The Risk Of Injury From An Obvious And Avoidable Danger

Under the doctrine of assumption of the risk, a defendant is relieved of its duty to protect a plaintiff if the plaintiff has voluntarily and deliberately proceeded to encounter a known and obvious risk and is therefore deemed to have assumed liability for his own injuries. *Barrett v. Fredavid Builders, Inc.*, 685 A.2d 129, 130 (Pa. Super. Ct. 1996). Generally, a plaintiff will not be said to have assumed a risk unless it can be shown that he "fully under[stood] the specific risk and voluntarily [chose] to encounter it under circumstances manifesting his willingness to accept the risk." *Berman v. Radnor Rolls, Inc.*, 542 A.2d 525, 533 (Pa. Super. Ct. 1988). Although typically whether the assumption of the risk doctrine applies is typically a question for the jury, the court may resolve the issue where reasonable minds could not differ. *Howell v. Clyde*, 620 A.2d 1107, 1113 (Pa. 1993). "However, the determination that the plaintiff has assumed the risk of his injuries such that recovery is prevented should occur only where it is beyond question that the plaintiff voluntarily and knowingly proceeded in the fact of an obvious and dangerous condition." *Barrett,* at 131. While the doctrine of assumption of risk has been largely limited due to the introduction of comparative negligence, it continues to remain a viable defense in Pennsylvania. *Howell*, at 1112.

In *Carrender*, the plaintiff argued that – the fact that she was aware of the dangerous condition of the parking lot and yet proceeded to voluntarily encounter it – was a fact for the jury to consider in apportioning fault. The plaintiff further argued that her awareness of the risk and her decision to voluntarily face it should not operate as a complete bar to her recovery. The Supreme Court rejected the plaintiff's argument, concluding that:

> When an invitee enters business premises, discovers dangerous conditions which are both obvious and avoidable, and nevertheless proceeds voluntarily to encounter them the doctrine of risk operates merely as a counterpart to the possessor's lack of duty to

> protect the invitee from those risks . . . By voluntarily proceeding to encounter a known or obvious danger, the invitee is deemed to have agreed to accept the risk and to undertake to look out for himself . . . It is precisely because the invitee assumes the risk of injury from obvious and avoidable dangers that the possessor owes the invitee no duty to take measures to alleviate those dangers. Thus, to say that the invitee assumed the risk of injury from a known and avoidable danger is simply another way of expressing the lack of any duty on the part of the possessor to protect the invitee against such dangers.

469 A.2d at 125. Accordingly, the Supreme Court held that "the legal consequence of the invitee's assumption of a known and avoidable risk is that the possessor of land is relieved of a duty of care to the invitee." *Id.*

Similarly, in *Ott*, the plaintiff testified that she knew that ice was slippery and she knew that there was another ice-free route to the train station available to her. Notwithstanding this knowledge, she chose to cross the icy portion of the parking lot because it was a shortcut. The Superior Court held that those facts were sufficient to establish that the plaintiff fully understood the specific risk of falling on slippery ice and voluntarily chose to encounter it. As such, plaintiff assumed the risk of injury, which barred her recovery. 577 A.2d 894, 899.

4. Although Narrowly Applied, The Choice of Ways Doctrine May Preclude Recovery Where the Danger The Plaintiff Chooses to Confront Is Indisputably Obvious

The choice of ways doctrine has been defined as follows: "[w]here a person, having a choice of two ways, one of which is perfectly safe, and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover." *Downing v. Shaffer*, 371 A.2d 953, 956 (Pa. Super. Ct. 1977). Under the choice of ways doctrine, a plaintiff cannot recover if no reasonable minds could disagree that there was "(1) a safe course, (2) a dangerous course, and (3) facts which would put a reasonable person on notice of the danger or actual knowledge of the danger." *Updyke v. BP Oil Co.*, 717 A.2d 546, 552 (Pa. Super. Ct. 1998), *quoting Downing*, 371 A.2d at 956. The choice of ways doctrine "still

exists in Pennsylvania despite the substitution of comparative negligence for contributory negligence." *Mirabel v. Morales*, 57 A.3d 144, 153 (Pa. Super. Ct. 2012).

5. The Trial Court Properly Entered Summary Judgment On Behalf of Defendants

On appeal, Plaintiff asserts that the trial court erred in granting summary judgment because (1) a genuine issue of material fact exists as to whether Plaintiff was contributorily negligent in choosing which route to walk to Defendant Acme's store, (2) it applied the "choice of ways" doctrine, which is usually for the jury to determine, (3) it decided that Plaintiff assumed the risk and thereby incorrectly absolved Defendants of the duty of care that they owed to Plaintiff, and (4) it relied upon a video of the incident, which allegedly was not part of the pleadings, depositions, answers to interrogatories, admissions of record, or affidavits on file. *See* Plaintiff's Statement of Matters Complained of on Appeal, at ¶1-9.

a. There is no genuine issue of material fact because reasonable minds cannot disagree that Plaintiff assumed the risk of an obvious and known danger when he chose to voluntarily encounter the mounds of snow

Viewing the evidence in the light most favorable to Plaintiff, reasonable minds cannot disagree that Plaintiff assumed the risk. Plaintiff conceded that the parking lot was clear of snow and ice except for isolated mounds of snow at the ends of the rows of parked cars. Plaintiff also conceded that he could have walked from his car through the snow-free lane of the parking lot and to the store. Instead of taking this shorter, more direct and show-free route, for some unknown reason, he had "tunnel vision. I just got out and kept straight and walked" toward the next row of parked cars rather than toward the store. Spady Dep. at 44. When he walked over to the next row of cars, he encountered a mound of snow which caused him to fall. *Id.* at 47. Instead of taking the shorter, more direct, snow-free route to the store, Plaintiff took a longer route that required him to climb over a mound of snow. His best explanation is that he thinks he may have gone that way because he noticed the handicapped parking sign in the next row of

parked cars and assumed it was most likely clear. Given the fact that the mound of snow was readily apparent and a safer, more direct, shorter and snow-free route was available to him, Plaintiff assumed the risk by voluntarily choosing to encounter the mound of snow. *See e.g., Carrender*, 469 A.2d at 122 ("Although [plaintiff] was aware that several convenient parking spaces free of ice were available, she kept her car in the space which she had chosen, alighted from her vehicle, and proceeded across the ice toward the clinic."); *Ott*, 577 A.2d 894, 895 ("Although snow and ice were present on the surface of the parking lot and were readily apparent to Ott, she attempted to cross the parking lot.").

Here, Plaintiff was not faced with two routes, both of which were fraught with danger such that the court could not say that one was a reasonable, safe alternative to the route he chose. Instead, the uncontroverted evidence shows that not only did Plaintiff have a snow-free route to the store – he actually took a longer route to the store during which he encountered the mound of snow. Thus, not only could he have avoided the dangerous condition, but he had to go out of his way to encounter it in the first place. There is no evidence that Plaintiff was not of normal perception, intelligence, and judgment such that he would not recognize both the obvious danger posed by the mound of snow and would perceive the risk of slipping and falling thereon. As such, reasonable minds cannot disagree that Plaintiff assumed the risk posed by such conditions and assumed the responsibility for ensuring his own safety. For that reason, summary judgment was proper.

b. The Choice of Ways Doctrine Applies Because Two Distinct Ways Existed: One Which Was Clearly Safe and One Which Involved Danger

As discussed above, the evidence of record shows at least two routes to Defendant Acme's store. The first route is the shortest, most direct route to the store on a snow-free portion of the parking lot, which is confirmed by both Plaintiff's deposition testimony and the video. The

second route – chosen by Plaintiff – required him to take a longer route by walking over to the next row of parked cars and scaling a mound of snow. During his deposition, Plaintiff admitted that he ignored the first route and instead chose the second route. The first route involved no snow or ice and therefore did not involve any unusual or obvious risk. The second route involved encountering a known and obvious danger – a mound of snow. *See Barrett v. Fredavid Builders, Inc.*, 685 A.2d 129, 131 (Pa. Super. Ct. 1996) ("Ice always is slippery, and a person walking on ice always runs the risk of slipping and falling.").

Plaintiff's explanation as to why he chose the longer route that took him to the mound of snow – that he assumed the handicapped parking area would be clear – is not reasonable given that a person of normal intelligence, perception and judgment would have taken the safer, shorter, more direct, snow-free route to the store. By ignoring the safer route and choosing the dangerous, longer, less convenient route over a mound of snow, Plaintiff's conduct fell short of what a reasonable person would conform to in order to protect himself from harm. *See Downing v. Shaffer*, 371 A.2d 953, 956 (Pa. Super. Ct. 1977) ("the rule requiring a person to select a safe route in favor of a dangerous route is nothing more than a formulation of the general rule that a person is . . . negligent if his conduct falls short of the standard to which a reasonable person should conform to in order to protect himself from harm"). For this additional reason, summary judgment was proper, and the Superior Court should affirm.

c. Defendants Owed No Duty To Plaintiff Because He Was Aware of and Voluntarily Chose to Encounter the Snow and Ice Mounds At The Ends of Each Row of Parked Cars in the Parking Lot

While a property owner has a duty to protect his invitees from foreseeable harm, this duty does not require him to keep his property free from snow and ice at all times. "[A]n owner or occupier of land is not liable for generally slippery and icy conditions, for to require that one's walk be always free of ice and snow would be to impose an impossible burden in view of the

climatic conditions in this hemisphere. Snow and ice upon a pavement merely create a transient danger, and the only duty upon the property owner or tenant is to act within a reasonable time after notice to remove it when it is a dangerous condition." *Alexander v. City of Meadville*, 61 A.3d 218, 224 (Pa. Super. Ct. 2012) (quoting *Gilligan v. Villanova University*, 584 a.2d 1005, 1007 (Pa. Super. Ct. 1991)). Normally, where a plaintiff alleges that a property owner was negligent in failing to remove snow and ice from its property, the property owner may avoid liability under the hills and ridges doctrine. However, the doctrine only applies when the snow and ice complained of are the result of an entirely natural accumulation from a recent snowfall and not where the condition complained of is an isolated patch of ice. *Harvey v. Rouse Chamberlin, Ltd.*, 901 A.2d 523, 527 (Pa. Super. Ct. 2006).

As discussed above, *supra* at 9-11, Plaintiff assumed the risk of falling on the mound of snow when he voluntarily chose to encounter a known and obvious danger. This case is most similar to *Carrender, supra,* where a plaintiff drove into the defendants' parking lot and observed areas that were icy and areas that were ice-free. Nevertheless, the plaintiff parked her car in a space that was in an icy area. It was predictable and not surprising that she slipped and fell on the ice when she returned to her vehicle, which was parked in the icy part of the parking lot. The Court held that the plaintiff assumed the risk of an obvious and known danger when, after seeing that the parking lot had several convenient parking spaces free of ice, she chose to park in a space where there was ice. As the Supreme Court concluded, "the danger posed by the isolated patch of ice was both obvious and known, and . . . defendants could have reasonably expected that the danger would be avoided . . . [thus] the legal consequence of the [plaintiff's] assumption of a known and avoidable risk is that [defendants] [are] relieved of a duty of care to the [plaintiff]." 469 A.2d 120, 125.

Similarly, in *Chiricos v. Forest Lakes Council Boy Scouts of America*, 571 a.2d 474 (Pa. Super. Ct. 1990), the plaintiff was at the defendant's scout camp supervising some scouts when he heard the sounds of an ATV and a motorcycle approaching on the dirt roads nearby. The plaintiff was concerned that the riders of the vehicles, who were trespassing on the property, would endanger the safety of the campers, and so he placed himself in the route of the ATV waving his hands. The ATV driver hit the plaintiff injuring his leg. The Superior Court noted that just as in *Carrender*, "we have testimony from the plaintiff acknowledging an 'awareness' of the 'obvious' danger posed by that which caused injury. Yet, cognizant of the danger attendant to the ATV, the plaintiff made a conscious choice to place himself in a position of danger from which he could not extricate himself until it was too late to react . . . ." *Id.* at 479. Holding that the plaintiff had "'discovered' the dangerous condition on [the defendant's] property, which was both obvious and *avoidable,* [the defendant] owed no duty of care the invitee/plaintiff," the Superior Court affirmed the trial court's order granting summary judgment in favor of the defendant. *Id.* at 480 (emphasis in original, footnote omitted).

Finally, in *Howell v. Clyde*, 620 A.2d 1107 (Pa. 1993), a plaintiff was socializing at his neighbor's house when he volunteered to help ignite a homemade fireworks cannon, which exploded and caused injuries to the plaintiff. The Supreme Court determined that the plaintiff was aware that fireworks explode and that he did not have to engage in the recreational activity of firing the cannon. Therefore, the Court concluded that the plaintiff was deemed to have assumed the risk of his injury. Accordingly, the Supreme Court reinstated the trial court's order entering an involuntary non-suit in favor of the defendant.

Here, based on Plaintiff's own testimony, it is reasonable to assume that he was actually aware of – or reasonably should have been aware of – the mound of snow but nevertheless he proceeded to voluntarily encounter it despite having a safe, shorter and snow-free alternative

route readily available to him. Because the condition of the parking lot and Plaintiff's awareness of the risk inherent in attempting to walk over and across a mound of snow were known to Plaintiff, Defendants owed no duty to him to remove the mound of snow or to warn him of the obvious danger of the same. *See generally Carrender. Chiricos,* and *Howell.*[2] For this additional reason, the Superior Court should affirm the trial court's order granting summary judgment in favor of Defendants.

d. The Trial Court Did Not Err In Viewing The Video Attached As An Exhibit

In his final claim of error, Plaintiff argues that the trial court should not have viewed the video from Defendant Acme's security camera because the video was not part of the pleadings, depositions, answers to interrogatories, admissions of record or affidavits on file. *See* Pa.R.C.P. 1035.1 (identifying matters that may properly constitute the record related to motions for summary judgment). As an initial matter, Defendants attached the actual video as an exhibit to their Motions for Summary Judgment. As such, there is no error because a court may properly review any exhibits attached to a motion for summary judgment. *See Borough of Bedford v. Comm., Dep't of Environmental Protection*, 972 A.2d 53, 60 n. 6, (Pa. Cmwlth. Ct. 2009) (when ruling on a motion for summary judgment, "a court must consider not only the pleadings but other documents of record, such as exhibits").

Additionally, Plaintiff argued in his response to Defendants' motion for summary judgment that the trial court should review the video, and not blindly rely on Defendants' unsupported assertions as the "final word" regarding which route Plaintiff took to the store. *See* Plaintiff's Brief in Response to Motion for Summary Judgment, at 7 ("To see the exact accurate

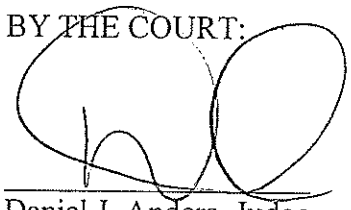
[2] *See also Barrett v. Fredavid Builders, Inc.*, 685 A.2d 129, 131 (Pa. Super. Ct. 1996) (discussing *Carrender* and *Howell*, and noting that "[in] both . . . cases, the risks at issue were dangerous, known, and obvious. Ice always is slippery, and a person walking on ice always runs the risk of slipping and falling. The plaintiff in *Carrender* admittedly saw the ice prior to stepping on it. Similarly, fireworks always explode, and a person always encounters a risk of injury from that explosion when he uses fireworks. Thus, the plaintiff in *Howell* knew the risk.").

route Plaintiff took from the car to the store, the video must be reviewed and evaluated. When there is an accurate recording of the route taken, a drawing made by one party's counsel should not be taken as the final word."). Having urged the trial court to review the video when deciding the motion, Plaintiff cannot now assert it was error for the trial court to have done so. Finally, Plaintiff's counsel never objected when Defendants' counsel submitted a copy of the video upon request of the trial court. *See generally Berardi v. Johns-Manville Corporation*, 482 A.2d 1067 (Pa. Super. Ct. 1984) (plaintiffs waived any error on appeal regarding a trial court's reliance on unsworn exhibits that did not comply with Pa.R.C.P. 1035 because plaintiff failed to raise with the trial court any objection to the consideration of those documents).

CONCLUSION

Based on the foregoing, the Superior Court should affirm the trial court's order granting Defendants' motion for summary judgment.

BY THE COURT:



Daniel J. Anders, Judge