IN THE COURT OF COMMON PLEAS OF
INDIANA COUNTY, PA
CIVIL DIVISION — LAW

JANE DOE and JOHN DOE, her husband, Plaintiffs, vs. DYNAMIC VENTURES, INC., and BOROUGH OF INDIANA a MUNICIPAL CORPORATION Defendants.	)	No. xxxx CD 2010 TYPE OF PLEADING: **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT DYNAMIC VENTURE INC.'S MOTION FOR SUMMARY JUDGMENT** Filed on Behalf of: **PLAINTIFFS** Counsel of Record for this Party: **RICHARD H. GALLOWAY, ESQ.** PA I.D. #11645 **LISA GALLOWAY MONZO, ESQ.** PA I.D. #66795 **GALLOWAY•MONZO, P.C.** 1100 Summit Drive, Suite 100 Greensburg, PA 15601 (724) 837-6000

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AND NOW, come the Plaintiffs, Jane Doe and John Doe (hereinafter "Plaintiffs" or "Doe"), by and through their counsel, Richard H. Galloway, Esq. and Lisa Galloway Monzo, Esq. of Galloway Monzo, P.C. and respectfully submit the following Memorandum of Law in opposition to Defendant's Motion for Summary Judgment, pursuant to Pa. R. C. P.1035.3, and in support thereof, avers as follows:

I. COUNTERSTATEMENT OF THE FACTS

On November 1, 2008, Plaintiff Jane Doe, was walking on the sidewalk alongside of and abutting the premises owned by Defendant Dynamic Ventures, Inc. (hereinafter "Dynamic Ventures") at 682 Philadelphia Street in the Borough of Indiana, Indiana County, Pennsylvania, (hereafter "Indiana Borough") when by reason of the negligence of the Defendants, she was caused to slip, trip or fall, causing the Wife Plaintiff to suffer

a fractured right hand and fingers, along with other severe injuries and damages. On or about October 29, 2012, Plaintiffs commenced a civil action against Dynamic Ventures, Inc, and the Borough of Indiana, as a result of the November 1, 2008 accident, alleging, as to Dynamic Ventures, Inc:

(1) In designing, constructing, and maintaining its sidewalk with one slab raised above the adjoining slab to a dangerous and defective degree;

(2) In failing to timely and reasonably inspect its premises, including its sidewalk, to detect the presence of a dangerous and defective condition caused by the raise slab of the sidewalk;

(3) In failing to warn the wife Plaintiff and other persons then and there lawfully using the sidewalk of the dangerous and defective condition which exists by reason a raised slab;

(4) In failing to post warnings, or barricade the area of the defect to protect the wife Plaintiff and others then and there lawfully upon the premises from the dangerous condition by the raised slab;

(5) In failing to remove the raised slab, lower it to its proper height adjacent to other slab, or to otherwise repair and maintain its sidewalk in proper and safe condition for the wife Plaintiff and others then and there lawfully using the same;

(6) In acting with a reckless disregard of the safety of the wife Plaintiff and others then and there lawfully using the same;

(7) In failing to erect barrels, saw horses, tape, or other barriers to prevent the wife Plaintiff and others then and there lawfully upon the sidewalk from coming into contact with a dangerous and defective condition caused by the raised slab; and

(8) In violating the ordinances of the Borough of Indiana and the Statutes of the Commonwealth of Pennsylvania relating to the proper and safe construction and maintenance of sidewalks.

and, as to the Defendant, Borough of Indiana, alleging:

(1) In designing, constructing, and maintaining or allowing the same to be done to a sidewalk at 682 Philadelphia Street, with one slab raised above the adjoining slab to a dangerous and defective degree;

(2) In failing to timely and reasonably inspect the sidewalks of the Borough of Indiana, including the sidewalk alongside the building at 682 Philadelphia Street to detect the presence of a dangerous and defective condition caused by the raised slab of the sidewalk;

(3) In failing to warn the wife Plaintiff and other persons then and there lawfully using the sidewalk of the dangerous and defective condition which exists by reason a raised slab;

(4) In failing to post warnings, or barricade the area of the defect to protect the wife Plaintiff and others then and there lawfully upon the premises from the dangerous condition by the raised slab;

(5) In failing to remove the raised slab, lower it to its proper height adjacent to other slab, or to otherwise repair and maintain its sidewalk in proper and safe condition for the wife Plaintiff and others then and there lawfully using the same;

(6) In acting with a reckless disregard of the safety of the wife Plaintiff and others then and there lawfully using the same;

(7) In failing to erect barrels, saw horses, tape, or other barriers to prevent the wife Plaintiff and others then and there lawfully upon the sidewalk from coming into contact with a dangerous and defective condition caused by the raised slab;

(8) In violating the ordinances of the Borough of Indiana and the Statutes of the Commonwealth of Pennsylvania relating to the proper and safe construction and maintenance of sidewalks; and

(9) In allowing, permitting and failing to stop the violation of its ordinances relating to the proper and safe construction and maintenance of its sidewalks, by the Defendant, Dynamic Ventures, Inc.

On or about September 28, 2012, the Defendant Dynamic Ventures filed a motion for summary judgment, alleging that the Plaintiffs have failed to prove that Dynamic Ventures was negligent in causing Plaintiff's fall. Specifically, Dynamic Ventures argues that:

> Based on the discovery conducted in this matter and the deposition testimony of David Kirk and Sherrie Shannon, it is clear that the alleged violation in the sidewalk that Plaintiffs allege caused Ms. Doe's fall is less than ½ inch and under Pennsylvania law would be considered 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. Accordingly, Defendant, Dynamic Ventures, Inc. did not breach any duty allegedly owed to Plaintiffs and summary judgment should be entered in favor of Defendant, Dynamic Ventures, Inc.

See Defendant Dynamic Ventures' Motion for Summary Judgment at ¶ 22.

On or about October 4, 2012, the Borough of Indiana filed a Joinder in Dynamic Venture, Inc.'s Motion for Summary Judgment, averring that the Borough of Indiana, "joins in, adopts and incorporates by reference the Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment filed by co-defendant, Dynamic Ventures, Inc." *See* Borough of Indiana's Joinder in Co-Defendant Dynamic Ventures, Inc. Motion for Summary Judgment at ¶ 1. Defendant, Borough of Indiana, raised no independent bases of its own for summary judgment.

Plaintiffs are entitled under Pa. R.C.P. § 1035.3(b) to timely supplement the record with additional evidence. Due to the attached affidavit of John Doe and photographs and the authority under Pa. R. C. P. § 1035.3(b), genuine issues of material fact exist and Plaintiffs respectfully ask this Court to deny summary judgment in the present action.

II. COUNTERSTATEMENT OF THE ISSUE

Where the Plaintiff, pursuant to Pa. R.C.P. §1035.3(b) adduces evidence, including photographs, demonstrating a defect in the sidewalk in controversy, of more than ¾ of an inch, which is greater than the ½ inch standard set forth in §400-27(C) of the Indiana Borough Code, defining a "hazard to public safety," does a genuine issue of material fact exist?

Positive answer suggested.

III. ARGUMENT

(A) STANDARD OF REVIEW

Pa. R.C.P. 1035.2 mandates that summary judgment be granted on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law. Summary judgment may be granted only in those cases in which the record clearly shows that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. P.J.S. v. Penn. State Ethics Comm'n, 723 A.2d 174, 176 (Pa. 1999). In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Jones v. SEPTA, 565 Pa. 211, 772 A.2d 435, 438 (Pa. 2001).

Summary judgment may be granted only in those cases in which the record clearly shows that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Hydropress Environmental Services, Inc. v. Twnship of Upper Mount Bethel, 836 A.2d 912 (Pa. 2003). Finally, the court may grant

summary judgment only when the right to such a judgment is clear and free from doubt. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205, 206 (Pa.1991).

(B) DISCUSSION OF THE LAW

(1) Pursuant to §400-27(C) of the Indiana Borough Code, additional evidence produced by the Plaintiff, showing a sidewalk defect greater than ¾ of an inch, constitutes a "hazard to public safety" and thus, an issue of material fact exists, precluding summary judgment.

It is well settled that the law imposes a duty upon a property owner to properly maintain its sidewalk in good repair.

> If therefore it be plain that the law imposes upon any one the duty of maintaining sidewalk in a good state of repair, manifestly that obligation must be considered in relation to the purpose and reason for which the sidewalk exists. A sidewalk that is permitted to get into a condition dangerous to the life or limb of the pedestrian is not a sidewalk maintained in good repair within the meaning of the law. That this must be true seems to us to necessarily result from the long line of decisions wherein the failure to discharge that duty, with resulting injury to an innocent pedestrian, has always been recognized as ground for liability to respond in damages.

Pittsburgh v. Reed, 74 Pa. Super. 444, 447 (Pa. Super. 1920).

Consistent with this duty, the General Municipal Law gives all municipalities in the Commonwealth the power to require property owners to construct and maintain sidewalks. *See* 53 P.S. § 46801-46806. The Borough of Indiana, in turn, has passed such an ordinance, governing Sidewalk Construction and Repair. *See* Article V of the Borough of Indiana Code. The ordinance provides that "The Public Work Committee's decision to require a segment of sidewalk to be reconstructed or repaired shall be based on either a determination by the Borough Manager that a hazard to public safety exists that must be immediately corrected, or upon recommendations of the Public Works Committee after inspection of sidewalks." Article V, § 400-27(B), Borough of Indiana Code (2012). A

"hazard to public safety" is defined as "**vertical separation greater than ½ inch exists between adjacent concrete panels** or masonry units or cracks within panels. . . " Article V, § 400-27(C), Borough of Indiana Code (2012) (emphasis added.)

Summary judgment is only appropriate where "the record clearly shows that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Hydropress Environmental Services, Inc. v. Twnship of Upper Mount Bethel, 836 A.2d 912 (Pa. 2003). Further, under the authority of Pa.R.C.P. 1035.3(b), "an adverse party may supplement the record. . . " Pa. R.C.P. 1035.4 provides that "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the signer is competent to testify to the matters stated therein. Verified or certified copies of all papers or parties thereof referred to in an affidavit shall be attached thereto or served therewith." The trial court may "rule upon the motion for judgment or permit affidavits to be obtained, depositions to be taken or other discovery to be had or make such other order as is just." Pa. R.C.P. 1035.3(c). Pa.R.C.P. 1035.3(c) makes it clear that the trial judge, reviewing the nonmoving party's response to a motion for summary judgment, possesses a wide range of discretion. In Gerrow v. Royle & Sons, et. al. , 572 Pa. 134, 813 A.2d 778, (Pa. 2002), the Pennsylvania Supreme Court granted allocatur specifically to address: "1) whether Rule 1035.3(b) of the Rules of Civil Procedure allows a party to supplement the record with additional evidence, rather than limiting such evidence merely to that intended to supplement evidence already of record." Id. at 138, 781. The Pennsylvania Supreme Court held that, under Rule 1035.3(b) read in conjunction with Rule 1035.2 and the Note and Explanatory Comments, such supplementation was

permitted. Thus, with the record so supplemented, if questions of material fact remain, summary judgment is not proper.

It is to be noted that the Defendants' motions are dependent solely on the testimony of management personnel. As such, the motion is subject to credibility issues which, in and of themselves, raise issues of material fact. *See* Nanty-Glo v. American Surety Co. , 300 Pa. 236, 163 A. 523 (1932; Penn Center House, Inc. v. Hoffman, 520 Pa. 171, 533 A.2d 900 (1989). The Defendant Dynamic Ventures cited the testimony of David Kirk, the Director of Planning and Code Enforcement for the Borough of Indiana, in its Motion for Summary Judgment, as dispositive of the issue of the vertical separation of the slabs on the sidewalk at 682 Philadelphia Street. Mr. Kirk testified that he "measured a variation in the elevations of the concrete slabs was within the allowable tolerances of the borough code of ½ inch." Defendant's Motion For Summary Judgment, ¶ 18. There is no dispute that the Borough of Indiana set a standard of a vertical separation of ½ inch for sidewalks. *See* Section 400-27(C) of the Borough of Indiana Code. The Defendant, Dynamic Ventures, contends that, accordingly, Defendant Dynamic Ventures had no duty to find or cause correction of the unevenness that brought about Mrs. Doe's fall. However, the photographs and affidavit of John Doe, in response to the Motion for Summary Judgment, show that the defect was, in fact, greater than ¾ of an inch and thus, should have triggered action by the Borough and the landowner. Thus, a material issue of fact remains to be litigated before the fact finder.

Whether the condition of the pavement made it dangerous and unsafe for pedestrians, such as Mrs. Doe, is a question of fact. It is therefore, clearly a case for the

jury to determine whether the conditions existing there at the time the plaintiff received her injuries were caused by the negligence of the Defendants.

IV. CONCLUSION

Summary judgment is appropriate only when there are no genuine issues of material fact and the movant is entitled to prevail as a matter of law. Pa. R. C. P. 1035.2. Because Plaintiffs have pleaded facts and adduced evidence that, if credited, could permit a jury to determine whether the condition of the pavement made it dangerous and unsafe for pedestrians, including whether the vertical separation of greater than ½ inch did, in fact , exist, there are questions of material fact that remain and summary judgment is not proper. Accordingly, summary judgment should be denied.

WHEREFORE, Plaintiffs, respectfully requests this Honorable Court to deny the Defendant's Motion for Summary Judgment.

Respectfully Submitted,

Galloway Monzo, P.C.

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Richard H. Galloway, Esquire
Counsel for Plaintiff

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Lisa Galloway Monzo, Esquire
Counsel for Plaintiff

NOTE: Motion for summary judgement was denied.