UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

WILLIAM GUNVILLE, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case: 3:11-CV-03022-RAL **DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

The United States, by and through counsel, United States Attorney Brendan V. Johnson and Assistant United States Attorney Jan L. Holmgren, hereby submits the following memorandum in support of its motion for summary judgment. References to the statement of material facts filed with this memorandum are denoted by "**SMF**" followed by the applicable enumerated fact.

INTRODUCTION

Plaintiff William Gunville sued the federal government pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., for injuries he suffered as a result of a slip and fall at the Indian Health Service hospital in Eagle Butte, South Dakota. On October 9, 2009, at the time Gunville entered the building for a 3 p.m. medical appointment, the sidewalks were wet. Gunville was leaving the main entrance at the front of the facility about 4:10 p.m. when he slipped and fell on ice that had formed on the sidewalk. Gunville

alleges that he suffered permanent injury, pain and suffering, and monetary damages resulting from the fall, which he claims were caused by the negligence of the United States.

While it is unfortunate that Gunville fell and suffered an injury, his injury was not caused by the negligence of a federal employee. By the time Gunville was leaving the building, an IHS employee had discovered the sidewalks were getting icy and was spreading ice melt on the sidewalk at the front of the building, at most, sixty-five (65) feet away from where Gunville fell. Gunville was aware that the sidewalk had gotten icy. Just before he fell, Gunville verbally warned a woman approaching the entrance sidewalk to be careful because the sidewalk was slippery.

SUMMARY JUDGMENT STANDARD

The United States seeks summary judgment pursuant to Fed. R. Civ. P. 56. The Supreme Court has instructed that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. The

statement of material facts in this case is presented in the manner most favorable to Gunville for purposes of summary judgment.

The district court is not required to "plumb the record" in order to find a genuine issue of material fact. *Barge v. Anheuser Busch, Inc.*, 87 F.3d 256, 260 (8th Cir. 1996). The moving party has the burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Vette Co. v. Aetna Cas. & Sur. Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). The facts must be viewed in the light most favorable to the nonmoving party, but only if there is a genuine dispute as to those facts. *Ricci v. DeStefano*, 557 U.S. 557, 129 (2009).

Once the moving party has met its burden of demonstrating there is no genuine issue of material fact, a nonmoving party may not rest on the allegations in its pleadings; it must, by affidavit or other evidence, set forth specific facts showing the existence of a genuine issue of material fact. Fed. R. Civ. P. 56(e); *see also Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir. 2002). A nonmoving party's mere disagreement, or bald assertion that a genuine issue of material fact exists, does not preclude summary judgment. *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989); *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 522 (8th Cir. 1987). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,'" and summary judgment must be granted. *Matsushita*, 475 U.S. at 587; *see also Kneibert v. Thomson*

Newspapers, Michigan Inc., 129 F.3d 444, 455 (8th Cir. 1997) (party opposing summary judgment must provide sufficient probative evidence to permit a verdict in its favor rather than relying on conjecture and speculation).

FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act ("FTCA") is a limited waiver of the sovereign immunity of the United States. Under the FTCA, the federal government is liable to the same extent as private persons for certain torts of federal employees acting within the scope of their employment. *See* 28 U.S.C. § 1346(b); 28 U.S.C. § 2674; *United States v. Orleans*, 425 U.S. 807, 813 (1976). A provision of the FTCA commonly known as the "private duty analog," provides that:

> [t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.

28 U.S.C. § 2674. The FTCA definition of private persons does not include state or municipal entities. *United States v. Olson*, 546 U.S. 43, 44-45 (2005).

The FTCA also provides that courts may only exercise jurisdiction over:

> claims against the United States... for injury or loss of property, or personal injury or death... under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). Thus, because the acts or omissions that Gunville complains of occurred in South Dakota, the federal court must apply South Dakota law to determine if liability exists. *See Goodman v. United States*, 2 F.3d

291, 292 (8th Cir. 1993); *LaFond v. United States*, 781 F.2d 153 (8th Cir. 1986).

Because state law tort liability applies, state law tort defenses also apply to FTCA actions. "A state may not protect private citizens from liability without also protecting the federal government," *McClain v. United States*, 445 F. Supp. 770 (D. Or. 1978). The private duty analog thus requires that the federal government must be afforded immunity even where the governmental conduct at issue presents similar, but not identical, circumstances to the type of private person conduct shielded from liability under state law; this is because the federal government can never be exactly like a private actor. *Olson*, 546 U.S. at 45. Invariably, this means that state law defenses, exceptions to liability, immunity provisions and limitations on recovery, coextensively limit the government's FTCA liability just as they would limit a private person's liability under similar circumstances. *See Owen v. United States*, 995 F.2d 734, 737 (5th Cir. 1991); *Banks v. United States*, 623 F. Supp. 2d 751, 752 (S.D. Miss. 2009); *Palmer v. Flaggman*, 93 F.3d 196, 199 (5th Cir. 1996); *Ewell v. United States*, 776 F.2d 246, 249 (10th Cir. 1985).

SOUTH DAKOTA NEGLIGENCE LAW

Under the private duty analog, South Dakota negligence and premises liability law is the law that must be applied in this case. South Dakota defines negligence as "the breach of a duty owed to another, the proximate cause of which results in an injury." *Stone v. Von Eye Farms*, 741 N.W.2d 767, 770 (S.D.2007). Therefore, in order to prevail on a claim of negligence, plaintiff

must prove duty, breach of that duty, proximate and factual causation, and actual injury. *Highmark Fed. Credit Union v. Hunter*, 814 N.W.2d 413, 415 (S.D.2012). That a slip and fall occurred resulting in an injury does not give rise to an inference that the fall was caused by the negligence of anyone. *Crites v. United States*, F. Supp. 2d 2008 WL 2355841 (D.S.D. June 9, 2008) (unreported) (citing *Delvechhio v. Lund*, 293 N.W.2d 474, 476-77 (1980).

STATEMENT OF FACTS

Plaintiff William Gunville has lived in the Eagle Butte, South Dakota, area his entire life, more than fifty (50) years. **SMF 53, 54**. His family ranches twenty-six miles outside of Eagle Butte. **SMF 2**. Gunville and his wife, Margaret, have two sons. **SMF 6**. At all times relevant to this suit, Gunville worked at the Bureau of Indian Affairs as a range technician. **SMF 3**. Mrs. Gunville was employed by the Indian Health Service. **SMF 8**. Gunville is a member of the Cheyenne River Sioux Tribe, and receives medical care at the Indian Health Service hospital where Mrs. Gunville is employed. **SMF 1, 3.**

Prior to the construction and 2012 opening of a new IHS health facility on the outskirts of Eagle Butte, tribal members went to the Indian Health Service hospital downtown for treatment. It is at that facility that the injury complained of occurred on October 9, 2009. **SMF 7**. A wide sidewalk spanned the front doors of that building, and at the bottom of the sidewalk, there is a wide curb ramp for wheelchair access. **SMF 24**. Perpendicular to the front entrance, a sidewalk runs along the front of the building. *Id.* People going into the facility park their vehicles on the parking lot pavement in front of that

sidewalk, and in front of the sidewalk directly across the parking lot, where IHS staff housing is located. **SMF 24, 31.**

The morning of October 9, 2009, was a work day, and the weather was misty. **SMF 13**. Gunville works from 7:30 a.m. to 4 p.m. **SMF 5**, **12**. He and Margaret Gunville drove to Eagle Butte together that day. **SMF 12**. Mrs. Gunville drove. Id. They used the windshield wipers because traveling at 60-65 m.p.h., the speed of their vehicle caused the mist to collect on the windshield. **SMF 13.** The road was not slippery. **SMF 12.** Gunville does not think he scraped the windshield that morning. **SMF 14.**

Mrs. Gunville dropped Gunville off at his office, which is located across a four-lane road from the IHS hospital. **SMF 4**. Mrs. Gunville then drove across the road to the IHS hospital and parked in a back parking lot. At noon, Gunville went to the IHS hospital and retrieved the vehicle, because he had to work at the BIA shop facility, which is about seven blocks from his office. **SMF 15.** He probably had to work outdoors at the shop for part of the day and there was a heavy mist. Id. He does not recall if it was windy. Id.

Gunville left work and drove back to the hospital for a 3 p.m. medical appointment, which was necessary to renew a prescription. **SMF 16**. Gunville parked against the curb in front of the IHS staff housing across the parking lot from the hospital. **SMF 16.** The sidewalks were wet. **SMF 17.** Gunville did not slip going into the IHS building, as far as he can remember. **SMF 17**.

Gunville was in the building about an hour. Before he left, Gunville stopped in to visit his wife, who worked in the office space next to the front entrance. **SMF 8, 18.** He left the building shortly after 4 p.m. **SMF 7, 18.**

At approximately the same time, IHS maintenance worker Steve Brown Wolf had left the IHS staff housing across the street, where he had been fixing a broken boiler. **SMF 29, 31**. It was not slippery when Brown Wolf went to the apartment building three hours earlier. **SMF 32**. Brown Wolf left the apartment building around 4 p.m., and as he went into the front entrance of the hospital, he noticed the sidewalks were getting icy. **SMF 34**. No one had complained to him any time that day that it was slippery outside. **SMF 33**. He walked through the hospital to the loading dock where there was ice melt, got a bucket, and started throwing ice melt on the sidewalk closest to the loading dock, working his way to the main entrance. **SMF 34, 38.**

Gunville, meanwhile, left his wife's office and was proceeding down the front entrance sidewalk. It was misting. **SMF 20**. Weather conditions had worsened while Gunville was in the building, and the sidewalks went from being wet to icy while he was inside. **SMF 21**. The entire sidewalk was icy. **SMF 22**.

A woman known to both William and Margaret Gunville, Nancy West, was coming into the hospital building at the time Gunville was leaving. **SMF 58**. She does not know the condition of the IHS sidewalk on October 9, 2009, prior her arrival. **SMF 65**. Gunville called to her to be careful because the sidewalk was slippery. **SMF 23**. Gunville saw Brown Wolf, to his left, salting

the sidewalks "a millisecond" before Gunville lost his footing, falling on his buttocks. **SMF 28**. Brown Wolf was salting the sidewalk between fifty and sixty feet from where Gunville fell. **SMF 35**. Gunville believes he landed on the curb ramp for wheelchair access from the parking area. **SMF 24**, **25**. It was the ice, not the slope of the ramp, that caused him to fall. **SMF 26**. Gunville does not recall where he was looking at the time that he fell. **SMF 27**. According to the administrative claim Gunville filed with IHS, his fall occurred about 4:10 p.m. **SMF 7**.

Brown Wolf does not remember seeing Gunville fall, but heard him exclaim something, and saw him get up on the handicap curb ramp. **SMF 36**. Gunville rose to his feet unassisted, and did not lose his footing getting up. **SMF 41**. West safely proceeded into the building to notify Mrs. Gunville that her husband had fallen. **SMF 59**. Mrs. Gunville went out of the building to check on her husband, and found him sitting in their vehicle. **SMF 61**.

Mrs. Gunville has no recollection of the weather or condition of the sidewalks at IHS hospital the day of her husband's fall. **SMF 11**. She did not have any trouble getting into the IHS building at any time on October 9, 2009. **SMF 44**. She does not recall if she left the IHS hospital building that day, other than after her husband's fall was reported to her and when she left work at 4:30 p.m. **SMF 61, 62**. Mrs. Gunville does not recall the condition of the sidewalks when she went out to check on her husband, and did not notice if there was ice melt on the sidewalks, but remembers she did not slip or fall on her way out. **SMF 43**.

Brown Wolf started spreading ice melt east of where Gunville was on the ground, and he was moving west to scatter ice melt at the main entrance. **SMF 37**. He started spreading ice melt on the sidewalk closest to the dock and worked his way to the front entrance. **SMF 38**. He did not start spreading ice melt at the main entrance because the ice melt was outside on the dock, he was already outside, and the closest sidewalk he was salting was on the way to the front entrance. Id. He estimates it only took him about a minute to get from where he started spreading ice melt to the front of the building. **SMF 39**. After spreading ice melt on the east sidewalk, Brown Wolf went up to the front entrance spreading ice melt and then down to the sidewalk to the west of the main entrance. **SMF 40**.

Gunville was supposed to pick up his youngest son about 4 p.m. at the school for parents' night, but he was not in a hurry. **SMF 55**. He did not have to scrape ice off his windshield when the left the IHS hospital parking lot. **SMF 42.** He said the mist was heavy, and he had to use his windshield wipers. **SMF 42**. He did not have any trouble backing his vehicle away from the curb. **SMF 45**. He left, drove to pick up his son at the school, and drove back to pick up his wife, who got off work at 4:30 p.m. **SMF 62**.

The Gunvilles attended the school event, but left because Gunville was in pain. They drove to the emergency room where an x-ray revealed Gunville had no broken bones. He was subsequently referred to Black Hills Orthopedic Clinic in Rapid City for further diagnosis and treatment of back and leg pain.

Mrs. Gunville's office at IHS was located such that everyone who came in the hospital probably had to go by it. **SMF 8**. Visitors have complained about the condition of the sidewalks to her, and when they did, she would instruct them to report it. **SMF 9**. No one, including her husband, complained to Mrs. Gunville about the condition of the sidewalk that day until West reported Gunville's fall. **SMF 10**. Gunville does not recall ever reporting that the sidewalk conditions were bad at the hospital. **SMF 19**. Gunville's fall was the only recorded fall on that day. **SMF 46.** Mrs. Gunville reported the fall and indicated on the form that salt should have been spread on the sidewalk as a prevention measure, but her recommendation was based solely on the fact that her husband fell, and nothing else. **SMF 64.** Gunville has not identified anyone else who fell on the sidewalks of IHS hospital on October 9, 2009. **SMF 52**.

Gunville has been up the IHS hospital sidewalks hundreds of times and in icy and bad weather, but this was the first time he fell there. **SMF 57**. Mrs. Gunville has never fallen outside the IHS building in her eighteen years there. **SMF 60**. She knows Brown Wolf from working at IHS and considers him a conscientious employee. **SMF 63**.

ARGUMENT

I. THE UNITED STATES DID NOT BREACH A LEGAL DUTY TO GUNVILLE, AND HIS NEGLIGENCE CLAIM MUST FAIL

Under South Dakota premises law, the duty of care owed by a possessor of land to those who enter upon it is defined by the traditional common law defining trespassers, licensees and invitees. *Musch v. H.D. Electr. Coop*, 460

N.W.2d 149 (S.D.1990). In this case, Gunville entered the IHS hospital for a medical appointment, so he was an invitee. Id.

As a general rule, the possessor of land owes an invitee the duty to exercise reasonable or ordinary care for the invitee's safety. *Mitchell v. Ankney*, 396 N.W. 2d 312, 313 (S.D.1986). There is a two-fold duty, to warn of dangerous conditions known to the landowner and to use ordinary care in active operations on the property. *Janis v. Nash Finch Co.*, 780 N.W.2d 497, 502 (S.D.2010). The liability of a landowner to an invitee for failure to render the premises reasonably safe for an invitee, or failure to warn him of a dangerous condition on the premises, is predicated upon a landowner's superior knowledge concerning the dangers on his property. *Janis*, 780 N.W.2d at 502, citing *Mitchell*, 396 N.W. 2d at 314. In this case, the dangers on the IHS property were the result of a change in the weather, not a pre-existing danger of which IHS would have superior knowledge. In fact, Gunville and IHS discovered at approximately the same time that the wet sidewalks had iced. *See Ewing v. United States*, 231 F. Supp. 1001 (D.S.D. 1964) (plaintiff is only allowed to recover under a theory of negligence when the perilous instrumentality is known to the owner or occupant and not known to the person injured); *Jones v. Kartar Plaza Ltd.*, 488 N.W.2d 428, 429-30 (S.D.1992) (no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant.)

It is for just this reason, and because the weather in South Dakota is quixotic in nature, that this state has narrowed a landowner's duty regarding

snow and ice. South Dakota follows the natural accumulation rule, i.e., that a property owner or occupant is liable for damages incurred from a slip and fall on ice only if the owner causes an unnatural or artificial accumulation of ice and snow. *Budahl v. Gordon & David Assoc.*, 323 N.W.2d 853 (S.D.1982) (ice created by water dripping from a building overhang onto a sidewalk). *Budahl*, 323 N.W.2d at 855-56. *Cf.*, *Chadwick v. Barba Lou, Inc.*, 431 N.E.2d 660 (Ohio1982) and *McClendon v. McCall*, 489 P.2d 756 (Okla.1971) (finding that a negligence action by a business invitee will not lie where the sole negligence asserted is a failure for an unreasonable time to remove natural accumulations of ice and snow.)

> As a general rule, the owner of premises, in the absence of a statutory provision to the contrary, owes no duty to pedestrians to keep the public sidewalk in front of his or her premises free from natural accumulations of snow and ice. Similarly, it has been the traditional rule, still followed in many jurisdictions, that a storekeeper owes no greater duty of care in this regard to his or her customers than he or she does to other travelers. It has been said that this rule, denying liability where the accumulation of snow and ice is natural, is generally based on the fact that in a climate where there are frequent snowstorms and sudden changes in temperature, these dangerous conditions appear with a frequency and suddenness which defy prevention, and usually, correction; consequently, the danger from ice and snow in such locations is an obvious one, and the occupier of the premises may expect that an invitee on his or her premises will discover and realize the danger and protect himself or herself against it. Accordingly, a premises owner will not be held negligent where there is ice or snow on his or her premises as the result of natural accumulation and the condition is as well known to the invitees as to the owner. It follows that in such jurisdictions there is no duty to warn of icy conditions which are patent and obvious.

62A Am. Jur. 2d Premises Liability § 656. There is no evidence of an unnatural accumulation of ice that caused Gunville to slip and fall. According to Gunville,

the entire sidewalk was icy, a fact which he recognized prior to his fall because he warned Nancy West about it. **SMF 22**. Thus, under the natural accumulation rule, there is no negligence on the part of IHS as a matter of law.

Even if the natural accumulation rule did not apply, a landowner still is only responsible for ordinary or reasonable care of the premises, not perfect care. *Mitchell*, 396 N.W. 2d at 313. In this case, IHS was exercising ordinary and reasonable care. Employee Steve Brown Wolf went to get the ice melt immediately after learning the sidewalk was icy. He was in the process of salting the sidewalks even as Gunville fell a few yards away. Gunville has no evidence anyone at IHS knew the sidewalks were icy and waited an unreasonable amount of time to treat them; he cannot prove that if IHS had inspected the sidewalks at some point earlier in the same hour, they would have been anything but wet.[1] By Gunville's own account, it was a misty day. Gunville slipped and fell leaving the building; he did not slip going into it. He did not mention to his wife, or anyone else, that the sidewalk was slippery. Gunville cannot say with certainty when within an hour's time the sidewalks went from water to ice. IHS records show Gunville was the only reported fall that day.

[1] Gunville has no expert testimony and has identified no witnesses to the condition of the sidewalks prior to Gunville's fall.

In *Morrison v. Mineral Palace Ltd.*, 603 N.W. 2d 193 (S.D. 1999), the South Dakota Supreme Court refused to overturn a defense verdict and order a new trial, noting a reasonable jury could conclude that "it is unreasonable to expect Mineral Palace to keep the driveway clear of every threatening deposit of slush or ice every minute of the day or night...." Id. at 197. IHS was not under a legal duty to station an employee at the entrance door to maintain constant vigilance over the wet sidewalks to see when, if ever, they became icy. There is no legal duty to treat wet sidewalks with ice melt, and no way (and no duty) to treat sidewalks that are simply wet. Gunville alleged that he slipped on ice, not water.[2] The United States did not breach the duty of ordinary and reasonable care as a matter of law, and therefore, there is no negligence.

Gunville claims that IHS was negligent because Brown Wolf chose to begin spreading ice melt at the front entrance, rather than the sidewalk spanning the front of the building. **SMF 49**. However, that claim fails to demonstrate a breach of ordinary and reasonable care. People parked their vehicles along the entire length of the front sidewalk of the IHS building and people that parked there traverse that length of sidewalk in order to get to the front entrance. In fact, Nancy West, who was parked at the handicap parking in front of the building, had to cross that same sidewalk, albeit on the opposite side of the entrance from where Brown Wolf had begun salting.

It, therefore, was a reasonable exercise of Brown Wolf's discretion to start spreading the ice melt immediately on that sidewalk, working from the dock to

[2] Gunville's complaint has not alleged a defect in the sidewalk itself or a failure to treat wet sidewalks.

the front entrance, rather than walking through the parking lot or hospital building leaving all of the sidewalks untreated, in order to get to the front entrance. Brown Wolf testified at deposition it would have taken him no more than a minute spreading ice melt to get from where he was spreading ice melt to the location of Gunville's fall, and in that time he would have treated more than sixty feet of sidewalk that otherwise would have been unprotected.

Gunville claims the IHS was negligent in failing to warn him of the icy conditions of the sidewalks by putting up orange warning devices outside. **SMF 51**. However, the duty of reasonable and ordinary care requires a landowner to warn of a dangerous condition only if the condition existed for a time long enough to "justify the inference that [the landlord] had knowledge of its existence." *Kryger v. Dokken*, 386 N.W.2d 481, 483 (S.D.1986). By Gunville's his own testimony, the sidewalk was wet when he entered the IHS hospital for his 3 p.m. appointment, and he saw Brown Wolf spreading ice melt further down the sidewalk at the time he fell just about an hour later. No warning, including the orange cones Gunville suggested at deposition, would have been as effective as actually treating the sidewalk. Additionally, there is no duty to warn when the dangerous instrumentality is open and obvious, and as well-known to the invitee as to the premises owner. Because the United States did not breach a duty to warn, there was no negligence.

What the evidence shows is that Gunville did not slip going into the building, he was the only person whose fall was reported for October 9, 2009, and no one notified IHS that the sidewalks were slippery that day until Nancy

West reported to Mrs. Gunville that William Gunville had fallen. By that time, Brown Wolf had already discovered the sidewalks were getting icy, and immediately acted on that knowledge. This is not a case where IHS knew the sidewalk was slippery and plaintiff did not notice, and as a result, slipped and fell. *Compare*, *Sybesma v. Sybesma*, 534 N.W. 355 (S.D.1995) (negligence case where plaintiff was a New York suburbanite with limited farm experience and no experience with cattle when she attempted to help move stock for the first time, whereas defendant had superior knowledge, knew of plaintiff's inexperience, and knew that the particular cow that caused plaintiff's injury had posed particular problems before). Gunville recognized the sidewalk was icy, at age fifty, had decades of experience with winter weather and ice, and nevertheless elected to proceed down the sidewalk despite the ice.

Gunville also chose to use the sidewalk curb ramp despite the ice. The curb ramp provided wheelchair access from the street/parking lot to the front entrance to the IHS hospital. In answer to repeated questioning about the curb ramp at deposition, Gunville testified it was the ice, and not the incline of the curb ramp, that caused him to fall. He testified the IHS was negligent because they did not paint the slope with nonslip paint or provide some kind of grips or handrails. **SMF 47, 50**. However, Gunville admitted that the absence of those items did not contribute to his fall. **SMF 48**.

Gunville testified the entire sidewalk was icy. Regardless of whether the curb ramp played any part in his fall, wheelchair access from the street is required by federal handicap accessibility law. *See* 28 C.F.R. § 35.151(i) (federal

handicap accessibility standard requiring curb ramps). Under the FTCA, the federal government is excepted from liability for its execution of a statute or regulation. *See* 28 U.S.C. § 2680(a).

Gunville has not alleged any negligence in the construction of the curb ramp. In any event, as Exhibits1-3 to **SMF 24** show, Gunville could easily have avoided the slope of the curb ramp entirely by simply taking a step to the side and walking off from the curb rather than using the curb ramp. He had been up that same sidewalk hundreds of times and knew the curb ramp was there for wheelchair access.

Based on the facts and applicable law, Gunville has failed to show that IHS employees breached a duty that caused his injury. There is no negligence on the part of the United States as a matter of law.

II. GUNVILLE'S RECOVERY IS BARRED BECAUSE HE ASSUMED THE RISK OF INJURY

Assumption of the risk is an absolute barrier to recovery by plaintiff. *Burhenn v. Dennis Supply Co.*, 685 N.W.2d 778, 786 (S.D. 2004). Courts apply an objective standard of reasonableness in determining whether a plaintiff has assumed the risk. *Westover v. E. River Electr. Power Co-op., Inc.*, 488 N.W.2d 892, 900 (S.D.1992). Assumption of the risk embodies three elements. It must be shown that [the plaintiff] (1) had actual or constructive knowledge of the risk; (2) appreciated its character; (3) voluntarily accepted the risk within the time, knowledge, and experience to make an intelligent choice. *Goepfert v. Filler*, 563 N.W.2d 140 (S.D.1997).

A. Gunville Had Actual Knowledge Of The Risk

Gunville knew the sidewalk was slippery as he exited the building. Gunville knew that ice presented a potential hazard, or he would not have warned Nancy West to be careful of the ice. As a rancher, he had slipped and fallen himself many times on open water holes. **SMF 56**. Gunville's testimony thus establishes he had knowledge of the risk.

In *Platt v. Meier*, 153 N.W.2d 404, 406 (S.D.1967), plaintiff assumed the risk of falling off a stage because she encountered the situation which created the risk over 250 times and knew there was no railing where she fell. Just like plaintiff in *Platt*, Gunville encountered the sidewalk in front of the IHS hospital hundreds of time. He lived in Eagle Butte his entire life, received his medical treatment at the same IHS hospital for years, got his prescriptions there, and visited his wife (an IHS employee) there. He clearly knew the curb cut and wheelchair incline were there. He had encountered the same sidewalk hundreds of times before, over a period of years, in all kinds of weather.

B. Gunville Appreciated The Risk

Gunville appreciated the risk that falling on snow or ice can result in injury. In fact, falling on ice is a "risk that no adult of average intelligence can deny." *Goepfert*, 563 N.W.2d at 143. Gunville has lived in South Dakota all his life, and has had some fifty years of previous life experience with winter weather in this state. He knows that snow and ice are slippery and can cause falls. His calling out to West to watch out because the sidewalk was slippery

shows he himself recognized the danger of falling on ice. He has fallen himself on open water holes.

C. Gunville Voluntarily Accepted The Risk Within The Time, Knowledge, And Experience To Make An Intelligent Choice

Gunville voluntarily accepted the risk of falling on the ice. According to the Restatement of Torts:

> Where the tortious conduct of the defendant forces upon the plaintiff a choice of conduct, but still leaves him an alternative which affords full protection, and which under the circumstances he may reasonably be required to elect, his choice of the particular risk may still be regarded as a voluntary one. If the plaintiff acts unreasonably in making his choice, he may be barred from recovery either by his assumption of risk or by his contributory negligence in failing to exercise reasonable care for his own safety.

(*See* § 496A, Comment d.)

Gunville could have avoided falling by notifying someone in the building (including his wife) that the sidewalks had gotten slippery, and waited until they were salted before proceeding. He clearly had knowledge that the sidewalk was slippery. He stated the whole sidewalk was slippery and he warned another pedestrian to be careful before he fell.

In the *Goepfert* case, decedent assumed the risk of injury when he exited a moving car when the reasonable alternative would have been to just stay in the car until it reached a complete stop. *Goepfert*, 563 N.W. 2d at 143. Just as Goepfert could have avoided the risk entirely by staying in the car, Gunville could have avoided the risk entirely by notifying his wife, or someone else in IHS, that the sidewalks were icy and waiting for them to be salted. He had time to make that decision. He was finished with his medical appointment. His

workday was already over. He testified he was not in a hurry to get his son, because his son would just wait for him.

Other invitees would notify Mrs. Gunville, whose office was right inside the building entrance, if the sidewalks needed care. Had Gunville gone back into the building to do so, the sidewalk at the front entrance may have been salted by the time he came back to the front door (since Brown Wolf testified it would only take him a minute or so to get there) or at the very least, he would have been able to see Brown Wolf spreading the ice melt and could have waited until Brown Wolf finished salting the front entrance sidewalk. *See Myers v. Lennox Coop Ass'n*, 307 N.W.2d 863, 865 (S.D. 1981) (plaintiff who stepped on an unstable pile of lumber while loading a garage truck assumed the risk because he had made an intelligent choice to encounter the risk and had reasonable alternatives to stepping on the lumber).

> [T]he factors to be considered in determining the existence of a reasonable and adequate alternative are much the same. They include the importance of the interest, right, or privilege which the plaintiff is seeking to advance or protect, the probability and gravity of each of the alternative risks, the difficulty or inconvenience of one course of conduct as compared with the other, and all other relevant factors which would affect the decision of a reasonable man under the circumstances.

Rest. 2d Tort § 496E.

Gunville could have avoided the familiar slope of the curb ramp entirely by stepping off to the side and stepping off the curb onto the parking lot. Gunville voluntarily encountered, by his own testimony, the risk that he would fall on ice and injure himself.

IV. PLAINTIFF'S LACK OF DUE CARE FOR HIS OWN SAFETY EITHER BARS OR REDUCES HIS RECOVERY, EVEN IF THE GOVERNMENT IS FOUND TO BE NEGLIGENT

Even if the court should find there was some negligence on the part of the United States, which defendant denies, Gunville's claim is barred by his own contributory negligence. Contributory negligence is conduct by plaintiff that amounts to a "breach of duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." *Starnes v. Stofferahn*, 160 N.W.2d 421, 426 (1968). Gunville's recovery is barred because his contributory negligence was more than slight. SDCL § 20-9-2. If a plaintiff's negligence is less than slight, South Dakota implements a comparative negligence standard and apportions the damages based on the degree of negligence of each party.

> Three factors may properly be considered in appraising the quality of a plaintiff's negligence: the precautions he took for his own safety; the extent to which he should have comprehended the risk as a result of warnings, experience, or other factors, and the foreseeability of injury as a consequence of his conduct. These factors of course may overlap in a given case, for a plaintiff may increase the foreseeability of injury by failing to take safety precautions and greater precautions may be expected if he is aware of danger.

Westover v. E. River Elec. Power, 488 N.W.2d 892, 898 (S.D. 1992) quoting *Associated Engineers, Inc. v. Job*, 370 F.2d 633, 641 (8th Cir. 1966). In this case, as previously pointed out, Gunville clearly comprehended the risk and foreseeability of harm from falling on a surface he recognized was icy. Even though he was not in a hurry, he did not go in and ask his wife to get someone

to salt the sidewalks. Had he done so, the sidewalks would probably have been salted by the time he came back out, or at the very least, he would have seen Brown Wolf salting and could have waited for him to finish before safely exiting the building. If he is alleging that the wheelchair access caused his fall, he could have avoided it by simply stepping to the side. He did not do so.

CONCLUSION

The law does not require IHS to keep its premises absolutely clear of snow and ice every minute of the day and night. In this case, IHS exercised reasonable and ordinary care based on the time of year and the weather conditions at the time. There was no unnatural accumulation of ice. This is not a case where IHS left the sidewalks in a poor condition for an extended period of time, or where its employees knew the sidewalks were icy, and did nothing. IHS provided reasonable care, which is all the law requires it to do.

For the reasons set forth herein, this court should enter summary judgment for the United States.

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