UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

WILLIAM GUNVILLE,	)	Civ. 11-3022-RAL
	)	
Plaintiff,	)	**PLAINTIFF'S MEMORANDUM**
	)	**IN OPPOSITION TO DEFENDANT'S**
-vs-	)	**MOTION FOR SUMMARY JUDGEMENT**
	)	
THE UNTIED STATES OF AMERICA,	)	
Defendant.	)	

The Plaintiff William Gunville, by and through his counsel Robert B. Anderson, submits this Memorandum in Opposition to the Defendant Motion for Summary Judgment. References to the Defendants Statement of Material Facts will be by "Defendant's STX". Reference to the Plaintiff's Response to the Defendants Statement of Material Facts will be by "Plaintiff's Response" and reference to the Plaintiff's Statement of Material Facts will be by "Plaintiff's STX" with reference to the numbered paragraphs refereed to.

INTRODUCTION

Plaintiff William Gunville ("Gunville") brought this action for personal injury pursuant to the Federal Tort Claims Act, 28 USC §2671. He brings this action seeking compensation for injuries he sustained as a result of a fall on ice directly in front of the main entrance of the then Indian Health Service Hospital ("IHS") in Eagle Butte, SD. The fall occurred on October 9, 2009. Gunville entered IHS for a medical check-up and to obtain a renewal on prescriptions at approximately 3:00 p.m. The day was misty and wet but not icy when he entered. He was in the hospital for a little more than an hour. When he left the hospital, also from the main entrance, conditions had turned to slippery ice or frozen sleet. Although he was wearing rubber soled boots his feet went out from under him as he walked down the main entrance and he fell landing on his back and hip.

Prior to Gunville's fall one of the grounds and maintenance employees of IHS determined that conditions presented a danger and that ice melt should be spread to ensure the safety of those using the facility. Rather than spreading the ice melt in front of the main entrance – where virtually everyone enters and exits the building – he began spreading the ice melt in the loading dock area and worked toward the most heavily traveled portion of the sidewalk. At the time Gunville fell no ice melt had been spread outside the main entrance of IHS. The employee in question was engaged in spreading the ice melt approximately 65 feet away in a less heavily traveled area when the fall occurred.

Because it is the duty of IHS to provide safe ingress and egress to the IHS facility, and because everyone knew that the most heavily traveled portion of the outdoor sidewalk was that located directly in front of the main entrance (where Gunville fell), the acts and omissions of the government and its employees create liability on their part. Summary Judgment as moved for by the Defendant should be denied.

SUMMARY JUDGMENT STANDARD

Gunville generally agrees with the Defendants recitation of the summary judgment standard in its memorandum. Defendant is entitled to summary judgment in its favor only if there are no genuine issues as to any material facts and it can meet its burden to show that that it's entitled to a judgment in its favor as a matter of law. See Fed. R. Civ. P.56.

Indeed there are few disputed facts as to the Plaintiff's assertion that the Defendant is liable. Those facts must be viewed in a light most favorable to the nonmoving party and the moving party has the burden of establishing entitlement to judgment as a matter of law. Plaintiff agrees that in order for the Defendant to prevail on its motion the record taken as a whole could

not lead a rational trier of fact to find for the nonmoving party. See Matsushita Elec. Indus. Co. v. Zentih Radio Corp., 475 US 574 (1986), at 587.

There are disputed facts in the records which create material issues of fact for resolution. Most importantly the application of those facts when viewed in a manner most favorable to the nonmoving party, as well as the application of those facts which are undisputed, require the court to deny Defendant's pending Motion.

FEDERAL TORT CLAIMS ACT

Gunville accepts the Defendant's comments on the application of the Federal Tort Claims Act.

FACTS

Gunville fell on an icy sidewalk in front of the main entrance to the then IHS facility in Eagle Butte, SD. Plaintiff's STX 1. The fall occurred on October 9, 2009 – not in the dead of winter but at a time when climatic conditions can be variable.

Gunville's fall occurred on a sidewalk area immediately in front of the main entrance to the IHS facility. Plaintiff's STX 1. All witnesses have agreed that everyone who goes into or out of the IHS facility would likely utilize that main entrance for ingress and egress.

Gunville entered the IHS facility at approximately 3:00 p.m. in order to renew a prescription and attend a necessary medical examination permitting him to do so. Defendant's STX 16.

The weather when Gunville entered was misty, wet and cool. However there is no indication that it was icy or that the sidewalk itself was icy. Plaintiff's STX 4.

Gunville remained in the facility for a little more than 1 hour. He attended his appointment, refilled his prescription and stopped to talk to his wife who works at the facility. Defendant's STX 18.

Steven Brown Wolf ("Brown Wolf") was on duty as a maintenance and grounds worker at the IHS facility on October 9, 2009. Defendant's STX 29, 31. He had been working on a furnace problem in a building across the parking lot from the main entrance of the IHS facility since approximately 1:00 p.m. Defendant's STX 31. Sometime around 4:00 p.m. he left that job and walked through the main entrance into the IHS facility. When he did so he noticed it was slippery and icy. Plaintiff's STX 13. He had described it as frozen sleet. Plaintiff's STX 12. This was different from the conditions he had noticed when he last walked through that area. He thought conditions were dangerous. Plaintiff's STX 13. No one told him to do anything but he realized the conditions were such that they required some remedial action. He obtained ice melt and began spreading it in the loading dock area some distance away from the main entrance. Plaintiff's STX 14, 16. He deliberately did not begin spreading the ice melt in the main entrance area although he had noted that area was icy and he was aware that everyone who came into the facility used that entrance. Plaintiff's STX 14, 16.

As Brown Wolf began spreading the ice melt Gunville came out the main entrance of the building to return to his vehicle. While Gunville was wearing rubber soled boots both feet went out from under him as he walked through the curb cutout which allowed wheelchair access to the main entrance of the facility. Plaintiff's STX 2, 3. Ice in that area caused him to slip and fall. Plaintiff's STX 7. Brown Wolf was about 65 ft. away from him when that happened. Defendant's STX 35. No ice melt had yet been spread in the area where Gunville fell and no

actions had been taken to deal with the icy conditions in the main entrance way nor had any warnings been given to people utilizing the facility. Plaintiff's Response 40.

Weather conditions and the conditions of the sidewalk had changed for the worse while Gunville was in the facility. This occurred without his knowledge. Plaintiff Response 10, Defendant's STX 21. This is confirmed by Brown Wolf's decision that conditions were dangerous in the main entry way and that something should be done to remediate the situation. Plaintiff's STX 13. It is clear that Brown Wolf's knowledge concerning the dangerous conditions in the main entryway was far superior to that of Gunvilles. Although making that decision, Brown Wolf chose not to apply the ice melt immediately in the main entry way but worked his way in that direction down one of the sidewalks which surrounded the IHS facility. Defendant's STX 38.

After getting up from the sidewalk Gunville drove to the school where his youngest son was waiting for him. Later that day he returned to the emergency room because of pain and other problems he was experiencing due to his fall.

Gunville at sometime after his fall, at the hospital facility, saw Brown Wolf. Gunville testified that Brown Wolf told him "I was a little late, wasn't I? Are you ok?" Plaintiff's STX 6. (Brown Wolf when asked about saying something to Gunville about being late and asked if he had any recollection of that Brown Wolf testified "not really". Brown Wolf Dep. P31:L4.) Therefore this is a disputed fact and creates a genuine issue of fact as to whether Brown Wolf made an admission against interest regarding his application of the ice melt.

ARGUMENT AND AUTHORITY

I. DEFENDANT'S ADMISSION AGAINST INTEREST IS A DISPUTED ISSUE OF FACT

Defendant's Motion for Summary Judgment should be denied due to the existence of disputed issues of material fact and primarily because when the settled laws apply to the facts defendant cannot prove that it is entitled to judgment in its favor as a matter of law. The parties do not dispute the weather changed on the afternoon of October 9, 2009 in such a way to necessitate ice melt for the safety those accessing the IHS facility. Further the parties do not dispute the manner in which the ice melt was spread. Specifically, the ice melt was not spread outside the main entrance of IHS where customers and patients come and go. Rather, Brown Wolf, the employee charged with the duty to create a safe way to enter and exit the building, chose to spread ice melt first by a loading dock area. IHS customers have no need to be near the loading docket area.

What is in dispute is the admission against interest Gunville heard Brown Wolf make. Specifically, Plaintiff heard Brown Wolf say, "I was a little late, wasn't I? Are you ok?" Gunville Dep. P10:L20-23; P11:L1-13; P12:L18-24; P14:L21-25 and P15:L5-25. Gunville heard Brown Wolf admit he was late in taking action in regard to his duty to maintain a safe entrance and exit to the IHS facility. Brown Wolf now does "not really" remember making the admission. Brown Wolf Dep. P31:L4. The existence of the factual dispute necessitates the taking of testimony and renders Summary Judgment of this matter inappropriate.

II. THE UNITED STATES BREACHED A LEGAL DUTY TO PLAINTIFF AND IS NEGLIGENT

Defendant's Motion for Summary Judgment should be denied because it is not entitled to judgment as a matter of law and factual issues exist regarding whether IHS took reasonable

action to protect the public accessing its facilities. While Gunville generally agrees with the Defendant's position regarding the duty a possessor of land owes an invitee, Gunville disagrees that no such duty existed in this case. Gunville argues Defendant did owe him a duty to keep its facility entrance safe. Brown Wolf admitted that his job was, in part, to create safe conditions for those utilizing the property. In fact Brown Wolf himself decided to put ice melt out: "because it had started to get slippery and that is what we do". Plaintiff's STX ¶13. Additionally, Gunville argues the action IHS took to keep the entrance safe was unreasonable, ineffective and as a result IHS breached its duty. As a result factual issues exist and the Defendant is not entitled to judgment as a matter of law.

A. DEFENDANT BRECHED ITS DUTY TO KEEP THE SIDEWALKS SAFE FOR PASSAGE

IHS has a duty to keep its property safe. This duty includes the obligation to warn of concealed, dangerous conditions known to it. *Luther v. City of Winner*, 674 N.W.2d 339, 347 (SD 2004) (citing Restatement Second Torts, 343). The liability of IHS for failure to keep its property safe, or failure to warn of the danger, is predicated upon its superior knowledge regarding the danger. *Mitchell v. Ankney*, 396 NW2d 312, 313 (SD 1986). The danger in this case, known to the Defendant, was a sidewalk covered in ice.

IHS had superior knowledge regarding the dangerous icy sidewalk at the entrance of its facility. Specifically, Brown Wolf admits he recognized the dangerous icy condition that existed on October 9, 2009 before the Plaintiff was injured. Defendant's STX 34, Plaintiff's STX 12, 13. In fact, Brown Wolf even took steps to protect IHS customers from the dangerous condition by spreading ice melt. However, the action Brown Wolf took as a result of his recognition of the dangerous icy condition was unreasonable, ineffective and did not keep customers such as Gunville safe. Upon recognition of the dangerous condition, Brown Wolf took action but

unfortunately he failed to take action in the principal area utilized by the public who were customers and patients at the IHS Hospital. Brown Wolf ignored the main entry area used by the public (and Gunville) for entry and exit. As a result, the main entry utilized by those individuals was left in a dangerous condition and ice covered, and Plaintiff's injury resulted. Plaintiff's STX 16.

The parties do not dispute the ice on the sidewalk formed while Gunville was in the hospital and that the icy conditions did not exist when he entered the hospital. Defendant's STX 21. The parties do not suggest Gunville should have known the temperature dropped such that ice formed while he was in the building. As a result, it is not possible for Gunville to have been aware of icy sidewalks before he was actually in the midst of the danger. The dangerously icy conditions were not obvious to Gunville until he was on the ice and he was injured before he could get himself to safety. Gunville had no ability to avoid the dangerous condition and did not appreciate the existence of the condition before it was too late. The actions Brown Wolf took as a result of his superior knowledge did not reasonably protect customers such as Gunville. Brown Wolf's actions did not keep the public passageway reasonably safe for pedestrian traffic and Brown Wolf made no attempt to warn the public of the danger he knew existed in the public passageway. As a result, of the Defendant's superior knowledge of the dangerous condition, it is not entitled to judgment as a matter of law. At the very least, factual issues exist regarding the nature of the ice and whether it was obvious and whether the action Brown Wolf took reasonably protected the public.

However, even when ignoring the duty to apply facts in a manner most favorable to the nonmoving party, the Defendant still owes Gunville a duty of care. Specifically, IHS is not relieved of the duty of reasonable care which it owes Gunville if, the dangerous condition will

cause physical harm despite its known and obvious nature. *Luther* at 347. As a result, even if the ice was "known and obvious" IHS is liable for Gunville's injury. Icy sidewalks cause physical harm to invitees regardless of whether the presence of the ice is "known and obvious." Maintaining a healthcare facility to provide services to the large number of people on the Cheyenne River Sioux Reservation who are entitled to those services creates in and of itself such liability. To hold otherwise would permit the Defendant USA to ignore the safety of those invites such as Gunville, and no legal rule in South Dakota permits that.

Brown Wolf recognized his duty to protect the public from the dangerous condition. However, the actions he took failed to protect the public from the dangerous condition. Brown Wolf testified at his deposition that he decided to put ice melt on the sidewalk. He testified, "it had started to get slippery and that is what we do." Plaintiff STX 13. However, his actions did not address the danger at the hospital entrance, an area which sees the highest public traffic. Rather, Brown Wolf took action to first address the danger near the loading docks – an area which the public presumably do not have significant access to – and then worked his way toward the main area which is the entrance used by almost everyone. Plaintiff's STX 14. Regardless of whether the condition was known and obvious, the Defendant owed Gunville a duty of care. IHS recognized that duty yet failed to take reasonable action to protect invitees, and more specifically Gunville, against the danger. As a result of the known danger ice causes and the unreasonable action taken by IHS to protect against that danger, Defendant is not entitled to judgment as a matter of law.

B. THE "NATURAL ACCUMULATION RULE" DOES NOT PROTECT DEFENDANT FROM LIABILITY

The Defendant cites *Buhdahl v. Gotdon & David Association* as the authority regarding the "natural accumulation rule." See. 323 N.W. 2d 853 (SD 1982). The Defendant argues the

Buhdahl holding limits winter-weather liability to those times when, a landowner causes the unnatural or artificial accumulation of ice and snow which result in injury. However, the facts at hand are distinguishable from *Budahl*. In *Budahl* the plaintiff was basing liability on the breach a city ordinance to clear the sidewalk. In this case, Gunville bases liability on IHS's behavior, IHS's established standard of care, and the duty of care IHS owes directly to the public.

Weather conditions can change rapidly. In South Dakota weather can change in the most dramatic ways making winter-weather risks known and obvious. However, South Dakota weather can also change in subtle ways such as a temperature drop, and thus create a dangerous condition that is not readily apparent. A temperature drop, which resulted in ice, is exactly what happened on October 9, 2009. The icy condition was not "well known to the invitees" and as a result IHS should have taken action to protect invitees such as Gunville. 62 Am. Jur. 2d Premises Liability 656. While Gunville agrees there is no evidence of an unnatural accumulation of ice that caused him to fall, there is evidence that IHS (through its employee) knew the condition existed. Gunville did not know the moisture accumulation turned to ice while he was in the IHS facility. However, Brown Wolf did know ice formed, and as a result a dangerous condition materialized yet he did not take reasonable action to address the same. Due to the fact the icy condition at the entrance of IHS was not known an obvious; the natural accumulation rule does not protect IHS from liability and Defendant is not entitled to judgment as a matter of law.

III. PLANTIFF DID NOT ASSUME THE RISK OF INJURY WHEN HE EXITED THE PUBLIC BUILDING AT THE MAIN ENTRANCE

Defendant's Motion for Summary Judgment should be denied because it is not entitled to judgment as a matter of law on the basis of an "assumption of the risk" theory. Gunville does not dispute the legal standard for an assumption of the risk as set forth by the Defendant. Specifically, to find Gunville assumed a risk, it must be shown that he (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 (SD 1997). However, the Defendant cannot show Gunville assumed any reasonable risk when he exited a public building at a public exit and proceeded to travel along a public passageway.

Gunville did not know the sidewalk was icy until he was on the ice and unable to protect himself from the hazard. Gunville was not aware of the temperature change while he was in the building. As a result, upon his exist, he had no reason to expect conditions to be different than they were when he entered the IHS facility. The Plaintiff did not appreciate the hazard until it was too late. He did not visually recognize the change from water to ice until he was unable to protect himself from danger. As a result of Gunville's inability to know of the risk, he could not appreciate the risk and accept the same and Defendant is not entitled to judgment as a matter of law based on this defense. Failure to establish any one of the elements of the assumption of risk defense is fatal. *Mack v. Kranz Farms, Inc.* 548 NW 2d 812, 814 (SD 1996). Further, if the Defendant is arguing that Gunville *should have known* the ice exists, a factual inquiry is necessary rendering summary judgment inappropriate. Whether Gunville should have known the ice existed will require inquiry into the physical appearance of the sidewalk, temperature and other factors that result in ice. The assumption of the risk issue is a classic question for the finder of fact under the circumstances which existed at the time Gunville fell.

IV. PLAINTIFF DID NOT LACK CARE FOR HIS OWN SAFETY WHEN HE EXITED THE PUBLIC BUILDING AT THE MAIN ENTRANCE

The icy condition outside IHS on October 9, 2009 when Gunville exited the facility was not apparent by observation. Gunville did not stand at the hospital exit, observe the icy condition and decide to proceed thus disregarding his own care. Rather, Gunville knew the ground was

wet. However, a wet sidewalk did not pose a threat when he left the IHS building any more than it did when he entered. Ice did not exist when Gunville entered IHS. Gunville's decision to proceed over a wet sidewalk does not equal a decision to proceed over an icy sidewalk. Gunville had no way to assess the danger or risk until he stepped upon the dangerous sidewalk. Had Brown Wolf started salting at the main entrance of the hospital in a place the public could see him or the salt, Defendant's argument would have merit. Defendant is not entitled to judgment as a matter law. As with the assumption of risk defense, the Arguments made by the government present a classic issue for the finder of fact.

CONCLUSION

Gunville does not expect that IHS can keep its premises absolutely clear of snow and ice each minute of every day and night. Rather, Gunville and the law expect IHS to remedy a dangerous condition known to it. The icy sidewalk that existed on October 9, 2009 that caused Gunville's injury was known to IHS. As a result of IHS's superior knowledge of the condition, its employee took action. Unfortunately, the action the employee took was not reasonably likely to protect IHS customers entering or exiting the property. Not only was the action not reasonably likely to make conditions safe, but the employee failed to warn the condition existed. Gunville did not know the condition existed until it was too late. He was unable to protect himself when he discovered ice existed. If IHS had properly reacted to its superior knowledge of the icy condition, Gunville's injury may not have happened. At the very least, Gunville would have been in a position to protect himself from the injury.

The Defendant is not entitled to judgment as a matter of law due to the existence of a duty to keep its property safe and due to the factual issues that exist. Materials facts exist

regarding Brown Wolf's admission against interest, whether the ice prevention methods were reasonable and whether the icy condition should have been known by Gunville.

For the reasons set forth herein, the Plaintiff respectfully requests this court deny the Defendant's Motion for Summary Judgment.

DATED this 27th day of March, 2013.

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BY: _____

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CERTIFICATE OF SERVICE

Robert B. Anderson of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 27 day of March, 2013, he either electronically filed or mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above captioned action to the following at his last known address:

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_____

ROBERT B. ANDERSON