UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

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| WILLIAM GUNVILLE,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Defendant. | Case: 3:11-CV-03022-RAL<br><br>**DEFENDANT'S MEMORANDUM IN REPLY 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 reply memorandum in support of its motion for summary judgment. The undisputed facts of this case warrant summary judgment because Gunville has failed to establish a duty, or that IHS breached a duty, and his claim for negligence fails if he fails to prove either element.

ARGUMENT

Neither party has evidence to show when, in the space of an hour on a misty day, wet sidewalks at the old Indian Health Service (IHS) hospital turned icy. The undisputed fact is that immediately upon finding the sidewalks had iced, IHS employee Steve Brown Wolf went directly to get ice melt from its location in the loading dock area,[1] went down the driveway and made his way

[1] The red line in the top photo of ECF 17-2 marks the driveway leading to the old emergency entrance/exit, and the loading dock is on the left (hospital) side of the bay.

to the front entrance, spreading the ice melt on the sidewalk before him. Gunville's whole negligence claim turns on the fact that Brown Wolf was 60 feet and one minute too late in preventing Gunville, who was exiting the building, from falling on a natural accumulation of ice on the bottom of the sidewalk. There is no dispute Brown Wolf was spreading ice melt at the time Gunville fell.

## I. IHS IS NOT LIABLE AS A MATTER OF LAW.

The only attack Gunville can make, because IHS immediately responded to the ice, is to attack the IHS employee's exercise of discretion in determining where he started spreading ice melt to get to the front entrance. However, at bottom, Gunville's claim is that IHS waited an unreasonable amount of time to treat the front entrance, a claim that is not even actionable in states like South Dakota that follow the natural accumulation rule[2]. McClendon v. McCall, 489 P.2d 756 (Okla.1971).

Brown Wolf decided to treat the sidewalks in front of the hospital building , spreading ice melt before him, as he walked outside with a bucket of ice melt on his way to treat the front entrance[3]. Gunville claims, without citing any legal authority for his position, that the only non-negligent choice was to start at the front entrance. However, neither the South Dakota legislature nor the South Dakota Supreme Court has chosen to micromanage the snow and

[2] The natural accumulation rule is set forth in Budahl v. Gordon & David Assoc., 323 N.W.2d 853, 855-56 (S.D.1982) (abutting property owner liable only if he causes an artificial or unnatural accumulation of ice or snow.)

[3] Gunville has not alleged or argued that Brown Wolf violated an IHS policy, instructions, IHS regulations or city ordinances that could arguably impose a different duty.

ice removal of private landowners in South Dakota by imposing a duty to remove a natural accumulation of snow or ice in a particular manner or order. There was no IHS policy or regulation that imposed such a requirement. Thus Gunville's claim fails as a matter of law for failure to establish a duty.

Furthermore, even if the natural accumulation rule did not apply, Brown Wolf's choice was reasonable and met the standard of reasonable and ordinary care, and therefore was not negligent as a matter of law. Brown Wolf did not "ignore" the front entrance as Gunville claims; he just took a different, and arguably, more logical, way to reach it. He did not "first address the danger near the loading dock" before the front entrance. The loading dock is where the ice melt was stored. Brown Wolf's testimony is that he walked from the loading dock down the driveway and started spreading ice melt on the sidewalk where the blue X is marked on Exhibit 3 (ECF 17-3), in order to make his way to the front entrance. ECF 22-3. P. 9 ll. 10-11.

In order to do as Gunville suggests, Brown Wolf would have had to walk from the loading dock, either through the hospital building (or walk the same route through the front parking lot parallel to the sidewalks he treated), with a full bucket of ice melt, and leaving all the sidewalks in front of the parking area untreated, in order to begin salting at the front entrance sidewalk. Brown Wolf's decision to treat 60 feet of sidewalk as he walked to the front entrance was a reasonable one, and the undisputed testimony establishes there was only a difference of one minute in the choice he made. Gunville's fall was within the short window of time it would have taken Brown Wolf to get 60 feet

to reach him with the ice melt. No landowner can treat every inch of a natural accumulation at the same instant in time. The legal standard for premises liability is negligence (breach of duty of reasonable and ordinary care) not strict liability (perfect care). Mitchell v. Ankney, 396 N.W. 2d 312, 313 (S.D.1986).

In its memorandum decision in Margaret Phillips v. United States, Civ. 99-4130 (D.S.D. March 30, 2001), the court found that the post office met the standard of reasonable care by spreading sand on icy steps at worst a few hours before the plaintiff fell, and at best, within the same hour. In this case, the time span between Brown Wolf's discovery of the ice and Gunville's fall was well within an hour, in fact, in the neighborhood of ten minutes. Brown Wolf was actually in the process of treating the sidewalks working toward the front entrance when Gunville fell. "A proprietor's duty does not compel perfection, nor must he render accidents impossible." Id. at p. 7, quoting Camp v. J.H. Kirkpatrick Co., 250 S.W. 2d 413, 417 (Texas App. 1952).

Gunville cannot and does not claim that IHS unnaturally created the icy condition of the sidewalk. *See* Budahl, 323 N.W.2d at 855-56. *Cf.*, Chadwick v. Barba Lou, Inc., 431 N.E.2d 660 (Ohio1982). Gunville makes a bare claim that the natural accumulation rule in Budahl does not apply. But the cases Gunville cites or provides in supplementary authority-- Budahl, Sauer v. United States, Civ. 04-1021 (D.S.D. 2006) and Pond v. United States, Civ. 07-5058 (D.S.D. 2010)—all support the continued viability of the natural accumulation rule.

In Budhal, while the defendant ultimately was determined not liable because it was the city's responsibility to clear the sidewalks, the case was nonetheless remanded to determine if the defendant was nonetheless liable for causing an unnatural accumulation of ice from a dripping overhang. In Sauer, the court applied the natural accumulation rule and determined that if the ice that plaintiff slipped on was caused by the natural accumulation and formation of ice under wet snow, the defendant cannot be held liable. In Pond, the court again applied the natural accumulation rule, but found that a separate duty of care was created by the defendant school's maintenance policies and directions to the maintenance crew; the crew had taken no steps to remove the snow and ice that had occurred a day earlier, possibly in violation of the policy. There is no such policy in this case (nor was there any delay in treating the sidewalks).

Gunville claims that summary judgment is inappropriate because there is a disputed material fact, i.e, that Brown Wolf made an admission that he was "a little late". Brown Wolf testified he does not really remember making that statement.[4].

[4] Gunville, in Plaintiff's SMF 6, glosses over the timing of the statement, allegedly encountering Brown Wolf sometime after 6 p.m. while he was being wheeled back to the ER... after being X-rayed. Dep. p. 42-43. **Exhibit 1**. This would have been after he fell, picked up his son at the school, drove back and picked up his wife at 4:30 p.m., attended the school event, and came back to the hospital. The emergency room record shows Gunville arrived at the ER at 6 p.m. and was discharged at 7:10 p.m. **Exhibit 2**. Brown Wolf testified his normal work day ended at 5 p.m. and his work time sheet shows he did not work overtime on October 9, 2009. **Exhibits 3** and **4**. Both the ER record and time sheet were provided in discovery. No evidence supports Gunville's apparent allegation that Brown Wolf either "hung around" the hospital or came back after work during Gunville's time in the ER. Unsupported self-serving allegations are insufficient to establish a genuine issue of material fact. Smith

Thus, the only reasonable inference that can be implied in Gunville's favor is that Brown Wolf does not recall making the statement. "An assertion that a party does not recall an event does not itself create a question of material fact about whether the event did, in fact, occur." Bosley v. Cargill Meat Solutions, Corp., 705 F.3d 777, 782 (8th Cir. 2013)(citing To v. U.S. Bancorp, 651 F.3d 888, 892 n. 2 (8th Cir. 2011)).

In any event, the claimed "admission" does not create an issue of material fact sufficient to prevent summary judgment. It is undisputed that Gunville reached the slope of the curb cut a minute before Brown Wolf reached that part of the sidewalk with ice melt.[5] Even if it were true that Brown Wolf made the statement, it is not an admission of liability, and at best, would only be acknowledgment that Brown Wolf arrived "a little late." It also fails as an admission, because in a natural accumulation jurisdiction, a negligence action by a business invitee will not lie where the sole negligence asserted is a failure for an unreasonable time to remove ice or snow. *See* McClendon v. McCall, 489 P.2d 756 (Okla.1971).

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v. International Paper Co., 523 F.3d 845,848 (8th Cir.2008). Rather, plaintiff must "point to evidence in the record sufficient to raise a genuine issue for trial." Jeseritz v. Potter, 282 F.3dd at 546 (quoting Mathews v. Trilogy Comm., Inc., 143 F.3d 1160, 1164 (8th Cir. 1998).

[5] Brown Wolf testified that it would have taken him one minute spreading ice melt to reach Gunville from where he was when he spotted Gunville on the ground, which, looking at ECF 17-3, appears a reasonable estimate. His testimony that it took him 15 to 20 minutes to finish spreading ice melt is not inconsistent; it was in response to a question, which was objected to, that contained no points of reference, e.g., how much ground was covered in that time. Regardless, Brown Wolf's decision to treat some sidewalks rather than no sidewalks, to get to the front entrance was a reasonable exercise of judgment.

Further, if Brown Wolf arrived "a little late," it was a little late to prevent Gunville from falling. IHS was not under a legal duty to prevent Gunville from falling. A landowner is held to the duty of reasonable and ordinary care of the premises; it is not the absolute insurer of a particular visitor's safety. Mitchell, 396 N.W.2d at 315. Thus the statement allegedly made is neither an admission nor material, and cannot bar summary judgment.

Gunville tries to circumnavigate the natural accumulation rule by now claiming that "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. His argument fails to create a genuine issue of material fact because IHS did, in fact, take immediate action to protect invitees by spreading ice melt.

The argument also fails because even if the natural accumulation rule would not apply, a landowner is not liable for injuries from dangers that are obvious[6] "or reasonably apparent" to the person injured. Jones v. Kartar Plaza Ltd., 488 N.W.2d 428, 429-30 (S.D.1992). Gunville's own deposition testimony establishes the ice was obvious or reasonably apparent. Gunville only made one trip down the front entrance sidewalk to the parking lot, and he testified that the whole sidewalk was icy and that the only difference between where he fell and the ice all the way up the sidewalk was the incline from the

[6]The legal test of whether a condition is obvious is not subjective, but objective. "'Obvious' means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of visitor, exercising ordinary perception, intelligence, and judgment." Mitchell, 396 N.W.2d at 315. Gunville's was the only reported fall that day, and the ice was apparent to Brown Wolf and the only other witness to the condition of the sidewalk, Nancy West, who testified she could see there was ice on the sidewalk. **Exhibit 5**.

handicap curb ramp. *See* ECF 17-4, Page ID Nos. 107; 111; 112 at Ll. 13-23. Although his attorney claims the icy condition of the sidewalk was not obvious to Gunville, his client testified ice covered the entire sidewalk. Gunville can claim no better version of the facts than his own testimony on a subject that he knows as a matter of fact. Hoy v. Country Pride Co-op, Inc., 2012 WL 1090423 *6 (D.S.D. March 30, 2012).

Regardless, the fact that a landlord discovers a natural accumulation of ice has created a potential hazard a matter of minutes before an invitee does not give the landowner superior knowledge. It just gives the landowner knowledge first. Gunville has no evidence anyone at IHS other than Brown Wolf knew the sidewalks were icy or that IHS waited an unreasonable amount of time to treat the ice; 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.

Even if the court should accept Gunville's claims that the natural accumulation rule does not apply, that the ice was not obvious to him or any reasonable person, and that IHS had superior knowledge of the icy conditions (by ten minutes), IHS nevertheless satisfied a landowner's duty of reasonable care by immediately treating the sidewalks. The court, as finder of fact, can use its own experience in noting that private landowners in South Dakota treat their icy sidewalks rather than warning people to beware of them. When questioned at deposition regarding his failure to warn claim, Gunville's only suggestion was to put up orange warning signs on the sidewalks until the ice melt takes hold. Thus he too presumes that a landowner will treat icy

sidewalks first, and then warn they might still be icy. The undisputed facts show IHS met a landowner's duty of ordinary and reasonable care.

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

The court need not reach the assumption of the risk defense unless it finds there is a question as to whether the government was negligent that would preclude summary judgment. In that event, Gunville still cannot recover because 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).

Gunville knew the sidewalk was slippery as he exited the building. He testified the whole sidewalk was icy and there was ice all the way up the sidewalk, so according to his testimony, there would have been no point when he exited the building when he did not have knowledge ice was there. He nevertheless proceeded all the way down the sidewalk to a familiar slope, and lost his footing there.

While Gunville argues that there should be an inquiry into the appearance of the sidewalk, temperature and other factors that result in ice, he

has produced no discovery in regard to those matters, and has identified no expert to offer an opinion on them. There are only three people who know the appearance and condition of the sidewalk at the time in question, Gunville, Brown Wolf, and Nancy West, and all of them were deposed. Both Brown Wolf and West testified they saw the ice, and Gunville, who only went down the untreated sidewalk once, testified the sidewalk was icy from the top of it to the bottom of it where he fell.

## III. PLAINTIFF'S CLAIM WOULD BE BARRED BY DOCTRINE OF CONTRIBUTORY NEGLIGENCE.

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. As previously pointed out, Gunville clearly comprehended the risk and foreseeability of harm from falling on a surface he testified was icy from top to bottom, and took no precautions for his own safety. He wore the same boots he was wearing all day, when it was merely misting. He did not step off the icy sidewalk but just proceeded down it to an incline at the bottom of the sidewalk that he knew was there and that he could have avoided by angling his direction or stepping to the side.

## CONCLUSION

It was misting all day on October 9, 2009. Neither party can prove with certainty when, within the span of the hour between 3 and 4 p.m., the sidewalks in front of the former IHS hospital went from being wet to being icy. It is undisputed that IHS employee Steve Brown Wolf discovered the sidewalks were getting icy sometime after 4 p.m. and went directly to get ice melt and

began treating the sidewalks in the front of the building, moving toward the front entrance. There was a span of no more than 10 minutes from the time he discovered the wet sidewalks had iced and the time Gunville fell. It is undisputed that Brown Wolf was in the process of spreading ice melt when Gunville fell a few feet away. While it is unfortunate Gunville fell, as a matter of law, IHS was not negligent.

IHS cannot be held liable for injuries caused by a natural accumulation of ice on its sidewalk. Nonetheless, IHS acted immediately and reasonably in responding to it. While Gunville attempts to create a dispute of material fact through conjecture and speculation, any dispute he attempts to create suggests a legal duty of perfect care. The undisputed facts show that the IHS met a landowner's duty of ordinary and reasonable care in its immediate and reasonable response to the sudden and natural accumulation of ice.

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

Date: April 16, 2013.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies she served upon the plaintiff a true and correct copy of the foregoing reply and exhibits by e-filing on the court's CM/ECF system on April 16, 2013.

/s/*Jan L. Holmgren*