**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT, LAW DIVISION**

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| Sabina Schleiss,<br><br>Plaintiff,<br><br>v.<br><br>Andersonville West Townhomes Owners Association, an Illinois corporation; Wesley Realty Group, Incorporated, an Illinois corporation, and Urban Outdoor Spaces a/k/a The Woodlands,<br><br>Defendants. | ) | No. 19 L 3675 |

**MEMORANDUM OPINION AND ORDER**

Summary judgment should be granted only if there exists no question of material fact. In this close case, the proximity of a patch of ice to a gutter downspout and other facts create an issue of material fact as to whether the ice was an unnatural accumulation. Similarly, testimony from residents and the plaintiff's expert create an issue of material fact as to whether an ice removal contractor spread salt prior to the plaintiff slipping on the ice, and the contractor's own testimony creates an issue of material fact as to whether he was contractually obligated to do so. The defendants' summary judgment motions are, therefore, denied.

Facts

On September 11, 2019, Sabina Schleiss filed a five-count complaint relating to injuries suffered after she slipped and fell on ice on January 23, 2019. The ice was located on the shared driveway of 5350 North Damen Avenue, a property commonly known as Andersonville West Townhomes. Andersonville West Townhomes Owners Association owned the property, while Wesley Realty Group managed the property. Schleiss's complaint asserts premises liability claims against the Association and Wesley, as well as negligence counts against the Association, Wesley, and Urban Outdoor Spaces, the contractor responsible for snow and ice removal at the property. Urban is also known as The Woodlands Outdoor Spaces. After the case proceeded to discovery, the parties deposed Schleiss, residents Elizabeth Luxem, Kelly Mulligan, Carly Lapin, and Denny Watkins, Association president, Heather Watkins, former Wesley employee, Nicole Palmer, and Urban president and sole employee, Alfredo Sanchez.

Pending before this court are two summary judgment motions: one brought by the Association and Wesley jointly, and the other brought by Urban. Both motions have been fully briefed. Schleiss additionally filed two supplemental responses including the expert witness testimony of Gerald Sobczak and Kenneth Boegeman, both of whom the parties deposed.

Schleiss arrived at the site at approximately 4:15 or 4:30 p.m. to walk Luxem's dog. Schleiss did not live at the Andersonville West Townhomes. It is undisputed that Schleiss was a business invitee. After leaving Luxem's residence at approximately 5:00 p.m., Schleiss realized that she had inadvertently taken one of Luxem's gloves and attempted to reenter the residence through the garage door in order to return the glove. As she walked up the driveway, Schleiss slipped on a patch of ice located near a gutter downspout that ran down the side of the garage and emptied onto the driveway. The gutter downspout was one of several at Andersonville West that were designed to transfer water from the roof of the townhomes to the driveway. The driveway sloped towards a drain in the center, although the asphalt surrounding the drain had broken up.

Mulligan was home at the time of Schleiss's fall and came outside to help. Mulligan testified in her deposition that Schleiss was seated just in front of a patch of ice near the gutter downspout and between the downspout and drain. Luxem also testified that she could guarantee there was ice on the driveway, that it was normal to have ice on the driveway during the winter, and that she had personally observed ice near the downspouts. Sobczak testified within a reasonable degree of professional certainty that the ice patch was caused by the downspout and the broken up asphalt near the drain. Specifically, Sobczak opined that snow on the roof had melted, travelled down the downspout, and refroze on the driveway surface where the broken up asphalt prevented it from reaching the drain. Boegeman testified that Urban insufficiently cleared and treated the driveway. The experts relied in part on weather reports from the day of Schleiss's fall, photographs of the driveway taken the following day, and e-mail exchanges among Association members regarding the condition of the driveway and Urban's performance of the contract. Daniel Kelber, a resident, sent one of the e-mails on January 24, 2019, that stated, "Here's the strange thing. They were here yesterday plowing the driveway. But they did a terrible job and didn't put down salt." Resident Margot Murvay also sent an e-mail two months prior to Schleiss's injury that stated:

> I'm wondering if we should look at our snow removal contract? I'm assuming we didn't get enough snow to warrant a visit, but the driveway and walkways are extremely icy. It makes me not only concerned for us, but for my dog walker and others using the sidewalks.

Prior to Schleiss's fall, Wesley had solicited bids on the Association's behalf for snow and ice removal services, and the Association directed Wesley to enter into

a contract with defendant, Urban Outdoor Spaces, then known as The Woodlands. The contract provided that Urban would clear snow and apply salt to the driveway "as soon as possible" after two inches or greater of snowfall were measured in downtown Chicago. The contract listed prices of $420 to remove snow and apply salt and $230 for salt application only. These services were also available upon the Association's request when snowfall was less than two inches. The relevant terms of the contract are depicted below:

**Article 1: Work Description :**
Plow garage entrances pulling all the snow by curb, all sidewalks and entrances, alley by garbage containers

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| **Article 2 Contract price** | **$ 420** | **Includes salt** |
| **Salt application only** | **$ 230** | |
| For snow fall of 2" to 5" | Original price | |
| For snow fall of 6" to 8" | 25% over original price | |
| For snow fall of 9 to 11" | 50% over original price | |
| For snow fall over 12" | will be cleaned 2 times and will be billed accordingly | |

**Service Specifications:**

1. Upon 2" or greater, as measured by downtown Chicago snow fall measurements.(or if requested under 2") Contractor will plow parking lot/alley/ drives, clear sidewalks, stairs, (porches if applicable). Porches will be cleared 2'-3" wide walk. As soon as possible after stops snowing. The contractor will not be held accountable for removal of snow from parking spaces if automobiles are not removed and will not be responsible to come back to clean said spaces.
   Need specific time to move cars.Time _____ 3-5 hour time frame. Driveways and alleys will be cleared plowing snow to both sides if no place to put the snow. Contractor will not be responsible for clearing front of the doors. Doors could be cleared for additional charges
2. Contractor has recommended the use of deicing or salt products to melt ice. Contractor will not be responsible for deicing, scraping. Additional charges will apply if contractor has to address the same.

Weather reports and witness testimony indicate that a mixture of snow and rain fell on the day of Schleiss's accident. Schleiss has not argued that the snowfall was greater than two inches. Further, it is undisputed that Urban did not receive a request to clear snow or apply salt on the date in question. Alfredo Sanchez, Urban's president and sole employee, testified, however, that he occasionally spread salt at the property on his own initiative, without request from the Association. The relevant portions of his deposition testimony are provided below:

Q: Did you ever provide salting to the Andersonville group at 5350 North Damen due to a storm or rainstorm where the temperature dropped below freezing?
A: A few times, yes, I have. When they—when they announce that there will be rain and it will freeze, I do.
Q: Okay. But that's something they have to request to you?
A: We have no specifics on who is the one deciding to—for this time to do it.
Q: Okay. So there have been times prior to January 23rd, 2019, where either Wesley Realty Group or you decided to provide salt where it was raining and the temperature dropped below freezing, which created a potential icing situation; is that true?
A: Yes.

Q: Okay. And when those times occurred, you don't know if it was you taking the initiative to provide the salt or Wesley calling you asking you to provide the salt, correct?
A: Right. It could be either.

* * *

Q: And there are times that you go to your client's premises to apply salt without being called because you're worried about freezing ice on the ground, correct?
A: If they have the contract to salt, yes. If not, I don't.
Q: Okay. 5350 North Damen had it in the contract to salt, correct?
A: Yes.

The weather reports and witness testimony show that it was not precipitating at the time of Schleiss's fall. Temperatures dropped from slightly above freezing early in the day to slightly below freezing prior to Schleiss's fall. Urban Outdoor billed the Association for salting on the day of Schleiss's injury, but the invoice did not specify what time the driveway was salted, and Sanchez could not recall in his deposition whether it was prior to Schleiss's fall.

Analysis

The Code of Civil Procedure authorizes the issuance of summary judgment "if the pleadings, depositions, 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." 735 ILCS 5/2-1005. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002). A plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Id.*

A defendant moving for summary judgment may disprove a plaintiff's case by showing that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action; this is the so-called "*Celotex* test." *See Celotex Corp. v. Catrett*,

477 U.S. 317, 323 (1986), *followed Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. A court should grant summary judgment on a *Celotex*-style motion only if the record indicates the plaintiff had extensive opportunities to establish his or her case but failed in any way to demonstrate he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33. Both of the instant motions are *Celotex*-style motions.

The Association and Wesley argue that they are entitled to summary judgment because they had no duty to remove natural accumulations of snow and ice from the driveway, and there is no evidence to show that the patch of ice on which Schleiss slipped was an unnatural accumulation. A property owner has no common law duty to remove natural accumulations of snow and ice because "it is unrealistic to expect property owners to keep all areas where people may walk clear from ice and snow at all times during the winter months." *Ordman v. Dacon Mgmt. Corp.*, 261 Ill. App. 3d 275, 281 (3d Dist. 1994); *see also Allen v. Cam Girls, LLC*, 2017 IL App (1st) 163340, ¶ 29; *McBride v. Taxman Corp.*, 327 Ill. App. 3d 992, 996 (1st Dist. 2002). A plaintiff in a slip-and-fall case involving snow and ice must, therefore, show that the accumulation of snow and ice was unnatural and that the property owner had actual or constructive notice of the condition. *See Hornacek v. 5th Ave. Prop. Mgmt.*, 2011 IL App (1st) 103502, ¶ 29.

In support of their motion, the Association and Wesley rely on *Kasper v. McGill Mgmt.*, 2019 IL App (1st) 181204. In that case, Kasper sued his homeowner's association after slipping on ice on a sidewalk outside his townhome. *Kasper*, 2019 IL App (1st) 181204, ¶ 1. Kasper testified that he had previously witnessed water exiting downspouts on a nearby slab of concrete, which then ran off onto the lawn and the sidewalk on which he slipped. *Id.*, ¶ 14. In affirming the circuit court's grant of summary judgment for the homeowners association, the appellate court found that Kasper had failed to show that the accumulation of ice was unnatural. *Id.*, ¶¶ 34, 42.

In this case, Schleiss testified that the ice patch she slipped on was approximately the size of two basketballs. The area in which she fell, as she and Mulligan identified, is further away from the downspout than the combined diameters of two basketballs. It is, therefore, undisputed that the ice patch was not continuous with ice directly beneath the downspout. This fact is confirmed by the photographic evidence and lends support to the Association and Wesley's reliance on *Kasper*, in which the plaintiff had no evidence linking the isolated ice patch he slipped on to the downspouts where it had allegedly originated on the day of his fall. *See id.*, ¶ 29 ("Plaintiff . . . did not see any evidence of runoff from the downspout on the day of his fall[.] There was no sign of water flowing from the downspout to the sidewalk.").

*Kasper* is, however, distinguishable in at least two important respects. First, the physical space between the downspouts and ice patch in *Kasper* appears to have been significantly greater than that between the downspout and ice patch here. *See id.*, ¶¶ 14, 29. To reach the sidewalk on which Kasper slipped, water leaving the downspout would have had to travel down the slab and across a strip of lawn. *Id.* As a matter of common sense, that proposition is far less probable than water refreezing after flowing mere feet away, as Schleiss has alleged. *Cf. id.* Second, unlike Kasper, Schleiss has provided evidence linking the patch of ice she slipped on to the downspout on the day of her fall. *Cf. id.*, ¶ 29. Not only was the patch of ice more proximate to the downspout than in *Kasper*, Mulligan testified that it was located between the downspout and the drain. The record also establishes that the temperature dropped from above freezing to below freezing prior to Schleiss's fall, making it plausible that snow could melt on the roof, travel through the downspout, and refreeze on the driveway. Moreover, Schleiss has offered expert testimony opining within a reasonable degree of professional certainty that the ice she slipped on originated from the downspout, and was slowed or prevented from reaching the drain by the ice accumulation caused by the broken up asphalt. The *Kasper* court explicitly relied on the absence of such expert testimony in reaching its conclusion. *See id.* The plaintiff in the other case relied on by the Association and Wesley also failed to provide expert evidence linking the ice she fell on to icicles formed under allegedly faulty gutters. *See Cole v. Paper St. Grp., LLC*, 2018 IL App (1st) 180474, ¶ 47. While the Association and Wesley rightly assert that precipitation on the day of Schleiss's fall permits a reasonable inference that the ice patch was a natural accumulation, the facts also permit other reasonable inferences that preclude summary judgment. *See Destiny Health*, 2015 IL App (1st) 142530, ¶ 20.

The Association and Wesley additionally argue that there is no evidence that they had notice of the icy condition. To establish liability in a premises liability case, a plaintiff must establish actual or constructive notice of the dangerous condition. *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468 (1976). Illinois courts have held that if a defendant created the dangerous condition at issue, the defendant's notice of the condition is irrelevant. *Bernal v. City of Hoopeston*, 307 Ill. App. 3d 766, 772 (4th Dist. 1999) ("when an affirmative act of a [defendant] causes a dangerous condition, no actual or constructive notice of said condition is required."). All the plaintiff must prove is that the defendant negligently created the dangerous condition on its premises. *Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712, 715 (4th Dist. 1998). Regardless of whether the Association and Wesley created the dangerous condition in this case, the record contains sufficient evidence to find actual or constructive notice. Association member Luxem testified that she had personally observed ice under the downspout, and fellow Association member Murvay had emailed the other members two months prior to Schleiss's fall expressing concern over the "extremely icy" driveway, and the danger it posed to her dog walker, who also happened to be Schleiss's dog walker. A jury could,

therefore, reasonably find that the Association knew or should have known about the alleged unnatural accumulation of ice.[1]

For its part, Urban supports its summary judgment motion by arguing that there is no evidence that the ice patch "was an unnatural accumulation created or contributed to by Urban's negligently removing ice or snow from the premises." As a general proposition, a defendant who voluntarily undertakes to remove natural accumulations of snow and ice has a duty to third persons to exercise reasonable care. This duty is reflected in the Restatement (Second) of Torts:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
> (a) his failure to exercise reasonable care increases the risk of such harm, or
> (b) he has undertaken to perform a duty owed by the other to the third person, or
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1965). The Illinois Supreme Court formally adopted section 324A into Illinois common law in *Bell v. Hutsell*, 2011 IL 110724, ¶ 12, although other courts have relied on it previously. *See Eichler v. Plitt Theaters, Inc.*, 167 Ill. App. 3d 685 (1st Dist. 1988).

Illinois courts apply a two-part rule when considering negligence claims brought against snow and ice removal contractors. As explained:

> [I]f a defendant is required by contract to remove snow and ice, and the defendant makes *no* attempt to do so then it may be held liable for injuries resulting from natural accumulations of snow and ice; but if a defendant takes *some* measures to remove snow and ice, then it may only be held liable if its efforts are "defective[.]"

*Allen v. Cam Girls, LLC*, 2017 IL App (1st) 163340, ¶ 33 (emphasis in original) (citing *Eichler*, 167 Ill. App. 3d at 690-93). Removal efforts are defective if they create or aggravate an unnatural accumulation of snow or ice. *McBride v. Taxman Corp.*, 327 Ill. App. 3d 992, 996-97 (1st Dist. 2002) (listing cases). "[T]he mere sprinkling of salt, causing ice to melt although it may later refreeze, does not aggravate a natural condition so as to form a basis for liability on the part of the

[1] As the Association and Wesley filed a joint motion, this court does not separately consider each party's notice issue.

[defendant]." *Harkins v. System Parking, Inc.*, 186 Ill. App. 3d 869, 873 (1st Dist. 1989) (listing cases).

Consideration of Urban's contractor is necessary because a contractor's duty to remove snow and ice is defined by the scope of his contract. By its express terms, the contract required Urban to remove snow or salt if two or more inches of snow fall or if the Association makes a request. Schleiss has not argued that two or more inches of snow fell on the day she slipped and fell, and it is undisputed that Heather, as Association president, did not request Urban to spread salt. At first glance, it would therefore appear that Urban had no contractual duty to remove snow and ice on the day in question because neither requirement was triggered. *See Kasper*, 2019 IL App (1st) 181204, ¶ 14. However, Sanchez's deposition testimony indicated that he was routinely permitted to spread salt when conditions warranted. This fact, coupled with the weather conditions indicated in the record, creates a reasonable inference that Urban had a contractual obligation to treat the driveway on the day of Schleiss's fall.

In accordance with the doctrinal backdrop presented above, Schleiss was also required to show that Urban breached its obligation by either making no attempt to remove snow and ice, or creating or aggravating an unnatural accumulation. *See Allen*, 2017 IL App (1st) 163340, ¶ 33; *see also McBride*, 327 Ill. App. 3d at 996-97. The record contains no evidence that Urban created or aggravated the ice patch. There is no indication that Urban was involved in placing the downspout or breaking up of the asphalt, and there is no indication that a pile of snow plowed by Urban caused the ice patch. The record permits, however, a reasonable inference that Urban made no attempt to remove the ice prior to Schleiss's fall. While Urban can point to Sanchez's testimony and its invoice for salting services to show that it applied salt to the driveway on the day in question, Schleiss can point to her expert witness testimony to show the opposite. And while that expert testimony relies on the hearsay of Kelber—who stated in an e-mail that Urban "didn't apply salt"—experts are permitted to rely on hearsay or other inadmissible evidence provided it is reasonable for an expert in their field to do so. *See In re Commitment of Hooker*, 2012 IL App (2d) 101007, ¶ 51. In addition to the fact that Schleiss's experts also relied on admissible evidence in the record, Urban has provided no sound argument for why it would be unreasonable for Schleiss's experts to rely on Kelber's hearsay.

Conclusion

For the reasons presented above, it is ordered that:

1. Andersonville West Townhome Association and Wesley Realty Group's summary judgment motion is denied; and
2. Urban Outdoor Spaces' summary judgment motion is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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