IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

CARRIEL LOUAH,

Plaintiff, MEMORANDUM AND ORDER

v. 06-C-31-S

WENDI RIECHLING and,
STEVEN RIECHLING

Defendants.

Plaintiff Carriel Louah commenced this personal injury action against defendants Wendi and Steven Riechling seeking monetary relief. Plaintiff alleges she sustained injuries to her foot, ankle and leg when she slipped and fell on an unnatural accumulation of ice on defendants' driveway. Accordingly, plaintiff alleges defendants are liable for damages based on a theory of negligence. Jurisdiction is based on 28 U.S.C. § 1332(a)(1). The matter is presently before the Court on defendants' motion for summary judgment. The following facts are either undisputed or those most favorable to plaintiff.

BACKGROUND

Plaintiff Carriel Louah is defendant Wendi Riechling's daughter and defendant Steven Riechling's step-daughter. Plaintiff resides in Rockford, Illinois and defendants reside in Darlington, Wisconsin. On January 14, 2005 plaintiff traveled from Rockford,

Illinois to Darlington, Wisconsin to surprise defendant Wendi Riechling on her birthday. Defendants and their friends were celebrating defendant Wendi Riechling's birthday at Gill's Tavern (hereinafter Gill's) in Darlington, Wisconsin. Plaintiff arrived at Gill's between 9:30 p.m. and 10:00 p.m. that evening and she intended to spend the night at defendants' home.

However, plaintiff left Gill's shortly after arriving because she wanted to go to defendants' home where she could shower and change for the party. When plaintiff entered defendants' home she did not notice any areas of ice accumulation on their walkway. Additionally, plaintiff failed to notice any such areas upon her departure. After leaving defendants' home plaintiff traveled back to Gill's where she spent several hours of the evening. Additionally, during the course of the night plaintiff visited several other bars located in the Main Street area of Darlington, Wisconsin. However, plaintiff testified at her deposition that she consumed "no more than three beers altogether" during the course of the evening.

On one occasion when plaintiff left Gill's, she slipped on a ramp outside the tavern. Plaintiff testified the ramp was snowy and wet. However, plaintiff denies that she fell down when she slipped at Gill's. Additionally, defendant Steven Riechling testified at his deposition that he noticed snow on top of his vehicle when he left Gills' for the evening which demonstrates that it snowed on the night of January 14, 2005. However, neither

plaintiff nor defendants noticed any ice accumulation outside Gill's on the night of defendant Wendi Riechling's party.

Defendants' home is situated in such a manner so that a two-stall driveway abuts the front of their house and a long covered walkway extends along the left-hand side of the residence. Said walkway leads to the home's main and only usable entrance. Upon returning from Gill's on the night of January 14, 2005 plaintiff parked her car in the left-hand stall of the driveway which is the stall located closest to the covered walkway. Plaintiff admits she did not notice any ice on defendants' walkway when she entered their home at the end of the evening.

Plaintiff arose early on the morning of January 15, 2005 at approximately 5:00 a.m. At that time she needed to go outside to her vehicle to retrieve her bathroom supplies. However, while she was en route to her vehicle she slipped and fell on defendants' driveway just before it meets their walkway. When plaintiff fell she fell forward and her hands hit the ground which may have caused some bruising. Plaintiff tried to pull herself up by using her vehicle as a brace. However, her attempt was unsuccessful and she began screaming and calling for her mother defendant Wendi Riechling. Defendants came outside and helped plaintiff into their home. Plaintiff sustained a broken left ankle from her fall. While plaintiff does not recall observing any ice in the location where she fell the police officer and emergency medical personnel

who responded to the scene reported they needed to step over ice to lift plaintiff into the ambulance.

Plaintiff alleges water was allowed to "puddle" on defendants' driveway and form an unnatural accumulation of ice because defendants' eaves trough (also referred to as a downspout extension) was not connected to their downspout which plaintiff alleges is a defective condition. However, plaintiff admits she does not know whether defendants' eaves trough was in fact disconnected on the morning of her accident. While defendants admit their eaves trough is periodically removed during the summer months to collect rainwater for defendant Steven Riechling's garden they state in their affidavits that said eaves trough is never left on either their driveway or their walkway and it was not placed on either their driveway or their walkway at the time of plaintiff's accident. Alternatively, plaintiff argues there is another equally defective part of defendants' gutter system which caused the unnatural accumulation of ice. Plaintiff asserts a gutter located at the roof-line is rusty and it leaks onto the area of the walkway near where she slipped and fell.

Defendants' home and driveway are set into a hill. The uphill side of defendants' yard pitches toward their driveway and walkway area while the driveway itself pitches toward the street and downhill side of their yard. Defendant Steven Riechling stated in his affidavit that he poured their driveway himself and when he did

so he pitched it so water would flow toward the street and the downhill side of defendants' yard. Additionally, the purpose of defendants' eaves trough is to divert water onto the grass so water flows parallel to the driveway toward the street. However, defendant Steven Riechling testified that if the eaves trough is disconnected and his bucket is not placed underneath the downspout to collect water the water runs "down the driveway."

According to weather reports submitted by the parties temperatures were frigid on the day of plaintiff's accident as well as the day before her accident with said temperatures ranging from -9 degrees fahrenheit to 5 degrees fahrenheit. However, on January 12, 2005 (three days before plaintiff's accident) temperatures were considerably more mild. On said date the low temperature was 32 degrees fahrenheit and the high temperature was 35 degrees fahrenheit. Additionally, on January 13, 2005 (two days before plaintiff's accident) the high temperature reached 30 degrees fahrenheit. However, the low temperature on said date dropped to 6 degrees fahrenheit marking the conclusion of the mild January weather.

On August 23, 2005 (approximately seven months after plaintiff's accident) defendant Wendi Riechling sent a letter to plaintiff which stated in relevant part as follows: "Steve and I should have fixed that damn eaves [trough] years ago." Plaintiff filed this action on January 17, 2006.

MEMORANDUM

Defendants assert plaintiff cannot establish that their eaves trough was disconnected at the time of her accident. Additionally, defendants assert plaintiff does not possess any evidence which demonstrates: (1) that water puddled in their driveway, or (2) that their drainage system was defective. Accordingly, defendants argue plaintiff cannot meet her burden to prove that an artificial accumulation of ice existed which necessitates granting summary judgment in their favor.

Plaintiff asserts defendants actually created the dangerous icy condition on their driveway by removing their eaves trough. However, at a minimum plaintiff asserts defendants had constructive notice of said condition. Additionally, plaintiff asserts defendants are subject to special liability because of her status as an invitee. Further, plaintiff asserts genuine issues of material fact remain on the artificial accumulation issue. Accordingly, plaintiff argues defendants' motion for summary judgment should be denied.

A. Summary judgment standard of review

Summary judgment is appropriate where 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(c).

A fact is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Disputes over unnecessary or irrelevant facts will not preclude summary judgment. Id. Further, a factual issue is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the non-moving party. Id. A court's role in summary judgment is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249, 106 S.Ct. at 2511.

To determine whether there is a genuine issue of material fact for trial courts construe all facts in the light most favorable to the non-moving party. Heft v. Moore, 351 F.3d 278, 282 (7th Cir. 2003)(citation omitted). Additionally, a court draws all reasonable inferences in favor of that party. Id. However, the non-movant must set forth "specific facts showing that there is a genuine issue for trial" which requires more that "just speculation or conclusory statements." Id. at 283 (citations omitted).

B. Special liability because of plaintiff's invitee status

Plaintiff asserts a possessor of land "has a special liability to invitees." However, under Wisconsin law defendants are not subject to special liability simply because plaintiff was an invited guest.

In 1975, the Wisconsin Supreme Court abrogated the special immunities which had previously applied to both licensees and

invitees. Antoniewicz v. Reszcynski, 70 Wis.2d 836, 856, 236 N.W.2d 1, 11 (1975). The Court indicated that it was not merging the licensee and invitee categories together rather it was abolishing them as relevant legal distinctions. Id. at 858 n. 5, 236 N.W.2d at 12. Additionally, the Court held that "[t]he duty toward all persons who come upon property with the consent of the occupier will be that of ordinary care. By such standard of ordinary care, we mean the standard that is used in all other negligence cases in Wisconsin." Id. at 857, 236 N.W.2d at 11. Accordingly, pursuant to Wisconsin law defendants did not owe plaintiff a special heightened duty of care simply because of her status as an invited guest. Rather, the standard of care to which defendants must have conformed was that of ordinary care under the circumstances.

C. Constructive notice of dangerous icy condition

Plaintiff argues that evidence contained within the weather reports demonstrates that defendants had constructive notice of an icy condition for a period of time before her accident. Additionally, plaintiff argues that despite such notice defendants failed to salt or otherwise attend to such a condition. Plaintiff cites to the following cases in support of her constructive notice argument: May v. Skelley Oil Co., 83 Wis.2d 30, 264 N.W.2d 574 (1978), Strack v. Great Atl. & Pac. Tea Co., 35 Wis.2d 51, 150

N.W.2d 361 (1967), Kaufman v. State St. Ltd. P'ship., 187 Wis.2d 54, 522 N.W.2d 249 (Wis. Ct. App. 1994); Steinhorst v. H.C. Prange Co., 48 Wis.2d 679, 180 N.W.2d 525 (1970). However, these cases all involve application of Wisconsin's safe-place statute which imposes a duty upon employers to furnish safe places of employment for both their employees and their frequenters. *See* Wis. Stat. § 101.11. Accordingly, because it is undisputed that defendants' home does not serve as a place of employment Wisconsin's safe-place statute does not apply to the facts of this action.

D. Natural v. artificial accumulation of ice

Defendants assert plaintiff cannot establish that their eaves trough was disconnected at the time of her accident. Additionally, defendants assert plaintiff does not possess any evidence which demonstrates: (1) that water puddled in their driveway, or (2) that their drainage system was defective. Accordingly, defendants argue plaintiff cannot meet her burden of proving an artificial accumulation of ice existed which necessitates granting summary judgment in their favor. Plaintiff asserts genuine issues of material fact remain on the artificial accumulation issue which prevents the entry of summary judgment.

In Wisconsin, it is well-established that when ice or snow accumulates on a sidewalk abutting private property, said property owner "owes no duty to passers-by" either to clear said sidewalk or to scatter abrasive material thereon. Holschbach v. Washington

Park Manor, 2005 WI App 55, ¶ 10, 280 Wis.2d 264, 270, 694 N.W.2d 492, 495 (*citing* Corpron v. Safer Foods, Inc., 22 Wis.2d 478, 484, 126 N.W.2d 14 (1964)). However, a defendant may incur liability for artificial accumulations.[1] *See* Corpron, at 484, 126 N.W.2d at 17 (citations omitted). Whether an accumulation of ice constitutes a natural or an artificial condition is a question of law. Holschbach, at ¶ 10, 280 Wis.2d at 270, 694 N.W.2d at 495. (citation omitted).

For an accumulation of ice to be considered artificial there must be evidence presented which demonstrates: (1) that something man-made (such as a drainage system or a downspout) was defective; and (2) that such defect caused the icy condition. Gruber v. Vill. of North Fond du Lac, 2003 WI App 217, ¶ 18, 267 Wis.2d 368, 380, 671 N.W.2d 692, 697. However, where land is graded or structures are built in the usual and ordinary way and not for the purpose of

[1]In support of their motion for summary judgment defendants cite to numerous examples of Wisconsin case law which stand for the proposition that a defendant can only incur liability for artificial accumulations of ice. Additionally, said cases articulate what a plaintiff has to prove to establish such an artificial condition existed at the time of injury. However, the factual situations underlying these cases are not analogous to the one present in this action. All cases cited by defendants involve a plaintiff who slipped and fell on a public sidewalk abutting private property. In this action it is undisputed that plaintiff slipped and fell on a private driveway/walkway owned exclusively by defendants. However, the parties agree that the legal standards and principles articulated by the Wisconsin courts in all cases cited by defendants control the outcome of this action despite considerable factual distinctions. Accordingly, the Court will address and apply such standards and principles when ruling on defendants' motion for summary judgment.

accumulating and discharging water on a sidewalk, drainage which results only incidentally and is not caused by negligent maintenance is deemed natural and ordinary. Corpron, at 484, 126 N.W.2d at 17 (citations omitted). Additionally, where a man-made drainage system or downspout is properly working but water manages to "find[] its way from the rear of the building to a sidewalk" such accumulation is not considered artificial because while it was man-made it was not defective. Gruber, at ¶ 18, 267 Wis.2d at 380, 671 N.W.2d at 697-698 (*citing* Plasa v. Logan, 261 Wis. 640, 644-647, 53 N.W.2d 720 (1952)). Conversely, when a property owner by negligent omission (such as failing to properly repair a drainage system) allows water to accumulate where only a normal amount of water would be anticipated then an artificial condition exists. Sambs v. City of Brookfield, 66 Wis.2d 296, 306, 224 N.W.2d 582, 588 (1975).

As a preliminary matter, the Court must address the allegedly defective condition which is at issue in this action. Defendants served plaintiff with interrogatories in which they requested plaintiff "[i]dentify all facts known to you or your attorney which support the allegation in the [c]omplaint that defendants...were negligent and that such negligence was a cause of injury...." Plaintiff responded by objecting to the question stating it was a proper subject for deposition testimony. However, plaintiff indicated that she "personally observed the defective condition

complained of prior to and subsequent to the claimed occurrence." Accordingly, at her deposition plaintiff was asked to describe the defective condition she referred to in her interrogatory response. Plaintiff testified concerning the subject of defendants' eaves trough not being connected to their gutter system. This was the only allegedly defective condition plaintiff referred to during the course of her deposition testimony.

However, plaintiff identified "another equally defective part of [defendants'] gutter system" in her brief submitted in opposition to defendants' motion for summary judgment. Plaintiff argues that a gutter located at the roof-line is rusty and it leaks onto the area of the sidewalk/driveway near where she slipped and fell. In support of her argument plaintiff identified as evidence: (1) a portion of defendant Steven Riechling's deposition testimony; and (2) a photograph marked as exhibit 18 which was produced in connection with defendant Wendi Riechling's deposition. However, the Court reviewed the portion of deposition testimony cited by plaintiff and defendant Steven Riechling never testified that said portion of their gutter system was either rusty or leaking. Additionally, while the picture identified as exhibit 18 shows a gutter seam it does not establish that such seam is either "rusty" or "leaking."

A court is obligated to draw all reasonable inferences in favor of a non-moving party when it decides a motion for summary

judgment. Heft, at 282 (citation omitted). However, a court is not required to stretch existing evidence to reach conclusions or bolster arguments it could not otherwise support. Frost Nat. Bank v. Midwest Autohaus, Inc., 241 F.3d 862, 868 (7th Cir. 2001). The evidence submitted by plaintiff in support of her argument does not allow the Court to reach the conclusion that a gutter at the roof-line is defective because it is rusty and leaking. Accordingly, the Court finds the only allegedly defective condition at issue in this action is the one plaintiff referred to in both her interrogatory response and deposition testimony which is the allegedly disconnected eaves trough.

With the allegedly defective condition identified, the issues pertinent to the present motion are the following: (1) whether there is sufficient evidence to support a finding that defendants' gutter system was defective because their eaves trough was not connected to their downspout; and (2) whether plaintiff's injuries were caused by such a defective condition. The evidence is sufficient on both issues to survive this summary judgment challenge.

Concerning the first issue, plaintiff identifies defendant Wendi Riechling's August 23, 2005 letter as support for her position that defendants' gutter system was defective. In said letter defendant Wendi Riechling states that "Steve and I should have fixed that damn eaves [trough] years ago." Plaintiff asserts

this letter infers that defendants' gutter system was in disrepair at the time of her accident. This is a reasonable inference and the Court is required to draw all reasonable inferences in plaintiff's favor. Heft, at 282 (citation omitted).

Additionally, plaintiff was asked at her deposition to view a photograph marked as exhibit six and identify the area in which she slipped and fell. On said photograph (which was taken six days after plaintiff's accident) defendants' eaves trough is disconnected from their downspout. Plaintiff asserts said photograph establishes that defendants' eaves trough was disconnected at the time of her accident. While said photograph fails to conclusively establish that defendants' eaves trough was in fact disconnected at the time of plaintiff's accident one could reasonably infer that defendants would not remove their eaves trough six days later when their property was being photographed in connection with plaintiff's accident. This evidence is sufficient to create a fact issue concerning the defective condition of defendants' gutter system and precludes summary judgment.

Regarding the second issue, defendant Steven Riechling testified that when the eaves trough is disconnected and his bucket is not placed underneath the downspout to collect water the water runs "down the driveway." When such testimony is combined with information contained in the weather reports regarding the fluctuation in temperatures, there is sufficient evidence to create

a fact issue concerning whether the allegedly defective condition allowed water to accumulate and later freeze on defendants' driveway which caused plaintiff to slip and fall.

While defendants submitted evidence which could persuade a jury to find that a defective condition did not exist, a court's role in summary judgment is not to "weigh the evidence and determine the truth of the matter." Anderson, at 249, 106 S.Ct. at 2511. Accordingly, defendants are not entitled to prevail as a matter of law on summary judgment concerning whether the accumulation of ice on their driveway was a natural or artificial condition because genuine issues of material fact remain for trial on the underlying defective condition and causation issues.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is DENIED.

Entered this 11th day of July, 2006.

BY THE COURT

S/

JOHN C. SHABAZ
District Judge