2015 IL App (1st) 143368-U
No. 1-14-3368

THIRD DIVISION
December 30, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VALERIE METKE, Plaintiff-Appellant, v. THE HARLEM IRVING COMPANIES, INC., Defendant-Appellee,	)	Appeal from the Circuit Court of Cook County. No. 12 L 2661
THE HARLEM IRVING COMPANIES, INC., Third-Party Plaintiff-Cross-Appellant, v. CYBOR FIRE PROTECTION CO., Third-Party Defendant-Cross-Appellee.	)	The Honorable William Gomolinski, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court order granting defendant's and third-party defendant's motions for summary judgment reversed where the record contained genuine issues of material fact as to the circumstances of plaintiff's fall, which rendered summary judgment inappropriate.

¶ 2 Plaintiff Valerie Metke suffered injuries when she slipped while shopping at an outdoor shopping mall owned and operated by defendant and third-party plaintiff Harlem Irving Companies, Inc. (Harlem Irving). Metke subsequently filed a negligence action against Harlem Irving, seeking to recover damages for her injuries. Harlem Irving, in turn, filed a counterclaim for contribution against third-party defendant Cybor Fire Protection Company (Cybor), a business with which it had contracted to provide fire protection system maintenance at the mall. Both Harlem Irving and Cybor filed motions for summary judgment, which were granted by the circuit court. On appeal, Metke argues that the circuit court erred in granting Harlem Irving's and Cybor's motions for summary judgment because genuine issues of material fact exist, rendering summary judgment inappropriate. For the reasons set forth herein, we reverse the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On January 4, 2011, Metke was a patron of Willowbrook Town Center (Willowbrook), an outdoor shopping center owned by Harlem Irving. As she was navigating from one store to another, she observed a 13-inch wide accumulation of water or ice on the sidewalk. Although she attempted to traverse over the moisture present on the sidewalk, she fell and suffered a right distal tibia-fibula fracture. Metke subsequently filed a complaint, and an amendment thereto, against Harlem Irving advancing claims of negligence.[1] In pertinent part, Metke's amended complaint alleged:

[1] Metke's first amended complaint also contained a negligence count against Arctic Snow and Ice Control, Inc. (Arctic), the company with which Harlem Irving had a contract to provide snow plowing and ice removal at Willowbrook. Arctic also filed a motion for summary judgment, which Metke did not oppose and the circuit court ultimately granted. Arctic is not a party to this appeal.

"On or about January 4, 2011, while lawfully on the [Willowbrook] premises, near the Bed Bath and Beyond store, Plaintiff, VALERIE METKE, slipped and fell on an unnatural accumulation of snow and/or ice on the public walkway.

*** At the aforesaid time and place, and prior thereto, Defendant, THE HARLEM IRVING COMPANIES, INC., owed Plaintiff a duty to keep its premises free of unnatural accumulations of snow and ice.

*** Notwithstanding the aforesaid duty, Defendant, THE HARLEM IRVING COMPANIES, INC., through its agents and/or servants, created an unnatural accumulation of snow and/or ice on the public walkway.

*** As a direct and proximate result of the aforesaid negligence of Defendant, THE HARLEM IRVING COMPANIES, INC., Plaintiff, VALERIE METKE, sustained personal injury, has and will in the future sustain pain and suffering, has and will be kept from attending her ordinary affairs and duties, has and will in the future become obligated to pay sums of money for medical and hospital care and attention, has lost and will in the future lose financial gain that she otherwise would have acquired and has been diminished in her earning capacity."

¶ 5 In its response to Metke's negligence action, Harlem Irving only admitted to owing Metke the duties prescribed by Illinois law and denied breaching any of its duties. Moreover, Harlem Irving asserted a contributive fault affirmative defense. In pertinent part, Harlem Irving alleged that any damages that Metke sustained were "in whole or in part, caused by [her] own wrongful acts or omissions." Specifically, Harlem Irving alleged that Metke:

"(a) failed to observe her surroundings even though she knew, or should have known, that failure to do so posed a risk of injury; (b) failed to undertake reasonable caution while

walking even though she knew, or should have known, that failure to do so posed a risk of injury; (c) failed to protect herself from an alleged condition that was known to this plaintiff even though she knew, or should have know[n], that failure to do so posed a risk of injury; (d) failed to protect herself from an alleged condition that was open and obvious even though she knew, or should have known, that failure to do so posed a risk of injury; (e) failed to protect herself from an alleged condition that was a natural accumulation; (f) failed to wear the appropriate clothing and/or footwear; (g) failed to reasonab[ly] discover the alleged condition even though she knew, or should have known that failure to do so posed a risk of injury; (h) failed to exercise the care known to her to be necessary in the face of winter weather, even though she knew, or should have known of the general weather conditions prevalent in DuPage County, Illinois during January 2011 and on the day of the accident."

¶ 6 Harlem Irving also filed a third-party complaint for contribution against Cybor. In its third-party complaint, Harlem Irving alleged:

"On or about January 4, 2011 Defendant/Third-Party Plaintiff, [HARLEM IRVING], and Third-Party Defendant, [CYBOR], had entered into a contract whereby [CYBOR] was to conduct quarterly inspections of fire protection systems at the shopping center commonly known as Willowbrook Town Center located at or about Illinois Route 83 and Plainfield Road, Willowbrook, Illinois.

*** At all times relevant to Plaintiff's First Amended Complaint at law, Third-Party Defendant, [CYBOR], owed a duty to exercise ordinary care and caution in the performance of said fire protection services.

*** Notwithstanding said duty, at the time of the events alleged in Plaintiff's First Amended Complaint at Law, Third-Party Defendant, [CYBOR], was guilty of one or more of the following negligent acts and/or omissions while performing a quarterly inspection at the shopping center commonly known as Willowbrook Town Center located at or about Illinois Route 83 and Plainfield Road, Willowbrook, Illinois:

a. conducted a main drain test by opening a valve and discharging water to the side of the building;

b. failed to put up signs or cones to warn people that they were opening the valve and discharging water to the outside of the building;

c. failed to properly salt the area affected by the discharged water; a

d. allowed too much water to be discharged while conducting the main drain test;

e. failed to inspect the area where the water was discharged to determine if the condition was dangerous;

f. failed to determine the outside temperature prior to conducting the main drain test;

g. failed to notify anyone from [HARLEM IRVING] that ice may be an issue after conducting the main drain test.

*** The injuries allegedly sustained by Plaintiff, VALERIE METKE, were a direct and proximate result of one of the aforesaid negligent acts and/or omissions of Third-Party Defendant, [CYBOR].

*** If Defendant/Third-Party Plaintiff, [HARLEM IRVING] is adjudged liable to the Plaintiff, VALERIE METKE, in any amount whatsoever on account of damage to the Plaintiff, VALERIE METKE, then the Third-Party Defendant, [CYBOR], is liable to the

Defendant/Third-Party Plaintiff, [HARLEM IRVING] because the fault and conduct of Third-Party Defendant, [CYBOR] caused or contributed to the injuries sustained by the Plaintiff."

¶ 7 In its written response, Cybor admitted to having a contract[2] with Harlem Irving to conduct quarterly inspections of Willowbrook's fire protection systems, but denied performing its inspection duties in a negligent manner. Moreover, as an affirmative defense, Cybor alleged that Harlem Irving, itself, was negligent. Specifically, Cybor alleged that Harlem Irving "owed [Metke] a duty to keep its premises free of unnatural accumulations of snow and ice, and *** owed the Plaintiff the duty of exercising ordinary care in the performance of said snow plowing and ice removal." Notwithstanding that duty, Cybor alleged that Harlem Irving "was guilty of one or more of the following negligent acts and/or omissions:

a. Failed to exercise ordinary care in the plowing and/or removal of snow and ice, thereby creating an unnatural accumulation of ice and/or snow;

b. Unevenly spread salt, thereby creating an unnatural accumulation of ice;

c. Piled snow in an area adjacent to the public walkway when it knew, or should have known that the snow would melt, run onto the public walkway and refreeze."

¶ 8 After the relevant pleadings had been filed, the parties commenced discovery. During her deposition, Metke testified that on January 4, 2011, she drove to the Willowbrook shopping mall after she dropped her grandson off at school. Although it had snowed two days earlier, that day was clear with no precipitation. She indicated that she was a regular patron of the shopping mall and estimated that she shopped there approximately "every other month." The two stores that she frequented were Bed Bath & Beyond and Michaels. On that day, sometime around 10

[2] Although both Harlem Irving and Cybor admit to having a contractual business relationship, no copy of that contract appears in the record on appeal.

a.m., Metke had finished shopping at Bed Bath & Beyond and began walking toward Michaels, which was located "about two stores away." At the time, Metke was wearing suede moccasins with crepe soles and was carrying a purse. During her short walk to Michaels, Metke fell. She explained: "[T]here was this trickle of water running down the—whatever you want to call it of the sidewalk there, and I thought I could walk over it. There must have been ice or something underneath there and I slipped on it." She confirmed that the trickle "wasn't wide," estimating that it was approximately 13 inches in width, but explained that it ran the "whole length of that sidewalk." Metke indicated that she believed that the trickle of water was from the melting snow and explained that the sidewalk was "graded" and that the trickle was coming from the snow and "running toward the sewer." However, she acknowledged that her explanation for the source of the trickle was "speculation." Metke did not know how long the water was on the sidewalk before her fall, but acknowledged that the water was visible and that she cautiously intended to "walk over" rather than "walk in" the water. Metke explained that she was being cautious because she recognized the risk posed by the water and wanted to avoid injuring herself.

¶ 9 Immediately after her fall, Metke felt pain in her "right leg" and saw a "bone sticking up *** through her jeans." She was unable to pick herself off of the ground. A concerned customer called for help and paramedics arrived on scene approximately 5 to 10 minutes later. She was subsequently placed on a stretcher and transported to Hinsdale Hospital where she underwent surgery to repair her right ankle. Following the surgery, which required the use of a metal plate and screws to repair her ankle, Metke underwent months of physical therapy. Following therapy, Metke no longer required use of a wheel chair and was able to walk. However, she testified that her stamina noticeably decreased and that she could no longer actively play with her grandchildren.

¶ 10 Metke confirmed that she did not recall the exact temperature on the day of her fall, but indicated that "it couldn't have been freezing" because she would not have been walking around if it had been freezing. Metke also confirmed that she did not recall seeing any salt granules on the ground. She also admitted that there was an alternative route available to her that did not have any visible trickle on the ground, but indicated that she elected to take the most direct route, which contained the visible "trickle."

¶ 11 Dominick LoCasio, a Fire Inspector with Cybor, testified that he was responsible for inspecting the fire protection systems of Cybor's clients to ensure that they were in proper working order. He explained some fire systems are more intricate than others, but that the majority of the systems used by Cybor's clients are "typically the same." During his inspections of various fire systems, LoCasio testified that he would typically test control valves and alarm switches and perform main drain water pressure tests and waterflow alarm tests. In addition, he would also conduct visual examinations of sprinkler heads to ensure that they appeared to be in working order.

¶ 12 LoCasio acknowledged being familiar with the fire protection system at Willowbrook and indicated that he had personally conducted inspections of that system since 2010. He performed inspections at that site "four times a year" and confirmed that he conducted an inspection at that location on January 4, 2011. He recalled that he arrived sometime around 9 a.m. and estimated that the actual inspection itself took him "about four minutes." He explained that "[q]uarterly inspections are very quick." LoCasio did not recall if there was snow on the ground that day. He did, however, recall that it was "very cold" and that he had observed "some ice along the edg[es]" of the landscaped areas of the premises. During his inspection that day, LoCasio testified that he performed a "main drain test" and a "limited visual inspection." He

explained that during a limited visual inspection, he looks around to ensure that "nothing looks damaged inside the room, like no one's like messe[d] with any of the valves. Or you know, just kind of a brief once over of the system inside the-- in the riser room where the water comes to the building, just to make sure that everything looks like it's in normal condition." With respect to the main drain test, LoCasio explained "it's where you—there's a—there's a main control valve that's normally shut that essentially tests the City's incoming water pressure. We compare that to previous tests that we've done. The first test that we perform is an initial test, and then we use that as a bookmark. And as the years go by, we test—this is to see if there's any degradation in the system. If we're—if there's less pressure from previous years or the initial tests that we've done to make sure that every—they're getting the proper amount of water to the system." In order to make this determination, LoCasio indicated that he had to "fully" open the control valve and record the residual pressure and then shut down the valve to record the return pressure. He further explained that once the valve is opened, "water is discharged outside" of the building. Specifically, the system at Willowbrook Town Center discharges the water at the "grassy *** mulch area" that is between Bed Bath and Beyond and a jewelry store. He estimated that water is discharged for approximately 15 seconds during the main drain test and indicated that the amount of water discharged during that time "couldn't be more than 100 gallons."

¶ 13 LoCasio confirmed that he never put up any warning signs or cones to let pedestrians know that there would be water discharged because the "mulch normally soaks it up." LoCasio did, however, distribute "about a quarter [of a 50 pound] bag of salt" over the affected area. He testified that if he believed that there would be a big ice problem that he could not have treated himself, he would have notified someone from Harlem Irving to remedy the issue. Approximately 15 to 20 minutes after completing his testing and salting the area, however,

LoCasio recalled that he received a phone call from Stan Bouzoukis, his contact at Harlem Irving. He explained: "I received a call asking [about] discharging any water. I told him yes, you know, it's part of the testing. And I did let him know I did throw some salt down. But he wanted to make sure that I discharged—or to make sure that I thr[ew] some more salt down because apparently somebody may have f[allen]. So, of course, I was distraught about it. So I ran to the Kmart right across the street and bought a couple more bags, threw them anywhere" that "was affected by the water."

¶ 14 LoCasio testified that Harlem Irving did not have advance notice that he would be performing his quarterly inspection of its fire system on January 4, 2011. He explained that the quarterly inspections are done the same month every year, but that the actual dates of the inspections would change depending on the flexibility in his schedule to get out to the various sites. Therefore, although Harlem Irving "would know the month, they just never really know the exact day." Moreover, he did not need to contact anyone from Harlem Irving to gain access to its fire protection system because he had been provided with the access codes to the lockbox and to the building.

¶ 15 Stanley Bouzoukis, Vice President of Property Management for Harlem Irving, testified that he was responsible for "negotiat[ing] contracts as far as landscaping, sweeping, snow removal, roofing." He confirmed that the mall's fire protection systems were regularly inspected, but notwithstanding LoCasio's testimony to the contrary, denied that any water was discharged during any testing completed during the winter months. He also testified that he first became aware of Metke's alleged accident several months after the incident and denied that he knew about the incident on the day that it occurred.

¶ 16 Following the completion of discovery, Harlem Irving filed a motion for summary judgment. In its motion, Harlem Irving asserted that it was entitled to summary judgment on "three separate grounds." Specifically, it argued as follows: "First, Harlem Irving moves for summary judgment because there is no evidence that it breached any duty it may have owed Metke. Second, Harlem Irving requests summary judgment as Metke admitted that her testimony regarding the ice that allegedly caused her fall was based only on her speculation that it was ice and nothing more. Finally, Harlem Irving moves this Court for summary judgment because the condition that caused Metke's alleged fall was open and obvious."

¶ 17 Cybor also filed a motion for summary judgment. It its motion, Cybor argued that it was entitled to summary judgment because Metke "failed to establish a *prima facie* case of negligence against either Cybor or the Third-Party Plaintiff [Harlem Irving]." Specifically, Cybor argued: "This premises liability case arises out of injuries Plaintiff allegedly sustained on January 4, 2011, at an outdoor mall when she *knowingly* stepped on a 'trickle' of water and slipped. *** Nevertheless, there is no evidence that Plaintiff slipped on anything other than a *natural* or *open and obvious* accumulation of water/ice. *** Under Illinois law, Cybor was entitled to expect Plaintiff to exercise reasonable care for her own safety and avoid natural accumulations of water/ice or other open and obvious dangers. Yet, Plaintiff decided to try to step over the 'trickle' even though she identified an alternative route. Thus, pursuant to the natural accumulation rule and the open and obvious doctrine, neither Cybor nor Third-Party Plaintiff, Harlem [Irving] owed Plaintiff any duty in this case to protect her from her alleged injuries."

¶ 18 Following a hearing on the motions, the transcripts of which do not appear in the record, the circuit court granted both Harlem Irving's and Cybor's motions for summary judgment. The written order contains no explanation for the circuit court's decision.[3] This appeal followed.

¶ 19 ANALYSIS

¶ 20 On appeal, Metke argues that the circuit court erred in granting Harlem Irving's and Cybor's motions for summary judgment. She asserts that the facts established during discovery revealed that the cause of her fall was the discharge of water during Cybor's main drain test and was not simply a natural accumulation of water or ice. Moreover, she maintains that "the fact that the water was readily visible ('open and obvious') does not abrogate the duty" of care imposed upon Harlem Irving and Cybor to avoid creating a hazardous condition.

¶ 21 Harlem Irving and Cybor, in turn, both respond that the circuit court properly ruled that neither party owed Metke a duty of care because she failed to identify the source of the alleged unnatural accumulation of water or ice that purportedly caused her fall. Moreover, both parties also argue that they owed Metke no duty of care because the water/ice accumulation was an open and obvious condition that she saw, recognized to be dangerous, and failed to avoid. Accordingly, Harlem Irving and Cybor argue that the circuit court's order should be affirmed.

¶ 22 Summary judgment is appropriate when “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 judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2010). In reviewing a motion for summary judgment, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party to determine whether a genuine issue of material fact exists. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12; *Williams*

[3] Third-party defendant Cybor states that the circuit court's ruling was based on both the open and obvious doctrine and the natural accumulation doctrine.

v. Manchester, 228 Ill. 2d 404, 417 (2008). A genuine issue of fact exists where the relevant facts in the case are disputed, or where reasonable persons could draw different inferences and conclusions from the undisputed facts. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004); *Bulduk v. Walgreen Co.*, 2015 IL App (1st) 150166, ¶ 11. To survive a motion for summary judgment, the nonmoving party need not fully prove her case at this preliminary stage of litigation; however, the plaintiff must present some evidentiary facts to support each element of her cause of action, which would arguably entitle her to a judgment. *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881 (2009); *Garcia v. Nelson*, 326 Ill. 2d 33, 38 (2001). Mere speculation is not sufficient to create a genuine issue of material fact necessary to withstand a defendant's motion for summary judgment. *Judge-Zeit v. General Parking Corp.*, 376 Ill App. 3d 573, 581 (2007). Although summary judgment has been deemed a "drastic means of disposing of litigation" (*Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)), it is nonetheless an appropriate mechanism to employ to expeditiously dispose of a lawsuit when the moving party's right to a judgment in its favor is clear and free from doubt (*Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001)). A trial court's ruling on a motion for summary judgment is subject to *de novo* review. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009).

¶ 23 To prevail on a negligence claim, a plaintiff must establish that the defendant owed her a duty of care, that the defendant breached that duty, and that the breach of that duty caused the plaintiff's injury. *Bruns*, 2014 IL 116998, ¶ 12; *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001); *Reed v. Galaxy Holdings, Inc.*, 394 Ill. App. 3d 39, 42 (2009). Therefore, to withstand a defendant's motion for summary judgment, a plaintiff in a negligence action must present some factual basis to support each of the elements of her claim that would arguably entitle her to a judgment in her favor. *Bruns*, 2014 IL 116998, ¶ 12. More specifically, a

plaintiff must first establish that the defendant owed her a duty of care because " '[i]n the absence of a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper.' " *Id.* ¶ 13, *quoting Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 411 (1991).

¶ 24 The existence of a duty of care depends upon "whether defendant and plaintiff stood in such a relationship to one another that the law imposed upon defendant an obligation of reasonable conduct for the benefit of plaintiff." *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990). Generally, to determine whether a duty exits in a negligence case, courts consider several factors, including: (1) the reasonable foreseeability of the injury; (2) the reasonable likelihood of injury; (3) the magnitude of the burden that guarding against injury places on the defendant; and (4) the consequences of placing that burden on the defendant. *Sollami v. Eaton*, 201 Ill. 2d 1, 17 (2002); *Bulduk.*, 2015 IL App (1st) 150166, ¶ 12. Ultimately, whether a duty of care exists is a question of fact that is subject to *de novo* review. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226 (2010); *Ward*, 136 Ill. 2d at 140.

¶ 25 In the instant case, there is no dispute that Metke suffered an injury to her right leg when she slipped on some form of moisture, either water or ice, that was present on the sidewalk of Harlem Irving's outdoor mall. There is similarly no dispute that Metke observed the 13-inch trickle of either water or ice prior to her fall and that she had attempted to step over, rather than on, the trickle at the time of her fall. Finally, there is no dispute that shortly before Metke's fall, Cybor employee Dominick LoCasio conducted an inspection of Willowbrook's fire protection system during which he performed a main drain test that resulted in a discharge of up to 100 gallons of water in the grassy area located by the Bed, Bath & Beyond store. The relevant inquiry on appeal is whether based upon these facts, there is a genuine issue of material fact as to

whether Harlem Irving and Cybor owed plaintiff a duty of care. To resolve this question, we must consider two doctrines: the natural accumulation doctrine and the open and obvious rule.

¶ 26 As a general rule, business operators owe their customers a duty to maintain their premises in a safe condition. *Ward,* 136 Ill. 2d at 141; *Bulduk,* 2015 IL App (1st) 150166, ¶ 12. Pursuant to the natural accumulation rule, however, landowners and other possessors of property have no duty to remove natural accumulations of ice, snow, or water from their property. *Krywin v. Chicago Transit Authority,* 238 Ill. 2d 215, 233 (2010); *Hornacek v. 5th Avenue Property Management,* 2011 IL App (1st) 103502, ¶ 26. Accordingly, a land or business owner bears no liability for injuries that result from a natural accumulation of ice, snow or water that is left undisturbed. *Krywin,* 239 Ill. 2d at 227; *Hornacek,* 2011 IL App (1st) 103502, ¶ 26. However, where a land owner or his hired contractor either aggravates a natural accumulation or engages in conduct that created a new, unnatural, or artificial condition, he may be subject to liability. *Hornacek,* 2011 IL App (1st) 103502, ¶ 26. To withstand a motion for summary judgment, a plaintiff bears the burden to affirmatively show that ice or snow upon which she fell was an unnatural accumulation caused by the landowner or that the landowner had actual or constructive knowledge of the condition. *Hornacek,* 2011 IL App (1st) 103502, ¶¶ 25-26.

¶ 27 In this case, construing the pleadings, depositions and admissions in the light most favorable to Metke, the nonmovant, (*Bruns,* 2014 IL 116998, ¶ 12*; Hornacek,* 2011 IL App (1st) 103502, ¶ 31) we find that there is sufficient evidence that the ice/water accumulation on which she allegedly fell was an unnatural accumulation created by Cybor. At the time of her deposition, Metke had no independent knowledge that Cybor employee Dominick LoCasio, in accordance with Cybor's contract with Harlem Irving, had performed a quarterly inspection of Willowbrook's fire protection system or that up to 100 gallons of water were discharged on the

premises during the course of that inspection. She was however, able to testify about the actual circumstances that were known to her at the time of her fall. Specifically, she noted that she fell around 10 a.m. on a 13-inch "trickle" of moisture located on the sidewalk between the Bed Bath & Beyond and Michaels, a craft store located "about two stores away." Although Metke testified at the time of her discovery deposition that she believed that the trickle was likely the result of melting snow, the deposition testimony of LoCasio provides support for her contention that the trickle was actually an unnatural accumulation of moisture that resulted from the main drain test that he had conducted on the premises earlier that morning. LoCasio testified that he arrived at Westbrook on the morning of January 4, 2011, to perform a quarterly inspection, which involved a main drain test. During that test, he had to open the control valve, which resulted in a discharge of "[no] more than 100 gallons" of water for approximately 15 seconds. LoCasio further testified that the water was discharged at a "grassy *** mulch area" by the Bed Bath & Beyond store. Although the mulch area usually soaked up the water discharged during the main drain test, LoCasio testified that because it was "very cold" that morning, he distributed "about a quarter [of a 50 pound bag] of salt" over the affected area. Given that he received a phone call about 15 to 20 minutes later from Stanley Bouzoukis informing him about Metke's fall, LoCasio conceded that he "apparently didn't [put] enough" salt on the area and testified that he "ran to the Kmart right across the street and bought a couple more bags [of salt], [and] threw them *** anywhere that was affected by the—from the water." Ultimately, LoCasio's testimony about the timing and nature of the main drain test as well as the location where the water discharged during that test provides the requisite evidentiary support for Metke's assertion that an unnatural accumulation was the cause of her fall.

¶ 28 The evidence in the record also contains sufficient evidence from which to conclude that Cybor and Harlem Irving had notice of the unnatural accumulation that resulted from the main drain test. Given that plaintiff alleges that Cybor employee LoCasio discharged water during the main drain test that created the alleged unnatural accumulation that caused her to fall and injure herself, Metke is not required to show that Cybor had notice of the condition. See *Hornacek*, 2011 IL App (1st) 103502, ¶ 34 (a plaintiff is not required to prove a defendant had actual or constructive notice of an unnatural accumulation where she alleges that the party created the condition). Nonetheless, LoCasio's testimony establishes that he had actual notice of the condition. Turning to Harlem Irving, there is no dispute that Bouzoukis did not know that LoCasio would be on the premises on the morning of January 4, 2011, to perform a main drain test. LoCasio, however, testified that Harlem Irving's contract with Cybor called for quarterly inspections of Willowbrook's fire protection services and that those inspections were performed during the same months every year. The exact dates of the inspections were dependent upon LoCasio's schedule, and therefore LoCasio explained that Harlem Irving "would know the month, they just never really k[new] the exact day" that he would be there to perform a quarterly inspection. Notwithstanding Bouzoukis's testimony to the contrary, LoCasio testified that a main drain test was always performed during the quarterly inspections and thus, up to 100 gallons of water were discharged by the Bed Bath & Beyond store at Willowbrook every January. We emphasize that notice is generally considered to be a question of fact that is left for the jury to decide and that "[t]o prove constructive notice, a plaintiff must show that the hazardous condition existed for a sufficient amount of time or that, through the existence of reasonable care, the defendant should have discovered the dangerous condition." *Hornacek*, 2011 IL App (1st) 103502, ¶ 29. Here, based upon LoCasio's testimony about the pattern and practice of

discharging gallons of water every January during the course of one of his yearly quarterly inspections, we find sufficient evidence to allow a trier of fact to conclude that Harlem Irving had constructive notice of the dangerous condition that caused the unnatural accumulation.[4] See, *e.g.*, *Hornacek*, 2011 IL App (1st) 103502, ¶ 35 (finding that there was sufficient evidence that landowner had constructive notice about the danger posed by snow piles in a parking lot, based in part, by witness testimony about relevant snow plowing pattern and practices and the condition of the parking lot the previous winter).

¶ 29 Notwithstanding the unnatural accumulation, Harlem Irving and Cybor invoke the open and obvious doctrine, and argue that they are nonetheless entitled to summary judgment because the "trickle" that purportedly caused Metke's fall was an open and obvious condition. The open and obvious doctrine is a common law construct reflected in section 343A of the Restatement (Second) of Torts, which has been adopted by the Illinois Supreme court, and provides as follows: "[A] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them." Restatement (Second) of Torts § 343A, at 218 (1965); *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 434-36 (1990); *Wade v. Wal-Mart Stores, Inc.*, 2015 IL App (4th) 141067, ¶ 14. "The term 'obvious' denotes that 'both the condition and the risk are apparent to and would be recognized by a reasonable [person], in the position of the visitor, exercising ordinary perception, intelligence, and judgment.' " *Diebert*, 141 Ill. 2d at 435, quoting Restatement (Second) of Torts § 343A, Cmt. b at 219 (1965). The rationale for this rule has been explained as follows: "In cases involving obvious and common conditions, such as fire, height, and bodies of water, the law

[4] Although the parties reference section 414 of the Restatement (Second) of Torts (Restatement (Second) of Torts § 414 (1965)) when discussing the relationship between Cybor and Harlem Irving and whether Harlem can be liable for the conduct of Cybor, we note that in actions such as this one, the relevant inquiry is simply whether Harlem Irving had the requisite notice of the condition, and as such, we need not address their arguments pertaining to that Restatement section. See generally *Hornacek v. 5th Avenue Property Management*, 2011 IL App (1st) 103502.

generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such conditions. The open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks." *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448 (1996); see also *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577, 595 (2008) (explaining that open and obvious doctrine reflects the belief that "it is not foreseeable that an invitee will be injured when the condition is obvious or known"). The open and obvious doctrine, however, is not confined to fire, height and bodies of water (*Bruns*, 2014 IL 116998, ¶ 17); rather, it has been applied to other conditions that reasonable persons would recognize as dangerous including parking lot defects (*Rexroad v. City of Springfield*, 207 Ill. 2d 33 (2003)), power lines (*American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14 (1992)), cracked sidewalks (*Bruns*, 2014 IL 116998) and icy sidewalks (*Ide v. City of Evanston*, 267 Ill. App. 3d 881 (1994)).

¶ 30 Here, there is no dispute that Metke saw what she described as a "trickle" of moisture on the sidewalk prior to her fall. She argues, however, that the danger posed by the trickle was not obvious because she perceived it to be water rather than ice and that the dangers posed by water and ice are different. We disagree. Any sort of moisture accumulation during a Chicago winter poses risks that are obvious to local residents. See, e.g., *Krywin*, 238 Ill. 2d at 239 (Justice Freeman, dissenting) (noting that "in northern climates, like ours, where ice and snow are a fact of life, people are aware of the hazards posed by such conditions"). Moreover, Metke's argument is belied by her deposition testimony that she recognized the risk posed by the trickle and, as such, made an effort to step over, rather than on, the trickle. Accordingly, we agree with Harlem

Irving and Cybor that the accumulation of moisture on the ground was an open and obvious condition.

¶ 31 Metke, however, invokes the deliberate encounter exception to the open and obvious rule. Pursuant to the deliberate encounter exception, a duty will be imposed "where the possessor [of land] has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." Restatement (Second) of Torts § 343A cmt. f, at 220 (1965); *Bruns*, 2014 IL 116998, ¶ 20. Essentially, "[t]he focus with the deliberate encounter analysis is on what the possessor of land anticipates or should anticipate the entrant will do." *Grillo*, 387 Ill. App. 3d at 596. Although most often applied in cases involving economic compulsion where employees knowingly confront a dangerous condition to fulfill requirements of their jobs (*Sollami*, 201 Ill. 2d at 16), we find that Metke presented sufficient evidence regarding the applicability of the deliberate encounter exception in this case. During her deposition, Metke acknowledged that there were two routes available to her to reach Michaels craft store, her intended destination. She testified that there was a large "Willowbrook" sign located in front of the Bed Bath & Beyond store that divided the walkway. The path in front of the sign was clear of any trickles, whereas the pathway in back of the sign contained the visible trickle. She explained, however, that the most direct path to Michaels was behind the sign and that she elected to take the most direct route to her next destination instead of taking the slightly longer, albeit hazard-free path in front of the sign. Given the layout of the walkway, it can hardly be deemed unforeseeable that shoppers like Metke would elect to deliberately encounter the pathway with the trickle when that path is the most direct route to their desired destination. See, *e.g.*, *Ralls v. Village of Glendale Heights*, 233 Ill. App. 3d 147, 155 (1997) (finding that the defendants owed the plaintiff, a

construction foreman, a duty of care notwithstanding the existence of an open and obvious dangerous condition at a construction site because it was foreseeable that construction workers would use the path containing the dangerous condition to reach a specific area of the construction site "rather than use the longer and inconvenient perimeter path" that did not contain the dangerous condition); see also *Morrissey v. Arlington Heights Racecourse, LLC.*, 404 Ill. App. 3d 711, 727 (2010) (emphasizing that "the existence of a duty is not determined by the presence or lack of alternative avenues by which to avoid an open and obvious danger but, rather, by whether the landowner could foresee whether despite the open and obvious nature of the condition, the plaintiff (with or without alternative means) would nevertheless have chosen to encounter that condition").

¶ 32 Even if the deliberate encounter exception to the open and obvious doctrine did not apply, this would not end our inquiry because the existence of an open and obvious danger, by itself, does not itself preclude the imposition of a duty of care. *Bruns*, 2014 IL 116998, ¶ 16; *Sollami*, 201 Ill. 2d at 15; *Ward v. K. Mart Corp.*, 136 Ill. 2d 132, 145 (1990); *Bujnowski v. Birchland, Inc.*, 2015 IL App (2d) 140578, ¶ 10. That is because " '[i]n assessing whether a duty is owed, [notwithstanding the existence of an open and obvious danger], the court must still apply traditional duty analysis to the particular facts of the case.' " *Bruns*, 2014 IL 116998, ¶ 19, *quoting Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 425 (1998). As set forth above, the traditional duty analysis involves consideration of the following four factors: (1) the reasonable foreseeability of the injury; (2) the reasonable likelihood of injury; (3) the magnitude of the burden that guarding against injury places on the defendant; and (4) the consequences of placing that burden on the defendant. *Sollami*, 201 Ill. 2d at 17; *Bulduk.*, 2015 IL App (1st) 150166, ¶ 12. Courts have held that an open and obvious condition necessarily impacts the first two factors

of the traditional duty analysis: the foreseeability and likelihood of plaintiff's injury. *Bruns*, 2014 IL 116998, ¶ 19. Specifically, courts have explained that "[w]here the condition is open and obvious, the foreseeability of harm and likelihood of injury will be slight, thus weighing against the imposition of a duty" of care. *Bruns*, 2014 IL 116998, ¶ 19. Accordingly, based on the open and obvious nature of the trickle in the instant case, the first two factors would weigh against the imposition of a duty. *Id.* The other two factors, however, strongly favor the imposition of a duty of care. Neither the magnitude of the burden of guarding against the injury nor the consequences of placing that burden on Harlem Irving and Cybor would be severe in this case. The parties could have simply used cones or otherwise blocked off the portion of the walkway containing the trickle, thereby forcing Willowbrook customers to detour around the dangerous portion of the walkway. See, *e.g.*, *Ide*, 267 Ill. App. 3d at 886 (concluding that although the unnatural accumulation of ice on a sidewalk was an open and obvious condition, the consideration of the four factors supported the imposition of a duty against the defendant municipality because "the simple act of barricading the sidewalk and parkway would have detoured [the plaintiff] from the danger represented by the [icy] sidewalk" and thus would not unreasonably burden the defendant). We emphasize that to withstand Harlem Irving and Cybor's summary judgment motions, Metke was not required to fully prove her case; rather, it was her burden to simply present a sufficient factual basis that would arguably entitle her to a judgment. *Bruns*, 2014 IL 11699, ¶ 12. After reviewing the record and the arguments of the parties, we find that Metke has satisfied this burden and that genuine issues of material fact exist in this case. As such, we conclude that summary judgment is not appropriate and reverse the judgment of the circuit court.

¶ 33 CONCLUSION

¶ 34 The judgment of the circuit court is reversed.

¶ 35 Reversed.