2011 IL App (2d) 101300-U
No. 2-10-1300
Order filed November 16, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHRISTINA STANLEY,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09-L-48
	)	
CHESAPEAKE COMMONS	)	
HOMEOWNERS ASSOCIATION,	)	
	)	
Defendant-Appellee and Third-Party	)	
Plaintiff	)	
	)	Honorable
(Accurate Edge Landscape Services, Inc.,	)	Steven Sullivan,
Third-Party Defendant).	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

Held: Where the condominium declaration does not trump the Snow and Ice Removal Act, the Act immunizes Chesapeake from liability for the negligent removal of snow, and where plaintiff failed to present sufficient facts to support willful and wanton conduct, the trial court properly dismissed counts I and II; affirmed.

¶ 1 This appeal comes before us from an order of the circuit court of Kane County granting summary judgment for defendants, Chesapeake Commons Homeowners Association (Chesapeake) and Accurate Edge Landscape Services, Inc. (Accurate Edge), in a slip-and-fall action brought by plaintiff, Christina Stanley. Plaintiff sued Chesapeake, and Chesapeake filed a third-party action against Accurate Edge, the landscaping service that had removed the snow. Count I alleged breach of a contractual duty to remove accumulations of snow and ice from the common area sidewalks of the condominium complex where plaintiff slipped and fell in accordance with the condominium declaration. Count II alleged willful and wanton conduct. The trial court granted Accurate Edge summary judgment and thereafter, granted Chesapeake summary judgment, finding Chesapeake immune from liability under the Snow and Ice Removal Act (Act) (745 ILCS 75/1 *et. seq.* (West 2008)), and that plaintiff failed to present sufficient evidence of willful and wanton conduct. Accurate Edge is not a party to this appeal. Plaintiff appeals only the judgment concerning Chesapeake. We affirm.

¶ 2 I. BACKGROUND

¶ 3 Plaintiff, her husband, and infant son moved into a condominium unit at the Chesapeake condominium complex, owned by her husband's parents, Mary and Jerry Stanley. On Saturday, February 9, 2008, around noon, plaintiff was walking on a common area sidewalk near the Stanley's condominium unit when she slipped and fell on a patch of ice.

¶ 4 Plaintiff had used the same sidewalk two times, without incident, earlier that day. At approximately 10 a.m., plaintiff, her husband, and son, left the condominium to run errands. The three used the same sidewalk where plaintiff later fell. Plaintiff could not remember whether any ice was present on the sidewalk when she left the condominium that morning. Plaintiff stated that the sun was shining and it was not sleeting or snowing when she and her family left to run errands.

Plaintiff and her family returned to the condominium around 11:45 a.m. to bring her son home, using the same sidewalk a second time. Plaintiff then returned to the car to retrieve diapers. Plaintiff was on her way to the car when she slipped and fell. Plaintiff testified during deposition that her feet slipped out from under her and she lost her balance. Plaintiff's right leg made contact with the sidewalk. She fractured both her tibia and fibula and underwent surgery, during which a titanium metal rod and five pins were inserted into plaintiff's right leg.

¶ 5 Plaintiff had traversed the common area sidewalk very slowly, aware that ice was present. The ice patch was at all times visible to plaintiff, appeared dangerous, and was not obscured by any snow. According to plaintiff, the patch of ice was located at the point where the common area sidewalk adjoined the individual sidewalk leading to her in-laws' condominium. She believed that the ice patch was large, continuous, and fanned out in the direction of the parking lot. Plaintiff testified that snow mounds, approximately 18 inches high, were present along the edges of the common area sidewalk and the sidewalk leading to the condominium unit, making it impossible for her to cut through the lawn and avoid the ice patch.

¶ 6 Plaintiff did not know how long the ice patch was present prior to her accident. Plaintiff testified that she had no idea what had caused the patch of ice to form. Plaintiff also did not know when snow and ice had last been cleared from the sidewalk or if salt was applied to the sidewalks.

¶ 7 Christopher Stanley, plaintiff's husband, testified that the ice patch on the common area sidewalk was in the same condition between the time when he, plaintiff, and their son left and returned to his parents' condominium on February 9, 2008. Stanley estimated that the temperature that day was in the high twenties to mid-thirties. He stated that the snow was thawing on that day and there had been "freeze-thaw" cycles during that week. Stanley did not recall it snowing at all on the day of the accident. He described the ice patch on which plaintiff fell as visible, large, and

spanning the entire width of the common area sidewalk. By his estimation, the ice patch was five and one-half to six feet in length.

¶ 8 Stanley stated that, on the day of the accident, snow was piled up along the entire length of the common area sidewalk. He thought the mounds along the edge to be approximately 18 to 24 inches high and attributed the snow mounds to Accurate Edge's snow plowing.

¶ 9 Dennis Argyrakis was the grounds manager at the condominium complex and a member of Chesapeake's board of directors at the time of the accident. As the grounds manager, he was responsible for special landscaping projects, maintenance issues relative to individual condominium units, and fielding complaints about parking problems and other general matters. According to Argyrakis, Chesapeake's contract with Accurate Edge mandated a minimal snowfall of two inches before Accurate Edge was required to plow snow at the complex. Pursuant to the contract, Accurate Edge was responsible for plowing and shoveling all of the sidewalks throughout the complex, including the sidewalks leading to the individual condominium units. Argyrakis understood that Accurate Edge had the discretion to apply deicing substances or salt to sidewalks and other surfaces at the property along with its normal snow plowing services. Accurate Edge could only use salt or other chemicals separate and apart from its regular snow plowing services when requested by the condominium board's president. By Argyrakis' account, he was unaware of any complaints concerning the accumulation of snow or ice on the common area sidewalks at the complex. He knew of no other slip-and-fall accidents other than plaintiff's incident. He was unaware of any "trouble spots" on the sidewalks in terms of "water ponding."

¶ 10 Judy Glowiak, who was the condominium complex's property manager at the time of the accident, recalled being contacted by plaintiff's mother-in-law about the accident. Glowiak never inspected the sidewalk where plaintiff slipped and fell. She also never asked the grounds manager

to examine the sidewalk's condition. Glowiak testified that the assistant who worked in the property management office on Saturdays during the relevant time period, never advised her about any complaints concerning the sidewalks being reported on Saturday, February 9, 2008. Glowiak does not remember retrieving any voice mails of complaints about icy conditions on the sidewalks upon her return to the office on Monday, February 11, 2008. Neither she nor Argyrakis patrolled the property to inspect the condition of the common areas. No one affiliated with the complex inspected Accurate Edge's work.

¶ 11 Chad Clark, Accurate Edge's vice president, testified that, under the contract with Chesapeake, Accurate Edge was required to plow when snow measured above two inches. Accurate Edge could also be summoned to the complex to plow when snow totaled less than two inches. Clark stated that the contract between Accurate Edge and Chesapeake applied to all of the sidewalks at the complex. Clark further stated that the contract called for both snow removal services and salting at the complex. According to Clark, the individual sidewalks leading to the condominium units were hand shoveled and the common sidewalks were cleared using a four-wheeler with a plow attached to it. He confirmed that the plow used to clear snow created snow mounds along the sidewalks' edge.

¶ 12 Clark stated that Accurate Edge could salt the sidewalks without seeking permission from the board's president if a snowfall totaled above two inches. If a snowfall did not measure two inches, Accurate Edge was prohibited from applying salt to sidewalks and other surfaces at the complex property without first seeking approval from the board's president. Accurate Edge did not conduct an investigation into plaintiff's accident.

¶ 13 Accurate Edge's invoices for work at the complex indicated that approximately 18 inches of snow fell between February 1 and February 6, 2008. The invoices showed that there was only

a trace of snow on the date of the accident, about 0.2 inches. Other documents shown to Clark reflected that actually 1.5 inches of snow fell on February 9, 2008. Clark could not explain the discrepancy, but he testified that, whatever amount fell, Accurate Edge did not plow the property that day. Accurate Edge plowed the day before plaintiff's accident and spread salt on the common area sidewalks.

¶ 14 Jessica Emmot-Cadwallader testified that, prior to plaintiff's accident, her daughter slipped and fell while stepping up from the parking lot onto the curb of the common sidewalk at the complex. Cadwallader stated that the ice on which her daughter slipped was caused by snow that had melted, puddled, and refroze. Cadwallader stated that she had contacted both Argyrakis and Glowiak about her daughter's accident.

¶ 15 Chesapeake and Accurate Edge filed separate motions for summary judgment[1] relative to counts I (breach of contract) and II (willful and wanton conduct) of plaintiff's complaint. Chesapeake argued that it was entitled to summary judgment as a matter of law because plaintiff was not a member of the condominium association as she and her spouse had not properly entered into a written lease for the occupancy of a condominium unit at the complex, and therefore, never acquired any rights under the condominium declaration. Chesapeake contended that plaintiff's failure to reduce to writing her rental agreement with her in-laws meant that she never became a "member" of the homeowners' association to whom a duty of care was owed under the condominium declaration. Chesapeake further claimed that it was immune from liability pursuant to the Act, asserting that the record was devoid of any evidence illustrating that it acted with either

[1] As stated, Accurate Edge is not a party to the appeal, and thus, we need not relate the argument it presented to the trial court.

a deliberate intention to harm plaintiff or a conscious disregard for her safety for its snow removal activities. Specifically, Chesapeake noted that nothing in the record indicated that it had actual or constructive notice of the ice patch on which plaintiff slipped and fell. Chesapeake alternatively argued that it had no duty to remove natural accumulations of ice.

¶ 16 The trial court granted Chesapeake's and Accurate Edge's separate summary judgment motions. Of relevance to this appeal, the trial court found Chesapeake was entitled to summary judgment as to count I because plaintiff sought tort damages for personal injury arising out of an alleged contractual relationship in violation of the economic loss doctrine set forth in *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982). With regard to count II, the court found that plaintiff failed to present any proof "of actual or constructive knowledge on [Chesapeake's] part as to the claimed condition; no evidence [was presented] as to how the icy patch was caused or how long it had been there. In short, [plaintiff presented] no evidence sufficient to present a genuine issue of material fact."

¶ 17 Plaintiff filed a motion to reconsider. In the motion and at the hearing, plaintiff argued that, although count I of her complaint was labeled a breach of contract claim, it was really a negligence claim alleging Chesapeake's duty of care arose out of the condominium declaration, and thus, the *Moorman* economic loss doctrine did not apply. The trial court agreed with plaintiff's argument that count I was, in actuality, a slip and fall case seeking tort damages and that the *Moorman* economic loss doctrine did not apply. Nevertheless, the court found that the alleged contractual obligation does not take the case outside of the Act. Accordingly, the court determined Chesapeake was immune from liability from plaintiff's claims under the Act because plaintiff failed to prove willful and wanton conduct. Plaintiff timely appeals.

¶ 18 II. MOTIONS TAKEN WITH THE CASE

¶ 19 Before we begin the analysis, we must address two related motions that were taken with the case. Chesapeake filed a motion to strike two references in plaintiff's reply brief: one concerning her husband's deposition testimony of an alleged direct link between the snow mounds and the accumulation of ice where the accident occurred, and the other regarding similar testimony from witness Brianne Parkin. Chesapeake points out that neither reference is part of the record on appeal. In addition, the reference to the husband's deposition testimony was never presented to the trial court.

¶ 20 Plaintiff replied to the motion to strike. However, prior to filing the reply, plaintiff first filed a motion to supplement the record. In the motion to supplement, plaintiff points out that Chesapeake argues on appeal that plaintiff did not present sufficient evidence to establish that the ice on which plaintiff was injured was caused by snow mounds created by Accurate Edge when it plowed the snow. Plaintiff further notes that Chesapeake did not present a natural accumulation of ice argument in its motion for summary judgment. Plaintiff asserts that her husband's deposition testimony reveals a direct link between the unnatural snow mounds and the ice and that it was discussed in plaintiff's written response brief to the trial court. However, plaintiff acknowledges that the correct page of the deposition transcript presented in her argument was omitted by clerical error. Plaintiff seeks to correct this and add the deposition testimony to the record on appeal. Plaintiff also seeks to add the deposition testimony of her neighbor, Brianne Parkin, who described the scene of the incident in question to establish the causation element Chesapeake claims is lacking. Plaintiff acknowledges that these pages to the record were not a part of the common-law record because the "natural accumulation of ice" issue was not raised in Chesapeake's initial summary judgment motion.

¶ 21 Chesapeake then filed a response and objection to plaintiff's motion to supplement the record on appeal. Chesapeake argues that, while plaintiff blames the omission in the record on appeal on the fact that Chesapeake waited until its summary judgment reply brief to raise arguments relative to the natural accumulation of ice rule, to which plaintiff raised no objection in the trial court, plaintiff preemptively argued in her opening appellant's brief that the ice patch on which she slipped and fell was an unnatural accumulation of ice. Moreover, the omission in the record relative to plaintiff's husband's testimony was brought to plaintiff's attention at the trial court level and nonetheless went uncorrected. Furthermore, Chesapeake notes that it pointed out during the proceedings below that plaintiff had misquoted her husband's deposition testimony, and it argues that this should have alerted plaintiff to the fact that she had the wrong page of her husband's discovery deposition transcript. Finally, Chesapeake asserts that, had plaintiff endeavored to provide the trial court with the full deposition transcript in the first place, the alleged clerical error would not have occurred. Chesapeake contends that plaintiff's motion to supplement should not only be denied because it is untimely (see *Public Federal Savings & Loan Ass'n of Chicago v. LaSalle National Bank*, 76 Ill. App. 2d 252, 260-61 (1966)), but also because the pages from the discovery deposition transcripts of the witnesses were never presented to the trial court and did not form any part of the basis for the trial court's summary judgment order that is currently on appeal (see *McCullough v. Knight*, 293 Ill. App. 3d 591, 594 (1997)).

¶ 22 We agree with Chesapeake. Plaintiff should have moved to strike the new argument or sought leave to respond to it in the trial court. Because plaintiff did neither, she is constrained by the record on appeal as it is presently constituted. Accordingly, we grant Chesapeake's motion to strike portions of plaintiff's reply brief and deny plaintiff's motion to supplement the record.

¶ 23 III. ANALYSIS

¶ 24 Plaintiff sets forth several issues for our consideration on appeal. Three arguments concern the *Moorman* economic loss doctrine, the exceptions to that doctrine, and how her status as "member" of the homeowners association should have no bearing on the viability of her claims. As set forth in the facts, the trial court initially granted summary judgment on several grounds, including lack of privity of contract and the *Moorman* economic loss doctrine. On reconsideration, however, the trial court found the *Moorman* doctrine inapplicable because it agreed with the argument raised by plaintiff that count I of her complaint was not based on breach of contract but actually sounded in tort. The court never mentioned privity of contract but, nevertheless, ultimately determined that the Act provided Chesapeake immunity from liability for plaintiff's negligence claim. The court further held that there was no evidence to support plaintiff's willful and wanton claim. Thus, we need not address plaintiff's first three arguments regarding privity, *Moorman*, and the duty created by contract, as they are irrelevant to the resolution of the appeal. Accordingly, we turn to plaintiff's remaining issues: (1) whether immunity under the Act applies to plaintiff's negligence claim; (2) whether plaintiff presented sufficient evidence of willful and wanton conduct, the sole exception to the immunity conferred under the Act**,** to create a material issue of fact; and (3) alternatively, whether plaintiff presented sufficient evidence of an unnatural accumulation of ice.

¶ 25 A. Standard of Review

¶ 26 Summary judgment is proper where 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 movant is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). The purpose of summary judgment is not to try an issue of fact, but to determine whether one exists. *Haberer v. Village of Sauget*, 158 Ill. App. 3d 313, 316 (1987). A triable issue of fact exists only where there is a dispute as to a material fact or where, although the facts are not in dispute,

reasonable minds might differ in drawing inferences from those facts. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). Our review of an order granting summary judgment is *de novo*. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 390 (1993).

¶ 27 B. Immunity of the Act

¶ 28 Sections 1 and 2 of the Act provide:

¶ 29 "§ 1. It is declared to be the public policy of this State that owners and others residing in residential units be encouraged to clean the sidewalks abutting their residences of snow and ice. The General Assembly, therefore, determines that it is undesirable for any person to be found liable for damages due to his or her efforts in the removal of snow or ice from such sidewalks, except for acts which amount to clear wrongdoing, as described in Section 2 of this Act.

§ 2. Any owner, lessor, occupant or other person in charge of any residential property, or any agent of or other person engaged by any such party, who removes or attempts to remove snow or ice from sidewalks abutting the property will not be liable for any personal injuries allegedly caused by the snowy or icy condition of the sidewalk resulting from his or her acts or omissions unless the alleged misconduct was willful and wanton." 745 ILCS 75/1, 2 (West 2008).

¶ 30 The Act eliminates liability for personal injuries allegedly caused by snowy or icy conditions on a sidewalk after a residential owner or occupant or other person or entity in charge of the residential property has removed or attempted to remove snow and ice from the sidewalk. *Watson v. J.C. Penny Co., Inc.*, 237 Ill. App. 3d 976, 979 (1992). The only exception to the immunity provided under the Act is if a residential owner or occupant or someone otherwise in charge of the

property performs snow and ice removal on a sidewalk in a willful or wanton fashion. *Gallagher v. Union Square Condominium Homeowner's Assoc.*, 397 Ill. App. 3d 1037, 1043 (2010).

¶ 31 Plaintiff argues that the Act is not applicable because the association declaration states that Chesapeake "ensures" sidewalks are maintained in a proper manner, including snow plowing of all sidewalks and the storage of such snow on the common areas. In *Divis v. Woods Edge Homeowners' Association*, 385 Ill. App. 3d 636, 638 (2008), the First District Appellate Court rejected a similar argument to the one made by plaintiff.

¶ 32 In *Divis*, the plaintiff sought damages for injuries sustained allegedly from falling on an ice patch situated on a sidewalk at a condominium complex. *Divis*, 385 Ill. App. 3d at 637. The plaintiff sued the homeowners' association, the realty and management company, and the contractor responsible for snow and ice removal on the premises, alleging that due to the negligent removal of snow, large patches of ice accumulated on the walkway which proximately caused his fall. *Divis*, 385 Ill. App. 3d at 637. The defendants sought to dismiss the plaintiff's negligence action on the basis that they were immune from liability pursuant to the Act. The trial court agreed and dismissed the suit. The plaintiff appealed, contending the Act did not apply to parties who enter into contractual obligations to remove snow and ice. *Divis*, 385 Ill. App. 3d at 637.

¶ 33 On appeal, the court determined that, notwithstanding their respective contractual obligations to remove snow and ice, the defendants were immune from liability under the Act. *Divis*, 385 Ill. App. 3d at 638. The court held:

¶ 34 "Here, we find that, contrary to plaintiff's contention, the Act provides defendants with an affirmative defense against plaintiff's claims of negligence or improper snow removal. *** Plaintiff alleged in his complaint that his fall was the result of 'incomplete and improper' snow removal. This is the type of conduct for which the legislature has

> sought to provide immunity from liability when it enacted the Act. Except in cases of clear wrongdoing or willful or wanton conduct, the legislature has determined that, as a matter of public policy, to encourage people to clear their sidewalks of snow and ice, it would be 'undesirable' for any person to be found liable for damages due to his or her snow removal efforts. We find the trial court's order granting the motion to dismiss proper." *Divis*, 385 Ill. App. 3d at 638-39.

¶ 35 The contractual obligation argued by the plaintiff in *Divis* is no different from the covenant set forth in the condominium declaration in the present case. Thus, we see no reason to depart from the persuasive holding in *Divis*. We conclude that the existence of an alleged duty set forth in a condominium declaration for the removal of snow and ice does not trump the immunity that the legislature sought to provide to residential owners, occupants, or others in charge of residential property for snow removal efforts under the Act.

¶ 36 Plaintiff cites several Illinois cases that she maintains have, in *dicta*, recognized a contractual duty to remove snow and ice founded upon the promises of condominium declarations. However, these do not support plaintiff's argument. In *Klikas v. Hanover Square Condominium Association*, 240 Ill. App. 3d 715, 721 (1992), the court found that the condominium association had no duty to remove snow from a village-owned sidewalk that abutted the condominium complex. The case did not discuss the Act, as it considered for purposes of summary judgment whether the association had a duty to remove snow from a village-owned sidewalk that was not located on condominium property. As distinguished by *Divis*, "[*Klikas*] did not address whether the defendants were immune from liability because of the Act." *Divis*, 385 Ill. App. 3d at 639. Moreover, unlike the improper or negligent removal of snow alleged here, *Klikas* involved allegations of a complete failure to remove snow and ice. In *McCarthy v. Hidden Lake Village Condominium Association*, 186 Ill. App.

3d 752 (1989), and *Wells v. Great Atlantic & Pacific Tea Co.*, 171 Ill. App. 3d 1012 (1988), the court did not discuss the Act because the plaintiffs in those cases did not sustain injuries on sidewalks. See *Gallagher*, 397 Ill. App. 3d at 1042 (the plain language of the Act only provides immunity for injuries sustained on residential sidewalks). *Schoondyke v. Heil, Heil, Smart & Golee, Inc.*, 89 Ill. App. 3d 640 (1980), predated the Act.

¶ 37 Plaintiff presents other arguments to attempt to avoid the effect of the Act. She contends that, because of the contractual promise, Chesapeake has waived or is estopped from raising the Act's immunity. Plaintiff maintains that, if plaintiff cannot seek damages for Chesapeake's negligence in light of Chesapeake's guarantee, the promise is illusory and meaningless. Plaintiff did not raise issues of waiver or estoppel, or argue the concept of illusory promises to the trial court. A reviewing court will not consider on review issues and arguments which were not presented to or considered by the trial court. *Lake County Trust Co. v. Two Bar B, Inc.*, 238 Ill. App. 3d 589, 598 (1992); *Lane v. Titchenel*, 204 Ill. App. 3d 1049, 1052 (1990). Thus, issues raised for the first time on appeal, even from a summary judgment order, are deemed waived. See *Lake County Trust*, 238 Ill. App. 3d at 598; *Lane*, 204 Ill. App. 3d at 1052. Regardless, these arguments really are just another way of alleging that the condominium declaration should take the case out of the Act's rubric**,** and *Divis* held that contractual obligations to remove snow and ice do not.

¶ 38 Defendant also points out, and we agree, that plaintiff's argument "blurs and/or confuses" the concepts of duty and immunity. The condominium declaration can be an alleged source for a duty of care in tort, but whether Chesapeake owed plaintiff that duty is separate from whether Chesapeake is immune from liability under the Act for plaintiff's claims. See *Divis*, 385 Ill. App. 3d at 639.

¶ 39 Plaintiff further contends that Chesapeake's promise to safely store snow is outside the parameters of the Act. We find this argument unavailing. First, plaintiff fails to explain what is "snow storage" or how the storage of snow does not apply to the Act. Second, we note that plaintiff never set forth this allegation in her complaint or sought to amend her complaint. Rather, she claimed the improper removal of snow and ice and the resulting unnatural accumulation of ice was negligent, which is the precise subject addressed by the Act.

¶ 40 In summary, we find the allegations raised by plaintiff in count I, the negligent removal of snow and ice from the sidewalk and the resulting unnatural accumulation of ice, is the type of conduct from which the legislature provided immunity. See *Gallagher*, 397 Ill. App. 3d at 1043 ("[w]here, under the common law, an owner or snow-removal contractor may have been liable for such injuries where the injuries were the result of an unnatural accumulation of snow and ice created or aggravated by the owner or snow-removal contractor, they are now immune unless their conduct was willful or wanton"). Under *Divis*, the existence of a condominium declaration has no bearing on the application of the Act's immunity. Thus, we conclude that the trial court properly dismissed count I.

¶ 41 C. Willful and Wanton Conduct

¶ 42 Plaintiff contends that Chesapeake's actions in removing the snow constituted willful and wanton conduct**,** and therefore Chesapeake is not immune from liability. In support, plaintiff maintains that the landscaping agreement between Chesapeake and Accurate Edge is evidence of Chesapeake's willful and wanton conduct.

¶ 43 While the question of willful and wanton conduct is a question of fact for the jury to resolve, the court must first consider whether the plaintiff has presented enough factual evidence to present the issue to the jury; if the plaintiff has failed to produce any evidence of such conduct, then the

court should find, as a matter of law, that the defendant's conduct was not willful and wanton. *Kurczak v. Cornwell*, 359 Ill. App. 3d 1051, 1060 (2005).

¶ 44 Willful and wanton conduct is defined as "a course of action which shows actual or deliberate intent to harm or which, if the course of action is not intentional, shows utter indifference or conscious disregard for the safety of others or their property." *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 301 (2010). Willful and wanton conduct " 'approaches the degree of moral blame attached to intentional harm, since the defendant deliberately inflicts a highly unreasonable risk of harm upon others in conscious disregard of it.' " *Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 416 (1990) (quoting *Bresland v. Ideal Roller & Graphics Co.*,150 Ill. App. 3d 445, 457 (1986)). Inadvertence, incompetence, and ineptness do not rise to the level of willful and wanton conduct. *Floyd v. Rockford Park District*, 355 Ill. App. 3d 695, 701 (2005).

¶ 45 To establish willful and wanton conduct in an alleged property defect context, the record must support the reasonable inference that a defendant was informed of a dangerous condition on the property or knew that others had been injured as a result of the dangerous condition. *Floyd*, 355 Ill. App. 3d at 701. Two examples of conduct from which "reckless disregard" for the safety of others can be inferred are (1) failure, after knowledge of impending danger, to exercise ordinary care to prevent it and (2) failure to discover a danger through recklessness or carelessness when it could have been discovered by ordinary care. *Kurczak*, 359 Ill. App. 3d at 1060.

¶ 46 Plaintiff raises the inadequacies of the contract between Chesapeake and Accurate Edge, which have no bearing on whether Chesapeake knew or reasonably should have been aware of the ice patch prior to plaintiff's accident. Moreover, plaintiff offers no evidence to show Chesapeake exhibited either deliberate intention to harm, utter indifference to, or conscious disregard for

plaintiff's welfare in its snow removal. Plaintiff did not present any evidence that Chesapeake had actual or constructive knowledge of the icy condition.

¶ 47 In plaintiff's reply brief, she raises the argument that Chesapeake had knowledge or reasonably should have known of the condition because it failed to inspect, failed to have the landscaper salt the area, and failed to provide the landscaper with guidelines regarding snow storage. Under Illinois Supreme Court Rule 341(h)(7) (210 Ill.2d R. 341(h)(7)), an appellant forfeits points not raised in the initial brief and cannot argue them for the first time in the reply brief. *Sellers v. Rudert*, 395 Ill. App. 3d 1041, (2009). Accordingly, we find plaintiff has forfeited this argument.

¶ 48 We agree with the trial court that plaintiff presented no evidentiary facts to support the allegations in count II of her complaint, as the record does not illustrate that Chesapeake's conduct was outrageous or that it acted with utter disregard for plaintiff's safety in carrying out its snow and ice removal activities. Accordingly, we cannot say that Chesapeake's actions with respect to the sidewalk amounted to willful and wanton conduct. Because the facts, when viewed in the light most favorable to plaintiff, are insufficient as a matter of law to constitute willful and wanton conduct, the trial court properly granted summary judgment in Chesapeake's favor as to count II of plaintiff's complaint.

¶ 49 Based on our conclusion that the trial court properly dismissed counts I and II, we need not address plaintiff's alternate argument that her injuries were the result of an unnatural accumulation of ice created by Chesapeake. Whether the act of removing the snow created a natural or unnatural accumulation of ice, the argument is irrelevant to the negligence count. See *Gallagher*, 397 Ill. App. 3d at 1043. The argument is only potentially relevant if the facts supported plaintiff's willful and wanton count, which we previously determined was insufficient as a matter of law.

¶ 50 IV. CONCLUSION

¶ 51 For the reasons stated, we affirm the judgment of the circuit court of Kane County granting summary judgment in favor of Chesapeake.

¶ 52 Affirmed.