2011 IL App (2d) 110253-U
No. 2-11-0253
Order filed February 2, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ELIZABETH TOCHECK,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-MR-264
	)	
CITY OF GENEVA and	)	
HILLQUIST BROTHERS	)	
EXCAVATING, INC.,	)	Honorable
	)	Kevin T. Busch,
Defendants-Appellees.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Hutchinson concurred in the judgment.

ORDER

Held: Summary judgment properly granted where plaintiff did not present evidence creating a material issue of fact regarding whether defendants' actions created an unnatural accumulation of ice that led to her injury. Further, claim that was added after expiration of the statute of limitations and which did not relate back to the original timely filing was properly dismissed.

¶ 1 Plaintiff, Elizabeth Tocheck, appeals the trial court's February 16, 2011, order granting defendants, the City of Geneva and Hillquist Brothers Excavating, Inc., summary judgment on her negligence claim. Plaintiff's claim pertains to injuries she received from a December 9, 2006, fall

in one of the City's parking lots. Plaintiff also appeals the court's section 2-619 (735 ILCS 5/2-619 (West 2006)) dismissal of her claim that the City failed to adequately illuminate the parking lot in which she fell. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 A. Plaintiff's Deposition Testimony

¶ 4 In 2006, plaintiff, age 27, worked as a loan assistant at Mid-America Bank. In addition, she worked as a server at a Geneva restaurant, the Mill Race Inn, from 2001 to 2006. On December 9, 2006, plaintiff worked a holiday party at the restaurant. Restaurant employees parked their cars in a lot across the street (Route 25) from the restaurant. That parking lot, which was paved with asphalt, was constructed in 2003, and is generally known as the Zule lot (a reference to the prior owners). The parking lot runs north to south and is relatively small, consisting of approximately 10 parking spaces. On the lot's east side is a retaining wall. At about 2:00 p.m., on December 9, 2006, plaintiff parked her car on the south end of the lot, facing the retaining wall to the east. Directly in front of plaintiff's car, on the southeast corner of the lot, was a snow mound. The lot slopes downward from east to west with, in plaintiff's estimation, an overall drop in elevation of "a good foot." The lot has two drains, one on the south end (located on the curb by the passenger side of where plaintiff's car was parked), and the other on the southwest corner of the lot and the street. On the lot's west side, between the lot and the street, is a sidewalk.

¶ 5 Plaintiff testified that, when she parked her car, it was very cold outside. Although she did not see any snow plows, she knew the lot had been plowed because there were snow mounds present. There were snow piles around the cars and on the sidewalks, and it "absolutely" appeared that the snow had been pushed off of the lot and onto the side of the lot. Two feet of snow was piled on the

island between the parking lot and sidewalk; cars were parked up against snow mounds along the retaining wall on the east end of the lot; and snow was piled on the southern end of the lot. There was less than one inch of snow on the asphalt. The roads and asphalt in the lot were wet, but there was no current precipitation. When asked when the most recent snowfall had occurred, plaintiff recalled "well, it had been snowing all week that week, pretty much. I don't think—it didn't snow that day or the day before I don't think. It was more towards the beginning of the week." Plaintiff exited her vehicle, proceeded west to the sidewalk, walked north on the sidewalk, and then, mid-block, crossed Route 25 to the restaurant's entrance. While walking from her vehicle to the sidewalk, plaintiff walked across snow, but did not encounter icy or slippery areas. There was snow on the sidewalk that was "more wet than snowy," presumably because more people had walked upon it.

¶ 6 Plaintiff worked until approximately 11:30 p.m. When she left the restaurant, it was slightly colder outside than when she had arrived, but she did not think that the temperature was below freezing. There was no precipitation at that time. Plaintiff took the same path back to her vehicle as she had taken from her car to the restaurant earlier that day. The road was free from snow. The sidewalk was "crunchier" and more slushy than it had been before, but it was not icy. On the asphalt of the parking lot, approximately one foot from the sidewalk, plaintiff slipped a little. She caught herself and thought "this is pretty icy[,]" so she "tiptoed" to her car. Plaintiff could see patches of ice "sporadically though the parking lot by [her] car" and tried to avoid them. Plaintiff continued toward her vehicle and, about three feet from the driver's side door, she slipped and fell on a patch of ice approximately the size, in diameter, of a basketball. Her "whole body went forward," her leg "went 360," and she felt her leg crack. Plaintiff looked down at her left leg and "it was pretty much

twisted, I mean, not recognizable." Using her cell phone, plaintiff telephoned the restaurant manager, and he and another employee drove plaintiff to the emergency room. Plaintiff broke her left tibia and fibula.[1]

¶ 7 Plaintiff testified that the lot was not salted and that it was icier when she left work than when she had arrived. She did not know if the ice patch upon which she slipped was present when she arrived at work; she did not see it at that time. When asked if she knew why the lot was icier after work, she replied that she did not know, and that her "best guess" was that the sun was shining on the snowbanks during the day, but then, when it became cold after sunset, the lot became cold and froze. It did not snow while plaintiff was working. When asked whether she recalled any cracks, holes, depressions or slopes in the asphalt, plaintiff replied that the parking lot is inclined and slopes downward from east to west. She did not, however, photograph or recall seeing cracks, depressions, or ruts where she fell.

[1]Plaintiff's injury required surgery that involved two long incisions, two rods, and 14 screws being inserted into her leg. She stayed three or four nights in the hospital. Plaintiff was required to keep weight off of her left leg for four to six weeks and, for about 12 weeks, used crutches. Plaintiff returned to work at Mid-America Bank in mid-February, 2006, but she did not return to Mill Race Inn. In March 2008, plaintiff required a second surgery to remove one lower plate from the inside of her leg. Plaintiff took prescription pain medication after both surgeries and, as she continues to experience discomfort and occasional swelling, she takes over-the-counter medication. Prior to the accident, plaintiff played in a softball league and was a competitive runner; the injury has prevented her from participating in various physical activities, such as running and skiing.

¶ 8 Streetlights illuminated the lot that night and plaintiff "know[s] it wasn't too dark." Plaintiff recalled, "it wasn't so dark to the point where I couldn't see, but it wasn't bright." Plaintiff did not recall whether lights in a nearby lot, which was elevated and to the east of the Zule lot, were illuminated that night and speculated that, if they were, they were very dull and not as bright as the streetlights.

¶ 9 Because plaintiff was essentially "incoherent" after the accident, her sister completed on her behalf a City of Geneva Public Incident Report form. Plaintiff signed the completed report. Plaintiff testified that the report is accurate except for two items. First, although the report stated that the lot was unplowed, plaintiff did not know if it was plowed. She clarified that the lot had obviously been plowed because there were snowbanks along the side of the lot, but she did not know if it had been plowed recently. Second, in a section addressing weather conditions, the box for snow was checked. Plaintiff clarified that there was snow on the ground, but that it was not snowing at the time of the incident.

¶ 10 In June 2007, plaintiff filed her initial complaint alleging, in sum, that defendants negligently failed to keep the parking lot free from unnatural accumulations of ice and snow. On October 15, 2008, plaintiff's deposition was taken. In January 2011, noting that, in her deposition, she testified that she believed the lighting near the parking lot was either not illuminated or was very dull when she fell, plaintiff moved to file a second amended complaint to add an allegation that the City was negligent for failing to adequately illuminate the parking lot. Over the City's objection, the court granted plaintiff leave to file the second amended complaint. The inadequate-illumination claim alleged that the City carelessly and negligently: (1) failed to maintain the parking lot lighting in a working and operable condition; (2) outfitted the parking lot with inadequate lighting sufficient for

pedestrian traffic; (3) outfitted the parking lot with motion-activated lighting that did not immediately illuminate when pedestrians entered the parking lot; (4) placed the parking lot lighting in a location inadequate for the illumination of the entire lot; and (5) owned, maintained, and controlled the parking lot lighting.

¶ 11 B. Steve LeMaire's Deposition Testimony

¶ 12 Steve LeMaire is employed by the City as its superintendent of streets and fleet.[2] He has held that position for more than 22 years and has worked for the City for more than 31 years. LeMaire wrote a 2006-2007 Snow Plan for the City. The plan provides that parking lots must be cleared of snow and ice and provides for three snowfall response phases: (1) phase one includes plowing and salting only emergency routes, streets, hills and schools; (2) phase two requires addressing all secondary streets and continued salting and plowing of emergency streets; and (3) phase three includes plowing, from curb-to-curb, all "secondaries" and, when completed, city streets, alleys, culs-de-sac, dead ends, public and commuter parking lots, and designated sidewalks will be cleared of snow and ice.

¶ 13 LeMaire generates and maintains snow removal event forms that reflect, city-wide and for any type of precipitation event during the winter season, the beginning and end of the snowfall, the phases taken by the snow removal response team, the hours the employees worked, and the rate and amount of salt applied. When compiling the reports, LeMaire refers to weather reports he receives twice daily from Continental Weather Service.

¶ 14 On December 1, 2006, there was a snowfall of between 6.5 and 9 inches. Thereafter, there was a minor (.5-inch) snow event on December 6, 2006. A December 6, 2006, weather report stated

[2] LeMaire's depositions were taken prior to plaintiff filing her second amended complaint.

that temperatures were going to fall, so refreezing would be a condition. The December 6, 2006, report showed high and low temperatures of 34 and 8 degrees, respectively, that phase three of the response was completed by 11 p.m. (hence, all parking lots should have been cleared of ice and snow), that "secondaries" were inspected between 10 and 11 p.m. and "nothing [was] needed," and that salt brine from salting activities "eliminated accumulation on pavement." LeMaire could not state with certainty whether salt had been applied in the Zule lot and, accordingly, whether salt brine eliminated accumulation in the lot.

¶ 15 On December 9, 2006 (the day of plaintiff's fall), LeMaire received from Continental a 4 a.m. weather report listing a current temperature of 16 degrees and a projected maximum temperature, at 2 p.m., above freezing. LeMaire knew that, on December 9, 2006, temperatures would start below freezing, rise to above freezing, and then fall to below freezing. The report stated there was a 95% chance of *no* precipitation that day, but LeMaire could not recall if there was any. LeMaire stated that one reason he kept the weather report from December 9, 2006, was because the December 10, 2006, weather report predicted a possibility of snow and he was concerned "that it warmed up and that we could have wet pavement freezing again on the streets."

¶ 16 In 2006, Hillquist, Inc., was the contractor responsible for plowing the Zule lot after first receiving authorization from the City (specifically, LeMaire). Hillquist would haul snow from the Zule lot *only* if the City specifically authorized it. Otherwise, the City was responsible for snow removal from and salting of the Zule lot. On December 1, 2006, after the 6.5- to 9-inch snowfall, Hillquist plowed the Zule lot. LeMaire testified that, based on Hillquist's invoice to the City, it was likely that Hillquist plowed the lot possibly two or three times during the storm and then used a front end loader to pile the snow into mounds on the south end of the lot. According to LeMaire, the City

directed Hillquist to plow from north to south in the Zule lot and to place snow mounds at the very southern end of the lot, beyond the curb. LeMaire saw that Hillquist sometimes piled snow on the grass in the southeast corner of the lot; that was not a problem and LeMaire did not tell Hillquist that it should not pile snow there.

¶ 17 Generally, after Hillquist plows the snow and places it in mounds, a City employee assesses whether the lot itself needs to be salted. Then, City employees use end loaders and dump trucks to remove the snow piles from the south end of the Zule lot. This removal process involves a front-end loader entering the parking lot, putting the bucket into the pile of snow, raising it up, and then driving the snow to a dump truck located in the street near the entrance to the lot. LeMaire stated that City employees have been authorized and instructed to remove snow from the Zule lot by backdragging. Backdragging involves pulling the pile of snow from the perimeter back onto the parking lot and then scooping it up with the end loader and dumping it into the dump truck. LeMaire has observed that, in this process, spillage from the bucket may get onto the parking lot, and he testified that backdragging may result in residue on the lot. The residue might, but does not always, require salting. According to LeMaire, because of limited resources and budgetary constraints, the City is conservative with salt; salting parking lots is "not a high priority." LeMaire acknowledged that plaintiff's accident report form states that she fell in an unplowed and unsalted lot and that she fell on some ice. LeMaire testified that he did not have any knowledge of that specific patch of ice and that no one had advised the City around the time of the accident that there was ice in the lot that needed to be removed.

¶ 18 LeMaire did not order any additional plowing or salting of the Zule lot after December 6, 2006; however, he did order that the snow piles be removed. Reports reflect that City employees

continued hauling snow from parking lots on December 7 and 8, 2006; however, those records do not specify if or when snow piles were hauled from the Zule lot. LeMaire agreed that, "as of December 8th of 2006 at 3:30 p.m., [ ] all of the parking lots, including the Zule parking lot had had snow removed[.]" LeMaire agreed that, as of December 8, 2006, post-storm activities, including hauling of snow, had been completed at the Zule lot. According to LeMaire, the reports reflect that snow removal took place in all lots, including the Zule lot, between December 3 and 8, 2006, but that he was not sure who exactly did it or when. LeMaire testified that his best approximation would be that the City would have hauled snow from the Zule parking lot on December 8, 2006, because that was the last day that the City hauled snow from lots and the Zule lot was last or second-to-last in terms of the priority of lots to be cleared. On December 13, 2006, after learning of plaintiff's fall, LeMaire inspected the Zule lot. At that time, there was no snow on the ground or snow piles, and the pavement was dry.

¶ 19 C. Court Rulings

¶ 20 On February 16, 2011, the trial court granted defendants' summary judgment motions. The court found that: (1) there was no evidence as to the origin of the ice patch upon which plaintiff slipped; (2) there was insufficient evidence to raise a genuine issue of material fact as to whether the ice upon which plaintiff slipped was a natural or unnatural accumulation; (3) although the snow was plowed into unnatural accumulations around the lot's perimeter, plaintiff did not slip on those unnatural accumulations; (4) "plaintiff's conjecture that the ice patch itself was formed from the thaw and refreezing of runoff from the mounds around the lot, or from the snow spilled in the removal efforts, is unsupported by the evidence;" and (5) there was no evidence that the City had actual or constructive notice of the condition. The court concluded "plaintiff must do more than

argue possibilities; rather plaintiff must point to specific evidence as to an identifiable cause of the ice patch." Further, the court granted the City's motion to dismiss as time-barred the second amended complaint's allegation regarding inadequate illumination. Plaintiff appeals.

¶ 21 II. ANALYSIS

¶ 22 A. Summary Judgment

¶ 23 Plaintiff argues that the trial court erred in granting summary judgment because there exists a genuine issue of material fact as to whether the accumulation of ice upon which she slipped was an unnatural condition caused by defendants' actions. We disagree.

¶ 24 We review *de novo* a trial court's grant of summary judgment. *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201 (2009). Summary judgment is appropriate only where the pleadings, depositions, and admissions on file show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006); *Ioerger*, 232 Ill. 2d at 201. Accordingly, the aim of summary judgment is not to try issues but, rather, to determine whether any triable issues of fact exist. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007); *Russell v. Village of Lake Villa*, 335 Ill. App. 3d 990, 993 (2002). Summary judgment is a drastic means of disposing of a case and should not be granted unless the movant's right to judgment is clear and free from doubt. *Forsythe*, 224 Ill. 2d at 280. Thus, in reviewing a summary judgment disposition, we strictly construe the record against the movant and liberally in favor of the nonmoving party. *Id.* Where reasonable persons could draw divergent inferences from undisputed facts, the issue should be decided by a trier of fact and the summary judgment motion should be denied. *Id.* The resolution of a motion for summary judgment is not a matter committed

to the sound discretion of the trial court; either the movant is entitled to judgment as a matter of law or the motion must be denied. *Manhanm v. Daily News-Tribune*, 50 Ill. App. 3d 9, 12 (1988).

¶ 25 To prove negligence, a plaintiff must set forth sufficient facts to establish that the defendant owed the plaintiff a duty, that the defendant breached its duty, and that an injury was proximately caused by the breach. *DiBenedetto v. Flora Township*, 153 Ill. 2d 66, 70 (1992). Generally, a local public entity has no duty to remove natural accumulations of ice and snow from public property. *Ziencina v. County of Cook*, 188 Ill. 2d 1, 13 (1999). Therefore, a public entity may not be found liable for injuries resulting from natural accumulations. See *Webb v. Morgan*, 176 Ill. App. 3d 378, 382 (1988). If, however, a local public entity does undertake snow-removal operations, it must exercise due care in its performance of those operations. *Ziencina*. 188 Ill. 2d at 14. In that case, the "duty is to prevent an unnatural accumulation on [the] property, whether that accumulation is the direct result of the owner's clearing of the ice and snow, or is caused by design deficiencies that promote unnatural accumulations of ice and snow." *Webb*, 176 Ill. App. 3d at 382-83. Thus, courts must consider on a case-by-case basis whether an accumulation of ice and/or snow is or is not natural. *Id.* A plaintiff bears the burden to affirmatively prove that the ice and snow upon which he or she fell was an unnatural accumulation caused by the defendant. *Id.* at 383.

¶ 26 Here, there is no dispute that plaintiff fell on ice and that she was injured. The question is what caused the ice, *i.e.*, whether it formed naturally (no liability) or was an unnatural accumulation created by defendants' efforts to remove snow and ice (potential liability). Plaintiff argues that she has presented sufficient evidence to establish an issue of fact regarding whether the ice was an unnatural accumulation caused by defendants. Specifically, she argues first that the record reflects a nexus between the piles of snow plowed by Hillquist, at the City's direction, and the ice because:

(1) the snow piles were placed on the southeast end of the lot (in front of where her car was parked); (2) that the lot slopes downward from east to west (from the front of her car toward the back of her car); (3) the lot's drains are located on the south and southwest sides of the lot (*i.e.*, to the side and in back of where plaintiff's car was parked); and (4) the weather reports and LeMaire's testimony reflected the existence of temperature variations that would permit melting and re-freezing of the snow. Second, plaintiff argues, there was sufficient evidence from which a factfinder could conclude that the ice upon which she slipped formed as a result of the City's December 8, 2006, efforts to backdrag and remove the snow piles from the lot. Thus, plaintiff argues that an unnatural accumulation was caused by either: (1) Hillquist leaving snow piles at elevations above where the drains were located; or (2) the City's act of backdragging the snow mounds onto the clear pavement or by spilling snow while dumping it out of the bucket while hauling it away. In sum, plaintiff argues that summary judgment was inappropriate because the evidence presented a genuine issue of fact regarding whether the ice was a natural or unnatural accumulation.

¶ 27 Our supreme court has found that a mound of snow created by a municipality's snow-removal efforts may be considered an unnatural accumulation. *Ziencina.* 188 Ill. 2d at 13 (affirming a jury verdict finding the defendant county liable where it plowed and placed a large snowmound at the corner of an intersection, thereby impairing visibility and resulting in the plaintiff's accident and injuries). However, where, as here, a plaintiff alleges that the *ice* upon which he or she slipped was created by an unnatural accumulation, such as a snow pile, the plaintiff bears the burden to present facts showing a "*direct link*" between the snow pile and the ice. *Madeo v. Tri-Land Properties Inc.*, 239 Ill. App. 3d 288, 294 (1992) (summary judgment affirmed because the plaintiff's assumptions that plowed snow melted, ran into the parking lot, and refroze were insufficient to link

the snow pile to the ice that caused her to slip); see also *Crane v. Triangle Plaza, Inc.*, 228 Ill. App. 3d 325 (1992) (summary judgment affirmed where the only evidence of a nexus between a snow pile on the periphery of a parking lot and the ice located in a depression in a parking lot was the plaintiff's testimony that she was "99 and 99/100%" sure that the ice was formed by the melting of unnaturally accumulated snow). Here, the evidence reflects that plaintiff's car was surrounded by snow mounds, that the lot sloped and there were mounds placed at the top of the slope, and that there were temperature variations the day that plaintiff fell. As discussed below, the case law instructs that more is needed to raise a material factual question as to whether the ice was an unnatural accumulation created by the snow mounds.

¶ 28 For example, in *Madeo*, the plaintiff presented meteorological data that temperatures rose and fell a few days prior to the fall, evidence that the parking lot in which she fell was sloped and that snow was plowed and placed at the top of the slope, and that melting snow and water would run from the snow mound into the parking lot toward a drain. Nevertheless, the court found that the evidence did not create a genuine issue of material fact because it merely reflected "that snow can melt and flow down an incline;" it did not raise a triable issue that the plaintiff's injuries resulted from an unnatural accumulation of ice or snow. *Madeo*, 239 Ill. App. 3d at 291. The court noted that the plaintiff presented no evidence concerning the steepness of the grade in the lot, nor any evidence that the ice where she slipped formed a sheet extending from the snow pile to the place where she fell, *linking* the snow pile to the ice. *Id.* at 292-94. Instead, the evidence reflected that the fall occurred on a two-foot by three-foot *patch* of ice. *Id.* at 293. Thus, the court upheld summary judgment because, while it was *possible* that the plaintiff slipped on ice that formed when

a snow pile melted, flowed across the parking lot, and refroze, the plaintiff did not supply any *concrete* evidence of that and, in essence, established only that "water flows downhill." *Id.*

¶ 29 In *Crane*, the plaintiff parked in a lot with the rear of her car near a snow pile. The plaintiff fell in front of her car on a patch of ice that measured two-feet by four-feet. The plaintiff presented evidence that the parking lot contained many holes and depressions and was uneven, although the lot was generally level with no incline. The evidence reflected that temperatures before the accident fluctuated above and below the freezing mark, and the plaintiff testified that she noticed snow and water, but no ice, in the parking lot the day before her fall. She stated she was "99 and 99/100%" certain that the snow melted, collected in the depressions, and froze. The appellate court found the evidence insufficient to establish the requisite nexus between the snow pile on the periphery of the lot and the ice in the depressions of the lot upon which the plaintiff fell. *Crane*, 228 Ill. App. 3d at 330. Noting that to find an ice condition unnatural there must be an "identifiable cause" of the formation, the court held that the only evidence linking the two physical realities was plaintiff's statement that she was certain the ice was formed by the snow pile and that "complete speculation is not enough to raise a genuine issue of fact as to whether the ice was created by unnatural accumulation of snow." *Id.* at 330-31.

¶ 30 Here, like in *Madeo* and *Crane*, plaintiff's evidence presents merely the *possibility* that the patch of ice upon which she slipped came from an unnatural accumulation that melted and refroze. Plaintiff disagrees that her evidence is insufficient to create a genuine issue of fact, and she points to *Johnson v. National SuperMarkets, Inc.*, 257 Ill. App. 3d 1011 (1994), and *Russell*, 335 Ill. App. 3d 990, where the courts found sufficient facts existed from which a jury could have determined that

the ice upon which the plaintiffs slipped and fell were unnatural accumulations caused by water running off of snowbanks and then refreezing. We disagree.

¶ 31 In *Johnson*, the appellate court affirmed a jury verdict in the plaintiff's favor. The evidence reflected high snow piles had been placed around light posts in a grocery store parking lot. The plaintiff saw a black puddle of water near her vehicle and she *and* other witnesses testified that they observed that the water in the puddle was coming from a pile of snow around the light post. The plaintiff ultimately slipped on some ice around the puddle while attempting to avoid the puddle. The court concluded that the jury could have determined that the icy puddle in which the plaintiff fell was an unnatural accumulation of ice caused by water running from the snowbanks onto the parking lot and then refreezing. *Id.* at 1016. According to the court, the evidence suggested that the defendant caused the unnatural accumulation when a third-party pushed the snow around the light posts to create large piles of snow, and the evidence reflected that the snow would thaw and drain onto the parking lot and refreeze when the temperature dropped. *Id.* The court specifically rejected the defendant's argument that the plaintiff's claim must fail because she did not present expert testimony on meteorological data and the effect of the slope of the parking lot on water running into various areas and freezing. *Id.* Rather, the court noted that:

> "[P]laintiff did not need an expert to testify to matters that can be appreciated by persons of ordinary intelligence. In fact, we do not believe that experts are allowed to testify to such matters. It is within the common knowledge of a person to know what the temperature is on a particular day and that water can melt, freeze, or refreeze depending on the temperature at any given time. It is also within common knowledge for a person to know that, if a parking lot slopes toward the entrance of the store and snow melts, the water will

> run downhill and collect at the entrance. Further, we believe that if the sun shines, snow will melt, and if it is in a large pile, the water from the snow will run down the pile, and if the temperature drops, it will refreeze in the area in which it collected." *Id.* at 1016-17.

The *Johnson* decision differs notably from the present case. In *Johnson*, there was no need for expert testimony to explain how a frozen puddle at the bottom of the slope was connected to the snow pile at the top of the hill because both the plaintiff and other witnesses actually saw the snow pile melting and pooling; that is, they witnessed the nexus or connection as it happened. Thus, the *Johnson* court did not need to consider whether the plaintiff's claim would have survived had she simply slipped on a frozen puddle when neither she nor anyone else saw where the puddle came from. In that vein, the case before us is more like *Madeo* and *Crane* where there was a fall on a patch of ice and there was no evidence to connect the ice with a nearby snowmound.

¶ 32 In *Russell*, upon which plaintiff also relies, this court reversed the trial court's grant of summary judgment in the defendant's favor where the plaintiff presented evidence that the ice upon which he slipped was in close proximity *and contiguous to* the snow piles the defendant had plowed and, although the plaintiff did not actually see the snow melting from the mound, it seemed "clear" to the plaintiff that the "ice got there as a result of the snow melting in liquid form and then being frozen as the temperature lowered." *Russell*, 335 Ill. App. 3d at 993. The court, citing *Johnson*, rejected the notion that the plaintiff's testimony regarding the ice constituted mere assumptions and opinions, stating:

> "[I]t is within the common knowledge of a person to know what the temperature is on a particular day and that water can melt, freeze, or refreeze depending on the temperature at any given time. Thus, [plaintiff] was not speculating when he described what he saw in

> the photograph and when he testified to his general knowledge that piled snow could melt and refreeze. It is true that in *Johnson* there was eyewitness testimony to the melting snow running along the pavement to the puddle and in this case there are no eyewitnesses. At this stage[,] plaintiff is required to show only facts that indicate a nexus between the snow and the ice. This he has done."

Here, plaintiff similarly argues that her evidence is not speculative, because it is common knowledge that snow piles can melt and refreeze. However, the court in *Russell*, like the court in *Johnson*, was presented with concrete evidence that the snow pile and ice were connected. Specifically, in *Russell*, the ice formed a *contiguous apron at the base of the snow mound*. *Id.* at 992, 996. Thus, the connection between the snow mound and the ice was clear. In contrast, here, as in both *Madeo* and *Crane*, plaintiff slipped on a *patch* of ice, not a sheet of ice that was physically connected to the snow mound, and she testified that there were only other *patches* nearby. As such, the evidence did not establish a link or nexus between the unnatural accumulations (the snow mounds) and the patch of ice upon which plaintiff slipped.

¶ 33 In sum, plaintiff argues that circumstantial evidence need not exclude all other possible inferences and that her evidence is sufficient to survive summary judgment because it reflects that defendants placed snow piles on elevated areas during periods of thawing and freezing, and that it is common knowledge that snow might melt with increasing temperatures, run downhill, and refreeze. However, those concepts are not in dispute. Rather, circumstantial evidence must justify an inference of *probability*, not mere *possibility* (*McCullough v. Gallagher & Speck*, 254 Ill. App. 3d 941, 949 (1993)), and the aforementioned cases make clear that, to succeed on her claim, plaintiff must establish *more* than temperature fluctuations and the positioning of snow on an incline.

Plaintiff must present concrete evidence reflecting an identifiable source of the ice. She has not done so. For example, unlike in *Johnson* or *Russell*, there is no testimony that the ice upon which plaintiff slipped was physically connected to the snowmound, nor did plaintiff or any other witnesses observe the snowmound melting into the lot to the spot where plaintiff fell. Nor is there any *other*, similar evidence that would establish a nexus between the snow and the ice.

¶ 34 Plaintiff's alternative theory of the case, that the City caused the ice by backdragging the snow into the lot during its snow removal efforts, fares no better. Plaintiff asserts that the evidence reflects that phase three was completed on December 6, 2006; accordingly, at that time, the lot should have been cleared of snow and ice and, thereafter, there was no precipitation of any kind. She notes that LeMaire testified that, because of its low priority, the lot would likely have been backdragged and the snow hauled away from the Zule lot on December 8, 2006, the day prior to the accident. Thus, plaintiff concludes that the reasonable inference to be drawn is that the ice was an unnatural accumulation caused by snow falling during the process of backdragging and removing snow from the lot.

¶ 35 We disagree that, even viewed in plaintiff's favor, the evidence creates a genuine issue of fact as to whether the City caused an unnatural accumulation of ice through its backdragging snow removal efforts. Specifically, there is no evidence to support this theory. First, plaintiff presents no evidence that, in fact, the Zule lot was backdragged. LeMaire's testimony discussed how the City hauls snow from its parking lots, that all lots should have been completed by December 8, 2006, and that, given the Zule lot's low priority, it would have been completed the last day of snow removal efforts. This does not, however, constitute evidence *in fact* that the City performed backdragging in the Zule lot the day prior to plaintiff's fall. Plaintiff notes that Hillquist "readily admits" that the

City backdragged the snow on December 8, 2006. Besides there being no basis for Hillquist to have such knowledge, closer inspection of Hillquist's record citation for this assertion reflects that, in a request to admit, the City admitted that it loaded and hauled snow piles from parking lots after the December 1, 2006, storm; however, the City *denied* the remaining allegations in the request to admit, which included that the snow removal efforts took place on December 8, 2006.

¶ 36 Second, our *de novo* review of this record leads us to conclude that the evidence directly contradicts plaintiff's assertion that the City removed the Zule lot's snow piles on December 8, 2006. Plaintiff testified that, on December 9, 2006, the day of her accident, snow piles were located in the parking lot and, specifically, that they were located in front of her car, and around the perimeter of the lot. As plaintiff puts it, "she testified at length about where all of the snow piles were located around the periphery of the Zule lot." Indeed, the existence of snow piles forms the entire basis of her claim that the ice formed from the snow piles melting and re-freezing. As such, the evidence does not support the notion that the ice upon which she slipped resulted from defendant's actions in *removing* the snow piles. In other words, if the snow piles were present on December 9, 2006, as plaintiff attests, then what snow piles did the City purportedly remove?

¶ 37 Further, even if plaintiff *had* presented concrete evidence that the City removed and hauled away snow piles from the Zule lot prior to her fall, she failed to present evidence from, for example, any city employee that he or she backdragged the lot to remove the piles and that, in the process, snow spilled onto the lot. The evidence reflects only that backdragging is an authorized procedure for snow removal and that spillage can occur, but not that backdragging or spillage occurred here. Thus, whether snow was dropped in the lot by the City, resulting in an unnatural accumulation that caused plaintiff's injury, remains pure speculation or, at best, a mere possibility.

¶ 38 In sum, plaintiff presented insufficient evidence to create an issue of fact on her negligence claim, and the court's judgment in defendants' favor is affirmed.

¶ 39 B. Section 2-619 Dismissal

¶ 40 Plaintiff next argues that the trial court erred in dismissing as untimely her claim regarding inadequate illumination. Again, plaintiff's injury occurred in 2006, she filed her original complaint in 2007, and the inadequate-illumination claim was added in 2011. Plaintiff does not dispute that, per the statute of limitations, the claim was untimely (one-year statute of limitations set forth in 745 ILCS 10/8-101 (West 2006)), but she argues that the amended claim "relates back" to the same occurrence alleged in her original complaint and, therefore, was improperly dismissed.

¶ 41 We review *de novo* a court's grant of a section 2-619 motion. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). In a section 2-619 motion to dismiss, the allegations of the complaint are taken as true, but the movant asserts that an affirmative defense or other matter defeats the plaintiff's claim. 735 ILCS 5/2-619 (West 2006); *Nielsen-Massey Vanillas, Inc. v. City of Waukegan*, 276 Ill. App. 3d 146, 151 (1995). The affirmative defense asserted here was the statute of limitations. The parties dispute whether, pursuant to section 2-616(b) of the Code (735 ILCS 5/2-616(b) (West 2006) (cause of action alleged in amended pleading not barred by time lapse if it grew out of the same transaction or occurrence as alleged in original, timely pleading)), the inadequate-illumination claim "relates back" to the filing date of the original complaint such that the claim is timely. We liberally construe the requirements of section 2-616(b) to allow resolution of litigation on the merits. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 355 (2008). "Both the statute of limitations and section 2-616(b) are designed to afford a defendant a fair opportunity to investigate the circumstances upon which liability is based while the facts are accessible." *Id.* However, a

defendant is not prejudiced by an amended claim where the facts that formed the basis of the claim were directed to the defendant's attention within the prescribed time limit. *Id.* Further, we remain mindful that "section 2-616(b) itself was largely designed to notify a party that claims will be asserted that grow out of the general fact situation set forth in the original pleading." *Id.* at 362. We are to consider the entire record to determine whether the defendant had such notice. *Id.* Thus, here, we are asked to consider whether the City had notice of the facts giving rise to plaintiff's claim that the City's alleged failure to properly illuminate the parking lot proximately caused her injury such that it is not prejudiced by plaintiff's addition of that claim after the statute of limitations had expired. We conclude that the inadequate-illumination claim is of a different character than the unnatural accumulation claim and that it does not relate back to plaintiff's original pleading.

¶ 42 Again, the inadequate-illumination claim plaintiff added to her second amended complaint alleged that the City negligently: (1) failed to maintain the parking lot lighting in a working and operable condition; (2) outfitted the parking lot with inadequate lighting sufficient for pedestrian traffic; (3) outfitted the parking lot with motion-activated lighting that did not immediately illuminate when pedestrians entered the parking lot; (4) placed the parking lot lighting in a location inadequate for the illumination of the entire lot; and (5) owned, maintained, and controlled the parking lot lighting. As plaintiff notes, in *Porter*, our supreme court adopted a sufficiently-close-relationship test such that "a new claim will be considered to have arisen out of the same transaction or occurrence and will relate back if the new allegations as compared with the timely filed allegations show that the events alleged were close in time and subject matter and led to the same injury." *Id.* at 360. In contrast, however, the court reiterated that an amendment is distinct from the original pleading and will *not* relate back where: (1) the original and amended set of facts are

separated by a significant lapse of time; *or* (2) the two sets of facts are different in character; *or* (3) the two sets of facts lead to arguably different injuries. *Id.* at 359. Here, plaintiff argues that the count alleging inadequate illumination properly relates back because it arose out of the same occurrence and injury as alleged in the original complaint. However, we agree with the City that the two claims are different in character. Namely, plaintiff's original allegations regarding snow and ice accumulation and the City's procedures for addressing inclement weather had nothing to do with the City's provisions for and implementation and maintenance of lighting in its parking lot, or the lighting conditions in the Zule lot the evening that plaintiff fell.

¶ 43 We find instructive *Doherty v. Cummins-Allison Corp.*, 256 Ill. App. 3d 624 (1993). In *Doherty*, the plaintiff originally asserted, in part, that the defendant failed to maintain a loading dock and permitted the dock to have an excessive slope; in the amended complaint, the plaintiff added that the defendant also failed to maintain the lights in the loading dock *and* parking lot areas and, accordingly, the lighting was inadequate for the plaintiff to see unnatural accumulations of ice. *Id.* at 627. The court held that the inadequate-illumination count did not relate back because "allowing the lights to burn out involves different conduct by different persons at different times than permitting the dock to have an excessive degree of slope or allowing it to fall into a state of disrepair," and because the failure to allege these acts initially prevented the defendants from discovering, prior to the expiration of the limitations period, that the plaintiff sought to recover damages by alleged lighting issues and, therefore, the defendants had no opportunity to preserve evidence or investigate these new allegations of negligence in a timely manner. *Id.* at 633.

¶ 44 Here, like in *Doherty*, plaintiff's failure to raise her claim regarding the provision for and maintenance of lighting in the parking lot until five years after the occurrence and four years after

the expiration of the statute of limitations, deprived the City of the opportunity to preserve evidence or investigate these allegations in a timely manner. We note, too, that, although plaintiff's motion to amend her complaint cited her deposition testimony as the basis for adding the new claim, plaintiff's deposition was taken in 2008; she did not file the inadequate-illumination claim until three years later. Further, although plaintiff is correct that *Doherty* preceded *Porter* and did not apply the sufficiently-close-relationship test, we disagree that *Doherty* is consequently of no value. Although *Doherty* did not reach its conclusion by applying the sufficiently-close-relationship test, it nevertheless remains illustrative of the difference in character (per the sufficiently-close-relationship test) between an unnatural-accumulation claim and an inadequate-lighting claim. The City's provision and maintenance of lights in the Zule lot and the lights' operation the night of plaintiff's fall is not of the same character as plaintiff's original claim that the City's street and fleet division created unnatural accumulations of snow or ice, or the resultant discovery regarding weather conditions, weather and snow removal reports, the efforts the City took to salt or remove snow, and Hillquist's plowing efforts. Further, comparison of plaintiff's claim with those addressed in other cases, post-*Porter*, supports dismissal of the claim. See, *e.g.*, *Wilson v. Schaefer*, 403 Ill. App. 3d 688, 695 (2009) (new claims of negligence for physician's failure to discover etiology of a condition and *res ipsa loquitor* did *not* relate back to the initial informed-consent claim; new claims were not merely an amplification of allegations of which the defendants were already aware but were, instead, "entirely different"); compare with *Stevanovic v. City of Chicago*, 385 Ill. App. 3d 630 (2008) (relation back permitted where original claim against the City that the plaintiff was injured in the City's ambulance where the driver's reckless performance caused the plaintiff to lurch inside the

vehicle and sustain injury *was* sufficiently related to the plaintiff's amended claim that the City negligently failed to provide seatbelts inside of the ambulance).

¶ 45 As we conclude that the inadequate-illumination claim does not relate back to the initial claims and, thus, was properly dismissed as untimely, we need address the parties' submitted authority regarding the merits of the illumination cause of action.[3]

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 48 Affirmed.

[3] We note, however, that plaintiff was briefly questioned in her deposition about basic conditions at the time of her fall and, when asked about lighting, she testified that the lighting was adequate. For example, plaintiff testified regarding the parking lot lighting that she "know[s] it wasn't too dark" and, that, while the lighting was not bright, "it wasn't so dark to the point where I couldn't see."