

FINAL ORDER

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

RITA KLECKLEY,)	
)	
Plaintiff,)	CIVIL ACTION FILE NO.
)	2018-CV-300339
v.)	
)	
ELDRIDGE SUGGS, IV and)	
THE SUGGS LAW FIRM, P.C.,)	
)	
Defendants.)	

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

This matter is before the Court on Defendants Eldridge Suggs IV (“Suggs”) and the Suggs Law Firm, P.C.’s (the “Law Firm’s”) Motion for Summary Judgment filed December 12, 2018 (the “Motion”). After considering the Motion, Plaintiff Rita Kleckley’s (“Kleckley’s”) response filed January 14, 2019, and Defendants’ reply filed January 31, 2019, and hearing oral argument on February 12, 2019, the Court hereby enters the following Order.

I. STANDARD OF REVIEW

Summary judgment is appropriate when the court, viewing all the facts and evidence and reasonable inferences from those facts in a light most favorable to the non-movant, concludes that the evidence does not create a triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. O.C.G.A. § 9-11-56(c); Lau's Corp. v. Haskins, 261 Ga. 491 (1991); Zeller v.

Home Fed. Sav. & Loan Ass'n, 220 Ga. App. 843 (1996); Rubin v. Cello Corp., 235 Ga. App. 250, 250-51 (1998).

Summary judgment shall be awarded to the moving party if the pleadings, depositions, answers to interrogatories and admissions in the record, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Lau's Corp. at 491.

In response to a motion for summary judgment, “the opposing party must come forward with rebuttal evidence or suffer judgment against him.” Nations Bank, N.A. (S.) v. Peavy, 227 Ga. App. 137, 138 (1997). “In rebutting this prima facie case, an adverse party may not rest upon the mere allegations of denials of his pleading, but his response, by affidavits or as otherwise provided in O.C.G.A. § 9-11-56, must set forth specific facts showing that there is a genuine issue for trial.” Entertainment Sales Co. v. SNK, Inc., 232 Ga. App. 669, 669-70 (1998) (punctuation omitted).

Summary judgment is an extreme sanction that the court should grant in only the clearest and rarest of cases. Grier v. Kanon Serv. Corp., 217 Ga. App. 110 (1995). The non-moving party is entitled to the benefit of every reasonable doubt, and the Court must grant the non-moving party the benefit of all favorable inferences derived from the evidence. McGonagil v. Treadwell, 216 Ga. App. 850 (1995).

II. FINDINGS OF FACT

On February 2, 2015, Kleckley was trying on shoes at Macy's Department Store ("Macy's") in South Lake Mall when she fell because, allegedly, "the heel caught in the snags of the poorly maintained carpet." (Def. SMF ¶ 1; Pl. Resp. ¶ 1.) Kleckley did not go to the emergency room until February 4, 2015. (Def. SMF ¶ 3; Pl. Resp. ¶ 3.) Kleckley informed the staff at Piedmont Fayette Hospital Emergency Department that the fall occurred because she "was trying on new shoes and tripped over [the] carpet." (Def. SMF ¶ 4; Pl. Resp. ¶ 4.)

On March 18, 2015, Kleckley retained Defendants to represent her with regard to a negligence claim against Macy's. (Def. SMF ¶ 5; Pl. Resp. ¶ 5.) Kleckley testified she went back to Macy's on an unknown date with Suggs and his assistant to "t[ake] pictures of the whole store where the carpet was horrible." (Kleckley Dep. 114:4-7.) On March 30, 2015, Defendants contacted Sarah Stewart ("Stewart"), a claims adjuster for Macy's Risk Management Department. (Def. SMF ¶ 6; Pl. Resp. ¶ 6.) On April 2, 2015, Stewart responded that Macy's had "completed a thorough investigation into this matter which reveals no liability on Macy's, Inc." (Def. SMF ¶ 7; Pl. Resp. ¶ 7.)¹

In August 2015, Dr. Philip Ploska "discovered that [] Kleckley was in need of a left sacroiliac fusion." (Ploska Aff. ¶ 5.) Dr. Ploska stated "[t]he injury is

¹ The Court notes Plaintiff admits it is "[u]ndisputed that the letter was sent by Ms. Stewart" but then states "the letter constitutes inadmissible hearsay."

consistent with the result of the fall [] Kleckley described she suffered in February 2015.” (Id. ¶ 6.) Kleckley testified the fall caused her to suffer immediate pain. (Kleckley Aff. ¶ 4.) On October 25, 2016, Dr. Ploska “performed a left sacroiliac fusion using SI-bone surgery on [Kleckley.]” (Id. ¶ 7.)

Kleckley had admittedly suffered problems with her back due to a variety of events that occurred before her alleged fall at Macy’s in 2015. (Def. SMF ¶ 9; Pl. Resp. ¶ 9.) For example, Kleckley was involved in a car accident which caused injury to her back. (Id.) In 2009, Kleckley filed a lawsuit against her former employer UPS for a trip and fall incident in the UPS cafeteria. (Def. SMF ¶ 10; Pl. Resp. ¶ 10.) In 2009, Kleckley underwent back surgery in 2009 at Henry Piedmont Hospital. (Def. SMF ¶ 11; Pl. Resp. ¶ 11.) Following her fall at UPS in 2008, Kleckley was declared 100% disabled and in or around 2011 began receiving social security benefits continuously until the present and continues to collect disability benefits to this day. (Def. SMF ¶ 12; Pl. Resp. ¶ 12.)

On March 7, 2017, Defendants filed suit against Macy’s on behalf of Kleckley. (Def. Mot. to Disqualify, Ex. A.) On August 15, 2017, the State Court of Clayton County granted Macy’s motion to dismiss because “[h]aving filed the Complaint more than two years after the alleged incident, [] Kleckley’s claims for personal injury are barred by the applicable statute of limitations.” (Id.) The dismissal was affirmed by the Court of Appeals in an unpublished opinion.

III. CONCLUSIONS OF LAW

Defendants move for summary judgment on Kleckley's claims for legal malpractice (count one) and attorney's fees (count two).

According to the Georgia Supreme Court,

'[i]n a legal malpractice action, the plaintiff must establish three elements: '(1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage to the plaintiff.'

...

[W]ith respect to the "ordinary care, skill and diligence" element, the law imposes upon persons performing professional services the duty to exercise a reasonable degree of skill and care, as determined by the degree of skill and care ordinarily employed by their respective professions under similar conditions and like surrounding circumstances.

Because the second element of the test involves answering the question whether certain professional standards have been met, 'except in clear and palpable cases (such as the expiration of a statute of limitation), expert testimony is necessary to establish the parameters of acceptable professional conduct [for an attorney], a significant deviation from which would constitute malpractice.' This does not mean, however, that expert testimony would also be appropriate with respect to the third and final element of the test, causation.

In order to establish the final element, '[t]he plaintiff must show that, but for the attorney's negligence in the underlying case, the plaintiff would have prevailed.' In this sense,

[t]o establish causation and injury in a legal malpractice action, the plaintiff is often compelled to prove the equivalent of two cases in a single proceeding or what has been referred to as a 'suit within a suit.' There must first be a determination that the

lawyer was negligent, that is, whether he or she violated the duty to exercise a reasonable degree of professional care, skill, and [diligence]. If the jury determines that the lawyer fulfilled this standard of care, that ends the case. If, however, the jury determines that the lawyer was negligent, the case moves on to the second phase, the so-called 'suit within a suit,' to determine whether the client was, in fact, damaged by that negligence. Thus, the ultimate goal of the 'suit within a suit' is to determine what the outcome should have been if the issue had been properly presented in the first instance. That determination, however, does not require that the jury in the malpractice action determine what the actual jury in the underlying action would have done; rather, the second jury is to determine what a reasonable jury would have done if the case had been tried differently. Thus, the jury in the malpractice action is permitted to substitute its own judgment for that of the jury in the underlying action.

Leibel v. Johnson, 291 Ga. 180, 181-82 (2012) (citations omitted).

Defendants argue they are entitled to summary judgment because Kleckley cannot establish the third element of proximate cause. (Defs. Br. 4-9.) Specifically, they argue Kleckley cannot establish: (1) there was a defect in Macy's carpet and the defect caused her fall; and (2) the defect was the proximate cause of her back injury. (Id.)

The Court of Appeals has explained trip-and-fall cases as follows.

Under O.C.G.A. § 51-3-1, '[w]here an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.' In such cases, '[t]he plaintiff must plead and prove that: (1) the defendant had actual or constructive knowledge of the hazard; and (2) the plaintiff, despite exercising ordinary care for his or her own personal safety, lacked

knowledge of the hazard due to the defendant's actions or to conditions under the defendant's control.'

Riggs v. Highland Hills Apts., LLC, 334 Ga. App. 247, 249 (2015) (citations omitted). Further, “[c]ausation is always an essential element in slip or trip and fall cases.” Id. (citation omitted).

On the issue of the fact of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to grant summary judgment for the defendant.

Shadburn v. Whitlow, 243 Ga. App. 555, 556 (2000) (citation omitted).

Additionally, “it is a well settled principle of negligence law that the occurrence of an unfortunate event is not sufficient to authorize an inference of negligence.”

Avery v. Cleveland Ave. Motel, Inc., 239 Ga. App. 644, 645 (1999) (citation omitted). Causation in slip-or trip-and-fall cases is fact intensive. In Riggs, the Court of Appeals pointed out the evidence before it

distinguishes the case from those slip-or trip-and-fall cases in which we found the evidence of causation to be too speculative to survive summary judgment. The alleged hazard in this case was specifically identified and there was evidence that it existed at the time of the fall. Compare Pinckney, 288 Ga. App. at 893 (finding only speculation that alleged hazard—algae on pool deck—was present when plaintiff slipped and fell, where algae was seen 12 days later and pool had been closed for repairs during interim); Moore v. Teague, 255 Ga. App. 220, 220-21 (2002) (plaintiff assumed she had slipped on wet floor

but did not actually know if floor was wet). Moreover, Riggs did not express uncertainty about the cause of his fall but instead, in his testimony, attributed his fall to the alleged hazard and described feeling the ground give way, a sensation consistent with stepping into a hole. Compare Canaan Land Props. v. Herrington, 330 Ga. App. 17, 19-20 (2014) (plaintiff admitted uncertainty about what caused his fall); Pinckney, 288 Ga. App. at 893 (plaintiff testified that she had no idea what caused her to fall); Pennington, 263 Ga. App. at 760 (although plaintiff testified to a ‘feeling of falling’ and assumed he had tripped on a nearby pile of hoses, he had no memory of his feet striking anything and could not say whether he had tripped at all); Shadburn v. Whitlow, 243 Ga. App. 555, 55 (2000) (witnesses to accident where woman fell at top of stairwell and landed on plaintiff testified that they were not certain what caused the fall). The evidence presented a jury question on whether the hole caused Riggs's fall. See Gilbert v. Automotive Purchasing Svc., 254 Ga. App. 770, 771-772, (2002) (evidence that plaintiff saw streak mark where her shoe had slipped on floor and that her husband had observed industrial floor cleaner on floor was sufficient to create jury issue that dangerous condition on premises caused plaintiff's fall).

Riggs at 250-51.

Kleckley testified that she went to Macy's with her sister-in-law and her two nieces to try on shoes. (Kleckley Dep. 109:19-24.) Kleckley stated she tried on a pair of shoes, walked across the room to look in the mirror, and “when [she] started walking across, [her] heel caught onto the snag [in the carpet], and [she] just went sailing on the floor.” (Id. 110:20-11:2.) She further testified

Q. And when you fell, do you know what caused you to fall?

A. My foot – the heel caught onto the carpet.

Q. How did it catch onto the car[p]et?

A. The carpet was – well, once you looked at the carpet – but I just was starting to walk. And the next thing I know my heel – and I just landed.

Q. Was the carpet torn? Was it ripped? Did it have a hole in it?

A. It was ripped in several places. Attorney Suggs and his assistant and I went back and took pictures of the whole store where the carpet was horrible.

Q. You said it was several rips in various places.

A. In various places. Yes, sir.

Q. Did you see those rips before you fell?

A. Didn't pay attention. I wasn't looking down at the ground.

Q. My question is: Did you see those rips before you fell?

A. No, I didn't.

...

Q. So you testified that you were in the ladies' shoe department for 30 to 45 minutes before you fell. You said also that the carpet was ripped in several places, that it was horrible. And for 30 to 45 minutes, you didn't see one rip in the carpet?

A. Well, I didn't realize how the carpet was ripped until Attorney Suggs and his assistant – we back the next – when we back for him to take the pictures, that is when I noticed how the carpet was all ripped in several places. Other than that, I didn't pay attention to the carpet.

...

Q. If you were looking straight and not looking down, how do you know that your heel got caught in a rip?

[Object to the form.]

A. Once I fell, it caught me so out of surprise. I looked down to see why did I fall. I said, "Oh, my heel caught that carpet." At the present time, it is – I was getting up and telling my – I was telling my sister-in-law, "Let's go," because I was, like, shocked and embarrassed that I fell.

Q. I'm sorry. You just said a couple of questions ago that you didn't look at the carpet and see the rips until you and Mr. Suggs went back the next day.

[Object to the form]

A. No. I said I didn't see various areas of the tears (sic) because I said it was ripped in several places. It was raggedy carpet in several parts of the store, all over that store Macy's. That is what Suggs said. We took pictures. So I didn't. That is what I was seeing, the rips and stuff that I seen with him. But at the time, when I slipped and fell, I got up. I got up, and I seen – trying to figure out why did I fall. And I seen that my heel caught a piece of the carpet.

...

Q. And after you fell and you looked to see what caused you to fall,

were your shoes in a rip? Or were they outside the ripped area but just near it?

[Object to form]

A. I don't recall that. I wasn't that detailed.

...

Q. Did he ever give you pictures – who took the pictures?

A. He did. Him and his assistant at that time.

Q. Okay. Did he ever give you any copies of those photographs?

A. No.

(Id. 113:19-119:3; 161:11-17.)

In an affidavit dated January 25, 2019, Kleckley states she “tripped and fell when the shoes [she] was trying on caught a snag in the carpet” at Macy’s. (Kleckley Aff. ¶ 2.) Additionally, “[t]he fall was caused by the poorly maintained carpet in the [shoe] department. Specifically, the carpeting had tears and snags which, while not apparent upon a casual observation were readily apparent upon a close examination.” (Id. ¶ 3.)

On February 11, 2019, the day prior to oral argument, Kleckley filed the Affidavit of Carrie Ford. Ford states she witnessed Kleckley fall. (Ford Aff. ¶ 3.) She further states “[a]fter Ms. Kleckley fell, I immediately observed that the carpet on which she had been walking in Macy’s was in very bad, ‘stringy’ or snagged condition. I believe that the poor condition of the carpet is what caused her to fall.” (Id. ¶ 4.)

Defendants argue “the conjecture that [Kleckley] may have fallen on the ‘snags of the [allegedly] poorly maintained carpet’ does not sufficiently establish

causation” and cite to Shadburn. (Defs. Br. 5.) In Shadburn, the evidence

show[ed] that Shadburn, Whitlow, and Jewel Palmer were on their way to Ormond Beach, Florida. En route, they stopped at New Perry Hotel to eat lunch. The three proceeded up a flight of stairs to the hotel restaurant. Palmer proceeded first, followed by Shadburn. Whitlow, an elderly woman who had impaired vision due to cataracts, followed last. Palmer was waiting in line at the restaurant when she heard a noise. Turning, she saw Whitlow, who had reached the top of the stairs, fall into Shadburn who was standing in the lobby area. Shadburn was injured.

Palmer and Shadburn believed that Whitlow's fall was caused by loose carpeting which they noticed at the top of the stairwell the evening after the fall; however, all three ladies testified that they were not actually certain what caused Whitlow to fall. Palmer also averred in her affidavit that Whitlow may have tripped because she may have been inebriated after sipping an unknown beverage from a cup during the trip to Perry.

Id. at 556.

The Shadburn court held “[t]he trial court properly granted summary judgment to New Perry Hotel because Shadburn failed to present any evidence that a condition on the stairs, the loose carpeting, caused Whitlow to fall. The speculation that Whitlow may have tripped on loose carpeting does not sufficiently establish causation.” Id.

Defendants also point to Imperial Invs. Doraville, Inc. v. Childers, 303 Ga. App. 490 (2010). In Imperial Invs., the evidence as trial was that

Childers tripped and collided with his friend, and they both fell through a plate glass window, causing serious injuries to Childers's arm.

At trial, Childers agreed that he was making ‘assumptions about why he fell.’ While he knew that he tripped, he did not know if he tripped over an object, because ‘at the time I never did look to see anything I tripped on.’ He also testified that he had gone in and out of the doorway about 15 times during the weekend, and he agreed from viewing photographs that there was renovation or construction work going on in the hall outside the banquet room, although he had no independent recollection of it. He did recall seeing some tape in the doorway as he exited and ‘rolls of carpet in the hallways.... You had to step through and over stuff just to go back to the dart hall.’ Childers also noticed that the carpet was ‘wrinkly,’ but even after he agreed with his counsel's suggestion, ‘You know with some precision what you fell over, you don't know exactly and that is how you testified?’ he still responded that he did not know if he stumbled over a raised piece of carpet. Childers's counsel then again asked Childers if he ‘had a pretty good idea what you fell over?’ and Childers responded affirmatively, but never testified directly that he knew that he fell over the carpet.

The friend that Childers was trying to catch up with testified that the carpet was ‘bunched up’ and ‘had duct tape in various spots around that area.’ However, he did not see what happened, and he did not see what Childers tripped over. Other witnesses did not see the fall, but testified that they observed tape and ‘bunched up’ carpet in the area as they went in and out of the doorway during the weekend.

Id. at 490-91.

The Imperial Invs. court reversed the trial court’s denial of the defendant’s directed verdict finding the plaintiff “maintained, despite his counsel's repeated attempts to elicit such a conclusion, that he did not know what he tripped over.” Id. at 493.

The Court also finds helpful the case of Avery. The facts in Avery show that

[a]s [the plaintiff] approached a set of stairs, her heel caught against the floor, and she began to fall. She grabbed for a rail, and, although it

appeared to be firm at the top of the stairwell, it became disconnected from the wall at the bottom. [The plaintiff] believed that her fall was caused by worn and frayed carpeting which she noticed at the top of the stairwell subsequent to her fall; however, [the plaintiff] testified that she was not actually certain what caused her to fall.

Avery v. Cleveland Ave. Motel, Inc., 239 Ga. App. 644, 644 (1999). The Avery court held the plaintiff's "admitted speculation that she initially may have tripped on worn carpeting does not sufficiently establish causation." Id. at 645.

Additionally, the Court finds Moore helpful. In Moore,

[the p]laintiff fell in the defendant's kitchen but does not know why her legs and feet did a split; she assumed that it was from the wet floor, but she did not actually know if the floor was wet. Everyone at the party, including the plaintiff, was aware that the icemaker malfunctioned twice during the party, spilling ice onto the floor.

Moore at 220-21.

The Moore court upheld the grant of summary judgment to the defendant because "summary judgment is appropriate in a slip or trip and fall case such as the instant case where the cause remains unknown." Id. at 222.

Here, Kleckley testified she "didn't realize how the carpet was ripped until Attorney Suggs and his assistant – we back the next – when we back for him to take the pictures, that is when I noticed how the carpet was all ripped in several places." (Kleckley Dep. 115:8-12.) She was also asked "after you fell and you looked to see what caused you to fall, were your shoes in a rip? Or were they outside the ripped area but just near it?" and she responded "I don't recall that. I

wasn't that detailed." (Id. 118:22-119:3.)

Similar to the plaintiffs in Shadburn, Avery, and Moore, Kleckley did not see any defects on the day she fell. While Kleckley has testified clearly that her heel caught on the carpet, she did not actually witness any snags or rips in the carpet on the day she fell. It was not until she retained and was accompanied by Defendants – approximately six weeks after the fall – that she noticed any defects in the carpet. Any supposition by Kleckley amounts to speculation or conjecture and not actual knowledge as to why she fell. Additionally, Ford did not witness Kleckley's heel catch a snag in the carpet. Any supposition by Ford amounts to speculation or conjecture and not actual knowledge as to why Kleckley fell. Because a mere possibility of causation is not enough and the matter is subject to speculation or conjecture, the Court finds Defendants are entitled to judgment as a matter of law because there is no evidence of causation.

The Court notes that at oral argument Defendants argued Kleckley had not proven Macy's had actual or constructive knowledge of the hazard. Kleckley objected to this argument because it was not raised in the Motion. According to the Court of Appeals,

[the defendant] urges that it was entitled to summary judgment based on [the plaintiff's] failure to present evidence of a defect. This issue, however, was not asserted in [the defendant's] motion for summary judgment. The issues that must be rebutted on motion for summary judgment are those raised by the motion. Accordingly, in responding to [the defendant's] motion, [the plaintiff] had no obligation to present

evidence on or to argue against this unasserted ground.

Buchan v. Lawrence Metal Prod., Inc., 270 Ga. App. 517, 521 (2004) (citation omitted). The Court finds Defendants did not seek summary judgment on this ground in their Motion and therefore the argument is untimely.

For the reasons stated, the Court **GRANTS** Defendants' Motion for Summary Judgment.

SO ORDERED, this 12th day of February, 2019.



Kelly Lee Ellerbe, Judge
Fulton County Superior Court
Atlanta Judicial Circuit

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