

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

Isabel M. Scalici v. Smith’s Food & Drug Centers, Inc.

Scalici v. Smith's Food & Drug Centers, Inc. · No. 2:24-cv-00540-ART-EJY · Decided January 23, 2026

SUMMARY

The United States District Court for the District of Nevada denied Isabel M. Scalici’s motions for partial summary judgment in her premises-liability action against Smith’s Food & Drug Centers, Inc. The court found genuine disputes regarding notice of the spill, causation, damages, failure to mitigate, and comparative negligence. The court also deemed waived Smith’s affirmative defenses based on laches, NRS 11.202, and reservation of the right to amend.

CASE DETAILS

COURT	United States District Court for the District of Nevada
WRITING FOR THE COURT	Anne R. Traum
JURISDICTION	United States District Court for the District of Nevada
DECIDED	January 23, 2026
DOCKET	2:24-cv-00540-ART-EJY
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiff moved for partial summary judgment on premises liability, causation, specified damages, and several affirmative defenses in a removed Nevada negligence action. The district court denied the motions.
STANDARD OF REVIEW	Summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The evidence and reasonable inferences are viewed in the light most favorable to the nonmoving party.
PRECEDENTIAL VALUE	unpublished, nonprecedential district court order
PARTIES	Isabel M. Scalici v. Smith’s Food & Drug Centers, Inc.

TOPICS

- summary judgment
- premises liability
- affirmative defenses
- comparative fault
- damages

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Scalici was entitled to partial summary judgment on premises liability based on actual or constructive notice of the water on the floor.
2. Whether Nevada's mode-of-operation theory established notice as a matter of law on the evidence concerning Smith's produce-spraying practices.
3. Whether Scalici was entitled to summary judgment on causation and specified damages because Smith's had not retained a rebuttal expert.
4. Whether genuine disputes of material fact precluded summary judgment on Smith's affirmative defenses of failure to mitigate damages and comparative negligence.
5. Whether Smith's waiver of its defenses of laches, NRS 11.202, and reservation of the right to amend required the court to grant relief on those defenses.

HOLDINGS

1. Summary judgment on premises liability was denied because genuine disputes of material fact remained as to whether Smith's had actual or constructive notice of the water hazard and failed to remedy it.
2. Scalici was not entitled to summary judgment under Nevada's mode-of-operation theory because the evidence did not establish a virtually continuous hazard associated with Smith's produce-spraying activity.
3. Scalici was not entitled to summary judgment on causation, past or future medical expenses, or past wage loss because Smith's identified evidence creating genuine disputes of material fact.
4. Summary judgment was denied on Smith's failure-to-mitigate defense because disputed facts remained regarding whether Scalici acted reasonably in pausing treatment while moving to Florida and whether she received treatment while in Portugal.
5. Summary judgment was denied on Smith's comparative-negligence defense because the surveillance evidence created a genuine dispute as to whether Scalici failed to exercise reasonable care and thereby caused or contributed to her injury.

KEY QUOTATIONS

“Summary judgment is appropriate if the movant shows “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”” (at 3)

“An owner of a business owes its patrons “a duty to keep the premises in a reasonably safe condition for use—the duty of ordinary care.”” (at 4)

“The owner or occupant of property is not an insurer of the safety of a person on the premises, and in the absence of negligence, no liability lies.” (at 4)

“an affirmative defense consists of new facts and arguments that, if true, will defeat a plaintiff's claim, even if all allegations in the complaint are true.” (at 8)

FACTUAL BACKGROUND

On April 7, 2022, Isabel Scalici slipped on water droplets while shopping in the produce section of a Smith's store in Las Vegas. Evidence suggested that a patron had shaken wet produce approximately eight minutes before the fall, but surveillance images also showed patrons moving through the area afterward, including a person apparently taking produce from the rack shortly before the fall. Scalici later received medical treatment for back injuries, and her medical evidence reflected possible preexisting or alternative causes, including a prior automobile accident, laminectomy, herniated disk, and stem-cell treatment. She also claimed past and future medical expenses and past wage loss.

PROCEDURAL HISTORY

Scalici filed a negligence action in Nevada state court on December 22, 2023, arising from a slip and fall at a Smith's store. Smith's removed the action to the United States District Court for the District of Nevada. Scalici then filed three motions for partial summary judgment, all of which the court denied; related motions for submission were denied as moot.

DISPOSITION

other

CASES CITED

- Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)
- Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986)
- Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 531 (9th Cir. 2000)
- James River Ins. Co. v. Hebert Schenk, P.C., 523 F.3d 915, 920 (9th Cir. 2008)
- Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970)
- DeBoer v. Sr. Bridges of Sparks Fam. Hosp., 282 P.3d 727, 732 (Nev. 2012)
- Perez v. Las Vegas Med. Ctr., 805 P.2d 589, 591 (Nev. 1991)
- Harrington v. Syufy Enterprises, 931 P.2d 1378, 1380 (Nev. 1997)
- Turner v. Mandalay Sports Ent., LLC, 180 P.3d 1172, 1177 (Nev. 2008)
- Asmussen v. New Golden Hotel Co., 392 P.2d 49, 49 (Nev. 1964)
- Sprague v. Lucky Stores, 849 P.2d 320, 322-23 (Nev. 1993)
- Rios v. Wal-Mart, Inc., 740 Fed. Appx. 582, 583 (9th Cir. 2018)
- Paul v. Imperial Palace, Inc., 908 P.2d 226, 230 (Nev. 1995)
- FGA, Inc. v. Giglio, 278 P.3d 490, 496-97 (Nev. 2012)
- Sosa Guzman v. Costco Wholesale Corp., No. 2:22-CV-02070-CDS-BNW, 2024 WL 4406915, at *3 n.3 (D. Nev. Aug. 23, 2024)
- Didier v. Sotolongo, 441 P.3d 1091 (Nev. 2019)
- Sanchez v. Albertson's LLC, No. 2:19-CV-02017-JAD-DJA, 2022 WL 2982926, at *4 (D. Nev. July 27, 2022)

- Lord v. State, 806 P.2d 548, 551 (Nev. 1991)
- Albios v. Horizon Communities, Inc., 132 P.3d 1022, 1034 (Nev. 2006)
- Shuette v. Beazer Homes Holdings Corp., 124 P.3d 530, 547 (Nev. 2005)
- Baker v. Wal-Mart Stores, Inc., No. 2:19-CV-02218-GMN-VCF, 2021 WL 5114652, at *3 (D. Nev. Sept. 8, 2021)
- F.D.I.C. v. Johnson, 35 F. Supp. 3d 1286, 1292 (D. Nev. 2014)
- Schettler v. RalRon Capital Corp., 275 P.3d 933, 940 (Nev. 2012)
- Automatic Merchandisers, Inc. v. Ward, 646 P.2d 553, 554 (Nev. 1982)
- Sercu v. Laboratory Corp. of America, No. 3:09-CV-0619-LRH-RAM, 2011 WL 540282, at *2-*3 (D. Nev. Feb. 8, 2011)

OPINION

1 2 UNITED STATES DISTRICT COURT 3 DISTRICT OF NEVADA 4 ISABEL M. SCALICI, Case No. 2:24-cv-00540-ART-EJY 5 Plaintiff, ORDER 6 v. 7 SMITH'S FOOD & DRUG CENTERS, INC. 8 Defendant. 9 10 This is a removed action stemming from a slip and fall on April 7, 2022, at 11 a Smith's Food & Drug Center in Las Vegas, Nevada. Plaintiff Isabel Scalici alleges 12 negligence against Defendant Smith's Food & Drug Centers, based on theories of 13 premises liability, respondeat superior, and negligent hiring, training, 14 supervision, and entrustment.

(ECF No. 1-1.) Ms. Scalici moves for partial 15 summary judgment as to Smith's affirmative defenses, premises liability, and 16 causation, past medical specials, past wage loss, and future medical specials. 17 (ECF Nos. 16, 17, 18.)

For the reasons set forth in this order, the Court denies 18 Ms. Scalici's partial motions for summary judgment. 19 I. FACTS 20 On April 7, 2022, Ms. Scalici was grocery shopping at the Smith's at 3160 21 N. Rainbow Boulevard in Las Vegas, Nevada. (ECF Nos. 1-1 at 4; 17 at 3.)

As Ms. 22 Scalici was walking through the produce section, she slipped and fell on droplets 23 of water on the floor. (Id.) 24 There is some evidence suggesting that another patron shook wet produce 25 in the area where the fall occurred about 8 minutes prior to the fall. (ECF No. 17 26 at 5.) Shortly after the patron shook some wet produce, Smith's Assistant Store 27 Leader, Gilbert Huizar, walked through the area.

(Id.) However, between Mr. 28 Huizar exiting the area and Ms. Scalici falling, still photos from the surveillance 1 footage show a number of patrons with produce in their carts walking through 2 the area. (ECF No. 24-2 at 11–17.) Some of these patrons appear to have produce 3 in their cart. (Id.) Additionally, just before Ms. Scalici slipped, a woman standing 4 next to her appears to put something from the produce rack into her cart.

(Id. at 5 15–17.) 6 Following this accident, Ms. Scalici began medical treatment for her 7 injuries in Las Vegas. (See e.g., ECF Nos. 18-2 at 2; 18-5 at 2.) After moving to 8 Florida in May 2022, Ms. Scalici continued medical treatment. (ECF No. 18-7 at 9 2–3.) She later consulted with Dr. Kevin Debiparshad of Synergy Spine & 10 Orthopedics. Dr. Debiparshad initially recommended surgery for Ms. Scalici’s 11 lumbar spine, including a lumbar microdiscectomy.

(ECF No. 18-1 at 2–3.) 12 However, Dr. Debiparshad later changed his opinion, instead recommending 13 transforaminal lumbar interbody fusion. (ECF No. 18-1 at 9.) 14 On December 22, 2023, Ms. Scalici filed the instant lawsuit against 15 Smith’s. (ECF No. 1-1.) Smith’s subsequently removed this action to federal court, 16 and Ms. Scalici moved for partial summary judgment.

(ECF Nos. 16, 17, 18.) 17 Smith’s responded to the partial summary judgment motions (ECF Nos. 24, 25, 18 26), and Ms. Scalici replied. (ECF Nos. 27, 28, 29.) 19 II. SUMMARY JUDGMENT STANDARD 20 Summary judgment is appropriate if the movant shows “there is no genuine 21 dispute as to any material fact and the movant is entitled to judgment as a matter 22 of law.” FED.

R. CIV. P. 56(a), (c). A fact is material if it “might affect the outcome 23 of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 24 242, 248 (1986). A dispute is genuine if “the evidence is such that a reasonable 25 jury could return a verdict for the nonmoving party.” *Id.* 26 The party seeking summary judgment bears the initial burden of informing 27 the Court of the basis for its motion and identifying those portions of the record 28 that demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. 1 Catrett, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party 2 to set forth specific facts demonstrating there is a genuine issue of material fact 3 for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 4 2000).

The Court views the evidence and reasonable inferences in the light most 5 favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 6 523 F.3d 915, 920 (9th Cir. 2008). 7 In contrast, when the nonmoving party bears the burden of proving a claim 8 or defense, the moving party may satisfy its burden by either (1) producing 9 evidence that negates an essential element of the non-moving party’s claim or 10 defense, or (2) showing that the nonmoving party lacks sufficient evidence to 11 establish an essential element on which it will bear the burden of proof at trial.

12 See *Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet this initial 13 burden, the Court does not need to consider the nonmoving party’s evidence and 14 summary judgment must be denied. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 15 144, 159–60 (1970). 16 III. LIABILITY 17 Ms. Scalici first seeks partial summary judgment as to premises liability, 18

contending that Smith's had both constructive notice of the spill and notice under 19 a mode of operation theory, yet failed to remedy the spill.

(ECF No. 17.) "In order 20 to prevail on a traditional negligence theory, a plaintiff must establish that (1) the 21 defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, 22 (3) the breach was the legal cause of the plaintiff's injuries, and (4) the plaintiff 23 suffered damages." *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.*, 282 P.3d 727, 24 732 (Nev.

2012). "In order to establish entitlement to judgment as a matter of law, 25 respondents must negate at least one of the [] elements of the plaintiff's case." 26 *Perez v. Las Vegas Med. Ctr.*, 805 P.2d 589, 591 (Nev. 1991).

In negligence actions, 27 courts are generally reluctant to grant summary judgment. *Harrington v. Syufy* 28 *Enterprises*, 931 P.2d 1378, 1380 (Nev. 1997). 1 "[W]hether a duty exists is actually a question of law." *Turner v. Mandalay 2 Sports Ent., LLC*, 180 P.3d 1172, 1177 (Nev. 2008). "An owner of a business owes 3 its patrons "a duty to keep the premises in a reasonably safe condition for use— 4 the duty of ordinary care." *Asmussen v. New Golden Hotel Co.*, 392 P.2d 49, 49 5 (Nev.

1964). Accordingly, a business owner is only liable for accidents stemming 6 from its own unreasonable—and therefore negligent—conduct, not for all 7 accidents occurring on its premises. See *Sprague v. Lucky Stores*, 849 P.2d 320, 8 322–23 (Nev. 1993) ("The owner or occupant of property is not an insurer of the 9 safety of a person on the premises, and in the absence of negligence, no liability 10 lies.") (internal quotation marks and citations omitted).

11 "Where a foreign substance on the floor causes a patron to slip and fall, 12 and the business owner or one of its agents caused the substance to be on the 13 floor, liability will lie, as a foreign substance on the floor is usually not consistent 14 with the standard of ordinary care." *Sprague*, 849 P.2d 320, 322 (Nev. 1993). But 15 [w]here the foreign substance is the result of the actions of persons other than 16 the business or its employees, liability will lie only if the business had actual or 17 constructive notice of the condition and failed to remedy it." *Id.* at 322-23.

18 Whether a property owner is under constructive notice of a hazardous condition 19 is a question of fact for the jury to resolve. *Sprague*, 849 P.2d at 323; see also 20 *Rios v. Wal-Mart, Inc.*, 740 Fed. Appx. 582, 583 (9th Cir. 2018) (citing *Sprague* 21 and affirming that constructive notice is a question of fact for the jury); *Paul v. 22 Imperial Palace, Inc.*, 908 P.2d 226, 230 (1995) (same).

23 Constructive notice can be proven with evidence of a virtually continual 24 hazard. For example, in *Sprague*, the plaintiff had slipped and fallen in the 25 produce section of defendant's supermarket. *Sprague*, 849 P.2d at 322. A half- 26 smashed grape was found next to plaintiff's

body immediately after the fall. Id. 27 Plaintiff did not allege that defendant or its employees had caused the grape to 28 be on the ground.

See id. However, defendant's employees testified that the 1 produce section was "a virtually continual hazard" due to customers dropping 2 food debris "all over the floor." Id. The court found that a reasonable juror could 3 have determined that the virtually continual debris on the floor put the store on 4 constructive notice that, at any time, a hazardous condition might exist which 5 would result in an injury to customers.

Id. at 323. 6 A. Liability Analysis 7 Although Ms. Scalici has not put forth any evidence suggesting that a 8 Smith's employee caused the water to be on the floor, there is a dispute of 9 material fact as to whether Smith's had actual or constructive notice of the 10 hazard. 11 Ms. Scalici argues that Smith's has conceded notice because Assistant 12 Store Leader Charity Puckett testified that a patron shook produce in the area 13 where the slip and fall occurred, and Mr. Huizar "missed it," therefore failing to 14 remedy the hazard.

(ECF No. 17 at 12.) Smith's, in turn, has provided photos 15 from surveillance footage which appear to show several patrons walking through 16 the area after Mr. Huizar left, including one woman who grabbed produce from 17 the wet rack just before Ms. Scalici fell. (ECF No. 24-2 at 11–17.) A juror could 18 therefore reasonably conclude that Mr. Huizar did not fail to remedy the issue 19 because it occurred after he walked through the area.

20 Ms. Scalici argues that Smith's also had notice under the mode of operation 21 theory, because Smith's practice of frequently spraying produce increases the 22 likelihood that customers will shake water droplets from the produce onto the 23 floor. (ECF No. 17 at 9–10.)

Under the mode of operation approach, "the plaintiff 24 satisfies the notice requirement if he establishes that an injury was attributable 25 to a reasonably foreseeable dangerous condition on the owner's premises that is 26 related to the owner's self-service mode of operation." FGA, Inc. v. Giglio, 278 P.3d 27 490, 496–97 (2012) (internal quotation marks and citation omitted).

In FGA, the 28 Nevada Supreme Court explained that they had implicitly adopted the mode of 1 operation approach in Sprague and declined to extend the approach to a sit-down 2 restaurant. Id. at 497. Smith's argues that its method of spraying produce is not 3 a proper activity for applying the mode of operation rule. (ECF No. 24 at 13.)

The 4 Court agrees. There is no evidence suggesting that water droplets in the produce 5 area caused a "virtually continuous hazard" analogous to that in Sprague. Ms. 6 Scalici attempts to support her proposition by alleging the existence of three prior 7 falls at the Smith's store. (ECF No. 17 at 10.)

However, even if these three falls 8 are factually similar to this case, they do not prove a “virtually continuous 9 hazard.” See *Sosa Guzman v. Costco Wholesale Corp.*, No. 2:22-CV-02070-CDS- 10 BNW, 2024 WL 4406915, at *3 n.3 (D. Nev. Aug. 23, 2024). Additionally, Ms. 11 Scalici does not provide caselaw showing that Nevada has adopted the mode of 12 operation rule in cases like this.

13 Because issues of fact remain as to whether Smith’s had actual or 14 constructive notice of the hazardous condition, Ms. Scalici is not entitled to 15 summary judgment as to premises liability. Accordingly, the Court denies 16 summary judgment on this issue. 17 IV. CAUSATION AND DAMAGES MOTION 18 Ms. Scalici next seeks summary judgment as to causation and certain 19 elements of damages, including \$28,746 for past medical expenses, \$397,958 for 20 future medical expenses, and \$48,087 for past wage loss.

(ECF No. 18 at 6–7.) 21 Ms. Scalici chiefly contends that because Smith’s has not retained an expert to 22 rebut her arguments, she is entitled to summary judgment on causation and past 23 medical specials, future medical specials, and past wage loss. (See ECF No. 18.) 24 Smith’s counters that it has disputed causation and damages, arguing that 25 because Ms. Scalici’s medical records and Dr. Debiparshad’s testimony show 26 multiple possible causes of her injuries, a jury must decide if her fall necessitated 27 the specific treatment she received.

(ECF No. 25.) 28 Ms. Scalici relies on *Didier v. Sotolongo*, 441 P.3d 1091 (Nev. 2019), and 1 *Lord v. State*, 806 P.2d 548 (Nev. 1991), to argue that Smith’s must retain an 2 expert to rebut her motion for partial summary judgment on causation and 3 damages. (ECF No. 18.) *Didier* however is unpublished and consequently not 4 binding. See *Sanchez v. Albertson’s LLC*, No. 2:19-CV-02017-JAD-DJA, 2022 WL 5 2982926, at *4 (D.

Nev. July 27, 2022). Additionally, *Didier* is distinguishable 6 because causation in that case was previously established as a matter of law. 7 *Lord v. State* is not a negligence case. Instead, it is a criminal case where the 8 Nevada Supreme Court concluded that a medical expert, rather than a detective, 9 should have testified about the cause of the criminal defendant’s injuries.

Lord, 10 806 P.2d at 551. Nowhere in the case does the Nevada Supreme Court hold that 11 a defendant must provide expert testimony to rebut the plaintiff’s expert 12 testimony. Ms. Scalici cites no other relevant authority to support her position 13 that a defendant must provide an expert opinion to rebut a plaintiff’s position in 14 a negligence case, once that plaintiff presents an expert opinion about causation 15 and damages.

16 Additionally, Smith’s has pointed to specific facts in Ms. Scalici’s medical 17 records and expert testimony showing a genuine issue of fact regarding 18 causation. Ms. Scalici’s medical records and Dr. Debiparshad’s deposition 19 testimony demonstrate that her injuries are multifactorial, with evidence of a car 20 accident, laminectomy, herniated disk, and stem cell treatment for low back 21 impairment that occurred prior to the accident at Smith’s.

(ECF Nos. 18-2 at 4, 22 16; 18-3 at 3; 18-9 at 12–13.) As to future medical specials, Dr. Debiparshad’s 23 deposition testimony demonstrates that the transforaminal lumbar interbody 24 fusion was merely one available option if Ms. Scalici’s symptoms do not resolve 25 with other treatments. (ECF No. 18-9 at 15.) Regarding past wage loss, Ms. Scalici 26 presents scant evidence concerning past wage loss, and claims lost wages for 27 months that she spent in Portugal.

(See ECF Nos. 18-8 at 2–6; 25-4.) Given that 28 summary judgment on causation is disfavored and genuine disputes of material 1 fact remain as to whether the fall at Smith’s caused all of Ms. Scalici’s injuries, 2 the Court denies her motion on this issue. 3 The Nevada Supreme Court has consistently recognized that “[g]enerally, 4 quantities of damages are determined by the jury.” *Albios v. Horizon 5 Communities, Inc.*, 132 P.3d 1022, 1034 (Nev.

2006) (quoting *Shuette v. Beazer 6 Homes Holdings Corp.*, 124 P.3d 530, 547 (Nev. 2005)). Because genuine disputes 7 as to breach of duty and causation exist, summary judgment on damages is 8 inappropriate. See *Baker v. Wal-Mart Stores, Inc.*, No. 2:19-CV-02218-GMN-VCF, 9 2021 WL 5114652, at *3 (D. Nev. Sept. 8, 2021).

Accordingly, the Court declines 10 to undertake a piecemeal assessment of damages and instead leaves that 11 determination to the jury. 12 V. AFFIRMATIVE DEFENSES MOTION 13 Ms. Scalici moves for partial summary judgment on Smith’s affirmative 14 defenses, including failure to mitigate and comparative negligence. (ECF No. 16.) 15 Ms. Scalici also moves for partial summary judgment on Smith’s affirmative 16 defenses of laches, NRS 11.202, and reservation of the right to amend.

(Id.) 17 Because Smith’s expressly waives its affirmative defenses of laches, NRS 11.202, 18 and reservation of the right to amend, the Court does not address Ms. Scalici’s 19 arguments pertaining to these affirmative defenses and deems them waived. (ECF 20 No. 26 at 3.) 21 In Nevada, “an affirmative defense consists of new facts and arguments 22 that, if true, will defeat a plaintiff’s claim, even if all allegations in the complaint 23 are true.” *F.D.I.C. v. Johnson*, 35 F. Supp. 3d 1286, 1292 (D.

Nev. 2014) (citing 24 *Schettler v. RalRon Capital Corp.*, 275 P.3d 933, 940 (Nev. 2012)). 25 In its first affirmative defense, Smith’s alleges that Ms. Scalici failed to 26 mitigate her damages by not treating when moving to Florida, and when in 27 Portugal. (ECF Nos. 1-1 at 25; 26 at 10–11.) Ms. Scalici argues in response that 28 Smith’s has failed to offer evidence to create a genuine dispute of material fact.

1 (ECF No. 16 at 7–9.) 2 Under Nevada law, a plaintiff must mitigate damages and “cannot recover 3 for damages which could have been avoided by the exercise of reasonable care.” 4 *Automatic Merchandisers, Inc. v. Ward*, 646 P.2d 553, 554 (Nev. 1982). “The 5 burden of proving

a failure to mitigate is on the party whose conduct is alleged to have caused the injury.” *Sercu v. Lab'y Corp. of Am.*, No. 3:09-CV-0619-LRH- 7 RAM, 2011 WL 540282, at *3 (D.

Nev. Feb. 8, 2011). Viewing all evidence in the light most favorable to Smith’s, the Court finds that there are disputed issues of fact as to whether it was reasonable for Ms. Scalici to pause treatment when moving to Florida, and whether Ms. Scalici treated her injury while in Portugal during summer 2022.

As a preliminary matter, there is no consensus on what type, frequency, and duration of treatment would be reasonable under the circumstances. Ms. Scalici received medical treatment during the month after her fall at Smith’s on April 7, 2022. (See e.g., ECF Nos. 18-2 at 2; 18-5 at 2.) Her medical records show that she did not receive medical treatment between April 29, 2022, and May 9, 2022, while she moved to Florida.

(ECF No. 18-7 at 2–4.) Furthermore, while Ms. Scalici asserts that she received medical treatment when visiting Portugal, she has not submitted any evidence of treatment from June 10, 2022, to September 13, 2022. (ECF No. 25- 20 3 at 3–6.)

Thus, the Court finds there are disputed issues of material fact precluding summary judgment on Smith’s affirmative defense of failure to mitigate damages and denies Ms. Scalici’s motion on this affirmative defense. In Smith’s second affirmative defense, it argues that Ms. Scalici was comparatively negligent for failing to observe and avoid the spill.

(ECF Nos. 1-1 25 at 25; 26 at 4–8.) Ms. Scalici argues that she should be granted partial summary judgment on this affirmative defense because Smith’s has offered no evidence of her negligence. (ECF No. 16 at 9–10.) “[C]omparative negligence is negligence on the part of the plaintiff which contributed to or caused plaintiffs injury.” *Sercu*, 2011 WL 540282, at *2. “To establish an affirmative defense of contributory negligence, a defendant must establish that the plaintiff was negligent and that the plaintiff’s negligence caused or contributed to plaintiffs injury.” *Id.* Viewing the evidence in the light most favorable to Smith’s, the Court finds there are disputed issues of material fact as to whether Ms. Scalici was negligent in not being more careful as she walked.

Smith’s photos from surveillance footage that captured the fall show several people walking through the area where Ms. Scalici eventually fell. (ECF No. 26 at 4-8.) None of these people slipped or fell. Though this evidence is thin, it is enough to show that there are disputed issues of material fact, and thus summary judgment on Smith’s affirmative defense of comparative negligence is denied.

VI. CONCLUSION IT IS THEREFORE ORDERED that Ms. Scalici’s partial motions for summary judgment are DENIED. (ECF Nos. 16, 17, 18.) IT IS FURTHER ORDERED that Ms. Scalici’s motions for submission are DENIED as moot. (ECF Nos. 31, 32, 33.)

DATED THIS 23rd day of January 2026. 20 22 ANNER TRAUM 23 UNITED STATES
DISTRICT JUDGE 24 25 26 27 28

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