IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

[redacted]

Plaintiff,

v.

[redacted] and
JOHN DOES 1-3,

Defendants.

Civil Action File Number:
15-A-1231-5

ORDER

This case comes before the Court on Defendant [redacted]'s Motion to Compel Plaintiff [redacted] to Submit to an Independent Medical Examination and its Motion for Summary Judgement. Having heard arguments, reviewed the motion, briefs, the relevant legal authority, and the contents of the entire file, the Court hereby finds and decides as follows:

Independent Medical Examination

This case arises out of injuries Plaintiff allegedly sustained after falling in Defendant [redacted]'s store. Plaintiff allegedly slipped on [redacted] Arguing Plaintiff has a history of injuries similar to those she allegedly sustained from the fall, Defendant [redacted] seeks an order compelling an Independent Medical Examination conducted by orthopedic specialist, Dr. Lee Kelley.

The issue before the Court is whether it should compel the IME under O.C.G.A. § 9-11-35 and the relevant case law. O.C.G.A. § 9-11-35 states in relevant part,

> (a) Order for examination. When the mental or physical condition ... of a party, ... is in controversy, the court in which the action is pending may

> order the party to submit to a physical examination by a physician or to submit to a mental examination by a physician or a licensed psychologist ... The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Georgia appellate Courts have interpreted and parsed this statute, and their analysis guides this Court. For example, in Metropolitan Life Insurance Co. v. Lehmann 125 Ga. App. 539 (1972), the Court explained, "By (the statute's) clear terms, the granting of an order for a physical examination is permissive, not mandatory, and may be entered only for 'good cause shown.' What is sufficient to fulfill that criterion rests in the broad discretion of the trial judge." *Citing* Bradford v. Parrish, 111 Ga. App 167 (1965), *(Some internal quotations omitted).* Metropolitan involved the appeal of the trial court's denial of a party's motion for an IME. The Court of Appeals affirmed this denial determining "[a] relevant factor" in the consideration of if "good cause" has been shown is "the ability of the movant to obtain the desired information by other means." Id. *citing* Schlangenhauf v. Holder, 379 US 104 (1964). Therefore, in Metropolitan the court found that because all of the plaintiff's relevant medical records were submitted to the defendant and the defendant's attorney had an opportunity to depose the plaintiff's doctor, the denial was proper.

Defendant [redacted] cites dicta from the Crider v. Sneider 243 Ga. 642 to support its motion. Specifically, Defendant [redacted] relies on the quote, "a plaintiff in a negligence action who asserts mental or physical injury, places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury."

In isolation, this quote suggests that trial courts are bound to compel IMEs in all personal injury cases. However, this interpretation would directly contradict the settled rules from Lehmann and Bradford, stating that IMEs are permissive, not mandatory, and the

determination of good cause "rests in the broad discretion of the trial judge." Additionally, in Crider, the party at issue did not place his mental or physical injury clearly in controversy, leading the Supreme Court of Georgia to conclude "the trial court did not abuse its discretion in ruling that the facts and circumstances of the collision could be established by other sources of evidence and therefore, the plaintiff had not shown 'good cause' for requiring the defendant to submit to the [IME]." Id.

It is clear from Georgia law that although good cause for an IME might be found in a negligence action when a plaintiff asserts a mental or physical injury, such an examination would not be proper if the movant has the ability to obtain the desired information by other means. For example, in Roberts v. Forte Hotels, Inc., 227 Ga. App. 471 (1997), the Court of Appeals focused on "good cause" stating, "It is true that in determining whether 'good cause' has been shown, '(t)he ability ... to obtain the desired information by other means is also relevant." Id. *citing* Prevost v. Taylor, 196 Ga. App 368 (1990). In Roberts, the plaintiff argued that the trial court erred in compelling an IME for the reason that the defendant chose not to depose the plaintiff's psychiatrist in order to obtain the information desired. In affirming the trial court's decision to compel the IME, the Court of Appeals emphasized that the desired information was protected by the plaintiff's assertion of the patient-psychiatrist privilege, and thus, could not be obtained via deposition.

Similarly, in Everett v. Goodloe, 268 Ga.App. 536 (2004), the Court of Appeals found the trial court did not abuse its discretion in ordering an IME because the plaintiff had not sought specific medical treatment for the injuries she alleged the defendant caused her. The Court of Appeals reasoned that because the plaintiff has not seen a doctor for the emotional injuries, bruises, and pain she allegedly sustained due to the actions of the defendant, the defendant did not have the ability to obtain the desired information by means other than an

IME. Thus an IME was proper.

On the other side of the spectrum is Prevost v. Taylor, 196 Ga. App. 368 (1990), which was later reversed on other grounds. In Prevost, the record revealed that medical records for all treatment received by the plaintiff were available to the defendant. Therefore, the "trial court did not abuse its broad discretion in denying the motion."

Morris v. Turnkey Medical Engineering, Inc., 729 S.E.2d 665 (2012) concisely stated a commonality in all of these cases:

> The grant or denial of a motion requesting such an examination rests in the sound discretion of the trial court. This court has repeatedly held that it will not reverse a trial court's decision on discovery matters absent a clear abuse of discretion. An order for the physical or mental examination of an individual pursuant to OCGA § 9–11–35 is a discovery matter. *(Internal quotations omitted.)*

Looking at all of these cases together, the following is clear: discretion rests with the trial court on this issue; granting such an order is permissive, not mandatory; and, while permissive, an order still must be supported by "good cause." Additionally, "good cause" has several factors, including the ability of the movant to obtain the desired information by other means and the timeliness of the motion and the events leading up to it. Further, where the movant had difficulty obtaining the desired information, Georgia appellate courts generally have affirmed the trial court's discretionary finding of good cause.

Turning to the facts of the instant case, the Court finds no good cause to compel an IME of Plaintiff. The information sought by the Defendant can either be obtained via discovery or has already been provided to the Defendants. Defendant [redacted] has not shown any reason why a review of Plaintiff's medical records by Dr. Kelley, or another licensed physician, would be insufficient.

Defendant [redacted] questions the relatedness of Plaintiff's injuries to the accident

that occurred in its store due to the Plaintiff's history of similar injuries. However, Defendant has not shown any specific lack or patent deficiency in the medical information that has been provided by Plaintiff regarding her current or previous injuries. Unlike the Everett plaintiff, who had not been treated by any medical professional, Plaintiff has been treated for her claimed injuries. Further, unlike the movant in Roberts, the instant Defendant is able to obtain the information and reports from Plaintiff's treating medical specialist, and for the most part, has done so already.

Defendant [redacted] argues that good cause exists solely because the Plaintiff has, by filing suit, put her physical condition at issue. This argument is incomplete and would require an IME in virtually every personal injury suit. To the contrary, the Court must exercise its discretion by weighing various factors. These factors include a consideration of whether Defendant [redacted] has born its burden of showing that it has sought sufficient information from other sources, and whether such other discovery is sufficient.

Because Defendant [redacted] has failed to show any specific deficiency in the medical information and records that have been provided by Plaintiff, the Court does not find the good cause required under O.C.G.A. § 9-11-35. As such, Defendant [redacted]s Motion to Compel an Independent Medical Examination of Plaintiff is hereby **DENIED**.

Motion for Summary Judgment

As noted above, this case arises out of a slip and fall that occurred in Defendant [redacted]s store which allegedly caused injuries to Plaintiff. In this case, Plaintiff allegedly slipped on [redacted] causing her to fall and sustain injuries.

Pursuant to O.C.G.A. § 9-11-56, summary judgment "shall be rendered forthwith in

the pleadings, depositions, answers, to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

As Defendant [redacted] has assumed for the purposes of its motion, without conceding, that Plaintiff was an invitee, this Order considers Plaintiff's claims in accordance with the law as it applies to invitees. O.C.G.A. § 51-3-1 states, "Where 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."

The Georgia Supreme Court, in Robinson v. Kroger, set forth a two-pronged test to determine whether an invitee could recover for injuries sustained in a slip and fall action. The Robinson Court held that, in order to prevail, an invitee must prove: (1) that the defendant had actual or constructive knowledge of the hazard; and (2) that the plaintiff lacked knowledge of the hazard despite the exercise of ordinary care due to actions of conditions within the control of the owner/occupier. Robinson v. Kroger Company, 268 Ga. 737, 492 S.E. 2d 403 (1997). Here, the issue is whether Defendant [redacted] had constructive knowledge of the hazard which may have caused the slip.

It is well established in Georgia law that constructive knowledge may be established by a showing "(1) an employee of the defendant was in the immediate vicinity of the fall and had an opportunity to correct the hazardous condition prior to the fall, or (2) the hazardous condition had existed for a sufficient length of time that it would have been discovered and removed had the proprietor exercised reasonable care in inspecting the premises." Kroger Co. v. Schoenhoff, 324 Ga. App. 619, 620–21 (2013) (*citing* Benefield v. Tominich, 308 Ga.App. 605, 608.)

Here, Defendant [redacted] argues the record is devoid of evidence demonstrating it had actual or constructive knowledge, and thus, it is entitled to Summary Judgment. Defendant cities to documentation of its inspection procedures to show it lacked constructive knowledge of the spill. However, Plaintiff raises questions regarding the "reasonableness" of such procedures and the inexact nature of the documentation of these procedures. Specifically Plaintiff points out that according to these documents, the last inspection of the area where Plaintiff fell could have occurred anywhere from an hour and fifteen minutes before her fall to fifteen minutes before her fall. Thus, Plaintiff has raised factual issues regarding the reasonableness of Defendant [redacted] s inspection procedures and the quality of the evidence supporting these procedures.

Additionally, Defendant [redacted] attempts to use the "prior successful traverse doctrine" to charge the Plaintiff with knowledge of the hazardous condition. However, Defendant [redacted] has put forth and cites to no evidence that plaintiff previously traversed the area. Instead, Defendants attempts to establish a prior traverse by looking to the amount of time that Plaintiff was in the area before her fall. Defendant [redacted] also argues that because Plaintiff had been in the area for a "lengthy" time prior to her fall she should have seen the alleged hazard as it was "open and obvious." Therefore, Defendant [redacted] contends Plaintiff's failure to notice said hazard establishes her lack of due care as a matter of law. While the amount of time Plaintiff was in the area prior to her fall may be relevant to her knowledge of the hazardous condition, it does not implicate the "prior successful traverse doctrine" and it does not establish her knowledge of the condition as a matter of law.

Under Georgia law issues such as the reasonableness of inspection procedures and whether a spill was of the size, nature and location of which a reasonable individual

exercising due would have noticed are matters reserved for the jury. The Supreme Court of Georgia has specially noted, "[i]ssues such as how closely a particular retailer should monitor its premises and approaches, what retailers should know about the property's condition at any given time, how vigilant patrons must be for their own safety in various settings, and where customers should be held responsible for looking or not looking are all questions that, in general, must be answered by juries as a matter of fact rather than by judges as a matter of law." Mairs v. Whole Foods Mkt. Grp., Inc., 303 Ga. App. 638, 641 (*quoting* American Multi–Cinema v. Brown, 285 Ga. at 445).

Plaintiff, in its Response to Defendant's Motion for Summary Judgment, has introduced evidence, through her own affidavit, that there was an employee in the area at the time she fell, and that employee could have seen the spill. This Court cannot engage in a weighing of the credibility of witness testimony for purposes of summary judgment. Thus the Court finds that the parties have presented conflicting evidence regarding Defendant's knowledge of the hazard that allegedly caused Plaintiff's fall.

After carefully considering the pleadings, motions, and all other evidence of record, the court finds there exists both conflicting evidence and open factual issues. Therefore, the Court cannot determine as matter of law whether Defendants had constructive knowledge of the hazardous condition and whether Plaintiff did not.

Because all evidence must be construed in favor of the non-moving party, this Court finds that there remains a genuine issue of material fact with regard to the hazard on Defendant's premises, as well as to both the Defendant's and the Plaintiff's constructive knowledge of any such condition. As such, Defendant's motion for summary judgment is hereby **DENIED**.

In Plaintiff Response to Defendant's Motion for Summary Judgment she argues that summary judgment in this case is not proper because Defendant [redacted] has engaged in the spoliation of evidence. Spoliation occurs through the destruction or failure to preserve evidence necessary to litigation. Baxley v. Hakiel Indus., Inc., 282 Ga. 312, 313 (*quoting* Bouvé & Mohr, LLC v. Banks, 274 Ga.App. 758, 762.) Following a determination of spoliation, a trial court may impose sanctions on the party responsible for said spoliation. In determining if sanctions are proper, trial courts "routinely and necessarily make factual findings about whether spoliation occurred" by considering such factors as "whether the spoliator acted in bad faith, the importance of the compromised evidence, and so on." Lustre-Diaz v. Etheridge, 309 Ga. App. 104, 106.

In this case, Plaintiff asserts that Defendant [redacted] engaged in spoliation when it failed to preserve video footage of inside its store on the day of the incident. However, Plaintiffs have put forth no evidence showing bad faith. Additionally, it is unconverted that no camera within Defendant [redacted] s store at the time of the incident would have captured the area where Plaintiff fell.

Thus, at this time, the Court finds the imposition of sanctions based on Defendant [redacted] s spoliation of evidence would be improper.

SO ORDERED, this 14 day of August, 2016.

David P. Darden, Judge
State Court of Cobb County

CERTIFICATE

I hereby certify that I have this day mailed (through the Cobb County Mail System) a copy of the foregoing Order to the following, to wit:

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This 19 day of Sept August, 2016.

Colleen Callaghan
Law Clerk to Judge David P. Darden
State Court of Cobb County