

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 GRACIELA TOBON,)
4)
5 Plaintiff,)
6 vs.)
7 SILVERADO REAL ESTATE, LLC;)
8 CONAM MANAGEMENT CORPORATION;)
9 Defendants.)

Case No.: 2:15-cv-00343-GMN-CWH

ORDER

10 Pending before the Court is the Motion for Summary Judgement filed by Defendants
11 Silverado Real Estate, LLC and ConAm Management Corporation (“Defendants”). (ECF No.
12 32). Plaintiff Graciela Tobon (“Plaintiff”) filed a response, (ECF No. 39), and Defendants filed
13 a reply, (ECF No. 41).¹ For the reasons discussed below, Defendants’ Motion for Summary
14 Judgement is **DENIED**.

15 **I. BACKGROUND**

16 This case arises out of a trip and fall accident that occurred at Silverado Village
17 Apartments in the evening on March 1, 2013. (See Compl. ¶ 8, Ex. A to Not. of Removal, ECF
18 No. 1). While searching for her friend’s apartment, Plaintiff fell over a concrete parking
19 stopper located near the sidewalk. (Pl.’s Dep. 19:7–18, Ex. B to Defs.’ MSJ, ECF No. 32-2).
20 According to Defendants, the concrete stopper was intended to prevent people from parking in
21 the pedestrian walkway. (Defs.’ MSJ 2:20–23).

22 On January 29, 2015, Plaintiff filed her Complaint in state court asserting a claim of
23 negligence for the dangerous placement of the parking stopper. (See Compl.). Defendant
24

25 ¹ In addition, Plaintiffs filed a Motion for Additional Discovery, (ECF No. 40). For good cause appearing, the Court grants this motion and considers Plaintiff’s deposition of Dennis Erickson, (ECF No. 43).

1 ConAm Management Corporation subsequently removed the action to this Court on February
2 26, 2015. (Not. of Removal, ECF No. 1). On January 29, 2016, Defendants filed the instant
3 Motion for Summary Judgment. (ECF No. 32).

4 **II. LEGAL STANDARD**

5 The Federal Rules of Civil Procedure provide for summary adjudication when the
6 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
7 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
8 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
9 may affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
10 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
11 jury to return a verdict for the nonmoving party. See *id.* “Summary judgment is inappropriate if
12 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
13 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
14 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
15 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
16 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

17 In determining summary judgment, a court applies a burden-shifting analysis. “When
18 the party moving for summary judgment would bear the burden of proof at trial, it must come
19 forward with evidence which would entitle it to a directed verdict if the evidence went
20 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
21 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
22 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
23 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
24 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
25 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving

1 party failed to make a showing sufficient to establish an element essential to that party's case
2 on which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–
3 24. If the moving party fails to meet its initial burden, summary judgment must be denied and
4 the court need not consider the nonmoving party's evidence. See *Adickes v. S.H. Kress & Co.*,
5 398 U.S. 144, 159–60 (1970).

6 If the moving party satisfies its initial burden, the burden then shifts to the opposing
7 party to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v.*
8 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
9 the opposing party need not establish a material issue of fact conclusively in its favor. It is
10 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
11 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
12 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
13 summary judgment by relying solely on conclusory allegations that are unsupported by factual
14 data. See *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
15 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
16 competent evidence that shows a genuine issue for trial. See *Celotex Corp.*, 477 U.S. at 324.
17 At summary judgment, a court’s function is not to weigh the evidence and determine the truth
18 but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249. The
19 evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn in
20 his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not
21 significantly probative, summary judgment may be granted. See *id.* at 249–50.

22 **III. DISCUSSION**

23 To establish a claim of negligence, Plaintiff must demonstrate that: (1) Defendants owed
24 Plaintiff a duty of care; (2) Defendants breached that duty; (3) Defendants’ breach of duty was
25 a legal cause of Plaintiff’s injuries; and (4) Plaintiff suffered damages. See *DeBoer v. Sr.*

1 Bridges of Sparks Fam. Hosp., 282 P.3d 727, 732 (Nev. 2012). In general, “[c]ourts often are
2 reluctant to grant summary judgement in negligence actions because whether a defendant was
3 negligent is generally a question of fact for the jury to resolve.” *Harrington v. Syufy Enters.*,
4 931 P.2d 1378, 1380 (Nev. 1997).

5 Defendants argue in their Motion for Summary Judgement that “[t]he undisputed facts
6 show that Plaintiff cannot establish that Defendants’ placement of the concrete parking stopper
7 was a dangerous condition.” (Defs.’ MSJ 9:18–19). The Court does not agree with this
8 characterization of the evidence. To the contrary, the Court finds that Plaintiff has raised
9 genuine issues of material fact as to the reasonableness of the parking stopper’s location near
10 the pedestrian walkway, the sufficiency of the lighting near the parking stopper at the time of
11 the injury, and Defendants’ knowledge of any prior incidents resulting from these conditions.

12 Defendants further argue that even if the parking stopper constituted a dangerous
13 condition, “Plaintiff has not presented any evidence that Defendants had notice that the
14 concrete parking stopper constituted a dangerous condition and failed to remedy it or warn of
15 its presence.” (Id. 11:11–13). When an unsafe condition is created by an owner or employee
16 operating within the scope of employment, the injured party does not need to prove the owner’s
17 notice of the condition’s dangerousness. See *Wagon Wheel Saloon & Gambling Hall, Inc. v.*
18 *Mavrogan*, 369 P.2d 688, 690 (1962). Such notice is considered “imputed to the owner.” Id.
19 Here, Defendants do not dispute placing the parking stopper near the pedestrian sidewalk. (See
20 Defs.’ MSJ 8:13–14). Accordingly, notice as to the parking stopper’s alleged dangerousness is
21 not a required element to establish Plaintiff’s negligence claim.

22 Lastly, Defendants argue that “Plaintiff cannot recover for any of her damages because
23 Plaintiff’s injuries are more attributable to her failure to watch where she was walking than any
24 actions or inactions of Defendants.” (Id. 12:6–8). Comparative negligence bars recovery only
25 when the plaintiff’s negligence exceeds the negligence of the defendant. See *Anderson v.*

1 Baltrusaitis, 944 P.2d 797, 800 (1997). In Nevada, a party's comparative negligence is
2 predominantly a question of fact. See id. It becomes a question of law only when the evidence
3 is of such a character as to support no other legitimate inference. Id; see also Mavrogan, 369
4 P.2d at 689. Given factors like the time of day and allegedly unexpected location of the
5 parking stopper, a jury could reasonably infer that Plaintiff was less negligent than Defendants.
6 Accordingly, Defendants are not entitled to summary judgement on the issue of negligence
7 liability.

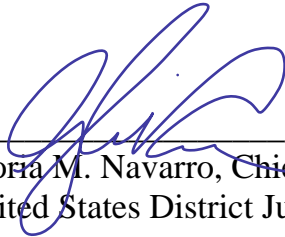
8 **IV. CONCLUSION**

9 **IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgement, (ECF
10 No. 32), is **DENIED**.

11 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Additional Discovery, (ECF
12 No. 40), is **GRANTED**.

13 **IT IS FURTHER ORDERED** that the parties shall file a Joint Pretrial Order by
14 November 1, 2016.

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16 **DATED** this 27 day of September, 2016.

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21 Gloria M. Navarro, Chief Judge
22 United States District Judge
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