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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARSHA ANDERSON O'BRIEN, Plaintiff/Appellant, v. KB HOME TUCSON, INC.; KB HOME SALES-TUCSON, INC.; and KB HOME, INC., Defendants/Appellees.	2 CA-CV 2010-0200 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20085032

Honorable Stephen C. Villarreal, Judge

REVERSED AND REMANDED

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E S P I N O S A, Judge.

¶1 In this personal injury action, plaintiff/appellant Marsha O'Brien appeals from the trial court's grant of summary judgment in favor of defendants/appellees KB

Home Tucson, Inc.; KB Home Sales-Tucson, Inc.; and KB Home, Inc. (collectively, KB). For the following reasons, we reverse.

Factual Background and Procedural History

¶2 "On appeal from a summary judgment, we view the facts in the light most favorable to the party against whom judgment was entered and draw all justifiable inferences in [her] favor." *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). In January 2007, O'Brien and her daughter went to a residential housing development, Pantano Overlook, to shop for a new home. KB was the owner and developer of Pantano Overlook and when O'Brien arrived at the site, a KB sales agent offered to show her homes under construction. While touring the development, O'Brien and the sales agent were discussing the available homes, potential resale values, and other topics about the area. As the trio approached a particular home they intended to view, the sales agent cut across a portion of the front yard where there were concrete forms, capped concrete-form stakes, and yellow tape. O'Brien followed him and, as she stepped onto a curb, she slipped on gravel debris and fell forward, striking her chest on a concrete-form stake and suffering injuries.[1]

¶3 O'Brien sued KB, alleging its negligence had caused her injuries. KB filed a motion for summary judgment, arguing O'Brien's claims failed as a matter of law because the condition of the area where she fell was "open and obvious" and her injuries

[1]O'Brien alleges she fell on a "steel reinforcing bar" or "rebar" whereas KB calls the same item a "concrete form stake." Because the parties do not dispute that O'Brien fell on the item, the parties' failure to agree on its correct name does not create an issue relevant to this appeal.

were the result of her own negligence. O'Brien opposed KB's motion, contending KB had created the hazard, its sales agent had led her to the hazard, and she "did not see nor appreciate the hazard of the debris on the curb[] or the upright rebar." She further argued that the determination of KB's negligence and her comparative fault were issues for the jury. O'Brien filed a supporting affidavit in which she avowed that "[b]ecause I was following closely behind [the sales agent], I did not see the debris on the curb nor the rebar sticking up" and "[p]rior to my fall, I did not see nor appreciate that the condition of the area over which [the agent] led me was dangerous."

¶4 After receiving O'Brien's affidavit, KB deposed her and thereafter filed a supplement to its summary judgment motion. KB explained in its supplement that O'Brien's affidavit conflicted with her deposition testimony in which she admitted that before falling, she had seen the debris on the curb, the yellow construction tape, the concrete forms, and the concrete-form stakes. The trial court ordered supplemental briefing on the "sham affidavit rule," explaining the rule "may or may not apply to the circumstances and may or may not be dispositive of the motion for summary judgment."[2] In its supplemental brief, KB argued that because O'Brien's deposition conflicted with her affidavit, the affidavit should be disregarded. O'Brien contended the sham affidavit rule did not apply because her deposition testimony was internally inconsistent and also

[2]Under the "sham affidavit rule," a party's affidavit is disregarded when it "is submitted to defeat summary judgment and contradicts the party's own deposition testimony." *Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, ¶¶ 9, 10, 153 P.3d 1069, 1071 (App. 2007).

argued that, even disregarding her affidavit, there nevertheless were issues of material fact that precluded the entry of summary judgment.

¶5 The trial court granted KB's motion for summary judgment, explaining it had disregarded O'Brien's affidavit under the sham affidavit rule and had "accept[ed] [her] subsequent deposition testimony . . . that she did see and appreciate the condition prior to stepping onto the curb." As a result, the court concluded O'Brien "ha[d] failed to create a factual dispute on the issue of open and obvious condition," and found "the condition was open and obvious as a matter of law." It further explained O'Brien "ha[d] failed to establish and develop a legal theory for her claim that [KB]'s employee led her to the debris field on the curb" and "[i]f [this theory] is part of the premises liability theory it must fail based upon the Court's ruling on the open and obvious condition." We have jurisdiction over O'Brien's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B).

Discussion

¶6 The entry of summary judgment is appropriate "if the pleadings, deposition[s], 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." Ariz. R. Civ. P. 56(c)(1). "In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law." *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, ¶ 15, 165 P.3d 173, 177 (App. 2007). "[S]ummary judgment is generally not appropriate in negligence actions" and

"may be granted only when there is no dispute as to any material facts, only one inference can be drawn from those facts, and the moving party is entitled to judgment as a matter of law." *McLeod ex rel. Smith v. Newcomer*, 163 Ariz. 6, 8, 785 P.2d 575, 577 (App. 1989).

¶7 "'[A] negligence action may be maintained only if there is a duty or obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.'" *Shaw v. Petersen*, 169 Ariz. 559, 561, 821 P.2d 220, 222 (App. 1991), *quoting Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354, 706 P.2d 364, 366 (1985) (alteration in *Shaw*).[3] "Further, there must be a breach of that duty, a causal connection between the breach and injury, and actual injury or damage." *Id.* "The first element, whether a duty exists, is a matter of law for the court to decide." *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007). "The other elements, including breach and causation, are factual issues usually decided by the jury." *Id.*

¶8 The duty a possessor of land owes to an entrant on the land generally depends on the entrant's status as an invitee, licensee, or trespasser. *See Woodty v. Weston's Lamplighter Motels*, 171 Ariz. 265, 268, 830 P.2d 477, 480 (App. 1992). Here, for purposes of summary judgment, KB did not challenge O'Brien's allegation that she was an invitee on KB's property. KB therefore owed her a duty to "use reasonable care

[3]Several Arizona and federal cases have noted in citing *Markowitz* that it was superseded by A.R.S. § 33-1551. But the statute was enacted before *Markowitz* was decided. *See* 1983 Ariz. Sess. Laws, ch. 82.

to make the premises safe for [her] use," which included the "obligation to discover and correct or warn of hazards which [KB] should reasonably foresee as endangering" her. *Markowitz*, 146 Ariz. at 355, 706 P.2d at 367.

¶9 As noted above, in granting summary judgment the trial court reasoned that because O'Brien had seen the hazard before she fell and the hazard was open and obvious, KB was entitled to judgment as a matter of law. This reasoning, however, is not a correct reflection of the law. "Although a land possessor is . . . not ordinarily found negligent for injuries to . . . invitees from conditions which are open and obvious, nor for those which are known to the invitee," "where the possessor should foresee that the condition is dangerous despite its open and obvious nature, neither the obvious nature nor the plaintiff's knowledge of the danger is conclusive." *Id.* at 356, 706 P.2d at 368; *see also Tribe v. Shell Oil Co.*, 133 Ariz. 517, 519, 652 P.2d 1040, 1042 (1982) (explaining "if the proprietor should anticipate the harm from the condition despite its obviousness, he may be liable for physical injury caused by that condition"); *Andrews v. Fry's Food Stores of Ariz.*, 160 Ariz. 93, 95, 770 P.2d 397, 399 (App. 1989) ("If an open and obvious condition is also found to be unreasonably dangerous, the possessor of land may be liable for physical injury caused by that condition."). "[T]he bare fact that a condition is open and obvious does not necessarily mean that it is not unreasonably dangerous." *Tribe*, 133 Ariz. at 519, 652 P.2d at 1042.

¶10 Moreover, "whether the condition 'was dangerous, open and obvious or whether [the property owner] should have anticipated the harm if open and obvious are issues to be decided by a jury in its capacity as triers of fact.'" *McLeod*, 163 Ariz. at 10,

785 P.2d at 579, *quoting Tribe*, 133 Ariz. at 519, 652 P.2d at 1042. Therefore, rather than eliminating KB's liability as a matter of law, "the possibility that the defect or hazard is 'open and obvious' is a factor to be considered in determining whether the possessor's failure to remedy the hazard or provide a warning was unreasonable and therefore breached the standard of care." *Markowitz*, 146 Ariz. at 356, 706 P.2d at 368; *see also Andrews*, 160 Ariz. at 96, 770 P.2d at 400 ("That a condition is open and obvious is merely a factor to be taken into consideration in determining if the condition was unreasonably dangerous.").

¶11 Acknowledging this authority, KB nevertheless maintains summary judgment was proper, citing *Flowers v. K-Mart Corp.*, 126 Ariz. 495, 616 P.2d 955 (App. 1980), and *Bellezzo v. State*, 174 Ariz. 548, 851 P.2d 847 (App. 1992). Although both of these cases affirmed the grant of summary judgment, we do not agree they demonstrate summary judgment was proper here. In *Bellezzo*, the plaintiff, who frequently had attended baseball games, had been injured by a foul ball at a baseball stadium after choosing to sit in an unscreened area that did not offer protection from foul balls. 174 Ariz. at 549-50, 851 P.2d at 848-49. This court explained that "[a]lthough the question of breach of duty generally presents an issue of fact for the jury," because the stadium had offered protected seating, "as a matter of law [the stadium owners] complied with their duty to protect spectators from an unreasonable risk of being injured by a foul ball"; to hold otherwise "would expose [them] to liability for injuries sustained by those spectators who choose to sit in unscreened areas, despite the open and obvious risk of sitting in such areas and the availability of a protected alternative." *Id.* at 551, 554, 851 P.2d at 851,

853. In so holding, we expressly refused to decide whether "the open and obvious nature of the risk a spectator could be struck by a foul ball . . . [would] justify finding, as a matter of law, that appellees were not negligent." *Id.* at 553, 851 P.2d at 852.

¶12 In *Flowers*, the plaintiffs were struck by a car in a K-Mart parking lot and alleged K-Mart had breached its duty to them by failing to provide a crosswalk. 126 Ariz. at 496-98, 616 P.2d at 956-58. In affirming summary judgment in favor of K-Mart, the court explained "if a condition is open and obvious, and business invitees encountering it can be expected to take perfectly good care of themselves without further precaution, then likelihood of harm, if any, from the conditions is slight, and as a matter of law the condition is not unreasonably dangerous." *Id.* at 498, 616 P.2d at 958. In so holding, this court expressly noted the case involved an allegation of "'inaction'" by K-Mart, which "'is not normally a basis for [tort] liability,'" as contrasted to circumstances where a plaintiff has alleged the "'negligent performance of a duty voluntarily undertaken.'" *Id., quoting Grimm v. Ariz. Bd. of Pardons & Paroles,* 115 Ariz. 260, 267, 564 P.2d 1227, 1234 (1977).

¶13 Both *Flowers* and *Bellezzo* are factually distinguishable from the case before us. Both involved, respectively, the well-known and accepted risks of a foul ball in a baseball stadium and a car being driven in a retail store's parking lot; as the *Bellezzo* court explained, the holding was necessary to "fulfill our responsibility to set the outer limits of negligence." 174 Ariz. at 554, 851 P.2d at 853. Here, on the other hand, O'Brien encountered a hazard created by KB while touring its unfinished housing development, had never been to a construction site before, and was led to the hazard by

following one of its sales agents. Therefore, although KB is correct that there are situations where it can be determined as a matter of law that the defendant did not breach its duty to the plaintiff, it is also true that generally this determination needs to be made by a jury. *See Gipson*, 214 Ariz. 141, ¶ 9, 150 P.3d at 230; *Bellezzo*, 174 Ariz. at 551, 851 P.2d at 850. Under these facts, we disagree with KB that this case presents one of those rare instances where summary judgment is proper.

¶14 Instead, we find this case to be more like *Johnson v. Tucson Estates, Inc.*, 140 Ariz. 531, 683 P.2d 330 (App. 1984). There, the defendant argued the trial court had erred by failing to grant its motion for a directed verdict because the slippery shower-room floor where the plaintiff had fallen was an open and obvious condition. *Id.* at 533-34, 683 P.2d at 332-33. We concluded the defendant was not entitled to judgment as a matter of law based on the open and obvious condition of the floor, explaining the "evidence presented a jury question on whether the appellant should have anticipated harm to a person in the appellee's position despite its open and obvious condition." *Id.* at 534, 683 P.2d at 333. In particular, although the plaintiff knew the floor was slippery and had fallen in the area before, the defendant knew the shower area "was a social gathering place for male residents" and "should have expected harm from the dangerous condition of the floor because this distraction might cause the invitees to forget the slippery condition of the floor or fail to protect themselves against it." *Id.* Similarly, O'Brien stated in her deposition that she had been "busy talking" with the sales agent while touring the unfinished development and was "following right behind [him], right after his footsteps." *See also Tribe*, 133 Ariz. at 519, 652 P.2d at 1042 (possessor "has reason to

anticipate harm to an invitee from a condition despite its obviousness" when "'the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious . . . or fail to protect himself against it'"), *quoting* Restatement (Second) of Torts § 343A, cmt. f (1965).

¶15 As set forth above, the trial court's determination that KB was entitled to summary judgment was based on the hazard's open and obvious nature and O'Brien's failure to create a disputed issue of material fact regarding this issue under the sham affidavit rule. Thus, even assuming the court correctly disregarded the affidavit, an issue we decline to decide, the fact the condition was open and obvious did not entitle KB to judgment as a matter of law. *See Markowitz*, 146 Ariz. at 356, 706 P.2d at 368; *Andrews*, 160 Ariz. at 96, 770 P.2d at 400. Accordingly, we conclude the court erred in granting KB summary judgment.

Disposition

¶16 For the reasons stated, we reverse the trial court's grant of summary judgment in favor of KB and remand for further proceedings consistent with this decision.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge