DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JUSTIN REEVES, a single man, Plaintiff/Appellant, v. ARROWHEAD R.V. RESORT, L.L.C., an Arizona limited liability company; STEVE COLBORN and PATRICIA COLBORN, husband and wife, Defendants/Appellees.	1 CA-CV 11-0386 DEPARTMENT D MEMORANDUM DECISION (Not for Publication Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Yuma County

Cause No. S1400CV200800055

The Honorable Mark Wayne Reeves, Judge

AFFIRMED

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T H O M P S O N, Judge

¶1 Justin Reeves (Reeves) appeals the trial court's

summary judgment in favor of Arrowhead R.V. Resort L.L.C. (Arrowhead). We affirm.

¶2 On appeal from summary judgment, we must determine whether any material factual disputes exist and, if not, whether the trial court correctly applied the law. *In re Estate of Johnson*, 168 Ariz. 108, 109, 811 P.2d 360, 361 (App. 1991) (citation omitted). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Estate of Hernandez v. Flavio*, 187 Ariz. 506, 509, 930 P.2d 1309, 1312 (1997). In this matter, therefore, we view the facts in the light most favorable to Reeves.

¶3 It is undisputed that Reeves suffered serious injury when he ran into a chain barrier driving his ATV home from work in a rural area on an unfamiliar road. It is undisputed that the barrier consisted of three metal posts with chain strung between them and that while Reeves first saw the metal posts from approximately 100 yards away, that he did not see the chain until he was nearly upon the barrier.[1] The parties stipulated

[1] At least one of the posts was knocked down during the accident. After the accident, a "Posted Private Property" sign was found near the broken chain; Reeves asserts the sign was not visible to him and may have already been on the ground. Reeves thought it was a public road and he'd seen other ATV tracks in the area. Arrowhead asserts that Reeves was driving at a high rate of speed. Reeves does not offer evidence of his actual speed; he asserts the road markings were "that of a rural public road in which the speed limit would be 55-60 miles per hours."

that:

1. The event occurred on Arrowhead's private property;

2. Reeves was a trespasser; and

3. A trespasser is a person who goes on property without actual or implied permission.

After the stipulation, the trial court granted Arrowhead's renewed motion for summary judgment. The court found Arrowhead's barrier did not create an "artificial condition highly dangerous to known trespassers" such as was explained in Restatement (Second) of Torts § 337 or create a willful and wanton disregard for trespassers' safety as discussed in *Webster v. Culbertson*, 158 Ariz. 159, 161, 761 P.2d 1063, 1065 (1988). Reeves timely appealed, asserting that whether Arrowhead's barrier was either a dangerous artificial condition or a willful and wanton disregard for the safety of known trespassers was a question of fact for the jury. Reeves further asserts that Arrowhead failed in its duty to warn trespassers.

¶4 The general rule is that the only duty owed to an adult trespasser is "to neither willfully nor intentionally inflict injury." *Carlson v. Tucson Racquet & Swim Club, Inc.*, 127 Ariz. 247, 249, 619 P.2d 756, 758 (App. 1980); *see Webster*,

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The police report attached to Reeves's separate statement of facts estimates his speed "at a high rate of speed" and that the officer estimated speed was 50 m.p.h.; there was no evidence of skid marks or braking.

158 Ariz. at 161, 761 at 1065. "Whether the defendant owes the plaintiff a duty of care is a threshold issue; absent some duty, an action for negligence cannot be maintained." *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 11, 150 P.3d 228, 230 (2007). Duty is a matter of law for the court. *Id.* at ¶ 9, 150 P.3d at 230; *Markowitz v. Ariz. Parks. Bd.*, 146 Ariz. 352, 356, 706 P.2d 364, 368 (1985). If a duty exists, it "requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Markowitz*, 146 Ariz. at 354, 706 P.2d at 366.

¶5 The trial court found Arrowhead did not willfully or wantonly disregard the danger presented to trespassers. In *DeElena v. Southern Pacific Co.*, our supreme court considered the following factors to determine if a railroad willfully and wantonly disregard the safety of an adult woman killed crossing the railroad tracks: (1) the actual or constructive knowledge of the peril to be apprehended, (2) an actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) a conscious failure to act to avoid the peril. 121 Ariz. 563, 566-67, 592 P.2d 759, 762-62 (1979). Under the evidence presented, we find no error in the trial court's determination that Arrowhead's chain barrier on its private property was not maintained with a willful or wanton

disregard for the safety of trespassers.[2]

¶6 The trial court also found § 337 of the Restatement did not apply on these facts. We agree. Section 337 recognizes an exception to the general rule regarding the duty to trespassers. It provides:

> Artificial Conditions Highly Dangerous to Known Trespassers.
>
> A possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if
> (a) the possessor knows or has reason to know of their presence in dangerous proximity to the condition, and
> (b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved.

Our Supreme Court in *Webster*, recognizing the doctrine of § 337, stated "When a landowner knows or has reason to know that trespassers come upon his property, he cannot, without liability, maintain a dangerous artificial condition on his property when he also *has reason to believe that the trespasser will not discover the dangerous condition or realize its risk*." 158 Ariz. at 162, 761 P.2d at 1066 (emphasis added).

¶7 Comment A to § 337 reads in pertinent part:

> The rule stated in this Section relates only to the

[2] Due to the resolution of this matter, we need not address the legislature's recent amendment of A.R.S. § 12-557 (2012) limiting the duties of landowners to trespassers.

> conditions under which a possessor of land is subject to liability to a trespasser whom he knows to be about to come in contact with a highly dangerous artificial condition maintained by him upon the land.

In *Webster*, the court clarified that "Reason to know" under § 337 "is not equivalent to 'actual knowledge.'" 158 Ariz. at 163, 761 P.2d at 1067. The *Webster* court reversed summary judgment for the landowner finding her barbed wire fence could be a dangerous artificial condition under the facts in the record. *Id.* at 162-63, 761 P.2d at 1066-67. In *Webster*, the landowner erected the fence on her property line, including across the wash, to keep out trespassers using her property for recreational purposes; footprints, hoofprints and tire tracks were plainly visible in the wash. *Id.* In the instant matter, Reeves points to his testimony and the police report attached as an exhibit to his separate statement of facts indicating that there were numerous ATV tire marks climbing hills near the canal and around the roadway itself as evidence of known trespassers. The police report indicated only one set of tire marks going down the road to the chains, the marks made by Reeves. Evidence of ATVs operating in the general area was not evidence that trespassers were in dangerous proximity to the Arrowhead chain fence, in the sense of *Webster*.

¶8 While Webster and this matter have some similarities, they are not identical. In *Webster*, as in the instant case, the

trespasser-plaintiff had not previously ridden this route before and did not see any private property or no trespassing signs.[3] *See id.* at 160-61, 761 P.2d at 1064-65. Unlike *Webster*, Reeves did see the fence posts which were visible from 100 yards away. *See id.* Further, Reeves was not riding a live animal, he was riding "at a high rate of speed" an ATV over which he had complete control. *See id.*

¶9 The property owner in *Webster* knew that horse riders were trespassing on her property and installed a barbed wire fence across the wash specifically to deter equestrians such as Webster. *Id.* at 160, 761 P.2d at 1064. Whether or not Arrowhead knew or had reason to know of people riding ATV's in the area, Arrowhead did not know or have reason to know that potential trespassers on ATVs would fail to discover the presence of a chain attached to highly visible fence posts crossing the road. This was not a hidden peril. We find no error in the trial court's determination that the chains did not create an artificial and highly dangerous condition that a trespasser would not discover or realize the involved risk as described in § 337.

[3] We note that there was also a "Posted" private property sign at the scene, Reeves did not see it and we must accept his assertion that it was on the ground at the time of his approach.

CONCLUSION

¶10 For the foregoing reasons, the trial court is affirmed.

/s/

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JON W. THOMPSON, Judge

CONCURRING:

/s/

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MICHAEL J. BROWN, Acting Presiding Judge

/s/

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MARGARET H. DOWNIE, Judge