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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/05/2013
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

OPTIMISTIC DEVELOPMENT, LLC, an) 1 CA-CV 12-0156
Arizona limited liability)
corporation,) DEPARTMENT A
)
Plaintiff/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
RURAL/METRO CORPORATION, an)
Arizona corporation; RURAL/METRO)
CORPORATION, a Delaware)
corporation,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-053047

The Honorable Michael R. McVey, Judge

AFFIRMED

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By Thomas S. Moring
Attorneys for Appellant

Scottsdale

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By Bradley R. Jardine
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Phoenix

O R O Z C O, Judge

¶1 Appellant Optimistic Development, LLC (Optimistic) appeals the superior court's judgment as a matter of law (JMOL) in favor of Appellee Rural Metro Corporation (Rural Metro) on Optimistic's negligence claim. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

¶2 On May 28, 2007, an unknown person set fire to a building owned by Optimistic that was located in an unincorporated part of Maricopa County. Optimistic's owner, Natalie Martinez, detected the fire and unsuccessfully attempted to extinguish it with portable commercial fire extinguishers. When those efforts failed, Martinez called 911.

¶3 Phoenix Regional Dispatch Center (PRDC) received the call and routed it to Rural Metro's dispatch center. In response, Rural Metro sent a full assignment of firefighting units. PRDC also dispatched Tempe firefighters from a nearby fire station to the scene. When the first firefighters arrived, they determined the building was already lost and focused their efforts on ensuring that the fire did not spread to neighboring properties.

¹ Because Optimistic has not included a trial transcript in the record on appeal, we derive the factual background from the parties' joint pretrial statement and other undisputed portions of the record.

¶4 Optimistic filed a complaint, in which it alleged Rural Metro affirmatively undertook the responsibility for fighting the fire, but failed to satisfy its duty because it did not act in a reasonably prudent manner in responding to and fighting the fire, thereby causing damage to Optimistic. After Optimistic presented its case at trial, the superior court granted Rural Metro's motion for JMOL.

¶5 Optimistic timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003) and 12-2101.A.1 (Supp. 2012).

DISCUSSION

¶6 Optimistic challenges the trial court's grant of JMOL in favor of Rural Metro. JMOL is appropriate when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue" Ariz. R. Civ. P. 50(a). Such a motion should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶7 We review the trial court's ruling on a motion for JMOL de novo, *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty.*, 222 Ariz. 515, 525, ¶ 14, 217 P.3d 1220, 1229

(App. 2009), and "view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party." *Shoen v. Shoen*, 191 Ariz. 64, 65, 952 P.2d 302, 303 (App. 1997). However, "[w]hen a party fails to include necessary items [from the record], we assume they would support the court's findings and conclusions." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶8 "To establish a claim for negligence, a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). Optimistic contends the court erred by granting JMOL in favor of Rural Metro because it presented evidence from which a reasonable jury could find that Optimistic had proved each of these elements. This argument must fail because Optimistic has not provided us with the trial transcript, without which we cannot determine the basis for the court's ruling and cannot ascribe error to its conclusions. *Baker*, 183 Ariz. at 73, 900 P.2d at 767 (stating appellant is required to "mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal"); see also ARCAP 11(b). In the absence

of a complete record, we presume the missing portions support the court's actions. *Baker*, 183 Ariz. at 73, 900 P.2d at 767; accord *Boltz & Odegaard v. Hohn*, 148 Ariz. 361, 366, 714 P.2d 854, 859 (App. 1985) ("Where no transcript of evidence is made part of the record on appeal, a reviewing court will not question the sufficiency of evidence to sustain the ruling.").

¶19 Nevertheless, Optimistic argues the evidence in the record establishes material questions of fact on the issues of duty, causation and damages. It contends that the parties stipulated to the admission of certain trial exhibits that demonstrate Rural Metro prevented PRDC from sending Tempe firefighters to respond to the fire earlier, which caused the fire to burn longer and consume more of the building, and resulted in the loss of a legal non-conforming use.² However, absent complete, certified transcripts, we cannot determine whether other evidence contradicted these exhibits or otherwise established that there was no question of material fact on these issues. As noted above, we must presume the missing portions of the record support the court's rulings. *Baker*, 183 Ariz. at 73, 900 P.2d at 767. Accordingly, we find that Optimistic has not demonstrated that the court erred.

² Optimistic's tenant operated an adult cabaret in the building, which was a legal non-conforming use of the property. Due to the extent of the fire damage, Maricopa County refused to allow the legal non-conforming use to continue.

ATTORNEY FEES

¶10 Rural Metro requests an award of attorney fees on appeal pursuant to Arizona Rule of Civil Appellate Procedure (ARCAP) 25, which authorizes an award of fees as a sanction if an appeal is "frivolous or taken solely for the purpose of delay." "The determination to award or decline attorneys' fees [pursuant to ARCAP 25] is within this Court's discretion," *Ariz. Dep't of Revenue v. Gen. Motors Acceptance Corp.*, 188 Ariz. 441, 446, 937 P.2d 363, 368 (App. 1996), and we impose ARCAP 25 sanctions with "great reservation." *Ariz. Tax Research Ass'n v. Dep't of Revenue*, 163 Ariz. 255, 258, 787 P.2d 1051, 1054 (1989).

¶11 Although we are unable to consider the merits of Optimistic's arguments on appeal because it failed to provide a certified copy of the trial transcript, the record does not establish frivolousness, intentional delay, or an improper motive. *See Hoffman v. Greenberg*, 159 Ariz. 377, 380, 767 P.2d 725, 728 (App. 1988) ("The line between an appeal which has no merit and one which is frivolous is very fine, and we exercise our power to punish sparingly."). We therefore deny Rural Metro's request for an award of fees under ARCAP 25. As the prevailing party on appeal, Rural Metro is awarded its costs on appeal upon compliance with ARCAP 21.

CONCLUSION

¶12 For the foregoing reasons, we affirm.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

PETER B. SWANN, Judge

/S/

MARK R. MORAN, Judge *Pro Tempore**

*The Honorable Mark R. Moran, Presiding Judge of the Coconino County Superior Court, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147 (West 2012).