DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DAVID CARL and AMY-MARILYN CARL, husband and wife, Plaintiffs/Appellants, v. CITY OF COTTONWOOD, a political Subdivision of the State of Arizona; DOUG BARTOSH and JANE DOE BARTOSH, husband and wife; JODY FANNING and JANE DOE FANNING, husband and wife; TIMOTHY PIERCE and JANE DOE PIERCE, husband and wife, Defendants/Appellees.	No. 1 CA-CV 12-0445 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. V1300CV201080198

The Honorable Kenton D. Jones, Judge

AFFIRMED

Dennis P. Bayless, P.C. Cottonwood
By Dennis P. Bayless
Attorneys for Plaintiffs/Appellants

Murphy Schmitt Hathaway & Wilson, P.L.L.C. Prescott
By Milton W. Hathaway, Jr.
Andrew J. Becke
Attorneys for Defendants/Appellees

D O W N I E, Judge

¶1 David and Amy-Marilyn Carl appeal from the superior court's grant of summary judgment to the City of Cottonwood, its City Manager, Chief of Police, and Police Commander (collectively, "Cottonwood"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The Carls alleged in their complaint and their notice of claim filed pursuant to Arizona Revised Statutes ("A.R.S.") section 12-821.01 that Cottonwood: (1) became "obsessed" with the Carls, using the planning and zoning process to "find some reason to chase the Carls out of the City of Cottonwood," and withholding a certificate of occupancy; (2) used a raid of the Carls' residence and business to intimidate them, harm their business, and "cause them to move out of the City"; and (3) investigated allegations of child abuse against Mr. Carl "despite no evidence of alleged abuse." The Carls alleged violations of 42 U.S.C. § 1983, "gross negligence," intentional infliction of emotional distress, and defamation.

¶3 The superior court adopted the parties' proposed deadlines for discovery and private mediation, with discovery to end in August 2011, and mediation to occur by October 17, 2011. On November 2, 2011, the Carls' attorney moved to withdraw based

on “irreconcilable differences” with the Carls. The motion was granted on December 6.

¶4 On January 5, 2012, Cottonwood filed a motion for summary judgment. The motion comprehensively addressed the allegations of the complaint and repeatedly cited the separate statement of facts, which was 197 pages in length and included documentation of investigations by Child Protective Services and law enforcement into alleged physical and sexual abuse by Mr. Carl; a probable cause affidavit for a 2009 search warrant and summaries of evidence collected during the so-called “raid”; zoning violation judgments entered against the Carls; and transcripts of deposition testimony by Mr. Carl, Mrs. Carl, and the Chief of Police. The motion for summary judgment addressed each count of the complaint and explained why the undisputed facts of record demonstrated that Cottonwood was entitled to judgment as a matter of law.

¶5 On January 30, 2012, attorney Dennis Bayless emailed Cottonwood’s counsel, stating he would be filing a notice of appearance on behalf of the Carls. Bayless acknowledged the pending motion for summary judgment, advised that he would be making discovery requests, and requested an extension of time to respond to the motion. Cottonwood’s attorney responded to Bayless that same day, stating:

> When did the Carls contact you? They have had the [motion for summary judgment] for several weeks and I can't understand the delay. Also, what kind of discovery are you talking about? After I hear from you in response to these questions I will let you know about an extension but this matter has been active for over a year and a half, they were represented, depositions have been taken. I am not inclined to delay this matter further.

¶6 Bayless filed a notice of appearance on February 1. On February 8, he emailed Cottonwood's counsel to request audio recordings of zoning meetings; notes, recordings, and memoranda from a September 2009 meeting with the City Manager, City Attorney, and Chief of Police; and audio and video recordings of police interviews with the Carls and their children. Cottonwood's counsel immediately responded that he was "working on putting together the materials you asked for." On February 13, Cottonwood's counsel advised Bayless that tapes of the zoning meetings no longer existed and that there were no notes, recordings, or memoranda from the September 2009 meeting; he promised to furnish the interview recordings as soon as he received them.

¶7 On March 5, the superior court granted Cottonwood's motion for summary judgment in an unsigned order stating:

> THIS MATTER having come before the Court on, "Defendants' Motion for Summary Judgment," filed on January 5, 2012, with oral argument requested but no Response filed in regard, thereto, and it appearing from the Motion

> that a basis exists, at law, for the granting of Summary Judgment and without a Response [having] been filed it cannot be said there are material questions of fact in dispute.
>
> THEREFORE, [Cottonwood's] Motion for Summary judgment is **GRANTED.**

The next day, Bayless asked Cottonwood's counsel to stipulate to vacating the ruling so that he could review the police recordings and respond to the motion for summary judgment. Cottonwood's counsel responded as follows:

> It shouldn't surprise you that the Court granted our [motion for summary judgment]. A response is a month overdue. You didn't file anything with the Court after your notice of appearance was filed on February 1. My clients will not allow me to enter in to any stipulation.
>
> I copied the audio and video files from the police and disks with those will be sent today. Once you review those it should confirm for you that the Carls' claims are without merit. It is our position that you and the Carls, through their prior attorney, have had more than sufficient time to participate in discovery and respond to the [motion for summary judgment] and that any request for additional time or discovery is not warranted.

¶8 On March 8, Bayless filed a Motion for Relief Pursuant to Rule 60(c), Arizona Rules of Civil Procedure ("Rule"), contending summary judgment was "entered as a result of mistake, inadvertence, and excusable neglect." Cottonwood opposed the motion. Finding no "mistake, inadvertence, surprise or

excusable neglect," the superior court denied the Rule 60 motion and entered the following signed order:

> [Cottonwood] having filed their Motion for Summary Judgment on January 5, 2012, no response having been filed and it appearing from the Motion that a basis exists, at law, for the granting of summary judgment;
>
> IT IS ORDERED granting Defendants' Motion for Summary Judgment and awarding [Cottonwood] their costs incurred herein in the amount of $1,329.60.

¶9 The Carls timely appealed "from Summary Judgment entered on May 18, 2012 in favor of Defendants." We have jurisdiction pursuant to A.R.S. § 12-2101.

DISCUSSION

¶10 The Carls identify one issue on appeal: whether the superior court "properly granted [Cottonwood's] Motion for Summary Judgment based upon the reason the [Carls] failed to timely respond to the Motion."[1] We review the grant of summary judgment *de novo*. *See Schwab v. Ames Constr.*, 207 Ariz. 56, 60, ¶ 17, 83 P.3d 56, 60 (App. 2004) (citations omitted).

¶11 A court may not grant a motion for summary judgment solely because the opposing party has not responded to it. *Id.* at 59, ¶ 15, 83 P.3d at 59 (citation omitted). However, nothing in this record suggests, let alone establishes, that the superior court entered summary judgment against the Carls based

[1] The Carls have not appealed or discussed the denial of their Rule 60(c) motion, so we do not address it.

only on their failure to respond. On the contrary, the March 5 order states that the court determined "*from the Motion that a basis exists, at law*, for the granting of Summary Judgment." (Emphasis added). The court went on to note that, "without a Response [having] been filed it cannot be said there are material questions of fact in dispute."

¶12 These statements demonstrate a clear understanding of Rule 56. "[A] party moving for summary judgment need merely point out by specific reference to the relevant discovery that no evidence existed to support an essential element of the claim. Conclusory statements will not suffice, but the movant need not affirmatively establish the negative of the element." *Orme School v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990). If a moving party meets its burden in doing so, the burden then shifts to the non-movant to produce sufficient evidence in rebuttal. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 119, ¶ 26, 180 P.3d 977, 984 (App. 2008) (citation omitted). "If the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted." *Orme School*, 166 Ariz. at 310, 802 P.2d at 1009; *see also GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990) (citations omitted) (if party

opposing summary judgment fails to present competent controverting evidence, the facts alleged by the moving party may be considered as true).

¶13 The superior court was required to review the motion for summary judgment, the accompanying statement of facts, and any other portions of the record brought to its attention, in order to determine whether Cottonwood was entitled to judgment as a matter of law. It did exactly that. *Choisser v. State ex rel. Herman*, 12 Ariz. App. 259, 469 P.2d 493 (1970), upon which the Carls rely, is entirely consistent with the superior court's actions. In *Choisser,* we stated:

> There are two prerequisites that must be met before entry of summary judgment is appropriate: (1) *the record brought to the trial court's attention* must show that there is no genuine dispute as to any material fact and that only one inference can be drawn from those undisputed material facts; and (2) that based on the undisputed material facts the moving party is entitled to a judgment as a matter of law. . . . . The admonition in Rule 56(e) means that an adverse party who fails to respond does so at his peril because uncontroverted evidence favorable to the movant, and from which only one inference can be drawn, will be presumed to be true.

Id. at 261, 469 P.2d at 495 (emphasis added).

¶14 The Carls have not identified any deficiencies in Cottonwood's summary judgment filings or explained how, as a legal or factual matter, the court erred by entering judgment

for Cottonwood based on the record before it. Cottonwood's motion stated a legal basis for entering judgment in its favor on every count of the complaint. The Carls brought nothing to the court's attention that would refute Cottonwood's arguments. They may not rely only on the allegations of their unverified complaint to defeat summary judgment. *See* Rule 56(e) (party opposing properly supported motion for summary judgment "may not rely merely on allegations or denials of its own pleading"). And the Carls have identified nothing else in the record that should have prevented entry of summary judgment against them.

CONCLUSION

¶15 We affirm the judgment of the superior court. As the successful party on appeal, Cottonwood is entitled to recover its appellate costs upon compliance with ARCAP 21.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
PHILIP HALL, Judge