NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 06/18/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

CHARLES B. PARKNAVY, a single man, Plaintiff/Appellant, v. WILLIAM S. WHITE, JR. and LEE ANN WHITE, husband and wife, Defendants/Appellees.	1 CA-CV 12-0542 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV20081446

The Honorable Anna C. Young

AFFIRMED

Fortner Law Firm, P.C. Prescott
By William B. Fortner
Attorney for Plaintiff/Appellant

Suits Law Firm, P.L.C. Prescott
By Douglas J. Suits
Attorney for Defendants/Appellees

T H O M P S O N, Judge

¶1 Plaintiff/Appellant Charles Parknavy (Parknavy) appeals the superior court's grant of summary judgment in favor of Defendant/Appellee William White (White). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 This appeal arises out of a conflict between neighbors, Parknavy and White. Parknavy and White own adjoining lots in the Appaloosa Meadows community and are bound by a recorded declaration of covenants, conditions, and restrictions for Appaloosa Meadows (Declaration). In his original complaint, Parknavy alleged that the Whites were operating a commercial dog-breeding facility in violation of the Declaration, allowed their dogs to roam at large, trespass on Parknavy's property, and harass him and his cats in violation of the Declaration and Chino Valley Town Code. The superior court dismissed Parknavy's claims that alleged a private right of action under the Chino Valley Town Codes, but held that Parknavy adequately stated a claim for breach of the Declaration and for injunctive relief.[1] Thereafter, Parknavy sought to amend his complaint five times.

¶3 The superior court denied his fourth motion to amend the complaint, but thereafter the parties agreed to, and the court approved, the filing of Parknavy's fifth amended

[1] Parknavy's request for a preliminary injunction was later denied.

complaint. Parknavy's fifth amended complaint is the operative complaint here and it consists of only two counts: breach of contract (the Declaration) and negligence.

¶4 White filed a motion for summary judgment and separate statement of facts supporting his motion. Parknavy filed an opposition; but instead of filing a controverting statement of facts, he filed an affidavit identifying the exhibits he intended to use at trial and expected trial witnesses.

¶5 The superior court granted White's motion for summary judgment and his subsequent application for attorneys' fees. Parknavy timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶6 Our review of summary judgment is de novo. *Great Am. Mortg., Inc. v. Statewide Ins. Co.*, 189 Ariz. 123, 125, 938 P.2d 1124, 1126 (App. 1997). Summary judgment is appropriate if there are no genuine issues as to any material fact. Ariz. R. Civ. P. 56(c)(1); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). We review the evidence "in the light most favorable to the party against whom summary judgment was entered." *TWE Ret. Fund Trust v. Ream*, 198 Ariz. 268, 271, ¶ 11, 8 P.3d 1182, 1185 (App. 2000).

¶7 When moving for summary judgment, the moving party bears the initial burden of showing that there are no issues of fact. *Berry v. Robotka*, 9 Ariz. App. 461, 466, 453 P.2d 972, 977 (1969). It is then the responsibility of the party opposing the motion to "come forward with a showing that there is competent evidence so as to create a factual issue for the trier of fact; the resisting party cannot rely upon its pleadings to meet this burden." *Id.* "If the party with the burden of proof on the claim or defense cannot respond to [a summary judgment] motion by showing that there is evidence creating a genuine issue of fact on the element in question, then . . . summary judgment should be granted." *Orme Sch.*, 166 Ariz. at 310, 802 P.2d at 1009. Parknavy argues that his affidavit presented enough evidence that there is a material fact in dispute to avoid summary judgment.

Breach of contract

¶8 We first analyze Parknavy's claim for breach of contract. The superior court granted White summary judgment because it held that Parknavy had not met his burden of producing sufficient evidence to show that there is a genuine issue of material fact to try. We will generally affirm the superior court's judgment if it "can be sustained on any theory framed by the pleadings and supported by the evidence."

Coronado Co., Inc. v. Jacome's Dept. Store, Inc., 129 Ariz. 137, 139, 629 P.2d 553, 555 (App. 1981).

¶9 Deed restrictions are "a contract between the subdivision's property owners as a whole and the individual lot owners." *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 47, ¶ 19, 226 P.3d 411, 416 (App. 2010) (citation omitted). Interpretation of a contract is a question of law, which we resolve independently of the trial court. *See Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993). The long-established rule in Arizona is that "when a restrictive covenant is unambiguous, it is enforced so as to give effect to the intent of the parties." *Powell v. Washburn*, 211 Ariz. 553, 556, ¶ 9, 125 P.3d 373, 376 (2006); *Biltmore Estates*, 177 Ariz. at 449, 868 P.2d at 1032 ("[T]he cardinal principle in construing restrictive covenants is that the intention of the parties to the instrument is paramount.").

¶10 Parknavy argues that he presented evidence of a valid contract between the parties which prohibited White from allowing his dogs to enter Parknavy's property, and that his affidavit included sufficient evidence that White's dogs entered his property to avoid summary judgment.

¶11 The Declaration is not a contract between Parknavy and White, as Parknavy asserts. Rather, it is a contract between

the Appaloosa Meadows community and White. *See Dreamland Villa*, 224 Ariz. at 47, ¶ 19, 226 P.3d at 416. Section 2.05(C) of the Declaration requires homeowners to keep their pets confined or under their control: "[a]ll domestic household pets shall be kept on a leash not to exceed six (6) feet in length when outside its Owner's Lot and all animals shall be directly under the Owner's control when not on the Owner's Lot." The Declaration provides that if an owner violates any of its provisions, the board may impose an assessment against the owner of up to two hundred dollars payable to the association for each violation. Additionally, Section 6.04(A) provides that any owner "has the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens or charges now or hereafter imposed by provision of this Declaration."

¶12 Thus, under the clear and unambiguous terms of the Declaration, even though the Declaration is not a contract between Parknavy and White, Parknavy had the right to bring a lawsuit to enforce the restrictions set forth in the Declaration. The problem is that Parknavy's breach of contract claim seeks to collect damages he suffered personally due to White's failure to confine or control his dogs as required by Section 2.05(C). Section 6.04(A) only allows an owner to sue to

enforce the covenants, conditions, and restrictions set forth in the Declaration, or assessments imposed due to violations of the Declaration. It does not provide that an owner has a right to sue for a breach of the Declaration and recover damages on his own behalf for another owner's violation of the Declaration. *See Coll. Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 537, ¶ 11, 241 P.3d 897, 901 (App. 2010) ("We interpret restrictive covenants in accordance with the Restatement (Third) of Property: Servitudes § 4.1(1) (2000), which gives effect to the intention of the parties as determined from the language, as well as the circumstances and purposes relating to its creation."). Therefore, as a matter of law, Parknavy is not entitled to recover damages he personally suffered as a result of White's violation of the Declaration. For this reason, White was entitled to summary judgment on Parknavy's breach of contract claim.

Negligence

¶13 Parknavy's second claim is for negligence. Specifically, he alleges that on one occasion when White failed to control his dogs, one of the dogs came onto his property and injured him. To prevail on a claim for negligence, Parknavy must prove four elements: (1) a duty requiring White to conform to a certain standard of care; (2) White's breach of that

standard; (3) a causal connection between White's conduct and the resulting injury; and (4) actual damages. *See Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007).

¶14 Parknavy claimed that when White's dog attacked him and his cats on January 5, 2009, as he turned he "felt tremendous pain in his back on the left side and also twisted his knee."[2] In his motion for summary judgment, White claimed that Parknavy could not provide evidence that any injury Parknavy suffered was proximately caused by White's dog attacking him.

¶15 To support his motion, White attached portions of Parknavy's deposition testimony establishing that before the January 5th incident, Parknavy suffered from the following pre-existing injuries: (1) a herniated disc requiring surgery in 1979; (2) chronic sciatica and back pain; (3) leg surgery in 1994 requiring plates and screws; (4) general pain off and on in his left leg; and (5) arthritis throughout his body. Parknavy also testified at his deposition that no medical provider had said that the injuries he was suffering from at the time of the deposition were directly related to the January 5th incident.

[2] These specific details were not included in the operative complaint.

¶16 White argues that Parknavy was required to designate a medical expert to testify as to causation, and his failure to identify any such expert requires summary adjudication.[3] Although the general rule is that an expert witness must provide medical causation testimony, that rule applies to medical negligence cases. And, even in a medical negligence case, a medical expert is not necessary to establish proximate causation if a causal relationship is "readily apparent to the trier of fact." *Salica v. Tucson Heart Hosp.-Carondelet, L.L.C.*, 224 Ariz. 414, 419, ¶ 16, 231 P.3d 946, 951 (App. 2010) (quoting *Gregg v. Nat'l Med. Health Care Servs., Inc.*, 145 Ariz. 51, 54, 699 P.2d 925, 928 (App. 1985)). This is not a medical negligence action. No expert testimony is needed to prove proximate causation in a general negligence case. *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990) (A "plaintiff need only present probable facts from which the causal relationship reasonably may be inferred.").

[3] White relies on *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000), to support this proposition. In *Logerquist*, the plaintiff appealed the trial court's order precluding expert testimony of her alleged repressed memory that she was sexually abused by her pediatrician. *Id.* at 472, ¶ 5, 1 P.3d at 115. The Supreme Court granted review to clarify Rule 702, Arizona Rules of Evidence, which governs the admissibility of opinion testimony. *Id.* at 471, ¶ 1, 1 P.3d at 114. *Logerquist* has no application to this case.

¶17 "Causation is generally a question of fact for the jury unless reasonable persons could not conclude that a plaintiff had proved this element." *Barrett v. Harris*, 207 Ariz. 374, 378, ¶ 12, 86 P.3d 954, 958 (App. 2004). A plaintiff may prove proximate causation by presenting facts from which a causal connection can be inferred, but cannot leave causation to the jury's speculation. *Salica*, 224 Ariz. at 419, ¶ 16, 231 P.3d at 951.

¶18 After White called into question the issue of proximate causation, the burden was on Parknavy to present some evidence of proximate causation. The only evidence offered in opposition to White's motion for summary judgment was Parknavy's affidavit, and it contains no facts that would allow us to infer a causal connection between the incident and his injuries. In his reply brief, Parknavy argues that he intended to testify at trial to the pain and suffering he experienced as a result of White's dog's attack. In order to avoid summary judgment, it was incumbent on Parknavy to submit an affidavit to that effect in opposition to White's motion. Parknavy cannot simply rest on his unverified pleadings. *See Berry*, 9 Ariz. App. at 466, 453 P.2d at 977.

¶19 Nor does the January 5th police incident report, which Parknavy attached as an exhibit to his affidavit, provide any

facts from which we may infer proximate cause. In that report, Parknavy told the officer that White's dog "scared his cat and his cat 'clawed' him (Parknavy) on the leg." Parknavy reported no other injury despite the fact that both he and White had informed the officer that they had hired attorneys and the officer "advised both parties [he] was going to document the incident."[4] Because Parknavy failed to provide any evidence establishing a causal connection between the incident and his injuries, the superior court properly granted summary judgment in favor of White on the negligence claim.

¶20 White seeks an award of attorneys' fees on appeal under A.R.S. § 12-341 (2003) and Arizona Rule of Civil Appellate Procedure 12.[5] In our discretion, we decline to award attorneys' fees.

[4] The officer testified at the preliminary injunction hearing that being "clawed" by his cat was the only injury that he could recall that Parknavy complained of suffering as a result of the January 5th incident.

[5] We presume White meant Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶21 For the foregoing reasons, we affirm.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Presiding Judge

/s/
DONN KESSLER, Judge