IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JULIE BUCHO-GONZALEZ, *Plaintiff/Appellant*,

v.

LIFE TIME FITNESS INC, et al., *Defendants/Appellees*.

No. 1 CA-CV 16-0691
FILED 3-13-2018

Appeal from the Superior Court in Maricopa County
No. CV2014-013424
The Honorable Jo Lynn Gentry, Judge

AFFIRMED

COUNSEL

Sherrets Bruno & Vogt LLC, Scottsdale
By Jason M. Bruno, Jared C. Olson
Counsel for Plaintiff/Appellant

Lewis Brisbois Bisgaard & Smith, LLP, Phoenix
By Matthew D. Kleifield, Robert C. Ashley
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge James P. Beene delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Peter B. Swann joined.

B E E N E, Judge:

¶1 Appellant Julie Bucho-Gonzalez ("Gonzalez") challenges the superior court's entry of summary judgment in favor of Appellee Life Time Fitness Inc. ("Life Time") on her negligence claim, its denial of her two dispositive motions, and its imposition of sanctions relating to one of her motions. We affirm on all issues raised.

FACTS AND PROCEDURAL HISTORY

¶2 Gonzalez suffered a head injury while exercising at a Life Time facility on October 22, 2012. Gonzalez sued Life Time for negligence approximately two years later, alleging that a "pop pin" on the left arm of a padded pectoral fly machine malfunctioned, causing the arm to strike her in the head. She alleged she was using the machine properly and according to the manufacturer's instructions when the malfunction occurred.

¶3 Gonzalez did not report the incident to Life Time before leaving the facility, but her boyfriend, LaSalle Browne, visited the facility later that day. Browne testified that he told a Life Time employee that Gonzalez had been injured while using a pectoral fly machine. He also testified that a Life Time engineer, Larry Baer, inspected the machine and found that one of the pop pins was loose. Gonzalez, however, testified in deposition that she did not know how the malfunction had occurred:

> Q: And what I understand you explained to us earlier was that you believed that this pop pin somehow came out of its adjustment hole and allowed the arm to swing forward, backwards, and then forward again hitting you in the head.
>
> Was my understanding correct in this regard?
>
> A. No. All I know is that the arm came forward, it came back and came forward. How that occurred, I do not know. All the talk about the pin is coming from other people and other diagrams. It's not what I know. I only know that I was hit on the head with the metal arm.

Gonzalez also demonstrated how she used the machine, maintaining that she used it properly.

¶4 Life Time moved for summary judgment, contending Gonzalez's testimony and demonstration foreclosed her ability to show a causal connection between the alleged malfunction and her injury.

Gonzalez responded with an affidavit from fitness industry expert Frank Smith who testified that "[a]s a result of Life Time Fitness's improper maintenance and lack of appropriate inspection of the . . . machine, the pop-pin on the left arm assembly malfunctioned . . . *as described by [Gonzalez] in her deposition* and caused the injuries she suffered." Gonzalez also requested sanctions against Life Time, contending Life Time spoliated evidence by placing a litigation hold on the wrong machine and deleting surveillance camera footage from the day of Gonzalez's injury.

¶5 Gonzalez also filed two dispositive motions. In the first, she sought partial summary judgment on the elements of duty, breach, and causation. In the second, she contended the liability waiver in her membership agreement was unenforceable. Life Time moved for sanctions under Arizona Rules of Civil Procedure ("Rule") 11 and 26(f), arguing that the second motion was frivolous and Gonzalez did not timely disclose her contention that the waiver was unenforceable.

¶6 The superior court granted summary judgment for Life Time, finding Gonzalez was "unable to state with any degree of certainty how the accident happened." The court also stated that her demonstration showed "the injury could not have occurred as she claims." The court denied Gonzalez's two dispositive motions as well as her sanctions request, but granted Life Time's sanctions request without explanation. The court ordered Gonzalez's counsel to pay Life Time's attorneys' fees incurred in responding to her second motion.

¶7 Gonzalez timely appealed following the entry of final judgment. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

I. The Superior Court Properly Granted Summary Judgment to Life Time

¶8 We review *de novo* whether summary judgment is warranted, including whether genuine issues of material fact exist and whether the trial court properly applied the law. *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 46, ¶ 16 (App. 2010). We construe all facts in favor of the nonmoving party. *Melendez v. Hallmark Ins. Co.*, 232 Ariz. 327, 330, ¶ 9 (App. 2013).

A. The Standard of Care Is Not at Issue on Appeal

¶9 Gonzalez first contends the superior court disregarded her evidence that Life Time breached the standard of care. The court granted Life Time's motion based on proximate cause, not breach of the standard of care. Even assuming material issues of fact remained as to Life Time's breach, an absence of evidence showing proximate cause would be fatal to Gonzalez's claim. *See, e.g., Ward v. Mount Calvary Lutheran Church*, 178 Ariz. 350, 354 (App. 1994) ("[I]f the party with the burden of proof cannot respond to the motion with a showing of evidence creating an issue of fact on an essential element of the claim, then summary judgment should be granted."). We therefore address proximate cause.

B. Gonzalez Did Not Present Competent Evidence of Proximate Cause

¶10 Gonzalez contends the superior court improperly resolved disputed issues of fact regarding proximate cause. A defendant's acts are the proximate cause of an injury only if they are a substantial factor in bringing about the harm. *Grafitti-Valenzuela ex rel. Grafitti v. City of Phoenix*, 216 Ariz. 454, 460, ¶ 21 (App. 2007). The mere possibility of causation is not enough. *Id*. (citing *Butler v. Wong*, 117 Ariz. 395, 396 (App. 1977)). Although proximate cause normally presents a fact issue for the jury, the court may grant summary judgment if no reasonable juror could conclude the defendant's conduct proximately caused the plaintiff's damages.[1] *Gipson v. Kasey*, 214 Ariz. 141, 143 n.1, ¶ 9 (2007).

¶11 Gonzalez first challenges the court's finding that she could only speculate the pop pin was loose or broken "because she never inspected the equipment despite it being made available to her." There is no evidence that anyone ever inspected the machine or the pop pin. Nor is there any evidence to support Smith's conclusion that the pop pin "malfunctioned . . . as described by [Gonzalez] in her deposition" because Gonzalez did not describe any alleged malfunction. *See Brand v. J. H. Rose Trucking Co.*, 102 Ariz. 201, 206 (1967) ("In establishing the proximate cause of an accident, speculation cannot be substituted for probative facts").

¶12 Gonzalez contends her inability to describe the incident is irrelevant because Smith established an "inference of causation." But Smith

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[1] Gonzalez also contends the court improperly considered comparative fault at the summary judgment stage. The court did not grant summary judgment on comparative fault.

relied solely on Gonzalez's testimony to conclude the pop pin malfunction "caused the injuries that she suffered." This circular reasoning does not create an "inference of causation." *See Carrizoza v. Zahn*, 21 Ariz. App. 94, 95 (1973) (expert must "base his opinion only upon competent evidence").

¶13 Gonzalez also cites Browne's testimony that Baer found "one of the pins was loose" while inspecting the machine on the day of the incident. The mere fact that a pop pin was loose does not by itself establish that it also "malfunctioned" and caused Gonzalez's injury. Moreover, Smith never tried to recreate the alleged malfunction. His causation opinion therefore was speculative and insufficient to withstand summary judgment. *Badia v. City of Casa Grande*, 195 Ariz. 349, 357, ¶ 29 (App. 1999) ("Sheer speculation is insufficient to establish the necessary element of proximate cause or to defeat summary judgment.").

C. *Res Ipsa Loquitur* Does Not Apply

¶14 Gonzalez next urges us to apply *res ipsa loquitur* in her favor. *Res ipsa loquitur* allows the trier of fact to infer negligence if an accident occurs that does not normally occur when due care is exercised. *Brookover v. Roberts Enterprises, Inc.*, 215 Ariz. 52, 57, ¶ 19 (App. 2007). The doctrine applies if the plaintiff shows (1) the accident is of a kind that ordinarily does not occur in the absence of negligence, (2) the accident was caused by an agency or instrumentality subject to the defendant's control, and (3) the plaintiff is not in a position to show the circumstances that caused the agency or instrumentality to operate to her injury. *Id*. at 57-58, ¶ 19. The court may grant summary judgment if any one of these three elements is not present. *Ward*, 178 Ariz. at 355.

¶15 We focus on the first element, which is only met if the plaintiff can show through common knowledge or expert testimony that it is highly probable the incident was caused by negligence. *Brookover*, 215 Ariz. at 58, ¶ 20; *see also Capps v. Am. Airlines, Inc.*, 81 Ariz. 232, 234 (1956) ("The doctrine applies only where the physical cause of the injury and the attendant circumstances indicate such an unusual occurrence that in their very nature they carry a strong inherent probability of negligence"). Neither Gonzalez nor Smith offered any evidence to suggest the incident likely could not have occurred absent negligence. *Res ipsa loquitur* therefore does not apply. *See Faris v. Doctors Hosp., Inc.*, 18 Ariz. App. 264, 270 (1972) (*res ipsa loquitur* does not apply "where there is no evidence that a negligent act of the appellees is more likely to cause the injury than any other possible cause"). We thus conclude that the superior court properly granted summary judgment to Life Time.

II. We Do Not Reach the Superior Court's Rulings Denying Gonzalez's Dispositive Motions

¶16 Gonzalez next challenges the court's denial of her two dispositive motions. Orders denying summary judgment typically are not appealable even after entry of a final judgment. *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 409 n.50, ¶ 105 (App. 2012). We may, however, review the orders if the court denied the motions on purely legal grounds. *Ryan v. San Francisco Peaks Trucking Co., Inc.*, 228 Ariz. 42, 48, ¶ 20 (App. 2011). A purely legal issue is "one that does not require the determination of any predicate facts, namely, the facts are not merely undisputed but immaterial." *Id.* (internal quotations omitted).

¶17 The superior court did not explain its denial of Gonzalez's motion regarding duty, breach, and causation, but our conclusion that the court properly granted summary judgment to Life Time renders that motion moot. As for Gonzalez's motion regarding the liability waiver, the court found there were factual disputes that precluded summary judgment, and we agree. Gonzalez admitted she could not recall whether she read the liability waiver when she signed it. Life Time also presented evidence disputing Gonzalez's claim that she had no opportunity to review the liability waiver before signing it. We therefore decline to reach the merits of that motion.

III. The Superior Court Did Not Abuse its Discretion in Awarding Sanctions Against Gonzalez

¶18 Gonzalez also challenges the superior court's sanctions award against her and her counsel. The court did not specify whether it based its award on Rule 11 or 26(f). We review an award of sanctions under either rule for an abuse of discretion. *Cal X-Tra*, 229 Ariz. at 410, ¶ 113; *Taliaferro v. Taliaferro*, 188 Ariz. 333, 339 (App. 1996). We review whether there was a proper basis for awarding fees under Rule 11 *de novo*. *Villa De Jardines Ass'n v. Flagstar Bank, FSB*, 227 Ariz. 91, 96, ¶ 12 (App. 2011).

¶19 Gonzalez first contends that, to the extent the court awarded sanctions under Rule 11, it did not make sufficient findings in support of the award. *See Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 497 (App. 1990) ("The trial court must make specific findings to justify its conclusion that a party's claims or defenses are frivolous."). Gonzalez did not raise this issue below and therefore has waived it on appeal. *See, e.g., John C. Lincoln Hosp. & Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, 540, ¶ 23 (App. 2004) (party must "object to inadequate findings at the trial court level so that the

court will have an opportunity to correct them, and failure to do so constitutes a waiver.").

¶20 Gonzalez next contends Rule 11 sanctions were inappropriate because the court found factual disputes remained as to her motion regarding the liability waiver. But those disputes arose out of her own efforts to either ignore or contradict her deposition testimony. For example, Gonzalez contended she "signed an electronic signature pad but was never shown a copy of the membership agreement," which conflicted with her deposition testimony that she did not recall signing on an electronic signature pad. She also contended Life Time did not inform her of the liability waiver but testified in deposition that she did not recall the signing process. She also chose not to attach a copy of the agreement to her motion despite never denying she signed it. We note that although constitutional challenges to liability waivers based on an assumption of the risk defense can be raised, Gonzalez failed to argue it here; thus, we do not address it. *See Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 405, ¶ 11 (2005) (Article 18, Section 5 of Arizona Constitution mandates that assumption of risk defense through signed releases/waivers be submitted to fact finder, precluding summary judgment); *see also Morganteen v. Cowboy Adventures, Inc.*, 190 Ariz. 463, 466 & n.5 (App. 1997) (holding that factual issues precluded summary judgment for defendant but expressly stating that court would not consider whether Article 18, Section 5 of Arizona Constitution applied because plaintiffs had not argued it).

¶21 Given these facts, we cannot say the superior court abused its discretion in determining she filed the motion without any reasonable chance of success.[2] *See Villa de Jardines*, 227 Ariz. at 96, ¶ 14 ("Rule 11 requires that attorneys have 'a good faith belief, formed on the basis of . . . reasonable investigation, that a colorable claim exists.'") (quoting *Boone v. Superior Court*, 145 Ariz. 235, 241 (1985)).

IV. The Superior Court Did Not Abuse its Discretion in Declining to Sanction Life Time for Spoliation of Evidence

¶22 Gonzalez also challenges the superior court's decision not to sanction Life Time for spoliation of evidence. Litigants have a duty to

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[2] Because we affirm the award under Rule 11, we need not reach Gonzalez's Rule 26(f) arguments. *See KCI Rest. Mgmt. LLC v. Holm Wright Hyde & Hays PLC*, 236 Ariz. 485, 488 n.2, ¶ 12 (App. 2014) ("We can . . . affirm the judgment if the court was 'correct in its ruling for any reason'") (quoting *Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, 404 n.7, ¶ 17 (App. 2006)).

preserve relevant evidence. *Smyser v. City of Peoria*, 215 Ariz. 428, 439, ¶ 36 (App. 2007). The trial court may impose sanctions when a party fails to do so. *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 260, ¶ 51 (App. 2013). In exercising its discretion over whether to impose sanctions, the court should consider whether there was bad faith or intentional destruction and whether the loss of the destroyed evidence prejudiced the party seeking sanctions. *Id*. We review the court's decision for an abuse of discretion. *Souza v. Fred Carries Contracts, Inc*., 191 Ariz. 247, 249 (App. 1997).

A. Bad Faith or Intentional Destruction

¶23 Gonzalez alleges that Life Time placed the wrong machine in a "litigation hold" despite knowing which machine she was using on the day of the incident, citing Browne's testimony. But Life Time presented evidence showing Browne told its employee Gonzalez was injured in the free weight area, suggesting there was at least initial confusion as to how Gonzalez was injured.

¶24 Even assuming Browne identified the correct machine on the day of Gonzalez's injury, the machine at issue was available for inspection as of March 2015, six months after Gonzalez filed suit. Despite this, neither Gonzalez nor Smith ever inspected the machine. Her contention on appeal that Life Time somehow altered the machine thus is speculative.

¶25 Gonzalez also contends Life Time failed to preserve surveillance camera footage from the day of the incident, arguing the cameras were in place to provide evidence in injury cases such as this. Life Time demonstrated below that the footage was automatically deleted after 30 days and that, due to camera locations, the footage would not have been useful had it been preserved. Moreover, Gonzalez admits she did not request the surveillance footage until October 2014, long after the relevant footage had been deleted. We thus see no evidence of bad faith or intentional destruction in this record.

B. Prejudice

¶26 Gonzalez does not argue on appeal that either of the issues raised above prejudiced her case. We see no prejudice given her failure to inspect the machine or request that Life Time preserve the surveillance footage some time before filing suit nearly two years after her injury. The superior court thus did not abuse its discretion in declining to sanction Life Time for spoliation of evidence.

CONCLUSION

¶27 We affirm the superior court's rulings. We will award Life Time its taxable costs incurred on appeal upon compliance with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA