IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

TAMARA ETCITTY, et al., *Plaintiffs/Appellants*,

v.

STATE OF ARIZONA, *Defendant/Appellee*.

No. 1 CA-CV 17-0464
FILED 5-1-2018

Appeal from the Superior Court in Maricopa County
No. CV2012-004611
No. CV2014-005128
(Consolidated)
The Honorable Jo Lynn Gentry, Judge

REVERSED AND REMANDED

COUNSEL

Mick Levin PLC, Phoenix
By Mick Levin, Sandra Lemon
Counsel for Plaintiffs/Appellants

Arizona Attorney General's Office, Phoenix
By Brock J. Heathcotte
Counsel for Defendant/Appellee

MEMORANDUM DECISION

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

T H O M P S O N, Presiding Judge:

¶1 Tamara Etcitty, by and through her parents and legal guardians Margaret and Arthur Etcitty (collectively, Plaintiffs), appeal from the superior court's entry of summary judgment in favor of the State of Arizona on their claim for negligence. For the following reasons, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On the evening of March 2, 2011, Margaret was driving north on U.S. 191 (Highway 191), a two-lane state highway in Apache County, with Tamara as her passenger. Their car struck a cow, crossed the median, and came to a stop in the southbound lane. After the accident, Margaret and Tamara exited their car and went to the side of highway. Thereafter, Tamara re-entered the highway and was standing near the disabled car when a van driving southbound struck her causing severe and permanent injury.

¶3 Plaintiffs filed a lawsuit against the State alleging it (1) had a duty to make Highway 191 reasonably safe, (2) was aware of multiple cow and vehicle collisions in the area, and (3) failed to take action to prevent such collisions.[1] Following discovery, the State filed a motion for summary judgment arguing that (1) it was immune from liability under Arizona Revised Statutes (A.R.S.) sections 12-820.01 (2016) and -820.03, (2) (2017) it had not breached its duty, and (3) Plaintiffs had failed to prove causation.

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[1] Plaintiffs filed a separate lawsuit in Apache County Superior Court against the driver of the van and the individuals whom Plaintiffs believed owned the cow and the gate from which the cow allegedly escaped. The Apache County case was later transferred to Maricopa County Superior Court, where it was consolidated with Plaintiffs' case against the State. Plaintiffs ultimately dismissed their claims against the other defendants.

The superior court granted the State's motion, and Plaintiffs timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (2018).[2]

DISCUSSION

¶4 Pursuant to Arizona Rule of Civil Procedure 56(a), a party is entitled to summary judgment when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). This court reviews the superior court's grant of summary judgment *de novo*. *See Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 291, ¶ 13 (App. 2010). In doing so, we view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the party against whom judgment was entered. *See Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 55, ¶ 8 (App. 2007).

¶5 In reviewing a motion for summary judgment, we are cognizant that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). As our supreme court explained in *Orme School*, summary judgment may not be used as a substitute for jury trial even when the court believes that "the moving party *will* probably win the jury's verdict." *Id*. at 310 (emphasis in original). "If the evidence would allow a jury to resolve a material issue in favor of either party, summary judgment is improper." *Comerica*, 224 Ariz. at 291, ¶ 12.

¶6 To establish their claim for negligence, Plaintiffs must prove four elements: (1) a duty requiring the State to conform to a certain standard of care, (2) a breach by the State of that standard, (3) a causal connection between the State's conduct and the resulting injury, and (4) actual damages. *See Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9 (2007) (citations omitted). The first of those elements, "whether a duty exists," is generally a legal issue for the court to decide, while the remaining elements, "including breach and causation, are factual issues usually decided by the jury." *Id*. The elements at issue in this case are breach and causation.

[2] This court dismissed Plaintiffs' first appeal for lack of jurisdiction finding there were unresolved claims against other defendants. Thereafter, Plaintiffs moved to dismiss those defendants, and the superior court entered a final judgment from which Plaintiffs timely appealed.

I. Breach of Duty

¶7 Both parties agree the State has a duty to maintain Highway 191 in a condition that is reasonably safe for travel. *See Wisener v. State*, 123 Ariz. 148, 150 (1979). "In Arizona, it is undisputed that the state has an unchanging duty to keep its roadways reasonably safe for travel and that, generally, the question of whether that duty was breached is for the trier of fact." *Booth v. State*, 207 Ariz. 61, 66, ¶ 13 (App. 2004), *as amended on reconsideration in part (Mar. 31, 2004). The State's liability extends to "dangerous conditions* permitted by [the State] to continue in existence." *Delarosa v. State*, 21 Ariz. App. 263, 265 (1974).

¶8 Although the parties agree the State has a duty, they disagree regarding whether the State breached its duty. Plaintiffs argue that a reasonable jury could find the State breached its duty. Conversely, the State argues there was no breach.

¶9 The record contains the following facts, which we view in the light most favorable to Plaintiffs, as the non-moving party. In 2009, multiple employees from the Arizona Department of Transportation (ADOT) were aware of a "danger situation" involving "a number of accidents involving motorists and livestock" in the area of Highway 191 near the accident site. The employees were also aware that certain homeowners, Edwin and Darlene Tracy, had a permitted turnout gate, which they sometimes left open. The State addressed this issue by sending a letter to the Tracys in July 2009 stating:

> It has been brought to our attention that there have been a number of accidents involving motorists and livestock in the vicinity of the turnout to your residence. The most recent of these accidents involved two calves that were struck and killed by a passing motorist.
>
> ADOT has the responsibility of ensuring the utmost safety possible to the traveling public and all that use it. Therefore, ADOT would like to take this opportunity to remind you that the gate to your property is to remain closed at all times when not in use to help provide this safety. Keeping the gate closed when not in use is one of the requirements of your turnout permit . . . .
>
> Should the gate remain open when not in use and livestock enters onto the highway right of way, ADOT will have to terminate your permit, remove the gate and construct a fence

> across the turnout. We would appreciate your cooperation in this very serious matter to help eliminate this dangerous situation.

¶10 ADOT's records reflect that problems with livestock on this area of Highway 191 continued into 2010, but no further communication between ADOT and the Tracys took place. When deposed, ADOT's maintenance supervisor explained that he did not escalate the livestock problem to his supervisor, because he knew Edwin Tracy. ADOT's district engineer indicated that if he had known there were issues attributable to cattle coming through a particular homeowner's gate, he would have fenced in the gate.

¶11 Viewing the evidence and all reasonable inferences drawn therefrom in the light most favorable to Plaintiffs, we determine there is sufficient evidence to raise genuine issues of material fact regarding whether the State breached its duty to maintain Highway 191 in a reasonably safe condition. *See Grafitti-Valenzuela ex rel. Grafitti v. City of Phoenix*, 216 Ariz. 454, 458, ¶ 13 (App. 2007) (holding that "[w]hether a defendant has exercised the care required to satisfy its duty is generally a question of fact for the jury"); *see also Booth*, 207 Ariz. at 68, ¶ 21 (explaining that the State's reasonableness of the state's inaction "in addressing and seeking to remedy the risk to drivers was a question for the jury"). Although a reasonable jury may conclude that the State did not breach its duty, the record does not support entry of judgment to that effect as a matter of law.

II. Causation

¶12 The parties also disagree regarding whether the State's alleged action or inaction caused Tamara's injuries. The State argues that its conduct did not proximately cause Tamara's injuries because the van driver's inattentiveness and Tamara's decision to re-enter the highway following the accident broke the chain of causation. Conversely, Plaintiffs argue that "the second collision was not a superseding, intervening cause."

¶13 To establish a prima facie case of negligence, Plaintiffs must show that the State's negligence was the proximate cause of Tamara's injuries. *See Grafitti-Valenzuela*, 216 Ariz. at 460, ¶ 20. "Courts generally leave the issue of proximate cause to the jury." *Ritchie v. Krasner*, 221 Ariz. 288, 297, ¶ 23 (App. 2009) (citation omitted). As we explained in *Ritchie v. Krasner*, a plaintiff "does not need to introduce evidence to establish that the negligence resulted in the injury or the death, but simply that the

negligence increased the risk of injury or death." *Id.* (citation omitted). "The step from increased risk to [the probability of] causation is one for the jury to make." *Id.* (citation omitted). A superseding cause is sufficient to become the proximate cause and relieve the defendant of negligence only when the intervening force is "unforeseeable and may be described, with the benefit of hindsight, as extraordinary." *Robertson v. Sixpence Inns of Am., Inc*., 163 Ariz. 539, 546 (1990) (citation omitted).

¶14 Here, the evidence reflects the van was travelling well under the posted speed limit when Tamara was struck. The police did not cite the van driver for any type of improper driving. There is conflicting evidence regarding why Tamara was standing near the disabled vehicle. The parties agree that (1) Tamara and her mother originally exited their car and went to the side of the highway, and (2) Tamara later re-entered the highway to stand near the disabled car. A witness, who stopped to assist, speculated that Tamara was "looking for something or checking the vehicle." The accident report indicates that Tamara "was in the process of directing traffic to avoid another collision by oncoming vehicles" when she was struck by the van. Plaintiffs' expert opined that a substantial number of pedestrian collisions are associated with disabled vehicles on a highway.

¶15 Based on this record, we cannot say as a matter of law that the intervening actions of either the van driver or Tamara were unforeseeable or extraordinary. The question of whether these actions became the proximate cause of Tamara's injuries, thereby relieving the State of its alleged negligence, is best left for a jury to answer.

¶16 The State also argues that "a jury would have to engage in prohibited speculation to find causation given the lack of evidence that the cow escaped through the Tracys' gate." To defeat summary judgment, a plaintiff must "present enough evidence for a jury reasonably to infer the negligent conduct on the part of the defendant was a proximate cause of plaintiff's injuries." *Ritchie*, 221 Ariz. at 298, ¶ 23 (citation and quotations omitted).

¶17 Here, the evidence reflects that the accident occurred at milepost 420.5 on Highway 191. ADOT inspection records indicate the Tracys' gate was located at milepost 420.45.[3] Additional evidence reflects

[3] There is conflicting evidence regarding whether the Tracys' gate is located at milepost 420.45, as reflected in ADOT's inspection records, or at milepost 422.9, as reflected on the permit. We must view the evidence in the light

the State was aware that a "number of problems" involving accidents with livestock escaping had created a "dangerous situation" in the vicinity of the Tracys' gate and sent a letter to the Tracys warning them of the need to close their gate. ADOT records also reflect that problems with livestock along this portion of Highway 191 continued after the letter was sent. From this evidence, a jury could reasonably infer that the cow involved in the collision came through the Tracys' gate.

¶18 On this record, we are unable to say that the State was entitled to judgment as a matter of law. Accordingly, we reverse the entry of summary judgment and remand for further proceedings.

III. Other Issues

¶19 Plaintiffs also argue the superior court erred "by considering improper evidence" introduced by the State in support of its motion for summary judgment. x Having reversed the entry of summary judgment, we decline to address this evidentiary issue. *See Freeport McMoRan Corp. v. Langley Eden Farms, LLC*, 228 Ariz. 474, 478, ¶ 15 (App. 2011) (explaining that appellate courts "do not issue advisory opinions or decide unnecessary issues").

¶20 In their opening brief, Plaintiffs also argue the State is not entitled to immunity under A.R.S. §§ 12-820.01 or -820.03. The State raised these affirmative defenses in the superior court, but did not respond to these issues on appeal. Accordingly, we treat these defenses as abandoned and decline to express an opinion on them. *See Porter v. Empire Fire & Marine Ins. Co.*, 106 Ariz. 274, 279–80 (1985) (declining to address affirmative defenses that were abandoned on appeal).

CONCLUSION

¶21 For the foregoing reasons, we reverse the entry of summary

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most favorable to the Plaintiffs, as the party against whom summary judgment was entered.

judgment and remand for further proceedings.

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