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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ROBERT P. JACOBSEN, an individual in his sole and separate right,
Plaintiff/Appellant,

v.

CITY OF BULLHEAD CITY, an incorporated municipality,
Defendant/Appellee.

No. 1 CA-CV 17-0644
FILED 8-14-2018

Appeal from the Superior Court in Mohave County
No. B8015CV201704016
The Honorable Charles W. Gurtler, Judge

AFFIRMED

COUNSEL

Robert P. Jacobsen, Florence
Plaintiff/Appellant

The Doyle Firm, P.C., Phoenix
By William H. Doyle
Counsel for Defendant/Appellee

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MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Jennifer M. Perkins and Judge Peter B. Swann joined.

H O W E, Judge:

¶1 Robert Jacobsen appeals the trial court's grant of summary judgment in Bullhead City's favor. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Rotary Park is a 211-acre municipal park located in Bullhead City that includes large open areas, soccer and football fields, and access to the Colorado River. Generally, Bullhead City does not charge a fee for the use of its public parks, including Rotary Park. Bullhead City charges fees, however, during the summer months for boat ramp access to the Colorado River, special events, or when a citizen reserves a park facility. Special events that charge admission fees are uncommon and limited to the reserved staging area.

¶3 In February 2016, Jacobsen was at one of Rotary Park's gazebos, which was unreserved and open to the public free of charge. Jacobsen leaned on the gazebo's railing, which gave way, resulting in Jacobsen falling six feet to the ground and receiving multiple injuries.

¶4 Bullhead City's Field Operations Supervisor oversaw the condition of facilities and equipment at the city's parks, and he first learned of the gazebo's broken railing in late February 2016. He marked the broken railing with yellow caution tape until the railing could be replaced. Before learning about the broken railing, the supervisor had taken frequent trips to Rotary Park and passed by the gazebo several times a week and had not seen any broken railings, damage, or safety issues.

¶5 Jacobsen served a notice of claim on Bullhead City alleging negligence. He later filed a complaint alleging negligence and premises liability claims against Bullhead City for failing to maintain the railing, failing to maintain the premises in a reasonably safe manner, and failing to warn about dangers that the condition presented. Bullhead City timely answered the complaint and later moved for summary judgment under

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A.R.S. § 33-1551, which generally bars claims against landowners by recreational users for injuries sustained while on the premises.

¶6 Jacobsen amended his complaint by adding another plaintiff and additional defendants seemingly related to events that occurred in a correctional facility after he was incarcerated.¹ The amended complaint again alleged negligence against Bullhead City and included several new causes of action against the additional defendants. The trial court struck the amended complaint and ordered Jacobsen to seek leave to amend the complaint. Jacobsen then responded to the summary judgment motion, asserting that summary judgment would violate Arizona Rule of Civil Procedure (“Rule”) 17(f)(2)(A) and the United States Constitution. That same day, he moved for appointment of a guardian ad litem (“GAL”) under Rule 17(f)(2)(A). Jacobsen stated that he was incompetent and needed the assistance of “qualified attorneys” to proceed in the action. He stated in an attached affidavit that he had been diagnosed as “Seriously Mentally Ill” in March 2002 and was a paranoid schizophrenic, delusional, and chronically depressed. He also stated that he was having difficulty obtaining assistance in maintaining his lawsuit.

¶7 The trial court declined to rule on the motion for summary judgment because of Jacobsen’s allegations about his mental disabilities and his request for a GAL. The court noted that Jacobsen had not sought leave to amend the complaint and that the amended complaint remained stricken. The court ordered the Mohave County Public Fiduciary to investigate Jacobsen’s incompetency claim and to recommend how it should proceed. The fiduciary investigated, and her report noted that a seriously mentally ill person is not necessarily deemed incompetent or incapacitated. The fiduciary also found no Title 14 proceedings indicating that Jacobsen had been deemed incapacitated. The fiduciary concluded that she was unable to make a recommendation regarding the appointment of a GAL without a finding of incompetency by a credentialed medical provider and an appropriate judicial ruling.

¶8 The court reviewed the fiduciary’s report and Jacobsen’s affidavit and found that Jacobsen sought legal counsel rather than a decision-maker. The court stated that it could not appoint counsel in a civil matter, but acknowledged Jacobsen’s claimed mental disabilities. The court noted, however, that the diagnoses occurred in March 2002 and that no evidence showed that Jacobsen was currently being treated for any mental

¹ The record does not explain the circumstances of Jacobsen’s incarceration.

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disabilities. The court therefore denied Jacobsen's request for a GAL but granted him an additional 20 days to file a supplemental response to Bullhead City's motion for summary judgment.

¶9 Jacobsen filed a supplemental response, which included a new allegation of gross negligence. After reviewing all of the documents for summary judgment, the court reiterated its previous finding that Jacobsen was neither incompetent nor entitled to the appointment of a GAL.

¶10 The court also found that Jacobsen had not alleged gross negligence within his complaint. The court considered but denied leave to amend the complaint to allege gross negligence because the facts presented did not support an allegation of gross negligence. Specifically, the court noted that Jacobsen had not alleged that Bullhead City had known of a defective railing, that previous injuries had resulted from using an aesthetic railing rather than a safety railing, or that an inspection would have even determined the need for a safety railing. The court also found that Bullhead City's "decision to go with an aesthetic look rather than taking a greater safety precaution" may have been a question of negligence for a jury, but the decision did not amount to gross negligence as a matter of law. The court then granted summary judgment in Bullhead City's favor.

¶11 Jacobsen prematurely appealed and did not file a new or amended notice of appeal after the trial court's signed judgment in Bullhead City's favor. But this Court will treat his appeal as timely under Arizona Rule of Civil Appellate Procedure 9(c).

DISCUSSION

¶12 On appeal from an order granting summary judgment, the Court reviews de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 55 ¶ 8 (App. 2007). "Summary judgment is appropriate if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Noriega v. Town of Miami*, 243 Ariz. 320, 324 ¶ 12 (App. 2017). A motion for summary judgment should therefore "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 (1990). Denial of a motion for leave to amend is reviewed for an abuse of discretion. *Swenson v. Cty. of Pinal*, 243 Ariz. 122, 128 ¶ 21 (App. 2017).

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1. Appointment of GAL or Counsel

¶13 Jacobsen claims that the trial court erred by finding him competent and declining to appoint him a GAL. Jacobsen argues that the court should have appointed a GAL under Rule 17(f)(2)(A), which states that a court must appoint a GAL to protect an incompetent person who is unrepresented in an action. The court received evidence that Jacobsen had mental disabilities, but it did not receive any evidence that he had been found incompetent or that he was already under an established guardianship. As such, he had no right to a GAL. Similarly, Jacobsen argues that the court erred by not appointing him counsel. Because a plaintiff does not have a constitutional right to counsel in a civil case, *see Acolla v. Peralta*, 150 Ariz. 35, 38 (App. 1986); *see also Encinas v. Mangum*, 203 Ariz. 357, 359 ¶ 8 (App. 2002) (due process is satisfied in a civil case if the litigants are given the opportunity to either hire an attorney or represent themselves), Jacobsen’s claim for appointed counsel also fails.

2. Arizona’s Recreational Use Statute

¶14 Jacobsen argues that the trial court erred by granting summary judgment in Bullhead City’s favor because his claim fell under an exception to Arizona’s recreational use statute. Specifically, he claims that Bullhead City’s decision to elevate the gazebo and to attach a decorative railing was a willful, malicious, or grossly negligent act.² Arizona’s recreational use statute, A.R.S. § 33-1551, limits a landowner’s liability to a person injured while on the landowner’s land for recreational purposes. *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1, 2 ¶ 6 (2003). The statute provides that the owner of land held open for public use is not liable to a recreational user except upon a showing that the owner acted willfully, maliciously, or grossly negligent in directly causing the recreational user’s injury. A.R.S. § 33-1551(A); *Dickey*, 205 Ariz. at 2 ¶ 6. “Grossly negligent” is defined as “a knowing or reckless indifference to the health and safety of others.” A.R.S. § 33-1551(C)(2). While gross negligence is often a question of fact for the jury, the issue may be resolved on summary judgment “if the plaintiff fails to produce evidence that is more than slight and that does not border on conjecture such that a reasonable trier of fact could find gross

² Jacobsen alleges for the first time on appeal that Bullhead City had acted willfully or maliciously in causing his injuries. As such, these arguments will not be considered. *In re MH 2008-002659*, 224 Ariz. 25, 27 ¶ 9 (App. 2010) (arguments raised for the first time on appeal are not considered except under exceptional circumstances).

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negligence.” *Armenta v. City of Casa Grande*, 205 Ariz. 367, 373 ¶ 21 (App. 2003).

¶15 Here, Rotary Park was recreational land held open to the public and Jacobsen was a recreational user under the statute. Thus, A.R.S. § 33-1551 provided Bullhead City with qualified protection from liability. To prove Bullhead City liable, Jacobsen needed to show that the city had acted willfully, maliciously, or grossly negligent in causing his injuries. Jacobsen, however, alleged only that the city was negligent in his complaint. Jacobsen raised the gross negligence claim for the first time in his supplemental response to Bullhead City’s motion for summary judgment. The trial court considered granting leave to amend the complaint to allege gross negligence, but declined to do so because no genuine issue of material fact existed and the general facts alleged did not support an allegation of gross negligence as a matter of law. The court noted that Jacobsen had not alleged that Bullhead City knew of the defective railing, that previous injuries resulted from the defective railing, or that an inspection would have shown the need for a safer railing. Thus, the record supports the court’s finding that Bullhead City’s use of the subject railing may have been negligent but did not amount to gross negligence as a matter of law. Because no reasonable trier of fact could find that Bullhead City acted with gross negligence, the trial court’s summary judgment in Bullhead City’s favor was appropriate. *See Armenta*, 205 Ariz. at 373 ¶ 21-23. Therefore, even if Jacobsen had been allowed to amend his complaint, his action would have been futile and the court’s denial of leave to amend was appropriate. *See Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 471 ¶ 40 (App. 2007).

CONCLUSION

¶16 For the foregoing reasons, we affirm.



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