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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: 09/16/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

HERMAN R. Q. MARTINEZ and) 1 CA-CV 09-0676
ROMELIA H. MARTINEZ, as surviving)
parents and heirs of decedent) DEPARTMENT C
Sarah Annette Martinez; ESTATE OF)
SARAH ANNETTE MARTINEZ, by and) **MEMORANDUM DECISION**
through its representatives,) (Not for Publication -
Herman R. Q. Martinez and Romelia) Rule 28, Arizona Rules of
H. Martinez,) Civil Appellate Procedure)
)
Plaintiffs/Appellees,)
)
v.)
)
DESERT SKY ESPLANADE, L.L.C., an)
Arizona limited liability)
company,)
)
Defendant/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-014888

The Honorable Douglas L. Rayes, Judge

AFFIRMED

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O R O Z C O, Judge

¶1 Desert Sky Esplanade, L.L.C. (Desert Sky), appeals from the judgment entered on a jury verdict in favor of Herman R. Q. Martinez and Romelia H. Martinez (the Parents). Desert Sky claims the trial evidence failed to prove its fault under a premises liability theory in causing the Parents' daughter's death. Desert Sky also challenges the trial court's orders denying its motion for new trial and renewed motion for judgment as a matter of law (JMOL). For the reasons that follow, we affirm the judgment and post-trial orders.

BACKGROUND

¶2 The trial evidence, viewed in a light most favorable to sustaining the jury verdict,¹ revealed the following. On June 25, 2004, certain commercial property (the Property) along 75th Avenue between Encanto Boulevard and McDowell Road was conveyed to Desert Sky.

¶3 On January 7, 2005, the Parents' sixteen-year-old daughter, Sarah Martinez (Sarah), was a passenger in a vehicle being driven by her friend, M.M. Proceeding westbound on Encanto Boulevard, M.M. turned south on Center Road, a paved roadway exceeding forty-feet in width that traversed the western

¹ *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996).

part of the Property.² Although Center Road was a private roadway, no sign indicated it was closed to the public, and M.M. believed Center Road was a "normal," "public" "access" road.

¶4 M.M. was driving fifty to fifty-five miles-per-hour as he steered through a curve in the road and noticed a speed hump³ when he was "[a]lmost . . . on top of it, within a few feet." There were no speed limit signs on Center Road, nor were there any signs warning of the speed hump. M.M. attempted to maneuver through "cut-outs" in the hump, lost control of the vehicle, and crashed laterally into a tree on the side of the road. Sarah sustained fatal injuries in the accident.

¶5 On October 19, 2006, the Parents commenced a wrongful death action against Desert Sky⁴ alleging, among other things, that the speed hump was unreasonably dangerous due to (1) its improper placement on the curve in the road and (2) the absence of both a posted speed limit and signs warning drivers of the hump's existence. The matter was tried to a jury. After the parties rested, Desert Sky argued no trial evidence could

² Center Road connected Encanto Boulevard and McDowell Road and provided delivery trucks access to retail stores on the Property.

³ A speed "hump" is "an asphalt mound[] placed on roadways for the purpose of slowing traffic" and is "gentler" than a speed "bump."

⁴ Other named defendants are not parties to this appeal.

support a finding of an unreasonably dangerous condition on the Property and accordingly moved orally for JMOL pursuant to Arizona Rule of Civil Procedure (Rule) 50. The court denied the motion, and the jury subsequently found Desert Sky and M.M. each 50% at fault and awarded the Parents \$2,500,000.00 in damages.

¶16 Desert Sky filed a motion for new trial and renewed JMOL. Again, Desert Sky claimed the Parents presented no evidence that the speed hump was unreasonably dangerous. Desert Sky also argued it did not, as a matter of law, owe Sarah a duty because Center Road was privately owned. Finally, Desert Sky asserted no evidence at trial established it had the requisite knowledge regarding the existence of the speed hump.⁵ The trial court denied Desert Sky's motion, and Desert Sky timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.B and -F.1 (2003).

DISCUSSION

¶17 Consistent with Arizona law, the jury was instructed that in order to find Desert Sky negligent, it had to determine that the speed hump was an unreasonably dangerous condition of which Desert Sky had notice, and Desert Sky failed to use reasonable care to prevent harm under the circumstances. Rev. Ariz. Jury Instr. (Civil), at 98 (4th ed. 2005). To satisfy the

⁵ It was undisputed at trial that the speed hump was in place when Desert Sky assumed ownership of the Property, thus inferring that Desert Sky did not construct the speed hump.

notice requirement, the jury was instructed to find any one of the following: (1) Desert Sky or its employees created the condition; (2) Desert Sky or its employees actually knew of the condition in time to provide a remedy or warning; or (3) the condition lasted for a sufficient length of time that Desert Sky or its employees, in the exercise of reasonable care, should have known of it. *Id.*; *Haynes v. Syntek Fin. Corp.*, 184 Ariz. 332, 339, 909 P.2d 399, 406 (App. 1995).

¶18 Desert Sky first argues it did not owe a duty to Sarah because the car accident occurred while she was trespassing on a private road. Desert Sky first raised this issue in its post-trial motion for a new trial and renewed JMOL; it did not raise the issue in its first Rule 50 motion made at trial. Indeed, Desert Sky approved of the following instruction given to the jury: "As the owner of a business, defendant Desert Sky [] is required to use reasonable care to warn of or safeguard or remedy an unreasonably dangerous condition of which Desert Sky [] had notice." Consequently, Desert Sky has waived the issue of whether it owed a duty to Sarah. *See Watson Constr. Co. v. Amfac Mortg. Corp.*, 124 Ariz. 570, 582, 606 P.2d 421, 433 (App. 1979) (stating that issues raised for the first time in a motion for new trial are waived).

¶19 Desert Sky next contends the Parents failed to prove Desert Sky had the requisite knowledge to find that it actually

or constructively knew the speed hump was unreasonably dangerous. This issue was also waived. In its Rule 50 motion at trial, Desert Sky only challenged the evidence showing the speed hump was unreasonably dangerous. Notably, when the Parents' attorney responded to Desert Sky's motion and began arguing the notice issue, the trial court interrupted twice saying: "Wait. All I wanted you to tell me, what facts support the proposition that this speed hump was unreasonably dangerous? That's a very narrow motion as to the lack of evidence for the jury to find this was an unreasonably dangerous condition." And, "Whoa, [Desert Sky's counsel is] not arguing notice, all he's saying is this was not a reasonably dangerous condition. That's all." Desert Sky did not object to this characterization of its Rule 50 motion. Thus, because Desert Sky raised the issue regarding its notice of the speed hump for the first time in its post-trial motion for new trial, this issue has been waived.⁶ *Id.*

⁶ Even if we were to find that this issue was not waived, sufficient evidence supports a finding that Desert Sky reasonably should have known of the speed hump because Desert Sky had owned the Property for over six months before the accident occurred. Desert Sky has not disputed that the speed hump was in existence when it acquired ownership of the Property. Further, trial evidence revealed that Desert Sky, as it conducted due diligence prior to purchasing the property, should have noticed "there might be a problem" with drivers speeding over the speed hump according to J.J., a traffic safety expert with experience in speed hump design.

¶10 Accordingly, the sole issue properly before us is whether the evidence at trial supported a finding that the speed hump was unreasonably dangerous. We will reverse the trial court's denial of a motion for JMOL or new trial only if it reflects a manifest abuse of discretion. *Ogden v. J.M. Steel Erecting, Inc.*, 201 Ariz. 32, 36, ¶ 15, 31 P.3d 806, 810 (App. 2001) (new trial); *Gonzales v. City of Phoenix*, 203 Ariz. 152, 153, ¶¶ 1-2, 52 P.3d 184, 185 (2002). We view the evidence in the light most favorable to sustaining the jury's verdict and, when considering the sufficiency of the evidence, will not disturb the verdict if any substantial evidence exists permitting reasonable persons to reach such a result. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶¶ 13-14, 961 P.2d 449, 451 (1998); *S. Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, 18, ¶ 16, 31 P.3d 123, 131 (App. 2001). We will not re-weigh the evidence because the credibility of witnesses and weight of the evidence are within the province of the jury. *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314, 318 (2000).

¶11 J.J. testified that national and local standards would prohibit speed humps in close proximity to curves on Center Road due to its excessive width and resultant higher speed and volume

of traffic.⁷ He also testified the curve before the speed hump limited the visibility of the speed hump and a driver's ability to see the hump's ground stripes. Because of the hump's placement relative to the curve, J.J. testified that warning signs should have been posted. J.J. also testified that he observed numerous skid marks on the hump's surface which in his experience indicated drivers had "react[ed] at the last . . . second" and were "having problems with that speed hump . . . in that location." This evidence was sufficient for the jury to determine that the speed hump was unreasonably dangerous based on its location relative to the curve and Center Road's lack of posted warning and speed limit signs. The trial court, therefore, did not abuse its discretion in denying Desert Sky's motion for JMOL or new trial.

⁷ Indeed, J.J. testified a speed limit should have been posted on Center Road "because it's connecting two major arterials. It looks like an arterial street itself. . . . So it looks, talks and walks like a major street and it should be signed that way and should be designed adequately."

CONCLUSION

¶12 For the above mentioned reasons, the judgment and trial court's orders denying Desert Sky's motion for a new trial and motion for renewed JMOL are affirmed.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

MARGARET H. DOWNIE, Judge