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

DIVISION ONE
FILED: 12/21/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BARRY GLENN HARRIS and SHAYLINN HARRIS, husband and wife,	1 CA-CV 10-0019
	DEPARTMENT C
Plaintiffs/Appellants,	
	MEMORANDUM DECISION
v.	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
STATE OF ARIZONA, by and through its Department of Transportation,	
Defendant/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2005-007822

The Honorable Peter B. Swann, Judge
The Honorable Larry Grant, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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P O R T L E Y, Judge

¶1 Barry Glenn Harris appeals the summary judgment granted to the State of Arizona. For the following reasons, we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

¶2 Harris was injured one evening when the tractor trailer he was driving struck the back of a tractor trailer that had entered U.S. Highway 60 ("U.S. 60") at the Peckary Road intersection. He never saw the other tractor trailer before the accident, even though its lights were turned on, including its emergency hazard lights.

¶3 Harris sued the State[1] alleging that the intersection at U.S. 60 and Peckary Road was negligently designed because it lacked an acceleration lane, was an unauthorized highway encroachment, and did not have signs warning motorists that slow-moving trucks were entering the highway. The trial court granted summary judgment for the State on Harris' negligence claims. Harris appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶4 Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c). We

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[1] Harris also sued others who are not parties to this appeal.

determine de novo whether any issue of material fact exists and whether the court properly applied the law. *Prince v. City of Apache Junction,* 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). We view the evidence and will make all reasonable inferences in the light most favorable to the non-prevailing party. *Angus Med. Co. v. Digital Equip. Corp.*, 173 Ariz. 159, 162, 840 P.2d 1024, 1027 (App. 1992). When "reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense," the court should uphold a grant of summary judgment. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶5 In its minute entry granting summary judgment, the trial court stated:

> Expert testimony exists which, read most favorably to the Plaintiff, might suggest than an accident involving a slow-moving truck would have been less likely had an acceleration lane been provided. But absent any evidence to demonstrate that the absence of an acceleration lane actually contributed to the accident at issue, a jury is left to speculate concerning the essential element of causation.

¶6 In a negligence action, the plaintiff must prove: (1) a duty owed to the plaintiff, (2) a breach of that duty, (3) proximate causation, and (4) actual damages. *Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983). For purposes of appeal, the State concedes that it was negligent by

not installing an acceleration lane. The State, however, contends that Harris has failed to prove causation. Specifically, the State contends any evidence suggesting that an acceleration lane contributed to the accident is speculative. The only issue on appeal, therefore, is whether the State's failure to require an acceleration lane at the Peckary Road intersection was a proximate cause of Harris' injuries.[2]

¶7 Proximate cause is defined as "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred." *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990). In order to establish causation, the plaintiff must prove "cause-in-fact," which is satisfied if "defendant's act helped cause the final result and if that result would not have happened

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[2] In his brief, Harris also argued that the Peckary Road intersection was negligently designed because it lacked a warning sign. Harris, however, conceded at oral argument that causation for lack of a warning sign was speculative. We, therefore, affirm the trial court's grant of summary judgment on that issue.

Harris also claims that it was error to grant summary judgment because Peckary Road was not an authorized encroachment. *See* Ariz. Admin. Code § R17-3-508. The State had issued a permit for an intersection approximately one mile east of Peckary Road, which was never constructed, and the permit was never enforced. According to Harris, the Peckary Road intersection was unreasonably dangerous because the permitted intersection required an acceleration lane. The argument is reiterative of the assertion that Peckary Road needed an acceleration lane, which is discussed below.

without the defendant's act." *Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205. The defendant need not be the only cause of the plaintiff's injury as long as the defendant's conduct contributed at least "only a little." *Id.*

¶8 Cause in fact is usually a question reserved for the jury, but the court can properly decide causation when there is no evidence from which reasonable minds could differ. *Petolicchio v. Santa Cruz Cnty. Fair & Rodeo Ass'n, Inc.*, 177 Ariz. 256, 262, 866 P.2d 1342, 1348 (1994). "Proximate cause may be determined by circumstantial evidence." *Mason v. Ariz. Pub. Serv. Co.*, 127 Ariz. 546, 553, 622 P.2d 493, 500 (App. 1980). And, we do not require that "each link in a chain of circumstantial inference exclude every other reasonable hypothesis." *Lohse v. Faultner*, 176 Ariz. 253, 259, 860 P.2d 1306, 1312 (App. 1992) (citing *State v. Harvill*, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970)). The plaintiff, however, must provide more than purely speculative evidence. *See Butler v. Wong*, 117 Ariz. 395, 396, 573 P.2d 86, 87 (App. 1977); *see also Badia v. City of Casa Grande*, 195 Ariz. 349, 357, ¶ 29, 988 P.2d 134, 142 (App. 1999) ("Sheer speculation is insufficient to establish the necessary element of proximate cause or to defeat summary judgment."). There must be "probable facts from which . . . causal relations may be reasonably inferred." *Purcell v. Zimbelman*, 18 Ariz. App. 75, 82, 500 P.2d 335, 342 (1972).

¶9 In numerous cases we have rejected negligence claims because we have found that evidence of proximate cause was speculative. *See, e.g.*, *Barrett v. Harris*, 207 Ariz. 374, 379, ¶ 17, 86 P.3d 954, 959 (2004); *Grafitti-Valenzuela ex rel. Grafitti v. City of Phx.*, 216 Ariz. 454, 461-62, ¶ 28, 167 P.3d 711, 718-19 (App. 2007); *Badia,* 195 Ariz. at 357, ¶ 29, 988 P.2d at 142; *Lohse*, 176 Ariz. at 263, 860 P.2d at 1316; *Flowers v. K-Mart Corp.*, 126 Ariz. 495, 499, 616 P.2d 955, 959 (App. 1980); *Shaner v. Tucson Airport Auth., Inc.*, 117 Ariz. 444, 448, 573 P.2d 518, 522 (App. 1977). These cases, however, require that the plaintiff establish that the accident would not have occurred absent negligence and that expert opinions on causation must be based on facts in the record, not conjecture or speculation.

¶10 For example, in *Grafitti-Valenzuela*, a young girl was abducted from a bus stop. 216 Ariz. at 456, ¶ 2, 167 P.2d at 714. She claimed that the City breached its duty to her by failing to provide a bus shelter and better lighting. *Id.* at 459, ¶ 15, 167 P.3d at 716. Because there were no facts suggesting that the assailant made use of the low lighting condition or the lack of a bus shelter, we held that a reasonable jury could not have found that inadequate lighting or the lack of a bus shelter caused the incident. *Id.* at 461-62, ¶ 28, 167 P.3d at 718-19. The plaintiff's expert testimony to the

contrary was, therefore, "nothing more than speculation." *Id.* Put differently, the plaintiff did not prove "but for" the low lighting conditions and the lack of a bus shelter the accident would not have occurred, and Plaintiff's expert could not offer speculative evidence to suggest otherwise.

¶11 Similarly, in *Flowers*, the plaintiffs were struck by a car while crossing a driveway to enter a retail store. 126 Ariz. at 496, 616 P.2d at 956. The plaintiffs sued the retailer claiming that it was negligent by not installing a crosswalk. *Id.* at 497, 616 P.2d at 957. The driver stated that he did not notice the plaintiffs until just before the accident, and at that point he applied his brakes. *Id.* at 496, 616 P.2d at 956. The plaintiffs' expert testified that he believed a crosswalk would have prevented the accident, but we held the expert's conclusion was not supported by the evidence because the driver did not see the plaintiffs. *Id.* at 499, 616 P.2d at 959. Again, the plaintiff failed to prove that "but for" the absence of a crosswalk the accident would not have occurred, and expert testimony to the contrary was not based on any facts in the record.

¶12 Finally, we reached the same conclusion in *Shaner*. There, a woman was abducted from the Tucson Airport parking lot. 117 Ariz. at 446, 573 P.2d at 520. Her family claimed that inadequate lighting and a lack of security caused her abduction. *Id.* at 448, 573 P.2d at 522. We held that "[s]ince there is no evidence of what happened in the parking lot, the jury would be left to sheer speculation on the issue of causation." *Id.* In effect, plaintiff failed to show that if there was adequate lighting and sufficient security, she would not have been abducted. Her expert's testimony to the contrary would not be based on facts in the record.

¶13 Here, however, there are sufficient facts in the record from which a reasonable jury could infer causation based on the absence of an acceleration lane. Peckary Road is approximately three-tenths of a mile from the crest of a hill. Harris introduced evidence that other intersections near Peckary Road have acceleration lanes, some that are 900 feet, and the accident occurred between 330 and 340 feet west of the intersection. The truck driver that Harris rear-ended testified at deposition that he thought the highway would be safer if there was an acceleration lane.

¶14 The State asserts that causation remains speculative because Harris' expert failed to calculate what would have happened if there was an acceleration lane. The State, however,

conceded that it had a duty to provide an acceleration lane,[3] which according to the State, is "designed to avoid situations where heavy vehicles, slow to accelerate to highway speeds, rashly pull out in front of oncoming traffic that is already traveling at highway speed." Having established that an acceleration lane is designed to prevent the type of harm that occurred, a reasonable jury can infer, based on common knowledge, that if there had been an acceleration lane and it was used, it could have prevented Harris' injuries. *See Purcell*, 18 Ariz. App at 83, 500 P.2d at 343 ("[T]he court can scarcely overlook the fact that the injury which has in fact occurred is precisely the sort of thing that proper care on the part of the defendant would be intended to prevent, and accordingly allow a certain liberality to the jury in drawing its conclusion" (quoting William Lloyd Prosser, *Law of Torts* § 41, at 242 (4th ed. 1971))).

¶15 Although the State claims that Harris never saw the tractor trailer, and that may be true, the jury could infer that Harris' failure to see the tractor trailer would be irrelevant if an acceleration lane was available because the vehicles would have been in different lanes. Moreover, Harris' alleged

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[3] Because the State conceded, only for appeal, that it was negligent by failing to install an acceleration lane, we do not have to decide whether the State breached its duty by failing to install an acceleration lane or if A.R.S. § 12-820.03 (2003) provides an affirmative defense.

inattentiveness and his failure to take any evasive action is a matter of comparative fault, which is always a question for the jury. Ariz. Const. Art. 18, § 6; *see Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 358-59, 706 P.2d 364, 370-71 (1985); *Robertson*, 163 Ariz. at 545, 789 P.2d at 1046. As our supreme court has stated, "[a] contributory negligence issue cannot be taken from the jury by the simple expedient of calling it an issue of causation." *Markowitz*, 146 Ariz. at 359; 706 P.2d at 371; *see Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 135-36, 717 P.2d 434, 439-40 (1986) ("For purposes of art. 18, § 5, 'contributory negligence' and 'comparative negligence' are consonant.").

¶16 Harris, moreover, is not required to prove causation to a certainty; "the jury must be permitted to make causal judgments from its ordinary experience without demanding impossible proof about what would have occurred if the defendant behaved more safely." 1 Dan B. Dobbs, *The Law of Torts*, § 173, at 420 (2001); *see* also *Purcell*, 18 Ariz. App. at 82, 500 P.2d at 342 ("[T]he plaintiff is not required to prove his cause beyond a reasonable doubt and he need not negate entirely the possibility that defendant's conduct was not a cause."); Dan B. Dobbs, Robert E. Keeton, & David G. Owen, *Prosser and Keeton on Torts*, § 41, at 270 (5th ed. 1984) ("Circumstantial evidence, expert testimony, or common knowledge may provide a basis from

which the causal sequence may be inferred." (footnotes omitted)). This is particularly true at the summary judgment stage, where the issue is whether there is a material question of fact that would allow a reasonable jury to find that causation is more probable than not.

¶17 A reasonable trier of fact could infer, based on the facts presented, that the accident would not have occurred if there was an adequate acceleration lane. Because there was sufficient evidence to establish a genuine issue of material fact on the issue of causation, summary judgment on the acceleration lane issue was inappropriate.

CONCLUSION

¶18 Based on the foregoing, we partially affirm, and partially reverse and remand the grant of summary judgment.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

PATRICIA A. OROZCO, Judge