

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DEREK XAVIER VALLEJO,) 1 CA-CV 10-0379
individually; and on behalf of)
his minor children, TIMOTHY) DEPARTMENT A
AARON VALLEJO and ABIGAIL EMILY)
VALLEJO,) **MEMORANDUM DECISION**
) (Not for Publication -
Plaintiffs/Appellants,) Rule 111, Rules of the
) Arizona Supreme Court)
v.)
)
ARENA PARK PLACE LIMITED, an) **FILED 6/7/11**
Arizona corporation,)
)
Defendant/Appellee.)
_____)

Appeal from the Superior Court of Maricopa County

Cause No. CV 2009-053698

The Honorable Stephen Kupiszewski, Judge Pro Tem

AFFIRMED

Coben & Associates
By Larry E. Coben
Attorneys for Plaintiffs/Appellants

Scottsdale

O'Connor & Campbell
By J. Daniel Campbell
And Anne Hutchinson
And Susanne Luse
Attorneys for Defendant/Appellee

Phoenix

T H O M P S O N, Judge

¶1 Plaintiffs Derek Xavier Vallejo and his minor children (collectively Vallejo) appeal the grant of summary judgment in favor of defendant Arena Park Place Limited (Arena). For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In November 2008, Derek Vallejo went out with friends to a bar on Jackson street in Phoenix. The bar's parking lot was full, so Vallejo paid to park in a nearby parking lot owned by Arena. After leaving the bar at around 2:00 a.m., Vallejo walked out to the parking lot and, as he stood talking to a friend, was shot in the head and permanently injured by a drive-by shooter. Police never found the shooter.

¶3 Vallejo filed a lawsuit against Arena and several other corporate defendants alleging claims of negligence. Arena filed a motion to dismiss pursuant to Arizona Rule of Civil Procedure 12(b)(6) on the basis that there was no evidence that it breached a duty to provide increased security, traffic control measures, or to warn of criminal activity. Arena attached an affidavit from Richard Kotarski (Kotarski) stating, among other things, that Kotarski was not aware of any drive-by shootings or similar crimes at or near the Arena parking lot. After the parties filed a response and reply, the trial court set the matter for oral argument, informing the parties that it

would consider Arena's motion to dismiss as a motion for summary judgment. Around the same time he filed his response, Vallejo filed a motion for leave to conduct discovery, but did not, pursuant to Arizona Rule of Civil Procedure 56(f) (Rule 56(f)) or otherwise, file any affidavits to support the request.

¶4 At oral argument, Vallejo's counsel did not object to the court treating the motion as a motion for summary judgment, but assented to the court doing so. The court found that no issues of material fact existed and granted summary judgment to Arena. Vallejo filed a motion for reconsideration, again without an affidavit, and the court denied the motion for reconsideration. Vallejo timely appealed.

DISCUSSION

¶5 Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1). We review the grant of summary judgment de novo to determine whether any genuine issue of material fact exists, and we view the evidence and all reasonable inferences in favor of the nonmoving party. *Chalpin v. Synder*, 220 Ariz. 413, 418, ¶ 17, 207 P.3d 666, 671 (App. 2008) (citation omitted). Summary judgment should be granted "if the facts produced in support of [a] claim . . . 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. . . ." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶6 In this case, Arena had a duty to Vallejo as a business invitee. See Restatement (Second) of Torts § 344 (1965). The relevant question is not whether Arena had a duty, but rather what was the standard of care and whether Arena breached its duty. See *Grafitti-Valenzuela v. City of Phoenix*, 216 Ariz. 454, 458, ¶ 12, 167 P.3d 711, 715 (2007). In this case, Arena presented Richard Kotarski's affidavit which stated that Arena was unaware of drive-by shootings or similar crimes in the vicinity of the parking lot. Vallejo had the burden to rebut the affidavit factually, but failed to do so.

¶7 Vallejo cites *Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981), and argues that he was surprised that the trial court treated the motion to dismiss as a summary judgment and therefore did not attach any extrinsic evidence or affidavits to his motion for leave to conduct discovery. The record indicates that Vallejo was not surprised by the court's treatment of the motion as one for summary judgment, however, having been explicitly advised before argument that the court would do so. At oral argument, Vallejo's counsel assented to the court's treating the motion as a motion for summary judgment, indicating that such

treatment was acceptable:

MR. COBEN: Very briefly, Your Honor. Since the Court's -in the Court's minute entry order, you indicated you would be treating this as a summary judgment motion.

THE COURT: That's what it is.

MR. COBEN: And that's fine. I don't think the -I don't think that procedural question leads to a different outcome because there are certainly fact questions regarding the exercise of duty and whether or not the duty was properly exercised.

Subsequently, Vallejo filed a motion for reconsideration, but still did not submit an affidavit meeting the requirements of Rule 56(f), which allows a party to request additional time to respond to a motion for summary judgment in order to undertake needed additional discovery. A motion seeking time for discovery before responding to summary judgment requires such an affidavit. *Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993) ("To succeed under Rule 56(f), the moving party must present an affidavit informing the court of: (1) the particular evidence beyond the party's control; (2) the location of the evidence; (3) what the party believes the evidence will reveal; (4) the methods to be used to obtain it; and (5) an estimate of the amount of time the additional discovery will require."). Because Vallejo had the burden to rebut Arena's affidavit but failed to do so, the trial court did not abuse its discretion in granting summary judgment to Arena.

¶8 For the foregoing reasons, we affirm the grant of summary judgment in favor of Arena.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PHILIP HALL, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Judge