DIVISION ONE
FILED: 05/24/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ZOE SPINNER, an individual, Plaintiff/Appellant, v. CGD TEMPE, L.P., a limited partnership, Defendant/Appellee.	)	1 CA-CV 10-0435 DEPARTMENT B **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-005964

The Honorable Jeanne Garcia, Judge

REVERSED AND REMANDED

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And

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K E S S L E R, Presiding Judge

¶1 Plaintiff/Appellant Zoe Spinner appeals the superior court's summary judgment in favor of Defendant/Appellee CGD Tempe, L.P. ("Hotel").[1] For the following reasons, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Spinner tripped and fell while entering the Fiesta Inn. She filed this suit alleging a claim for negligence against the Hotel. The Hotel moved for summary judgment, claiming Spinner had not raised a material question of fact regarding whether it had breached the duty of care it owed her or caused her injuries. The court granted the motion, ruling as a matter of law that the Hotel had not breached its duty of care. Spinner timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

ISSUES

¶3 Spinner argues the superior court erred in granting the Hotel's motion for summary judgment because questions of material fact exist regarding whether the Hotel breached the

[1] Spinner incorrectly named Fiesta Inn Associates, L.L.L.P. rather than CGD Tempe, L.P., as the defendant in this action. CGD appeared and answered the complaint. It is ordered amending the caption for this appeal to remove Fiesta Inn Associates, L.L.L.P. as the appellee and to add CGD Tempe, L.P. as the appellee. The caption shown on this decision shall be used on all further documents filed in this appeal.

duty of care it owed her and whether the Hotel proximately caused her injuries.

DISCUSSION

¶4 A court may grant summary judgment 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). We view the evidence in the light most favorable to Spinner, against whom judgment was entered, and determine de novo whether there are genuine issues of material fact and whether the trial court erred in its application of the law. *Unique Equip. Co., Inc. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999). We will affirm the entry of summary judgment if it is correct for any reason. *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

¶5 To establish a claim for negligence, a plaintiff must prove: (1) a duty requiring the defendant to conform to a certain standard of care; (2) the defendant's breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages. *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). The Hotel moved for summary judgment on the grounds that Spinner had not offered sufficient evidence to create a material question of fact on the issues of breach and causation.

1. The Superior Court Erred in Ruling as a Matter of Law that the Hotel Did Not Breach its Duty of Care.

¶6 "Arizona recognizes that a possessor of land 'is under an affirmative duty' to use reasonable care to make the premises safe for use by invitees." *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 355, 706 P.2d 364, 367 (1985) (citation omitted) *superseded by statute on other grounds as recognized by Maher v. United States,* 56 F.3d 1039 (9th Cir. 1995). As the parties do not dispute that Spinner was the Hotel's invitee, the Hotel owed her a duty of reasonable care to make its premises safe for her use. The standard of reasonable care generally includes an obligation to discover and correct or warn of hazards that the possessor of the premises should reasonably foresee might endanger an invitee. *Markowitz*, 146 Ariz. at 355, 706 P.2d at 367.

¶7 Although Spinner presented evidence that the curb on which she allegedly tripped was inconspicuous, the Hotel argues it was an "open and obvious" condition about which it did not need to warn Spinner. The open and obvious nature of a defect is a factor the trier of fact may consider in determining whether the possessor of the land acted with reasonable care; it is not a condition that releases the possessor of land from the duty it owes to its invitees. *Id*. at 356, 706 P.2d at 368. If a business owner should anticipate harm from a condition despite

its open and obvious nature, the owner may be liable for injury if it does not take reasonable steps to protect invitees. *Tribe v. Shell Oil Co.,* 133 Ariz. 517, 519, 652 P.2d 1040, 1042 (1982). "Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it . . . ." *Id*. (quoting Restatement (Second) of Torts § 343A, cmt. f (1965)). Whether a condition was open and obvious or whether the defendant should have anticipated the harm are issues to be decided by a jury. *Id.; see also Andrews ex. rel. Kime v. Casagrande*, 167 Ariz. 71, 75, 804 P.2d 800, 804 (App. 1990) ("[W]hether a condition is open and obvious is generally a question for the trier of fact to resolve.").

¶8 Here, there was a dispute of fact about the alleged inconspicuous nature of the curb. Spinner's daughter, Suzanne Haddad avowed that she was walking with Spinner immediately prior to the fall, noticed the curb after Spinner fell, and believed it to be inconspicuous.[2] Donna Gagnon stated in her

[2] The Hotel argues the superior court erred in considering these affidavits because their subject matter was not properly disclosed. However, it appears from the record that the disclosure deadline had not yet passed at the time Spinner produced the affidavits, and she asserts that she disclosed them in a supplemental disclosure statement simultaneously with her

affidavit that she observed Spinner's care and treatment after the fall. Although she did not claim to have witnessed Spinner's fall, she stated that the curb was inconspicuous and she believed it had caused the incident. A jury might conclude that the curb was inconspicuous and reasonable care required the Hotel to post a written warning on or about the curb, to affix a marking on the curb to make it more noticeable, or to have an employee call attention to the curb and remind invitees to watch their step. Or, a jury might determine that reasonable care did not require the Hotel to do any of those things. Under the facts of this case, reasonable jurors could reach many different conclusions as to the conduct required by the Hotel to comply with the duty of reasonable c*are* it owed to Spinner. *Markowitz*, 146 Ariz. at 358, 706 P.2d at 370. As a result, we cannot say as a matter of law that the Hotel did not breach its duty. *Id*.

¶9 A material question of fact exists regarding the allegedly obvious nature of the curb and whether the Hotel acted reasonably under the circumstances. The superior court erred in granting summary judgment for the Hotel on this basis.

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response to the motion. We find no error in the court's consideration of the affidavits.

2. Spinner Presented a Genuine Issue of Material Fact on Causation.

¶10 The Hotel contends that Spinner failed to raise a material question of fact on the issue of causation. We disagree. The plaintiff's testimony that she tripped over a solid object, testimony of two witnesses corroborating that there was an inconspicuous concrete curb in the area, and a photograph of the area showing that a curb was the only solid object in the vicinity provide sufficient circumstantial evidence of causation to preclude a summary judgment.

¶11 A defendant's act is a proximate cause of an injury if it helped cause the final result and that result would not have happened without the defendant's act. *Ontiveros v. Borak*, 136 Ariz. 500, 506, 667 P.2d 200, 206 (1983), *superseded by statute on other grounds as recognized by Booth v. State,* 207 Ariz. 61, 83 P.3d 61 (App. 2004). Thus, a defendant may be liable for negligence even if his conduct contributed "only a little" to the plaintiff's injury if the injury would have not happened "but for" the defendant's conduct. *Id*. at 505, 667 P.2d at 205. A plaintiff "may prove proximate causation by presenting facts from which a causal relationship may be inferred, but . . . cannot leave causation to the jury's speculation." *Salica v. Tucson Heart Hosp.-Carondelet, L.L.C.*, 224 Ariz. 414, 419, ¶ 16, 231 P.3d 946, 951 (App. 2010). The mere possibility of

causation is not enough. *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.") (citation omitted). However, a plaintiff need not negate all other causes of her injury. *Purcell v. Zimmerman*, 18 Ariz. App. 75, 82, 500 P.2d 335, 342 (1972). Proximate cause is a question of fact for the jury in all but "rare instances." *Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc.*, 189 Ariz. 206, 212, 941 P.2d 218, 224 (1997) (citation omitted).

¶12 Spinner testified at her deposition that she felt her foot strike "something solid" before she fell, but she did not see what had caused her to trip. Photographs of the area demonstrate that a concrete curb was in the area of the fall. Other witnesses testified the curb was inconspicuous, and Spinner's failure to see and identify the object she fell over permits a reasonable inference that she fell over something inconspicuous, so the solid inconspicuous curb matches Spinner's testimony of what she fell over. While the Hotel argues that Spinner could have tripped over a number of things besides the curb, Spinner does not have to negate all other causes of the accident provided we can draw a reasonable inference that she tripped over the curb. *Purcell, id.*

¶13 Although no witness actually observed Spinner's foot touch the curb, a reasonable jury could permissibly infer that the curb caused Spinner's fall because it matches the description of what Spinner felt, was known to be in the immediate vicinity of the fall, and no evidence indicates that there was any other object in the area for Spinner to trip over.

CONCLUSION

¶14 For the foregoing reasons, we reverse the decision of the trial court and remand for further proceedings consistent with this decision.

/s/

DONN KESSLER, Presiding Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Judge

/s/

SHELDON H. WEISBERG, Judge