IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

CENTRAL ARIZONA COUNCIL ON DEVELOPMENTAL DISABILITIES,
AN ARIZONA NON-PROFIT CORPORATION,
Plaintiff/Appellant,

v.

TOWN OF MIAMI, A MUNICIPAL CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2022-0159
Filed October 4, 2023

Appeal from the Superior Court in Gila County
No. CV202000278
The Hon. David E. Wolak, Judge Pro Tempore

AFFIRMED

COUNSEL

David Alan Dick and Associates, Chandler
By David Alan Dick
Counsel for Plaintiff/Appellant

Humphrey & Petersen P.C., Tucson
By Andrew J. Petersen
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Gard authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

G A R D, Judge:

¶1 This negligence case arises from a fire that damaged multiple buildings in the Town of Miami. Central Arizona Council on Developmental Disabilities (CACDD), which owned one of the buildings, appeals from the superior court's order granting summary judgment in Miami's favor. CACDD asserts that the court misconstrued Miami's duty of care, and that genuine and material factual disputes exist on the question whether Miami breached its duty. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Because it is the non-moving party, we view the facts in the light most favorable to CACDD. *See Cliff Findlay Auto., LLC v. Olson*, 228 Ariz. 115, ¶ 8 (App. 2011). In the early morning hours of September 19, 2019, a fire broke out in a building in Miami. Several fire departments responded, including Tri-City Fire Department ("Tri-City")—which had contracted with Miami to provide firefighting services for the town—and the Globe Fire Department. The fire spread to and severely damaged several buildings. CACDD owned one of the damaged buildings.

¶3 CACDD later sued Miami and Tri-City, as well as the City of Globe and the Globe Fire Department, alleging breach of contract and negligence. Tri-City moved to dismiss the complaint for failure to state a claim, *see* Ariz. R. Civ. P. 12(b)(6), and Miami, Globe, and the Globe Fire Department all joined the motion. The superior court granted Tri-City's motion and dismissed all claims against all defendants, except the negligence claim against Miami.[1]

[1]CACDD appealed from the superior court's order dismissing the claims and parties, but this court dismissed the appeal for lack of jurisdiction. *See Cent. Ariz. Council on Dev. Disabilities v. Tri-City Fire Dist.*, No. 2 CA-CV 2021-0149, ¶ 1 (Ariz. App. Dec. 16, 2022) (decision order). In its reply brief in the present matter, CACDD represents that it has moved in superior court to amend the complaint to plead more specific breach of

¶4 Miami thereafter moved for summary judgment on the remaining negligence claim, which alleged, among other things, that Miami had failed to supply adequate water to fight the fire. Citing *Veach v. City of Phoenix*, 102 Ariz. 195, 197 (1967),[2] Miami argued that it had no general duty to provide water for fire protection, and that CACDD could not show that it had breached any duty it had voluntarily assumed because firefighters had sufficient water to combat the fire and because there was no evidence that firefighters had treated residents unequally.

¶5 Miami supported its motion with a report from Tri-City, a photograph of the fire scene, and a declaration from Tri-City Fire Chief Nick Renon, who had coordinated the multi-agency fire response. Renon described the firefighting operation, which involved multiple fire departments from the region, thirty-six firefighters and first responders, seven fire trucks, and two ladder trucks. He recalled that firefighters used hydrants near the buildings to combat the blaze. He explained that authorities also shuttled water to the fire's location to ensure that water supply and pressure would not be impacted when town residents awoke and began to use water. And he emphasized that firefighters had sufficient water and equipment for their operation and that "[a]t no time" was the water supply or pressure inadequate.

¶6 Opposing the motion, CACDD relied on media reports and photographs, police and fire department reports, Miami's disclosure statement, and an affidavit from CACDD's principal, Doug Bacon, who described his review of Miami's disclosure and, based on that review, offered various opinions regarding the firefighting effort. CACDD argued that a genuine factual dispute existed regarding the water supply's

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contract claims against Tri-City and Miami. As CACDD admits, these filings are not part of the record in this appeal, and, in any event, they are immaterial to whether the court erred by granting summary judgment in Miami's favor on the negligence claim.

[2]In *Veach*, our supreme court held that "a municipality has no absolute duty to provide water for fire protection purposes to its inhabitants." 102 Ariz. at 197. But if a municipality voluntarily chooses to do so, "it has the duty of giving each person or property owner such reasonable protection as others within a similar area within the municipality are accorded under like circumstances," and it must exercise its discretion in determining what constitutes reasonable protection in a non-arbitrary manner. *Id.*

adequacy, contending that vehicles had compromised the supply by driving on water hoses and that Miami's agent had told the media at the time of the fire that the water pressure was problematic. CACDD also alleged that Miami had discriminatorily allocated resources under *Veach* by prioritizing buildings located on Sullivan Street, thereby driving the fire toward CACDD's building on Keystone Street.

¶7 The superior court initially denied the motion, finding a genuine issue of material fact regarding whether Miami had supplied sufficient water to fight the fire. Miami moved for reconsideration, arguing that Bacon's affidavit was improper and, in any event, did not establish a genuine factual dispute precluding summary judgment; that Miami's only duty was to administer the firefighting services it had agreed to provide in a non-discriminatory manner; and that CACDD had offered no competent evidence to establish a factual dispute regarding whether Miami had breached either claimed duty.

¶8 The superior court reconsidered its ruling and granted Miami's summary judgment motion, finding that Bacon's affidavit was not competent because it "merely offer[ed] opinions on information set forth in [Miami's] disclosures." The court further identified the applicable legal duty as whether Miami had "provided equal service, including water supply, to all of its residents." On this question, the court found that CACDD had failed to supply "any admissible evidence that [Miami] breached its duty." And the court concluded that CACDD's legal theory that Miami "failed to provide sufficient water to fight the fire [was] unsupported by Arizona law as well as the facts presented thus far in this case." This appeal followed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

Discussion

¶9 We review de novo a superior court's ruling granting summary judgment, *see First Am. Title Ins. Co. v. Johnson Bank*, 239 Ariz. 348, ¶ 8 (2016), viewing "the evidence and reasonable inferences therefrom in the light most favorable to the party opposing the motion," *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 231 Ariz. 8, ¶ 12 (2012). A court must grant summary judgment "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." Ariz. R. Civ. P. 56(a).

¶10 "When a moving party meets its initial burden of production by showing that the non-moving party does not have enough evidence to carry its ultimate burden of proof at trial," the non-moving party must then "present sufficient evidence demonstrating the existence of a genuine factual dispute as to a material fact." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 26 (App. 2008). If that party "cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted." *Orme Sch. v. Reeves*, 166 Ariz. 301, 310 (1990). A genuine factual dispute "is one that a reasonable trier of fact could decide in favor of the party adverse to summary judgment on the available evidentiary record." *Modular Mining Sys., Inc. v. Jigsaw Tech., Inc.*, 221 Ariz. 515, ¶ 15 (App. 2009) (quoting *Martin v. Schroeder,* 209 Ariz. 531, ¶ 12 (App. 2005)).

¶11 The non-moving party "may support its opposition by affidavit, depositions, answers to interrogatories, or admissions," but "unsworn and unproven assertions of facts are insufficient." *McCleary v. Tripodi*, 243 Ariz. 197, ¶ 21 (App. 2017); *see also* Ariz. R. Civ. P. 56(c)(5), (6). "[S]peculation is insufficient to defeat summary judgment," *Avitia v. Crisis Preparation and Recovery Inc.*, 254 Ariz. 213, ¶ 29 (App. 2022), as are "affidavits that only set forth ultimate facts or conclusions of law," *Florez v. Sargeant*, 185 Ariz. 521, 526 (1996). Affidavits submitted to oppose summary judgment must instead contain admissible facts within the affiant's personal knowledge, to which the affiant is competent to testify. Ariz. R. Civ. P. 56(c)(5); *Tilley v. Delci*, 220 Ariz. 233, ¶ 9 (App. 2009). And while we review a superior court's summary judgment ruling de novo as discussed above, the superior court possesses discretion to determine the admissibility of evidence in the summary judgment proceeding. *See United Ins. Co. v. Lutz*, 221 Ariz. 411, ¶ 19 (App. 2011) (citing *Mohave Elec. Coop. v. Byers*, 189 Ariz. 292, 301 (App. 1997)).

¶12 As a preliminary matter, CACDD discusses in its opening brief contractual and negligence claims against Tri-City, Globe, and the Globe Fire Department. To the extent CACDD seeks to litigate those claims now, it may not do so because the superior court disposed of them through a separate, partial judgment, which CACDD has already appealed. The merits of the dismissed claims are thus outside the present appeal's scope, at least insofar as they relate to Tri-City, Globe, and the Globe Fire

Department.[3] And even assuming CACDD could challenge in the instant appeal the court's order dismissing the contractual claim against Miami, *see* A.R.S. § 12-2102(A), we agree with Miami that CACDD has insufficiently argued and has thus waived that issue. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived.").

¶13 To establish a negligence claim, "a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9 (2007). "The first element, whether a duty exists, is a matter of law for the court to decide." *Id.* And "[a]lthough breach and causation are factual matters, summary judgment may be appropriate if no reasonable juror could conclude that the standard of care was breached." *Id.* n.1.

¶14 At issue here is the scope of Miami's duty to CACDD and whether Miami breached that duty. CACDD appears to contend that Miami had a duty to maintain an adequate water supply for firefighting purposes, which it breached when fighting the fire that damaged CACDD's building. CACDD derives this duty's existence from Miami's contract with Tri-City to provide firefighting services, of which CACDD claims to be a third-party beneficiary; various statutes; and both Arizona and extrajurisdictional authority. CACDD further contends that, after voluntarily assuming a duty to provide fire services, Miami failed to render those services "impartially and without discrimination to all members of the general public to whom its scope of operation extend[ed]," as *Veach* requires. Miami responds that *Veach* establishes its only duty, and that CACDD has not established a breach of either that duty or of the claimed duty to provide adequate water for firefighting services.

¶15 We agree that, under *Veach*, Miami had a duty to furnish equal protection to all town residents after agreeing to provide firefighting services. But we need not resolve whether Miami had an additional duty to ensure adequate water to provide those services because, even if we assume such a duty exists, the superior court correctly granted summary judgment because there was no genuine issue of material fact regarding

[3]Because the present appeal involves only the judgment entered in Miami's favor, we take no action on the protective answering brief Tri-City filed in this action.

whether Miami breached that duty. There was also no genuine issue of material fact regarding whether Miami breached its duty under *Veach*.

¶16 We begin with Bacon's affidavit, on which CACDD relied to oppose summary judgment and which the superior court rejected as incompetent.[4] Challenging this ruling, CACDD contends that Bacon had viewed "pictures and videos taken the night of the fire" and thus possessed personal knowledge of their contents. Miami, on the other hand, argues that Bacon's affidavit is improper because it is not based on his personal knowledge or events he perceived, and notes that Bacon merely read "the information attached to . . . Miami's disclosure and news reports of the incident [and] then stat[ed] what he believes that evidence shows."

¶17 The superior court appropriately rejected Bacon's affidavit as incompetent. First, Bacon does not profess to have been present for the fire, to have witnessed the firefighting effort, or to have personal knowledge of firefighters' operational decisions and the reasons for them. Bacon could not, as CACDD proposes, gain personal knowledge of the relevant events merely by reviewing evidence supplied by Miami. *See* Ariz. R. Civ. P. 56(c)(5); *Tilley*, 220 Ariz. 233, ¶ 9; *see also Compton v. Nat'l Metals Co.*, 10 Ariz. App. 366, 369 (1969) (attorney's affidavit was legally insufficient where it was "based upon his review of the case and his belief that there existed a triable issue of fact in the case, but which was not based upon his personal knowledge of the fact[s]").

¶18 Second, Bacon's affidavit contains opinions, conclusions, and editorial comments regarding the reasons for, and the wisdom behind, firefighters' decisions. *See Cecil Lawter Real Est. Sch., Inc. v. Town & Country Shopping Ctr. Co.*, 143 Ariz. 527, 534 (App. 1984) (superior court should not have considered portions of tenant's affidavit that were "couched in terms of [his] opinion or conclusion pertaining to the lease agreement" in ruling on summary judgment), *disapproved on other grounds by Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 590 (1995). As Miami

[4]CACDD includes in its list of issues presented that the superior court erred by granting summary judgment because it failed to construe "all reasonable factual inferences in favor of [CACDD]." But CACDD does not develop this argument, and it is waived. *See Schabel*, 186 Ariz. at 167. And in any event, the superior court's ruling rests primarily on its conclusion that CACDD had failed to *offer* competent, admissible evidence to support its claim in the first place. Nothing in the court's ruling suggests that it failed to draw any available reasonable inferences in CACDD's favor.

notes, because Bacon does not claim to have personally witnessed the fire or the response, these opinions are not based on his perception of those events and are not admissible as lay witness opinions. *See* Ariz. R. Evid. 701. Likewise, Bacon does not purport to be an expert in firefighting or any other relevant discipline that would allow him to interpret Miami's disclosure and opine on the fire response's adequacy or the firefighters' efforts. *See* Ariz. R. Evid. 702.

¶19 Bacon thus seeks to testify regarding an event he did not witness, based on knowledge he acquired from materials prepared, and statements made, by others, and to offer opinions from those materials and statements without having any relevant expertise. CACDD has failed to proffer any legal theory under which this testimony would be admissible, and the superior court did not err by rejecting Bacon's affidavit as incompetent. *See United Ins. Co.*, 221 Ariz. 411, ¶ 19; *Mohave Elec. Coop.*, 189 Ariz. at 301.

¶20 Without Bacon's affidavit, CACDD is left with only unsworn assertions that were insufficient to defeat Miami's motion. *See* Ariz. R. Civ. P. 56(c)(5), (6); *McCleary*, 243 Ariz. 197, ¶ 21. But even considering the remainder of the materials CACDD submitted, there is no genuine issue of material fact precluding summary judgment.

¶21 CACDD's materials do not contain evidence of water shortage, deficient water pressure, or arbitrary discrimination among residents.[5] To the contrary, they document an active fire response, which

[5]We note that many of the materials CACDD cites do not contain the information it attributes to them, a defect from which Bacon's affidavit also suffers. For example, CACDD contends that Miami's agent stated in a media recording that firefighters "did not have [an] adequate supply of water to fight the fire." But the recording merely contains a statement that the fire put pressure on town "resources"; the speaker does not state that the water supply was inadequate. Nor does a written media report, which CACDD also cites for this proposition, contain such an admission. Likewise, CACDD contends that a report from Tri-City contains "[r]eports of traffic running over water hoses and causing interruption of water pressure for fighting the fire," while the report in reality documents only a request for police assistance to control traffic because "people [were] running all over the hose" and references no water interruption. And CACDD's citation to various photographs of the fire scene does not support its assertion that firefighters' construction of a temporary retaining pool for

involved significant resources and abundant water use; they refer to no water-related impediments to the firefighting effort; and they are consistent with the declaration from Tri-City Chief Renon, which supported Miami's motion.[6] We thus agree with the superior court that CACDD's allegation that Miami breached its perceived duty to supply adequate water for firefighting "is unsupported . . . by the facts presented" below. A reasonable trier of fact could not find in CACDD's favor on this question. *See Gipson*, 214 Ariz. 141, ¶ 9; *Modular Mining Sys., Inc.,* 221 Ariz. 515, ¶ 15.

¶22 The same is true of CACDD's claim that Miami breached its duty under *Veach*. The materials submitted in opposition to summary judgment do not directly or inferentially establish that firefighters acted in a discriminatory or arbitrary fashion in fighting the fire. CACDD compares photographs purporting to depict firefighters spraying water on Sullivan Street buildings while not doing the same for CACDD's building on Keystone Street. But these photographs capture single moments in time during the firefighting effort and do not alone establish that firefighters prioritized Sullivan Street buildings during the entire fire. And even if the images could give rise to this inference, they do not speak to the reasons behind that decision and do not establish that firefighters arbitrarily deployed resources to protect certain buildings at the expense of others. *See Veach*, 102 Ariz. at 197.

¶23 Accordingly, CACDD has provided no competent, admissible evidence establishing that Miami breached either the claimed duty to provide adequate water for firefighting or the *Veach* duty to treat residents equally when providing firefighting services. To the contrary, CACDD has supplied only speculative and unsubstantiated allegations, *see Florez*, 185 Ariz. at 526; *Avitia*, 254 Ariz. 213, ¶ 29, from which a reasonable factfinder could not find a breach of either potential duty, *see Gipson*, 214 Ariz. 141,

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water delayed the fire response or was intended to rectify an active water problem rather than to be a precautionary measure as Renon asserts.

[6]To the extent CACDD contends that Renon's declaration was deficient because it is not notarized, it is incorrect. The declaration complied with Rule 80(c), Ariz. R. Civ. P., and thus was properly considered in support of Miami's summary judgment motion. CACDD notes that Rule 80(c) was amended in 2022, after Renon signed his declaration. But the rule did not change in a manner that affects the present issue. *Compare* Ariz. R. Civ. P. 80(c) (2021) *with* Ariz. R. Civ. P. 80(c) (2023).

¶ 9; *Modular Mining Sys., Inc.,* 221 Ariz. 515, ¶ 15. The superior court correctly granted summary judgment.

Disposition

¶24 For the foregoing reasons, we affirm the superior court's order granting summary judgment in favor of the Town of Miami.