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

FILED BY CLERK
NOV 12 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

NANCY J. ANDREWS, as the surviving spouse of John L. Andrews, deceased,

Plaintiff/Appellant,

v.

CORONA ELECTRIC, INC., an Arizona corporation,

Defendant/Appellee.

2 CA-CV 2009-0080
DEPARTMENT A

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20080309

Honorable Paul E. Tang, Judge

REVERSED

Haralson, Miller, Pitt, Feldman & McAnally, P.L.C.
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H O W A R D, Chief Judge.

¶1 Appellant Nancy Andrews appeals from the trial court's grant of summary judgment to appellee Corona Electric ("Corona") in the wrongful death action arising

from her husband's death. She claims the court erred by finding, as a matter of law, that she had not shown sufficient facts to raise a factual issue concerning causation with respect to Corona's role in the accident. Because Andrews did raise a factual issue concerning causation, we reverse the grant of summary judgment.

Facts and Procedural History

¶2 We view the facts and reasonable inferences from those facts in the light most favorable to the party against whom summary judgment was granted. *See Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003). At the time of his death, Andrews's husband John was employed by Pima County. Pursuant to a work order, John and his colleague Kenneth Brooker went to a county building to disable a fire curtain.[1] Wayne-Dalton Corporation ("Wayne-Dalton")[2] had installed the fire curtain assembly, and Corona had performed the required electrical work.

¶3 Before beginning their work, Brooker called Wayne-Dalton and spoke with someone there. Brooker explained that he and John needed to disconnect the fire curtain from the building's power supply and asked the representative what would happen if they did so. Brooker was informed that the fire curtain "shouldn't" drop, so Brooker felt "confident" that the curtain would not come down.

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[1]A fire curtain is a shield or a door that is installed in a roll in the ceiling and, when triggered, descends to prevent the spread of a fire.

[2]Wayne-Dalton is also a defendant in the action below. The trial court denied its motion for summary judgment. Corona is the sole appellee in this appeal.

¶4 Brooker could not determine from the labels in the circuit breaker box which breaker controlled the power to the fire curtain. Brooker also attempted to locate the appropriate circuit breaker on the electrical plans but was not able to identify it based on the drawings he consulted. While Brooker was looking for the correct circuit breaker, John remained in the lobby.

¶5 Brooker informed John that he had been unable to identify the correct breaker. In an effort to find it through trial and error, John then climbed a ladder so he could observe the green light on the curtain that indicated whether there was power to the unit while Brooker turned off particular breakers. After Brooker had tried several circuit breakers with no success, John told Brooker he could disconnect power manually. Brooker testified that manually cutting power to the equipment they serviced was common practice used when necessary.

¶6 After John cut the wire, the fire curtain dropped. John may have attempted to stop the door with his foot, but he fell and hit his head. When Brooker found him, John's right leg was tangled in the ladder, and he died as a result of the injuries he sustained.

¶7 Andrews sued multiple defendants, including Corona. Corona filed a motion for summary judgment, which the court granted. Andrews then filed a motion for reconsideration, which the court denied, and this appeal followed.

Causation

¶8 We review a grant of summary judgment de novo. *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, ¶ 14, 129 P.3d 966, 971 (App. 2006). Summary judgment is required where there is "no genuine issue as to any material fact." Ariz. R. Civ. P. 56(c)(1). Our supreme court has interpreted this rule to mean that, "if the facts produced in support of the claim or defense 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 or defense," summary judgment should be granted. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶9 Andrews first argues that the trial court erred in granting summary judgment in favor of Corona because the determination of causation is not a matter of law but rather a factual issue of foreseeability for a jury to decide. Causation is analyzed in two parts: cause-in-fact and proximate cause. *See Rogers ex rel. Standley v. Retrum*, 170 Ariz. 399, 401, 825 P.2d 20, 22 (App. 1991) (describing two causation elements as cause-in-fact and foreseeability or proximate cause). Both cause-in-fact and proximate cause are usually fact-based inquiries left to the jury. *Ontiveros v. Borak*, 136 Ariz. 500, 505, 667 P.2d 200, 205 (1983) (cause-in-fact); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 23, 211 P.3d 1272, 1281 (App. 2009) (proximate cause). However, "summary judgment may be appropriate if no reasonable juror could conclude that . . . the damages were proximately caused by the defendant's conduct." *Gipson v. Kasey*, 214 Ariz. 141, n.1, 150 P.3d 228, 230 n.1 (2007); *see also Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205 (under some

circumstances cause-in-fact can be determined as matter of law). Thus, the court did not err by considering the issue of causation as a matter of law.

Cause-in-Fact

¶10 Andrews next argues that a reasonable jury could find that Corona's conduct was a cause-in-fact of John's injuries. A defendant can only be liable if its act or omission was a cause-in-fact of the plaintiff's injury, meaning that the injury "would not have occurred 'but for'" that conduct. *Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205. Conduct can be a cause-in-fact even if it "contributed 'only a little' to the plaintiff's injuries." *Id.* The evidence shows that John was on the ladder when the fire curtain fell because he and Brooker did not have the information they needed to disconnect power to the fire curtain at the breaker box. Reasonable jurors could conclude that, but for Corona's conduct, John would not have been injured.

Proximate Cause

¶11 Andrews also argues that the trial court erred in finding, as a matter of law, that John's injuries were not foreseeable and, therefore, Corona's conduct was not a proximate cause of the injuries. Proximate cause has been "unvaryingly define[d]" by Arizona courts 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), *quoting McDowell v. Davis*, 104 Ariz. 69, 71, 448 P.2d 869, 871 (1968). To prove proximate cause, the plaintiff is not required to establish that the

defendant's breach of its duty[3] definitively caused the plaintiff's injury "'but simply that the negligence increased the risk of injury or death.'" *Ritchie*, 221 Ariz. 288, ¶ 23, 211 P.3d at 1281, *quoting Thompson v. Sun City Cmty. Hosp., Inc.*, 141 Ariz. 597, 607, 688 P.2d 605, 615 (1984). "'The step from increased risk to [the probability of] causation is one for *the jury* to make.'" *Id.*, *quoting Thompson*, 141 Ariz. at 607, 688 P.2d at 615 (alteration in *Ritchie*) (emphasis added). Thus, to demonstrate that a factual issue exists with regard to causation in order to survive a motion for summary judgment, Andrews must show there are sufficient facts to allow reasonable jurors to find that Corona's conduct increased the risk of injury to John. *See Gipson*, 214 Ariz. 141, n.1, 150 P.3d at 230 n.1 (summary judgment appropriate only if "no reasonable juror" could conclude defendant's conduct was proximate cause of plaintiff's injury).

¶12 Andrews offered evidence to demonstrate an increased risk of injury due to Corona's conduct in not labeling the circuit breaker or providing drawings that would allow someone to locate the appropriate circuit breaker. Andrews also showed that the only reason John was on the ladder when he fell was because he needed to find an alternate way to disconnect power from the fire curtain. That is, he needed to observe the green power light while Brooker tried the circuit breakers and, when that was unsuccessful, to cut the wire manually. Thus, reasonable jurors could find that Corona's

[3]For the purposes of this appeal, Corona conceded in oral argument that it had a duty to label the circuit breaker and provide as-built drawings and that it had breached that duty.

omissions did increase the risk of the injury and that Corona's conduct was therefore a proximate cause of John's injuries.

¶13 The definition of proximate cause also specifically addresses "efficient intervening cause[s]," though not all intervening causes are superseding causes that will relieve a defendant of liability. *Robertson*, 163 Ariz. at 546, 789 P.2d at 1047. A superseding cause "arises only when an intervening force was unforeseeable and may be described, with the benefit of hindsight, as extraordinary." *Id.* Nevertheless, the parties did not clearly argue below or on appeal whether any superseding causes might limit Corona's liability. "'Affirming a summary judgment on new grounds . . . may deprive the non-moving party of the opportunity to present facts which are relevant to the new issues, but which were not relevant to the issues raised below.'" *Jones v. Cochise County*, 218 Ariz. 372, n.5, 187 P.3d 97, 102 n.5 (App. 2008), *quoting Rhoads v. Harvey Publ'ns, Inc.*, 131 Ariz. 267, 269, 640 P.2d 198, 200 (App. 1981) (omission in *Jones*). "Thus, we 'may affirm on new grounds only if there are no conceivable facts which would allow the non-moving party to prevail on the new issues.'" *Id.*, *quoting Rhoads*, 131 Ariz. at 269, 640 P.2d at 200. Accordingly, we do not address that issue in this decision.

¶14 At oral argument, Corona cited *Sabina v. Yavapai County Flood Control District*, 196 Ariz. 166, ¶¶ 20-21, 993 P.2d 1130, 1135 (App. 1999), and *Barrett v. Harris*, 207 Ariz. 374, ¶¶ 23, 29-31, 86 P.3d 954, 960, 962-63 (App. 2004), in support of its argument that the injury must fall within the "recognized risks" associated with its

conduct. But the result in *Barrett* and *Sabina* did not rest on foreseeability. Rather, the negligent acts there did not cause the injury. *See Robertson*, 163 Ariz. at 546, 789 P.2d at 1047 (defining proximate cause as "that which, in a natural and continuous sequence . . . produces an injury, and without which the injury would not have occurred"). Here, Brooker testified that they could not find the proper circuit breaker because it was neither labeled nor to be found in any plans. It was their practice to cut power from a device manually if they could not find the proper breaker. And cutting the power required John to be on the ladder. We must give John the benefit of all reasonable inferences. *See Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d at 11. A jury could find that Corona's negligent actions did produce the injury.

¶15 Corona also referred to the Restatement (Second) of Torts § 435 (1965)[4] and stated that public policy was a factor in the foreseeability analysis. It concluded that the injury here was outside the "recognized risks" of its conduct and as a matter of policy it should not be liable. Restatement § 435 states:

> (1) If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable. (2) The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.

[4]Section 435 has been used by Arizona courts. *See*, *e.g.*, *Barrett*, 207 Ariz. 374, ¶¶ 22-26, 86 P.3d at 960-61.

¶16 Our courts have recognized that the connection between a breach of duty and an injury can be too attenuated to support a finding of liability. *J. R. Norton Co. v. Fireman's Fund Ins. Co.*, 116 Ariz. 427, 430, 569 P.2d 857, 860 (App. 1977) ("The question of law is whether that conduct, if shown, is too distantly related to the loss to allow legal responsibility to attach to it."). "[Proximate cause] is a legal determination that certain conduct is significant or important enough that the defendant should be legally responsible." *Piper v. Bear Med. Sys., Inc.*, 180 Ariz. 170, 174, 883 P.2d 407, 411 (App. 1993).

¶17 But, in *Gipson*, our supreme court declared that foreseeability is a factor concerning causation and is primarily a jury function: "Such factual inquiries [as foreseeability] are reserved for the jury." 214 Ariz. 141, ¶ 16, 150 P.3d at 231. Furthermore, a jury could find that Corona's breach of duty was a "substantial factor" in bringing about John's death. *See* Restatement § 435. And Corona's breach of duty is not as attenuated from the injury as the defendants' in *Ritchie*, 221 Ariz. 288, ¶¶ 2-9, 211 P.3d at 178-79, which was determined by a jury, and *Gipson*, 214 Ariz. 141, ¶¶ 3-6, 150 P.3d at 230.[5] Therefore, we cannot find as a matter of law that John's death was not foreseeable.

Conclusion

[5]We recognize that *Gipson* involved duty.

¶18 We conclude that genuine issues of material fact remain with respect to causation and that summary judgment was not proper. Thus, we reverse the trial court's grant of summary judgment in favor of Corona Electric.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge