DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JAZYLN ORTIZ, a minor and surviving child of Gilbert Garay, Jr., deceased, by and through JASMIN ORTIZ, her mother and next friend; GILBERT and CARMEN GARAY, husband and wife, surviving parents of Gilbert Garay, Jr., deceased; JOSHUA CORONA, a single male, Plaintiffs/Appellants, v. AMPCO SYSTEMS PARKING, INC., a foreign corporation doing business in Maricopa County, Arizona; BARRON COLLIER COMPANY, LTD., L.P., a foreign limited liability company doing business in Maricopa County, Arizona; CITY OF PHOENIX, a government entity, Defendants/Appellees.	1 CA-CV 10-0833 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-013418

The Honorable Gary E. Donahoe, Retired Judge

AFFIRMED

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G E M M I L L, Judge

¶1 This is a wrongful death case arising out of a shooting in a Phoenix parking lot. The superior court resolved the case on summary judgment. Finding no genuine dispute of material fact or legal error, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

I. The Shooting

¶2 During the early morning hours of May 26, 2008, Gilbert Garay, Jr. ("Gilbert") and Joshua Corona ("Joshua") got into a fight with Jose Luis Carillo, Oscar Morales Carillo, Walter Villaescusa, and Christian Molina (collectively the "Assailants"). The brawl began at the Silver Wine and Martini Bar and continued across the street and into a parking lot (the "Lot"). At some point, one of the Assailants fired shots, wounding Joshua and killing Gilbert.

¶3 At the time of the shooting, the City of Phoenix (the

"City") owned the Lot and leased it to Barron Collier Co. Ltd. ("Barron") under a Disposition and Development Agreement. Barron hired Ampco Systems Parking, Inc. ("Ampco") to operate and maintain the Lot.

II. This Lawsuit

¶4 On May 19, 2009, Jazlyn Ortiz ("Jazlyn"), Jasmin Ortiz ("Jasmin"), Gilbert Garay, Sr. ("Gilbert Senior"), Carmen Garay ("Carmen"), and Joshua filed a negligence and wrongful death suit against the City, Barron, and Ampco, and also asserted claims against the Assailants and the Assailants' spouses.[1] As amended, the complaint alleged that the City, Barron, and Ampco knew or should have known that patrons of local bars used the Lot, and that the Lot was not well-lit and created an unsafe condition. According to the amended complaint, this condition proximately caused injuries and damages to Jazlyn, Jasmin, Gilbert Senior, Carmen, and Joshua. Ampco, the City, and Barron filed answers denying liability.

¶5 Next, Ampco, joined by Barron and the City, moved for judgment on the pleadings with respect to all claims against them pursuant to Rule 12(c) of the Arizona Rules of Civil Procedure. For purposes of the motion, they admitted that the Lot was not "well lit" but argued that the plaintiffs could not

[1] Two other defendants named in the amended complaint, Sky Lounge LLC and LKR, Inc., were dismissed pursuant to a stipulation on April 20, 2010.

establish that the lighting condition proximately caused their injuries. The plaintiffs responded with a successful Rule 56(f) motion for additional time to conduct discovery on the adequacy of the lighting conditions, and on whether Ampco, Barron, and the City had knowledge of prior incidents at the Lot.

¶6 During the ensuing eight months, plaintiffs took the deposition of David C. Abril ("Abril"), an Ampco employee. Abril, who was not present during the shooting, testified that the Lot operated on a payment drop box system and provided off-duty police officers as security only between 7 p.m. and 1 a.m. on "bar nights," which normally occurred on Fridays and Saturdays and during special events.

¶7 After obtaining this evidence, the plaintiffs responded to the Rule 12(c) motion by arguing that better lighting and a security guard stationed at the Lot would have deterred and prevented the shooting. The response, signed by the plaintiff's counsel, attached no affidavits but did supply two uncertified police reports, an excerpt of Abril's deposition testimony, expert reports, a bystander's video allegedly capturing the incident, and a maintenance and service contract for Ampco.

¶8 In their replies, Ampco, the City, and Barron pointed out that the plaintiffs had supplied no admissible evidence that the lighting condition and the absence of security had caused

their injuries. Barron and the City also moved to strike portions of the response as unsupported by sworn testimony.

¶9 During oral argument, the superior court accepted the plaintiffs' counsel's avowal that he would cure the evidentiary deficiencies and denied the motion to strike. But after reviewing the expert reports, the court determined that the statements were speculative and failed to create a genuine dispute of material fact as to causation. Treating the Rule 12(c) motion as one for summary judgment, the superior court ruled: "There simply is no admissible evidence that either the lack of lighting or security was a substantial factor in bringing about the harm."

¶10 The superior court signed two judgments containing Rule 54(b) language on October 4, 2010. This appeal followed.

DISCUSSION

I. As A Matter Of Law, The Plaintiffs' Claims Fail For Lack Of Evidence To Support The Causation Element.

¶11 This court reviews the superior court's grant of summary judgment *de novo*. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). Summary judgment is warranted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). We view the facts in the light most favorable to the non-moving parties. *See Orme*

Sch. v. Reeves, 166 Ariz. 301, 309-10, 802 P.2d 1000, 1008-09 (1990).

¶12 To establish a negligence claim, a plaintiff must prove: (1) the existence of a duty to meet a certain standard of care; (2) the defendant's breach of that duty; (3) a causal connection between the breach and the injury; and (4) actual damages. *Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983) (citing William L. Prosser, Handbook of the Law of Torts § 30, at 143 (4th ed. 1971)). The plaintiffs contend that genuine and material issues of fact exist as to whether the defendants proximately caused the relevant injuries, and summary judgment was not warranted.

¶13 Proximate cause is "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). To establish causation, a plaintiff must show "cause-in-fact" with proof that "defendant's act helped cause the final result and if that result would not have happened without the defendant's act." *Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205. Cause in fact is a factual issue usually resolved by a jury. *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007).

¶14 To withstand a motion for summary judgment, the

plaintiffs must establish a prima facie case on the elements of the claim, including causation, with admissible evidence. *See Orme Sch.*, 166 Ariz. at 309-10, 802 P.2d at 1008-09; *Barrett v. Harris*, 207 Ariz. 374, 379, ¶ 17, 86 P.3d 954, 959 (App. 2004) (requiring that causation must be shown to be probable and not merely possible); Ariz. R. Civ. P. 56(e) (requiring sworn or certified documents to support any affidavit submitted with summary judgment papers). The plaintiff "is not required to prove his case beyond a reasonable doubt and he need not negate entirely the possibility that defendant's conduct was not a cause." *Purcell v. Zimbelman*, 18 Ariz. App. 75, 82, 500 P.2d 335, 342 (1972). Nevertheless, there must be "probable facts from which . . . causal relations may be reasonably inferred," *id.*, to justify a trial.

¶15 In *Grafitti-Valenzuela ex rel. Grafitti v. City of Phoenix*, we upheld a grant of summary judgment to a city sued by an abducted child for its failure to provide better lighting and a bus shelter at a bus stop. 216 Ariz. 454, 462, ¶ 28, 167 P.3d 711, 719 (App. 2007). The assailant had spoken to the plaintiff at the bus stop prior to the abduction and was not deterred by the presence of nearby witnesses. *Id.* at 461, ¶ 26, 167 P.3d at 718. In the absence of facts showing that the plaintiff's abductor had made use of the lack of lighting and shelter, we held that no reasonable jury could have found that these

conditions caused the events. *Id.* at 461-62, ¶ 28, 167 P.3d at 718-19. We accordingly dismissed a contrary opinion from the plaintiff's expert as "nothing more than speculation." *Id.*

¶16 The Lot here admittedly was not "well lit" and there is no evidence that a security guard was present during the shootings. Having reviewed the record, however, we conclude as a matter of law that the plaintiffs have failed to provide probable facts from which a causal connection may be inferred.

¶17 The plaintiffs did not produce testimony from the Assailants that the presence of a security guard in the Lot would have deterred the conflict or prevented the shooting. The record is also devoid of evidence that the Assailants noted the security situation once the fight reached the Lot. With respect to the lighting issue, there is also no evidence that the Assailants were in any way concerned with stealth or concealment. As the superior court found, a reasonable person is left with only speculation. Based upon this record, we find no probable facts supporting a reasonable inference of a causal relation between the Lot's security and lighting conditions and the damage sustained. *See id.*; *see also Shaner v. Tucson Airport Auth., Inc.*, 117 Ariz. 444, 448, 573 P.2d 518, 522 (App. 1977) (given the lack of eyewitness testimony on what had transpired in the parking lot, a jury would be required to engage in "sheer speculation on the issue of causation" and the

role of allegedly inadequate lighting and security, even assuming that the plaintiff's wife had been abducted from the parking lot); *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" in a case in which a trier of fact could not reasonably infer that the decedent's sobriety level or the defendants' alleged violations of police customs and practices in releasing the decedent had caused her to be fatally attacked after she left the substation); *Flowers v. K-Mart Corp.*, 126 Ariz. 495, 499, 616 P.2d 955, 959 (App. 1980) (affirming the grant of summary judgment in the absence of evidence to support a reasonable inference that the availability of a crosswalk would have prevented the accident).[2]

¶18 Nor can we agree that *Martinez v. Woodmar IV*

[2] Other jurisdictions agree. *See Jojos Rests., Inc. v. McFadden*, 117 S.W.3d 279, 282-84 (Tex. Ct. App. 2003) (holding that the patron failed to establish that the failure to station security personnel in the parking lot during the "bar rush" was the proximate cause of injuries a car passenger sustained when a motorist fired a shotgun at the vehicle; no evidence supported the inference that security personnel in the lot would have prevented the violence); *Davis v. Christian Bhd. Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 406-10, ¶¶ 37-47 (Miss. Ct. App. 2007) (holding that the expert affidavit of a police officer failed to create a genuine issue of fact as to the cause-in-fact of a resident's shooting in a parking lot because (1) the affidavit was not based upon facts or data, (2) the suspected assailant was a guest at the complex, and (3) there was no evidence to support the conclusion that the inadequate lighting contributed to the resident's death).

Condominiums Homeowners Ass'n, Inc., is controlling. 189 Ariz. 206, 941 P.2d 218 (1997). *Martinez* devotes the bulk of its analysis to the scope of duty and breach in the premises liability context, explaining that a property owner's "duty of care may include measures to protect others from criminal attacks, provided the attacks are reasonably foreseeable and preventable." *Id.* at 211, 941 P.2d at 223 (citation omitted). Based upon the facts of that case – including prior parking lot incursions by gangs dealing in drugs, warnings from the defendant condominium's own security guard that 24-hour patrols were needed, the termination of a second guard for financial reasons, and a neighboring complex's employment of off-duty patrols – the court identified a factual issue as to whether increased security might have deterred the assailant from firing shots in the condominium parking lot. *Id.* at 211-12, 941 P.2d at 223-24.

¶19 There are no facts here, however, to establish that this kind of incident had previously occurred at the Lot. Instead, one of the plaintiffs' experts opined that the Lot is in a high crime area based upon statistics for Arizona and Maricopa County as a whole. This evidence failed to create a genuine dispute of material fact. *See Parish v. Truman*, 124 Ariz. 228, 229 n.1, 603 P.2d 120, 121 n.1 (App. 1979) (explaining that an affidavit containing an opinion that a

neighborhood is in a high crime area "is insufficient to withstand a motion for summary judgment").

¶20 We conclude that the evidence shows at best a possibility that inadequate lighting and security were substantial factors in the shooting, but not a reasonable probability. There is no evidence supporting the contention that a security guard or better lighting would have made a difference. *See Florez v. Sargeant*, 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996) ("affidavits that only set forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment"). Our determination on cause in fact obviates the need to consider whether the shooting qualifies as a superseding cause relieving Ampco, the City, and Barron of liability. *Grafitti*, 216 Ariz. at 462, ¶ 29, 167 P.3d at 719 (declining to reach the superseding cause issue). We also need not address whether the superior court erred in denying the motion to strike portions of the plaintiffs' response.

CONCLUSION

¶21 We affirm the superior court's grant of summary judgment. Ampco, the City, and Barron have cited no substantive authority for their attorneys' fee requests and we deny the requests. *See Roubos v. Miller*, 214 Ariz. 416, 420, ¶ 21, 153 P.3d 1045, 1049 (2007); ARCAP 21(c)(2). Ampco, the City, and

Barron are entitled to their taxable costs on appeal upon compliance with Rule 21(a) of the Rules of Civil Appellate Procedure.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

____/s/_____
JON W. THOMPSON, Presiding Judge

____/s/_____
MAURICE PORTLEY, Judge