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ARIZONA SUPERIOR COURT

PIMA COUNTY

IRASEMA C. GOMEZ, individually and on behalf of EDGAR GOMEZ, Deceased, et al.,

Plaintiffs,

v.

Officer FRANK TORRES, Badge 4198, Department of Public Safety, et al.

Defendants.

No. C20025939

MOTION FOR SUMMARY JUDGMENT CONCERNING THE FENCE

[Oral Argument Requested]

(Assigned to Honorable Jane L. Eikleberry)

Arizona moves for partial summary judgment on four issues concerning the fence. *See* Ariz. R. Civ. P. 56(c) and (d).

First, ADOT cannot be liable for any harm to Plaintiffs that resulted from cows entering the right-of-way through cuts in the fence. When a third party creates a dangerous condition, a governmental entity may only be liable if it has actual or constructive notice of the condition. The fence was cut in several places. ADOT did not cut it. ADOT did not know about the cuts.

Nor did ADOT have constructive knowledge of the cuts. For constructive notice, a plaintiff must show some evidence that the condition existed long enough to infer that, by the exercise of reasonable diligence, the entity should have known of the defect. No one

can know whether the cuts had been there an hour, five hours, or five days. Plaintiffs cannot establish, therefore, other than through sheer speculation, that the cuts had been there so long that ADOT ought to have known about them; that is, Plaintiffs cannot establish constructive notice. ADOT cannot be liable for the cuts.

Second, it is nothing but speculation to guess that this accident was caused by the cow coming through the fence in any way but the cuts in the fence.

Third, even if it could somehow be inferred that, more probably than not, the cow came through the fence at some point other than the cuts – at one of the places in the fence improved in the days following the accident, as Plaintiffs argue – one would still have to speculate about whether the places improved were defects that had been there long enough so that Plaintiffs could argue Arizona had constructive knowledge of those defects.

Fourth, ADOT is entitled to immunity under A.R.S. § 12-820.03 on the issue of the adequacy of the design or construction of the fencing.

MEMORANDUM

FACTS:

This is the wrongful death, cow-in-the-road case in which Plaintiff Irasema Gomez was a front seat passenger in the northbound lane coming back from Mexico on I-19 in the early morning hours of April 7, 2002. (Statement of Facts (SOF) 1). Mrs. Gomez' husband, Edgar Gomez, was driving, and Mario Garcia, Mrs. Gomez' brother, was lying down in the rear seat. They drove into a cow. (SOF 3). Edgar Gomez and Mario Garcia, Jr. were killed, and Irasema Gomez was injured. (SOF 3).

Prior to this accident, at 1:07 a.m., DPS Officer Torres had responded to a call of a cow in the I-19 right-of-way at around KM 85 (mile 52.78) in the southbound lane. (SOF 4). He drove south slowly, using his spotlights, looking for cows along the roadway and

in the median. (SOF 5). He began looking about two miles before the reported location, and then continued to about 2.5 miles after the location, where, at about mile 50.6, he found a cow and a calf and herded then through a place in the right-of-way fence that had been cut beside the southbound lane. (SOF 6). The cows ran into the desert and out of sight. (SOF 6). Officer Torres then called dispatch to call Arizona Department of Transportation (ADOT) to fix the fence. It was 1:22 a.m. (SOF 7). Continuing to look for cattle, Officer Torres then drove slowly south and then north. (SOF 7).

On his way back to Tucson, Officer Torres received a call about a collision at mile 56 between a cow and a van in the northbound lane. He went to that non-injury accident, arriving at 1:44 a.m. (SOF 8). At 1:48, Officer Torres received the call about the subject accident. The car had come to rest at milepost 51.5 in the northbound lane. (SOF 9).

About 80% of the time, when officers respond to calls of cows in the right-of-way, no cows are to be found, perhaps because people see the cattle, but not the fence in front of the cattle.

Later that same day, an ADOT crew repaired five places in the fencing between mileposts 50.5 and 56.1 where the fence had been cut. (SOF 10). The cuts appeared fresh; that is, they were shiny and did not have any residue on them. (SOF 10). The pinch marks from the wire cutters could easily be seen. (SOF 10). At milepost 50.5, along the southbound right-of-way, the fence had been cut. (SOF 11). This is where Officer Torres had herded the cow and calf through the fence and called ADOT to make repairs. They fixed two panels. Right across the road, at milepost 50.5 northbound, one strand had been cut, and it was replaced. (SOF 11). At milepost 50.69, along the northbound lane, the fence had been cut. At milepost 55, the fence had been cut. (SOF 11). At milepost 56.1, along the northbound right-of-way, the fence had been cut. (SOF 11).

Two other spots along the right-of-way fence received maintenance the day following the accident. (SOF 12). One location, the Papago off-ramp, at milepost 54.39,

is 2.89 miles from the point where the car came to rest. (SOF 12). At the other location, milepost 55.1, the crew stretched the wire at two panels. (SOF 12). This would have meant that the wire was not as taut as the fence crew wanted it to be. (SOF 12). This was 3.6 miles from the spot where the car came to rest. (SOF 12). There is no evidence about whether the fence in either location was in such a condition that it would have permitted cows to cross. Simply replacing a portion of the fence does not mean the fence is breached at that location. (SOF 13).

ADOT employees are mandated to conduct, and have conducted, "annual inspections" of the right-of-way range fencing along I-19, making repairs as needed. (SOF 15). They also conduct on-going inspections, again making repairs as needed. (SOF 15). Not only do they continually inspect and improve the fence, they also visually inspect the fence each time they travel along I-19 to any other job site. (SOF 15).

When they make repairs, the ADOT maintenance employees create maintenance reports. The fence maintenance reports serve as an aid to budgeting and planning by recording the areas needing maintenance and the amount and cost of the materials used. (SOF 16). The reports do not usually record the manner in which the fence is not in compliance or could otherwise be improved; that is not their purpose. (SOF 16). Maintaining the fence at a particular spot does not mean that the fence at that location is breached. (SOF 17).

LAW AND ITS APPLICATION:

Lack of Notice, the Issue:

Under Arizona law, when a third party creates a dangerous condition, a governmental entity may only be liable if it has actual or constructive notice of the condition. For constructive notice, a plaintiff must show some evidence that the condition existed long enough to infer that, by the exercise of reasonable diligence, the entity should have known of the defect. Arizona had no actual notice of the several cuts through which

the cow might have come, and Plaintiffs can present no evidence as to how long the cuts had been there. Can Arizona be liable for fence cuts about which it had no actual knowledge, when there is no evidence about how long the cuts existed?

Lack of Notice, the Law and Its Application:

Arizona is not an insurer to all travelers on the state highway system. *Walker v. County of Coconino,* 12 Ariz. 547, 549, 473 P.2d 472, 474 (1970); *Matts v. City of Phoenix*, 137Ariz. 116, 118, 669 P.2d 94, 97 (App. 1983). A governmental entity may be held liable for the negligence of a third party that creates a dangerous condition only if the governmental agency has actual or constructive notice of the condition. *See, e.g., Lowman v. City of Mesa,* 125 Ariz. 590, 593, 611 P.2d 943, 946 (1980) (holding a city has a duty to maintain streets in a safe condition and to warn of dangers of which the city has actual or constructive notice); *Coburn v. City of Tucson*, 143 Ariz. 76, 79, 691 P.2d 1104, 1107 (App. 1984) (city had no notice of sand in road), approved as modified on collateral issue, 143 Ariz. 50, 691 P.2d 1078 (1984); *Matts* at 118, 669 P.2d at 97 (city had no notice of hole in road).

The notice must be of the defect itself that occasioned the injury, and not merely of conditions naturally productive of that defect and subsequently in fact producing it. *See Preuss v. Sambo's of Arizona, Inc*., 130 Ariz. 288, 289, 635 P.2d 1210, 1211 (1981); *McGuire v. Valley National Bank of Phoenix*, 94 Ariz. 50, 381 P.2d 588 (1963); *Spelbring v. Pinal County,* 135 Ariz.493, 495, 662 P.2d 458, 460 (App. 1983).

No actual notice:

There is no evidence that Arizona had actual knowledge of the cuts in the fence.

No constructive notice:

Nor is there evidence of constructive notice. In order to establish constructive notice, a plaintiff is required to introduce some evidence that the defect complained of had existed for a sufficient length of time from which it could be inferred that the defendant

should have known of the defect through the exercise of reasonable diligence. *See, e.g., Preuss v. Sambo's of Arizona, Inc*., 130 Ariz. at 289, 635 P.2d at 1211 (1981) *McGuire* at 53-54, 381 P.2d at 590; *City of Phoenix v. Brown*, 88 Ariz. 60, 65, 352 P.2d 754, 758 (1960); *City of Phoenix v. Weedon*, 71 Ariz. 259, 265, 226 P.2d 157, 161 (1950); *Matts* at 119, 669 P.2d at 97; *Vreeland v. Board of Regents*, 9 Ariz.App. 61, 63, 449 P.2d 78, 80 (1969).

In *Matts*, the plaintiffs sued Phoenix for injuries received from a hole in a Phoenix street. The plaintiffs attempted to prove constructive notice of the hole. The Court noted,

> In order to establish constructive notice, appellants were required to introduce some evidence that the defect complained of had existed for a sufficient length of time from which it could be inferred that, by the exercise of reasonable diligence, the city should have known of the defect. See *City of Phoenix v. Brown*, 88 Ariz. 60, 65, 352 P.2d 754, 758 (1960); *City of Phoenix v. Weedon*, 71 Ariz. 259, 265, 226 P.2d 157, 161 (1950).

Id. at 119, 669 P.2d at 97.

The plaintiffs attempted to show constructive notice through a photograph of the hole with rounded edges, as though weather had worn it down over time, and through logs showing repair material having been brought to the location after the accident. *Id* at 120-21, 669 P.2d at 98-99. In upholding the directed verdict, the court held, "The jury would have been required to indulge in sheer speculation to determine the duration of the condition." *Id.* at 121, 669 P.2d at 99.

In *McGuire*, the plaintiff slipped on a pebble-like substance in the defendant's stairwell. The defendant knew that workmen in the building had been depositing dust, grit and dirt in the stairwell, and the defendant's janitors had noticed a peddle-like substance on the day of the accident and had cleaned it up. In upholding the directed verdict in favor of the defendant, the Arizona Supreme Court noted,

> The pebble could have been deposited ten seconds before the plaintiff fell, or ten minutes, or two hours and ten minutes. There is no evidence from which the jury could infer that one period of time was more reasonable than any other. Only if it had been there for a sufficient length of time for the defendant, in the exercise of reasonable care, to find and remove it, could the defendant be found negligent. Submission of these facts to the jury would require the jury to guess whether the pebble had been on the stairway for a sufficient length of time. This cannot be permitted.'* * * It is, of course, incumbent upon a plaintiff alleging negligence upon the part of a defendant to show affirmatively by evidence sufficient to satisfy a reasonable mind that the negligence complained of actually existed. *It is not sufficient that the facts are such that it might have existed. It must appear affirmatively that it did.'* Butane Corp. v. Kirby, 66 Ariz. 272, 282, 187 P.2d 325, 332 (1947).

Id. at 53-54, 381 P.2d at 590 (emphasis in original).

In *Vreeland,* the plaintiff slipped down stairs when she stepped on tacks that had fallen from a University of Arizona bulletin board. The bulletin board, although provided for official use, was not enclosed, and the stairs were swept only once each day. *Id*. at 62, 449 P.2d at 79. The plaintiff could not show that, by a preponderance of evidence, some third party had not created the hazard, so the plaintiff was required to show either constructive or actual knowledge of the tacks:

> It therefore was incumbent upon the plaintiff to establish that the defendants had actual notice of the presence of the thumbtacks on the stairway or that they had been there for a sufficient length of time prior to her injury, for the defendants, in the exercise of reasonable care, to discover and remove them.

Id.

In *Spelbring*, the plaintiff was a passenger in a dune buggy when the driver swerved to avoid a rock in a county road, causing the dune buggy to roll. 135 Ariz. at 494, 494, 662 P.2d at 458. To the left of the driver was a hill consisting of loose dirt, rocks, and bushes. *Id*. The slope of the hill was approximately 60 degrees. *Id*. The plaintiff argued that the county did not need notice of the rock in the road, because the county had actual or constructive notice of the potential risk that rock would fall into the

road. *Id*. at 495, 622 P.2d at 459. The plaintiff argued the county knew of the hill and its composition of loose rock, knew rocks would roll down a 60 degree slope, and knew the rocks would roll into the road creating a hazard. *Id.* From this, the plaintiff argued a jury question was created as to the county's negligence. *Id*. As the plaintiff could not show actual or constructive knowledge of the rock in the road, the Court affirmed the granting of the motion for summary judgment, quoting *Preuss*, 130 Ariz. at 289, 635 P.2d at 1211:

> With respect to the notice requirement, the notice must be of the defect itself which occasioned the injury, and not merely of conditions naturally productive of that defect and subsequently in fact producing it. *McGuire v. Valley National Bank of Phoenix,* 94 Ariz. 50, 381 P.2d 588 (1963).

Id. at 495, 622 P.2d at 459.

Arizona is not required to make a daily inspection of every lane mile of the State's highway system. *See Matts* at 121, 669 P.2d at 99. The ADOT crews are required to conduct annual inspections. It is not disputed that they conducted those inspections and more and that they are continually inspecting the fencing. They inspect it when they are called about a problem with the fence. They inspect it every time they drive up and down the highway.

Of course, there is no evidence that ADOT cut the fence. Some third party cut it. Therefore, Plaintiffs must show that the cuts had been in the fencing for so long that ADOT should have known of them through the exercise of reasonable care. But they cannot show how long the cuts had been there. Plaintiffs cannot show constructive knowledge of the cuts in the fence. Guessing and speculation are not enough.

Only Speculation as To How the Cow Got Through the Fence, The Issue:

Under Arizona law, Plaintiffs must prove causation-in-fact; they must prove it was ***more likely than not*** that some negligence by Arizona was a substantial factor in causing the presence of the cow on the roadway, and that the cow would not have been there but for Arizona's negligence. A "mere possibility of such causation is not enough." The

fence had been cut in five places. The cow could have gained access through one of the cuts. It is merely possible the cow could have breached the fence at other locations. Can Plaintiffs maintain their claim concerning the fence when they can present only speculation concerning how the cow entered the highway?

The Law and its Application:

Plaintiffs' argument that the cow pushed its way through the fence is speculative because (1) there were five cuts in the fence through which the cow could have entered the right-of-way and (2) Plaintiffs have no evidence that there were as many or more other places through which the fatal cow could have come.

Plaintiffs' theory that the cow pushed its way through the fence cannot prevail as a matter of law, because they have the burden of proof on the issue of causation and "a mere possibility of such causation is not enough." *Purcell v. Zimbelman*, 18 Ariz. App. 75, 82, 500 P.2d 335, 342 (1972). Put otherwise, "[s]heer speculation is insufficient to establish the necessary element of proximate cause or to defeat summary judgment." *Badia v. City of Casa Grande*, 195 Ariz. 349, 357, 988 P.2d 134, 142 (App. 1999) (*citing Flowers v. K-Mart Corp.,* 126 Ariz. 495, 616 P.2d 955 (App. 1980) and *Shaner, supra*).

On the issue of causation, a plaintiff must introduce evidence that affords a reasonable basis for the conclusion that it is ***more likely than not*** that defendant's conduct was a substantial factor in bringing about the result. *Shaner v. Tucson Airport Auth., Inc.,* 117 Ariz. 444, 448,573 P.2d 518, 522 (App. 1977).

"A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Prosser & Keeton, Torts* (5th ed. 1984) § 41, p. 269.[1] *See also Restatement (Second) of Torts* § 433B, cmt a,

[1] The standard for Summary Judgment is the same as for a directed verdict. *Hart v. Seven Resorts, Inc.,* 190 Ariz. 272, 278, 947 P.2d 846, 852 (App. 1977).

at 442 (1965) (to same effect).

The probabilities are not evenly balanced. There were several places near the accident site where the fence had been cut. It is nothing but speculation to guess that this accident was caused by the cow coming through the fence in any way but the cuts in the fence – cuts for which Arizona cannot be responsible.

The maintenance records show that the fence was maintained and improved after the accident, just as it was before the accident. But maintaining a portion of the fence does not mean that the portion maintained would have permitted a cow to enter the right-of-way. An argument that the cow could have come through at any of those places is necessarily based solely upon conjecture.

Plaintiffs' expert Dr. Robert Bleyl summed up what we can know about how the cow got onto the right-of-way:

> "Q. While we're on it, you don't know how this cow that was involved in this fatal accident got onto the highway?
> A. Nobody knows.
> Q. You don't know whether or not the cow got in through a place where the fence had been cut?
> A. Nobody knows.
> Q. You don't know how long any cuts in the fence had been there prior to the accident, right?
> A. Nobody knows."

(SOF 14).

Concerning any negligence in the maintenance of the fence, Plaintiffs cannot provide any evidence from which it could be inferred that, more likely than not, the cow entered the roadway where the fence was not cut. Plaintiffs cannot prove causation. Speculation is not enough. On the issue of the maintenance of the fence, Arizona is entitled to summary judgment.

No Notice of Any Other Defects in the Fence:

Plaintiffs have provided no evidence that the places improved, but not cut, after the accident were defects that had been there long enough so that Plaintiffs could argue

Arizona had constructive knowledge of those defects. Arizona had no actual knowledge of any defect that would have permitted a cow to enter the right-of-way. Without knowledge of the defects, Arizona cannot be liable for those defects. *See, e.g., Preuss* at 289, 635 P.2d at 1211; *McGuire* at 53-54, 381 P.2d at 590; *Brown* at 65, 352 P.2d at 758; *Weedon* at 265, 226 P.2d at 161; *Matts* at 119, 669 P.2d at 97; *Vreeland* at 63, 449 P.2d at 80.

Immunity, the Issue:

In Arizona, a public entity is not liable for an injury arising out of a plan or design for construction or maintenance of highways and rights-of-way if the plan or design is prepared in conformance with generally accepted engineering or design standards in effect at the time of the planning or designing. Plaintiffs admit the livestock fence in Arizona's right-of-way was designed in accordance with generally accepted standards in effect at the time the fence was constructed. Can Arizona be liable for the design of the fence?

A.R.S. § 12-820.03:

> Neither a public entity nor a public employee is liable for an injury arising out of a plan or design for construction or maintenance of or improvement to highways, roads, streets, bridges, or rights-of-way if the plan or design is prepared in conformance with generally accepted engineering or design standards in effect at the time of the preparation of the plan or design, provided, however, that reasonably adequate warning shall be given as to any unreasonably dangerous hazards which would allow the public to take suitable precautions.

The livestock fence was built according to the design standard of the time – which continues to be the standard today. (SOF 18). That design standard was approved by the Federal Highway Administration at the time of the installation of the fencing. (SOF 18). Having been approved by the FHA, it is the livestock and right-of-way fencing generally to be found throughout the country. (SOF 18). The fencing around the accident scene complies with the specifications approved by the FHA. (SOF 18).

Plaintiffs have admitted the fence complies with the American Association of State

Highway and Transportation Officials (AASHTO). (SOF 19). They cannot reasonably deny that it was designed in conformance with the generally accepted design throughout the country for livestock rights-of-way fencing at the time it was constructed.

In their expert disclosures, Plaintiffs suggest alternative fence designs. Because Arizona cannot be liable for any injury arising from the design of the fence, the alternative fencing is irrelevant.

Plaintiffs argue Arizona should have provided warnings – signs warning of livestock – along I-19, because of the nature of the fence. They are welcome to do so. But both the design of the fencing and any suggested alternative design are irrelevant.

CONCLUSION:

ADOT cannot be liable for any harm to Plaintiffs that resulted from cows entering the right-of-way through cuts in the fence. Arizona did not cut the fence. Arizona did not know about the cuts in the fence. Arizona did not have constructive knowledge of the fence: There is no evidence from which it can be inferred that the cuts were present so long that Arizona should have discovered them.

It is nothing but speculation to guess that this accident was caused by the cow coming through the fence in any way but the cuts in the fence. Speculation is not enough.

Even if we pretend there is evidence that the fatal cow, more likely than not, came through the fence at some spot other than one of the cuts in the fence, Plaintiffs cannot show how long such a breach had existed. Plaintiffs cannot show constructive knowledge of these supposed breaches.

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Finally, as to the design of the fencing, Arizona is entitled to summary judgment.

RESPECTFULLY SUBMITTED this _____ day of.

TERRY GODDARD
ATTORNEY GENERAL

_____
ROGER W. PERRY, JR.
Assistant Attorney General
Attorneys for Arizona Defendants

COPY of the foregoing hand-delivered
this _____ day of to:

Honorable Jane L. Eikleberry
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COPY of the foregoing mailed
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