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10 **ARIZONA SUPERIOR COURT**
11 **PIMA COUNTY**

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

15 Plaintiffs,

16 v.

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

19 Defendants.

No. C20025939

**REPLY
TO RESPONSE TO
MOTION FOR SUMMARY
JUDGMENT
CONCERNING THE FENCE**

(Assigned to Honorable Jane L.
Eikleberry)

20 Plaintiffs never address the issues presented in Arizona's motion for summary
21 judgment: Can Arizona be responsible for cuts in a fence it had no actual or constructive
22 knowledge of, and is there any non-speculative evidence that the cow came through the
23 fence at some spot other than one of those cuts?

THE ISSUES PLAINTIFFS IGNORE:

Lack of Notice:

24 There is no evidence that Arizona knew or should have known of the cuts in the
25 fence.

26 Arizona put the law, the facts, and the relevant issue all in one place:

1 “Under Arizona law, when a third party creates a
2 dangerous condition, a governmental entity may only be liable
3 if it has actual or constructive notice of the condition. For
4 constructive notice, a plaintiff must show some evidence that
5 the condition existed long enough to infer that, by the exercise
6 of reasonable diligence, the entity should have known of the
7 defect. Arizona had no actual notice of the several cuts
8 through which the cow might have come, and Plaintiffs can
9 present no evidence as to how long the cuts had been there.
10 Can Arizona be liable for fence cuts about which it had no
11 actual knowledge, when there is no evidence about how long
12 the cuts existed?”

13 *Arizona’s Motion for Summary Judgment Concerning the Fence, p. 4-5; see also, Preuss*
14 *v. Sambo’s of Arizona, Inc.*, 130 Ariz. 288, 289, 635 P.2d 1210, 1211 (1981) (No
15 constructive notice of rock on ramp: “With respect to the notice requirement, the notice
16 must be of the defect itself which occasioned the injury, and not merely of conditions
17 naturally productive of that defect and subsequently in fact producing it.”); *McGuire v.*
18 *Valley National Bank of Phoenix*, 94 Ariz. 50, 381 P.2d 588 (1963) (No constructive
19 notice of pebble-like substance on stairs: “Only if it had been there for a sufficient length
20 of time for the defendant, in the exercise of reasonable care, to find and remove it, could
21 the defendant be found negligent. Submission of these facts to the jury would require the
22 jury to guess whether the pebble had been on the stairway for a sufficient length of
23 time.”); *Vreeland v. Board of Regents*, 9 Ariz.App. 61, 63, 449 P.2d 78, 80 (1969) (No
24 constructive notice of tacks under bulletin board on stairs, without evidence of time tacks
25 on stairs); *Spelbring v. Pinal County*, 135 Ariz.493, 495, 662 P.2d 458, 460 (App. 1983)
26 (No constructive notice of rock in road, where county knew of 60 degree slope beside
road, and that rocks would roll into the road); *Matts v. City of Phoenix*, 137 Ariz. 116,
118, 669 P.2d 94, 97 (App. 1983) (city had no notice of hole in road); *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).

Plaintiffs cannot answer this question, so they ignore it, and they ignore it by

1 ignoring the cuts in the fence.

2 Plaintiffs cite *Booth v. State of Arizona*, 207 Ariz. 61, 83 P.3d 61 (App. 2002).

3 Their mischaracterizations of the case are unimportant. The issue in this motion for
4 summary judgment concerns notice of a dangerous condition created by a third party.

5 Someone cut the fence. There is no evidence about how long the cuts were there. This is
6 not a strict liability case. *Walker v. County of Coconino*, 12 Ariz. 547, 549, 473 P.2d 472,
7 474 (1970); *Matts v. City of Phoenix*, 137 Ariz. 116, 118, 669 P.2d 94, 97 (App. 1983).

8 Before Arizona can be found liable for the cuts in the fence, there must be some evidence
9 that the cuts were there long enough so that Arizona, through the use of reasonable care,
10 would have found and fixed the cuts. *See, e.g., Preuss*, at 289, 635 P.2d at 1211; *McGuire*
11 at 53-54, 381 P.2d at 590; *City of Phoenix v. Brown*, 88 Ariz. 60, 65, 352 P.2d 754, 758
12 (1960); *Matts*, at 118, 669 P.2d at 97.

13 Nowhere does the *Booth* court address the issue of a condition caused by a third-
14 party. *Booth* is inapplicable.

15 **Plaintiffs' "Analysis" of the Constructive Notice Cases:**

16 Plaintiffs' application of the case law assumes the fence was not cut. It has no
17 application to the uncontroverted facts for this motion for summary judgment.

18 Arizona offers some general observations to Plaintiffs' arguments contained in
19 their "analysis":

20 First, the age or quality of the fence is irrelevant. Old fence, new fence, any fence
21 can be cut.

22 Second, the extent to which Arizona had notice that cows can get onto highways is
23 irrelevant to the issues presented in this motion for summary judgment: Can Arizona be
24 responsible for cuts about which it had no actual or constructive knowledge, and is there
25 any non-speculative evidence that the cow came through the fence at some spot other than
26 at one of those cuts?

1 Third, Plaintiffs cite *Wisener v. State*, 123 Ariz. 148, 598 P.2d 511 (1979). They
2 do not cite it as support for anything, nor do they discuss it. They only say *Spelbring*
3 distinguishes it. Still, apart from *Booth*, it is the only case they independently cite, and
4 Arizona will address it. In *Wisener*, a car overturned when it swerved to avoid a cow.
5 The plaintiff presented evidence the right-of-way fence was not constructed according to
6 approved plans and fell below the standard of care. *Id.* at 150, 598 P.2d at 513. The
7 Court specifically noted there was no evidence that any third-party caused any breach in
8 the fence. *Id.* at 151, 598 P.2d at 514. There were several possible means by which the
9 cow could have gained access to the highway, any one of which could have been
10 attributed to the state. *Id.* Here it is undisputed that the design and construction of the
11 fence complies with AASHTO and FHA requirements. *Arizona's Statement of Facts*
12 (*SOF*) 18. And here, some third-party did cut the fence in several places, *SOF* 10, 11.
13 Here the issue is notice of the cuts; in *Wisener* the issue was a deviation from construction
14 standards. *Wisener* is inapposite.

15 Plaintiffs argue that the notice cases cited by Arizona all involved an isolated
16 occurrence, yet Plaintiffs do not suggest that these cuts in the fence were anything but
17 isolated occurrences. Instead, Plaintiffs pretend the cuts on April 7, 2002, did not exist.

18 At any rate, cuts in the fencing along I-19 are, indeed, isolated, rare events. *Exhibit*
19 *A, Affidavit of Dave Connors.*

20 **Only Speculation as to How the Cow Got Through the Fence, The Issue:**

21 Again, Plaintiffs make no effort to answer the question Arizona posed to them:

22
23 Under Arizona law, Plaintiffs must prove causation-in-
24 fact; they must prove it was ***more likely than not*** that some
25 negligence by Arizona was a substantial factor in causing the
26 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

1 have breached the fence at other locations. Can Plaintiffs
2 maintain their claim concerning the fence when they can
3 present only speculation concerning how the cow entered the
4 highway?

4 *Arizona's Motion for Summary Judgment Concerning the Fence*, pp. 8-9; *see also*,
5 *Purcell v. Zimbelman*, 18 Ariz. App. 75, 82, 500 P.2d 335, 342 (1972) (plaintiffs have
6 burden of proof on issue of causation and “a mere possibility of such causation is not
7 enough.”); *Badia v. City of Casa Grande*, 195 Ariz. 349, 357, 988 P.2d 134, 142 (App.
8 1999) (“[s]heer speculation is insufficient to establish the necessary element of proximate
9 cause or to defeat summary judgment.”); *Shaner v. Tucson Airport Auth., Inc.*, 117 Ariz.
10 444, 448, 573 P.2d 518, 522 (App. 1977) (plaintiff must introduce evidence that affords a
11 reasonable basis for the conclusion that it is ***more likely than not*** that defendant's conduct
12 was a substantial factor in bringing about the result.); *Prosser & Keeton, Torts* (5th ed.
13 1984) § 41, p. 269 (“A mere possibility of such causation is not enough; and when the
14 matter remains one of pure speculation and conjecture, ***or the probabilities are at best***
15 ***evenly balanced***, it becomes the duty of the court to direct a verdict for the defendant.”)
16 (emphasis added); *see also Restatement (Second) of Torts* § 433B, cmt a, at 442 (1965) (to
17 same effect).

18 Plaintiffs do not take issue with this issue statement. They take no issue with the
19 facts cited. They take no issue with the case law cited. They take no issue with Arizona's
20 conclusion: “It is nothing but speculation to guess that this accident was caused by the
21 cow coming through the fence in any way but the cuts in the fence – cuts for which
22 Arizona cannot be responsible....”

23 Plaintiffs have not addressed this issue, and Arizona assumes Plaintiffs concede the
24 validity of the facts and the law as recited by Arizona. There is no non-speculative
25 evidence the cow came through the fence in some way other than the cuts in the fence.
26 On this issue, Arizona is entitled to summary judgment.

1 **No Notice of Any Other Defects in the Fence:**

2 We could only reach this issue if Plaintiffs had somehow pointed to some non-
3 speculative evidence that the cow, more likely than not, came through the fence where it
4 was not cut. They have pointed to no such evidence. We do not reach this issue.

5 **Immunity:**

6 Through their complete silence on this issue, Plaintiffs concede Arizona is entitled
7 to absolute immunity, under A.R.S. § 12-820.03. Plaintiffs concede the fence was
8 designed in conformance with the generally accepted design standards throughout the
9 country for livestock right-of-way fencing at the time it was constructed. They admitted
10 in disclosure that it complies, even today, with AASHTO. (SOF 18, 19). It was approved
11 by the FHA. Plaintiffs’ argument that the standards are only a minimum, even if true,
12 does not negate Arizona’s entitlement to immunity under A.R.S. § 12-820.03.

13
14 **THE FENCE WAS CUT.**

15 None of Plaintiffs’ arguments and analyses – their discussion of *Booth*, their
16 arguments about the quality of the fencing and prior cows on the right-of-way, their
17 attempts to distinguish Arizona’s case citations concerning notice – none of this can make
18 any sense unless one pretends the fence was not cut. So that is what they pretend, until, at
19 the end of their 14-page brief, Plaintiffs devote one and one-half pages to an effort to
20 create an issue of fact about the cuts. Plaintiffs toss out one irrelevant idea after another:

- 21 1. Plaintiffs note that there is no evidence that anyone reported the cuts to the
22 police. This is proof of nothing. The ADOT maintenance crew does not report damage to
23 the fence by a third party to the police. They never have. They don’t wait for police.
24 They fix the fence. *Exhibit A, Affidavit of David Connors.* As Jimmy Macias said in his
25 deposition, “I mean like I said we watch and make sure the fence is in good order and if
26 there's any breaks or cuts in it, then we take care of it right then and there.” *Exhibit B,*

1 *Deposition of Jimmy Macias, p. 16.*

2 If the proponent of a claim or defense is unable to produce evidence sufficient to
3 send the claim or defense to the jury, it would effectively abrogate the summary judgment
4 rule to hold that the motion should be denied simply on the speculation that some slight
5 doubt (and few cases have complete certainty), some scintilla of evidence, or some
6 dispute over irrelevant or immaterial facts might blossom into a real controversy in the
7 midst of trial. The purpose of the summary judgment rule is to enable trial courts to rid the
8 system of claims that are meritless and do not deserve to be tried. *Orme School v. Reeves*,
9 166 Ariz. 301, 802 P.2d 1000 (S. Ct. 1990).

10 2. Plaintiffs then run through some of their unsubstantiated ideas about why cattle
11 might get onto the right-of-way, including wind and forage. Arizona would take issue
12 with these assertions, and with their alleged support, but not here. The assertions are
13 irrelevant. They do nothing to create any issue of fact concerning the cuts. A cow needs
14 no special reason to walk through a cut, open, fence. It can simply wander through.

15 Only disputes over facts that might affect the outcome of the suit under the
16 governing law will properly preclude the entry of summary judgment. Factual disputes
17 that are irrelevant or unnecessary will not be counted. *Anderson v. Liberty Lobby, Inc.*,
18 477 U.S. 242 (1986), citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and
19 Procedure, pp. 93-95 (1983); *Burrington v. Gila County*, 159 Ariz. 320, 767 P.2d 43 (Ct.
20 App. 1988).

21 3. “There were no experts of who (sic) examined the actual cut to determine that it
22 was caused by vandals as opposed to snapping at various points from stress.” How could
23 this create an issue of fact concerning the cuts in the fence? In any event, the men who
24 maintain the fences, day in and day out, often *cutting* the fence to replace wire, are experts
25 concerning what a cut wire looks like. No Plaintiffs’ expert, and no evidence, rebuts these
26 informed observations.

1 4. Plaintiff says there are no pictures of the cuts. Why does this create an issue of
2 fact concerning the cuts?

3 5. Plaintiffs complain that the wire cuts were not saved when the fence was
4 recently replaced. First, the actual cuts were gone the moment the fence was repaired the
5 morning after the accident. They repair the fence by cutting the wire out where it has
6 been cut, so that they can add new wire, add the “gripples” that bind the new wire
7 together, and then stretch the fence. Plaintiffs lost no evidence when the fence was
8 replaced – although they have never before evidenced any interest in the fence, and none
9 of their experts ever looked at it.

10 6. Plaintiffs do not say, or even imply, how their complaints about Danny Vega –
11 who also said the fence was cut, in the maintenance report from April 7, 2002 – create a
12 genuine issue of fact about the cuts.

13 7. Plaintiffs say the number of cuts is in dispute. They point to no evidence of
14 such a dispute. At any rate, it is the fact of cuts, not their number that is material.¹

15 8. Plaintiffs say there were no tire tracks found near the cuts. The defense does
16 not know where Plaintiffs find this evidence in the record, and Plaintiffs do not say how
17 this would create a genuine issue of fact concerning the cuts.

18 **CONCLUSION:**

19 There is no genuine issue of material fact concerning the fence. Arizona is entitled
20 to judgment as a matter of law.

21 ADOT cannot be liable for any harm to Plaintiffs that resulted from cows entering
22 the right-of-way through cuts in the fence. Arizona did not cut the fence. Arizona did not
23 know about the cuts in the fence. Plaintiffs cannot show Arizona had constructive
24 knowledge of the cuts in the fence: There is no evidence from which it can be inferred that

25 _____
26 ¹ Plaintiffs argue the cow could have come through at the place that Officer Torres herded
the cows back into the desert – a place where the fence was cut.

1 the cuts were present so long that Arizona should have discovered them.

2 It is nothing but sheer speculation to guess that this accident was caused by the cow
3 coming through the fence in any way but the cuts in the fence. “A mere possibility of
4 such causation is not enough; and when the matter remains one of pure speculation and
5 conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the
6 court to direct a verdict for the defendant.” *Prosser & Keeton, Torts* (5th ed. 1984) § 41,
7 p. 269.

8 Because Plaintiffs cannot show Arizona had actual or constructive knowledge of
9 the cuts, and there is nothing but speculative evidence that the cow came through the
10 fence at some spot other than one of those cuts, we do not reach the issue of whether
11 Plaintiffs could show constructive knowledge of any other supposed breaches through
12 which the cow could have come.

13 Plaintiffs concede through silence that Arizona is entitled to absolute immunity
14 concerning the design and construction of the fencing. *See* A.R.S. § 12-820.03.

15 RESPECTFULLY SUBMITTED this _____ day of _____.

16
17 **TERRY GODDARD**
ATTORNEY GENERAL

18
19 _____
20 ROGER W. PERRY, JR.
Assistant Attorney General
Attorneys for Arizona Defendants

21
22 COPY of the foregoing hand-delivered
this _____ day of _____ to:

23 Honorable Jane L. Eikleberry
24 PIMA COUNTY SUPERIOR COURT
110 West Congress
25 Tucson, AZ 85701
26

1 COPY of the foregoing mailed
this _____ day of January, 2017 to:

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