

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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MANUEL A. LOPEZ,  
*Plaintiff/Appellant,*

*v.*

LOWE'S HIW, INC.,  
*Defendant/Appellee.*

No. 2 CA-CV 2013-0104  
Filed January 30, 2014

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).*

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Appeal from the Superior Court in Pima County  
No. C20123722  
The Honorable Ted B. Borek, Judge

**AFFIRMED**

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COUNSEL

Manuel A. Lopez, Tucson  
In Propria Persona  
*Plaintiff/Appellant*

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By Philip R. Higdon and Christine A. Hammerle  
*Counsel for Defendant/Appellee*

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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

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V Á S Q U E Z, Presiding Judge:

¶1 Appellant Manuel Lopez appeals from the trial court's grant of summary judgment in favor of appellee Lowe's HIW, Inc. On appeal, Lopez contends that the court erred by finding no genuine issues of material fact on his 42 U.S.C. § 1981 claim and by also dismissing his other racial-discrimination claims. For the following reasons, we affirm.

**Factual and Procedural Background**

¶2 "Although the pertinent facts of this case are largely undisputed, we view them in the light most favorable to the party opposing the summary judgment motion below." *Keonjian v. Olcott*, 216 Ariz. 563, ¶ 2, 169 P.3d 927, 928 (App. 2007). In July 2011, after a storm caused damage to his home, Lopez went to a Lowe's home improvement store located on the east side of Tucson to purchase supplies for the repairs. Lopez, a Hispanic American, found the necessary materials and approached the customer-service desk to check out. At least two customers were already in line to be helped by the cashier, an African American. Lopez set his supplies on the floor to the left of the register and leaned against the counter. After the customers who were there before Lopez had been assisted or directed elsewhere, the cashier began to help a couple who arrived after Lopez. Lopez immediately complained. The cashier directed Lopez to another register operated by an Asian American employee.

¶3 Lopez moved and stood between the customer-service desk and the line for the Asian American cashier. While he was standing there, an elderly Caucasian couple approached the customer-service desk, and the African American cashier also directed them to the Asian American cashier, instructing her to help them. When the couple got in line for the Asian American cashier,

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Lopez, who was still standing in between registers, began taking photographs of the cashiers and the couple with his cellular telephone. After the cashier assisted the couple, she offered to help Lopez. She then rang up his supplies, and Lopez paid for them.

¶4 After unsuccessfully attempting to address the incident with the store manager and submitting a complaint to the Arizona Attorney General, Lopez filed a lawsuit, alleging racial discrimination based on A.R.S. §§ 41-1401, 41-1441; 42 U.S.C. §§ 1981, 1985; and the Fourteenth Amendment. According to Lopez, the Lowe's employees had discriminated against him based on his race "by conspiring not to serve [him]" and "making him wait until all [the Caucasian] customers were served." Specifically, he claimed the African American cashier helped the Caucasian customers first and "even told" the Asian American cashier to do the same.

¶5 Lowe's filed a motion to dismiss pursuant to Rule 12(b)(6), Ariz. R. Civ. P., arguing Lopez had failed to state a claim upon which relief could be granted. The trial court granted Lowe's motion to dismiss all of Lopez's claims except the § 1981 claim. Lowe's then moved for summary judgment on the § 1981 claim on the grounds that Lopez had failed to prove any contractual relationship was "blocked or thwarted" and had also failed to "provide[] a scintilla of evidence of a racial motivation." The court granted the motion for summary judgment by a signed minute entry, followed by entry of a final judgment. This appeal followed.

### Jurisdiction

¶5 As a preliminary matter, we address Lowe's contentions that "Lopez did not appeal from the final judgment" and "the notice of appeal limits this court's review to the trial court's April 19 summary judgment order." Our jurisdiction is limited by statute, and we have no authority to consider the merits of an appeal over which we do not have jurisdiction. *Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981). "The general rule is that an appeal lies only from a final judgment." *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991); see also A.R.S. § 12-2101(A)(1).

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¶6 Rule 8(c), Ariz. R. Civ. App. P., requires that a notice of appeal “designate the judgment or part thereof appealed from.” This court does not acquire jurisdiction to review matters not identified in the notice. *Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 561, 578 P.2d 985, 990 (1978); *Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982). We may construe a notice of appeal liberally, *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 30, 972 P.2d 676, 683 (App. 1998), and technical defects such as incorrect dates are not fatal to the appeal, *see, e.g., Hanen v. Willis*, 102 Ariz. 6, 9-10, 423 P.2d 95, 98-99 (1967) (finding jurisdiction despite notice of appeal citing date of minute entry rather than date of final judgment); *Udy v. Calvary Corp.*, 162 Ariz. 7, 10-11, 780 P.2d 1055, 1058-59 (App. 1989) (notice of appeal naming only parents as appellants and not son on whose behalf suit was brought did not preclude appeal on his behalf). However, we cannot disregard the plain requirements of Rule 8(c) and infer from the notice something that is not there. *Baker v. Emmerson*, 153 Ariz. 4, 8, 734 P.2d 101, 105 (App. 1986).

¶7 According to his notice of appeal, which was filed on May 30, 2013, Lopez is appealing “the [trial c]ourt’s final Order of April 19, 2013.” The only order entered on that date was the ruling granting Lowe’s motion for summary judgment on the § 1981 claim. Because that ruling disposed of the only remaining claim and was signed and filed, it could be considered the final judgment if the court so intended. *See Devenir Assocs. v. City of Phoenix*, 169 Ariz. 500, 504, 821 P.2d 161, 165 (1991) (document entitled “opinion” not final and appealable because trial court did not intend it to be); *Focal Point, Inc. v. Court of Appeals*, 149 Ariz. 128, 129-30, 717 P.2d 432, 433-34 (1986) (signed minute entry valid judgment because trial court titled it “judgment,” demonstrating intent order was appealable judgment). However, in that ruling, the court also directed Lowe’s to lodge a form of judgment. The court then entered a final judgment on May 3, 2013. The April 19 ruling thus cannot be considered a final, appealable judgment. *See Davis*, 168 Ariz. at 304, 812 P.2d at 1122.

¶8 Although Lopez’s notice of appeal indicates he is appealing the April 19 summary judgment ruling, it was timely filed after entry of the May 3 final judgment. *See Ariz. R. Civ.*

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App. P. 9(a). And, the May 3 final judgment explicitly refers to the April 19 summary judgment ruling. Liberally construing the notice of appeal, we understand Lopez to be appealing that portion of the May 3 final judgment relating to the trial court's April 19 summary judgment ruling. See *Gutierrez*, 193 Ariz. 343, ¶ 30, 972 P.2d at 683; Ariz. R. Civ. App. P. 8(c). He has therefore limited our review to that issue, see *Baker*, 153 Ariz. at 8, 734 P.2d at 105, and we have no jurisdiction to address the court's dismissal of his other claims pursuant to Rule 12(b)(6).

**Summary Judgment**

¶6 Lopez challenges the trial court's grant of summary judgment in favor of Lowe's on his § 1981 discrimination claim. We review a trial court's grant of summary judgment de novo. *Link v. Pima Cnty.*, 193 Ariz. 336, ¶ 12, 972 P.2d 669, 673 (App. 1998). A motion for summary judgment should be granted if "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); see also *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). A party is entitled to judgment as a matter of law if it can demonstrate that "the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986).

¶7 Section 1981(a) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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It was designed, "by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976).

¶8 To sustain his § 1981 claim, Lopez must establish: "(1) that [he] is a member of a racial minority; (2) that [the Lowe's employees] had intent to discriminate on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute, in this instance, the making and enforcing of a contract."<sup>1</sup> *Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 751 (5th Cir. 2001); *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993); *see also Gregory v. Dillard's, Inc.*, 565 F.3d 464, 469 (8th Cir. 2009) (describing test as four-part analysis). In granting Lowe's motion for summary judgment, the trial court "f[ound] it significant that [Lopez] was able to complete his purchases because that fact is fatal" to a § 1981 claim. The court also concluded that "there is no evidence other than [Lopez]'s

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<sup>1</sup> Lopez urges us to adopt the requirements outlined in *Callwood v. Dave & Buster's, Inc.*, 98 F. Supp. 2d 694, 707 (D. Md. 2000), for a prima facie case under § 1981. According to *Callwood*, plaintiffs must show: (1) "they are members of a protected class"; (2) "they made themselves available to receive and pay for services ordinarily provided by the defendant to all members of the public in the manner in which they are ordinarily provided"; and (3) "they did not enjoy the privileges and benefits of the contracted for experience under factual circumstances which rationally support an inference of unlawful discrimination" because "(a) they were deprived of services while similarly situated persons outside the protected class were not deprived of those services, and/or (b) they received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable." 98 F. Supp. 2d at 707. But at least one other court has declined to adopt this test based on *Callwood's* "alternative analytical approach" where "there is scant evidence as to how members of the protected class are treated differently from members outside the class." *Williams v. Staples, Inc.*, 372 F.3d 662, 668 n.5 (4th Cir. 2004). We agree with this distinction and decline to apply *Callwood* here.

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inadmissible speculation that his treatment was motivated by discrimination," noting that Lopez "did not see or hear an employee of [Lowe's] use any racial epithet, derogatory term, or offensive gesture."<sup>2</sup>

¶9 Lopez contends that the trial court erred in granting Lowe's motion for summary judgment because it only "cared about" the fact that he "was finally served" and not about "how [he] was treated." Citing *McCaleb v. Pizza Hut of America, Inc.*, 28 F. Supp. 2d 1043, 1048 (N.D. Ill. 1998), Lopez suggests that a contract includes all of "the accoutrements that are ordinarily provided," such as being served in a timely and reasonable way. And, Lopez maintains that his service was unreasonable because he was only assisted "after all the [Caucasian] customers were served." But we need not address this argument.

¶10 Even assuming Lopez's contract with Lowe's had been delayed and thus interfered with, Lopez presented no evidence of discriminatory intent. *See Morris*, 277 F.3d at 751. A plaintiff must "produce specific evidence of discriminatory purpose" by the defendant to survive summary judgment. *Lewis v. City of Ft. Collins*, 903 F.2d 752, 759-60 (10th Cir. 1990); *see also McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) (plaintiff must produce evidence suggesting defendant's conduct due to discriminatory intent). To do so, the plaintiff may offer direct or circumstantial evidence or may follow the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).<sup>3</sup>

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<sup>2</sup> Lopez argues the trial court erred in concluding that, "because [the Lowe's] employees did not use racial slurs, [he] was not discriminated [against]." But Lopez misapprehends the court's conclusion. The court determined that Lopez had failed to present evidence of discriminatory intent and, in reaching that conclusion, noted that Lopez conceded that none of the Lowe's employees had used derogatory or offensive language.

<sup>3</sup> Under the *McDonnell Douglas* framework, the plaintiff must first establish a prima facie case of discrimination by a preponderance of the evidence, the defendant then has the burden of articulating a legitimate, non-discriminatory reason for the

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*Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (applying framework to § 1981 claims). “[I]t is possible for the defendant to present such strong evidence of a nondiscriminatory rationale that summary judgment is warranted.” *Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 950 (11th Cir. 1991).

¶11 Lopez maintains that the photographs he took show the Lowe’s employees discriminated against him based on his race. But the photographs do not add anything to the record that was “not otherwise asserted and established.” *Taylor v. Mueller*, 24 Ariz. App. 403, 410, 539 P.2d 517, 524 (1975) (photographs of accident scene attached to motion for summary judgment added nothing to record). Rather, the photographs merely show Lowe’s employees and customers standing near a cash register. Lopez “d[id] little more than cite to [his] mistreatment and ask the court to conclude that it must have been related to [his] race. This is not sufficient.” *Lizardo v. Denny’s, Inc.*, 270 F.3d 94, 104 (2d Cir. 2001).

¶12 Moreover, Lowe’s has demonstrated that Lopez’s treatment was not based on discriminatory intent. See *Brown*, 939 F.2d at 950. According to Lowe’s, “the crux of Lopez’s claim is that the African American cashier refused to help him, and instead directed him to the Asian American cashier.” But, as Lowe’s points out, and Lopez admits, the African American cashier directed the elderly Caucasian couple to the Asian American cashier as well. Thus, there is no indication that Lopez’s treatment was based on racial animus. And, although the African American cashier specifically instructed the Asian American cashier to assist the elderly couple, this occurred after Lopez had failed to get in line at the Asian American cashier’s register. Summary judgment was therefore appropriate. See *Celotex Corp.*, 477 U.S. at 331; *Morris*, 277 F.3d at 751.

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treatment, and, finally, the plaintiff must demonstrate that the defendant’s proffered reasons are merely a pretext for discrimination. *McDonnell Douglas Corp.*, 411 U.S. at 802-04; see also *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 959-60 (4th Cir. 1996).

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**Disposition**

¶13 For the foregoing reasons, we affirm.