NOTICE: NOT FOR PUBLICATION.
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

ANDREW HAYES, *Plaintiff/Appellant*,

v.

US AIRWAYS GROUP, INC., a foreign corporation; US AIRWAYS, INC., a foreign corporation, *Defendants/Appellees*.

No. 1 CA-CV 13-0036
FILED 12-10-2013

Appeal from the Superior Court in Maricopa County
No. CV2012-001443
The Honorable John Rea, Judge

AFFIRMED

COUNSEL

The Roll Law Office, P.L.L.C., Tempe
By Guy P. Roll

Counsel for Plaintiff/Appellant

Jones, Skelton & Hochuli, P.L.C., Phoenix
By Kevin D. Neal, Jonathan P. Barnes, Jr.

Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Lawrence F. Winthrop delivered the decision of the Court, in which Judge Margaret H. Downie and Judge Jon W. Thompson joined.

W I N T H R O P, Presiding Judge:

¶1 Andrew Hayes appeals the trial court's judgment dismissing his complaint against U.S. Airways Group. Inc. and U.S. Airways, Inc. (collectively, "U.S. Airways") for failure to state a claim upon which relief can be granted. *See* Ariz. R. Civ. P. ("Rule") 12(b)(6). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 In March 2012, Hayes filed a *pro se* complaint against U.S. Airways, alleging "Personal Injury; Tort; Negligence; [and] Negligent Retention." Hayes alleged he had been attacked and beaten in an Ahwatukee high school parking lot by two assailants - Edward George Myer and Hayes' ex-wife, Valerie, both employees of U.S. Airways.[2] Hayes further alleged that U.S. Airways and some of its employees knew or should have known of a "meretricious relationship" between Myer and Valerie; that animosity, ill will, disputes, and threats had resulted between himself and the assailants before the attack; and that Myer and Valerie were "unfit for their jobs" and likely to harm him. Hayes maintained U.S.

[1] Hayes' statement of facts in his opening brief fails to make any citation to the record as required by Arizona Rule of Civil Appellate Procedure ("ARCAP") 13(a)(4), and contains factual assertions for which we find no record support. Accordingly, we disregard Hayes' statement of facts and instead rely on our review of the record and the allegations of the complaint, for which a motion to dismiss assumes the truth. *See Sholes v. Fernando*, 228 Ariz. 455, 457 n.2, ¶ 2, 268 P.3d 1112, 1114 n.2 (App. 2011); *Flood Control Dist. of Maricopa Cnty. v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985).

[2] Hayes did not name Myer or Valerie as defendants in the complaint.

Airways and its employees had done nothing to intervene, warn him, or report the situation to law enforcement authorities before he was assaulted.

¶3 U.S. Airways moved to dismiss the complaint pursuant to Rule 12(b)(6), arguing that (1) the alleged actions of Myer and Valerie were outside the course and scope of their employment, (2) neither U.S. Airways nor its employees had a duty to control Myer's and Valerie's conduct toward Hayes, and (3) Hayes' alleged injury was unrelated to the nature of Myer's and Valerie's work with U.S. Airways.

¶4 In a minute entry filed September 21, 2012, the trial court granted U.S. Airways' motion to dismiss. Pursuant to Arizona Revised Statutes section 12-2101(A)(1) (West 2013),[3] we have jurisdiction over Appellant's timely appeal of the trial court's final judgment dismissing Hayes' complaint with prejudice.

ANALYSIS

I. *Applicable Law and Standard of Review*

¶5 Pursuant to Rule 8(a)(2), Ariz. R. Civ. P., all pleadings that set forth a claim for relief shall contain "[a] short and plain statement of the claim showing that the pleader is entitled to relief." "If a pleading does not comply with Rule 8, an opposing party may move to dismiss the action for '[f]ailure to state a claim upon which relief can be granted.'" *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008) (quoting Rule 12(b)(6)).

¶6 In adjudicating a Rule 12(b)(6) motion, courts consider only the pleading itself, *Young v. Rose*, 230 Ariz. 433, 438, ¶ 25, 286 P.3d 518, 523 (App. 2012), and well-pled material allegations "are taken as admitted, but conclusions of law and unwarranted deductions of fact are not." *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989) (citations omitted); *see also Blankenbaker v. Marks*, 231 Ariz. 575, 577, ¶ 6, 299 P.3d 747, 749 (App. 2013) (stating that this court assumes the truth of the allegations set forth in the complaint). Although the inclusion of conclusory statements will not invalidate a complaint, mere conclusory statements are insufficient to state a claim

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[3] We cite the current version of the applicable statute because no revisions material to our analysis have since occurred.

upon which relief can be granted. *Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346.

¶7 We review *de novo* a trial court's decision to grant a motion to dismiss for failure to state a claim upon which relief may be granted. *See Blankenbaker*, 231 Ariz. at 577, ¶ 6, 299 P.3d at 749. We will affirm the dismissal only if the plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. *Id*.

II. Dismissal Pursuant to Rule 12(b)(6)

A. Vicarious Liability

¶8 U.S. Airways argues that Hayes has waived any vicarious liability claim by failing to argue that Myer and Valerie were in the course and scope claim of their employment with U.S. Airways at the time he was attacked. We agree that neither Hayes' complaint nor his opening brief[4] makes any claim or argument of vicarious liability sufficient to survive a motion to dismiss.

¶9 An employer may be held vicariously liable for the negligent work-related actions of its employees under the doctrine of respondeat superior. *Tarron v. Bowen Mach. & Fabricating, Inc.*, 225 Ariz. 147, 150, ¶ 9, 235 P.3d 1030, 1033 (2010). An employer is vicariously liable for such acts, however, only if the employee is acting "within the scope of employment" at the time of the negligent act. *Engler v. Gulf Interstate Eng'g, Inc.*, 230 Ariz. 55, 57, ¶ 9, 280 P.3d 599, 601 (2012) (citation omitted). Whether an employee acted within the course and scope of his employment depends on the degree to which the employee was subject to the employer's control. *Id*. at 57-58, ¶ 10, 280 P.3d at 601-02. An employee acts outside the course and scope of employment when the employee pursues "an independent course of action that does not further the employer's purposes and is not within the control or right of control of the employer." *Id*. at 58, ¶ 13, 280 P.3d at 602 (citing *Robarge v. Bechtel Power Corp.*, 131 Ariz. 280, 283-84, 640 P.2d 211, 213-14 (App. 1982), and adopting Restatement (Third) of Agency § 7.07 (2006)).

¶10 Although Hayes has alleged that Myers and Valerie were employed by U.S. Airways at the time he was attacked, he did not allege in his complaint and has not argued in his opening brief that Myers and Valerie were on-duty, performing acts of the kind they were hired to

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[4] Hayes did not file a reply brief.

perform or commonly done by them for U.S. Airways, acting in furtherance of their employer's business, or in any way otherwise acting in the "course and scope" of their employment with U.S. Airways when they assaulted him. *See id*. at ¶ 11; *Higginbotham v. AN Motors of Scottsdale*, 228 Ariz. 550, 552, ¶ 5, 269 P.3d 726, 728 (App. 2012). Consequently, Hayes has failed to preserve any claim of vicarious liability on the part of U.S. Airways through Myer's and Valerie's actions. *See Pruitt v. Pavelin*, 141 Ariz. 195, 205, 685 P.2d 1347, 1357 (App. 1984); *see also State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 124, ¶ 82, 290 P.3d 1226, 1247 (App. 2012) (recognizing that issues not raised in the opening brief are waived on appeal); *Jones v. Burk*, 164 Ariz. 595, 597, 795 P.2d 238, 240 (App. 1990) (same).

B. Direct Liability

¶11 Hayes also has not alleged the necessary facts to impose a duty on U.S. Airways, a predicate for his direct liability claim based on negligence or negligent retention. To establish a claim for negligence, a plaintiff must prove the existence of "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007) (citations omitted). Whether a duty exists is a legal question for the court to decide. *Id*. (citation omitted). Further, "[w]hether the defendant owes the plaintiff a duty of care is a threshold issue; absent some duty, an action for negligence cannot be maintained." *Id*. at ¶ 11 (citation omitted).

¶12 In this case, Hayes failed to allege any facts in his pleading to show U.S. Airways had a duty to prevent harm to him. Hayes did not allege in his complaint and has not argued in his opening brief that the attack occurred on U.S. Airways property or that either attacker used any U.S. Airways instrumentality. *See Wertheim v. Pima Cnty.*, 211 Ariz. 422, 425, ¶ 12, 122 P.3d 1, 4 (App. 2005) (recognizing that, in limited circumstances, such as when an employee is on the employer's premises or using the employer's property, the employer may have a duty to control his employee's off-duty conduct (citing Restatement (Second) of Torts § 317 (1965))). Further, although a special relationship may create a duty to prevent harm to a third party, *see Gipson*, 214 Ariz. at 144-45, ¶ 18, 150 P.3d at 231-32; Restatement (Second) of Torts § 315, Hayes has not alleged any facts to support the conclusion that a special relationship existed between U.S. Airways and him that might create a duty. *Cf. Nunez v. Prof'l Transit Mgmt. of Tucson, Inc.*, 229 Ariz. 117, 121-22, ¶¶ 17-23, 271

P.3d 1104, 1108-09 (2012) (recognizing that a common carrier's duty is to exercise reasonable care with regard to its passengers).

¶13 Although Hayes argues that, under the Restatement (Second) of Agency § 213 (1958), the employment relationship between U.S. Airways and his alleged assailants may have been sufficient to subject U.S. Airways to liability, we find Hayes' reliance on § 213 unavailing. The language of this section of the Restatement makes clear that liability may result only if "the employer antecedently had reason to believe that an undue risk of harm would exist *because of the employment*." *Id*. at cmt. d (emphasis added). Thus, under § 213, liability may be imposed only "for the business in hand." *Id*. Hayes' complaint failed to allege facts to show that U.S. Airways had reason to believe he faced an undue risk of harm because of the business conducted by Myer and Valerie in their employment with U.S. Airways. *See, e.g., Kassman v. Busfield Enters.*, 131 Ariz. 163, 166-67, 639 P.2d 353, 356-57 (App. 1981) (holding that an employer could not be held independently liable for a plaintiff's injury when the plaintiff was shot by the employer's doorman, who had impermissibly carried a gun to work (citing Restatement (Second) of Agency § 213 cmt. d)).

¶14 Hayes also cites *McGuire v. Arizona Protection Agency*, 125 Ariz. 380, 609 P.2d 1080 (App. 1980), apparently as support for the argument that U.S. Airways owed him a duty. In *McGuire*, this court in a divided opinion reversed a motion to dismiss, finding that liability could exist for an alarm system company when a former employee used the knowledge obtained in installing an alarm to subsequently disconnect the alarm and rob the house. *See id*. at 381-82, 609 P.2d at 1081-82. Unlike the plaintiff in *McGuire*, Hayes has not alleged that he was a customer of U.S. Airways, U.S. Airways is engaged in work of a sensitive nature that created a risk specific to him, or Myer or Valerie gained special knowledge about him as a result of their work for U.S. Airways. *See Henning v. Montecini Hospitality, Inc.*, 217 Ariz. 242, 247, ¶¶ 17-18, 172 P.3d 430, 435 (App. 2007) (distinguishing *McGuire* on the basis that, because McGuire was a current customer when the alarm was installed, "the alarm company owed a duty of care to McGuire specifically when it committed the allegedly negligent acts").

¶15 Because the allegations in Hayes' complaint fall well short of establishing any duty on the part of U.S. Airways to prevent harm to him, we need not address Hayes' allegations that U.S. Airways breached any

alleged duty by failing to foresee a possible attack and intervene, warn him, or report the situation to law enforcement authorities.[5] Here, the sole basis for Hayes' complaint against U.S. Airways is an alleged assault committed off-site by two off-duty U.S. Airways employees involved in a personal conflict with Hayes and acting entirely outside the course and scope of their employment, under circumstances having no possible connection to any U.S. Airways business activity or property. Under these alleged circumstances, the trial court did not err in granting U.S. Airways' motion to dismiss for failure to state a claim upon which relief can be granted.

III. Costs and Attorneys' Fees on Appeal

¶16 U.S. Airways requests an award of costs and attorneys' fees on appeal pursuant to ARCAP 21 and 25. ARCAP 21 merely sets forth the procedure for a party to request attorneys' fees and is not independent authority for an award of fees. *Freeman v. Sorchych*, 226 Ariz. 242, 252-53, ¶ 31, 245 P.3d 927, 937-38 (App. 2011). Under ARCAP 25, we may award attorneys' fees as a sanction for an appeal that is frivolous or taken solely for the purpose of delay:

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[5] Briefly, however, we note that the elements of breach, causation, and damages are factual issues usually decided by a jury. *Gipson*, 214 Ariz. at 143, ¶ 9, 150 P.3d at 230. Nevertheless, "if no reasonable juror could conclude that the standard of care was breached or that the damages were proximately caused by the defendant's conduct," a court may decide these matters. *Id*. at n.1 (citations omitted). In this case, even if we were to find a duty on the part of U.S. Airways (which we do not), the mere conclusory statements contained in Hayes' complaint are insufficient to conclude that U.S. Airways should have foreseen the violent physical attack allegedly perpetrated by Myer and Valerie. *See Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346. Moreover, Hayes' complaint and argument in his opening brief fail to provide a legal connection between U.S. Airways' alleged negligence and his alleged assault. Any failure by U.S. Airways to carefully hire, supervise, or train its employees cannot be shown on the facts alleged in the complaint to be a proximate cause of Hayes' injuries, and even had U.S. Airways suspended or terminated the employment of Myer and Valerie, nothing would have prevented them from assaulting Hayes in the circumstances alleged in the complaint.

> Where the appeal is frivolous or taken solely for the purpose of delay, or where a motion is frivolous or filed solely for the purpose of delay, or where any party has been guilty of an unreasonable infraction of these rules, the appellate court may impose upon the offending attorneys or parties such reasonable penalties or damages (including contempt, withholding or imposing of costs, or imposing of attorneys' fees) as the circumstances of the case and the discouragement of like conduct in the future may require.

Because the line between a frivolous appeal and one that simply lacks merit is fine, we use sparingly the power to punish attorneys or litigants for prosecuting frivolous appeals. *Price v. Price*, 134 Ariz. 112, 114, 654 P.2d 46, 48 (App. 1982) (citation omitted). Nevertheless, we will impose sanctions on parties or their attorneys for burdening the court with an appeal that indisputably has no merit. *Id.*

¶17 In this case, any reasonable attorney would agree that, based on the underlying pleading, Hayes' appeal is completely without merit. Given Hayes' frivolous argument, in addition to his failure to conform his brief to the requirements of ARCAP 13(a)(4), we find that an award of attorneys' fees to U.S. Airways pursuant to ARCAP 25 is justified. Consequently, in our discretion, we award U.S. Airways reasonable costs and attorneys' fees pursuant to ARCAP 25, in an amount to be determined by this court upon compliance with ARCAP 21. Responsibility for the award of costs and attorneys' fees to U.S. Airways shall be equal and joint and several between Hayes and his appellate counsel. *See Mangan v. Mangan*, 227 Ariz. 346, 354, ¶ 32, 258 P.3d 164, 172 (App. 2011).

CONCLUSION

¶18 The trial court's judgment is affirmed.

Ruth A. Willingham · Clerk of the Court
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