IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JOHN W. YODER, *Plaintiff/Appellant*,

v.

TUX-XPRESS INC., *Defendant/Appellee*.

No. 1 CA-CV 16-0396
FILED 5-2-2017

Appeal from the Superior Court in Maricopa County
No. CV2014-013537
The Honorable Joshua D. Rogers, Judge

AFFIRMED

COUNSEL

Dillingham Law PLLC, Scottsdale
By John L. Dillingham
Counsel for Plaintiff/Appellant

Schneider & Onofry P.C., Phoenix
By Jon D. Schneider, Maria C. Lomeli
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

H O W E, Judge:

¶1 John W. Yoder appeals the trial court's granting summary judgment in favor of Tux-Xpress, Inc. Yoder argues that Tux-Xpress owed him a duty as a business invitee to provide reasonable means of ingress and egress from its store. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 One day in April 2013, Yoder went to Tux-Xpress to pick up a suit for his high school prom. When Yoder exited, he crossed through the landscape area in front of the store to get to the parking lot. The landscape area separated the sidewalk directly in front of Tux-Xpress and the parking lot. While crossing over the landscape area, Yoder stepped on a loose brick and fell face-first onto the parking lot curb. Yoder sued Tux-Xpress and the property owner, Ava Investments, LLC, alleging negligence in their failure to maintain the premises in a reasonably safe condition.

¶3 Tux-Xpress moved for summary judgment, arguing that Ava Investments owned and controlled the area where Yoder fell. Tux-Xpress submitted a statement of facts and the 1998 lease agreement with its motion for summary judgment. Although the lease was silent about who controlled the landscape area, the specific property leased to Tux-Xpress was Suite B. The lease required Tux-Xpress "to periodically sweep and clean the sidewalks and adjacent to the demised premises, as needed, and shall promptly remove all waste, trash, rubbish and papers accumulating on the premises." Additionally, the lease required Ava Investments to maintain in good repair the exterior walls, roof, and sidewalks.

¶4 To show that it never controlled or possessed the landscape area, Tux-Xpress alleged that it made no improvements or changes to the area before or after Yoder's fall. Before the bricks were installed, Tux-Xpress's owner informed Ava Investments of people walking their dogs through the landscape area and asked for something to be done. Ava Investments then hired a landscaper to "beautify" the area and install the

bricks. Additionally, while other tenants put plants in the landscape area, Tux-Xpress never did so.

¶5 Yoder responded that control or possession of the landscape area was irrelevant to whether Tux-Xpress owed a duty to him as a business invitee. Although he argued that control was irrelevant, he disagreed that Tux-Xpress exercised no control or possession over the landscape area. Yoder alleged that Tux-Xpress had partial control over the landscape area because at one point in time it had to pay a portion of the area's water bill and that the other tenants installed plants in the landscape area.

¶6 After a hearing, the trial court granted Tux-Xpress summary judgment. The trial court noted that while "[i]t is true that the fact that an injury occurs off of a business' premises does not necessarily eliminate the business' duty . . . [the duty] only extends to injuries occurring off its premises based upon the business' exercise of control over that which it has control,"—i.e., its own premises. The trial court concluded that nothing in the lease transferred control of the landscape area to Tux-Xpress and that no evidence showed that Tux-Xpress controlled the landscape area. Yoder moved for reconsideration, which the trial court denied. After the trial court amended its judgment to add finality language pursuant to Arizona Rule of Civil Procedure 54(b), Yoder timely appealed.

DISCUSSION

¶7 Yoder argues that the trial court erroneously granted summary judgment because Tux-Xpress owed him a duty to maintain the landscape area outside its store. We review de novo the trial court's grant of summary judgment and view the facts in the light most favorable to the non-moving party. *Wickham v. Hopkins*, 226 Ariz. 468, 470 ¶ 7, 250 P.3d 245, 247 (App. 2011). Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). Because Yoder did not present sufficient evidence to establish Tux-Xpress controlled or possessed the landscape area, the trial court did not err.[1]

¶8 To establish a claim for negligence, a plaintiff must prove four factors: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach of that standard of care; (3) a causal connection between

[1] Because we hold that summary judgment was appropriate, we need not address Tux-Xpress's alternative argument that Yoder should be collaterally estopped from suing Tux-Xpress.

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). "Duty is defined as an obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Id.* at ¶ 10. Whether a duty exists is reviewed de novo and without such a finding, a negligence action cannot be maintained. *Wickham*, 226 Ariz. at 470–71 ¶ 8, 250 P.3d at 247–48.

¶9 Yoder argues that Tux-Xpress owed him a duty of care as a business invitee to keep the landscape area reasonably safe. A possessor of land has a duty to keep its premises reasonably safe for invitees. *Timmons v. Ross Dress for Less, Inc.*, 234 Ariz. 569, 570 ¶ 8, 324 P.3d 855, 856 (App. 2014). A possessor of land is defined as "a person who is in occupation of the land with intent to control it." *Id.* at 571 ¶ 8, 324 P.3d at 857. The lease between Tux-Xpress and Ava Investments states that the leased premises is Suite B. Further, the lease only required Tux-Xpress to periodically sweep the sidewalks and pick up trash. The lease did not require Tux-Xpress to do anything else regarding the area outside of Suite B. Instead, the lease required Ava Investments to maintain the exterior of the building and the sidewalks. Additionally, although other tenants took it upon themselves to plant flowers in the landscape area, Tux-Xpress never did so. On this record, we cannot say that Tux-Xpress either occupied the landscape area or intended to control it in any way. That Tux-Xpress did not change or alter the landscape area since it entered the lease with Ava Investments in 1998 supports this conclusion. Thus, Tux-Xpress did not have a duty to maintain the landscape area in which Yoder fell.

¶10 Yoder contends that as Tux-Xpress's business invitee, Tux-Xpress had a duty to provide reasonably safe means of ingress and egress from its store regardless whether Tux-Xpress exercised any control over the landscape area. Relying in part on *Stephens v. Bashas' Inc.*, 186 Ariz. 427, 924 P.2d 117 (App. 1996), Yoder argues that a business's duty extends beyond its own premises. But *Stephens* is distinguishable. In *Stephens*, a truck driver parked on a major street after a Bashas' employee told him that he could not park at Bashas' for lack of space. 186 Ariz. at 429, 924 P.2d at 119. A car hit Stephens as he walked to the back of his truck. *Id.* at 429, 924 P.2d at 119. Stephens sued Bashas' arguing that Bashas' had a duty to him as a business invitee. *Id.* at 429, 924 P.2d at 119. This Court found that "Bashas' had an affirmative duty to use reasonable care in conducting its business and maintaining its premises to avoid causing injury to Stephens," even though the injury occurred off Bashas' premises. *Id.* at 431, 924 P.2d at 121. Bashas's duty to Stephens as a business invitee arose from its failure to maintain its premises—the area it controlled—not the area where the

accident occurred. Unlike *Stephens*, where Bashas' could have maintained its own lot so that Stephens would not have had to park on a major street, nothing that Tux-Xpress could have done or not done on its own premises would have had any effect on Yoder's use of the landscape area.

¶11 Yoder's reliance on *Timmons* is also misplaced. In *Timmons*, the plaintiff tripped outside of a Ross Dress for Less store and sued both Ross and the property owner for negligence. 234 Ariz. at 570 ¶ 2, 324 P.3d at 856. Ross argued that it had only a non-exclusive easement over the area where Timmons fell and therefore that it did not owe her a duty to keep the area safe. *Id.* at 571 ¶ 13, 324 P.3d at 857. This Court held that although Ross did not own the area where Timmons fell, the easement gave Ross sufficient control over the area to justify a duty to act reasonably in providing for the safety of its invitees. *Id.* at 572 ¶ 16, 324 P.3d at 858. The Court's finding that Ross owed a duty to Timmons arose strictly from Ross's exercise of control over the area where Timmons tripped. Unlike the defendant in *Timmons*, Tux-Xpress's lease with its property owner contained no easement over the area where the accident occurred or any other language conferring control to Tux-Xpress and thus Tux-Xpress did not control or express an intent to control the area.[2]

¶12 Accordingly, a business owes a duty to its invitees when the business controls the area where an accident happens or when it fails to properly maintain its premises and that failure subsequently leads to an accident off its premises. Because Tux-Xpress did not control the landscape area, and Yoder did not show that Tux-Xpress failed to reasonably maintain Suite B, it did not owe a duty of care to Yoder.

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[2] Yoder also relies on *Udy v. Calvary Corp.*, 162 Ariz. 7, 780 P.2d 1055 (1989). *Udy* is not useful here because it addressed a landlord's duty to a tenant and not a tenant's duty to a business invitee. We note, however, that the two concurring opinions considered the landlord's control over the premises in finding a duty existed. *See id.* at 16, 780 P.2d at 1064 (Jacobson, J., specially concurring) (finding a duty when the landlord controls the tenant's ability to protect himself from off-premises dangers); *id.* at 17, 780 P.2d at 1065 (Gerber, J., specially concurring) (finding the landlord's exclusive control over the premises a central fact in determining duty).

CONCLUSION

¶13 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA