NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AMANDA LYNN FARACI, an individual, Plaintiff/Appellant, v. MAYO CLINIC ARIZONA, an Arizona corporation, Defendant/Appellee.	1 CA-CV 08-0847 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-019522

The Honorable J. Kenneth Mangum, Judge

AFFIRMED

Frederick C. Berry, Jr., PC — Phoenix
By Frederick C. Berry, Jr.,
And
Law Offices of Charles M. Brewer, Ltd. — Phoenix
By David L. Abney
Co-Counsel for Appellant

Snell & Wilmer LLP — Phoenix
By Barry D. Halpern
And Martha E. Gibbs
Scott A. Shuman
Attorneys for Appellee

O R O Z C O, Judge

¶1 Appellant, Amanda Lynn Faraci (Faraci), appeals the trial court's dismissal of all claims against Appellee, Mayo Clinic Arizona, an Arizona corporation (Mayo Clinic). Faraci also appeals the trial court's denial of her motion under Rule 56(f) of the Arizona Rules of Civil Procedure requesting additional time to conduct discovery. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On the night of September 6, 2007, Paige Marie Perry (Perry), a Mayo Clinic employee, was involved in an automobile collision with Faraci. At the time of the accident, Perry had been employed by Mayo Clinic since approximately September 2005, as a Development Officer. As a Development Officer, Perry was primarily responsible for raising money for Mayo Clinic by soliciting donations.

¶3 On the night of the collision, Perry attended a Mayo Clinic "cultivation event." According to Perry, a cultivation event was a "chance for the staff and the benefactors to get to know each other better." Although Mayo Clinic did not require Perry to attend, it was suggested that she attend. Ultimately, Perry attended the event and arrived at approximately 5:00 p.m. Perry did not participate in setting up or planning the event. However, she did deliver brochures to the Event Coordinator.

Additionally, Perry expected to see some of the potential benefactors with whom she was working.

¶4 The event was held at Mayo Clinic's Specialty Building, located approximately thirteen miles from the office where Perry worked. Finger food, wine, water, soda, and other beverages were provided at the event. Perry testified in her deposition that wine served at the cultivation event was provided by a Mayo Clinic benefactor who owned a wine distribution company. Although Perry admitted to drinking wine at the event, she could not recall how much she actually consumed because the wine was served as part of a "tasting."[1] Without knowing how many ounces of wine were in a regular pour, Perry estimated she consumed approximately two glasses of wine during the event.

¶5 It is unclear how long Perry was at the event. However, she testified that "[cultivation] events rarely run longer than an hour or two." Perry left the event and drove to a gas station where she bought gas and a regular-sized bottle of wine. She then drove to a friend's apartment with the wine. Perry did not recall when she arrived at her friend's apartment or how long she was there. However, while she was at her friend's apartment, she drank one glass of wine. At some point that evening, Perry left her friend's apartment and drove to her

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[1] Perry explained that during the "tasting," the server poured sip-sized portions of wine.

parents' home. Sometime between five and ten minutes after leaving her friend's apartment, Perry's vehicle collided with Faraci's vehicle.

¶6 Perry was arrested for extreme driving under the influence (DUI) and a sample of her blood was taken for analysis. The Scottsdale Police Department Crime Laboratory found Perry's blood sample had a blood alcohol concentration (BAC) of 0.158%.

¶7 Perry subsequently pled guilty to DUI and on October 22, 2007, Faraci filed a civil action against Perry, alleging the collision was caused by Perry's negligence. Specifically, Faraci alleged Perry was driving her vehicle under the influence of intoxicating liquor in violation of Arizona law.

¶8 On February 28, 2008, Faraci deposed Perry and discovered the facts relating to Mayo Clinic. On March 28, 2008, Faraci filed a motion for leave to file a first amended complaint seeking to add Mayo Clinic as a defendant. In her First Amended Complaint, Faraci alleged Mayo Clinic was directly liable because it served intoxicating liquor to Perry during the course and scope of her employment. Faraci also alleged Mayo Clinic was vicariously liable because Perry "was operating [her vehicle] within the course and scope of her employment with Mayo Clinic."

¶9 On June 4, 2008, Mayo Clinic filed a motion to dismiss Faraci's claims, arguing: (1) Faraci failed to allege facts creating a right to relief beyond mere speculation; (2) that as a

"social host" under Arizona Revised Statutes (A.R.S.) section 4-301 (2002), Mayo Clinic is not liable for any damages resulting from the serving of spirituous liquor; and (3) Mayo Clinic is not vicariously liable under the doctrine of *respondeat superior* because Perry was not operating her vehicle within the course and scope of her employment.

¶10 On June 17, 2008, Faraci responded, arguing Mayo Clinic's motion to dismiss should be treated as a motion for summary judgment because Mayo Clinic presented matters outside the pleadings. With her response, Faraci filed a Rule 56(f) motion requesting the trial court delay ruling on Mayo Clinic's motion to dismiss until Faraci was able to conduct additional discovery to prepare countering affidavits. Faraci made two arguments in response: (1) that although A.R.S. § 4-301 releases a "social host" from the consequences of serving alcohol to an intoxicated person, Mayo Clinic was not a "social host" because it was serving liquor to further its business pursuits and failed to acquire a special events license under A.R.S. § 4-203.02.A.1 (2002); and (2) that under the holding in *Dickinson v. Edwards*, 105 Wash.2d 457, 716 P.2d 814 (1986), Mayo Clinic could be held vicariously liable.

¶11 In a minute entry dated July 11, 2008, the trial court granted Mayo Clinic's motion to dismiss. The trial court treated the matter as a motion for summary judgment and found no basis

for delaying its ruling, effectively denying Faraci's Rule 56(f) motion. The trial court found that A.R.S. § 4-203.02.A.1[2] was not applicable in this case because Mayo Clinic did not sell alcohol at the cultivation event. As a result, the trial court found Mayo Clinic was immune from liability under A.R.S. § 4-301. Additionally, the trial court found that the doctrine of *respondeat superior* did not support Faraci's claim because Perry was not acting within the scope or course of her employment with Mayo Clinic after leaving the cultivation event.

¶12 On July 14, 2008, Faraci filed a Motion for New Trial or Motion to Amend the Judgment, arguing the trial court should either: (1) allow Faraci to conduct further discovery as requested by her Rule 56(f) motion; or (2) enter a Rule 54(b) judgment to make the July 11, 2008 ruling appealable. On October 21, 2008, after finding "no just reason for delay," the trial court signed an amended order dismissing Faraci's claims against Mayo Clinic. Faraci filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101 (2003).

DISCUSSION

¶13 Faraci presents essentially three issues on appeal: (1) whether the trial court properly dismissed Mayo Clinic after

[2] Although the trial court's minute entry cites to "A.R.S. § 4-203(A)(1)," we assume the trial court intended to cite to § 4-203.02.A.1 because it was the statute cited in Faraci's argument. Furthermore, there is no subsection "(A)(1)" found in § 4-203.

finding the doctrine of *respondeat superior* did not apply; (2) whether the trial court properly dismissed Mayo Clinic under a theory of direct liability for serving liquor at the cultivation event; and (3) whether the trial court properly denied Faraci's Rule 56(f) motion.

¶14 We review a grant of summary judgment *de novo* and view the facts in the light most favorable to the non-moving party. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). A court may grant summary judgment "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). The determination of whether a genuine issue of material fact exists is based on the record made in the trial court. *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994).

Liability under *Respondeat Superior*

¶15 Faraci first argues that Mayo Clinic is vicariously liable under the doctrine of *respondeat superior*. Under Arizona law, "[a]n employer is vicariously liable for the negligent or tortious acts of its employee acting within the scope and course of employment." *Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc.*, 197 Ariz. 535, 540, ¶ 17, 5 P.3d

249, 254 (App. 2000). An employee's conduct is within the scope and course of employment "only if (a) it is the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; and (c) it is actuated, at least in part, by a purpose to serve the [employer]." *Anderson v. Gobea*, 18 Ariz. App. 277, 280, 501 P.2d 453, 456 (1972). Additionally, *at the time of the injury*: "(1) the employee must be subject to the employer's control or right of control; [and] (2) the employee must be acting in furtherance of the employer's business." *Robarge v. Bechtel Power Corp.*, 131 Ariz. 280, 284, 640 P.2d 211, 214 (App. 1982).

¶16 Accordingly, we first look to Perry's conduct *at the time of the collision* and determine whether that conduct was within the scope and course of her employment with Mayo Clinic. *See id.* Faraci alleged in her complaint that the negligent conduct that caused the collision was Perry's driving while under the influence of intoxicating liquor in violation of Arizona law.

¶17 Although Faraci's First Amended Complaint alleges. Perry "was operating [her] vehicle within the course and scope of her employment with Mayo Clinic," the record indicates Faraci has failed to present any evidence supporting this allegation. Rather, the undisputed facts indicate that Perry had left the cultivation event hours before the collision. After leaving the event, not only did Perry leave the control of her employer, but

she also performed several acts that were *not* within the scope and course of her employment with Mayo Clinic. Perry: (1) drove to a gas station; (2) purchased gas for her personal vehicle; (3) purchased a bottle of wine for her own consumption; (4) visited her friend's apartment solely for personal reasons; and (5) left her friend's apartment to drive to her parents' home. As a general rule, "[t]he conduct of an employee who is going to or coming from [her] place of work is generally not within the scope of [her] employment." *Bruce v. Chas Roberts Air Conditioning, Inc.*, 166 Ariz. 221, 226, 801 P.2d 456, 461 (App. 1990).

¶18 Additionally, as the trial court pointed out, Faraci offered "no evidence that Perry was receiving pay during this time, was requested by the Mayo Clinic to stop at her friend's house, or was expecting to meet with more clients that evening." Based on these undisputed facts, only one conclusion may be drawn: Perry's conduct *at the time of the collision* was not in furtherance of Mayo Clinic's business interest and therefore was not within the scope and course of her employment. *See Washington Nat. Trust Co. v. W. M. Dary Co.*, 116 Ariz. 171, 175, 568 P.2d 1069, 1073 (1977) (where only one legal conclusion may be drawn, the trial court may rule as a matter of law). We agree with the trial court that Mayo Clinic is not liable under a theory of *respondeat superior*.

¶19 Nevertheless, Faraci argues we should follow the law of another jurisdiction in making our determination. Faraci contends that we should adopt the rule set forth in *Dickinson v. Edwards*, a case from the State Supreme Court of Washington. 105 Wash.2d 457, 716 P.2d 814. However, we are not bound by the decisions of other states whose courts of last resort have settled an issue. *State ex. rel. Ariz. Dept. of Revenue v. Talley Indus., Inc.*, 182 Ariz. 17, 22, 893 P.2d 17, 22 (App. 1994). This is especially true when this Court has expressly rejected the rule Faraci advocates from *Dickinson*. *Bruce*, 166 Ariz. at 227, 801 P.2d at 462. In *Bruce*, we adopted the reasoning of the dissent in *Dickinson*, which stated that "[w]e have consistently required that the nexus exist at the time the act that results in injury occurs." *Id.* (Citations omitted.)

¶20 We see no reason to depart from our decision in *Bruce*. Even if we adopted the *Dickinson* rule, the facts in this case would be insufficient to create liability. Under *Dickinson*, one of the factors that creates a prima facie case is that the employee must cause "the accident while driving from the [employer's event]." 105 Wash.2d at 468, 716 P.2d at 820. In this case, Perry did not cause the collision while driving from the cultivation event. Rather, she was driving from her friend's apartment. We therefore affirm the trial court's dismissal of Faraci's *respondeat superior* claim against Mayo Clinic.

"Social Host" Immunity under A.R.S. § 4-301

¶21 Faraci argues the trial court improperly dismissed her claims based on the immunity for social hosts under A.R.S. § 4-301. Pursuant to A.R.S. § 4-301:

> A person other than a licensee or an employee of a licensee acting during the employee's working hours or in connection with such employment is not liable in damages to any person who is injured, or to the survivors of any person killed, or for damage to property, which is alleged to have been caused in whole or in part by reason of the furnishing or serving of spirituous liquor to a person of the legal drinking age.

Faraci argues that Mayo Clinic is not immune for five reasons. First, "an employer stays vicariously liable for the acts of an employee that became impaired as part of performing her job duties – and then caused an accident." Faraci's first argument is simply a repetition of her claim under the theory of *respondeat superior*. Although Faraci is correct that § 4-301 does not cut off the possibility of vicarious liability, we have previously addressed that argument.

¶22 Second, Faraci argues that Mayo Clinic was a "business host," not a "social host." However, the legislature has not defined "social host." Therefore, we must look to § 4-301 in considering Faraci's argument. We interpret statutes in accordance with the legislature's intent and look to the plain language of the statute as the best indicator of that intent. *Fragoso v. Fell*, 210 Ariz. 427, 430, ¶ 7, 111 P.3d 1027, 1030

(App. 2005). "If the language is clear and unambiguous, we give effect to that language and do not employ other methods of statutory construction." *Id.*

¶23 Upon reviewing § 4-301, we find the term "social host" is mentioned only in the section heading. Section headings do not constitute part of the law. A.R.S. § 1-212 (Supp. 2008). However, "headings can be used to aid interpretation when ambiguity exists." *Bruce*, 166 Ariz. at 225, 801 P.2d at 460. In this case, no ambiguity exists. The section's operative language makes only one distinction between those who are immune from liability and those who remain potentially liable: that "[a] *person other than a licensee* . . . is not liable." A.R.S. § 4-301 (emphasis added). Pursuant to A.R.S. § 4-101.25 (Supp. 2008)[3], "[p]erson" is defined as including "a partnership, limited liability company, association, company or corporation, as well as a natural person." We agree with *Bruce* that the term "social host" is not restrictive and that it "refers to all categories of persons as enumerated in A.R.S. § 4-101[.25] who are nonlicensed providers of alcohol." *Bruce*, 166 Ariz. at 225, 801 P.2d at 460.

¶24 "Licensee" is defined as "a person who has been issued a license or an interim retail permit pursuant to this title or a

[3] We cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

special event licensee." A.R.S. § 4-101.21. Because Mayo Clinic was not a licensee,[4] and Perry was not an employee of a licensee, we find Mayo Clinic was a "social host" for immunity purposes under § 4-301.

¶25 Third, Faraci argues that Perry "was drinking as part of her job duties." Once again, this is simply a repetition of Faraci's *respondeat superior* claim and has therefore already been addressed.

¶26 Fourth, Faraci argues that because Mayo Clinic "was 'selling' liquor at a business event, Mayo Clinic had a legal duty to do that through a liquor license[] – or to obtain a special events license."[5] However, nothing in the record suggests Mayo Clinic was "selling" liquor at the cultivation event.[6] Moreover, Faraci admits in her own motion for a new trial that "[t]rue, the Plaintiff did not present evidence that

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[4] For the reasons stated *infra* ¶ 26, Mayo Clinic was not required to obtain a license for serving alcohol at the cultivation event.

[5] Faraci cites to A.R.S. § 4-203.02.A.1 and Arizona Administrative Code R19-1-309 to indicate why Mayo Clinic was required to obtain a license. Both require the "selling" of liquor. Therefore, Mayo Clinic needed to have been selling liquor at the cultivation event to require a license.

[6] Faraci argues we should interpret "sell," as defined by A.R.S. § 4-101.30 (Supp. 2009), to mean "to dispose of or to deal with." However, the plain and unambiguous language of A.R.S. § 4-101.30 requires more than simply "disposal." It includes an "intent to sell" or to deliver "for value." A.R.S. § 4-101.30. Faraci's reading of A.R.S. § 4-101.30 is overly broad and thus we reject it.

Mayo Clinic did sell alcohol at this event." Accordingly, the trial court correctly found Mayo Clinic was not selling liquor at the cultivation event and therefore was under no obligation to obtain a liquor license.

¶27 Fifth, Faraci argues that Mayo Clinic is liable for serving alcohol to an obviously intoxicated person in violation of A.R.S. § 4-244.14 (Supp. 2008). However, as Mayo Clinic correctly points out, Faraci failed to make this argument to the trial court and therefore waives it on appeal. *Lansford v. Harris*, 174 Ariz. 413, 419, 850 P.2d 126, 132 (App. 1992). Accordingly, we do not consider this argument. Because the undisputed facts indicate Mayo Clinic was a "social host" serving liquor at the cultivation event, we find the trial court correctly concluded that A.R.S. § 4-301 precludes liability. Therefore, we affirm the trial court's dismissal of Faraci's direct liability claims against Mayo Clinic.

Special Employer-Employee Relationship

¶28 Faraci also argues that "an employer owes a duty of care to third persons for risks posed to those third persons by the special relationship between the employer and its employee." To support this contention, Faraci cites to the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 43(b)(3) and *Gariup Constr. Co., Inc. v. Foster*, a case out of Indiana. 519 N.E.2d 1224 (Ind. 1988). However, these

authorities do not state the law in Arizona. Accordingly, we are not required to follow the law Faraci cites. *Talley*, 182 Ariz. at 22, 893 P.2d at 22. We find this theory of liability to be part of the "liability" precluded by A.R.S. § 4-301 because employers, like Mayo Clinic, are expressly included in § 4-301's definition of a "person other than a licensee." *See* A.R.S. § 4-101.25. Accordingly, we affirm the trial court's dismissal of all claims against Mayo Clinic.

Faraci's Rule 56(f) Motion

¶29 Faraci also argues the trial court improperly denied her Rule 56(f) motion requesting additional time to conduct further discovery. "We will not disturb [a] trial court's Rule 56(f) ruling absent an abuse of discretion." *Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993). The trial court properly treated Mayo Clinic's motion to dismiss as a motion for summary judgment. As a result, Faraci filed a Rule 56(f) motion with her response to Mayo Clinic's motion to dismiss. "The purpose of requiring an affidavit under Rule 56(f) is to avoid addressing a motion for summary judgment until each party has had a full opportunity to ascertain the true facts." *Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 493, 803 P.2d 900, 904 (App. 1990).

¶30 To succeed on a Rule 56(f) motion, "the moving party must present an affidavit informing the court of: (1) the

particular evidence beyond the party's control; (2) the location of the evidence; (3) what the party believes the evidence will reveal; (4) the methods to be used to obtain it; and (5) an estimate of the amount of time the additional discovery will require." *Lewis*, 178 Ariz. at 338, 873 P.2d at 676. In this case, Faraci's Rule 56(f) motion identified the following proposed discovery: (1) the depositions of four proposed witnesses; (2) an outstanding request for document production; and (3) Mayo Clinic's Disclosure Statement. However, after identifying this proposed discovery, Faraci stated only that the discovery "will lead to the discovery of admissible evidence."

¶31 Although Faraci identified the proposed discovery, a vague summary of the evidence to be obtained, without identifying specific facts indicating a genuine issue for trial, is insufficient to delay the trial court's ruling. *Magellan S. Mountain Ltd. P'ship v. Maricopa County*, 192 Ariz. 499, 502, ¶ 10, 968 P.2d 103, 106 (App. 1998). Because Faraci's Rule 56(f) motion failed to identify specific evidence that would show a genuine issue for trial, we find no abuse of discretion in the trial court's denial of Faraci's Rule 56(f) motion and affirm its ruling.

CONCLUSION

¶32 For the reasons stated above, we affirm the trial court's dismissal with prejudice of all claims against Mayo

Clinic. Additionally, we affirm the trial court's denial of Faraci's Rule 56(f) motion.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

PHILIP HALL, Presiding Judge

/S/

DONN KESSLER, Judge