DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SHAWN RAMEY,	)	1 CA-CV 09-0109
	)	
Plaintiff/Appellant,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
WILLIAM PERRY WADLINGTON,	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
Defendant/Appellee.	)	Civil Appellate Procedure)
	)	

Appeal from the Superior Court in Mohave County

Cause No. CV 2007-0088

The Honorable Charles W. Gurtler, Jr., Judge

AFFIRMED

Vannah & Vannah — Las Vegas, NV
By Matthew R. Vannah
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By Stephen D. Hoffman
and Ron Beach
and Karen L. Karr
Attorneys for Defendant/Appellee

N O R R I S, Judge

¶1 This appeal arises out of an aggravated assault by the son of William Perry Wadlington ("Bill") on Shawn Ramey ("Shawn") in January, 2006. The superior court ruled, as a matter of law, Bill was not liable for his son's assault on Shawn under either direct negligence or agency liability theories. We agree with the superior court Bill was entitled to summary judgment and affirm its ruling.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 At the time of the assault, Bill was 89 years old and received in-home care from Cathy, Shawn's wife. Cathy began working for Bill at his home in late 2005.

¶3 Shawn worked out-of-town during the week, and returned and lived with Cathy and Bill on weekends. Bill was aware of this arrangement.

¶4 Cathy and Shawn knew Bill's 59-year-old son, William Mike Wadlington ("Mike"), and considered him a friend. Cathy testified Mike was disabled and needed assistance after taking ten or 12 steps.

¶5 Cathy's friend Roxanne stayed at Bill's home on the night of January 19, 2006. Cathy introduced Roxanne to Bill. Roxanne had also met Mike a few times.

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[1]We view the facts and reasonable inferences to be drawn from those facts in the light most favorable to Shawn, the nonmoving party. *Verma v. Stuhr*, ___ Ariz. ___, ___ ¶ 23, n.2, ___ P.3d ___, ___ n.2, 2009 WL 3517672 (Ariz. App. Oct. 29, 2009).

¶6 Shawn arrived at Bill's home for his weekend visit with Cathy shortly after 3:00 p.m. on January 20, 2006. Around 4:00 p.m., Shawn, Cathy, and Roxanne left for McDonald's to buy dinner for themselves and Bill. All three had been drinking.

¶7 After they left, Bill called Mike. According to his police statement, Bill did not recognize a woman at his house and "told [Mike] that someone was invading his home" and he did not want her in the house "whatsoever." Similarly, Mike told police Bill had called him and reported "someone was 'invading' his residence and he needed help."

¶8 Mike arrived at Bill's home before the three returned. Mike sat on a couch in the living room while Bill sat in a recliner across from Mike. According to his police statement, Mike had brought a knife for protection because he anticipated Roxanne was the uninvited woman and he would have to deal with her.

¶9 Bill told police that after Shawn, Cathy, and Roxanne returned, Mike told him the allegedly unknown woman was Roxanne, a friend of Cathy's. Roxanne left the living room for the bathroom and back bedroom.

¶10 In her deposition, Cathy stated that upon her entrance Mike "right away" started "screaming" at her about the cleanliness of Bill's house and Cathy's decision to bring Roxanne over. Mike told Cathy she was fired. Cathy attempted

to explain to Mike why Roxanne was there, stating "Mike, it's only Roxanne and she stayed the night one night."

¶11 Shawn then told Cathy, "Let's go," walked outside, and grabbed his bags. Mike continued to yell at Cathy for two or three minutes and at some point unsheathed his knife. Shawn then re-entered the home, got within inches of Mike's face and said: "You're ungrateful, and you're not going to talk to my wife like this. She takes care of you and your father both." Mike interpreted Shawn's approach as "an aggressive advancement and threat to my own safety."

¶12 Mike then stabbed Shawn. During these events, Bill sat silently in his chair. Mike was ultimately convicted of aggravated assault and incarcerated.

¶13 Shawn and Cathy sued Bill and Mike and alleged Bill "negligently employ[ed] his son to evict the persons from his home" and was vicariously liable because Mike was acting as Bill's agent or servant at the time of the stabbing. The Rameys ultimately obtained a default judgment against Mike; and Bill moved for summary judgment against them. In support of Bill's motion for summary judgment, Mike submitted an affidavit stating he "acted alone and without direction or instruction from anyone."

¶14 Opposing summary judgment, Shawn argued Bill authorized Mike to confront the Rameys and the unknown woman,

and thus Mike functioned as Bill's agent. According to Shawn, the stabbing was the "natural and probable consequence" of Bill's call to Mike and it was "inevitable" Mike would confront Shawn. Consequently, the assault was foreseeable and Bill had a duty to protect Shawn.

¶15 In statements filed in support of the Rameys' opposition to summary judgment, however, Bill and Shawn said Mike had had no previous altercations with Shawn, and Bill knew of no prior violent incidents between Mike and any other person. Bill remembered Mike used to have a Doberman Pincher and had been "quite violent" with the dog, but did not state when the incident had occurred. Further, Bill acknowledged Mike was disabled and stated Mike had no history of mental problems.

¶16 The superior court granted summary judgment to Bill, and signed a judgment stating "there is no nexus between the telephone call and the incident," and there are no facts to support Bill "either knew or should have known that Defendant William Michael Wadlington brought a knife with him or would have utilized the knife in the manner that he did." This appeal followed.

DISCUSSION

¶17 On appeal, Shawn argues he presented sufficient evidence creating genuine issues of material fact Bill acted negligently in summoning Mike or is responsible for Mike's

attack under agency theories. We review a grant of summary judgment de novo. *Wallace v. Casa Grande Union High Sch. Dist. No. 82*, 184 Ariz. 419, 424, 909 P.2d 486, 491 (App. 1995). Summary judgment is warranted when "the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); *see* Ariz. R. Civ. P. 56(c)(1). A party opposing a summary judgment motion must supply sufficient competent evidence showing a genuine issue of fact. *GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990).

I. Negligence

¶18 The necessary elements of a negligence claim are duty, breach, causation, and damages. *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). A jury ordinarily determines the issues of breach and causation, including whether the risk of harm is foreseeable. *Id.* at 144, ¶ 17, 150 P.3d at 231. Nevertheless, summary judgment is proper when the plaintiff fails to present sufficient evidence of forseeability and possible prevention of harm. *Hill v. Safford Unified Sch. Dist.*, 191 Ariz. 110, 113, 952 P.2d 754, 757 (App. 1997) (citing

Martinez v. Woodmar IV Condominiums Homeowners Assoc., Inc., 189 Ariz. 206, 211, 941 P.2d 218, 223 (1997)).

¶19 On appeal, Shawn focuses his arguments on Bill's alleged breach of a specific duty as a landowner to warn Shawn, a guest, about a foreseeable assault or take other measures. Our review of the complaint and Shawn's response opposing summary judgment discloses no such theory. Accordingly, we decline to address Shawn's arguments concerning this theory of liability on appeal. *See Webber v. Grindle Audio Prods., Inc.*, 204 Ariz. 84, 90, ¶ 26, 60 P.3d 224, 230 (App. 2002) (declining to consider an argument not raised in the superior court's summary judgment litigation).

¶20 But even assuming Bill owed Shawn a duty of care, Shawn failed to raise a triable issue of fact as to whether Bill breached that duty. The essence of Shawn's negligence argument was Mike's violence was foreseeable to Bill and thus Bill breached the standard of care by (1) summoning Mike to his home to "help" him, (2) allowing Mike to wait with a knife, and (3) allowing Mike to escalate a confrontation. Shawn presented no evidence to the superior court Mike's assault on Shawn was foreseeable, however. *See Gipson*, 214 Ariz. at 144, ¶ 16, 150 P.3d at 231 ("foreseeability often determines whether a defendant acted reasonably under the circumstances").

¶21 Specifically, there is nothing in the record indicating Mike was violent or had a propensity towards violence. The record contains no evidence Bill asked Mike to bring a knife, Mike unsheathed the knife in front of Bill before the three returned, or Bill and Mike discussed the knife or what Mike intended to do with the knife before the assault. Indeed, when asked by police whether Mike normally carried a knife, Bill replied: "I, I can't answer that. I don't know." And, Shawn admitted Mike did not have the knife when the two men had visited Bill's home on prior occasions.

¶22 Nevertheless, Shawn argues Mike's violent behavior was foreseeable, pointing to Bill's acknowledgement of Mike's previous "vicious" behavior with his dog. In Arizona, a prior instance of aggressive conduct need not be the same type as the conduct at issue to create a triable issue of fact regarding foreseeability. *Cf. Parsons v. Smithey*, 109 Ariz. 49, 53, 504 P.2d 1272, 1276 (1973) ("Where it is alleged that the parents had knowledge of the child's particular disposition which was such that they should have known that he would commit a certain type of act, many types of evidence may be relevant"). However, Shawn failed to present the superior court with any evidence establishing when Mike's conduct with the dog occurred. Accordingly, the superior court could not determine whether Mike's prior conduct with his dog was relevant and capable of

creating a genuine issue of material fact. *See Clark C.B. v. Fuller*, 872 N.Y.S.2d 781, 781-82 (App. Div. 2009) (reversing denial of summary judgment; parent's knowledge of single prior altercation is not sufficient to establish knowledge of son's propensity to engage in violent or vicious conduct).

¶23 In light of this record, *see also supra* ¶ 15, the superior court properly granted summary judgment on the negligence claim against Bill. *Cf. Pfaff By And Through Stalcup v. Ilstrup*, 155 Ariz. 373, 374, 746 P.2d 1303, 1304 (App. 1987) (summary judgment to parent on negligent supervision theory based on absence of evidence child was violent or assaultive; thus, "it cannot be said that there was a necessity to control the child or a foreseeable risk of injury of the type here involved"); *Olson v. Staggs-Bilt Homes, Inc.*, 23 Ariz. App. 574, 577-78, 534 P.2d 1073, 1076-77 (1975) (home builder not liable as a matter of law for actions of its armed security guard who was not known to be vicious or careless).

II. Agency/Vicarious Liability

¶24 Alternatively, Shawn argues he presented sufficient evidence of an agency relationship between Bill and Mike based on either actual authority or ratification. We disagree.

¶25 Agency is the fiduciary relationship that arises when one person (a principal) manifests assent to another person (an agent) "that the agent shall act on [the principal's] behalf and

subject to [the principal's] control," and there is "consent by the agent to act on behalf of the principal and subject to [the principal's] control." *Dawson v. Withycombe*, 216 Ariz. 84, 100, ¶ 43, 163 P.3d 1034, 1050 (App. 2007). A principal is subject to liability to a third party harmed by an agent's conduct when the conduct "is within the scope of the agent's actual authority or ratified by the principal; and (1) the agent's conduct is tortious, or (2) . . . if [done by] the principal, would subject the principal to tort liability." Restatement (Third) of Agency § 7.04 (2006). Actual authority "may be proved by direct evidence of express contract of agency between the principal and agent or by proof of facts implying such contract or the ratification thereof." *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, 597, ¶ 29, 161 P.3d 1253, 1261 (App. 2007) (quoting *Corral v. Fidelity Bankers Life Ins. Co.*, 129 Ariz. 323, 326, 630 P.2d 1055, 1058 (App. 1981)).

¶26 Agency is generally a question of fact to be determined by the jury. *Schenks v. Earnhardt Ford Sales Co.*, 9 Ariz. App. 555, 557, 454 P.2d 873, 875 (1969) (citation omitted). If the facts viewed most favorably are insufficient to prove agency, it becomes a question of law for the court. *Id.* As the party asserting an agency relationship, Shawn had the burden of presenting a triable issue of fact that Mike was

Bill's agent. *See Brown v. Ariz. Dep't of Real Estate*, 181 Ariz. 320, 326, 890 P.2d 615, 621 (App. 1995).

¶27 Shawn produced no evidence of an express agency contract or any facts implying such a contract existed between Mike and Bill. Bill told Mike someone was "invading" his home and requested "help" but there is no evidence Bill expressly or impliedly authorized Mike to attack anyone.

¶28 Shawn also presented no evidence Bill ratified Mike's assault. Ratification occurs when a principal subsequently approves "a previous unauthorized act by one claiming to act as an agent." *Phoenix W. Holding Corp. v. Gleeson*, 18 Ariz. App. 60, 66, 500 P.2d 320, 326 (1972) (quoting *Young Mines Co. v. Citizens' State Bank*, 37 Ariz. 521, 528-29, 296 P. 247, 250 (1931)). Ratification is demonstrated by approval after the act, not during it or at any other time. *Compare id.* at 66, 500 P.2d at 326 (execution of deed did not constitute ratification because it occurred before alleged act) *with Lee v. United States*, 171 F. Supp. 2d 566, 577 (M.D.N.C. 2001) (employer ratified managerial employee's assault through affidavit of plant manager establishing plant manager believed employee was acting within the scope of employment at the time of the assault).[2] Here, Bill sat silently. Bill's silence during the

[2]Shawn relies on the Restatement (Second) of Agency § 94 cmt. a (1958) for the proposition silence can create an

assault cannot constitute a ratification, and, further, Shawn presented no evidence Bill approved of Mike's conduct after the incident.

¶29 But even if a material dispute of fact exists as to actual authority or ratification, the scope of the alleged agency was to help or protect Bill from a potential home invasion. The undisputed evidence, however, establishes Mike assaulted Shawn because Mike was upset with Cathy regarding the cleanliness of Bill's home and the guest she had invited over. Bill told police that after Shawn, Cathy, and Roxanne returned from McDonald's, Mike had told him the unknown woman was Roxanne and she "had been to the house before." In her deposition, Cathy stated Mike yelled at her for "two or three minutes" before Shawn confronted Mike. *See supra* ¶ 11. Further, the record shows the stabbing occurred as a result of this confrontation. Thus, Mike's assault of Shawn was not within the scope of the alleged agency between Bill and Mike. *Cf. Higgins v. Assmann Elecs., Inc.*, 217 Ariz. 289, 297, ¶ 29, 173 P.3d 453, 461 (App. 2007) (conduct within the scope of agency or employment "may be either of the same nature as that authorized

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affirmation of an unauthorized transaction. The illustrations for this comment, however, involve contracts and sales in which a principal fails to speak up when an agent places an order in the principal's name or the agent agrees to board a horse in the principal's stable. *Id.* illus. 2 & 3. Nothing in the section, comments, or illustrations requires a principal to disavow a criminal assault.

or incidental to that authorized") (quoting *State Dept. of Admin. v. Schallock*, 189 Ariz. 250, 257, 941 P.2d 1275, 1282 (1997)).

CONCLUSION

¶30 For the foregoing reasons, we affirm summary judgment in favor of Bill. As the prevailing party on appeal, Bill is entitled to recover his costs on appeal, subject to his compliance with Arizona Rule of Civil Appellate Procedure 21. *See* Ariz. Rev. Stat. § 12-342 (2003).

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
_____
SHELDON H. WEISBERG, Judge

/s/
_____
MARGARET H. DOWNIE, Judge