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

DIETZ-CRANE BUILDERS, L.L.C., an Arizona limited liability company; DIETZ-CRANE HOMES, L.L.C., an Arizona limited liability company, Defendants/Third-Party Plaintiffs/Appellants, v. HORIZON WASTE SERVICE OF ARIZONA, INC., formerly known as AMERICAN GRADING AND DISPOSAL, INC., an Arizona corporation, Third-Party Defendant/ Appellee.	No. 1 CA-CV 09-0369 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)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. CV2001-005246

The Honorable Edward O. Burke, Judge

AFFIRMED

Gaona Law Firm — Phoenix
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By Rina Rai
Kelly A. Hedberg
Attorneys for Appellee

J O H N S E N, Judge

¶1 Dietz-Crane Builders and Dietz Crane Homes (together, "Dietz-Crane") appeal from the superior court's grant of summary judgment in favor of Horizon Waste Service of Arizona ("Horizon"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2001, a group of homeowners filed a class-action complaint against Dietz-Crane, alleging multiple causes of action relating to construction defects in a subdivision outside Phoenix. Dietz-Crane ultimately entered into an agreement with the class in which it agreed to a stipulated judgment and assigned to the homeowners its claims against its insurers. Before entering that agreement, however, Dietz-Crane in January 2004 filed a third-party complaint against its subcontractors, including Horizon, alleging breach of contract, breach of express warranty, breach of implied warranties, negligence, indemnity and contribution.

¶3 In September 2008, another defendant in the third-party action, Mitchell Electric ("Mitchell"), filed a motion for summary judgment on all of Dietz-Crane's claims. Horizon filed

a joinder in Mitchell's motion. Horizon's joinder stated, in its entirety:

> Third-Party Defendant, Horizon Waste Services of Arizona, Inc. ("Horizon Waste"), by and through undersigned counsel, hereby joins in Third-Party Defendant, Mitchell Electric's Motion for Summary Judgment re: All Claims. Horizon Waste maintains the same position of Mitchell Electric, since Dietz-Crane's experts allocate no damages or fault to the work of Horizon Waste. (See Mitchell Electric, SOF ¶ 11). Based on the foregoing, Horizon Waste respectfully requests that this Court grant Mitchell Electric's Motion for Summary Judgment.

After settling with Dietz-Crane, Mitchell withdrew its motion for summary judgment on December 4, 2008, and the court dismissed Mitchell from the action. Because of the settlement, Dietz-Crane filed no response to Mitchell's motion. Neither, however, did it respond to Horizon's joinder, and the superior court heard oral argument on Horizon's motion on December 19, 2008.

¶4 The court granted summary judgment in favor of Horizon on all of Dietz-Crane's claims. Dietz-Crane timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶5 We review the superior court's entry of summary judgment *de novo*, viewing the facts and inferences in the light most favorable to the non-moving party. *Brookover v. Roberts*

Enters., Inc., 215 Ariz. 52, 55, ¶ 8, 156 P.3d 1157, 1160 (App. 2007). We consider only the evidence that was before the court when it addressed the motion. *Id.* Summary judgment is appropriate when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1). This occurs 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). We may affirm summary judgment even if the superior court "reached the right result for the wrong reason." *Aida Renta Trust v. Maricopa County*, 221 Ariz. 603, 608, ¶ 5, 212 P.3d 941, 946 (App. 2009) (internal quotation omitted).

¶6 Paragraph 11 of the statement of facts in support of Mitchell's motion for summary judgment – the paragraph cited in Horizon's joinder – states that a letter Dietz-Crane sent to the third-party defendants allocates $75,000 in attorney's fees but $0 for any alleged defects to Mitchell. The letter makes an identical allocation to Horizon. According to Dietz-Crane, however, this letter is inadmissible pursuant to Arizona Rule of Evidence 408. Thus, Dietz-Crane argues, because Horizon's joinder rested entirely on this piece of inadmissible evidence,

the court erred when it granted summary judgment in favor of Horizon.

¶7 A party moving for summary judgment must "demonstrat[e] both the absence of any factual conflict and his or her right to judgment." *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990). In determining whether the moving party has met this "burden of production," the court must determine which party bears the burden of proof on the claim or defense at trial. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 117 n.7, ¶ 22, 180 P.3d 977, 982 n.7 (App. 2008).

¶8 If the moving party does not bear the burden of proof at trial, it may meet its burden of production by "'point[ing] out by specific reference to the relevant discovery that no evidence exist[s] to support an essential element of the [non-moving party's] claim' or defense." *Thruston*, 218 Ariz. at 117, ¶ 22, 180 P.3d at 982 (quoting *Orme Sch.*, 166 Ariz. at 310, 802 P.2d at 1009); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Although in such a case the moving party is not required to present evidence negating the non-moving party's claim, it may not rest on "bald assertions" or "conclusory statements" that the non-moving party lacks evidence supporting its claim. *Thruston*, 218 Ariz. at 117-18, ¶¶ 21-23, 180 P.3d at 982-83 (citing *Orme Sch.*, 166 Ariz. at 310, 802 P.2d at 1009).

Also, the non-moving party must have been allowed sufficient opportunity for discovery before the court determines it lacks evidence to supports its claim. *Id.* at 118, ¶ 24, 180 P.3d at 983.

¶9 When the moving party demonstrates that the non-moving party lacks evidence to meet its burden of proof at trial, the burden shifts to the non-moving party to present evidence sufficient to show the existence of a genuine issue of material fact. *Id.* at 119, ¶ 26, 180 P.3d at 984; *see also MacConnell v. Mitten*, 131 Ariz. 22, 25, 638 P.2d 689, 692 (1981). At this point, "[t]o defeat the motion, the non-moving party must call the court's attention to evidence overlooked or ignored by the moving party or must explain why the motion should otherwise be denied." *Thruston*, 218 Ariz. at 119, ¶ 26, 180 P.3d at 984; *see also Hydroculture, Inc. v. Coopers & Lybrand*, 174 Ariz. 277, 283, 848 P.2d 856, 862 (App. 1992) ("defendant can obtain summary judgment when the plaintiff is unprepared to establish a prima facie case").

¶10 Applying these principles here, we hold Horizon met its burden of production and Dietz-Crane failed to demonstrate the existence of a genuine issue of material fact. Contrary to Dietz-Crane's assertion, Horizon's motion relied on more than the assertedly inadmissible letter to demonstrate Dietz-Crane's lack of evidence. Horizon's motion stated that it joined

Mitchell's motion for summary judgment because, as with Mitchell, Dietz-Crane had disclosed no expert evidence of damages or fault attributable to Horizon. Mitchell's motion argued that "there has been no disclosure by [Dietz-Crane] as to legal fees incurred in defending Mitchell Electric's work, there are no experts[']reports implicating Mitchell Electric's work, there are no costs of repairs (Plaintiff's or Defense) or other expert witness testimony that any work performed within Mitchell's scope of work was allegedly defective, and no evidence that a defense was required." In support, Mitchell Electric's statement of facts referenced repair estimates, invoices and reports in the record that contained no attribution of defects or damages to Mitchell.

¶11 Because the motion Horizon joined made "specific reference to the relevant discovery" to demonstrate the absence of evidence to support Dietz-Crane's claims against Horizon, we conclude Horizon met its burden of production. *See Thruston*, 218 Ariz. at 117, ¶ 22, 180 P.3d at 982. The burden then shifted to Dietz-Crane to present evidence sufficient to show the existence of a genuine issue of material fact. *See id.* at 119, ¶ 26, 180 P.3d at 984. Dietz-Crane did not even attempt to meet this burden in the superior court and does not attempt to do so on appeal. *See National Housing Indus., Inc. v. E.L. Jones Dev. Co.*, 118 Ariz. 374, 377-78, 576 P.2d 1374, 1377-78

(App. 1978) (affirming summary judgment entered upon plaintiff's failure to offer expert testimony in engineering design case).[1] Nor did Dietz-Crane argue in the superior court that it lacked sufficient time or opportunity to develop evidence to support its claims against Horizon. By the time of oral argument on the motion for summary judgment, nearly five years had passed since Dietz-Crane had filed its third-party complaint against Horizon and the other subcontractors.

¶12 At oral argument on the motion, Dietz-Crane did not argue that any genuine fact issue existed, nor did it point to evidence to support its claims against Horizon. Instead, it argued only that Horizon's joinder rested entirely on the alleged settlement letter and because a settlement letter is inadmissible, the motion necessarily should fail. On appeal, Dietz-Crane also fails to point to any evidence of damages or faulty work attributable to Horizon, but rests on the same argument it urged in the superior court.

¶13 We do not discern from the "pleadings, deposition[s], answers to interrogatories, and admissions on file, together with the affidavits" in the record any evidence of defective work or damages attributable to Horizon. Ariz. R. Civ. P.

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[1] The non-moving party's failure to respond, by itself, does not permit entry of summary judgment. *Schwab v. Ames Const.*, 207 Ariz. 56, 59, ¶ 15, 83 P.3d 56, 59 (App. 2004). Rather, the superior court must consider the record before it and determine whether there exists any genuine issue of material fact. *Id.*

56(c)(1). Thus, because we conclude Horizon met its burden of showing the absence of evidence to support Dietz-Crane's claims against it and Dietz-Crane failed to demonstrate any issue of material fact, we hold the superior court correctly granted summary judgment in favor of Horizon.

CONCLUSION

¶14 For the foregoing reasons, the judgment of the superior court is affirmed. We grant Horizon's request for attorney's fees pursuant to A.R.S. § 12-341.01 (2003) and its requests for costs pursuant to ARCAP 21.

/s/_____
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/_____
PATRICK IRVINE, Judge

/s/_____
PHILIP HALL, Judge