IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

PATRICK YAGER,
Plaintiff/Appellant,

v.

ALONSO PASTOR,
Defendant/Appellee.

No. 2 CA-CV 2016-0085
Filed November 18, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20150489
The Honorable Stephen C. Villarreal, Judge

AFFIRMED

COUNSEL

Miniat & Wilson, LPC, Tucson
By Jerald R. Wilson
Counsel for Plaintiff/Appellant

Audilett Law PC, Tucson
By Daryl A. Audilett
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Patrick Yager appeals from the trial court's grant of summary judgment in favor of Alonso Pastor on Yager's claim of negligence. Yager contends the court erred in finding that Pastor did not owe a duty of care to Yager based on A.R.S. § 28-4033. Because the trial court ruled correctly, we affirm.

Factual and Procedural Background

¶2 On appeal from summary judgment, we view the facts and all justifiable inferences in the light most favorable to Yager as the non-moving party. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). In November 2014, Yager was driving his motorcycle when he was hit by a van driven by Javier Lopez. Yager suffered significant injuries as a result of the collision.

¶3 Lopez was cited for an unsafe lane change and admitted fault. Lopez owned the van and, at the time of the crash, was working as a driver for a shuttle company. In order to maintain the minimum insurance required to operate a shuttle service, *see* § 28-4033, Lopez asked Pastor, who operates a different shuttle service, to include his van on Pastor's policy, and Pastor agreed. Pastor added Lopez's van to his personal automobile liability insurance policy, but did not inform his insurance company that Lopez owned the van. Each month, Lopez paid Pastor the amount of the premium to insure his van.

¶4 Yager sued both Lopez and Pastor for negligence. When Lopez sought liability coverage under the insurance policy in connection with the lawsuit, the insurance company denied coverage because Pastor's policy was limited to vehicles owned by

Pastor. Yager and Lopez entered a stipulated judgment against Lopez. Pastor moved for summary judgment, arguing he did not owe any duty of care to Yager because he did not own or operate the van. The trial court agreed and entered judgment in favor of Pastor. We have jurisdiction over Yager's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Standard of Review

¶5 On appeal from summary judgment, we determine de novo whether the trial court correctly applied the law and whether there are any genuine disputes as to any material fact. *Dayka & Hackett, L.L.C. v. Del Monte Fresh Produce N.A., Inc.*, 228 Ariz. 533, ¶ 6, 269 P.3d 709, 711-12 (App. 2012). The court should grant summary judgment when "the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). The only issue on appeal is whether Pastor owed a duty of care to Yager, an issue of law we review de novo. *Vasquez v. State*, 220 Ariz. 304, ¶ 22, 206 P.3d 753, 760 (App. 2008).

Common Law Duty of Care

¶6 Yager first argues that Pastor had a duty of care imposed by § 28-4033. A duty of care may be based on public policy, as found in statutes and common law. *US Airways, Inc. v. Qwest Corp.*, 238 Ariz. 413, ¶ 33, 361 P.3d 942, 951 (App. 2015).

¶7 Section 28-4033(A)(2)(b) requires a "person who operates" a shuttle service like Lopez's to maintain a minimum of $750,000 in liability insurance coverage. A.R.S. § 28-4032. A "person" includes an owner or operator. A.R.S. § 28-4031. Our supreme court has found that § 28-4033 gives rise to a passenger's cause of action for negligence against an owner or operator who has

failed to comply with the statutory requirements. *Napier v. Bertram*, 191 Ariz. 238, ¶ 13, 954 P.2d 1389, 1393 (1998).[1]

¶8 Based on the undisputed facts, Pastor did not own or operate the shuttle. Accordingly, § 28-4033 does not apply to him. Yager contends, however, the situation here is analogous to that in *Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228 (2007). In *Gipson*, the defendant gave prescription narcotics to his co-worker for recreational use while at a party involving alcohol. *Id.* ¶¶ 3-4. The co-worker, in turn, gave them to her boyfriend, who later died from the combination of alcohol and narcotics. *Id.* ¶¶ 5-6. The court found the defendant owed a duty of care to the victim based on "[s]everal Arizona statutes [that] prohibit the distribution of prescription drugs to persons lacking a valid prescription." *Id.* ¶ 26. Because the victim fell within the class of persons protected by the statutes, they gave rise to a tortious duty of care. *Id.*

¶9 Yager contends that "Pastor's action in buying and/or procuring [the] required insurance that allowed . . . Lopez to drive on the streets potentially endangering others is no different than the *Gipson* defendant providing drugs to a third party." But the defendant in *Gipson* violated the very statutes that were designed to protect the victim. *Id.* ¶¶ 26, 28. Although Yager correctly points out that he is within the class of persons § 28-4033 is designed to protect, Lopez, and not Pastor, is the one who violated it. *Napier*, 191 Ariz. 238, ¶ 10, 954 P.2d at 1392 (§ 28-4033 "is specifically directed at owners . . . of commercial vehicles"). Yager has not pointed to any statute that Pastor violated by failing to ensure that Lopez was adequately insured, and the statutes he does cite apply only to the owner or operator of the inadequately insured shuttle service or, more generally, the driver of a motor vehicle. A.R.S. §§ 28-4033, 28-4036 (misdemeanor for common carrier to be inadequately insured), 28-4135 (prescribing civil penalties for drivers without

[1] *Napier* refers to A.R.S. § 28-1233, which has since been renumbered as § 28-4033. 191 Ariz. 238, ¶ 8, n.2, 954 P.2d at 1391 & n.2.

adequate insurance).[2] Because Pastor did not own the van or Lopez's shuttle service, and was not the driver, the reasoning of *Gipson* does not support imposing liability on him.

¶10 Yager next argues Pastor owed a common law duty of care "to take affirmative measures to control or avoid increasing the danger from the conduct of others" arising from his relationship with Lopez. As support, he cites two cases involving alcohol-related automobile accidents, in which our supreme court found the person supplying the alcohol owed a duty to the person harmed by the intoxicated driver. *See Ontiveros v. Borak*, 136 Ariz. 500, 506, 667 P.2d 200, 206 (1983) (bartender owed duty to pedestrian struck by intoxicated motorist because foreseeable that serving motorist "30 beers over the space of five or six hours" would lead to "accident likely to cause death or serious injury"); *see also Petolicchio v. Santa Cruz Cty. Fair & Rodeo Ass'n*, 177 Ariz. 256, 261-62, 866 P.2d 1342, 1347-48 (1994) (liquor licensee had duty to general public to ensure alcohol guarded from minors it had notice were accessing and drinking it).

¶11 The court in *Ontiveros* based liability on the defendant's violation of the liquor-licensing statutes, 136 Ariz. at 509-11, 667 P.2d at 209-11, but, as discussed above, Pastor did not violate any relevant statutes here. The court in *Petolicchio* determined the defendant, as a liquor licensee, had a duty to store alcohol in a way that prevented persons who would endanger the public from obtaining it. 177 Ariz. at 261-62, 688 P.2d at 1347-48. Here, Pastor was not in the position of the licensee; Lopez, as the shuttle service operator, was. Yager has not explained, and we fail to see, how unintentionally failing to ensure that Lopez was properly insured is analogous to providing motorists with alcohol who, foreseeably, then drive and cause serious injury because they are intoxicated. We reject Yager's contention that these cases dictate that Pastor owed a common law duty of care to him.

---

[2] Yager additionally cites A.R.S. § 28-4139. That statute prescribes the penalties for displaying a suspended license plate on a vehicle, and is therefore not applicable to this case.

Assumption of a Duty of Care

¶12 Yager next argues that Pastor assumed a duty of care by agreeing to put Lopez's van on his insurance policy. He first relies upon Restatement (Second) of Torts § 324A, which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

¶13 This section limits liability to those whose "undertaking" increases the risk of or results in physical harm to a third person. *See, e.g., Stanley v. McCarver*, 208 Ariz. 219, ¶¶ 2, 15, 92 P.3d 849, 850-51, 854 (2004) (radiologist interpreting plaintiff's x-ray as part of pre-employment tuberculosis screening undertook duty to inform plaintiff of any life-threatening conditions); *Gilbert Tuscany Lender, LLC v. Wells Fargo Bank*, 232 Ariz. 598, ¶ 18, 307 P.3d 1025, 1029 (App. 2013) (declining to impose duty pursuant to Restatement § 324A where plaintiffs suffered no physical harm); *Prof'l Sports, Inc. v. Gillette Sec., Inc.*, 159 Ariz. 218, 222, 766 P.2d 91, 95 (App. 1988) (defendants, who contracted to perform plaintiff's security services, undertook plaintiff's duty to use reasonable care to prevent underage drinking and thus potentially liable for physical harm to minors resulting from negligence in performing that duty);

Papastathis v. Beall, 150 Ariz. 279, 282, 723 P.2d 97, 100 (App. 1986) (franchisor who undertook responsibility for inspecting soft drink racks liable when customer injured by soft drink falling off rack).

¶14 In each of the above cases, the defendant's relationship with the injured person was such that the defendant's failure to exercise reasonable care in performing their duty increased the risk of or resulted in the "physical harm." Pastor's undertaking was to assist Lopez in complying with the insurance mandates under § 28-4033. Any failure to exercise reasonable care in that undertaking did not increase the risk of or cause the physical harm associated with Lopez unsafely changing lanes and hitting Yager. Accordingly, § 324A does not apply here.

¶15 Yager next argues that *Napier* compels the conclusion that Pastor undertook Lopez's duty under § 28-4033. He points to the court's statement that a person "may maintain an action in negligence against a person responsible for acquiring or ensuring the acquisition of insurance coverage as provided in" § 28-4033. *Napier*, 191 Ariz. 238, ¶ 22, 954 P.2d at 1395. He thus reasons that because Pastor contacted the insurance company to obtain the coverage, signed the coverage documents, and arranged the monthly payments, he was "responsible" for procuring the coverage and effectively assumed Lopez's duty imposed by § 28-4033.

¶16 Yager, however, has taken the trial court's statement out of context. The court's reference to "a person responsible" was in the context of the "financial responsibility" dictates of § 28-4033, which apply only to the owner of the vehicle or shuttle service. *Napier*, 191 Ariz. 238, ¶ 22, 954 P.2d at 1395; *see also* A.R.S. §§ 28-4031(3)(a), 28-4033. This is evidenced by the court's earlier statement that, "[g]iven the legislature's goals in enacting [§ 28-4033], the best and perhaps only effective way to attain those goals is to permit a passenger to bring a negligence action for the *owner's* failure to comply with the statutory mandate." *Napier*, 191 Ariz. 238, ¶ 13, 954 P.2d at 1393 (emphasis added).

¶17 Additionally, the court in *Napier* determined that an insurance agent did not owe a duty to the non-client passenger to ensure the common carrier was properly insured. *Id.* ¶ 21. Although

Yager attempts to distinguish that conclusion from the facts here, he has not provided any legal authority supporting his position and we find his arguments unpersuasive. If a professional insurance agent does not owe a duty to third parties, then Pastor, a layperson attempting to help a friend insure his vehicle, can hardly be said to nevertheless have such a duty. *Napier* does not support Yager's argument that Pastor assumed Lopez's statutory duty to carry the mandated insurance. That duty was owed by Lopez. *Id.* ¶ 13.

¶18 Yager additionally argues Pastor assumed a duty based on *Smith v. Johnson*, 183 Ariz. 38, 899 P.2d 199 (App. 1995). In that case, the defendant made a left turn, relying on a fellow motorist's signal that it was safe to do so. *Id.* at 40, 899 P.2d at 201. While making the turn, the defendant's and plaintiff's cars collided. *Id.* The plaintiff sought to exclude evidence of the signaling motorist on the grounds that he owed her no legal duty. *Id.* at 44, 899 P.2d at 205. In affirming the trial court's denial of that request, this court stated that once the signaling motorist decided to act, he had a duty to do so carefully. *Id.* at 45, 899 P.2d at 206.

¶19 Our conclusion in that case was based on the case law specific to motorists who chose to signal fellow motorists. *Id.* at 44-45, 899 P.2d at 205-06. And the signaling motorist was a cause of the physical injury. *Id.* at 40, 899 P.2d at 201. Here, both § 28-4033 and *Napier* limit the liability for failure to comply with the statutory requirements to the owner of the vehicle. *Smith* is not instructive or persuasive in this case and we reject Yager's argument premised upon it.

Joint Enterprise

¶20 Yager next argues that Pastor owed him a duty of care because he had a joint enterprise with Lopez. Restatement (Second) of Torts § 876 states that:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Liability under this section requires a showing the parties agreed to engage in tortious conduct or that a tortious result was the goal of their actions. *Id.* cmts. a-e.

¶21 In *Gomez v. Hensley*, three truck drivers agreed to drive in a convoy and above the posted speed limit. 145 Ariz. 176, 177-78, 700 P.2d 874, 875-76 (App. 1984). One of the drivers hit a pickup truck, killing or injuring all the occupants. *Id.* at 177, 700 P.2d at 875. Because the evidence showed that all three drivers had agreed to engage in the tortious conduct of speeding in excess of the speed limits, all three drivers could be liable for the injuries based on a theory of joint enterprise. *Id.* at 179, 700 P.2d at 877.

¶22 Yager argues *Gomez* supports his proposition that Pastor was acting in concert with Lopez. But unlike the truck drivers in *Gomez*, Yager has not alleged, nor does the evidence suggest, that Pastor and Lopez intentionally engaged in a tortious act together. On the contrary, the evidence shows that both men believed placing Lopez's van on Pastor's insurance policy complied with the requirements of § 28-4033. Yager has not shown Pastor acted in concert with him to commit a tortious act.

Negligent Entrustment

¶23 Yager lastly argues that Pastor is liable based on the theory of negligent entrustment. The first element of negligent

entrustment, however, is that the defendant owns or controls the vehicle involved. *Acuna v. Kroack*, 212 Ariz. 104, ¶ 22, 128 P.3d 221, 227 (App. 2006). The parties do not dispute that Pastor neither owned nor controlled Lopez's van. Consequently, Yager's argument on this issue fails.

Disposition

¶24 For the foregoing reasons, we affirm the trial court's judgment.