DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JBME COMPANY, LLC, an Arizona limited liability company, Plaintiff/Appellant, v. FIRST AMERICAN TITLE COMPANY, a California corporation, Defendant/Appellee.	No. 1 CA-CV 12-0301 1 CA-CV 12-0459 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
JBME COMPANY, LLC, an Arizona limited liability company, Plaintiff/Appellant, v. SERVICELINK VALUATION SOLUTIONS, LLC, a Delaware limited liability company and a division of Chicago Title Insurance Company, Defendant/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2010-030971

The Honorable Mark Brain, Judge

AFFIRMED

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H A L L, Judge

¶1 JBME Company, LLC (JBME) appeals from the superior court's dismissal of its complaint against First American Title Insurance Company (First American). JBME also appeals from the superior court's grant of summary judgment in favor of ServiceLink Valuation Solutions, LLC (ServiceLink). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In early 2005, JBME owned Maricopa County Parcel Numbers 212-08-372E, K and L. On May 4, 2005, JBME executed a warranty deed transferring a parcel of property to Douglas and Stacie Tower. The exhibit attached to the warranty deed contained a legal description of Parcel L; which was a mistake because JBME had intended to convey Parcel K. On October 28, 2005, the Towers executed a warranty deed transferring the property to Rick Low and Jeanine Krall. The exhibit attached to the warranty deed contained a legal description of Parcel L. On

August 11, 2006, Low and Krall executed a deed of trust in favor of Plaza Home Mortgage, Inc. The exhibit attached to the deed of trust contained a legal description of Parcel L.

¶3 On October 1, 2008, the May 4, 2005 warranty deed transfer from JBME to the Towers was re-recorded (at the request of Guaranty Title Agency). In the re-recording, the original exhibit attached to the warranty deed, providing a legal description of Parcel L, was struck and a legal description of Parcel K was attached. On October 9, 2008, the October 28, 2005 warranty deed transfer from the Towers to Low and Krall was re-recorded (at the request of Monument Homes). In the re-recording, the original exhibit attached to the warranty deed, providing a legal description of Parcel L, was struck and a "corrected" legal description of Parcel K was attached. On December 8, 2008, the August 11, 2006 deed of trust in favor of Plaza Home Mortgage was re-recorded (at the request of First American). In the re-recording, the legal description of the property consisted of two parcels, both Parcel K and Parcel L.

¶4 On December 30, 2008, the May 4, 2005 warranty deed (JBME to the Towers) was re-recorded a second time, with a "corrected" legal description encompassing both Parcel K and Parcel L. On the same date, the October 28, 2005 warranty deed (the Towers to Low and Krall) was re-recorded a second time,

with a “corrected” legal description encompassing both Parcel K and Parcel L.

¶5 On March 31, 2009, a trustee’s deed upon sale was executed by the California Reconveyance Company (as trustee under the deed of trust held by Plaza Home Mortgage) in favor of U.S. Bank. The attached exhibit provided a legal description of Parcel L.

¶6 On May 11, 2009, the May 4, 2005 warranty deed (JBME to the Towers) was re-recorded a third time, with a “corrected” legal description encompassing only Parcel K. On May 11, 2009, the October 28, 2005 warranty deed (the Towers to Low and Krall) was recorded a third time, with a “corrected” legal description encompassing only Parcel K. On the same date, the August 11, 2006 deed of trust was re-recorded, with a “corrected” legal description encompassing only Parcel K.

¶7 Meanwhile, subsequent to its trustee’s deed upon sale acquisition, U.S. Bank contracted with ServiceLink to market the property. On August 10, 2009, U.S. Bank executed a special warranty deed in favor of Robert and Elizabeth Yeary, which ServiceLink recorded. The legal description attached to the special warranty deed encompassed Parcel K and Parcel L.

¶8 On May 6, 2010, JBME sent the Yearys a letter demanding that they quit-claim their interest in Parcel L to

JBME. The Yearys did not quit claim their interest in Parcel L to JBME.

¶9 On December 9, 2010, JBME filed a complaint in superior court (1) to quiet title to Parcel L (against the Yearys and U.S. Bank), (2) for damages for unjust enrichment (against the Yearys and U.S. Bank), (3) for damages for negligence (against ServiceLink), and (4) for damages for conversion (against U.S. Bank). On August 24, 2011, JBME filed an amended complaint adding, as relevant here, First American to its claim for damages for negligence. The claim for negligence against First American and ServiceLink states in pertinent part:

> 80. The above-referenced defendants owed a duty to JBME to, among other things, not conduct business in a manner as to deprive JBME of property which JBME is the owner of.
>
> 81. The above-referenced defendants breached their duty owed to JBME by preparing and/or recording certain documents that inaccurately conveyed or granted as security property legally owned by JBME.
>
> 82. Due to this breach of duty by the above-referenced defendants, JBME has been forced to file this litigation in order to quiet title in Parcel 212-08-372L, in addition to facing the possibility of the loss of ownership of Parcel 212-08-372L.
>
> 83. As a result thereof, JBME is suffering damages in at least the form of attorneys' fees and costs incurred, for which the above-referenced defendants should be held liable.

¶10 On November 11, 2011, First American filed a motion to dismiss the complaint arguing, among other things, that it owed

no duty to JBME and therefore JBME could not prove its allegation of negligence. On December 19, 2011, the superior court held a hearing on First American's motion to dismiss. At the hearing, counsel for JBME asserted that First American had "a duty not to record documents that divest [] JBME of their interest in property without JBME's authority." In response, counsel for First American countered that First American was involved in recording only one document, the re-recording of the deed of trust transfer from Low and Krall to Plaza Home Mortgage, and that the recording was part of a loan escrow and therefore First American only had a duty to the parties to the escrow.

¶11 On January 3, 2012, after taking the matter under advisement, the superior court issued an unsigned minute entry granting First American's motion to dismiss, stating in relevant part:

> The allegations in the First Amended Complaint against [First American] are extraordinarily cursory. [First American] is identified (paragraph 6) and alleged to have re-recorded a deed of trust between Rick Low and Plaza Home Mortgage, Inc. (paragraph 26). What follows is a broad statement that [First American] owes [JBME] a duty (paragraph 80), that it "prepared and/or recorded certain documents that inaccurately conveyed or granted as security property legally owned by JBME," (paragraph 81), and that as a result, plaintiff faces consequences and seeks damages (paragraphs 82-83). At argument, [JBME] acknowledged that it never had a relationship with [First American].

> [First American] is apparently being sued as an escrow company. Arizona's courts have limited the duties owed by escrow companies in two ways. First, courts have limited their duties to their principals: the agent must comply strictly with the terms of the escrow agreement and disclose facts that a reasonable escrow agent would perceive as evidence of fraud being committed on a party to the escrow. *Burkons v. Ticor Title Ins. Co of California*, 168 Ariz. 345, 813 P.2d 710 (1991). Second, the courts have generally refused to acknowledge a duty to third parties such as plaintiff. *E.g. Luce v. State Title Agency*, 190 Ariz. 500, 502, 950 P.2d 159, 161 (1997) ("Generally, a title company's duties are to those with whom it has a contractual relationship."); *Maxfield v. Martin*, 217 Ariz. 312, 173 P.3d 476 (2008) (recognizing a duty to a "third-party" in the limited circumstance where the escrow was intended to include the third-party as a party to the contract).
>
> Plaintiff's complaint, even construed as charitably as possible to plaintiff, offers nothing to suggest that [First American] owed it a duty sounding in negligence (which is how Count 4 is captioned). Plaintiff cites no case holding that an escrow company can be sued for negligence in such circumstances (and the Court is unaware of any such case).

¶12 The following day, ServiceLink filed a motion for summary judgment, contending that it owed no duty to JBME as a matter of law. On April 9, 2012, the superior court issued an unsigned minute entry granting ServiceLink's motion for summary judgment. Incorporating by reference its January 3, 2012 minute entry granting First American's motion to dismiss, the superior court held that, for the same reasons, "ServiceLink is entitled to judgment as a matter of law."

¶13 The superior court reduced its minute entry rulings to final signed judgments. JBME timely appealed. JBME filed a

motion to consolidate the appeals, which we granted. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶14 On appeal, JBME contends that the superior court erred by finding that neither First American nor ServiceLink owed JBME a duty. First, JBME argues that First American and ServiceLink owed JBME a duty because they "could both reasonably foresee" that their conduct would cause JBME harm. Second, JBME claims that First American and ServiceLink owed JBME a duty arising out of contract because their contractual obligations affected JBME as a third-party. Third, JBME maintains that the superior court erred by determining that First American and ServiceLink's actions, as relevant here, occurred within the scope of escrow proceedings. In the alternative, JBME contends that it was an involuntary party to the escrow proceedings and therefore a party to whom a duty was owed. Finally, JBME asserts that First American and ServiceLink owed JBME a duty pursuant to Restatement (Second) of Torts § 324A (1977). We address each argument in turn.

¶15 We review a superior court's grant of a motion to dismiss de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, 356-57, ¶¶ 7-8, 284 P.3d 863, 866-67 (2012). We will "uphold dismissal only if the plaintiffs would not be entitled to relief

under any facts susceptible of proof in the statement of the claim." *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996). In determining whether a complaint states a claim on which relief can be granted, we must assume the truth of all well-pleaded factual allegations and resolve all inferences in favor of the party opposing the motion to dismiss. *Cullen v. Auto-Owners Ins. Co*., 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008). The dismissal of a complaint for failure to state a claim is appropriate when "as a matter of law . . . the plaintiff would not be entitled to relief under any interpretation of the facts." *Bunker's Glass Co. v. Pilkington PLC*, 202 Ariz. 481, 485, 47 P.3d 1119, 1123 (App. 2002).

¶16 Likewise, we review de novo a grant of summary judgment, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment is appropriate when "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). Summary judgment is proper "if the facts produced in support of the claim . . . 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." *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶17 Under Arizona common law, a plaintiff is required to prove four elements to establish a claim for negligence: (1) the existence of a duty recognized by law requiring the defendant to conform to a certain standard of care; (2) the defendant's breach of that duty; (3) a causal connection between the breach and the plaintiff's resulting injury; and (4) actual damages. *Delci v. Gutierrez Trucking Co.*, 229 Ariz. 333, 335, ¶ 7, 275 P.3d 632, 635 (App. 2012). A duty is 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 ¶ 8 (quoting *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 10, 150 P.3d 228, 230 (2007)).

¶18 The existence of a duty is a question of law that we review de novo. *Delci*, 229 Ariz. at 335, ¶ 8, 275 P.3d at 634. "Whether a defendant owes the plaintiff a duty is a threshold issue." *Id*. "If no duty is owed, a negligence action cannot be maintained." *Id*.

¶19 JBME first argues that First American and ServiceLink owed it a duty of care because it was foreseeable that JBME would be harmed by their conduct.

¶20 In *Gipson*, the supreme court held "that evaluating whether an injury to a particular plaintiff was foreseeable by

the defendant requires a fact-specific inquiry reserved for the jury, and therefore foreseeability 'is more properly applied to the factual determinations of breach and causation than to the legal determination of duty.'" *Id*. (quoting *Gipson*, 214 Ariz. at 144, ¶¶ 16-17, 150 P.3d at 231). For that reason, the supreme court held that a duty may not be predicated on the foreseeability of harm to others. *Gipson*, 214 Ariz. at 144, ¶ 15, 150 P.3d at 231 ("[F]oreseeability is not a factor to be considered by courts when making determinations of duty.").

¶21 Absent a foreseeability analysis, the *Gipson* court "discussed two scenarios that may give rise to a duty of care: (1) the relationship between the parties, and (2) public policy." *Delci*, 229 Ariz. at 336, ¶ 12, 275 P.3d at 635 (citing *Gipson*, 214 Ariz. at 144-46, ¶¶ 18-26, 150 P.3d at 231-33). A duty of care may arise from a special relationship "based on contract, family relations, or conduct undertaken by the defendant." *Gipson*, 214 Ariz. at 144-45, ¶ 18, 150 P.3d at 231-32. "Public policy used to determine the existence of a duty may be found in state statutory laws and the common law." *Delci*, 229 Ariz. at 336, ¶ 12, 275 P.3d at 635.

¶22 JBME asserts that First American and ServiceLink owed JBME a duty arising out of contract. Relying on *Professional Sports, Inc. v. Gillette Sec., Inc*., 159 Ariz. 218, 766 P.2d 91 (App. 1988), JBME argues that First American's escrow contract

and ServiceLink's marketing contract serve "as the basis for a third-party duty" because the contracts required First American and ServiceLink "to perform certain functions affecting" JBME.

¶23 In *Professional Sports*, the defendant security company entered a contract with a professional sports team to "monitor alcoholic beverage service and consumption" and "detect" the attempted purchase and consumption of alcoholic beverages by underage persons attending the team's sporting events. 159 Ariz. at 219, 766 P.2d at 92. The underage plaintiff was injured after consuming alcohol at a sporting event and then being struck by a vehicle upon leaving the stadium. *Id*. In analyzing whether the defendant owed a duty to the plaintiff, the court acknowledged that a duty, generally, does not arise out of contract unless there is a direct contractual relationship between the negligent and injured parties. *Id*. Nonetheless, the court found that, because the defendant's contract specifically "included preventing underage persons [such as the plaintiff] from purchasing and consuming alcohol," the defendant's duty to exercise reasonable care in performing its contractual obligations extended to the plaintiff. *Id*.

¶24 Unlike the circumstances in *Professional Sports*, JBME has not pled or argued that the First American and ServiceLink contracts in any way provided for the rendering of services to JBME as a third party. Indeed, there is no suggestion that JBME

was contemplated or referenced directly or indirectly in those contracts. Therefore, *Professional Sports* is readily distinguishable and we perceive no basis for departing from the general rule that a duty does not arise out of contract absent privity between the injured and negligent parties. *See Forbes v. Romo*, 123 Ariz. 548, 551, 601 P.2d 311, 314 (App. 1979) (explaining that, in general, "no cause of action in tort for negligence arises from breach of a duty created by virtue of contract unless there exists between the defendant and the injured person privity of contract").

¶25 JBME next argues that it was an "involuntary party to the escrow" and therefore First American and ServiceLink owe JBME a duty from their escrow relationship.

¶26 "An escrow agent has a fiduciary relationship of trust and confidence to the parties to the escrow." *Maxfield v. Martin*, 217 Ariz. 312, 314, ¶ 12, 173 P.3d 476, 478 (App. 2007). "The escrow relationship gives rise to two specific fiduciary duties to the principals: to comply strictly with the terms of the escrow agreement and to disclose facts that a reasonable escrow agent would perceive as evidence of fraud being committed on a party to the escrow." *Id*. "The existence of a fiduciary duty is a question of law we review de novo." *Id*.

¶27 As explained in *Maxfield*, an escrow agent has a fiduciary duty to all persons identified as parties to escrow,

even an "involuntary party to the transaction." *Id*. at 315, ¶ 14, 173 P.3d at 479. In that case, a woman wearing a wig and sunglasses posed as the plaintiff and handled all transactions with the defendant title company. *Id*. at 477, ¶ 4, 173 P.3d at 477. The title company "knew that the loan documents had not been signed or verified" by the mortgage company, but had instead "been given to a third person who had obtained the signature and returned them." *Id*. at 313, ¶ 3, 173 P.3d at 477. Nonetheless, the title company never contacted the plaintiff to inform her of its actions in recording a deed of trust against her property. *Id*. at 315, ¶ 14, 173 P.3d at 479. This court held that the title company owed a duty to the plaintiff "because the escrow instructions identified [the plaintiff] as a party entitled to the protection of fiduciary duties." *Id*. We further held that, "as part of its duty," the title company should have confirmed her identity. *Id*.

¶28 In contrast, here, JBME was not identified in the escrow documents as a party entitled to the protection of fiduciary duties. JBME has not cited, nor has our research revealed, any authority for its claim that an escrow agent has a fiduciary duty to persons not identified as parties to escrow,

that may nonetheless be affected by the escrow transactions. Therefore, this claim is groundless.[1]

¶29 Finally, JBME contends that First American and ServiceLink owed it a duty pursuant to Restatement (Second) of Torts § 324A (1977).

¶30 Restatement (Second) § 324A 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.

(Emphasis added).

¶31 This section of the Restatement extends liability for physical harm, not economic harm. As such, this section has no application here, in which the only alleged harm is financial.

[1] To the extent JBME argues that the superior court erred by "narrowly" considering only whether First American and ServiceLink owed JBME a duty through an escrow relationship, we note that, as discussed *supra* ¶ 20, First American and ServiceLink did not owe JBME a general duty based on foreseeability of harm, and therefore the superior court properly considered whether the parties had a special relationship that could form the basis for a duty.

Therefore, the superior court did not err by finding neither First American nor ServiceLink owed a duty to JBME.[2]

¶32 First American and ServiceLink have requested their attorneys' fees and costs incurred on appeal pursuant to A.R.S. § 12-341.01 (Supp. 2013) on the basis that JBME claimed the existence of a contractual relationship, which required them to prove "there was none." *See Lacer v. Navajo County*, 141 Ariz. 392, 394, 687 P.2d 400, 402 (App. 1984) ("A party is entitled to an award of its attorney's fees under A.R.S. § 12-341.01 if judgment in its favor is based upon the absence of the contract sued upon by the adverse party."). In the exercise of our discretion, we grant First American and ServiceLink their reasonable attorneys' fees and costs incurred on appeal in an amount to be determined upon their compliance with Arizona Rule of Civil Appellate Procedure 21.

[2] In its reply brief, JBME argues for the first time that First American and ServiceLink owed it a duty on public policy grounds. Because JBME failed to raise this issue in its opening brief, it is waived and we do not address it. *See Varsity Gold, Inc. v. Porzio*, 202 Ariz. 355, 357, ¶ 9, 45 P.3d 352, 354 (App. 2002) (explaining that arguments raised for the first time in a reply brief deprive the other party of the opportunity to respond and are therefore deemed waived).

CONCLUSION

¶33 For the foregoing reasons, we affirm the superior court's dismissal of JBME's complaint against First American and its grant of summary judgment in favor of ServiceLink.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
MARGARET H. DOWNIE, Presiding Judge

_/s/_____
MAURICE PORTLEY, Judge