IN THE
# ARIZONA COURT OF APPEALS
**DIVISION ONE**

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WILLIAM BLACK,
*Plaintiff/Appellant*,

*v.*

SENSING ENTERPRISES INC., et al.,
*Defendants/Appellees*.

No. 1 CA-CV 20-0024
FILED 12-22-2020

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Appeal from the Superior Court in Maricopa County
No. CV2018-004348
The Honorable Rosa Mroz, Judge

**AFFIRMED**

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COUNSEL

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Jones, Skelton & Hochuli, P.L.C., Phoenix
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*Counsel for Defendant/Appellee W.J. Sullivan Construction Company*

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**MEMORANDUM DECISION**

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge D. Steven Williams and Judge David D. Weinzweig joined.

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**T H U M M A**, Judge:

**¶1** A journeyman painter fell through a skylight and was seriously injured while repainting a warehouse. The painter sued the owner of the warehouse, the tenant and the general contractor, claiming each had neglected its safety responsibilities. The superior court granted defendants summary judgment, concluding they owed no duty to the painter, who was employed by a non-party subcontractor controlling the work. Because the painter has shown no error, summary judgment is affirmed.

**FACTS AND PROCEDURAL HISTORY**

**¶2** Defendant Pruitt's Warehousing, LLC owns a commercial warehouse in Phoenix. For decades, Pruitt has leased the warehouse to defendant Sensing Enterprises, Inc. (collectively, Pruitt and its tenant are referred to as Sensing). During that time, defendant W.J. Sullivan Construction Co. (Sullivan) has served as Sensing's general contractor, maintaining and repairing the warehouse. When the exterior of the warehouse needed repainting in 2017, Sullivan hired subcontractor Ghaster Painting & Coatings (Ghaster) to do the work. Ghaster assigned its employee (now plaintiff) William Black to power wash the exterior walls to prepare them for painting. Black did so by using a handheld power sprayer, a boom lift and a hose attached to a spigot on the roof of the warehouse.

**¶3** Several days into the project, Sensing asked Ghaster to move its equipment away from a loading dock to allow for a delivery. To do so, Black accessed the roof by boom lift, uncoupled his fall protection gear and detached the sprayer hose from the spigot, gathering its coils in his arms. As he returned to the lift, Black clipped the frame of one of the skylights and fell backward through the skylight, landing on the warehouse floor. Black was seriously injured, with fractures to his back, hip, elbows and wrists and a head injury which caused him to lose sight in his left eye.

**¶4** Black sued Sensing and Sullivan for negligence. After discovery, defendants moved for and were granted summary judgment. This court has jurisdiction over Black's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A) and -2101(A)(1) (2020).[1]

## DISCUSSION

**¶5** Summary judgment should be granted "if 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 moving party must establish that "the facts produced in support of [a] claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the [claim's] proponent." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990).

**¶6** This court reviews the grant of a motion for summary judgment de novo, *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 46 ¶ 16 (App. 2010), viewing the facts and reasonable inferences in a light most favorable to the nonmoving party, *see Andrews v. Blake*, 205 Ariz. 236, 240 ¶ 12 (2003). When uncontroverted, "facts alleged by affidavits attached to a motion for summary judgment may be considered true." *Portonova v. Wilkinson*, 128 Ariz. 501, 502 (1981). A grant of summary judgment will be affirmed if it is correct for any reason. *Hawkins v. State*, 183 Ariz. 100, 103 (App. 1995).

**¶7** Black's claims against Sensing and Sullivan are for common law negligence. Black must therefore plead and prove: (1) defendants owed him a recognized legal duty to conform to a certain standard of care; (2) defendants breached that duty; and each breach was a (3) cause-in-fact and (4) legal (proximate) cause of his (5) resulting damages. *See, e.g.*, *Gipson v. Kasey*, 214 Ariz. 141, 143 ¶ 9 (2007); *Ontiveros v. Borak*, 136 Ariz. 500, 504 (1983); *Boisson v. Ariz. Bd. of Regents*, 236 Ariz. 619, 622 ¶ 5 (App. 2015). The first element — whether defendants owed Black a duty of care — is a question of law subject to de novo review. *See Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 564 ¶ 7 (2018). The remaining elements typically are factual matters unless they can be resolved as a matter of law on the undisputed facts. *See Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 358 (1985).

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

**¶8** The existence of a duty is a "threshold issue" without which a negligence claim "cannot be maintained." *Gipson*, 214 Ariz. at 143 ¶ 11. Here, the superior court granted summary judgment to both defendants, finding neither owed Black a duty. This court therefore considers only whether Sensing or Sullivan owed Black a duty, and if so, the scope of that duty; it does not address the issues of breach, causation or damages.

**¶9** Black argues summary judgment was improper because: (1) defendants owed him a duty to warn of dangerous conditions; (2) Sensing owed him, as a business invitee, a duty to keep the premises reasonably safe and (3) defendants retained sufficient control over Ghaster's work for their general duties of care to apply to him. The court addresses each of Black's arguments in turn.

## I. Duty to Warn of Dangerous Conditions.

**¶10** Black argues the superior court erred in granting summary judgment to both defendants because each owed a duty to warn Ghaster's employees that the skylights were dangerous. For decades, Arizona has recognized the duty standard in Restatement (Second) of Torts (Restatement) § 343 (1965) ("Dangerous Conditions Known to or Discoverable by Possessor"). *See, e.g.*, *Brierly v. Anaconda Co.*, 111 Ariz. 8, 11 (1974). Section 343 provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Restatement § 343.

**¶11** As possessor of the warehouse, Sensing owed Black a duty to warn of hidden or concealed defects on the premises. *See* Restatement § 343; *Citizen's Util., Inc. v. Livingston*, 21 Ariz. App. 48, 53 (1973). As general contractor, Sullivan owed Black the same duty. *Pruett v. Precision Plumbing, Inc.*, 27 Ariz. App. 288, 290 (1976) (construing § 343 to include independent contractors), *rejected on other grounds by Lewis v. N.J. Riebe Enter., Inc.*, 170 Ariz., 384, 389 (1992); *see also Lewis*, 170 Ariz. at 388 (general contractor must give "reasonable warning" to subcontractor's employees of dangers which "are not obvious"). But this duty is limited—neither defendant had a duty to warn Black of dangerous conditions that were "known and obvious" and therefore unlikely to cause injury. *Pruett*, 27 Ariz. App. at 290. "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement § 343A(1); *see also Brierly*, 111 Ariz. at 11 (quoting, approvingly, jury instruction "identical to § 343A(1)").

**¶12** The summary judgment record shows that the danger of falling through the skylights was "known and obvious." Black testified at his deposition that he noticed "a lot" of skylights on the warehouse roof and that the skylights appeared old, sun-damaged and brittle. Black also admitted he believed the skylights would not hold his weight. In addition, Black presented no evidence that defendants should have expected Black would not discover or realize any danger created by the skylights or would fail to protect himself against it. On this record, the court did not err in concluding that any danger created by the skylights was known and obvious to Black and that defendants could properly expect Black to recognize the danger of falling through the skylights on the warehouse roof, which was not generally accessible, and act accordingly. *See Mason v. Ariz. Pub. Serv. Co.*, 127 Ariz. 546, 551 (App. 1980) (finding no duty to warn plaintiff of the "open and obvious" danger of an uninsulated power line). Thus, the court properly found defendants owed Black no duty.

**¶13** Black cites evidence that defendants knew or should have known the skylights were not protected by guardrails and screens he claims were required by regulations promulgated by the federal Occupational Safety and Health Administration (OSHA) and therefore defendants had a duty to warn him of these deficiencies. Black, however, did not argue to the superior court that defendants had a duty of care based on OSHA

regulations. Accordingly, that argument is waived. *Lunney v. State*, 244 Ariz. 170, 181 ¶ 40 (App. 2017).[2]

**¶14** Even on the merits, Black has not shown OSHA regulations could provide the basis for a duty here. *See Pruett*, 27 Ariz. App. at 290 (noting 29 U.S.C. § 653(b)(4) provides "OSHA will not support a cause of action for personal injuries to an employee or a subcontractor") (citing cases); *see also Wendland v. AdobeAir, Inc.*, 223 Ariz. 199, 202 ¶ 13 (App. 2009) (following *Pruett*); 29 U.S.C. § 653(b)(4) ("Nothing in this chapter shall be construed to . . . enlarge or diminish . . . the common law or statutory rights, duties, or liabilities of employers."). On this record, the court properly granted summary judgment to defendants on Black's duty-to-warn claims.

## II. Liability to Business Invitees.

**¶15** Black argues the court erred in granting summary judgment to Sensing because it had a duty to keep the premises reasonably safe for business invitees. More specifically, Black argues the court erred in finding Sensing "owe[d] no duty to the employees of an independent contractor," and in finding that because Black was employed by Ghaster, an independent subcontractor, Sensing could not be liable for Black's injuries as a matter of law.

**¶16** "Arizona courts have consistently recognized that a landowner is not liable for the negligent conduct of an independent contractor unless the landowner has been independently negligent." *Lee v. M and H Enter., Inc.*, 237 Ariz. 172, 175 ¶ 12 (2015) (citing authority). The primary reason for this rule is, when the landowner has no power to control how the independent contractor does its work, the contractor is properly charged with acting to prevent risk and any resulting liability if the contractor fails to do so. *Id.* at 176 ¶ 12. This rule also reflects that independent contractors are assumed to shift the cost of their worker's compensation insurance to the landowners who hire them. *Welker v.*

[2] The only citation to OSHA regulations in the record is in pages 11 and 13 of an expert report attached to Black's statement of facts opposing Sullivan's motion for summary judgment. A passing reference in an exhibit that is not mentioned in a motion or supporting briefing is insufficient to preserve an argument for appeal. *See Payne v. Payne*, 12 Ariz. App. 434, 435 (1970) ("[A] party must timely present [its] legal theories to the trial court so as to give the trial court an opportunity to rule properly."). Black's OSHA argument as to Sensing is also waived given this expert report was not filed until a month *after* entry of summary judgment for Sensing.

*Kennecott Copper Co.*, 1 Ariz. App. 395, 403 (1965). Thus, the scope of a landowner's duty to an independent contractor (and an independent contractor's employees) is limited by the degree of control the landowner retains over the independent contractor's work. *Lee*, 237 Ariz. at 178 ¶ 22.

**¶17** Tacitly recognizing this limit, Black asserts the subcontract with Ghaster did not involve any painting on the roof of the warehouse, meaning the roof remained in Sensing's control. This, according to Black, means he should have been treated as a business invitee when he was injured. Black also asserts, as a business invitee, Sensing owed him a duty to ensure the premises were reasonably safe regardless of the degree of control it retained. *See Stephens v. Bashas' Inc.*, 186 Ariz. 427, 430 (App. 1996). The existence of that duty, Black argues, means summary judgment was improper.

**¶18** Contrary to Black's argument, it is undisputed that Black was acting in the scope of his duties as an employee of a subcontractor (Ghaster) when he was injured. That his injuries were caused by a fall from a part of the building that his employer had not been hired to paint does not, somehow, transform him into a business invitee. *Compare Lee*, 237 Ariz. at 176 ¶ 15 (affirming grant of summary judgment for landowner because plaintiff was employed by an independent contractor to assist in cleanup of landowner's worksite), *with Stephens*, 186 Ariz. at 430 (reversing grant of summary judgment for landowner because plaintiff was a business invitee from whom landowner expected an "imminent delivery"). Thus, Sensing's duty to provide Black with reasonably safe premises extended only so far as the degree of control it retained over his work.

## III. Liability for Retained Control.

**¶19** Black argues the court erred in granting summary judgment to both defendants because each retained control over Ghaster's work and are thus subject to liability under Restatement § 414:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

**¶20** Possessors of land and general contractors have a duty to provide employees of their subcontractors with a "reasonably safe" worksite. *Lewis*, 170 Ariz. at 388; *Lee*, 237 Ariz. at 178 ¶ 22. The scope of that duty, however, extends "no further than the control retained" by the possessor of the land or the general contractor. *Lewis*, 170 Ariz. at 388. (quoting *Mason*, 127 Ariz. at 551). Under § 414, then, defendants' respective duties of care extended as far as the scope of their retained control over Ghaster's "actual work," not the premises more broadly. *See Lewis*, 170 Ariz. at 388, 390; *Lee*, 237 Ariz. at 178 ¶ 22 ("[T]o trigger liability under Restatement § 414, a landowner must have retained some measure of control not over the premises of the work site, but over the actual work performed.") (citation omitted).

**¶21** The existence of a duty by a possessor of land or a general contractor is a question of law. *Lee*, 237 Ariz. at 178 ¶ 23. The scope of that duty, however, is defined by the degree of control retained. Although the issue of retained control may be a question of fact, summary judgment may be granted "if no reasonable jury could conclude the landowner, [possessor of land or general contractor] retained control over the work at issue." *Id.*; *see also Orme Sch.*, 166 Ariz. at 309. A possessor of land or a general contractor may retain control over a subcontractor's work either by (1) contract or (2) conduct. *See Lewis*, 170 Ariz. at 390. If either of these considerations shows defendants "assumed affirmative duties with respect to safety," then the scope of their duty to provide a reasonably safe worksite would extend to Black's injuries. *See id.* at 391; *Lee*, 237 Ariz. at 178 ¶ 22; *Vega v. Griffiths Constr., Inc.*, 172 Ariz. 46, 47–48 (App. 1992).

### A. The Superior Court Properly Concluded Sensing Owed Black No Duty Under § 414.

**¶22** Black has produced no evidence that Sensing, by contract, retained control over Ghaster's work. Among other things, the record contains no contract to which Sensing is a party that would allow it to retain control. Black's claim that "Sullivan signed Ghaster's proposal as the agent and representative of" Sensing is untenable, as Sensing's name does not appear in the agreement. And Black has shown no basis for why Sullivan's obligations should be imputed to Sensing. *See Best Choice Fund, LLC v. Low & Childers, P.C.*, 228 Ariz. 502, 510–11 ¶ 26 (App. 2011) (agents "may only bind a principal within the scope of their authority, actual or apparent").

**¶23** Black likewise failed to establish Sensing retained control over Ghaster's work by conduct. In his opposition to summary judgment, Black conceded

> it is undisputed that Defendants did not control the painting work or the work that was being done on the outside walls of the buildings by Ghaster. In fact, it is undisputed that Defendants had no say over Ghaster as to the details of the work of the power washing and painting of the outside walls of the warehouse building.

**¶24** Black now argues Sensing "had direct control over Ghaster's activities" because Black would not have been injured had Sensing not instructed Ghaster to move its equipment away from the loading dock. But a such request to move equipment does not constitute an exercise of control over the manner of the work. It is more analogous to a landowner's rights "to order the work stopped or resumed, to inspect its progress . . . or to prescribe alterations and deviations," which do not trigger liability. *See* Restatement § 414, cmt. c; *Lee*, 237 Ariz. at 179 ¶ 25.

### B. The Superior Court Properly Concluded Sullivan Owed Black No Duty Under § 414.

**¶25** It may have been that Sullivan agreed to assume some, or even ultimate, responsibility for workplace safety in its contract with Sensing, as the general contractors did in *Lewis* and *Vega*. *See* 170 Ariz. at 390–92; 172 Ariz. at 47–48. But the record contains no contract between Sullivan and Sensing. By failing to include it, Black cannot rely on the terms of the contract between Sullivan and Sensing as a basis for any duty by Sullivan to Black under § 414.

**¶26** The parties do include, and focus on, the subcontract between Sullivan and Ghaster. That subcontract, however, does not show Sullivan owed Black a duty under § 414. Instead, under the subcontract between Sullivan and Ghaster, Ghaster agreed to "[m]aintain a clean, safe work area." There is nothing to suggest the subcontract allowed Sullivan to retain control over Ghaster's work.

**¶27** Black contends Ghaster's proposal is subject to OSHA regulations that reserve "overall responsibility" for "safety on the job" to a general contractor, and thus Sullivan retained control over Ghaster's work irrespective of the terms of Ghaster's proposal. As noted above, Black did

not press this argument in superior court, meaning it is waived on appeal. *See Lunney*, 244 Ariz. at 181 ¶ 40. Moreover, although OSHA regulations are admissible to establish a defendant's *compliance* with a duty of care, they are not admissible to *create* a duty of care, or — as Black proposes — to define its scope. *See* 29 U.S.C. § 653(b)(4) ("Nothing in this chapter shall be construed to . . . enlarge or diminish . . . the common law or statutory rights, duties, or liabilities of employers"); *Pruett*, 27 Ariz. App. at 293. This is equally true when, as here, plaintiff was not employed by defendants at the time of the accident. *See Wendland*, 223 Ariz. at 202 ¶ 13 ("For purposes of Mr. Wendland's accident, it is undisputed that AdobeAir was not bound by OSHA regulations, as Mr. Wendland was not an employee of AdobeAir.").

**¶28** The record also contains no evidence of conduct by Sullivan exercising sufficient control or authority over Ghaster's work for the scope of Sullivan's duty of care to extend to Black's injuries. Sullivan did not retain control over the premises, supervise the project or direct Ghaster's employees. Moreover, Ghaster supplied its own equipment and was generally free to perform its work as it saw fit.

**¶29** Testimony about a tacit understanding between Sullivan and Ghaster that the former assumed overall responsibility for project safety does not, as Black asserts, constitute evidence of actual control. Control retained by conduct requires, at minimum, some overt act by which the general contractor exerts some degree of authority over the result, manner or details of the subcontractor's work. *See, e.g.*, *Lewis*, 170 Ariz. at 393 (general contractor supervised and directed plaintiff's work on day of accident and even exercised its safety authority by instructing other workers to vacate the area under plaintiff); *Vega*, 172 Ariz. at 48 (general contractor appointed a safety manager who supervised the site and conducted daily inspections). Accordingly, the superior court properly concluded that, by its conduct, Sullivan exercised insufficient control over Ghaster's subcontracting work to owe Black a duty under § 414.

## CONCLUSION

**¶30** The judgment is affirmed. Because they are the successful parties on appeal, defendants are awarded their taxable costs, contingent upon their compliance with Arizona Rule of Civil Appellate Procedure 21.


AMY M. WOOD • Clerk of the Court
FILED: AA