IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

GWENDOLYN ALOIA, et al., *Plaintiffs/Appellants*,

v.

PLATINUM MEDICAL LLC, et al., *Defendants/Appellees*.

No. 1 CA-CV 20-0176
FILED 4-29-2021

Appeal from the Superior Court in Maricopa County
No. CV2015-013391
The Honorable Timothy J. Thomason, Judge

AFFIRMED

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MEMORANDUM DECISION

Judge Brian Y. Furuya delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Samuel A. Thumma joined.

F U R U Y A, Judge:

¶1 Fourteen plaintiffs[1] appeal the grant of summary judgment to defendants Charles and Amy Oddo (collectively, "the Oddos"), Platinum Training, LLC, Platinum Medical, LLC, and Platinum Medical, Inc. (collectively, "Platinum"), on negligence and vicarious liability claims. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Stephen Gore and his wife owned Biological Resource Center, Inc. ("BRC"), an anatomical donation organization that worked with individuals who chose to donate their bodies for medical and scientific research, testing, and education, and with family members who wished to do so for relatives who had died. Platinum, which is in the business of conducting hands-on medical education programs, procured anatomical specimens from BRC beginning in 2012. The Oddos are officers of Platinum. Platinum did not have access to either the signed donor consent forms or the donors' names and did not interact with, or have contact with, donor families.

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[1] Gwendolyn Aloia, Debbie Beaugez, Tanya Caruso, Nancy Culver, Lee Ann Druding, Agnes Hansen, Troy Harp, Jill Gentry (Hansen), Gwen Timmerman, Helen Peterson, Donna Rector, Richelle Wallace, JoAnn Waller, and Amanda Waterman. Additional plaintiffs in the underlying lawsuit are referenced in the opening brief, but they are not parties to this appeal.

¶3 On March 1, 2013, Platinum and BRC signed an agreement in which BRC agreed to provide anatomical specimens for Platinum, with Platinum reimbursing BRC for the costs of procuring those specimens. On May 24, 2013, Gore signed an employment agreement with Platinum to serve as the Director of Anatomical Operations and became a nine percent owner of Platinum.

¶4 BRC ultimately provided hundreds of bodies to defendant Arthur Rathburn, who is alleged to have dismembered the bodies and sold them to paying customers. After federal and state officers executed search and seizure warrants at BRC's building in Phoenix in 2014, Gore was criminally charged and pled guilty to one count of illegal control of a criminal enterprise committed between January 1, 2010 and January 31, 2014.

¶5 Appellants and other plaintiffs filed a lawsuit against Gore, BRC, Platinum, the Oddos, Rathburn, and others for mishandling their family members' donated bodies. As to Platinum and the Oddos, Appellants claimed intentional infliction of emotional distress, intentional mishandling of bodies and body parts, civil conspiracy, racketeering, and aiding and abetting. Appellants also asserted these same claims against Gore and BRC, along with additional claims for common law fraud and violation of the Arizona Consumer Fraud Act.[2]

¶6 As relevant here, Platinum and the Oddos moved for summary judgment. In response, Appellants argued Gore was an employee and owner of Platinum when he committed the acts that led to his felony conviction and asserted vicarious liability claims based on Gore's employment with Platinum. The superior court granted summary judgment in favor of Platinum and the Oddos on all claims, including vicarious liability claims based on Gore's acts.[3]

¶7 Shortly before the summary judgment ruling, Appellants amended their complaint to add claims against Platinum and the Oddos for negligence and negligent distribution of donated bodies and body parts. Appellants alleged that Platinum and the Oddos owed duties "during the vetting process and operational oversight of BRC," consistent with industry

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[2] Waterman did not allege fraud claims against Gore or BRC.

[3] The superior court permitted other plaintiffs to proceed with vicarious liability claims, finding those plaintiffs' decedents had consent forms and dates of death *after* the date of Gore's employment agreement.

standards "when using and distributing donated bodies" to "ensur[e] proper informed consent had been obtained." Platinum and the Oddos moved for summary judgment regarding these negligence claims as well. Following briefing and oral argument, the superior court found that Platinum owed no duty to Appellants and granted summary judgment for Platinum and the Oddos on the negligence claims.

¶8 At trial, some of the Appellants obtained jury verdicts against Gore on claims for common law fraud, intentional infliction of emotional distress, and mishandling of body parts.[4] Appellants also obtained a default judgment against BRC. The superior court entered a Rule 54(b) judgment in favor of Platinum and the Oddos on the summary judgment rulings. Appellants timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") §§ 12–120.21(A)(1) and –2101(A)(1).

DISCUSSION

¶9 We review *de novo* the grant of summary judgment, viewing the facts "in the light most favorable" to Appellants, against whom summary judgment was entered. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12 (2003). When there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, we will affirm a grant of summary judgment. Ariz. R. Civ. P. 56(a); *Thompson v. Pima Cty*, 226 Ariz. 42, 44, ¶ 5 (App. 2010).

I. Vicarious Liability and Alter Ego

A. *Respondeat Superior* and Gore

¶10 Appellants argue the superior court erred in granting summary judgment to Platinum notwithstanding their vicarious liability theory as to Gore's intentionally tortious conduct. Appellants argue that "[b]ecause Gore was an employee and an owner/member of Platinum, his wrongful acts may be imputed to Platinum directly by virtue of the doctrine of *respondeat superior*." But the court's ruling is supported by the facts.

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[4] Appellants withdrew their claims against Gore for civil conspiracy, racketeering, and aiding and abetting. Gore moved for judgment as a matter of law on the Arizona Consumer Fraud Act claim, which the superior court granted.

¶11 "A basic test to determine if the doctrine of *respondeat superior* applies to hold an employer liable for the negligence of his employee is whether he is subject to the employer's control or right to control the physical conduct of the employee and the performance of his service." *State v. Super. Ct., In & For Maricopa Cty.*, 111 Ariz. 130, 132 (1974) (quotation omitted). Further, a party opposing summary judgment must contest the moving party's evidence with adequately specific and admissible facts that are not composed solely of ultimate facts, conclusions of law, self-serving assertions without factual support in the record, or mere conclusory statements. *See* Ariz. R. Civ. P. 56(e); *Florez v. Sargeant,* 185 Ariz. 521, 526–27 (1996).

¶12 Here, it was undisputed that Gore's employment agreement was dated May 24, 2013. It is likewise undisputed that all Appellants' consent forms for donations were signed prior to this date. Further, the record indicates that Appellants did not provide admissible and non-conclusory evidence in support of their argument that Platinum had the right to control Gore's conduct before Gore was employed by Platinum. Thus, as to these Appellants, all of whom had signed consent forms that predated Gore's employment with Platinum, the superior court noted that Platinum could not be vicariously liable to these Appellants for Gore's actions. Given these circumstances, the court did not err in determining that Appellants could not recover via *respondeat superior*.

¶13 On different but equally compelling grounds, even if it is assumed that Appellants had presented sufficient non-conclusory evidence to sustain a dispute as to Platinum's pre-employment control of Gore, nevertheless, liability would only pertain if they had also shown Gore was acting within the course and scope of his alleged employment with Platinum; that is, if he were performing a service in furtherance of Platinum's business. *See Robarge v. Bechtel Power Corp.,* 131 Ariz. 280, 284 (App. 1982). That issue was not directly adjudicated, but "we may also affirm a trial court on any basis supported by the record." *Leflet v. Redwood Fire & Cas. Ins. Co.*, 226 Ariz. 297, 300, ¶ 12 (App. 2011).

¶14 Here, Appellants do not challenge the superior court's summary judgment ruling as to the course and scope of an employment issue, other than to state in a conclusory fashion that Gore's wrongful acts may be imputed to Platinum via *respondeat superior*. Thus, Appellants' opposition failed to cite anything in the record establishing a disputed issue of material fact (as opposed to conclusory argument and allegations) regarding Gore's scope of employment, or that any of Gore's wrongful conduct was in furtherance of Platinum's medical-education business.

Consequently, summary judgment in favor of Platinum on the vicarious liability claims was additionally proper based upon this failing. *Olson v. Staggs-Bilt Homes, Inc.*, 23 Ariz. App. 574, 576–77 (1975) (noting that an employer is not vicariously liable if an employee is not acting on behalf of the employer and affirming summary judgment).

B. Alter Ego and BRC

¶15 Appellants assert that Platinum may be liable for the tortious actions of BRC under the doctrine of alter ego because Platinum allegedly controlled BRC. The superior court rejected this alter ego theory in its entirety. Given that default judgment was entered against BRC, Appellants could recover from Platinum only if Platinum were the alter ego of BRC. Appellants argue it is a disputed issue of material fact whether Platinum managed, operated, and controlled BRC starting in 2012, such that it was BRC's alter ego.

¶16 To recover under an alter ego theory, a plaintiff must prove "both (1) unity of control and (2) that observance of the corporate form would sanction a fraud or promote injustice." *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 37 (1991). It is not enough that the companies are in some way intertwined—the "unity of control" must be so pronounced that the individuality or separateness of the two entities ceased to exist. *DBT Yuma, L.L.C. v. Yuma Cty. Airport Auth.*, 236 Ariz. 372, 374, ¶ 9 (App. 2014) (quotation omitted), *aff'd in part, vacated in part on other grounds by DBT Yuma, L.L.C. v. Yuma Cty. Airport Auth.*, 238 Ariz. 394 (2015).

¶17 Appellants point to facts indicating that Charles Oddo had an office in BRC's facility, that Gore was (at some point) Platinum's employee and part owner, and many purported facts lacking evidentiary support. *See* Ariz. R. Civ. P. 56(c)(5)–(6) (noting that facts offered in support of summary judgment must be such as would be admissible in evidence); *Florez,* 185 Ariz. at 526. Even assuming the truth of all those facts relied on by Appellants, and even taken together, they still do not show that any unity of control was so pronounced that BRC essentially ceased to exist.

¶18 Moreover, there is no evidence presented that Appellants were tricked into thinking they were dealing with some entity other than BRC. Thus, Appellants cannot show that observance of the corporate form would sanction a fraud. *Taeger v. Catholic Fam. & Cmty. Servs.,* 196 Ariz. 285, 299, ¶ 54 (App. 1999) (finding no fraud in absence of confusion over relationship). The superior court properly granted Platinum summary judgment on the alter ego theory of recovery.

II. Negligence

¶19 Appellants additionally challenge the grant of summary judgment on their negligence claims, for which the superior court found Platinum owed no duty to Appellants. Appellants seek to frame the issue as whether Arizona recognizes a cause of action for negligent interference with dead bodies in the context of whole-body donation programs. At issue, however, is not whether this particular cause of action exists, but instead whether Platinum owed a duty to the appellants.

¶20 The plaintiff bears the burden of establishing a legal duty, which is a threshold issue in maintaining any negligence claim. *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 563–64, ¶¶ 2, 7 (2018). Whether a duty exists is a question of law, "determined *before* the case-specific facts are considered." *Id.* at 564, ¶ 7 (quoting *Gipson v. Kasey*, 214 Ariz. 141, 145, ¶ 21 (2007)). A legal duty arises when there is a special relationship between the parties or can be based on public policy. *Id.* at 563, 565, ¶¶ 2, 14. A duty based on public policy can arise from Arizona state statutes, federal statutes, or the common law. *Id*. at 565, ¶¶ 14–15. We review a superior court's determination of whether a duty exists *de novo*. *Id.* at 564, ¶ 7.

¶21 Appellants assert there is a common law duty to treat human remains in a non-negligent manner and that Arizona also recognizes a private cause of action to remedy breaches of that duty pursuant to Restatement (Second) of Torts § 868 (1979). That Restatement provision provides:

> One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.

Relying on *Morton v. Maricopa Cty.*, 177 Ariz. 147 (App. 1993) and *Tomasits v. Cochise Memory Gardens, Inc.*, 150 Ariz. 39 (App. 1986), Appellants argue "[w]e all owe a duty to a decedent's family members" to act in accordance with § 868.

¶22 Appellants are correct that Arizona recognizes causes of action for mishandling a body pursuant to § 868. But no Arizona case holds § 868 itself creates a general duty of care. The plain language of that provision addresses liability, not duty. *Vasquez v. State* analyzed a plaintiff's argument that the superior court's dismissal of her "wrongful handling of a dead body" claim for lack of duty was erroneous because her claim was

"grounded in and independently actionable" under § 868. 220 Ariz. 304, 315–18, ¶¶ 38–46 (App. 2008) (quotation omitted). The *Vasquez* Court noted that it is "not clear whether the concept of duty is inherently subsumed in that provision" and concluded that a "separate, preliminary analysis on the duty issue [was] required . . . before § 868's rule of liability comes into play." *Id.* at 316, ¶ 39.

¶23 Moreover, neither *Tomasits* nor *Morton* support Appellants' argument that Arizona's common law imposes a general, free-standing duty to treat human remains in a non-negligent manner under the facts applicable to this case. Although *Tomasits* recognized a cause of action under § 868 by a plaintiff against a cemetery for the mishandling of her parents' bodies during their disinterment and reinterment, that case did not discuss duty. 150 Ariz. 39. *Morton* affirmed a judgment of liability against Maricopa County, finding that the medical examiner's office had a duty to not negligently prevent the proper interment or cremation of an unidentified murder victim's remains, the deviation from which gave rise to a cause of action grounded in § 868. 177 Ariz. at 151–53. The basis of the duty recognized in *Morton* was A.R.S. § 36–831, which established the priority order for the duty of burial, listing family members and the county, among others. *Id.* at 151–52. Here, however, Appellants make no argument that any underlying statute imposes a duty on Platinum vis-à-vis Appellants, which would undergird their claim pursuant to § 868.

¶24 Instructive to this case, *Ramirez v. Health Partners of S. Ariz.* held that there is no common law right of action to recover damages for negligent interference with a dead body in the organ-donation context. 193 Ariz. 325, 334, ¶ 32 (App. 1998). Although recognizing that holding, Appellants argue *Ramirez* is distinguishable from this case, which involves whole-body donation, and thus the common law duty still applies to Platinum. But, as noted above, there is no common law duty supporting Appellants' argument. Further, as with *Tomasits*, *Ramirez* is not a duty case. Any public policy concerns addressed in *Ramirez* do not create a duty owed by Platinum to Appellants.

¶25 Finally, Appellants argue Platinum bears vicarious liability for Gore's negligence, as well as its own direct negligence, for its personal role in the donor consent process and ownership of bodies in the storage facility. They additionally assign error to the superior court for allegedly failing to consider evidence they believe established a factual basis for Platinum's own direct negligence. Appellants did not raise these arguments

in their opening brief, addressing them only in their reply brief.[5] Therefore, they are waived. *See Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62 (App. 2009) (noting that failure to present significant argument in an opening brief can constitute abandonment and waiver); *In re Marriage of Pownell*, 197 Ariz. 577, 583, ¶ 25 n.5 (App. 2000) (noting that arguments raised for the first time in a reply brief are waived).

¶26 The superior court properly granted summary judgment on Appellants' negligence claims.[6]

CONCLUSION

¶27 For the foregoing reasons, we affirm the superior court's judgment. We award costs to Appellees upon compliance with ARCAP 21.

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

[5] On December 4, 2020, Platinum filed a "Motion to Strike New and Unsupported Arguments in Reply Brief," requesting that this Court strike certain arguments presented for the first time in appellants' reply brief. Appellants filed a Response on December 18, 2020 and a Reply was filed on December 21, 2020. This Motion is well-taken, but the issue raised in the Motion has been addressed directly by this decision. Therefore, the Motion is denied as moot.

[6] Having found no duty, we do not address Appellants' argument whether immunity under the Arizona Revised Uniform Anatomical Gift Act, A.R.S. §§ 36–841 to –864, applies. The superior court specifically did not reach the immunity issue but rather merely cited to the Act to support its finding that there was no duty.