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

ALAN L. LIEBOWITZ, an individual, Plaintiff/Appellant, v. U.S. OFFICE HOLDINGS, L.P., a Texas limited partnership, Defendant/Appellee.	1 CA-CV 10-0636 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-033214

The Honorable Gary E. Donahoe, Judge

REVERSED AND REMANDED

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By David A. Weber
Attorneys for Defendant/Appellee

N O R R I S, Judge

¶1 This appeal arises from a tort claim for injuries suffered when appellant, Alan L. Liebowitz, walked into a glass wall in an office building owned by appellee, U.S. Office Holdings ("Holdings"). The superior court granted summary

judgment in favor of Holdings based on its argument it owed Liebowitz no duty of care. Because we find an issue of fact exists as to whether Holdings controlled the glass wall and thus owed Liebowitz a duty of care, we reverse the superior court's grant of summary judgment and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 On January 9, 2007, Liebowitz rode an elevator to the eighth floor of the Great American Tower office building and then walked toward Suite 800, the law firm of Hinshaw & Culbertson ("Hinshaw"). A glass wall divided Hinshaw's office space from the lobby area near the elevators. Moving through what he thought to be open space, Liebowitz walked into the glass wall and sustained injuries.

¶3 Liebowitz sued Hinshaw and Holdings. Liebowitz later stipulated to Hinshaw's dismissal with prejudice. Holdings moved for summary judgment, which the superior court granted. Liebowitz timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes section 12-2101(B) (2003).

DISCUSSION[1]

¶4 A possessor of land owes an affirmative duty "to use reasonable care to make the premises safe" for invitees. *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 355, 706 P.2d 364, 367 (1985). This duty of reasonable care "includes an obligation to discover and correct or warn of hazards which the possessor should reasonably foresee as endangering an invitee." *Id.*; *see also* Restatement (Second) of Torts ("Restatement") § 343 (1965).[2] A possessor of land is a person occupying land with intent to control it. Restatement § 328E(a). Here, Liebowitz argues Holdings owed him a duty of care because it

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[1]We review the grant of a motion for summary judgment de novo and view the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. *State v. Mabery Ranch, Co.*, 216 Ariz. 233, 239, ¶ 23, 165 P.3d 211, 217 (App. 2007). Summary judgment is appropriate if no genuine issue of material fact exists and one party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c).

[2]Restatement § 343 states:

> 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
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> (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.

controlled the glass wall. Because a disputed issue of fact exists as to whether Holdings or Hinshaw controlled the glass wall, a factfinder must resolve this question before a court can rule on duty. *See Siddons v. Bus. Props. Dev. Co.*, 191 Ariz. 158, 159, ¶ 4, 953 P.2d 902, 903 (1998). If Holdings controlled the glass wall, it owed Liebowitz a duty of reasonable care, and, thus, the superior court should not have granted summary judgment.

¶5 In *Siddons*, a child was seriously injured when a heavy door fell on him outside of a business. *Id.* at 158, ¶ 1, 953 P.2d at 902. The injury occurred after the tenants had removed the door and propped it against the outside wall of the building, as they regularly did to move large appliances out of the store. *Id*. at ¶¶ 1-2. The Arizona Supreme Court, citing Restatement § 360,[3] stated that if the landlord "retained control

[3]Restatement § 360 states:

> A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could

over the area where the accident occurred, it would have had a duty to inspect and make safe." *Id.* at 159, ¶ 5, 953 P.2d at 903. The court explained the "broad language" in the lease, which placed all common areas in the landlord's "exclusive control" and prevented tenants from making any changes "to the interior or exterior of the premises," arguably gave the landlord the authority to prevent the removal of the door. *Id.* at ¶ 6. The court reversed the grant of summary judgment for the landlord because there was an issue of fact regarding whether the landlord had control over the area where the accident occurred. *Id.*

¶6 The dispute here is similar. Liebowitz asserts he never actually made it into Hinshaw's leased space because he was injured in the lobby controlled by Holdings. Holdings, however, characterizes the glass wall as Hinshaw's "entryway" and thus part of Hinshaw's leased space.[4] Although the lease does not specifically state who controlled the common areas, a finder of fact could reasonably infer from the lease provisions that Holdings controlled the common areas. Under the lease, Holdings prohibited obstruction of "vestibules, halls, stairways

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have made the condition safe.

[4]Hinshaw rented Suites 800 and 810 from Holdings, which included "[a]pproximately" 6778 rentable square feet, according to the lease.

and other similar areas"; controlled access and keys to the building; and provided services like heating and air conditioning, electricity, janitorial, elevators, and parking. *See* 62 Am. Jur. 2d *Premises Liability* § 16 (1990) (landlord "is liable to third persons for injuries resulting from his negligence in maintaining such portion of the premises as are retained under his control, or are for the common use of his tenants").

¶7 The lease also provided Holdings with broad authority regarding windows and signs in the building, even those within leased space. Holdings had the authority to approve changes, before work occurred, to windows or window treatments and the authority to approve, before placement, any signs that would be visible "from the common areas" or outside the building. While Holdings asserts it never exercised this authority, the lease nonetheless provided Holdings, similar to the landlord in *Siddons*, with the authority to control windows, signs, vestibules, and access, and thus the authority to possibly "eliminat[e] the potential hazard." 191 Ariz. at 159, ¶ 6, 953 P.2d at 903.

¶8 Construing the evidence and reasonable inferences in a light most favorable to Liebowitz, we hold that, as in *Siddons*, "[a]t the very least, such evidence raises factual issues

regarding the landlord's control," *id.*, and thus reverse the grant of summary judgment.

¶9 Holdings, citing *Piccola ex rel. Piccola v. Woodall*, argues, because a lease to a tenant is equivalent to a sale, any and all duties owed to Liebowitz shifted to Hinshaw once the lease began. 186 Ariz. 307, 310, 921 P.2d 710, 713 (App. 1996). *Piccola* does contain this "landlord non-liability" proposition, but only as part of a discussion explaining that the rule is outdated and that landlords can have duties even if they have leased property to a tenant. *Id.* In recognition of this development in the law, we held a "landlord owes a duty of reasonable care which requires inspection of premises if there is reason to suspect defects existing at the time the tenant takes possession. The landlord must repair or warn the tenant of such defects." *Id.* Because *Piccola* demonstrates that landlords can retain duties despite leasing to tenants, and, more importantly, because a fact issue exists as to whether the injury occurred in an area controlled by Holdings -- possibly rendering the lease to Hinshaw immaterial -- *Piccola* does not foreclose Holdings from owing a duty of reasonable care.

¶10 Holdings also argues we can affirm the judgment because, as a matter of law, it had no duty to warn about the danger of the glass wall because it was an "open and obvious"

condition and Liebowitz had visited Hinshaw previously when the wall was in the same condition. Holdings made this argument in its original motion for summary judgment, which the superior court denied because "fact issues . . . exist[ed] regarding the relative degrees of fault of the parties." Denials of motions for summary judgment are nonappealable interlocutory orders this court seldom reviews, and, because the superior court found the existence of issues of fact, we will not review its order here. *See Grain Dealers Mut. Ins. Co. v. James*, 118 Ariz. 116, 117 n.1, 575 P.2d 315, 316 n.1 (1978).

CONCLUSION

¶11 For the foregoing reasons, we reverse the superior court's grant of summary judgment in favor of Holdings and remand for further proceedings.

_/s/_____
PATRICIA K. NORRIS, Judge

CONCURRING:

_/s/_____
PETER B. SWANN, Presiding Judge

_/s/_____
DANIEL A. BARKER, Judge