

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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BLANCA ORTIZ, A MARRIED WOMAN IN HER INDIVIDUAL CAPACITY,  
*Plaintiff/Appellant,*

*v.*

SARAH ESPINOZA, A SINGLE WOMAN,  
*Defendant/Appellee.*

No. 2 CA-CV 2013-0081  
Filed December 12, 2013

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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NOT FOR PUBLICATION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); Ariz. R. Civ. App. P. 28(c).*

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Appeal from the Superior Court in Pima County

No. C20117122

The Honorable Kenneth Lee, Judge

**AFFIRMED**

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COUNSEL

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*Counsel for Plaintiff/Appellant*

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By Ryan Redmon  
*Counsel for Defendant/Appellee*

**MEMORANDUM DECISION**

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Kelly and Judge Espinosa concurred.

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ECKERSTROM, Judge:

¶1 This civil action concerns an alleged sexual assault committed against plaintiff/appellant Blanca Ortiz when she was a guest in the home of defendant/appellee Sarah Espinoza. Ortiz challenges the trial court's grant of summary judgment against her. We affirm for the reasons that follow.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to Ortiz, the party opposing summary judgment. *See Wyckoff v. Mogollon Health Alliance*, 232 Ariz. 588, ¶ 2, 307 P.3d 1015, 1016 (App. 2013). Ortiz and Espinoza were longtime friends. Ortiz also dated Espinoza's brother, Timothy Lance, in high school, and the two were briefly engaged. Thereafter, Ortiz graduated college, married a different man, and taught a community college program that helped young criminal offenders transition into the workforce. Lance became a violent methamphetamine user with multiple felony convictions. He often would beat women, and he had at least one conviction for domestic violence against the mother of his children. He had no history, however, of any sexual offenses.

¶3 In 2007, at Espinoza's request, Ortiz met Lance in California to provide him with employment information following his release from incarceration. Espinoza believed the two also carried on a sporadic romantic relationship around that time. In October 2010, Espinoza gave Lance money for a bus ticket from California to Arizona, where both she and Ortiz lived. Espinoza also allowed him to stay at her house.

¶4 That same month, Ortiz visited Espinoza's house after receiving an invitation from her to attend a small social gathering.

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According to Ortiz's affidavit, she was unaware Lance would be there. Based on their history, Espinoza expected Lance and Ortiz to have sex that evening, and she described them as appearing amicable. To another guest, Ortiz appeared uncomfortable around Lance. When Espinoza excused herself at the end of the evening to go to bed, leaving Lance and Ortiz alone together, he raped her as she was trying to leave the house. Ortiz then ran outside; she reported the crime to law enforcement officials several days later.

¶5 Ortiz brought a negligence action against Espinoza, asserting a claim of "premises liability."<sup>1</sup> The claim specifically alleged that because Espinoza knew Lance was a violent convict on her premises and was "infatuated" with Ortiz, Espinoza breached her duty to ensure Ortiz's safety as a guest by leaving her alone with him, rather than taking steps to see that she made it safely to her vehicle. The trial court granted Espinoza's motion for summary judgment without making express findings. This timely appeal followed the entry of judgment.

**Discussion**

¶6 On appeal, Ortiz characterizes her claim as one for negligence, and she maintains the trial court erred by granting summary judgment against her. "Summary judgment is appropriate when the pleadings and items in the record 'show that 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.'" *Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, ¶ 7, 263 P.3d 683, 686-87 (App. 2011), quoting Ariz. R. Civ. P. 56(c)(1). "We review a grant of summary judgment de novo," and we will affirm a trial court's ruling if it is correct on any ground. *Id.* ¶ 8. An appellant carries the burden of demonstrating the lower court erred. *Guirey, Srnka & Arnold, Architects v. City of Phoenix*, 9 Ariz. App. 70, 71, 449 P.2d 306, 307 (1969).

¶7 A plaintiff must prove four elements to sustain a negligence claim: "(1) a duty requiring the defendant to conform to

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<sup>1</sup>Other claims and parties are irrelevant to this appeal.

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a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007). Whether a duty exists is a question of law to be decided by courts. *Id.*

¶8 Generally, a private person has no duty to protect another from a third party's criminal attacks. *Parish v. Truman*, 124 Ariz. 228, 230, 603 P.2d 120, 122 (App. 1979).<sup>2</sup> This rule reflects the broader liability-limiting principle that "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not itself impose upon him a duty to take such action." *DeMontiney v. Desert Manor Convalescent Ctr., Inc.*, 144 Ariz. 6, 10-11, 695 P.2d 255, 259-60 (1985), quoting Restatement (Second) of Torts § 314 (1965) (hereinafter "Second Restatement").<sup>3</sup> But we previously have recognized that § 315 of the Second Restatement sets forth certain exceptions to that rule. *Davis v. Mangelsdorf*, 138 Ariz. 207, 208, 673 P.2d 951, 952 (App. 1983). It provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which

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<sup>2</sup>To be more precise, we might say that a person owes no duty to take precautionary measures for another person's safety from a third party. See Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 Colum. L. Rev. 1413, 1424 & n.64 (Oct. 1999).

<sup>3</sup>The Restatement (Third) of Torts: Liability for Physical and Emotional Harm, §§ 7(a), 37 (2010) (hereinafter "Third Restatement"), is to the same effect. Because Ortiz has not developed any arguments under the Third Restatement, however, we focus on the Second.

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imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Second Restatement § 315. The word "actor" here "describe[s] the person whose conduct is in question as a basis for liability." Second Restatement § 314 cmt. b.

¶9 Given Ortiz's general statements on appeal that Espinoza "had a duty to . . . protect [Ortiz] from harm," we find it necessary to clarify that no duty arose out of § 315(b) due to a "special relation" between these two parties. As the comment to that section makes clear, the relevant relationships giving rise to an affirmative duty of protection are those of common carrier and passenger, custodian and ward, innkeeper and guest, and landowner and public invitee. See Second Restatement §§ 314A, 315 cmt. c, 320; see also *Parish*, 124 Ariz. at 230, 603 P.2d at 122. A "public invitee" is a term of art that means "'a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.'" *Callender v. MCO Props.*, 180 Ariz. 435, 442, 885 P.2d 123, 130 (App. 1994), quoting *Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 143, 639 P.2d 330, 333 (1982). A social guest, by contrast, is a licensee, and this relationship by itself does not give rise to the same duty of protection by a property owner. See *Parish*, 124 Ariz. at 230, 603 P.2d at 122; *Kostas v. Alworth*, 50 Pa. D. & C.3d 455, 456-57 (Pa. Com. Pl. 1988); see also Second Restatement § 332 cmt. a ("A social guest may be cordially invited, and strongly urged to come, but he is not an invitee.").

¶10 Our case law recognizes that private hosts do have an affirmative duty to protect their social guests, but this duty is less than the ordinary duty of reasonable care. It is a duty "to refrain from knowingly exposing [the social guest] to a hidden peril or wilfully or wantonly causing him harm." *Shannon v. Butler Homes, Inc.*, 102 Ariz. 312, 318, 428 P.2d 990, 996 (1967); accord *Parish*, 124 Ariz. at 230, 603 P.2d at 122.

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¶11 An affirmative duty of reasonable care did exist here, however, under § 315(a) of the Second Restatement, due to Lance's status as a social guest and the fact that the alleged tort occurred on Espinoza's property. The relationships requiring an actor to control a third party's conduct are found in §§ 316 through 319 of the Second Restatement. Second Restatement § 315 cmt. c; *accord Davis*, 138 Ariz. at 208-09, 673 P.2d at 952-53. Section 318, which is relevant to the present case, provides as follows:

If the actor permits a third person to use land . . . in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor

(a) knows or has reason to know that he has the ability to control the third person, and

(b) knows or should know of the necessity and opportunity for exercising such control.

Second Restatement § 318. In other words, a host has a duty to control the conduct of a social guest, or licensee, only if they are together on the host's premises and the host knows of the necessity of exercising such control. *See Bloxham v. Glock Inc.*, 203 Ariz. 271, ¶ 7, 53 P.3d 196, 199 (App. 2002) (recognizing duty of possessor of land to control licensee under Second Restatement).

¶12 Having articulated the nature of Espinoza's duty of care to Ortiz, we turn to the distinct question of the standard of care required by that duty. *See Gipson*, 214 Ariz. 141, ¶ 10, 150 P.3d at 230. "The standard of reasonable care 'may be modified by the surrounding circumstances of time, place and persons.'" *Nunez v. Prof'l Transit Mgmt. of Tucson, Inc.*, 229 Ariz. 117, ¶ 19, 271 P.3d 1104,

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1108 (2012), *quoting S. Pac. Co. v. Buntin*, 54 Ariz. 180, 185, 94 P.2d 639, 641 (1939). Fact-specific questions about what actions the standard of care required in a particular case and whether the defendant breached her duty are generally issues to be decided by the jury. *Gipson*, 214 Ariz. 141, ¶¶ 9-10, 150 P.3d at 230. But summary judgment is warranted “if no reasonable juror could conclude that the standard of care was breached.” *Id.* n.1. Such is the case here.

¶13 As she argued below, Ortiz alleges Espinoza breached her duty of care by “leaving . . . Ortiz alone with Lance” despite “knowing Lance’s history and the totality of the circumstances.” The record, however, does not indicate a reasonable person in the same circumstances would have known of the “necessity” to exercise control over Lance in order to “prevent him from intentionally harming others.” Second Restatement § 318. Lance had no history of sexual crimes, and he had not been violent with Ortiz in their past interactions. Ortiz, in turn, was generally aware of his violent criminal background. These facts would not alert a reasonable person to the need to protect Ortiz from a sexual assault by Lance, even when we draw all reasonable inferences from the record in her favor. *See Andrews v. Blake*, 205 Ariz. 236, ¶ 13, 69 P.3d 7, 11 (2003); *cf. McDonald v. Lavery*, 534 N.E.2d 1190, 1192 (Mass. App. Ct. 1989) (upholding summary judgment for defendants who knew of son’s misuse of firearms but not his “propensity for using his firearms in a violent or threatening manner toward anyone prior to the incident” injuring plaintiff).

¶14 Although Ortiz attempts to establish a breach of duty largely based on the fact that Espinoza expected Lance and Ortiz to have sex after the gathering, it is a distortion of the record to consider this belief without also considering the basis of it, namely that Espinoza also believed the two were involved in an ongoing sexual relationship. When the record is properly viewed, consistent with our standard of review, we determine no facts would allow a

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reasonable juror to find Espinoza breached her duty of care by leaving Ortiz unattended or by failing to escort her to her vehicle.<sup>4</sup>

¶15 A jury likewise could not conclude Espinoza breached her duty of care by failing to specifically disclose Lance’s past domestic violence against other women, as Ortiz now urges on appeal. She has cited no authority, and we have found none, supporting the proposition that a private host must reveal all known criminal background information of those present that might be relevant to the safety or comfort of her other guests. Indeed, we have recognized “[t]he exemption from liability for social hosts” as “a good example of a policy-based duty exception,” *Gipson*, 214 Ariz. 141, ¶ 37, 150 P.3d at 235 (Hurwitz, J., concurring), acknowledging that “imposing liability is potentially problematic because of its impact on a substantial slice of social relations.” Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 7 cmt. a (2010). Our case law suggests a property owner has an obligation to warn a visitor about a third party only when the owner has reason to know that the third party presents a danger analogous to a hidden peril, such as “a homicidal maniac in the back bedroom” or an estranged and violent “gentleman friend” who would be easily provoked by the presence of another man. *Jobe v. Smith*, 159 Ariz. 36, 36, 764 P.2d 771, 771 (App. 1988). This plainly is not the case here.

¶16 We do not address Ortiz’s additional arguments concerning other alleged duties and breaches, as she has failed to provide record citations, in accordance with Rule 13(a)(4) and (6), Ariz. R. Civ. App. P., indicating whether such arguments were presented and thus preserved below. *See Delmastro*, 228 Ariz. at 137

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<sup>4</sup>We have resolved this case based on the question of “breach,” as opposed to the question of “duty,” because our supreme court has emphasized that “[t]he issue of duty is not a factual matter” and must be “determined *before* the case-specific facts are considered.” *Gipson*, 214 Ariz. 141, ¶ 21, 150 P.3d at 232. We note, however, that under the conditional language of § 318 of the Second Restatement, this could be described as a no-duty case, because the facts alleged did not create a duty by Espinoza to control Lance’s conduct.



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n.2, 263 P.3d at 686 n.2 (observing noncompliance with Rule 13 “is an appropriate ground for this court to find an appellant’s argument waived”); *see also Payne v. Payne*, 12 Ariz. App. 434, 435, 471 P.2d 319, 320 (1970) (“[T]he general law in Arizona [is] that a party must timely present his legal theories to the trial court so as to give the trial court an opportunity to rule properly.”).

**Disposition**

¶17 For the foregoing reasons, we affirm the trial court’s grant of summary judgment. We deny Espinoza’s request for attorney fees pursuant to A.R.S. § 12-349(A)(1), as the present appeal has adequate justification. We grant Espinoza her taxable costs on appeal upon her compliance with Rule 21(a), Ariz. R. Civ. App. P.