IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JOSEPH ANTHONY CAMPOS AND MARIA COLMENERO, THE SURVIVING FATHER AND MOTHER OF JOSEPH ANTHONY CAMPOS, JR.,
Plaintiffs/Appellants,

v.

BABYLON A.D., LLC DBA EDEN ADULT CABARET & CAFÉ, A BUSINESS ENTITY,
Defendant/Appellee.

No. 2 CA-CV 2022-0025
Filed October 19, 2022

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NOT FOR PUBLICATION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)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20202490
The Honorable Michael J. Butler, Judge

AFFIRMED

COUNSEL

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and

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MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

S T A R I N G, Vice Chief Judge:

¶1 Joseph Campos and Maria Colmenero ("Parents") appeal from the trial court's summary judgment in favor of Babylon A.D., LLC doing business as Eden Adult Cabaret & Café ("Eden"). For the reasons that follow, we affirm the summary judgment.

Factual and Procedural Background

¶2 "In reviewing a decision on a motion for summary judgment, we determine *de novo* whether any genuine issues of fact exist and whether the trial court erred in its application of the law." *Purdy as Tr. of Survivors of Jones v. Metcalf*, 252 Ariz. 270, ¶ 14 (App. 2021) (quoting *Maycock v. Asilomar Dev., Inc.*, 207 Ariz. 495, ¶ 14 (App. 2004)). And we view the facts in the light most favorable to Parents, the non-moving party. *See Keonjian v. Olcott*, 216 Ariz. 563, ¶ 2 (App. 2007).

¶3 Early one morning in June 2018, Eric Zamarra finished his work as a security guard at an event in downtown Tucson, and, still wearing a shirt that read "Security" across the front, he went to Eden to drop something off for an Eden employee. Zamarra knew some of the security personnel at Eden from previous security work at other locations. After arriving at Eden, he helped an individual who had fallen to the ground during a fight in the line of patrons waiting to enter the club. Joseph Campos Jr. was part of the group that instigated the fight. Eden's general manager, Jeffrey Lindstrom, told the group involved in the fight to leave and also called the police.

¶4 A short time later, Campos's group returned to Eden.[1] When the group asked if they could go into the club, Lindstrom denied them entry. Zamarra saw Lindstrom talking to the group in the parking lot, and, as he walked back toward the entrance of the club with Lindstrom, Zamarra informed Lindstrom that individuals in the group had guns. When a second fight involving the group ensued, Zamarra tried to help break it up, ultimately shooting and killing Campos. Campos was involved in the fighting before he was shot and killed.

¶5 Parents filed a wrongful death claim against both Eden and Zamarra, alleging negligence that caused Campos's death. The trial court granted Eden's motion for summary judgment, concluding it had no legal duty to protect Campos or to control Zamarra, and Parents appealed. We have jurisdiction pursuant to A.R.S. §§ 12-2101(A)(1) and 12-120.21(A)(1).

Discussion

¶6 Summary judgment is appropriate when 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). This standard is met "if the facts produced in support of the claim or defense 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 or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990).

¶7 To establish a negligence claim, the plaintiff "must show a duty owed by defendant to plaintiff, a breach of duty, and an injury proximately caused by the breach of the duty." *Kiser v. A. J. Bayless Markets, Inc.*, 9 Ariz. App. 103, 106-07 (1969). Whether there exists a duty sufficient

[1]Evidence suggests Campos returned to Eden after participating in the first fight and being told to leave the premises by security at Eden. Specifically, a police report includes Lindstrom's "summarized and paraphrased" statements that "the same group the guy was part of started a fight with someone" and "the [guy] on the ground was part of the fight, he was here with the first fight and came back." Additionally, in his affidavit, Lindstrom stated that after the first fight, he had "called police and told the group who had been assaulting the individual in line that they had to leave the premises." Parents do not appear to contest Campos's presence during the first fight and even state in their reply brief that Campos "returned" to Eden—impliedly conceding he was part of the group involved in the initial altercation.

to support a claim for negligence is a question of law. *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354 (1985); *see Gipson v. Kasey*, 214 Ariz. 141, ¶¶ 9, 19, 21, 23-24, 32 (2007) (looking to statute to find public policy that imposes legal duty). "Under Arizona common law, various categorical relationships can give rise to a duty." *Gipson*, 214 Ariz. 141, ¶ 19. The Restatement (Second) of Torts defines the special relationships that impose such a duty. Restatement §§ 314A, 318, 344 (1965); *see also Martinez v. Woodmar IV Condos. Homeowners Ass'n*, 189 Ariz. 206, 208 (1997) (Arizona courts look to restatement when no relevant case law). We address the pertinent special relationships below.

Eden did not have a duty to protect Campos from harm.

¶8 Under Restatement § 315, no duty exists "to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relation exists between the actor and the other which gives to the other a right to protection." Restatement § 314A defines the special relations that trigger a legal duty under § 315. *See Fedie v. Travelodge Int'l, Inc.*, 162 Ariz. 263, 265 (App. 1989). Relevant here, there is a special relation between "[a] possessor of land who holds it open to the public" and a "member[] of the public who enter[s] in response to his invitation." § 314A. Arizona has adopted these sections of the Restatement. *Fedie*, 162 Ariz. at 265.

¶9 Similarly, Restatement § 344 imposes a legal duty on "[a] possessor of land who holds it open to the public for entry for his business purposes" to "members of the public while they are upon the land for such a purpose" to protect against "physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons." We have applied this section of the Restatement to impose an affirmative duty on landowners to maintain safe premises for business invitees with regard to actions of third parties. *See, e.g.*, *Cotterhill v. Bafile*, 177 Ariz. 76, 78-79 (App. 1993) (bar owner had duty to make bar reasonably safe for patron); *Simon v. Safeway, Inc.*, 217 Ariz. 330, ¶¶ 15, 17-18, 23 (App. 2007) (store had duty to protect customers from dangerous activities on premises).

¶10 The trial court concluded there was "no genuine issue of material fact that Mr. Campos was a trespasser during the morning in question" and, therefore, Eden had no duty to protect him. Specifically, it determined Campos was not a business invitee and there was no qualifying relationship under §§ 314A and 315 because Eden had denied Campos's group entry into the club. The court subsequently concluded § 344 was also inapplicable because Campos was not a business invitee.

¶11 On appeal, Parents argue Campos was a business invitee and, therefore, Eden had a duty to protect him from harm by third parties under § 344. Alternatively, Parents assert Lindstrom's statements in his affidavit in support of summary judgment conflict with his statements in a 2018 police report and security footage from the morning of the shooting, creating a genuine issue of material fact sufficient to preclude summary judgment. Specifically, they contend that contrary to Lindstrom's statement in his affidavit that, upon the group's return, he told "the individuals in the vehicle . . . that they were not welcome to return to Eden and had to leave," the police report states the group asked Lindstrom "if they could come in," to which he replied "no and walked away." Further, Parents assert the security video shows that "Campos enter[ed] the premises without any contact from the manager, (or any other of Eden's employees) within less than one minute of the shooting." Thus, Parents argue Campos's status at the time of the shooting is "a question of fact [for] the jury to determine" and the trial court erred in granting Eden's motion for summary judgment.

Campos was not a business invitee at the time of the shooting.

¶12 A business invitee "is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Restatement (Second) of Torts § 332; *see also Stephens v. Bashas' Inc.*, 186 Ariz. 427, 430 (App. 1996). A business's premises can include its parking lot. *See McFarlin v. Hall*, 127 Ariz. 220, 222, 224-25 (1980) (affirming judgment in favor of patron who was shot by another intoxicated patron in parking lot of bar because bar had duty to protect invitees from other intoxicated patrons on its premises). An individual can have the status of business invitee even off of the business's premises. *Stephens*, 186 Ariz. at 428-31 (Bashas delivery driver was business invitee even when injury occurred off-premises because Bashas was aware he was waiting off-premises to make delivery at scheduled time).

¶13 Although a "landowner owes a special duty to an invitee, . . . this duty may be diluted or extinguished if the invitee engages in explicitly or impliedly unpermitted activities or goes beyond the area to which he or she is invited." *Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 143 (1982). And, a business invitee can become a trespasser or licensee if the individual exceeds the "scope of invitation." *Id.* at 143-44 (concluding shopping center did not owe department store employee special duty as business invitee

because, at time of injury, employee had exceeded scope of invitation by walking through decorative planter, an impliedly unpermitted area); *see also Shiells v. Kolt*, 148 Ariz. 424, 425 (App. 1986). "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Restatement (Second) of Torts § 329 (1965).

¶14 In *Shiells*, a car-wash customer was injured when he vaulted over a railing in front of the business office and the railing collapsed. 148 Ariz. at 424. Although the railing had been previously damaged, its "condition was not obvious," and the customer "was not aware of it." *Id.* Noting that the railing had been installed to "provide a safe walkway for customers . . . from the gas pumps to the cashier," we determined that although the customer was permitted in the area outside the office, his use of the railing was implicitly unpermitted because there was no evidence that anyone else had attempted to vault over the railing or that the car wash had ever permitted such conduct. *Id.* at 425. Thus, we concluded, the customer had created the situation that resulted in his injury, and the owners of the car wash had "no legal obligation to protect him." *Id.*

¶15 Here, Campos was not a business invitee of Eden when he was shot and killed. Like the injured individual in *Shiells*, Campos engaged in an implicitly unpermitted activity on the business premises by remaining in the parking lot after his group was denied entry into the club. *Id.*; *see also Nicoletti*, 131 Ariz. at 143-44. A reasonable person could only conclude that, because he had been denied entry and told to leave, he was not a business invitee when he was shot and killed.

Campos's status is not a question of fact for the jury.

¶16 In certain situations, whether a relationship gives rise to a duty may be a factual question for a fact-finder before a trial court can analyze duty. *Est. of Maudsley v. Meta Servs., Inc.*, 227 Ariz. 430, n.9 (App. 2011); *see McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, ¶¶ 35-36 (App. 2013) (whether hotel guest exceeded scope of her invitation and became trespasser by climbing out window in her room to smoke on balcony was material question of fact for the jury to decide). But when, as here, there is no evidence to suggest that the business gave the individual permission to engage in the activity that ultimately resulted in the injury—in this case, remaining in the parking lot of the club at approximately 3:00 a.m. after

being denied entry based on involvement in an earlier fight[2]—there is no question of fact for the jury. *Nicoletti*, 131 Ariz. at 144; *see also Shiells*, 148 Ariz. at 425. It was implicitly unpermitted for the group, including Campos, to remain on the premises after the first physical altercation and after expressly being denied entry into the club upon return.[3] Thus, because no reasonable juror could conclude Campos's status was anything but that of a trespasser at the time of the shooting, the trial court did not err in granting summary judgment in favor of Eden. *See Orme Sch.*, 166 Ariz. at 309.

Under Restatement §§ 315 and 318, Eden did not have a duty to control Zamarra's actions.

¶17 Under Restatement § 315, there is no duty to control the conduct of a third party unless a "special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct." A special relation includes one between an actor and a third person who he "permits . . . to use land . . . in his possession" if the actor "knows or has reason to know that he has the ability to control the third person, and . . . knows or should know of the necessity and opportunity for exercising such control." Restatement § 318. Section 318 is "applicable where the possessor of land is present and the land is being used or the activity is being carried on with his permission, and when, therefore, he has not only the ability to control the conduct of the third person as possessor, but also the opportunity to do so." *State v. Brown*, 129 Ariz. 347, 350 (App. 1981).

¶18 A trial court should not apply § 318 where the possessor of land has no reason to know of the need to control the third party. *See Cordova v. Parrett*, 146 Ariz. 79, 83 (App. 1985). In *Cordova*, we concluded that owners of a mobile home did not have a duty to control the actions of

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[2]Even if Campos was not involved in the first fight, this would not change our analysis. Uncontroverted evidence establishes that Campos's group was denied entry into the club before the second fight.

[3]The frame of the video does not include the entire parking lot, making it impossible to see any interaction—or lack thereof—between Lindstrom and the individuals in the vehicle. Thus, we reject Parents' argument that the video footage contradicts Lindstrom's statement in his declaration that he "contact[ed] the individuals in the vehicle to let them know that they were not welcome to return to Eden and had to leave."

a moving company resulting in the death of a company employee. *Id.* at 80-81, 83. The homeowners had instructed the company where to move the mobile home but otherwise had no knowledge of how to move such homes and thus no knowledge that they needed to control the conduct of the company. *Id.* at 81, 83.

¶19 Parents argue Eden had a duty to control Zamarra's conduct because it permitted him to assist in security while armed with a gun and wearing a "Security" shirt. In contrast, Eden contends it had "no reason to know of any necessity to control Mr. Zamarra's actions" because it did not know that Campos would return and a shooting would take place.

¶20 Eden's relationship with Zamarra, however, was far less substantial than that between the owners of the mobile home and the moving company in *Cordova*, which we concluded was insufficient to establish a duty to control. 146 Ariz. at 83. There is no evidence that Eden tasked Zamarra with security responsibilities. Instead, the evidence indicates Zamarra voluntarily inserted himself, first by helping another patron who was knocked down during the initial fight, then by telling the security manager that a group of individuals had guns, and finally by firing his gun during the second physical confrontation. These acts did not, either individually or cumulatively, establish a special relation between Eden and Zamarra as contemplated in § 318.

Zamarra did not have apparent authority to act on Eden's behalf.

¶21 "Apparent authority exists when the principal engages in intentional or inadvertent conduct that allows a third party reasonably to conclude that the agent has actual authority." *Best Choice Fund, LLC v. Low & Childers, P.C.*, 228 Ariz. 502, ¶ 29 (App. 2011); *see Reed v. Gershweir*, 160 Ariz. 203, 205 (App. 1989). Therefore, "to establish apparent authority the record must reflect that the alleged principal not only represented another as his agent, but that the person who relied on the manifestation was reasonably justified in doing so under the facts of the case." *Reed*, 160 Ariz. at 205.

¶22 A third party must rely on the principal's representations for there to be apparent authority. *See Fendler v. Texaco Oil Co.*, 17 Ariz. App. 565, 571 (1972). In *Fendler*, we determined the operator of a towing service had no apparent authority to act for Texaco when it towed Fendler's parked car to a Texaco service station. 17 Ariz. App. at 566-67, 571. We explained that, even assuming Texaco had "clothed" the operator with "apparent or

ostensible authority," there was no evidence that the Fendlers had relied on any representations by Texaco. *Id.* at 571.

¶23 Here, Parents argue Zamarra had apparent authority to act on behalf of Eden because it "allowed him to assist them with security in the parking lot" while armed and wearing a shirt that said "Security." Alternatively, they argue apparent authority is a question of fact the jury must decide. Eden counters Zamarra was merely its customer and did not have apparent authority because Eden employees "did not ask him to intervene in the fight, and Eden employees did not know Mr. Zamarra was even involved until after the shooting." Eden also points out that both Lindstrom and Zamarra denied the existence of a principal-agent relationship.

¶24 The trial court concluded Parents had not provided enough evidence to create a "genuine issue of fact" regarding whether Zamarra had authority from Eden to act on its behalf. The court explained that the video of Zamarra walking with Lindstrom and an employee's statement that Zamarra had assisted in breaking up the physical confrontation were insufficient to establish an "agency relationship." We agree.

¶25 On the record before us, no reasonable fact-finder could conclude there was an agency relationship between Eden and Zamarra. First, Eden did not make any representations that Zamarra had authority to act on its behalf when he voluntarily stepped in to help another patron during the first altercation or when he involved himself in the second altercation. Even assuming Eden had inadvertently represented to third parties that Zamarra was an agent of the club, like the plaintiff in *Fendler*, Parents provided no evidence that Campos relied on those representations. There is no evidence that Campos was even aware of Zamarra's presence, let alone that Campos was relying on his protection as part of Eden's security when he returned with his group to Eden's parking lot after the first fight. Therefore, there is no genuine issue of material fact regarding apparent authority, and Parents' argument fails.

Disposition

¶26 For these reasons, we affirm the trial court's summary judgment in favor of Eden. As the prevailing party on appeal, we award Eden its taxable costs upon compliance with Rule 21, Ariz. R. Civ. App. P.