DIVISION ONE
FILED: 7/2/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

YAVAPAI TITLE AGENCY, INC., an Arizona corporation,	1 CA-CV 12-0562
Plaintiff/Counterdefendant/ Appellee,	DEPARTMENT T
v.	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
PACE PREPARATORY ACADEMY, an Arizona nonprofit corporation,	
Defendant/Counterclaimant/ Appellant.	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV201000484

The Honorable Anna C. Young, Judge

AFFIRMED

Linda Wallace, PLLC — Sedona
by Linda Wallace
Attorney for Defendant/Counterclaimant/Appellant

Roberts & Carver, PLLC — Prescott
by Jerry P. Carver
Attorney for Plaintiff/Counterdefendant/Appellee

P O R T L E Y, Judge

¶1 Pace Preparatory Academy ("Pace") appeals the summary judgment entered in favor of Yavapai Title Agency, Inc. ("YTA")

and the denial of its summary judgment motion. Because we find no error, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 2003, Pace borrowed $253,959 from Bank One ("Lender")[1] to build a charter high school. To memorialize the transaction, the president of Pace, Holly Stiles, signed a promissory note ("Note") on behalf of the non-profit corporation. She secured the Note by signing a deed of trust ("Pace Deed of Trust"), which encumbered the property ("the Dewey Property"). Stiles also signed a personal guarantee obligating her to pay the sums due under the Note.

¶3 Two years later, Pace and Stiles' Colorado consulting business, Stiles Educational Services, LLC ("SES"), entered into a consulting agreement. The collaboration ended in June 2007 when the parties agreed to terminate that agreement. As part of the agreement, SES and Pace, by Richard B. Thelander, entered into a Lease/Option to Purchase Real Property ("Lease/Option"); Pace would lease the Dewey Property to SES for twenty months and SES would pay rent each month, which was equal to the monthly Note payment, directly to the Lender as Pace's mortgage payment. The agreement also gave SES the option to buy the Dewey Property at any time before the lease term ended on February 15, 2009, the date the last payment was due under the Note.

[1] The successor to Bank One is JP Morgan Chase Bank N.A.

¶4 The same day that Thelander executed the Lease/Option for Pace, Pace also quit claimed the Dewey Property to SES. Concurrently, the parties hired YTA to open an escrow pursuant to the Lease/Option. YTA, however, discovered the recorded quit claim deed in August 2007 and informed both parties that the escrow would be cancelled unless it received different instructions. YTA heard nothing and canceled the escrow.

¶5 SES sold the Dewey Property in April 2008 to Christopher Fannin dba Cross Point Free Will Baptist Church of Prescott by special warranty deed. Fannin borrowed $350,000 from the Free Will Baptist Home Missions Extension Loan Fund, Inc. ("FWB") and his note was secured by a deed of trust. SES, however, did not disclose the Pace Deed of Trust in its Commercial Seller's Property Disclosure Statement, and YTA, the escrow agent and title insurer, did not discover or list the Pace Deed of Trust in the title insurance policy. The YTA policy insured that FWB's deed of trust was in a first lien position.

¶6 Although Pace believed that SES had paid off the Note pursuant to the Lease/Option, SES had in fact stopped paying the lease payments and the Lender initiated a trustee's sale on the Dewey Property in August 2009. To settle Fannin's title insurance claim, YTA paid the Lender the remaining indebtedness and was given a general assignment from the Lender.

¶7 YTA then sued Pace, Stiles, and SES to recover the sums it paid to the Lender. Pace filed an answer, counterclaim and cross-claims. In its counterclaim, Pace alleged that YTA was negligent by failing to discover the existence of the Pace Deed of Trust.

¶8 YTA secured summary judgments against Stiles, SES, and Pace on its complaint.[2] Because the counterclaim could impact YTA's judgment, the court allowed Pace to file a motion for summary judgment. In its motion, Pace argued that YTA breached its duty to Pace. YTA filed a response and cross-motion for summary judgment claiming it did not owe a duty to Pace, with whom YTA had no contractual relationship. The court subsequently denied Pace's motion and granted YTA's cross-motion because YTA had no duty to Pace during the SES-Fannin transaction. This timely appeal followed.

DISCUSSION

¶9 Pace argues that the court not only improperly granted YTA's cross-motion for summary judgment but also improperly denied its motion for summary judgment. Because Pace asserts that the court erred by determining that YTA did not owe Pace a duty, the sole issue on appeal is whether YTA, as a title insurer, owed a legal duty to Pace.

[2] Pace does not appeal the summary judgment granted to YTA on its complaint.

¶10 We review the entry of summary judgment de novo, "viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion." *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). We will independently determine "whether any genuine issues of material fact exist," *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 55, ¶ 8, 156 P.3d 1157, 1160 (App. 2007), because summary judgment is only appropriate when "the pleadings, deposition[s], answers to interrogatories, and admissions on file, together with the affidavits, if any, 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." Ariz. R. Civ. P. 56(c); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990) (explaining that summary judgment is proper "if the facts produced in support of the claim . . . 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").

¶11 To successfully assert a claim for negligence, Pace was required to "prove four elements: (1) a duty requiring [YTA] to conform to a certain standard of care; (2) a breach by [YTA] of that standard; (3) a causal connection between [YTA]'s conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230

(2007). To prove the existence of a duty, Pace had to show the existence of an "obligation, recognized by law, requiring [YTA] to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Diaz v. Phoenix Lubrication Serv., Inc.*, 224 Ariz. 335, 338, ¶ 12, 230 P.3d 718, 721 (App. 2010) (internal quotation marks omitted). Because the court found that YTA did not owe Pace a duty, Pace's negligence counterclaim failed as a matter of law. *See id.* ("Whether a defendant owes the plaintiff a duty is a threshold issue," so "[a]bsent a duty, a negligence action cannot be maintained."). We review the court's conclusion de novo because "[t]he existence of a duty is a question of law." *Id.*

A. Arizona Law Surrounding the Existence of a Duty When Parties Are Not in Privity of Contract

¶12 Pace first argues that the court improperly considered *Phoenix Title & Trust Co. v. Continental Oil Co.*, 43 Ariz. 219, 29 P.2d 1065 (1934), to conclude that in the absence of privity of contract YTA did not owe Pace a duty. Pace asserts that *Donnelly Construction Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 188, 677 P.2d 1292, 1296 (1984), overturned the holding in *Phoenix Title*. We disagree.

¶13 In *Phoenix Title,* our supreme court stated the general rule that privity is required for a plaintiff to assert a negligence claim against a title insurer. 43 Ariz. at 228-29,

29 P.2d at 1068-69. *See also Collins v. Stockwell*, 137 Ariz. 437, 441, 671 P.2d 415, 419 (App. 1983) ("Arizona law is clear that a title company is not liable for any damage suffered by a lienholder as a result of a title report issued to a subsequent purchaser of property, absent privity of contract between the lienholder and the title company."), overruled on other grounds and opinion vacated by *Collins v. Stockwell*, 137 Ariz. 416, 671 P.2d 394 (1983); William B. Johnson, Annotation, *Negligence in Preparing Abstract of Title as Ground of Liability to One Other than Person Ordering the Abstract*, 50 A.L.R.4th 314 (1986) (indicating the majority of states require privity of contract to impose a duty on a title abstractor). *Phoenix Title* also recognized that the general rule does not apply when: (1) a statute requires a title insurer to file a bond and face liability when third persons are harmed by defects in the title insurance; (2) an "agent acts for an undisclosed principal;" (3) the original title insurance commitment is reissued to a third party; and (4) the title insurance "is made for the benefit of a third person." 43 Ariz. at 228-29, 29 P.2d at 1068-69.

¶14 Fifty years later, the court in *Donnelly* "expressly disapprove[d]" of the blanket rule that a party not in privity with a title insurer could not sue the insurer for negligence. 139 Ariz. at 188, 677 P.2d at 1296. Although the court did not create a definitive rule, *id.*, it explicitly limited its holding

to design professionals by stating "that design professionals are liable for foreseeable injuries to foreseeable victims which proximately result from their negligent performance of their professional services."[3] *Donnelly*, 139 Ariz. at 188, 677 P.2d at 1296. Therefore, *Donnelly* did not expressly overrule *Phoenix Title*.

¶15 Pace also asserts that the court wrongly concluded that a contractual relationship is required to find a duty. Although we agree that privity of contract is not always required for a duty to exist, the cases Pace cites in arguing a duty should be found here are distinguishable. *See, e.g.*, *Sage v. Blagg Appraisal Co., Ltd.*, 221 Ariz. 33, 36, 40, ¶¶ 15, 26, 209 P.3d 169, 172, 176 (App. 2009) (holding that a real estate appraiser owes a duty to the prospective buyer of the home being appraised because the appraiser knew that the recipient of the information, the mortgagor, intended to supply the information to the prospective buyer); *Maxfield v. Martin*, 217 Ariz. 312, 315, ¶ 14, 173 P.3d 476, 479 (App. 2007) (finding that a title company owed a duty to a party whose name was "used as one of the parties to the escrow"); *Luce v. State Title Agency, Inc.*, 190 Ariz. 500, 501-02, 950 P.2d 159, 160-61 (App. 1997)

[3] Without expressly overruling *Donnelly*, our supreme court subsequently "expressly h[e]ld that foreseeability is not a factor to be considered by courts when making determinations of duty." *Gipson*, 214 Ariz. at 144, ¶¶ 14-15, 150 P.3d at 231.

(explaining that, although "[t]he duties of title companies have, to a limited extent, been extended beyond the terms of their contracts," a title insurer owed no duty to a party that it "had neither contract with nor contact with" when it negligently recorded a deed of trust); *Mur-Ray Mgmt. Corp. v. Founders Title Co.*, 169 Ariz. 417, 423, 819 P.2d 1003, 1009 (App. 1991) (holding that a duty exists, "notwithstanding a lack of privity between the parties," when an escrow agent supplies "information in the course of its business as an escrow agent," and the escrow agent "is aware of the intended use of the information and then only if he intended to supply it for that purpose"); *Arizona Title Ins. and Trust Co. v. O'Malley Lumber Co.*, 14 Ariz. App. 486, 491-93, 484 P.2d 639, 645-46 (1971) (explaining that a title insurer "owed no contractual or trust duty" to third parties it was not in privity with but owed a duty "not to misstate existing, ascertainable facts" when it chose to speak and make representations to the third parties).

¶16 Here, and unlike the plaintiff in *Sage*, who was the recipient of information supplied by the defendant appraiser, 221 Ariz. at 36, 40, ¶¶ 15, 26, 209 P.3d at 172, 176, none of the parties to the SES-Fannin transaction provided Pace with the title report because Pace had quit claimed its property interest away nearly a year earlier. Next, and unlike the plaintiff in *Maxfield* whose name was "used as one of the parties to the

escrow," 217 Ariz. at 315, ¶ 14, 173 P.3d at 479, Pace was not a party in the SES-Fannin transaction. Finally, unlike the defendants in *Mur-Ray*, 169 Ariz. at 423, 819 P.2d at 1009, and *O'Malley*, 14 Ariz. App. at 491-93, 484 P.2d at 645-46, who made representations and provided "information in the course of [their] business as [] escrow agent[s]," *Mur-Ray*, 169 Ariz. at 423, 819 P.2d at 1009, YTA did not supply any information to Pace during the SES-Fannin transaction. As a result, and considering the facts in this case, the trial court did not erroneously interpret the current state of the law: YTA did not owe Pace a duty because the two parties were not in privity of contract and their relationship did not fit within one of the four exceptions outlined in *Phoenix Title*.

B. The Relationship Between the Parties

¶17 Pace next argues that a duty was created because it had a fiduciary or special relationship with YTA. *See Gipson*, 214 Ariz. at 145, ¶¶ 18, 20, 150 P.3d at 232 ("Duties of care may arise from special relationships based on contract, family relations, [] conduct undertaken by the defendant," or "may result from the nature of the relationship between the parties."). Specifically, and citing to *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 24, 945 P.2d 317, 335 (App. 1996), Pace claims that YTA had more information than it did

because YTA learned of Pace's obligation under the Note during the 2007 escrow and was involved in the SES-Fannin transaction.

¶18 Pace omits, however, that *Price Waterhouse* specifically determined that a fiduciary relationship did not exist when Price Waterhouse only served as an independent auditor and certified that United Bank of Arizona was financially sound to Union Bancorp of California. *Id.* at 12, 25, 945 P.2d at 323, 336. In fact, we stated that the auditor's "superior knowledge of [the bank]'s financial statements and records" does not establish a fiduciary relationship unless the knowledge and information is inaccessible "through the exercise of reasonable diligence." *Id.* at 25, 945 P.2d at 336. Here, at the time of the SES-Fannin transaction, Pace had no relationship with YTA, and Pace was not relying on YTA for any information. The SES/Pace-YTA relationship ended in August 2007 when the Pace-SES escrow was canceled. *See, e.g., Fin. Assocs., Inc. v. R & R Realty Co.*, 25 Ariz. App. 530, 531, 544 P.2d 1131, 1132 (1976) (finding that the title company's duty to the plaintiff ended when the escrow relationship ended). In fact, after the Dewey Property was quit claimed to SES contrary to the Lease/Option, YTA was no longer a party to any transaction involving Pace. *See Diaz*, 224 Ariz. at 339, ¶ 16, 230 P.3d at 722 (stating that "[o]ur supreme court has . . . emphasized . . . the importance of the contracts between parties in

determining the boundaries of potential liability") (citing *Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc.*, 223 Ariz. 320, 321, ¶ 1, 223 P.3d 664, 664 (2010)). Consequently, Pace and YTA did not have a fiduciary or special relationship that created a duty at the time of the SES-Fannin transaction.

C. Public Policy

¶19 Finally, Pace argues that public policy mandates the recognition of a duty. "Public policy may be found in state statutes and the common law," *Estate of Maudsley v. Meta Servs., Inc.*, 227 Ariz. 430, 435, ¶ 15, 258 P.3d 248, 253 (App. 2011), and "may support the recognition of a duty of care." *Gipson*, 214 Ariz. at 145, ¶ 23, 150 P.3d at 232.

¶20 Pace asserts that Arizona Revised Statutes ("A.R.S") section 6-835 (West 2013) supports its argument for finding a public policy duty because the statute does not specifically require privity before a title agency can be sued. Section 6-835 states that:

> [n]othing in this chapter shall limit any statutory or common law right of any person to bring an action in any court having jurisdiction for any act involved in the transaction of the escrow business or the right of the state to punish any person for any violation of law based on such act.

A.R.S. § 6-835. The statute, however, does not support Pace's argument; it only provides that a person involved in a

transaction of escrow business can sue a title insurer. If the person is involved in the escrow process, the person will have privity of contract to sue or one of the *Phoenix Title* exceptions may be applicable. *See* 43 Ariz. at 228-29, 29 P.2d at 1068-69. Moreover, Pace has not provided any authority that § 6-835 creates a public policy duty. Because the statute does not create a duty, we need not further address the argument. *See Swanson v. Image Bank, Inc.*, 202 Ariz. 226, 239, ¶ 49, 43 P.3d 174, 187 (App. 2002) (stating that "we do not address . . . unsupported assertion[s]"), overruled on other grounds by *Swanson v. Image Bank, Inc.*, 206 Ariz. 264, 77 P.3d 439 (2003); Arizona Rule of Civil Appellate Procedure ("ARCAP") 13(a)(6).

¶21 Similarly, Pace contends that the common law, as a matter of public policy, would support the imposition of a duty on a title company to parties not in privity of contract. Citing to *Sage*, 221 Ariz. at 34-35, 39, ¶¶ 7, 23, 209 P.3d at 170-71, 175, and *St. Joseph's Hospital & Medical Center v. Reserve Life Insurance Co.*, 154 Ariz. 307, 315-16, 742 P.2d 808, 816-17 (1987), Pace argues that the cases reflect a public policy mandating the imposition of a duty on a title company to supply truthful and accurate information to third parties with a stake in the transaction.

¶22 Those cases, however, do not reveal the creation of a duty by a title insurer as a matter of public policy. Neither involved a title insurer and neither modified the legal construct outlined in *Phoenix Title*. Moreover, Arizona courts are reticent to impose a duty absent privity of contract between a title insurer and plaintiff or the voluntary undertaking of a duty by a title insurer to a plaintiff. *See Luce*, 190 Ariz. at 502, 950 P.2d at 161 ("Generally, a title company's duties are to those with whom it has a contractual relationship."); *see also O'Malley*, 14 Ariz. App. at 646, 484 P.2d at 493 (discussing liability of title insurers and stating that the court has previously "indicate[d] a strong judicial unwillingness to hold . . . defendants responsible to a class of persons of unknown magnitude who might, unbeknownst to the defendants, make use of and rely upon their statements"). Consequently, the cases do not support the creation of a common law duty as a matter of public policy. As a result, the trial court properly granted YTA summary judgment and denied Pace's motion.

ATTORNEYS' FEES

¶23 Pace requests its attorney' fees and costs on appeal. YTA also requests its fees and costs on appeal pursuant to the Note and A.R.S. § 12-341.01 (West 2013). Because YTA is the prevailing party, we will award it a reasonable amount of its fees and costs upon its compliance with ARCAP 21.

CONCLUSION

¶24 For the foregoing reasons, we affirm the judgment.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
SAMUEL A. THUMMA, Judge

/s/
_____
DONN KESSLER, Judge