



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**DABUSH v. SEACRET DIRECT LLC,
CV-19-0200-PR**

PARTIES:

Petitioner: Seacret Direct, LLC (“Direct”)

Respondent: Ephraim (“Dabush”) and Rachel Dabush (together, the “Dabushes”)

FACTS:

Chambers, LLC (“Chambers”), owned a warehouse that it leased to Seacret Spa, LLC (“Spa”), a beauty supply wholesaler. Spa, in turn, subleased a portion of the warehouse to Prizma Capital, LLC (“Prizma”), and another portion to Direct. Prizma is a real estate development company; Direct sells and distributes Spa’s beauty products. Prizma’s portion of the warehouse was separated from Direct’s by a chain link fence.

Elad Gotlib (“Gotlib”), a Spa shareholder and a principal of Prizma, generally managed the warehouse for Spa. David Ben-Shabat (“Ben-Shabat”), was employed by Direct and regarded as the “boss” of Direct; he was generally responsible for maintenance on Direct’s portion of the warehouse.

In the fall of 2013, the roof over Direct’s portion of the warehouse began to leak. As with previous warehouse-wide maintenance issues, Gotlib hired Prizma to make repairs. Two Prizma workers, Unzueta and Nevarez, worked on repairing the roof.

On the morning of the accident, Dabush visited the warehouse. At Ben-Shabat’s request Dabush ended up on the roof supervising Unzueta and Nevarez as they repaired the roof. Dabush asked Nevarez to push on a skylight and then took pictures as the pressure disclosed a crack. Dabush then walked over to another skylight, placed his foot on it, and fell through. Dabush suffered significant injuries.

The Dabushes sued Chambers, Spa, Direct, and Prizma alleging each was negligent. Direct and Prizma moved for summary judgment, arguing that they did not owe Dabush a duty of care because neither possessed the premises at the time of his fall, only Chambers and Spa did. The trial court agreed and granted the motion, finding that neither Direct nor Prizma possessed the premises at the time of the fall. The Dabushes appealed.

The court of appeals began by noting that on review of a summary judgment it must “view the facts and reasonable inferences in the light most favorable to the Dabushes, the non-prevailing parties.” *Dabush v. Seacret Direct LLC*, 1 CA-CV 18-0288, 2019 WL 2651082, at *1 ¶ 6 (Ariz. App. June 27, 2019) (mem. decision). The court held that a possessor of land generally owes a

duty to inspect and make safe areas that it controls and that the “element of control is thus essential to a finding of duty.” *Id.* at *2 ¶ 8. The court stated that “the issue of who controls certain property normally presents a question of fact.” *Id.* (citing *Sanchez v. City of Tucson*, 191 Ariz. 128, 130 ¶ 10 (1998)).

With respect to Direct, the court of appeals held that the record “provides enough factual evidence to defeat summary judgment on the issue of control.” *Id.* In support, the court pointed to testimony that “David [Ben-Shabat] often interjected himself into problems that arose throughout the warehouse” and Ben-Shabat’s own testimony that “he was responsible for maintenance of the portion of the warehouse dedicated to Direct, including the roof.” *Id.* ¶ 9. The court also noted that the sublease with Spa was “silent” as to who had control of the roof. *Id.* ¶ 10. And, while there was evidence that Direct’s portion of the warehouse floor was separated by a chain link fence, there was no “evidence to show that the roof was similarly marked or that Spa assumed exclusive control of the roof at any time during its sublease.” *Id.*

Thus, the court of appeals concluded that there were genuine issues of material fact about whether Direct, via Ben-Shabat, had “exerted control over the roof covering its portion of the warehouse at the time of Ephraim [Dabush]’s injury” sufficient to create a duty to him. *Id.* (citing *Tostado v. City of Lake Havasu*, 220 Ariz. 195, 201–2 ¶¶ 27–29 (App. 2008)). The court reversed the grant of summary judgment on Direct’s duty to Ben-Shabat and remanded for further proceedings.¹ *Id.* at *3 ¶ 14.

Direct then filed a petition for review in this Court.

ISSUE (as restated by the Court):

Absent a lease provision to the contrary, does the lessee who exercises actual possession or control over a portion of a property assume a duty of care?

This Summary was prepared by the Arizona Supreme Court Staff Attorney’s Office solely for educational purposes. It should not be considered official commentary by the Court or any member thereof or part of any brief, memorandum or other pleading filed in this case.

¹ The court of appeals affirmed the grant of summary judgment to Prizma. *Dabush v. Seacret Direct LLC*, 1 CA-CV 18-0288, 2019 WL 2651082, at *3 ¶ 14 (Ariz. App. June 27, 2019) (mem. decision). No party challenges that ruling.