IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SHIRRON REID, *Plaintiff/Appellant*,

v.

DANIELA REID, *Defendant/Appellee*.

No. 1 CA-CV 12-0781
FILED 11-21-2013

Appeal from the Superior Court in Maricopa County
CV2010-018676
The Honorable John Rea, Judge

AFFIRMED

COUNSEL

Kimberly A. Staley, Peoria
By Kimberly A. Staley

Counsel for Plaintiff/Appellant

Jones, Skelton & Hochuli, P.L.C., Phoenix
By Eileen Dennis GilBride
William D. Holm

Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge John C. Gemmill delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge Kent E. Cattani joined.

G E M M I L L, Judge:

¶1 Shirron Reid ("Shirron") appeals from a Maricopa County Superior Court grant of summary judgment dismissing her claims of negligence, assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, negligent supervision, and wanton negligence against Daniela Reid ("Daniela").[1] Because the record on appeal reveals no issues of material fact and Daniela owed no legal duty to Shirron or her minor children, we affirm the summary judgment.

BACKGROUND

¶2 The legal history between the parties is extensive, and we only briefly recount the facts important to resolving this appeal. Randall and Daniela Reid divorced in 2003 while Daniela lived in Illinois and Randall in New Mexico. Two sons were born to them while married, one of whom was Robert, who suffers from Asperger's Syndrome. The Illinois court presiding over the divorce granted Daniela custody of their sons. Randall received reasonable visitation that eventually included the boys staying with him during the summer months. Later, Randall married Shirron, who had two daughters from a previous relationship. Randall and Shirron soon after had a son, who lived with them and Shirron's two daughters.

¶3 By 2007, both Daniela and her sons and Randall and his family lived in Maricopa County. Randall filed a petition in 2007 asking the Maricopa County Superior Court to award him sole custody of their two sons. A custodial reevaluation occurred, but the superior court left the custody arrangement relatively unchanged from what the Illinois court established in 2003. Randall appealed the superior court's order,

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[1] Because the parties share their last name, we use their first names to distinguish between them.

which this court addressed in *Reid v. Reid*, 222 Ariz. 204, 213 P.3d 353 (App. 2009). After we remanded the case to the superior court, Robert turned eighteen, and the parties settled.

¶4 In July 2008, while staying with Randall for the summer, Robert, then 16 years old, was swimming in the backyard pool with his siblings and step-siblings. At some point, Robert grabbed one of Shirron's daughters ("Jane Doe") and pushed her under water. The other children in the pool began screaming and attempted to force Robert to release Jane Doe. The commotion brought out Randall and Shirron, who had been in the kitchen of their home. In the course of the event, Robert was seen touching Jane Doe's breasts and the area around her genitals. Robert admitted to inappropriately touching Jane Doe, but conflicting explanations emerged as to what caused Robert to attack. Robert later pled delinquent as part of a plea agreement to one count of attempted molestation of a child, a class 3 felony.

¶5 Nearly two years after the incident, Shirron brought a tort action on behalf of herself and her children against Robert and Daniela. Shirron's complaint sought damages from Robert and Daniela based on claims of negligence, assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, negligent supervision, and "wanton negligence." The complaint also sought punitive damages. Robert and Daniela proceeded as separate parties, with each filing a separate answer to the complaint. In May 2011, Robert filed a notice of settlement with Shirron, and the trial court dismissed Robert from the action with prejudice in October 2011. Litigation on the complaint continued between Shirron and Daniela.

¶6 Daniela filed a motion for summary judgment in April 2012, which was fully briefed and argued. The trial court granted Daniela's motion. Shirron's motion to reconsider was denied, and the court entered final judgment in September 2012, dismissing Shirron's complaint and granting Daniela $168 in double taxable costs, $27,989.28 in sanctions pursuant to Arizona Rule of Civil Procedure 68(g), and $3,401.37 in costs. Shirron timely appeals, and we have jurisdiction under Arizona Revised Statutes ("A.R.S") sections 12-120.21(A)(1) and -2101(A)(1).[2]

[2] Absent material revisions since the events in question, we cite a statute's current version.

ANALYSIS

¶7 Summary judgment is appropriate "if the moving party shows that 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). We review a granting of summary judgment de novo and view the facts in the light most favorable to the non-moving party. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Likewise, we review any questions of law raised by summary judgment proceedings de novo. *Id.*

I. Consideration of the Facts on a Motion for Summary Judgment

¶8 Shirron argues that the trial court failed to consider the facts in the light most favorable to her as the party opposing summary judgment, but the facts in this case are largely undisputed. The parties disagree over the legal implications of those facts as they relate to Shirron's tort claims; specifically, whether Daniela owed a duty of care under any of the tort theories put forth by Shirron. Shirron incorrectly argues that the trial court was required to find that Daniela owed legal duties to her and her children as issues of material fact. Whether a duty exists is a matter of law decided by the reviewing court. *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). There is no evidence that the trial court failed to view the facts in the light most favorable to Shirron.

II. Negligence Claims

¶9 Shirron primarily argues that Daniela is liable for damages because of negligence. A claim for negligence requires a plaintiff to prove four elements: (1) the defendant's legal duty to the plaintiff requiring conduct within a certain standard of care, (2) the defendant's breach of that duty, (3) a causal connection between the defendant's conduct and the injury, and (4) actual damages. *Id.*; *Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983) (superseded by statute on other grounds). In granting Daniela's motion for summary judgment, the trial court held that Shirron failed to show "any authority supporting the existence of any special duty[.]" Therefore, we begin our de novo review by determining whether Daniela owed any duty to Shirron or Shirron's children.

¶10 As previously noted, determinations of duty are questions of law. *Gipson*, 214 Ariz. at 143, ¶ 9, 150 P.3d at 230. Our case law well-establishes the principle that duty exists when "the relationship of the

parties [is] such that the defendant [is] under an obligation to use some care to avoid or prevent injury to the plaintiff." *Markowitz v. Arizona Parks Bd.*, 146 Ariz. 352, 356, 706 P.2d 364, 368 (1985) (superseded by statute on other grounds as recognized in *Maher v. United States*, 56 F.3d 1039, 1042 n.4 (9th Cir. 1995)); *Grafitti-Valenzuela ex rel. Grafitti v. City of Phoenix*, 216 Ariz. 454, 458, ¶ 8, 167 P.3d 711, 715 (App. 2007); *Vasquez v. State*, 220 Ariz. 304, 312, ¶ 28, 206 P.3d 753, 761 (App. 2008). Regardless of the evidence presented by either party, if a court determines that no duty exists, "the defendant is not liable even though he may have acted negligently in light of the foreseeable risks." *Markowitz*, 146 Ariz. at 356, 706 P.2d at 368. Here, Shirron argues that Daniela's duty is established by special relationship, both as a reasonable parent and as a "treating psychiatrist." We analyze in turn when a duty is established by special relationships and whether a duty attached in either alleged relationship.

A. Special Relationship

¶11 Shirron argues that the trial court erred by holding that Daniela owed no duty to Shirron or Shirron's children because no special relationship existed. While a special relationship is not essential for a duty to exist, such relationships often assist courts in "identifying and defining duties of care." *Gipson*, 214 Ariz. at 145 n.3, ¶ 18, 150 P.3d at 232 n.3. Special relationships may give rise to duties when a relationship "find[s] its basis in contract, family relations, or undertakings." *Stanley v. McCarver*, 208 Ariz. 219, 221, ¶ 7, 92 P.3d 849, 851 (2004). The Restatement (Second) of Torts ("Restatement") § 315 (1965) establishes that no duty to control the conduct of a third person exists absent a "special relation" between: (1) the actor and the third person which "imposes a duty upon the actor to control the third person's conduct," or (2) "the actor and the other which gives to the other a right to protection." Arizona has adopted this rule. *Fedie v. Travelodge Int'l., Inc.*, 162 Ariz. 263, 265, 782 P.2d 739, 741 (App. 1989); *Davis v. Mangelsdorf*, 138 Ariz. 207, 208, 673 P.2d 951, 952 (App. 1983). Our case law confirms that the duty to control often arises from relationships such as parent-child, master-servant, possessor of land-licensee, or guardian-ward. *Fedie*, 162 Ariz. at 265, 782 P.2d at 741. Likewise, the duty to protect exists in relationships such as carrier-passenger, innkeeper-guest, landlord-invitee, guardian-ward, teacher-student, or jailer-prisoner. *Id.*

¶12 Daniela had no special relationship with Shirron and Shirron's children that imposed a duty on Daniela to protect them, but obviously a parent-child relationship exists between Daniela and Robert.

Thus, at issue here is the parent-child special relationship and the extent of Daniela's duty, if any, to control Robert.

B. Duty to Control Under the Parent-Child Special Relationship

¶13 Although a parent-child special relationship exists between Daniela and Robert, a duty under this relationship did not attach at the time of the incident between Robert and Jane Doe because Daniela did not control Robert at that time. The common law establishes that parents are generally not liable for the torts of their children. *Parsons v. Smithey*, 109 Ariz. 49, 51, 504 P.2d 1272, 1274 (1973). Under § 316 of the Restatement, a duty to control a minor child is imposed upon a parent if: (1) the parent knows or has reason to know that he has the ability to control the child, and (2) the parent knows or has reason to know of the necessity and opportunity for exercising such control. Comment b to § 316 indicates that the Restatement's drafters intended for the duty to attach at the moment of the activity causing the injury. Restatement (Second) of Torts § 316 cmt. b (1965). Failure to perform this duty, once triggered, can result in parental liability for negligent supervision, which is analyzed under the ordinary rules of negligence. *Parsons*, 109 Ariz. at 52, 504 P.2d at 1275; *see also Crisafulli v. Bass*, 38 P.3d 842, 846, ¶ 27 (Mont. 2001) (imposing liability on parents for failing to exercise reasonable care in performance of their duty, not vicarious liability for the tortious acts of their child).

¶14 Shirron repeatedly argues that Daniela controlled Robert "at all times," even when Robert visited his father. But these assertions, even taken in the light most favorable to Shirron, do not establish Daniela's control "at all times." While Daniela did have legal custody of Robert, Robert's tortious activity occurred while he was under the care of his father. This impaired any ability of Daniela to control Robert at the time of the attack. Daniela's legal custody raises no factual issue concerning Daniela's control or potential ability to control Robert at the time of this incident. *See Pfaff By and Through Stalcup v. Ilstrup*, 155 Ariz. 373, 373, 746 P.2d 1303, 1303 (App. 1987) ("Control requires present ability to affect the conduct of another. Potential ability is insufficient. [Evidence about past custodial arrangements] raises no factual issue."). Therefore, we conclude that Daniela owed no duty as a parent to control Robert at the time of Robert's tortious actions.

C. Psychiatrist Liability for Torts of Patients

¶15 Shirron alleges that Daniela is liable for professional negligence because Daniela, a psychiatrist, "was [Robert's] treating psychiatrist" and therefore Daniela owed the duty of a "reasonable person with the same or similar skills." Shirron also asserts that Daniela's professional duty extends to "third parties who are within a zone of danger." She contends that our supreme court's holding in *Hamman v. County of Maricopa*, 161 Ariz. 58, 775 P.2d 1122 (1989) supports a claim against Daniela under a "zone of danger" theory.

¶16 Arizona recognizes an express doctor-patient special relationship as giving rise to a duty of care. *Diggs v. Ariz. Cardiologists, Ltd.*, 198 Ariz. 198, 201, ¶ 14, 8 P.3d 386, 389 (App. 2000). Cases like *Hamman* allow for finding a mental health professional liable for negligence, even without a formally established special relationship, if the doctor should have determined under the applicable standards of professional care whether a patient poses a serious danger of violence. *See Hamman*, 161 Ariz. at 64, 775 P.2d at 1128; *see also Stanley*, 208 Ariz. at 226, ¶ 23, 92 P.3d at 856 ("the absence of a formal doctor-patient relationship does not necessarily preclude the imposition of a duty of care"). In such cases, a doctor must act to protect forseeable victims of the danger. *Hamman*, 161 Ariz. at 64, 775 P.2d at 1128.

¶17 Viewing the facts in a light most favorable to Shirron reveals that, even if a doctor-patient relationship existed between Daniela and Robert, Daniela is not liable to Shirron as a matter of law. The "zone of danger" analysis established in *Hamman* requires that, once a psychiatrist determines, or reasonably should have determined under applicable professional standards, "that a patient poses a serious danger of violence to others, the psychiatrist has a duty to exercise reasonable care to protect the *foreseeable victim* of that danger." *Id*.

¶18 The record does not show that Daniela committed professional negligence that exposed Shirron and her children to a "zone of danger." The only evidence suggesting Robert possessed violent tendencies is a single incident in which Robert threw a chair down a school hallway upon becoming angry after being teased. Shirron attempts to paint Robert as a bully with significant behavioral issues at home and school, but she points only to her own deposition testimony to support her assertions. Additionally, Shirron attempts to establish Robert's propensity to commit sexual assault by highlighting deposition testimony

from Randall and Shirron concerning what Daniela supposedly knew about Robert's sexual fantasies and masturbation habits. Even if the claims discussed in Randall and Shirron's depositions are true, there is no evidence proving Robert was likely to commit a sexual assault. With no additional evidence showing Robert's propensity to commit a sexually motivated attack, these assertions amount to bare allegations that do not prove Robert actually posed a threat of serious danger, much less that Daniela possessed actual knowledge about such a threat. "[E]ven though it might be said that [the non-moving party] raised a scintilla of evidence or a slight doubt, the evidence in this case was such that, if produced at trial, the trial judge would have been required to direct a verdict in favor of [the moving party] and therefore should have granted summary judgment." *Orme School v. Reeves*, 166 Ariz. 301, 311, 802 P.2d 1000, 1010 (1990). Notwithstanding Shirron's scintilla of evidence, summary judgment under the *Orme School* standard was appropriate regarding whether a duty arose from any doctor-patient special relationship between Daniela and Robert.

D. Liability under A.R.S. § 12-661

¶19 Shirron argues that A.R.S. § 12-661 establishes a claim for negligent parental supervision and that this statutory standard supersedes the *Parsons* duty of care analysis in a negligent parental supervision claim. Section 12-661 imputes liability to parents for up to $10,000 when the malicious or willful misconduct of their minor children "results in any injury to the person or property of another." A.R.S. § 12-661(A).

¶20 Although Shirron did not expressly plead a claim under A.R.S. § 12-661, she argues that any claim under the statute is subsumed within her negligence claim. She also argues that because the statute was amended after the supreme court decided *Parsons*, the *Parsons* analysis no longer controls. We do not reach whether Shirron appropriately pled a § 12-661 claim because the statute does not apply as a matter of law. Though our review of *Parsons* and A.R.S. § 12-661 does not reveal *Parsons* to be inapplicable in analyzing the statute, we decide the issue on other grounds. This court has explicitly held that liability under A.R.S. § 12-661 cannot attach to a parent "who has neither custody nor control of his child." *Pfaff*, 155 Ariz. at 373, 746 P.2d at 1303. We reiterate *Pfaff*'s holding that A.R.S. § 12-661 cannot apply to a parent who is not in actual, physical custody of his or her child at the time the malicious or willful misconduct occurs. Accordingly, because Daniela had no ability to control Robert at

the time of the attack, she is not liable for Robert's conduct under A.R.S. § 12-661.

III. Shirron's Other Claims

¶21 In addition to her negligence claims, Shirron also alleges that Daniela is liable for claims of assault, battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. Nothing in the record supports these claims, and the trial court correctly entered summary judgment in Daniela's favor.

CONCLUSION

¶22 This appeal arises from tragic circumstances, but the unhappy relationship between the Reids is not sufficient to establish that Daniela owed a duty of care. Shirron did not produce evidence establishing clear issues of material fact or that Daniela owed a duty of care to her and her children at the time of Robert's attack. Accordingly, we affirm the trial court's granting of summary judgment, costs, and Rule 68(g) sanctions in favor of Daniela Reid.