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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| KADEN HERRINGTON, a minor, by and through his natural parent, ROSALI VARGAS; and ROSALI VARGAS, an individual,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>MINI-SKOOL EARLY LEARNING CENTERS, INC., a Delaware corporation, dba MINI-SKOOL EARLY LEARNING CENTER,<br><br>Defendant/Appellee. | 2 CA-CV 2009-0047<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20073678

Honorable Stephen C. Villarreal, Judge

AFFIRMED

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B R A M M E R, Judge.

**¶1** Appellants Kaden Herrington, a minor, and Rosali Vargas, his mother, appeal from the trial court's grant of summary judgment in favor of appellee Mini-Skool Early Learning Centers, Inc. (Mini-Skool). Kaden and Rosali argue that their claims of premises liability and negligence per se were neither contested nor addressed by Mini-Skool's motion for summary judgment and that a question of fact bars summary judgment on their negligent supervision claim. We affirm.

**Factual and Procedural Background**

**¶2** "On appeal from summary judgment, this court reviews the record *de novo* and applies the same standard as the trial court." *Cox v. May Dep't Store Co.*, 183 Ariz. 361, 363, 903 P.2d 1119, 1121 (App. 1995). We view the facts in the light most favorable to the party opposing summary judgment and draw all reasonable inferences arising therefrom in favor of that party. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). On January 18, 2006, three-year-old Kaden was injured while using playground equipment at Mini-Skool's day care facility, in which he had enrolled two weeks earlier. Kaden was playing on the equipment when his foot slipped off a U-shaped bar. He fell, striking his mouth on the bar and injuring his lips and teeth. At least two Mini-Skool employees were on the playground when Kaden fell, including the facility's director who was standing three or four feet away. Kaden had played on the equipment several times just before falling and had played on it earlier that day without incident.

**¶3** Kaden and Rosali sued Mini-Skool for negligence, asserting Mini-Skool had supervised Kaden inadequately while he was using the equipment they claim was dangerous. Mini-Skool moved for summary judgment on "all" of Kaden and Rosali's claims. In ruling on the motion, the trial court observed that, although Kaden and Rosali's complaint was "unclear," it appeared they had alleged "two theories of tort liability against [Mini-Skool], inadequate supervision and premises liability." The court then determined they "ha[d] offered no evidence or testimony that the level of staffing or the quality of supervision at the playground fell below the standard of care[,] nor . . . [did Kaden and Rosali] prove[] how additional supervision or different supervision would have prevented Kaden's fall." The court further concluded that Kaden and Rosali "ha[d] not come forward with any evidence . . . that the playground equipment or the premises were unreasonably dangerous and that [Mini-Skool] had notice of the dangerous condition." Thus, the court found there were no material factual issues in dispute and granted Mini-Skool's motion for summary judgment. This appeal followed.

**Discussion**

**¶4** Kaden and Rosali first argue the trial court erred in entering summary judgment on their negligence per se and premises liability claims because Mini-Skool's motion for summary judgment addressed only their claim of negligent supervision. We initially observe that nothing in Kaden and Rosali's complaint reasonably can be read to allege Mini-Skool was negligent per se; the complaint does not assert Mini-Skool violated any statutory or regulatory provisions. *See* Ariz. R. Civ. P. 8(a) (complaint must contain "short and plain

statement of the claim showing that the pleader is entitled to relief"); *Caldwell v. Tremper*, 90 Ariz. 241, 247, 367 P.2d 266, 270 (1962) ("[V]iolation of a statute or ordinance requiring a certain thing to be done or not to be done is negligence per se.").

**¶5** Despite Mini-Skool's argument to the contrary, we agree with the trial court that Kaden and Rosali's complaint at least arguably states a claim for premises liability. *See generally Contreras v. Walgreens Drug Store No. 3837*, 214 Ariz. 137, ¶ 7, 149 P.3d 761, 762-63 (App. 2006) (business has duty to keep premises reasonably safe for customers). Kaden and Rosali, however, have failed to cite authority suggesting the court erred in considering that claim pursuant to Mini-Skool's motion seeking "judgment in its favor on all claims." "Opening briefs must present and address significant arguments, supported by authority[,] that set forth the appellant's position on the issue in question." *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009); *see also* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain citation to authority). Rather than cite authority addressing the relevant issue, Kaden and Rosali instead generally recite the law governing negligence and observe that we must view the evidence in the light most favorable to them. This discussion does not address the issue whether the court properly could consider on summary judgment any claims other than their negligent supervision claim. Kaden and Rosali therefore have waived this argument on appeal, and we do not address it further.[1] *See Ritchie*, 221 Ariz. 288, ¶ 62, 211 P.3d at 1289, *citing State v. Moody*, 208 Ariz. 424, n.9, 94

[1]Nor do Kaden and Rosali argue the record demonstrates the existence of a material question of fact whether the premises were unreasonably dangerous.

P.3d 1119, 1147 n.9 (2004); *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000) (declining to consider "bald assertion . . . offered without elaboration or citation to any constitutional provisions or legal authority").

**¶6** Kaden and Rosali next argue the trial court erred in granting Mini-Skool's motion for summary judgment on their negligent supervision claim because the elements of breach and causation are factual questions for the trier of fact to decide. To maintain a negligence action, the plaintiff must show that the defendant owed a duty to the plaintiff, the breach of which caused the plaintiff's injury. *See Morris v. Ortiz*, 103 Ariz. 119, 121, 437 P.2d 652, 654 (1968).

**¶7** When reviewing a similar issue, Division One of this court quoted from a Louisiana case to illustrate that "adults supervising the acts of children are not subject to strict liability for their injuries." *Ward v. Mount Calvary Lutheran Church*, 178 Ariz. 350, 357-58, 873 P.2d 688, 695-96 (App. 1994). The Louisiana court stated that "supervisors of a day nursery are charged with the highest degree of care toward the children placed in their custody . . . [but] are nevertheless not the absolute insurers of their safety and cannot be expected or required to prevent children from falling or striking each other during the course of normal childhood play." *Oldham v. Hoover*, 140 So. 2d 417, 421 (La. Ct. App. 1962). Kaden and Rosali assert this language establishes a higher standard of care for supervisors of a day nursery, such as Mini-Skool, than the traditional standard of reasonable care under the circumstances. *See Morris*, 103 Ariz. at 121, 437 P.2d at 654 (stating, with respect to high school student injured while supervised by teacher, that "[n]egligence is, of course, the

failure to act as a reasonable and prudent person would act in like circumstances"). Nothing in *Ward*, however, can reasonably be read as creating a heightened standard of care. Moreover, even under the most rigorous standard of care, Kaden and Rosali have presented no evidence that Mini-Skool breached the duty it owed Kaden.

**¶8** Although breach and causation are usually questions for the trier of fact, *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007), summary judgment is appropriate nonetheless 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.'"[2] *Hughes Custom Bldg., L.L.C. v. Davey*, 221 Ariz. 527, ¶ 8, 212 P.3d 865, 868 (App. 2009), *quoting Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); *see also* Ariz. R. Civ. P. 56(c); *Gipson*, 213 Ariz. 141, n.1, 150 P.3d at 230 n.1. "We review de novo whether there are any genuine issues of material fact and whether the trial court applied the law properly." *Hughes Custom Bldg.*, 221 Ariz. 527, ¶ 8, 212 P.3d at 868.

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[2]Relying on *Markowitz v. Arizona Parks Board*, 146 Ariz. 352, 706 P.2d 364 (1985), Kaden and Rosali appear to argue that breach of duty and proximate cause are always fact questions and summary judgment was therefore inappropriate. Although our supreme court stated in *Markowitz* that proximate cause was "usually [a question] for the jury," 146 Ariz. at 358, 706 P.2d at 370, nothing in that decision suggests a trial court may not grant a motion for summary judgment where, as here, there is no disputed material fact on an element of negligence. To the contrary, the court clarified in *Gipson* that, "[a]lthough breach and causation are factual matters, summary judgment may be appropriate if no reasonable juror could conclude that the standard of care was breached or that the damages were proximately caused by the defendant's conduct." 213 Ariz. 141, n.1, 150 P.3d at 230 n.1, *citing Markowitz*, 146 Ariz. at 357-58, 706 P.2d at 369-70, and *Coburn v. City of Tucson*, 143 Ariz. 50, 53, 691 P.2d 1078, 1081 (1984).

**¶9** Kaden and Rosali assert that Mini-Skool's failure to instruct Kaden "about playing on the equipment" constituted a breach of the standard of care, but fail to present any evidence, expert or otherwise, indicating what conduct would have been reasonable under the circumstances. Moreover, their argument is belied by the fact that no child previously had suffered a similar injury on the playground during the tenure of Mini-Skool's director. Although foreseeability does not determine whether a duty was owed, and it is clear one was owed here, it is relevant in determining whether the duty was breached. *See Gipson*, 214 Ariz. 141, ¶¶ 15-16, 150 P.3d at 231 ("[F]oreseeability is not a factor to be considered by courts when making determinations of duty . . . . [But it] often determines whether a defendant acted reasonably under the circumstances. . . ."); *Martinez v. Woodmar IV Condos. Homeowners Ass'n*, 189 Ariz. 206, 211, 941 P.2d 218, 223 (1997) ("The type of foreseeable danger . . . dictate[s] . . . the nature and extent of the conduct necessary to fulfill the duty."). It is undisputed that Kaden had climbed the equipment several times just before falling and had climbed it earlier that day without incident. Mini-Skool's director had been watching Kaden on the playground equipment and had been standing three or four feet away from him when he fell. Nothing in the record suggests Kaden had been allowed to play in an unsafe fashion.

**¶10** Kaden and Rosali also have failed to produce evidence showing that any negligence on the part of Mini-Skool caused Kaden's injury. To establish causation, a plaintiff must show both cause-in-fact and proximate cause. Establishing cause-in-fact requires the plaintiff to show that "but for" the defendant's negligence, the plaintiff would

not have been injured. *Ontiveros v. Borak*, 136 Ariz. 500, 505, 667 P.2d 200, 205 (1983). Establishing proximate cause requires the plaintiff to show conduct by the defendant that, "in a natural and continuous sequence, unbroken by any efficient intervening cause, produce[d] [the plaintiff's] injury, and without which the injury would not have occurred." *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546, 780 P.2d 1040, 1047 (1999).

**¶11** Kaden and Rosali produced no evidence that Mini-Skool's failure to give a safety instruction to Kaden contributed to Kaden's injury, nor did they show that, but for the lack of such an instruction, Kaden would not have been injured. As previously noted, Mini-Skool's director had watched Kaden climb the equipment several times without incident before he was injured. Similarly, although Kaden and Rosali assert "the director could have, while actually watching Kaden, . . . stepped forward to protect him against the fall," adult supervisors of children are not subject to strict liability for a child's injuries and cannot be expected "'to anticipate the myriad of unexpected acts which occur daily in and about schools and school premises.'" *Ward*, 178 Ariz. at 357, 873 P.2d at 695, *quoting Morris*, 103 Ariz. at 121, 437 P.2d at 654. Nor can they be expected to "'somehow circumvent'" a child's unexpected act. *Id., quoting Morris*, 103 Ariz. at 121, 437 P.2d at 654. Kaden and Rosali presented no evidence that Mini-Skool's director or any other employee either should or could have anticipated Kaden's unfortunate fall. The only evidence Kaden and Rosali indicated they intended to present on the element of causation is irrelevant to their negligent supervision claim. Indeed, they asserted below they would "call an expert witness . . . [to] testify that the poor conditions of the property caused [Kaden] to fall." But they failed to

produce any such evidence in the trial court. *See Ward*, 178 Ariz. at 352, 873 P.2d at 690. In any event, their intended expert testimony does not address how Mini-Skool's supervision could have contributed to Kaden's injury.

**Disposition**

**¶12** Because Kaden and Rosali have waived on appeal any argument the trial court improperly granted summary judgment on their premises liability claim and have failed to demonstrate any disputed questions of fact whether Mini-Skool breached the duty of care owed Kaden and whether any breach caused his injuries, we affirm the trial court's grant of summary judgment in favor of Mini-Skool.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge