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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

VICKIE PATAKI, the surviving mother of JOSHUA MOODY, in her own right, Plaintiff/Appellant, v. JEFFREY LINEHAN and CHRISTINE LINEHAN, Defendants/Appellees.	2 CA-CV 2010-0081 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20066380

Honorable Kenneth Lee, Judge

AFFIRMED

The Leader Law Firm, P.C.
By John P. Leader — Tucson
Attorney for Plaintiff/Appellant

Bleaman Law Firm, P.C.
By Marc D. Bleaman — Tucson
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B R A M M E R, Presiding Judge.

¶1 Vickie Pataki appeals from the trial court's grant of summary judgment in favor of appellee Jeffrey Linehan on her wrongful death claim, in which she asserted

Linehan negligently had caused the death of her son, Joshua Moody.[1] She argues the court erred by concluding Linehan owed no duty to Joshua and in dismissing her claim for punitive damages. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered, drawing all justifiable inferences in its favor. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). In September 2006, Linehan met a few friends, including Eric Brown, at a club. While there, he saw Joshua's girlfriend, Melissa Pugh, who worked at the club as a dancer. Although Pugh had asked Linehan to leave, he asked her to dance for him. Pugh refused and walked away. She then called Joshua and told him what had transpired.

¶3 Joshua and his brother, Jay Moody, then went to the club to speak with Linehan to stop him from "harassing" Pugh. When they approached Linehan, he suggested they go outside and talk because the club was noisy. After Linehan, Brown, Jay, and Joshua went outside, a heated argument ensued, and Linehan tried repeatedly to separate Jay and Brown. Although the men briefly parted ways after club employees intervened, Linehan and Brown again approached Jay and Joshua in the parking lot. After further argument, Brown punched Joshua in the face, causing him to fall unconscious to the ground. Jay and Brown then began fighting. Linehan kicked Joshua

[1]Linehan and Joshua referred to each other as brothers or stepbrothers because Joshua's father had been in a relationship with Linehan's mother since Joshua and Linehan were young.

at least once while he was on the ground. Joshua died from injuries sustained during the fight.

¶4 Pataki sued the club, asserting a wrongful death claim. After settling that claim, Pataki amended her complaint to allege wrongful death claims against Brown and Linehan, asserting they had "breached duties owed to" Joshua. Jay joined as a plaintiff, asserting a claim of negligent infliction of emotional distress against Brown and Linehan. Pataki and Jay also requested punitive damages. After Pataki and Jay accepted Brown's offer of judgment, the trial court entered judgment in favor of Pataki and Jay against Brown.

¶5 Linehan filed a motion for summary judgment on Pataki's and Jay's claims. He argued Pataki had not established "a prima facie case of negligence" because he did not owe Joshua a duty "to refrain from asking Pugh for a dance" or to control Brown's behavior. He additionally contended Jay could not establish the elements required to prove a claim of negligent infliction of emotional distress. Finally, Linehan asserted Pataki and Jay had not "set forth any conduct . . . that would support a claim for punitive damages" and that no available evidence would support such a claim.

¶6 After argument, the trial court granted Linehan's motion "as to all claims" and "dismissed [them] with prejudice." In ruling, the court stated Pataki had identified two theories of negligence: "Linehan's interaction with Melissa Pugh and . . . failing to defuse the situation and/or control . . . Brown's behavior." The court determined Linehan "had no legal duty" to Joshua "in either of th[o]se situations."

¶7 The trial court also noted Pataki had not alleged any intentional tort claims, and that her characterization of her claim based on Linehan's alleged striking of Joshua as a negligence claim was "an exercise of sophistry." The court stated Pataki could not assert that claim without amending her complaint, for which she had made no request. The court also stated that, despite disclosing negligence per se as a liability theory, Pataki had not amended her complaint to include that claim. The court also determined Jay had "failed to meet several elements of [hi]s claim for negligent infliction of emotional distress." Finally, the court determined that, because "there is no basis for liability, the punitive damages requested . . . cannot stand." The court then entered a judgment in favor of Linehan awarding him $2,353.90 in costs. This appeal followed.[2]

Discussion

¶8 Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). "On appeal from a summary judgment, we must determine de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998). A trial court should grant a motion for summary judgment only "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

[2]Jay does not appeal from the judgment in favor of Linehan.

advanced by the proponent of the claim or defense." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶9 To prove negligence, Pataki must demonstrate Linehan owed Joshua a duty of care. *Gipson v. Kasey*, 214 Ariz. 141, ¶¶ 9, 11, 150 P.3d 228, 230 (2007) ("[A]bsent some duty, an action for negligence cannot be maintained."). Duty is an "'obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.'" *Id.* ¶ 10, *quoting Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354, 706 P.2d 364, 366 (1985). Whether a duty exists is a question of law we review de novo. *See id.* ¶ 9; *Vasquez v. State*, 220 Ariz. 304, ¶ 22, 206 P.3d 753, 760 (App. 2008).

¶10 Pataki asserts Linehan owed a duty to Joshua "based solely on [their] relationship," presumably their purported family relationship. *See Gipson*, 214 Ariz. 141, ¶ 18, 150 P.3d at 231-32 ("Duties of care may arise from special relationships based on contract, family relations, or conduct undertaken by the defendant."). First, despite Linehan and Joshua purportedly having referred to each other as brothers or stepbrothers, they were not legally related. In any event, Pataki cites no authority, and we find none, suggesting adult brothers or stepbrothers owe a reciprocal duty based solely on that relationship. *See, e.g., id.* ¶ 19 (describing "various categorical relationships" giving rise to duty). Pataki identifies no other reason to find a duty based on Linehan's and Joshua's relationship.

¶11 Pataki also contends Linehan had a duty "to avoid exposing others to increased harm," and asserts Linehan breached that duty "by acting inappropriately

toward [Pugh]" and by suggesting he and Joshua should go outside to talk—acts that ultimately led to Brown assaulting Joshua.[3] She relies on the following statement by our supreme court in *Gipson*: "This court has . . . previously noted that 'every person is under a duty to avoid creating situations which pose an unreasonable risk of harm to others.'" 241 Ariz. 141, n.4, 150 P.3d at 233 n.4, *quoting Ontiveros v. Borak*, 136 Ariz. 500, 509, 667 P.2d 200, 209 (1983).

¶12 The court in *Gipson*, however, concluded duty must be based either on a special relationship or public policy. 214 Ariz. 141, ¶¶ 22-24, n.4, 150 P.3d 228, 232-33, 233 n.4. We already have rejected Pataki's argument that Linehan owed Joshua a duty based on their relationship, and she offers us no public policy reason to conclude Linehan owed Joshua such a duty. Nor can we envision a reasonable basis to do so in these circumstances.

¶13 Pataki argues, in essence, that all persons owe a duty to all other persons at all times. Arizona has not adopted this approach. *See Bloxham v. Glock Inc.*, 203 Ariz. 271, ¶ 8, 53 P.3d 196, 200 (App. 2002) ("'We do not understand the law to be that one owes a duty of reasonable care at all times to all people under all circumstances.'"), *quoting Hafner v. Beck*, 185 Ariz. 389, 391, 916 P.2d 1105, 1107 (App. 1995); *see also*

[3]Because she did not raise it below, we do not consider Pataki's argument that Linehan breached a duty to Joshua by "re-engaging him" after club employees had told them to leave. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (errors not raised in trial court not raisable on appeal). Nor do we consider her argument, made for the first time in her reply brief, that Linehan owed a duty to Joshua because he had undertaken to protect Joshua from Brown. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005) (issue raised for first time in reply brief waived on appeal).

Gipson, 214 Ariz. 141, ¶¶ 33-41, 150 P.3d at 234-35 (Hurwitz, J., concurring) (suggesting Arizona should adopt global duty rule). Our supreme court expressly declined to do so in *Gipson*, 214 Ariz. 141, ¶¶ 22-24, n.4, 150 P.3d 228, 233, 233 n.4, and Pataki has offered no reason compelling us to do so here.

¶14 Nor did Linehan have any duty to control Brown's conduct. *See Bloxham*, 203 Ariz. 271, ¶ 7, 53 P.3d at 199 (no duty to "control the conduct of a third party" absent special relationship between defendant and third party or defendant and plaintiff). Moreover, viewing the record through the lens of the standard *Gipson* approved, that "every person" has a duty to avoid conduct creating an "unreasonable risk of harm," 136 Ariz. at 509, 667 P.2d at 209, nothing suggests Linehan's conduct created an unreasonable risk of harm, if it created a risk of any harm at all. Thus, we find no fault in the trial court's conclusion Linehan did not owe Joshua a duty.[4]

¶15 Further, despite Pataki's assertion to the contrary, Linehan raised the argument below—albeit in passing—that, even if Linehan owed Joshua a duty, no evidence supports the conclusion he breached that duty by asking Pugh for a dance, by asking Joshua and Jay to speak to him outside, or by failing to control Brown. A defendant's conduct breaches a duty of care when "there was a foreseeable and

[4]Pataki also argues the trial court erred by considering "specific conduct" in determining whether Linehan owed Joshua a duty. She relies on our supreme court's statement in *Gipson*, "caution[ing] against narrowly defining duties of care in terms of the parties' actions in particular cases . . . because a fact-specific discussion of duty conflates the issue with concepts of breach and causation." 214 Ariz. 141, ¶ 21, 150 P.3d at 232. To the extent the court may have so conflated the issues here, we nonetheless will affirm a trial court's grant of summary judgment if it is correct for any reason. *City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, ¶ 14, 32 P.3d 31, 36 (App. 2001).

unreasonable risk of harm from that conduct." *Rudolph v. Ariz. B.A.S.S. Found.*, 182 Ariz. 622, 625, 898 P.2d 1000, 1003 (App. 1995). We agree with Linehan there was no evidence from which a reasonable trier of fact could conclude Linehan's conduct resulted in a foreseeable and unreasonable risk of harm to Joshua. *See Orme Sch.*, 166 Ariz. at 305, 802 P.2d at 1004. Nothing in the record suggests Linehan knew or should have known Brown would punch Joshua, or even that a physical confrontation was likely to occur.

¶16 Although the trial court grounded its ruling in its conclusion Linehan owed Joshua no duty, we may affirm the court's grant of summary judgment if it is correct for any reason. *City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, ¶ 14, 32 P.3d 31, 36 (App. 2001); *see also Rudolph*, 182 Ariz. at 626, 898 P.2d at 1004 ("[D]espite the trial court's error in granting summary judgment based on the lack of duty, we can affirm the trial court's judgment if there is no evidence that defendants breached their duty.").

¶17 Pataki further argues Linehan had "a duty not to kick and punch" Joshua, presumably referring to the deposition testimony of a witness who stated he had seen Linehan kick Joshua after Joshua had fallen to the ground.[5] Pataki reasons that "duty can

[5]The trial court noted Pataki had disclosed a negligence-per-se theory based on Linehan's alleged violation of several criminal statutes. Beyond observing that Pataki had not amended her complaint to include a negligence-per-se claim, the court did not address further this theory of liability in its decision. As we understand her argument, Pataki asserts she was not required to articulate such a claim in her complaint because her later disclosure of that theory of relief was adequate, and the court therefore erred by concluding she had "failed to disclose negligence theories related to [Linehan's] kicking and punching." Even assuming Pataki's complaint reasonably can be read to assert a claim based on negligence per se, *see* Ariz. R. Civ. P. 8(a), she does not develop this argument adequately on appeal. *See Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154

be based on statutes" and that Linehan's conduct "violated Arizona's negligent homicide statute." *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."). She fails, however, to develop this argument in any meaningful way. She does not cite Arizona's negligent homicide statute in her opening brief, explain how Linehan's conduct violated it, or identify evidence in the record supporting that conclusion. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain "citations to the authorities, statutes, and parts of the record relied on"). Therefore, Pataki has waived this argument on appeal and we decline to address it further.[6] *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 394 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal). Additionally, although Linehan's kicking of Joshua plainly would constitute an intentional tort, Pataki acknowledges—consistent with the trial court's conclusion—that she has not asserted an intentional tort claim.

¶18 For the reasons stated, we conclude the trial court did not err in granting Linehan's motion for summary judgment. To the extent Pataki suggests her punitive damages claim survives the court's grant of summary judgment in Linehan's favor on her wrongful death claim, we reject that argument. *See Bridgestone/Firestone N. Amer. Tire, L.L.C. v. Naranjo*, 206 Ariz. 447, ¶ 29, 79 P.3d 1206, 1213 (App. 2003) (punitive

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P.3d 391, 394 n.2 (App. 2007). Moreover, Pataki raises this argument for the first time in her reply brief, *see Romero*, 211 Ariz. 200, n.3, 119 P.3d at 471 n.3. Accordingly, we do not address it further.

[6]Nor do we address Pataki's argument made for the first time in her reply brief that Linehan breached a duty of care by "overreact[ing] in self defense." *See Romero*, 211 Ariz. 200, n.3, 119 P.3d at 471 n.3.

damages claim "cannot proceed" when plaintiff "no longer can recover actual damages"). We therefore need not address her argument that Linehan had moved to dismiss her punitive damages claim under Rule 12(b)(6), Ariz. R. Civ. P., rather than Rule 56(c), Ariz. R. Civ. P., and the court therefore improperly analyzed Pataki's punitive damages claim "under summary judgment methodology."

Disposition

¶19 We affirm the trial court's grant of summary judgment in favor of Linehan.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge