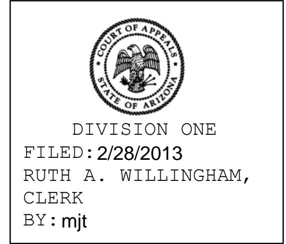
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 2/28/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CATALINA PEREZ and LUIS GARCIA, both individually and as surviving parents of DESIREE GARCIA PEREZ, deceased,	1 CA-CV 12-0316
Plaintiffs/Appellants,	DEPARTMENT E
v.	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
DENISE THRUSH and SEAN W. ECKES, wife and husband,	
Defendants/Appellees.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-010178

The Honorable Mark H. Brain, Judge

REVERSED AND REMANDED

Douglas F. Dieker, PC — Scottsdale
By Douglas F. Dieker
Co-Counsel for Plaintiffs/Appellants

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By David L. Abney
Co-Counsel for Plaintiffs/Appellants

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Attorneys for Defendants/Appellees

D O W N I E, Judge

¶1 Catalina Perez and Luis Garcia (collectively, "Appellants"), both individually and as surviving parents of Desiree Garcia Perez, appeal the superior court's grant of summary judgment to Denise Thrush and Sean W. Eckes (collectively, "Appellees"). Because questions of fact exist regarding the duty owed by Appellees, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶2 Heriberto and Andrea Perez leased a home from Thrush in July 2009. Accompanied by their daughter, Catalina Perez, Heriberto and Andrea visited the property before signing the lease, and they inquired about the condition of the swimming pool fence, which they noted was short and did not self-latch. According to Appellants, Thrush stated that she would fix the fence and gate.

¶3 Initially, Heriberto and Andrea occupied the house with their seven-year-old grandson, Sebastiano. During their tenancy, Heriberto, Andrea, and Catalina repeatedly asked Appellees to repair the pool fence and gate. Appellees

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[1] The parties dispute most of the facts relevant to our analysis. For purposes of appellate review and our recitation of the facts, we accept Appellants' alleged facts as true and draw all reasonable inferences from those facts in Appellants' favor. *See Sanchez v. City of Tucson*, 191 Ariz. 128, 130, ¶ 7, 953 P.2d 168, 170 (1998).

purportedly promised on many occasions to make the repairs, yet failed to do so.

¶4 In the fall of 2010, Andrea was placed in a long-term care facility due to injuries resulting from a fall. Catalina and her two daughters reportedly moved into the rental home to assist Heriberto, residing there for several months. Catalina informed Thrush that she and her 18-month-old daughter, Desiree, were living at the home while Andrea was away. On November 27, 2010, Desiree was found unconscious, face-down in the pool; she died three days later.

¶5 Appellants filed this action for wrongful death. Appellees moved for summary judgment, contending they owed no duty of care to Desiree. The superior court granted the motion, ruling there was no evidence that Desiree was a tenant to whom Appellees owed a duty of care.

¶6 Appellants timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

DISCUSSION

¶7 A court may grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). We determine *de novo* whether there are genuine issues of material fact and whether the superior court erred in its

application of the law. *Unique Equip. Co., Inc. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999) (citation omitted).

¶8 "To establish a claim for negligence, a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). We focus on the element of duty, which was the basis for the superior court's ruling. We review questions of duty *de novo*. *Clark v. New Magma Irrigation & Drainage Dist.*, 208 Ariz. 246, 248, ¶ 8, 92 P.3d 876, 878 (App. 2004).

¶9 A 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." *Gipson*, 214 Ariz. at 143, ¶ 10, 150 P.3d at 230 (internal quotation marks omitted). A duty exists when the parties' relationship is such that the defendant has "an obligation to use some care to avoid or prevent injury to the plaintiff." *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 356, 706 P.2d 364, 368 (1985) *superseded on other grounds by statute*, A.R.S. § 33-1551 (1983), *as recognized in Wringer v. United States*, 790 F. Supp. 210, 213 n.3 (D. Ariz. 1992).

¶10 Whether a duty exists is a legal question to be decided by the court. *Gipson*, 214 Ariz. at 143, ¶ 9, 150 P.3d at 230 (citation omitted). However, when the existence of a duty depends on preliminary questions that must be determined by a fact finder, the court may not rule as a matter of law and should not enter summary judgment. *See Estate of Maudsley v. Meta Servs., Inc.*, 227 Ariz. 430, 437 n.9, ¶ 23, 258 P.3d 248, 255 (App. 2011) (whether a relationship that may give rise to a duty actually exists may be a factual question for a fact finder to decide before court can analyze duty); *Diggs v. Ariz. Cardiologists, Ltd.*, 198 Ariz. 198, 200, ¶ 11, 8 P.3d 386, 388 (App. 2000) ("[T]he existence of a duty may depend on preliminary questions that must be determined by a fact finder."); *State v. Juengel*, 15 Ariz. App. 495, 499, 489 P.2d 869, 873 (1971) (child plaintiff's status "as trespasser, licensee or invitee was contested and properly treated as a question of fact for the jury's determination"), *overruled on other grounds in New Pueblo Constructors, Inc. v. State*, 144 Ariz. 95, 108-09, 696 P.2d 185, 198-99 (1985).

¶11 A landlord has a duty to "inspect the premises when he has reason to suspect defects existing at the time of the taking of the tenancy and to either repair them or warn the tenant of their existence. In other words he is under the duty to take those precautions for the safety of the tenant as would be taken

by a reasonably prudent man under similar circumstances." *Cummings v. Prater*, 95 Ariz. 20, 26, 386 P.2d 27, 31 (1963). A landlord's duties extend to child tenants. *McLeod v. Newcomer*, 163 Ariz. 6, 9, 785 P.2d 575, 578 (App. 1989).

¶12 We discussed the duty that a landowner owes a child tenant in *McLeod*. There, a child suffered brain damage after he was found in the swimming pool on residential property his parents leased. *Id.* at 7, 785 P.2d at 576. This Court rejected the landlord's contention that only the parents, and not the child, were tenants, ruling it could be inferred the child was a tenant because he was living in the house with the landlord's knowledge and consent. *Id.* at 9, 785 P.2d at 578.[2] We then held that the landlord's duty "was to exercise such care as a reasonably prudent person would exercise toward children under similar circumstances." *Id.*

¶13 We also rejected the landlord's argument that whenever parents rent a residence, it is their obligation, not the landlord's, to insure that children residing on the premises are

[2] *See also McFarland v. Kahn*, 123 Ariz. 62, 62-63, 597 P.2d 544, 544-45 (1979) (drawing no distinction regarding duty landlord owed child of tenants); *Udy v. Calvary Corp.*, 162 Ariz. 7, 13, 780 P.2d 1055, 1061 (App. 1989) (holding landlord owed duty of care to child of tenants); *Presson v. Mountain States Props., Inc.*, 18 Ariz. App. 176, 178-79, 501 P.2d 17, 19-20 (1972) (making no distinction between duty landlord owed to child of parent-tenants and duty owed to her father, who signed the lease).

safe from obvious dangers. *Id.* at 10, 785 P.2d at 579. On the contrary, "[t]he existence of a parent-child relationship alone does not serve to transfer a landlord's obligation, without additional circumstances," such as an express agreement that the parents will assume the full duty of "taking the proper and realistic measures which will protect their children from a recognized, specific hazard." *Id.* The record in this case includes no evidence of any such agreement.

¶14 In opposing the motion for summary judgment, Appellants offered an affidavit from Catalina Perez. Catalina avowed that Desiree had lived at the residence for "several months" with Appellee Thrush's knowledge and implied consent. Although there is evidence in the record undercutting this claim, questions of fact exist regarding whether Desiree was a tenant at the time of the incident. *McLeod*, 163 Ariz. at 9, 785 P.2d at 578. Additionally, a fact-finder considering the tenancy issue may consider the lease, which could be read to permit Heriberto, Andrea, and their "immediate family" to occupy the premises without the landlord's written consent.

¶15 To the extent Appellees suggest that minor children must be listed on a lease to attain tenancy status, we disagree. Appellees also rely on A.R.S. § 33-1310(16), which defines a tenant, for purposes of Arizona's Residential Landlord and Tenant Act, as "a person entitled under a rental agreement to

occupy a dwelling to the exclusion of others." According to Appellees, it is "preposterous" to suggest "that an eighteen-month old child is in fact a tenant that could exclude anyone from the land or had any type of 'right or title.'" But adopting Appellees' argument would lead to the conclusion that a young child is never a tenant -- a proposition squarely contradicted by established caselaw.

¶16 Appellees also argue that even if Desiree was a tenant, they were relieved of any duty to repair or warn her because Heriberto and Andrea had sufficient opportunity to learn of the dangerous condition, as discussed in *Piccola v. Woodall*, 186 Ariz. 307, 921 P.2d 710 (App. 1996). We disagree.

¶17 In *Piccola*, we adopted the Restatement (Second) of Torts § 358(2) (1965), which states that a landlord's liability for failure to disclose a dangerous condition to a tenant continues only until the tenant has had a reasonable opportunity to discover the condition and take precautions. 186 Ariz. at 312, 921 P.2d at 715. In *Piccola*, a six-year-old child was injured when she fell through a plate glass door at a home owned by Woodall and leased to the Steinburgs. *Id.* at 308-09, 921 P.2d at 711-12. At the time of the injury, the child was the Steinburgs' social guest. *Id.* at 309, 921 P.2d at 712.

¶18 This Court held that the Steinburgs, who had leased the home for two and one-half years, *id.* at 312 n.7, 921 P.2d at

715 n.7, had sufficient opportunity to learn of the dangerous condition, thereby absolving Woodall of liability for it. *Id.* at 312, 921 P.2d at 715. We stated: "The lessor is under no duty to warn the lessee of a condition which he reasonably believes that the lessee will discover, or of the extent of the risk involved in an obvious condition, unless he should realize that the lessee is unlikely to appreciate it." *Id.* (quoting Restatement (Second) of Torts § 358, cmt b).

¶19 *Piccola* is inapplicable here because *if* Desiree was a tenant to whom Appellees owed a duty of care, the duty ran to Desiree, not merely to the adult tenants. *See, e.g., Schultz v. Eslick*, 788 F.2d 558, 560 (9th Cir. 1986) ("The proper inquiry is whether the landlords satisfied their duty of due care to the three-year-old plaintiff, not to her parents."). As such, the grandparents' knowledge of the danger would not, as a matter of law, vitiate Appellees' duty to Desiree. When a child is a tenant, the landlord must "exercise such care as a reasonably prudent person would exercise *toward children* under similar circumstances." *McLeod*, 163 Ariz. at 9, 785 P.2d at 578 (emphasis added).

¶20 Finally, Appellants contend Appellees assumed a duty of care by agreeing to repair the pool barriers at the outset of the tenancy and throughout the lease term. Appellees deny any such promises. However, accepting Appellants' alleged facts as

true, *Sanchez*, 191 Ariz. at 130, ¶ 7, 953 P.2d at 170, we conclude that issues of fact exist regarding whether Appellees' conduct gave rise to a duty that might not otherwise have existed. *See, e.g., Knauss v. DND Neffson Co.*, 192 Ariz. 192, 198, 963 P.2d 271, 277 (App. 1997) ("A party may voluntarily assume a duty not imposed at common law and, once assumed, must discharge the duty with reasonable care."); *Bishop v. State*, 172 Ariz. 472, 475, 837 P.2d 1207, 1210 (App. 1992) ("An actor who gratuitously undertakes to render services agrees to exercise reasonable care in performing the undertaking."); *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 176 Ariz. 247, 250, 860 P.2d 1300, 1303 (App. 1992) ("When a person voluntarily undertakes an act, even when there is no legal duty to do so, that person must perform the assumed duty with due care and is liable for any lack of due care in performing it.").

CONCLUSION

¶21 If Desiree was a tenant, Appellees owed her a duty "to exercise such care as a reasonably prudent person would exercise toward children under similar circumstances."[3] *McLeod*, 163 Ariz.

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[3] We do not address Appellants' request that we abolish common law distinctions between duties a lessor owes to a licensee and those owed to an invitee because this argument was not raised below. *See Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 13, 160 P.3d 231, 234 n.5 (App. 2007) (as a general rule, parties may not argue on appeal legal issues not raised below). Moreover, as a practical matter, "such a fundamental change in the common law requires an evaluation of competing public

at 9, 785 P.2d at 578. Because the record does not permit the court to decide the tenancy question as a matter of law, and because factual issues exist regarding Appellees' purported assumption of a duty to repair, we reverse the entry of summary judgment and remand to the superior court for further proceedings consistent with this decision.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
PHILIP HALL, Judge

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policies that is more appropriately addressed to the Arizona Supreme Court." *Delci v. Gutierrez Trucking Co.*, 229 Ariz. 333, 337-38, ¶¶ 15-18, 275 P.3d 632, 636-37 (App. 2012) (refusing to depart from law imposing no duty absent special relationship and adopt presumptive duty-of-care standard from Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 7 (2010)).