

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: 4/23/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MATTHEW TONN, a married man in his individual capacity and as surviving parent of Adam Tonn, decedent,
Plaintiff/Appellant,
v.
ERIC MOORE and AMY LYNN MOORE, husband and wife,
Defendants/Appellees.

) No. 1 CA-CV 12-0372
)
) DEPARTMENT D
)
) **MEMORANDUM DECISION**
)
) (Not for Publication -
) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-016520

The Honorable Eileen S. Willett, Judge

AFFIRMED

Goldberg & Osborne Phoenix
By John Edwards Osborne
Douglas L. Settel
Attorneys for Plaintiff/Appellant

Hill & Hill, PLC Phoenix
By R. Corey Hill
Ginette M. Hill
and
DeCiancio Robbins, PLC Tempe
By Christopher Robbins
Attorneys for Defendants/Appellees

G E M M I L L, Judge

¶1 Matthew Tonn ("Matthew"), father of decedent Adam Tonn, appeals from the superior court's decision finding that Adam's suicide from a self-inflicted gunshot wound was an intervening act and superseding cause that precludes Matthew's cause of action against Amy and Eric Moore (collectively "the Moores"), Adam's mother and stepfather, for negligently storing the firearm Adam used to take his own life. Because we agree with the superior court that Adam's suicide was an intervening superseding cause, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Adam was the fourteen-year-old son of Matthew and Amy. Matthew and Amy were divorced and had joint custody of Adam and his younger sister. Adam shared a residence with his mother, his stepfather Eric, and his sister. On November 20, 2010, Adam chose to stay at home while the rest of the family went to the movies. When they returned home, the family found Adam dead in the master bedroom from a self-inflicted gunshot wound.

¶3 The gun Adam used was registered to Eric. The gun was stored, unloaded, in an unlocked case hidden under a pile of clothes on a shelf in Amy and Eric's bedroom closet. The ammunition was hidden separately under a different pile of clothes in the same closet. Neither of the Moores had told Adam where the gun and ammunition were stored.

¶14 Adam had previously completed a Firearms Safety Training Class in September 2009, and had achieved Sharpshooter Classification through the NRA/Winchester Marksmanship Program in October 2009. He was a member of the Junior Division of the Rio Salado Sportsman's Club. He also shot with Matthew who had trained him how to handle firearms. He had shot Eric's handgun only once.

¶15 A police investigation and coroner's report determined Adam's death to be a suicide. Although Adam had twice seen a therapist for behavioral issues, the parties agreed that he had never shown any signs of depression or suicidal ideation. The psychologist Adam had seen confirmed that Adam had given no indication of being suicidal or depressed.

¶16 Matthew filed a wrongful death action against the Moores. He alleged that Eric was negligent in leaving the firearm and ammunition accessible, unsecured, and improperly stored in a residence occupied by a minor and that this negligence was a direct and proximate cause of Adam's death.

¶17 The Moores filed a motion for summary judgment. They argued primarily that, as a matter of law, Adam's suicide was not foreseeable and that Matthew could not show that access to Eric's firearm was the proximate cause of Adam's death because Adam's suicide was an intervening, superseding cause. In response, Matthew challenged the Moores' position that the

evidence established that Adam committed suicide, but argued that even if Adam's death was a suicide, it was foreseeable because a minor with access to a gun is at risk of injuring himself or others. He argued the Moores' failure to secure the gun created the risk that Adam would kill himself, and therefore the suicide could not be a superseding cause.

¶18 At oral argument in superior court, the Moores acknowledged they had an obvious duty of care to act reasonably under the circumstances. They contended they had no reason to take additional precautions regarding the gun because no one had reason to believe that Adam would use the gun to harm himself. At the conclusion of the oral argument, the parties agreed with the court's summation that the only question of law at issue was whether a child's suicide is an intervening superseding event when a child had access to a parent's gun.

¶19 The court found that suicide is uniformly treated as an unforeseeable superseding cause which relieves the original actor of liability. The court also reasoned the parents had committed no crime and noted that the criminal prohibition against an unaccompanied minor carrying a firearm includes an exception for a minor on his parent's private property. See Arizona Revised Statutes ("A.R.S.") section 13-3111(A) (2010). The court granted the Moores' motion for summary judgment. Matthew filed a timely notice of appeal. We have jurisdiction

pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2013).

DISCUSSION

¶10 Summary judgment may be granted 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). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). Further, we will affirm summary judgment “when ‘no reasonable juror could conclude that the standard of care was breached or that the damages were proximately caused by the defendant’s conduct.’” *Grafitti-Valenzuela v. City of Phoenix*, 216 Ariz. 454, 458, ¶ 13, 167 P.3d 711, 715 (App. 2007) (citation omitted).

¶11 Matthew challenges the superior court’s decision finding that Adam’s suicide was an intervening superseding cause precluding recovery against the Moores for negligence.¹ To make

¹ Matthew also argues that the superior court wrongly concluded that the Moores owed no duty to minor children living in their home to safely secure a firearm. The court did not

a claim for negligence, a plaintiff must prove a duty requiring the defendant to conform to a certain standard of care, a breach by the defendant of that duty, a causal connection between the defendant's conduct and the injury, and actual damages. *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). A defendant's act is the proximate cause of an injury if the conduct, "in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury" and if the injury would not have occurred without the conduct. *Pompeneo v. Verde Valley Guidance Clinic, Inc.*, 226 Ariz. 412, 414, ¶ 9, 249 P.3d 1112, 1114 (App. 2011) (citation omitted). An "efficient intervening cause" is an independent cause, occurring between the original act and the harm that is necessary in causing the harm. *Barrett v. Harris*, 207 Ariz. 374, 378, ¶ 11, 86 P.3d 954, 958 (App. 2004). An intervening cause is a superseding cause when the intervening cause was unforeseeable and, when viewed in hindsight, extraordinary. *Id.* When an intervening cause is within the scope of the original risk created by the defendant's

make such a finding. As the court noted, the Moores agreed at oral argument that they had a duty of care to act reasonably under the circumstances. The court found only that Matthew could not prove proximate causation as a matter of law because Adam's suicide was an intervening act that was a superseding cause of the injury. To the extent that Matthew's argument could be construed as advocating for a particular standard of care, we need not and do not address the argument because we conclude that the court properly concluded that Adam's suicide was a superseding cause.

negligence, the intervening cause is not a superseding cause and the defendant is not relieved of liability. *Rossell v. Volkswagen of Am.*, 147 Ariz. 160, 169, 709 P.2d 517, 526 (1985) (citing *Parness v. City of Tempe*, 123 Ariz. 460, 464, 600 P.2d 764, 768 (App. 1979)).

¶12 Suicide, however, is almost universally considered a superseding cause that is neither foreseeable nor a "normal incident of the risk created." *Maricopa Cnty. v. Cowart*, 106 Ariz. 69, 71, 471 P.2d 265, 267 (1970). We have previously explained:

As a general rule a person will not be relieved of liability by an intervening force which could reasonably have been foreseen, nor by one which is a normal incident of the risk created. However, if such intervening force takes the form of suicide the practically unanimous rule is that such act is a new and independent agency which does not come within and complete a line of causation from the wrongful act to the death and therefore does not render defendant liable for the suicide.

Tucson Rapid Transit Co., v. Tocci, 3 Ariz. App. 330, 334, 414 P.2d 179, 183 (1996) (citing 11 A.L.R.2d 751 (1950)).

¶13 Matthew argues that Adam's suicide was foreseeable and relies on *Crown v. Raymond*, 159 Ariz. 87, 764 P.2d 1146 (App. 1988). In *Crown*, a minor took her own life with a weapon she had purchased the day before using a driver's license on which the date of birth had obviously been altered to make her seem older. *Id.* at 88, 764 P.2d at 1147. Her surviving parents sued

the gun shop owner, who contended that the plaintiffs could not show proximate cause because the minor's suicide was not foreseeable. *Id.* at 90, 764 P.2d at 1149. This court found that the decedent fell within the protection of a state statute prohibiting the furnishing of a firearm to a minor without a parent's consent. *Id.* This court reasoned that the existence of the statute expressed legislative "awareness . . . that children in possession of guns are at risk of injuring either themselves or others, either negligently or intentionally" and that the legislature had therefore declared that injury to the minor or others was "foreseeable when guns are sold to minors without their parents' knowledge or consent." *Id.*

¶14 The court's finding of foreseeability in *Crown* was based on the statute. The case before us does not involve the unlawful sale of a firearm to a minor. It concerns, rather, the use of a firearm by an unattended minor in a private residence. Under A.R.S. § 13-3111(A), an unemancipated, unaccompanied minor is prohibited from knowingly carrying or possessing a firearm on private property "except private property owned or leased by the minor or the minor's parent, grandparent or guardian." By this statute, the legislature has declined to criminalize unaccompanied minors' possession of firearms in their parent's home, which occurred in this case. Consequently, unlike in *Crown*, the legislature here has not similarly expressed a view

toward the foreseeability of injury created by a minor's possession of a firearm in his or her parent's home.

¶15 Matthew does not suggest that the facts of the case made Adam's suicide foreseeable.² Matthew and the Moores agreed that they had not observed or learned of anything that would indicate that Adam might take his own life. The psychologist Adam had twice seen for behavioral issues also reported that Adam had shown no signs of depression and had given "no indications" that he would commit suicide. Given the absence of any hint even in hindsight that Adam might take his own life, his suicide was unforeseeable and extraordinary. We see nothing in this record to cause us to deviate from the generally accepted view that suicide is an intervening superseding event relieving the defendant of any alleged liability. We conclude as a matter of law, therefore, that no reasonable juror could determine on this record that the Moores' actions were the proximate cause of Adam's death.

¶16 Matthew also argues that having an unsecured firearm in the home greatly increases the risk of adolescent suicide.

² Matthew contended in the trial court that a question of fact existed as to whether Adam had, in fact, committed suicide. He suggested that Adam's inexperience with the particular firearm may have caused Adam to accidentally discharge the weapon or that Adam may have been playing "Russian roulette." Matthew does not reassert this contention on appeal, and so has abandoned it. See *Torrez v. Knowlton*, 205 Ariz. 550, 552 n.1, ¶ 3, 73 P.3d 1285, 1287 n.1 (App. 2003) (issues not argued on appeal are deemed abandoned).

Even were we to accept this statement as true, the argument is more appropriately made to the legislature.

CONCLUSION

¶17 As a matter of law, Adam's suicide constituted an intervening, superseding cause for his death, releasing the Moores from liability for allegedly storing the firearm inappropriately. We therefore affirm the trial court's decision granting summary judgment.

/s/

JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/

JON W. THOMPSON, Judge

/s/

DONN KESSLER, Judge