IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SHANNON BLACK, et al., *Plaintiffs/Appellants*,

v.

STATE OF ARIZONA, et al., *Defendants/Appellees*.

No. 1 CA-CV 20-0333
FILED 6-15-2021

Appeal from the Superior Court in Maricopa County
No. CV2016-091846
The Honorable Tracey Westerhausen, Judge

AFFIRMED

COUNSEL

Shannon Black and Kevin Black, Fort Thomas
Plaintiffs/Appellants

Arizona Attorney General's Office, Tucson
By Jennifer J. Sanders
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Jennifer M. Perkins delivered the decision of the Court, in which Judge Randall M. Howe and Judge Maria Elena Cruz joined.

P E R K I N S, Judge:

¶1 Shannon and Kevin Black appeal the judgment in favor of the State and Kayla Soohy (collectively, "Defendants"). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In March 2015, the Department of Child Services ("DCS"), responded to reports that Kevin struck his stepdaughter, KD, and that Shannon, KD's biological mother, neglected and emotionally abused KD. DCS filed a dependency petition and assigned Soohy to investigate. The superior court removed KD from the Blacks' home and placed her with a foster family. The court found probable cause to continue the temporary placement two months later.

¶3 Shannon, KD, and KD's biological father, Bryan Sawyer, agreed to place KD in Sawyer's custody. The superior court approved this arrangement and then DCS dismissed the dependency petition.

¶4 During the initial investigation, Shannon worked at Arizona Counseling and Treatment Services ("ACTS"), which provides behavioral health services to children in DCS's system. DCS asked ACTS to preclude Shannon from working with children until DCS finished its investigation. ACTS then asked Shannon to reapply for fingerprint clearance. Shannon refused, so ACTS terminated her. Shannon filed an unemployment benefits claim, which the deputy denied. An administrative law judge later upheld the denial of benefits, finding her discharge resulted from her own willful or negligent misconduct.

¶5 The Blacks sued the State in March 2016, alleging negligence, negligence per se, and intentional interference with a business expectancy ("IIBE"). The IIBE claim blamed the State for ACTS's decision to terminate Shannon. The Blacks also asserted several other claims irrelevant to this appeal. The State moved for summary judgment on all claims asserting, among other things, it owed no duty and did not cause Shannon's

termination. The Blacks cross-motioned for partial summary judgment on the negligence claim.

¶6 The superior court denied the Blacks' motion, concluding the DCS mission statement did not create a duty. The court found that even if a duty existed, questions of fact remained as to breach. The court also denied the Defendants' summary judgment motion for the negligence claim because of noncompliance with Arizona Civil Procedure Rules 7.1(a)(2) and 56(c)(3)(A), which require citations to specific pages and parts of the supporting record. But the court granted summary judgment for the Defendants as to the negligence per se and IIBE claims.

¶7 The superior court allowed the Defendants to file a supplemental motion for summary judgment on the duty issue. In this same ruling, the court denied the Blacks' oral motion to amend the complaint. The court then granted the Defendants' summary judgment motion for the negligence claim, finding no duty or breach. The Blacks timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶8 Summary judgment is appropriate when no genuine issue of material facts exists, and the questions can be resolved on the law. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990). We review grants of summary judgment *de novo*, considering any facts and inferences in the light most favorable to the nonmoving party. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15 (App. 2007).

I. Negligence and Negligence Per Se

¶9 Negligence requires proof of four elements: "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by 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 (2007). A violation of a statute enacted for the protection and safety of the public constitutes negligence per se. *Good v. City of Glendale*, 150 Ariz. 218, 221 (App. 1986).

¶10 Whether a duty exists is a question of law we review *de novo*. *Gipson*, 214 Ariz. at 143, ¶ 9. "Duty is defined as 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.* at ¶ 10 (quoting *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354 (1985)).

¶11 A duty arises from "either recognized common law special relationships or relationships created by public policy." *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 565, ¶ 14 (2018). The Blacks do not allege a duty based on a special relationship. To find a public policy-based duty, courts look to state and federal statutes and the common law. *See id.* at ¶ 15. "A statute reflecting public policy may create a duty when a plaintiff 'is within the class of persons to be protected by the statute and the harm that occurred . . . is the risk that the statute sought to protect against.'" *Id.* (quoting *Gipson*, 214 Ariz. at 146, ¶ 26).

¶12 The Blacks argue the Defendants' duty stems from a parent's constitutional and statutory rights, common law, and DCS regulations and policies. Parents have a fundamental right to the custody and control of their children. *In re Maricopa Cnty. Juv. Action No. JD-561*, 131 Ariz. 25, 27 (1981); *see also* A.R.S. §§ 1-601(A), -602(A). But this right is not without limits, and the State may encroach upon this right to protect the welfare of children. *See JD-561*, 131 Ariz. at 27–28.

¶13 The legislature created DCS to protect the welfare of children. *See* A.R.S. § 8-451(A), (B). DCS achieves this purpose by investigating abuse reports and providing services to children and families. *See* A.R.S. § 8-451(B). Child safety is DCS's chief concern. *See id.* (DCS coordinates services to the family "without compromising child safety"); *see also Dep't of Child Safety v. Beene*, 235 Ariz. 300, 304, ¶ 9 (App. 2014) (several statutes in Title 8 emphasize the paramount importance of child's best interests in dependency proceedings).

¶14 The Defendants argue a statutory duty is inapplicable unless the plaintiff is a member of the protected class designed by statute. And the legislature did not craft the child safety statutes to protect the Blacks. *See Lorenz v. State*, 238 Ariz. 556, 558, ¶¶ 13–14 (App. 2015) (the statutes governing DCS are intended to protect dependent children). In *Lorenz*, grandparents sought custody of their grandchild, who was in DCS custody. *Id.* at 558, ¶¶ 7–8. The grandparents argued that DCS had a duty to place the child with them based on the statutes, regulations, and the DCS manual favoring kinship placements. *Id.* at ¶ 12. But we held that because DCS's primary purpose is to protect children, the statutory scheme did not protect grandparents' interests. *Id.* at 558–59. ¶¶ 14–18 (citing A.R.S. §§ 8-451(B), -514(B), and -103(B), and Ariz. Admin. Code R6-5-6614).

¶15 The Blacks contend that unlike the grandparents in *Lorenz*, parents have constitutional and statutory rights supporting a duty on DCS's part. But only the child's interests are paramount. *See Beene*, 235 Ariz.

at 304, ¶ 9. We therefore conclude the Blacks do not fall within the class of persons warranting protection for purposes of negligence per se under the child safety statutes. *See Good*, 150 Ariz. at 221.

¶16 The Blacks contend dependency caselaw supports their argument that the State owes a duty to parents of children in DCS custody. They assert the State "has an affirmative duty to make all reasonable efforts to preserve the family relationship." *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 186, ¶ 1 (App. 1999); *see also Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 93, ¶ 19 (App. 2009) (the State has statutory and constitutional obligations to make reasonable efforts at reunification).

¶17 DCS's obligations in dependency proceedings do not create a duty under a negligence theory for allegedly unreasonable investigations. DCS's statutory duty requires it to make reasonable efforts to preserve the family. *See Jordan C.*, 223 Ariz. at 93, ¶ 19. Whether DCS made reasonable efforts to preserve the family, or the agency's investigation was reasonable, are questions for the juvenile court. The Blacks rely on dependency caselaw, where the court ensures that DCS did not violate parental rights. The Blacks have not argued they lacked an opportunity to raise their concerns in the dependency proceeding.

¶18 Public policy considerations also support not imposing a duty. *See Guerra v. State*, 237 Ariz. 183, 187, ¶ 20 (2015) ("[P]olicy considerations may militate against finding a duty in certain contexts."). Courts may find no duty "based on concerns that potential liability would chill socially desirable conduct or otherwise have adverse effects." *Gipson*, 214 Ariz. at 146, ¶ 29. Imposing a duty here may prevent DCS employees from acting to protect a child for fear of potential liability or litigation. *See Wertheim v. Pima Cnty.*, 211 Ariz. 422, 427, ¶ 20 (App. 2005) ("Courts traditionally fix the duty point by balancing factors," such as "the proliferation of claims," and "public policies affecting the expansion or limitation of new channels of liability.") (cleaned up). Imposing such a duty when the State removes a child from parental custody may also conflict with the State's interest in child safety. *See* A.R.S. § 8-451(B).

¶19 "The DCS manual does not provide a basis for imposing public policy-based tort duties." *Lorenz*, 238 Ariz. at 559, ¶ 19. As an agency guideline, the DCS manual "cannot be construed as rules or regulations, nor do they have the force and effect of law." *Id.* (quoting *Monroe v. Basis Sch. Inc.*, 234 Ariz. 155, 160, ¶ 15 (App. 2014)). The Blacks construe the Defendants' expert as stating DCS policies are mandatory, implying those policies carry the force of law. But the expert testified that DCS's policies

are "written as best practices" and that investigators could never follow all policies in every case given "the workloads, the burden, the time frames, et. cetera." We thus reject the Blacks' contention that DCS's policies support a tort duty.

¶20 We hold the Defendants owed no duty to the Blacks and affirm judgment in the Defendants' favor.

II. Section 1983

¶21 The Blacks argue the superior court erred because it did not clearly rule on their motion to amend the complaint, so they could add a claim under 42 U.S.C. § 1983. The Defendants assert the Blacks waived the § 1983 claim by failing to (1) file the amended complaint after the court granted leave to amend, and (2) raise a § 1983 claim in the original complaint or in any of the summary judgment motions.

¶22 For the first time in their reply brief, the Blacks claim they attached their amended complaint to their motion to amend. Notwithstanding waiver, the superior court granted the Blacks leave to amend the complaint on July 17, 2019. But the Blacks failed to file or serve the amended complaint within ten days. *See* Ariz. R. Civ. P. 15(a)(5). This failure supports the court's denial of the Blacks' orally renewed motion to amend the complaint at the January 2020 trial management conference. The Blacks thus failed to bring their § 1983 claim before the court.

¶23 The Blacks also assert the original complaint sufficiently alleged a § 1983 claim. We disagree. The original complaint referred only to the Defendants' duty to investigate under "state and federal statutes and regulations." The Blacks' failure to refer to a specific statute is not fatal if the complaint alleged facts establishing entitlement to relief. *See Mullenaux v. Graham Cnty.*, 207 Ariz. 1, 6, ¶ 18 (App. 2004); *see also* Ariz. R. Civ. P. 8(a)(2). The Blacks alleged a negligent investigation and accused the Defendants of providing false information to Shannon's employer. But the original complaint did not allege anyone acting under color of law violated the Blacks' constitutional or fundamental rights. *See Mulleneaux v. State*, 190 Ariz. 535, 538–39 (App. 1997). The original complaint therefore did not adequately plead a § 1983 claim.

III. Intentional Inference with Business Expectancy

¶24 The Blacks' IIBE claim alleged the Defendants' conduct led ACTS to prohibit Shannon from working with children, and thus caused her termination. The Blacks contend the superior court erred in granting

summary judgment for this claim because the Defendants failed to properly cite the record in the statement of facts. We disagree. The Defendants' summary judgment motion properly cited the administrative law judge's decision, which found ACTS's request for an updated background check to be reasonable.

¶25 Notwithstanding the administrative law judge's ruling that ACTS had good cause to fire Shannon, the Blacks cannot show the Defendants' actions intentionally caused her termination. *See Dube v. Likins*, 216 Ariz. 406, 412, ¶ 14 (App. 2007).

¶26 The Blacks assert, for the first time in the reply brief, the superior court erred in granting summary judgment because the Defendants wrongfully insisted ACTS remove Shannon from working with children. The Blacks never raised this argument in response to the Defendants' summary judgment motion. This argument is waived, and we need not address it. *See Johnson v. Provoyeur*, 245 Ariz. 239, 243, ¶ 13 n.5 (App. 2018).

¶27 The Blacks list a fifth issue on appeal–an alleged conflict of interest between the State and Soohy–but failed to address it their briefs. This issue is also waived. *See* ARCAP 13(a)(7) (arguments in appellant's opening brief must contain supporting contentions, legal authorities, and record citations); *see also State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370 (App. 1990).

CONCLUSION

¶28 We affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA