DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JAYDEN PROPST, a minor, by and through his Next Friends, ROBERT A. PROPST and LISA M. PROPST, his parents, Plaintiffs/Appellants, v. JAY FARNSWORTH and CONNIE FARNSWORTH, husband and wife, Defendants/Appellees.	1 CA-CV 09-0355 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-090009

The Honorable Joseph C. Kreamer, Judge

AFFIRMED

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S W A N N, Judge

¶1 Jayden Propst, a minor, was injured in an accident when the Farnsworths' six-year-old[1] son, Joseph, spilled hot food on him. Jayden brought this negligence action against his grandfather, claiming that he acted unreasonably in supervising Joseph. The superior court granted summary judgment against Jayden after concluding that the actions of his mother, Lisa, constituted a superseding cause of his injuries. Though we disagree with the superior court's ruling concerning superseding cause, we conclude that summary judgment was warranted because no duty existed as a matter of law in the circumstances of this case.

FACTS AND PROCEDURAL HISTORY

¶2 Jay Farnsworth put a TV dinner in the microwave for his six-year-old son, Joseph. Jay instructed Joseph that when the microwave bell went off, he was to put a plate under the TV dinner, take it out, and put it on the top of the stove to cool before he tried to eat it. Jay then left the house to pick up two of his other children. Although Connie, Joseph's mother, was at home at the time, she did not feel well and was lying

[1] Although the parties' briefs refer to Joseph as a "six-year-old," the portions of Jay's deposition that are in the record on appeal state that Joseph was seven at the time of the incident. Here, we use the age argued by the parties in their briefs.

down in the bedroom. After Jay left, Lisa, Joseph's adult sister, arrived at the Farnsworths' house with her three-week-old son, Jayden. As she had in the past when visiting the Farnsworths, she set Jayden down in his car seat in the hallway between the kitchen and family room. Lisa saw Joseph sitting on the kitchen stove next to his cooked TV dinner and asked him what he was doing. Lisa had seen Joseph sitting on the stove in the past to use the microwave and had complained about this to her parents, who had then "yelled at him." Joseph told her he had just gotten his food out of the microwave and wanted to take it into the family room to eat while he watched television; he also asked her to remove the plastic film. Lisa told Joseph to wait, because "it was too hot," and indicated that she would take his TV dinner into the family room for him after she made a bottle for Jayden. While she prepared the bottle for Jayden, Lisa took the film wrap off the TV dinner, which (consistent with Joseph's instructions) was on a plate on the stove. She stirred the mashed potatoes and then turned her attention away from the TV dinner. Jayden began screaming, and as Lisa turned around, Joseph said he was sorry several times. Joseph had retrieved the plate containing his TV dinner from the stove, and when he leaned over Jayden while walking past him, the TV dinner

slipped off the plate and onto Jayden. Jayden sustained severe burns.

¶3 Jayden, through his parents, filed a negligence action against his grandparents, the Farnsworths, and other defendants.[2] The Farnsworths moved for summary judgment asserting, *inter alia*, that Lisa's actions were an intervening and superseding cause of Jayden's injuries. The superior court agreed and entered judgment for the Farnsworths.

DISCUSSION

I. DUTY

¶4 As an initial matter, the Farnsworths contend that Jayden failed to establish, and the superior court improperly concluded, that they owed Jayden a duty of care. We agree.[3]

¶5 "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

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[2] The other original defendants settled and were dismissed from the case.

[3] "We review a trial court's grant of summary judgment de novo, viewing the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Hourani v. Benson Hosp.*, 211 Ariz. 427, 432, ¶ 13, 122 P.3d 6, 11 (App. 2005).

228, 230 (2007). 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.* at ¶ 10 (quoting *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354, 706 P.2d 364, 366 (1985)).

¶6 Whether a duty exists is a matter of law for the court to decide, *id.* at ¶ 9, and duty may arise from the relationship of the parties or public policy.[4] *Id.* at 145, ¶ 18, 150 P.3d at 232. Before *Gipson*, Arizona courts often considered foreseeability issues in determining duty. *See id.* at 144, ¶ 15, 150 P.3d at 231. In *Gipson*, however, our supreme court expressly held that "foreseeability is not a factor to be considered by courts when making determinations of duty." *Id.* "Foreseeability . . . is more properly applied to the factual determinations of breach and causation . . . ." *Id.* at ¶ 17. Against this background, we consider the two potential sources

[4] The Restatement (Third) of Torts: Liability for Physical Harm § 7(a) (Proposed Final Draft No. 1, 2005) adopts an arguably more expansive concept of duty, which assumes that duty generally exists absent a legal reason to the contrary. *See id.* §§ 7, 41; *Gipson*, 214 Ariz. at 147-48, ¶¶ 34-41, 150 P.3d at 234-35 (Hurwitz, J., concurring). In *Gipson*, however, the court stopped short of adopting the Third Restatement and found it unnecessary to resolve "whatever tension may exist" between *Ontiveros* [*v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983)], the Third Restatement and its earlier cases. *Id.* at 146 n.4, ¶ 24, 150 P.3d at 233 n.4. Though we are mindful of a potential trend toward adoption of the Third Restatement, we base our decision upon current law.

of duty in this case -- the duty to supervise a child and the duty of a landowner to licensees.

A. Parent's Duty to Control Minor Child

¶7 Under Arizona law, a mere parental relationship will not impose liability upon parents for the torts of their children. *Parsons v. Smithey*, 109 Ariz. 49, 51, 504 P.2d 1272, 1274 (1973). Instead, the law imposes on parents an independent duty to exercise reasonable supervisory care in certain limited circumstances. *See id.* at 51-52, 504 P.2d at 1274-75.

¶8 To define these circumstances, Arizona courts have relied on the test established by the Restatement (Second) of Torts ("Restatement") § 316 (1965). *See Seifert v. Owen*, 10 Ariz. App. 483, 460 P.2d 19 (1969). Under the Restatement,

> [a] parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> > (a) knows or has reason to know that he has the ability to control his child, and
> >
> > (b) knows or should know of the necessity and opportunity for exercising such control.

This section does not impose vicarious liability -- it imposes an independent duty on the parent to exercise reasonable care when the parent knows or should know that there is an

opportunity to exercise control. The drafters of the Restatement viewed this duty narrowly: "The duty of a parent is *only* to exercise such ability to control his child *as he in fact has at the time when he has the opportunity to exercise it* and knows the necessity of so doing." Restatement § 316 cmt. b (emphases added). In other words, the law does not impose a general duty to educate and supervise children to prevent all foreseeable harm -- it imposes a duty to react reasonably in the moment. And the Restatement test does not require the court to venture into the now-forbidden realm of foreseeability to determine whether a duty existed. The dispositive question under section 316 is not whether the parent should have foreseen a *future* need for control -- the question is whether the parent exercised reasonable control at the moment he had the opportunity to do so. When there is no opportunity to exercise control, the duty imposed by section 316 simply does not apply.

¶9 We recognize that, independent of section 316, a parent has a duty to avoid placing a child in a situation in which the child is likely to cause harm, much as any person has a duty to act reasonably to avoid dangerous situations. But that general duty does not have any application to these facts. Even assuming *arguendo* that Jay acted negligently by allowing Joseph to take the dinner out of the microwave and remove the

wrapping, it was the act of spilling the food -- not preparing it -- that caused the injury. The fact that Joseph had a role in cooking the dinner had nothing to do with the events that led to Jayden's injuries -- if Jay or Lisa had prepared the dinner (and indeed Lisa was the last person to participate in its preparation), Joseph's act of spilling it would have injured Jayden.

¶10 If there was any duty, therefore, it must flow from section 316's separate recognition that parents must sometimes control their children even in ordinary circumstances. Yet here it is undisputed that Jay was not home at the time of the accident, and Jay therefore had no opportunity to exercise control at that moment. And because he was not home, he could not have had the knowledge of Jayden's whereabouts or the fact that control was necessary to prevent the spill. We therefore conclude that Jay's status as Joseph's parent furnishes no basis for the imposition of a duty to Jayden on these facts.

B. Duty to Licensees

¶11 A landowner owes a duty of care to a licensee, i.e., "a person who is privileged to enter or remain on the land only by virtue of the possessor's consent." *Hicks v. Superstition Mountain Post No. 9399*, 123 Ariz. 518, 521, 601 P.2d 281, 284 (1979) (quoting Restatement § 330). Generally, a homeowner has

a duty to warn a licensee of hidden dangers and refrain from willfully causing a licensee harm. *Shaw v. Petersen*, 169 Ariz. 559, 561, 821 P.2d 200, 222 (App. 1991). A homeowner breaches his duty to his guests when he fails to adequately warn them of known hidden dangers.[5] *See Shannon v. Butler Homes, Inc.*, 102 Ariz. 312, 316, 428 P.2d 990, 994 (1967). The duty to warn licensees, however, does not transform a landowner into an insurer of his guests' safety, and we find nothing on this record to suggest that a lack of warning contributed to Jayden's injuries.

¶12 Here, even assuming *arguendo* that a hidden danger existed, Jayden was an infant incapable of understanding a warning. Lisa placed Jayden on the floor in his car seat while Jay was out of the house, and Jay therefore had no knowledge of any danger Jayden faced by virtue of his physical placement.[6] And Joseph's participation in the preparation of the dinner was

[5] There is no duty to warn of open and obvious dangers. *Robles v. Severyn*, 19 Ariz. App. 61, 64, 504 P.2d 1284, 1287 (1973).

[6] Though Lisa was substantially involved in events and circumstances that led to Jayden's injury, we reject the trial court's conclusion that her actions constituted a superseding cause. An intervening cause qualifies as a "superseding cause," and thereby relieves a defendant of liability for his original negligence, only if the "intervening force was unforeseeable and may be described, with the benefit of hindsight, as extraordinary." *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990). The record does not support a conclusion as a matter of law that Lisa's actions were "unforeseeable" or "extraordinary."

not a "hidden" danger about which a warning was required. Lisa was fully aware of Joseph's preparation of the dinner, and she assisted Joseph by removing the plastic cover from the dinner and stirring it. Because no warning from Jay could have prevented the harm in this case, there is no triable issue concerning Joseph's reasonableness in failing to warn, and the duty to warn is simply inapposite to these facts. We therefore conclude that the landowner's duty to licensees furnishes no basis for liability in this case.

CONCLUSION

¶13 For the foregoing reasons, we affirm.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Chief Judge

N O R R I S, Judge, concurring in part, dissenting in part.

¶14 The superior court granted summary judgment to the Farnsworths, concluding as a matter of law Lisa was a superseding cause of the accident that injured her son, Jayden. The majority rejects the superior court's ruling on that issue, *see supra* note 6, ¶ 12, and I agree. I part company with the

majority's conclusion, however, that summary judgment was still proper because "no duty [of care] existed as a matter of law in the circumstances of this case." *See supra* ¶ 1.

¶15 Our supreme court and the Restatement (Second) of Torts ("Restatement") (1965) have long recognized that duties of care may arise from various special relationships. *Gipson v. Kasey*, 214 Ariz. 141, 144-45, ¶¶ 18-19, 150 P.3d 228, 231-32 (2007) (citing cases and Restatement § 315). One such relationship is between a parent and his or her minor child. That relationship subjects a parent to a duty of reasonable care to protect another person from the unreasonable risk of bodily harm caused by his or her minor child. *See* Restatement § 316, *cited in Parsons v. Smithey*, 109 Ariz. 49, 52, 504 P.2d 1272, 1275 (1973); *see also Seifert v. Owen*, 10 Ariz. App. 483, 484, 460 P.2d 19, 20 (1969) (analyzing Restatement § 316). The Restatement states a parent is under a duty of reasonable care to control the conduct of his or her minor child if the parent "(a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control." Although not stated expressly in the Restatement, its formulation of duty appears to rest on principles of foreseeability.

¶16 In *Gipson*, our supreme court held, however, that a court should not consider foreseeability of harm in determining duty. 214 Ariz. at 144, ¶ 15, 150 P.3d at 231. Accordingly, I do not believe it is possible to square the Restatement's formulation of duty with *Gipson*. The majority does not address this conflict and instead bases its conclusion the Farnsworths did not have a duty to control Joseph, *see supra* ¶¶ 7-10, principally on the Restatement's formulation of a parent's duty, which appears to be premised on the foreseeability of the harm.

¶17 In light of *Gipson*, whether, under the Restatement, a parent has the ability to control his child and "knows or should know of the necessity and opportunity for exercising such control" are factors that should bear on whether a parent exercised reasonable care under the circumstances, not on whether a duty of care exists in the first place. Therefore, applying the Restatement through the lens of *Gipson*, I believe the Farnsworths owed a duty of reasonable care to protect third parties, such as Jayden, from the risk of harm posed by Joseph.[7]

¶18 The question then becomes whether Jayden presented sufficient evidence to establish a triable issue of fact on breach. Viewing the record in a light most favorable to Jayden

[7] Because I believe the Farnsworths owed a duty of reasonable care as parents under the Restatement and *Gipson*, I express no opinion on the applicability to this case of the duty of reasonable care a landowner owes to a licensee.

as the non-moving party, I conclude he did. Not only did Jayden present evidence Jay had the ability to control Joseph -- after all, Jay instructed Joseph what to do with the TV dinner and the microwave -- but he also presented evidence of a foreseeable risk of harm and the necessity of taking steps to prevent this risk. Specifically, Jayden presented evidence the Farnsworths knew Joseph had handled hot microwave food in the past and had decided he was not capable of doing so: Lisa testified her parents had "yelled" at Joseph when she had reported to them she had seen him "getting into the microwave." In addition, Jayden presented evidence Jay could reasonably anticipate Jayden would be present when Jay decided to leave Joseph by himself with the microwave and hot TV dinner. Lisa testified she and Jayden visited the Farnsworths nearly "every day," generally just after 2:30 p.m., when she picked up her other son from school.

¶19 Finally, the majority reasons that because Jay was not at home at the time of the accident he neither had the opportunity to exercise control over Joseph nor the knowledge he needed to do so. Thus, the majority reasons, the Farnsworths owed no duty of care. I disagree. First, as discussed above, these factors go to breach, not duty. Second, Jayden presented evidence Jay had both the opportunity to exercise control over Joseph and knew of the necessity of doing so. Third, a parent

cannot evade his or her duty of reasonable care by ignoring his or her child's behavior and the risk of harm that behavior presents to a third party.

¶20 For the foregoing reasons, I would reverse the superior court's summary judgment in favor of the Farnsworths and remand for further proceedings.

/s/
_____
PATRICIA K. NORRIS, Presiding Judge