DIVISION ONE
FILED: 10/20/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation; and GREAT NORTH-WEST INSURANCE COMPANY, an Idaho company,	No. 1 CA-CV 10-0711
	DEPARTMENT E
	MEMORANDUM DECISION
Plaintiffs/Appellees,	Not for Publication - (Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	
MICHAEL and KATHLEEN SLAYTON, husband and wife,	
Defendants/Appellants.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-008666

The Honorable John Christian Rea

AFFIRMED

Jones, Skelton & Hochuli, P.L.C. — Phoenix
By Ronald W. Collett
Lori L. Voepel
Attorneys for Plaintiff/Appellee State Farm

Aspey, Watkins & Diesel, P.L.L.C. — Flagstaff
By Louis M. Diesel
Donald H. Bayles, Jr.
Brian Y. Furuya
Attorneys for Plaintiff/Appellee Great Northwest

Garrey Woner Hoffmaster & Peshek, PC — Scottsdale
By D. Reid Garrey

Shawna M. Woner
Attorneys for Defendants/Appellants

G E M M I L L, Judge

¶1 Michael and Kathleen Slayton (collectively "the Slaytons") appeal the trial court's grant of summary judgment to defendants State Farm Mutual Automobile Insurance Company ("State Farm") and Great Northwest Insurance Company ("Great Northwest"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In July 2008, the Slaytons; their ten-year-old son, Jacob; their daughter, Audrey Wall; Audrey's boyfriend, Fernando Parral-Sanchez; and Michael Slayton's mother, Rosann Romero, were camping in the Apache National Forest. On July 5, Parral-Sanchez consumed an unknown amount of beer at the campsite. Later that same day, Parral-Sanchez and Jacob left the campsite, with Parral-Sanchez driving Romero's all-terrain vehicle ("ATV") and Jacob as a passenger in the vehicle. Parral-Sanchez and Jacob were involved in an accident, which resulted in fatal injuries to Jacob. The accident was reported by a third-party at 6:28 p.m. that evening.

¶3 At the campsite, the Slaytons heard sirens and saw a deputy sheriff's vehicle pass by with its lights on and sirens activated. After another emergency vehicle passed them, the Slaytons got in their car to follow it. The Slaytons followed

the ambulance to the accident site, approximately two to three miles from the campsite. Michael Slayton jumped out of the car, asking if a little boy had been involved in the accident. Someone pointed to the bottom of the hill, and Michael discovered Jacob's lying dead at the base of the ravine. Kathleen Slayton was helped to the bottom of the ravine, and she lay next to her son's body and covered him with a blanket.

¶4 Parral-Sanchez was also injured in the accident and was taken to the hospital. After he was admitted to the hospital, at approximately 12:43 a.m. on July 6, his blood-alcohol level was recorded at .083%.

¶5 State Farm had issued an insurance policy for the ATV to Romero. The Slaytons made a demand upon State Farm for $50,000, including $25,000 for the wrongful death of their son and $25,000 of the aggregate policy limit for their own separate injuries resulting from negligent and/or intentional infliction of emotional distress. State Farm agreed to pay the $25,000 for compensation for the wrongful death of the Slaytons' son but declined to pay the additional $25,000. State Farm maintained that Arizona law did not support the Slaytons' claims for negligent and/or intentional infliction of emotional distress.

¶6 The Slaytons were insured by Great Northwest at the time of accident, and the policy included underinsured motorist coverage in the amount of $100,000 per person and $300,000 per

accident. Great Northwest paid the Slaytons $100,000 as compensation for the lack of sufficient coverage with respect to the wrongful death of their son. Great Northwest, however, declined to tender the remaining $200,000 requested by the Slaytons for injuries resulting from negligent and/or intentional infliction of emotional distress.

¶7 In August 2009, the parties entered into a comprehensive stipulation that included the following pertinent provision:

> [State Farm and Great Northwest] recognize and agree that if Michael and Kathleen Slayton have a valid claim for negligent and/or intentional infliction of emotional distress under Arizona law, the value of such claims exceeds the aggregate policy limits available to them under the State Farm policy, and accordingly if [the trial court], or any appellate court to which any of the parties to this agreement may bring an appeal, applies Arizona law so as to allow such claims, the remaining $25,000.00 policy limits under the State Farm policy will be paid to [the Slaytons.]

The Slaytons further agreed not to institute bad faith claims against State Farm and Great Northwest based on past conduct, and it was understood that if the final legal ruling permits a negligent and/or intentional infliction of emotional distress claim by the Slaytons, they will have the opportunity to seek part or all of an additional $100,000 of coverage from Great Northwest.

¶8 State Farm moved for summary judgment in February 2010, arguing that summary judgment was appropriate because

> [t]his case falls squarely within the "zone of danger" rule which requires [the Slaytons] to prove they were present and within the zone of danger in order to recover damages for negligent and/or intentional infliction of emotional distress due to the death of their son, Jacob Slayton. In this case, the Slaytons were miles away at the time of the accident resulting in the death of Jacob Slayton.

Great Northwest moved for summary judgment in March 2010, alleging there was no genuine issue as to any material fact.

¶9 The Slaytons subsequently moved for summary judgment, arguing

> [t]he public policy of Arizona is consistent with the vast majority of jurisdictions that have abandoned the antiquated "zone of danger" rule and allow recovery where parents are forced to endure the unimaginable horror of witnessing the sudden, tragic and gruesome death of their child.

¶10 Following oral argument, the trial court granted State Farm's and Great Northwest's motions for summary judgment, and denied the Slaytons' motion for summary judgment. The court declared that the Slaytons did not have "valid claims under Arizona Law for negligent and/or intentional infliction of emotional distress against Fernando Parral-Sanchez, Rosann Romero or [] State Farm and Great Northwest as a result of the death of Jacob Slayton." State Farm and Great Northwest had "no

duty to pay [the Slaytons] more than the previously tendered insurance amounts of $25,000 (the single limit of State Farm's liability policy), and $100,000 (the single limit of Great Northwest's underinsured policy), for the accident resulting in the wrongful death of Jacob Slayton."

¶11 The Slaytons filed a timely notice of appeal, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶12 We review a grant of summary judgment de novo, and we view the facts in a light most favorable to the non-moving party. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment may be granted when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56(c)(1). Summary judgment is appropriate only "if the facts produced in support of the [other party's] claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme School*, 166 Ariz. at 309, 802 P.2d at 1008.

¶13 The Slaytons argue that the trial court erred in refusing to allow them to pursue a claim for bystander

infliction of emotional distress relating to their perceptions in the aftermath of the accident that claimed the life of their son.

¶14 "A negligent infliction of emotional distress cause of action requires the plaintiff to: (1) witness an injury to a closely related person, (2) suffer mental anguish manifested as physical injury, and (3) be within the zone of danger so as to be subject to an unreasonable risk of bodily harm created by the defendant." *Pierce v. Casas Adobes Baptist Church*, 162 Ariz. 269, 272, 782 P.2d 1162, 1165 (1989); *see also Keck v. Jackson*, 122 Ariz. 114, 115-16, 593 P.2d 668, 669-70 (1979).

¶15 The Slaytons concede that "they did not see the ATV as it careened off the roadway and down the embarkment." Rather, they followed an emergency vehicle to the scene of the accident, where they discovered their son's dead body lying at the base of the ravine. While these facts are certainly tragic, they do not rise to the level of liability for negligent infliction of emotional distress under Arizona law. Because the Slaytons did not witness their son's death and were not in the "zone of danger," they cannot pursue a claim for negligent infliction of emotional distress. *See Pierce*, 162 Ariz. at 272, 782 P.2d at 1165. The Slaytons assert that, if this court concludes that Arizona law does not allow for recovery when a bystander is not within the "zone of danger," that requirement should be

abandoned in cases in which the injury suffered by the victim is fatal or severe; the victim and the plaintiff are related as spouse, parent-child, grandparent-grandchild, or siblings; and, the plaintiff has observed an extraordinary event, specifically the incident and injury or aftermath of an accident in gruesome detail. Even if we were inclined to modify the "zone of danger" requirement to include recovery under the aforementioned fact patterns, we are bound by the earlier decisions of our supreme court. *See Lopez v. Ariz. Water Co., Inc.*, 23 Ariz.App. 99, 101, 530 P.2d 1132, 1134 (1975) (court of appeals is bound by prior decisions of the supreme court). As a result, we are not in a position to change the long-standing and well-established parameters of the tort of negligent infliction of emotional distress.[1]

¶16 Lastly, the Slaytons argue that Arizona courts should permit a claim for intentional infliction of emotional distress when a family member is severely injured or killed by the actions of a drunk driver, even if the family member is not within the "zone of danger," if the family member arrived at the accident scene while the victim is still present and in

[1] The Slaytons do not argue otherwise. We assume that by seeking in our court a change in established supreme court law, they are essentially making their record as a prerequisite to asking the Arizona Supreme Court for a change in the law.

substantially the same condition as immediately after the accident.

¶17 Our supreme court has set out three elements for the tort of intentional infliction of emotional distress, based upon the Restatement of Torts. *Ford v. Revlon, Inc.*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987) (citing *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954)). The three elements are: "the conduct by the defendant must be 'extreme' and 'outrageous'"; "the defendant must either intend to cause emotional distress or recklessly disregard the near certainty that such distress will result from his conduct"; and, "severe emotional distress must indeed occur as a result of defendant's conduct." *Id.* (citations omitted). An act will qualify as intentional only if "the actor desired to cause the *consequences*-and not merely the act itself-or if he was certain or substantially certain that the *consequences* would result from the act." *Mein ex rel. Mein v. Cook*, 219 Ariz. 96, 100, ¶ 17, 193 P.3d 790, 794 (App. 2008).

¶18 The Slaytons assert that drunk driving with a small child is "extreme and outrageous." And although they do not believe Parral-Sanchez intentionally killed their son, they allege that "he acted in an outrageous, reckless, and reprehensible manner." The Slaytons, however, do not directly address the remaining two elements of a claim for intentional infliction of emotional distress in their opening brief. *See*

ARCAP 13(a)(6) (The appellant's brief should include "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.").

¶19 Because the Slaytons acknowledge Parral-Sanchez did not intentionally harm their son, they must necessarily be arguing that he "recklessly disgard[ed] the near certainty that such distress will result from his conduct." *See Ford*, 153 Ariz. at 43, 734 P.2d at 585. Driving under the influence with a child is certainly reprehensible conduct. But on this record, we find no question of material fact as to whether Parral-Sanchez was aware of and recklessly disregarded a near certainty of a fatal accident with accompanying severe emotional distress.[2]

¶20 The Slaytons have not established a *prima facie* case for the tort of intentional infliction of emotional distress. Because there is no evidence of a genuine issue of material fact, summary judgment was appropriate.

CONCLUSION

[2] We also note that Michael Slayton testified at his deposition that he believed the accident may have resulted from Parral-Sanchez steering to the right due to another vehicle coming toward them, causing the ATV to hit loose gravel, which may have led to a "hydroplane effect" and a loss of control. He stated that, had he been driving, he "probably would have made the same mistake." Michael Slayton also stated in his deposition that he was "not interested in pursuing any sort of criminal charges against [Parral-Sanchez]."

¶21 For the foregoing reasons, we affirm the trial court's grant of summary judgment to State Farm and Great Northwest.

__/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

____/s/_____
DIANE M. JOHNSEN, Presiding Judge

____/s/_____
PATRICIA A. OROZCO, Judge