IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DAVID PARTON, et al., *Plaintiffs/Appellants*,

v.

FRANKLYN D. JEANS, et al., *Defendants/Appellees*.

No. 1 CA-CV 18-0024
FILED 12-5-2019

Appeal from the Superior Court in Maricopa County
No. CV2015-006012
The Honorable Daniel G. Martin, Judge

AFFIRMED

COUNSEL

Mick Levin PLC, Phoenix
By Mick Levin
Counsel for Plaintiffs/Appellants

Jennings Strouss & Salmon PLC, Phoenix
By John J. Egbert, J. Scott Rhodes, Anne E. McClellan
Counsel for Defendants/Appellees Franklyn D. Jeans, Cassandra H. Ayres, and Beus Gilbert PLLC

Manning & Kass, Ellrod Ramirez Trester LLP, Phoenix
By Anthony S. Vitagliano, Robert B. Zelms, Fatima M. Badreddine
Counsel for Defendants/Appellees Steven C. Mahaffy, Mahaffy Law Firm PC

MEMORANDUM DECISION

Chief Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Kenton D. Jones and Judge David D. Weinzweig joined.

S W A N N, Chief Judge:

¶1 This is an appeal from the entry of summary judgment for the defendants in an action for legal malpractice premised on the defendants' failure to file a wrongful death action. We affirm because the plaintiffs would not have succeeded in the wrongful death action. The wrongful death action arose out of a suicide, and our supreme court has adopted the majority rule that suicide is always an intervening and superseding cause of death unless it is the result of delirium or insanity. Though the majority rule is primitive and unduly inflexible, a reasonable judge or jury would have been required to follow it, which would have barred the plaintiffs' recovery.

FACTS AND PROCEDURAL HISTORY

¶2 In May 2012, David and Wendy Parton's daughter, a twenty-year-old Scottsdale Community College ("SCC") student, used a firearm to commit suicide at her home.

¶3 Attributing their daughter's suicide to bullying by an SCC instructor and an SCC administrator, the Partons promptly sought counsel to pursue a wrongful death action. The Partons first met with Franklyn Jeans and Cassandra Ayres of Beus Gilbert, P.L.L.C., who referred them to Steven Mahaffy of Mahaffy Law Firm, P.C. The Partons retained Mahaffy in June 2012, but by early 2013 terminated Mahaffy's services and told Mahaffy that they were being represented by Beus Gilbert.

¶4 The Partons failed to commence a lawsuit before the statute of limitations expired in May 2013. In April 2015, they sued Beus Gilbert and Mahaffy (collectively, "the defendants") for legal malpractice based on their alleged failure to either file a timely complaint or advise the Partons of the statute of limitations.

¶5 Mahaffy moved for summary judgment and Beus Gilbert joined the motion in part. The defendants asserted, as relevant here, that the Partons could not establish a legal malpractice claim because they

would not have succeeded in the underlying wrongful death action on a negligence theory.[1] Mahaffy argued that the SCC personnel owed no duty to the decedent, and both defendants argued that the decedent's suicide was, as a matter of law, an unforeseeable intervening and superseding cause of her death.

¶6 The superior court granted summary judgment for the defendants. The Partons timely appeal.

DISCUSSION

¶7 We review the grant of summary judgment for a legal-malpractice defendant de novo, viewing the facts and inferences in the light most favorable to the plaintiff. *Collins v. Miller & Miller, Ltd.*, 189 Ariz. 387, 392 (App. 1996). Summary judgment is appropriate "if the facts produced in support of the [malpractice] claim . . . 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." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990).

¶8 To establish legal malpractice, a plaintiff must show, among other things, "that 'but for the attorney's negligence, he would have been successful in the prosecution or defense of the original suit.'" *Glaze v. Larsen*, 207 Ariz. 26, 29, ¶ 12 (2004) (citation omitted). "Under an objective standard, the trier in the malpractice suit views the first suit from the standpoint of what a reasonable judge or jury would have decided, but for

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[1] In the superior-court proceedings, the Partons identified several wrongful death theories, including intentional infliction of emotional distress. But because they raise only negligence on appeal, our review is restricted to that theory. *See Jones v. Burk*, 164 Ariz. 595, 597 (App. 1990) ("Issues not clearly raised and argued in a party's appellate brief constitute waiver of error on review."). And despite the record's ambiguity regarding the grounds on which the court granted summary judgment, only those summary-judgment theories re-urged by an appellee—namely, that the Partons would not have succeeded on a negligence claim because they could not prove either a duty or proximate cause—are properly before us. *See* ARCAP 13(b)(2) ("The appellee's answering brief may include in the statement of issues presented for review and may discuss in the argument any issue that was properly presented in the superior court without the need for a cross-appeal, and the appellate court may affirm the judgment *based on any such grounds*." (emphasis added)).

the attorney's negligence." *Phillips v. Clancy*, 152 Ariz. 415, 418 (App. 1986). To succeed in a "first suit" for wrongful death by negligence, the plaintiff must prove that the defendant owed the decedent a duty (a question of law), the breach of which caused the death (typically questions of fact). *See Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9 (2007). The plaintiff also must prove proximate cause, defined as "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces [the] injury, and without which the injury would not have occurred." *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546 (1990).

¶9 We hold that a reasonable judge or jury, bound by Arizona case law, would have concluded that the Partons could not prove causation in the wrongful death action.[2] Our case law specially limits liability for suicide as follows.

¶10 Certain types of institutions, such as mental institutions and juvenile detention homes, owe a specific duty of care to avoid the suicide of individuals committed to their custody and known to be at risk of suicide. *DeMontiney v. Desert Manor Convalescent Ctr. Inc.*, 144 Ariz. 6, 10 (1985); *Maricopa Cty. v. Cowart*, 106 Ariz. 69, 71 (1970). But nearly 50 years ago, our supreme court held that when

> a [s]pecific duty of care is absent, that is [in] cases involving a wrongful act by the defendant and a subsequent suicide by the injured party, *the almost universal rule is that the suicide by the injured party is a superseding cause which is neither foreseeable nor a normal incident of the risk created and therefore relieves the original actor from liability for the death resulting from the suicide.*

Cowart, 106 Ariz. at 71 (emphasis added); *see also DeMontiney*, 144 Ariz. at 10 (quoting the "general rule" established by *Cowart*). As an exception, liability may exist when the defendant negligently caused the decedent to suffer "delirium or insanity" that either "prevent[ed] him from realizing the nature of his act and the certainty or risk of harm involved therein, or . . . ma[de] it impossible for him to resist an impulse caused by his insanity which deprive[d] him of his capacity to govern his conduct in accordance with reason." *Tucson Rapid Transit Co. v. Tocci*, 3 Ariz. App. 330, 335 (1966) (quoting the Restatement (Second) of Torts § 455 (1965)); *see also Pompeneo*

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[2] We therefore do not decide whether the Partons could establish a legal duty.

v. Verde Valley Guidance Clinic, 226 Ariz. 412, 414–15, ¶¶ 10–14 (App. 2011) (applying *Tocci*). "But if the man is sane,[3] or if the suicide is during a lucid interval, when he is in full command of his faculties, but his life has become unendurable to him by reason of his injuries it is agreed in negligence cases that his voluntary choice is an abnormal thing, which supersedes the defendant's liability." *Tocci*, 3 Ariz. App. at 336 (citation omitted). The foregoing represents the prevailing national view. *E.g.*, C.T. Dreschsler, Annotation, *Civil Liability for Death by Suicide*, 11 A.L.R.2d 751 § 2[b] (updated 2019); Alex B. Long, *Abolishing the Suicide Rule*, 113 Nw. U.L. Rev. 767, 784–85 (2019).

¶11 At the same time, we believe our supreme court should revisit the aging majority rule.[4] The majority rule draws from society's historical view of suicide as sinful and immoral, and its historical classification as a felony. *Long*, *supra*, at 773–78. But societal and legal views of suicide have evolved—our understanding of mental health has changed, moral perspectives on suicide are more diverse, and the classification of suicide as a crime has long been discarded. *Id.* at 775–82. The majority rule fails to consider those changes. *Id.* at 782, 810. Further, it fails to account for modern legislative willingness to recognize that wrongful conduct which may increase the risk of suicide, such as school bullying, should be addressed by the law. *See* A.R.S. § 15-341(36); *Patton v. Bickford*, 529 S.W.3d 717, 733–34 (Ky. 2016). "At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Rosier v. First Fin. Cap. Corp.*, 181 Ariz. 218, 221–22 (App. 1994) (citation omitted); *see also* Allen C. Schlinsog, Jr., *The Suicidal Decedent: Culpable Wrongdoer, or Wrongfully Deceased?*, 24 J. Marshall L. Rev. 463, 479 (1991) ("[P]sychiatry now supports the proposition that all suicides, including those consciously committed, are foreseeable."). And the "[a]nalysis of proximate causation must remain flexible, rather than static: as society, its needs, and its norms change, so too must the contours of tort

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3 The manner in which the court phrased the rule is consistent with the antediluvian assumptions about mental health and human behavior that underlie it.

4 "The legislature may well believe that when a judge-made common law rule has become obsolescent, anachronistic and unjust, the responsibility for change is ours, not theirs. There is no reason that we should refuse to act within our power and perform our duty when by so doing we further legislative objectives." *Ontiveros v. Borak*, 136 Ariz. 500, 512 (1983).

liability and enforcement procedures." *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 74 F. Supp. 2d 221, 225 (E.D.N.Y. 1999); *see also* Long, *supra*, at 810–11 ("'[T]he continued vitality of the common law, including the law of torts, depends upon its ability to reflect contemporary community values and ethics.' Tort law in particular 'operates as a vehicle through which communities perpetually reexamine and communicate their values.'" (citations omitted)). Moreover, the majority rule "effectively short-circuits any real analysis into whether the decedent's suicide was within the scope of foreseeable risk created by the defendant's negligence." Long, *supra*, at 804. The majority rule therefore may produce anomalous results, precluding relief for suicide when it is the *precise* harm that a reasonable person could foresee. *See* Long, *supra*, at 804–06; *Kivland v. Columbia Orthopaedic Grp., LLP*, 331 S.W.3d 299, 308–09 (Mo. 2011) (citing publications recognizing increased suicide rate in trauma patients and people with spinal cord injuries).

¶12 Accordingly, "some courts are beginning to move beyond rote application of the suicide rule and its exceptions and toward a more traditional scope-of-risk analysis," recognizing that the traditional analysis "is sufficient to address the vast majority of these cases without relying upon the fiction that suicide is a superseding cause as a matter of law." Long, *supra*, at 812–13. *See, e.g.*, *Wyke v. Polk Cty. Sch. Bd.*, 129 F.3d 560, 563–65, 574–75 (11th Cir. 1997) (holding that jury could conclude that middle-school student's suicide was foreseeable to school board when school knew of his two recent on-campus suicide attempts); *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602, 605, 611–12 (W.D. Va. 2002) (holding that student's suicide was foreseeable to college when college knew of and had previously intervened with respect to his suicide threats and self-harm); *Patton*, 529 S.W.3d at 733 (holding that torment of another may foreseeably cause suicide, as recognized by Kentucky's anti-bullying statutes); *Kivland*, 331 S.W.3d at 303, 306–10, 313–14 (expressly rejecting majority rule and holding that causation of suicide was material question of fact where decedent acted after allegedly negligently performed surgery left him partially paralyzed and in intense, continuous pain); *White v. Lawrence*, 975 S.W.2d 525, 527–28, 531–32 (Tenn. 1998) (holding that causation of suicide was material question of fact where decedent acted after unknowingly ingesting prescription medication that wife, on physician's advice, gave to him secretly); *Edwards v. Tardif*, 692 A.2d 1266, 1267, 1269–73 (Conn. 1997) (upholding plaintiff's verdict in medical malpractice case where patient whom physician should have known to be at risk for suicide committed suicide by overdosing on medication that physician prescribed without conducting in-person evaluation). We believe that these courts have taken

the correct approach, but we cannot follow the modern approach until and unless our supreme court changes Arizona law.

¶13 We would not adopt the majority rule if it were within the scope of our authority to make that decision. But applying the majority rule, as our supreme court precedent requires, we conclude that a reasonable judge or jury would not have found liability in the Partons' wrongful death action. Because proximate cause usually is a question of fact for the jury, "to defeat summary judgment, a plaintiff 'need only present probable facts from which the causal relationship reasonably may be inferred.'" *Braillard v. Maricopa Cty.*, 224 Ariz. 481, 496–97, ¶ 50 (App. 2010) (citation omitted). But the Partons presented no facts or testimony to prove that the decedent's suicide was the product of delirium or insanity. Their experts opined only that the decedent likely suffered from panic and anxiety disorders, that the instructor had bullied her, and that the instructor and the administrator's conduct had likely caused emotional fallout that led to her suicide. They did not provide evidence that the suicide was anything other than volitional. Additionally, they did not argue that SCC owed the decedent a specific duty of care to avoid her suicide, and we find no Arizona law recognizing a *specific* duty of care in the higher-education context. Nor did the Partons argue negligence per se, and we find no statute that would establish such negligence. *Cf. Crown v. Raymond*, 159 Ariz. 87, 87–88, 90–91 (App. 1988) (holding that minor's suicide was reasonably foreseeable to gunshop owner who engaged in negligence per se by violating statute requiring parental consent for gun sales to minors, because "[t]he existence of the [violated] statute itself expresses an awareness by the legislature that [the protected class] are at risk of injuring . . . themselves . . . either negligently or intentionally").

¶14 Because the Partons would not have succeeded in an action for negligently-caused wrongful death under current law, we hold that the superior court correctly entered summary judgment for the defendants in the legal malpractice action.

CONCLUSION

¶15 We affirm for the reasons set forth above.