SUPREME COURT OF ARIZONA

DIANNAH DINSMOOR, Plaintiff/Appellant, v. CITY OF PHOENIX; DEER VALLEY UNIFIED SCHOOL DISTRICT NO. 97; LYNN MILLER and JANE DOE MILLER; KIMBERLY HEINZ and JOHN DOE HEINZ; KENNETH PALMER and JANE DOE PALMER, Defendants/Appellees.	Arizona Supreme Court No. CV-20-0214-PR Court of Appeals Division One No. 1 CA-CV 19-0045 Maricopa County Superior Court No. CV2015-001448

AMICUS CURIAE BRIEF OF ARIZONA CHARTER SCHOOLS ASSOCIATION, ARIZONA SCHOOL BOARDS ASSOCIATION, AND ARIZONA SCHOOL RISK RETENTION TRUST IN SUPPORT OF DEFENDANTS/APPELLEES

(Filed with consent of all parties)

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INTRODUCTION

If left unreviewed, this case will wreak havoc for schools across the state. The opinion, which applies to every single K-12 school in Arizona—whether a district school, charter school, or private school—upends school-liability law. It makes schools liable for harm that occurs off school premises, outside of school hours. The broad duty articulated by the court of appeals is completely unmoored from traditional common-law limits, and it effectively requires schools to be insurers of any student harm, regardless of where and when the harm occurs.

Sadly, bad things sometimes do and will happen to students when they are away from school, but making schools responsible for those damages is inappropriate and legally unsupportable. To top it off, the practical consequences of the opinion put schools in an unfeasible position. On one hand, this opinion subjects them to liability for off-campus, off-hours harm. But on the other hand, they have little practical or legal ability to control what happens off-campus after school hours. This Court should grant review, reverse the court of appeals, and affirm the superior court's grant of summary judgment.

INTEREST OF AMICI CURIAE

This case affects every single K-12 school in the state. The amici curiae have a strong interest in ensuring sound legal standards for schools in Arizona.

The Arizona Charter Schools Association and the Arizona School Boards Association represent the interests of the state's public schools, both school districts and charter schools, which serve more than 1.1 million students. The Arizona School Risk Retention Trust provides 247 of Arizona's public schools—K-12 and post-secondary—with pooled insurance coverage, including liability coverage.

This case will substantially disrupt the amici's member schools. The amici therefore have a strong interest in this Court granting review, vacating the court of appeals' opinion, and confirming that Arizona schools are held to a duty and negligence standard that is both legally reasonable and functional in practice.

REASONS TO GRANT REVIEW

I. Schools need this Court's guidance regarding the scope of their negligence liability.

Six years ago, high school sophomore Ana G. was fatally shot at a friend's house after school. Op. ¶ 1. No one disputes that this terrible event

happened away from school, after school hours, and had no connection to a school event. *See, e.g.*, Op. ¶¶ 1, 10, 25. As the superior court correctly recognized, under controlling precedent at the time, the school did not owe a duty of care to protect Ana from the risk of gun violence off campus, outside of school hours, and unrelated to a school event. IR-272.

The court of appeals, however, ignored this precedent in favor of adopting a new and nearly limitless duty of care for schools. Instead of following the settled rule that a school's duty to students is "bounded by geography and time," *Monroe v. BASIS School, Inc.*, 234 Ariz. 155, 157-58, ¶ 6 (App. 2014), the court of appeals held that schools owe a general duty of care to protect students, even from harms that "occurred off campus and after school," Op. ¶ 25. The court of appeals effectively compelled schools to become insurers of student safety, without regard to the scope of traditional tort law or the practical abilities of Arizona's schools. This case warrants this Court's review for several reasons.

A. The issues in this case impact all K-12 schools statewide.

This case has statewide importance because it will apply to the more than 2,400 K-12 schools in Arizona—district schools, charter schools, and private schools—that are responsible for educating more than 1.1 million

students. EISi Express Tables, 2017-2018 Aggregated Counts from Public & Private Schools (Arizona), National Conference for Education Statistics, https://nces.ed.gov/ccd/elsi/expressTables.aspx. This case affects all schools, not just the named parties.

The opinion sent shockwaves throughout the education community. Perhaps the best indication of the opinion's impact comes from how often it has been been mentioned in recent presentations within the school community. In addition to the other significant issues currently facing schools, this opinion added an additional disruptive factor to school administration, and that disruption has caused substantial concern about the opinion's repercussions. It is simply that important, and that disruptive.

B. The court of appeals' conflicting decisions create significant uncertainty for schools.

The Court should also grant review because "there are conflicting decisions by the Court of Appeals." ARCAP 23(d)(3).

Just six years ago, the court of appeals explicitly refused to adopt a "limitless" duty in the school-student relationship in *Monroe v. BASIS School, Inc.*, 234 Ariz. 155 (App. 2014). In *Monroe*, a car struck a fifth grade student one block from her school as she was biking home. *Id.* at 157, ¶ 2. The

student alleged that the school acted negligently by failing to post a crossing guard at the busy intersection and for locating its elementary school near the dangerous intersection. *Id.* ¶ 3. The court of appeals affirmed summary judgment in favor of the school. *Id.* at 156, ¶ 1.

Rejecting the student's argument that the school owed "a duty to protect her from an unreasonable risk of harm on her way from the school to her final destination," *id.* at 157, ¶ 4, the court noted that the student "cite[d] to no authority and we are aware of none that defines a school's common law duty so broadly," *id.* at 159, ¶ 11. Instead, the court looked to the purpose and history of the school-student relationship to conclude that the duty created thereby is "bounded by geography and time, encompassing risks such as those that occur while the student is at school or otherwise under the school's control." *Id.* at 157-58, ¶ 6 (citing Restatement (Third) of Torts (Physical and Emotional Harm) § 40(b)(5) cmts. f, *l* (2012)). Accordingly, the court held that the school did not "owe[] a duty of care to a student traveling to and from school when that student is not in the school's custody nor participating in a school-sponsored function." *Monroe*, 234 Ariz. at 159, ¶ 11.

The court of appeals issued *Monroe* just one month before Ana's death. The District should have been able to rely on this precedent, but the court of appeals created chaos for the District (and for all Arizona schools) by adopting an entirely different duty in this case. Although the opinion recognizes that "it is the relationship itself that creates the duty," Op. ¶ 25, it then proceeds to hold that the "special relationship between a school and its students" created a general duty of care, unlimited by the contours of that relationship, Op. ¶¶ 23-25.

These conflicting articulations of the parameters of the duty and the conduct necessary to fulfill that duty leave schools without any guidance on the obligations and liabilities. *Monroe* tells schools that their duty is to protect students from risks that arise on campus, during schools hours, or while students are otherwise under the schools' supervision. Under *Monroe*, the District would be entitled to summary judgment for a lack of duty. But this opinion now instructs schools that they must protect students from all risks, whether on campus or off, before or after school, and regardless of whether the student is under school supervision. And according to that standard, the District is not entitled to summary judgment on duty (or breach or causation, *see infra* § II.B-C). Unsurprisingly, these conflicting

instructions are causing chaos in the education and risk-management communities. Schools, students, and parents need the Court's guidance on this issue now.

C. The opinion puts schools in a nearly impossible position.

If the opinion stands, every school in Arizona could be liable for harm that occurs entirely off campus, outside of school hours. This puts schools in an impossible position. Schools are very limited in their ability to control what happens off-campus and off-hours. No teachers, counselors, school resource officers, or other school personnel are present. Schools simply cannot monitor the actions of students when they are away from school. And schools may not discipline students for off-campus actions unless the actions materially and substantially disrupt the school environment. *See, e.g.*, *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1101-02, 1122 (C.D. Cal. 2010) (observing that schools cannot impose discipline "simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments"). In addition, state and federal student privacy laws and norms limit schools' ability to call one student's parent to talk to him or her about another student at the school.

Arizona schools work extremely hard to try to fulfill their primary obligation of educating Arizona's youth. They also work extremely hard to keep students safe while at school. And they are now working tirelessly to protect students from the impact of COVID-19. The court of appeals has added yet another responsibility to schools' must-do lists—the impossible task of addressing off-campus, after-hours violence from teenage romances gone bad and any number of scenarios that may arise after students leave school for the day. That puts schools in an impossible position in light of their limited ability to control off-campus behavior, limited ability to discipline students for off-campus activities, and limited ability to talk about one student to another student's parents.

II. The opinion's negligence framework radically departs from longstanding principles.

A. The opinion fails to tailor a school's duty of care to the contours of the relationship giving rise to it.

Through a chain of legal errors, the court of appeals' decision creates a fundamental shift in negligence law. When a duty arises from a special relationship, the scope of that duty covers only expected activities within the relationship. *See, e.g.*, *Monroe*, 234 Ariz. at 157, ¶ 5 ("The student-school relationship is one that can impose a duty *within the context of the*

relationship." (emphasis added) (citing, among others, the Restatement (Third) of Torts § 40 & cmt. *l*)). Accordingly, "[t]he scope of the duty imposed by the student-school relationship is not limitless." *Monroe*, 234 Ariz. at 157, ¶ 6. The default common-law rule is that a school's duty of care is "bounded by geography and time, encompassing such risks as those that occur while the student is at school or otherwise under the school's control." *Id.* at 157-58, ¶ 6. The common law thus recognizes that "once students independently leave school grounds, with or without permission, their actions are outside the supervisory power of school officials." *Id.* at 161, ¶ 18; *see also Collette v. Tolleson Unified Sch. Dist. No. 214*, 203 Ariz. 359, 364, ¶ 19 (App. 2002) ("The ability to impose discipline after the fact is significantly different from the power to control a student's conduct before the fact.").

This articulation of duty is consistent with schools' statutory obligations, which typically track the common-law duty by focusing on risks occurring at school, during school hours, or otherwise under the school's control. *See, e.g.*, A.R.S. § 15-341(A)(12), (16), (23), (36) (authorizing school district governing boards to take action and adopt policies related to students "on school property," "in instructional and noninstructional activities," "on school grounds," "on school buses," "at school-sponsored

events and activities," etc.). Despite this limitation on the scope of a school's duty, the court of appeals erroneously concluded that a school owes a general duty of care to students, unlimited by time or location. It therefore refused to consider *any* facts about the relationship between a school and its students to determine whether and to what extent the District owed a duty here. *See* Op. ¶¶ 25-26; *cf. Boisson v. Ariz. Bd. of Regents*, 236 Ariz. 619, 623, ¶¶ 11, 13 (App. 2015) ("this court does not look at the parties' actions alleged to determine if a duty exists," but can consider facts relevant to "determining whether an off-campus activity is deemed a school activity" for which a school owes its students a duty of care (internal quotation marks omitted)).

This holding improperly divorces a school's duty from the relationship giving rise to it in the first place. *See* Restatement (Third) of Torts § 40, cmt. f ("The duty imposed in this Section applies to dangers that arise within the confines of the relationship and does not extend to other risks."); *accord* Restatement (Second) of Torts § 314A, cmt. c (1965). In doing so, the holding conflicts not only with other school-student relationship decisions, but also with Arizona's approach to special relationship duties more broadly.

Contrast this unlimited duty for schools against the standard the court applied to the police officer-victim special relationship in this same case. The opinion found that the police-victim special relationship did not impose a duty of care in this case, but that the school-student special relationship did. *Compare* Op. ¶¶ 19-22 (concluding that "the record does not support" finding a duty owed to Ana by Officer Palmer in his capacity as a police officer) *with* Op. ¶¶ 25-26 (refusing to consider the facts of the relationship between Ana and school staff, including Officer Palmer, when assessing the District's duty). But both relationships involve the same actors (Ana and Officer Palmer) and the same set of facts. If a *police officer* had no duty to protect Ana from gun violence under these circumstances, why would a *school*?

The court of appeals nonetheless suggests that its decision will not impose an unlimited duty on schools because the alleged negligence must have taken place during school hours and/or on school grounds. *See* Op. ¶ 25 (noting that the duty requires a school to take "appropriate actions," i.e., "actions it could have taken while [the student] was on campus during school hours"). But realistically, that is no limit at all—virtually all such claims against a school will include allegations that the school could have

taken some action while the student was under its custody or supervision that could have prevented or reduced the risk of harm. As this Court has recognized, such "limitless duties expand tort liability beyond manageable bounds." *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 577, ¶ 80 (2018).

B. The opinion improperly abdicates the courts' gatekeeping role in negligence cases.

In negligence actions, the court must determine as a matter of law whether a legal obligation or duty to protect from injury or harm exists, while breach and causation ordinarily are fact questions for the jury. *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9 (2007). "[I]n approaching the question of negligence or unreasonable risk," however, "the courts set outer limits. A jury will not be permitted to require a party to take a precaution that is clearly unreasonable . . . ." *Rogers v. Retrum*, 170 Ariz. 399, 403 (App. 1991) (citation omitted). Thus, a court may rule as a matter of law 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." *Gipson*, 214 Ariz. at 143, ¶ 9 n.1.

Importantly, this Court's decision in *Gipson v. Kasey* did not change the courts' gatekeeping role. Rather, "*Gipson* held that while courts may no

longer use foreseeability to determine whether a plaintiff is foreseeable (duty), they may still use foreseeability in determining whether the injury is foreseeable (breach and causation)." *Quiroz*, 243 Ariz. at 565, ¶ 13.

Here, the court of appeals improperly refused to exercise its gatekeeping function at all. *See, e.g.*, Op. ¶¶ 25, 28-34. First, the court of appeals improperly ignored the District's argument that the actions the plaintiffs claimed it should have taken were "unreasonable *as a matter of law*," instead deeming this "a fact question for the jury." Op. ¶ 33 (emphasis added). It is not. Indeed, the court of appeals considered and resolved similar claims in *Hill v. Safford Unified School District*, 191 Ariz. 110 (App. 1997).

In *Hill*, a high school student (Fast) and another student (Hill) had a verbal altercation during school; Fast then shot and killed Hill after school. *Id.* at 111-12. The plaintiffs sued the school for negligence, alleging that the school breached its duty of care by failing to detain Fast and/or call the police or his parents after the students' fight. *Id.* at 116. The plaintiffs argued that the school had a duty to act to prevent Fast from shooting Hill because it knew of "on-going gang difficulty at school," it had previously searched Fast's locker after hearing rumors that he brought a gun to school, and it was

aware of the students' verbal altercation earlier in the day. *Id.* at 115-16. The court disagreed, however, that the verbal altercation, nonspecific rumors of gang violence, and "a past rumor that Fast had a gun in his locker, a rumor that the school investigated and dispelled" put the school on notice of the impending gang violence or Fast's violent tendencies. *Id.* at 116. Accordingly, the court held that the school did not breach its duty of care as a matter of law. *Id.* at 117.

Just like in *Hill*, the court of appeals could have, and should have, decided whether the proposed actions were unreasonable *as a matter of law* based on the plaintiffs' version of the facts. *See, e.g.*, *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, ¶ 7 (1998) (at the summary judgment stage, the court views the evidence in the light most favorable to the non-moving party). Ana and Matthew's verbal altercation and a rumor that Matthew had a gun at school—a rumor the District investigated and dispelled—are not sufficient to show that the District should have foreseen the impending shooting or Matthew's alleged propensity for violence. *See, e.g., Hill*, 191 Ariz. at 115-16. But the court erroneously refused to consider these or any facts, including the time and location of the incident, to determine whether the District should be held liable as a matter of law here.

Second, the court of appeals improperly ignored the issue of proximate causation entirely. "Causation" for negligence purposes requires a plaintiff to prove both actual ("but-for") causation *and* proximate ("legal") causation. *See Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 438-39, ¶¶ 13-14 (App. 2007). In contrast to actual (but-for) causation, proximate causation "is a question of the extent of the defendant's original obligation," and thus the question "is not primarily one of causation at all," but "rather one of the policy as to imposing legal responsibility." W. Prosser & W. Keeton, *The Law of Torts* § 44, at 301 (5th ed. 1984). In other words, proximate causation is "the limitation which *the courts* have placed upon the actor's responsibility for the consequences of the actor's conduct." *Id.* § 41, at 264 (emphasis added).

In this case, the court of appeals found that the District was not entitled to summary judgment on causation based on the plaintiff's testimony regarding actual causation. Op. ¶ 34 (citing the plaintiff's testimony that the District's failure to notify her was the but-for cause of Ana meeting Matthew that day). In doing so, the court abdicated its responsibility to set the outer limits on negligence liability arising from the school-student special relationship under proximate causation.

The court of appeals should have considered the District's liability as a matter of law in this case, whether under the rubric of duty, breach, or proximate causation. By failing to do so, the Court abdicated its gatekeeper role.

C. If the opinion stands, it will dramatically increase the litigation burden on schools and courts.

By adopting an unlimited duty of care, the opinion all but eliminates the possibility of schools prevailing on summary judgment for a lack of duty because the foreseeability of the harm is no longer part of the duty analysis for negligence purposes. It then compounds this problem by rejecting the courts' obligation to set the outer bounds of negligence liability, whether as a question of duty, breach, or proximate causation. (*See* § II.A-B, above.)

The practical consequence of these rulings is that all claims of negligent student supervision will have to go to a jury. And, therefore, schools will need to set aside additional portions of their already limited budgets for litigation expenses. That is a tremendous—and unfair—burden to place on schools, particularly when it is a burden not faced by other actors in "special relationships." (*See, e.g.*, § II.A.) Tellingly, under the opinion's broad language, cases like *Boisson*, *Monroe*, and *Hill* would have had to go to a jury

rather than be resolved at summary judgment. Thus, in addition to generally increasing damages liability for schools, the opinion also increases the cost of litigation by requiring cases to go to a jury instead of being resolved on summary judgment.

In sum, the court of appeals' decision is both legally wrong and practically untenable. It warrants this Court's review. *See* ARCAP 23(d)(3).

CONCLUSION

The Court should grant the petition for review.

RESPECTFULLY SUBMITTED this 21st day of September, 2020.

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