SUPREME COURT OF ARIZONA

DIANNAH DINSMOOR,

Plaintiff/Appellant/Respondent,

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/Petitioners.

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

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

(Filed with consent of all parties)

Lynne C. Adams (011367)
Eric M. Fraser (027241)
Hayleigh S. Crawford (032326)
OSBORN MALEDON, P.A.
2929 N. Central Ave., Ste. 2100
Phoenix, Arizona 85012
602-640-9000
ladams@omlaw.com
efraser@omlaw.com
hcrawford@omlaw.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

Under settled law, a duty based on a special relationship is limited to the scope of the underlying special relationship. Such a duty is bounded by geography and time. This longstanding principle applies with full force to the school-student relationship. The law imposes a duty on schools, but this duty applies only to risks that occur on-campus, during school hours. Because this case involves an off-campus, after-hours harm, the District did not owe a duty.

INTEREST OF AMICI CURIAE

The Arizona School Boards Association and the Arizona Charter Schools 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 with pooled insurance coverage, including liability coverage. The amici curiae therefore have a strong interest in ensuring that the duty and negligence standards applied to Arizona schools are both legally sound and realistic in practice.

ARGUMENT

I. This Court should hold that a school's duty to its students is bounded by geography and time.

A. A duty based on a special relationship cannot extend past the bounds of the special relationship.

As with any actor, a school's duty cannot extend past the underlying rationale for imposing a duty in the first place. There is no common-law duty of care to take affirmative precautions for the aid or protection of others. Restatement (Second) of Torts § 314 & cmt. a (1965); *accord* Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 37 & cmt. a (2012). The general rule is that "[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless" a special relationship exists that creates a duty to control the third person's conduct or protect the victim. Restatement (Second) § 315.

Arizona follows the common-law rule. Thus, "duty in Arizona is based on either recognized common law special relationships or relationships created by public policy," conduct, or contract. *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 565, ¶ 14 (2018). This case arises only out of the "special relationship" basis for imposing duty.

The duty imposed by a special relationship "applies to dangers that arise within the confines of the relationship and does not extend to other risks. Generally, the relationships [that justify imposing a duty] are bounded by geography and time." Restatement (Third) § 40 cmt. f; *accord* Restatement (Second) § 314A cmt. c ("The rules stated in this Section apply only where the relation exists between the parties, and the risk of harm, or of further harm, arises in the course of that relation.").

The Second and Third Restatements of Torts provide helpful examples of the common sense limitations on a duty established by a special relationship. A common carrier owes a duty to its passengers, but this duty stops when "a person [has] left the vehicle and is no longer a passenger." Restatement (Third) § 40 cmt. f. An innkeeper owes a duty to its guests, but this duty does not extend "to a guest who is injured or endangered while off the premises." *Id.*; *accord* Restatement (Second) § 314A cmt. c ("A carrier is under no duty to one who has left the vehicle and ceased to be a passenger, nor is an innkeeper under a duty to a guest who is injured or endangered while he is away from the premises. Nor is a possessor of land under any such duty to one who has ceased to be an invitee.").

There are exceptions, of course, when the actor has taken an

affirmative act to extend the special relationship past its normal bounds. For example, a cruise ship may owe a duty to its off-ship passengers if the cruise company conducts its own "onshore tour." Restatement (Third) § 40 cmt. f. But the company would not have a duty if the passengers arrange for an independent tour or activity not conducted by the cruise line.

These principles make perfect sense. An innkeeper in Chicago can control its own premises to keep the inn safe for guests. But the innkeeper has no legal or practical ability to control what its guests do off-property, and no ability to make the streets of Chicago perfectly safe for its guests while they sightsee. A cruise company likewise can maintain its ship in good working order and provide for security on the ship (and on company-organized onshore tours). But the cruise company cannot control what its guests do off-ship, nor can it provide for safety in all of Cozumel.

It is good public policy to impose a duty on these companies, but it is equally good public policy to limit that duty to the scope of the special relationship. Allowing the duty to extend past the scope of the special relationship would undermine the default principle that actors generally do not have a duty to prevent a third party from causing physical harm to another.

B. The limited-scope duty principle applies with full force in the school-student context.

The school-student relationship is one of the special relationships recognized at common law. *See* Restatement (Third) § 40(b)(5). In certain circumstances, therefore, the common law imposes an affirmative duty of care on a school where none would otherwise exist. But the rationale for imposing a duty illustrates why the duty must be limited.

Schools have a duty to their students because of three types of special relationships: "[1] it is a custodian of students, [2] it is a land possessor who opens the premises to a significant public population, and [3] it acts partially in the place of parents." Restatement (Third) § 40 cmt. *l*. Each of these rationales makes sense.

First, when schools take custody of students at the school drop-off point, they accept responsibility for keeping the students safe, particularly because the students are minors and have limited abilities to protect themselves from harm. *See, e.g.*, Restatement (Second) § 320 & cmt. a (rationale applies to schools).

Second, because schools control their premises, they have the same types of duties as other premises owners. *See* Restatement (Third) § 40 cmts.

l, j (duty of land possessor who holds premises open to public). Schools can and do control access to the campus and can ensure that the facilities are safe, among other things.

Third, society recognizes that parents are generally responsible for keeping their children safe from harm. But when parents drop their children off at school, the parents lose the ability to keep their children safe. They cannot hover over their children for the entire school day to fend off potential harm, even if they wanted to. *See* Restatement (Second) § 320 cmt. b ("[A] child while in school is deprived of the protection of his parents or guardian."). The parents instead must rely on the school, and so the school "acts partially in the place of parents." Restatement (Third) § 40 cmt. *l*.

But each of these rationales has bounds. Once a student is off school property and outside of school hours, the scope of the special relationship ends and the rationale for imposing a duty terminates. Once a student has gone home, the school is no longer the custodian of the student and the first rationale terminates. Once the student has left the school's physical campus, the second rationale terminates. And once the parents regain the ability to keep their children safe, the third rationale terminates (regardless of whether the parents exercise that ability). For these reasons, "[a]s with the other

duties imposed by [special relationships], [the duty] is only applicable to risks that occur while the student is at school or otherwise engaged in school activities." Restatement (Third) § 40 cmt. *l*.

This is not a special exception for schools. Rather, it flows directly from the principles that are applicable to all actors. The duty imposed by a special relationship cannot extend past the circumstances that created the special relationship. Just as an innkeeper cannot make all of Chicago safe for its guests, a school unfortuantely cannot make the broader world safe for its students. As with all special-relationship-based duties, the duty is "bounded by geography and time." *Id.* cmt. f.

And just like with the other types of special relationships, a school may owe a duty to its students in other limited contexts when the school-student relationship has been extended. For example, a school may owe a duty on an off-campus field trip or off-campus swim meet because the school is still the students' custodian and still partially acts in place of parents. These exceptions work just like the Restatement's example of a cruise-ship-organized onshore tour.

C. Arizona caselaw recognizes that a school's duty is bounded by geography and time.

Arizona caselaw recognizes these principles. While a school acts in the above roles (as a custodian, a premises owner, or partially in place of parents), it owes an affirmative duty to protect students against the risk of unreasonable harm, including the risk of harm from third parties. *See Jesik v. Maricopa Cty. Cmty. Coll. Dist.*, 125 Ariz. 543, 546 (1980) (duty to protect student on campus from risk of third party's intentional tort or criminal act).

Arizona caselaw recognizes the limits of this duty, as coextensive with, and bounded by, the underlying special relationship. In *Monroe v. BASIS School, Inc.*, the court of appeals acknowledged 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." 234 Ariz. 155, 157-58, ¶ 6 (App. 2014). So long as a school is the custodian of the student, the student is on school premises, or the student is under school supervision, the school-student relationship is in effect and the duty applies. Said another way, "[t]he student-school relationship is one that can impose a duty *within the context of the relationship*." *Id.* at 157, ¶ 5 (emphasis added); *see also Chavez v. Tolleson Elementary Sch. Dist.*, 122 Ariz. 472, 476 (App. 1979)

(school personnel owe duty of ordinary care to "students *in their charge*" (emphasis added)). And because it is an affirmative duty, it encompasses the risk of intentional or criminal acts by third parties occurring at school. *See Jesik*, 125 Ariz. at 546.

But once the student is no longer under the school's control, on its premises, or under its supervision, the school-student relationship ends, and so too does the duty of care. "Once students independently leave school grounds, with or without permission, their actions are outside the supervisory power of school officials." *Monroe*, 234 Ariz. at 161, ¶ 18; *accord Banks v. New York City Dep't of Educ.*, 70 A.D.3d 988, 990 (N.Y. App. Div. 2010) ("a school's duty to protect its students from negligence is coextensive with and concomitant to its physical custody and control over its students" and thus "once students leave their school's orbit of authority, parents are free to resume custodial control and the school's custodial duty ceases").

The out-of-state cases cited by Dinsmoor (at 10-11) are consistent with Arizona's limitations on the school-student relationship and do not require a different outcome. In holding that a school could be liable when an elementary school student snuck off campus and was hit by a motorcycle, the court in *Hoyem v. Manhattan Beach City School District* relied on a

California statute that reflected schools' custodial obligations during the school day to ensure students remained on campus. 585 P.2d 851, 854 (Cal. 1979) (citing 5 Cal. Code Reg. § 303). And *Bryant v. United States* concerned a boarding school, which had full-time custody of and responsibility for its students during the school year. 565 F.2d 650, 652 (10th Cir. 1977). Each of these decisions reflects one of the three rationales for imposing the special relationship that schools have with students; neither expands the relationship in the way Dinsmoor seeks to expand it here.

D. Like any other actor, a school's conduct can create a duty with respect to risks outside the school-student relationship.

Although the common-law special relationship between schools and students does not impose a duty of care to affirmatively protect students from third-party crimes off campus, after school, and unrelated to any school-sponsored activity, this does not mean that a school will never owe such a duty to its students. It simply means that this duty, when it exists, arises from a different source—from statute or from a school's conduct or agreement. *See Quiroz*, 243 Ariz. at 565, ¶ 14 ("Duties based on special relationships may arise from several sources, including special relationships recognized by the common law, contracts, or 'conduct undertaken by the

defendant.'" (quoting *Gipson v. Kasey*, 214 Ariz. 141, 145, ¶ 18 (2007)).

For example, in *Alhambra School District v. Superior Court*, 165 Ariz. 38 (1990), this Court held that a school assumed a duty of care by voluntarily undertaking to provide protection at a street crossing, even though the school would not otherwise owe a duty with respect to an off-campus crossing. *Id.* at 41-42; *see also Jefferson Cty. Sch. Dist. R-1 v. Justus*, 725 P.2d 767, 770 (Colo. 1986) (school can owe a duty either "on the basis of the [school-student] relationship" or under the "separate and distinct body of law hold[ing] that a party may assume duties of care by voluntarily undertaking to render a service"). Schools also have various statutory obligations that could give rise to a statute-based duty. There is no dispute that this case does not implicate any of these other sources of duty.

Limiting a school's affirmative duty of care to the education environment except when a school's conduct gives rise to additional duties at common law makes good sense. It is analogous to the duty of police officers. Just like schools do not have an unlimited duty to protect students from all potential harms, police do not have an unlimited duty of care to protect all citizens from potential harm. *Compare Hogue v. City of Phoenix*, 240 Ariz. 277, 280–81, ¶ 12 (App. 2016) ("merely establishing a police

department does not make a city 'a general insurer of safety or liable for absolutely all harms to its citizens'" (quoting *Austin v. City of Scottsdale*, 140 Ariz. 579, 582 n.2 (1984)), *with Collette v. Tolleson Unified Sch. Dist., No. 214*, 203 Ariz. 359, 365, ¶ 25 (App. 2002) (agreeing that "schools should [not] be insurers of their students' conduct or be liable for students' negligent acts away from school").

* * *

In sum, a school's duty based on the school-student special relationship must be bounded by geography and time so that it encompasses only those risks arising on campus during school hours.

II. Dinsmoor did not meet the burden of showing that the District had a duty to prevent the off-campus shooting here.

A. The risk in this case does not implicate the school's duty because it occurred off-campus and outside of school hours.

"[D]uty is not presumed; in every negligence case, the plaintiff bears the burden of proving the existence of a duty." *Quiroz*, 243 Ariz. at 563, ¶ 2. Dinsmoor did not meet that burden here.

Dinsmoor relies solely on the existence of a common-law special relationship between the District and Ana as the basis for finding a duty here. *See, e.g.*, Respondent's Supp. Br. at 5-7. Dinsmoor made no effort to

identify, much less prove, an alternative basis for imposing a duty on the District to protect Ana against a criminal act occurring after school and off campus. As in *Dabush v. Seacret Direct LLC*, Dinsmoor "failed to present any evidence showing that Defendants assumed a duty to protect [Ana] from harm" off campus and after school. ___ Ariz. ___, CV-19-0200-PR, 2021 WL 79752 at *8, ¶ 40 (Ariz. Jan. 8, 2021). Thus, "even though the existence and extent of an assumed duty is generally a question of fact for the jury," this Court "may decide the issue as a matter of law." *Id.*

As explained above (Argument § I), the duty imposed by the school-student relationship is bounded by time and geography and extends only to the risks arising within the context of that relationship. The risk that Matthew might commit gun violence against Ana did not arise in the context of the school-student relationship. Matthew and Ana unquestionably were off campus and the school day had already ended.

Thus, all three of the rationales for the school-student special relationship had terminated. The school was not serving as Ana's custodian (rationale #1), she was off school gounds (rationale #2), and her parents had the ability to reassert control and protection (rationale #3). Instead, the school was like the innkeeper whose guest gets attacked outside the inn in

Chicago or the cruise ship operator whose passenger gets attacked while independently sightseeing in Cozumel. For these reasons, the duty does not cover the circumstances of this case.

B. Dinsmoor's arguments cannot place the danger within the scope of the school's duty.

1. Contrary to Dinsmoor's implicit argument, the school-student relationship is not boundless.

Dinsmoor's arguments presuppose that the school-student relationship automatically imposes an unbounded duty. Dinsmoor quotes the court of appeals' opinion in arguing that "it is the relationship between student and School District 'that creates the duty, not the facts and circumstances of the injury.'" Respondent's Supp. Br. at 7 (quoting Op. ¶ 25). But that relationship is transitory. The school is not the custodian of its students for 24 hours a day. The students do not remain on campus for 24 hours a day. The school does not act partially in place of parents for 24 hours a day. The special relationship is bounded, and the duty extends only as far as the underlying special relationship.

Even the cases Dinsmoor cites in support of an expansive duty rule acknowledge that the duty created by the school-student relationship is "for the benefit of the students enrolled in their classes" and thus exists "within

the context of the relationship," "to the students within their charge," "during the time the student is under their charge." Respondent's Supp. Br. at 6-7 (quoting *Delbridge v. Maricopa Cty. Cmty. Coll. Dist.*, 182 Ariz. 55, 58 (App. 1994); *Monroe*, 234 Ariz. at 157, ¶ 5; *Rogers v. Retrum*, 170 Ariz. 399, 401 (App. 1991); and *Chavez*, 122 Ariz. at 475, respectively).

Dinsmoor's argument also presumes a duty any time a special relationship exists, instead of requiring a plaintiff to prove the existence of a duty in each case. This Court previously cited this burden-shifting assumption when declining to adopt the Third Restatement's new duty formulation. *See Quiroz*, 243 Ariz. at 574, ¶ 63.

In addition, treating a special relationship as a shorthand for duty conflicts with Arizona's approach to special relationship duties more broadly. Contrast Dinsmoor's asserted unlimited duty for schools against the standard the court of appeals applied to the police-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. It makes no sense that a police officer acting on behalf of the City would have no duty to protect Ana from gun violence under these circumstances, but that same police officer, under the same circumstances, does have a duty to protect Ana from gun violence when acting on behalf of the District. Dinsmoor does not explain how to reconcile the court of appeals' conflicting duty/no duty findings with respect to Office Palmer.

2. Contrary to Dinsmoor's argument, this case does not fall within the scope of the school-student duty.

A duty based on a special relationship is limited "to *risks* that arise within the scope of the relationship." Restatement (Third) § 40(a) (emphasis added). Said another way, the duty does not extend past "*dangers* that arise within the confines of the relationship." *Id.* cmt. f (emphasis added). The question is not whether the defendant could have taken action on premises to prevent the harm; the question is whether the *danger* or *risk* falls within the scope of the relationship. As applied to schools in particular, the duty

"is only applicable to risks that occur while the student is at school or otherwise engaged in school activities." *Id.* cmt. *l*.

In an effort to reframe this case to place it within the proper scope of the school's duty, Dinsmoor's supplemental brief repeatedly refers to the "high-school office," as if the danger took place there, during school hours. It did not. The danger to be avoided was not that Matthew would come on campus and hurt Ana (and the District took action to prevent that on-campus risk by thoroughly investigating rumors that Matthew and/or a gun were on campus that day). The danger was that Matthew would hurt Ana off-campus *after* she had left school for the day. That ends the inquiry.

Consider the three things that Dinsmoor contends the District should have done, all supposedly arising on-campus: (1) call 911, (2) warn Ana's mother, or (3) keep Ana at the school office. Respondent's Supp. Br. at 14. Each of these is aimed at avoiding potential off-campus, after-hours dangers. *Cf. N.L. v. Bethel Sch. Dist.*, 378 P.3d 162, 164-65, ¶¶ 2-8 (Wash. 2016) (risk of danger that registered sex offender posed to other students arose on campus and suggested precautions were aimed at limiting contact with vulnerable students on campus). If the danger to be avoided were an on-campus,

school-day danger, the school would be trying to prevent a student with a gun from coming on campus and attacking another student.

Placing the blame on the school office does not salvage Dinsmoor's case, even setting aside the fact that school offices are not sophisticated command centers, and even setting aside the fact that the school probably legally could not have detained Ana (an innocent student) at the office. Just like the innkeeper's office and cruise ship security office have no duty to prevent off-site harm, the school has no duty to use its school office to prevent "risks that occur while the student is [not] at school or otherwise engaged in school activities." Restatement (Third) § 40 cmt. *l*.

C. Dinsmoor's position would lead to absurd results.

Dinsmoor's position is that a school's duty to its students is unlimited. As long as someone in the school office *could* prevent harm to a student, then the school owes a duty. This position would lead to absurd results. Arizona students have a constitutional right to an education, which means that schools deal with a wide variety of students, each with his or her own issues and needs. Exposing schools to liability for an off-campus, after-school assault based on mere notice of a student's behavioral issues is unworkable. *See N.L.*, 378 P.3d at 174, ¶ 42 (Madsen, C.J., dissenting) (warning that,

"[t]aken to its logical conclusion, if a school has notice of a student's violent tendencies, under the majority's view, it could be found liable for an off-campus, non-school-related assault").

Consider a situation that probably unfolds almost every day across schools in Arizona. A teacher learns that a student has a reputation for speeding and driving recklessly. The teacher knows that the student's girlfriend (another student in the school) plans to ride in the other student's car this afternoon. If the student crashes his car and his girlfriend gets injured, may she sue the school? Did the school have a duty to protect her from an off-campus, after-hours risk? The answer is no. And the answer is still no even if someone in the school could have called the police, called the girlfriend's mother, or detained the girl in the school office.

These legal principles can lead to initially counterintuitive results, as shown by the Restatement's illustrations. In the first illustration, the Restatement teaches that a restaurant has a duty to seek medical care when a waiter sees a customer suffering from an asthma attack inside the restaurant. Restatement (Third) § 40 cmt. *l*, illus. 1. In the second illustration, the waiter sees the customer through a window, suffering from an asthma attack just outside the restaurant. *Id.*, illus. 2. But because the "asthma attack

occurred outside the scope of the relationship" with the restaurant, the restaurant owes no duty to seek medical care. *Id.* This is so even though the waiter *could* take action inside the restaurant (by calling 911 from the restaurant's phone, for example) to avoid the risk. But the waiter does not have a *legal obligation* to do so. The same is true here. Because this case involves an off-campus, after-hours danger, the law imposes no duty, regardless of what actions the school could have taken from the school office.

There are over a million students in Arizona. Schools try hard to ensure their students' safety on-campus and off-campus. But there are limits to their legal duty to do so and to their legal liability. Any other rule would be impractical, unworkable, and bad public policy.

CONCLUSION

This Court should reverse the court of appeals and affirm the superior court's grant of summary judgment.

RESPECTFULLY SUBMITTED this 17th day of February, 2021.

OSBORN MALEDON, P.A.

By /s/ Hayleigh S. Crawford

Lynne C. Adams
Eric M. Fraser
Hayleigh S. Crawford
2929 N. Central Ave., Ste. 2100
Phoenix, Arizona 85012

Attorneys for Arizona Charter Schools Association, Arizona School Boards Association, and Arizona School Risk Retention Trust