SUPREME COURT OF ARIZONA

MARY QUIROZ, AS THE SURVIVING SPOUSE OF ERNEST V. QUIROZ, ET AL.,	)	No. 1-CV-16-0248-PR
Plaintiffs/Appellants,	)	Court of Appeals, Division One Case No. 1-CA-CV-15-0083
v.	)	
ALCOA, INC., ET AL.,	)	Maricopa County Superior Court No. CV 2013-009160
Defendants/Appellees.	)	

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and an underlying membership of more than three million U.S. businesses and corporations of every size, from every sector, and in every geographic region of the country. In particular, the Chamber has many members located in Arizona and others who conduct substantial business in Arizona. For that reason, the Chamber and its members have a significant interest in the development of Arizona civil law on the question of the legal duty owed by premises owners and employers to those alleging injury from conditions on the premises.

Here, as explained below, the Chamber believes that the Court of Appeals properly applied longstanding principles of tort law to hold that an employer's duty does not extend beyond the workplace, to encompass an injury to an employee's child that was allegedly caused by asbestos fibers used at the workplace and transported into the employee's home.

[1] No counsel to the parties authored this brief in whole or in part. *See* A.R.C.A.P. 16(a). This brief is sponsored by the Chamber of Commerce of the United States of America; no other entity provided financial resources for the preparation of this brief. *See* A.R.C.A.P. 16(b)(3).

INTRODUCTION

In this appeal, Plaintiffs ask the Court to make an extraordinary change in Arizona law by recognizing a legal duty in tort extending from the owner/operator of an industrial facility to all of those who may come into contact with an individual who encounters potentially hazardous substances at the industrial facility. This seemingly limitless duty would extend to people and places that are located far beyond the confines of the facility and extend to environmental conditions existing in distant places that the facility's owner has never visited, and over which the facility's owner has no control.

Plaintiffs make no real effort to establish the existence of such a far-reaching duty under existing Arizona law. Instead, Plaintiffs advocate for an abrupt change in Arizona law, which would enable the Court to engage in a fact-intensive, outcome-driven duty analysis, in which, at the outset, the Court presumes that a legal duty exists. Arizona law does not provide for such a result-driven analysis.

All potential litigants benefit when duties are well-defined, and individuals can assess with certainty the bounds of their legal responsibilities. Society, too, benefits as a whole when Courts can stand as gatekeepers, and make dispassionate assessments of one's duties to society, without being persuaded and influenced by often sympathetic fact patterns, which lead to inconsistences and outcome-driven

results. Accordingly, Arizona courts must retain their ability to make legal determinations of duty, and the ruling of the Court of Appeals must be affirmed.

ARGUMENT[2]

The existence of a legal duty is the threshold issue in a negligence case. *Gipson v. Kasey*, 214 Ariz. 141, 143 ¶11, 150 P.3d 228, 230 (Ariz. 2007) (*en banc*) (citing *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354, 706 P.2d 364, 366 (Ariz. 1985) (*en banc*)). In the absence of a legal duty, an action for negligence cannot lie. *Id*. *See also Diaz v. Phoenix Lubrication Service, Inc.*, 224 Ariz. 335, 338 ¶12, 230 P.3d 718, 721 (Ariz. App. Div. 1 2010) (*citing Gipson*, 214 Ariz. at 143 ¶11, 150 P.3d at 230)).

The question of whether a legal duty exists is solely a question of law for the Court. *Alcombrack v. Ciccarelli*, 238 Ariz. 538, 540 ¶6, 363 P.3d 698, 700 (Ariz. App. Div. 1 2015) (citing *Gipson*, 214 Ariz. at 143, ¶9, 150 P.3d 228). As a pure question of law, the question of whether a legal duty exists is assessed without regard for the specific facts of any particular case. *Gipson*, 214 Ariz. at 143 ¶10, 150 P.3d at 230. Rather, the existence of legal duty turns on the question of whether, in certain categories of cases, a defendant will or will not be held potentially accountable for damages. *Id.* at 143 ¶11. *See also Delci v. Gutierrez*

[2] In presenting its arguments, the Chamber is relying upon the facts of this matter as stated in the Court of Appeals' opinion.

Trucking Co., 229 Ariz. 333, 335 ¶8, 275 P.2d 632, 634 (Ariz. App. Div. 1 2012) (quoting *Gipson* for the proposition that "[T]he issue of duty involves generalizations about categories of cases"). Accordingly, the fact-specific notion of "foreseeability" has no place in the duty analysis. *Gipson*, 214 Ariz at 143 ¶15, 150 P.3d at 231. Under Arizona jurisprudence, the concept of "foreseeability" is reserved for factual questions relating to breach and causation, which are reached only after a duty is determined to exist as a matter of law. *Delci*, 229 Ariz. at 336 ¶11, 275 P.3d at 636.

Under the framework of Arizona law, there are two scenarios that may give rise to a duty of care: (1) the relationship between the parties, and (2) public policy. *Delci*, 229 Ariz. at 336 ¶12, 275 P.3d at 635 (citing *Gipson*, 214 Ariz. at 144-46, ¶¶ 18-26, 150 P.3d at 231-33). As will be set forth below, neither of those scenarios exists within the relationships at issue in the matter *sub judice*. Accordingly, under existing Arizona law, no legal duty exists between the Plaintiffs in this case and Reynolds.

In the absence of any support for the duty they seek to impose within the confines of existing Arizona law, Plaintiffs are left to advocate for a material alteration, or even abandonment, of existing, well-grounded precedents to achieve the case-specific outcome they seek. Nevertheless, the Court should be very hesitant to relinquish its control over the negligence cause of action in a manner

that essentially erases the element of duty from the necessary requisites of a negligence action under Arizona law. *Delci*, 229 Ariz. at 338 ¶18, 275 P.3d at 637 (citing *Gipson*, 214 Ariz. at 147-48; ¶¶ 33-40, 150 P.3d at 234-235).

I. THERE IS NO SPECIAL RELATIONSHIP BETWEEN AN INDUSTRIAL FACILITY AND THE MEMBERS OF ITS VISITORS' HOUSEHOLDS.

In *Gipson*, the Court began its "special relationship" analysis by looking for relationships that have been recognized to give rise to a legal duty under Arizona law. *Gipson*, 214 Ariz. at 145 ¶¶19-22, 150 P.3d at 232. At the outset, the Court noted that a "fact-specific analysis of the parties is a problematic basis for determining if a duty of care exists." *Id*. at 145 ¶21. Rather, the existence of a legal duty is to be determined *before* the case-specific facts are considered. *Id*. (*citing Markowitz*, 146 Ariz. at 354, 706 P.2d at 366; 1 Dan B. Dobbs, *The Law of Torts* §226, at 577 (2001)). Accordingly, in the matter *sub judice* the duty question is not to be resolved with a specific focus on Dr. Quiroz or the Reynolds facility, but rather, the analysis is to be conducted in the context of a generic industrial facility owner's relationship to individuals who come into contact with the facility's visitors, wherever that contact may occur.

In the Court of Appeals, Plaintiffs relied upon § 371 of the Restatement (Second) of Torts to support their argument that a duty of this nature exists under Arizona law. *Quiroz v. Alcoa, Inc.*, 240 Ariz. 517, 521 ¶¶ 16-17, 382 P.3d 75, 79

(Ariz. App. Div. 1 2016). As the Court of Appeals correctly noted, this Restatement section hinges on the notion of foreseeability, which is not something that is properly assessed in a duty analysis under Arizona law. *Id*. at 521 ¶17 (*citing Barkhurst v. Kingsmen of Route 66*, 234 Ariz. 470, 472 ¶10, 323 P.3d 753, 755 (Ariz. App. Div. 1 2014)). *See also* Restatement (Second) of Torts § 371, Comment b, Illustrations 1-12 (precluding liability when the windy condition is not anticipated or foreseeable to the landowner). At the same time, however, even assuming *arguendo* that § 371 could be applied in this case, it does not provide for a duty of the type for which Plaintiffs advocate here.

As illustrated by its comments, Section 371 of Restatement (Second) addresses a scenario in which—like a brush fire causing smoke—a landowner creates a hazardous condition on its property, and the same condition migrates on to neighboring properties. *Id*. at § 371, Comment b, Illustrations 1. and 2. Here, no environmental conditions that existed at the Reynolds facility migrated onto neighboring properties. Rather, the injury at issue in this case resulted from an allegedly dusty condition at the Quiroz home, which could have been impacted by poor ventilation, enclosed spaces, clothes laundering practices, and myriad other variables occurring at the Quiroz home over which Reynolds had no control.

Industrial processes often involve the use of various compounds and chemicals. Any responsibility that the facilities' owners may have to use those

compounds and chemicals safely within the walls of the facility, where the facility's owner has control over the use of the materials, does not logically extend to making sure that those present within the industrial facility do not inadvertently transfer those chemicals and compounds to different places (over which the industrial facility owner has no control), and create atmospheric conditions that are different from those existing within the facilities. *See In Re New York City Asbestos Litigation (Holdampf)*, 5 N.Y.3d 486, 494-95, 840 N.E.2d 115, 120-21 (N.Y. 2005). Indeed, the primary out-of-state decisions upon which Plaintiffs rely involve fact-intensive, outcome-driven "foreseeability" analyses, which are proscribed under *Gipson*, and which if taken to their logical conclusions, would lead to nearly infinite legal duties. *See, e.g.*, *Satterfield v. Breeding Insul. Co.*, 266 S.W.2d 347, 362 (Tenn. 2008) (citation omitted) (holding that duty exists where a defendant's conduct creates an unreasonable and foreseeable risk); *Olivio v. Owens-Illinois, Inc.*, 186 N.J. 394, 403, 895 A.2d 1143, 1148 (N.J. 2006) (holding that the question of legal duty "devolves to a question of foreseeability of the risk . . ."). *But see Ramsey v. Atlas Turman Ltd.*, C.A. No. N14C-01-287ASB, 2017 WL 465301 at *1 (Del. Super. Ct. Feb. 2, 2017) (holding that employer owed no duty to employee's spouse who never set foot in the workplace); *Palmer v. 999 Quebec, Inc.*, 2016 ND 17 ¶17, 874 N.W.2d 303, 307 (N.D. 2016) (holding that no special

relationship existed between employee and his child, who was exposed to asbestos fibers from his father's clothing outside of the workplace).

In addition, the duty for which Plaintiffs advocate would require the intervention of the third-party transferors of the allegedly dangerous materials, over which the facility owner has no control. *In re New York City Asbestos Litigation (Holdampf)* 5 N.Y.3d at 494-95, 840 N.E.2d at 120-21. To the extent these third-parties do not take precautionary measures, themselves, to prevent exposure to the myriad people and places with which they may come into contact after leaving the industrial facility, there is no protection at all offered by this purported "duty." *Id*. Thus, Courts should be cautious to not extend legal duties beyond the scope of the actor's control. *Id*. (*citing Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232, 750 N.E.2d 1055 (N.Y. 2001)) (for proposition that "in determining whether a duty exists, courts must be mindful of the precedential, and consequential, future effects of the rulings, and limit the legal consequences of wrongs to a controllable degree").

II. NO ARIZONA PUBLIC POLICY SUPPORTS THE IMPOSITION OF THE DUTY THAT PLAINTIFFS SEEK TO IMPOSE HERE.

Under *Gipson*, the judicial policy behind Arizona's duty analysis is clear. The Court stands as a gatekeeper to determine whether a public policy reason exists for recognizing a legal duty. In the matter *sub judice*, Plaintiffs ask the Court to impose a legal duty on owners of industrial facilities to protect anyone

who may encounter an industrial worker that may have come into contact with a potentially harmful substance at the facility. The sheer breadth of that duty, and the unreasonable and arbitrary obligations that it would impose on owners of industrial facilities, provide a strong reason to not recognize such a duty. Not surprisingly, Plaintiffs do not spend much of their supplemental brief arguing that such a duty exists under current Arizona law.

Instead, Plaintiffs seek to convince the Court that Arizona law is not correctly articulated in *Gipson*, and that Arizona law *presumes* that a legal duty exists in all instances where there is a casual chain between an act and an injury, and that potentially limitless duty is precluded only when the Court finds a compelling legal reason not to accept it. As set forth above, there is a strong policy reason against the imposition of a duty of this type; the owner of a building cannot possibly protect everyone who comes into contact with those who enter the building. Nevertheless, even if such a public policy justification for refusing to impose a duty was absent, Plaintiffs still have no legal basis for turning *Gipson* upside-down, and recalibrating the sequence of the duty analysis under Arizona law.

The change in Arizona law that Plaintiffs propose is a fundamental one. Instead of allowing courts to make reasoned decisions based on categorical relationships, Plaintiffs ask the Court to presume that a duty exists, and to only

hold otherwise after analyzing the facts of the case in detail. But, Arizona precedents do not support a rule that a duty exists in all instances, except where excluded, and Arizona courts do not permit fact-driven duty analyses. In fact, the recognition of the contrary rules that Plaintiffs offer, would require one to erase from Arizona law the well-accepted premise that the question of legal duty is a threshold issue by which courts control the scope of legal responsibility under Arizona law. This dispassionate duty analysis is a bedrock principle that permits courts to define legal relationships, not simply as an afterthought to which one turns after determining the desired outcome of the particular case before the court.

Plaintiffs' argument in favor of a legal duty under Arizona law appears to be grounded in a reading of *Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d 200, 204 (Ariz. 1983) that conflicts directly with *Gipson*, which was decided more than two decades after *Ontiveros*, and which "reject[ed] any contrary suggestion in prior opinions." *Gipson*, 214 Ariz. at 144 ¶15, 150 P.3d at 231. From there, in apparent recognition that the *dicta* from *Ontiveros* cannot negate the unequivocal holding of *Gipson*, Plaintiffs advocate that Arizona should join a tiny minority of states that have adopted §7 of the Restatement (Third) of Torts,[3] which has been roundly

[3] Counsel's research located only two states that have adopted Section 7's presumption of legal duty. *Accord see Delci*, 229 Ariz. at 338 ¶18 n. 6, 275 P.3d at 637 n. 6. In fact, a larger number have states have accepted Section 7's comment providing that foreseeability has no role in the duty analysis.

rejected by Arizona courts to date. *See Alcombrack*, 238 Ariz. at 543 ¶14 n. 9, 363 P.3d at 703 n. 9 (recognizing that only Iowa and Nebraska have expressly adopted Section 7); *Delci*, 229 Ariz. at 338 ¶18 n. 6, 275 P.3d at 637 n. 6 (same).

Plaintiffs' reliance on *Nunez v. Professional Transit Management*, 229 Ariz. 117, 271 P.3d 1104 (Ariz. 2012)[4] illustrates the error in Plaintiffs' argument. In *Nunez* a bus passenger sued the bus company and its driver for the driver's negligence. There was no question that a bus company and bus driver owe a legal duty to the passengers riding on the bus; that issue was never in dispute. Rather, the question in *Nunez* went to the *scope* of the duty owed, which relates to the factual question of breach. *See Delci*, 229 Ariz. at 336 ¶11, 275 P.3d at 635 (holding that fact-intensive questions are best reserved for the causation and breach elements of the negligence cause of action). *Nunez* therefore, has nothing to do with the issue currently before the Court.[5]

Similarly, Plaintiffs find no support in the California Supreme Court's recent decision in *Kesner v. Superior Court*, 384 P.3d 283, 210 Cal. Rptr. 3d 283 (Cal.

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[4] *See* Plaintiffs' Supplemental Brief at 3-4, 8, 11-12.

[5] The other recent Arizona precedent upon which Plaintiffs rely, *Johnson v. Alida Land & Cattle Co., LLC*, 241 Ariz. 30, 383 P.3d 673 (Ariz. App. Div. 1 2016), is entirely inapposite, since the plaintiff at issue in that case was injured when he came into direct contact with a fence that defendant constructed on the land. *Johnson* does not deal with alleged harms occurring at locations distant from the defendant's property.

2016). In *Kesner*, the court's duty analysis was based on a California statute that presumes the existence of a legal duty unless excluded. *Id*. at 289-90 (citing California Civil Code Section 1714). For at least two reasons, this case is not relevant here.

First, it is a California statute, and not the Restatement (Third) that drove the decision in *Kesner*. And while the *Kesner* decision is consistent with the Restatement (Third) test for which Plaintiffs advocate, *Kesner* offers no statement that the *Kesner* Court would have adopted Section 7 in the absence of a controlling California statute.

Second, the rule in *Kesner* is based on a California doctrine under which "foreseeability" is the "predominant factor in [California's] duty analysis." *Id*. at 304. This is in stark contrast to Arizona law, in which this Court has held expressly that "foreseeability is not *a* factor to be considered by Courts when making determinations of duty, and we reject any contrary suggestion in prior opinions." *Gipson*, 214 Ariz. at 144 ¶15, 150 P.3d at 231 (emphasis added). Thus, the fundamental underlying premises of the *Kesner* and *Gipson* decisions are polar opposites; the decisions are no more compatible than oil and water.

Simply put, there is no precedential basis for adopting a broad legal rule that the owner of an industrial facility owes a legal duty to everyone who may come in contact with those who work at the facility, simply because potentially dangerous

materials may be used at the facility. Accordingly, the Court should join the majority of courts across the country who have not adopted §7 of Restatement (Third) and who have rejected the existence of a legal duty under these circumstances.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

March 16, 2017

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