

# **GIPSON V. KASEY: THE BEGINNING OF A NEW ANALYTICAL FRAMEWORK IN ARIZONA FOR DUTY DETERMINATIONS?**

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## **INTRODUCTION**

Traditionally, “a prima facie case of negligence has four elements: duty, breach, causation, and injury.”<sup>1</sup> Of these elements, the concept of “duty” has likely caused the greatest amount of confusion in case law. In *Gipson v. Kasey*, however, the Arizona Supreme Court took an unprecedented step toward clarifying the elements that a court should consider when determining whether a duty exists.<sup>2</sup>

Much of the confusion in state case law surrounding the notion of duty can be traced to the landmark case of *Palsgraf v. Long Island Railroad Co.*, where Judge Cardozo and Judge Andrews disputed whether duty was a relational or a non-relational term.<sup>3</sup> Judge Cardozo, writing for the majority, held that an unforeseeable plaintiff cannot recover for harm resulting from unreasonable actions by the defendants toward a third party.<sup>4</sup> Since *Palsgraf*, courts have

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1. John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 658 (2001); see also John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1747 (1998) [hereinafter Goldberg & Zipursky, *The Moral of MacPherson*] (“Thus, as it was first systematized in the latter part of the nineteenth century, the tort of negligence was typically defined in terms of the four elements still recited in modern casebooks: duty, breach, cause (in fact and proximate), and damages.”).

2. *Gipson v. Kasey* (*Gipson II*), 150 P.3d 228, 231 (Ariz. 2007).

3. 162 N.E. 99 (1928).

4. Judge Cardozo reasoned that “[t]he plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another,” that negligence is “a term of relation,” and that “[n]egligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all.” *Id.* at 100–01. Judge Andrews, in dissent, argued that “[d]ue care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone,” and that “[e]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.” *Id.* at 102–03. Under Judge Andrews’ concept of negligence, the only way that a judge can properly hold that a case should not be submitted to the jury is if the judge finds that there is some special policy exception to the general duty of care, or the facts are such that no jury could disagree about the issue of proximate cause or breach.

struggled with the opaque and complex role of foreseeability in duty determinations.<sup>5</sup>

Judges and juries consider the foreseeability of a plaintiff's injury in three of the four elements of negligence: (1) duty, (2) breach of duty, and (3) causation.<sup>6</sup> Foreseeability is a question of fact, and thus, is a question for the jury.<sup>7</sup> The same is true for both breach of duty and proximate cause.<sup>8</sup> The question of whether the defendant owes a duty to the plaintiff, however, is a question of law for the judge to determine.<sup>9</sup> The ultimate result is that, when making duty determinations, state court judges are bound by case law to make factual inquiries in individual cases.<sup>10</sup> As a result, the duty issue often overlaps with breach and causation, and roles traditionally left to the jury or factfinder are usurped by the judge.<sup>11</sup> This problem is amplified when courts, like the court of appeals in *Gipson*, make additional factual inquiries to determine whether a special relationship exists among the parties.<sup>12</sup> Many academics have criticized these lines of cases, arguing that they intrude on the role of the jury and cause confusion due to their inconsistencies.<sup>13</sup> They also assert that judges often simply use foreseeability as a guise for public policy determinations.<sup>14</sup>

Like other state courts, Arizona courts have struggled with these problems in judicial duty determinations.<sup>15</sup> However, unlike the court's past opinions, the court in *Gipson* explicitly clarified the role of foreseeability by holding that it is "not a factor to be considered by courts when making determinations of duty."<sup>16</sup> Additionally, the court held that courts should refrain

5. See *infra* Part I.A.

6. See *infra* Part I.A.

7. Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265, 280 (2006). In their article, *Abusing Duty*, Dilan A. Esper and Gregory C. Keating argue that "[t]he reasonable person standard of negligence law is specially tied to juries because it claims a presumptively universal range of application and invokes a common moral conception." *Id.*

8. See *infra* Part I.A.

9. JAMES A. HENDERSON, RICHARD N. PEARSON & JOHN A. SILICIANO, *THE TORTS PROCESS* 163 (6th ed. 2003).

10. W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 751–55 (2005).

11. See *supra* note 7.

12. See *Gipson v. Kasey (Gipson I)*, 129 P.3d 957, 961 (Ariz. Ct. App. 2006), *aff'd*, 150 P.3d 228 (Ariz. 2007).

13. Modern skepticism toward relational concepts of duty, and toward the place of duty in negligence law in general, can be traced to, and perhaps is best articulated in, the works of Oliver Wendell Holmes and William L. Prosser. Goldberg & Zipurksy, *The Moral of MacPherson*, *supra* note 1, at 1753–60. Prosser argued that decisions by judges not to impose liability on a defendant, after the defendant had acted unreasonably and therefore violated the general duty of care, should be based only upon sound policy reasoning and should not rely on some form of metaphysical lack of duty notions. *Id.* at 1758–60.

14. See, e.g., Cardi, *supra* note 10, at 762–63.

15. *Gipson v. Kasey (Gipson II)*, 150 P.3d 228, 231 (Ariz. 2007).

16. *Id.*

from engaging in any fact-specific inquiries when making duty determinations.<sup>17</sup> The court reasoned that this approach “recognizes the jury’s role as fact finder” and decreases confusion as to whether a duty is present in a particular case.<sup>18</sup>

## I. THE ROLE OF FORESEEABILITY IN DUTY DETERMINATIONS

### A. Confusion and Inconsistencies Created by Past and Current State Case Law

The process by which judges make determinations of “duty” is often unclear and confusing. In *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third)*, Professor Jonathan Cardi describes the imposition of a duty as a two-step process.<sup>19</sup> The first step requires the judge to decide “whether the defendant owed a duty at all,” and the second step requires the judge to “define the scope of that duty in the form of a standard of care.”<sup>20</sup> Yet, what motivates judicial determinations of duty varies widely depending on the jurisdiction and the court. Professor Cardi identifies five major factors that judges consider when making determinations about whether the defendant owed a duty of care: (1) community notions of obligation; (2) a broad legislative sense of social policy; (3) concern for the rule of law; (4) the goal of convenience of administration; and (5) foreseeability.<sup>21</sup> Professor Cardi notes that of these factors, foreseeability often plays the most prominent role in judicial determinations of whether a defendant owed a duty of care.<sup>22</sup> Indeed, “in many jurisdictions, foreseeability is the main determinant of whether a duty is owed.”<sup>23</sup> At times, foreseeability is “cited as a reason to impose a duty where one would not otherwise exist,”<sup>24</sup> while at other times, the lack of foreseeability is cited “as grounds for denying a duty, even where the defendant’s conduct created a risk of physical harm.”<sup>25</sup>

There are several ways judges utilize foreseeability in duty determinations. Foreseeability is most commonly used when determining the foreseeability of a particular plaintiff, which was at issue in *Palsgraf*.<sup>26</sup> Foreseeability is also utilized when determining the “foreseeability of the type of harm or the manner in which harm occurred . . . .”<sup>27</sup> Foreseeable *manner* of harm issues arise when a defendant’s conduct injures a plaintiff in an unusual manner, while foreseeable *risk* of harm issues arise when a defendant’s conduct is not normally thought to create a sufficient risk of harm.<sup>28</sup> In both cases, the “use of

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17. *Id.* at 232.

18. *Id.* at 231–32.

19. Cardi, *supra* note 10, at 751.

20. *Id.*

21. *Id.* at 752–55.

22. *Id.* at 755.

23. Esper & Keating, *supra* note 7, at 318. Esper and Keating cite cases from numerous jurisdictions, including Arizona, in support of this assertion. *Id.*

24. Cardi, *supra* note 10, at 755 (citing *Murdock v. City of Keene*, 623 A.2d 755, 757 (N.H. 1993)).

25. *Id.* (citing *Herrera v. Quality Pontiac*, 73 P.3d 181, 187 (N.M. 2003)).

26. *Id.* at 757.

27. *Id.* at 761.

28. *Id.* at 760–62.

foreseeable risk as a basis for deciding whether to impose a duty has been roundly criticized for its usurpation of the jury's role in deciding breach.<sup>29</sup> Finally, some judges use foreseeability as a guise for public policy determinations.<sup>30</sup> Professor Cardi, like William Prosser,<sup>31</sup> argues that “[a]t its core, duty . . . inescapably involves matters of policy.”<sup>32</sup> Courts inevitably must consider policy issues when considering whether to find a lack of duty in a particular situation, and because many courts feel uncomfortable engaging in legislative-like actions, these decisions can often be masked by the “seemingly ubiquitous and ever-malleable concept, foreseeability.”<sup>33</sup>

Indeed, as an example, many judges appear to use foreseeability as a guise for making public policy decisions when determining the liability of social hosts to third parties who are harmed by intoxicated guests.<sup>34</sup> For example, in *Langle v. Kurkul*, the court held that a social host only owes a duty of care to third parties harmed via the drunk driving of a party guest when the social host can *foresee* that the guest will drive a car after drinking.<sup>35</sup> Other courts similarly rely on foreseeability to refrain from imposing a duty on social hosts for the conduct of their guests.<sup>36</sup> Yet, many times these courts are actually deciding that the social host did not *breach* a duty of care, rather than deciding that the social host did not *owe* a duty of care.<sup>37</sup> Thus, courts are either confusing the elements of the negligence action, or they “feel strongly that social host liability cases ought to be dismissed upon motion for summary judgment, but find it difficult to do so pursuant to the ‘no reasonable jury’ standard.”<sup>38</sup> Because judges may also find it difficult to make legislative-type decisions regarding the liability of social hosts, judges instead rely on foreseeability as a basis for their decisions.

### ***B. The Restatement (Third) of Torts and the Role of Foreseeability***

The Restatement (Third) of Torts, approved by the American Law Institute, includes several groundbreaking positions regarding duty and the role of foreseeability in negligence cases. For example, section 6, titled “Liability for Negligent Conduct,” states that “[a]n actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable.”<sup>39</sup> Negligence is elsewhere defined as a failure to “exercise

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29. *Id.* at 762.

30. *Id.* at 763.

31. *See, e.g.,* Goldberg & Zipurksy, *The Moral of MacPherson*, *supra* note 1, at 1760.

32. Cardi, *supra* note 10, at 762; *see also* Marshall v. Burger King Corp., 856 N.E.2d 1048, 1057 (Ill. 2006).

33. Cardi, *supra* note 10, at 763.

34. *Id.*

35. 510 A.2d 1301, 1306 (Vt. 1986).

36. Cardi, *supra* note 10, at 763 (citing Graff v. Beard, 858 S.W.2d 918, 921–23 (Tex. 1993)).

37. *Id.* at 764.

38. *Id.* at 765.

39. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 6 (Proposed Final Draft No. 1, 2005).

reasonable care under all the circumstances,”<sup>40</sup> and section 7 largely defines when a court may determine that the ordinary duty of reasonable care is inapplicable.<sup>41</sup> The Restatement (Third) does not embrace a large role for duty determinations and limits “no-duty” determinations to exceptional cases based on a countervailing principle or policy. Furthermore, the text of section 7 never mentions foreseeability as a reason for imposing, or not imposing, a duty. Perhaps the most striking aspect of the Restatement (Third) is comment j to section 7, titled “The proper role of foreseeability.”<sup>42</sup>

Comment j specifically recognizes foreseeability as “an element in the determination of negligence.”<sup>43</sup> It states, however, that the “factfinder must assess the foreseeable risk at the time of the defendant’s alleged negligence,” and that the nature of the assessment, because it is concentrated on the specific facts of the case, makes it improper to apply to a category of cases.<sup>44</sup> Thus, comment j states that “courts should leave such determinations to juries unless no reasonable person could differ on the matter.”<sup>45</sup> It further states that no-duty rulings are categorical determinations that should “be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care.”<sup>46</sup> The comment notes that these determinations “do not depend on the foreseeability of harm based on the specific facts of a case” and that “[t]hey should be articulated directly without obscuring references to foreseeability.”<sup>47</sup> To clarify further, comment j states that:

A lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination. Rather, it is a determination that no reasonable person could find that the defendant has breached the duty of reasonable care.

Despite frequent use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.<sup>48</sup>

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40. *Id.* § 3.

41. *Id.* § 7. Section 7 of the Restatement (Third) states that:

(a) An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.

(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

42. *Id.* § 7, cmt. j.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

Thus, the Restatement (Third) is clear in its complete rejection of the use of foreseeability in duty determinations and offers a simpler, and analytically sound, approach to resolving duty issues. However, in contrast to the Arizona Supreme Court's holding in *Gipson*, courts in several jurisdictions have been hostile to the position set forth in the Restatement (Third) regarding the role of foreseeability.

In *Davis v. Dollar Rent A Car Systems, Inc.*, a decedent's estate brought suit following a fatal car accident.<sup>49</sup> The District Court of Appeals for the Fifth District of Florida, relying on a standard that the Florida Supreme Court established in *McCain v. Florida Power Corp.*,<sup>50</sup> held that the proper test for determining whether the defendant owed a duty of care is the "foreseeable zone of risk standard."<sup>51</sup> The court concluded that the defendant's conduct more likely than not created a foreseeable zone of risk and, therefore, the defendant owed a duty of care to the decedent.<sup>52</sup> The court, relying on numerous cases that applied the foreseeable zone of risk standard, denied the plaintiff's motion for rehearing.<sup>53</sup> Judge Griffin, dissenting, noted the changes in duty determinations proposed by the Restatement (Third).<sup>54</sup> The majority, however, followed Florida case law and did not even acknowledge the position put forth in the Restatement (Third).

Similarly, in *Marshall v. Burger King Corp.*, the Illinois Supreme Court addressed whether to impose a duty on a Burger King restaurant.<sup>55</sup> The plaintiff brought a negligence action after his son was killed when a car hit the restaurant table at which he was sitting.<sup>56</sup> The plaintiff asserted that the defendants had not exercised "due care in designing, constructing, and maintaining the restaurant and

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49. 909 So. 2d 297 (Fla. Dist. Ct. App. 2005).

50. 593 So. 2d 500 (Fla. 1992).

51. *Davis*, 909 So. 2d at 301 (citing *McCain*, 593 So. 2d 500).

52. *Id.* at 303. The court noted that "[t]he necessary examination of alleged facts, which the supreme court recognizes may be essential in determining whether or not a legal duty exists, does not convert the duty analysis into a jury question." *Id.*

53. *Id.* at 316.

54. *Id.* Judge Griffin referred to sections 6 and 7 of the proposed final draft of the Restatement (Third) and noted that "Subsection (b) of Section 7 appears to me to be contrary to the 'mother' of all of Florida's 'foreseeable zone of risk cases.'" *Id.* (citing *Kaisner v. Kolb*, 543 So. 2d 732, 735 (Fla. 1989)). Judge Griffin then noted that the case at hand is one in which the conduct may be more accurately classified as a failure to act. *Id.* at 317-18. Referring to comments j and l of section 7 and comment f of section 37, Judge Griffin argued that Williams could not be characterized as an "actor" and therefore should not be liable for the injuries occurring as a result of his failure to act unless a rule of policy imposes a duty. *Id.* at 318. However, Judge Griffin also stated that "[f]rom the standpoint of the Restatement Third's Draft, no matter whether Mr. and Mrs. Williams can be characterized as 'actors,' liability is controlled by a policy determination." *Id.* She concluded by noting that "[i]f the *Whitt* court felt constrained by *Kaisner's* 'foreseeable zone of risk' analysis to impose such a duty, perhaps the re-articulation of tort law as reflected in the new draft Restatement frees us all to begin the debate anew." *Id.*

55. *Marshall v. Burger King Corp.*, 856 N.E.2d 1048 (Ill. 2006).

56. *Id.* at 1051 (The car "hit a sidewalk adjacent to the restaurant, became airborne, and penetrated the brick half-wall and windows surrounding the restaurant's entrance.").

that their failure to do so proximately caused the decedent's injuries.<sup>57</sup> The defendants filed a motion to dismiss, claiming that they owed no duty to protect the plaintiff's son from injuries caused by the car.<sup>58</sup> The circuit court granted the defendants' motion to dismiss, and the appellate court reversed.<sup>59</sup>

On appeal, the Illinois Supreme Court summarized the defendants' arguments as being that they owed no duty to the plaintiff to prevent these types of incidents since their occurrence was not reasonably foreseeable, and that the finding of a duty would impose a considerable burden on the business community at large.<sup>60</sup> The court then explained that there are four policy considerations impacting duty determinations under Illinois law: the "reasonable foreseeability of the injury," the "likelihood of the injury," the "magnitude of the burden of guarding against the injury," and the "consequences of placing that burden on the defendant."<sup>61</sup> In analyzing the duty issue, the court found that it was reasonably foreseeable that a patron such as the decedent could "be placed at risk by automobile-related accidents."<sup>62</sup> Thus, the "foreseeability" requirement of the court's duty inquiry was satisfied. The court proceeded to find that the defendants indeed owed a duty of care to the plaintiff. The court then, turning to the defendants' request for a specialized exemption, found that this was actually a request for a finding of no breach and that "[i]t is inadvisable for courts to conflate the concepts of duty and breach in this manner."<sup>63</sup> Concluding that the only remaining issue in the case was whether the defendants breached the duty owed to the plaintiff, an inquiry that could not be answered at the current stage of the proceedings, the court affirmed the ruling of the appellate court and remanded the case.<sup>64</sup>

Justice McMorrow, dissenting, disagreed with the majority's finding that foreseeability existed as a matter of law.<sup>65</sup> Justice McMorrow argued that no cited cases supported the majority's position on the foreseeability of such an occurrence. She noted that the majority of cases in the United States regarding such incidents have generally found their occurrence to be unforeseeable and have refused to impose a duty on restaurant owners to protect against them.<sup>66</sup> Justice McMorrow argued that the court should have found that the defendant owed no duty to the plaintiff as a result of the lack of foreseeability. In doing so, Justice McMorrow acknowledged that:

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57. *Id.*

58. *Id.* at 1052.

59. *Id.*

60. *Id.* at 1054. Note that this latter argument seems to be confusing what the decision to impose a duty would imply. The mere imposition of a duty would not necessarily create a burden on the business community since, in any negligence action, a plaintiff would still have to prove breach. If the precautions needed to prevent such an unlikely accident were truly burdensome, it seems unlikely that juries would find that the defendants had breached their duty of care.

61. *Id.* at 1057 (citations omitted).

62. *Id.* at 1060.

63. *Id.* at 1061.

64. *Id.*

65. *Id.* at 1068.

66. *Id.* at 1070.

Contemporary tort scholarship, including the proposed Restatement (Third) of Torts, takes the position that foreseeability should not play any part in the ordinary duty, or affirmative duty analysis. The majority does not adopt this position, which would be a departure from our case law, and I express no opinion on its merits.<sup>67</sup>

Thus, like the District Court of Appeals in Florida, the Illinois Supreme Court followed prior case law, rather than the position put forth in the Restatement (Third) and continued to focus on foreseeability in making duty determinations.

## II. *GIPSON V. KASEY*

Unlike the courts in Florida and Illinois, the Arizona Supreme Court in *Gipson v. Kasey* refused to follow precedent that confused the issue of foreseeability and instead adopted an analytically sound position tracking the approach of the Restatement (Third) to foreseeability's role in the duty calculation.

### A. *Factual and Procedural Background*

On the morning of December 17, 2002, Sandy Watters awoke to find that her boyfriend, Nathan Followill, had died in his sleep.<sup>68</sup> The Maricopa County Medical Examiner's report attributed his death to a toxic combination of alcohol and Oxycodone.<sup>69</sup> On December 16, 2002, Followill and Watters, both employees of Streets of New York Pizza, attended an employee holiday party at one of the Streets of New York restaurants.<sup>70</sup> The restaurant provided beer, while another employee, Larry Kasey, brought whiskey, which he shared with the other guests, including Followill.<sup>71</sup>

Kasey also allegedly distributed prescription pain pills containing the narcotic drug Oxycodone.<sup>72</sup> Kasey had previously provided prescription drugs to Streets of New York employees.<sup>73</sup> On three prior occasions, however, Kasey refused to provide pain pills to Followill because Kasey thought that he was "too stupid and immature to take drugs like that."<sup>74</sup> Kasey also knew that Watters was dating Followill because he had socialized with both on several occasions.<sup>75</sup>

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67. *Id.* at 1068 n.3 (citing the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 cmt. j, § 37, cmt. f (Proposed Final Draft No. 1, 2005); Cardi, *supra* note 10, at 739).

68. *Gipson v. Kasey* (*Gipson I*), 129 P.3d 957, 959 (Ariz. Ct. App. 2006), *aff'd*, 150 P.3d 228 (Ariz. 2007).

69. *Id.*

70. *Gipson v. Kasey* (*Gipson II*), 150 P.3d 228, 229 (Ariz. 2007).

71. *Id.*

72. *Id.* In his pleadings, Kasey disputed the fact that he brought pain killers to the party. *Gipson I*, 129 P.3d at 959 n.1. He conceded, however, that the opposing party, Susan Gipson, presented some evidence that supported the allegation. *Id.* Because Gipson was the non-moving party, for summary judgment purposes, the court treated the allegation as if it was true. *Id.*

73. *Gipson I*, 129 P.3d at 959.

74. *Id.*; *Gipson II*, 150 P.3d at 230.

75. *Gipson II*, 150 P.3d at 230.



Despite this fact and despite Kasey's opinion of Followill, Kasey gave Watters eight pills of two different strengths at the party.<sup>76</sup> Although Kasey told Watters of the differing strengths, he failed to warn her of the dangers associated with mixing pills and alcohol.<sup>77</sup> He later admitted that he was aware of those dangers at the time he gave the pills to Watters.<sup>78</sup>

Later that evening, Followill took the pills from Watters,<sup>79</sup> and, soon after, Followill told another party guest that he obtained the pills from Kasey.<sup>80</sup> As the night progressed, Followill became increasingly intoxicated and attributed his condition to the pills.<sup>81</sup> At approximately 1:00 a.m., Watters and Followill left the party and subsequently went to bed around 2:00 a.m.<sup>82</sup> When Watters awoke the next morning, she attempted to wake Followill but discovered that he was dead.<sup>83</sup> A forensic toxicologist noted that the level of Oxycodone in Followill's system equaled the dosage of six pills.<sup>84</sup> He concluded, as did the Maricopa County Medical Examiner, that the combination of Oxycodone and alcohol caused Followill's death.<sup>85</sup>

After Followill's death, Susan Gipson, Followill's mother, filed a wrongful death action against Kasey "based on his alleged negligence in providing Oxycodone pills to Followill, either directly or through Watters."<sup>86</sup> After the initial discovery period, Kasey filed a motion for summary judgment, arguing that "as a matter of law he owed no duty to Followill" and that "his conduct was not a proximate cause of Followill's death."<sup>87</sup> The superior court granted summary judgment for Kasey.<sup>88</sup> The court found that Kasey did not owe a duty to Followill and that his conduct was not a proximate cause of Followill's death because two intervening acts occurred after Kasey gave the pills to Watters.<sup>89</sup> First, Watters, not Kasey, chose to give the pills to Followill.<sup>90</sup> Second, Followill harmed himself by choosing to take the pills after consuming alcohol.<sup>91</sup>

Gipson appealed the court's grant of summary judgment, and the court of appeals reversed.<sup>92</sup> The court of appeals found that Kasey owed a duty of care to

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76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Gipson v. Kasey (*Gipson I*), 129 P.3d 957, 959 (Ariz. Ct. App. 2006), *aff'd*, 150 P.3d 228 (Ariz. 2007).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 960.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 960, 966.

Followill.<sup>93</sup> The court based its decision on the totality of the circumstances, specifically: (1) the special relationship between Followill and Kasey; (2) the foreseeability of Followill's death; and (3) state and federal statutes prohibiting individuals from sharing prescription drugs.<sup>94</sup> First, the court determined that a special relationship existed between Kasey and Followill because they were co-workers and friends and had socialized previously.<sup>95</sup>

Second, the court found that Kasey's conduct foreseeably led to Followill's death.<sup>96</sup> To support its contention that courts should consider foreseeability as a factor in determining whether a duty exists, the court of appeals relied on a string of cases,<sup>97</sup> the most recent being *Riddle v. Arizona Oncology Services, Inc.*<sup>98</sup> In doing so, the court of appeals rejected a broad interpretation of *Martinez v. Woodmar IV Condominiums Homeowners Ass'n*<sup>99</sup> and its progeny, which suggested that courts should not consider foreseeability when making duty determinations.<sup>100</sup> The court stopped short of prohibiting consideration of foreseeability, acknowledging that even though "the existence of a duty does not 'totally hinge' on foreseeability," it is still a factor that courts should consider.<sup>101</sup> In this case, the court concluded the injury was foreseeable. It reasoned that Arizona courts have taken a broad view of both the foreseeability of the class of persons injured and the type of injury.<sup>102</sup> As a result, in Arizona, an injury is foreseeable if the injury may be "reasonably expected to occur now and then" as a result of the defendant's conduct.<sup>103</sup> Here, the court determined that because Kasey knew that the pills were not prescribed for anyone else and that overdosing or combining them with alcohol was dangerous, he could have foreseen harm to Followill.<sup>104</sup>

Third, the court held that both state and federal statutes prohibiting individuals from sharing prescription drugs with others also supported a duty of care.<sup>105</sup> To reach its holding, the court relied on two Arizona Supreme Court opinions:<sup>106</sup> (1) *Stanley v. McCarver*<sup>107</sup> and (2) *Estate of Hernandez v. Arizona*

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93. *Id.* at 960, 963.

94. *Id.* at 960–61.

95. *Id.* at 961.

96. *Id.*

97. *Id.*

98. 924 P.2d 468 (Ariz. Ct. App. 1996) (holding that "foreseeability of harm appears to be an element" that Arizona courts consider when making duty determinations).

99. 941 P.2d 218 (Ariz. 1997).

100. *Gipson I*, 129 P.3d at 961.

101. *Id.*

102. *Id.* at 962 (citing *Tellez v. Saban* 933 P.2d 1233 (Ariz. Ct. App. 1996) (holding that "the definition of a 'reasonably foreseeable event' is an event that might reasonably be expected to occur now and then"))).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. 92 P.3d 849 (Ariz. 2004) (stating that courts look to several sources, including statutes, when making duty determinations).

*Board of Regents*.<sup>108</sup> In both cases, the court concluded that statutes could support the recognition of a duty.<sup>109</sup> In *Gipson*, the court of appeals reasoned that statutes prohibiting individuals from sharing prescription drugs reflected a public policy decision to protect individuals that had “no medical need for them” and were not properly warned of the dangers associated with the prescription drugs.<sup>110</sup> Accordingly, the statutes supported a finding that Kasey had a duty to prevent injury to Followill when distributing the prescription drugs.<sup>111</sup>

Finally, the court of appeals concluded that a reasonable jury could find that Kasey’s conduct was the proximate cause of Followill’s death.<sup>112</sup> While the court recognized that Watters’ and Followill’s actions both constituted intervening acts, the court found that they were not superseding acts relieving Kasey of liability.<sup>113</sup> The court explained that in order for an intervening act to break the chain of causation and relieve a defendant from liability, the act must be so extraordinary that “a reasonable person in the position of the original actor” could not have foreseen it.<sup>114</sup> Based on the record, the court determined that both of the alleged intervening acts were foreseeable.<sup>115</sup> Accordingly, because the court of appeals found that Kasey owed a duty of care to Followill, and that a reasonable jury could find that Kasey’s conduct was a proximate cause of Followill’s death, it reversed the trial court’s grant of summary judgment for Kasey.<sup>116</sup>

The Arizona Supreme Court subsequently granted Kasey’s petition for review but only on the issue of whether an individual owes a duty of care when he improperly give his prescription drugs to others.<sup>117</sup>

### ***B. The Supreme Court’s Analysis***

In a unanimous decision, the Arizona Supreme Court found that Kasey did indeed owe a duty of care to Followill.<sup>118</sup> However, the court concluded that courts should not consider foreseeability, which is a question of fact, nor engage in any other fact-specific inquiry when making duty determinations because duty determinations are questions of law.<sup>119</sup> The court worried that these inquiries could conflate the duty issue with breach and causation and could also encroach on the jury’s role as fact-finder.<sup>120</sup> Accordingly, the court rejected the court of appeals’ conclusion that courts should consider an injury’s foreseeability when determining

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108. 866 P.2d 1330 (Ariz. 1994) (holding that the defendants had a duty of care because there was no statutory immunity for serving alcohol to minors).

109. *Stanley*, 92 P.3d at 851; *Hernandez*, 866 P.2d at 1339.

110. *Gipson I*, 129 P.3d at 963.

111. *Id.*

112. *Id.* at 964.

113. *Id.*

114. *Id.*

115. *Id.* at 965.

116. *Id.*

117. *Gipson v. Kasey (Gipson II)*, 150 P.3d 228, 230 (Ariz. 2007).

118. *Id.* at 234.

119. *Id.*

120. *Id.*

whether a duty exists.<sup>121</sup> Similarly, the court rejected the fact-specific analysis used by the court of appeals in finding that a special relationship existed between the parties.<sup>122</sup> The court further held that, in this case, public policy supported a categorical duty owed by individuals improperly sharing prescription drugs with others.<sup>123</sup>

In a concurring opinion, Justice Hurwitz suggested an alternative conceptual approach that courts should take when making duty determinations.<sup>124</sup> Hurwitz suggested that rather than focusing on whether a particular defendant owes a duty of care, courts should assume that a duty of care exists unless “public policy justifies an exception to the general rule.”<sup>125</sup> Similar to the conclusions in the majority opinion, foreseeability would play no role in the determination of whether there should be an exception to the general rule that one owes a duty of care.

### *1. The Majority Opinion*

Writing for the court, Justice Bales concluded that public policy, evidenced by statutes, supported the existence of a duty of care when an individual distributes prescription pills to others in violation of state statutes; therefore, Kasey owed a duty of care to Followill.<sup>126</sup> In reaching this conclusion, the court emphasized that the determination of whether a duty exists is a question of law, while the remaining elements of negligence—breach, causation, and actual damages—are questions of fact.<sup>127</sup> Thus, whether a duty exists is a threshold issue for any negligence claim.<sup>128</sup> As such, if no duty exists, a negligence suit cannot be maintained for a certain “category” of cases, regardless of the unreasonableness of the defendant’s conduct.<sup>129</sup>

After setting forth its conclusion, the court examined the three factors used by the court of appeals to support its finding of a duty: foreseeability, the existence of a special relationship, and the presence of applicable statutes.<sup>130</sup> The court first considered the role foreseeability should play in duty determinations.<sup>131</sup> Acknowledging that case law on the issue lacked clarity and caused confusion, the court expressly held that foreseeability should play no role in determining whether a duty exists.<sup>132</sup> Citing Professor Cardí, Justice Bales explained that foreseeability is a fact-specific inquiry that often determines two issues traditionally left to the

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121. *Id.* at 231.

122. *Id.* at 232.

123. *Id.* (citing *Stanley v. McCarver*, 92 P.3d 849, 851 (Ariz. 2004)).

124. *Id.* at 234 (Hurwitz, J., concurring).

125. *Id.* at 234–35 (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 (Proposed Final Draft No. 1, 2005)).

126. *Id.* at 233.

127. *Id.* at 230.

128. *Id.*

129. *Id.*

130. *Id.* at 231.

131. *Id.*

132. *Id.* (citing Cardí, *supra* note 10, at 751–55).

jury: breach and proximate cause.<sup>133</sup> Thus, by considering foreseeability, the court undermines the role of the jury as fact-finder and often “obscure[s] the factors that actually guide courts in recognizing duties.”<sup>134</sup> Like the drafters of the Restatement (Third) of Torts, the court apparently hoped that eliminating foreseeability as an element would decrease confusion as to whether a duty exists and preserve the role of the jury.<sup>135</sup>

The court then considered the relationship between Kasey and Followill. It declined to engage in the fact-specific analysis used by the court of appeals to find that a special relationship existed between Kasey and Followill.<sup>136</sup> Justice Bales recognized that certain categorical relationships, such as the landowner-invitee relationship, may support the recognition of a duty; however, he explained that engaging in a fact-specific inquiry to find a special relationship encroaches on the role of the jury and conflates the issue of duty with breach and causation.<sup>137</sup> Thus, the court rejected the court of appeals’ finding that a special relationship existed between Kasey and Followill.<sup>138</sup>

The court noted that a “preexisting or direct relationship between the parties” is not necessary.<sup>139</sup> Absent a special relationship, public policy may support the existence of a duty.<sup>140</sup> The court explained that while a statute is not required to create a civil duty, a statute can support a tort duty if “the statute is designed to protect the class of persons, in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation.”<sup>141</sup> Thus, the court concluded that state statutes prohibiting individuals from sharing prescription drugs with others supported the existence of a duty.<sup>142</sup> The court emphasized that “these statutes are designed to avoid injury or death to people” who have no medical need for the prescription drugs and have not been instructed on their use or informed of their dangers.<sup>143</sup>

The court also recognized that there may be exceptions to a duty of care when a duty of care would “chill socially desirable conduct or otherwise have adverse effects.”<sup>144</sup> Such exceptions usually materialize in the statute itself.<sup>145</sup> For example, the court has recognized a no-duty rule for social hosts that serve alcohol to adults.<sup>146</sup> Kasey argued that the court should impose a similar no-duty rule

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 232.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 233 (quoting *Estate of Hernandez v. Ariz. Bd. of Regents*, 866 P.2d 1330, 1339 (1994) (quotations omitted)).

142. *Id.*

143. *Id.* (quoting *Gipson v. Kasey (Gipson I)*, 129 P.3d 957, 963 (Ariz. Ct. App. 2006)).

144. *Id.*

145. *Id.*

146. ARIZ. REV. STAT. ANN. § 4-301 (2002).

here.<sup>147</sup> The court rejected this argument, however, because unlike the no-duty rule for social hosts, no social benefit stems from illegal distribution of controlled substances.<sup>148</sup> If a duty was imposed on social hosts, socially desirable exchanges might be prevented.<sup>149</sup> Due to this concern, legislatures have included exceptions within the relevant statutes. However, they have not included an exception pertaining to prescription drugs.<sup>150</sup> Therefore, as there was no exception to the duty of care in this case, the court concluded that Kasey indeed owed a duty to Followill.<sup>151</sup>

2. *The Concurring Opinion: Arizona's Future Framework for Duty Determinations?*

In his concurring opinion, Justice Hurwitz suggested that in the future the court should employ the analytical framework described in sections 6 and 7 of the Restatement (Third) of Torts to make duty determinations.<sup>152</sup> While the majority committed to a position on the role of foreseeability similar to that in the Restatement (Third), it did not commit to a position regarding the nature of duty itself. Instead, the majority based its duty determination on statutes supporting the recognition of a duty. Hurwitz took this extra step, and suggested that instead of focusing on whether to impose a duty on the particular defendant, the court should instead assume that “an actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”<sup>153</sup>

With a duty of care as the norm, the court would only recognize an exception, or a no-duty rule, when public policy justifies that exception.<sup>154</sup> Similar to the position of the Restatement (Third), only public policy, and not foreseeability, could justify an exception to the general rule that individuals owe each other a duty of care. Because a no-duty rule imposes no liability on a certain category of actors no matter how unreasonable their conduct, individuals will only be relieved of liability “when there is a good reason for doing so.”<sup>155</sup> The concurrence explained that a full adoption of this new framework would force courts to articulate a clear reason for why a no-duty rule existed and thereby eliminate the “understandable confusion among the bar and lower courts on the duty issue.”<sup>156</sup>

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147. *Id.*

148. *Id.* at 234.

149. *Id.* at 233.

150. *Id.*

151. *Id.* at 233–34.

152. *Id.* at 234.

153. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: PHYSICAL HARM § 7(a) (Proposed Final Draft No. 1, 2005)). In the majority opinion Justice Bales also noted that at common law every individual has a duty of reasonable care to prevent harm. *Id.* at 232 n.3.

154. *Id.* at 235.

155. *Id.*

156. For example, Justice Hurwitz noted that the court of appeals may have felt bound to discuss whether a special relationship existed between Kasey and Followill based on statements by the court that duty depends on “the relationship of the parties.” *Id.* By assuming that a relationship existed between Kasey and Followill, however, the court only

### CONCLUSION

The positions put forth in the Restatement (Third) regarding duty and foreseeability are intriguing and have, expectedly and perhaps deservingly, engendered quite a bit of debate. Although the Restatement (Third) might be capable of clearing up much of the confusion that exists regarding judicial duty decisions, several state courts have already refused to depart from previous case law in order to adopt the position of the Restatement (Third). However, in *Gipson v. Kasey*, Arizona has set itself apart from these states. In *Gipson*, the Arizona Supreme Court took an unprecedented step towards clarifying the requisite elements in duty determinations and the role that foreseeability plays in this determination. In doing so, the court in many ways adopted the reasoning and conclusions of the Restatement (Third) in regard to foreseeability. Indeed, Justice Hurwitz, in his concurrence, took the analysis one step further by suggesting acceptance of the position put forth in the Restatement (Third) not only in regard to the role of foreseeability, but in regard to the role of duty in general. Although in many ways *Gipson* was a departure from existing case law, the rejection of foreseeability's role in duty determinations will greatly simplify a complicated doctrine and ultimately lead to greater predictability regarding the outcome and procedure of many tort cases. Further adoption of the position set forth in the Restatement (Third) in regard to duty itself may lead to even greater simplification, clarity, and predictability.

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needed to explore whether public policy supported a no-duty rule. *Id.* As the majority noted, public policy does not support such an exception and, therefore, the outcome of this case would not be different under the new analytical framework. *Id.*