



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



SUSAN GIPSON, individually and as surviving
parent of NATHAN KIM FOLLOWILL v. LARRY
KASEY, et al., CV-06-0100-PR

PARTIES AND COUNSEL:

Petitioner: Larry Kasey and Jane Doe Kasey, represented by R. Corey Hill, Ginette M. Hill and Christopher Robbins of the Cavanaugh Law Firm

Respondent: Susan Gipson, represented by James F. Brook and John N. Vignelli of James F. Brook and Associates

FACTS:

Nathan Followill died in his sleep after he consumed Oxycontin pills and hard liquor at a party for employees of Streets of New York restaurant. Followill, his girlfriend Stacy Watters, and Larry Kasey all attended the party. Kasey, a 63-year-old retiree and pizza deliveryman, had provided some of his back pain pills to others in the past. He brought the pills and hard liquor to the employee party, which included an “open beer bar.” Sometime during the evening, he gave Watters eight Oxycontin pills. She told Followill, and he took them from her. Followill later took up to six of the pills and drank some shots of liquor. He became increasingly intoxicated and complained to a friend that, “Kasey’s pills were f***ing [me] up.” Followill left the party with Watters about 1:00 am. He went to bed about 2:00. In the morning, she could not wake him.

The Maricopa County Medical Examiner reported the cause of Followill’s death was “acute combined toxicity of alcohol and Oxycodone,” a prescription drug also known as Oxycontin. A forensic toxicologist analyzed that the level of Oxycodone in Followill’s system was consistent with ingestion of six pills, that the drugs combined with alcohol was the cause of death, and that the alcohol consumed alone would not have been fatal.

Susan Gipson filed a wrongful death suit against Kasey pursuant to A.R.S. §§ 12-612 and -613 (2003), alleging that he negligently caused the death of her son by giving him Oxycodone.

After initial discovery, Kasey moved for summary judgment, arguing that as a matter of law he owed no duty of care to Followill and his conduct was not a proximate cause of Followill’s death.

The trial court agreed and granted the motion. It said the doctrine of negligence *per se* does not apply because Followill harmed himself by ingesting the pills, that Kasey had no special relationship with the Followill, and Watters’ intervening act of giving pills to Followill, and his own act of voluntarily ingesting them, negated proximate cause.

It denied Gipson's motion for reconsideration and entered final judgment, from which she appealed.

The appellate court reversed. It said Gipson may maintain her negligence action if she proves duty, breach of duty, proximate cause and damages. It said the question of duty is whether the relationship of the parties was such that the defendant was under an obligation to use some care to avoid or prevent injury to the plaintiff. The court found Kasey's argument – that no direct relationship existed – was too narrow:

1. First, it decided that the relationship that existed between Kasey and Followill supported recognition of a duty: they were co-workers and friends; they had socialized previously; Followill had asked Kasey for pills in the past [though Kasey denies giving him any]; and Kasey knew that Followill and Watters were dating and were together at the party.
2. Second, it said recognition of a duty is supported by a consideration of foreseeability, which the court found is relevant, despite "some variance in Arizona appellate cases regarding the role of foreseeability as a factor in determining duty". The court analyzed that Kasey knew the pills were not prescribed for anyone else and that they could be dangerous if taken in overdose or with alcohol; thus, it was foreseeable to him that Watters might give some of the pills to Followill, who might take them.
3. Third, the court said recognition of a duty is supported by federal and state statutes that prohibit distributing prescription drugs to those who have not been prescribed the drug, or distributing controlled substances except as authorized by law, and also is supported by an underlying public policy to protect from injury or death those who have no medical need for such drugs and have not been properly instructed on their usage, potency and possible dangers.

The court rejected Kasey's argument that he had no duty to control Watters without a "special relationship" between him and her, or him and Followill.

The appellate court next considered if summary judgment could be sustained because Kasey's conduct was not as a matter of law a proximate cause of Followill's death. It said a plaintiff proves proximate cause by: "demonstrating a natural and continuous sequence of events arising from the defendant's act or omission, unbroken by any efficient intervening cause, that produced an injury, in whole or in part, and without which the injury would not have occurred. . . . An 'efficient intervening cause' is an independent cause that occurs between the original act or omission and the final harm and is necessary in bringing about that harm." It identified that Kasey argued two intervening acts relieved him of liability. It said an intervening cause became a superseding cause that would relieve a defendant of liability "when the intervening force was unforeseeable and may be described, with the benefit of hindsight, as extraordinary." As it had already recognized, the court said that "the definition of a reasonably foreseeable event is an event that might 'reasonably be expected to occur now and then, and would be recognized as not highly unlikely if it did suggest itself to the actor's mind.'" The court agreed that Watters' act of

giving pills to Followill and his act of taking them while consuming alcohol were intervening causes, but it concluded that they were not superseding causes that relieved Kasey of liability as a matter of law.

Addressing the argument that by his voluntary actions Followill was the ultimate decision maker in his death, the court declined to declare his conduct a superseding cause as a matter of law. It said generally an Arizona court cannot grant summary judgment or directed verdict on the basis of a plaintiff's fault in causing an injury because contributory negligence is a question of fact for the jury under the Arizona Constitution art. 18, § 5. It is not to be treated as a question of legal causation.

Finally, the court rejected Kasey's suggestion that Arizona should adopt the position taken by other jurisdictions, that intoxicated persons who harm themselves should not be allowed to sue those who provide intoxicating substances, because, while it may represent sound public policy, it is not the law in Arizona. The court said it applied the law of Arizona in this case.

ISSUES:

"1. Given the *Gipson* court's acknowledgment of conflicts between its decision and the decisions of this Court and other panels of the court of appeals on virtually every aspect of the issue of 'duty' in a negligence action, is this Court's guidance necessary to resolve the conflicts? More specifically:

"a. Does the *Gipson* decision conflict with the holdings in *Martinez*, *Wertheim*, *Knauss* and others that foreseeability is not a relevant factor in the initial legal determination of duty?

"b. Does the *Gipson* decision conflict with the holdings in *Wertheim* and *Bloxham* that a person does not owe a duty of reasonable care at all times to all people under all circumstances?

"c. Does the *Gipson* decision conflict with the holdings of *Markowitz*, *Coburn*, and others that the existence of a duty is not to be confused with details of the standard of care?

"2. Is a young adult who takes six potent pain pills from his girlfriend and knowingly and willingly ingests the pills to get high, while consuming alcohol to the point of extreme intoxication, the sole proximate cause of his own injuries?

"3. If, as the *Gipson* court acknowledges, it is good public policy not to allow a monetary recovery to one who engages in 'conscious folly' by knowingly, voluntarily, and self-indulgently becoming intoxicated and thereby injuring himself, should that also be the law of Arizona?"

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