



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**ROBERT FLEMING v. ARIZONA DEPT. of PUBLIC SAFETY
CV-14-0315-PR**

PARTIES:

Petitioner: Robert Fleming, conservator of the surviving minor children of Faith Mascolino

Respondent: The State of Arizona, and its Department of Public Safety (“DPS”)

FACTS:

Mascolino went out drinking with some co-workers and her daughter. Her daughter, B.D., left the last drinking establishment with Mascolino and dropped her off at her car. About an hour later, at 1:15 a.m., DPS Officer Walter noticed Mascolino driving erratically. After several miles of trying, the officer got her to pull off into an emergency lane near a guardrail on a freeway overpass. At Mascolino’s car Walter observed signs of intoxication. Officer Rivera arrived on the scene and administered field sobriety tests, which Mascolino could not complete. The result of the portable breath test she agreed to take yielded a breath alcohol content measurement far over the legal limit.

Upon establishing intoxication, Rivera put Mascolino uncuffed in his police cruiser, which was parked behind Walter’s cruiser. Mascolino stayed in the car’s back seat as the officers tried to contact her family by telephone. Twenty-two minutes after the arrest, Rivera reached Mascolino’s daughter. Driver Robert Gallivan then veered at a high rate of speed out of the middle lane toward the emergency lane. Walter saw the Gallivan car coming and shouted to warn Rivera. They vaulted over the guardrail to avoid the car, which hit Rivera’s cruiser. Mascolino was killed on impact.

Fleming, conservator of Mascolino’s surviving children, brought a wrongful death action against Gallivan and DPS. Fleming asked to preclude the portable breath test results from evidence, but the trial court denied the request. DPS asked for a jury instruction based on Arizona Revised Statutes § 12-820.02(A)(7). It argued that this statute grants qualified immunity to public employees for negligent acts with regard to “[a]n injury to the driver of a motor vehicle that is attributable to the violation by the driver of section 28–693, 28–1381 or 28–1382.” Over Fleming’s objection the trial court granted the DPS request for the immunity instruction. The jury found no fault by DPS, attributing seventy-five percent of the fault to Gallivan and the rest to Mascolino. Fleming appealed.

The court of appeals affirmed the trial court.

ISSUE:

In its published opinion, the court of appeals expands the qualified immunity provided by A.R.S. §12-820[.02](A)(7) far beyond the obvious intent of the Arizona Legislature, prior decisions of this Court, and plain common sense. The State has no statutory immunity for negligently harming persons in its custody, and A.R.S. § 12-820.02(A)(7) has no application to the facts of this case.

Definitions:

A.R.S. (Arizona Revised Statutes) § (section) 12-820.02(A)(7):

(A) Unless a public employee acting within the scope of the public employee's employment intended to cause injury or was grossly negligent, neither a public entity nor a public employee is liable for:

....

(7) An injury to the driver of a motor vehicle that is attributable to the violation by the driver of A.R.S. §§ 28-693 [reckless driving], 28-1381 [driving under the influence of alcohol or drugs, "DUI"], or 28-1382 [extreme DUI].

Conservator: A court-appointed responsible adult who protects the interests of children or others who cannot manage their own affairs

Qualified immunity: If qualified immunity applies, it shields government officials or employees from legal responsibility for some of their actions. In Arizona, the Legislature enacts laws that say when governmental liability exists.

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