ARIZONA SUPREME COURT

STATE OF ARIZONA Petitioner, v. THE HONORABLE GUS ARAGON, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA, Respondent, and MAX FONTES, Real Party in Interest.	No. 20-0304-PR No. 2 CA-SA 20-0031 Pima County Superior Court No. CR 20182815-001

SUPPLEMENTAL AMICUS CURIAE BRIEF
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ISSUE

Did the court of appeals err by defining the "event" in a superseding cause defense as defendant's conduct and finding foreseeability as a matter of law where the defendant's conduct "event" increased the risk of harm to the victim, thereby eliminating the defense of superseding cause?

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INTERESTS OF AMICUS CURIAE

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief in support of the real party in interest, Max Fontes, because the issues touch the core of AACJ's mission. Whether and when a defendant can present evidence and obtain an instruction regarding superseding and intervening causation goes to the heart of the state's burden of proof, the defendant's right to present a complete defense, and the jury's authority to decide factual issues. In order to ensure defendants have the ability to present a complete defense, and to guarantee that the state is required to prove to a jury every element of an offense beyond a reasonable doubt—including causation—this Court should overturn the decision of the court of appeals.

INTRODUCTION

Causation is in dispute.

Mr. Fontes's defense is reasonable. Mr. Fontes did not cause Shelby's injuries or G.T.'s death. Shelby's injuries and G.T.'s death were solely caused by Shelby's conduct—his decision to drive with marijuana in his system, his failure to yield the right of way when making a left-hand turn, and most importantly his failure to put G.T. in a seatbelt.

However, by defining the "event" as only Mr. Fontes's conduct and judicially determining what was and was not foreseeable, the court of appeals precluded Mr. Fontes from presenting any of this evidence or making any meaningful argument regarding causation and foreseeability. This was an error.

In effect, the lower court's ruling prevents a trial on the core issue in this case—whether Mr. Fontes caused Shelby's injuries and G.T.'s death.

FACTS

When Shelby got into his car, he did not buckle his child, G.T., into a child seat. When Shelby got into his car, he did not fasten his own seatbelt. When Shelby got into his car, he had marijuana and a metabolite in his system. Then, while driving, Shelby failed to yield when making a left-hand turn. *State v. Aragon (Fontes)*, 249 Ariz. 573, ¶¶ 2-3 (App. 2020).

The state concedes that Shelby's actions "likely were[] a concurrent proximate cause of his injuries and G.T.'s death." St. Supp. Br. 16.

More than that, Mr. Fontes's defense is that Shelby's actions were the sole cause of Shelby's injuries and G.T.'s death. Pet. Rev. 5.

Shelby had marijuana in his system and there was a baggy with marijuana found in his car. St. Supp. Br. Appx. C, pg.35-36; St. Supp. Br. Appx. M, pg.31-32. Shelby also failed to yield when making a left-hand turn. St. Supp. Br. Appx. C, pg.47. Shelby pleaded guilty to endangerment and DUI. *See id.* at 30-31. Regarding the endangerment count, Shelby's factual basis was based on "the THC in his system and the lack of restraints." *Id.* at 31; *see also id.* at 32.

Mr. Fontes retained an expert—Chester Flaxmayer—who would testify "that marijuana and THC usage affects judgment, perception, concentration." St. Supp.

Br. Appx. M, pg.23.[1] Mr. Flaxmeyer would further testify that Shelby's intoxication and failure to yield was the true cause of the accident. *Id.* at 24.

Regarding the lack of seatbelts, Sergeant Avila would testify that he found no indication Shelby or G.T. were injured within their car. Pet. Rev. Appx. 2. Robert Anderson, an engineer, would testify the use of seatbelts and a child restraint seat would have prevented Shelby and G.T. from being ejected. *Id.* And expert Seth Podowski would testify that without any evidence of injuries within the car, all injuries to Shelby and G.T. were the result of the ejection. *Id.*

Had Shelby not used marijuana, he would have made safer decisions.

Had Shelby yielded the right of way, the accident would not have occurred.

Had Shelby used a seatbelt, he would not have been injured.

Had Shelby secured G.T. in a child restraint seat, G.T. would not have died.

Because Mr. Fontes expected expert testimony would support each of these points, the trial court agreed that a jury could conclude Mr. Fontes was not at fault for Shelby's injuries or G.T.'s death. *Fontes*, 249 Ariz. 573, ¶ 3. The court thus indicated it would admit the evidence and let the jury decide. *Id.*

On special action review, the court of appeals reversed, precluding the evidence, ruling Mr. Fontes was not free to argue Shelby was the sole cause, and prohibiting a superseding causation instruction. *Id.* at ¶¶ 1, 11, 14.

[1] The transcript spells Mr. Flaxmayer's name "Flexmire."

DISCUSSION

This case is resolved by two premises:

1. A defendant has the right to defend himself on the basis that he did not cause the injury required by an offense (death in a manslaughter case); and

2. The jury is responsible for making decisions regarding causation and foreseeability which are related to that argument.

The court of appeals opinion, however, precludes Mr. Fontes from arguing he did not cause the pertinent injury. He is not allowed to present evidence, including expert testimony, regarding causation; he is not entitled to an instruction regarding causation; he is not permitted to argue the death was caused by something other than his conduct.

In doing so, the court of appeals mandated its own assessment of causation and foreseeability, thereby stripping that decision from the jury.

Courts should not act in the stead of juries, which are tasked with assessing causation and foreseeability. Rather, courts should permit the parties to present their evidence, provide correct instructions regarding causation and foreseeability, and allow juries to perform their historical function.

1. The court of appeals erred when it defined the "event" only as Mr. Fontes's conduct and stripped the jury of its ability to decide causation.

Through its statement of the issue, this Court has identified the two ways in which the lower court's decision was problematic: the lower court defined the

"event" only as Mr. Fontes's conduct and judicially decided causation and foreseeability. The court of appeals erred in both manners. First, the lower court erred when it decided foreseeability and causation instead of allowing that decision to go to the jury. Second, the lower court improperly limited its evaluation to just one "event" when multiple "events" are at issue.

A. Causation and foreseeability are issues for the jury to decide in the first instance, not the courts.

The appellate court first erred when it decided foreseeability as a matter of law and thereby stripped the question of foreseeability from the jury.

Mr. Fontes and the state disagree on the most fundamental element in the manslaughter charge—whether Mr. Fontes caused G.T.'s death. The trial court recognized this dispute and ruled that the jury should resolve the question of causation. This was legally correct and supports Mr. Fontes's right to present a complete defense.

Mr. Fontes has a right to present a complete defense. U.S. Const. Amend. 5, 14; Ariz. Const. Art. 2, § 4; *California v. Trombetta*, 467 U.S. 479, 485 (1984). His right to a complete defense works in conjunction with the demand that the state must prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

Regarding the manslaughter charge, the state must prove beyond a reasonable doubt that Mr. Fontes "caused the death of" G.T. *See* A.R.S. § 13-1103(A)(1). And Mr. Fontes can defend against the accusation on the basis that he did not cause G.T.'s death.

When there is a dispute over causation—or foreseeability as it is related to causation—the jury decides the issue. As this Court has noted, "the question of proximate cause is a question of fact for the jury." *Robertson v. Sixpence Inns of America, Inc.*, 163 Ariz. 539, 546 (1990). Similarly, this Court observed that foreseeability 'necessarily involves an inquiry into the specific facts of an individual case" and is therefore "for the jury." *Gipson v. Kasey*, 214 Ariz. 141, ¶ 16 (2007).

Even the cases cited by the state reaffirm the point that causation and foreseeability are jury questions. *See e.g. Torres v. JAI Dining Services*, 250 Ariz. 147, ¶ 20 (App. 2020) (causation); *Dupray v. JAI Dining Services*, 245 Ariz. 578, ¶ 18 (App. 2018) (causation); *Salica v. Tucson Heart Hosp.—Carondelet, L.L.C.*, 224 Ariz. 414, ¶ 16 (App. 2010) (causation); *Griffith v. Valley of Sun Recovery and Adjustment Bureau, Inc.*, 126 Ariz. 227, 230 (App. 1980) (foreseeability).

These cases also demonstrate that a trial court should only take the causation and foreseeability decisions from a jury in the rare circumstance where no reasonable juror could differ on the question. *Gipson*, 214 Ariz. 141, ¶ 6 fn.1;

Robertson, 163 Ariz. 539, 546; *Torres*, 250 Ariz. 147, ¶ 20; *Dupray*, 245 Ariz. 578, ¶ 18; *Griffith*, 126 Ariz. at 230.

The trial court considered the proffered evidence and determined the jury could reasonably conclude that Shelby's conduct—and not Mr. Fontes's—caused Shelby's injuries and G.T.'s death. *Fontes*, 249 Ariz. 573, ¶ 3.

This decision was legally correct. It properly construed Mr. Fontes's proposed evidence "in the light most favorable to admission of that evidence." *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 123 (1985). And it correctly assessed the proffered evidence in the light most favorable to Fontes's request for causation instructions. *State v. King*, 225 Ariz. 87, ¶ 13 (2010).

Mr. Fontes's defense is that he did not cause G.T.'s death. G.T.'s death was wholly due to Shelby's decision to drive under the influence of marijuana, failure to yield when making a turn, and failure to place G.T. in a child seat.

Rather than allow Mr. Fontes to present his defense and permit the jury to decide causation, the appellate court decided it was not convinced. *Fontes*, 249 Ariz. 573, ¶ ¶ 1, 11, 14. In doing so, the court improperly conferred precedential power upon prior findings regarding causation and foreseeability. *See* Bryan Garner et al., The Law of Judicial Precedent § 44 pg.382 (Thomson Reuters 2016); *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 895 (10th Cir. 1994); *c.f. State v. Hickman*, 205 Ariz. 192, ¶ 38 (2003).

Foreseeability and causation are jury questions. Where there is a dispute on causation or foreseeability and a reasonable mind could reach either conclusion, it must be left for the jury. Here, the trial court considered the evidence and concluded a reasonable juror could find that Shelby's injuries and G.T.'s death were solely caused by Shelby's driving with marijuana in his system, failure to yield when making a turn, and failure to wear a seatbelt or restrain G.T. The trial court accordingly left the question for the jury. By reversing, the appellate court substituted its own judgment and stripped the questions of foreseeability and causation from the jury.

B. The jury can and should consider multiple "events" when deciding whether Mr. Fontes—or another source—caused specified injuries.

The jury is free to consider all possible "events" that caused Shelby's injuries and G.T.'s death. This is true regardless of whether the "event" is characterized as a proximate cause or superseding cause.

Causation is in dispute. Mr. Fontes's argument is that Shelby is the sole cause of his own injuries and G.T.'s death. Fontes has discussed this with the labels of superseding causation and proximate causation.

In its Supplemental Brief, the state now argues there were two concurrent proximate causes of G.T.'s death: Mr. Fontes's speeding and Shelby's conduct

including his intoxication, failure to yield, and failure to restrain either himself or G.T. in a seatbelt. *See* St. Supp. Br. 3, 9-10.

Regardless of whether Shelby's conduct is termed a superseding cause or a sole proximate cause, the jury is free to consider at least two "events" when deciding causation: Mr. Fontes's conduct and Shelby's conduct.

Because causation is in dispute, the proper approach is to instruct the jury and let the jury decide.

Such an instruction is already included in the Revised Arizona Jury Instructions (Criminal). RAJI 2.03 provides a general instruction regarding causation. RAJI (Criminal) 2.03 (pg.52). It explains "but for" causation, proximate causation, and superseding causation. And RAJI 2.03.03 addresses causation when there are multiple actors—this very situation:

> The unlawful acts of two or more people may combine to cause the [death] [injury] of another. If the unlawful act of the other person was the sole proximate cause of [death] [injury], the defendant's conduct was not a proximate cause of the [death] [injury]. If you find that the defendant's conduct was not a proximate cause of the [death] [injury], you must find the defendant not guilty.

RAJI (Criminal) 2.03.03 (pg.53). The use note also indicates the "instruction may be appropriate to give if there is a dispute regarding the unlawful acts of two or more people where there is no accomplice liability." *Id.* Further, the instruction "should be given along with the general causation instruction that requires the state to prove causation." *Id.* (citing RAJI 2.03).

These instructions—and the multiple actors instruction in particular—are drawn from this Court's decision in *State v. Cocio*, 147 Ariz. 277, 280-82 (1985), *abrogated on other grounds by State v. Nissley*, 241 Ariz. 327 (2017).

Notably, *Cocio* dealt with a similar factual scenario. There, the defendant got into a car accident and killed a passenger in a second vehicle. *Cocio*, 147 Ariz. at 279. He was charged and convicted of manslaughter. *Id.* The defendant was permitted to present his evidence regarding the other driver's conduct. *See id.* at 281-82; *see also id.* at 290-91 (Feldman, J., dissenting). And the trial court read a pair of instructions similar to the current RAJIs for general causation and causation when multiple actors are involved. *See id.* at 280-81. This Court ruled that this pair of instructions accurately set forth the law. *Id.* at 281.

By looking at only one "event"—and defining that "event" as only Mr. Fontes's conduct—the court of appeals ignored the nature of a causation dispute.

The jury does not look at just Mr. Fontes's conduct. When applicable, the jury looks at multiple possible causes. When there are multiple "events" that might have caused a death, the jury is capable of weighing the evidence and determining if a second cause was the "sole cause" of death. This is part of the process for ensuring the jury can correctly determine whether Mr. Fontes caused G.T.'s death, or G.T.'s death was attributable to Shelby alone.

2. The state's focus on semantics fails to address the underlying legal principles.

In its Supplemental Brief, the state raises a new argument: Shelby's conduct was a concurrent proximate cause, not a superseding cause. Relying upon a claimed difference between concurrent proximate cause and superseding cause, the state argues a superseding cause instruction is not proper.

The state's argument misses the lessons of this Court's cases: whether using the verbiage of superseding causation or sole proximate causation, a person should not be held criminally liable for injuries caused by someone or something else.

A. This Court, as well as the court of appeals, has evaluated alternative proximate causes as superseding causes.

This Court and our court of appeals have repeatedly characterized what the state labels "concurrent proximate causes" as "superseding causes."

- *State v. Cocio*, 147 Ariz. 277, 279 (1985): This Court approved of an superseding causation instruction where the superseding cause was the poor driving of another person. This Court noted that the "instruction told the jury that if Rodriguez's act intervened to cause death and such act was not foreseeable by defendant, defendant's acts would not be the proximate cause of the death."

- *State v. Bass*, 198 Ariz. 571, ¶¶ 10-11, 14 (2000): Another person's improper attempts to change lanes and a passenger's grab and jerk of the steering wheel were treated as potential superseding causes and the jury properly instructed. This Court ruled an instruction that defined superseding causation "set forth the proper standard by which to determine when an intervening event becomes superseding."

- *State v. Freeland*, 176 Ariz. 544, 547 (App. 1993): The court of appeals noted that "a victim's conduct might constitute an intervening, superseding cause that breaks the causal chain." As examples of such superseding causation, the court identified a victim's failure to yield when making a left turn, a victim's cocaine impairment, a victim's running a red light, and a bicyclist's weaving in the lane.

- *State v. Paxson*, 203 Ariz. 38, ¶ 12 (App. 2002): The court of appeals ruled that a design defect—airbags that deployed early—could be considered a superseding cause if it was unforeseeable and either abnormal or extraordinary.

Each case concerned a cause the state now labels as a "concurrent proximate cause." Yet in each, this Court and our court of appeals viewed the situation under the auspices of superseding causation.

This said, if the state's focus on semantics is correct, the conclusion would still support Mr. Fontes and the trial court. The only difference is the label.

B. Under proximate cause, Mr. Fontes should still be entitled to present a defense that Shelby was the sole proximate cause of his injuries and G.T.'s death.

Even if Shelby's conduct is not characterized as a superseding cause, the trial court was still correct. Mr. Fontes is entitled to present his evidence of Shelby's problematic behavior (driving with marijuana in his system, failing to yield, and failing to restrain G.T. in a seatbelt); obtain an instruction on causation; and argue Shelby was the sole proximate cause of G.T.'s death.

In addressing this argument, the state concedes the key point in their Supplemental Brief: "Shelby's actions could have been, and likely were, a concurrent proximate cause of his injuries and G.T.'s death." St. Supp. Br. 16.

The state concedes Shelby was a proximate cause of Shelby's injuries and G.T.'s death; Mr. Fontes argues Shelby was the *sole* proximate cause of Shelby's injuries and G.T.'s death.

When that is the issue, the resolution is not to prevent Mr. Fontes from presenting evidence, deprive him of proper jury instructions, and muzzle his arguments. The resolution is to allow Mr. Fontes to present his evidence, permit him to make his argument, and instruct the jury correctly.

As noted above, the Revised Arizona Jury Instructions (Criminal) already have a set of instructions for this precise issue—Causation and Causation (Multiple Actors). RAJI (Criminal) 2.03 and 2.03.03. These instructions direct the jury to consider the contributions of multiple actors and determine if another actor was the sole proximate cause of an injury.

Here, the jury would consider Shelby's decision to drive with marijuana in his system, failure to yield when making a turn, and failure to restrain G.T. If the jury concludes Shelby's conduct was the sole proximate cause of his injuries and G.T.'s death, they will have concluded Mr. Fontes was not a proximate cause.

Rather than confront this issue, the state misrepresents AACJ's position. The state argues, "Even *amicus* appear to acknowledge that it strains common sense to contend that Shelby was the 'sole cause'—again, Shelby and G.T. do not get ejected from the car if a speeding Fontes does not hit them." St. Supp. Br. 17. This claim has no support.

A jury could reasonably decide Shelby was the sole proximate cause of his injuries and G.T.'s death in this case. In his offer of proof, Mr. Fontes noted the expected testimony of three witnesses. From the combination of these experts, Mr. Fontes's defense is that the accident did not cause Shelby's injuries or G.T.'s death; Shelby's failure to restrain himself and G.T. was the sole cause.

Indeed, the states' response—that Shelby and G.T. are not ejected unless Fontes hits them—misses the point. Foremost, Mr. Fontes has a legitimate claim that some of Shelby's conduct—driving with marijuana in his system and failing to yield—calls into question "but for" causation.

More to the point, "but for" causation does not answer proximate causation. Mr. Fontes was involved in an accident. But that does not mean he was the proximate cause of Shelby's injuries or G.T.'s death. Criminal liability—even civil liability—does not stop at "but for" causation. Liability is predicated upon the answer to the more nuanced question of proximate causation. *See Nichols v. City of Phx.*, 68 Ariz. 124, 135-36 (1949) (discussed at St. Supp. Br. 15).

While the state may not find Mr. Fontes's position persuasive, it is not their decision; that decision belongs to a jury.

There is a legitimate dispute regarding proximate causation. Mr. Fontes has retained at least three experts to support his defense against proximate causation. *See* Pet. Rev. Appx. 2; St. Supp. Br. Appx. M, pg.23-24. He has evidence to support his claim that Shelby's conduct was the sole proximate cause of Shelby's injuries and G.T.'s death.

It is not appropriate for the state, the court of appeals, or this Court to invade the traditional province of the jury and insert its own judgment regarding causation or foreseeability. Mr. Fontes should be permitted to take his evidence, an appropriate set of instructions, and his argument to the jury and have them decide. And the state is free to make its argument regarding the weight of the seatbelt evidence and foreseeability to the jury. The jury may accept the state's argument; they may accept Mr. Fontes's. But the decision should belong to the jury.

CONCLUSION

Causation is in dispute in this case.

Whether phrasing the issue as superseding causation or sole proximate causation, the fundamental principles are the same:

1. Defendants like Mr. Fontes have the right to defend on the basis that they did not cause injuries, and

2. Juries make causation and foreseeability determinations.

Appellate courts should not prevent a person in Mr. Fontes's position from making an appropriate argument and holding the state to its burden. Nor should an appellate court replace its judgment regarding causation and foreseeability for the determination of a properly instructed jury.

When the appellate court defined the "event" only as Mr. Fontes's conduct and judicially determined foreseeability, it prevented Mr. Fontes from presenting evidence of his causation defense and invaded the province of the jury.

This Court should thus reverse the appellate court's decision and reinstate the trial court's order admitting the evidence regarding causation and indicating an intent to instruct the jury on causation.

RESPECTFULLY SUBMITTED this 9th day of June, 2021.

Arizona Attorneys for Criminal Justice

By /s/ Mikel Steinfeld
MIKEL STEINFELD