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

BRIEF OF AMICUS CURIAE
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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 in 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 and the defendant's right to present a complete defense. In order to ensure defendants have the ability to present a complete defense, and to guarantee that the state is required to prove every element of an offense beyond a reasonable doubt—including causation—this Court should overturn the decision of the court of appeals.

REASONS THIS COURT SHOULD GRANT REVIEW

Juries are supposed to be responsible for fact-finding. When questions of causation and foreseeability are at issue, it is for the jury to resolve. It is not for an appellate court to resolve. And this fact-finding cannot rely largely upon factual determinations made in an unrelated twenty-year-old opinion.

The trial court understood this. And the trial court agreed Fontes's evidence going to intervening and superseding causation should be admitted, and an instruction given. But here, the court of appeals stripped the jury of its right by making its own factual decisions: Fontes was the substantial and proximate cause of the accident and the victims' improper conduct was foreseeable. Based upon this conclusion, the court ruled a superseding causation instruction should not be read, thereby rendering the evidence irrelevant. Worse, this decision was based upon the court's recognition that it had already decided the factual issue as it related to seat belt nonuse.

This decision departs from the well-established principle that foreseeability and causation questions are factual and reserved for the jury. The decision also improperly elevates the factual determinations of prior cases to the level of precedent. This Court should thus grant review and overrule the court of appeals.

1. *Fontes* departs from the well-established principle that foreseeability and causation are factual questions to be determined by the jury.

This Court has repeatedly ruled that the jury is responsible for finding and deciding facts in criminal cases. "The jury's role, as guaranteed by our state and federal constitutions, is to decide the factual issues of a defendant's guilt or innocence." *State v. Bible*, 175 Ariz. 549, 567 (1993). As a result of this fundamental principle, this Court has even extended the right to have a jury decide factual questions that some courts have considered judicial questions. For example, in *State v. Willoughby*, this Court concluded that even jurisdiction must be left to the jury. 181 Ariz. 530, 536 (1995).

At issue here were two classic jury questions: causation and foreseeability.

This Court made clear that foreseeability is a jury question in *Gipson v. Kasey*, 214 Ariz. 141, ¶ 16 (2007). There, this Court held that foreseeability "necessarily involves an inquiry into the specific facts of an individual case." *Id.* This Court also recognized that "foreseeability often determines whether a defendant acted reasonably under the circumstances or proximately caused injury to a particular plaintiff." *Id.* As this Court recognized: "Such factual inquiries are for the jury." *Id.* And if courts determined foreseeability as a threshold legal issue, the "jury's fact-finding role could be undermined …." *Id.*

This Court similarly made clear that causation is a jury question in *Robertson v. Sixpence Inns of America, Inc.*, 163 Ariz. 539, 546 (1990). There, this

Court held, "Ordinarily, the question of proximate cause is a question of fact for the jury." *Id.* The requirement that causation go to the jury can only be altered "when plaintiff's evidence does not establish a causal connection, leaving causation to the jury's speculation, or where reasonable persons could not differ on the inference derived from the evidence …." *Id.* At that point, the trial court may enter a directed verdict. *Id.*

And in *Robertson*, this Court extended the need for a jury decision on causation to intervening and superseding causation. *Id.* at 546-47; *see also Dupray v. JAI Dining Services*, 245 Ariz. 578, ¶ 18 (App. 2019) (citing *Robertson* to support the proposition that a jury must decide "whether an intervening and superseding cause exists").

While *Gipson* and *Robertson* were civil cases, that is of no import; causation and foreseeability are the same between civil and criminal cases. Before 2000, criminal cases differentiated between "coincidental" and "responsive" intervening acts. *State v. Bass*, 198 Ariz. 571, ¶ 12 (2000). But in *Bass*, this Court found that distinction strained. *Id.* at ¶ 13. This Court thus held, "as to superseding cause, … any prior distinction between coincidental and responsive events is eliminated. Our criminal standard for superseding cause will henceforth be the same as our tort standard." *Id.*

Here, the trial court's decisions fully comport with this jurisprudence. As the court of appeals noted, the trial court identified three possible superseding causes: "(1) Shelby's possible impairment; (2) Shelby's failure to yield; and (3) Shelby's failure to restrain himself and his son." *State v. Aragon (Fontes)*, __ Ariz. __, 473 P.3d 358, ¶ 6 (App. 2020).

The trial court's decision to allow the evidence and read a supervening causation instruction did precisely what this Court has required—let the jury decide causation and foreseeability. By reversing, the court of appeals stripped that decision from the jury and imposed its own assessment of what was foreseeable. And more problematic, the court did so by simply relying upon prior cases that had deprived juries of their role as fact-finder.

The court relied first upon the example of *State v. Slover*, 220 Ariz. 239 (App. 2009). *Fontes*, 473 P.3d 358, ¶ 7. But the unique factual scenario in *Slover* makes it distinguishable from the present case. In *Slover* the appellant argued that the victim's inability or unwillingness to save themselves was a superseding cause. *Slover*, 220 Ariz. 239, ¶ 10. The court of appeals agreed no superseding causation instruction was warranted when the only superseding causation discussed was the victim's failure to save himself. But that is a far cry from the question of whether the victims' injuries were actually the result of Shelby's impairment, Shelby's failure to yield, or Shelby's failure to restrain himself and his son.

Moreover, the issue in *Slover* was whether the defense was entitled to an instruction, not whether the defense was even permitted to introduce the evidence. In fact, *Slover* states that at trial the appellant argued "there was evidence that "the accident in this case didn't produce fatal injuries or injuries that by themselves would cause the death of [the victim]." *Id.* at ¶ 10. This indicates the evidence was in fact allowed.

The court's reliance upon *State v. Freeland*, 176 Ariz. 544 (App. 1993), similarly stripped the decision of foreseeability from the jury. *See Fontes*, 473 P.3d 358, ¶ 10. *Freeland* was limited. First, the defendant was permitted to offer testimony from the treating doctor "that a seat belt might have prevented some but not all of the victim's serious injuries." *Id.* at 546. Second, the appeal focused upon two instructions that were given: that a victim's contributory negligence was not a defense and that Arizona law did not require that seat belts be used. *Id.*

In *Freeland*, the court of appeals recognized that a superseding cause must be unforeseeable. *Freeland*, 176 Ariz. at 548 (citing *Ontiveros v. Borak*, 136 Ariz. 500, 506 (1983)). But the court then made its own factual determination that it is foreseeable that unbelted drivers will be on the roads. *Id.* This factual determination then became the foundation for the decision. *Id.*

Freeland further sought to distinguish this Court's decision in *Law v. Superior Court*, 157 Ariz. 147 (1988), where this Court found that the "nonuse of

an available seatbelt" is related to the "obligation to conduct oneself reasonably to minimize damages and avoid foreseeable harm to oneself." *Law*, 157 Ariz. at 153. In light of developments in Arizona's comparative negligence scheme, this Court framed the essential question as "whether a plaintiff who does not wear an automobile seat belt is at 'fault' for injuries enhanced or caused by the failure to use the seat belt." *Id.* at 154. Based upon its review of several cases, this Court concluded a person who failed to "act reasonably to minimize foreseeable injuries and damages … may be at 'fault'" for their injuries. *Id.* at 155. This Court thus allowed the jury to consider the nonuse of a seat belt to reduce damages. *Id.* at 157.

Freeland distinguished *Law* based on "the distinction between *causal* and *compensatory* responsibility." *Freeland*, 176 Ariz. at 548 (emphasis original). The nonuse of a seat belt was not considered a superseding act that relieved a civil defendant of causal responsibility; it was contributory negligence that reduced damages. *Id.*

Freeland was thus premised upon four bases: 1) beltless drivers are foreseeable, 2) beltless drivers don't break the causal chain, 3) the defendant's conduct was a substantial and proximate cause, and 4) civil cases allow beltless drivers defense in the damages phase, not the liability phase. None of these justifications stands up to scrutiny.

As discussed above, the first reason—that beltless drivers are foreseeable—is flawed because it is a factual decision that should be made by the jury. Moreover, Fontes presented evidence that the conclusion reached in *Freeland* is no longer valid. Only 36% of occupants wore seat belts in 1989, two years after the accident in *Freeland*. *See* Pet.Rev. 8. But in 2018, nearly 90% of occupants wore seat belts. *Id.* The foreseeability question is for a jury.

The second justification—the failure to wear a seat belt does not break the causal chain—is similarly flawed. Like foreseeability, causation is also a jury decision. Thus, it is for the jury—not an appellate court—to decide whether the failure to wear a seat belt breaks the causal chain.

Like the first two justifications, the third—that the defendant's conduct was a substantial and proximate cause—again substitutes the appellate court's judgment for that of a jury. Put differently, the jury should be responsible for deciding whether it was the defendant's conduct or the alleged victims' failure to wear seat belts that led to the specific injuries.

The third justification is also related to the court's fourth justification—that nonuse of a belt goes to damages, not liability. This fails to understand the nature of the assessment involved in criminal cases. In cases such as this, the jury's decision involves two questions: whether the defendant caused the accident and whether the defendant's conduct caused the scope of harm that is charged. Thus, as

to the manslaughter count, the jury needs to decide if the defendant's conduct, or the failure to use a seat belt, caused the death of the alleged victim. Fontes has proffered evidence that the cause was the failure to use a seat belt. Thus, a jury could reasonably conclude that Fontes caused the accident and a lesser quantum of injury, but that he did not cause the actual death.

Further supporting this failure, "[m]ost states that have addressed the question agree that legal causation is defined more narrowly in criminal law than in tort law." *State v. Bauer*, 329 P.3d 67, ¶ 17 (Wash. 2014). In *Bauer*, the Washington Supreme Court recognized a difference between causation in fact and legal or proximate causation. *Id.* at ¶ 14. Causation in fact referred to "but for" causation. *Id.* Legal or proximate causation "involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact." *Id.* (quoting *Hartley v. State*, 698 P.2d 77, 83 (Wash. 1985)). Thus, tort and criminal law are analogous when evaluating causation in fact. *Id.* at ¶ 15. But because criminal law and tort law serve different purposes and criminal law involving more drastic consequences, legal or proximate cause is defined more narrowly. *Id.* at ¶¶ 16-17 (discussing cases from across the country and academic sources).

This actually aligns with this Court's decision in *Law*. While *Law* restricted the nonuse of seat belt evidence to damages, it recognized it was admissible because the nonuse of a seat belts went to the plaintiff's fault. While cases have

certainly held that contributory negligence is not at issue in criminal cases, the question of fault is. When assessing proximate causation (or intervening or superseding causation), the question is whether the defendant is at fault for the damage that was sustained. Where there is evidence that something other than a defendant's conduct caused the damage, the defendant should be permitted to submit that evidence to the jury and have the trial court instruct the jury as to the theory of defense.

The overarching error is that the court of appeals stripped the fact-finding role from the jury. This is illustrated by the judicial fact-finding that occurred in the opinion. This decision turned upon a foreseeability assessment: "Fontes's speeding created the foreseeable risk that a fatal accident occurred." *Fontes*, 473 P.3d 358, ¶ 9.

This is the very point. It is for the jury to decide if Fontes's speeding created the foreseeable risk of an accident. And it is for the jury to decide if the scope of such an accident would have been a fatal injury.

The correct approach was the one taken by the trial court—admit the evidence and instruct the jury. To do otherwise strips the jury of its role. And, as will be discussed next, it confers precedential power to factual decisions.

2. *Fontes* entrenches an errant practice of conferring precedential power to factual determinations made by an appellate court.

Factual findings in appellate cases are not precedent. Bryan Garner—along with a host of judges including then-Judge Neil Gorsuch, then-Judge Brett Kavanaugh, and then-Justice Rebecca Berch—concisely explained this principle in The Law of Judicial Precedent, § 44 p.382 (Thomson Reuters 2016).

Garner and company explained, "A precedent is valuable and authoritative only as establishing a legal rule or principle." Factual findings, on the other hand, are not precedential: "Stare decisis does not apply to findings of fact and has only limited application to cases that turn on the admissibility or weight of evidence or on the application of a settled legal principle to the facts established in the particular controversy." *Id.*

In explaining this principle, Garner and company noted that "Precedents wield authority and power only to the extent that they establish or reinforce a legal rule or principle." *Id.* But "Stare decisis has no application to findings of fact or to mixed questions of fact and law …." *Id.* Rather, findings of fact apply "quite narrowly to certain types of cases." *Id.*

This principle is in accord with the holdings of several courts. Consider:

- **First Circuit:** "We do not believe that the net of stare decisis can be cast quite so broadly as the government fondly hopes. While this doctrine 'makes each judgment a statement of the law, or precedent, binding in future cases before the same court', it nevertheless 'deals only with law, as the facts of each successive case must be determined

by the evidence adduced at trial.'" *U.S. v. Reveron Martinez*, 836 F.2d 684, 691 (1st Cir. 1988) (quoting 1B J. Moore, W. Taggart and J. Wicker, Moore's Federal Practice ¶ 0.401 at 3 (2d ed. 1985)).

- **Tenth Circuit:** "This is not an example of *stare decisis. Stare decisis* is the policy of courts to adhere to precedent and not to disturb a settled point of law. The district court in the instant case did not rely on *Adair* for precedential treatment of the law. Instead, the court turned to *Adair* for the resolution of specific factual and legal issues peculiar to Ms. Meredith's claim." *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 895 (10th Cir. 1994) (internal citation omitted).

- **Michigan:** "The circuit court erred in holding that *Cibor* controlled 'under the doctrine of *stare decisis.*' The rule of *stare decisis* establishes uniformity, certainty, and stability *in the law*. Stare decisis does not control findings of fact." *Guardiola v. Oakwood Hosp.*, 504 N.W.2d 701, 704 (Mich.App. 1993) (cleaned up).

The principle is well-established: precedent applies to statements of the law, not to factual determinations.

While this Court has not had an opportunity to endorse this specific principle, this Court's previous rulings are nonetheless in alignment. In *State v. Hickman*, this Court considered the ease by which a court might abandon precedent. *State v. Hickman*, 205 Ariz. 192, ¶ 38 (2003). This Court ruled that "Cases may be divided into three general categories: (1) statutory interpretation; (2) constitutional interpretation; and (3) rules created by the courts, such as procedural or evidentiary rules." *Id.* The precedent's category drove the burden involved. *Id.*

Hickman importantly divides cases along legal lines; it does not include factual assessments in its categorization. This is because precedent is defined by the legal rules and principles involved, not the factual determinations. Thus, while this Court has not expressly stated the principle explained by Garner and company, and endorsed across the country, this Court has still reached the same core understanding.

Fontes, however, confers precedential value to prior fact-finding. This is most clear when assessing the foreseeability that a person will not use a seat belt. In *Fontes*, the court of appeals held, "This court has already determined that a victim's failure to wear a seatbelt is not a superseding cause." *Fontes*, 473 P.3d 358, ¶ 10. This was because *Freeland* had concluded that a person "who drinks and drives should reasonably foresee that some among the potential victims of drunken driving will not wear seat belts …." *Id.* (quoting *Freeland*, 176 Ariz. at 548).

In *Fontes*, the court gave precedential power to *Freeland*'s factual determinations. As discussed above, the result of this conduct was to strip the jury of their role to act as fact-finders. This Court's review is necessary to explain the impropriety of such appellate court fact-finding.

3. The state's Response to the Petition for Review proves the errors discussed above.

In its Response to the Petition for Review, the state's argument demonstrates precisely why this Court should accept review. The state's argument is premised upon supporting the judicial fact-finding done by the court of appeals.

As the court acknowledged, when Fontes sped 70-95 mph on a road with a 45 mph speed limit, he created the foreseeable risk that a fatal accident could, and in this case, did occur. While Shelby's conduct increased the risk of a fatal collision, Fontes created or increased the risk that a particular harm to Shelby would occur, and was a substantial factor in causing that harm. Resp. PFR, 5-6 (cleaned up).

They further err in how they evaluate the evidence and request for instruction. The state claims it is an abuse of discretion to give a jury instruction "contrary to law or unsupported by the record." *Id.* at 6. But when deciding whether an instruction is appropriate, evidence is viewed in the light most favorable to giving the instruction. *See State v. King*, 225 Ariz. 87, ¶ 13 (2010). Evidence is similarly considered "in the light most favorable to admission of that evidence." *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 123 (1985).

The trial court did precisely that—it viewed the evidence in a light favorable to admission. It viewed the evidence in a light favorable to instructing on intervening cause. The trial court's goal was to let the jury decide factual

questions. But the court of appeals substituted its own fact-finding for the trial court's and the jury's, with no deference given.

The state's response proves the court of appeals decision was premised upon fact-finding—a jury function. The state's argument further establishes that the judicial fact-finding also violated basic principles regarding how to review the admission of evidence and requests for jury instructions—yet another basis to grant review.

CONCLUSION

The court of appeals stripped from the jury the ability to decide foreseeability and causation, instead inserting its own factual decisions regarding foreseeability and causation, and used those decisions to prevent the presentation of evidence and instruction as to superseding causation. In doing so, the court largely relied upon the factual findings—not legal principles—of other cases.

This Court should grant review, overturn the court of appeals, and reinstate the trial court's order.

RESPECTFULLY SUBMITTED this 10th day of November, 2020.

Arizona Attorneys for Criminal Justice

By /s/ Mikel Steinfeld
MIKEL STEINFELD