

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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TRYNA CHIULLI, a married woman, individually, and as parent and  
guardian of THANE PERNIE, deceased, *Plaintiff/Appellant*,

*v.*

ARTHUR LEE BARRINGTON and JANE DOE BARRINGTON, husband  
and wife; JEREMY BARRINGTON, an unmarried person,  
*Defendants/Appellees.*

No. 1 CA-CV 14-0849  
FILED 2-9-2017

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Appeal from the Superior Court in Maricopa County  
No. CV2012-052404  
The Honorable John R. Hannah, Judge

**AFFIRMED**

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COUNSEL

Jeffrey S. Kaufman, Ltd., Phoenix  
By Jeffrey S. Kaufman

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By Stephen J. Gordon  
*Co-Counsel for Plaintiff/Appellant*

Jardine Baker Hickman & Houston, PLC, Phoenix  
By Bradley R. Jardine  
*Counsel for Defendants/Appellees*

**MEMORANDUM DECISION**

Judge Peter B. Swann delivered the decision of the Court, in which Presiding Judge Patricia A. Orozco (retired) and Judge Jon W. Thompson joined.

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**S W A N N**, Judge:

¶1 This is a wrongful-death negligence case. Plaintiff Tryna Chiulli (“Chiulli”) challenges the superior court’s denial of her requests for a jury instruction purportedly based on *Gipson v. Kasey*, 214 Ariz. 141 (2007), and its denial of her motion for new trial based on the failure to give the instruction. Because the requested jury instruction misstated *Gipson*, casting its explanation of negligence duty essentially as one of strict liability, we affirm the superior court’s entry of judgment on the jury’s defense verdict and its denial of the Chiulli’s motion for new trial.

**FACTS AND PROCEDURAL HISTORY**

¶2 Chiulli brought a wrongful death action against Arthur and Jeremy Barrington, father and son, arising from her son Thane Pernie’s death. Chiulli alleged that Arthur failed to properly secure his prescription morphine pills, that Jeremy provided the morphine to Thane, and that Thane died as a result. Arthur and Jeremy defended on the theory that others were at fault for Thane’s death: Jamie Ruchupanai, Jamie’s mother, Chiulli, and Thane himself.

¶3 At trial, Jamie and another witness testified that the afternoon before Thane died, Jeremy offered Thane several pills that he said were soma pills he had stolen from Arthur. Jeremy, by contrast, testified that Jamie stole medication from Arthur, took the drugs to his mother’s house in a backpack so that she could sell them, and, days later, handed pills to Jeremy and instructed him to pass them to Thane. Thane accepted the pills and immediately ingested all of them.

¶4 Thane died in his sleep that night or the next morning. An autopsy revealed that Thane had soma, dextromethorphan, and morphine in his body and that he died from acute polydrug toxicity caused by the dextromethorphan and morphine.

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¶5 Jamie testified that Jeremy had stored a backpack of drugs at Jamie's house after Thane's death and that Arthur had later confirmed that the drugs were his, were stolen, and included morphine pills. Jeremy testified that he did not steal from Arthur, and he denied knowing that Arthur took morphine.

¶6 Chiulli's expert witness testified that Thane could have taken the contributorily fatal morphine at the afternoon encounter; the defense expert testified that was scientifically impossible.

¶7 Before the close of evidence, Chiulli submitted a proposed jury instruction. The proposed instruction read:

Every person is under a duty to avoid creating situations which pose an unreasonable risk of harm to others. *Ontiveros v. Borak*, 136 Ariz. 500, 509, 667 P.2d 200, 209 (1983 Ariz.); *Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228, ft.nt.4 (Ariz. 2007).

Public policy bars a person from providing to another person prescription medications for which the recipient has no medical need for, who has not been properly or duly instructed on their usage, potency or possible danger and which drug may endanger the person to whom the medications is given. *Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228, 233 para. 26 (Ariz. 2007).

There are Arizona statutes that prohibit the distribution of prescriptions to person[s] lacking a valid prescription. *Gipson, supra*. At P.3d 233 para 26.

The purpose of these statutes is to prevent injury or death to people who have not been prescription drug. *Id.* [sic]

If you find that Jeremy Barrington provided morphine to Thane Pernie, then Jeremy Barrington is responsible for the death of Thane Pernie.

If you find that Jeremy Barrington provided the morphine to Thane Pernie then Jeremy Barrington breached a duty to Thane Pernie.

The defendants objected to the instruction, arguing that it constituted a comment on the evidence and that *Gipson* dealt simply with the existence

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of a legal duty, which was not at issue. The superior court declined to give the instruction.

¶8 The next day, Chiulli renewed her request for the instruction, in a reworded form that eliminated the penultimate paragraph but still defined the specifics of a duty concerning prescription drugs. The superior court again denied the request, and instructed the jury on negligence and fault consistent with the Revised Arizona Jury Instructions (“RAJI”) (Civil) (5th ed. 2013).

¶9 The jury found in favor of Arthur and Jeremy, and the superior court entered judgment on the verdict. Chiulli moved for a new trial based on the superior court’s refusal to give her proposed *Gipson* instruction, and the superior court denied the motion. Chiulli appeals.

### JURISDICTION

¶10 We previously stayed Chiulli’s appeal and revested jurisdiction in the superior court because the judgment did not include the language required by Ariz. R. Civ. P. (“Rule”) 54(c). During the resulting proceedings concerning the wording of the judgment, the parties agreed that the judgment should include a provision dismissing claims against all defendants other than Arthur and Jeremy – Chiulli had originally named Jamie, his mother, and Jeremy’s mother as defendants, but she did not pursue her claims against them. Only Jeremy’s mother, however, was ever formally dismissed.

¶11 The superior court entered a judgment with Rule 54(c) language, but did not specifically address the disposition of the claims against Jamie, his mother, and Jeremy’s mother. On appeal, Arthur and Jeremy state that they “are not clear that this Court has jurisdiction over this matter[, because] it appears a Rule 54(b) judgment was necessary to provide jurisdiction over this appeal because no order appears to have dismissed or otherwise resolved the claims Chiulli made against [Jamie] and [his mother].”

¶12 We conclude that we have jurisdiction. The parties agreed that the superior court’s order should include a provision dismissing the other defendants. We interpret the Rule 54(c) provision to effect that dismissal. This case is distinguishable from *Madrid v. Avalon Care Center-Chandler, L.L.C.*, 236 Ariz. 221 (App. 2014). In *Madrid*, we lacked jurisdiction over the appeal despite the presence of Rule 54(c) language because the disposition of all claims was not clear. *Id.* at 224, 225–26, ¶¶ 6, 11. Here, by contrast, the record supports the parties’ stipulation to

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dismiss the claims against the defendants against whom claims were not litigated.

DISCUSSION

¶13 Chiulli contends that the superior court committed reversible, fundamental error by denying her proposed jury instruction and motion for new trial. She argues that the instruction was required because it was legally correct under *Gipson*, was justified by the evidence, and might have resulted in a verdict in her favor. We review de novo whether a jury instruction correctly states the law. *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cty.*, 222 Ariz. 515, 533, ¶ 50 (App. 2009). We review the denial of a motion for new trial for abuse of discretion. *Delbridge v. Salt River Project Agric. Improvement & Power Dist.*, 182 Ariz. 46, 53 (App. 1994).

¶14 Chiulli's proposed jury instruction misconstrued *Gipson*. *Gipson* held that a person who distributes his or her prescription medication to another owes a duty of care. 214 Ariz. at 142, 147, ¶¶ 1, 32. Chiulli's proposed jury instruction went far beyond that proposition, generalizing and misstating *Gipson*'s reasoning and concluding with what was essentially a statement of strict liability: "[i]f Jeremy Barrington provided morphine to Thane Pernie, then Jeremy Barrington is responsible for the death of Thane Pernie."

¶15 Negligence requires proof of a duty requiring the defendant to conform to a standard of care, a breach of that standard, a causal connection between the breach and an injury, and actual damages. *Id.* at 143, ¶ 9. Duty and breach may in some circumstances be established as "negligence per se" by the defendant's failure to comply with a public-safety statute prohibiting or requiring certain conduct. *Griffith v. Valley of the Sun Recovery & Adjustment Bureau, Inc.*, 126 Ariz. 227, 228-29 (App. 1980). But the strict liability contemplated by Chiulli's proposed instruction has no support in *Gipson* or elsewhere. The proposed instruction combined, in a highly suggestive and misleading manner, the legal question of duty decided by *Gipson* with the jury questions of breach, causation, and damages. *See Gipson*, 214 Ariz. at 143, ¶¶ 9-10. No Arizona authority requires the superior court to instruct the jury on the precise parameters of a negligence duty under the facts of each case, and the superior court's use of the standard negligence instruction was appropriate.

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¶16 To the extent that Chiulli sought to instruct the jury on negligence per se, *Gipson* did not decide whether the unauthorized distribution of prescription medication constitutes negligence per se. See *id.* at 142–47, ¶¶ 1–32. Further, Chiulli failed to plead negligence per se, and she expressly withdrew her request for a negligence per se jury instruction.

¶17 The superior court did not err by declining to give Chiulli’s proposed instruction and denying her motion for new trial. The superior court properly instructed the jury on negligence in accordance with the RAJI instructions for Fault 5-9 and 11, and Negligence 5, and the evidence supported the verdict.

CONCLUSION

¶18 We affirm the judgment and denial of the motion for new trial. In exercise of our discretion, we deny the appellees’ request for an award of attorney’s fees under A.R.S. § 12-349. The appellees are entitled to an award of costs under A.R.S. § 12-341, upon compliance with ARCAP 21.



AMY M. WOOD • Clerk of the Court  
FILED: AA