IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

DIANNAH DINSMOOR, *Plaintiff/Appellant*,

v.

CITY OF PHOENIX, et al., *Defendants/Appellees*.

No. 1 CA-CV 19-0045

FILED 6-30-2020

Appeal from the Superior Court in Maricopa County
No. CV2015-001448
The Honorable David B. Gass, Judge *Retired*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

COUNSEL

Ahwatukee Legal Office PC, Phoenix
By David L. Abney

The Skiver Law Firm, Scottsdale
By Ryan Skiver
Co-Counsel for Plaintiff/Appellant

Berke Law Firm, PLLC, Phoenix
By Lori V. Berke, Jody C. Corbett
Counsel for Defendants/Appellees City of Phoenix and Kenneth Palmer

Jardine Baker Hickman & Houston, PLLC, Phoenix
By Bradley R. Jardine, Michael Warzynski
Counsel for Defendants/Appellees Deer Valley Unified School District #97, Lynn Miller and Kimberly Heinz

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OPINION

Judge Kent E. Cattani delivered the opinion of the Court, in which Presiding Judge Paul J. McMurdie and Judge Jennifer B. Campbell joined.

C A T T A N I, Judge:

¶1 At a friend's house after school one day in 2014, high-school student Matthew B. shot and killed his classmate, sophomore Ana G., then killed himself. Ana's mother, Diannah Dinsmoor, brought claims for wrongful death, negligence, and gross negligence against Deer Valley Unified School District, Principal Lynn Miller, and Assistant Principal Kimberly Heinz (collectively, the "District"), as well as Phoenix Police Officer Kenneth Palmer and the City of Phoenix (collectively, the "Phoenix Defendants"). The superior court granted summary judgment in favor of the defendants, reasoning none of them owed Ana or Dinsmoor a duty as necessary to support Dinsmoor's claims.

¶2 We agree with the superior court that Dinsmoor failed to establish that the City had a duty to protect Ana. We disagree, however, with the superior court's assessment of the District's duty. As a matter of law, the District had a duty to protect Ana based on the school–student relationship, and issues of fact preclude summary judgment on other grounds. We further conclude that, on this record, a fact issue precludes summary judgment on whether Officer Palmer was acting as an agent of the District or solely in his capacity as a law enforcement officer for the City. Accordingly, we affirm the judgment in favor of the City, reverse the judgment for the District and Officer Palmer, and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶3 Matthew and fellow sophomore Raven H. were dating in late 2013; they broke up around the end of the year. In January 2014, Matthew and Raven were involved in a violent confrontation in class. The details of the altercation are disputed, but Raven described a history of verbal and physical abuse that led to her hitting Matthew, who then threw her to the ground, where he shook her and choked her. Both students were suspended for a period of days.

¶4 By March 2014, Matthew and Ana were dating. On March 5, Ana and Raven realized that Matthew had been lying to each of them about the other. Ana then publicly confronted Matthew during lunch at school. Although there is a dispute as to what occurred, Matthew told his father that, sometime after the lunchtime confrontation, one of Ana's close friends flashed a knife at him. After that incident, Matthew planned to stay home from school for at least a couple of days.

¶5 On March 6, Ana received a text message from Matthew that she interpreted as threatening to hurt or kill Raven. Ana told Raven about the text, and Raven reported the threat to Assistant Principal Heinz. Heinz then spoke with Ana and reviewed the text, which Heinz construed as "very vague" in isolation. Heinz then consulted Officer Palmer, who worked as a school safety officer at the high school while off duty from the Phoenix Police Department. The District contacted Raven's mother but did not contact Matthew's or Ana's parents.

¶6 The parties dispute whether Matthew's text message in fact conveyed a threat, the District interpreting the message as vague and potentially innocuous and Dinsmoor relying on the students' understanding that the message meant Matthew was going to beat or kill Raven on her way home from the bus. The parties further dispute whether the District became aware at that time that Matthew had access to firearms.

¶7 That evening, Ana and Matthew arranged by text message to meet at a friend's house after school the next day. Ana told her mother about Matthew's threats against Raven but did not tell her that she planned to meet him the next day. The parties dispute whether Dinsmoor perceived Matthew as a danger to Ana at that time.

¶8 March 7 was a half day of school, with classes ending around 11:00 a.m. The parties dispute whether Matthew was on campus at some point that day. Throughout the morning, Officer Palmer and Heinz received reports that somebody was at school with a gun, and eventually heard that Matthew was on campus with a gun. But Officer Palmer was unable to find anyone who had personally seen a gun, and neither Heinz nor Officer Palmer were able to find Matthew that morning.

¶9 Before the school day ended, Ana told Heinz that she was going to a friend's house and that Matthew "might show up there"; Heinz responded that Ana should "make good choices." Ana also told Heinz that she and Matthew were fine and that she was not concerned about her own safety. Ana also told Officer Palmer that Matthew wanted to meet her after

school; Officer Palmer "advised her against" seeing him, saying that "it was not a good idea."

¶10 After school, Ana went to the friend's house, and Matthew arrived a bit later. Ana and Matthew went outside into the front yard, where Matthew shot Ana, then himself. Both were pronounced dead at the scene.

¶11 Dinsmoor sued the District, the City, and Officer Palmer for damages resulting from Ana's death, asserting claims of wrongful death, negligence, and gross negligence. After the close of discovery, the District and the Phoenix Defendants moved for summary judgment, which the superior court granted, ruling that neither the District nor the Phoenix Defendants owed Ana or Dinsmoor a cognizable legal duty under the circumstances presented.

¶12 Dinsmoor timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶13 Summary judgment is proper only if there are no genuine issues of material fact and, based on those undisputed facts, the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305 (1990). A defendant moving for summary judgment must "point out by specific reference to the relevant discovery that no evidence exist[s] to support an essential element of the claim." *Orme Sch.*, 166 Ariz. at 310. A party opposing summary judgment "may not rely merely on allegations . . . of its own pleading," but rather "must, by affidavits or as otherwise provided in this rule, set forth specific facts showing a genuine issue for trial." Ariz. R. Civ. P. 56(e); *see also Orme Sch.*, 166 Ariz. at 310.

¶14 We review the superior court's summary judgment ruling de novo, viewing the facts and all reasonable inferences in the light most favorable to the party against whom judgment was entered. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 14 (App. 2012). We similarly review de novo other issues of law, including the existence of a duty. *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 564, ¶ 7 (2018).

¶15 All of Dinsmoor's claims are premised on allegations of negligence or gross negligence that she argues caused her daughter's death. *See* A.R.S. § 12-611 ("When death of a person is caused by wrongful act, neglect or default" that would have allowed the decedent a claim for

damages, "the person who . . . would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured . . . ."). A claim for negligence requires proof of four elements: "(1) a duty requiring the defendant to conform to a certain standard of care; (2) breach of that standard; (3) a causal connection between the breach and the resulting injury; and (4) actual damages." *Quiroz*, 243 Ariz. at 563–64, ¶ 7. A claim for gross negligence requires proof of those four elements plus "[g]ross, willful, or wanton conduct." *Noriega v. Town of Miami*, 243 Ariz. 320, 326, ¶ 23 (App. 2017) (alteration in original and citation omitted). The existence of a duty is generally an issue of law to be decided by the court, whereas the other elements, including breach and causation, are generally factual issues reserved for the jury. *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9 (2007).

¶16 A duty is an "obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354 (1985). In *Gipson*, the Arizona Supreme Court effected "a sea change in Arizona tort law by removing foreseeability from our duty framework," invalidating earlier precedents to the extent they relied on foreseeability to determine duty. *Quiroz*, 243 Ariz. at 565, ¶ 12; *see also Gipson*, 214 Ariz. at 144, ¶¶ 15–17 (noting that the generally fact-specific assessment of foreseeability is often closely aligned with the reasonableness of actions and their results and thus "is more properly applied to the factual determinations of breach and causation than to the legal determination of duty").

¶17 Post-*Gipson*, a duty must be based either on a preexisting special relationship between the parties or a relationship created by public-policy considerations. *Quiroz*, 243 Ariz. at 565–66, ¶¶ 14–16; *see also Gipson*, 214 Ariz. at 145, ¶¶ 18, 23. "Duties based on special relationships may arise from several sources, including special relationships recognized by the common law, contracts, or 'conduct undertaken by the defendant.'" *Quiroz*, 243 Ariz. at 565, ¶ 14 (citation omitted). Those based on public policy generally find their roots in "our state and federal statutes and the common law." *Id.* at ¶ 15.

I. The City.

¶18 As Dinsmoor acknowledged in superior court, her claims against the City are premised wholly on vicarious liability for Officer Palmer's actions as a law enforcement officer. She asserts that the City,

through Officer Palmer, undertook to protect Ana from Matthew and thus owed her a duty to do so non-negligently.

¶19 Police do not owe a generalized duty to protect every citizen within their jurisdiction from all potential harm; "merely establishing a police department does not make a city 'a general insurer of safety or liable for absolutely all harms to its citizens.'" *Hogue v. City of Phoenix*, 240 Ariz. 277, 280–81, ¶ 12 (App. 2016) (quoting *Austin v. City of Scottsdale*, 140 Ariz. 579, 582 & n.2 (1984)). Police may, however, create a special relationship giving rise to a duty by undertaking to provide specific protection for a particular person. *Noriega*, 243 Ariz. at 327, ¶ 29. "[A] special relationship is created—and thus a duty of care owed—when police officers learn of a potential threat and tell the victim that they will take action on that threat," particularly in a manner that would induce justified reliance. *Id.* at 327–28, ¶ 32; *see also McGeorge v. City of Phoenix*, 117 Ariz. 272, 277 (App. 1977).

¶20 Dinsmoor contends that Officer Palmer's advice to Ana not to meet with Matthew after school reflects both an acknowledgement that Matthew presented an immediate danger to Ana and an undertaking to protect her. Although Dinsmoor suggests that Officer Palmer knew or should have known of a threat to Ana, the record shows that Ana told him only about a potential threat that Matthew posed to Raven, not to Ana herself. *Compare Austin*, 140 Ariz. at 579–80 (anonymous report of threat to the life of a specific individual, detailing the victim's name, residential address, and anticipated location).

¶21 Moreover, the record does not support Dinsmoor's contention that Officer Palmer promised to take action on a threat against Ana or otherwise undertook to protect her from Matthew. Dinsmoor primarily relies on Officer Palmer's comment advising Ana not to meet Matthew after school, but she offers no basis for linking this comment to a threat of harm directed against Ana or for construing it as a specific assurance of safety. *Cf. Hogue*, 240 Ariz. at 281, ¶ 15.

¶22 Accordingly, the superior court did not err by concluding that, as a matter of law, the City (through Officer Palmer in his capacity as a law enforcement officer) did not assume a duty to protect Ana. Because duty is a necessary element of Dinsmoor's claims, *see Gipson*, 214 Ariz. at 143, ¶ 11, we thus affirm the summary judgment in favor of the City.

II. The District.

A. Duty.

¶23 Dinsmoor also asserts that the superior court erred by ruling that the District owed Ana no duty. We agree. The District owed Ana a duty based on the special relationship between a school and its students.

¶24 As noted, a duty may arise from a special relationship between the parties recognized by the common law, *Quiroz*, 243 Ariz. at 565, ¶ 14, and the school–student relationship is one such special relationship. *See Monroe v. Basis Sch., Inc.*, 234 Ariz. 155, 157, ¶ 5 (App. 2014); *Hill v. Safford Unified Sch. Dist.*, 191 Ariz. 110, 112 (App. 1997) ("The teacher-student relationship is a special relation that creates a duty of due care."); *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 166 (App. 1996) ("In Arizona, it is well-established that school districts have a legal duty to the students enrolled in their schools."); *Delbridge v. Maricopa Cty. Cmty. Coll. Dist.*, 182 Ariz. 55, 58 (App. 1994) (recognizing the duty arising from the special relationship between student and school district, administrator, and teacher); *Rogers v. Retrum*, 170 Ariz. 399, 401 (App. 1991) (recognizing a duty owed to students by school teachers and administrators); *Chavez v. Tolleson Elementary Sch. Dist.*, 122 Ariz. 472, 475 (App. 1979) ("There can be little question that a school district and a classroom teacher owe a duty of ordinary care toward a student during the time the student is under their charge."); *see also* Restatement (Second) of Torts § 314A (1965) (recognizing nonexclusive list of relationships giving rise to a duty to protect), *cited with approval in Quiroz*, 243 Ariz. at 565, ¶ 14; Restatement (Third) of Torts: Phys. & Emot. Harm § 40(b)(5) (2012) (expressly recognizing the school–student relationship as a special relationship giving rise to a duty).[1]

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[1] As the District notes, much of this case law pre-dates *Gipson*. To the extent a prior case assessed duty based on foreseeability, it is no longer good law. *See Quiroz*, 243 Ariz. at 565, ¶ 12. But all of the cases cited here are consistent with *Quiroz*, 243 Ariz. at 565, ¶ 14, and remain valid, because they rely on a special relationship between school and student giving rise to a duty.

Moreover, except *Chavez*, all of these cases mention foreseeability within the duty discussion only in relating the type of risks (foreseeable vs. unreasonable risks of harm) from which a school must protect a student. *Hill*, 191 Ariz. at 112; *Schabel*, 186 Ariz. at 166; *Delbridge*, 182 Ariz. at 58; *Rogers*, 170 Ariz. at 401. That is, they acknowledge the existence of a duty

¶25 The District acknowledges that the school–student relationship may give rise to a duty but urges that the location and time of the injury here—off campus and after school—means that no such duty existed "under the facts and circumstances of this case." The details of the timing and location of the injury may well be relevant to the District's knowledge of the risks involved, the precautions it was required to take, and its ability to prevent the harm—that is, to breach of the standard of care and causation. *See Gipson*, 214 Ariz. at 144, ¶¶ 16–17; *see also Quiroz*, 243 Ariz. at 568, ¶ 27. But it is the relationship itself that creates the duty, not the facts and circumstances of the injury. *Cf. Quiroz*, 243 Ariz. at 568, ¶ 28 ("Of course, if a special relationship exists between a landowner and an injured plaintiff, a duty exists even if the injury occurs off-premises."). Even if the injury ultimately occurred away from school, the District's obligation to Ana arose within the school–student relationship and required it to take appropriate actions—here, actions it could have taken while Ana was on campus during school hours—to protect her from the harm that ultimately occurred off campus, after school. *See Monroe*, 234 Ariz. at 157–58, ¶ 6.

¶26 Moreover, as a practical matter, the District's proposed no-duty rule based on location of injury would yield absurd results. Even the clearest threat of imminent physical harm to a student would not require action—no matter how certain the risk or how easily avoidable the harm might be—as long as the threatened harm was to occur across the street from campus and a few minutes after the end of the school day. A school unquestionably has a duty to address situations of which school officials become aware in dealing with students on campus. The details of the ultimate injury matter, but not to the duty analysis; instead, they bear on the school's knowledge, the clarity of the threat, and the school's ability to prevent harm to the student, and thus on what action was reasonable under the circumstances and whether that action (or inaction) caused or contributed to the damage.

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based on the relationship, then mention foreseeability in the context of "whether the injury is foreseeable (breach and causation)," which remains a permissible consideration. *Quiroz*, 243 Ariz. at 565, ¶ 13. Even *Chavez*, which notes the now-impermissible consideration of a "foreseeable plaintiff" in assessing duty, 122 Ariz. at 477, largely analyzed the foreseeability of the resulting harm. *Id.* at 477–78.

Because (and only to the extent that) these authorities properly based duty on a special school–student relationship, they remain authoritative even in the wake of *Gipson*.

¶27 Accordingly, the superior court erred by determining that the District owed no duty to protect Ana.

B. Breach and Causation.

¶28 The District argues alternatively that, duty notwithstanding, it was entitled to summary judgment because Dinsmoor did not prove breach and causation. As *Gipson* reiterated, the generally fact-specific assessment of foreseeability remains a proper consideration closely aligned with the factual determinations of reasonableness of actions (breach) and their results (causation). 214 Ariz. at 144, ¶¶ 15–17. Although breach and causation are generally fact questions reserved for the jury, the court is permitted to "set outer limits" and grant summary judgment if no reasonable jury could find that the defendant breached the standard of care or caused the injury. *Rogers*, 170 Ariz. at 403 (citation omitted); *see also Gipson*, 214 Ariz. at 143, ¶ 9 n.1. Here, the superior court did not reach these issues in light of its duty-based ruling. Nevertheless, the record reflects disputes of material fact bearing on breach and causation, *see supra* ¶¶ 3–4, 6–8, and when considered in the light most favorable to Dinsmoor, *see Allen*, 231 Ariz. at 213, ¶ 14, the record precludes summary judgment against her.

¶29 Relying on *Hill v. Safford Unified School District*, the District argues that Ana's murder was unforeseeable as a matter of law. In *Hill*, this court affirmed summary judgment for a school district in a wrongful death action after one student fatally shot another off campus after school following an argument at school. 191 Ariz. at 111. Noting that foreseeability of the harm "defines and limits the scope of conduct necessary to fulfill a duty," the court held that the record did not support a finding that the victim's death was foreseeable. *Id.* at 115. There was no evidence of ongoing gang activity at the school (or that the school knew the gathering of students after school was gang related), that the school knew of students bringing guns to school (or knew that any student had a weapon that afternoon after school), or that the perpetrator "was known to have dangerous propensities and violent tendencies." *Id.* Nor was the school aware of threats to the victim by the perpetrator or that the perpetrator and the victim were in a confrontation after school. *Id.* Simply put, the summary judgment on foreseeability in *Hill* was based on an evidentiary vacuum.

¶30 Here, in contrast, a jury arguably could conclude that Matthew's violence against Ana was reasonably foreseeable and that the District should have contacted Dinsmoor or taken some other action to protect Ana. Although the parties dispute the details, a jury hearing

evidence of Matthew's on-campus altercation with Raven in January 2014 could infer that the District knew of his potential for violence.

¶31 The parties dispute whether Matthew's March 6 text message conveyed a threat, but Ana's and Raven's understanding of the meaning and their reactions could permit a jury to conclude that the message threatened violence. Although that threat was directed at Raven, a jury could consider it in the context of Matthew's history of violence and Ana's public confrontation with him on March 5, 2014 to infer a possibility that the potential for violence reached Ana as well.

¶32 Based on the March 7 reports first that an unspecified student had brought a gun to campus, then that Matthew was on campus with a gun, a jury could discern a threat of gun violence, most likely against Raven or Ana given their history with Matthew. And after the reports that Matthew had a gun on campus, Ana told both Assistant Principal Heinz and Officer Palmer that there was some likelihood that she would see Matthew after school. Although the District offered substantial evidence that the reports of a gun on campus were simply rumors and that Matthew did not come to school that morning, Dinsmoor offered two witnesses who testified under oath that Matthew was on campus, including one stating that he was carrying what appeared to be a gun. The District's rejoinder—that one witness was mistaken and the other just "assumed" he saw Matthew—goes to the weight a jury might give this evidence and does not render the issue undisputed. Although this universe of facts certainly does not compel the conclusion that Matthew's violence against Ana was foreseeable, it is enough to preclude summary judgment.

¶33 The District further argues that it did not breach the standard of care because the actions Dinsmoor argues it should have taken are unreasonable as a matter of law. *See Rogers*, 170 Ariz. at 403 ("A jury will not be permitted to require a party to take a precaution that is clearly unreasonable. . . . Thus, for example, the jury may not require a train to stop before passing over each grade crossing in the country.") (citation omitted). But this again presents a fact question for the jury. For example, Dinsmoor suggests that the District should have contacted her on March 7 to inform her about the situation and ask her to pick Ana up after school. Based on its own interpretation of the evidence, the District construes Dinsmoor's suggestion as an unreasonable demand that it notify the parent of any student who "witnessed an alleged threat against a different student" and nevertheless felt safe herself. But a jury could interpret the evidence differently and find a foreseeable threat of violence against Ana, which might reasonably require the school to—at a minimum—call her parent.

Accordingly, the District was not entitled to summary judgment on the issue of breach.

¶34 Finally, the District argues that Dinsmoor failed to establish a triable issue as to causation. But the District's position again relies on its own interpretation of disputed facts. For example, the District suggests that Ana's death would not have been avoided if it had contacted Dinsmoor on March 7 because Dinsmoor knew about Matthew's threatening text message but still failed to take precautions for Ana's safety after school closed early the following day. But Dinsmoor did not know of the reports (even if unsubstantiated) that Matthew had come to campus armed the morning of the shooting. Nor did Dinsmoor know what the District knew about Ana's plans to meet Matthew that afternoon, and she testified that, had she known, she would have prevented the meeting.

¶35 Although the District may ultimately persuade a jury that it properly assessed and responded to the situation in light of the information available, or that there was nothing more it could reasonably have been expected to do, the issues of breach and causation cannot on this record be resolved on summary judgment. Accordingly, we reverse the judgment in favor of the District and remand for further proceedings.

III. Officer Palmer's Capacity.

¶36 Officer Palmer asserts that he was entitled to judgment as a matter of law on the basis that he was acting at the time only in his capacity as an off-duty law enforcement officer and not as an agent of the District. Agency is generally a question of fact for the jury but may be determined on summary judgment as a matter of law if the material facts are not in dispute. *Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, 29, ¶ 12 (App. 2011). In an agency relationship, the principal authorizes the agent to act on the principal's behalf, subject to the principal's control. *Id.*; *see also Dawson v. Withycombe*, 216 Ariz. 84, 100, ¶ 43 (App. 2007).

¶37 Officer Palmer argues that undisputed facts show he was never subject to the District's control and was at all relevant times operating not as an agent of the District, but solely as a law enforcement officer. The Phoenix Defendants submitted substantial evidence that Officer Palmer's role on campus was limited to law-enforcement responsibilities, not District functions, and that he was not subject to District evaluation or control. *Cf. State v. Kurtz*, 78 Ariz. 215, 218 (1954) (distinguishing between off-duty officer's actions "in 'vindication of public right and justice'" as opposed to "acts of service to their private employer").

¶38 But Dinsmoor presented contrary evidence, not the least of which was the Phoenix Defendants' own disclosure statement acknowledging that "[w]hile performing his duties as School Safety Officer, Defendant Palmer was acting as an agent of the Deer Valley Unified School District." (Alterations omitted.) Although that statement is not a binding judicial admission, *Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 440 (App. 1997), it is nevertheless admissible evidence bearing on agency. *See* Ariz. R. Evid. 801(d)(2); *Ryan v. S.F. Peaks Trucking Co., Inc.*, 228 Ariz. 42, 47, ¶ 16 (App. 2011) (holding disclosure statement admissible as admission of party-opponent, although not a conclusive judicial admission).

¶39 Accordingly, on this record, an issue of fact precludes summary judgment on whether Officer Palmer was acting as an agent of the District. And because only one of Officer Palmer's potential principals (the City, not the District) was entitled to summary judgment on Dinsmoor's claims, we reverse the judgment in favor of Officer Palmer.

CONCLUSION

¶40 For the foregoing reasons, we affirm the judgment in favor of the City but reverse the judgment in favor of the District and Officer Palmer and remand for further proceedings.

¶41 Both the District and the Phoenix Defendants seek an award of attorney's fees on appeal under A.R.S. § 12-349(A)(1), which authorizes an award of attorney's fees against a party who "[b]rings . . . a claim without substantial justification." Given our disposition of the appeal, we decline both requests.

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