

**IN THE SUPREME COURT
STATE OF ARIZONA**

JAVAN “J.D.” and HOLLY MESNARD, husband and wife,	No. CV-20-0209-PR
Petitioners,	Court of Appeals (Div. One) No. 1 CA-SA-20-0125
v.	Maricopa County Superior Court Case No. CV2019-050782
HONORABLE THEODORE CAMPAGNOLO,	
Respondent,	
DONALD M. SHOOTER,	
Respondent-Real Party-In-Interest.	

**RESPONDENT-REAL PARTY-IN-INTEREST
DONALD M. SHOOTER’S REPLY BRIEF TO ADAMS AMICUS BRIEF**

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INTRODUCTION

Respondent-Real Party-In-Interest Donald M. Shooter (“Shooter”) respectfully submits this Reply Brief to the Adams Amicus Brief for this Court’s review in considering the questions accepted for review by this Court:

1. Whether Mesnard is absolutely immune from suit based on his actions complained of in the Amended Complaint.

2. Whether Mesnard’s release of the investigative report from the law firm retained by the Arizona House of Representative to review the allegations against Mr. Shooter and others was privileged.

To these questions, the answer of the Adams Amicus, which may be expected from fellow defendants to the Mesnard Petitioners before the Respondent Superior Court, is to argue for a broad legislative immunity (i) without frank recognition of how Arizona treats immunity as an exception to the rule of liability (restrictive, not broad) and (ii) without reasoned justification for how the pleaded facts of the Amended Complaint could fall within the scope of legitimate legislative immunity (they don’t).

THE ADAMS AMICI INTEREST: SAME AS MESNARD PETITIONERS

Kirk Adams is the former Speaker of the Arizona House of Representatives and the former Chief of Staff to Arizona Governor Ducey, and he and his wife are fellow defendants with the Mesnard Petitioners in the underlying action before the Respondent Superior Court. The interest of the Adams amici in the underlying action is fully aligned with the Mesnard Petitioners.

What this case poses are circumstances presented by the pleaded facts that fall outside the scope of the legitimate application of legislative immunity. That was the correct judgment of the Respondent Superior Court, who concluded that the absolute immunity and legislative privilege doctrines did not cover the facts pleaded in the Amended Complaint (Pet. App. 21-36).

The interest of the Adams amici is for immunity still to apply, but that means, unacceptably, to expand immunity to cover what the pleaded facts show here (Resp. App. 1-115):

First, Mesnard hired a private firm Sherman & Howard to conduct an investigation with privately conducted interviews and to render a jaundiced report with numerous factual errors, instead of adhering to the established procedural and parliamentary due process norms of an Ethics Committee hearing consisting of Shooter's elected peers, before whom Shooter would be able to confront his accusers, provide witnesses for his defense and in the process expose the corruption about which Mesnard and Adams were so worried. (Resp. App. 4-11, 16-18, 22-25, 29-32, 38.)

Second, Mesnard surreptitiously directed materially revisions to the Sherman & Howard report and removed substantial exculpatory evidence about Shooter so as to hide that exculpatory evidence from legislative members and the public when the Mesnard version of the Sherman & Howard report was released to create media frenzy. (Res. App. 27-28, 34-37.)

Third, Mesnard issued a press release not about legislative activities, but to attack and defame Shooter politically, asserting that Shooter sent his peers a letter with false information, jeopardized the anonymity of a victim of sexual harassment despite the victim and her attorney repeatedly telling him not to jeopardize her anonymity and engaged in a clear act of retaliation and intimidation which was yet another violation of the sexual harassment policy -- *all of which was known to Mesnard to be untrue*. (Resp. App. 28-29, 31-33, 36-37, 46-48.)

REPLY TO ADAMS AMICUS BRIEF

There are two fundamental errors in the analysis of the Adams Amicus Brief.

I.

THE ADAMS AMICUS BRIEF, LIKE THE MESNARD PETITIONERS' BRIEF, FAILS TO ADDRESS HOW THIS COURT TREATS ARIZONA LAW ON IMMUNITY

The first fundamental error of the Adams Amicus Brief, like the Mesnard Petitioners' Brief, is that the Adams Amicus Brief approaches the subject of immunity with a discussion of federal constitutional law, asserting a "broad" immunity. While the Adams Amicus Brief contains a lengthier treatment of the subject, the Adams Amicus Brief is similar to the Brief of the Mesnard Petitioners that focuses on federal constitutional law. That contrasts greatly with Shooter's focus on provisions of the Arizona Constitution (Article 4, Part 2, sections 6 & 7) and on this Court's precedents: *City of Tucson v. Fahringer*, 164 Ariz. 599, 600, 795 P.2d 819, 820 (1990)

(“governmental immunity is the exception and liability the rule”); *Fidelity Sec. Life Insurance v. Dep’t of Insurance*, 191 Ariz. 222, 225, 954 P.2d 580, 583 (1998) (“we have emphasized that liability of public servants is the rule in Arizona and immunity is the exception”); *Grimm v. Arizona Board of Pardons & Paroles*, 115 Ariz. 260, 266, 564 P.2d 1227, 1233 (1977) (public official liability for wrongful acts serves the goals of deterring wrongdoing and compensating victims); *Sanchez v. Coxon*, 175 Ariz. 93, 97, 854 P.2d 126, 130 (1993) “We do not favor immunity from common law liability,” citing *Grimm*, “lack of responsibility can breed lack of care”); *Chamberlain v. Matthis*, 151 Ariz. 551, 555, 729 P.2d 905, 909 (1986) (arguments favoring official immunity are countered by the legitimate complaints of those injured by government officials with respect to reputation).

For this Court’s review, consideration of this Court’s decisions cannot be sidestepped, as the Adams Amicus has done, no doubt due to the Adams advocacy for “broad” immunity in contrast to the values promoted by this Court consistently in its rulings on the subject of governmental immunity.

II.

THE PLEADED FACTS FALL OUTSIDE THE SCOPE OF LEGITIMATE LEGISLATIVE IMMUNITY AND PRIVILEGE

The second fundamental error of the Adams Amicus Brief, like the Mesnard Petitioners’ Brief, is that unlike in the cases and authorities cited in the Adams Amicus Brief, it was not within the “legitimate legislative sphere” for Mesnard to retain a law

firm to create a report based on privately conducted interviews instead of following the traditional legislative method of a public Ethics Committee hearing (at which Shooter would be able to confront his accusers, provide witnesses for his defense and in the process expose the corruption about which Mesnard and Adams were so worried) and then for Mesnard to release his surreptitiously materially revised version of the report that no longer contained information, testimony and exhibits exculpatory to Shooter. It also was not within the scope of legitimate legislative immunity for Mesnard to issue a press release not about legislative activities, but rather to attack Shooter politically with intentionally false statements -- asserting that Shooter sent his peers a letter with false information, jeopardized the anonymity of a victim of sexual harassment despite the victim and her attorney repeatedly telling him not to jeopardize her anonymity and engaged in a clear act of retaliation and intimidation which was yet another violation of the sexual harassment policy – again, *all of which was known to Mesnard to be untrue*. To the facts alleged in the Amended Complaint (pp. 2-3 above), the reasons for common law liability recognized in *Grimm* apply. In Arizona, where liability is the rule and not the exception, Respondent Superior Court's decision was correct.

CONCLUSION

For the reasons stated above and in Shooter's Supplemental Brief, this Court should answer the Court's two questions with "NO" and affirm the Decision of the

Court of Appeals declining jurisdiction of the Mesnard Petitioners' Petition for Special Action, and the Court should order such other relief as deemed just and proper.

Dated: February 5, 2021

Respectfully submitted,
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