STATE OF ARIZONA RETAIL AND HOSPITALITY COMPENDIUM OF LAW

Updated by
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We hope that you enjoy our overview of Arizona law and its impact on retailers. We have included sections on general liability, premises liability, damages, insurance coverage, health care liens, and employment law. Importantly, we hope the materials serve as a primer for how to prevent accidents and lawsuits. If you have any questions about Arizona retail law, the below authors, and Jones Skelton & Hochuli would be happy to answer any questions you may have.

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1

GENERAL LIABILITY

Comparative Negligence In Arizona

Fault Allocation

Arizona follows the doctrine of pure comparative negligence. A.R.S. § 12-2501, *et. seq.* With the exception of three circumstances, discussed below, joint and several liability is abolished in Arizona. Therefore, a defendant only minimally at fault will not have to pay the full amount of damages. ***Piner v. Maricopa County Superior Ct.***, 192 Ariz. 182, 188, 962 P.2d 909, 915 (1998). *See also* A.R.S. §§ 12-2506–2509. Rather, each defendant is liable for only that amount of the plaintiff's damages that is directly proportional to the percentage of fault the jury allocates to that defendant. A.R.S. § 12-2506(A). A separate judgment is entered against the defendant for that amount. *Id.* In assessing percentages of fault, the trier of fact considers the fault of all persons who contributed to the alleged injury, regardless of whether the person was, or could have been, named as a party to the suit. § 12-2506(B). "Under Arizona's comparative fault system, the fact finder must assess 'degrees of fault,' not degrees of causation." ***State Farm Ins. Companies v. Premier Manufactured Sys., Inc.***, 213 Ariz. 419, 425, 142 P.3d 1232, 1238 (Ct. App. 2006) (citing § 12-2506).

Defendants can still be jointly and severally liable in three circumstances. First, joint and several liability applies to defendants who are "acting in concert." A.R.S. § 12-2506(D). "Acting in concert" means "entering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort." § 12-2506(F)(1). By its terms, defendants cannot negligently act in concert; the term applies to intentional conduct only. *Id.*

Second, joint and several liability applies where one "person was acting as an agent or servant of the party." § 12-2506(D). For example, an employer can be jointly and severally liable for the employee's actions if the employee was acting within the scope of his or her employment. *See Law v. Verde Valley Med. Ctr.*, 217 Ariz. 92, 95, 170 P.3d 701, 704 (Ct. App. 2007) ("Subsection 12–2506(D)(2) preserves the vicarious liability of a principal or master for the conduct of an agent or servant. The master and servant (or principal and agent) may therefore be jointly liable[.]"). The third instance where joint and several liability applies is where the "party's liability for the fault of another person arises out of a duty created by the federal employers' liability act, 45 United States Code § 51." A.R.S. § 12-2506(D).

Non-Parties at Fault

A.R.S. § 12-2506(B) states that when assessing the percentage of each defendant's fault, the fact finder "shall consider the fault of all persons who contributed to the alleged injury . . . regardless of whether the person was, or could have been, named as a party to the suit." These assessments of percentages of fault for such "non-parties are used only as a vehicle for accurately determining the fault of the named parties." A.R.S. § 12-2506(B). As an assessment of fault against a non-party does not subject that nonparty to liability, the non-party is not required to pay any damages to plaintiff. *Id.* In effect, assessment of fault against a non-party reduces the amount of damages a plaintiff will recover. For instance, if a jury awards plaintiff $10,000 in damages and finds a defendant 20% at fault and the non-party 80% at fault, plaintiff will only recover $2,000 from the defendant. Assessment of fault against nonparties does not subject any nonparty to liability in the underlying action, or any other action, and it may not be introduced as evidence of liability in any action. *Id.*

A defendant can name a non-party at fault even if the plaintiff is prohibited from directly naming or recovering from such party. *See, e.g.*, ***Dietz v. General Elec. Co.,*** 169 Ariz. 505, 511, 821 P.2d 166, 172 (1991) (non-employer defendants who allegedly contributed to employee's work-related injuries can require submission of employer's negligence to jury, even though employer is not party to lawsuit and cannot be made party consistent with exclusivity portions of workers' compensation law); ***McKillip v. Smitty's SuperValu, Inc.***, 190 Ariz. 61, 64–65, 945 P.2d 372, 375–76 (Ct. App. 1997) (fault can be allocated to an unidentified customer who dropped slippery wax paper in store); ***Smith v. Johnson***, 183 Ariz. 38, 44–45, 899 P.2d 199, 205–06 (Ct. App.1995) (jury could consider fault of unidentified driver who might have flagged another motorist into an accident); ***Rosner v. Denim & Diamonds, Inc.***, 188 Ariz. 431, 432, 937 P.2d 353, 354 (Ct. App. 1996) (jury could apportion fault of nonparty, unidentified assailants). Defendants can offer evidence at trial of the nonparty's negligence and argue that the jury should attribute all or some percentage of fault to him, thereby reducing defendant's percentage of fault and consequent liability. From the plaintiff's standpoint, this designation can result in the named defendants "laying off" their liability on a non-party who can never be a party defendant. An allegedly negligent defendant may seek to compare the fault of a non-party who commits a criminal or intentional act. ***Thomas v. First Interstate Bank***, 187 Ariz. 488, 489, 930 P.2d 1002, 1003 (Ct. App. 1996).

A defendant must name a non-party at fault within 150 days after filing an answer unless newly discovered evidence disclosed at a later date reveals the existence of a non-party at fault. ***Soto v. Brinkerhoff***, 183 Ariz. 333, 335-37, 903 P.2d 641, 643-45 (1995); *see also* Ariz. R. Civ. P. 26(b)(5). The purpose of this rule is to require defendants "to identify for the plaintiff any unknown persons or entities who might have caused the injury in time to allow the plaintiff to bring them into the action before the statute of limitations expires." ***Scottsdale Ins. Co. v. Cendejas***, 220 Ariz. 281, 286, 205 P.3d 1128, 1133 (Ct. App. 2009) (citation omitted). To this end, Ariz. R. Civ. P. 26(b) requires a party to serve all parties with a notice disclosing "the identity and location of the nonparty allegedly at fault, and the facts supporting the allegation of fault." It is insufficient to give the name and address of a person or entity and then state that it might be at fault "to the

extent" it performed "any" work that might have caused or contributed to plaintiff's damages. ***Cendejas***, 220 Ariz. at 286, 205 P.3d at 1133. It is also insufficient to name "any subcontractor" who performed "any work" in a way that caused or contributed to the damage. *Id.*

Willful and Wanton Conduct

A.R.S. § 12-2505(A) bars a plaintiff who has acted intentionally, willfully or wantonly from claiming the benefits of comparative fault. But a willfully- or wantonly-acting defendant may seek a reduction in liability based upon the comparative fault of the plaintiff, ***Wareing v. Falk***, 182 Ariz. 495, 500–01, 897 P.2d 1381, 1386–87 (Ct. App. 1995), or a non-party. ***Lerma v. Keck***, 186 Ariz. 228, 232, 921 P.2d 28, 32 (Ct. App. 1996). Treating claimants differently from defendants neither illegally discriminates against claimants nor violates equal protection. *Id.* at 234. Unlike a defendant, a willful and wanton claimant is using the court system to benefit from an injury caused by his or her willful and wanton conduct. A willful and wanton defendant, on the other hand, is involuntarily brought before the court and is simply attempting to limit his liability. When a defendant argues that the plaintiff's conduct was willful and wanton, the jury must first decide whether the plaintiff was contributorily negligent and, if so, by what percentage that negligence should reduce his recovery. ***Williams v. Thude***, 180 Ariz. 531, 538, 885 P.2d 1096, 1103 (Ct. App. 1994), *aff'd* and *remanded*, 188 Ariz. 257, 934 P.2d 1349 (1997). The jury is then instructed that if it finds plaintiff's conduct was willful or wanton, it should not determine relative degrees of fault, and may find completely for the plaintiff or the defendant as it sees fit. *Id.* This approach is the only one compatible with Article 18, Section 5 of the Arizona Constitution, which requires the jury to decide all issues of contributory negligence. *Id.* at 1103–04; ***Gunnell v. Arizona Public Service Co.***, 202 Ariz. 388, 394, 46 P.3d 399, 405 (2002).

Indivisible Injury

The "single indivisible injury rule" is still intact in Arizona after the abolition of joint and several liability. ***Piner v. Superior Court***, 192 Ariz. 182, 188, 962 P.2d 909, 915 (1998); ***A Tumbling-T Ranches v. Paloma Investment Limited Partnership***, 197 Ariz. 545, 552, 5 P.3d 259, 266 (Ct. App. 2000). That is, when a plaintiff's injury is indivisible, even though caused by successive accidents, the plaintiff may assert a claim against all wrongdoers without having to prove the extent of injury caused by each. *Piner*, 192 Ariz. at 186, 962 P.2d at 913. "When the tortious conduct of more than one defendant contributes to one indivisible injury, the entire amount of damage resulting from all contributing causes is the total amount 'of damages recoverable by the plaintiff.'" *Id.* at 188. Then, the fault of each defendant is compared and each defendant is severally liable for damages allocated in direct proportion to that defendant's percentage of fault. *Id.* In such a situation, the burden of apportionment shifts to the defendants. *Id.* at 189. Accordingly, in an indivisible injury case, "the factfinder is to compute the total amount of damage sustained by the plaintiff and the percentage of *fault* of each tortfeasor. Multiplying the first figure by the second gives the maximum recoverable against each tortfeasor." *Id.*

When the jury renders a judgment for plaintiff in an indivisible injury case, payment by one defendant of the full amount of damages constitutes a satisfaction of plaintiff's rights against all tortfeasors legally responsible for plaintiff's indivisible injury. *See* ***Bridgestone/Firestone North America Tire, L.L.C. v. Naranjo***, 206 Ariz. 447, 450–52, 79 P.3d 1206, 1209–11 (Ct. App. 2003). In *Naranjo*, the plaintiffs' rental car rolled over due to tire failure, injuring them and killing one passenger. *Id.* at 448. After the plaintiffs sued the rental company, a jury rendered a $9 million-plus verdict for the plaintiffs, allocating 30% fault to the non-party tire manufacturer. *Id.* A.P.S. paid the entire amount. *Id.* In the meantime, the tire manufacturer filed a case against A.P.S. and plaintiffs, seeking a declaratory judgment that it was not obligated to indemnify A.P.S. for any damages awarded to the plaintiffs. *Id.* The plaintiffs counterclaimed for negligence and strict products liability. *Id.* The court granted summary judgment for the tire manufacturer, ruling that A.P.S.'s satisfaction of the judgment in the first case had discharged the manufacturer from any liability to the plaintiffs arising from the same accident. *Id.* The Court of Appeals affirmed, stating that the plaintiffs had suffered an indivisible injury for which they were already fully compensated after recovering the entire amount of damages from A.P.S. *Id.* at 451–52.

Assumption of the Risk

The Arizona Constitution, Article 18, Section 5 provides that the "defense of contributory negligence or of assumption of the risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." The Arizona Supreme Court has held that this principle applies to both express and implied assumption of the risk. ***Phelps v. Firebird Raceway, Inc.***, 210 Ariz. 403, 405, 111 P.3d 1003, 1005 (2005). In *Phelps*, a race car driver sued Firebird Racetrack for injuries he sustained during the race when he lost control of his vehicle and crashed into a wall. *Id.* at 404. Before the race, Phelps signed a release and covenant not to sue together with a release and waiver of liability, assumption of risk and indemnity agreement. *Id.* Firebird sought summary judgment based upon the express contractual assumption of the risk agreement the plaintiff had signed. *Id.* The trial court granted Firebird's motion, and entered a judgment dismissing the plaintiff's claims. *Id.* The Court of Appeals affirmed. *Id.* at 405. The Supreme Court of Arizona reversed, holding that Article 18, Section 5 of the Arizona Constitution "unambiguously requires that the defense of assumption of risk be a question of fact for the jury 'in all cases whatsoever' and 'at all times.'" *Id.* Even though there was an express contractual assumption of the risk agreement, the constitutional language required a jury to decide the issue. *Id.* at 410.

The constitutional right to have a jury decide the issue of assumption of risk applies even where the actor is engaged in criminal conduct. ***Sonoran Desert Investigations, Inc. v. Miller***, 213 Ariz. 274, 281, 141 P.3d 754, 761 (Ct. App. 2006). In this case, Hernandez died of asphyxiation after a private security guard employed by the plaintiff, Sonoran Desert Investigations ("SDI"), apprehended Hernandez on suspicion of shoplifting. *Id.* at 277. The security guard allegedly confronted Hernandez "after seeing him conceal bottles of moisturizer in his clothing and walk toward the front of the store." *Id.* After Hernandez's widow filed an action for wrongful death, SDI claimed it was not liable pursuant to A.R.S. § 12-712(B), which provided that the jury in a civil case may find the defendant not liable if the claimant was committing a misdemeanor and was at least fifty per cent responsible for the injury. *Id.* The court held the statute unconstitutional as

the statute wrongly allowed Hernandez's criminal conduct to trigger the defendant's non-liability. *Id.* at 281.

Article 18, Section 5 of the Arizona Constitution also requires the jury to decide issues of the plaintiff's comparative negligence. ***Gunnell v. Arizona Public Service Co.***, 202 Ariz. 388, 394, 46 P.3d 399, 405 (2002). In ***Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.***, 176 Ariz. 383, 388, 861 P.2d 668, 673 (Ct. App. 1993), the Court of Appeals held that Section 5 "expressly provides that contributory negligence and assumption of risk shall be a jury question in all cases whatsoever." Accordingly, Section 5 "is violated by mandatory instructions which compel, direct, or require the jury to find for the defendant if it finds negligence or assumption of the risk on the plaintiff's part." *Id.* at 386. Rather, the jury must be given permissive instructions which "leave the plaintiff's recovery to the discretion of the jury if it finds out the plaintiff was negligent or assumed the risk." *Id. See also* ***Williams v. Thude***, 180 Ariz. 531, 537–39 885 P.2d 1096, 1102–04 (Ct. App. 1994), *aff'd* and *remanded*, 188 Ariz. 257, 934 P.2d 1349 (1997).

Liability for the Acts of an Independent Contractor

Generally, the employer of an independent contractor is not vicariously liable for the conduct of the independent contractor. ***Ft. Lowell–NSS Ltd. P'ship v. Kelly***, 166 Ariz. 96, 101, 800 P.2d 962, 967 (1990). However, an employer of an independent contractor will be vicariously liable for the independent contractor's conduct if the contractor is performing a "non-delegable duty." *Id.*; *see also* ***Wiggs v. City of Phoenix***, 198 Ariz. 367, 369, 10 P.3d 625, 627 (2000). The "non-delegable duty" is somewhat of a misnomer because it does not mean a duty which an employer *cannot* delegate to an independent contractor; rather, it is a duty that is so important that, even having delegated the duty, the employer will remain liable for the contractor's conduct. *Ft. Lowell*, 166 Ariz. at 101. The non-delegable duty exception "is premised on the principle that certain duties of an employer are of such importance that he may not escape liability merely by delegating performance to another." *Id.* Such duties arise in those "special situations in which the law prescribes a duty requiring a higher degree of care." *Id.*

Non-delegable duties may be imposed by statute, by contract, by franchise or charter, or by the common law. *Id. See, e.g.*, ***DeMontiney v. Desert Manor Convalescent Ctr., Inc.***, 144 Ariz. 6, 8, 695 P.2d 255, 257 (1985) (county's duty to provide safe treatment to involuntarily detained mental patients is non-delegable); ***Ft. Lowell-NSS Ltd. P'ship v. Kelly***, 166 Ariz. 96, 101,104, 800 P.2d 962, 967, 970 (1990) (duty of a possessor of land to keep his premises reasonably safe for invitees is non-delegable); ***Wiggs v. City of Phoenix***, 198 Ariz. 367, 370, ¶ 8, 10 P.3d 625, 628 (2000) (city's duty to maintain its highways in a reasonably safe condition is non-delegable); ***Simon v. Safeway, Inc***., 217 Ariz. 330, 339, 173 P.3d 1031, 1040 (Ct. App. 2007) (while defendant did not initially owe a non-delegable duty to provide security services, defendant voluntarily assumed that duty within the context of the heightened duty it already owed to its business invitees, thereby creating a non-delegable duty to protect its invitees from the intentionally tortious conduct of those it hired to provide security on its premises); ***Flood Control Dist. of Maricopa County v. Paloma Inv. Ltd. P'ship***, 230 Ariz. 29, 39, 279 P.3d 1191, 1201 (Ct. App. 2012)

(dam owners had a non-delegable duty to maintain dam in a safe condition). *Compare* ***Myers v. City of Tempe***, 212 Ariz. 128, 132, 128 P.3d 751, 755 (2006) (city's duty to provide emergency services may be delegated).

The abolition of joint and several liability in Arizona (in favor of the pure comparative fault doctrine) does not affect the non-delegable duty concept. When an employer is vicariously liable for an independent contractor's conduct, the employer's remedy is to seek either indemnity or contribution from the negligent independent contractor. *See* ***Nelson v. Grayhawk Properties, Inc.***, 209 Ariz. 437, 441, 104 P.3d 168, 172 (Ct. App. 2004). The independent contractor can still be held independently liable for its own negligence if it breaches the applicable standard of care. *Id*.

Contribution

A.R.S. §§ 12-2501 through 12-2504 incorporate the Uniform Contribution Among Joint Tortfeasors Act. "Contribution" is the concept whereby a tortfeasor who has paid more than his portion of liability for the plaintiff's injuries recovers the excess from the other joint tortfeasor.

The right of contribution arises if "two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death." A.R.S. § 12-2501(A). The right of contribution "exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability." § 12-2501(B). The amount of contribution to which a tortfeasor is entitled is the amount he paid in excess of his pro rata share. *Id.* "A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement." § 12-2501(D). A tortfeasor who enters into such a settlement with a claimant also cannot seek contribution to the extent the settlement is unreasonable. *Id.* However, this statute does not abrogate the common law right of indemnity, does not apply to breaches of trust or fiduciary obligations, and does not create "a right of contribution against an employer . . . liable for workmen's compensation . . . unless the employer . . . is subject to direct suit under § 23-1022." § 12-2501(F)(3).

Contribution and indemnity are sometimes confused. Contribution is available when one defendant who has paid more than his pro rata share of liability to the plaintiff seeks to recover the excess from joint tortfeasors who have paid less than their pro rata share. § 12-2501(B). "Indemnity" occurs when one defendant's full liability is shifted to another person who becomes obliged, for some reason, to pay those damages (such as when an innocent employer pays the employee's liability to plaintiff due to vicarious liability). Indemnity is addressed in the Uniform Contribution Among Tortfeasors Act only to the extent that the Act forbids a tortfeasor who has an indemnity obligation to another tortfeasor from seeking contribution from that other tortfeasor. § 12-2501(F).

Where "a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury," none of the other tortfeasors are

discharged from liability unless the terms of the release or covenant so provide. § 12-2504. Nevertheless, this release does reduce the claim against the others to the extent of the settlement amount. *Id.* Such a release or covenant also discharges the settling tortfeasor from any liability for contribution to any other tortfeasor. *Id.*

There is no right of contribution between tortfeasors when the settling defendant's liability or potential liability is "several only." ***PAM Transp. v. Freightliner Corp.***, 182 Ariz. 132, 133, 893 P.2d 1295, 1296 (1995). Thus, when a tortfeasor who settles any and all claims arising out of an accident is subject to several liability *only*, that tortfeasor cannot seek contribution from other defendants who are similarly severally liable. *See id.* at 133. This effectively limits contribution actions to only those situations where defendants are jointly and severally liable. *Id.*; *see* A.R.S. § 12-2506(E).

A plaintiff may waive the joint liability of both settling and non-settling parties and, by formal agreement, and, by settlement agreement, hold the non-settling parties only severally liable, thereby precluding the non-settling parties' rights to contribution from the settling parties. ***Herstam v. Deloitte & Touche, LLP***, 186 Ariz. 110, 115–17, 919 P.2d 1381, 1386–88 (Ct. App. 1996).

"There is no right of contribution in favor of any tortfeasor who the trier of fact finds has intentionally, willfully or wantonly caused or contributed to the injury or wrongful death." A.R.S. § 12-2501(C).

"Common Liability"

"Common liability" refers to "the dollar amount shared by joint tortfeasors for which they are legally answerable" to the plaintiff. ***PAM Transport v. Freightliner Corp.***, 182 Ariz. 132, 134, 893 P.2d 1295, 1297 (1995). Since there is no more joint liability in Arizona, except for the narrow situations discussed above, in most cases "there is no common liability to discharge," and, accordingly, no right of contribution when a single tortfeasor settles a plaintiff's claim against him. ***Cella Barr Assocs., Inc. v. Cohen***, 177 Ariz. 480, 484–85, 868 P.2d 1063, 1067–68 (Ct. App. 1994).

As is noted above, the employer of an independent contractor can be held liable for an independent contractor's torts where an employer owes a non-delegable duty. In these situations, joint liability is preserved, and so the employer may seek contribution from the independent contractor, even where the employer has some degree of independent liability. ***Wiggs v. City of Phoenix***, 198 Ariz. 367, 371, 10 P.3d 625, 629 (2000); A.R.S. § 12-2506(E).

In strict products liability actions, liability is several only. Each entity is liable for its own actions in distributing a defective product. ***State Farm Insurance Companies v. Premier Manufactured Systems, Inc.***, 217 Ariz. 222, 225, 172 P.3d 410, 413 (2007). Thus, contribution would not apply.

Indemnity

The general rule is that there is no indemnity among joint tortfeasors. ***Cella Barr Assoc., Inc. v. Cohen***, 177 Ariz. 480, 485, 868 P.2d 1063, 1068 (Ct. App. 1994). Arizona recognizes exceptions to this rule where it is equitable to shift liability for the loss from one joint tortfeasor to another. *Id.* In *Cella Barr Assoc., Inc. v. Cohen*, the plaintiff argued for application of an exception from the RESTATEMENT OF RESTITUTION § 90, which provides that indemnity among joint tortfeasors is permitted where the party seeking indemnity is an agent who has become liable in tort, through no fault of his own, simply by following the instructions of another agent of the principal. *Id.* at 486. Because the plaintiff failed to establish that it was an following the instructions of another agent of the principal acting under the principal's direction, however, the Court held that the plaintiff was not entitled to indemnity under § 90. *Id.* at 487. Thus, it is not clear yet whether § 90 provides a viable exception to the general rule barring indemnity among joint tortfeasors.

Like the contribution situation, joint liability is preserved where a defendant who owes a non-delegable duty is found vicariously liable for the actions of its independent contractor. ***Wiggs***, 198 Ariz. at 371, 10 P.3d at 629. The employer may seek indemnity against the independent contractor in cases of pure vicarious liability. *Id.*; A.R.S. § 12-2501(F)(1).

After settling with a homeowner, a general contractor may obtain indemnity from a subcontractor only if the general subcontractor proves the extent of the subcontractor's fault. ***MT Builders, L.L.C. v. Fisher Roofing, Inc.***, 219 Ariz. 297, 304, 197 P.3d 758, 765 (Ct. App. 2008).

Settlement Credit

A.R.S. § 12-2504(1) states that when the plaintiff gives a tortfeasor a release or covenant not to execute in good faith, that discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor. It does not discharge any other tortfeasor unless its terms so provide. *Id.* But, it reduces the plaintiff's claim against the others to the extent of the greater of "any amount stipulate by the release or the covenant or in the amount of the consideration paid for it, whichever is the greater." *Id.* This statute does not apply, however, where the non-settling tortfeasor is not jointly and severally liable for the plaintiff's damages. ***Neil v. Kavena***, 176 Ariz. 93, 95, 859 P.2d 203, 205 (Ct. App. 1993) (statute no longer applicable after abolition of joint and several liability).

Intentional Joint Tortfeasors

A defendant who is jointly and severally liable for an intentional tort with a co-tortfeasor is entitled to have an adverse judgment reduced by the amount of any settlement reached with a co-tortfeasor. ***Bishop v. Pecanic***, 193 Ariz. 524, 530, 975 P.2d 114, 120 (Ct. App. 1998). In *Bishop*, a group of tortfeasors committed an intentional tort. *Id.* at 525. Some, but not all, of the defendants settled with the plaintiff before trial. *Id.* at 526. At the trial against the remaining defendants, the jury found that the defendants had acted in concert, rendering them jointly and severally liable for the judgment. *Id.* Because the defendants were "liable in tort for the same

injury" as were those who settled," A.R.S. § 12-2504(1) required the award to be reduced by the amount of the settlement, even though defendants had committed an intentional tort. *Id.* at 530.

Joint liability under A.R.S. § 12-2506 (D)(1) requires proof "that the parties made a conscious agreement to commit an intentional tort" and "actively took part in the intentional tort." ***Mein ex. re. Mein v. Cook***, 219 Ariz. 96, 99, 193 P.3d 790, 793 (Ct. App. 2008). A conscious agreement to commit a "tortious act" will not suffice to impose joint liability, unless the parties "*knowingly agree* to commit the intentional tort." *Id.*

Dramshop Liability

Arizona recognizes two distinct dramshop causes of action; common law and statutory. A plaintiff may file suit pursuant to either, or both, theories.

Common Law

Arizona first adopted a common law dram shop cause of action in ***Brannigan v. Raybuck***, 136 Ariz. 513, 516, 667 P.2d 213, 216 (1983), and ***Ontiveros v. Borak***, 136 Ariz. 500, 513, 667 P.2d 200, 213 (1983). In *Ontiveros*, the Arizona Supreme Court held that "[t]avern owners and other licensed sellers in Arizona will be under a duty of care and may be held liable when they sell liquor to an intoxicated patron or customer under circumstances where the licensee or his employees know or should know that such conduct creates an unreasonable risk of harm to others who may be injured either on or off the premises." *Ontiveros*, 136 Ariz. at 513, 667 P.2d at 213. In *Brannigan*, the Court similarly held that "a supplier of liquor is under a common law duty of reasonable care in furnishing liquor to those who, by reason of immaturity or previous over-indulgence, may lack full capacity of self-control and may therefore injure themselves, as well as others. *Brannigan*, 136 Ariz. at 516, 667 P.2d at 216.

In 1986, the Legislature attempted to abrogate the common law dram shop claim created in *Ontiveros*. A.R.S. § 4-312(A) provided that neither the intoxicated person himself, nor a person present when the intoxicated person was drinking, could bring a dramshop suit. ***Schwab v. Matley***, 164 Ariz. 421, 425, 793 P.2d 1088, 1092 (1990), held this was an unconstitutional attempt to tamper with the constitutional defenses of assumption of risk and contributory negligence. Similarly, ***City of Tucson v. Fahringer***, 164 Ariz. 599, 603, 795 P.2d 819, 823 (1990), held A.R.S. § 12-820.03(2)—which barred claims by an intoxicated driver or his adult passengers against a public entity for injuries that were the intoxicated driver's own fault—unconstitutional because the statute attempted to tamper with the constitutional defenses of assumption of the risk and contributory negligence. ***Young v. DFW Corp.***, 184 Ariz. 187, 190, 908 P.2d 1, 4 (Ct. App. 1995), held A.R.S. § 4-312(B) unconstitutional. A.R.S. § 4-312(B) provided that dramshop liability could only be imposed as provided in § 4-311 (allowing a suit only when the licensee serves a person who is either "obviously intoxicated" or under the legal drinking age). *Young* held this section unconstitutional because it abrogates a common law negligence claim for plaintiffs who are intoxicated, but not "obviously intoxicated," and have consumed a sufficient number of alcoholic drinks so that the licensee should know that they are intoxicated. *Young*, 184 Ariz. at 190, 908 P.2d at 4.

A.R.S. § 4-311 (Licensee Liability)

A.R.S. § 4-311 sets forth the conditions under which one who is not a social host can be liable for serving alcohol.

A.R.S. § 4-311(A) states that a liquor licensee is liable for personal injuries, property damage, or wrongful death if (1) it sold alcohol to a person who was "obviously intoxicated" or under the legal drinking age, and (2) the purchaser drank the alcohol, and (3) the purchaser's consumption of the alcohol was a proximate cause of the injury, death, or property damage.

A.R.S. § 4-311(B) provides that "[n]o licensee is chargeable with knowledge of previous acts by which a person becomes intoxicated at other locations unknown to the licensee unless the person was obviously intoxicated."

A.R.S. § 4-311(C) provides that if an underage person purchases alcohol from a licensee, and causes injuries or property damage as a result of their consumption within a reasonable time after the sale, it shall create a rebuttable presumption that the underage person consumed the alcohol provided by the licensee.

A.R.S. § 4-311 (D) defines "obviously intoxicated" as "inebriated to such an extent that a person's physical faculties are substantially impaired and the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction that would have been obvious to a reasonable person."

In ***Carrillo v. El Mirage Roadhouse***, ***Inc.,*** 164 Ariz. 364, 369, 793 P.2d 121, 126 (Ct. App. 1990), the court held that a liquor licensee has "a duty not to sell, serve or furnish alcohol to anyone regardless of their condition if a licensee has actual or constructive knowledge that an intoxicated person will ultimately receive and consume the alcohol." In effect, a licensee cannot sell liquor to a person whom he knows or should know will give the liquor to an intoxicated person. In *Carrillo*, there was "ample evidence" from which a trier of fact could determine that the defendant bar knew that an intoxicated individual's friends were giving him alcohol after the bartenders refused to serve him anymore. *Id.*

In ***Henning v. Montecini Hospitality, Inc.***, 217 Ariz. 242, 247–48, 172 P.3d 430, 435–36 (Ct. App. 2007), the court held that an owner of a bar owed no duty of care to an injured party with regard to hiring, training and supervision of bar employees who worked for a different company that managed the bar. The bar in this case, Famous Sam's, was owned by Montecini Hospitality but operated by a different company by the name of Zimbow Enterprises. *Id.* at 243. Plaintiffs sued Montecini, Famous Sam's (the franchisor) and Zimbow for negligence under the dramshop statutes and for the negligent hiring, training and supervision of their employees when plaintiffs were injured in a car accident after drinking at Famous Sam's. *Id.* at 243–44. Settlements were reached with both Zimbow and Famous Sam's. *Id.* at 244. Montecini moved for summary judgment, "contending it had no duty under the dram shop laws because it did not have possession and control of the bar nor did it employ any of the alcohol servers on the night in question." *Id.* The court granted Montecini's motion, reasoning that the legislature significantly

limited the liability of nonlicensees for serving alcohol and the court "would exceed our authority were we to substitute our own public policy determinations for those at the legislature." *Id.* at 246.

Other Issues

In ***Hoeller v. Riverside Resort Hotel***, 169 Ariz. 452, 453, 820 P.2d 316, 317 (Ct. App. 1991), the defendant was a Nevada casino that served an Arizona resident, who then drove into Arizona and injured plaintiffs. The court ruled that Arizona law, rather than Nevada law, applied to protect the Arizona victims. *Id.* at 458. Similarly, in ***Williams v. Lakeview Co.***, 199 Ariz. 1, 2–3, 29, 13 P.3d 280, 281–82 (2000), a Nevada casino served alcohol to someone who later caused an accident in Arizona. In a 3-2 decision, the court held that Arizona did not have personal jurisdiction over the Nevada casino. *Id.* at 6. The court emphasized that jurisdiction questions are case-specific and fact intensive, thus leaving open the possibility that Arizona might have jurisdiction over an out-of-state vendor in other circumstances. *Id.* at 3–4.

In ***Patterson v. Thunderpass, Inc.***, 214 Ariz. 435, 436, 153 P.3d 1064, 1065 (Ct. App. 2007), the court addressed whether a tavern fulfilled its duty of reasonable care by driving an intoxicated patron home, and whether the patron's return to the tavern constituted a superseding, intervening event that broke the chain of proximate causation. Here, an intoxicated patron backed her vehicle into a parked Jeep as she attempted to leave the tavern. *Id.* at 436. The tavern first confiscated her keys and called her a cab, but when the cab never arrived, a tavern employee drove the patron home and then returned the keys to her. *Id.* Unbeknownst to the tavern employees, the patron returned to the parking lot behind the tavern to get her vehicle within an hour. *Id.* After obtaining her vehicle, the patron was involved in a high-speed head-on collision with a vehicle driven by the plaintiff. *Id.* The plaintiff sued the tavern, "alleging that he had sustained damages as a result of the tavern serving intoxicating liquor to" the patron, who "later caused the motor vehicle accident with him. *Id.* The court held that the intervening acts by the tavern of separating the patron from her vehicle and driving her home broke the chain of legal causation and relieved the tavern of liability. *Id.* at 440. The patron's "decision to return that night to retrieve her vehicle while she was still intoxicated was unforeseeable and extraordinary and thus constituted a superseding, intervening event of independent origin that negated any negligence on the part of the tavern or its employees." *Id.* at 441.

2

PREMISES LIABILITY

Liability of the Possessor of Land

Premises liability is an action in tort and, with a few exceptions, is generally based upon allegations of negligence. That is, the landowner or person in possession of the premises failed, in some respect, to keep the premises reasonably safe for others on or using the premises.

The duty owed by the landowner and possessor of land depends upon the status of the plaintiff. Arizona is one of the few states that has retained the traditional distinctions among invitee, licensee and trespasser. *See* ***Woodty v. Weston's Lamplighter Motels***, 171 Ariz. 265, 268, 830 P.2d 477, 480 (Ct. App. 1992) ("In Arizona, the particular duty of care owed by a landowner to an entrant on his or her land is determined by the entrant's status as an invitee, licensee or trespasser."). *See also* ***Bellezzo v. State***, 174 Ariz. 548, 851 P.2d 847 (Ct. App. 1992); ***Shaw v. Petersen***, 169 Ariz. 559, 821 P.2d 220 (Ct. App. 1991). Consequently, defending any premises liability action in Arizona requires a determination of whether the claimant is an invitee, licensee or trespasser. *Woodty*, 171 Ariz. at 268; 830 P.2d at 480.

Invitee

An invitee is a person invited to enter or remain upon the premises for a purpose connected with the business of the owner or occupier of the premises, or as a member of the public for a purpose for which the land is held open to the public. *See* RESTATEMENT (SECOND) OF TORTS § 332 (1965) (followed in ***Nicoletti v. Westcor, Inc.***, 131 Ariz. 140, 143, 639 P.2d 330, 333 (1982)). In the context of a business establishment, an invitee is a person who is invited to enter or remain upon the premises for some benefit to the business proprietor, *i.e.*, a customer who will potentially make a purchase of a product or is, in some other fashion, upon the premises that is beneficial to the business proprietor. *See id.*

The tenant of an apartment complex is considered an invitee. *See* ***Fehribach v. Smith,*** 200 Ariz. 69, 73, 22 P.3d 508, 512 (Ct. App. 2001). A person may enter upon the premises and originally be an invitee, but subsequently lose the status of an invitee by entering portions of the premises which are not held open to the public, or by remaining on the premises for personal purposes which are no longer of any benefit to the possessor of the premises. *See* ***Nicoletti***, 131 Ariz. at 143, 639 P.2d at 333. For this reason, it is always important during investigation and discovery to determine why the claimant was on the premises and what he or she was doing at various instances in time.

The owner or occupier of the premises generally owes a duty to invitees to discover, correct and/or warn of hazards which the occupier should reasonably foresee will endanger the invitee.

Robertson v. Sixpence Inns of America Inc., 163 Ariz. 539, 544, 789 P.2d 1040, 1045 (1990). This duty might require the possessor of the premises to conduct a reasonable inspection in a reasonable manner which would normally discover potentially harmful hazards. *Id.* The proprietor of a business is not, however, "an insurer" of an invitee's safety, and "is not required to keep the premises absolutely safe." ***Preuss v. Sambo's of Arizona, Inc.***, 130 Ariz. 288, 289, 635 P.2d 1210, 1211 (1981). Rather, the possessor of the premises only has the duty to use reasonable care to keep the premises in a reasonably safe condition. *Id.* A possessor's duty to invitees also extends to providing a reasonably safe means of entering and leaving the property. *See* ***Stephens v. Bashas', Inc.***, 186 Ariz. 427, 430, 924 P.2d 117, 120 (Ct. App. 1996). A business owner may be liable for injury occurring off the premises if the business owner's activities on the premises contributed to the injury off the premises. *Id.*

In Arizona it is not enough for an invitee simply to show that a dangerous condition existed on the premises. Rather, the invitee must also show that the possessor and its employees either created the condition, actually knew of the condition, or had "constructive" notice of the condition. ***McDonald v. Smitty's Super Valu, Inc.*,** 157 Ariz. 316, 318, 757 P.2d 120, 122 (Ct. App. 1988). For an invitee to establish liability against the possessor, the invitee must prove, by a preponderance of the evidence, the following:

1. The existence of an unreasonably dangerous condition on the premises which caused injury to the invitee;

2. That the business proprietor or its employees created the dangerous condition; or

3. That the possessor or its employees actually knew of the dangerous condition in time to provide a remedy or warning; or

4. The dangerous condition existed for a sufficient length of time that the possessor or its employees, in the exercise of reasonable care, should have known of it; and

5. The business proprietor failed to use reasonable care to prevent harm under the circumstances.

Premises Liability Instruction No. 1, Revised Ariz. Jury Instructions (5th). Note, an invitee does not have to show the possessor had actual or constructive notice if the possessor actually created or revised the dangerous condition. ***Isbell v. Maricopa Cty.***, 198 Ariz. 280, 283, 9 P.3d 311, 314 (2000).

Sometimes, the inherent nature of the condition can evidence the landowner/possessor's constructive notice of the particular condition that caused the plaintiff's accident. This is particularly true when the condition is a deteriorated sidewalk or stairwell. In ***Haynes v. Syntek Finance Corp.***, 184 Ariz. 332, 334, 909 P.2d 399, 401 (Ct. App. 1995), the plaintiff was injured when she fell on a chipped and decaying sidewalk within an apartment complex. Although the apartment owner claimed it did not have actual or constructive notice of the sidewalk's condition, the court held that the inherent nature of a condition, plus photographs of similar

conditions in other areas of the property, and prior complaints of similar conditions, was sufficient to establish the landowner's "constructive notice." *Id.* at 339–40. Indeed, the very nature of the deterioration suggested that the condition did not arise suddenly, but instead developed slowly over a period of time. *Id.* at 339.

Once a landowner/possessor has knowledge of a dangerous condition, it cannot escape liability merely by showing that it did "something" to remedy the situation. Once a dangerous condition becomes known to the possessor, the possessor's legal duty is not fulfilled merely by attempts to remedy or warn of the dangerous situation. *See generally* ***Robertson v. Sixpence Inns of Am., Inc.***, 163 Ariz. 539, 544, 789 P.2d 1040, 1045 (1990). Instead, the attempts to remedy or warn must be reasonable in and of themselves. *Id.* If the attempts to remedy or warn of the situation are not reasonable or are inadequate, the possessor may still be held liable. *Id.* Consequently, the relevant inquiry is whether the possessor pursued adequate and reasonable measures to correct the condition or to warn invitees of the condition. *Id.*

Mode of Operation Rule

In some cases, it is almost impossible for the invitee to prove that a landowner or possessor of premises had actual notice of the dangerous condition; or that the dangerous condition existed for such a length of time that the landowner or possessor should have had notice of the condition. In such cases, the invitee might attempt to rely upon the "mode of operation" rule to establish liability.

The mode of operation rule applies only in certain limited circumstances, and is not a rule of strict liability. The mode of operation rule simply relieves the invitee from having to prove that the possessor had actual or constructive notice of the dangerous condition. *See* ***Chiara v. Fry's Food Stores***, 152 Ariz. 398, 400, 733 P.2d 283, 285 (1987) (*abrogated on other grounds by Orme School v. Reeves*, 166 Ariz. 301 (1990)). The mode of operation rule applies where the possessor has adopted a method of operation from which it could reasonably be anticipated that dangerous conditions would regularly arise. *See id.*; Premise Liability Instruction 2, Revised Ariz. Jury Instructions(4th). The court defines "regularly" as "customary, usual, or normal," and focuses its analysis on whether a business is able to reasonably anticipate that a condition hazardous to customers will regularly occur. *See* ***Contreras v. Walgreens Drug Store,*** 214 Ariz. 137, 140, 149 P.3d 761, 764 (Ct. App. 2006). The mode of operation rule is commonly applied in situations where the business proprietor is a self-service market, a self-service department store, a convenience store, or a service station. *See* ***McKillip v. Smitty's SuperValu, Inc.***, 190 Ariz. 61, 945 P.2d 372 (Ct. App. 1997); ***Chiara v. Fry's Food Stores***, 152 Ariz. 398, 733 P.2d 283 (1987); ***Tom v. S.S. Kresge Co.***, 130 Ariz. 30, 633 P.2d 439 (Ct. App. 1981); and ***Shuck v. Texaco Refining and Marketing, Inc.***, 178 Ariz. 295, 872 P.2d 1247 (Ct. App. 1994).

Claimants seeking to use the rule must establish two elements for there to be liability. First, the claimant must prove that the business adopted a method of operation from which it could reasonably anticipate that dangerous conditions would regularly arise. ***Chiara***, 152 Ariz. at 400, 733 P.2d at 285. Second, the claimant must prove that the business failed to exercise reasonable care to prevent harm under those circumstances. *Id.* at 401. Accordingly, when defending a mode

of operation case, the defendant would show that it follows reasonable inspections and cleaning procedures in an attempt to reduce or discover dangerous conditions, even though it did not discover the particular dangerous condition that caused the claimant's injury.

Failure to Warn

A property owner has a duty to invitees to warn of dangerous conditions. *See* ***McMurty v. Weatherford Hotel, Inc.***, 231 Ariz. 244, 252, 293 P.3d 520, 528 (Ct. App. 2013). The warning needs to be sufficient to allow invitees to make an informed decision to protect themselves, or to move to other premises. ***Robertson v. Sixpence Inns of America, Inc.***, 163 Ariz. 539, 544, 789 P.2d 1040, 1045 (1990). This duty may also extend to employees of independent contractors. *Id.* In *Robertson,* the court considered whether a hotel was liable for the death of a security guard who was killed in a robbery attempt of the premises. *Id.* at 541. The security guard was an employee of an independent contractor retained by the hotel. *Id.* The court held that the hotel had a duty to warn its independent contractor of a known danger. *Id.* at 544. Additionally, since the hotel manager knew an armed robber was fleeing the premises at the same time the security guard was patrolling the grounds, it was up to the jury to decide as to whether the hotel had breached its duty of care. *Id.* at 545. Again, the key factor is foreseeability. If the property possessor has information that leads him to believe a danger exists, a warning should be given to those within the zone of danger. *Id.*

Trespasser

A trespasser is a person who is on the premises without the consent or privilege of the landowner or possessor. ***Barry v. Southern Pac. Co.***, 64 Ariz. 116, 120–21, 166 P.2d 825, 828 (1946). *See also* RESTATEMENT (SECOND) OF TORTS § 329. The standard of care that a landowner or possessor owes to an adult trespasser is to refrain from intentionally injuring the adult trespasser. ***Spur Feeding Co. v. Fernandez***, 106 Ariz. 143, 145, 472 P.2d 12, 14 (1970); Premises Liability Instruction No. 5, Revised Ariz. Jury Instructions (4th); A.R.S. § 12-557(A). A different standard of care might apply to a child trespasser under the attractive nuisance doctrine discussed below.

As previously stated, a claimant's status can change as he or she goes about the premises. ***Nicoletti v. Westcor, Inc.***, 131 Ariz. 140, 143, 639 P.2d 330, 333 (1982). For example, a claimant might originally enter upon the premises as an invitee or licensee, but then become a trespasser if his or her presence exceeds the consent (either in terms of time, space or location) of the landowner or person in possession of the premises. An invitee will not become a trespasser, however, unless it is obvious that they are about to enter an off-limits area. *See* ***McMurtry,,*** 231 Ariz. at 256, 293 P.3d 520, 532 (Ct. App. 2013). In *McMurtry*, the decedent fell to her death from the window of her hotel room because the balcony railing extended only halfway across the window opening. *Id.* at 248. The court rejected the hotel's argument that the decedent became a trespasser upon going through the window because the hotel openly invited patrons to smoke on the balcony. *Id.* at 255–56. The court further held that since the hotel knew patrons frequently sat on the edges of their windows to smoke, and did nothing to stop them from doing so, the hotel impliedly invited patrons to go through their windows to smoke. *Id.* at 256. Accordingly,

landowners and possessors should clearly mark areas that are off limits and enforce those boundaries.

Attractive Nuisance Doctrine

The attractive nuisance doctrine is a theory of liability that applies to child trespassers. ***Spur Feeding Co.*** 106 Ariz. at 145, 472 P.2d 12, 14 (1970). An attractive nuisance is an artificial condition on the property posing a serious risk of harm that children, because of their youth and inexperience, might not recognize as posing a serious risk of harm. *Id.* at 147 (citing RESTATEMENT (SECOND) OF TORTS § 339). The landowner or possessor of the property could be liable to children injured by the "attractive nuisance" on the property if the landowner or possessor knows or has reason to know that children are likely to trespass on the property. *Id.* Application of the attractive nuisance doctrine is not limited to trespassing children but can also include child licensees and child invitees. ***State v. Juengel***, 15 Ariz. App. 495, 499, 489 P.2d 869, 873 (1971) (*disagreed with on other grounds by* ***New Pueblo Constructors, Inc. v. State***, 144 Ariz. 95, 696 P.2d 185 (1985)); RESTATEMENT (SECOND) OF TORTS § 343B ("In any case where a possessor of land would be subject to liability to a child for physical harm caused by a condition on the land if the child were a trespasser, the possessor is subject to liability if the child is a licensee or an invitee."). It is not necessary that the dangerous condition actually be responsible for attracting the child; liability may be imposed even though the child was not aware of the dangerous condition before entering the property or before it injured him. ***MacNeil v. Perkins***, 84 Ariz. 74, 82, 324 P.2d 211, 216 (1958); ***Brown v. Arizona Pub. Serv. Co.***, 164 Ariz. 4, 10, 790 P.2d 290, 296 (Ct. App. 1990).

For liability under the attractive nuisance doctrine, all of the following must be proven:

1. The child trespasser was injured by a condition on the property;

2. The landowner/possessor knew or should have known that children were likely to trespass near the dangerous condition;

3. The landowner/possessor knew or should have known that the condition posed an unreasonable risk of harm to children;

4. Because of the child's age, the child did not understand the risk of harm involved;

5. The usefulness of the condition and the burden of eliminating the risk of harm are slight compared to the risk of harm to children; and

6. The landowner/possessor failed to use reasonable care to protect the child from danger.

Premises Liability Instruction No. 6, Revised Ariz. Jury Instructions(5th).

Doctrines Applicable to Every Class of Entrant

Non-Party at Fault

In ***McKillip v. Smitty's SuperValu, Inc.***, 190 Ariz. 61, 62, 945 P.2d 372, 373 (Ct. App. 1997), a patron sued slipped on waxed tissue paper that had been dropped on the floor of the supermarket. The court held that under Arizona's comparative fault scheme, Smitty's could name the "unknown paper dropper" as a non-party at fault, and the jury could apportion fault to that non-party. *Id.* at 65.

Res Ipsa Loquitur

If a plaintiff is not in a position to show that the defendant's negligence caused her injury, she might be able to use the doctrine of *res ipsa loquitur.* "*Res ipsa loquitur* is a theory of circumstantial evidence under which the jury may reasonably find negligence and causation from the fact of the accident and the defendant's relation to the accident." ***Cox v. May Dep't Store Co.,*** 183 Ariz. 361, 363, 903 P.2d 1119, 1121 (Ct. App. 1995) (sufficient evidence to allow jury to infer, under doctrine of res ipsa loquitur, that negligence was cause of accident which occurred when rider's jacket became lodged in escalator). For the doctrine of *res ipsa loquitur* to apply: (1) the accident must be of a kind which ordinarily does not occur in the absence of negligence; (2) the accident must be caused by an instrumentality within the exclusive control of the defendant; and (3) the plaintiff must not be in a position to show the particular circumstances or defects which caused the instrumentality to produce injury. *Id*. at 364. The Cox court held that a fourth element – that the accident must not have been due to any voluntary action on the part of the plaintiff – was no longer applicable due to the advent of comparative negligence. *Id.* at 365.

Open and Obvious Defense

The open and obvious nature of a condition is not a complete defense to a premises liability action. *See* ***Markowitz v. Ariz. Parks Bd.***, 146 Ariz. 352, 356, 706 P.2d 364, 368 (1985) (*superseded by statute on other grounds as recognized in* ***Wringer v. U.S****,* 790 F. Supp 210 (D. Ariz. 1992)). The open and obvious nature of a condition is simply one factor to consider in determining whether the landowner or possessor of the premises breached his standard of care. *Id.* at 356–57. If a condition is "open and obvious," then it probably will not qualify as a hidden or concealed peril, and therefore, the landowner's failure to warn of the condition probably will not result in a finding of liability. *Id.* at 356; ***McMurtry***, 231 Ariz at 253, 293 P.3d at 529. Additionally, a condition that is not readily visible might not be deemed a dangerous condition because one would reasonably expect a reasonable person keeping a lookout would see and avoid the condition. *See* ***McMurtry***, 231 Ariz at 253, 293 P.3d at 529.

Generally, the open and obvious nature of a condition is a factual argument to be made to the jury in arguing either that the landowner satisfied its duty toward the claimant, or alternatively, for arguing that the claimant was comparatively negligent for failing to see that which was open and obvious.

Easement Holders

While an easement holder has a general duty to act reasonably, the nature of its duty depends on the degree of control over the property that the easement holder has (or does not have). ***Clark v. New Magma Irrigation & Drainage Dist.***, 208 Ariz. 246, 249–50, 92 P.3d 876, 879–80 (Ct. App. 2004). The scope of the duty cannot extend beyond the scope of the holder's use, even when the easement holder has knowledge of the allegedly dangerous conditions created by another. *Id.*

Liability for the Acts of an Independent Contractor

In general, a principal is not vicariously liable for the acts of third person, such as an independent contractor, who injures someone unless there is a special relationship between the principal and the claimant, or the principal and the independent contractor. ***Parish v. Truman***, 124 Ariz. 228, 231, 603 P.2d 120, 122 (Ct. App. 1979); RESTATEMENT (SECOND) OF TORTS § 315.

There are, however, some notable exceptions to the general rule, particularly in the context of premises liability. A landowner/business proprietor might be vicariously liable for the torts of an independent contractor under (1) the non-delegable duty rule; (2) the doctrine of retained control; and (3) inherently dangerous activities. For additional theories holding an principal liable for the acts of an independent contractor, *see* RESTATEMENT (SECOND) OF TORTS §§ 415, 425.

The Non-delegable Duty Rule

A possessor of land has a non-delegable duty to an invitee to keep the premises reasonably safe, to warn of dangerous conditions and, if practicable, make safe the dangerous conditions on the premises. ***Fort Lowell-NSS Ltd. P'ship v. Kelly***, 166 Ariz. 96, 101, 800 P.2d 962, 967 (1990). For example, a land possessor who hires a contractor to perform work on the premises is responsible for injuries to an invitee caused by dangerous conditions created by the contractor.

Applying the non-delegable duty rule, many jurisdictions now hold that a business proprietor is vicariously liable for the torts of an independent security agency's guards. *See, e.g.,* ***Nash v. Sears Roebuck & Co.***, 174 N.W.2d 818, 820 (Mich. 1970); ***Hendricks v. Fay, Inc.***, 159 S.E.2d 362, 367 (N.C. 1968); ***Safeway Stores Inc. v. Kelly***, 448 A.2d 856, 858 (D.C. App. 1982). These jurisdictions, like Arizona, adhere to the principle that a business proprietor has a non-delegable duty to keep the premises reasonably safe, and hence, a business proprietor cannot absolve itself from liability by delegating the performance of security services to an independent contractor. A business owner who places a security agency on its premises for the purposes of protecting its property and for maintaining peace and order, will be liable for the tortious acts of the security agency because the security agency is serving the purposes of the business proprietor.

In ***Wiggs v. City of Phoenix***, 198 Ariz. 367, 368, 10 P.3d 625, 626 (2000), the employer of an independent contractor named its contractor as a non-party at fault. However, because the employer owed a non-delegable duty to keep its city streets reasonably safe, the employer was vicariously liable for the negligence of its contractor. *Id.* at 369–70. In these circumstances, it

makes no sense to name an independent contractor as a non-party at fault because doing so does not relieve the employer of any liability.

The independent contractor can still be held independently liable for its own negligence if it breaches the applicable standard of care. ***Nelson v. Grayhawk Props., L.L.C.***, 209 Ariz. 437, 440, 104 P.3d 168, 171 (Ct. App. 2004).

Doctrine of Retained Control

The doctrine of retained control is often invoked where a plaintiff seeks to hold a general contractor responsible for the acts of a subcontractor. The general contractor "who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." RESTATEMENT (SECOND) OF TORTS § 414.

Control must relate to the actual manner in which the work is performed, not merely the retention of some control over the premises. *See* RESTATEMENT (SECOND) OF TORTS § 414, cmt c ("In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done."). That is, the employer must have the right to control the manner and the method or the details of the work. ***Koepke v. Carter Hawley Hale Stores***, 140 Ariz. 420, 425-26, 682 P.2d 425, 430-31 (Ct. App. 1984); ***German v. Mountain States Tel. Co.***, 11 Ariz. App. 91, 94-95, 462 P.2d 108, 111-12 (1969). It is not enough that the employer has "a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations." RESTATEMENT (SECOND) OF TORTS § 414, cmt c. These general rights are "usually reserved to employers, but it does not mean that the contractor is controlled as to his method of work or as to operative detail." *Id.*

Inherently Dangerous Activities

A landowner/possessor of land will retain liability for injuries caused by inherently dangerous activities performed on the premises, even if those activities are performed by an independent contractor, if the contractor failed to take reasonable precautions against such danger. *See* RESTATEMENT (SECOND) OF TORTS § 427.

Inherently dangerous work is work that involves a risk that cannot be eliminated even with the exercise of reasonable care. ***Bible v. First Nat. Bank of Rawlins***, 21 Ariz. App. 54, 57, 515 P.2d 351, 354 (1973). The key element of an inherently dangerous activity is that the risk cannot be eliminated by the exercise of reasonable care, even if the risk could be diminished. Blasting is an example of an inherently dangerous activity. The only way the risk can be eliminated is by eliminating the activity.

Vicarious Liability for Punitive Damages

Arizona has not yet directly addressed the issue of whether a business proprietor can be held vicariously liable for punitive damages based upon the conduct of an independent contractor. However, the non-delegable duty rule and the retained control doctrine might provide the avenue for vicarious punitive damages.

Arizona courts have already held that an employer can be vicariously liable for the punitive damages awarded due to acts of an employee, in the pure employer-employee context. ***Wiper v. Downtown Dev. Corp. of Tucson***, 152 Ariz. 309, 732 P.2d 200 (1987). However, an employer can be vicariously liable for those punitive damages only if the punitive damages were actually awarded against the employee. *Id.* at 311–12. When no punitive damages have been awarded against an employee, no punitive damages can be imposed on the employer unless they are based on some independent tortious conduct of the employer. *Id.*

In light of the fact that Arizona strongly adheres to the principle that a business owner has a non-delegable duty to keep its premises reasonably safe, it might not be much of a step for the courts to hold that the business proprietor is vicariously liable for punitive damages under the non-delegable duty rule or the retained control doctrine.

Liability for Criminal Acts Committed by Third Parties

A landowner/possessor of property owes no duty to protect a person against the criminal acts of a third party absent proof of a special relationship between the landowner/possessor and the person who commits the crime, or between the landowner/possessor and the person who is injured. RESTATEMENT (SECOND) OF TORTS § 315. Special relationships are those such as parent/child, master/servant, possessor of land/licensee, and one who is required by law to take custody, or who voluntarily takes custody, of another under circumstances such as to deprive the other of his normal opportunities for protection. *See* RESTATEMENT (SECOND) OF TORTS § 314A.

A landowner owes a common law duty to use reasonable care to prevent harm from criminal acts on the landowner's property. This includes the duty to take reasonable measures to protect against foreseeable activities creating danger, including criminal attacks in common areas under the landowner's control. ***Knauss v. DND Neffson Co.***, 192 Ariz. 192, 196-97, 963 P.2d 271, 275-76 (Ct. App. 1997). Even if no special relationship exists with the landowner (social guests or licensees are not “special relationships”), the landowner still has a duty, with respect to common areas under its control, to maintain its property in a reasonably safe condition. ***Martinez v. Woodmar IV Condominiums Homeowners Ass'n Inc.***, 189 Ariz. 206, 208, 941 P.2d 218, 220 (1997).

The criminal conduct of a third person will not relieve a landowner or possessor of property of liability if the landowner’s/possessor’s negligence created the risk that the crime or tort would be committed. *See* RESTATEMENT (SECOND) OF TORTS § 449. A landowner or possessor may be liable for negligence if its action or inaction afforded the third person an opportunity to commit a tort or crime, and the landowner or possessor realized or should have realized that the third person

might avail him or herself of the opportunity. The key issue is almost always whether the landowner or possessor should have foreseen or anticipated the risk of criminal activity. RESTATEMENT (SECOND) OF TORTS § § 448, 449; ***Central Alarm of Tucson v. Ganem***, 116 Ariz. 74, 567 P.2d 1203 (Ct. App. 1977). In *Ganem*, an alarm company left a key to deactivate the alarm system in a place accessible to unauthorized persons. *Id.* at 76. The key was stolen and a business burglarized. *Id.* Because the negligence of the alarm company was the proximate cause of the loss by theft, the alarm company was not relieved of liability for the subsequent burglaries. *Id.* at 77. The court ruled that the subsequent burglaries were an intervening cause, but not a superseding cause because the burglaries were certainly within the risk created by the alarm company's actions in leaving the deactivation key accessible to other people. *Id.*

Propensity Towards Violence

"Propensity towards violence" is an extension or factor of the foreseeability requirement. If a property possessor knows that another individual on the premises has a propensity towards violence, and might harm patrons or guests, then the possessor has a duty to warn or make safe the potential danger. ***Sucanick v. Clayton***, 152 Ariz. 158, 160, 730 P.2d 867, 869 (Ct. App. 1986). Before liability can be imposed for failing to act, however, the plaintiff must prove that a reasonable person in the position of the possessor would recognize the danger or harm. *Id.* In *Sucanick v. Clayton*, the plaintiff was stabbed by another customer. *Id.* at 159. Prior to the incident, the assailant had been involved in a brief altercation with a rival group in the tavern who had since left the tavern. *Id.* The court held that although it was foreseeable that the assailant could attack a member of the rival group, it was not foreseeable that he posed a threat to other patrons in the tavern, including the plaintiff. *Id.* at 160. The brief altercation between the assailant and the rival group did not indicate that the tavern needed to act to protect others not part of the rival group. *Id.* at 161. *See also* ***Hebert v. Club 37 Bar***, 145 Ariz. 351, 353–54, 701 P.2d 847, 849–50 (Ct. App. 1984) (Even assuming that the bar owners and bartender were negligent in serving patron who shot and killed victim in bar's parking lot, the murder was both "unforeseeable and extraordinary," as the bar owners and bartender had no reason to believe that patron was dangerous or violent.).

Failure to Maintain Adequate Security

Another theory of recovery is the failure to maintain adequate security. The failure to provide adequate lighting, door locks, or other security measures may subject certain landowners to liability for harm caused by a criminal attack on persons to whom the owner owes a duty of care. **Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc**., 189 Ariz. 206, 210, 941 P.2d 218, 222 (1997). The landlord's duty of care might include measures to protect others from criminal attacks, provided the attacks are reasonably foreseeable and preventable. *Id*. at 210–11.

In cases involving apartment complexes, plaintiffs might allege that the landlord's failure to provide adequate security breached the warranty of habitability. The basis of this claim might be (1) an express warranty in the lease agreement assuring that the premises will be kept in a safe and habitable condition; (2) an implied warranty requiring the landlord to protect the tenant

from injury due to conditions which are unreasonably dangerous, ***Presson v. Mountain States Properties, Inc.***, 18 Ariz. App. 176, 179, 501 P.2d 17, 20 (Ct. App. 1972), or (3) a statutory duty to protect tenants from criminal acts. The Arizona Residential Landlord and Tenant Act requires the landlord to "do whatever is necessary to put and keep the premises in a fit and habitable condition." A.R.S. § 33-1324(A)(2). Plaintiff might argue that keeping the premises habitable includes taking whatever steps are reasonably necessary to protect the tenant from the likelihood of criminal attack. *See Presson*, 18 Ariz. App. at 178, 501 P.2d at 20 ("It is the opinion of the Court that a landlord who leases premises for residential occupancy will not be immune from liability under traditional negligence theories if he fails to act as a reasonable man would in holding his tenants safe from injury due to a condition which . . . is 'unreasonably dangerous'.").

Innkeeper Statute

Arizona has an innkeepers' statute which limits the liability of innkeepers for property loss where that innkeeper "maintains a fireproof safe and gives notice by posting in a conspicuous place in the office or in the room of each guest that money, jewelry, documents and other articles of small size and unusual value may be deposited in the safe." A.R.S. § 33-302(A). Under this statute, an innkeeper meeting the requirements of subsection § 33-302(A) "is not liable for loss of or injury to any such article not deposited in the safe, which is not a result of his own act." *Id.* In ***Terry v. Linscott Hotel Corp.***, 126 Ariz. 548, 550, 617 P.2d 56, 58 (Ct. App. 1980), hotel guests sued the Scottsdale Hilton to recover for the loss of jewelry stolen from their hotel room. Plaintiffs alleged the hotel owed them a duty to disclose the rash of recent break-ins and to provide adequate security. *Id.* at 550. Because the hotel had complied with the "posting provisions" of A.R.S. § 33-302(A), the court granted the hotel's motion for partial summary judgment. *Id.* at 554. The statute provides limited liability for innkeepers who post notice in motel rooms regarding the availability of a fireproof safe for the keeping of their valuables. *See* A.R.S. § 33-302.

Landlord's Liability to Tenant and Guests of Tenants

Evaluating the liability of a landlord requires considering each of the following.

1. Is the claimant a tenant, guest of the tenant or a trespasser?

2. Did the injury occur in a common area or specifically in the tenant's leased premises?

3. Was the injury caused by a defect that already existed at the time of the lease or was it a condition that was created subsequent to the lease?

4. Who created the condition that caused injury?

Generally, a landlord is under a duty of ordinary care (1) to inspect the premises when he has reason to suspect defects existing at the time of the taking of the tenancy and (2) to either repair them or warn the tenant of their existence. ***Piccola v. Woodall***, 186 Ariz. 307, 310, 921 P.2d 710, 713 (Ct. App. 1996). In the broadest sense, a landlord has a duty to take those precautions for

the safety of the tenant as a reasonably prudent person would take under similar circumstances. *Id.* If a nuisance exists on the premises at the time of its renting, the landlord might not be discharged from liability for injury occurring as a result of that nuisance. The landlord cannot simply claim that he had no actual knowledge of the condition if by exercising reasonable diligence, a reasonable inspection of the premises would have discovered the nuisance. *See id.* "A landlord owes a duty of reasonable care which requires inspection of premises if there is reason to suspect defects existing at the time the tenant takes possession." *Id.* The landlord's liability is suspended as soon as he surrenders possession and control of the premises in good condition to the tenant. *See* ***Klimkowski v. De La Torre***, 175 Ariz. 340, 342, 857 P.2d 392, 394 (Ct. App. 1993). However, the landlord will remain liable to persons injured in or on "common areas" of the property over which the landlord retains control, or are for the common use of tenants and guests. *See* RESTATEMENT (SECOND) OF TORTS § 360.

Although the landlord's duty of reasonable care requires the landlord to remedy or warn of defects existing at the time of leasing the premises, the landlord's liability for failure to remedy or warn might continue only until such time as the tenant has a reasonable opportunity to discover the condition himself and take precautions. RESTATEMENT (SECOND) OF TORTS § 358(2). If the tenant or a guest of the tenant is injured by a defect of which the tenant already had notice, the landlord may be shielded from liability for any injuries resulting to the tenant or the tenant's guests. ***Piccola***, 186 Ariz. at 312, 921 P.2d at 715. Such was the case in *Piccola v. Woodall*, where a tenant's guest was injured when she fell through a sliding door made of plate glass rather than safety tempered glass. *Id.* at 309. The tenant was well aware of this condition. *Id.* Accordingly, the court held that the landlord's duty to warn of reasonably discoverable dangerous conditions had passed to the tenant because the tenant had, in fact, discovered the condition. *Id.* at 313.Therefore, the duty to warn the guest of the dangerous condition rested with the tenant, not the landlord. *Id.*

If the tenant has control of premises in good condition when leased, any injury subsequently caused by a condition on the premises or use of the premises is not evidence of the landlord's liability. RESTATEMENT (SECOND) OF TORTS § 355 ("Except as stated in §§ 357 and 360- 362, a lessor of land is not subject to liability to his lessee or others upon the land with the consent of the lessee or sublessee for physical harm caused by any dangerous condition which comes into existence after the lessee has taken possession."). The landlord is not responsible for injuries occurring as a result of a tenant's torts of a tenant with respect to the use of the property. For example, a landlord is not responsible for a tenant's act in creating or maintaining a nuisance upon the leasehold after a landlord transfers possession to the tenant. ***Klimkowski***, 175 Ariz. at 342, 857 P.2d at 394.However, if a landlord knows or should know that his tenant has created a nuisance on his leased premises and nevertheless continues to rent to the same tenant beyond the time period needed to terminate the lease, the landlord might be held liable if a third party suffers damage as a result of the nuisance. *Id.*

In ***Siddons v. Bus. Properties Dev. Co.***, 191 Ariz. 158, 158, 953 P.2d 902,902 (1998), the tenant removed and propped a heavy door next to the building on the sidewalk in front of his business. It fell on the plaintiff, injuring him. *Id.* at 158. While the Supreme Court acknowledged that the

landlord has no duty to protect against a condition created exclusively by the tenant after the tenant takes possession, the court also stated that the landlord could still be subject to liability, under the RESTATEMENT (SECOND) OF TORTS § 360, if the landlord still had control over the area (sidewalk) where the accident occurred and retained the duty to inspect and make the sidewalk area safe. *Id.* at 159–60.

The RESTATEMENT (SECOND) OF TORTS § 837(1) creates an exception to the general principal that a landlord is not liable for injuries caused by the acts of the tenant after the tenant takes control of the property. This Restatement section has been adopted in Arizona. *See* ***Klimkowski***, 175 Ariz. at 342, 857 P.2d at 394. Section 837(1) of the Restatement states:

> (1) A lessor of land is subject to liability for a nuisance caused by an activity carried on upon the land while the lease continues and the lessor continues as owner, if the lessor would be liable if he had carried on the activity himself, and (a) at the time of the lease the lessor consents to the activity or knows or has reason to know that it will be carried on, and (b) [the lessor] then knows or should know that it will necessarily involve or is already causing the nuisance.

Retail merchants may be subject to claims of false arrest and false imprisonment.

"False imprisonment requires proof that: (1) the defendant acted with intent to confine another person within boundaries fixed by the defendant; (2) the defendant's act resulted in such confinement, either directly or indirectly; and (3) the other person was conscious of the confinement or was harmed by it." ***Hart v. Seven Resorts Inc.***, 190 Ariz. 272, 281, 947 P.2d 846, 855 (Ct. App. 1997). "The essential element of false imprisonment is the direct restraint of personal liberty or the freedom of locomotion." ***Swetnam v. F. W. Woolworth Co.***, 83 Ariz. 189, 192, 318 P.2d 364, 366 (1957). *See also* ***Deadman v. Valley Nat'l Bank of Ariz.***, 154 Ariz. 452, 457, 743 P.2d 961, 966 (1987); ***Wisniski v. Ong***, 84 Ariz. 372, 376, 329 P.2d 1097, 1099 (1958). "There need not be actual force; the restraint may be from the fear of force as well as from force itself." *Swetnam,* 83 Ariz. at 192, 318 P.2d at 366. "Words alone are frequently sufficient to bring about the actual restraint of liberty." *Id*.

In order to establish a claim for false arrest, there must be an actual arrest, or similar conduct, *Id.* at 192. In *Swetnam*, the plaintiff was suspected of shoplifting and was followed by store personnel. *Id.* at 191. Although the plaintiff was never stopped, detained, or threatened by the store personnel, the plaintiff sued the store for false arrest, claiming that she was followed, and that this constituted a threat of an arrest. *Id.* at 191–92. On appeal, the Supreme Court of Arizona held that being followed by store personnel did not amount to a restraint of liberty. *Id.* at 193. In dicta, the Court also stated that even if the employees used accusatory language, the conduct still would not amount to false arrest. *Id.* at 192*. See also* ***Hart*** 190 Ariz. at 282, 947 P.2d 846, 856 (Ct. App. 1997) (holding that there was no false imprisonment where passenger initially manifested consent to the transportation, and that an unexpressed revocation of consent did not negate initial consent to situation).

Retailer merchants may be held liable for false imprisonment claims made by children who witness a parent being detained, or who are detained themselves in the process of detaining the parent. ***Gau v. Smitty's Super Valu, Inc.***, 183 Ariz. 107, 110, 901 P.2d 455, 458 (Ct. App. 1995). In *Gau*, a mother and child were detained by store personnel after the mother allegedly shoplifted. *Id.* at 109. In the process, the mother fainted and was taken to a hospital, while the child was left at the store for two hours without supervision. *Id.* The mother and child were both awarded damages by a jury on claims of false imprisonment. *Id.* On appeal, the verdict in favor of the child was upheld. *Id.* at 110. Relying on the Restatement, the Court reasoned that an actor is subject to liability for false imprisonment if "he acts intending to confine the other *or a third person*," "his act directly *or indirectly* results in such a confinement of the other," and "the other is conscious of the confinement or is harmed by it." *Id*. The Court further reasoned that "[t]he damages that flow foreseeably from a false confinement of a caretaker flow equally foreseeably to an accompanying small child." *Id.*

The Arizona Shopkeepers' Privilege

The Arizona Shopkeepers' Privilege, codified in A.R.S. § 13-1805, provides permission for retail merchants to detain suspected shoplifters for reasonable cause, in a reasonable manner, and for a reasonable amount of time.

Under Arizona law, a "merchant, or a merchant's agent or employee, with reasonable cause, may detain on the premises in a reasonable manner and for a reasonable time any person who is suspected of shoplifting." A.R.S. § 13-1805(C). The statute is a defense to false arrest, false or unlawful imprisonment, or wrongful detention if the merchant establishes reasonable cause to suspect shoplifting, and reasonable time and manner for questioning and detention of the suspect. ***Koepnick v. Sears Roebuck & Co.***, 158 Ariz. 322, 326, 762 P.2d 609, 613 (Ct. App. 1988) (citing ***Gortarez v. Smitty's Super Valu, Inc.***, 140 Ariz. 97, 103, 680 P.2d 807, 813 (1984)).

Reasonable cause, and the reasonableness of the manner and time of the detention, are generally held to be questions of law to be determined by the court where the facts or inferences from them are not in dispute. ***Gortarez***, 140 Ariz. at 104, 680 P.2d at 814. When there is a dispute, however, then the issue of reasonable cause becomes a mixed question of law and fact, and it is for the jury to determine the disputed facts. *Id.*

Reasonable Cause

"Reasonable cause is not dependent on the guilt or innocence of the person, or whether the crime was actually committed." ***Gortarez v. Smitty's Super Valu, Inc.***, 140 Ariz. 97, 103, 680 P.2d 807, 813 (1984). "[O]ne may act on what proves to be an incorrect belief[,] provided the facts show that the belief was reasonable." *Id*.

In *Koepnick v. Sears Roebuck & Co.*, a retail customer sued Sears for false arrest, assault, trespass to chattel, invasion of privacy, and malicious prosecution. ***Koepnick v. Sears Roebuck & Co.***, 158 Ariz. 322, 325, 762 P.2d 609, 612 (Ct. App. 1988). In this case, a store security officer suspected the customer of shoplifting a wrench and detained the customer for 15 minutes while waiting for

the police to arrive. *Id.* at 324. Upon arrival of the police, the customer was injured in an altercation with a police officer and handcuffed. *Id.* Upon investigation, it was discovered that the customer had receipts for the wrench, the store clerk who sold the wrench to the customer verified the sale, and no further stolen items were found after a search of the customer's truck. *Id.* at 324–25. "The entire detention lasted approximately 45 minutes." *Id.* at 325. After a trial on the false arrest and trespass to chattel claims, the jury awarded compensatory and punitive damages to the customer. *Id.* The trial court determined that it had erred in submitting the issue of reasonable cause to the jury because the undisputed facts established reasonable cause. " *Id.* at 326–27. On appeal, the Court determined that the issue of the manner of the detention was properly submitted to the jury, and that the trial court did not err in denying Sears' motion for a directed verdict. *Id.* at 330.

Although what constitutes reasonable cause will be determined on a case by case basis, shoplifting does not have to be specifically witnessed in order to support a finding of reasonable cause. ***Kon v. Skaggs Drug Center, Inc.***, 115 Ariz. 121, 123, 563 P.2d 920, 922 (Ct. App. 1977). Indeed, if the law required such specific observations, the reasonable cause language would be unnecessary. *Id*. *See also* ***Gau v. Smitty's Super Valu, Inc.***, 183 Ariz. 107, 111, 901 P.2d 455, 459 (App. 1995) (reasoning that regardless of intent, an appearance of shoplifting by putting sandals in a cart, covering the sandals, and leaving without paying gave store reasonable cause for suspicion of shoplifting).

Reasonable Manner

In order to ensure proper action, retail merchants must be sure to only detain patrons for the purpose of questioning them regarding the suspected shoplifting in order to determine whether law enforcement need be summoned, or while waiting for law enforcement to arrive. ***Gortarez v. Smitty's Super Valu, Inc.***, 140 Ariz. 97, 104, 680 P.2d 807, 814 (1984). Additionally, retail merchants should act in a reasonable manner when detaining patrons, should always request a search before performing one, and may never use force unless in self-defense. *Id*.; *see also* ***Gau v. Smitty's Super Valu, Inc.***, 183 Ariz. 107, 111, 901 P.2d 455, 459 (Ct. App. 1995)("The statute does not authorize merchants to search the detained person or her possessions.").

In *Gortarez v. Smitty's Super Valu, Inc.*, the store detained two customers but failed to question them first regarding the suspected shoplifting in order to determine whether law enforcement should be summoned, they failed to summon law enforcement, and they failed to detain the customers for the purpose of summoning law enforcement. ***Gortarez***, 140 Ariz. at 100–01, 680 P.2d 807, 810–11 (1984). Following the detainment, a physical altercation ensued between the store personnel and customers. *Id.* at 101. Finding that reasonable cause existed for the detainment, the trial court directed a verdict on the false arrest and imprisonment claim. *Id.*

On appeal, the Court affirmed the trial court's finding of reasonable cause but found there were questions of fact as to whether the detention was for a proper purpose, and whether the detention was reasonable in terms of manner and time, thus warranting a remand for a new trial. *Id.* at 106. With regard to whether the manner of the detention was reasonable, the Court explained that there was a question as to whether the use of force in the search and restraint of

the customers was reasonable. *Id.* at 105. The Court stated that the "evidence adduced probably would have supported a finding that the manner of detention was unreasonable as a matter of law." *Id.* "At best, there was a question of fact; there was no support for the trial court's presumptive finding that as a matter of law the detention was performed reasonably." *Id.*

Reasonable Time

Retail merchants should not detain patrons any longer than is reasonable under the circumstances. ***Kon v. Skaggs Drug Tr., Inc.***, 115 Ariz. 121, 124, 563 P.2d 920, 923 (Ct. App. 1977). While there is no specific rule on what constitutes a reasonable amount of time, the Court of Appeals determined in *Kon* that an hour-long detention for the purpose of waiting for law enforcement to arrive was a reasonable amount of time. *Id.* In *Kon*, a customer was detained for suspected shoplifting, refused to answer questions from store personnel, and refused to allow store personnel to look in her purse. *Id.* at 122. The Court of Appeals held that the hour long detention was a reasonable amount of time under the circumstances because the plaintiff was not cooperating with store employees. *Id.* at 124.

A retailer is not legally responsible for the time a customer is detained by the police. ***Koepnick v. Sears Roebuck & Co.***, 158 Ariz. 322, 330, 762 P.2d 609, 617 (Ct. App. 1988). The decision to place a customer under arrest and to continue to detain him or her is solely within the discretion of the police, even if the retail store encourages the arrest. *Id.*

Malicious Prosecution Claims

Malicious prosecution claims against retail stores can arise following a shoplifting investigation.

In order to establish a malicious prosecution claim, the plaintiff must show that the defendant instituted criminal proceedings against the plaintiff without probable cause and actuated by malice. ***Walsh v. Eberlein***, 114 Ariz. 342, 344, 560 P.2d 1249, 1251 (Ct. App. 1976). A "criminal proceeding" for purposes of malicious prosecution may consist of a lawful arrest on a criminal charge. RESTATEMENT (SECOND) OF TORTS § 654(2)(c).

Following a shoplifting investigation, malicious prosecution claims arise more frequently against law enforcement because law enforcement has the ability to arrest and institute criminal proceedings. *See generally* ***Gonzales v. City of Phoenix***, 203 Ariz. 152, 52 P.3d 184 (2002). Although such claims can be made against the retail merchant, it is difficult for plaintiffs to establish the elements of the claim because retailers do not have the ability to prosecute. *See* ***Koepnick v. Sears Roebuck & Co.***, 158 Ariz. 322, 326, 762 P.2d 609, 613 (Ct. App. 1988) (upholding directed verdict on malicious prosecution claim). Nevertheless, retail merchants should be aware that the claim is available, and can arise in the context of a shopkeeper's detention. Additionally, to the extent that the retail merchant is involved in an investigation that leads to an arrest or prosecution, they may be called as witnesses in malicious prosecution cases against law enforcement.

Defamation Claims

Defamation claims can arise in the retail context if false records regarding shoplifting incidents are published.

Under Arizona law, "[t]o be defamatory, a publication must be false and bring the defamed person into disrepute, contempt, or ridicule, or impeach the person's honesty, integrity, virtue, or reputation." ***Godbehere v. Phoenix Newspapers, Inc.***, 162 Ariz. 335, 341, 783 P.2d 781, 787 (1989). Truth is a defense to a defamation claim. *Id.*; *see also* ***Cullison v. City of Peoria***, 120 Ariz. 165, 170, 584 P.2d 1156, 1161 (1978). Defamation claims are not likely to arise in the retail context because retailers do not typically publish information that might harm a person's reputation. Retail merchants should be cautious, however, regarding the confidentiality of records regarding shoplifting or other negative incidents, and should ensure that such information is not published.

3

DAMAGES

Proximate Cause

Plaintiff is entitled to recover damages for only those injuries or the consequences thereof which were caused by the defendant's conduct. ***Valley Nat'l Bank v. Brown***, 110 Ariz. 260, 264, 517 P.2d 1256, 1260 (1974). The defendant's conduct need not be the cause or the only cause of plaintiff's injury; rather, liability can attach if the defendant's actions were simply a cause of plaintiff's injury. *See* Fault Instruction No. 5, Revised Ariz. Jury Instructions(4th). It does not matter how little or how large a cause is.

The proximate cause of an injury is that which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces an injury, and without which the injury would not have occurred. ***Barrett v. Harris***, 207 Ariz. 374, 378, 86 P.3d 954, 958 (Ct. App. 2004). The plaintiff has the burden of proving by the preponderance of the evidence a causal connection between the accident and the injuries claimed. ***Benkendorf v. Advanced Cardiac Specialists Chartered***, 228 Ariz. 528, 530–31, 269 P.3d 704, 706–07 (Ct. App. 2012). When the issue of a causal connection is a key element of the case, defendants often file motions for summary judgment or motions in limine when the plaintiff fails to develop admissible evidence of proximate cause.

Generally, the test for determining the causal relationship between an accident and subsequent injuries is whether the plaintiff can prove through medical and/or other evidence that it was more probable than not that the injuries were caused by the accident. *Id.* Whether the opinion of a medical expert is necessary to establish the causal relationship depends on the nature of the injury, the circumstances under which it was sustained, and the plaintiff's condition before and after the alleged injury. If the injured plaintiff suffered from a pre-existing disability or condition, the defendant can be held liable for the enhanced injury or aggravation of the pre-existing condition. These plaintiffs are typically referred to as "eggshell" plaintiffs. *See* discussion below.

Compensatory Damages

Compensatory tort damages seek to restore a plaintiff, as nearly as possible, to the position he would have been in had the tort not occurred. ***Standard Chartered PLC v. Price Waterhouse***, 190 Ariz. 6, 34, 945 P.2d 317, 345 (Ct. App. 1996); RESTATEMENT (SECOND) OF TORTS § 903, cmt a. In such cases, the tortfeasor is liable for those damages that directly and proximately result from the wrong committed. *See* ***Standard Chartered PLC,*** 190 Ariz. at 32, 945 P.2d at 343; ***Thompson v. Better-Bilt Aluminum Prod. Co.***, 171 Ariz. 550, 554, 832 P.2d 203, 207 (1992). Plaintiffs may recover both economic damages, which compensate for objectively verifiable monetary losses

(including loss of earning capacity and/or lost wages and medical and other out-of-pocket expenses), as well as non-economic damages, which include claims for pain and suffering, mental anguish, injury and disfigurement, loss of consortium, and other losses that cannot be easily expressed in monetary terms. *See* RESTATEMENT (SECOND) OF TORTS §§ 905–06. When recovery is sought for future consequences of a tort, damages are generally available only if such consequences are reasonably certain to occur. *See* RESTATEMENT (SECOND) OF TORTS § 910.

Arizona jurors are given the following standard instruction when called upon to deliberate on a tort case:

Measure of Damages

> If you find [any] [defendant] liable to [plaintiff], you must then decide the full amount of money that will reasonably and fairly compensate [plaintiff] for each of the following elements of damages proved by the evidence to have resulted from the fault of [any] [defendant] [party] [person]:
>
> 1. The nature, extent, and duration of the injury.
>
> 2. The pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future as a result of the injury.
>
> 3. Reasonable expenses of necessary medical care, treatment, and services rendered, and reasonably probable to be incurred in the future.
>
> 4. Lost earnings to date, and any decrease in earning power or capacity in the future.
>
> 5. Loss of love, care, affection, companionship, and other pleasures of the [marital] [parent-child] relationship.
>
> 6. Loss of enjoyment of life, that is, the participation in life's activities to the quality and extent normally enjoyed before the event.

Personal Injury Damages Instruction No. 1, Revised Ariz. Jury Instructions Civil (5th).

While a plaintiff need not prove damages with mathematical certainty, the damages must not be speculative or conjectural. ***Coury Bros. Ranches, Inc. v. Ellsworth***, 103 Ariz. 515, 521, 446 P.2d 458, 464 (1968). Plaintiff bears the burden of providing an evidentiary and logical basis for calculating a compensatory award. *See* ***Linthicum v. Nationwide Life Ins. Co.***, 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986) ("a plaintiff may collect compensatory damages upon proof by a preponderance of the evidence of his injuries due to the tort of another"). Expert testimony is not necessarily required to submit the issue to a jury. However, experts in medicine, economics and the like are commonplace.

Where property is damaged, the usual measure of damages for permanent injury which the property owner is entitled to recover is the difference between the market value of the property immediately before and after it was damaged, and/or the reasonable cost of repairs. ***State v. Brockell***, 187 Ariz. 226, 228, 928 P.2d 650, 652 (Ct. App. 1996). If the property has no market value, its actual worth to the owner is the test for the amount of damages. *Id.*

A jury is not obligated to award damages to a plaintiff, even if it finds for the plaintiff on liability. *See* ***Felder v. Physiotherapy Assocs.***, 215 Ariz. 154, 163–64, 158 P.3d 877, 886–87 (Ct. App. 2007). The assessment of damages is left to the fair, intelligent judgment of the jury. *Id.* The jury can award such damages as it deems reasonable and fair in accordance with common knowledge, experience and good sense. *See* ***Meyer v. Ricklick***, 99 Ariz. 355, 357–58, 409 P.2d 280, 281–82 (1965). Weighing the evidence is a proper function of the jury, who is not bound to accept even uncontested testimony. *See id.* Since awarding damages is the province of the jury, judges are reluctant to tamper with a jury's damage award unless the award is so excessive or inadequate as to be unjust. *Id.* Accordingly, a jury's wide ranging authority to determine the amount of damages is not unbridled. *Id.* The jury award is subject to limited trial court superintendence through post-trial order of remittitur or new trial. The trial judge has the duty to enter post-trial order of remittitur or new trial when the record affirmatively shows the jury's verdict to be excessive or the result of passion, prejudice, or bias. *Id.*

Types of Compensatory Damages

Pain and Suffering

No precise rule fixes an award of damages in a personal injury action, because such compensation does not ordinarily lend itself to mathematical computation. ***McNelis v. Bruce***, 90 Ariz. 261, 268, 367 P.2d 625, 629 (1961). The legal presumption behind damages for pain and suffering is that mental/emotional suffering is a natural consequence of severe physical injury. The amount of compensation for pain and suffering is awarded at the discretion of the fact-finder. As previously noted, great latitude is allowed. Generally, evidence of the plaintiff's health and physical condition, before and after the injury, may be introduced to establish the nature, extent, and consequences of the injuries caused by the defendant.

Pain as an element of non-pecuniary damages has been defined as the injured person's psychological response to a bodily injury. Under the rubric of "pain and suffering," courts permit recovery for a range of losses including physical pain, the adverse emotional consequences attributable to that pain and the injury that caused it, and the frustration and anguish caused by the inability to participate in the normal pursuits and pleasures of life.

Plaintiffs cannot recover for the mere possible consequence of an injury; a plaintiff may recover damages only for those losses that are reasonably certain or probable to occur in the future. ***Newman v. Piazza***, 6 Ariz. App. 396, 401, 433 P.2d 47, 52 (Ct. App. 1967). In regard to future damages, plaintiff would need to prove by a preponderance of the evidence that she will have future pain and suffering, medical expenses, impairment and/or physical disability. A distinction is made between the reasonable probability of some future disability and permanent injury;

evidence may be sufficient to sustain recovery for the former but not the latter. Like any other future loss, the permanent nature of the injury must be proven to a degree of reasonable certainty or probability. Proof of a permanent injury is a prerequisite to introduction of evidence on life expectancy. *See* ***Besch v. Triplett***, 23 Ariz. App. 301, 305, 532 P.2d 876, 880 (1975) (Where there is no issue or evidence of permanent injury, the issue of future medical expenses cannot be submitted to the jury).

If a physician testifies concerning the physical condition of an injured plaintiff, his opinion must be reasonably certain both as to the cause of the physical condition and its future effects. *See id.* The jury may accept or reject all or part of a witness' testimony.

A.R.S. § 46-455, the elder/incapacitated person abuse statute, expressly provides that victims of elder abuse or their representatives may recover pain and suffering damages, even after the death of the abused victim, against any person employed to provide care, or who was a defacto guardian or conservator, who has been appointed by the court, or who causes or permits the life of an adult to be injured or endangered. *See also* ***Denton v. Superior Court***, 190 Ariz. 152, 157, 945 P.2d 1283, 1288 (1997). Injunctive relief and attorneys' fees are also awardable to those persons injured. *See* § 46-455(H)(4).

Medical Expenses

Damages for past medical expenses are virtually always included in tort cases to restore the injured individual to a financial position substantially equivalent to that which he would have occupied had he not been injured. As with other forms of damages, the plaintiff bears the burden of providing evidence to allow the jury to calculate and compensate him for past medical expenses.

To obtain an award for future medical expenses, a plaintiff must show a reasonable probability that such medical expenses will be incurred in the future. *See* RESTATEMENT (SECOND) OF TORTS § 906. Recovery based on pure speculation is not allowed. *Id.* Other expenses that might qualify for compensation are numerous and may require proof of the reasonable value of services rendered by consultants, nurses, home health care providers, ambulance service, prosthetic devices and medicine. In addition, a plaintiff may recover medical expenses incurred in order to mitigate his damages. On the other hand, a plaintiff should not be compensated for items connected with medical care unrelated to his injuries. If the medical expenses are for treatment of a number of ailments, only one of which was caused by the defendant, the plaintiff has the burden of proving the portion of his medical expenses that are attributable to the defendant's act.

Since the measure of recovery is a reasonable value of the services, the jury may award a lower amount than the actual cost of the medical treatment, even though a physician testifies that in his opinion the treatment was necessary or the actual cost is reasonable. On the other hand, if the actual cost is less than the reasonable value, recovery is limited to the actual cost.

In ***Lopez v. Safeway Stores, Inc.,*** 212 Ariz. 198, 207, 129 P.3d 487, 496 (Ct. App. 2006), the Court of Appeals held that an injured plaintiff was entitled to claim and recover the full amount of her reasonable medical expenses the health care provider charged, without any reduction for the amounts apparently written off by her physicians pursuant to contractually agreed-upon rates with her insurance carriers. In other words, the plaintiff was entitled to claim the full amount of the billed medical charges, even though neither she nor her health insurer would ever have to pay the full billed amount. *Id.* The court reasoned that this serves the fundamental purpose of the collateral source rule – to prevent a tortfeasor from deriving any benefit from compensation or indemnity that an injured party has received from a collateral source. *Id.* at 203. See Chapter 5 for a discussion of the collateral source rule.

Lost Wages/Impairment of Earning Capacity

Where a plaintiff claims lost income because of the injuries sustained, he is entitled to recover damages for either or both (1) lost wages pre-trial, and (2) impairment of future earning capacity. *See* ***Hatcher v. Hatcher***, 188 Ariz. 154, 158, 933 P.2d 1222, 1226 (Ct. App. 1996) ("In a personal injury action, recovery may be had for any diminution in earning ability as distinct from loss of earnings.").

Loss or impairment of future earning capacity compensates the victim for money that, but for the injury, he would have been able to earn in the future for his projected working life. *See* ***Mandelbaum v. Knutson***, 11 Ariz. App. 148, 149–50, 462 P.2d 841, 842–43 (Ct. App. 1969). This element has been defined as the "permanent diminution of ability to earn money." *See id.* at 151. The plaintiff need not be employed at the time of the injury to recover for impairment of earning capacity. *Id.* at 150. In fact, a plaintiff may recover for impairment of earning capacity even if he has never been employed, or was temporarily unemployed at the time of the injury. *Id.* Parties routinely use economic and medical expert testimony to either establish or refute the claim that the injury has impaired plaintiff's earning capacity. The jury may consider a variety of factors that differ from plaintiff to plaintiff, including the plaintiff's age, life expectancy, work-life expectancy, health habits, occupation, talents, skill, experience, training, probable pay raises, promotions and other advancements, declining earning capacity due to age, and the like. *Id.* at 149–50. Nonetheless, actual earnings of the plaintiff before and after the injury are evidence of earning capacity and are generally considered by experts testifying on the subject.

Loss of Consortium

Loss of consortium damages compensate the injured party's spouse for harm to their relationship (including society, companionship, services, and affection) caused by a physical or psychological injury. "Loss of consortium . . . is defined as a loss of capacity to exchange love, affection, society, companionship, comfort, care and moral support." ***Pierce v. Casa Adobes Baptist Church***, 162 Ariz. 269, 272, 782 P.2d 1162, 1165 (1989). Loss of consortium damages are awarded only when the injured person "suffers a severe, permanent and disabling injury" which renders the person "unable to exchange love, affection, care, comfort, companionship and society in a normally gratifying way." *Id.* at 273. Such an injury does not need to be "the functional equivalent of death, or even be categorized as catastrophic." *Id.* at 272. The threshold level of interference with the

normalcy of the relationship is a question of law to be decided by the judge. *Id.* Once the judge has decided that the threshold level of interference exists, "the trier of fact determines the question of recovery or the amount recoverable based on the degree of that interference." *Id.*

Loss of consortium is a derivative claim, so it cannot exist unless "all elements of the underlying cause [are] proven." ***Barnes v. Outlaw***, 192 Ariz. 283, 285–86, ¶ 8, 964 P.2d 484, 486–87 (1998). Derivative claims, such as loss of consortium, that arise from an injury or death to another person, are subject to the "each person" coverage limits of an automobile liability policy, with the amount paid to be pro-rated among all of the claimants. ***State Farm Mut. Auto. Ins. Co. v. Connolly ex rel. Connolly***, 212 Ariz. 417, 419, 132 P.3d 1197, 1199 (Ct. App. 2006). Any defenses available for use against the injured party (i.e. assumption of risk, comparative negligence, etc.) are also available against the lost consortium claimant. ***Quadrone v. Pasco Petroleum Co.***, 156 Ariz. 415, 417–18, 752 P.2d 504, 506–07 (Ct. App. 1987).

Loss of Spousal Consortium

A claim for loss of spousal consortium occurs when an injured party is unable to provide his or her spouse with "love, affection, protection, support, services, companionship, care, society, and in the marital relationship, sexual relations." ***Barnes v. Outlaw***, 192 Ariz. 283, 286, 964 P.2d 484, 487 (1998). "The purpose of a consortium claim is to compensate for the loss of these elements." *Id.* Arizona courts allow such a claim when the injured spouse has suffered mental and/or emotional injury only "since loss of consortium is no longer exclusively based on a deprivation of services theory." *Id.*

Spouses estranged at the time of injury, or not enjoying such "consortium" at the time of the injury, are unable to recover. *Barnes*, 192 Ariz. at 286, 964 P.2d at 487. "There must first be some basis to infer that affection or companionship was actually lost."). In ***Bain v. Superior Court***, 148 Ariz. 331, 335, 714 P.2d 824, 828 (1986), the Court held that a loss of consortium claim puts into issue the normalcy and quality of the relationship between the parties prior to the injury. Very personal information can be sought of the claimant regarding the nature of the pre-injury relationship as compared to the post-injury relationship, both during discovery and at trial. "Whether the marital relationship has been harmed enough to warrant damages in any given case is a matter for the jury to decide." *Barnes*, 192 Ariz. at 286, 964 P.2d at 487.

Loss of Filial Consortium

"[P]arents may maintain a cause of action for loss of their child's consortium when the child suffers a severe, permanent, and disabling injury that substantially interferes with the child's capacity to interact with his parents in a normally gratifying way." ***Pierce v. Casas Adobes Baptist Church***, 162 Ariz. 269, 272, 782 P.2d 1162, 1165 (1989). In ***Frank v. Superior Court***, 150 Ariz. 228, 231, 722 P.2d 955, 958 (1986), the court expanded the claim to include children having reached the age of majority. As a result, parents may have a cause of action for loss of consortium against a third party who negligently injures their adult child. *Id.*

Loss of Parental Consortium

Villareal v. State Dep't of Transp., 160 Ariz. 474, 477, 774 P.2d 213, 216 (1989), held that "children may recover for loss of consortium when a third party causes serious, permanent, and disabling injury to their parent." Arizona permits loss of consortium claims only when the parent suffers serious, permanent, disabling injury rendering the parent unable to provide love, care, companionship, and guidance to the child." *Id.* at 480. "The parent's mental or physical impairment must be so overwhelming and severe" as to destroy or nearly destroy the parent-child relationship. *Id.*

"To bring a consortium claim, the child/plaintiff must show that the defendant injured the child's parent in a manner that would subject the defendant to liability under ordinary tort principles." *Id.* at 481. The child of the injured parent "may recover for the loss of the parent's love, affection, protection, support, services, companionship, care, and society." *Id.* "In determining the amount of damages to award the child, relevant factors include, but are not limited to, the child's age, the nature of the child's relationship with the parent, the child's emotional and physical characteristics, and whether other consortium-giving relationships are available for the child." *Id.* at 481–82.

In *Villareal*, the court also reiterated that "[o]rdinarily, children's minority tolls the statute of limitations." *Id.* at 481 (citing A.R.S. § 12–502). "Minor children suffering injury may wait to bring an action until after they become eighteen years old, and the applicable statute of limitations runs from their eighteenth birthday." *Id.* However, "because a child's loss of consortium claim is derivative of the parent's personal injury claim," defendants may require joinder of the claims by appropriate motion to the trial court. *Id.* "This will avoid duplicate litigation and will allow settlement or finalization of all claims resulting from the defendant's conduct at the same time." *Id.* Nevertheless, if "the defendant does not request joinder, or if joinder is not feasible, the normal statute of limitations rules will apply." *Id.*

Hedonic Damages

Hedonic damages are those damages awarded to the plaintiff "for the loss of enjoyment of life's activities", or for the value of life itself, as measured separately from the economic productive value that an injured or deceased person would have had. ***Ogden v. J.M. Steel Erecting, Inc.***, 201 Ariz. 32, 38, 31 P.3d 806, 812 (Ct. App. 2001). Hedonic damages compensate the plaintiff for the monetary value associated with a loss of the everyday pleasures of life, as distinct from the economic or productive value of life. In *Ogden*, the court held that hedonic damages are distinguishable from, and not duplicative of, damages for pain and suffering. *Id.* at 38. The court explained that an "award for pain and suffering compensates the injured person for the physical discomfort and emotional response to the sensation of pain caused by the injury itself." *Id.* at 39. In contrast, hedonic damages "compensate for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations." *Id.*

Diminution of Quality of Life

Damages for diminution of quality of life flow from property damage claims involving toxic spills or the disposal of toxic wastes. Plaintiffs generally allege that these acts constitute a common law nuisance to neighboring property owners, causing them to endure the hardship of disruption to their daily routine of life. This category of damages is independent of personal physical injury and therefore is unrelated to the impairment to quality of life that is associated with pain and suffering damages.

Pre-Existing Condition, Unusually Susceptible Plaintiff

In tort actions, a plaintiff may recover damages for aggravation of a preexisting condition. *See*, *e.g.*, ***Kalaf v. Assyd***, 60 Ariz. 33, 36, 130 P.2d 1036, 1037 (1942). The plaintiff is not entitled to compensation for physical or emotional conditions that pre-existed the defendant's conduct. But if the defendant's fault aggravated a pre-existing physical or emotional condition of the plaintiff, the jury must decide the full amount of money that will reasonably and fairly compensate plaintiff for that aggravation or worsening – even if a normally healthy person would not have suffered similar injury. *See id.*; ***Papastathis v. Beall***, 150 Ariz. 279, 281, 723 P.2d 97, 99 (Ct. App. 1986) ("The trauma to a pre-existing condition causing the worsening of that condition was a substantial factor in [the decedent's] eventual death and is a basis for liability.").

Emotional Distress Damages

Arizona recognizes a distinct claim for negligent infliction of emotional distress – which occurs when the claimant has witnessed injury to another. ***Keck v. Jackson***, 122 Ariz. 114, 115, 593 P.2d 668, 669 (1979) ("damages for shock or mental anguish at witnessing an injury to a third person, occasioned by a defendant's negligence, are recoverable"). In order to recover for the tort of emotional distress: 1) the "shock or mental anguish of the plaintiff must be manifested as a physical injury;" 2) the damages must be caused by the emotional disturbance that occurred at the time of the accident (and not thereafter); 3) the plaintiff must be within the "zone of danger;" and 4) the plaintiff must have a close personal relationship with the person injured. *Keck*, 122 Ariz. at 115–16, 593 P.2d at 669–70. *See also* ***State Farm Mut. Auto. Ins. Co. v. Connolly ex rel. Connolly***, 212 Ariz. 417, 132 P.3d 1197 (Ct. App. 2006).

In regard to the zone of danger, "the plaintiff/bystander must himself have been in the zone of danger so that the negligent defendant created an unreasonable risk of bodily harm to him." *Keck*, 122 Ariz. at 116, 593 P.2d at 670. Additionally, the bystander must have a family relationship, or something closely akin thereto, to the victim in order to state an emotional distress claim. *See id.* ("the emotional distress must result from witnessing an injury to a person with whom the plaintiff has a close personal relationship, either by consanguinity or otherwise"). As a result, the Arizona Court of Appeals has held that a co-worker or friend of the injured person does not have a close enough relationship to state a negligent infliction claim. ***Hislop v. Salt River Project Agr. Imp. & Power Dist.***, 197 Ariz. 553, 558, 5 P.3d 267, 272 (Ct. App. 2000). However, where the claimant is himself a participant and victim, he can state a negligent infliction claim even if he did not know the person killed by the defendant's conduct. ***Ball v. Prentice***, 162 Ariz.

150, 152, 781 P.2d 628, 630 (Ct. App. 1989 (claimant stated a negligent infliction claim where he was involved in an accident and saw culpable driver of the other car killed as a result of the accident). Since the negligent infliction claim is not derivative, it probably would not be subject to the "each person" limitation as loss of consortium claims are. The issue remains unsettled in Arizona.

Pet owners cannot recover emotional distress or loss of companionship damages for the negligent injury or death of their pet. ***Kaufman v. Langhofer***, 223 Ariz. 249, 255–56, 222 P.3d 272, 278–79 (Ct. App. 2009). Arizona law treats pets as personal property and limits recovery of damages for their negligent injury or death to the fair market value of the pet at the time of its death. *Id.* at 252. *See also* A.R.S. § 1-215 (29).

Punitive Damages

Punitive damages are awarded to punish the defendant and to deter him and others from repeating similar conduct. ***Linthicum v. Nationwide Ins. Co.***, 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986). "In deciding whether punitive damages are awardable, the inquiry should be focused upon the wrongdoer's mental state." *Id.* "To recover punitive damages something more is required over and above the 'mere commission of a tort.'" *Id.* Rather, the "wrongdoer must be consciously aware of the wrongfulness or harmfulness of his conduct" and "consciously aware of the evil of his actions, of the spitefulness of his motives or that his conduct is so outrageous, oppressive or intolerable in that it creates a substantial risk of tremendous harm to others" such that "the evil mind required for the imposition of punitive damages may be found." *Id.* The plaintiff must prove this "evil mind" by clear and convincing evidence. *See* ***Olson v. Walker***, 162 Ariz. 174, 177, 781 P.2d 1015, 1018 (Ct. App. 1989) (award of punitive damages against intoxicated driver may only be had upon clear and convincing evidence of driver's evil mind").

An evil mind exists where: (a) the defendant intended to injure the plaintiff; or (b) his wrongful conduct was motivated by spite or ill will; or (c) where the defendant consciously pursues a course of conduct knowing that he creates a substantial risk of significant harm to others. *Linthicum*, 150 Ariz. at 330, 723 P.2d at 679. An evil mind can also be inferred when a defendant's conduct is so outrageous or egregious that it can be assumed he intended to injure or that he consciously disregarded the substantial risk of harm created by his conduct. ***Gurule v. Illinois Mut. Life & Cas. Co.***, 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987); ***Tritschler v. Allstate Ins. Co.***, 213 Ariz. 505, 517, 144 P.3d 519, 531 (Ct. App. 2006); ***Hyatt Regency Phoenix Hotel v. Winston & Strawn***, 184 Ariz. 120, 132, 907 P.2d 506, 518 (Ct. App. 1995). A jury may infer an evil mind if "defendant deliberately continued his actions despite the inevitable or highly probable harm that would follow" or when "a defendant continues a course of conduct with knowledge of the past harm caused by that conduct." ***Gurule***, 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987). "A claim for punitive damages requires proof of facts beyond those required to prove bad faith." ***Tritschler***, 213 Ariz. at 517, 144 P.3d at 531.

In determining whether to award punitive damages, the jury considers: (1) the severity of the defendant's conduct; (2) the conduct's duration; (3) the degree to which the defendant was

aware of the conduct or attempted to conceal it; and (4) the defendant's net worth. ***Hyatt Regency Phoenix Hotel Co.***, 184 Ariz. at 132, 907 P.2d at 518. The U.S. Supreme Court has held that the measure of punitive damages must be "reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 538 U.S. 408, 426 (2003) (noting that few punitive damage awards more than nine times the amount of compensatory damages would satisfy due process).

Amount of Damages

In ***Hudgins v. Southwest Airlines, Co.***, 221 Ariz. 472, 478, 212 P.3d 810, 816 (Ct. App. 2009), the Arizona Court of Appeals evaluated whether a punitive damages award was unconstitutionally excessive. To do so, the Court of Appeals applied the guideposts provided by ***BMW of North America, Inc. v. Gore***, 517 U.S. 559 (1996), evaluating "the degree of reprehensibility of the defendant's misconduct, the ratio between compensatory and punitive damages, and how the award compares with other penalties." *Hudgins*, 221 Ariz. at 490, 212 P.3d at 828 (citing *Gore*, 517 U.S. at 575). In *Hudgins*, the Court of Appeals ultimately determined that the ratio of punitive-to-compensatory damages of 8:1 was unconstitutionally excessive. *Id.* at 492. Reducing the punitive damages award to a 1:1 ratio, the court said the defendant's conduct fell on the low to middle range of the reprehensibility scale, and noted that compensatory damages were substantial in light of the actual injury. *Id.* In a similar case, ***Security Title Agency, Inc. v. Pope***, 219 Ariz. 480, 505, 200 P.3d 977, 1001 (Ct. App. 2008), the Court of Appeals reduced a punitive damages award from an approximately 6:1 ratio to a 1:1 ratio because the harm suffered was economic as opposed to physical, defendant's acts did not threaten health or safety, few reprehensible factors were present, and plaintiff received a substantial compensatory damage award.

4

INSURANCE COVERAGE

Duty To Defend And Indemnify

Standard liability policies require the insurer to defend the insured against all actions brought against the insured which are, judging by the allegations in the complaint, potentially within coverage of the policy. As a starting point, the insurer is under an obligation to defend only if it would be held bound to indemnify the insured in case the injured person prevailed upon the allegations of the complaint. *See* ***Kepner v. W. Fire Ins. Co.,*** 109 Ariz. 329, 331, 509 P.2d 222, 224 (1973) ("If the complaint in the action brought against the insured upon its face alleges facts which come within the coverage of the liability policy, the insurer is obligated to assume the defense of the action, but if the alleged facts fail to bring the case within the policy coverage, the insurer is free of such obligation.").

However, an insurer's duty to defend the insured is independent of, and not limited by the insurer's duty to indemnify. ***Quihuis v. State Farm Mut. Auto. Ins. Co.***, 235 Ariz. 536, 544, 334 P.3d 719, 727 (2014). The duty to defend is much broader*, id.*, and may be triggered even though the insurer is ultimately relieved of its duty to indemnify, i.e., actually pay the claims brought against the insured, ***Cont'l Cas. Co. v. Signal Ins. Co.***, 119 Ariz. 234, 238, 580 P.2d 372, 376 (Ct. App. 1978) ("The duty to defend is not synonymous with, nor determinative of the question of coverage.").

Generally, a liability insurer has only three options when requested to defend an insured. First, the insurer can defend unconditionally and without reservation of rights. Second, the insurer can defend under a reservation of rights, i.e., agree to provide a defense, while reserving its right to deny the duty to indemnify, depending upon policy language and ultimate resolution of the claims. The third option is for the insurer to refuse to defend the insured entirely. As will be discussed below, an insurer that chooses to defend under a reservation of rights, or chooses not to defend the insured at all, incurs risks.

Once an insurer accepts and assumes the duty to defend the insured, even if done mistakenly or voluntarily, the insurer must carry out the duty competently, diligently and in good faith. ***Lloyd v. State Farm Mut. Auto. Ins. Co.***, 176 Ariz. 247, 250, 860 P.2d 1300, 1303 (Ct. App. 1992). An insurer's voluntary assumption of the duty to defend may give rise to a cause of action for derelictions in that defense even when there is no actual coverage for the claims under the policy. *Id.* In *Lloyd*, the insured was driving a race car when the plaintiff was injured. *Id.* at 248. Although State Farm covered other of the insured's vehicles, this particular race car was not insured under the policy. *Id.* When the insured was sued, State Farm initially provided a defense to the insured but subsequently withdrew its representation when it determined that no coverage existed. *Id.*

at 248–49. The court held that State Farm's initial acceptance of the defense, although gratuitous, created an obligation to act with good faith and fair dealing during its defense, regardless of the fact that there was no coverage under the policy. *Id.* at 250–51. Consequently, a liability insurer can be found liable for bad faith even when the policy does not require the insurer to defend or indemnify the insured. *Id.* at 251 –52.

In some circumstances, multiple insurance companies can share the duty to defend. An insurer who has a duty to defend, but fails to do so, can be compelled to contribute its share of the defense costs. ***Home Indem. Co. v. Mead Reinsurance Corp.***, 166 Ariz. 59, 61–63, 800 P.2d 46, 48–50 (1990).

Although the language of many insurance policies suggests that the tender or exhaustion of policy limits relieves the insurer of the duty to defend, Arizona case law holds otherwise. The mere fact that a primary insurer has paid or tendered its policy limits does not extinguish the insurer's duty to defend the insured, nor does it relieve the insurer of its responsibility for continuing defense costs. ***California Cas. Ins. v. State Farm Mut. Auto. Ins. Co.***, 185 Ariz. 165, 168–69, 913 P.2d 505, 508–09 (Ct. App. 1996). Rather, an insurer's duty to defend terminates when the insurer tenders the policy limits and obtains from the claimant either a complete release or a covenant not to execute against the insured's assets. *Id.* Likewise, an insurer's tender of policy limits does not end the duty to defend in the absence of a judgment, settlement, or release completely protecting the personal assets of the insured. ***Continental Cas. Co. v. Farmers Ins. Co. of Ariz.***, 180 Ariz. 236, 237–38, 883 P.2d 473, 74–75 (Ct. App. 1994) (Farmers properly discharged its duty to defend, and owed no share of defense costs because Farmers had paid policy limits and secured release of all claims except claims covered by the excess carrier).

5

HEALTH CARE PROVIDER LIENS

In Arizona, an action is not assignable in whole or in part prior to the judgment. ***Harleysville Mut. Ins. Co. v. Lea***, 2 Ariz. App. 538, 541, 410 P.2d 495, 498 (1966) (injured party cannot assign his personal injury recovery to insurer to reimburse medical payments made). In addition, an insurer cannot be subrogated to the proceeds of the insured's personal injury action. ***Allstate Ins. Co. v. Druke***, 118 Ariz. 301, 303–04, 576 P.2d 489, 491–92 (1978); ***State Farm Fire & Cas. Co. v. Knapp***, 107 Ariz. 184, 185, 484 P.2d 180, 181 (1971). Where a policy creates "an interest in any recovery against a third party for bodily injury . . . [s]uch an arrangement, if made or contracted for prior to settlement or judgment, is the legal equivalent of an assignment and therefore unenforceable." *Allstate*, 118 Ariz. at 304, 576 P.2d at 492.

Exceptions to the general rule against subrogation and assignment exist. For example, under A.R.S. § 20-259.01, an insurer has a right of subrogation and the right to sue for reimbursement "of the total amount of the payments in the name of the insured against any uninsured motorist responsible for the damages to the injured." A.R.S. § 20-259.01(I). In addition, health care providers in Arizona who render treatment to injured persons resulting from the fault of another, or health insurers who pay for the medical treatment, may have a right of subrogation (reimbursement) against the injured person's tort recovery. The mechanism by which these rights are secured is referred to as a medical or health care provider lien.

This chapter focuses on the following health care provider liens:

1. Statutory health care providers liens pursuant to A.R.S. § 33-931;
2. Arizona Health Care Cost Containment System (AHCCCS) – Arizona Medicaid liens;
3. ERISA liens; and
4. Medicare's right of reimbursement.

Statutory Health Care Providers Liens (A.R.S. § 33-931 et seq.)

Pursuant to A.R.S. § 33-931, health care providers who treat injured persons arising from the fault of another are entitled to a lien against the injured person's tort recovery for the reasonable and customary charges of the treatment rendered. The purpose of allowing health care provider liens is to "lessen the burden on hospitals and other medical providers imposed by non-paying accident cases." ***LaBombard v. Samaritan Health Servs.***, 195 Ariz. 543, 548, 991 P.2d 246, 251 (Ct. App. 1998) (citation omitted).

The lien created under this statute attaches solely to proceeds the injured party receives; the health care provider may not pursue an action to enforce its lien directly against the injured party. *See* ***Blankenbaker v. Jonovich***, 205 Ariz. 383, 384, 71 P.3d 910, 911 (2003) (A.R.S. § 33-394 allows an action to enforce a health care provider lien only against those liable to an injured person, not against the injured person); A.R.S. § 33-394. In addition, statutory health care provider liens apply only to third-party tort recoveries; first party underinsured and uninsured motorist proceeds and liens and/or claims for subrogation by health insurance companies are specifically exempt. A.R.S. § 33-931 ("except health insurance, and underinsured and uninsured motorist coverage as defined in section 20-259.01").

In 2014, A.R.S. § 33-931 was preempted by ***Abbott v. Banner Health Network***, 236 Ariz. 436, 341 P.3d 478 (Ct. App. 2014). In *Abbott*, the Court of Appeals addressed "whether hospitals who accept payment from the Arizona Health Care Cost Containment System ("AHCCCS") for services rendered to AHCCCS patients ("Patients") can later seek to impose and enforce liens on funds the Patients have obtained from third-party tortfeasors related to the Hospital services provided." *Id.* at 438. The hospitals claimed that by entering into accord and satisfaction agreements, the Patients could not now seek to declare the liens unenforceable." *Id.* The Court held that "the accord and satisfaction agreements are void because, as the Patients argue, federal law preempts Arizona law to the extent state law allows the liens. Since the liens themselves are void under federal law, the accord and satisfaction agreements are also unenforceable." *Id.* In 2016, *Abbott v. Banner Health Network*, 236 Ariz. 436, 341 P.3d 478 (Ct. App. 2014), was reversed by ***Abbott v. Banner Health Network***, 239 Ariz. 409, 411, 372 P.3d 933, 935 (2016). Here, the Arizona Supreme Court held that, although "Arizona's lien statutes are preempted by federal law," the settlement agreements at issue "were supported by adequate consideration and addressed a proper subject matter." *Id.* at 411. "Consequently, the accord and satisfaction agreements are valid." *Id.*

In 2020, the Arizona Supreme Court declared A.R.S § 33-931 (A) unconstitutional as applied. ***Ansley v. Banner Health Network***, 248 Ariz. 143, 459 P.3d 55 (2020). In *Ansley*, plaintiffs were treated at hospitals under the Arizona Health Care Cost Containment System ("AHCCCS"), which is the state's contract provider for the federal Medicaid program and negotiates reimbursement rates with hospitals. *Id.* at 145-46. The hospitals recorded liens against the third-party tortfeasors who caused the patients' injuries to recover the remainder of their customary fees beyond Medicaid reimbursement. *Id.* A.R.S § 33-931(A) allows medical providers to secure "a lien for the care and treatment ... of an injured person" in an amount equal to their "customary charges for care." *Id.* Moreover, A.R.S. § 36-2903.01(G)(4) provides that a "hospital may collect any unpaid portion of its bill from other third-party payors."

The plaintiffs filed a class action challenging the liens, contending that the authorizing statutes violate federal Medicaid law, specifically 42 U.S.C. § 1396a(a)(25)(C) and 42 C.F.R. § 447.15. *Id*. The regulation, which implements the statute, provided that state Medicaid plans must limit participation to "providers who accept, as payment in full, the amounts paid by the agency plus any deductible, coinsurance or copayment required by the plan to be paid by the individual."

The Arizona Supreme Court held that Medicaid patients had a private right of action against hospitals to enforce the Medicaid provisions concerning balance billing. *Id.* at 63-64. The court also held that Federal law preempted Arizona's lien statutes as applied to secure payment from third-party tortfeasors for the difference between Medicaid reimbursement and the hospitals' actual costs. *Id.* at 64. The Code of Federal Regulations expressly provided that "a State plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the agency plus any deductible, coinsurance or copayment required by the plan to be paid by the individual. *Id*. Thus, A.R.S. § 33-931(A) is unconstitutional as applied to AHCCCS patients for balance billing purposes as it has been preempted by Federal law.

Perfection Requirement

To be valid and enforceable, a lien pursuant to this statute must be perfected in compliance with A.R.S. § 33-932. To perfect a lien under § 33-932, the lien holder must record in the county where the treatment was rendered, within 30 days of the first date of service, a lien setting forth the following information:

1. The name and address of the patient;
2. The name and address of the health care provider;
3. The name and address of the executive officer or agent of the health care provider, if any;
4. The dates of services and treatment received;
5. The amount claimed due; and
6. The name of those alleged to be responsible for paying the damages, i.e., the tortfeasor and the tortfeasor's insurance company

A.R.S. § 33-932(A). In addition to timely recordation, A.R.S. § 33-932 now requires that the lien holder send a copy of the lien via first class mail to all named persons within 5 days after recording the claim or lien. A.R.S. § 33-932(C).

"Treatment Continuing"

Liens that are recorded with "treatment continuing" language are valid for the final amount billed as opposed to the amount listed on the lien. *See* A.R.S. § 33-932(B) ("Amounts incurred during the continued period are also subject to the lien."). There is no requirement to re-record with the final amount billed.

Special Rules for Hospitals and Ambulance Companies

Hospitals and ambulance companies are not required to name the tortfeasor and his/her insurance company, as described in A.R.S. § 33-932(A)(6). In addition, hospitals and ambulance companies are not required to record within 30 days of service. Rather, a hospital or ambulance

company need only record 30 days before the date the settlement is agreed to or the date the judgment is paid in order to have a valid enforceable lien. A.R.S. § 33-932(D). Finally, pursuant to A.R.S. § 33-931(D), hospitals take priority over all other liens authorized by A.R.S. § 33-931, but not as to other forms of recovery, such as AHCCCS. *See* A.R.S. § 33-931(D) ("Liens perfected pursuant to this article by a hospital have priority for payment over all other liens authorized by this article.").

Enforcement

A perfected statutory health care provider lien is enforceable against the patient's recovery, the liable tortfeasor, or the tortfeasor's insurance company for two years after judgment/settlement. *See* A.R.S. § 33-934(A)–(B). Although A.R.S. § 33-934 permits a lien holder to pursue its lien against the patient's recovery, it does not permit a lien holder to pursue the patient beyond the amount of tort recovery, i.e., the patient's personal assets. ***Blankenbaker v. Jonovich***, 205 Ariz. 383, 387, 71 P.3d 910, 914 (2003). Moreover, the lien holder is only entitled to recover the "customary charges" for reasonable and necessary medical treatment. *Id.* at 388; *see* A.R.S. § 33-931(A) (*declared unconstitutional as applied* in ***Ansley v. Banner Health Network***, 248 Ariz. 143, 459 P.3d 55 (2020)); 33-934(B).

Health Care Providers Who Accept AHCCCS and/or Medicare Benefits

Health care providers who accept AHCCCS and/or Medicare benefits are prohibited from pursuing a "balance bill lien" for the difference between the billed charges and the AHCCCS and/or Medicare payment. *See* ***Lizer v. Eagle Air***, 308 F. Supp. 2d 1006, 1009 (D. Ariz. 2004); 42 U.S.C. § 1395cc(a)(1)(A); 42 C.F.R. 489.21(a).

Defenses to Enforcement

A defendant in a lien enforcement action cannot argue that it is not liable for the underlying accident giving rise to the lien. *See* A.R.S. § 33-934(B) ("The defendant in the lien or assignment action cannot raise as a defense in that action that it is not liable for the amount it is obligated to pay under the judgment or settlement"). The only available defenses to a lien enforcement action are: (1) that the charges sought are "erroneous or exceed the customary charges;" and/or (2) "that the care, treatment or transportation giving rise to the charges was not medically necessary or causally related to the event giving rise to the claim to which the lien or assignment extends." *Id.* The lien holder has the burden to prove the treatment was "customary," and that the care or treatment was reasonable and necessary. Consequently, when defending an action to enforce a lien, it is important to determine first whether the treatment was reasonable and necessary, and second whether the charges sought are truly customary. If not, it might be possible to negotiate a reduction on those grounds.

Resolving Statutory Health Care Providers Liens

The Common Fund Doctrine

Even if the treatment was reasonable and the charges customary, health care providers pursuing a lien under A.R.S. § 33-931 are required to reduce the lien by an amount that represents a pro-

rata share of the legal expenses incurred in securing the tort recovery. ***LaBombard v. Samaritan Health Systems***, 195 Ariz. 543, 549, 991 P.2d 246, 252 (Ct. App. 1998). The purpose of the "common fund doctrine," as it is often called, is to "ensure fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses . . . ." *Id.* For example, a litigant who recovers $50,000 and faces a health care provider lien in the amount of $20,000 can argue, under the common fund doctrine, that the lien should be reduced by a proportionate share of the attorneys' fees and legal expenses incurred in securing the judgment. Assuming for purposes of this example that the attorneys' fees are 25% of the settlement, and the expenses incurred were $5,000, the total "cost" associated in securing the judgment is $17,500, or 35% of the settlement amount. The lien holder is then asked to reduce its lien by the same percentage, which in this case would be a reduction of $7,000.

Arizona Health Care Cost Containment System (AHCCCS) Liens (A.R.S. § 36-2915 et seq.)

Under federal law, every state that participates in the Medicaid program is required to enact statutes to provide for the reimbursement of expenses paid on behalf of Medicaid beneficiaries. *See* 42 U.S.C. § 1396a(a)(25)(B), (H), (I). Arizona participates in the federal Medicaid program through AHCCCS, the State agency that provides medical care and treatment to the indigent. Under A.R.S. § 36-2915(A), AHCCCS is entitled to pursue a lien against "any third party or . . . monies payable from accident insurance, liability insurance, workers' compensation, health insurance, medical payment insurance, underinsured coverage, uninsured coverage, or any other first or third party source."

Perfection Requirement

To perfect a lien pursuant to A.R.S. § 36-2915(B), the AHCCCS lien holder must record, within 60 days from either the date of hospital discharge or the first date of service, in the county in which the injuries were incurred, a lien setting forth the following:

1. The name and address of the patient;
2. The name and address of the administration;
3. The dates of service and treatment;
4. The amount charged; and
5. The names and addresses of those alleged to be responsible for the injuries giving rise to the treatment.

In addition, the AHCCCS lien holder must, within 5 days of recording the lien, mail a copy of the lien to the patient and each person or entity alleged to be responsible for the damages. A.R.S. § 36-2915(B).

Alternative Recovery Under A.R.S. § 12-962

An AHCCCS lien holder that fails to properly record its lien as required by A.R.S. § 36-2915(B) may still recover the expenses paid on behalf of the plan beneficiary under A.R.S. § 12-962. However, recovery under A.R.S. § 12-962 is limited to only third party proceeds. *See* ***Ariz. Health Care Cost Containment Sys. v. Bentley***, 187 Ariz. 229, 234, 928 P.2d 653, 658 (Ct. App. 1996) (noting that AHCCCS' lien rights under A.R.S. § 36-915 do not preempt AHCCCS recovery under A.R.S. § 12-962); ***Ariz. Dep't of Admin. v. Cox***, 222 Ariz. 270, 278 n.6, 213 P.3d 707, 716 n.6 (Ct. App. 2009) (noting that A.R.S. § 12-962 does not permit the state to recover anything other than what is recovered from the third party).

Enforcement

Under A.R.S. § 36-2916(B), the AHCCCS lien holder may enforce its lien against the patient, the tortfeasor, or the tortfeasor's insurance company. Alternatively, should the AHCCCS lien holder choose to pursue its right of subrogation under A.R.S. § 12-962, it may do so by initiating a direct action against the tortfeasor or the AHCCS beneficiary's tort recovery, or by intervening in an existing third party personal injury action brought by the AHCCCS beneficiary. A.R.S. § 12-962(B).

Priority and Statute of Limitations

AHCCCS liens pursuant to A.R.S. § 36-2915 have priority over liens by the Department of Economic Security, the counties, statutory health care provider liens pursuant to A.R.S. § 33-931, and claims against a third-party payor. A.R.S. § 36-2915(F). An AHCCCS lien holder has 2 years from the date of entry of the judgment or the making of the settlement or compromise in order to pursue its lien rights. A.R.S. § 36-2916(B).

Resolving AHCCCS Liens

To determine whether an AHCCCS lien exists, one should begin by looking up the third-party administering entity. In rare circumstances will a lien be filed on behalf of AHCCCS itself. In Arizona, common AHCCCS entities include Mercy Care Plan and APIPA, among others.

An AHCCCS lien holder is required to reduce its lien if, after considering the following factors, it determines that the reduction" provides a settlement of the claim that is fair and equitable":

1. The nature and extent of the person's injury or illness;

2. The sufficiency of insurance or other sources of indemnity available to the person; and

3. Any other factor relevant for a fair and equitable settlement under the circumstances of a particular case.

A.R.S. § 36-596.01(I). Note, however, that 15 days after being put on notice of a settlement, the AHCCCS lien amount becomes final and cannot be amended. A.R.S. § 36-2915(G).

An AHCCCS lien holder is not required to reduce the federal portion of the benefits paid, which can account for up to 30%. ***Eaton v. Ariz. Health care Cost Containment Sys.***, 206 Ariz. 430, 79 P.3d 1044 (Ct. App. 2003). The only exception to this rule occurs when a plaintiff recovers less than the full value of his/her claim, in which case the AHCCCS lien holder is only entitled to recover a pro-rata share of what it paid on behalf of the injured person, less a deduction for litigation expenses consistent with the "common fund doctrine." ***Southwest Fiduciary v. Ariz. Health Care Cost Containment Sys.***, 226 Ariz. 404, 249 P.3d 1104 (Ct. App. 2011).

Medicare's Right of Reimbursement: Part A & B Coverage

Medicare provides health insurance and medical benefits for the following:

- People aged 65 or older
- People under 65 who have been receiving Social Security Disability Income (SSDI) for 24 continuous months
- People of any age with End-Stage Renal Disease (ESRD)

Once an individual becomes eligible for Medicare Part A (which covers hospital care) and Part B (which covers physician care), he or she can opt to enroll in a Part C, or Medicare Advantage Plan. Medicare's right to reimbursement with respect to payments made under Part A & B plans are distinct from the reimbursement rights which apply to payments made under Part C. Thus, this section addresses them separately.

Medicare Secondary Payer Act of 1980

Medicare's lien rights are governed by the Medicare Secondary Payer (MSP) Act of 1980, codified at 42 U.S.C. § 1395y(b)(2)(B)(ii). Prior to the enactment of the MSP Act, Medicare was the "primary payer" of medical bills for its beneficiaries and could not seek reimbursement. The MSP Act now provides that Medicare is the "secondary payer" of medical bills after primary healthcare insurance, Workers' Compensation, automobile insurance coverage and other liability plans. To facilitate the coordination of treatment and benefits, however, Medicare often pays the medical expenses of its beneficiaries up front as a "conditional payment." 42 U.S.C. § 1395y(b)(2)(B). Medicare is then entitled to reimbursement of the conditional payment from the beneficiary's primary plan. *Id.*

Perfection Requirement

No formal perfection requirements are required for Medicare to have a valid enforceable lien. Rather, the right of reimbursement arises upon Medicare's issuance of a conditional payment on behalf of the beneficiary. Note that Medicare's rights to recover from tortfeasor's insurance policies under the MSP Act are essentially rights of subrogation, even though Medicare's rights are referred to as a lien.

Enforcement

Medicare may initiate an action to enforce its liens against all those involved in the personal injury action, including the plaintiff and his or her attorney, the tortfeasor, and the insurance carrier. *See* 42 U.S.C. § 1395y(b)(2)(B). Medicare has 6 years from the date it learns of the settlement or recovery to enforce its lien rights. 28 U.S.C. § 2415(a).

Medicaid's share of a settlement may not exceed the portion of the settlement that represents medical expenses. ***Arkansas Dep't of Health and Human Services v. Ahlborn***, 547 U.S. 268 (2006).

Resolving Medicare Liens

Resolving and negotiating Medicare liens requires an understanding of the Medicare claims process through which Medicare formally asserts its right of reimbursement. Following is a brief description of the procedure in place at the time of writing. For the most current information on the Medicare claims process, visit www.msprc.info.

Medicare pursues its right of reimbursement through the Medicare Secondary Payer Contractor (MSPRC). Whenever a Medicare beneficiary initiates a personal injury action, a claim is opened with the Coordination of Benefits Contractor (COBC). Upon receipt of the claim, the MSPRC issues a Rights and Responsibilities letter, setting forth Medicare's right of reimbursement and the beneficiary's responsibility to report information to Medicare in conformance with the claims process. A Conditional Payment letter is issued 65 days later, and sets forth an itemized list of expenses that Medicare claims it paid on behalf of the beneficiary for the subject accident or incident. If any of the charges listed are disputed, i.e., because they are not accident related, the MSPRC will review the dispute, and may issue a revised Conditional Payment Letter.

Once the case is settled or judgment entered, a Final Settlement Detail is submitted which lists the date and amount of the settlement, and any attorneys' fees and costs incurred. The MSPRC then issues a Final Lien Demand letter which formally sets forth the amount Medicare is seeking in reimbursement. Medicare is required to, at a minimum, reduce its lien by a pro-rata share of the attorneys' fees and costs incurred in securing the judgment. 42 C.F.R. § 411.37(a).

The beneficiary has 60 days from the receipt of the Final Demand letter to pay the amount due before interest and penalties begin accruing, unless an administrative remedy is pending. *See* ***Haro v. Sebelius***, 747 F.3d 1099 (9th Cir. 2014) ("If Medicare is not reimbursed within 60 days after notice of the primary insurer's payment, the Secretary is entitled to charge interest on the reimbursement amount."). Administrative remedies include compromise, waiver and appeal. *See* 42 C.F.R. § 405.376 (compromise); 42 U.S.C. § 1395gg (waiver); and 42 U.S.C. § 1395ff (administrative appeal).

Medicare Advantage's Right of Reimbursement: Part C Plans

Unlike Medicare Part A & B, Medicare Advantage Plans are administered by private insurers and governed by separate statutes. 42 U.S.C. § 1395w-21 *et seq.* These statutes permit, but do not require, a Medicare Advantage Plan to allow recovery against a primary plan (whereas payments

made under Part A & B coverage "shall be conditioned" upon reimbursement by a primary plan). *Compare* 42 U.S.C. § 1395y(b)(2), *with* 42 U.S.C. § 1395mm(e)(4). Courts have said this reflects Congress' intent not to give these plans the same reimbursement rights as the Medicare program. *See* ***Care Choices HMO v. Engstrom***, 330 F.3d 786 (6th Cir. 2003); ***Nott v. AETNA U.S. Healthcare, Inc.***, 303 F. Supp. 2d 565 (E.D. Pa. 2004). These courts have further held that Medicare Advantage Plan statutes create a right of reimbursement without providing a remedy to enforce that right. *See Nott*, 303 F. Supp. 2d at 571 ("[W]hile granting statutory permission to include recovery provisions in their contracts, Congress did not create a mechanism for the private enforcement of subrogation rights of Medicare substitute[s]."). Even after the Medicare Advantage statutes were amended in 2005 to give Medicare Advantage Plans the same rights as the Medicare program under 42 U.S.C. § 1395 *et seq*., courts continue to reject Medicare Advantage Plans' attempts to enforce lien rights under federal law. *See, e.g.*, ***Parra v. PacifiCare of Arizona, Inc.***, 715 F.3d 1146 (9th Cir. 2013). *But see* ***In re Avandia Mktg., Sales Practices and Products Liab. Litig.***, 685 F.3d 353, 356 (3d Cir. 2012) (holding that insurance company had private right of action under Medicare Secondary Payer Act).

In April 2013, the Ninth Circuit held in *Parra* that the Medicare statutes did not grant a Medicare Advantage Plan a private right of action to enforce its lien rights in federal court. *Parra*, 715 F.3d at 1153. Thus, after *Parra*, a Medicare Advantage Plan in Arizona will have to proceed in state court to enforce its lien rights. However, given that state courts since *Druke* have declined to enforce liens in the face of Arizona's anti-subrogation provisions, it remains to be seen whether a Medicare Advantage Plan's lien rights will be enforceable in Arizona. To the extent a Medicare Advantage Plan is deemed to have no enforceable lien rights, it would likewise have no future interest in the recovery and cannot demand a Medicare Set Aside. *But see* ***Estate of Ethridge v. Recovery Mgmt. Sys., Inc.***, 235 Ariz. 30, 34, 326 P.3d 297, 301 (Ct. App. 2014) ("Although the Part C authorization provision does not, by itself, require reimbursement, other provisions of Medicare Part C—in conjunction with its associated regulations—grant to Medicare Advantage plans the right to obtain reimbursement from the settlement of claims seeking recovery of medical expenses paid for plan enrollees. And, this right preempts Arizona's anti-subrogation doctrine.").

Medicare Set Aside

Workers' Compensation Cases

The Medicare statutes specifically mandate that settlement funds in workers' compensation cases earmarked for future medical treatment be "set aside." Once those funds are exhausted, Medicare assumes liability for any further medical expenses.

Third Party Liability Cases

Unlike workers' compensation cases, no specific statutes require a Medicare Set Aside (MSA) in third party liability cases. Moreover, Medicare recently indicated that it would not require or consider a MSA in a third party liability case where a beneficiary's treating physician certifies in writing that the accident-related injuries have resolved and no further treatment is required. *See*

CMS Memorandum: "Medicare Secondary Payer – Liability Insurance (Including Self-Insurance) Settlements, Judgments, Awards or Other Payments and Future Medicals," INFORMATION, September 30, 2011. Nonetheless, in light of Medicare's overall mandate that its payments are secondary to those that are made, or can reasonably be expected to be made, by a primary plan, it is important to consider an MSA in liability settlements where future medical expenses are specifically allocated by a jury on the verdict form, or where future medical expenses are paid as part of a personal injury settlement.

Wrongful Death Proceeds

When a liability insurance payment is made pursuant to a wrongful death action, Medicare may recover from the payment only if the state statute permits recovery of these medical expenses. *See* Medicare Secondary Payer Manual § 50.5.4.1.1. In Arizona, damages recoverable in a wrongful death action "shall not be subject to debts or liabilities of the deceased, unless the action is brought on behalf of the decedent's estate." A.R.S. § 12-613. Accordingly, in Arizona, Medicare may only enforce its right of reimbursement against wrongful death proceeds if the claim is brought on behalf of the estate. Beyond that, Medicare cannot enforce its lien against recoveries paid to beneficiaries of a wrongful death claim. *Id.*; *see also* ***Gartin v. St. Joseph's Hospital and Medical Center***, 156 Ariz. 32, 34, 749 P.2d 941, 945 (Ct. App. 1988) (holding that only the estate can make a survival claim for the medical expenses incurred by the decedent before his or her death).

New Medicare Reporting Requirements

As of January 1, 2012, all insurers (including no-fault and self-insured policies) are required to report first and third party personal injury settlements, verdicts or awards to Medicare whenever Medicare paid medical expenses on behalf of its beneficiary that are compensated as part of the recovery. This change is the result of the implementation of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), which effectively shifted the burden to the insurer to put Medicare on notice of settlements so that Medicare can pursue its statutory right of reimbursement. 42 U.S.C. § 1395y(b)(7), (b)(8). A Registered Reporting Entity (RRE) that fails to comply can be fined $1,000 per day for failing to report and faces "double damages," i.e., double the amount Medicare paid on behalf of the beneficiary for expenses related to the subject incident.

6

ARIZONA EMPLOYMENT LAW

Arizona Employment Protection Act (A.R.S. § 23-1501)

Employment in Arizona is presumed to be at-will. This means that an employer may discharge an employee for any reason or for no reason at all, with or without notice. An employer, however, may not discharge an employee for a reason that violates Arizona's public policy or Arizona's employment laws. The public policy of the state is codified in the Arizona Employment Protection Act, A.R.S. § 23-1501.

History of the AEPA

Prior to the enactment of the Arizona Employment Protection Act (AEPA), a number of court decisions recognized exceptions to the at-will rule, such as when termination contravened public policy or where there were implied promises of job security. For example, in ***Wagenseller v. Scottsdale Mem'l Hosp.***, 147 Ariz. 370, 378, 710 P.2d 1025, 1033 (1985), *superseded in part* by A.R.S. § 23-1501, the Arizona Supreme Court held that an employer may be liable for civil damages if the employer discharges an employee for a reason that contravenes public policy. In so holding, the court reasoned that it had independent authority to determine what actions of the employer violated the public policy of the state. *Id.* at 380.

In 1996, in response to the *Wagenseller* line of cases, the Legislature enacted the AEPA. The AEPA sharply circumscribed common law claims for wrongful termination by, among other things:

- abolishing implied oral employment contracts altering at-will employment, and making only express written contracts actionable as an exception to the at-will doctrine;
- limiting the instances in which a wrongful discharge claim could be brought; and
- Preventing employees from bringing common law claims for wrongful termination when the statute alleged to be violated provided a remedy for its violation.

When May An Employer Be Liable Under the AEPA?

According to A.R.S. § 23-1501(3), an employee must demonstrate one of the three following theories of liability in order to state a claim for wrongful termination under the AEPA:

1. termination in breach of a qualifying employment contract;
2. termination in violation of a specific statute; or

3. retaliatory termination.

Termination in Breach of A Qualifying Written Contract

When Does a Written Contract Qualify?

To be actionable under the AEPA, a written contract must:

1. State that the employment relationship has a specified duration, or otherwise expressly restrict the right of either party to terminate the employment relationship; and

2. Be signed by both parties, or the party to be charged, or clearly set forth an express intent for it to be an employment contract

A.R.S. § 23-1501(2). "Partial performance of employment shall not be deemed sufficient to eliminate the requirements" of § 23-1501(2). In addition, § 23-1501(2) does not "affect the rights of public employees under the Arizona Constitution and state and local laws or the rights of employees and employers as defined by a collective bargaining agreement." § 23-1501(2).

How The Courts Determine Whether a Document Qualifies

In determining whether an employment contract or other document satisfies the requirements of A.R.S. § 23-1501(2), the courts apply common law principles of contract interpretation and give effect to the parties' intent. ***Johnson v. Hispanic Broadcasters of Tucson, Inc.***, 196 Ariz. 597, 599, 2 P.3d 687, 689 (Ct. App. 2000). In *Johnson*, the court of appeals stated that if the employment agreement is reasonably susceptible to the interpretation that it guaranteed the employee employment for a specific length of time, thus restricting the employer from terminating him, extrinsic evidence is admissible to interpret the agreement's terms, but not to supply a required element. *Id*.

Although the AEPA requires contracts to be in writing to be actionable, contract terms limiting the right of the employer or employee to terminate the employment relationship can be either express or implied. ***Roberson v. Wal-Mart Stores***, 202 Ariz. 286, 291, 44 P.3d 164, 169 (Ct. App. 2002). "In Arizona, implied-in-fact terms may be found in an employer's policy statements regarding job security or employee disciplinary procedures, such as those contained in personnel manuals or memoranda." *Id.* "Not all employer policy statements, however, create contractual promises." *Id.* "An implied-in-fact contract term is formed when 'a reasonable person could conclude that both parties intended that the employer's (or the employee's) right to terminate the employment relationship at-will had been limited.'" ***Demasse v. ITT Corp***, 194 Ariz. 500, 505, 984 P.2d 1138, 1143 (1999) (internal citation omitted).

How to Avoid A Court Finding An Implied-in-Fact Contract Term

Including in personnel manuals disclaimers that clearly and conspicuously tell employees that the manual is not part of the employment contract, and that their jobs are terminable at-will, helps insulate an employer from liability. *See, e.g.*, ***Hart v. Seven Resorts, Inc***., 190 Ariz. 272, 278, 947

P.2d 846, 852 (Ct. App. 1997) (holding that the employer prevented the personnel manual from converting an at-will relationship into one for a definite term by including a disclaimer in "plain and common language"); ***Duncan v. St. Joseph's Hosp. & Med. Ctr.***, 183 Ariz. 349, 356, 903 P.2d 1107, 1114 (Ct. App. 1995).

Damages for Breach of Contract Under the AEPA

A.R.S. § 23-1501(3)(a) limits the damages a terminated employee can recover under the AEPA for breach of contract. An employee who prevails on a breach of contract claim under the AEPA is entitled to recover the value of all sums that would have been due from the time of the breach through the end of the agreement, less any sums that reasonably could have been earned from substitute employment before the end of the agreement. Tort damages, on the other hand, including lost earnings, diminution in future earning capacity, lost insurance coverage, mental anguish/emotional distress, reputational harm, punitive damages, etc., are not recoverable for termination in breach of an employment contract.

Mitigation of Damages

A terminated employee is required to make reasonable efforts to reduce damages by trying to find substantially similar employment. However, a terminated employee need not accept employment that is not substantially similar to his or her prior employment, nor does the terminated employee have a responsibility to accept employment that imposes an undue burden or hardship.

Statute of Limitations

Under A.R.S. § 12-541(3), claims for damages for breach of an oral or written employment contract, "including contract actions based on employee handbooks or policy manuals that do not specify a time period in which to bring an action," must be brought within one year after the cause of action accrues.