CHAPTER 1: GENERAL TORT LIABILITY

To pursue a tort claim against a defendant, a plaintiff must prove the defendant (a) owed plaintiff a duty of care, (b) breached that duty (acted unreasonably or fell below the applicable standard of care), (c) caused plaintiff harm, and (d) plaintiff's damages**. *Lorenz v. State***, 238 Ariz. 556, 558, 364 P.3d 475, 477 (Ct. App. 2015). Generally, a defendant will owe a duty to a plaintiff only if they had a relationship (for example, innkeeper/guest), if the defendant undertook such a duty, if a statute created a duty between them (such as dog owner/invitee), or if public policy recognizes a duty imposed on one to act reasonably towards another (such as driver/other drivers on the road). ***Quiroz v. ALCOA Inc***., 243 Ariz. 560, 416 P.3d 824 (2018). Whether the defendant owes the plaintiff a duty of care is a threshold issue of law for the court. ***Gipson v. Kasey***, 214 Ariz. 141, 150 P.3d 228 (2007). Finally, courts cannot consider foreseeability when making determinations of duty. ***Cal-Am Properties Inc. v. Edais Eng'g Inc.***, 253 Ariz. 78, ___, ¶ 7, 509 P.3d 386, 389 (2022).

The other elements of a tort claim—breach, causation, and damages—are usually factual issues for the jury. *Gibson,* 214 Ariz. at 143. But summary judgment can be appropriate on these issues if no reasonable juror could conclude on the record presented by the plaintiff that the defendant breached the standard of care or proximately caused the claimed damages. *Id*.

INTENTIONAL TORTS

Conduct can be considered an intentional tort only "if the actor desired to cause the consequences and not merely the act itself, or if he was certain or substantially certain that the consequences would result from the act." ***Mein v. Cook***, 219 Ariz. 96, 193 P.3d 790 (Ct. App. 2008). *See also* RESTATEMENT (THIRD) OF TORTS: Phys. & Emot. Harm § 1. Types of intentional torts include assault, battery, false imprisonment, malicious prosecution (wrongful institution of civil proceedings in the civil context), and intentional infliction of emotional distress. It is beyond this Chapter's scope to address all intentional torts, but intentional infliction is a claim that plaintiffs routinely allege.

Intentional Infliction of Emotional Distress

A plaintiff claiming intentional infliction of emotional distress must prove (a) defendant's conduct was extreme and outrageous, (b) the defendant either intended to cause emotional distress or recklessly disregard the near certainty that such distress will result from his/her conduct; and (c) the distress was severe. ***Mintz v. Bell Atl. Sys. Leasing Intern, Inc***., 183 Ariz. 550, 562-63, 905 P.2d 559, 553-54 (1995); ***Ford v. Revlon, Inc***., 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987). The trial court determines whether the defendant's conduct is sufficiently extreme and outrageous to state a claim for intentional infliction. *Mintz*, 183 Ariz. at 563, 905 P.2d at 554. The plaintiff must show that the defendant's acts were "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id*. Only when reasonable minds can differ in determining whether conduct is sufficiently extreme or outrageous does the issue go to the jury. *Id*. Conduct that is callous and insensitive, and certain to cause emotional distress, but is merely a defendant's

insistence upon his/her legal rights in a permissible way, does not rise to the level of extreme and outrageous. *See Mintz*, 183 Ariz. at 564, 905 P.2d at 555.

"A line of demarcation should be drawn between conduct likely to cause mere 'emotional distress' and that cause 'severe emotional distress.'" ***Midas Muffler Shop v. Ellison***, 133 Ariz. 194, 199, 650 P.2d 496, 501 (Ct. App. 1982) (citation omitted); *see also* RESTATEMENT (THIRD) OF TORTS § 46 cmt. j (1965) (liability only arises when emotional distress is extreme; "Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people."). Thus, crying, being stressed and upset, and occasional trouble sleeping are typically not enough to establish severe emotional distress. *Midas*, 133 Ariz. at 199.

NEGLIGENT TORTS

Negligence is the failure to exercise reasonable care under all the circumstances. RESTATEMENT (THIRD) OF TORTS: Phys. & Emot. Harm § 3 Negligence. A plaintiff can claim the defendant was negligent in any number of ways. It is beyond this Chapter's scope to discuss every way in which a plaintiff can claim a defendant was negligent. But particular negligence claims are discussed below.

There can be no claim for negligent use of intentional force. ***Ryan v. Napier***, 245 Ariz. 54, 425 P.3d 230, 236 (2018).

Negligent Infliction of Emotional Distress

A claim for negligent infliction of emotional distress requires the plaintiff to witness an injury to a third person, resulting in plaintiff's shock or mental anguish. Plaintiff must prove that the defendant's negligence caused the third person's bodily harm; that plaintiff directly observed the event; and that plaintiff had a close personal relationship with the person injured. ***Keck v. Jackson***, 122 Ariz. 114, 593 P.2d 668 (1979). While damages are recoverable for emotional distress caused by witnessing injury to another, the emotional distress "must be manifested as a physical injury" and the damages must be caused by "the emotional disturbance that occurred at the time of the accident, and not thereafter." *Id.* The law also requires that plaintiff be within the "zone of danger" (i.e., in proximity to the injury-causing event). The zone of danger is usually established as a matter of law by the court, and is rarely an issue for the jury.

With respect to the "close personal relationship" factor, the plaintiff bystander must have a family relationship, or something closely similar, to the victim in order to pursue this claim. ***Hislop v. Salt River Project Agr. Imp.***, 197 Ariz. 553, 5 P.3d 267 (Ct. App. 2000). A co-worker or friend relationship is not sufficient. Allowing recovery for witnessing injury to a co-worker or friend would be out of proportion to the culpability inherent in conduct that is merely negligent. *Id.* However, in the case of ***Ball v. Prentice***, 162 Ariz. 150, 781 P.2d 628 (Ct. App. 1989), the court created an exception to this general rule. In *Ball*, one party was involved in an accident and saw the culpable driver of the other car killed as a result of the accident. The party sued for negligent infliction of emotional distress and the court of appeals ruled that because the party was a participant and victim, and not bystander, he could seek to recover damages for negligent infliction of emotional distress even though he was not acquainted with the driver who was killed.

Unlike a loss of consortium claim, in Arizona a claim for negligent infliction of emotional distress is not subject to the "each person" limitation often found in insurance policies. In a loss of consortium claim, a tortfeasor's injury to one person indirectly affects another person by affecting the relationship between the injured party and the plaintiff; but in a negligent infliction of emotional distress claim, the plaintiff directly experiences the tortfeasor's negligence, and that negligence causes the plaintiff to suffer such severe emotional distress that physical injury results. ***State Farm Mut. Auto. Ins. Co. v. Connolly ex rel. Connolly***, 212 Ariz. 417, 132 P.3d 1197 (Ct. App. 2006). Thus, a claim for negligent infliction of emotional distress constitutes a separate "bodily injury" arising from the "same accident" as the other injured party, and the separate "each person" coverage limits would apply to compensate each person for his/her respective bodily injuries, up to the aggregate "each accident" coverage limits provided in the policy. *Id*

Negligence *Per Se*

Some statutes, ordinances and regulations are passed to protect a certain class of persons from unreasonable risk of harm. A violation of such a statute, ordinance or regulation would be deemed negligence per se (in and of itself) and below the standard of care. ***Deering v. Carter***, 92 Ariz. 329, 333, 376 P.2d 857, 860 (1962). For a plaintiff to use negligence per se, the statute must have been designed to protect the plaintiff from the harm of which he complains. The plaintiff must also be in the class of persons that the statute is intended to protect. *See* RESTATEMENT (THIRD) OF TORTS: Phys. & Emot. Harm § 14.

COMPARATIVE NEGLIGENCE IN ARIZONA

Fault Allocation

Arizona follows the doctrine of pure comparative fault. A.R.S. § 12-2501 *et seq*. Except for three circumstances discussed below, joint and several liability is abolished. Thus, a defendant only minimally at fault will not have to pay the full amount of damages where the rest of the fault is apportioned to others. ***Piner v. Superior Court***, 192 Ariz. 182, 962 P.2d 909 (1998); *see* A.R.S. § 12-2506 through § 12-2509. 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). In assessing percentages of fault, the trier of fact considers the fault of all persons who contributed to the injury, regardless of whether the person was, or could have been, named as a party to the suit. A.R.S. § 12-2506(B). Fault is apportioned regardless of whether each person's conduct was negligent or intentional; the jury need not apportion a certain amount of fault to intentional conduct as compared to negligent conduct. ***Hutcherson v. City of Phoenix***, 192 Ariz. 51, 55, ¶ 20, 961 P.2d 449, 453 (1998), *abrogated in part on other grounds, State v. Fischer*, 242 Ariz. 44, 392 P.3d 488 (2017).

Defendants can still be jointly and severally liable in three circumstances. The first is for defendants who are "acting in concert." A.R.S. § 12-2506(D)(1). "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." A.R.S. § 12-2506(F)(1). Defendants cannot negligently act in concert; the term applies to intentional conduct only. The second joint and several circumstance occurs where one person "was acting as an agent or

servant of the party." A.R.S. § 12-2506(D)(2). 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/her employment. The third joint and several circumstance is where "[t]he 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)(3).

Non-Parties at Fault

A.R.S. § 12-2506 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." A.R.S. § 12-2506(B). The percentages of fault assessed against such non-parties "are used only as a vehicle for accurately determining the fault of the named parties." *Id.* Assessment of fault against a non-party does not require the non-party to pay any damages to the plaintiff. *Id.* Assessment of fault against a non-party effectively reduces the amount of damages the plaintiff will recover. For instance, if a jury awards the plaintiff $10,000 in damages and finds a defendant 20% at fault and the non-party 80% at fault, the plaintiff will recover $2,000 from the defendant.

A defendant can name a non-party at fault even if the plaintiff is prohibited from directly suing or recovering from such party. *See, e.g.*, ***Dietz v. General Elec. Co.,*** 169 Ariz. 505, 821 P.2d 166 (1991) (employee cannot sue employer directly, but can name employer as non-party at fault); ***McKillip v. Smitty's SuperValu, Inc.***, 190 Ariz. 61, 945 P.2d 372 (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, 899 P.2d 199, 206 (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, 937 P.2d 353 (Ct. App. 1996) (jury could apportion fault of non-party unidentified assailants). Defendants can offer evidence at trial of a non-party's negligence and argue that the jury should attribute all or some percentage of fault to the non-party, thereby reducing the 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/intentional act. ***Thomas v. First Interstate Bank***, 187 Ariz. 488, 930 P.2d 1002 (Ct. App. 1996).

Permitting a defendant to name the plaintiff/employee's employer as a non-party at fault creates an inequity when a trier of fact allocates some percentage of fault to the non-party employer. First, the plaintiff's award is reduced by reason of the employer's fault, and second, the plaintiff might have to satisfy a lien against this diminished recovery in favor of the employer and workers' compensation carrier to the extent of workers' compensation benefits provided. To cure this inequity, the Supreme Court has held that a workers compensation carrier may assert a lien on a third party recovery only to the extent the compensation benefits paid exceed the employer's proportionate share of the total damages set by verdict in the underlying action. ***Aitken v. Indus. Comm'n of Arizona***, 183 Ariz. 387, 392, 904 P.2d 456, 461 (1995). It has been suggested that this rule unconstitutionally usurps the Legislature's authority, but to date the *Aitken* rule stands. ***Twin City Fire Ins. Co. v. Leija***, 244 Ariz. 493, 497, 422 P.3d 1033, 1037 (2018).

A defendant may name the plaintiff's subsequent treating physician as a non-party at fault despite the "original tortfeasor rule." That rule states that if a negligent actor is liable for another's bodily injury, he is also liable for any additional bodily harm resulting from the normal efforts of third persons in rendering aid, whether negligent or not. ***Cramer v. Starr***, 240 Ariz. 4, 8-9, 375 P.3d 69, 73-74 (2016). Although the plaintiff cannot use the original tortfeasor rule to *automatically* impute a medical provider's subsequent negligence to the original tortfeasor, the plaintiff may argue that the original tortfeasor proximately caused the enhanced injury resulting from the provider's negligence. 240 Ariz. at 9-10.

A defendant must give notice within 150 days after filing an answer that it intends to assert a non-party's fault. Ariz. R. Civ. P. 26(b)(5); *see also* A.R.S. § 12-2506(B). If a defendant fails to timely name a non-party at fault, the fact finder cannot allocate any percentage of fault to that non-party except upon the parties' written agreement "or on motion showing good cause, reasonable diligence, and lack of unfair prejudice to all other parties." *Id*. 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 sufficient 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, ¶ 18, 205 P.3d 1128, 1133 (Ct. App. 2009). To this end, Rule 26(b)(5), Ariz. R. Civ. P. requires the defendant to "provide the identity, location, and the facts supporting the claimed liability" of the non-party at fault. It is insufficient, for example, to give the name and address of a person or entity and merely state that it might be at fault "to the extent" it performed "any" work that might have caused or contributed to the plaintiff's damages. *Cendejas, supra,* ¶ 20. However, "a notice of nonparty at fault must be read together with a party's timely disclosures." ***Bowen Prods., Inc. v. French***, 231 Ariz. 424, 427, 296 P.3d 87, 90 (Ct. App. 2013). A notice that is insufficient on its face may be sufficient when the party's disclosures reveal the factual basis for the non-party's alleged fault. *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, 897 P.2d 1381 (Ct. App. 1995), or a non-party, ***Lerma v. Keck***, 186 Ariz. 228, 921 P.2d 28 (Ct. App. 1996). Treating claimants differently from defendants neither improperly discriminates against claimants nor violates equal protection. 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 the plaintiff's recovery. The jury is then instructed that if it finds the 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. This approach is the only one compatible with Article 18, § 5 of the Arizona Constitution, which requires the jury to decide all issues of contributory negligence. ***Williams v. Thude***, 180 Ariz. 531, 885 P.2d 1096 (Ct. App. 1994), *aff'd* and *remanded*, 188 Ariz. 257, 934 P.2d 1349 (1997); ***Gunnell v. Arizona Public Service Co.***, 202 Ariz. 388, 46 P.3d 399 (2002).

Indivisible Injury

The "single indivisible injury rule" is still intact in Arizona after the abolition of joint and several liability. ***Cramer v. Starr***, 240 Ariz. 4, 8, ¶ 15, 375 P.3d 69 (2016) (citing ***Piner v. Superior Court***, 192 Ariz. 182, 962 P.2d 909 (1998)); ***A Tumbling-T Ranches v. Paloma Investment Limited Partnership***, 197 Ariz. 545, 5 P.3d 259 (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. Rather, each defendant is liable for the entire amount of unapportioned damages, and the burden of apportionment shifts to the defendants. Successive tortfeasors are responsible for the entire amount of damages if "their acts occur closely in time and place" and the plaintiff receives successive injuries that "the trier of fact determines to be unapportionable between or among the several tortfeasors." *Piner*, 192 Ariz. at 196, ¶ 18.

When the jury renders a judgment for the plaintiff in an indivisible injury case, payment by one defendant of the full amount of damages constitutes a satisfaction of the plaintiff's rights against all tortfeasors legally responsible for the plaintiff's indivisible injury. *See* ***Bridgestone/Firestone North America Tire, L.L.C. v. Naranjo***, 206 Ariz. 447, 79 P.3d 1206 (Ct. App. 2003). In *Naranjo*, the plaintiffs' rental car rolled over due to tire failure, injuring them and killing one passenger. They sued the rental company. The jury rendered a $9-million-plus verdict for the plaintiffs, allocating 30% fault to the non-party tire company. APS paid the entire amount. In the meantime, the tire company brought a declaratory judgment action against APS and the plaintiffs arguing it was not liable for contribution for the judgment. The plaintiffs counterclaimed for negligence and strict products liability. The court granted summary judgment for the tire company. As a matter of law, APS was not entitled to contribution from the tire company because APS and the tire company were joint tortfeasors who caused an indivisible injury. The plaintiffs had no cause of action against the tire company because the plaintiffs had already recovered their full damages from APS and had filed a satisfaction of judgment in that case.

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." This principle applies to both express and implied assumption of the risk. ***Phelps v. Firebird Raceway, Inc.***, 210 Ariz. 403, 111 P.3d 1003 (2005). In *Phelps*, a racecar driver sued the racetrack for injuries he sustained during the race when he lost control of his vehicle and crashed into a wall. Before the race, the driver signed a release and covenant not to sue together with a release and waiver of liability, assumption of risk and indemnity agreement. The racetrack sought summary judgment based upon the express contractual assumption of the risk agreement. The trial court granted the racetrack's request and dismissed the action. The court of appeals affirmed. The Supreme Court reversed, holding that article 18, section 5 of the Arizona Constitution required the defense of assumption of risk be a question of fact for the jury in all cases whatsoever and at all times. Even though there was an express contractual assumption of the risk agreement, the constitutional language required a jury to decide the issue.

The constitutional right to have a jury decide the issue of assumption of the risk applies even where the actor is engaged in criminal conduct. ***Sonoran Desert Investigations, Inc. v. Miller***, 213 Ariz. 274, 141 P.3d 754 (2006). There, Hernandez died of asphyxiation after Howard apprehended him on suspicion of shoplifting. Howard was a private security guard employed by Sonoran Desert Investigations (SDI) who had been assigned to a Tucson Safeway store. Howard confronted Hernandez after seeing him conceal bottles of moisturizer in his clothing and walk toward the front of the store. SDI claimed it was not liable as a matter of law, based on § 12-712(B) (providing 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). The court held the statute unconstitutional, because it would mean that Hernandez's criminal conduct would trigger the defendant's non-liability. The constitutional guarantee 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 Agricultural Improvement & Power Dist. v. Westinghouse Electric Corp.***, 176 Ariz. 383, 861 P.2d 668 (Ct. App. 1993), the court of appeals held that contributory negligence and assumption of the risk are always a question of fact for the jury; and jury instructions that compel, direct, or require the jury to find for the defendant if it finds negligence or assumption of the risk by the plaintiff violate article 18, section 5. The jury must be instructed simply to determine whether or not the plaintiff assumed the risk and, if so, the jury has discretion whether to find for the plaintiff or the defendant. *See also* ***Williams v. Thude***, 180 Ariz. 531, 885 P.2d 1096 (Ct. App. 1994), *aff'd* and *remanded*, 188 Ariz. 257, 934 P.2d 1349 (1997).

A court may constitutionally preclude a person who has been properly incarcerated for a criminal conviction from suing for negligence when the alleged harm is the incarceration itself. ***Muscat by Berman v. Creative Innervisions LLC***, 244 Ariz. 194, 199, 418 P.3d 967, 972 (Ct. App. 2017). *Muscat*, a child abuser, was placed in a group home and was supposed to be supervised at all times. A staff member failed to supervise him at a church, Muscat molested a child, and he was arrested. Muscat sued the home, claiming he was arrested as a result of the home's negligence. His complaint was dismissed. The court did not decide whether the "wrongful conduct rule" applies in Arizona (stating that a wrongdoer cannot base a tort claim on his own actions). The court held that Muscat failed to state a claim because the only harm he claimed was related to his proper incarceration. "No properly-convicted criminal has a legally protected interest in being free from the inherent consequences of the resulting sentence." This result, said the court, was not in conflict with the constitutional doctrines of contributory negligence or assumption of risk. *Id.* at 200, 418 P.3d at 973.

The "firefighter's rule" says that a first responder who is injured in the course of rendering help cannot sue the person who called for help. The rule is a type of assumption of the risk theory. The reasoning is that the tort system is not the appropriate vehicle for compensating public safety employees for injuries sustained as a result of negligence that creates the very need for their employment. ***Espinoza v. Schulenburg***, 212 Ariz. 215, 217, 129 P.3d 937, 939 (2006). The firefighter's rule does not apply to off-duty first responders. Excluding volunteers from the application of the firefighter's rule serves the important societal goal of encouraging those most qualified to stop and render aid to do so—or at least of not discouraging them from rendering aid by precluding suit for injuries suffered in the course of their volunteer service. However, the firefighter's rule only applies to first responders, not to caregivers who privately contract to help

others. ***Sanders v. Alger***, 242 Ariz. 246, 251, 394 P.3d 1083, 1088 (2017) (firefighter's rule did not prevent an in-home caregiver from suing an elderly patient who fell on the caregiver and injured him).

LIABILITY FOR THE ACTS OF AN EMPLOYEE (RESPONDEAT SUPERIOR/VICARIOUS LIABILITY)

"An employer is vicariously liable for the negligent or tortious acts of its employee acting within the scope and course of employment." ***Doe v. The Roman Catholic Church Of The Diocese Of Phoenix***, 1 CA-CV 22-0143, 2023 WL 4241197, at *6, ¶ 33 (Ariz. Ct. App. June 29, 2023). "An employee's conduct is within the scope of employment if (1) the conduct is the kind the employee is employed to perform, (2) the conduct is substantially within the authorized time and space limits, and (3) the conduct is actuated, at least in part, by a purpose to serve the employer." ***Anderson v. Gobea***, 18 Ariz. App. 277, 280, 501 P.2d 453, 456 (1972). Such conduct falls within the course and scope even if expressly forbidden by the employer. *Doe,* 2023 WL 4241197 at * 6. In the context of motor vehicle accidents, courts typically focus on whether the employer had a right to control the employee's activity at the time the tortious conduct occurred. ***Carnes v. Phoenix Newspapers, Inc.,*** 227 Ariz. 32, 35, ¶ 10, 251 P.3d 411, 414 (Ct. App. 2011). However, "[a]n employee's tortious conduct falls outside the scope of employment when the employee engages in an independent course of action that does not further the employer's purposes and is not within the control or right of control of the employer." ***Engler v. Gulf Interstate Engineering, Inc.,*** 230 Ariz. 55, 280 P.3d 599 (2012).

Ordinarily, a dismissal on the merits of a claim against an agent/employee will relieve the principal/employer of liability. ***Kennecott Copper Corp. v. McDowell***, 100 Ariz. 276, 281–82, 413 P.2d 749, 752-53 (1966) (recognizing that a directed verdict in favor of an agent who purportedly committed a tort "necessarily releases the principal"); **RESTATEMENT (SECOND) OF TORTS § 883** ("If two defendants are joined in an action for the same harm, judgment can properly be entered against one and in favor of the other, except when the judgment is entered after trial on the merits and the liability of one cannot exist without the liability of the other."); *see also* ***Laurence v. Salt River Project Agric. Improvement & Power Dist***., 255 Ariz. 95, 528 P.3d 139, 150 (2023). However, if the employee has been dismissed on a procedural ground, such as for the failure to serve a notice of claim, the employer remains subject to a respondeat superior theory of liability. *Laurence,* 255 Ariz. 95, 528 P.3d at 150.

LIABILITY FOR THE ACTS OF AN INDEPENDENT CONTRACTOR

Normally, the employer of an independent contractor is not vicariously liable for the contractor's conduct. ***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 remain vicariously liable if the contractor is performing a "non-delegable duty." ***Wiggs v. City of Phoenix***, 198 Ariz. 367, 371, 10 P.3d 625, 629 (2000). The "non-delegable duty" is really a misnomer. A non-delegable duty is not one that the employer *cannot* delegate to an independent contractor; it one that is so important that, having delegated the duty, the employer will remain liable for the contractor's conduct. The rule is based on the principle that certain duties of employers are so important that they may not

escape liability by delegating performance to another. Such duties arise in those "special situations in which the law prescribes a duty requiring a higher degree of care." ***Ft. Lowell–NSS Ltd. P'ship***, 166 Ariz. at 101, 800 P.2d at 967; ***Lee v. M & H Enterprises, Inc***., 237 Ariz. 172, 176, ¶ 13, 347 P.3d 1153, 1157 (Ct. App. 2015). Non-delegable duties may be imposed by statute, by contract, by franchise or charter, or by the common law. *See, e.g*., ***DeMontiney v. Desert Manor Convalescent Ctr. Inc.***, 144 Ariz. 6, 695 P.2d 255 (1985) (county's duty to provide safe treatment to involuntarily detained mental patients); ***Ft. Lowell-NSS Ltd. P'ship***, 166 Ariz. at 101, 800 P.2d at 967 (duty of a possessor of land to keep his premises reasonably safe for invitees); ***Wiggs***, 198 Ariz. at 370, ¶ 8, 10 P.3d at 628 (city's duty to maintain streets in reasonably safe condition); ***Simon v. Safeway, Inc***., 217 Ariz. 330, 339, ¶ 24, 173 P.3d 1031, 1040 (Ct. App. 2007) (Safeway did not owe a nondelegable duty to provide security services, but having voluntarily assumed that duty within the context of the heightened duty it already owed to its business invitees, Safeway created a nondelegable 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, ¶ 26, 279 P.3d 1191, 1201 (Ct. App. 2012) (dam owner's duty to maintain a dam in a safe condition). *Compare* ***Myers v. City of Tempe***, 212 Ariz. 128, 132, ¶ 18, 128 P.3d 751, 755 (2006) (the duty to provide emergency services may be delegated).

The abolition of joint and several liability in Arizona (in favor of purely comparative fault) does not affect the non-delegable duty concept. When an employer is vicariously liable for the 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, 104 P.3d 168 (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*.

A consent judgment in favor of a principal who has a non-delegable duty does not automatically bar a claim against the tortfeasor agent. ***Jamerson v. Quintero***, 233 Ariz. 389, 391, ¶ 8, 313 P.3d 532, 534 (Ct. App. 2013). In *Jamerson*, the agent argued that the dismissal of the principal (due to settlement) automatically required dismissal of the agent/independent contractor. The agent reasoned that because the principal was only vicariously liable under the non-delegable duty concept, if the principal could not be held liable, then that must mean no liability for the agent. The court disagreed. Settlement with and dismissal of the *agent* would automatically relieve the *principal* of vicarious liability, because if there is no agent liability, there can be no vicarious liability on the principal. But the converse is not true. The agent's liability is not derivative, as is the principal's. So the principal's settlement says nothing about the agent's liability. And because the principal is jointly and severally liable with the agent, A.R.S. § 12-2506(D), dismissal of the principal does not automatically discharge the agent from liability. However, any judgment against the agent will be reduced by the amount the principal paid to settle.

CONTRIBUTION

A.R.S. §§ 12-2501 through 12-2504 incorporate the Uniform Contribution Among Tortfeasors Act. "Contribution" is the concept whereby one who has paid more than his portion of liability for a 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 if a tortfeasor has paid more than his pro rata share of the common liability. A.R.S. § 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 settling tortfeasor may not seek contribution from a non-settling tortfeasor whose liability is not extinguished by the settlement, nor can he seek contribution to the extent the settlement is unreasonable. A.R.S. § 12-2501(D). The statute does not, however, abrogate the common law right of indemnity and it does not apply to breaches of trust or fiduciary obligations. A.R.S. § 12-2501(F).

Contribution and indemnity are sometimes confused. Contribution is available when one defendant who has paid more than his proportionate share of liability to the plaintiff seeks to recover the excess from joint tortfeasors who have paid less than their proportionate share. "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 the plaintiff due to vicarious liability). Indemnity is addressed in the Contribution 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.

Where the defendants were acting in concert and the recovery is joint and several, a release or covenant not to sue or not to enforce the judgment given in good faith to one of them does not discharge the others from liability (unless its terms so provide), but it does reduce the claim against the others to the extent of the settlement amount. A.R.S. § 12-2504; ***Jamerson v. Quintero*****,** 233 Ariz. at 392, 313 P.3d at 535. It also discharges the settling tortfeasor from any liability for contribution to the other tortfeasor.

There is no right of contribution between tortfeasors when their 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, that tortfeasor cannot seek contribution from other defendants who are similarly severally liable. This decision effectively limits contribution actions to only those situations where defendants are jointly liable.

A plaintiff may waive the joint liability of both settling and non-settling parties and, by formal 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, 919 P.2d 1381 (1996).

There is no right of contribution in favor of any tortfeasor whom 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. ***Parker v. Vanell***, 170 Ariz. 350, 824 P.2d 746 (1992); ***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 the plaintiff's claim against him. ***Cella Barr Assoc., Inc. v. Cohen***, 177 Ariz. 480, 868 P.2d 1063 (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 Ins Co. v. Premier Manufactured Sys. Inc.***, 217 Ariz. 222, 172 P.3d 410 (2007). Thus, contribution would not apply.

INDEMNITY

The general rule is that there is no indemnity among joint tortfeasors. Arizona recognizes exceptions to this rule where it is equitable to shift liability for the loss from one joint tortfeasor to another. In ***Cella Barr Assoc., Inc. v. Cohen***, *supra*, the plaintiff wanted to apply an exception in the RESTATEMENT OF RESTITUTION § 90 allowing indemnity among joint tortfeasors where the party seeking indemnity is an agent who has become liable in tort, without any fault of his own, simply by following the instructions of another agent of the principal. The court did not decide whether § 90's exception applied in Arizona because Cella Barr was not acting at the direction of Cohen. Thus, it is not clear yet whether Arizona will follow this 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. The employer may seek indemnity against the independent contractor in cases of pure vicarious liability. ***Wiggs***, 198 Ariz. at 371, 10 P.3d at 629; A.R.S. § 12-2501(F)(1).

Arizona's equitable indemnity law allows a plaintiff to seek indemnity from a culpable indemnity defendant if the plaintiff was subject to derivative or imputed liability and discharges an actual obligation that the culpable indemnity defendant owed to a third party. ***KnightBrook Ins. Co. v. Payless Car Rental Sys. Inc.***, 243 Ariz. 422, 424, 409 P.3d 293, 295 (2018). The plaintiff in a common law indemnity action generally must show: (1) it discharged a legal obligation owed to a third party; (2) for which the indemnity defendant was also liable; and (3) as between the two, the obligation should have been discharged by the [indemnity] defendant. There is no duty of indemnity unless the payment discharges the primary obligor from an existing duty. An actual obligation is necessary for an equitable indemnity claim. *Id*. *KnightBrook* rejected the notion that a right of indemnity could exist based only on the payor's "justifiable belief" that he owed a duty to the third party. *Id*. at 426, 409 P.3d at 297.

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

SETTLEMENT CREDIT

A.R.S. § 12-2504 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. But it reduces the plaintiff's claim against the others to the extent of the greater of either any stipulated amount or the consideration paid for it. The statute does not apply to damages that sound primarily in contract. ***John Munic Enters., Inc. v. Laos***, 235 Ariz. 12, 16-17, ¶ 12, 326 P.3d 279, 283-84 (Ct. App. 2014). The statute also does not apply where the liability is several only. ***Neil v. Kavena***, 176 Ariz. 93, 859 P.2d 203 (Ct. App. 1993) (statute no longer applicable after abolition of joint and several liability).

In those few cases where joint and several liability applies, the courts take a "settlement-first" approach to deciding the amount to credit a non-settling defendant. *See* ***Shelby v. Action Scaffolding, Inc***., 171 Ariz. 1, 827 P.2d 462 (1992).[1] Shelby fell from scaffolding and was injured. Action rented the scaffold to Shelby's employer. General Scaffolding sold the equipment to Action. Shelby sued Action for negligence and General Scaffolding for strict products liability. The case went to trial. After all parties had presented their evidence, General Scaffolding settled with Shelby for $250,000. The jury then returned a verdict of $650,000 for the plaintiff, allocating 30% fault to Action and 70% fault to Shelby.

The trial court reduced Shelby's damages in proportion to his fault before deducting the settlement amount from the reduced damages. This is called a "fault-first formula." The court of appeals, however, deducted the settlement amount from his damages first, before reducing those damages in proportion to Shelby's fault. This is a "settlement-first formula."

The Supreme Court held that the settlement-first formula was consistent with the legislative intent, the contribution statute, and fundamental fairness. The settlement-first formula allows a plaintiff, rather than a non-settling defendant, to benefit from the settlement with a joint tortfeasor. In this case, Shelby negotiated a $250,000 settlement, which was quite favorable given that the jury found Shelby caused all but $195,000 of his damages. The settlement-first formula allowed Shelby to recover a portion of the damages caused by Action in addition to the settlement amount. If the court had applied the fault-first formula, Action would have been relieved of any responsibility due to the offset for General's settlement.

Intentional Joint Tortfeasors

Intentional joint tortfeasors are entitled to a credit against a judgment for the amount of the plaintiff's settlement with other joint tortfeasors. ***Bishop v. Pecanic***, 193 Ariz. 524, 975 P.2d 114 (Ct. App. 1998). There, a group of tortfeasors committed an intentional tort. Some, but not all, of the defendants settled with the plaintiff before trial. The trial proceeded against the remaining

[1] ***Shelby*** pre-dated the effective date of the statute abolishing joint and several liability. If ***Shelby*** had been filed after the statute's effective date, the court's analysis would have been different. *See* ***Gemstar Ltd. v. Ernst & Young***, 185 Ariz. 493, 508, 917 P.2d 222, 237 (1996); ***Bishop v. Pecanic***, 193 Ariz. 524, 527, ¶ 9, 975 P.2d 114, 117 (Ct. App. 1998).

defendants. The jury found the defendants had acted in concert, rendering them jointly and severally liable for the judgment. 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.

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. A conscious agreement to commit a "tortious act" will not suffice to impose joint liability, unless the tortious act is an intentional tort. ***Mein ex. re. Mein v. Cook***, 219 Ariz. 96, 193 P.3d 790 (Ct. App. 2008). To "act in concert," the tortfeasors must knowingly agree to commit an intentional tort. *Id.*

GUEST STATUTE

A guest statute generally provides that a non-paying automobile passenger may not sue the driver when the passenger is injured as a result of the driver's simple negligence. Many guest statutes allow a suit for wilful misconduct or, sometimes, intoxication. Arizona does not have a guest statute.

PARENTAL IMMUNITY

A parent is not immune from liability for tortious conduct toward her child. ***Broadbent v. Broadbent***, 184 Ariz. 74, 907 P.2d 43 (1995). Rather, Arizona has a "reasonable and prudent parent" standard. In other words, parents can assert the defense of having acted "as a reasonable and prudent parent under the circumstances." Liability will be imposed even if the negligent act involved some matter of parental supervision, discretion, care, custody and control. In *Broadbent,* a mother left her child unattended near a swimming pool. The child suffered a near drowning, causing permanent brain damage. The child, through his father, sued the mother for negligent supervision. The court held that the mother's admitted negligent conduct was actionable. The mother was not protected from liability by "parental immunity."

Johnson v. Pankratz, 196 Ariz. 621, 2 P.3d 1266 (2000), held that in an ordinary negligence action, the plaintiff need not produce expert testimony to establish the standard of care. *Johnson* involved a daughter's suit against her father for negligent parental supervision at the playground. The court held that the jury could rely on its own experience in determining whether the father acted with reasonable care under the circumstances.

Parents are not immune from liability for their child's malicious or willful misconduct that injures the person or property of another. A.R.S. § 12-661. Such misconduct "shall be imputed" to the parents or legal guardian with custody or control of the child, regardless of whether the parents or guardian could have anticipated the misconduct. A.R.S. § 12-661(A). The parents or guardian having custody or control will be held jointly and severally liable with the child for actual damages resulting from the misconduct, up to a maximum of $10,000 for each tort committed by the child. A.R.S. § 12-661(A), (B). This liability is in addition to any other liability imposed by law. A.R.S. § 12-661(B).[2] However, a parent who has neither custody nor control of a child is not liable under this statute. ***Pfaff By & Through Stalcup v. Ilstrup***, 155 Ariz. 373, 373, 746 P.2d 1303, 1303 (Ct.App. 1987). "Control requires present ability to affect the conduct of another," while mere

"[p]otential ability is insufficient." *Id.* Thus, for example, a father who lived 120 miles away from his 17-year-old son could not be held liable for his son's sexual assault under the parental liability statute. *Id.*

Arizona allows a claim for liability against a parent for negligent entrustment of a dangerous object (such as a vehicle) to a child where a plaintiff can show the defendant owned and controlled the item in question. *See e.g.,* ***Acuna v. Kroack,*** 212 Ariz. 104, 110, ¶ 22, 128 P.3d 221, 227 (Ct. App. 2006); ***Tissicino v. Peterson***, 211 Ariz. 416, 419, ¶ 12, 121 P.3d 1286, 1289 (Ct. App. 2005). Arizona is also one of the few jurisdictions that still recognizes the family purpose doctrine, which "subjects the owner of a [vehicle] to vicarious liability when the owner provides an automobile for the general use by members of the family ... and when the vehicle is so used by a family member." ***Young v. Beck***, 227 Ariz. 1, 4, ¶ 8, 251 P.3d 380, 383 (2011).

DRAM SHOP LIABILITY

Common Law

Arizona first adopted a common law dram shop cause of action in ***Branningan v. Raybuck***, 136 Ariz. 513, 667 P.2d 213 (1983), and ***Ontiveros v. Borak***, 136 Ariz. 500, 667 P.2d 200 (1983). In these two cases, the Arizona Supreme Court held that tavern owners could be held liable if they sold liquor to intoxicated patrons where the tavern owner should have known that such conduct created unreasonable risk of harm to others who may be injured on or off the tavern owner's premises. Recently, however, the Arizona court of appeals held that Arizona's dram shop statutes (which hinge liquor licensee liability on overserving someone who is "obviously intoxicated") expressly preempts common law negligence claims. ***Torres v. Jai Dining Services (Phoenix), Inc.***, 508 P.3d 1148, 1159 (Ct. App. 2022); A.R.S. § 4-312(B). The Arizona Supreme Court accepted review of this case and recently held oral argument, but as of the date of publication, has not issued an opinion. As such, for now, common law dram shop claims remain preempted and thus invalid until and unless the Arizona Supreme Court decides otherwise.

A.R.S. § 4-301 (Social Host)

In 1985, the Legislature enacted statues addressing the civil liability of those who furnish alcohol to others. A.R.S. § 4-301 states that a social host – *i.e*., a non-licensee – is not liable in damages for personal or property damages allegedly caused by the furnishing or serving of liquor to a person of the legal drinking age. Though the statute "limits" liability, it is not unconstitutional under the Arizona Constitution, art. 18, § 6 ("The right of action to recover damages for injuries shall never be abrogated "), because there was no right of action against a tavern owner in the common law at the time the constitution was adopted. ***Bruce v. Chas Roberts Air Conditioning***, 166 Ariz. 221, 801 P.2d 456 (Ct. App. 1990).

[2] The parental liability statute does not limit an insurer's right to exclude coverage for a child's acts imputed to the parents or legal guardian. A.R.S. § 12-661(C).

Hernandez v. Arizona Bd. of Regents, 177 Ariz. 244, 866 P.2d 1330 (1994), *vacated in part*, 187 Ariz. 506, 930 P.2d 1309 (1997), reiterated that A.R.S. § 4-301 provides no protection for social hosts who provide alcohol to minors. The plaintiff in *Hernandez* was injured by a minor who had been given alcohol at a fraternity party. Because A.R.S. § 4-301 did not apply, the plaintiff could maintain a common law negligence action against those who served the minor.

In ***Petolicchio v. Santa Cruz County Fair & Rodeo Assoc.***, 177 Ariz. 256, 866 P.2d 1342 (1994), the Supreme Court held that this statute does not protect a defendant who neither furnished nor sold alcohol to the minor. There, the minor stole the liquor from the defendant's locked cabinet and gave it to his underage friends, one of whom drove a car and injured a passenger. The court held that the social host statute applies only to people who furnish or serve alcohol. Because the alcohol was stolen, the statute did not apply and common law principles governed.

Arizona's drinking age of 21 governs whether social host immunity is available. ***Knoell v. Cerkvenik-Anderson Travel, Inc.***, 185 Ariz. 546, 917 P.2d 689 (1996). There, the defendant provided tours to Mexico for recent high school graduates. As part of the trip, the defendant hosted parties in Mexico and furnished alcoholic beverages. The legal drinking age in Mexico is 18. Timothy Knoell was an 18-year-old participant. He consumed the defendant's alcohol and allegedly jumped or fell to his death from the balcony of his hotel room. Timothy's parents sued. Because Timothy was not of legal drinking age in Arizona, § 4-301 did not protect the defendant with social host immunity.

In ***Riddle v. Arizona Oncology Servs., Inc.***, 186 Ariz. 464, 924 P.2d 468 (Ct. App. 1996), an employer ordered his employee to leave work due to the obvious signs of intoxication. On the way home, the employee was involved in a motor vehicle accident. The court held that the employer owed no duty to a third party motorist to control the conduct of the off-duty employee who consumed illegal drugs before and during work. The court reasoned that the employer did not furnish the employee with any intoxicants or with a vehicle. It simply instructed her to leave the premises because of her intoxicated condition and inability to work. Under those circumstances, the employer did not have a duty to control the employee's actions or to prevent her from operating a vehicle.

In ***Andrews, Woodward v. Eddie's Place, Inc.,*** 199 Ariz. 240, 16 P.3d 801 (2000), the court of appeals held that the two-year personal injury statute of limitations applied to a claim against a liquor establishment, rather than the one-year statute applicable to liability created by statute, where the plaintiff based the suit, in part, on common law liability. The court held that the dram shop statute did not create a new claim against liquor licensees, but simply attempted to codify the common law theory of dram shop liability. The validity of this case is in question now, given the Court of Appeals' holding in *Torres* that the dram shop statutes preempt any common law claim. If that holding survives Supreme Court review, the statute of limitations will be one year.

In ***Barkhurst v. The Kingsmen of Route 66, Inc.***, 234 Ariz. 470, 323 P.3d 753 (Ct. App. 2014), the court held that a volunteer, nonprofit organization that sponsored an annual rodeo and related events, and listed on its website various activities including an evening of entertainment at a restaurant, did not owe a duty of care to an assault victim who was injured in the restaurant parking lot two and a half hours after the entertainment had ended. The organization was not a

social host, but merely a promoter of events, and had no control over the restaurant or its entertainment.

A.R.S. § 4-311 (Licensee Liability)

This statute sets forth the conditions under which one who is not a social host can be liable for serving alcohol. As noted above, under the recent ***JAI Dining*** case, this statutory cause of action is currently the only basis for asserting dram shop liability against a liquor licensee.

A.R.S. § 4-311(A) states that a liquor licensee is liable for personal injuries and property damage, or for 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 alcohol consumption was a proximate cause of the injury, death, or property damage.

A.R.S. § 4-311(B) provides that no 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 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, 793 P.2d 121 (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 the 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. Here, there was ample evidence from which a trier of fact could find that the Roadhouse knew an intoxicated individual's friends were giving him alcohol after the bartenders refused to serve him anymore. The continued viability of this case is in question given the current preemption of a common law dram shop claim.

In ***Henning v. Montecini Hospitality, Inc.***, 217 Ariz. 242, 172 P.3d 430 (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 supervising bar employees who worked for a different company that managed the bar. The bar, a Famous Sam's franchise, was owned by Montecini Hospitality and operated by Zimbow Enterprises. The plaintiffs sued Montecini, Famous Sam's (the franchisor), and Zimbow for negligence under the dram shop statutes and for the negligent hiring, training and supervision of their employees. Settlements were reached with both Zimbow and Famous Sam's. Montecini moved for summary judgment contending it owed no duty under the dram shop laws because it had no possession or control of the bar, nor did it employ any of the servers when the accident occurred. The court affirmed summary judgment for Montecini, reasoning that the Legislature

significantly limited the liability of non-licensees for serving alcohol, and the court "would exceed [its] authority were [it] to substitute [its] own public-policy determinations for those of the Legislature."

In ***McMurtry v. Weatherford Hotel, Inc.***, 231 Ariz. 244, 293 P.3d 520 (Ct. App. 2013), the court held that a genuine issue of material fact existed (precluding summary judgment) as to whether a hotel used reasonable care in escorting an intoxicated guest from the hotel bar to the guest's room, given the falling hazard posed by the room's window/balcony configuration. A licensee's liability turns on whether it fulfilled its duty to exercise reasonable care in serving intoxicants to patrons who might later injure themselves or others, either on or off the premises.

Other Issues

In ***Hoeller v. Riverside Resort Hotel***, 169 Ariz. 452, 820 P.2d 316 (Ct. App. 1991), the defendant was a Nevada casino that served an Arizona resident, who then drove into Arizona and injured the plaintiff. The court ruled that Arizona law, rather than Nevada law, applied to protect the Arizona victim. But in ***Williams v. Lakeview Co.***, 199 Ariz. 1, 13 P.3d 280 (2000), a Nevada casino served alcohol to someone who later caused an accident in Arizona. In a 3-2 decision, the Supreme Court held that Arizona did *not* have personal jurisdiction over the Nevada casino absent a causal connection between the casino's Arizona contacts and the plaintiffs' claims. The court emphasized, however, 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.

In ***Patterson v. Thunder Pass, Inc.***, 214 Ariz. 435, 153 P.3d 1064 (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. An intoxicated patron backed her vehicle into a parked Jeep as she attempted to leave the tavern. The tavern confiscated her keys and called her a cab. The cab never arrived, so a tavern employee drove the patron home and then returned the keys to her. Within an hour, and unbeknownst to the tavern employees, the patron returned to the parking lot behind the tavern to get her vehicle. After obtaining her vehicle, the patron was involved in a high-speed head-on collision with a vehicle driven by Patterson. Patterson sued the tavern for over-serving the patron. The court held that the tavern's intervening acts of separating the patron from her vehicle and driving her home broke the chain of legal causation and relieved the tavern of liability. The patron's decision to return to retrieve her vehicle while she was still intoxicated was unforeseeable and extraordinary and thus constituted a superseding and intervening event that negated any negligence on the part of the tavern or its employees.

In ***Dupray v. JAI Dining Services (Phoenix), Inc***., 245 Ariz. 578, 432 P.3d 937 (Ct. App. 2018), Panameno drank a significant amount of alcohol before imbibing at JAI's establishment. His friend drove Panameno to the friend's house. After 15 or 20 minutes, Panameno drove to his girlfriend's house where the girlfriend argued with him for being intoxicated and tried to take his keys. Panameno drove off in anger and crashed into Dupray who was on a Vespa-type scooter. Dupray sued JAI. The court held that there was sufficient evidence that JAI breached its duty in overserving Panameno; and the fact that his friend drove him away from the club did not absolve

JAI of liability. The evidence, said the court, "does not show that the club's personnel took any action to see that Panameno reached home safely." Further, a reasonable jury could conclude that JAI should have foreseen Panameno's collision with Dupray. The court nevertheless reversed the verdict for Dupray because the trial court failed to instruct the jury on "intervening and superseding cause." The jury could have concluded that although JAI's negligence in overserving Panameo was the actual cause of the collision, the chain of causation was broken by Panameno's independent decisions to drive to his girlfriend's house and then drive away from her house even though he was intoxicated and was warned not to drive.

In ***Torres v. JAI Dining Services (Phoenix) Inc***., 252 Ariz. 28, 497 P.3d 481 (2021), an intoxicated patron left an establishment drunk and arrived home safely. The court rejected the argument that his decision to sleep for a while and then drive again was an intervening, superseding cause as a matter of law. The court found no "authority for limiting the scope of risk in dram shop cases to the patron's drive from the liquor licensee's venue to the patron's home or similar resting place." Instead, the "risk of liability ends when the patron sobers up" and the jury should decide the intervening, superseding cause issue. The court distinguished ***Patterson*** because club personnel did not separate the patron from his truck or ensure his safe transportation home. They knew only that he drove away from the club after being escorted out. A jury could reasonably conclude that Villanueva's act in driving while intoxicated, even after he reached home, although an intervening cause of the accident, was nevertheless foreseeable by someone in the club's position and not extraordinary in hindsight.

SETTLEMENT OF A MINOR'S CASE

A minor does not have capacity to enter into a binding contract, including settlement agreements. RESTATEMENT (SECOND) OF CONTRACTS §§ 7, 12, 14. Therefore, obtaining a binding settlement of a minor's claim requires court approval. In ***Gomez v. Maricopa County***, 175 Ariz. 469, 857 P.2d 1323 (Ct. App. 1993), the court held that the court must appoint a guardian and/or conservator, and approve the settlement, before the minor's claim can be settled. Failure to take these steps leaves open the possibility that the minor can later reopen the claim.

The Legislature has amended A.R.S. § 14-5103 since *Gomez*, but the amendments do not affect the foregoing provisions. The statute says that a person under a duty to pay or deliver money or personal property to a minor, including monies related to the settlement of a civil claim, may perform this duty, in amounts not exceeding $10,000 annually, by paying or delivering money or property to any of the following:

- The minor, if the minor is married;
- Any person having the care and custody of the minor and with whom the minor resides;
- The guardian of the minor; or
- A financial institution incident to a deposit in a federally insured savings account in the sole name of the minor and giving notice of the deposit to the minor.

For years, the general understanding was that A.R.S. § 14-5103 permitted settlement of a minor's claim for less than $10,000 without obtaining formal court approval. *Gomez* changed that. A.R.S.

§ 14-5103 only governs the method of payment; it does not eliminate the need for court approval of a guardian or conservator before a settlement is binding.[3]

Probate Rule 53, adopted effective January 1, 2020, removes all doubt that *Gomez* is the law even on settlements under $10,000. Subsection (a) provides that "no settlement of a claim brought on behalf of a minor or an adult in need of protection is binding on the minor or the adult in need of protection unless it is approved by a judicial officer," except that a conservator may enter into a binding settlement not involving personal injury or wrongful death without court approval. Subsection (b) states that any court may approve a minor's settlement under $10,000, but only a probate court may approve a minor's settlement over $10,000.

A federal court in which a minor's claims are being litigated has a duty to protect the minor's interests. ***Robidoux v. Rosengren***, 638 F.3d 1177, 1181 (9th Cir. 2011); ***Salmeron v. United States***, 724 F.2d 1357, 1363 (9th Cir. 1983); ***K.T. v. Ramos***, 2012 WL 443732, at *7 (D. Ariz. Feb. 13, 2012). Under Rule 17(c), the district court can appoint a guardian *ad litem* to protect a minor in an action. ***Adamson v. Hayes***, 2010 WL 5069885, at *4 (D. Ariz. Dec. 7, 2010). The process of appointing a guardian *ad litem* is procedural and state law will not apply to cases brought in federal courts. ***M.S. v. Wermers,*** 557 F.2d 170, 174 n. 4 (8th Cir. 1977); ***Adamson v. Hayes***, 2010 WL 5069885, at *4 (D. Ariz. Dec. 7, 2010).

To ensure a minor's interests are protected in a proposed settlement agreement, the federal court must review and approve the settlement agreement before a guardian ad litem has authority to bind the minor to the agreement. ***Robidoux v. Rosengren***, *supra*, quoting ***Dacanay v. Mendoza***, 573 F.2d 1075, 1080 (9th Cir. 1978) ("a district court is required to 'conduct its own inquiry to determine whether the settlement serves the best interests of the minor'"). It is the court's order approving the settlement that vests the guardian ad litem with the legal power to enforce the agreement. *Id*. at 1079; *K.T. v. Ramos*, *supra*.

Conservatorships

A conservator is "a person who is appointed by a court to manage the estate of a protected person." A.R.S. § 14-1201(10). Unlike a guardian, who "has the powers and responsibilities of a custodial parent regarding the ward's support, care and education," A.R.S. § 14-5209(A), a conservator's powers are limited to the minor's finances and other property. *See, e.g.*, A.R.S. §§ 14-5420, -5424, and -5425.

Typically, in a personal injury case, the settlement of a minor's claim consists of a lump sum deposited in a federally insured bank account, or the purchase of an annuity, as described below. In those civil settlements, a conservatorship is necessary to protect the minor's interests, as is described above. The court may appoint a conservator when "the court determines that a minor owns money or property that requires management or protection that cannot otherwise be

[3] Significant legislative history supports an argument that court approval is not necessary to settle a minor's claim in an amount less than $10,000. However, obtaining a guardian for all minor settlements is the best practice.

provided." A.R.S. § 14-5401(A)(1). Arizona permits the court to "appoint an individual or a corporation, with general power to serve as trustee, as conservator of the estate of a protected person," A.R.S. § 14-5410, subject to certain statutorily required disclosures, A.R.S. § 14-5106. Venue for the conservatorship is appropriate either in the county where the protected person resides, or in any county of the state where the person has property, if he does not reside in the state. A.R.S. § 14-5403.

When settling a minor's claim, any person who is interested in the minor's estate or affairs, including that person's parent, guardian, or custodian, may petition for appointment as conservator. A.R.S. § 14-5404(A). These "non-licensed fiduciaries" are required to complete the training prescribed by the Arizona Supreme Court before the court hears the matter. Ariz. R. Probate P. 10; Arizona Judicial Branch: Probate, **www.azcourts.gov/probate/Training.aspx** (last visited July 4, 2023). The petition must set forth certain information, including the petitioner's interest in the minor's estate, the minor's age, and a general description of the estate in question. A.R.S. § 14-5404(B). Certain people who might have an interest in the conservatorship proceedings, such as the minor's biological parents, must be notified. A.R.S. § 14-5405; *see also* A.R.S. § 14-5406 (providing that interested persons may request notice).

When a conservatorship petition is filed based on the minority of the person to be protected, the court must hold a hearing to address certain aspects. A.R.S. § 14-5407(A). Because the goal of the conservatorship proceeding is to protect the minor's interests, the court must appoint an attorney to represent the minor if at any time during the proceedings "the court determines that the interests of the minor are or may be inadequately represented." *Id.*

"After the hearing, and after making specific findings on the record that a basis for the appointment of a conservator or any other protective order has been established, the court shall make an appointment or other appropriate protective order." A.R.S. § 14-5407(E). After appointment, the conservator's duty is "to act as a fiduciary," and to observe statutorily mandated standards. A.R.S. § 14-5417.

Unless the court otherwise orders, a conservatorship regarding a minor's assets generally terminates on the protected minor's eighteenth birthday. A.R.S. §§ 14-5401(B), -5430. In the case of a settlement that provides for the purchase of an annuity, however, the conservatorship will involve only a single transaction – the purchase of the annuity. A.R.S. § 14-5409. That "single transaction conservatorship" terminates as soon as the "special conservator" files the annuity contract with the court. *Id.*

Finally, on June 20, 2023, Governor Hobbs signed legislation enacting significant reform to Arizona's Guardianship and Conservatorship statutes. While these amendments are too numerous to detail here, the most significant change involve the ability for an adult with a disability who is 18 years or older to enter into a decision-making agreement with the guardian/conservator to share in certain decision-making responsibilities such as the ability to make choices where they want to live, the services, supports and medical care they want to receive, and whom they want to live with and where they want to work.

Guardianships

A.R.S. § 14-5209 sets forth the powers and duties of a minor's guardian. Those powers include:

1. "Receive monies payable for the support of the ward under the terms of any statutory benefit, insurance system, private contract, devise, trust, conservatorship or custodianship, and monies or property of the ward paid or delivered pursuant to § 14-5103."
2. "Take custody of the person of the ward and establish the ward's place of residence in or outside this state, if consistent with the terms of an order of a court of competent jurisdiction relating to the detention or commitment of the ward."
3. "If no conservator for the estate of the ward has been appointed, institute proceedings, including administrative proceedings, or take other appropriate action to compel the performance by any person of a duty to support the ward or to pay amounts for the welfare of the ward."
4. "Facilitate the ward's education, social or other activities and consent to medical or other professional care, treatment or advice for the ward. A guardian is not liable by reason of this consent for injury to the ward resulting from the negligence or acts of third persons unless a parent would have been liable in the circumstances."
5. "Consent to the marriage or adoption of the ward.
6. "If reasonable, delegate to the ward certain responsibilities for decisions affecting the ward's well-being."

A.R.S. § 14-5209(C).

If you have questions regarding the information in this chapter, please contact the author or any JSH attorney.

CONTRIBUTING AUTHOR:

JUSTIN ACKERMAN, PARTNER Justin represents clients in federal and state appellate matters in cases involving excessive force, wrongful death, personal injury, bad faith, and premises liability. He has successfully represented clients and argued before the Arizona Court of Appeals, Arizona Supreme Court, and Ninth Circuit Court of Appeals.
jackerman@jshfirm.com | 602.263.4552 | jshfirm.com/jackerman