CHAPTER 14: 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 to keep the premises reasonably safe for others on or using the premises.

The duty a landowner and possessor of land owes depends upon the status of the plaintiff. Arizona is one of the few states that has retained the traditional distinctions between invitees, licensees, and trespassers. *See* ***Bellezzo v. State***, 174 Ariz. 548 (App. 1992); ***Shaw v. Petersen***, 169 Ariz. 559 (App. 1991); and ***Woodty v. Weston's Lamplighter Motels***, 171 Ariz. 265 (App. 1992). Consequently, defending any premises liability action in Arizona requires a determination of whether the claimant is an invitee, licensee, or trespasser.

INVITEES

An invitee is a person invited to enter or remain upon the premises for a purpose either connected with the landowner's or occupier's business, 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 (followed in ***Nicoletti v. Westcor, Inc.***, 131 Ariz. 140 (1982)). In the context of a business establishment, an invitee is a person who enters or remains 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 upon the premises for some other reason that benefits the business proprietor. For example, the tenant of an apartment complex is considered an invitee. *See* ***Fehribach v. Smith*****,** 200 Ariz. 69, 73 (App. 2001).

In ***McCaw v. Arizona Snowbowl Resort***, 254 Ariz. 221 (App. 2022), the court held that a ski resort owed patrons a duty of care based on their status as business invitees. The Arizona Ski Safety Act did not abrogate common-law negligence principles, and did not relieve ski area operators of a duty of care they owe to ski lift passengers.

A person may be an invitee when originally entering the premises, but subsequently lose the invitee status by entering portions of the premises not held open to the public, or by remaining on the premises for personal purposes that no longer benefit the landowner or occupier. *See Nicoletti*, 131 Ariz. at 143. 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 relevant times.

In ***Ritchie v. Costello***, 238 Ariz. 51 (App. 2015), the court assumed that a paraglider who collided with a hot air balloon was a business invitee of the nearby Cottonwood airport, an uncontrolled airport. As such, the airport owed the paraglider a duty to maintain the airport premises in a reasonably safe manner and to provide reasonably safe conditions for aircraft using the airport, including runways. But once the invitee safely leaves the premises, the relationship ends and so does the duty. Here, the

collision occurred after the paraglider had been in the air for half an hour. Therefore, the paraglider ceased to be an invitee after successfully getting into the air and moving away from the airport, and the airport did not owe him a duty. Because the airport was uncontrolled, it did not owe him a duty while he was in the air.

The Arizona Supreme Court held that sublessees of a multi-tenant commercial building did not owe a duty to a worker who fell through the skylight on the roof of the building due to the contracted roofing company's allegedly negligent repairs. The sublease did not give the sublessees the right to control the roof, the sublessees did not exercise actual control over the roof, and there was no evidence the sublessees assumed a duty to protect the worker from the risk of falling through the skylight. Further, the court held that the sublessee who contracted for the repairs did not thereby "possess" the roof. ***Dabush v. Seacret Direct LLC***, 250 Ariz. 264 (2021).

The occupier of premises owes a duty to invitees to discover, correct, and/or warn of hazards the occupier should reasonably foresee will endanger the invitee. ***Robertson v. Sixpence Inns of America Inc.***, 163 Ariz. 539, 544 (1990). This duty might require the occupier to reasonably inspect for potentially harmful hazards. But the proprietor of a business is not an insurer of an invitee's safety, and is not required to keep the premises absolutely safe. ***Preuss v. Sambo's***, 130 Ariz. 288, 289 (1981). Rather, the possessor of the premises only has the duty to use reasonable care to keep the premises in a reasonably safe condition. 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 (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.

In Arizona it is not enough for an invitee to show that a dangerous condition existed on the premises. 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. 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.

RAJI (Civil) 7th Premises Liability Instruction No. 1. 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 County***, 198 Ariz. 280, 283 (2000).

Sometimes, a particular condition's inherent nature can evidence the landowner/possessor's constructive notice that it 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, 339 (App. 1995), the plaintiff was injured when she fell on a chipped and decaying sidewalk within an apartment complex. Though 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 the 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." Indeed, the very nature of the deterioration suggested that the condition did not arise suddenly, but instead developed slowly over a period of time.

Conversely, in ***Alcombrack v. Ciccarelli***, 238 Ariz. 538 (2015), a tenant shot a locksmith who was changing the locks on the house. Unbeknownst to the tenant, the landlord's house had been sold through foreclosure. The tenant thought the locksmith was trying to break in. The locksmith, a business invitee, sued the landlord for negligence. The landlord won summary judgment because the landlord was not in possession of the property, thus, there was no landlord-invitee relationship. The court also declined the locksmith's invitation to adopt the RESTATEMENT (THIRD) OF TORTS § 7. That section, which provides that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm," would greatly expand Arizona law. *Id*. at 542.

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. The attempts to remedy or warn must be reasonable. If the attempts to remedy or warn of the situation are not reasonable or are inadequate, the possessor may still be held liable. Consequently, the relevant inquiry is whether the possessor pursued adequate and reasonable measures to correct the condition or to warn invitees of the condition.

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. 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* ***Chiara v. Fry's Food Stores***, 152 Ariz. 398 (1987); Premises Liability Instruction No. 2, RAJI (7th).

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 (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 (App. 1997); ***Chiara v. Fry's Food Stores***, 152 Ariz. 398 (1987); ***Tom v. S.S. Kresge Co.***, 130 Ariz. 30 (App. 1981); and ***Shuck v. Texaco Refining & Mktg., Inc.***, 178 Ariz. 295 (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. Second, the claimant must prove that the business failed to exercise reasonable care to prevent harm under those circumstances. 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* RESTATEMENT (SECOND) OF TORTS § 343. The warning needs to be sufficient to allow invitees to make an informed decision to protect themselves, or to move to other premises. This duty may also extend to employees of independent contractors. In ***Robertson v. Sixpence Inns of America, Inc.***, 163 Ariz. 539 (1990), 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. The security guard was an employee of an independent contractor retained by the hotel. The court held that the hotel had a duty to warn its independent contractor of a known danger. 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. 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.

LICENSEES

A licensee is a person who is privileged to enter or remain upon land by virtue of possessor's consent, whether given by invitation or permission, and usually for their own benefit. *See* ***Barry v. S. Pac. Co.***, 64 Ariz. 116 (1946); *See also* RESTATEMENT (SECOND) OF TORTS § 330. An example of a licensee is a person who is loitering on the property or who is using the parking lot or entrance to the premises as a rendezvous point for friends and acquaintances. Likewise, someone who is walking across the property as a shortcut to get from one point to another is a licensee. A social guest in one's home is also a licensee. ***Parish v. Truman***, 124 Ariz. 228, 229 (App. 1979).

The possessor of premises owes a licensee the duty to adequately warn of hidden or concealed dangers of which the possessor has actual knowledge, and also to refrain from willfully injuring the licensee. ***Shannon v. Butler Homes***, 102 Ariz. 312, 316 (1967); ***Shaw v. Petersen***, *supra*; Premise Liability Instruction No. 3 RAJI (7th). With respect to a licensee, the possessor of property does not have

an obligation to inspect and discover concealed dangers, but only to warn of concealed dangers of which the possessor has actual knowledge.

The issue in the licensee context is often whether the possessor of the premises gave adequate warning of the hidden danger. Whether adequate warning was given is generally a question of fact. In determining whether a warning is adequate, an important factor is whether the claimant is an adult or a child. A condition that might not be deemed hidden or concealed from an adult licensee could be deemed to be a hidden or concealed hazard to a younger child. Likewise, whether the warning of a hidden condition is adequate might also depend upon the age and capacity of the child to appreciate the extent of the risk of harm involved. *See* Premises Liability Instruction No. 4, RAJI (7th); ***McLeod v. Newcomer***, 163 Ariz. 6, 9 (App. 1989).

RECREATIONAL USE STATUTE

Hikers, hunters, boaters and others who enter another's property for recreational uses without payment of fee are deemed to be licensees, provided that they are on the property with the possessor's consent. The possessor's duty to these individuals, however, has been modified by statute. A.R.S. § 33-1551. A possessor of land will not be liable for injury to these specific licensees except upon a showing of willful, malicious or grossly negligent conduct on the part of the possessor of land. The conduct of the landowner must be more than simply negligent before any liability will attach. A.R.S. § 33-1551 applies to premises such as agricultural, range, open space, park, flood control, mining, forest, or railroad lands, among others. Additionally, the statute appears to apply to users of green belt areas and community parks located in residential neighborhoods. Because the recreational use statute limits common law liability, courts must construe it strictly to avoid any overbroad statutory interpretation that would give unintended immunity and take away a right of action. ***Andresano v. County of Pima***, 213 Ariz. 65 (App. 2006).

Recreational Premises

In ***Smith v. Arizona Bd. of Regents***, 195 Ariz. 214 (App. 1999), the court limited the recreational use immunity to open spaces used for recreation. Here, the injury occurred on a trampoline in an open area of Arizona State University's campus. The court held that the statute did not protect the school from liability because the accident was caused by a piece of equipment, not by a condition of the land. The purpose of the statute is to encourage landowners to open their outdoor, open land for recreation. In ***Armenta v. City of Casa Grande***, 205 Ariz. 367 (App. 2003), however, a child rode his bike under a goal post and was injured when the post fell on top of him. Plaintiff argued the recreational use statute did not apply because a goal post is a type of apparatus that is excluded from the statutory definition of "premises." The court disagreed, distinguishing the *Smith* trampoline case. It reasoned that the "critical issue is whether improvements to recreational premises such as a softball field, which there included human-made structures such as bases and fences, 'change the character of the premises and [thus] put the property outside the protection' of the statute." The goal post did not "change the character of the premises" as the trampoline in the *Smith* case did. The court went on to hold that the express language of the statute defines "premises" to include "fixtures" and "structures" on the land.

RECREATIONAL USERS

To be protected by A.R.S. § 33-1551, not only must the landowner/possessor have "recreational" land, but also the plaintiff must fall within the definition of a "recreational user." If the plaintiff does not fit the statutory definition of a "recreational user," the statute does not limit a landowner/possessor's liability. In determining whether the entrant is a recreational user, the court will give primary consideration to the nature and purpose of the entrant's activities, not the plaintiff's subjective intent. ***Relyea v. United States***, 220 F.Supp.2d 1048 (D. Ariz. 2002) (minor who was injured in car accident when returning to campsite to retrieve belongings was still a recreational user because camping was the activity that originally brought her to the forest land). *Compare* ***Herman v. City of Tucson***, 197 Ariz. 430 (1999) (plaintiff who went to park to work at concession was not a recreational user).

The statute defines a "recreational user" as "a person to whom permission has been granted or implied without the payment of an admission fee or any other consideration to travel across or enter [the] premises." *Id.* In ***Andresano v. County of Pima***, 213 Ariz. 65 (App. 2006), a participant in a fundraising event at a county park fell in a drainage culvert and broke her ankle. She was deemed a recreational user because she did not pay an admission fee. The court did not impute the charity's user fee to the participant individually, so as to remove her from her recreational user status.

An entrant can still be considered a "recreational user" if the fee paid for entry is nominal, paid only to offset the costs of using the premises, and is paid to a public or non-profit entity. ***MacKinney v. City of Tucson***, 231 Ariz. 584 (App. 2013). What is a "nominal" fee? In ***Prince v. City of Apache Junction***, 185 Ariz. 43 (App. 1996), the court held that the plaintiff member of a city softball league team was not a recreational user because each softball team was required to pay the city a $250 entry fee to play in the league, and $250 is not nominal. Hence, A.R.S. § 33-1551 did not control the standard of liability. In direct response to the *Prince* case, the legislature amended A.R.S. § 33-1551 to add the "nominal fee" provision (property owners do not lose protection of the statute by charging a nominal fee), thus indicating legislative belief that a $250 fee is "nominal." Thus, in ***Allen v. Town of Prescott Valley***, 244 Ariz. 288 (App. 2018), the court held that a $270 fee charged to each softball team was nominal and the town was entitled to the protection of the statute. The court remanded *Allen*, however, for a trial on whether the town acted with gross negligence.

STATUTE'S CONSTITUTIONALITY

The Arizona Supreme Court has held that the recreational use statute does not violate the anti-abrogation provision of Arizona's Constitution when applied to a negligence action against a municipality engaged in a governmental function. ***Dickey v. City of Flagstaff***, 205 Ariz. 1 (2003) (city held out park to the public for recreational use, and maintenance of the park was a governmental function). Because the city's stewardship of the park was governmental in nature, the city would have been immune at common law for acts of negligence arising from its maintenance of the park, and thus, the constitution's anti-abrogation provision did not apply.

In ***Normandin v. Encanto Adventures, LLC***, 245 Ariz. 67 (App. 2018), a mother sued an amusement park and the City after she fell and broke her ankle during her daughter's birthday party. The trial court granted summary judgment for the park and city. The court of appeals affirmed, upholding the constitutionality of the recreational use statute against plaintiff's claims that it violated Arizona's anti-abrogation clause (by depriving her of a right to sue a private party for simple negligence) and equal protection (by treating non-recreational users more favorably than recreational users). The court also held that the statute was rationally related to a legitimate governmental interest and not an unconstitutional special law. Though the Arizona Supreme Court granted review, it did not decide whether the anti-abrogation clause bars the Legislature from granting a private business tort immunity from negligence on the ground that the private business has a contract with a public entity and is arguably an "agent" of the public entity.

Instead, the Court held that the amusement park operator was not a "manager" within the definition of the statute and remanded the case back to the trial court without addressing the constitutional issue. ***Normandin v. Encanto Adventures, LLC***, 246 Ariz. 458 (2019).

TRESPASSER

A trespasser is a person who is on the premises without the consent or privilege of the landowner or possessor. ***Barry v. S. Pac. Co.***, 64 Ariz. 116 (1946); *see also* RESTATEMENT (SECOND) OF TORTS § 329. The standard of care 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, 472 P.2d 12 (1970); Premises Liability Instruction No. 5, RAJI (7th); A.R.S. § 12-557. A different standard of care applies 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. 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 possessor's consent (either in terms of time, space or location). An invitee will not become a trespasser, however, unless it is obvious that he is about to enter an off-limits area. *See* ***McMurtry v. Weatherford Hotel, Inc.***, 231 Ariz. 244 (App. 2013). In *McMurtry*, the decedent fell to her death from her hotel room window because the balcony railing extended only halfway across the window opening. 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. 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. Thus, landowners/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. 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. 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. ***Spur Feeding Co. v. Fernandez***, 106 Ariz. 143 (1970); RESTATEMENT (SECOND) OF TORTS § 339; Premises Liability Instruction No. 6, RAJI (7th). 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 (1971) (*disagreed with on other grounds by* ***New Pueblo Constructors, Inc. v. State***, 144 Ariz. 95 (1985)). The dangerous condition need not actually attract 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 (1958); ***Brown v. Arizona Pub. Serv. Co.***, 164 Ariz. 4 (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, RAJI (7th).

DOCTRINES APPLICABLE TO EVERY CLASS OF ENTRANT

NON-PARTY AT FAULT

In ***McKillip v. Smitty's SuperValu, Inc.***, 190 Ariz. 61, 62 (App. 1997), a patron 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.

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* allows a jury to find negligence and causation simply 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 (App. 1995) (plaintiff was ascending the escalator at store when her

jacket became lodged between the escalator's moving handrail and stationary guide, causing her to be thrown down and dragged to the top of the escalator). For the doctrine of *res ipsa loquitur* to apply: (1) the accident must be of a kind that 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 that caused the instrumentality to produce injury. *Id*. 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 fault.

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 (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. 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. 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. Therefore, open and obvious conditions do not present an unreasonable risk of harm.

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. In ***Perez v. Circle K Convenience Stores, Inc.***, 564 P.3d 623 (Ariz. 2025), the Arizona Supreme Court held that duty in premises liability case, as in all negligence cases, is based on the nature of the parties' relationship, and that the business owner-invitee relationship between Circle K and Perez established a duty. The Court further explained that whether the condition that caused Perez's injury was unreasonably dangerous or open and obvious was irrelevant to the existence of a duty. Instead, these facts determined whether Circle K breached its duty. Thus, the Court held, summary judgment based on the absence of a duty was not proper. Thus, as it currently stands, the issue of whether a condition is open and obvious is one that must be assessed in the breach stage of a negligence claim. The Supreme Court was quick to point out, however, that it is still possible to seek summary judgment on open and obvious conditions if the record supports that result. 564 P.3d at 630, ¶ 15.

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). 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. ***Clark v. New Magma Irrigation & Drainage Dist.***, 208 Ariz. 246 (App. 2004).

LIABILITY FOR THE ACTS OF AN INDEPENDENT CONTRACTOR

In general, a principal is not vicariously liable for the acts of 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. ***Rand v. Porsche Fin. Servs.***, 216 Ariz. 424, 431, ¶ 23 (App. 2007).

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 a 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's 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 is "non-delegable." ***Fort Lowell-NSS Ltd. P'ship v. Kelly***, 166 Ariz. 96, 101 (1990) (a non-delegable duty is one "for which the employer must retain responsibility, despite proper delegation to another.") Such duty arises in those "special situations in which the law prescribes a duty requiring a higher degree of care," such as the affirmative duty of a landowner "to protect those described as his invitees by making and keeping the premises safe." ***Simon v. Safeway, Inc***., 217 Ariz. 330, 338 (App. 2007). This means that a land possessor who hires a contractor to perform work on the premises may be vicariously liable to an invitee if an independent contractor creates a dangerous condition that injures the invitee. In ***Wiggs v. City of Phoenix***, 198 Ariz. 367 (2000), for example, the City of Phoenix owed a non- delegable duty to keep its streets reasonably safe for travelers, and therefore the City could be vicariously liable for the negligence of its subcontractor, APS. In these circumstances, it makes no sense to name the independent contractor as a non-party at fault because doing so does not relieve the employer of any liability. Under the non-delegable duty rule, a business proprietor is vicariously liable for the torts of an independent security agency's guards. ***Simon v. Safeway, Inc.***, *supra* at 339 ("Safeway did not initially have a specific, nondelegable duty to provide security services. Instead, it voluntarily assumed that duty within the context of the heightened duty it already owed to its business invitees. Having assumed the task of providing security services on its premises, Safeway thus created for itself a personal, non-delegable duty to protect its invitees from the intentionally tortious conduct of those with whom it had contracted to maintain a presence and provide security on its premises."). The fact that the land possessor might be vicariously liable for the independent contractor's negligence does not take away the claimant's right to also sue the independent contractor for its own negligence if it breaches the applicable standard of care. ***Nelson v. Grayhawk Props., L.L.C.***, 209 Ariz. 437, 440 (App. 2004).

Notably, the non-delegable duty rule does not hold land possessors vicariously liable for the torts of the contractor's employees. *See, e.g.,* ***Vanoss v. BHP Copper Inc***., 244 Ariz. 90, 94 (App. 2018). This is because employees are covered by Arizona's workers' compensation scheme—the premiums of which a landowner either directly or indirectly pays by hiring an independent-contractor employer. *Id*.

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 may be liable for the acts of an independent subcontractor if the general contractor retains "control" over the independent contractor. This is a theory of direct, not vicarious, liability. An employer who entrusts work to an independent contractor, but who retains control over any part of the work is subject to liability for the physical harm to others for whom the employer owes a duty to exercise reasonable care.

Control must relate to the actual manner in which the work is performed, not merely the retention of some control over the premises. 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 (App. 1984); ***German v. Mt. States Tel. Co.***, 11 Ariz. App. 91, 94-95 (1969); ***Lee v. M & H Enterprises, Inc.***, 237 Ariz. 172 (App. 2015). It is not enough that the employer has a general right to order the work stopped or resumed, to inspect the progress of the work, to make suggestions or recommendations, or to prescribe deviations. These general rights are usually reserved to employers, but it does not mean that the contractor is controlled as to its *method* of work or as to *operative* detail.

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'l. Bank of Rawlins***, 21 Ariz. App. 54, 57 (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. ***Wiper v. Downtown Dev. Corp. of Tucson***, 152 Ariz. 309 (1987). However, an employer can be vicariously liable for those punitive damages only if the punitive damages were actually awarded against the employee. ***Wiper***, 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.

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/invitee, 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. 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 (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 (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. 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; ***Cent. Alarm v. Ganem***, 116 Ariz. 74 (App. 1977). In *Ganem*, a burglar alarm company left a key to deactivate the alarm system in a place accessible to unauthorized persons. The key was stolen and homes were burglarized. The alarm company was not relieved of liability for the subsequent burglaries. 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.

TAVERN OWNERS

Arizona's dram shop statutes, A.R.S. §§ 4-311 and -312, expressly preempt all common law dram shop liability claims. ***Torres v. Jai Dining Servs. (Phoenix), Inc.***, 265 Ariz. 212 (2023). This express preemption precludes all common-law claims seeking to hold a liquor licensee liable for damages caused by an

allegedly overserved patron. *Id.* Under A.R.S. § 4–311(A), a licensee is liable for property damage or personal injuries if the licensee sold liquor to an obviously intoxicated person and that person's consumption of the liquor proximately caused the plaintiff's injury. The statute carries a one-year statute of limitation.

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 (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*. See also ***Grafitti-Valenzuela ex rel. Grafitti v. City of Phoenix***, 216 Ariz. 454, 458 (App. 2007).

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 Props., Inc.***, 18 Ariz. App. 176 (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." 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.

INNKEEPER STATUTE

Arizona has an innkeepers' statute which limits the liability of innkeepers for property loss. The statute does not apply to guests' personal or bodily injury. A.R.S. § 33-302(A). In ***Terry v. Linscott Hotel Corp.***, 126 Ariz. 548 (App. 1980), hotel guests sued the Scottsdale Hilton for the theft of their jewelry 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. The hotel won summary judgment because it had complied with the "posting provisions" of A.R.S. § 33-302(A). 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.

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 satisfies its duty to keep its premises safe by: (1) inspecting the premises when he has reason to suspect defects existing at the time the tenants take possession; and (2) either repairing them or warning the tenant of their existence. 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. *See, e.g.*, ***Ibarra v. Gastelum***, 249 Ariz. 493, 497 (App. 2020) (approving jury instruction stating, "[i]f you find that [landlord] had notice of the unreasonably dangerous condition and failed to use reasonable care to prevent harm under the circumstances, then [landlord] was negligent."). In Ibarra, the court also held that the tenant could not sue the landlord for negligence per se under the Uniform Residential Landlord and Tenant Act for an alleged breach of a statutory duty to keep the apartment in a fit an habitable condition. The purpose of the Act is to define and simplify the law "governing the rental of dwelling units and the rights and obligations of landlord and tenant" and to encourage both landlords and tenants "to maintain and improve the quality of housing." A.R.S. § 33-1302. Remedies available under the Act focus on relief other than personal injuries, such as possession, lease termination and payment for repairs. The Act does not mention personal injury claims or remedies. Further, said the court, the statute only defines a general standard of care; it does not prohibit a specific act. Thus, the Act's violation is not negligence per se. 249 Ariz. at 496.

If a nuisance exists on the premises at the time of 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. The landlord's liability is suspended as soon as he surrenders possession and control of the premises in good condition to the tenant. 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 tenants' and guests' common use.

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. 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. Such was the case in ***Piccola v. Woodall***, 186 Ariz. 307 (App. 1996), where a tenant's guest was injured when she fell through a sliding door made of plate glass rather than safety tempered glass. The tenant was well aware of this condition. 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. 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 *prima facie* evidence of the tenant's liability, not

the landlord's. The landlord is not responsible for injuries occurring as a result of a tenant's tort 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. 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. ***Klimkowski v. De la Torre***, 175 Ariz. 340 (App. 1993).

In ***Siddons v. Bus. Props. Dev. Co.***, 191 Ariz. 158 (App. 1998), the tenant propped a heavy door next to the building on the sidewalk in front of his business. It fell on the plaintiff, injuring him. While the landlord has no duty to protect against a condition created exclusively by the tenant after the tenant takes possession, the court 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.

The RESTATEMENT (SECOND) OF TORTS § 837(1) creates an exception to the general principle 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. *Klimkowski*, *supra*. It 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.

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

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