CHAPTER 2: PERSONAL INJURY DAMAGES

OVERVIEW

Common law damages are typically categorized into three types: compensatory damages, punitive damages, and nominal damages.

Compensatory tort damages are designed to restore the plaintiff, as nearly as possible, to the position in which he would have been, had the tort not occurred. Compensatory, or actual, damages are intended to redress the injury or loss that a plaintiff has suffered by reason of the defendant's wrongful conduct. These include both economic damages, which compensate for objectively verifiable monetary losses—including loss of earning capacity, lost wages, and medical and other out-of-pocket expenses—and non-economic damages, which include the plaintiff's pain and suffering, mental anguish, injury and disfigurement, loss of consortium, and other losses that cannot be easily expressed in monetary terms. A plaintiff need not prove compensatory damages with mathematical certainty; however, they must not be speculative or conjectural. ***Coury Bros. Ranches, Inc. v. Ellsworth***, 103 Ariz. 515, 521 (1968). Future damages are generally available only if such consequences are reasonably certain to occur.

In addition to compensatory damages, the plaintiff may also be entitled to punitive damages if the defendant acted maliciously, wantonly, and willfully. ***Linthicum v. Nationwide Ins. Co.***, 150 Ariz. 326, 331 (1986). The goal of punitive damages is to punish and deter malicious conduct. ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 538 U.S. 408, 422–23 (2003); ***Desert Palm Surgical Grp., P.L.C. v. Petta***, 236 Ariz. 568, 584, ¶ 47 (App. 2015).

At the other end of the spectrum are nominal damages. Generally, nominal damages are a trivial sum of money (one dollar) when a violation or technical invasion of a legal right causes no actual, provable injury or damages. The award of nominal damages, while a token amount, secures the plaintiff's status as the prevailing party for the purposes of awarding attorney's fees (where allowed) and costs. ***Roberts v. City of Phoenix***, 225 Ariz. 112, 122, ¶ 38 & n.4 (App. 2010); ***Cummings v. Connell***, 402 F.3d 936, 942 (9th Cir. 2005).

Proximate Cause

A plaintiff can only recover those damages that are the direct and proximate consequence of the defendant's wrongful act. ***Valley Nat'l Bank v. Brown***, 110 Ariz. 260, 264 (1974). In Arizona, the proximate cause of an injury is that cause which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces an injury, and without which the injury would not have occurred. ***Pompeneo v. Verde Valley Guidance Clinic***, 226 Ariz. 412, 414, ¶ 9 (App. 2011).

Generally, the plaintiff must prove through medical or other evidence that the defendant's conduct more probably than not caused his injuries. ***Pompeneo***, 226 Ariz. at 415, ¶¶ 13–14. The question of proximate cause is usually for the jury, and the plaintiff has the burden of proving by a preponderance of the evidence a causal connection between the defendant's conduct and the injuries claimed. ***Dupray v. JAI Dining Servs. (Phoenix), Inc.***, 245 Ariz. 578, 584, ¶ 18 (App. 2018); ***Rhodes v. Int'l Harvester Co***., 131 Ariz. 418, 421 (App. 1982). Whether the opinion of a medical expert is necessary to establish the causal relationship depends on the nature of the injury, the circumstances under which it was sustained, and the plaintiff's condition before and after the alleged injury. ***Windhurst v. Ariz. Dep't of Corr.***, 256 Ariz. 186, 194, ¶¶ 25–26 (2023). However, when the issue of a causal connection is debatable, defendants often file motions for summary judgment or motions in limine arguing that the plaintiff has no admissible evidence of proximate cause. ***Markowitz v. Ariz. Parks Bd.***, 146 Ariz. 352, 358–59 (1985).

Causation issues can directly affect the amount of damages recoverable in actions for personal injuries or death. For instance, a defendant will not be liable for a plaintiff's condition or disability that pre-exists the defendant's conduct, but the defendant will be liable for exacerbating the pre-existing disability or condition if the evidence supports it. ***Gasiorowski v. Hose***, 182 Ariz. 376, 378 (App. 1994). These plaintiffs are typically referred to as "eggshell" plaintiffs.

Jury Awards

Determining the amount of damages is left to the judgment of the jury. The jury is the sole arbiter of the facts, and it is their function to weigh the evidence. Plaintiff bears the burden of supplying the jury with some evidentiary and logical basis for calculating a compensatory award. Jurors are not bound to accept even uncontested testimony, and a jury may award such damages as they deem reasonable and fair in accordance with their common knowledge, experience and good sense. *See* ***Estate of Reinen v. N. Ariz. Orthopedics, Ltd.***, 198 Ariz. 283, 287, ¶ 12 (2000). A jury is not obligated to award damages to a plaintiff, even if it finds for the plaintiff on liability, and the range of any award must be supported by the evidence.

Because awarding damages is the fact finder's duty, judges are reluctant to tamper with a jury's damage award unless the award is so excessive or inconsequential as to be unjust. A jury's wide-ranging authority to determine the amount of damages, however, is not unbridled. The jury award is subject to limited trial court oversight through a post-trial order of remittitur or new trial. ***Larsen v. Decker***, 196 Ariz. 239, 245 ¶ 28 (App. 2000). The rationale for the court's authority to issue such orders is to prevent so-called "runaway jury" verdicts. If the trial judge finds the damage award is tainted by "passion or prejudice," or is "shockingly or flagrantly outrageous," the court must order a new trial. ***Soto v. Sacco,*** 242 Ariz. 474, 478, ¶ 9 (2017) (cleaned up). If, however, the verdict is neither the result of passion or prejudice nor shockingly outrageous, but instead reflects "an exaggerated measurement of damages," the trial court may exercise its discretion to order remittitur. ***Id.*** A remittitur is a device for reducing an excessive verdict to the realm of reason. ***Desert Palm Surgical Grp., P.L.C. v. Petta***, 236 Ariz. 568, 581, ¶ 38 (App. 2015). A trial court grants a new trial conditionally; if the party against whom the remittitur is ordered refuses to accept it, the new trial is granted without further order. ***Soto***, 242 Ariz. at 479, ¶¶

11–12. In exercising its discretion to reduce a jury's damages award, a trial court is cautioned to be "circumspect" and may not simply substitute its judgment for the jury's. ***Ahmad v. State***, 245 Ariz. 573, 576, ¶ 5 (App. 2018). Trial judges must specifically describe in their orders "why the jury award is too high or low" in "sufficient detail to apprise the parties and appellate courts of the specific basis for the court's ruling." ***Soto*****,** 242 Ariz. at 480, ¶¶ 13-14.

TYPES OF COMPENSATORY DAMAGES

A plaintiff in a tort action is entitled to recover those sums that will reasonably compensate him or her for all damages sustained as the direct, natural and proximate result of the defendant's conduct, if the plaintiff establishes those amounts with reasonable certainty. ***Cont'l Life & Accident Co. v. Songer***, 124 Ariz. 294, 304 (App. 1979). In personal injury cases, Arizona jurors are given the following standard instruction when called upon to deliberate:

Measure of Damages

If you find [any] [*name of defendant*] liable to [*name of plaintiff*], you must then decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for each of the following elements of damages proved by the evidence to have resulted from the fault of [*any*] [*name of defendant*] [party] [person]:

1. The nature, extent, and duration of the injury.
2. The pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future.
3. Reasonable expenses of necessary medical care, treatment, and services already incurred and reasonably probable to be incurred in the future.
4. Lost earnings to date, and any decrease in earning power or capacity in the future.
5. Loss of love, care, affection, companionship, and other pleasures of the [marital] [parent-child] relationship.
6. Loss of enjoyment of life, that is, the participation in life's activities to the quality and extent normally enjoyed before the injury.

RAJI (CIVIL) 8th Personal Injury Damages 1. Arizona does not have damage caps. ***Wendelken v. Superior Court***, 137 Ariz. 455, 458 (1983).

Pain and Suffering

Pain is the plaintiff's psychological response to a physical injury. "Pain and suffering," includes physical pain, the adverse emotional consequences attributable to that pain and the injury that caused it, and the frustration and anguish caused by the inability to participate in the normal pursuits and pleasures of life. The actual inability to participate in those normal pursuits of life is known as "hedonic damages" and is discussed below.

There is no precise rule by which the jury can quantify a pain and suffering damage award, because such compensation does not ordinarily lend itself to mathematical computation. The theory behind pain and suffering damages is that mental or emotional suffering is a natural consequence of severe physical injury. The jury has complete discretion to award pain and suffering. Generally, plaintiffs may introduce evidence of their health and physical condition before and after the injury to establish the nature, extent, and consequences of the injuries the defendant caused.

Plaintiffs cannot recover for possible injury; rather, they may recover only for those losses that are reasonably certain, or probable to occur in the future. ***Coppinger v. Broderick***, 37 Ariz. 473, 476 (1931). A plaintiff can, however, recover for the reasonable probability of some future disability and permanent injury. Like any other future loss, the plaintiff must prove the permanent nature of the injury to a degree of reasonable certainty or probability. Proof of a permanent injury is a prerequisite to introducing evidence on life expectancy. ***Besch v. Triplett***, 23 Ariz. App. 301, 304–05 (1975). Future damages require proof by a preponderance of the evidence that plaintiff will suffer future pain and suffering, medical expenses, impairment, or physical disability in the future. In ***DeStories v. City of Phoenix***, 154 Ariz. 604, 606 (App. 1987), for example, the court of appeals held that future damages were not awardable to construction workers who were exposed to and inhaled asbestos dust. Though they suffered no physical injury, the construction workers sued for future damages, claiming the exposure gave them an increased risk of developing asbestosis or lung cancer. The court of appeals upheld summary judgment for the defendant. It reasoned that an increased risk of injury is not compensable absent some proof that an actual injury is reasonably certain to occur in the future. ***Id*** at 606. And there, the plaintiffs offered no evidence that any one of them would contract a disease to a reasonable degree of medical probability. ***Id.*** at 607.

Plaintiffs often introduce expert medical testimony to support a claim of future harm. Any physician who testifies must opine that the cause of plaintiff's condition and its future effects are reasonably certain. *See* ***Allen v. Devereaux***, 5 Ariz. App. 323, 326 (1967). The jury may accept or reject all or part of a witness' testimony.

Emotional Distress

To be compensable, emotional disturbances must be more than temporary, transitory or inconsequential, but claims for fear of disease are compensable in appropriate circumstances. For example, in ***Monaco v. HealthPartners of S. Ariz.***, the plaintiff was a medical patient who was erroneously administered a radioactive substance, which increased his risk of contracting leukemia from 1 in 16,000 to 3 in 100. 196 Ariz. 299, 300, ¶ 2 (App. 1999). He never contracted the disease; but his fear of contracting the disease caused problems sleeping, night sweats, and required psychological counseling after which he was diagnosed with post-traumatic stress disorder. The appellate court held that this was sufficient evidence of substantial long-term emotional disturbances to support a claim for negligent infliction of emotional distress. ***Id.*** at 303, ¶ 12.

Pet owners cannot recover for emotional distress or loss of companionship resulting from the negligent injury or death of their pet. ***Kaufman v. Langhofer***, 223 Ariz. 249, 255–56, ¶ 27 (App. 2009).

Arizona law treats pets as personal property and allows recovery equal to the fair market value of the pet at the time of its death. ***Roman v. Carroll***, 127 Ariz. 398, 399 (App. 1980). Although the legislature in 2015 removed the word "dog" from the definition of "personal property," *see* **A.R.S. § 1-215(30)**, this change is not likely to alter the rule of *Kaufman*. A negligent infliction claim still requires the plaintiff to have witnessed injury to a closely related person, and "[b]ecause humans are not related to pets, limits cannot be based on degree of consanguinity;" further, there is no reason, "as a matter of public policy, the law should offer broader compensation for the loss of a pet than would be available for the loss of a friend, relative, work animal, heirloom, or memento." ***Kaufman***, 223 Ariz. at 255–56, ¶¶ 24, 30 (citation omitted).

Finally, pets are not included in the definition of "person." **A.R.S. § 1-215(29).** The ***Kaufman*** court did note, however, that its decision was limited to negligent conduct; and Arizona might allow recovery of emotional distress damages for a loss involving intentional, willful, malicious, or reckless conduct. 223 Ariz. at 256, ¶ 32 n.13.

MEDICAL EXPENSES

Past Medical Expenses

Damages for past medical expenses are virtually always included in tort cases to restore injured individuals to a financial position substantially equivalent to that which they would have occupied had they not been injured. As with other forms of damages, the plaintiff bears the burden of producing evidence from which the jury can calculate and compensate him for prior medical expenses. A jury may not consider a speculative damages claim that is not supported by evidence. ***Lewin v. Miller Wagner & Co.***, 151 Ariz. 29, 34 (App. 1986); *see also* ***Felder v. Physiotherapy Assocs.***, 215 Ariz. 154, 162, ¶ 38 (App. 2007) ("[U]ncertainty as to the amount of damages does not preclude recovery. This is simply a recognition that doubts as to the extent of the injury should be resolved in favor of the innocent plaintiff and against the wrongdoer. But it cannot dispel the requirement that the plaintiff's evidence provide some basis for estimating his loss." (cleaned up)).

Expenses that might qualify for compensation are numerous and may require proof of the reasonable value of items and services such as consultants, nurses, home health care providers, ambulance service, prosthetic devices and medicine. In addition, plaintiffs may recover medical expenses incurred in order to mitigate their damages. However, plaintiffs should not receive compensation for items connected with medical care unrelated to their injuries. If the medical expenses are for treatment of a number of ailments, only one of which was caused by the defendant, plaintiffs have the burden of proving what portion of their medical expenses are attributable to the defendant's act.

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

In ***Lopez v. Safeway Stores, Inc***., 212 Ariz. 198, 207, ¶ 26 (App. 2006), the court of appeals held that an injured plaintiff was entitled to claim and recover the full amount of her reasonable medical expenses the health care provider *charged*, without any reduction for the amounts written off by her physicians pursuant to contractually agreed-upon rates with her insurance carriers. In other words, the plaintiff was entitled to claim the full amount of the billed medical charges, even though neither she nor her health insurer would ever have to pay the full-billed amount. The court reasoned that this serves the fundamental purpose of the collateral source rule – to prevent a tortfeasor from deriving any benefit from compensation or indemnity that an injured party has received from a collateral source. *See* **Chapter 4** for a discussion of the collateral source rule.

Future Medical Expenses

To recover future medical expenses, the future treatment must be "reasonably probable" to occur, and plaintiff must have some evidence of the nature and cost of the future treatment. ***Saide v. Stanton***, 135 Ariz. 76, 77 (1983). Evidence of the duration, amount, and cost of treatment must be definite. ***Valley Nat'l Bank of Ariz. v. Haney***, 27 Ariz. App. 692, 694 (1976). Although future treatment is an estimate, the jury "cannot be allowed to speculate or guess" about the cost of future medical expenses and must be given "some data . . . upon which it might reasonably estimate the amount to be allowed for this item." ***Charron v. Kernan***, 8 Ariz. App. 488, 491 (1968) (quoting ***Henderson v. Breesman***, 77 Ariz. 256, 259 (1954)). Recovery is not allowed if based on pure speculation.

Medical Monitoring Expenses

Claims seeking damages for medical monitoring or medical surveillance have become common in toxic tort litigation. Medical monitoring claims are premised on the theory that a plaintiff exposed to a toxic substance because of the defendant's conduct should not be forced to shoulder the often substantial cost of periodic medical tests that might be necessary to detect cancer or other diseases. Claims for medical monitoring are akin to claims for future medical expenses in that the proponent of the claim must provide competent medical evidence that such expenses are reasonably probable and necessary. *See* ***Yslava v. Hughes Aircraft Co.***, 845 F. Supp. 705, 708–709 (D. Ariz. 1993).

Courts generally recognize that plaintiffs exposed to toxic substances often have a demonstrated need to monitor their physical condition over an extended period of time. *See* ***Burns v. Jaquays Min. Corp.***, 156 Ariz. 375, 380–81 (App. 1987). As such, unlike a "fear of disease" claim, the plaintiff in an exposure claim need not demonstrate any additional or present injury as the basis of the damages claim. Rather, the claim is based on the present need for medical monitoring.

LOST WAGES/IMPAIRMENT OF EARNING CAPACITY

When a plaintiff has lost income because of injuries sustained, he is entitled to recover damages for either or both: (1) loss of time and earnings, and (2) loss or impairment of earning capacity. *See* ***Hatcher v. Hatcher***, 188 Ariz. 154, 157–58 (App. 1996). "Loss of time" or "loss of earnings"

compensates the injured party for wages lost because of the injury, and loss or impairment of earning capacity compensates the victim for all moneys that could have been earned in the future, but for the injury. Loss of earnings is an item of special damage and must be pleaded and proved. ***Mandelbaum v. Knutson***, 11 Ariz. App. 148, 149 (1969).

The value of the impairment or decrease in earning capacity due to injury has been defined as the "permanent diminution of ability to earn money." Courts typically view this element as a "lost stream of income" composed of the difference between what the plaintiff would have earned without the injury and the forecasted actual earnings given the injuries for the plaintiff's projected working life. Impairment of earning capacity is not necessarily measured by an injured person's employment or salary at the time of the injury and past earnings need not be shown. ***Ball Corp. v. George***, 27 Ariz. App. 540, 544 (1976). In fact, a plaintiff may recover for impairment of earning capacity even if he has never been employed or was temporarily unemployed at the time of the injury.

An injured person might assert that an injury caused that person to abandon plans to change employment, to obtain additional education or training, or to otherwise advance a career. In the face of such an assertion, the court recognizes a distinction between persons with only vague hopes of entering a new profession and those with demonstrated ability and intent to do so.

To determine lost earning capacity, the jury may consider a variety of factors, including the plaintiff's age, life expectancy, work-life expectancy, health habits, occupation, talents, skill, experience, training, probable pay raises, promotions and other advancements, declining earning capacity due to age, and the like. Both sides routinely use economic or medical expert testimony to establish or refute the impairment of the plaintiff's earning capacity. Experts generally consider the plaintiff's actual earnings before and after the injury. *See* ***Felder v. Physiotherapy Assocs.***, 215 Ariz. 154, 165, ¶ 49 (App. 2007).

LOSS OF CONSORTIUM

A claim for loss of consortium compensates the injured party's family member for the loss of love, affection, protection, support, services, companionship, care, society, and in the marital relationship, sexual relations resulting from the tort to the injured party. ***Barnes v. Outlaw***, 192 Ariz. 283, 286 (1998). Loss of consortium is a derivative claim that requires the claimant to prove all the elements of the underlying tort. ***Martin v. Staheli***, 248 Ariz. 87, 92, ¶ 17 (App. 2019). Any defenses applicable to the injured party (i.e., assumption of risk, comparative negligence, etc.) are also available against the lost consortium claimant. *See, e.g.*, ***Quadrone v. Pasco Petroleum Co.***, 156 Ariz. 415, 416–17 (App. 1987).

To recover loss of consortium damages, the claimant must prove "a severe, permanent and disabling injury" which renders the person "unable to exchange love, affection, care, comfort, companionship and society in a normally gratifying way." ***Pierce v. Casa Adobes Baptist Church***, 162 Ariz. 269, 272 (1989). Such an injury does not need to be the functional equivalent of death, or even be catastrophic. The threshold level of interference with the normalcy of the relationship is a question of law to be decided by the judge. Once the judge has decided that threshold level of interference exists, it is up to the trier of fact (judge or jury) to determine the amount recoverable (if any) based on the interference.

Although Arizona's Survival Statute, **A.R.S. § 14-3110**, provides that an injured person's loss of consortium claim does not survive his death, the injured person's death does not extinguish his survivors' loss of consortium claim if the death was unrelated to his claim for allegedly negligent medical treatment. ***Martin***, 248 Ariz. at 93–94, ¶ 24. In ***Martin***, the court of appeals held the patient's death extinguished his own non-economic claims, but the family members could still pursue their claim for the alleged injury to their familial relationship with the injured person from the time of his injury until his death. ***Id.***

Loss of consortium claims are subject to the "each person" limitation often found in insurance policies. ***Stillman v. Am. Family Ins.***, 162 Ariz. 594, 597 (App. 1990). There, the insurance policy limited liability coverage to $100,000 for injuries to "each person" and $300,000 for "each occurrence." ***Id.*** The court held that for purposes of the policy, only "one" party (the child) was injured, and thus, the insurer's liability on the parents' loss of consortium claim was limited by its total policy limitation of $100,000 for that one person. ***Id.***

Arizona recognizes three types of loss of consortium claims: (1) loss of spousal consortium; (2) loss of filial consortium; and (3) loss of parental consortium.

Loss of Spousal Consortium

A claim for loss of spousal consortium occurs when an injured party, as a result of his or her injuries, is unable to provide his or her spouse with love, affection, care, comfort, companionship, society and moral support. The claim belongs to the spouse of the injured party as a separate cause of action.

Spouses estranged, or not enjoying such "consortium," at the time of the injury, are unable to recover. A loss of consortium claim puts into issue the normalcy and quality of the relationship between the parties prior to the injury. ***Bain v. Superior Court***, 148 Ariz. 331, 335–36 (1986). As such, the defense can seek and admit into evidence very personal information regarding the nature of the claimant's pre-injury relationship with the injured spouse compared to the post-injury relationship.

Loss of Filial Consortium

Arizona recognized a parent's right to recover for loss of their minor child's consortium in ***Reben v. Ely***, 146 Ariz. 309, 312 (1985). There, a minor child was administered liquid cocaine thought to be liquid Tylenol. ***Id.*** at 309–310. Severe and permanent brain damage resulted. ***Id.*** The court allowed the parents' claim for the loss of their son's love, companionship, and society. ***Id.*** at 314. The focus in deciding a claim for loss of a child's consortium is the interference in the normal relationship between a parent and child. ***Miller v. Westcor Ltd. P'ship***, 171 Ariz. 387, 395 (App. 1991). In ***Frank v. Superior Court***, 150 Ariz. 228, 234 (1986), the court expanded ***Reben*** to include adult children. Prior to ***Frank***, courts held that upon the child's reaching the age of majority, the reciprocal legal obligations of support and obedience ended, thereby ending a parent's entitlement to the services and earnings of their adult children. ***Frank*** allowed parents to recover the lost "economic security" their adult children provided to them.

Loss of Parental Consortium

Arizona recognizes a child's right to recover for loss of parental consortium. In ***Villareal v. State Dep't of Transp.***, 160 Ariz. 474, 481–82 (1989), the court held that a child may recover for loss of parental consortium when the parent suffers a serious, permanent, disabling injury rendering the parent unable to provide love, care, companionship, and guidance to the child and the parent-child relationship is destroyed or nearly destroyed. The court reasoned that children have a right to enjoy a mutually beneficial relationship with their parents, and society needs to protect a child's right to receive the benefits derived from the parental relationship. ***Id.*** However, the court limited the definition of "parent" to biological and adoptive parents, and specifically excluded injuries of siblings, grandparents, other relatives and friends for the purposes of this type of claim. ***Id.*** at 480.

HEDONIC DAMAGES

Hedonic damages are awarded for noneconomic, intangible losses involving pleasure, as with the loss of enjoyment of life, the loss of a view from one's property, or suffering caused by disparate treatment." DAMAGES, Black's Law Dictionary (12th ed. 2024). Hedonic damages are an attempt to compensate the plaintiff for the monetary value associated with a loss of the everyday pleasures of life, as distinct from the economic or productive value of life.

In ***Ogden v. J.M. Steel Erecting, Inc.***, 201 Ariz. 32, 39, ¶ 31 (App. 2001), the court of appeals held that hedonic damages can be a component of a general damages claim, distinguishable from, and not duplicative of, damages for pain and suffering. The court explained that an award for pain and suffering compensates the injured person for the physical discomfort and emotional response to the sensation of pain caused by the injury itself. ***Id.*** In contrast, hedonic damages compensate for the limitations on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his or her talents, recreational interests, hobbies, or avocations. ***Id.*** The court clarified this ruling in ***Quintero v. Rogers***, 221 Ariz. 536, 540, ¶¶ 9–10 (App. 2009), stating that *Ogden* did not say hedonic damages were distinct from pain and suffering, but rather, each claim is a slightly different way of arguing for a general damages award. Thus, hedonic damages are not excluded from "pain and suffering" under the survival statute, **A.R.S. § 14-3110**, and cannot be recovered after a person's death.

PROPERTY DAMAGE CLAIMS

In general, the measure of damages for injury to personal property when it is not destroyed is the difference in the value of the property immediately before and immediately after the damage. If the property has no market value, its actual worth to the owner is the test. ***State v. Brockell***, 187 Ariz. 226, 228 (App. 1996).

When the property is repaired or restored, however, the measure of damages includes the cost of repair with due allowance for any difference between the value of the property before the damages and the value after repairs, as well as the loss of use. In Arizona, property damage claims include compensation for the cost of repair, residual diminution in fair market value, and loss of use. ***Farmers Ins. Co. v. RBL Inv. Co.***, 138 Ariz. 562, 564–65 (1983) (citing the RESTATEMENT (SECOND) OF TORTS § 928 (1977)).

Arizona law does not require the sale or transfer of a damaged personal property to establish a claim for diminution in value or to prove the loss in value. ***Oliver v. Henry***, 227 Ariz. 514, 518–19, ¶ 16 (App. 2011). The loss can be established through other competent means, such as an expert appraisal of the pre-loss and post-repair values. Moreover, a plaintiff does not need to actually rent a substitute chattel to make a claim for damages involving a loss of use. ***Aries v. Palmer Johnson***, 153 Ariz. 250, 259 (App. 1987). The damages may be based upon the reasonable rental value of a substitute item, whether or not the plaintiff actually rents the item.

Diminution in Value Based On Toxic Spills or Waste

These damages flow from property damage claims involving toxic spills or the disposal of toxic wastes. Plaintiffs generally allege that these acts constitute a diminution in the value of their property created by the contamination's proximity. *See generally* ***Nucor Corp. v. Emp'rs Ins. Co. of Wausau***, 231 Ariz. 411 (App. 2012). Common law nuisance claims are also attributed to the property damage and its disruption to the plaintiffs' daily routine of life. This category of damages is independent of personal physical injury and therefore is unrelated to the impairment to quality of life that is associated with pain and suffering damages.

ECONOMIC LOSS DOCTRINE

The Economic Loss Doctrine generally prohibits tort actions that seek only "pecuniary damage[s] not arising from injury to the plaintiff's person or from physical harm to property." Although some courts apply the doctrine to bar tort recovery of purely pecuniary losses, Arizona takes a narrower approach. In Arizona, the doctrine bars only the recovery of "pecuniary or commercial damage, including any decreased value or repair costs for a product or property that is itself the subject of a contract between the plaintiff and defendant, and consequential damages such as lost profits." ***Sullivan v. Pulte Home Corp***., 232 Ariz. 344, 345–46, ¶ 8 (2013) (cleaned up). A contracting party is limited to its contractual remedies for purely economic loss. ***Flagstaff Affordable Housing Ltd. P'ship v. Design Alliance, Inc***., 223 Ariz. 320, 326, ¶ 28 (2010). The Economic Loss Doctrine does not apply, however, to negligence claims by a plaintiff who has no contractual relationship with the defendant**.** ***Sullivan***, 232 Ariz. at 346, ¶ 9. Arizona's economic loss doctrine serves to encourage the private ordering of economic relationships, protect the expectations of contracting parties, ensure the adequacy of contractual remedies, and promote accident- deterrence and loss-spreading. ***Id.*** at ¶ 10. ***Flagstaff Affordable Housing*** held that where the Economic Loss Doctrine applies, a party will be limited to its contract remedies *unless* the parties have specifically provided in their contract for tort remedies. 223 Ariz. at 326, ¶ 30.

An aggrieved party may, however, recover for personal injuries or damage to property proximately caused by a non-contracting party. *See* ***Carstens v. City of Phoenix***, 206 Ariz. 123, 129, ¶ 28 (App. 2003), *rejected on other grounds by Flagstaff Affordable Housing Ltd. P'ship,* 223 Ariz. at 325, ¶ 23. Tort remedies are available if the defect presented a real danger of harm to persons or other property, if an "accident" occurred, if the damage was of the type recognized as "tort damage" (harm to persons or other property), or if some combination of these factors applies. In such cases, the plaintiff will be able to recover for all damages – personal injury, property damage to other property, property damage to the product itself, and all consequential damage generally allowed in tort actions. ***Salt River Project Agr. Imp. & Power Dist. v. Westinghouse Elec. Corp***., 143 Ariz. 368, 380 (1984), *abrogated on other grounds by* ***Phelps v. Firebird Raceway, Inc***., 210 Ariz. 403 (2005). A federal district court applied the doctrine and *Westinghouse* in the context of a defaulted student loan. The harm allegedly suffered by the plaintiff was "directly attributable to the alleged breach of a specified contractual provision and the foreseeable result of such breach." ***Andrich v. Navient Sols. Inc.***, 2020 WL 1508449, at *6 (D. Ariz. Mar. 30, 2020) (citing *Westinghouse Elec. Corp*., 143 Ariz. at 379-80).

PRE-EXISTING CONDITION, UNUSUALLY SUSCEPTIBLE PLAINTIFF

In tort actions, a plaintiff may recover damages for aggravation of a preexisting condition. ***Kalaf v. Assyd***, 60 Ariz. 33, 36 (1942). Defendants must take plaintiffs as they find them at the time of the accident and cannot complain if the plaintiff was more seriously injured by the accident than another person would have been. ***City of Scottsdale v. Kokaska***, 17 Ariz. App. 120, 128 (1972). In these situations, jurors may be given an instruction that reads:

> **Pre-Existing Condition, Unusually Susceptible Plaintiff**
>
> [*Name of plaintiff*] is not entitled to compensation for any physical or emotional condition that pre-existed the fault of [*name of defendant*]. However, if [*name of plaintiff*] had any pre-existing physical or emotional condition that was aggravated or made worse by [*name of defendant's*] fault, you must decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for that aggravation or worsening.
>
> You must decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for all damages caused by the fault of [*name of defendant*], even if [*name of plaintiff*] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

RAJI (CIVIL) 8th Personal Injury Damages 2. Plaintiffs are not entitled to compensation for any physical or emotional condition that pre-existed the fault of defendant. However, if plaintiff had any pre-existing physical or emotional condition that was aggravated or made worse by defendant's fault, the jury must decide the full amount of money that will reasonably and fairly compensate plaintiff for that aggravation or worsening – even if a normally healthy person would not have suffered similar injury. *See, e.g.,* ***Papastathis v. Beall***, 150 Ariz. 279, 281 (App. 1986) ("The trauma to a pre-existing condition causing the worsening of that condition was a substantial factor in his eventual death and is a basis for liability.").

DAMAGES FOR WRONGFUL DEATH OF SPOUSE, PARENT, OR CHILD

In Arizona, a wrongful death claim is purely statutory and governed by **A.R.S. §§ 12-611 through 12-613. A.R.S. § 12-611** provides that "[w]hen death of a person is caused by wrongful act, neglect or default, . . . the person who . . . would have been liable if death had not ensued shall be liable to an action for damages." The statutory scheme directs that "the jury shall give such damages as it deems fair and just with reference to the injury resulting from the death to the surviving parties who may be entitled to recover, and also having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default." **A.R.S. § 12-613**. The decedent's pain and suffering is not included in the measure of damages and cannot be claimed as damages by the surviving claimants. *See* ***Duenas v. Life Care Ctrs. of Am., Inc***., 236 Ariz. 130, 138, ¶ 25 (App. 2014) (wrongful death damages "that may be recovered are the beneficiaries', not the decedent's"); ***Girouard v. Skyline Steel, Inc***., 215 Ariz. 126, 131–32, ¶ 19 (App. 2007) ("[A] survivor may not recover for mental anguish resulting from the negligent acts of the defendant prior to the decedent's death,. . . . Nor may a survivor recover for mental anguish resulting from actual or perceived pain and suffering experienced by the decedent during the time leading up to death because such period of time precedes the death of the decedent.").

In some wrongful death cases, a jury may award zero damages if they deem it "fair and just." ***Walsh v. Advanced Cardiac Specialists Chartered***, 229 Ariz. 193, 196, ¶ 9 (2012). Arizona's recommended jury instruction states:

> **Damages for Wrongful Death of Spouse, Parent, or Child**
>
> If you find [*name of defendant*] liable to [*name of plaintiff*], you must then decide the full amount of money that will reasonably and fairly compensate [name of each survivor] [separately] for each of the following elements of damages proved by the evidence to have resulted from the death of [*name of decedent*].
>
> 1. The loss of love, affection, companionship, care, protection, and guidance since the death and in the future.
> 2. The pain, grief, sorrow, anguish, stress, shock, and mental suffering already experienced, and reasonably probable to be experienced in the future.
> 3. The income and services that have already been lost as a result of the death, and that are reasonably probable to be lost in the future.
> 4. The reasonable expenses of funeral and burial.
> 5. The reasonable expenses of necessary medical care and services for the injury that resulted in the death.

RAJI (CIVIL) 8th Personal Injury Damages 3. An action for wrongful death can be brought by and in the name of the surviving husband or wife, child, parent or guardian, or personal representative of the deceased person *for and on behalf of* the surviving husband or wife, children or parents, or if none of these survive, on behalf of the decedent's estate. **A.R.S. § 12-612**. In other words, a wrongful death action is *one action* for damages with *one plaintiff* and *one judgment,* but the jury will make separate

awards to each beneficiary in proportion to their proven damages. *See* ***Wilmot v. Wilmot***, 203 Ariz. 565, 569, ¶ 12 (2002). Though either parent can be the named plaintiff for the death of a child, and though each has a claim for damages, both cannot be named plaintiffs in separate actions. Likewise, though there may be several surviving children, each with claims, they cannot file multiple separate lawsuits. Whoever files first is deemed the named plaintiff for the benefit of all beneficiaries who may have a claim for damages. The Estate has a claim only if there is no surviving spouse, parent or child. ***Gonzalez v. Ariz. Pub. Serv. Co.***, 161 Ariz. 84, 87 (App. 1989).

Surviving adult children, no matter their age or marital status, have a claim for the death of a parent. Likewise, a parent has a claim for the death of a child, regardless of the child's age or marital status. A spouse has a claim only if legally married to the deceased. A spouse must prove the existence of a valid marriage, which is determined by examining the law of the place where the couple was married. ***Donlann v. Macgurn***, 203 Ariz. 380, 383, ¶ 11 (App. 2002). Co- habiting partners do not have a wrongful death claim. Long time girlfriends, boyfriends or fiancés are not wrongful death claimants, either.

Biological children of the decedent are proper wrongful death claimants, but biological children who are adopted by another before the death of the biological parent do not have standing to sue for the wrongful death of the biological parent. The right to bring a wrongful death action is a "legal consequence" of the parent-child relationship (a right that by statute cannot exist without the relationship); and that right is lost upon adoption, ***Edonna v. Heckman***, 227 Ariz. 108, 111, ¶ 14 (App. 2011), or upon termination of a parental rights. ***Wise on behalf of Wise v. Aspey, Watkins & Diesel attorneys at law, P.L.L.C.***, 254 Ariz. 447, 451, ¶ 17 (App. 2023) Legally adopted children have a wrongful death claim, but stepchildren and foster children do not. Siblings, grandparents, aunts, uncles and cousins do not have a claim and cannot be either plaintiffs or statutory beneficiaries.

A statutory plaintiff has a duty to prosecute the claim on behalf of all statutory beneficiaries, to whom the statutory plaintiff owes a fiduciary duty. ***Wilmot***, 203 Ariz. at 569, ¶ 13. Although a statutory plaintiff may not settle the claims of the statutory beneficiaries without their consent, ***id.*** at 570, ¶ 18, they may settle their own personal claims without the consent of the statutory beneficiaries. *See* ***Est. of Brady v. Tempe Life Care Vill., Inc.***, 254 Ariz. 122, 129, ¶ 36 (App. 2022).

Damages for Survival Claims

A.R.S. § 14-3110 provides that "[e]very cause of action, except a cause of action for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium or invasion of the right of privacy, shall survive the death of the person entitled thereto or liable therefor, and may be asserted by or against the personal representative of such person, provided that upon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed." Upon a claimant's death, any claim he had for pain and suffering or hedonic damages is extinguished. *See* ***Quintero v. Rodgers***, 221 Ariz. 536, 540, ¶ 10 (App. 2009).

Claims for punitive damages survive the death of the plaintiff as well as the death of the tortfeasor under A.R.S. § 14-3110. ***Id.*** ¶ 12.

The elder abuse statute, **A.R.S. § 46-455**, provides an exception to the rule that a pain and suffering claim extinguishes upon the claimant's death. ***Denton v. Superior Court***, 190 Ariz. 152, 154–55 (1997). These claims may be brought against any person employed to provide care, was a de facto guardian or conservator, who has been appointed by the court, or who causes or permits the life of an adult to be injured or endangered.

PUNITIVE DAMAGES

Punitive damages are awarded over and above compensatory damages to punish the wrongdoer and deter others from emulating his/her conduct. ***Linthicum v. Nationwide Ins. Co.***, 150 Ariz. 326, 330 (1986). **RAJI (CIVIL) 8th Personal Injury Damages 4** states:

> **Punitive Damages**
>
> If you find [*name of defendant*] liable to [*name of plaintiff*], you may assess additional damages to punish [name of defendant] or to deter [*name of defendant*] and others from similar misconduct in the future. Such damages are called "punitive" damages. To recover punitive damages, [*name of plaintiff*] must prove by clear and convincing evidence:
>
> 1. [*Name of defendant*]'s misconduct was intended to cause harm, or
> 2. [*Name of defendant*]'s misconduct was motivated by spite or ill will, or
> 3. [*Name of defendant*]'s misconduct was:
>   a. outrageous, oppressive, or intolerable, and
>   b. [*Name of defendant*] knew or intentionally disregarded that [his/her/its] conduct created a substantial risk of harm to others.

Entitlement to Punitive Damages

To justify a punitive damage award, the inquiry should be focused on the defendant's mental state. "Something more" is required above the mere commission of a tort. Arizona courts have developed a shorthand reference for this "something more," requiring that the plaintiff "prove that defendant's evil hand was guided by an evil mind." ***Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.***, 230 Ariz. 592, 604, ¶ 60 (App. 2012). The standard of proof is by clear and convincing evidence, which may be established by either direct or circumstantial evidence. ***Linthicum v. Nationwide Ins. Co.***, 150 Ariz. 326, 332 (1986); ***Hyatt Regency Phoenix Hotel v. Winston & Strawn***, 184 Ariz. 120, 132 (App. 1995).

Although the case law since ***Linthicum*** has used the phrase "evil mind" as short hand to describe the state of mind to establish a claim for punitive damages, the RAJI punitive damage jury instruction, which was revised in 2018 and again in 2023, removed the phrase "evil mind" based on the Civil Jury Instruction Committee's belief that the phrase is a legal term of art that could be confusing to jurors because they might apply or be influenced by their own religious or social perspective.

An evil mind can be inferred "from a defendant's conduct or objectives." ***Nardelli***, 230 Ariz. at 604, ¶ 61. For instance, it may be inferred when a defendant's conduct is so outrageous or egregious that it can be assumed he intended to injure or that he consciously disregarded the substantial risk of harm created by his conduct. ***Gurule v. Illinois Mut. Life & Cas. Co.***, 152 Ariz. 600, 602 (1987); ***Tritschler v. Allstate Ins. Co.***, 213 Ariz. 505, 517, ¶ 38 (App. 2006); ***Hyatt Regency Phoenix Hotel***, 184 Ariz. at 130. A jury may also infer an evil mind if the defendant deliberately continued a course of action despite inevitable or highly probable harm that would follow. ***Gurule***, 152 Ariz. at 602. In comparing bad faith claims to punitive damages claims, the court of appeals has stated that claims for punitive damages require proof of facts beyond those required to prove bad faith, i.e., the clear and convincing evidence that the defendant's conduct was undertaken with an evil mind. ***Sobieski v. Amer. Std. Ins. Co. of Wisconsin,*** 240 Ariz. 531, 536, ¶¶ 17–18 (App 2016); ***Tritschler***, 213 Ariz. at 517–18, ¶ 39.

The Arizona Supreme Court clarified the standard for punitive damages in ***Swift v. Carman***, 253 Ariz. 499 (2022). The court reiterated that only a knowing culpability warrants punitive damages. In an intentional tort case, such as for bad faith, the knowing culpability can exist if the defendant was motivated by spite or ill will. In a negligence case, however, by definition there is no intent to injure. As such, the only means by which the plaintiff is likely to meet the punitive damage standard is by demonstrating the outrageousness of a defendant's conduct. As the court put it, "Absent proof of the intent to cause harm or that the defendant acted out of spite or ill will, outrageous conduct will always be required to sustain a claim for punitive damages in negligence cases." ***Id.*** at 507, ¶ 25.

For example, in ***Quintero v. Rogers***, 221 Ariz. 536, 542, ¶ 24 (App. 2009), the court held that a punitive damages claim could proceed where the driver, who pled guilty to reckless driving and endangerment, was weaving in and out of traffic prior to the collision, had approached intersection traveling more than 25 miles-per-hour above posted speed limit, and then pumped the brakes slightly and swerved to avoid an on-coming vehicle, which caused him to fishtail and cross over median into oncoming traffic. In the garden variety traffic accident or other negligence case, however, the ***Swift*** court noted, "it will be only the rare negligence case that meets this standard [of intent to cause harm or that the defendant acted out of spite or ill will]." 253 Ariz. at 507, ¶ 26. In ***Swift***, said the court, the driver's conduct did not meet the punitive damage standard because negligence—even gross negligence—is not enough for punitive damages. ***Id.***

Absent a specific exclusion, punitive damages are covered under the liability portion of an insurance policy. ***Price v. Hartford***, 108 Ariz. 485, 488 (1972). On the other hand, punitive damages are not covered under an uninsured motorist ("UM") or underinsured motorist ("UIM") endorsement to an insurance policy unless the endorsement clearly states there is coverage for punitive damages. ***State Farm Mut. Auto Ins. Co. v. Wilson***, 162 Ariz. 247, 250 (App. 1989), *modified on remand*, 162 Ariz. 251 (1989).

The Constitutionality of Punitive Damages Awards

The Due Process Clause of the United States Constitution limits the size of punitive damages awards. Grossly excessive punitive damage awards violate the Fourteenth Amendment. The Arizona Court of Appeals has held, however, that a 1:1 ratio of punitive to compensatory damages is not unconstitutional. ***Sec. Title Agency, Inc. v. Pope***, 219 Ariz. 480, 503–04, ¶ 106 (App. 2008); ***Hudgins v. Sw. Airlines***, 221 Ariz. 472, 492, ¶ 65 (App. 2009).

As a general rule, the appropriate size of a punitive damage award is measured by three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed by comparable cases." ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 538 U.S. 408, 419 (2003); *see also* ***Hudgins***, 221 Ariz. at 490, ¶ 51 (applying *Gore* factors, namely "the degree of reprehensibility of the defendant's misconduct, the ratio between compensatory and punitive damages, and how the award compares with other penalties"). In ***Campbell***, the United States Supreme Court commented that few awards of punitive damages more than nine times the amount of the compensatory damage award would satisfy due process. 538 U.S. at 425. Defendants should be punished because they engaged in conduct that harmed the plaintiff, not because they are an unsavory individual or business. ***Id.*** at 423.

The degree of reprehensibility of the defendant's conduct is the most important factor. To analyze reprehensibility, Arizona courts consider whether: (a) the harm caused was physical as opposed to economic; (b) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (c) the target of the conduct had financial vulnerability; (d) the conduct involved repeated actions or was an isolated incident; and (e) the harm was the result of intentional malice, trickery, or deceit, or mere accident. In ***Hudgins***, a punitive damage award ratio (of punitive-to-compensatory damages) of 8:1 was unconstitutionally excessive. 221 Ariz. at 491, ¶ 57. The defendant's conduct fell on the low to middle range of the reprehensibility scale, and compensatory damages were substantial in light of the actual injury. The court reduced the punitive damages award to a 1:1 ratio. *Id.* at 492, ¶ 65.

In a similar case, the court in ***Security Title Agency, Inc.***, reduced a punitive damage award from an approximately 6:1 ratio to a 1:1 ratio. 219 Ariz. at 503–504, ¶ 106. In doing so, the court reasoned that the harm suffered was economic as opposed to physical, defendant's acts did not threaten health or safety, few reprehensible factors were present, and plaintiff received a substantial compensatory damage award. *Id.*

In ***Nardelli v. Metro. Grp. Prop. And Cas. Ins. Co.***, the court noted that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. When compensatory damages are substantial, a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. 230 Ariz. 592, 611, ¶ 95 (App. 2012). The court held that when the reprehensibility of conduct is low to moderate, punitive damages should remain at a 1:1 ratio. ***Id.***

Most recently, the court of appeals found that ratios of 2.67:1 and 3:1 were constitutionally excessive in ***Smith v. Olsen***, 257 Ariz. 518, 532, ¶ 55 (App. 2024).

Arizona courts have, however, awarded punitive damages in amounts greater than a 1:1 ratio. In ***Arellano v. Primerica Life Insurance***, the court reduced a punitive damages award from a 13:1 ratio to a 4:1 ratio because the defendant's conduct fell within "the middle to high range of reprehensibility." 235 Ariz. 371, 380, ¶ 45 (App. 2014).

These general principles notwithstanding, ratio caps may apply to punitive damages awards for specific types of claims. *See, e.g.*, ***Exxon Shipping Co. v. Baker***, 554 U.S. 471, 514 (2008) (holding 1:1 ratio of compensatory to punitive damages is the upper limit in maritime tort cases).

Punitive Damage Claims Survive Death

As discussed above, punitive damage claims survive the death of both the plaintiff and tortfeasor. In ***Quintero v. Rodgers***, 221 Ariz. 536, 540, ¶ 11 (App. 2009), the court held that **A.R.S. § 14-3110**, the survival statute**,** does not preclude a personal representative from maintaining a punitive damages claim, because punitive damages do not compensate for the decedent's "pain and suffering." *See also* ***Haralson v. Fisher Surveying Inc.***, 201 Ariz. 1, 4, ¶ 14 (2001) (punitive damages claim survives tortfeasor's death and may be recoverable against his estate). In ***Haralson***, punitive damages were recoverable where the deceased driver crossed the centerline, causing a head on collision while in a "drugged stupor." ***Id.*** at 7, ¶ 26 (Jones, J., concurring). The court cited other examples where punitive damages might be appropriate, such as terrorist attacks, bombings, mass murderers and serial killings, but refused to limit the circumstances to such "outrageous conduct." ***Id.*** at 4, ¶ 13 (majority op.). The court reasoned that "while a punitive damage award cannot punish a deceased wrongdoer for his or her reprehensible conduct, it may deter its future occurrence by others." ***Id.*** ¶ 15.

Vicarious Liability for Punitive Damages

Hyatt Regency Phoenix Hotel v. Winston & Strawn, 184 Ariz. 120, 130–31 (1995), reaffirmed the rule in Arizona that an employer is vicariously liable for punitive damages for acts its employees commit in furtherance of the business and within the scope of employment. The plaintiff need not establish a separate "evil mind" on the part of the employer, but without evidence of an employee's evil mind, punitive damages cannot be assessed against the employer independently. A deceased's employer can also be vicariously liable for punitive damages if the deceased was acting in the course and scope and in furtherance of the employer's business when the tort was committed. ***Haralson v. Fisher Surveying Inc.***, 201 Ariz. 1, 7, ¶ 25 (2001).

BAD FAITH DAMAGES

Damages awarded in a bad faith case are described in more detail in the Chapter 7 ("Insurance Coverage and Bad Faith") of this Guide. In general, the jury is instructed that if it finds the defendant breached the duty of good faith and fair dealing, and that plaintiff suffered other damages in addition to the judgment that was entered against him, the jury must decide the full amount of money that will reasonably and fairly compensate plaintiff for each of the following elements of damage proven by the evidence to have resulted from defendant's breach of the duty of good faith and fair dealing:

1. Monetary loss or damage to credit reputation experienced and reasonably probable to be experienced in the future; and
2. Emotional distress, humiliation, inconvenience, and anxiety experienced and reasonably probable to be experienced in the future.

RAJI (Civil) 7th Insurance Bad Faith 6; ***Rawlings v. Apodaca***, 151 Ariz. 149, 161 (1986); ***Farr v. Transamerica Occidental Life Ins. Co.***, 145 Ariz. 1, 6–7 (App. 1984).

CLAIMS MADE BY UNDOCUMENTED ALIENS

Non-resident aliens can pursue wrongful death claims. ***Bonthron v. Phoenix Light & Fuel Co***., 8 Ariz. 129, 130 (1903). Resident aliens may also pursue wrongful death and personal injury claims. *See, e.g.*, ***Parra v. Continental Tire North Am., Inc***., 222 Ariz. 212 (App. 2009).

In the 2006 general election, Arizona voters amended Article 2 of Arizona's Constitution to include § 35 which reads, "[a] person who is present in this state in violation of federal immigration law related to improper entry by an alien shall not be awarded punitive damages in any action in any court in this state." **Article 2, § 35** thus denies standing to recover punitive damages to any person present in Arizona in violation of federal immigration law related to improper entry by an alien. Similarly, **A.R.S. § 12-512**, enacted in 2011, states that "A person who is present in this state in violation of federal immigration law related to improper entry by an alien shall not be awarded punitive damages in any action in any court in this state."

MITIGATION OF DAMAGES

Although an injured party is often said to have "duty to mitigate damages," this term is misleading because there is no liability for failing to take such steps. A party is merely precluded from recovering avoidable damages. ***W. Pinal Family Health Ctr., Inc. v. McBryde***, 162 Ariz. 546, 549 (App. 1989). The defendant has the burden of proving that plaintiff failed to reasonably mitigate his or her damages. ***Barnes v. Lopez***, 25 Ariz. App. 477, 481 (1976). The plaintiff has a duty to exercise due care and to act diligently to protect his or her own interest. The principle that plaintiffs must undertake reasonable measures to protect their own interests is a "paradigm judicial principle of historic origins." ***Law v. Superior Court***, 157 Ariz. 142, 145 (App. 1986). However, the injured party need only exercise

reasonable care to mitigate damages. ***Life Investors Ins. Co. of Am. v. Horizon Res. Bethany, Ltd.***, 182 Ariz. 529, 534 (App. 1989). "Extraordinary or risky actions are not required" of the injured party "unless it would be unreasonable to fail to take those actions." ***Solar-W., Inc. v. Falk***, 141 Ariz. 414, 419 (App. 1984).

The RESTATEMENT (SECOND) OF TORTS § 918(1) "provides the basis for a proper jury instruction where a party has allegedly failed to use 'reasonable effort or expenditure after the commission of the tort' to avoid harm." ***Cavallo v. Phoenix Health Plans, Inc.***, 254 Ariz. 99, 107, ¶ 33 (2022); *see also* **RESTATEMENT (SECOND) OF TORTS § 918(1)** (1979) ("[O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort."). There is, however, an exception to this rule, which may apply if the "tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests." ***Cavallo***, 254 Ariz. 99, ¶ 35.

NON-USE OF SEATBELT/MOTORCYCLE HELMET

The plaintiff's non-use of a seatbelt or motorcycle helmet goes to the question of comparative fault and is an affirmative defense. Non-use of a seatbelt or motorcycle helmet bears on the issue of damages and not on any other issue. Defendant has the burden of proving that the plaintiff's non-use was unreasonable under the circumstances and that it caused injuries that would not have occurred, or would have been lessened, had the seatbelt or motorcycle helmet been used. The jury must then decide whether any such fault should reduce plaintiff's full damages. If the jury does decide the plaintiff's fault should reduce the plaintiff's damages, the court will reduce plaintiff's damages by the percentage of fault assigned by the jury. ***Law v. Superior Court***, 157 Ariz. 142, 145–46 (App. 1986); ***Warfel v. Cheney***, 157 Ariz. 424, 429–30 (App. 1988).

COMPARATIVE FAULT AND CONTRIBUTORY NEGLIGENCE

A.R.S. § 12-2501 states that "if two or more persons become jointly or severally liable in tort for the same injury . . . there is a right of contribution among them[;] . . . [n]o tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability." In Arizona, joint and several liability is abolished in most circumstances. ***State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.***, 213 Ariz. 419, 423, ¶ 12 (App. 2006). Ours is a system of comparative fault, making "each tortfeasor responsible for paying his or her percentage of fault and no more." ***Young v. Beck***, 227 Ariz. 1, 4, ¶ 10 (2011). A comparative fault case is one in which a party contends that someone other than, or as well as, a single defendant (including the plaintiff) is at fault. This concept is more thoroughly covered in **Chapter 1** of this Guide.

In ***Cramer v. Starr***, 240 Ariz. 4, 6 (2016), however, the plaintiff could claim an allegedly negligent driver who caused an accident was also liable for an allegedly negligent surgery occasioned by the accident, so long as the jury allocated fault between the parties in accordance with **A.R.S. § 12-2501**. The court said the jury could hold a driver liable for additional harm resulting from an allegedly negligent spinal

fusion surgery performed on plaintiff after the accident where the plaintiff proved the driver's negligence created a reasonably foreseeable risk that such surgery might have been necessary, and that surgery might have been performed negligently. Such fault cannot, however, be "automatically impute[d]" to the defendant under the common law "original tortfeasor rule." ***Cramer***, 240 Ariz. at 6.

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

CONTRIBUTING AUTHOR:

ASHLEY CABALLERO-DALTREY, ASSOCIATE
Ashley is part of the firm's appellate team where she represents clients in federal and state appellate matters and dispositive motions. Before joining JSH, Ashley worked as a law clerk for Chief Justice Ann Scott Timmer of the Arizona Supreme Court. She focuses her practice on municipal law, personal injury, bad faith, and premises liability.
adaltrey@jshfirm.com | 602.263.4489 | jshfirm.com/adaltrey