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Overview of State of Arizona **Court System**

A. Trial Courts

1. Municipal Courts
    a. Municipal courts have criminal jurisdiction over misdemeanor crimes and petty offenses committed in their city or town including misdemeanor criminal traffic cases, civil traffic cases, violations of city ordinances and codes. Municipal courts may also issue search warrants as well as orders of protection and injunctions prohibiting harassment.
2. Justice of the Peace Courts (A.R.S. §22-201)
    a. Each county has justice courts that are presided over by a justice of the peace, who is elected for a four year term.
    b. Justice of the Peace Courts hear lawsuits when the amount in dispute is $10,000 or less, including:
        i. Eviction Actions and Landlord & Tenant Disputes
        ii. Collection Cases
        iii. Consumer Complaints Against Businesses
        iv. Negligence Actions
        v. Breach of Contract Cases
    c. Justice courts have criminal jurisdiction over:
        i. petty offenses and misdemeanors;
        ii. assault or battery — less serious offenses not committed on a public officer while performing his or her duties;
        iii. breaches of peace and committing a willful injury to property;
        iv. misdemeanors and criminal offenses punishable by fines not more than $2,500, or
        v. imprisonment in county jail, not more than six months, or both fine and imprisonment; and,
        vi. felonies for the purpose of issuing warrants and conducting preliminary hearings.
3. Superior Court
    a. Court of general jurisdiction
    b. Each county has at least one superior court judge. In counties with more than one superior court judge, the judges operate in numbered divisions.
    c. Article VI § 14 of the Arizona Constitution provides the superior court with jurisdiction over:
        i. cases and proceedings in which exclusive jurisdiction is not vested by law in another court;
        ii. equity cases that involve title to or possession of real property or the legality of any tax, assessment, toll or municipal ordinance;

        iii. other cases in which the value of property in question is $1,000 or more, exclusive of interest and costs;
        iv. criminal cases amounting to a felony, and misdemeanor cases not otherwise provided for by law;
        v. forcible entry and detainer actions (evictions of renters);
        vi. proceedings in insolvency (however, bankruptcy is handled in federal court);
        vii. actions to prevent or stop nuisances;
        viii. matters of probate (wills, estates);
        ix. dissolution or annulment of marriages (divorces);
        x. naturalization and the issuance of appropriate documents for these events; and,
        xi. special cases and proceedings not otherwise provided for, and such other jurisdiction as may be provided by law.
    d. The Superior Court acts as an appellate court for justice and municipal courts.
4. Juvenile Court
    a. Counties with more than one superior court judge also have a special juvenile court. One or more superior court judges are assigned to hear all juvenile cases involving delinquency, incorrigibility and dependency.
5. Tax Court
    a. The Tax Court has jurisdiction over all questions of law and fact relating to disputes involving the imposition, assessment or collection of Arizona taxes. Although the Tax Court is a department of the Superior Court in Maricopa County, it handles cases across the state.
    b. The small claims division hears disputes concerning the valuation or classification of class five property (your home), or where the full cash value of all real and personal property does not exceed $300,000. In addition, the small claims division judges hear all tax cases in which the amount of taxes, interest at the time of assessment, and penalties is less than $5,000. There is no right to appeal the decision of the Tax Court's small claims division.

B. Appellate Courts

1. Court of Appeals (A.R.S. §12-120)
    a. Comprised of two divisions:
        i. Division One in Phoenix has 16 judges
            1. Division One consists of the counties of Maricopa, Yuma, La Paz, Mohave, Coconino, Yavapai, Navajo and Apache
        ii. Division Two in Tucson has six judges
            1. Division Two consists of the counties of Pima, Cochise, Santa Cruz, Greenlee, Graham and Gila.
    b. The Court of Appeals:
        i. hears and decides cases in three judge panels;

ii. has jurisdiction in all matters properly appealed from superior court; and,
iii. reviews all decisions properly appealed to it.

c. Court of Appeals, Division One, has statewide responsibility for appeals from the Industrial Commission, unemployment compensation rulings of the Department of Economic Security, and rulings by the Tax Court.

2. The Supreme Court (Article VI, §5 of the Arizona Constitution)
   a. Primary judicial duties are to review appeals and provide rules of procedure for all the courts in Arizona.
   b. The Supreme Court:
      i. may choose to review a decision of the court of appeals when a party (the plaintiff or defendant in the original case) files a petition for review;
      ii. always hears the appeal when the superior court imposes a death sentence;
      iii. regulates activities of the State Bar of Arizona and oversees admission of new attorneys to the practice of law;
      iv. reviews charges of misconduct against attorneys, and has the authority to suspend or disbar them; and,
      v. serves as the final decision making body when disciplinary recommendations are filed against Arizona judges by the Commission on Judicial Conduct.
   c. Five justices serve on the Supreme Court for a regular term of six years. One justice is selected by fellow justices to serve as Chief Justice for a five year term. A.R.S. §12-101

Procedural

A. Venue

1. Pursuant to A.R.S. §12-401, a person shall be sued in the county in which the person resides, except:

   a. When a defendant or all of several defendants reside outside the state or their residence is unknown, the action may be brought in the county in which the plaintiff resides.
   b. A married person may be sued in the county in which such person's spouse resides unless such spouse is living separate and apart from the defendant.
   c. Transient persons may be sued in any county in which found.
   d. Persons who have contracted a debt or obligation in one county and thereafter remove to another county may be sued in either county.
   e. Persons who have contracted in writing to perform an obligation in one county may be sued in such county or where they reside.
   f. Persons who have contracted a debt or obligation without the state may be sued in any county in which found.
   g. When there are several defendants residing in different counties, action may be brought in the county in which any of the defendants reside.

h. Actions against personal representatives, administrators, guardians and conservators as such, to establish a money demand against the estate represented by them, shall be brought in the county in which the estate is being administered.
i. In cases of fraud and defalcation of public officers action may be brought in the county in which the fraud was committed or the defalcation occurred, or in which the defendant or any of several defendants reside or may be found.
j. When the foundation of the action is a crime, offense or trespass for which an action in damages may lie, the action may be brought in the county in which the crime, offense or trespass was committed or in the county in which the defendant or any of the several defendants reside or may be found, but any action for damages against the editor, proprietor or publisher of a newspaper or periodical published in the state for publication of an alleged libelous statement shall be brought in the county in which the principal publication office of the newspaper or periodical is located or in the county where the plaintiff resided at the time of publication of such statement.
k. Actions for the recovery of personal property may be brought in the county in which the property may be or in which the defendant or any of several defendants may be found.
l. Actions for the recovery of real property, for damages thereto, for rents, profits, use and occupation thereof, for partition thereof, to quiet title thereto, to remove a cloud or incumbrance on the title thereto, to foreclose mortgages and other liens thereon, to prevent or stay waste or injuries thereto, and all other actions concerning real property, shall be brought in the county in which the real property or a part thereof is located.
m. Actions for dissolution of marriage or legal separation shall be brought in the county in which a petitioner is residing at the time the action is filed.
n. Actions to enjoin execution of judgments or to stay proceedings in any action shall be brought in the county in which the judgment was rendered or the action is pending.
o. Actions against counties shall be brought in the county sued unless several counties defendants, when it may be brought in any one of the counties.
p. Actions against public officers shall be brought in the county in which the officer, or one of several officers, holds office.
q. Actions on behalf of the state shall be brought in the county in which the seat of government is located.
r. Actions against railroad companies, insurance companies, telegraph or telephone companies, joint stock companies and other corporations may be brought in any county in which the cause of action, or a part thereof, arose, or in the county in which defendant has an agent or representative, owns property or conducts any business.
s. Where part of a river, watercourse, highway, road or street is the boundary line between two counties, the courts of each of the counties shall have

concurrent jurisdiction in actions over such parts of the river, watercourse, highway, road or street.

2. Not more than one change of venue or one change of judge may be granted in any action, but each party shall be heard to urge his objections to a county or judge in the first instance.(A.R.S. §12-411)

B. Statute of Limitations

The following statutes of limitation are pertinent:

1. One Year after the cause of action accrues (A.R.S. §12-541) for:
    a. Malicious prosecution
    b. False imprisonment
    c. Libel or slander
    d. Seduction or breach of promise of marriage
    e. Breach of employment contract
    f. Wrongful termination
    g. Liability created by statute other than a penalty or forfeiture.
2. Two year statute of limitation after the cause of action accrues (A.R.S. §12-542) for:
    a. Injuries done to person
    b. Injuries done to person when death ensues
    c. Injury to property
    d. Conversion of property
    e. Forcible entry and forcible detainer
    f. Real property claimed by right of possession (A.R.S. §12-522
3. Real Property in adverse possession under title or color of title: Three years after the cause of action accrues (A.R.S. §12-523).
4. Contract in writing for debt: six years after the cause of action accrues (A.R.S. §12-548).

Savings Statute (A.R.S. 12-504)

1. If an action is terminated in any manner other than by abatement, voluntary dismissal, dismissal for lack of prosecution or a final judgment on the merits, a new action may be commenced for the same cause after the expiration of the time so limited and within six months after such termination.
2. If an action timely commenced is terminated by abatement, voluntary dismissal by order of the court or dismissal for lack of prosecution, the court in its discretion may provide a period for commencement of a new action for the same cause. Such period shall not exceed six months from the date of termination.

C. Time for Filing an Answer

An Answer must be filed within 20 days after the service of the summons and complaint upon the defendant. Ariz.R.Civ.P. 12(a). If service of the summons has been waived on request, an answer shall be served and filed within 60 days after the date when the request was sent or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

1. Computing Time:
    a. The actual date of service is NOT included
    b. Weekends and legal holidays are included only if the period of time specified or allowed is over 11 days.
    c. The last day of the period shall be included unless it is a weekend or legal holiday, in which the period runs until the end of the next day which is not a weekend or legal holiday.
2. Accrual of Tort Actions
    a. Accrual of tort limitations period is governed by the discovery rule and occurs when the plaintiff knows or should have known of the alleged tort and has sustained irrevocable harm as a result of the tort.

An action may be dismissed:

(a) By the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or

(b) By order of the court pursuant to a stipulation of dismissal signed by all parties who have appeared in the action. (Ariz.R.Civ.P. 41(a)).

A defendant may move for dismissal of an action or claim against the defendant for failure of the plaintiff to prosecute or to comply with the Rules of Civil Procedure. A dismissal under these terms operates as an adjudication upon the merits unless the dismissal is for lack of jurisdiction, improper venue or failure to join a party under Rule 19. (A.R.S. §41(b)).

Liability

A. Negligence

1. Common Law Negligence

Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. Restatement (Second) of Torts §282. A claim for negligence requires proof of the following four elements:

    a. the existence of a duty of care

    b. a breach of that duty

c. that the breach of duty was the proximate cause of the inury

d. actual damages

Duty is an obligation, recognized by law, requiring the defendant to conform to a certain standard of conduct for the protection of others against unreasonable risks. *Ontiveros v. Borak,* 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983). If a legal duty exists, and a breach of that duty occurs, negligence cannot exist unless such breach is the cause of the claimant's damages. Causation is comprised of two distinct legal concepts. First, a party is required to prove cause-in-fact. In other words, a party must prove that the injury claimed would not have occurred "but for" the negligent act or in the alternative, that the negligent act was a "substantial factor" in the resulting injury. *Inspiration Consol. Copper Co. v. Conwell*, 21 Ariz. 480, 484, 190 P. 88, 90 (1920); *Brand v. J.H. Rose Trucking Co*., 120 Ariz. 201, 427 P.2d 519 (1967). Second, it must be determined by the court that the "scope of liability" extends to the range of risks or harms suffered. *Rogers v. Retrum*, 170 Ariz. 399, 402, 825 P.2d 20, 23 (App. 1991); *Salt River Valley Water Users' Ass'n v. Cornum*, 49 Ariz. 1, 63 P.2d 639 (1937); *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200(1983); *Sabina v. Yavapai County Flood Control Dist.*, 196 Ariz. 166, 171, 993 P.2d 1130, 1135 (App. 1999).

2. Comparative Negligence/Contributory Negligence

The Uniform Contribution Among Tortfeasors Act (UCATA) predominantly establishes a system of pure comparative fault. Jefferson L. Lankford & Douglas A. Blaze, The Law of Negligence in Arizona, §6.02(1) at 6-7 (3rd Ed. 2010). This allows injured parties compensation even when they are at fault, but reduces damages attributable to that fault, and renders "each tortfeasor responsible for paying for his or her percentage of fault and no more." *State Farm Ins. Cos. v. Premier Manufactured Sys. Inc.*, 217 Ariz. 222, 225, ¶12, 172 P.3d 410, 413 (2007). The general goal of UCATA is to make each tortfeasor responsible for only its share of fault. *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 404, 904 P.2d 861, 866 (1995). This ensures liability is allocated to defendants only in direct proportion to their percentages of fault, and affords a joint tortfeasor paying an amount exceeding his or her share of fault the right contribution from other torfeasors. *Wareing v. Falk,* 182 Ariz. 495, 897 P.2d 1381 (App. 1995).

It is the fact finder's responsibility to distribute fault among all those who contributed to a plaintiff's injury. *Scottsdale Ins. Co. v. Cendejas*, 220Ariz. 281, 285, ¶18, 205 P.3d 1128, 1132 (App. 2009). This distribution of relative degrees of fault amongst parties and, if appropriate, non-parties, must add up to 100%. A.R.S. §12-5606(A)-(C); *see also* RAJI (Civil) 4th ed., Fault Instruction 11 (2005). Where multiple tortfeasors cause a single, indivisible injury, plaintiff need only prove a defendant's action was a "substantial factor" in causing the injury. *Piner v. Super. Ct*., 192 Ariz. 182, 188, ¶24, 962 P.2d 909, 915 (1998). If causation is indeterminable, and plaintiff demonstrates multiple defendants contributed to the final result, the burden shifts to defendant tortfeasors to apportion damages among themselves. Id. at 189, ¶30, 962 P.2d at 916

Comparative fault is an affirmative defense that defendant has the burden to prove. *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cty.,* 22 Ariz. 515, 540, ¶83, 217 P.3d 1220, 1245 (App. 2009), *review denied* March 2, 2010. The defenses to comparative negligence and assumption of the risk are "in all cases a question of fact and shall at all times be left to the jury." A.R.S. §12-2505(A).

Contributory negligence is applied comparatively with the fault of the defendant or defendants and any non-parties. A.R.S. §12-2502. The test for contributory negligence is whether the plaintiff's conduct, or that of any non-party at fault, under the circumstances was that of a reasonable, prudent person exercising ordinary care for his own safety. *McGriff v. McGriff*, 114 Ariz. 323, 560 P.2d 1230 (1977). In order to constitute fault, the negligent conduct must have been a proximate cause of injury. *McDowell v. Davis*, 104 Ariz. 69, 448 P.2d 869 (1968).

The Arizona Constitution states that contributory negligence is always left to the jury. Ariz. Const. art. 18, §5. Similarly, the court can never instruct the jury that the plaintiff or non-party at fault was contributorily negligent. *Id*. A court can, however, instruct the jury that certain conduct by the plaintiff or non-party at fault constitutes negligence per se, but, following such an instruction, the jury decides whether to apply the doctrine of contributory negligence. *Barnes v. City of Tucson*, 157 Ariz. 566, 760 P.2d 566 (App. 1988).

B. Negligence Defenses

1. Assumption of the Risk

The defense of assumption of the risk is always one for the jury to decide. Ariz. Const. art. 18, §5. Assumption of the risk can be found to exist no matter how careful the plaintiff was as it is based upon the notion of consent as opposed to carelessness. *Hildebrand v. Minyard*, 16 Ariz. App. 583, 494 P.2d 1328 (1972). A person who fails to fully appreciate and comprehend the risks of his actions may be contributorily negligent, but has not assumed the risk. *Id*. In order to assume a risk, a person must know the facts or circumstances creating the danger, comprehend and fully appreciate the consequences of his actions, and voluntarily expose himself to them. *Chavez v. Pima County,* 107 Ariz. 358, 488 P.2d 978 (1971). Two of the most common variations of assumption of the risk are express and implied. The Supreme Court has decided that no matter how aggressively the express assumption of the risk agreements are written, whether the plaintiff who signed the agreement actually assumed the risk remains a jury question which precludes the entry of summary judgment in favor of the defendant who created the agreement. *Phelps v. Firebird Raceway, Inc.,* 210 Ariz. 403, 111 P.3d 1003 (2005).

The other main type of assumption of the risk is that which is implied from the circumstances of the case. *Hildebrand v. Minyard*, 16 Ariz. App. 583, 494 P.2d 1328 (1972). The elements of implied assumption of the risk are (1) a risk of harm to plaintiff caused by defendant's conduct or by the condition of defendant's land or chattels; (2) a plaintiff's actual knowledge of the particular risk and appreciation of its magnitude; and (3) a plaintiff's voluntary choice to enter or remain within the area of risk under circumstances which manifest his willingness to accept the particular risk. *Id.*

2. Last Clear Chance Doctrine

Judicially created "last clear chance" doctrine was effectively abolished by enactment of the comparative negligence statute, A.R.S. §12-2505. *Dykeman By and Through Dykeman v. Engelbrecht,* 166 Ariz. 398, 803 P.2d 119 (App. Div. 1 1990).

3. Emergency Doctrine

Arizona has imposed three prerequisites to the giving of the sudden emergency jury instruction:

(1) There must be a sudden or unexpected confrontation with imminent peril; and
(2) The emergency must not be a result of the negligence of the person seeking the instruction; and
(3) The party seeking the instruction must have had two or more alternative courses of conduct available.

Petefish By and Through Clancy v. Dawe, 137 Ariz. 593, 596, 672 P.2d 937, 940 (Ct. App. Div. 1 1982); *See Tansy v. Morgan*, 124 Ariz. 362, 364, 604 P.2d 626, 628 (1979). Where any prerequisite is lacking, either as a matter of law or through a deficiency in the evidence, the giving of the instruction is reversible error. *Dawe,* 137 Ariz. at 596, 672 P.2d at 940; *See Woods v. Harker*, 22 Ariz. App. 83, 523 P.2d 1320 (1974).

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Gross Negligence is defined as "a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages." Black's Law Dictionary, 2009 ed. "Negligence is gross if the precautions to be taken against harm are very simple, such as persons who are but poorly endowed with physical and mental capacities can easily take." H.L.A. Hart, "Negligence, *Mens Rea* and Criminal Responsibility," in *Punishment and Responsibility* 136, 149 (1968). Most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind." *Prosser and Keeton on the Law of Torts* § 34, at 211–12 (W. Page Keeton ed., 5th ed. 1984).

Recklessness is "conduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk." Black's Law Dictionary, 2009 ed. Recklessness is a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing. Id. "The ordinary meaning of the word [*recklessness*] is a high degree of carelessness. It is the doing of something which in fact involves a grave risk to others, whether the doer realizes it or not. The test is therefore objective and not subjective." R.F.V. Heuston, *Salmond on the Law of Torts* 194 (17th ed. 1977).

D. Negligent Hiring and Retention

An employer conducting an activity through employees (agents of the employer) is subject to liability for harm to a third party if the employer is negligent or reckless in:

I. Giving improper or ambiguous orders or in failing to make proper regulations of employees;
II. The employment of improper persons for work involving risk or harm to others;
III. The supervision of the employee's activity; or
IV. Permitting, or failing to prevent, negligent or other tortuous conduct by persons, whether or not the employer's employees upon the premises of instrumentalities are under the employer's control

Restatement (Second) of Agency §213

If the employer is found liable, it is because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business in hand. *Kassman v. Busfield Enter., Inc.*, 131 Ariz. 163, 166, 639 P.2d 353, 356 (App. Div. 2 1981)(*citing* Restatement (Second) of Agency §213, Comment d).

E. Negligent Entrustment

"Where one who owns a dangerous instrumentality, such as an automobile, and loans it to another who, to the knowledge of the owner, is incompetent to drive such a vehicle, the owner is guilty of negligence if the driver negligently injures another." *Powell v. Langford*, 58 Ariz. 281, 285, 119 P.2d 230, 232 (1941).

Proving incompetence is essential to succeed on a negligent entrustment claim. There are three generally recognized categories of incompetence: (1) incompetence based on age or experience; (2) incompetence based on physical or mental condition (e.g. intoxication); and (3) incompetence through known reckless behavior. *Thomason v. Harper*, 280 S.E.2d 773 (Ga. App. 1982); *McCart v. Muir*, 641 P.2d 384 (Kan. 1982). While evidence of prior bad acts is generally not admissible into evidence, an exception applies to negligent entrustment cases where evidence of prior specific acts indicating incompetence or unfitness has been held admissible on the separate question of the entrustee's competence or fitness and the entruster's knowledge of that incompetence. *McCarson v. Foreman*, 692 P.2d 537, 541 (N.M. App. 1984).

Negligent entrustment also applies when "the peculiar circumstances of the case are such as to give the actor good reason to believe that the third person may misuse the instrumentality." *Tellez v. Saban*, 188 Ariz. 165, 171, 933 P.2d 1233, 1239 (App. 1996), *citing* Restatement (Second) of Torts §308, cmt. b.

A defendant's ownership of a chattel is not a prerequisite to liability for negligent entrustment. *Tissicino v. Peterson*, 211 Ariz. 416, 419, ¶8, 121 P.3d 1286, 1289 (App. 2008). Instead, the defendant's right to control the chattel is an essential element of a negligent entrustment claim. *Id*. The entrustor of a chattel should consider the characteristics of the entrustee, such as youth, inexperience or otherwise in evaluation whether the latter might use the chattel in a manner that would pose an unreasonable risk of physical harm to himself and others. *Id*. *citing* Restatement (Second) of Torts §390; *see also Martin v. Schroeder*. 209 Ariz. 531, 105 P.3d 577 (App. 2005) (adopting Restatement (Second) of Torts §390 regarding negligent entrustment).

F. Dram Shop

I. Elements

A licensee is liable for property damages and personal injuries or is liable to a person who may bring an action for wrongful death pursuant to §12-612, or both, if a jury finds all of the following:

1. The licensee sold spirituous liquor [ ] to a purchaser who was obviously intoxicated…
2. The purchaser consumed the spirituous liquor sold by the licensee
3. The consumption of spirituous liquor was a proximate cause of the injury, death or property damage…

A.R.S. §4-311.

A dram shop owes both a statutory and common law duty of care to use reasonable care in serving a patron alcohol, and that duty extends so far as to encompass protecting the patron from himself. *See Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983); *Brannigan v. Raybuck*, 136 Ariz. 513, 667 P.2d 213 (1983). In order to establish that the dram shop defendant breached its common law duty of care, the plaintiff need only establish that, at the time he or she was served alcohol, he or she had consumed a sufficient number of alcoholic drinks that the dram shop defendant knew or should have known that he was intoxicated. *Young v. DFW Corp*., 184 Ariz. 187, 189, 908 P.2d 1, 3 (App. 1995). The question of causation is one reserved for the jury under usual principles of Arizona tort law. *Ontiveros*, 136 Ariz. at 508, 667 P.2d at 208

II. Negligence Per Se

A dram shop plaintiff may establish that a dram shop defendant was negligent per se if he or she is able to prove that the dram shop defendant violated A.R.S. §4-244 when it served the plaintiff alcohol when he or she was “disorderly or obviously intoxicated.” The dram shop defendant may then be able to show its violation of the statute excusable if it can establish that “the demeanor or conduct of the person served was such that there was no reason to believe that he or she was intoxicated.” *Brannigan,* 136 Ariz at 518, 667 P.2d at 218.

III. Defenses

A dram shop defendant has a constitutional right, under the Arizona Constitution, to raise the affirmative defenses of contributory negligence and assumption of the risk, and determination of these defenses must be left to the jury. Ariz. Const., art. 18, §5.

Under the common law contributory negligence scheme, “it is well established that plaintiff’s contributory negligence, if a proximate cause of his injuries, could operate as an absolute bar to plaintiff’s recovery in a negligence action.” *Cheney v. Super Co.*, 144 Ariz. 446, 698 P.2d 691 (1985). Plaintiff’s negligence may bar recovery if plaintiff contributes in any degree, even only slightly, to his injury. *Id.* Thus, if a dram shop defendant can prove that the plaintiff intentionally, willfully, or wantonly caused or

contributed to his injury, then the plaintiff's contributory negligence would serve as a complete bar to recovery, even if the dram shop plaintiff's contribution to the injury was slight.

A dram shop defendant may be able to raise a defense under A.R.S. §12-711 also. Under A.R.S. §12-711, if the dram shop defendant is able to establish that the plaintiff was under the influence of an intoxicating liquor and as a result of that influence, the dram shop plaintiff was at least fifty percent responsible for the accident or the event that caused plaintiff's harm, then the jury may find the dram shop defendant not liable. *See* A.R.S. 12-711.

G. Joint and Several Liability

Several liability means that, of the total fault for harm attributable to defendants, the court shall enter judgment against each defendant only for the defendant's own percentage of the total fault. *Sowinski v. Walker*, 198 P.3d 1134, 1169 (Alaska 2008). There are three exceptions to the general rule of "several only" liability:

> The liability of each defendant is several only and is not joint, except that a party is responsible for the fault of another person, or for payment of the proportionate share of another person, if any of the following applies:
>
> 1. Both the party and the other person were acting in concert.
> 2. The other person was acting as an agent or servant of the party.
> 3. The party's liability for the fault of another person arises out of a duty created by the federal employers' liability act, 45 U.S.C. §51.

A.R.S. §12-2506(D).

The "acting in concert" exception applies only to several liability arising from intentional torts. *Clouse v. State of Ariz., Dep't of Pub. Safety*, 194 Ariz. 473, 478, ¶24, 984 P.2d 559, 564 (App. 1998), *vacated by Clouse v. State Dep't of Public Safety*, 198 Ariz. 473, 11 P.3d 1012 (App. 2000), *and vacated and superseded by Clouse ex rel. Clouse v. State,* 199 Ariz. 196, 16 P.3d 757 (2001). A.R.S. §12-2506(F)(1) defines acting in concert as follows:

> [E]ntering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort. Acting in concert does not apply to any person whose conduct was negligent in any of its degrees rather than intentional. A person's conduct that provides substantial assistance to one committing an intentional tort does not constitute acting in concert if the person has not consciously agreed with the other to commit the intentional tort.

To prove "acting in concert" under A.R.S. §12-2506(F)(1), plaintiff must provide evidence "that the parties (a) knowingly agreed to commit an intentional tort that (b) they were certain or substantially certain would result in the consequences complained of, and (c) actively participated in commission of the tort." *Chappell v. Wenhholz,* 226 Ariz. 309, 311,¶9, 247 P.3d 192, 194 (App. 2001)(*citing Mein ex rel. Mein v. Cook*, 219 Ariz. 96, 99-100, ¶¶12, 17, 19, 193 P.3d 790, 193, 94 (App. 2008)). Generally, "[a] 'conscious agreement' need not be verbally expressed and may be implied from the conduct itself."

Id., 226 Ariz. at 312,¶12, 247 P.3d at 195 (citing Restatement (Second) of Torts §876, cmt. a (1979); *see also Dawson v. Withycombe*, 216 Ariz. 84, 103, ¶53, 163 P.3d 1034, 1053 (App. 2007)). A tortfeaser need not "knowingly agree" before the actual commission of the intentional tort. Id. at 311, ¶11, 247 P.3d at 195; *see also Thompson v. Better-Built Aluminum Prod. Co., Inc*., 171 Ariz. 550, 557, 832, P.2d 203, 210 (1992) (plaintiff may prove requisite state of mind through indirect or circumstantial evidence).

Conduct within an agent or servant relationship may give rise to liability under A.R.S. §12-2506(D)(2). Causes of action involving concerted action, such as joint venture and aiding and abetting, remain viable when tortfeasors act as agents or servants of another. Whether the requisite relationship exists is determined by common law agency principles. *Kolstad v. Am. Dental Ass'n,* 527 U.S. 526, 542, 119 S. Ct. 2118, 2128, 144 L. Ed 2d 494, 510 (1999). The Restatement (Second) of Torts §876 provides guidance for determining whether the conduct creates a mutual agency.

There are no Arizona cases dealing with the Federal Employee Liability Act exception.

H. Wrongful Death and/or Survival Actions

The Arizona Wrongful Death Act is composed of three statutes: A.R.S. §§ 12-611-613. Under A.R.S.§12-611, if a party would have been liable under Arizona law for causing harm to the decedent "if death had not ensued," then they are likewise liable for damages in a wrongful death action.

A.R.S. §12-612 defines who can sue the alleged tortfeaser. There are four groups of potential wrongful death plaintiffs:

* The decedent's husband or wife
* The decedent's children, both natural and adopted
* The decedent's natural parents, adoptive parents, or guardians
* The personal representative for the decedent's estate (*See* A.R.S. Title 13, Ch. 11).

A.R.S. §12-613, describes the damages that can be awarded in a wrongful death action. In its entirety, the statute provides as follows:

> In an action for wrongful death, 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. The amount recovered in such action shall not be subject to debts or liabilities of the deceased, unless the action is brought on behalf of the decedent's estate.

A.R.S. §12-613.

Wrongful death claims for all statutory beneficiaries are to be consolidated in a single action. *Wilmot v. Wilmot*, 203 Ariz. 565, 569 ¶11, 58 P.3d 507, 511 (2002). At the

conclusion of a successful action there is "one judgment, the proceeds of which are held by the statutory plaintiff as trustee for the persons on whose behalf the suit was brought." *Id.* (*quoting Nunez v. Nunez*, 25 Ariz. App. 558, 562, 545 P.2d 69, 73 (1976)).

In the typical case of a wrongful death claim arising out of the negligence of an alleged tortfeaser, the plaintiff would be required to prove duty, breach of duty, and causation just as they would in a negligence claim not involving death. *See Shafer v. Monte Mansfield Motors*, 91 Ariz. 331, 333, 372 P.2d 333, 335 (1962) (describing elements of negligence claim under Arizona law); *see also Jesik v. Maricopa County Cmty. College Dist.*, 125 Ariz. 543, 545, 611 P.2d 54, 549 (1980) (holding that wrongful death defendant must have breached duty of care owed to decedent to be found liable); *Buckeye Irrigation Co. v. Askren*, 45 Ariz. 566, 577-78, 46 P.2d 1068, 1072 (1935) (holding that wrongful death action based on negligence required proof that negligence proximately caused death).

Damages are not an essential element of a wrongful death claim, and a wrongful death jury can find the defendant(s) liable yet still award zero damages to some or all of the beneficiaries. W*alsh v. Advanced Cardiac Specialists Chartered*, 227 Ariz. 354, 358 ¶12, 258 P.3d 172, 176 (App. 2011); *White v. Greater Ariz. Bicycling Ass'n,* 216 Ariz. 133, 138 ¶16, 163 P.3d 1083, 1088 (App. 2007). The damages in a wrongful death action are based on each statutory beneficiary's injuries as a result of the wrongful death, not the nature of the negligent act. *Englert v. Carondolet Health Network*, 199 Ariz. 21, 27 ¶16, 13 P.3d 763, 769 (App.2000). Beneficiaries of a decedent are entitled to both pecuniary and compensatory damages. *Boies v. Cole*, 99 Ariz. 198, 203, 407 P.2d 917, 920 (1965).These damages include:

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 in the future;
4. The reasonable expenses of funeral and burial; and
5. The reasonable expenses of necessary medical care and services for the injury that resulted in the death

See A.R.S. §12-613; *City of Tucson v. Wondergem*, 105 Ariz. 429, 466 P.2d 383 (1970); *Jeffery v. United States*, 381 F. Supp. 505 (Ariz. 1974); *Salinas v. Kahn*, 2 Ariz. App. 181, 407 P.2d 120 (1965).

I. Vicarious Liability

A.R.S. §12-2506(D)(2) establishes that a principal or master remains vicariously liable for the torts of an agent or servant. Vicarious liability is a principal's imputed responsibility for an agent's or servant's fault. *Wiggs v. City of Phoenix*, 198 Ariz. 367, 371 ¶13, 10 P.3d 625, 629 (2000).

An employer may be held vicariously liable under the doctrine of respondeat superior for the negligent acts of its employee acting within the course and scope of

employment. *Baker ex rel. Hall Brake Supply, Inc. v. Steward Title & Trust of Phoenix, Inc.,* 197 Ariz. 535, 540, ¶17, 5 P.3d 249, 254 (App. 2000), *review denied* Jan. 9, 2001; *Restatement (Third) of Agency* § 7.07(1) (2006). For an employer to be held vicariously liable for an employee's negligent acts, the employee must be "subject to the employer's business." *Robarge v. Bechtel Power Corp.*, 131 Ariz. 280, 284, 640 P.2d 211, 214 (App. 1982). An employer's control or right to control is measured at the time of the employee's conduct at issue. *Smith v. Hansberger*, 189 Ariz. 103, 106, 938 P.2d 498, 501 (App. 1996).

"[A]n employer is not vicariously liable for the negligence of an independent contractor, unless the employer of the contractor has been independently negligent." *Rause v. Paperchine, Inc., et al.*, 743 F. Supp. 2d 1114, 1118 (D. Ariz. 2010)(*citing Ft. Lowell-NSS Ltd. P'ship v. Kelly*, 166 Ariz. 96, 101, 800 P.2d 962, 967 (1990)); *Restatement (Second) of Torts* §§ 410-415 (1965). However, there are exceptions to this general rule. *Id.* These exceptions fall into three categories: (1) the inherently dangerous work exception; (2) the non-delegable duty exception; and (3) exception for torts caused by the direct negligence of the employer in selecting and instructing the contractor. *See* Restatement (Second) of Torts §§ 410-429. Due to these exceptions, an employer may be vicariously liable for the contractor's negligence, even where the employer is not personally negligent.

J. Exclusivity of Workers' Compensation

Arizona's Workers' Compensation statutes (A.R.S. §23-901 *et seq.*) permit employees, who have not opted out, to make a limited recovery for work-related injuries without having to prove negligence by the employer. Employers that have complied with the requirements of the statutes are immune from suit by their employees for negligently caused injuries. A.R.S. §23-1022(A). Workers' compensation benefits are also the exclusive civil remedy of an injured employee against a co-employee. *Id*. Employers can lose their immunity by failing to have proper notices posted and claim forms available. A.R.S. §23-906(E). Employers and co-employees can also be sued if they injure an employee through an act of willful misconduct which shows a willful disregard of the life, limb or bodily safety of the employee. A.R.S. §23-1022(A). Willful misconduct is defined as "an act done knowingly and purposely with the direct object of injuring another." A.R.S. §23-1022(B).

K. Construction Defect

I. Statute of Limitations

The statute of limitations is set forth in A.R.S. §12-501 *et seq*. The statute applies to construction defect claims in the same manner as any other civil claim. *See* A.R.S. §12-501 to -512. A.R.S. §12-552 is a statute of repose that precludes contract and implied warranty claims against developers and builders filed more than 8 years after substantial completion of the improvements. Only if the injury occurs during the eighth year after substantial completion or a latent defect is discovered during the eighth year does the limitations period extend by 1 year. A.R.S. §12-552(B). In addition, where an owner and/or subsequent purchaser of a dwelling knew or had notice of an alleged defect yet failed to bring the claim within eight years of substantial completion of the

dwelling, the action is barred by the statute of repose. *See Maycock v. Asilomar Dev. Inc.*, 207 Ariz. 495, 497, ¶6, 88 P.3d 565, 567 (App. 2004).

II. Indemnity

General contractors/developers may file suit against subcontractors, engineers, and/or design professionals for claims including breach of express warranty, breach of implied warranty, negligence/negligence per se, and strict liability. General contractors/developers may also file suit for indemnity.

Common law indemnity is a general indemnity claim. If the contract does not contain any language on indemnification, then the general contractor/developer can only bring a common law indemnity claim. In general, in an action for common law indemnity, the general contractor/developer must show, first, it has discharged a legal obligation owed to a third party; second, the subcontractor was also liable to the third party; and third, as between itself and the subcontractor, the obligation should have been discharged by the subcontractor. *MT Builders, LLC v. Fisher Roofing, Inc.*, 219 Ariz. 297, 302, ¶10, 197 P.3d 758, 763 (2008).

Even if the contract contains an express indemnity provision, the general contractor/developer must still look at the specific language of the provision to determine if it is a general or specific indemnity provision. When an indemnity clause does not specifically address what effect the indemnitee's negligence will have on the indemnitor's obligation to indemnity, it will be regarded as a "general" indemnity agreement. *See Estes Co. v. Aztec Constr., Inc.*, 139 Ariz. 166, 169, 677 P.2d 939, 942 (1983). Under a general indemnity agreement, an indemnitee is entitled to indemnification for a loss resulting in part from an indemnitee's passive negligence but not its active negligence. *Id.* "Generally, active negligence is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform." *Id.* "On the other hand, passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition, perform a duty imposed by law, or take adequate precautions against certain hazards inherent in employment." *Id*.

A specific indemnity agreement addresses what effect the indemnitee's negligence has on the indemnitor's obligation to indemnify and specifically imposes upon indemnitor an obligation to indemnity for any type of damage, even though also caused by the negligence of the indemnitee. *Grubb & Ellis Mgmt. Serv., Inc. v. 407417 B.C., LLC*, 213 Ariz. 83, 87, ¶ 14, 138 P.3d 1210, 1214 (App. 2006).

III. Purchaser Dwelling Act

Usually a construction defect complaint cannot be filed until the Purchaser Dwelling Act ("PDA"), also known as the right to repair statute is followed. See A.R.S. §12-1361 *et seq*. Under the PDA, the litigation process commences by the HOA/homeowner sending the general contractor/developer a Notice of Deficiencies. The general contractor/developer then has 60 days to inspect the units, evaluate the claims and provide a good faith offer to repair or replace. Failure to comply with the PDA can result in dismissal of all substantive claims.

IV. Damages

The cost to repair is the most often sought remedy in a contract based claim in construction defect claims. *Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.,* 124 Ariz. 242, 253, 603 P.2d 513, 524 (App. 1979). Arizona requires the injured party to exercise reasonable care to mitigate damages. *See S.A. Gerrard Co., Inc. v. Fricker*, 42 Ariz. 503, 508, 27 P.2d 678, 680 (1933). Where the cost of repair measure of damage in a construction defect case would result in "economic waste," the proper measure of damages is the difference in the value between the building as designed and as construction. *County of Maricopa v. Walsh & Oberg Architects, Inc.*, 16 Ariz. App. 439, 441-42, 494 P.2d 44, 46-7 (1972). Economic waste can only be used when the building would be substantially destroyed by completely remedying the defects. *Blecick v. Sch. Dist. No.18 of Cochise County,* 2 Ariz. App. 115, 123, 406 P.2d 750, 758 (1965). The breaching party has the burden of proving that the cost of repair measure of damages would result in economic waste. *County of Maricopa*, 16 Ariz. App. At 442, 494 P.2d at 47. Loss of use damages are also recoverable. Restatement (Second) of Contracts §348 (1981). Attorneys' fees may be recoverable by the prevailing party. *Id.* at §348(1) & Illustration 1.

V. Defenses

General defenses that are asserted, if warranted, include standing, extrapolation, failure to mitigate, diminution in value, economic waste and patent defects.

a. Patent Defects: The implied warranty of workmanship claim exists only with respect to latent defects that become manifest after purchase. *Richards v. Powercraft Homes, Inc.,* 139 Ariz. 242, 245, 678 P.2d 427, 430 (1984). This defense precludes recovery for patent defects which are defects that were, or could have been discovered, upon reasonable inspection. *Hershey v. Rich Rosen Const.*, 169 Ariz. 100, 113-114, 817 P.2d 55, 58-59 (App. 1991).
b. Diminution of Value: Arizona law dictates that the measure of damages for injury to land and improvements thereon is the "difference in the market value of the land immediately before the injury and immediately after the injury, but if the land may be restored to its original condition, the cost of restoration may be used as the measure of damages if it does not exceed the diminution in the market value of the land. *Blanton & Co. v. Transamerica Title Ins. Co.,* 24 Ariz. App. 185, 188, 536 P.2d 1077, 1080 (App. 1975). The homeowner/HOA has the burden of proving the cost of repair for each of the alleged defects in each unit as well as a diminution of property value.
c. Extrapolation: The law is well settled that a plaintiff must prove damages with reasonable certainty. *Cont'l Life & Acc. Co. v. Songer*, 124 Ariz. 294, 304, 603 P.2d 921, 931 (App. 1979). To the extent that a homeowner/HOA seeks to rely on indirect observations or fails to establish statistically sound protocols for extrapolation, the homeowner/HOA runs a risk that a court will not permit this type of evidence.

Damages

A. Statutory Caps on Damages

The Constitution of the State of Arizona states:

> "No law shall be enacted in this state limiting the amount of damages to be recovered for death or injury of any person, except that a crime victim is not subject to a claim for damages by any person who is harmed while the person is attempting to engage in, engaging in or fleeing after having engaged in or attempted to engage in conduct that is classified as a felony offense."

A.R.S. Const. Art. 2 § 31

Awards of punitive damages are also subject to constitutional restraints, as a grossly excessive punitive damages award violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because the defendant did not have "fair notice" of its exposure to the extent of punishment that could be imposed. *Hudgins v. Sw. Airlines, Co.,* 221 Ariz. 472, 489, ¶50, 212 P.3d 810, 827 (App. 2009)(*citing BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417, 123 S. Ct. 1513 (2003)).

B. Compensatory Damages for Bodily Injury

Compensatory damages compensate the victim for the injury and return the victim, as nearly as possible, to the position he was in prior to the injury. *U.S. Fid. & Guar. Co. v. Davis*, 3 Ariz. App. 259, 413 P.2d 590 (1966). They fall into two general categories: special damages and general damages.

Special damages are meant to compensate the injured person for the loss he has suffered by placing him in the position he would have been in had the wrong not occurred. *Felder v. United States*, 543 F.2d 657 (9th Cir. 1976); *see also Riexinger v. Ashton Co.,* 9 Ariz. App. 406, 453 P.2d 235 (1969). Special damages are, generally speaking, the costs and expenses arising from the injury which can be computed. Many types of damages fit within this category: past and future medical expenses, past and future wage loss, property damage, past and future lost profits, and loss of services, for example.

General damages are damages which are not capable of computation. *Palmer v. Kelly*, 54 Ariz. 466, 468-69, 97 P.2d 209, 209-10 (1939). They include damages for pain and suffering, loss of enjoyment of life, impairment, disability, and mental distress. *Iadanza v. Harper*, 611 S.E.2d 217 (N.C. App. 2005). They are available to individual victims but not to entities.

C. Collateral Source

With the exception of medical malpractice cases, in which the doctrine has been abolished, the collateral source rule applies in all cases involving negligently caused damages. *See* A.R.S. §12-565; *Hall v. Olague*, 119 Ariz. 73, 74, 579 P.2d 577, 578

(App. 1978). The rule holds that benefits received from a collateral source do not operate to reduce the damages recoverable from the wrongdoer. *Id.* Evidence of the past or future receipt of collateral source benefits by the injured party is inadmissible. *See, e.g. S. Dev. Co. v. Pima Capital Mgmt. Co.,* 201 Ariz. 10, 21, ¶33, 31 P.3d 123, 134 (App. 2002). The rule has been applied in a variety of contexts including sick pay, fraternal benefit payments, government benefits, health insurance, gratuitously provided benefits, continued salary payments while disabled, and the portion of medical bills written off pursuant to a contract between the provider and an insurer. *See Riexinger v. Ashton Co.*, 9 Ariz. App. 406, 408 453 P.2d 235, 237 (1969); *Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 202, 129 P.3d 487, 491 (App. 2006); *Hall*, 119 Ariz. at 75, 579 P.2d at 580.

D. Pre-Judgment/Post-Judgment Interest

A.R.S. §44-1201 details the legal rate of interest allowable in Arizona. Interest on any loan, indebtedness or other obligation should be for 10% per annum unless a different rate is contracted in writing. A.R.S. §44-1201(A). Interest contained in written agreements that are subject to litigation will be the interest imposed on any judgment amounts so long as it is not usurious under applicable law. The interest rate on a monetary award stemming from a written agreement wherein the interest rate is expressly stated and is higher than 10% per annum will accrue at that rate on the debt for both prejudgment and postjudgment amounts. However, any award of attorney's fees or costs to the prevailing party will have interest accruing only on the judgment award amount from the date of the entry of the judgment at the applicable legal interest rate on the date of the entry of the judgment pursuant to the requirements of A.R.S. §44-1201.

In accordance with A.R.S. 44-1201(B), interest on any other judgment amount shall be the lesser of 10% per annum (compounded simply) or at a rate per annum that is equal to 1% plus the prime rate as published by the board of governors of the federal reserve system or any publication that may supersede it on the date that the judgment is entered. The calculation of prejudgment and postjudgment interest is not compounded, but accrues simply. *See State ex rel. Miller v. Beardsley Indus. Property,* 173 Ariz. 19, 839 P.2d 439 (Ct. App. Div. 1 1992); *Employers Mut. Cas. Co. v. McKeon*, 170 Ariz. 75, 821 P.2d 766 (Ct. App. Div. 1 1991).

A.R.S. § 44-1201(D) does not allow the court to award prejudgment interest for any unliquidated, future, punitive or exemplary damages. 'Future damages' are defined as damages that will be incurred after the date of the judgment and include the costs of any injunctive or equitable relief that will be provided after the date of the judgment. A.R.S. §44-1201(E) The Arizona Court of Appeals has held that statutory interest on a liquidated debt is due as a matter of right both prejudgment and post-judgment." *See Imperial Litho/Graphics v. M.J. Enterprises*, 152 Ariz. 68, 730 P.2d 245 (Ct. App. Div. 1 1986).

E. Damages for Emotional Distress

To establish a prima facie case of intentional infliction of emotional distress, a

plaintiff must show that:

(1) The conduct by the defendant was extreme and outrageous;
(2) The defendant either intended to cause emotional distress or recklessly disregarded the near certainty that such distress would result from his conduct; and
(3) Severe emotional distress did indeed occur as a result of defendant's conduct.

Citizen Publ'g Co. v. Miller, 210 Ariz. 513, 516, 115 P.3d 107, 110 (2005); *Wallace v. Casa Grande Union High Sch. Dist. No..82 Bd. of Governors*, 184 Ariz. 419, 428, 909 P.2d 486, 495 (App. 1995); *Ford v. Revlon*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987).

To establish a prima facie case of negligent infliction of emotional distress in Arizona, the claimant must ordinarily show that:

(1) He or she suffered shock or mental anguish manifested by a physical injury;
(2) He or she was in the "zone of danger" such that defendant's negligence must have created an unreasonable risk of bodily harm, and
(3) Emotional distress resulted from witnessing an injury to a person with whom the claimant has a close personal relationship.

Gau v. Smitty's Super Valu, Inc., 183 Ariz. 107, 108, 901 P.2d 455, 456 (App. 1995); *Pierce v. Casas Adobes Baptist Church*, 162 Ariz. 269, 272, 782 P.2d 1162, 1165 (1989); *Quinn v. Turner*, 155 Ariz. 225, 227, 745 P.2d 972, 974 (App. 1987).

If a claimant proves the elements of intentional or negligent infliction of emotional distress, the plaintiff may recover compensatory damages and punitive damages. *Ford v. Revlon*, 153 Ariz. 38, 734 P.2d 580 (1987). Damages for loss of consortium are also recoverable when applicable. *Barnes v. Outlaw*, 192 Ariz. 283, 964 P.2d 484 (1998).

F. Wrongful Death and/or Survival Action Damages

The damages in a wrongful death action are based on each statutory beneficiary's injuries as a result of the wrongful death, not the nature of the negligent act. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 27 ¶16, 13 P.3d 763, 769 (App, 2000).

> In an action for wrongful death, 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. The amount recovered in such action shall not be subject to debts or liabilities of the deceased, unless the action is brought on behalf of the decedent's estate.

A.R.S. §12-613. This is an individualized inquiry specific to each plaintiff or statutory beneficiary, so the result is a single verdict with specific and distinct damage awards for each statutory beneficiary. A.R.S §12-612 (C); *Quinonez ex rel. Quinonez v. Andersen*, 144 Ariz. 193, 196, 696 P.2d 1342, 1345 (App. 1984).

Beneficiaries of a decedent are entitled to both pecuniary and compensatory damages. *Boies v. Cole*, 99 Ariz. 198, 203, 407 P.2d 917, 920 (1965). These damages include:

- The loss of love, affection, companionship, care, protection, and guidance since the death and in the future;
- the pain, grief, sorrow, anguish, stress, shock, and mental suffering already experienced, and reasonably probable to be experienced in the future;
- 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;
- the reasonable expenses of funeral and burial; and
- the reasonable expenses of necessary medical care and services for the injury that resulted in the death.

RAJI (Civil) 4th ed., Personal Injury Damages 3 (2005); A.R.S. §12-613; *City of Tucson v. Wondergem,* 105 Ariz. 429, 433, 466 P.2d 383, 387 (1970); *Salinas v. Kahn*, 2 Ariz. App. 181, 195, 407 P.2d 134, 151 (1965); *Jeffery v. United States,* 381 F. Supp. 505, 510 (D. Ariz. 1974).

The term "aggravating circumstances" as used in A.R.S. §12-613 allows for the imposition of punitive damages in a wrongful death action. *Quinonez*, 144 Ariz. at 198, 696 P.2d at 1378. The "aggravating circumstances" which justify the imposition of punitive damages do not have to be directly involved in the event causing wrongful death itself as long as there is some causal link to the plaintiff's harm. *Id.* To be eligible to receive punitive damages, a statutory beneficiary must have suffered their own actual damages as well. *Quinonez*, 144 Ariz. at 198, 696 P.2d at 1378. No published case has ever addressed or interpreted "mitigating circumstances," in any context. *But see Haralson v. Fisher Surveying, Inc*., 201 Ariz. 1, 6 ¶20, 31 P.3d 114, 119 (2001)(holding that jury in wrongful death case considering punitive damages "should be instructed to consider all aspects of fairness and justice in deciding whether to award punitive damages," including effect of exemplary damages on deceased tortfeasor's heirs).

G. Punitive Damages

Punitive or exemplary damages are non-compensatory in nature. Punitive damages are to be awarded to punish the wrongdoer and deter others from emulating the wrongdoer's conduct. *Linthicum v. Nationwide Life Ins. Co.,* 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986). These damages can be sought with respect to a number of different common law and statutory claims; punitive damages may also be sought in the context of an equity action. *See Nielson v. Flashberg*, 101 Ariz. 335, 419 P.2d 514 (1966)(fraud), *Schmidt v. American Leasco*, 139 Ariz. 509, 679 P.2d 532 (App. 1983)(consumer deception), *Jerman v. O'Leary*, 145 Ariz. 397, 701 P.2d 1205 (App. 1985)(breach of fiduciary duty), *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986)(breach of the covenant of good faith and fair dealing), *Nelson v. Cail*, 120 Ariz. 64, 582 P.2d 1384 (App. 1978)(intentional interference with contractual relations); A.R.S. §12-632 (unlawful motor vehicle subleasing), A.R.S. §12-731 (interception or disclosure of wire, oral or electronic communications), A.R.S. §13-2314.04 (racketeering), A.R.S. §23-1325 (defamation re. picketing and secondary boycotts), A.R.S. §41-1491.33 (fair housing discrimination); *Medasys Acquisition Corp. v. SDMS, P.C.*, 203 Ariz. 420, 55 P.3d 763 (2002). *Olson v. Walker*, 162 Ariz. 174, 781 P.2d 1015 (App. 1989)(torts caused by intoxicated drivers); *Schmidt v. American Leasco*, 139 Ariz. 509, 679 P.2d 532 (App. 1983)(consumer deception); *Hyatt Regency Phoenix Hotel Co. v. Winston c. Strawn,* 184 Ariz. 120, 907 P.2d 506 (App. 1995)(legal malpractice); *Miller*

v. Kelly, 212 Ariz. 283, 130 P.3d 982 (App. 2006)(medical malpractice); *Watts v. Golden Age Nursing Home*, 127 Ariz. 255, 619 P.2d 1032 (1980)(nursing home); *Ranburger v. S. pac. Transp. Co.*, 157 Ariz. 551, 760 P.2d 551 (1988)(personal injury); *Volz v. Coleman Co*., 155 Ariz. 567, 748 P.2d 1191 (1987)(products liability); *Thompson v. Better-Built Aluminum Product. Co., Inc.,* 171 Ariz. 550, 832 P.2d 203 (1992)(wrongful discharge); *Hilgeman v. Am. Mortg. Sec., Inc*., 196 Ariz. 215, 995 P.2d 1030 (App. 2000)(invasion of privacy).

Under Arizona law, punitive damages is not a standalone claim, rather it is a measure of damage permitted with respect to a cause of action recognized in Arizona. *Sisemore v. Farmers Ins. Co. of Ariz*., 161 Ariz. 564, 566, 779 P.2d 1303, 1305 (App. 1989). As such, the statute of limitation for the cause of action that also seeks recovery of punitive damages applies equally to the prayer for punitive damages. *See* A.R.S. §12-501 *et seq.* Punitive damages are awardable in tort cases but not cases where the sole recovery is for breach of contract. *See Tarnoff v. Jones*, 17 Ariz. App. 240, 497 P.2d 60 (1972); *Hudgins v. Sw. Airlines Co*., 212 Ariz. 472, 212 P.3d 810, *review denied* (App. 2009).

The concept of punitive damages embodies a rule for individualized punishment of a wrongdoer whose conduct toward the plaintiff is particularly outrageous –for it must be certain that the wrongdoer is being punished because his conduct actually caused the plaintiff's injuries. *Jacobson v. Superior Court*, 154 Ariz. 430, 432, 743 P.2d 41-, 412 (Ap. 1987). This civil punishment can be in addition to criminal sanctions. *Puz v. McDonald*, 140 Ariz. 77, 78-79, 680 P.2d 213, 214-15 (App. 1984). In addition to individuals, exemplary damages can be sought in commercial contexts as well, so long as the requisite elements are met. *Security Title Agency, Inc. v. Pope*, 219 Ariz. 480, 499, ¶86-89, 200 P.3d 977, 996 (App. 2008).

In determining whether punitive damages are awardable, the inquiry is focused upon the wrongdoer's mental state. *Lithicum*, 150 Ariz. at 330, 723 P.2d at 679. Plaintiff must show that defendant acted with an "evil hand" guided by an "evil mind." *Rawlings*, 151 Ariz. at 330, 723 P.2d at 679. The tortfeasor's conduct must surpass "gross negligence or mere reckless disregard of the circumstance." *Lithicum*, 150 Ariz. at 330, 723 P.2d at 679. A tortfeasor's "evil mind" manifests if he either "intended to injure the plaintiff" or "consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others." Gurule v. Ill. Mut. Life & Cas. Co., 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987). This standard is satisfied by evidence that defendant's wrongful conduct was motivated by spite, actual malice, or intent to defraud. *Id.* The "requisite intent and outrageous and egregious conduct must occur in tandem with the conduct giving rise to the injury in order to recover punitive damages." *Saucedo v. The Salvation Army,* 200 Ariz. 179, 24 P.3d 1274 (App. 2001).

Arizona requires a punitive damages claim to be proven by clear and convincing evidence. *Lithicum*, 150 Ariz. at 331, 723 P.2d at 680.

H. Diminution in Value of Damaged Vehicle

"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 injury." *Oliver v. Henry*, 260 P.3d 314 (Ariz. Ct. App. 2011). When the property is repaired or restored, "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." *Id.*

Evidentiary Issues

A. Failure to Wear a Seat Belt

The seat belt defense only applies when nonuse of the seat belt was unreasonable under the circumstances. *Law v. Super. Ct.,* 157 Ariz. 147, 157, 755 P.2d 1135, 1145 (1988). There may be circumstances when it is not unreasonable to refuse or to fail to use a seat belt. *Id.* It is the responsibility of the jury to determine whether the nonuse was negligent and whether, under the Arizona Constitution, the nonuse should reduce the recovery of the plaintiff. *Id.* The jury may choose not to apply the fault, even if the evidence of the fault is clear and undisputed. *Id.* In order for the defense to be applied, the nonuse of the seat belt must have either caused injuries which would not have occurred if the belt had been used or must have enhanced the injuries which did occur. *Id.* The evidence must show the degree of enhancement with reasonable probability. *Id.* The defendant asserting the defense has the burden of proving the existence of the necessary elements. *Id.*

Furthermore, the jury must be instructed that evidence of nonuse of the seat belt applies only to the issue of how much money to award the plaintiff and to no other issue. *Id.* To the extent that the jury finds the existence of the necessary elements and decides to apply the defense, it may reduce the plaintiff's damages by the amount it finds those damages were caused or enhanced by the nonuse of the seat belt.

B. Failure of Motorcyclist to Wear a Helmet

In *Warfel v. Cheney*, the Court of Appeals recognized a helmet defense that applies when nonuse of a helmet was unreasonable under the circumstances. 157 Ariz. 424, 758 P.2d 1326 (App. 1988). Evidence of helmet availability may bear on the issue of whether plaintiff acted reasonably under the circumstances to minimize damages and avoid foreseeable harm to himself. Id. at 430, 758 P.2d at 1332.

C. Expert Testimony

In July 2010, the Arizona legislature signed into law A.R.S. §12-2203 which imposed the *Daubert* standard on expert testimony in cases in Arizona. The federal *Daubert* standard requires expert testimony to be "the product of reliable principles and methods" and requires experts to have "reliably applie[d] the principles and methods to the facts of the case." *See Daubert v. Merrell Dow Pharm., Inc*. 509 U.S. 579, 588-590 (1993) (*Daubert* also requires the court to consider "the *Daubert* factors," which include testing, peer review, error rate, and general acceptance.) In September 2011, the Arizona Supreme Court adopted an amendment to Arizona Rule of Evidence 702 to conform to the federal rule. The new language of Arizona Rule 702 is:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

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D. Collateral Source

In general, the collateral source rule allows a plaintiff to recover damages from a defendant even if they have already recovered from another source. *S. Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, 22, ¶ 33, 31 P.3d 123, 134 (App. 2002) *citing Norwest Bank (Minn.), N.A. v. Symington*, 197 Ariz. 181, 189, 3 P.3d 1101, 1109 (App. 2000). Compensation that a plaintiff has already received for her injuries from another source which is "fully independent" of the defendant, will not reduce any amount for which the defendant is liable. *Id.*

The collateral source rule, however, does not apply to actions brought pursuant to the Arizona Medical Malpractice Act. A.R.S. §12-565. A defendant health care provider may offer evidence of any amount or other benefit which is or will be payable as a benefit to the plaintiff as a result of the injury. A.R.S. §12-565(A). If defendant elects to introduce such evidence, the plaintiff may establish the amount she paid or contributed to secure her benefits and she may offer proof of any liens against the amount she recovers and/or right of subrogation. *Id.*

With the exception of medical malpractice cases, in which the doctrine has been abolished, the collateral source rule applies in all cases involving negligently caused damages. *Hall v. Olague*, 119 Ariz. 73, 74, 579 P.2d 577, 578 (App. 1978). Evidence of the past or future receipt of collateral source benefits by the injured party is inadmissible. *See, e.g. S. Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, 21, ¶33, 31 P.3d 123, 134 (App. 2001). The rule has been applied in a variety of contexts such as sick pay, fraternal benefit payments, government benefits, health insurance, gratuitously provided benefits, continued salary payments while disabled, and the portion of medical bills written off pursuant to a contract between the provider and an insurer. *Reixinger v. Ashton Co.*, 9 Ariz. App. 406, 408, 453 P.2d 235, 237 (1969); *Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 202, 129 P.3d 487, 491 (App. 2006); *Hall*, 119 Ariz. 73, 75, 579 P.2d 577, 580.

E. Recorded Statements

An original writing, recording, or photograph is required in order to prove its content unless the Arizona Rules of Evidence or an applicable statute provides otherwise. Ariz.R.Evid. 1002. A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate. Ariz.R.Evid. 1003. If a party introduces all or part of a recorded statement, an adverse party may require the introduction, at that time, of any other part, or any other recorded statement, that in

fairness ought to be considered at the same time. Ariz.R.Evid. 1006.

F. Prior Convictions

Rule 609, Arizona Rules of Evidence governs impeachment of a witness through evidence that the witness has been convicted of a crime. Rule 609 applies to all witnesses, including criminal defendants who choose to testify in their defense. It represents one of the limited instances where specific acts of misconduct by a witness are admissible to impeach credibility, and the only instance where a specific act of misconduct may be proven for that purpose by independent evidence. *Amburgey v. Holan Division of Ohio Brass Co.,* 124 Ariz. 531, 606 P.2d 21 (1980). Rule 609 applies to civil cases, but the issue arises most frequently in criminal proceedings.

The conviction of a witness for a felony came to be viewed as a fact bearing on the witness' credibility, rather than a disqualification of the witness entirely. *State v. Hull,* 60 Ariz. 124, 132 P.2d 436 (1942). Under Ariz.R.Evid. Rule 609(a), a witness may be impeached, provided the trial court permits it, on the basis of: (1) a conviction of a crime punishable by death or by imprisonment for a period in excess of one year under the law under which the conviction was entered, and (2) on the basis of conviction of a crime involving a lesser potential punishment if the crime involved "dishonesty or false statement." To fall into the latter category, the crime must involve an element of deceit, untruthfulness or falsification. *Blankinship v. Duarte*, 137 Ariz. 217, 669 P.2d 994 (Ct. App. Div. 2 1983). A conviction for tax evasion has been held to meet this standard. *Id.*

If the trial court allows the impeachment evidence, the fact of the conviction can be elicited from the witness during cross-examination, or proven by extrinsic evidence. The fact that a conviction is on appeal does not render it inadmissible, but if evidence of such a conviction is allowed, then evidence of the appeal becomes admissible as well. Ariz.R.Evid. 609(e)

Rule 609(a)(1) applies to any conviction for a crime punishable by more than one year in prison—regardless of whether the crime has anything to do with truthfulness or is probative of the witness' credibility. To qualify under Rule 609(a)(1), a conviction need only be punishable by death or imprisonment in excess of one year. Rule 609(a)(1) does not state a requirement as to the sentence the witness actually received or served. Moreover, the issue is whether the crime was punishable by imprisonment in excess of one year under the law under which the witness was convicted—which law may or may not be Arizona law. *State v. Malloy*, 131 Ariz. 125, 127, 639 P.2d 315, 317 (1981).

Under Rule 609(a)(2), a conviction for any crime, including a misdemeanor or petty offence, that involves "dishonesty or false statement" may be admissible to impeach. No conviction of any sort is automatically admissible to impeach a witness. Even if the other conditions of Rule 609(a) are satisfied, a criminal conviction of a witness may not be used for impeachment unless the Court determines that its probative value outweighs its prejudicial effect. *Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 701 P.2d 575 (Ct. App. Div. 2). In the case of an older conviction, the Court must determine that the probative value of the older conviction substantially outweighs its prejudicial impact.

Any felony conviction has probative value on credibility. *Id.* Rule 609(a) places on the party seeking to impeach a witness with a conviction the burden to show that the probative value (on credibility) of the prior conviction outweighs its prejudicial effect. The Arizona Supreme Court has held, however, that the impeaching party generally "need

only come forward with the date, place, and nature of the prior conviction in order to satisfy its initial burden of showing probative value." *State v. Dunlap*, 187 ARiz. 441, 930 P.2d 518 (Ct. App. Div. 1 1996); *State v. Williams*, 144 Ariz. 433, 437, 698 P.2d 678, 683 (1985). Thereafter, it is up to the opposing party to point out the prejudicial effect of admitting the prior conviction. *Id.* If the opposing party's evidence of unfair prejudice "successfully counters the probativeness of veracity inherent in any prior felony conviction," the impeaching party must "present additional evidence of probative value to sustain its burden under Rule 609, Ariz.R.Evid." *Id.* The impeaching party may not show that the manner in which the crime was committed was especially serious; and the opposing party may not show any mitigating factors. *State v. Sustaita*, 119 Ariz. 583 P.2d 239 (1978); *State v. Britson*, 130 Ariz. 380, 636 P.2d 628 (1981).

In balancing probative value against prejudicial effect under Rule 609(a), the trial court should take into account the "impeachment value of the prior conviction, length of time since the prior conviction, the witness' history since the prior conviction, the similarity between the past and present crimes, the importance of the defendant's testimony, and 'the centrality of the credibility issue'" but these are not exclusive factors. *State v. Williams*, 144 Ariz. 433, 437, 698 P.2d 678, 683 (1985).

Settlement

A. Offer of Judgment

Under Rule 68, an offer of judgment is an offer communicated to an adverse party to "allow judgment to be entered in the action in accordance with the terms and conditions of the offer, with costs then accrued." Rule 68, Ariz.R.Civ.P. An implicit rather than explicit requirement of Rule 68 is that an offer of judgment be in writing. *Davis v. Discount Tire Co*., 182 Ariz. 571, 898 P.2d 520 (App. 1995).

Rule 68, Ariz.R.Civ.P. requires certain specificity. First, the offer must contain a specific monetary sum to settle the asserted causes of action. Second, if the offer is for the entry of a monetary judgment, then it is deemed to include all damages, taxable court costs, interest, and attorneys' fees, if any, sought in the case, unless the offer specifically excludes any attorneys' fees that have been sought. *Id.* Third, the offer must be specific enough so that it can be determined, at the time of judgment, whether the offer or the judgment favored the offeree. *Id.* Lastly, the offer must be sufficiently specific to support entry of a judgment based upon an acceptance. *Greenwald v. Ford Motor Company,* 196 Ariz. 123, 993 P.2d 1087 (App. 1996).

An offer for a specific amount "to include all taxable costs" does not comply with the terms of Rule 68(a) which requires that there be a monetary offer "plus costs then accrued." *Hales v. Humana of Arizona, Inc.*, 186 Ariz. 375, 923 P.2d 841 (App. 1996). When the offeror does not clearly indicate that the amount specified in the offer does not include taxable costs, as this provision of Rule 68 requires, or specifies that it does, it does so at its peril. *Id.* In that circumstance, the comparison that will eventually be drawn, to determine whether sanctions will be awarded, will be between the amount of the judgment obtained by the offeree and the amount of the offer less the costs incurred by the offeree as of the date the offer was made. *Id.* The fact that an offer of judgment is conditioned upon the offeree's agreement not to disclose the fact or amount of the offer does not render it unenforceable. *Powers v. Taser Intern., Inc.*, 217 Ariz. 398, 174 P.3d 777 (Ct. App. Div. 1 2007). While Rule 68(b) provides that either party may file an offer

of judgment and acceptance, the language that Rule 68 is permissive, and does not require either party to file the offer. *Id.* A stipulation for dismissal that embodies none of the offer of judgment's terms could also be employed. *Id.*

An offer of judgment remains effective for thirty (30) days after it is served, except in the case where the offer is made within sixty (60) days after service of the summons and complaint, in which case the offer remains effective for sixty (60) days after service. Rule 68, *Ariz.R.Civ.P.* An offer that is made within 45 days of trial is only effective for 15 days. *Id.* An offer of judgment is irrevocable during the effective period prescribed in Rule 68. *Mubi v. Broomfield*, 108 Ariz. 39, 492 P.2d 700 (1972); *Twin City Const. of Fargo, North Dakota v. Cantor*, 22 Ariz.App. 133, 524 P.2d 967 (1974). An offer that is not accepted within the specified time period is deemed to be withdrawn. *Id.* An offer that is not accepted may not be admitted into evidence except in a proceeding to determine costs, and may not be considered in determining whether or not an additur should be granted. *State v. Burton*, 20 Ariz.App. 491, 514 P.2d 244 (1973).

If the eventual judgment that is obtained is equal to, or more favorable to the party making the offer than, the terms of the offer**,** the party to whom the offer was made must pay double the costs incurred by the offeror after the offer was made, reasonable expert witness fees incurred by the offeror after the offer was made, and prejudgment interest on unliquidated claims which is to accrue from the date of the offer. *Fleitz v. Van Westrienen*, 114 Ariz. 246, 560 P.2d 430 (App. 1970). Amendments to Rule 68, effective January 1, 2008, substituted the language that sanctions are to be awarded if the offeree does not obtain a "more favorable judgment" than the offer**.**

Under Rule 68(g), if the eventual judgment includes an award of taxable costs or attorneys' fees, only those taxable costs and attorneys' fees determined by the court as having been reasonably incurred as of the date of the offer was made may be considered in determining whether that judgment was more favorable than the offer. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 261 P.3d 784 (Ct. App. Div. 1 2011).

B. Liens

I. Healthcare Provider Liens

Health care providers who provide treatment to injured persons arising from the fault of another are entitled to a lien against the injured person's tort recovery for the reasonable and customary charges of the treatment rendered. A.R.S. §33-931. In order to perfect a lien pursuant to A.R.S. §33-931, the lienholder must record in the county where the treatment was rendered, within 30 days of the first date of service, a lien that sets forth the following information:

(1) The name of the patient;
(2) The name and address of the health care provider;
(3) The dates of service;
(4) The amount owed; and
(5) The name of those alleged to be responsible for paying the damages.

A.R.S. §33-923 (A).

A timely perfected statutory health care provider lien is enforceable against the patient's recovery, the tortfeasor liable for the damages, or the tortfeasor's insurance company. A.R.S. §33-934(A). The lien holder may not pursue the patient beyond the

amount of the tort recovery. *Blakenbaker v. Jonovich*, 205 Ariz. 383, 387, ¶19, 71 P.3d 910, 914 (2003).

In an action to enforce a statutory health care provider lien, the lien holder is only entitled to recover its customary charges. A.R.S. §33-913(A). The only defenses to a lien enforcement action are: (1) that the charges sought are not the customary charges; and/or (2) that the care or treatment was not reasonable or necessary. A.R.S. §33-934(B). A statutory health care provider lien is not enforceable against wrongful death recoveries. The lien is only enforceable against a recovery of medical expenses by the decedent's estate. Gartin v. St. Joseph's Hosp. & Med. Ctr., 156 Ariz. 32, 749 P.2d 941 (App. 1988).

II. Arizona Health Care Cost Containment System (AHCCCS) Lien

A.R.S. §36-2915(A) permits an AHCCCS entity to pursue a lien against a third party or monies payable from accident insurance, liability insurance, workers' compensation, health insurance, medical payment insurance, underinsured coverage, uninsured coverage, or any other first of third party source.

In order to have a valid, enforceable AHCCCS lien, it must be properly perfected. If the AHCCCS entity fails to properly record its lien as required its lien as required by A.R.S. §36-2915, it may still recover the expenses paid on behalf of the beneficiary under A.R.S. §12-962, but its recovery is limited to only third party proceeds. A.R.S. §12-962(A). The AHCCCS entity may enforce its lien against the AHCCCS beneficiary, the tortfeasor, or the tortfeasor's insurance company under the provisions set forth in A.R.S. §36-2916. A.R.S. §36-2916(B).

An AHCCCS entity lien holder is required to reduce its lien. IN determining the amount of the reduction, the entity considers: (1) the nature and extent of the illness; (2) the sufficiency of insurance or other sources of indemnity; and (3) any other factor relevant to determining a fair and equitable settlement. A.R.S. §36-569.01(I).

III. ERISA Liens

An action to enforce an ERISA lien is governed by 29 U.S.C. §1132, and can be brought by the Secretary, a participant, beneficiary or fiduciary. The Secretary has broad power to bring an action to "enjoin any act" or "enforce any provision" of the Act. 29 U.S.C. §1132(a)(3). An ERISA plan is not statutorily required to reduce its lien. As a

IV. Medicare's Right of Reimbursement

While Medicare reoutinely pays claims presented, pursuant to the provisions of the Medicare Secondary Payer statute, it considers those payment to be "secondary" to any other available coverage. 42 U.S.C. §1395y(b)(2)(B)(ii). The Medicare Secondary Payer statute governs Medicare's "lien" rights and provides that when a Medicare beneficiary is injured as the result of the negligence of another, the medical expenses should be paid by the "primary plan." 42 C.F.R. §411.46; 42 U.S.C. §1395y(b)(2)(A)(ii). However, to facilitate the coordination of treatment and benefits, Medicare often pays the medical expenses up from as a "conditional payment." 42 U.S.C. §1395y(b)(2)(B). Medicare is then entitled to recover from the "primary plan" the "conditional payment' made on behalf of the beneficiary. *Id*. The "primary plans" against which Medicare had a right of recovery include liability insurance no-fault insurance, medical payments, PIP, and

uninsured/underinsured motorist coverage. 42 U.S.C. §1395y(b)(2)(A)(ii). There is no formal perfection requirement in order for Medicare to have a valid enforceable lien. The right of reimbursement arises upon Medicare's issuance of a "conditional payment" on behalf of the beneficiary. 42 U.S.C. §1395y(b)(2)(B)(ii).

V. Worker's Compensation Lien

An injured worker who makes a claim for workers' compensation benefits may also pursue a claim against the person(s) alleged to have caused the injury. A.R.S. §23-1023. However, if the injured worker pursues a third party recovery, the workers' compensation carrier is entitled to a lien for the amount of benefits paid on his/her behalf. A.R.S.§23-1023(C).

C. Minor Settlement

Wrongful death settlements involving minors must be approved by a probate court acting as or after appointing a guardian *ad litem*, as with any settlement of any claim on behalf of a minor. *In re Millman*, 101 Ariz. 54, 64, 415 P.2d 877, 887 (1966).

D. Negotiating Directly with Attorneys

In accordance with Arizona Rules of Professional Conduct, Rules 4.2, 4.3, and 5.5(b), lawyers ethically may not negotiate with an opposing party's non-lawyer public adjuster if the adjuster is not supervised by a lawyer. A lawyer may communicate directly with an opposing party who is "represented" by a public adjuster if the adjuster is not supervised by a lawyer or authorized to practice law. *See* State Bar of Arizona, Formal Op. 99-07 (1999).

E. Confidentiality Agreements

Confidentiality agreements like all settlement provisions are contracts and can only be set aside for the same reasons that any other contract could be rescinded, such as fraud, duress, or undue influence.

F. Releases

In Arizona, a covenant not to execute does not extinguish the plaintiff's cause of action whereas a release abandons a claim or right to the person against whom the claim exists or the right is to be enforced or exercised." *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County*, 220 Ariz. 202, 209, 204 P.3d 1051, 1058 (2008). (quotations omitted).

Transportation Law

A. State Speed Limits

Arizona's speed limit laws are governed by A.R.S. § 28-701, which generally provides that a speed is too great and unreasonable if a vehicle drives in excess of the following speeds:

a. 15 mph approaching a school crossing
b. 25 mph in a business or residential district
c. 65 mph in other locations

See A.R.S. § 25-701. These speed limits may be adjusted by authorities if they determine that the maximum speed permitted is greater or less that is reasonable or safe. A.R.S. §§ 28-702 and 28-703.

B. Overview of State CDL Requirements

1. Classes of CDL Licenses

Class A –

Required to operate a combination vehicle (truck and trailer) if the GVWR of the trailer is 10,001 pounds or more, and when added to the GVWR of the power unit (truck), the combined weight rating (GCWR) is 26,001 or more pounds.

Class B –

Required to operate any vehicle with a GVWR of 26,001 pounds or more. A trailer may be towed if the GVWR of the trailer is 10,000 pounds or less.

Class C –

Required to operate any vehicle with a GVWR of 26,000 pounds or less, if the vehicle is required to be placarded to transport hazardous materials or transports 16 or more passengers, including the driver.

3. Requirements for obtaining a CDL

   a. To qualify for an Arizona CDL, one must have Arizona as his state of domicile.
   b. A first time CDL applicant must obtain a CDL instruction permit to operate a vehicle requiring a CDL on the highway. The CDL instruction permit is valid for six months. The minimum age for a CDL is 21. An individual may apply for an intrastate CDL, valid only in Arizona, if at least 18 years old.
   c. Both a knowledge and skills test is required.
      (1) An applicant must correctly answer 80% of the questions on the knowledge test in order to achieve a passing score
      (2) An applicant must complete a road/skills test in the class of vehicle he is wanting to obtain a license for.
   d. All commercial drivers must maintain a current Medical Examiner Certificate completed as required by CFR 391.43. These forms are not good for more than two years.

4. Renewal of CDL
   a. Arizona issues a 5-year CDL. Drivers are responsible for renewing their CDL before the expiration date.
   b. To renew, the person must bring the current CDL and properly completed Medical Examiner Certificate or DOT card to any CDL office in the state.

Insurance Issues

A. State Minimum Limits of Financial Responsibility

Arizona requires drivers to maintain the following insurance coverage and limits:

(1) $15,000 for bodily injury to or death of one person in any one accident

(2) $30,000 for bodily injury to or death of two or more persons in any one

accident

(3) $10,000 for injury to or destruction of property of others in any one accident. A.R.S. §28-4009.

B. Uninsured Motorist Coverage

A.R.S. §20-259.01 mandates that insurers offer uninsured motorist coverage (UM) and underinsured motorist coverage (UIM) in writing. However, the statute does not require the offer to contain an explanation of the nature of UM/UIM insurance. *Tallent v. Nat'l Gen. Ins. Co*., 185 Ariz. 266, 267, 915 P.2d 665, 666 (1996). The offer need only be "reasonably calculated to bring to the insured's attention that which is being offered." *Giley v. Liberty Mut. Fire Ins. Co*., 168 Ariz. 306, 307, 812 P.2d 1124, 1125 (App. 1991).

Satisfying the "written notice" provision of A.R.S. §20-259.01 or its requirement to "make available" the coverage does not require that that insurance producer or insurer translate the offer from English into Spanish so that a Spanish speaker may understand the terms. "It only requires that the insurance producer make an offer that, if accepted, would bind the insurer to provide the offered coverage." *Ballesteros v. Am. Standard Ins. Co. of Wisconsin*, 226 Ariz. 345, 349, 248 P.3d 193, 197 (2011).

The insurer may, and often does, delegate to insurance producers its statutory duty under A.R.S. §20-259.01 to offer UM/UIM coverage in writing. *Millers Nat'l Ins. Co. v. Taylor Freeman Ins. Agency*, 161 Ariz. 490, 779 P.2d 365 (App. 1989). If the producer accepts this delegation, he must comply with the statute as though he were the insurer. *Id.* Accordingly, the producer's failure to comply may subject him to liability both to the insured and the insurer. *Ballesteros*, 226 Ariz. at 349, 248 P.3d at 197.

C. No Fault Insurance

Arizona does not utilize no-fault insurance.

D. Unfair Claims Practices

The Arizona Unfair Claim Settlement Practices Act (the "Act") is found at A.R.S. §20-461. The Act expressly provides that its provisions do not create a private right or cause of action. A.R.S. §20-416(C); *Melancon v. USAA Cas. Ins. Co.,* 174 Ariz. 344, 347, 849 P.2d 1374, 1377 (App. 1992). Instead, the statute provides an administrative remedy to the Director of Insurance if an insurance company performs certain enumerated actions with such frequency as to indicate a general business practice. *Id.* The express provisions of the Act and the Department of Insurance regulations promulgated thereunder are not standards of conduct in and of themselves by which an insurance company is to be evaluated in handling an individual claim for purposes of creating a claim for bad faith. *Franks v. United States Fid. & Guar. Ins. Co.,* 149 Ariz. 291, 718 P.2d 193 (App. 1985).

E. Bad Faith Claims

Insurance bad faith is based on the implied covenant of good faith and fair dealing which is implied by law into all contracts, including insurance policies. *Rawlings v. Apodaca,* 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986); *Wagenseller v. Scottsdale Mem. Hosp*. 147 ARiz. 370, 383, 710 P.2d 1025, 1038 (1985). The cause of action for insurance bad faith is an intentional tort; however, the intent required is the intent simply

to commit the improper act without a reasonable belief that its action is permissible under the policy. *Noble v. Nat'l Life Ins. Co.*, 128 Ariz. 188, 189, 624 P.2d 866, 867 (1981). The cause of action is said to arise from the contractual relationship between the insured and the insurer. *Leal v. Allstate Ins. Co.*, 199 Ariz. 250, 17 P.3d 95 (2000); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 174, 913 P.2d 1092 (1996). Therefore, the duty of good faith and fair dealing is owed to the insured and a stranger to the insurance contract has no claim for bad faith, absent an assignment, against the insurance company pertaining to its performance of its contractual duties. *Fobes v. Blue Cross & Blue Shield of Ariz.*, 176 Ariz. 407, 409, 861 P.2d 692, 695 (App. 1993). The duty of good faith is mutual and requires that neither party act in a way that damages the rights of the other party to receive the benefits which flow from the contractual relationship. *Taylor*, 185 Ariz. at 176, 913 P.2d at 1094.

A cause of action for insurance bad faith is governed by the tort statute of limitations, A.R.S. §12-542. The statute of limitations begins to run in a first party claim from the date that the insurance company intentionally denies, fails to process or fails to pay the insured's claim. *Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 500, 851 P.2d 122, 125 (App. 1992). However, the period only begins to run if the decision by the insurance company is clear and unequivocal. *Id.* In a third party failure-to-settle situation, the bad faith claim against the insurer does not accrue and the limitations period does not begin to run until the excess judgment against the insured becomes final and nonappealable. *Taylor*, 185 Ariz. at 179, 913 P.2d at 1097.

In order to establish a prima facie case of bad faith, it must be shown that the insurance company acted both (1) unreasonably toward its insured and (2) knowing it was acting unreasonably or with reckless disregard as to the reasonableness of its actions. *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 164 Ariz. 256, 260, 792 P.2d 719, 723 (1990); *Trus Joist Corp. v. Safeco Ins. Co.*, 153 Ariz. 95, 104, 735 P.2d 125, 134 (App. 1986). The tort arises when the insurer commits consciously unreasonable conduct. *Walter v. Simmons*, 169 Ariz. 229, 818 Ariz. 214 (App. 1991). The insurer must intend the act or omission and form that intent without a reasonable basis or fairly debatable grounds for its action. *Rawlings*, 151 Ariz. at 160, 726 P.2d at 576.

First party and third party bad faith claims both arise from the same implied duty of good faith and fair dealing. *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 164 Ariz. 256, 258, 792 P.2d 719, 721 (1990). The burden of proof to establish a breach of the implied covenant of good faith and fair dealing is a preponderance of the evidence. *Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 36, 800 P.2d 20, 23 (App. 1990). In order to comply with its duty of good faith and fair dealing, the insurance company must give equal consideration to the interests of its insured in deciding whether to settle or to continue to defend a claim. *Clearwater*, 164 Ariz. at 259, 792 P.2d at 722.

In determining whether an insurer has acted in bad faith in refusing to settle a claim, the test is generally whether a prudent insurer without consideration of policy limits and acting as if it alone would be responsible for the judgment would have settled the claim. *General Acc. Fire & Life Assur. Corp. v. Little*, 103 Ariz. 435, 441-42, 443 P.2d 690, 696-97 (1968). In evaluating whether equal consideration was provided

through an objective evaluation, Arizona courts have set out factors to be considered by the trier of fact:

1. The strength of the injured claimant's case on the issues of liability and damages;
2. Attempts by the insurer to induce the insured to contribute to the settlement;
3. Failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured;
4. The insurer's rejection of advice of its own attorney or agent;
5. Failure of the insurer to inform the insured of a compromise offer;
6. The amount of financial risk to which each party is exposed in the event of a refusal to settle;
7. The fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and
8. Any other factors tending to establish or negate bad faith on the part of the insurer.

Clearwater, 164 Ariz. at 259, 792 P.2d at 722; *Little*, 103 Ariz. at 439, 443 P.2d at 694.

In a first party bad faith case, the damages recoverable are:

- Any unpaid benefits still owed under the insurance policy
- Any actual damages for loss or injury to credit
- Any emotional distress, anxiety, humiliation and inconvenience suffered; and
- Any attorneys' fees incurred to obtain payment under the contract

Farr v. Transamerica Occidental Life Ins. Co., 145 Ariz. 1, 6-7, 699 P.2d 376, 381-82 (App. 1984)

If the plaintiff in the action is the insured, he may also recover personal damages for any actual damages for loss or injury to his credit, and any emotional distress, anxiety, humiliation, and inconvenience suffered. *Id.*

F. Coverage – Duty of Insured

When an insurer performs its contractual obligation to defense, the policy requires the insured to cooperate with the insurer and aid insurer in the defense. *United Services Auto. Ass'n v. Morris*, 154 Ariz. 113, 117, 741 P.2d 246, 250 (1987). If the insurer performs its obligation, the cooperation clause applies with full force, and settlement by the insured constitutes a breach of the policy. *Id.* at 117-118, 741 P.2d at 250-251. If the insurer issues a reservation of rights letter, the insured may take steps to protect himself by stipulating to a judgment and assigning his rights to the plaintiff without violating the cooperation clause. *United Services Auto. Ass'n v. Morris*, id.