STATE OF ARIZONA COMPENDIUM OF LAW

Prepared by

Jones, Skelton & Hochuli, PLC
40 N Central Ave, Suite 2700
Phoenix, AZ 85004
(602) 263-1700
www.jshfirm.com

Updated 2017

PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

A) **Derivative suits.** The pre-suit notice requirement for derivative actions against a corporation or association is governed by A.R.S. § 10-742. Under § 10-742, no shareholder may commence a derivative proceeding until both: (1) a written demand has been made on the corporation to take suitable action and (2) ninety (90) days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand was rejected by the corporation, the statute of limitations will expire within the ninety (90) days, or irreparable injury to the corporation would result by waiting for the expiration of the ninety (90) day period.

B) **Public entities.** The pre-suit notice requirement for actions against any public entity or public employee acting within the scope of their employment is governed by A.R.S. § 12-821 *et seq.* Prior to suit and within one hundred eighty (180) days of the cause of action's accrual, the plaintiff must file a claim (also called a "notice of claim") with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona Rules of Civil Procedure. A.R.S. § 12-821.01(A). A claim must contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed. *Id.* It must also contain a specific amount for which the claim can be settled and the facts supporting that amount. *Id.* Failure to adhere to these statutory requirements will bar plaintiff's state law claims. *Id*.

C) **Custody of Indian children.** The pre-suit notice requirement for actions involving an Indian child is governed by 25 U.S.C. § 1912. "In any involuntary proceeding in a state court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right to intervention." 25 U.S.C. § 1912(a). If the identity or location of the parent or Indian custodian and tribe is unknown, notice shall be given to the Secretary, who then has fifteen days after receipt to provide notice to the parent or Indian custodian and tribe concerned.

D) **Dwellings.** The pre-suit notice requirement for actions by purchasers against sellers of dwellings which arise out of or are related to the design, construction, condition or sale of the dwelling is governed by A.R.S. § 12-1361 *et seq.* "Before filing a dwelling action, the purchaser shall give written notice by certified mail, return receipt requested, to the seller specifying in reasonable detail the basis of the dwelling action." A.R.S. § 12-1363(A). "After receipt of the notice described in subsection A of this section, the seller may inspect the dwelling to determine the nature and cause of the alleged construction defects and the nature and extent of any repairs or replacements necessary to remedy the alleged construction defects." *Id.* at B.

Relationship to the Federal Rules of Civil Procedure

Arizona has adopted the Arizona Rules of Civil Procedure, which closely mirror the Federal Rules of Civil Procedure. The 2017 amendments restyle the Arizona Rules of Civil Procedure in a manner similar to the 2007 restyling of the Federal Rules of Civil Procedure. Thus, the numbering of the Arizona Rules mirrors the numbering of Federal Rules and the two have analogous subject matters. Subdivisions of each rule, however, do not always correspond.

Description of the Organization of the State Court System

A) **Judicial selection.** The Governor appoints seven Arizona Supreme Court justices for staggered six-year terms. ARIZ. CONST. art. VI, § 4; A.R.S. § 12-101. One justice is selected by fellow justices to serve as Chief Justice for a five-year term. ARIZ. CONST. art. VI, § 3. Supreme Court Justices are then re-elected at the general election next preceding the expiration of a term of office. A.R.S. § 12-101.

Court of Appeals judges are selected by a merit system. ARIZ. CONST. art. VI, § 36(D). A nonpartisan commission considers applicants and sends a list of nominees to the Governor. *Id.* at § 36–37. The Governor must appoint the judges from this list, based on merit and regardless of party affiliation. *Id.* at § 37(C). Appellate judges initially serve terms ending sixty (60) days following the next general election held after the expiration of a two-year term. *Id*. at § 37; A.R.S. § 12-120.01. They may then be re-elected for a six-year term by agreement of a majority of those voting on the question votes "Yes." ARIZ. CONST. art. VI, § 38(C).

Superior Court judges are also appointed through a merit system. ARIZ. CONST. art. VI, § 41(J). Applicants are first screened by a non-partisan commission, which selects names that are forwarded to the Governor. *Id.* at § 41(B-C). Superior Court judges in Arizona's larger counties hold office for a regular term of four (4) years. *Id.* at § 12, 41(A) Other counties can choose whether to adhere to (4) year term system. *Id.* There must be at least one (1) Superior Court judge for every county. *Id.* at § 10.

B) **Structure.** The Arizona court system consists of the Supreme Court, the Court of Appeals Divisions One and Two, Superior Courts, and courts inferior to Superior Court. ARIZ. CONST. art. VI, § 1. Appellate Division One sits in Phoenix while Appellate Division Two is located in Tucson. A.R.S. § 12-120. Counties are divided into precincts, each of which has a justice court. A.R.S. § 22-101. In addition, Arizona's incorporated cities and towns each have a municipal court. A.R.S. § 22-402.

C) **Alternative Dispute Resolution (ADR).** A superior court may submit a dispute to an alternative dispute resolution program created or authorized by appropriate local court rules upon motion of either party, or upon its own initiative, after consultation with the parties. ARIZ. R. CIV. P. 16.

1) Compulsory arbitration is governed by A.R.S. § 12-133 and follows the Arizona Rules of Civil Procedure and the Arizona Rules of Evidence. *See* Ariz. R. Civ. P. 72. When a Complaint is filed, the plaintiff must also file a Certificate of Compulsory Arbitration specifying whether the case is subject to compulsory arbitration. *Id.* Superior courts are required to establish jurisdictional limits not to exceed sixty-five thousand dollars ($65,000.00) and must submit to arbitration those cases (except appeals from municipal or justice courts) that: (1) seek an amount in controversy within the jurisdictional limit; and (2) request only monetary relief. ARIZ. R. CIV. P. 72(b); A.R.S. § 12-133. Once a case is certified for arbitration, the Superior Court clerk randomly selects an arbitrator from a list containing the names of all lawyers qualified to serve in that particular type of case. A.R.S. § 12-133(C). Arbitration awards are non-binding and the parties who appear and participate in the arbitration proceeding can file an appeal for a trial de novo in Superior Court. *Id.* at (H–I).

    i. Compulsory arbitration may be waived on a showing of good cause upon written stipulation of all parties. A.R.S. § 12-133(B). In addition, the jurisdictional limit does not apply to arbitration conducted under an ADR program approved by the Supreme Court. *Id.* at (L).

ii. An arbitrator may *not* decide any motions that would dispose of the matter completely. *See* Ariz. R. Civ. P. 74 (a, d).

2) Mediation programs are authorized by A.R.S. § 12-134 and are utilized at the discretion of the superior court. A.R.S. § 12-134(A).

Service of Summons

A) **Person.** Service of summons upon a person is governed by ARIZ. R. CIV. P. 4.1(d). Service upon an individual is affected by delivering a copy of the summons and the pleading to the individual personally or by leaving copies at the individual's home with a person of suitable age and discretion who lives there, or by delivering a copy of the summons and pleading to an agent authorized by appointment or by law to receive service. Ariz. R. Civ. P. 4.1(d).

B) **Governmental entity.** Service of summons upon a governmental entity is governed by ARIZ. R. CIV. P. 4.1(h). Service is effective by delivering a copy of the summons and the pleading to the following individuals:

1) For the State, the Attorney General;

2) For a County, the Clerk of the Board of Supervisors thereof;

3) For a Municipal Corporation, the Clerk thereof;

4) For any other governmental entity:

i. The individual designated by the entity pursuant to the statute to receive service; or

ii. If no designation, the chief executive officer, or, alternatively, the official secretary, clerk, or recording officer. Ariz. R. Civ. P. 4.1(h).

C) **Corporations, partnerships, or other unincorporated entities.** Service of summons upon these entities is governed by ARIZ. R. CIV. P. 4.1(i). A private corporation may be served by delivering a copy of the summons and the pleading to a partner, an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service. Ariz. R. Civ. P. 4.1(i). If the agent is authorized by statute and the statute requires it, service shall be affected by mailing a copy to the party on whose behalf the agent accepted or received service. *Id.*

D) **Waiver of service.** Waiver of service is governed by ARIZ. R. CIV. P. 4.1(c). A plaintiff may notify a defendant of an action and request that the defendant waive service of summons. Ariz. R. Civ. P. 4.1(c)(1). To do so, the plaintiff must submit the notice and request in writing and address them directly to the defendant. *Id.* A defendant who waives service does not waive any objections to venue or personal jurisdiction. *Id.*

E) **Nonresidents.** ARIZ. R. CIV. P. 4.2(a) allows *in personam* jurisdiction over nonresidents to the maximum extent permissible under the Arizona Constitution and the Constitution of the United States. Service must be made according to the rules governing service to particular entities under ARIZ. R. CIV. P. 4.1(d)by a person authorized to serve process under the law of the state where service is made.

1) An Arizona court can exercise specific jurisdiction over a non-resident defendant if: (1) the defendant performed some act or consummated some transaction within Arizona by which he purposefully availed himself of the privilege in conducting activities in Arizona, (2) the claim arises out of or results from the defendant's Arizona-related activities, and (3) the exercise of jurisdiction would be reasonable. *See Austin v. Crystaltech Web Hosting*, 211 Ariz. 569, 574, 125 P.3d 389, 394 (App. 2005).

F) **Nonresident motorists.** Nonresident motorists fall under A.R.S. § 28-2321 *et seq.* A nonresident motorist accepts the privileges granted under § 28-2321 *et seq.* by operating a motor vehicle on a public highway. A.R.S. § 28-2326(A). Service of process under § 28-2326 is made by leaving a copy of the summons and complaint and fee of four dollars with the director of the Department of Transportation or in the director's office during office hours. A.R.S. § 28-2327(A).

Statute of Limitations

A) **General.** Unless otherwise noted, all claims must be brought within four (4) years of when the cause of action accrues. A.R.S. § 12-550.

B) **Oral contracts.** No statute specifically addresses the statute of limitations for all oral contracts. However, A.R.S. § 12-543 provides that the statute of limitations for debts from oral contracts between merchants and their creditors is three (3) years.

C) **Written contracts.** A.R.S. § 12-548 requires that actions arising out of a written contract must commence within six (6) years after the cause of action accrues. However, insurance contract clauses specifying a different time by which an action must commence are enforceable so long as they allow at least a one-year statute of limitations for property and marine and transportation actions and two (2) years for all other actions. A.R.S. § 20-1115(A)(3); *Nangle v. Farmers Ins. Co. of Ariz.*, 205 Ariz. 517, 519, 73 P.3d 1252, 1254 (App. 2003).

1) **Discovery rule.** Arizona courts apply the "discovery rule" to contract actions governed by A.R.S. § 12-548. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 589, 898 P.2d 964, 967 (Ariz. 1995). Under this rule, the statute of limitations does not commence until the plaintiff knew, or, in the exercise of reasonable diligence, should have known that he has suffered injury as a consequence of a breach of contract. *Id.*

2) **Realty conveyance.** The statute of limitations for an action seeking specific performance of a contract for the conveyance of realty is governed by A.R.S. § 12-546. This action must be brought within four (4) years of the date the action accrued. A.R.S. § 12-546.

3) **Sale of goods.** The statute of limitations for an action arising from a sale of goods is governed by the Uniform Commercial Code, A.R.S. § 47-2725. "An action for breach of any contract for sale must commence within four years after the cause of action has accrued." A.R.S. § 47-2725(A). The parties may, by their agreement, reduce this period to as little as one year, but they cannot extend it. *Id.*

D) **Contribution.** The statute of limitations for contribution actions is governed by A.R.S. § 12-2503.

1) **After judgment.** Where a judgment has been issued for the injury or wrongful death against a tortfeasor seeking contribution, any separate action by him to enforce

contribution must commence within one (1) year after the judgment has become final by lapse of time for appeal or after appellate review. A.R.S. § 12-2503(C).

2) **Before judgment.** Where a judgment has not been issued for the injury or wrongful death against the tortfeasor seeking contribution, his right to contribution is barred unless he has either: (1) discharged by payment the common liability within the applicable statute of limitations applicable to the claimant's right of action against him and has commenced his contribution action within one (1) year after payment; or (2) agreed while the action is pending against him to discharge the common liability and has within one (1) year after the agreement paid the liability and commenced his action for contribution. A.R.S. § 12-2503(D).

E) **Employment.** The Arizona Employment Protection Act states that all employment relationships in Arizona are at will unless a written, signed contract between the employer and employee specifies otherwise. A.R.S. § 23-1501(A)(2). Actions for breach of an oral or written employment contract must be commenced and prosecuted within one (1) year from the date the action accrued unless the employee handbook or policy manual specifies otherwise. A.R.S. § 12-541(3).

F) **Fraud or Mistake.** The statute of limitations for fraud or mistake is governed by A.R.S. § 12-543. Actions for relief on the ground of fraud or mistake shall be commenced and prosecuted within three (3) years after the cause of action accrued. A.R.S. § 12-543(3). A cause of action for fraud or mistake accrues when the aggrieved party discovers the facts constituting the fraud or mistake.

G) **Public entities.** A.R.S. § 12-821 governs all actions against a public entity or public employee. Actions to recover against public entities and public employees must be brought within one (1) year after the cause of action accrues. A.R.S. § 12-821.

1) **Notice of Claim.** Before filing suit, a Notice of Claim must be served on the public entity or public employee within one hundred eighty (180) days after the cause of action accrues. A.R.S. § 12.821.01(A).

2) **County.** Claims against the county are governed by A.R.S. § 11-622. Claimants must present an itemized claim to the Board of Supervisors of the county against which the demand is made within six (6) months after the last item of the account accrued. A.R.S. § 11-622.

H) **Debt.** Under A.R.S. § 12-548 (A), actions concerning a debt shall be brought within six (6) years of the date the action accrued if the indebtedness is evidenced by or founded on either: (1) a written contract executed in Arizona or (2) a credit card. Actions for a debt stemming from breach of an oral contract are governed by A.R.S. § 12-543 and must commence within three (3) years after the cause of actions accrued. A.R.S. § 12-543(1).

I) **Personal injury.** The statute of limitations for a personal injury action is governed by A.R.S. § 12-542 and is two (2) years from the time the cause of action accrues. A.R.S. § 12-542(1). Accordingly, "the claim is barred two years from when the plaintiff knew or should have known facts giving rise to the claim." *Anson v. American Motors Corp.*, 155 Ariz. 420, 424, 747 P.2d 581, 585 (App. 1987).

J) **Wrongful death.** The statute of limitations for a wrongful death action is governed by A.R.S. § 12-542(2). Contrary to the wording of A.R.S. 12-542(2), however, the statute of limitations is two (2)

years from the time the cause of action accrues. A.R.S. § 12-542(2); *Anson v. American Motors Corp.*, 155 Ariz. 420, 425–26, 747 P.2d 581, 586–87 (App. 1987). The "discovery" rule applies in wrongful death actions, so the suit accrues when "a plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by the defendant's negligent conduct," not limited to the date of death of the injured party. *Id.* at 423, 426.

K) **Medical malpractice.** The statute of limitations governing medical malpractice actions is A.R.S. § 12-542. Except as provided in A.R.S. § 12-551, (which states that product liability cases must be commenced and prosecuted within twelve (12) years after the product was first sold for use or consumption, unless the cause of action is based upon the negligence of the manufacturer or seller or a breach of an express warranty), any action for injury or death against a licensed health care provider must commence within two (2) years subject to the same accrual rule discussed in *Anson*, 155 Ariz. at 423–26, above. A.R.S. § 12-542(1); *see also* A.R.S. § 12-561(2).

L) **Legal malpractice.** Legal malpractice claims are subject to the two-year statute of limitations set forth in A.R.S. § 12-542. *Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 139, 927 P.2d 796, 799 (App. 1996). "A claim for legal malpractice accrues when: (1) the plaintiff knows or reasonably should know of the attorney's negligent conduct; and (2) the plaintiff's damages are ascertainable, and not speculative or contingent." *Id.*

M) **Property damage.** The statute of limitations for property damage actions is governed by A.R.S. § 12-542. Except as provided in A.R.S. § 12-551, (which states that product liability cases must be commenced and prosecuted within twelve (12) years after the product was first sold for use or consumption, unless the cause of action is based upon the negligence of the manufacturer or seller or a breach of an express warranty), actions to recover damages for an injury done to real or personal property or to recover the possession of personal property or damages for conversion, must be commenced within two (2) years after the cause of action accrued. A.R.S. § 12-542.

N) **Survivorship.** Under A.R.S. § 14-3109, where a decedent's cause of action has not been barred by death, the statute of limitations ceases to run until a personal representative is appointed or until twelve (12) months after the death, whichever occurs first. A.R.S. § 14-3109. However, the statute of limitations cannot expire sooner than four (4) months after death, even if a personal representative is appointed earlier. *Id.* The survival statute, A.R.S. § 14-3110, allows a personal injury action to survive the death of the alleged tortfeasor for the duration of the two (2) year statute of limitations. A.R.S. § 14-3110.

O) **Tolling.** A number of statutes specifically enumerate tolling provisions applicable to minors or those under a legal disability. Under A.R.S. § 12-502, if a person entitled to bring an action for personal injuries is under eighteen (18) years of age or of unsound mind at the time the action accrues, the period of such disability shall not be deemed a portion of the period limited for commencement of the action. A.R.S. § 12-502. "Such person shall have the same time after removal of the disability which is allowed to others." *Id*. Under A.R.S. § 12-528, if a person entitled to bring a real property action is under eighteen (18) years of age or of unsound mind at the time the action accrues, tolling likewise does not begin until the disability or minority is removed. A.R.S. § 12-528.

P) **Bad faith.** Bad faith has a two (2) year statute of limitations which begins to run when the insured suffers appreciable, non-speculative harm. *Manterola v. Farmers Ins. Exch.*, 200 Ariz. 572, 576, ¶ 10, 30 P.3d 639, 643 (App. 2001); *see also* A.R.S. § 12-542.In third-party bad faith actions against an

insurer for failure to settle, the statute of limitations begins to accrue when the underlying judgment becomes final and non-appealable. *See Taylor v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 174, 178, 913 P.2d 1092, 1096 (Ariz. 1996); *see also* A.R.S. § 12-542.

Q) **Uninsured motorists.** A.R.S. § 12-555 governs the statute of limitations for uninsured motorist claims. A person may make such a claim by giving written notice to the insurer within three (3) years of the accident. A.R.S. § 12-555(A). However, the insured can still assert a claim within three (3) years after the earliest of: (1) the date the insured knew the tortfeasor was uninsured; (2) the date the person knows or should know the tortfeasor's insurer denied coverage; or (3) the date the person knew or should have known of the insolvency of the tortfeasor's insurer. *Id*. The insured must give written notice of intent to pursue a claim within three (3) years *and* make a claim with the tortfeasor's insurer or file and action within the applicable statute of limitations, except that the insured is still entitled to make a claim within three (3) years after the date the person knows or should have known the tortfeasor has insufficient liability limits. *Id*. at (B).

    1) Under A.R.S. § 12-555(D), an insurer shall bring a subrogation claim within two (2) years after the date the insurer first makes payment to the insured under the uninsured motorist coverage.

R) **Medicare.** Medicare actions appear to be governed by different limitations periods. For tort actions, 28 U.S.C. § 2415(b) sets forth a three (3) year statute of limitations period. 28 U.S.C. § 2415(b). Section 2415(a) sets forth a six (6) year period for contract actions. *Id.* at (a). Section 2415(d) states that government actions to recover payment must commence within six (6) years. *Id.* at (d). The action accrues on the date payment was first made. *Id.*

Statutes of Repose

A) **Construction.** The statute of repose for actions involving development of real property design, engineering and construction of improvements to realty is governed by A.R.S. § 12-552. Actions based in contract against a person who develops or sells real property, or performs or furnishes the design, specifications, surveying, planning, supervision, testing, construction or observation of construction of an improvement to real property must commence within eight (8) years after substantial completion of the improvement. A.R.S. § 12-552(A). However, an action to recover damages for an injury or latent defect discovered during or after the eighth year after substantial completion may be brought within one year after the date of the injury or discovery, but no later than nine (9) years after substantial completion of the improvement. *Id.* at (B). This statute of limitations also applies to actions based on the implied warranties of workmanship and habitability that arise out of the contract or the construction. *Id.* at (C).

B) **Condominium associations.** Actions challenging the validity of an amendment to a condominium declaration adopted by a condo association are governed by A.R.S. § 33-1227(B). Actions shall not be brought more than one (1) year after the amendment is recorded. A.R.S. § 33-1227(B).

C) **Fraudulent transfers.** A.R.S. § 44-1009 provides that a claim for relief with respect to a fraudulent transfer or obligation under the Uniform Fraudulent Transfer Act (UFTA) must be brought within four (4) years after the transfer was made or the obligation was incurred, or, if later, within or one (1) year after the fraudulent nature of the transfer or obligation was or through the exercise of reasonable diligence could have been discovered by the claimant.

Venue Rules

A) **Requirements.** Venue is governed by A.R.S. § 12-401. Venue is proper in the county of residence in which a defendant resides. A.R.S. § 12-401. Venue is also proper in the following circumstances:

1) Venue is proper in the county in which plaintiff resides if the defendant's county of residence is unknown. *Id.* at (1).

2) A married person may be sued in the county in which his or her spouse resides unless that spouse is living separate and apart from defendant. *Id.* at (2).

3) Transient persons may be sued in any county in which found. *Id.* at (3).

4) Persons contracting a debt in one county who move to another may be sued in either. *Id.* at (4).

5) Persons contracting in writing to perform an obligation in one county may be sued in that county or where they reside. *Id.* at (5).

6) Persons who contracted a debt or obligation outside of the state may be sued in any county in the debt lies.

7) Where several defendants reside in several counties, an action may be brought in any county in which found. *Id.* at (7).

8) To establish money demands against an estate, an action shall be brought in the county in which the estate is administered. *Id.* at (8).

9) For fraud against public officers, an action may be brought in county in which the fraud occurred, or in which the defendant resides or may be found. *Id.* at (9).

10) In cases where foundation for action is an offense or trespass for which damages may be collected, an action may be brought in the county where the incident occurred or in county in which defendant(s) reside or may be found. *Id.* at (10). Any action for damages against the editor, proprietor or publisher of a newspaper or periodical published in the state for publication of alleged libelous statements shall be brought in the county in which the principal publication office is located or in the county where plaintiff resided at time of publication of that statement. *Id.*

11) To recover personal property, an action may be brought in county in which the property or the defendants may be found. *Id.* at (11).

12) All actions concerning real property must be brought in the county in which the real property is located. *Id.* at (12).

13) Actions to dissolve marriage or legally separate must be brought in the county in which the petitioner resides at the time the action is filed. *Id.* at (13).

14) To enjoin execution of judgments or stay proceedings, actions must be brought in the county in which judgment was rendered or the action is pending. *Id.* at (14).

15) Actions against counties shall be brought in the county being sued unless several counties are defendants, in which case the action may be brought in any one of those counties. *Id.* at (15).

16) Actions against public officers shall be brought in the county in which the officer holds office. *Id.* at (16).

17) Actions on behalf of the state shall be brought in the county in which the seat of government is located. *Id.* at (17).

18) Actions against railroad, insurance, telegraph, telephone, or joint stock companies or other corporations may be brought in any county in which the cause of action arose or in the county in which defendant has an agent or representative, owns property or conducts any business. *Id.* at 18.

19) Where part of a river, watercourse, highway, road or street is the boundary line between two counties, the courts in each will have concurrent jurisdiction in actions over such parts of the river, watercourse, highway, road or street. *Id.* at 19.

B) **Change of venue.** A.R.S. § 12-406(B) governs the statutory grounds for a change of venue. Grounds which may be alleged are: (1) there exists in the county where the action is pending so great a prejudice against the party requesting a change of venue that he cannot obtain a fair and impartial trial; (2) the convenience of witnesses and the ends of justice would be promoted by the change; or (3) there is other good and sufficient cause, to be determined by the court. A.R.S. § 12-406(B).

NEGLIGENCE

Comparative Fault/Contributory Negligence

A) **Joint and several liability abolished.** The 1987 amendments to the Uniform Contribution Among Tortfeasors Act (UCATA) created a system of comparative fault and abolished joint and several liability in all but three circumstances: acting in concert, agency, and duties created by the Federal Employer's Liability Act. A.R.S. § 12-2506(D).

B) **Pure comparative negligence.** Arizona follows the doctrine of pure comparative negligence, governed by A.R.S. § 12-2501 *et seq.* Each defendant is liable only for the amount of plaintiff's damages attributable to that defendant's percentage of fault, and separate judgments are entered for each defendant on that amount. A.R.S. § 12-2506. There is no right to comparative negligence for a claimant who has intentionally, willfully, or wantonly caused or contributed to the injury or wrongful death. A.R.S. §12-2505(A).

C) **Question of fact.** The question of contributory negligence is a question of fact that is left to the jury. A.R.S. §12-2505(A). Full damages must be reduced in proportion to the relative degree of the claimant's fault which is a proximate cause of any injury or death. *Id*.

D) Fault is apportioned regardless of whether that fault is negligent or intentional, and nothing requires a minimum amount of fault to be apportioned for intentional conduct. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 55, 961 P.2d 449, 453 (1998). Relative degrees of fault shall be determined and apportioned as a whole at one time by the trier of fact. A.R.S. § 12-2506(C).

Exclusive Remedy – Worker's Compensation protections

A) In Arizona, workers' compensation protections are governed by A.R.S. § 23-901 *et seq.*. Workers' compensation acts as a no-fault alternative to the tort system, compensating an employee and his dependents if the personal injury or death to the employee results from any accident arising out of and in the course of employment. ARIZ. CONST. art. XVIII, § 8. The right to recover compensation for such injuries is the exclusive remedy against the employer or co-employee acting in the scope of his employment, and against the employer's workers' compensation insurance carrier or administrative service representative. A.R.S. § 23-1022. The claimant has the burden of proving he is entitled to compensation. *See* A.R.S. § 23-901.01.

1) **"Arising out of" or "in the course of."** An injury or accident occurs in the course of employment if the employee is injured doing what a person may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time. *Goodyear Aircraft Corp. v. Gilbert*, 65 Ariz. 379, 383, 181 P.2d 624, 626 (Ariz. 1947). "Arising out of" refers to the origin or the injury. *Id.* "In the course" refers to time, place, and circumstances under which it occurred. *Id.*

2) **Outside of employment.** In Arizona, the rules governing an employer's liability when his employee is engaged in an act for his own benefit, apart from and in no way incidental to his employment, vary depending on whether or not the employee was acting with the permission of his employer. *Goodyear*, 65 Ariz. at 383, 181 P.2d at 626. If the employee was acting with the employer's permission, generally compensation is awarded. *Id*. at 383-84, 181 P.2d at 626-27. If not, the employee is usually denied compensation. *Id*.

B) **Personal injury.** Personal injury caused by an accident arising out of and in the course of employment also includes injuries to the employee committed by a third person due to the employment, except for disease unless it results from the injury. A.R.S. § 23-901(13)(b). Additionally, Personal injury includes diseases characteristic of that occupation, but not ordinary diseases to which the public is exposed. A.R.S. § 23-901(13)(c).

C) **Willful conduct.** Workers' compensation may not limit an employee's recovery against his employer when injury is caused by the employer's willful misconduct and the act indicates willful disregard of safety of employees. A.R.S. § 23-1022(A). Two requirements must be met for an employer's action to be considered willful and thus exempt from the Workers' Compensation Act so that an employee can maintain an action at common law. *Lowery v. Universal Match Corp.*, 6 Ariz. App. 98, 100, 430 P.2d 444, 446 (App. 1967). First, the employer must have knowingly and purposely engaged in the act. Second, the direct result of the employer's action must be injury to another person. *Id*. Gross negligence or wantonness, which do not constitute "willful acts" in themselves, must be accompanied by the intent to inflict an injury upon another person. *Id*.

D) **Third parties.** Arizona preserves a common-law right to recover damages where the employee's action is against someone other than the employer or co-employees. ARIZ. CONST. Art. XVIII, § 8. Under A.R.S. § 23-1023(A), an employee who is injured or killed by the negligence or wrongdoing of a third

party tortfeasor, or his dependents, may pursue a third party tort claim against that third party. *Moretto v. Samaritan Health Sys.*, 190 Ariz. 343, 347, 947 P.2d 917, 921 (App. 1997). Receiving workers' compensation does not bar claims against third-party tortfeasors. *Kilpatrick v. Superior Court*, 105 Ariz. 413, 417, 466 P.2d 18, 22 (Ariz. 1970).

1) An injured employee or his dependents must file a tort action within one (1) year of the injury or death, after which period any claims are assigned to the insurance carrier, or the person liable for the payment of compensation. A.R.S. §23-1023(B). At that point, the injured employee no longer has an interest in the claim against the third party tortfeasor and cannot complain regarding the assignee's action or inaction on the claim. *Hills v. Salt River Project Ass'n*, 144 Ariz. 421, 427, 698 P.2d 216, 222 (App. 1985) (citing *K.W. Dart Truck Co.*, 116 Ariz. 9, 567 P.2d 325 (Ariz. 1977)).

2) The insurance carrier or self-insured employer has the right to intervene in any action instituted by the employee or his dependents, to protect the insurance carrier's or self-insured employer's interests. A.R.S. § 23-1023(C).

E) **Waiver of common law remedies.** A worker is deemed to have waived his common law remedies with respect to employers who comply with A.R.S. § 23-906(D), requiring employers to post notice in English and Spanish informing employees they fall under compulsory workers' compensation, unless the employee specifically rejects coverage before sustaining any injuries. *Anderson v. Indus. Comm'n of Ariz.*, 147 Ariz. 456, 457, 711 P.2d 595, 596 (Ariz. 1985). Employees may reject workers' compensation and retain the right to sue the employer as provided by law. A.R.S. § 23-906(A). To do so, an employee must provide notice to the employer *before* the employee sustains any injuries. A.R.S. § 23-906(C). After which, the employer shall notify the insurance carrier employee's choice to reject workers' compensation. Id. If notice is not posted, however, the employer has not complied with A.R.S. § 23-906(D) and the "statutory waiver" will be deemed ineffective. *Anderson*, 147 Ariz. at 461, 711 P.2d at 600.

F) **Minors.** Workers' compensation as applicable to minors is governed by A.R.S. §§ 23-905, 23-1066, and 23-1042. A minor working legally will be deemed of the age of majority and has the sole claim to compensation for an injury. A.R.S. § 23-905(A). However, an award of a lump sum compensation to the minor will be paid to his legally-appointed guardian. *Id.* An injured minor working at an age and occupation that is not legally permitted is entitled to additional compensation. A.R.S. § 23-905(B).

G) **Dual capacity doctrine.** Under the "dual capacity doctrine," an employer who is normally shielded from tort liability by workers' compensation may be liable to an injured worker if the employer acted in a capacity outside of employment and worker's injury arose from employer's other role. *Diaz v. Magma Copper Co.*, 190 Ariz. 544, 552, 950 P.2d 1165, 1173 (App. 1997) (citing *Dugan v. Am. Express Travel Related Services, Co.*, 185 Ariz. 93, 101, 912 P.2d 1322, 1330 (App. 1995)). However, the court noted that Arizona courts tend to disapprove of the doctrine because it conflicts with Arizona's exclusivity provision, A.R.S. § 23-1022(A), and undermines the workers' compensation system. *Diaz,* 190 Ariz. at 555, 950 P.2d at 1176. n. 6.

Indemnification

A) The right to indemnity occurs when two parties form a contract making one party responsible for the other party's obligations or, in the absence of an express indemnity agreement, when there is an implied contract for indemnity or when justice demands there be a right. *Schweber Elecs. v. Nat'l*

Semiconductor Corp., 174 Ariz. 406, 410, 850 P.2d 119, 123 (App. 1992). Indemnity permits one defendant to shift the entire loss to one who more justly deserves it. *Herstam v. Deloitte & Touche, LLP*, 186 Ariz. 110, 118, 919 P.2d 1381, 1389 (App. 1996).

B) **Distinguishing from contribution.** Indemnification and contribution are distinguishable. *Pinal Cnty. v. Adams*, 13 Ariz. App. 571, 572, 479 P.2d 718, 719 (App. 1971). Contribution distributes loss among tortfeasors by requiring each to pay his proportionate share, while indemnity shifts the *entire* loss from one tortfeasor to another who should bear it instead. *Id.* There is no contribution or indemnity between joint tortfeasors. *Id.* at 573, 720.

C) Indemnification is allowed where:

1) the indemnitee, solely through indemnitor's negligence, breaches the duty to maintain his premises in reasonably safe condition for use by invitees;

2) the indemnitee, solely through indemnitor's negligence, breaches the duty to provide a safe workplace or otherwise suffers loss through the indemnitor's negligence;

3) the indemnitee-municipality, because of another's negligence, breaches its duty to maintain streets and sidewalks in a reasonably safe condition;

4) the indemnitee-employer is liable to plaintiff under respondent-superior only because of the indemnitor-employee's unauthorized negligent act;

5) the indemnitee, upon whom statute or common law imposes strict liability, is liable through the indemnitor's negligent act;

6) the indemnitee retailer or chattel distributor, through the fault of a supplier or manufacturer-indemnitor, is liable to another; and

7) the indemnitee employee or agent at request of, and in reliance upon, representations of the indemnitor, performs an unauthorized lawful act resulting in loss to a third person.

Adams, 13 Ariz. App. at 572-73. 479 P.2d at 719-20 (citing Sherk, *Common Law Indemnity among Joint Tort-Feasors*, 7 ARIZ. L. REV. 59, 62).

D) **Express Indemnity.** This occurs when a written indemnity provision in a contract or agreement dictates the breadth of indemnity provided. Generally, express indemnity is placed into two classes:

1) **Effect of negligence unspecified.** A general indemnity agreement does not specifically address the effect of negligence of either party on the obligation to indemnify. Arizona courts generally agree an indemnitee is not entitled to compensation because of its own wrong unless the indemnity agreement expresses such an intention in clear and unequivocal terms. *Shirley v. Nat'l Applicators of Cal., Inc.*, 115 Ariz. 521, 526, 566 P.2d 322, 327 (App. 1977).

2) **Effect of negligence specified.** A specific indemnity agreement expressly addresses the effect of negligence on indemnification. The extent of each party's duty is defined by the

contract itself. *Birth Hope Adoption Agency, Inc. v. Doe*, 190 Ariz. 285, 288, 947 P.2d 859, 862 (App. 1997). In doing so, the court applies a reasonableness standard. *Id.*

E) **Implied Indemnity.** In the absence of an express indemnity agreement, a party has a right to indemnity when there is an implied contract based on the relationship or when justice demands it, and where the claimant was innocent of any independent wrong or breach. *Schweber Elecs.*, 174 Ariz. at 410, 850 P.2d at 123.

F) **Product liability.** Product liability indemnification actions are governed by A.R.S. § 12-684. In a product liability action where a manufacturer refuses to defend the seller of the product, the manufacturer must indemnify the seller for any judgment rendered against it and reimburse the seller for reasonable attorney's fees. A.R.S. § 12-684(A).

Indemnification is available to the seller of the product from the manufacturer unless the seller had knowledge of the defect, or unless the seller: (1) modified the product, (2) the modification was a substantial cause of the accident, and (3) the modification was not authorized or requested by the manufacturer. A.R.S. § 12-684(A). If these three factors cannot be shown, the manufacturer must indemnify the seller and bear the burden of the defense. *Id.*

Joint and Several Liability

A) The Arizona legislature amended the Uniform Contribution Among Tortfeasors Act ("UCATA"), abolishing joint liability and replacing it with a system of several liability based on comparative fault. *Piner v. Super. Crt. In and For Cty. of Maricopa*, 192 Ariz. 182, 188, 962 P.2d 909, 915 (Ariz. 1998). Courts must allocate responsibility among all tortfeasors, regardless of whether they are a party to the action. *Id*.

B) **Several liability.** In an action for personal injury property damage or wrongful death, the liability of each defendant for damages is several only, except as otherwise provided by A.R.S. § 12-2506(D). UCATA left intact the rule of indivisible injury, relieving the plaintiff of apportioning damages according to causal contribution; thus, each defendant is only liable for the amount of damages proportionate to that defendant's percentage of fault. *Piner*, 192 Ariz. at 915-16, 962 P.2d at 188-89.

C) **Applicability of joint and several liability.** The liability of each defendant is several only except that a party is responsible for the fault of another person, or paying a proportionate share of another person, if:

1) both parties were acting in concert;

2) the other party was acting as an agent or servant of the party; or

3) the party's liability for 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).

If a defendant is found jointly and severally liable pursuant to A.R.S. § 12-2506(D) above, that defendant has a right to contribution. A.R.S. § 12-2506(E). In actions arising out of the Federal Employers' Liability Act, a person or entity, other than the employee of the defendant, whose

negligence or fault caused or contributed to the plaintiff's injury or death shall contribute to the defendant. *Id*.

Strict Liability

A) Strict liability applies when a defendant participates in an activity that is so dangerous that public policy favors holding the defendant liable merely because he was participating in the activity itself. *Perez v. S. Pac. Transp. Co.*, 180 Ariz. 187, 188, 883 P.2d 424, 425 (App. 1993). Thus, liability is imposed even when there is no negligence. *Id.*

B) **Abnormally dangerous activities.** Arizona courts apply the Restatement (Second) of Torts to consider whether strict liability applies to a defendant engaged in an abnormally dangerous activity. *Perez,* 180 Ariz. at 188, 883 P.2d at 425. The Restatement requires a case-by-case analysis of the following six factors as a whole before imposing strict liability on the abnormally dangerous activity:

1) existence of a high degree of risk of some harm to the person, land or chattels of others;

2) that the harm that results from it will be great;

3) inability to eliminate the risk by the exercise of reasonable care;

4) extent to which the activity is not a matter of common usage

5) inappropriateness of the activity to the place where it is carried on; and

6) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520.

C) **Relationship with products liability.** Strict liability and products liability are distinct concepts. *Perez*, 180 Ariz. at 188, 883 P.2d at 425. Products liability refers to a manufacturer or distributor's liability for the condition of its product. *Id.* Plaintiffs can bring products liability claims under strict liability or negligence. *Id.*

D) Arizona adopted the Restatement (Second) of Torts, § 402A, for strict products liability issues. Defendants are strictly liable for unreasonably dangerous products. *See Perez*, 180 Ariz. at 187. To establish a prima facie case for strict liability, the plaintiff must prove:

1) the product is defective and unreasonably dangerous;

2) the defective condition existed at the time the product left the defendant's control; and

3) the defective condition is the proximate cause of plaintiff's injuries.

Piper v. Bear Med. Sys., Inc., 180 Ariz. 170, 173, 883 P.2d 407, 410 (App. 1993).

E) **Products liability damages.** Arizona has codified the common law of product liability in A.R.S. § 12-681.

1) If the plaintiff successfully proves a strict liability case, he is entitled to regular tort damages, but is not entitled to recover pure "economic loss," which is the cost of replacing the defective product. *See Salt River Project Agric. Imp. & Power Dist. v. Westinghouse Elec. Corp.*, 143 Ariz. 368, 379, 694 P.2d 198, 209 (Ariz. 1994). However, if the defect is unreasonably dangerous to persons or other property, plaintiff may recover the cost of replacement. *Id.*

F) **Products liability theories.** Plaintiffs use three theories to prove the elements above: defective design, defective manufacture, and failure to warn.

1) **Defective design.** A product is defectively designed if the plaintiff can demonstrate the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. *Moorer v. Clayton Mfg. Corp.*, 128 Ariz. 565, 567-68, 627 P.2d 716, 718-19 (App. 1981). A plaintiff may also recover when the product's design proximately caused his injury and the defendant fails to prove, in light of relevant factors, that the benefits of the challenged design outweigh the risk inherent in the design. *See Id.* at 568, 719, 627 P.2d at 719. If the plaintiff proves the product is defective, he need not prove fault on the part of the defendant in order to recover. *Id.* He still must prove, however, that the defective design proximately caused his damages. *Id.*

2) **Defective manufacture.** A plaintiff can recover for damages caused by a defectively manufactured product by proving the product, though properly designed, left the product in a condition other than intended, and that the defective condition of the product proximately caused the accident. *See Brown v. Sears, Roebuck & Co.*, 136 Ariz. 556, 562, 667 P.2d 750, 756 (App. 1983).

3) **Failure to warn.** Manufacturers and sellers have a duty to warn of dangers inherent in the intended use of a product, as well as dangers that can be reasonably anticipated. *See Kavanaugh v. Kavanaugh*, 131 Ariz. 344, 348, 641 P.2d 258, 262 (App. 1981). Defendants must provide adequate operating instructions and warn consumers of the possible consequences of failing to follow those instructions. *Brown*, 136 Ariz. at 563, 667 P.2d at 757. The warning label may also be examined to determine whether it is adequate. *Id.*

G) **Criminal law.** Under A.R.S. § 13-202(B), if a statute defining a criminal offense does not expressly state a culpable mental state sufficient for committing the offense, no culpable state is required and the offense is one of strict liability unless the proscribed conduct necessarily involves a culpable mental state. If the offense is one of strict liability, proof of a culpable mental state will suffice to establish criminal responsibility. A.R.S. § 13-202(B).

H) **Learned intermediary doctrine.** The learned intermediary doctrine ("LID"), enables a drug manufacturer to be shielded from liability if it provides adequate warnings to a prescribing physician. *Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, 23-4, 365 P.3d 944, 948-49 (Ariz. 2016 Generally, with prescription pharmaceuticals, the manufactures have a duty to warn the consumers of foreseeable risks of harm from using their products. *Id.* at 24, 949. However, the LID allows the manufacturer to satisfy their duty to warn by providing "complete, accurate, and appropriate warnings" to a doctor intermediary. *Id.* Moreover, the LID is compatible with the Uniform Contribution Among Tortfeasor's

Act (UCATA) because the LID provides a means by which a manufacturer can satisfy its duty to warn the end user, rather than shifting liability to someone else. *Id.* at 26, 365 P.3d at 951.

Willful and Wanton Conduct

A) Under the Uniform Contribution Among Tortfeasors Act ("UCATA"), willful and wanton misconduct is a form of fault comparative to ordinary negligence. *See Wareing v. Falk*, 182 Ariz. 495, 498, 897 P.2d 1381, 1384 (App. 1995). There is no right to comparative negligence for any claimant who has intentionally, willfully or wantonly caused or contributed to the injury or wrongful death. *Id*. at 499, 897 P.2d at 1385. However, a *defendant* may seek a reduction in liability based on plaintiff's comparative fault even if defendant acted willfully or wantonly. *Id*. at 501, 897 P.2d at 1387.

    1) If willful and wanton contributory negligence is raised, the jury must be instructed that, should they find plaintiff's willful and wanton conduct contributed to cause of plaintiff's own injury, it may find either for plaintiff or defendant. *See Williams v. Thude*, 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (Ariz. 1997); A.R.S. § 12-2505(A).

B) An act is willful where the resulting injury is intentional or the natural or probable consequence of the act. *Conchin v. El Paso & S.W.R. Co.*, 13 Ariz. 259, 264, 108 P. 260, 262 (Ariz. Terr. 1910). A party is wantonly negligent if he acts or fails to act when he knows or should know facts which would lead a reasonable person to realize that his conduct not only creates an unreasonable risk of bodily harm to others but also involves a high probability that substantial harm will result. *Walls v. Ariz. Dept. of Pub. Safety*, 170 Ariz. 591, 595, 826 P.2d 1217, 1221 (App. 1991).

C) Punitive damages are appropriate only where defendant's wrongful conduct was guided by evil motives or willful or wanton disregard of the interests of others. *Piper*, 180 Ariz. at 180, 883 P.2d at 417.

    1) Under A.R.S. §41-621(K), the state and its departments, agencies, boards and commissions are immune from liability for losses arising out of a judgment for willful and wanton conduct resulting in punitive or exemplary damages.

DISCOVERY

Discovery Generally

In January 2017, the Arizona Supreme Court adopted a petition to amend the Arizona Rules of Civil Procedure and Related Rules. There were a number of changes to Rule 26 ("general provisions governing discovery"). For example:

A) Ariz. R. Civ. P. 26(b) requires that discovery be "proportional to the needs of the case . . . " The rule no longer includes the phrase "reasonably calculated to lead to the discovery of admissible evidence."

B) The court "must" limit (versus "may" limit under the previous rule) the frequency or extent of discovery under the circumstances specified in Rule 26(b)(1)(B).

C) Rule 16(a)(3) assures that discovery is "proportional to the needs of the case."

D) Rule 16(c) allows a scheduling order to provide that a party must request a conference with the court before filing a discovery or disclosure motion.

E) Under Rule 25(b)(5), a party must serve a notice of non-party at fault on all other parties and "should" file the notice with the court.

F) New Rule 26(g) requires that any discovery or disclosure motion must include as an attachment a good faith consultation certificate complying with Rule 7.1(h).

G) "Claims of privilege or protection of trial preparation materials" has been moved from 26.1(f) to Rule 26(b)(6).

Rule 26.1. Prompt Disclosure of Information

Rule 26.1(a)(9) also omits the old "reasonably calculated" language. A new category number (10) was added concerning the disclosure of any insurance policy, indemnity agreement, or suretyship agreement. This new provision replaces the old Rule 26(b)(2) ("insurance agreements").

Ariz. R. Civ. P. 26.1(b) ("disclosure of hard copy documents and electronically stored information") is new. The rule governs methods of production for electronically stored information and, if appropriate, cost-shifting for such production.

Note: "Unless the parties agree or the court orders otherwise, a party must produce electronically stored information in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the electronically stored information in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the producing party." Ariz. R. Civ. P. 26.1(b)(2)(D).

Electronic Discovery

In September 2007, the Arizona Supreme Court amended a number of the Rules of Civil Procedure to clarify how electronically-stored information is to be handled and the courts' powers to compel and enforce disclosure of such records.

H) **Court orders.** ARIZ. R. CIV. P. 16, a court may enter orders governing the disclosure, discovery, and preservation of electronically-stored information. Under this rule, the court may also incorporate an agreement regarding preservation reached by the parties into any order, or impose such requirements. ARIZ. R. CIV. P. 16(b).

    1) In cases assigned to the Complex Civil Litigation Program, this rule requires that during the initial case management conference, the parties discuss discovery, disclosure, the preservation of electronically stored information and any agreements parties have reached regarding claims of privilege or work-product after production. ARIZ. R. CIV. P. 16.3.

I) **Privileged e-discovery.** ARIZ. R. CIV. P. 26.1 addresses inadvertent production of privileged or work-product materials in the context of electronic discovery. Under this rule, once the producing party notifies the receiving party of the inadvertent disclosure, the receiving party must promptly return, sequester, or destroy the material. ARIZ. R. CIV. P. 26.1(f)(2).

1) The receiving party may also present the documents to the court under seal to determine the claim. In such cases the producing party must preserve the information until the claim is resolved. Ariz. R. Civ. P. 26(b)(6)(B)(iv).

J) **Document requests.** ARIZ. R. CIV. P. 34 permits electronically stored information to be included in a document request. Under the amended rule, the requesting party may ask for the specific form(s) in which electronically stored information is to be produced. When the requesting party fails to specify the form, the responding party must produce the information in a reasonably usable form. ARIZ. R. CIV. P. 34(b).

Ariz. R. Civ. P. 26.1(b) requires that a party serve with its disclosure a copy of any documents existing in hard copy that it has identified under Rule 26.1(a)(8), (9), and (10), subject to the limits of Rule 26(b)(1)(B) or other good cause for not doing so.

K) Material used solely for impeachment purposes must be also disclosed. ARIZ. R. CIV. P. 26.1(a)(8).

L) **Sanctions.** Under ARIZ. R. CIV. P. 37(g), a party or person has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action's commencement, whichever occurs first. A court order or statute also may impose a duty to preserve certain information. Ariz. R. Civ. P. 37(g)(1)(A).

If electronically stored information that should have been preserved is lost because a party—either before or after an action's commencement—failed to take reasonable steps to preserve it, a court may order additional discovery to restore or replace it, including, if appropriate, an order under Rule 26(b)(2). If the information cannot be restored or replaced through additional discovery, the court has a variety of options to cure the loss. *See* Ariz. R. Civ. P. 37(g)(2).**Expert Witnesses**

A) Witness testimony is governed by ARIZ. R. EVID. 701-06.

1) **Lay witnesses.** Any lay witness testimony in the form of opinions or inferences is limited to those which are: (a) rationally based on the perception of the witness,(b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. ARIZ. R. EVID. 701. The person calling the lay witness must disclose a fair description of the substance of each witness' testimony. ARIZ. R. CIV. P. 26.1(a)(3).

2) **Experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. ARIZ. R. EVID. 702. The party calling such witnesses must disclose the subject matter of their testimony, the substance of facts and opinions to which the expert will testify, a summary of grounds for such an opinion, their qualifications and the source of any copies of any reports prepared by the expert. ARIZ. R. CIV. P. 26.1(a)(6). The expert does not have to testify to the underlying facts or data used in testimony unless the court requires otherwise. ARIZ. R. EVID. 705. However, the expert may be required to disclose the underlying facts or data on cross-examination. *Id.*

3) **Bases of an Expert's Opinion Testimony**. An expert may base an opinion on facts or data if that the expert has been made aware of or personally observed those facts or data. ARIZ. R. EVID. 703. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. *Id*. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect. *Id*.

4) **Trial Court's Gatekeeping Role**. ARIZ. R. EVID. 702 recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue. *Id*. The trial court's gatekeeping function is not intended to replace the adversary system. Cross examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. *Id*.

B) **Rebuttal witnesses.** Upon receipt of a notice of defenses, ARIZ. R. CRIM. P. 15.1(h), requires the state to disclose any rebuttal witness with their relevant written or recorded statements in criminal cases.

C) **Discovery of expert work product.** Under ARIZ. R. CIV. P. 26(b)(4), the opinions of a prospective expert witness are not protected by the "work product" privilege. *State ex rel. Willey v. Whitman*, 91 Ariz. 120, 125, 370 P.2d 273, 277 (Ariz. 1962). However, an expert retained by counsel, or by the client at counsel's direction, to investigate and produce reports on technical aspects of specific litigation and who is not expected to testify at trial, is considered party of counsel's "investigative staff" and that expert's work product is protected. *See State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 192, 777 P.2d 686, 690 (Ariz. 1989).

Non-Party Discovery

A) Subpoenas are governed by ARIZ. R. CIV. P. 45. Subpoenas are issued by the Clerk of the Court but have the force of law. *See Ingalls v. Superior Court in and for Pima Cnty.*, 117 Ariz. 448, 573 P.2d 522 (App. 1977). The clerk must issue a signed but otherwise blank subpoena to a party requesting it. ARIZ. R. CIV. P. 45(a)(2). That party must complete the subpoena before service. *Id.* In 2007, the rule was amended to allow the State Bar of Arizona to issue signed subpoenas on behalf of the clerk through an on-line subpoena issue service approved by the Supreme Court of Arizona. *Id.*

B) **Service.** A subpoena may be served by any person who is not a party and is at least eighteen (18) years of age. ARIZ. R. CIV. P. 45(d)(1). Proof of service when necessary shall be made by filing with the clerk of the court of the county in which the case is pending a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. ARIZ. R. CIV. P. 45(d)(5).

Service shall be made by delivering a copy to the proper person and, if that person's presence is commanded, by tendering to that person the fees for one day's attendance and mileage under law. ARIZ. R. CIV. P. 45(d)(1). When issued to a party, or on behalf of the state or an officer thereof, fees and mileage need not be tendered. ARIZ. R. CIV. P. 45(d)(2).

C) **Expense.** A party or attorney issuing a subpoena shall take reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena. ARIZ. R. CIV. P. 45(e)(1). Upon violation, the superior court of the county where the subpoena was issued shall impose upon the party or

attorney in breach an appropriate sanction, which may include, but is not limited to, lost earnings and reasonable attorneys' fees. *Id*.

D) **Disclose.** A party shall disclose information regarding all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess. ARIZ. R. CIV. P. 26.1(a)(4).

E) **Objections.** Objections to subpoenas must be made in writing within fourteen (14) days of service, or before the time specified for compliance, whichever is earlier. ARIZ. R. CIV. P. 45(c)(5)(A)(ii).

Privileges

A) **Attorney-client privilege.** Arizona statutes codify the common law privilege allowing a client to prevent interrogation of his attorney with respect to the advice given or information exchanged in the course of the professional relationship. A.R.S. § 12-2234. This statute extends to communications between the attorney and his paralegal, assistant, secretary, stenographer, or clerk. *Id*.

1) **Corporations.** *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870, 874 (Ariz. 1993) established the scope of attorney-client privilege where the client is a corporate entity. The court held that all communications initiated by an employee and made in confidence to counsel in which the communicating employee is directly seeking to secure or evaluate legal advice for the corporation, will be privileged. The subsequent 2003 legislative amendment to A.R.S. § 12-2234, makes all communications between corporate counsel and a corporate officer, employee or agent privileged if they were (1) for the purpose of providing legal advice to either the corporation or the employee or (2) for the purpose of obtaining information in order to provide such legal advice.

B) **Work product.** ARIZ. R. CIV. P. 26(b)(3) codifies the work product privilege established in *Hickman v. Taylor*, 329 U.S. 495 (1947). The rule protects documents and tangibles prepared in anticipation of litigation or trial by or for another party or that party's representative. Experts retained by counsel for consulting or to investigate technical aspects of specific litigation are considered part of the lawyer's investigative staff and the expert's work product is thus protected. *See State ex re. Corbin v. Ybarra*, 161 Ariz. 188, 192, 777 P.2d 686, 690 (Ariz. 1989). Disclosure of trial preparation materials may be had only upon a dual showing by the party seeking disclosure: (1) that there is a substantial need for the materials sought and (2) that the party cannot obtain the substantial equivalent of the materials by other means without undue hardship. *See Butler v.* Doyle, 112 Ariz. 522, 544 P.2d 204, (Ariz. 1975). Additional protection is given to the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party. *See Longs Drug Stores v. Howe*, 134 Ariz. 424, 427, 657 P.2d 412, 415 (Ariz. 1983).

C) **Common interest doctrine.** The common interest doctrine extends the scope of the attorney-client and work product privileges to permit persons with common interests to share privileged attorney-client communications and work product to coordinate their respective positions, without destroying the privilege. *Ariz. Indep. Redistricting Com'n v. Fields*, 206 Ariz. 130, 141, 75 P.3d 1088, 1099 (App. 2003) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1)). Exchanged communications subject to this doctrine must themselves be privileged as well as related to the parties' common interest. *Id*. at 1100. "The doctrine does not create a privilege, but is an exception to the rule that communications between a person and a lawyer representing another person are not privileged." The

doctrine protects only those communications made to facilitate the rendition of legal services to each client involved, and does not apply to communications solely among clients. *Id*.

D) **Standard.** The Arizona Supreme Court recognizes four criteria for evidentiary privilege of communications: (1) the communication must originate in circumstances indicating that the parties were confident it would remain confidential; (2) such confidentiality is essential to the full maintenance of the relationship in connection with which the communication occurred; (3) the relationship is one which the community believes should be fostered; and (4) the injury to the relationship that would occur from disclosure would be greater than the countervailing benefit to the litigation process. *City of Tucson v. Superior Court In and For Cnty. of Pima*, 167 Ariz. 513, 517, 809 P.2d 428, 432 (Ariz. 1991).

E) **Other forms.** Other forms of privileged communications include:

1) A.R.S. §§ 12-2235, 12-2292, 32-3283, 32-2085: Discovery of medical records.

2) A.R.S. §§ 12-2235, 13-4062(4): Physician-patient privilege.

3) A.R.S. §§ 12-2231, 13-4062(1): Anti-marital fact privilege.

4) A.R.S. § 12-2232: Marital communications privilege.

5) A.R.S. §§ 12-2233, 13-4062(3): Privilege for communications with clergy.

6) A.R.S. § 32-749: Accountant-client privilege.

7) A.R.S. § 12-2237: Reporter and informant privilege.

8) A.R.S. § 13-117: Privilege against self-incrimination.

Request for Admission

A) ARIZ. R. CIV. P. 36(a) governs the procedure by which any party may request another party admit: (1) the truthfulness of statements of fact, (2) the genuineness of documents, (3) the accuracy or legitimacy of opinions, and (4) the appropriate application of the law to the facts. Responses must be served within forty (40) days after the service of the request unless served with or shortly after the summons and complaint, in which case the defendant may respond within sixty (60) days. *Id*.

1) **Limit.** Under ARIZ. R. CIV. P. 36(b), absent an agreement of all parties or with leave of court, a party may not serve more than twenty-five (25) substantive requests, each addressing only one factual matter. However, upon: (1) agreement of all parties; (2) an order of the court following a motion demonstrating good cause; or (3) an order of the court following a Comprehensive Pretrial Conference pursuant to Rule 16(c), additional requests may be made.

B) **Responses.** Responses to requests must either: (1) admit the matter, (2) deny the matter, (3) set forth the reason(s) why the matter cannot be truthfully admitted or denied or (4) state an objection. ARIZ. R. CIV. P. 36(a). An answering party cannot submit a lack of information or knowledge as a response unless the response also states that the party made reasonable inquiry and the information known or

readily obtainable is insufficient to enable the party to admit or deny a request. Therefore, ARIZ. R. CIV. P. 36 imposes an obligation upon the responding party to conduct some reasonable investigation into the matters that are the subject of the request. A party must provide responses to a request within thirty (30) days after they are served.

Unique State Issues

A) Arizona is a disclosure state. Evidence that is not disclosed is reasonably anticipated not to be used at trial. ARIZ. R. CIV. P. 37(c)(1).

B) Defendants convicted in a criminal proceeding are precluded from denying in any civil proceeding brought by a victim or the state against the criminal defendant the essential allegations of the criminal offense of which he was adjudged guilty, including judgments of guilt resulting from no contest pleas. A.R.S. § 13-807. A person may bring a civil action separate from the criminal action to prove damages in excess of the amount of the restitution order. *Id*.

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

A) The general rule regarding accident construction experts is explained by UDALL, ARIZONA LAW OF EVIDENCE, § 21 37-38 (1960): "A properly qualified expert who did not witness the accident has been permitted to give his opinion as to the speed of an automobile based on skid marks, damage to the vehicles, injuries and other effects of a collision. But so many variables are involved in trying to reconstruct an accident that the court should carefully scrutinize the qualifications and the information of a non-eyewitness expert who undertakes to offer opinions beyond those involving speed, skid marks and point of impact." *See State v. Lajeunesse*, 27 Ariz. App. 363, 367, 555 P.2d 120, 124 (App. 1976). An expert witness may base opinions on personal observations, testimony, or properly admitted evidence, however, he must also base his opinion only on competent evidence. *Carrizoza v. Zahn*, 21 Ariz.App. 94, 95, 515 P.2d 1192, 1193 (App. 1973).

    1) Use of skid marks to show course and direction of travel will have no probative effect unless the skid marks are properly shown to have been made by the vehicles involved in the accident in question. *Id*.

B) **Witnesses.** The competence of a witness to testify as an expert is within the trial court's discretion. *State v. Passarelli*, 130 Ariz. 360, 362, 636 P.2d 138, 140 (Ariz Ct. App. 1981). A witness qualified by knowledge, skill, experience, training, or education, may testify to an opinion or otherwise if their scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. *Id*.; ARIZ. R. EVID. 702. Moreover, effective January 1, 2012, the Arizona Supreme Court amended Arizona Rule of Evidence 702 and adopted Federal Rule of Evidence 702, which embodies the principles set forth in *DaubertMerrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). *See State ex rel. Montgomery v. Miller*, 234 Ariz. 289, 297, ¶ 17, 321 P.3d 454, 462 (2014).

Appeal

A) A.R.S. § 12-2101, designates instances in which a right of appeal from the superior court exists. Generally, an appeal may be made after a court issues a final judgment or court order, or certain

interlocutory judgments. *Id*. A final judgment or final order clearly fixes the rights and liabilities of the litigants and determines the controversy at issue. ARIZ. R. CIV. P. 54(a).

B) **Intermediate orders.** Upon an appeal from a final judgment, the supreme court shall review any intermediate orders involving the merits of the action and necessarily affecting the judgment, and all orders and rulings assigned as error, whether a motion for a new trial was made or not. A.R.S. § 12-2102(A).

    1) The Arizona Supreme Court may, upon appeal of a final judgment, review an order denying a motion for a new trial although no appeal was taken from the order. A.R.S. § 12-2102(B).

C) **Interlocutory judgments.** Interlocutory judgments are appealable in actions: (1) that determine the litigants' rights and direct an accounting or other proceeding to determine the amount of recovery, (2) for partition that result in orders directing partition be made, and (3) to redeem personal property from a mortgage or lien thereon resulting in an order for accounting. A.R.S. § 12-2101(A)(6)-(8).

D) **Procedure.** A notice of appeal must be filed within thirty (30) days after the entry of a judgment from which the appeal is taken, unless otherwise provided by law. ARIZ. R. CIV. APP. P. 9(a). If a party dies during the time he is entitled to take an appeal, his personal representative may take the appeal within ninety (90) days after the party's death. Ariz. R. Civ. App. P. 9(d). A notice of cross-appeal must be filed by an opposing party within twenty (20) days from the date the notice of appeal is filed, or 30 days after entry of the judgment from which the appeal is taken, whichever is later. *Id*. A timely notice of appeal shall also be a timely appeal from any related judgment for jury fees, regardless of whether the notice designates the judgment. ARIZ. R. CIV. APP. P. 9(c).

Collateral Source Rule

A) The collateral source rule prevents defendants in tort cases from introducing evidence that a source independent of the defendant has provided payments or benefits to the injured party. *Taylor v. S. Pac. Transp. Co.*, 130 Ariz. 516, 519, 637 P.2d 726, 729 (1981); Restatement (Second) of Torts § 920(2). This means that the defendant cannot get credit for payments the insured has received from another source (such as an insurer), even if those payments covered all or part of the harm for which the defendant is liable. *Taylor*, 130 Ariz. at 519, 637 P.2d at 729. A defendant cannot argue that a plaintiff has already been made whole for his losses by his own insurance company. *Michael v. Cole*, 122 Ariz. 450, 595 P.2d 995 (1979).

B) **Breach of Contract.** The collateral source rule does not apply to breach of contract claims. *Norwest Bank (Minnesota), N.A. v. Symington*, 197 Ariz. 181, 189, 3 P.3d 1101, 1109 (2000).

C) **Tortfeasor's Insurer**. A defendant's insurance is not a collateral source because it is not fully independent of the defendant; therefore, payments the defendant (through his insurer) made to the plaintiff are admissible. *Bustos v. W.M. Grace Dev.*, 192 Ariz. 396, 399, 966 P.2d 1000, 1003 (App. 1997).

D) **Medical malpractice.** A.R.S. § 12-565, abolished the collateral source evidentiary rule in medical malpractice cases, only. The Supreme Court, however, recognized the abolition did not constitute a statutory limitation on damages. *Allen v. Fisher*, 118 Ariz. 95, 97, 574 P.2d 1314, 1316 (App. 1977); *see also Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (Ariz. 1977).

E) In any action against a licensed health care provider, A.R.S. § 12-565(A) allows a defendant to introduce 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 or death, to establish that any cost, expense, or loss claimed by the plaintiff as a result is subject to reimbursement or indemnification from collateral sources. Introduction of plaintiff's collateral benefits does not guarantee the trier of fact will award a reduction in damages. A.R.S. § 12-565(B). No provider of collateral benefits may recover against the plaintiff to reimburse such benefits, nor shall such a provider be subrogated to the rights of the plaintiff. A.R.S. § 12-565(C).

Convictions

Evidence of prior convictions is only admissible to impeach the credibility of a witness.

A) **Criminal.** A prior conviction can be used to impeach a witness if the conviction was for a crime punishable by imprisonment for one (1) year or longer or a crime involving a dishonest act or false statement. ARIZ. R. EVID. 609(a).

B) **Traffic.** Civil traffic violations have been decriminalized. A.R.S. § 28-121. Unless a local ordinance or regulation provides for the imposition of a criminal penalty, a violation of the ordinance or regulation constitutes a civil traffic violation. A.R.S. § 28-626(C). A conviction of a traffic offense based on a guilty plea is admissible in a subsequent civil suit arising out of the same accident. *Hays v. Richardson*, 95 Ariz. 263, 267, 389 P.2d 260, 263 (Ariz. 1964).

Day in the Life Videos

The admission of videotape evidence is within the sound discretion of the trial court. *State v. Paul*, 146 Ariz. 86, 88, 703 P.2d 1235, 1237 (App. 1985). Requirements for admission of a video recording are the same for a photo, that it fairly and accurately depict that which it purports to show. *Id*. The recording must, as a whole, be accurate and sufficiently complete. *Id.* Foundation for the recording must be provided, including the manner of making the videotape, location, time, identification of the parties and objects, and identification of the voices. *Id*. (*See* "Use of Photographs" Section).

Dead Man's Statute

Under A.R.S. § 12-2251, where a lawsuit is brought by or against the personal representative of any estate, or guardian of an incompetent, neither party can testify as to statements made by the decedent or the incompetent. *See Troutman v. Valley Nat'l Bank of Ariz.*, 170 Ariz. 513, 826 P.2d 810 (App. 1992).

A) **Applicability.** Application of the statute is within the trial court's discretion and only applies under certain circumstances. *Troutman* 170 Ariz. at 515, 826 P.2d at 812. First, the action must be by or against the personal representative, administrator, guardian or conservator of an estate. A.R.S. § 12-2251. Second, the testimony must concern a transaction with or statement by the decedent or an incompetent. *Id.* Third, the testifying witness must be a party to the action. *Id*. Strangers to the suit and anyone but except a formal party may freely testify. *Cachenos v. Baumann*, 25 Ariz. App. 502, 506, 544 P.2d 1103, 1107 (App. 1976).

B) **Exceptions.** Arizona courts may admit testimony regarding a transaction with or statements made by a decedent when an injustice would result upon rejecting the testimony, or where independent evidence exists to corroborate the transaction. *See Cachenos v. Baumann*, 25 Ariz. App. 502, 506, 544

P.2d 1103, 1107 (App. 1976). Generally, Arizona courts have not established a standard to determine when sufficient evidence exists to declare exclusion of testimony under the statute a judicial error.

Medical Bills

A plaintiff in a negligence case may only recover the reasonable value of all medical services received, not the total bills paid. *See Larsen v. Decker*, 196 Ariz. 239, 995 P.2d 281 (App. 2000).

A) **Standard.** Damages for past medical expenses are virtually always included in tort cases to restore the injured individual to a financial position substantially equivalent to the position he would have occupied had he not been injured. Future medical expenses require a showing that there is a reasonable probability such medical expenses will be incurred, and may require additional proof of the reasonable value of services rendered by physicians, medicine, consultants, etc. *Lewis v. N.J. Riebe Enters.*, 170 Ariz. 384, 397 (Ariz. 1992); *see also Griffen v. Stevenson*, 1 Ariz. App. 311, 315, 402 P.2d 432, 436 (1965).

B) **Full Amount of Medical Expenses**. In *Lopez v. Safeway Stores, Inc*., 212 Ariz. 198, 129 P.3d 487 (App. 2006), the court of appeals held that an injured plaintiff was entitled to claim and recover the full amount of her reasonable medical expenses the health care provider charged, without any reduction for the amounts apparently written off by her physicians pursuant to contractually agreed-upon rates with her insurance carriers. In other words, the plaintiff was entitled to claim the full amount of the billed medical charges, even though neither she nor her health insurer would ever have to pay the full billed amount.

C) **Connection to injury.** Plaintiff may recover medical expenses incurred to mitigate damages, but should not be compensated for medical care unrelated to his injuries. *See In re Mulhall*, 159 Ariz. 528, 529, 768 P.2d 1173, 1174 (Ariz. 1989). The jury may always award a lower amount than the actual cost of the medical treatment where the actual cost is less than the reasonable value. Recovery is limited to actual cost. *Samsel v. Allstate Ins. Co.*, 204 Ariz. 1, 4, 59 P.3d 281, 284 (Ariz. 2002).

D) **Collateral sources.** A defendant is not permitted to introduce evidence that the plaintiff has received payments from a collateral source to mitigate damages (*See* "Collateral Source Rule" section). In addition, evidence of furnishing, offering or promising to pay medical, hospital or similar expenses caused by an injury, is not admissible to prove liability for the injury. ARIZ. R. EVID. 409.

Offers of Judgment

Offers of judgment in Arizona are governed by ARIZ. R. CIV. P. 68(a). At any time more than thirty (30) days before trial begins, any party may serve on another an offer to allow judgment to be entered in the action. Ariz. R. Civ. P. 68(a). If an offer is for the entry of a money judgment, the award should be stated as a specific, all-inclusive sum. ARIZ. R. CIV. P. 68(b).

A) **Rejected offer.** Evidence of a rejected offer shall not be admissible except in a proceeding to determine sanctions under the rule. Any objections to an offer must be served, in writing, on the offeror within ten (10) days. ARIZ. R. CIV. P. 68(d).

B) **Time limitations.** An offer of judgment remains open for thirty (30) days after it is served, except when: 1) an offer made within sixty (60) days of service of the summons and complaint shall remain

effective for sixty (60) days following such service; (2) an offer made within 45 days of trial shall remain effective for fifteen (15) days of service. ARIZ. R. CIV. P. 68(h).

Offers of Proof

An offer of proof is a detailed description of the proposed evidence. *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 129, 700 P.2d 819, 827 (1985). When an objection to evidence is sustained, the party offering the evidence must make an offer of proof to preserve error in excluding the evidence in a new trial or appeal. *State v. Bay*, 150 Ariz. 112, 115, 722 P.2d 280, 283 (Ariz. 1986). Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and in the case one is admitting evidence, a timely objection or motion to strike appears on the record stating specific grounds of the objection, or in the case one is excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context. ARIZ. R. EVID. 103(a).

A) **Purpose.** Offers of proof serve a two-fold purpose: (1) the description allows the trial judge to determine whether his initial ruling was erroneous and permits him to allow the evidence to be introduced and (2) the description allows the appellate court to be better able to determine whether any error was harmful in the case. *Jones*, 145 Ariz. at 129, 700 P.2d at 827.

B) **Question and answer form.** ARIZ. R. EVID. 103(c) authorizes the trial court to direct a making of an offer of proof in question and answer form, where a witness whose testimony was excluded is examined as if the testimony had not been excluded. Instead of a testimony, counsel may also make an oral or written statement describing the witness testimony.

Prior Accidents

Evidence of prior accidents is admissible where the proper foundation is laid and the accident occurred under similar conditions, for similar reasons and was not too remote in time. *Burgbacher v. Mellor*, 112 Ariz. 481, 483, 543 P.2d 1110, 1112 (Ariz. 1975). Previous incidents can show the existence, notice or knowledge of a dangerous condition. *Id.* Where incidents are sufficiently similar, their probative value outweighs their prejudicial effect. *See id.*

Relationship to the Federal Rules of Evidence

Arizona's Rules of Evidence closely mirror, but are not identical to, the Federal Rules of Evidence.

Seat Belt and Helmet Use Admissibility

Evidence of the nonuse of seatbelts and helmets may be admitted if failure to wear a seatbelt was a proximate cause of plaintiff's injuries, and only on the issue of damages. *See Law v. Superior Court In & For Maricopa Cnty.*, 157 Ariz. 142, 144, 755 P.3d 1130, 1132 (App. 1986) (*Law I*). A driver's failure to use a seatbelt does not completely bar recovery. *Id*. at 143. Evidence of a plaintiff's helmet nonuse is relevant to the issue of whether a plaintiff could have avoided injuries and whether damages should be reduced accordingly, and may be admissible to show that a plaintiff could have reduced injuries if she wore a helmet. *Warfel v. Cheney*, 157 Ariz. 424, 430, 758 P.2d 1326, 1332 (App. 1988).

A) **Burden.** The defendant has the burden of proving the non-use was unreasonable under the circumstances and that it caused injuries that would not have occurred had the seatbelt or helmet had been used, or increased the injuries. *Law v. Superior Court In & For Maricopa Cnty.*, 157 Ariz. 147,

155, 754 P.2d 1135, 1142 (Ariz. 1988) (*Law II*). In *Law II*, the court concluded that under comparative negligence principles, plaintiff's failure to use an available seat belt was relevant to plaintiff's foreseeability of injury and damages, providing the evidence showed the injury would not have occurred or would have been mitigated by using the seat belt, and provided evidence established the degree of enhancement of the injury due to the nonuse. *Id.* at 157, 955 P.2d at 145.

Spoliation

Spoliation is the withholding, hiding, or destruction of evidence relevant to a legal proceeding.

A) **Duty.** Arizona law imposes upon litigants a duty to preserve evidence they know or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, or is reasonably likely to be requested during discovery. *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 250, 955 P.2d 3, 6 (App. 1997). Arizona does not recognize the separate tort for the spoliation of evidence. *Id.* at 249 n. 1.

B) **Sanctions.** Before imposing the sanction of dismissal due to spoliation, the district court should consider: (1) the public's interest in expeditious resolution of litigation, (2) the court's need to manage its dockets, (3) the risk of prejudice to that party seeking sanctions, (4) public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions. *State Farm Fire & Cas. Co. v. Broan Mfg. Co., Inc.*, 523 F.Supp.2d 992, 996-98 (D. Ariz. 2007).

In determining whether to allow an adverse inference instruction, courts should consider "whether the destruction of evidence was intentional or in bad faith" and whether the loss of evidence caused prejudice to the party seeking sanctions. *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 260, 293 P.3d 520, 536 (App. 2013).

Subsequent Remedial Measures

Under ARIZ. R. EVID. 407, post-accident remedial measures are not admissible to prove negligence or that a product was unreasonably dangerous. The remedial measures encompassed by the rule include not only design changes but also other remedial measures such as the posting of warning notices, the conduct of safety studies and similar measures. Evidence of subsequent remedial measures may be admissible when offered for another purpose, such as to show the feasibility of avoiding damage or harm, or for impeachment purposes. *See Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 441, 652 P.2d 507, 514 (Ariz. 1982); *Slow Dev. Co. v. Coulter*, 88 Ariz. 122, 128, 353 P.2d 890, 894 (Ariz. 1960).

A) **Product liability.** A.R.S. § 12-687 provides that evidence of a product safety analysis or review or of reasonable remedial measures taken as a consequence of such a product safety analysis or review is inadmissible to show negligence or that the product was defective or unreasonably dangerous. Such evidence, however, may be admitted if offered for other purposes, such as to show the feasibility of precautionary measures, or for impeachment purposes.

B) **Limiting instruction.** Where evidence of subsequent remedial measures is admitted, the trial court must, upon request, give the jury a limiting instruction. *See Readenour v. Marion Power Shovel*, 149 Ariz. 442, 450, 719 P.2d 1058, 1066 (Ariz. 1986). ARIZ. R. EVID. 407 does not permit a party who performed subsequent remedial measures to introduce evidence of them to deter or prevent an award of punitive damages. *See Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, 304, 995 P.2d 735, 740 (App. 1999).

Use of Photographs

Photographs are a frequently-used and extremely-effective type of demonstrative evidence. Trial courts have great discretion in admitting photographs into evidence. *State v. Clark*, 126 Ariz. 428, 433, 616 P.2d 888, 893 (Ariz. 1980); see also *State v. Schad*, 123 Ariz. 557, 571, 633 P.2d 366, 380 (1981) ("As long as the photograph has some probative value it is admissible even if inflammatory."). Photographic evidence is relevant if it aids the jury in understanding an issue, but not every photograph is admissible. *Id.*

A) **Admissibility test.** Arizona courts apply a three-prong test to determine whether to admit a potentially inflammatory photograph: (1) the photograph must be relevant to an issue in the case, (2) the probative value of the photo must outweigh its prejudicial effect, and (3) the evidence must not have the tendency to incite passion or inflame the jury. *State v. Anderson*, 210 Ariz. 327, 339, 111 P.3d 369, 381 (Ariz. 2005).

B) **Foundation.** Photographs must have a proper foundation before being admitted into the record. The photo must be relevant and authenticated. Authentication may be proved by using the photographer or other persons familiar with the subject matter to testify the photograph is a fair and accurate representation of what it purports to represent. *State v. Kelly*, 111 Ariz. 181, 189, 526 P.2d 720, 728 (Ariz. 1974).

DAMAGES

Caps on Damages

The Arizona constitution prohibits placing caps on damages for personal injury or death. ARIZ. CONST. art. II § 31. The assessment of damages is left to the judgment of the jury. Judges will not tamper with a jury's award unless the award is so excessive or inconsequential as to be unjust. *Acuna v. Kroack.*, 212 Ariz. 104, 114, 128 P.3d 221, 231 (App. 2006). Thus, the jury award is subject to trial court superintendence that is limited to a post-trial order for a new trial or remittitur when the record corroborates the jury's verdict as excessive or the result of passion, prejudice, or bias. *See Carter-Glogau Labs, Inc. v. Constr., Prod. & Maint. Laborers' Local 383*, 153 Ariz. 351, 358, 736 P.2d 1163, 1170 (App. 1986); *Reed v. Hyde*, 15 Ariz. 203, 205, 487 P.2d 424, 426 (App. 1971).

Calculation of Damages

A) In Arizona, a plaintiff bringing a cause of action for personal injuries may recover for various damages including:

    1) past and future medical bills;

    2) past and future pain and suffering;

    3) lost past earnings and decrease in future earnings, earning power or capacity;

    4) loss of love, care, affection, companionship, and other pleasures of the marital or familial relationship;

    5) aggravation of a pre-existing condition; and

6) loss of enjoyment of life.

B) **Scope.** Plaintiffs may recover both economic damages, which compensate for objectively verifiable monetary losses including loss of earning capacity and/or lost wages and medical and other out-of-pocket expenses, as well as non-economic damages, which includes claims for pain and suffering, mental anguish, injury and disfigurement, loss of consortium, and other intangible losses.

C) While damages are not required to be proven with mathematical certainty, they must not be speculative or conjectural. *See Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 521, 446 P.2d 458, 464 (1968). Plaintiff bears the burden of supplying the fact finder with the evidentiary and logical basis for calculating a compensatory award. *Id.* at 521-23, 446 P.2d at 465-66. Thus, unless there is non-speculative evidence demonstrating future suffering, additional medical expense, or future loss of income, those questions may not be submitted to the jury. The Revised Arizona Jury Instructions offer the model jury instructions on damages.

D) **Property.** When property is damaged, the owner is entitled to recover the difference between the value of the property immediately before and after it was damaged or the reasonable cost of repairs. *See State v. Brockell*, 187 Ariz. 226, 228, 928 P.2d 650, 652 (App. 1996). If the property has no market value, the owner is entitled to recover damages measured by the diminution in value of the property. *Id.*

Available Items of Personal Injury Damages

A) **Past medical expenses.** Damages for past medical expenses are virtually always included in tort cases. The plaintiff bears the burden of proving enough evidence to allow the jury to calculate and compensate him for prior medical expenses. *See Allied Van Lines v. Parsons*, 80 Ariz. 88, 100, 293 P.2d 430, 437 (1956). Medical bills and records are relevant to prove past medical expenses only if supported by additional evidence that the treatment and the bills were both necessary and reasonable. *See Deese v. State Farm Mut. Auto. Ins. Co.*, 172 Ariz. 504, 506, 838 P.2d 1265, 1267 (1992).

B) **Future medical expenses.** Future medical expenses require a showing that there is a reasonable probability that such medical expenses will incur. *Besch v. Triplett*, 23 Ariz. 301, 302-03, 532 P.2d 876, 877-78 (App. 1975). Expenses which may qualify for compensation are numerous and may require proof of the reasonable value of services rendered by consultants, nurses, home health care providers, ambulance service, prosthetic devices and medicine. *Id.*

C) **Hedonic damages.** Hedonic damages are those awarded for the loss of enjoyment of life, or the value of life itself, as measured separately from the economic productive value that an injured or deceased person would have had. Hedonic damages are not duplicative of damages for pain and suffering. *See Ogden v. J.M. Steel Erecting, Inc.*, 201 Ariz. 32, 38, 31 P.3d 806, 812 (App. 2001). Unlike pain and suffering, hedonic damages compensate for the limitations, resulting from the defendant's negligence on the injured person's ability to participate and derive pleasure from life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations. *Id.* at 39, 31 P.3d at 813.

D) **Increased risk of harm.** An increased risk of injury does not constitute a compensable harm absent some proof that an actual injury is reasonably certain to occur in the future. *See DeStories v. City of Phoenix*, 154 Ariz. 604, 606, 744 P.2d 705, 707 (App. 1987).

E) **Disfigurement.** Disfigurement is generally defined as marring the appearance of beauty, or deforming, impairing, or injuring someone's appearance or attractiveness. *See Funk v. Indus. Comm'n of Ariz.*, 167 Ariz. 466, 468-69, 808 P.2d 827, 829-30 (App. 1991) (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 565 (unabridged 1967) and WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 524 (2d ed. 1983)). Plaintiffs can recover non-economic damages for disfigurement.

F) **Pain and suffering.** Pain as an element of non-pecuniary damages has been defined as the psychological response by the injured person to a corporal injury. The courts permit recovery for a range of losses including physical pain, adverse emotional consequences attributable to the pain and injury, and frustration and anguish caused by the inability to participate in the normal pursuits and pleasures of life. *Coppinger v. Broderick*, 37 Ariz. 473, 476, 295 P. 780, 781 (1931). Generally, evidence of a plaintiff's health and physical condition, before and after the injury, may be introduced to establish the nature, extent, and consequences of the injuries caused by the defendant. *See generally Maldonado v. S. Pac. Transp. Co.*, 129 Ariz. 165, 629 P.2d 1001 (App. 1981); *Allied Van Lines*, 80 Ariz. at 89, 293 P.2d at 437 (1956).

1) **Future pain and suffering.** There is no recovery allowed for the possibility of an injury. But plaintiff is entitled to recover damages for losses which are reasonably certain or probable to occur in the future. *See Coppinger*, 37 Ariz. at 476, 295 P. at 781. An award to the injured party for such compensation would require proof beyond the preponderance of the evidence that there will be future pain and suffering, medical expenses, impairment, and/or the physical disability. The permanent nature of an injury must be proved to a degree of reasonable certainty or probability. *See id.* Proof of a permanent injury is a prerequisite to introducing evidence on life expectancy. If a physician testifies as to the physical condition of the injured plaintiff, his opinion must be reasonably certain both as to the cause of the physical condition and its future effects. Once a permanent adverse effect on the plaintiff has been proven by objective evidence, the jury must award damages for future pain, suffering, and mental anguish. *See Allied Van Lines*, 80 Ariz. at 100, 293 P.2d at 437 (1956).

G) **Loss of consortium.** These damages typically compensate the injured party's spouse for harm to their relationship caused by a physical or psychological injury, including society, companionship, services, and affection. Recovery is predicated upon the person as a victim of a severe, permanent and disabling injury which renders the person unable to exchange love, affection, care, comfort, companionship and society in a normally gratifying way. *Pierce v. Casa Adobes Baptist Church*, 162 Ariz. 269, 271, 782 P.2d 1162, 1164 (1989). A sexual relationship is not necessary to make a loss of consortium claim in Arizona. *See id.* at 272, 782 P.2d at 1165 (1989) (recognizing a parent's ability to maintain a cause of action for loss of a child's consortium). A judge decides the threshold level of interference, before leaving it up to the fact finder to determine the recoverable amount based on the interference. *Id.*

1) There are three types of loss of consortium claims available in Arizona: (1) loss of spousal consortium, *City of Glendale v. Bradshaw By & Through Bradshaw*, 108 Ariz. 582, 584, 503 P.2d 803, 805 (1972); (2) loss of filial consortium, *Pierce*, 162 Ariz. at 271, 782 P.2d at 1164-65; and (3) loss of parental consortium, *Villareal v. Dep't of Transp.*, 160 Ariz. 474, 477-78, 774 P.2d 213, 216-17 (1989).

H) **Lost income, wages, earnings.** Where a plaintiff has lost income due to personal injury, he is entitled to recover damages for either or both: (1) loss of time and earnings and (2) loss or impairment of earning capacity. *See Hatcher v. Hatcher*, 188 Ariz. 154, 158, 933 P.2d 1222, 1226 (App. 1996). Generally, loss of time or earnings compensates the injured party for wages lost because of the injury, while loss or impairment of earnings capacity compensates the victim for all monies that he could have earned in the future but for the injury. *Id.* The plaintiff need not be employed at the time of the injury to recover for impairment of earning capacity; however, post-injury earnings may be considered to prove the amount of earning capacity impairment plaintiff actually suffered. *Reavis v. Indus. Comm'n of Ariz.*, 196 Ariz. 280, 281, 995 P.2d 716, 717 (App. 1999).

I) **Pre-existing condition.** Plaintiff may recover damages for aggravation of a preexisting condition. *Tucson Rapid Transit Co. v. Rubiaz*, 21 Ariz. 221, 228, 187 P. 568, 571 (1920). Plaintiff may not recover from any physical or emotional condition that pre-existed the fault of defendant; however, if plaintiff's pre-existing condition was aggravated or made worse by defendant's fault, the jury must decide the full amount of money that will reasonably and fairly compensate plaintiff for that detriment. *Id.* at 229, 187 P. at 571.

J) **Emotional distress claims.** Arizona recognizes liability for emotional distress caused by witnessing injury to another. *See Keck v. Jackson*, 122 Ariz. 114, 115-16, 593 P.2d 668, 669-70 (1979). Arizona requires that the emotional distress be manifested as a physical injury and that the damages be caused by the emotional disturbance that occurred at the time of the accident only. *Id.* Plaintiff must also be within the zone of danger, established as a matter of law by the court. *Id.* at 116, 593 P.2d at 670. Plaintiff has the burden of proving defendant's negligence was the cause of bodily harm to a person; plaintiff's direct observation of the event resulting in bodily harm to that person caused plaintiff physical injury or illness; and the plaintiff had a close personal relationship with the person injured. *See also State Farm Mut. Auto. Ins. Co. v. Connolly ex rel. Connolly*, 212 Ariz. 417, 132 P.3d 1197 (App. 2006); *Keck*, 122 Ariz. at 116, 593 P.2d at 670.

Mitigation

A) "[T]he victim of a tort has a duty to exercise due care and to act diligently to protect his or her own interest." *Law v. Superior Court*, 157 Ariz. 142, 145, 755 P.2d 1130, 1133 (App. 1986). The injured party need only exercise reasonable care to mitigate damages. *See Life Investors Ins. Co. of America v. Horizon Res. Bethany, Ltd.*, 182 Ariz. 529, 534, 898 P.2d 478, 483 (App. 1995).

B) **No liability.** Although an injured party appears to have a duty to mitigate damages, there is no real liability for failing to take such steps. A party is merely precluded from recovering for avoidable damages. *See Monthofer Invs. Ltd.v. Allen*, 189 Ariz. 422, 428, 943 P.2d 782, 788 (App. 1997). The burden of proof that mitigation of damages was reasonably possible is upon the party at fault. *See Solar-West, Inc. v. Falk*, 141 Ariz. 414, 419, 687 P.2d 939, 944 (App. 1984).

C) **Breach of contract.** One who claims to have been injured in a breach of contract must use reasonable means to avoid or minimize damages resulting from the breach. *W. Pinal Family Health Ctr., Inc. v. McBryde*, 162 Ariz. 546, 548, 785 P.2d 66, 68 (App. 1989).

Punitive Damages

A) In Arizona, punitive damages are available where a defendant's conduct was outrageous because of evil motive or his reckless indifference to the rights of others. *Hudgins v. Sw. Airlines, Co.*, 221 Ariz.

472, 486, 212 P.3d 810, 824 (App. 2009). Punitive damages are not permissible to punish negligence, gross negligence, or even reckless disregard of the circumstances. *Id.* at 487, 212 P.3d at 825 (citing *Volz v. Coleman Co.*, 155 Ariz. 567, 570, 748 P.2d 1191, 1194 (1987)) To determine the appropriateness of an award, juries and courts consider the goals of punitive damage awards and factors such as: (1) the severity of the defendant's conduct; (2) the conduct's duration; (3) the degree to which the defendant was aware of the conduct or attempted to conceal it; and (4) the defendant's net worth. *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 501-02, 733 P.2d 1073, 1084-85 (1987) ("It is axiomatic that the wealthier the wrongdoing defendant, the greater the award of punitive damages necessary to punish him."); *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 132, 907 P.2d 506, 518 (App. 1995); *White v. Mitchell*, 157 Ariz. 523, 530-31, 759 P.2d 1427, 1334-35 (App. 1988).

B) **Constitutionality.** The United States Supreme Court held that the measure of punitive damages must be reasonable and proportionate to the amount of harm to the plaintiff and damages recovered. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003). However, the Due Process Clause in the Fourteenth Amendment of the United States Constitution imposes a substantive limit on the size of punitive damage awards, and courts must act as "gatekeepers" over verdicts including punitive damage awards. *Arellano v. Primerica Life Ins. Co., Co.*, 235 Ariz. 371, 378, 332 P.3d 597, 604 (App. 2004) (finding that a 13:1 ratio of punitive damages to compensatory damages was too high, and that a 4:1 ratio was appropriate). Courts do not impose a bright-line ratio between compensatory and punitive damages, but "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety . . . [and] '[w]hen compensatory damages are substantial, . . . a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Nardelli v. Metro. Group Prop. & Cas. Ins. Co.*, 230 Ariz. 592, 611, 277 P.3d 789, 808 (App. 2012) (citing *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 503, 200 P.3d 977, 1000 (App. 2008)).

C) **Evil mind.** An evil mind exists where: (1) the defendant intended to injure the plaintiff; (2) wrongful conduct was motivated by spite or ill will; (3) the defendant, not intending to cause the injury, consciously pursued a course of conduct knowing he creates a substantial risk of significant harm to others; or (4) a defendant's conduct is so outrageous or egregious that it can be assumed he intended to injure or consciously disregarded the substantial risk of harm created by his conduct. *See Gurule v. Ill. Mut. Life & Cas. Co.*, 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987); *Hyatt*, 184 Ariz. at 132, 907 P.2d at 518.

    1) **Standard.** Plaintiffs are required to prove evil intent by clear and convincing evidence to recover punitive damages. *Lithicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 332, 732 P.2d 675, 681 (1986). Clear and convincing evidence is that which may persuade that the truth of the contention is highly probable. *Thompson v. Better-Bilt Aluminum Products Co.*, 171 Ariz. 550, 557, 832 P.2d 203, 210 (1992). In reviewing a punitive damages award, courts consider "(1) the degree of reprehensibility of defendant's conduct, (2) the disparity between plaintiff's actual or potential harm and the punitive damages award, and (3) the difference between the jury's punitive damage award and the authorized civil penalties in comparable cases." *Arellano*, 235 Ariz. App. at 378, 332 P.3d at 604 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409 (2003)).

D) **Insurance.** Absent a specific exclusion, punitive damages are recoverable under the liability portion of an insurance policy. *See Price v. Hartford*, 108 Ariz. 485, 487, 502 P.2d 522, 524 (1972).

Alternatively, unless an uninsured motorist or underinsured motorist endorsement to an insurance policy for bodily injury clearly states that there is coverage for punitive damages, these damages are not recoverable. *See State Farm Mut. Auto. Ins. Co. v. Wilson*, 162 Ariz. 247, 249-50, 782 P.2d 723, 725-26 (App. 1989), *modified on remand*, 162 Ariz. 251, 782 P.2d 727 (1989).

1) In actions when an insurer breaches a covenant of good faith and fair dealing, a claimant must provide evidence that defendant's conduct was motivated by spite, actual malice or intent to defraud, or a conscious and deliberate disregard of the interests and rights of other in order to be liable for punitive damages. *See Gurule*, 152 Ariz. at 602, 734 P.2d at 87.

E) **Survival.** A claim for punitive damages survives a tortfeasor's death and such damages may be recoverable against his estate in appropriate circumstances. *See Haralson v. Fisher Surveying Inc.*, 201 Ariz. 1, 6, 31 P.3d 114, 119 (2001).

F) **Caps.** Arizona does not recognize a cap on punitive damages. Judicial review, however, provides some constitutional safeguards where punitive damages are awarded. For example, the United States Supreme Court recently issued several opinions regarding the constitutionality of punitive damages. In *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996), the Supreme Court held that the Fourteenth Amendment due process clause prohibits states from imposing grossly excessive punishment against a tortfeasor. The Court also listed several factors to consider in determining whether an award of punitive damages is appropriate: (1) the degree of reprehensibility of the defendant's conduct or defendant's culpability, (2) the relationship between the penalty and the harm to the victim caused by defendant's action, (3) the relation between the plaintiff's compensatory damages and the amount of the punitive damages, (4) the difference between civil punitive damages and the criminal sanction which could be imposed for comparable misconduct, and 5) the sanctions imposed in other cases for comparable misconduct. *Id*. 575-85; *see also Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 425 (2001).

G) **Lawfulness.** Additionally, the United States Supreme Court followed the *BMW* decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, and held that out-of-state conduct dissimilar from the acts upon which liability is premised may not serve as a basis for punitive damages. 538 U.S. at 422. A state cannot punish a defendant for conduct that may have been lawful where it occurred. *Campbell*, 538 U.S. at 421. Nor does a state have a legitimate concern in opposing punitive damages to punish a defendant for unlawful acts committed outside the state's jurisdiction. *Id.* at 421.

Recovery of Pre- and Post-Judgment Interest

A) **Prejudgment interest.** The recovery of prejudgment interest is governed by A.R.S. § 44-1201, and serves the purpose of making plaintiff whole and is not applicable to personal injury claims. Under Arizona law, the trial court has discretion to determine the date prejudgment interest commences. *Trus Joist Corp. v. Safeco Ins. Co. of Am.*, 153 Ariz. 95, 110, 735 P.2d 125, 140 (App. 1986).

1) **Accrual.** A lienholder is entitled to both pre- and post-judgment interest on liquidated debt at a rate of ten percent per annum, unless the parties agreed to a different rate. *See Interstate Mktgs., Inc. v. Mingus Constructors, Inc.*, 941 F.2d 1010, 1014 (9th Cir. 1991). Prejudgment interest accrues from the date of demand, and not from the date of the loss. *See Alta Vista Plaza, Ltd. v. Insulation Specialists Co.*, 186 Ariz. 81, 83, 919 P.2d 176, 178 (App. 1995), *review denied*, 187 Ariz. 340, 929 P.2d 1288 (1996).

2) **Calculation.** The proper calculation of prejudgment interest would reflect accrual of interest on the total judgment from the time the complaint was filed until the time of settlement, and then on the amount of the judgment less the amount of the settlement after the date of the settlement. *Dawson v. Withycombe*, 216 Ariz. 84, 113-4, 163 P.3d 1034, 1063-64 (App. 2007).

3) **Requirement that the claim is liquidated.** A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount due with exactness, without reliance upon opinion or discretion. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa Cty.*, 208 Ariz. 532, 544, 96 P.3d 530, 542 (App. 2004). If the claim is liquidated, the awarding of prejudgment interest is a matter of right rather than being discretionary. *See Matter of Estes' Estate*, 134 Ariz. 70, 81, 654 P.2d 4, 15 (App. 1982). If the claim is unliquidated, no interest is allowed on the theory that the person liable does not know the sum he owes and hence cannot be in default for not paying. *Ariz. E.R.R. Co. v. Head*, 26 Ariz. 259, 262, 224 P. 1057, 1059 (1924).

B) **Post-judgment interest.** Post-judgment interest applies from the date a judgment is rendered and is governed by 28 U.S.C. § 1961 in federal courts.

C) Under A.R.S. § 12-347, the clerk of the court must include in a judgment the costs and interests on a verdict from the time it was rendered. Interest on any judgment shall be at the rate of ten percent per annum unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to. A.R.S. § 44-1201(A).

D) **Recovery of interest in other proceedings.** Under A.R.S. § 12-352(A), in a medical malpractice action, the court awards payment of interest to a prevailing party at a rate that is 1% above the federal post-judgment interest rate on the date judgment is entered, but not more than 9%. The schedule for interest on a judgment in a condemnation proceeding is controlled by A.R.S. § 44-1201(B).

Recovery of Attorney Fees

Recovery of attorney fees is governed by A.R.S. § 12-341.01. The court, and not a jury, award reasonable attorney fees. A.R.S.§ 12-341.01(C).

A) **Contracts.** In any action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees. A.R.S. § 12-341.01(A). If a written settlement offer is rejected and the judgment obtained is equal to or more favorable to the offeror than the one made in writing, the offeror is deemed to be the successful party from the date of the offer and the court may award him reasonable attorney fees. *Id*. The award pursuant to this subsection should be made to mitigate the burden of the expense of litigation to establish a just claim or just defense. A.R.S. § 12-341.01(B). It need not equal or relate to the attorney fees actually paid or contracted, except that the award may not exceed the amount actually paid or agreed to be paid. *Id*.

B) **Standard.** The court, and not a jury, shall award reasonable attorney fees under this section. A.R.S. § 12-341.01(C) (2017). (The statute was revised and no longer contains the clear and convincing standard. See A.R.S.§ 12-341.01)

Settlement Involving Minors

A) A.R.S. § 14-5103 only governs the method of payment for settlements involving minors; it does not eliminate the need for court approval or a guardian or conservator before a settlement is binding. A minor does not have capacity to enter into a binding contract, including settlement agreements. *See generally Pacheco v. Delgardo*, 46 Ariz. 401, 52 P.2d 479 (1935). Thus, obtaining binding settlement of a minor's claim requires court approval. *See generally id.* Under A.R.S. § 14-5103(A), a person under a duty to pay a settlement to a minor may pay by delivering money or property to the following: (1) the minor, if he is married, (2) any person having the care and custody of the minor and with whom the minor resides, (3) the minor's guardian or (4) a financial institution incident to a deposit in a federally insured savings account in the sole name of the minor and giving notice of the deposit to the minor.

B) A minor may repudiate any compromise or settlement of any right of action which she may have at any time before her majority, unless it is made by a guardian legally authorized to make sure settlement. *Pacheco*, 46 Ariz. at 406, 52 P.2d at 481.

Taxation of Costs

A) A party who recovers judgment for only part of a demand or claim is entitled to all taxable costs in the absence of a statute providing for apportionment or some other rule. *See Ayala v. Olaiz*, 161 Ariz. 129, 131, 776 P.2d 807, 809 (App. 1989).

B) **Supreme Court.** Taxable costs in the Supreme Court include: (1) the amount paid to the clerk of that court, (2) the amount paid to the superior court clerk for certified copies of the record and for transmitting it, (3) the cost of printing or typing the abstract of record and briefs, (4) the amount paid for the transcript of the notes of the reporter of the superior court, and (5) such other disbursements as may have been incurred pursuant to an order of the court or agreement of the parties. A.R.S. § 12-331.

C) **Superior Court.** Taxable costs in Superior Court include: (1) fees of officers and witnesses, (2) cost of taking depositions, (3) compensation of referees, (4) costs of certified copies of papers or records, (5) sums paid to execute a bond or other obligation therein, and (6) other disbursements made or incurred pursuant to an order or agreement of the parties. A.R.S. § 12-332(A). A jury fee is also included to reflect the cost of reimbursement for juror travel expenses. A.R.S. § 12-332(B).

    1) Expert witness fees are not taxable costs in an eminent domain proceeding. *See State ex rel. Morrison v. Jay Six Cattle Co.*, 88 Ariz. 97, 110, 353 P.2d 185, 194 (1960).

Unique Damages Issues

A cause of action for pain and suffering does not survive the death of the person injured. A.R.S. § 14-3110.

encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.