

APPELLATE TIP: PRESERVE “NO-DUTY” ARGUMENTS IN NEGLIGENCE CASES WITH PRETRIAL AND POST-TRIAL MOTIONS

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Written By: Jennifer Anderson

In *Quiroz v. ALCOA, Inc.* (May 11, 2018), the Arizona Supreme Court recently clarified the “duty” element of a negligence claim and reaffirmed prior decisions holding that: (1) the plaintiff must prove the duty element in every case because courts will not presume a duty exists; (2) foreseeability is not a factor in determining the existence of a duty; (3) duties are based on special relationships or public policy; and (4) public policy may be expressed in state statutes, federal statutes, or the common law. The court refused to adopt the duty framework set forth in the Third Restatement of Torts, which ordinarily presumes a duty when a defendant’s actions create a risk of harm to a plaintiff.

What does this mean in practice? Duty is a threshold issue and “a legal matter to be determined *before* the case-specific facts are considered.” *Gipson v. Kasey*, 214 Ariz. 141, 145, ¶ 21 (2007) (emphasis in original). Therefore, in every negligence case, defense counsel should assess whether the defendant owed the plaintiff a duty of care. If not, defense counsel should file a motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment based on lack of a duty. (If you already have such a motion pending, consider supplementing it with a citation to *Quiroz*.)

Keep in mind that the denial of one of these pretrial motions is generally not reviewable on appeal, even after entry of a final judgment. See *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 539, ¶ 19 (App. 2004); *ClearOne Communications, Inc. v. Biamp Sys.*, 653 F.3d 1163, 1172 (10th Cir. 2011). A defendant who wants to preserve a no-duty issue for appeal must do so by reasserting it in a Rule 50 motion for judgment as a matter of law during and after trial, or in some other post-trial motion. *John C. Lincoln Hosp.*, 208 Ariz. at 539, ¶ 19.

There is an exception to this preservation rule for a “purely legal issue” asserted in a summary judgment motion. *Ryan v. San Francisco Peaks Trucking Co., Inc.*, 228 Ariz. 42, 48, ¶ 20 (App. 2011). A “purely legal issue” is “one that does not require the determination of any predicate facts.” *John C. Lincoln Hosp.*, 208 Ariz. at 539, ¶ 19. Whether a duty exists is, at least arguably, a “purely legal issue.” But it is still the better practice to reassert a no-duty argument in a Rule 50 motion if a pretrial motion is unsuccessful. The appellate practice group can help you with such motions, or any other pretrial or post-trial motions you may need filed in your case.