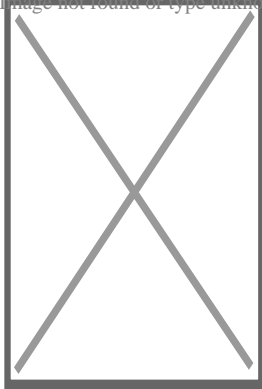


DEFENDANTS SHOULD PRESERVE “NO-DUTY” ARGUMENTS IN NEGLIGENCE CASES WITH PRETRIAL AND POST-TRIAL MOTIONS

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In *Quiroz v. ALCOA Inc.*, 243 Ariz. 560 (2018), the Arizona Supreme Court 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, defendants and their counsel should assess whether the plaintiff was owed 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 the lack of a duty.

Keep in mind that the denial of one of these pretrial motions is generally not reviewable on appeal, even after a final judgment is entered. 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 motion for judgment as a matter of law both during and after trial, or in some other post-trial motion. *John C. Lincoln Hosp.*, 208 Ariz. at 539, ¶ 19; see Ariz. R. Civ. P. 50.

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 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 JSH appellate practice group stands ready to assist the firm’s trial attorneys and their clients with such motions, and with any other pretrial or post-trial motions that need to be filed.