Arizona

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Arizona law on products liability is based on §402A of the Restatement (Second) of Torts (1965), but was significantly impacted by tort reform legislation in 1978 and by the adoption of pure comparative fault. The Arizona Constitution requires that plaintiff's fault in all cases is a question of fact for the jury.

PRE-SALE DUTIES

What is the Scope of the Duty to Warn?

Arizona Jury Instruction

Even a product "faultlessly made" can have an informational defect. *Davis v. Cessna Aircraft Corp*., 182 Ariz.26, 893 P.2d 26 (Ariz. Ct. App. Div. 1, 1994); *Southwest Pet Products, Inc. v. Koch Industries*, 273 F.Supp.2d 1041 (D.Ariz.2003). The elements of a *prima facie* case are (1) a duty to warn or instruct; (2) the lack of warning or instruction made the product defective and unreasonably dangerous; (3) the warning or instruction was missing when it left the hands of the manufacturer; and (4) the injury was caused by the lack of warning or instruction.

Arizona jury instructions provide:

> A product is defective and unreasonably dangerous if a manufacturer or seller, who knows or should know that a foreseeable use of its product may be unreasonably dangerous, does not provide adequate warning(s) of the danger or instruction(s) for reasonably safe use.

Hindsight Test Does Not Apply to Warnings

Generally, under Arizona products liability law, the manufacturer is presumed to have known at the time of the manufacture of the product, all harmful characteristics of the product and the consequence of reasonably foreseeable use, which includes all information up to the time of trial. Whether the hindsight test applied to a warnings case was an open question until *Powers v. Taser International,* 217 Ariz. 398, 174 P.3d 777 (Ariz. Ct. App. Div. 1, 2008). The court held that the hindsight test, imputed knowledge, did not apply to failure to warn cases. The warning was judged by what the manufacturer knew or should have known at the time of manufacture but not by subsequent events or knowledge.

The court, in *Powers v. Taser, supra,* noted that Arizona generally follows the Restatement. The court considered whether it should adopt The Restatement (Third) Torts: Product Liability §2(c) (1998) and reject the hindsight test in its entirety even in design defect cases. The court refused to adopt the Restatement view because it was rejected by an earlier decision in the State Supreme Court in *Dart v. Wiebe Manufacturing, Inc*., 147 Ariz. 242, 709 P.2d 876 (1985).

Warning Claim Can Be Under Negligence or Strict Liability

While rejecting the hindsight test for warning cases and preserving it for design cases, the court nevertheless held that a warning case could be based on strict liability. Even though warnings cases are based on a foresight test, they can still be based on strict liability or negligence. If based on negligence, the reasonableness of the warning is the issue. The jury determines whether the manufacturer fell below the standard of care as to warnings.

For a strict liability claim, the jury determines if the warning advised of a particular risk that was known or knowable in light of the generally recognized scientific or medical knowledge.

Is a Warning Adequate; Is It Required?

Statute

Under Arizona statute, A.R.S. §12-683(3), use of a product in contravention of its express and adequate instructions or warnings appearing on or attached to the product or its original container or wrapping is an affirmative defense. The statute therefore addresses some of the factors by allowing warnings to be attached to the product or its original container or wrapping. However, there are few cases otherwise addressing "adequacy." *Shell Oil Company v. Gutierrez,* 581 P.2d 271 (Ariz. Ct. App. Div.2, 1978), held that the adequacy of a warning label is not determined solely by reference to the words on the label but also by reference to the physical aspects of the warning, such as conspicuousness, prominence, and relative size of print. It then cites to *First National Bank in Albuquerque v. Nor-Am Agricultural Products, Inc.,* 537 P.2d 682 (N.M.App. 1975), which is a New Mexico decision with an exhaustive list of factors for the adequacy of labels.

Ultimately, the adequacy of a warning is judged by what the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings. A.R.S. §12-683(3). The determination of adequacy of warning is usually a jury question. *Brown v. Sears Roebuck & Co.,* 136 Ariz. 556, 667 P.2d 750 (Ariz. Ct. App. Div. 1, 1983).

Commonly Known Dangers

The Arizona decisions relating to commonly known dangers have applied the doctrine to determine if the product was unreasonably dangerous. In *Scheller v. Wilson Certified Foods, Inc.,* 559 P.2d 1074 (Ariz. Ct. App. Div.1, 1976), the court held that raw pork was not unreasonably dangerous because it was common knowledge that pork had to be cooked. Plaintiffs had obtained the pork from a retailer which had "smoked" the pork and mistakenly believed that the smoking was sufficient cooking. In *Southwest Pet Products v. Koch Industries,* 273 F.Supp.2d 1041 (D.Ariz. 2003), the court held that a certain type of wheat contamination was commonly known to pet food manufacturers. The product was therefore not unreasonably dangerous. The court also held that a warning would not have changed plaintiff's conduct, which already included testing, and therefore there was no causation shown.

Open and Obvious

The fact that a danger is open and obvious does not eliminate the need for warning. In Arizona, the obviousness of the danger is but one factor to consider in determining whether a product is defective. *Turner v. Machine Ice Co.,* 138 Ariz. 329 674 P.2d 883 (Ariz. Ct. App. Div.1, 1983), and *Rodriguez v. Besser Co.,* 565 P.2d 1315 (Ariz. Ct. App. Div. 1, 1977). However, *Brown v. Sears Roebuck & Co.,* 136 Ariz. 556, 667 P.2d 750 (Ariz.

Ct. App. Div. 1, 1983) shows that the line between "open and obvious" dangers and "commonly known" dangers is not always clear. The *Brown* court found as a matter of law that the danger of electric shock from cutting an extension cord is so obvious and well known as to defeat a claim that a warning was required.

Unavoidably Unsafe Products

Arizona follows comment *k* of §402A of the *Restatement (Second) on Torts* (1965) on "unavoidably unsafe products" and holds that a warning is required for such products. *Gaston v. Hunter,* 121 Ariz. 33, 588 P.2d 326 (Ariz. Ct. App. Div.1, 1978).

No Appellate Decisions or Other Warning Issues

Arizona appellate courts have not addressed warning issues of foreign language, pictorials, or over-warning. These issues are addressed under the test of reasonableness or adequacy. Absent appellate decisions, Arizona courts look to the Restatement for guidance.

Does Arizona Recognize a Heeding Presumption?

Yes, but it is a rebuttable presumption. There are a series of Arizona cases recognizing the heeding presumption, including *Dole Food Co. v. North Carolina Foam Industries, Inc.,* 188 Ariz. 298, 935 P.2d 876 (Ariz. Ct. App. Div.1, 1997); and *Englehart v. Jeep Corp.,* 122 Ariz. 256, 594 P.2d 510 (Ariz.1979). The most recent case on the heeding presumption in a warning case is *Golonka v. General Motors,* 204 Ariz. 575, 65 P.3d 956 (Ariz. Ct. App. Div. 1, 2003). However, *Golonka* applied Arizona law that presumptions disappear when sufficient contrary evidence has been presented, the so-called "bursting bubble" theory of presumptions. The trial court determines if there has been sufficient, competent evidence that the warning would not have been followed. If so, the presumption vanishes.

Golonka involved an issue of warning in a park-to-reverse case. The appellate court held that the driver's failure to follow the cautions in the owner's manual to set the parking brake, turn off the engine, and remove the key, together with the driver's apparent ignoring of a buzzer when she opened the door with the engine running were sufficient to rebut the heeding presumption. As a consequence, no heeding presumption should have been given.

Defenses Available to Those in Chain of Distribution

Comparative Fault Rather Than Joint Liability

Arizona has recently applied comparative fault rather than joint liability to those in the chain of distribution. In *State Farm v. Premier Manufacturing Systems, Inc.,* 142 P.3d 1232 (Ariz. Ct. App. Div. 1, 2007), the court held that the jury should determine "the differing conduct, roles, duties and responsibilities played by all of the participants in the distribution chain…" Each participant is assessed its share of fault.

Misuse/Comparative Causation

Arizona case law on misuse has been codified in A.R.S. §12-683(3) which states that:

a. defendant shall not be liable if defendant proves that...

3. The proximate cause of the incident giving rise to the incident was a use or consumption of the product which was for a purpose, in a manner or in an activity other than that which was reasonably foreseeable…

However, Arizona's pure comparative fault applies in products liability cases. As a result, all fault that contributes to cause an injury can be considered by the jury and apportioned.

In *Anderson v. Nissei ASB Machine Co., Ltd.,* 197 Ariz. 168 3 P.3d 1088 (Ariz. Ct. App. Div. 1, 1999), held that a worker's recovery was reduced proportional to his fault in his knowing use of a machine with the guards removed. Similarly, in *Times Mirror Co. v. Sisk*, 122 Ariz. 174, 593 P.2d 924 (Ariz. Ct. App. Div. 2, 1978), evidence of negligent acts by members of a flight crew were allowed in evidence over plaintiff's objection that contributory negligence was not a defense to a strict liability claim. The appellate court held the evidence was admissible to show that the cause of the accident was the negligence of the crew.

Indemnity

Indemnity is owed even if the product is ultimately ruled to be not defective. *Desert Golf Carts v. Yamaha Motor Co.*, 198 Ariz. 103, 7 P.3d 112 (Ariz. Ct. App. Div. 1, 2000). The court looks to the allegation of the complaint to determine if indemnity is owed, rather than to the ultimate outcome of plaintiff's claim of defect.

Under Arizona statute, A.R.S. §12-684, the seller has a right to tender its defense to the manufacturer. The manufacturer is required to indemnify the seller and reimburse all its attorneys' fees and costs unless the seller had knowledge of the defect or the seller's modification of the product caused the injury. On the other hand, the seller owes indemnity if it provided the plans and specifications to the manufacturer and the accident was due to such plans.

Contractual Rights

The parties in the chain of distribution are able to shift liability through contractual and insurance agreements. Indemnity agreements are enforceable. *Schweber Electronics v. National Semiconductor Corp.,* 850 P.2d 119 (Ariz. Ct. App. Div. 1, 1992). However, a party's active fault bars a common law indemnity claim. *Foremost-McKesson Corp. v. Allied Chemical Co.,* 680 P.2d 818 (Ariz. Ct. App. Div. 2, 1983), and *Allison Steel Mfg. Co. v. Superior Court,* 511 P.2d 198 (Ariz. Ct. App. Div. 1, 1973).

Retailer's Duty to Warn Differs from Manufacturer's Duty

In *Foremost-McKesson Corp. v. Allied Chemical Co.,* 680 P.2d 818 (Ariz. Ct. App. Div. 2, 1983), the court distinguished between the duty to warn owed by a manufacturer from that of a distributor or retailer. Only the manufacturer has the heavy burden of discovering the product's dangers and warning the foreseeable users. Other parties in the chain of distribution have a duty to warn of what they know or have reason to know. They are not held to a "should have known" standard, as that only applies to the manufacturer. This concept has been carried forward in the indemnification statute, A.R.S. §12-684, where a retailer's actual knowledge of defect, but not its constructive knowledge, bars indemnity.

Component Part Manufacturer's Duty to Warn

A component part manufacturer can have a duty to warn not only the purchaser and/or assembler but also the ultimate user. In *Maake v. Ross Operating Valve Co.*, 717 P.2d 923 (Ariz. Ct. App. Div. 2, 1985), plaintiff's hand was crushed while operating a power press. The component supplier, Ross, manufactured and sold two

palm buttons and a pneumatic valve which constituted the actuating system for the press. Plaintiff's expert testified that there were numerous warnings owed by the component supplier. The court rejected warnings regarding placing hands in the operating area and using hand tools to place and remove objects in the die area, holding that those warnings did not apply to Ross. However, the court held that Ross, the component supplier of the actuating system, did have a duty to warn regarding the actuating system and, specifically, a duty to warn that the cycle could repeat, unless additional components were added. Similarly, *Anguiano v. E. I. DuPont DeNemours,* 47 F.3d 806 (9th Cir. 1995), held that a component supplier may have a duty to warn of dangers from its component which is aware of an application that could pose a danger.

Warning to Learned Intermediary May Not Suffice

The Arizona appellate decisions somewhat conflict on whether an adequate warning to a learned intermediary is sufficient to fulfill the duty to warn. In *Davis v. Cessna*, 893 P.2d 26 (Ariz. Ct. App. Div. 1, 1994), the court stated, "The manufacturer's duty to warn is ordinarily satisfied if given to the specialized class of people that may prescribe or administer the product." Teledyne was held to have satisfied its duty to warn by warning Cessna regarding pumping fuel from an auxiliary pump into the engine and the risk of flooding the engine.

However, in *Dole Food Company v. North Carolina Foam Industries, Inc.,* 935 P.2d 876 (Ariz. Ct. App. Div. 1, 1996), the court held that it was an issue of fact whether a warning to the sophisticated intermediary would suffice. Relying on the Restatement (Second) of Torts, §388, the court held that there were four factors to consider to determine if a manufacturer fulfilled its duty to warn by warning the intermediary. These factors are the likelihood of harm if a warning is not given to the ultimate user, the nature of the possible harm, the probability that the intermediary will pass along the warning and the difficulty for the manufacturer to warn the ultimate user.

The court in *Dole Food* also noted that the learned intermediary doctrine has also been called the knowledgeable user defense or the bulk supplier defense. *Shell Oil Co. v. Gutierrez,* 581 P.2d 271 (Ariz. 1978), dealt with a bulk supplier and applied the same four factors as in *Dole Food*.

In *Watts v. Medicis Pharmaceutical Corporation*, 365 P.3d 944 (Ariz. 2016) the Court analyzed the learned intermediary doctrine and reiterated that a manufacturer is not liable if it adequately warns the learned intermediary. However, if the manufacturer fails to adequately warn the intermediary, it can be directly liable to plaintiff. The court rejected the New Jersey "direct to consumer" exception to the learned intermediary doctrine.

Is It Possible to Delegate the Duty to Warn to Third Parties?

Arizona courts would not be likely to allow delegation of the manufacturer's duty to warn given the case law discussed above regarding the learned intermediary.

However, *Shell Oil Company v. Gutierrez,* 581 P.2d 271 (Ariz. Ct. App. Div. 2, 1978), does recognize out of state cases, *Martinez v. Dixie Carriers, Inc*., 529 F.2d 457 (5th Cir. 1976), and *Jacobson v. Colorado Fuel and Iron Corp*., 409 F.2d 1263 (9th Cir. 1969), which hold that there is no duty to warn "professional employees" since the employer could be expected to do so.

Is It Necessary to Warn Sophisticated User?

Yes. In Arizona, a manufacturer has a duty to warn sophisticated users of the product. For instance, Teledyne was required to warn Cessna of potential flooding of its engines in *Davis v. Cessna,* 893 P.2d 26 (Ariz. Ct.

App. Div. 1, 1994). A physician prescribing a medical device is required to be warned. *Fiore v. Collagen Corporation*, 930 P.2d 477 (Ariz. Ct. App. Div. 1, 1996). Monsanto was required to warn Callaway Mills of its fiber for use in carpets in *d'Hedouville v. Pioneer Hotel Company*, 552 F.2d 886 (9th Cir. 1977). However, *Young v. Environmental Air Products, Inc.,* 136 Ariz. 206, 665 P.2d 88, *aff'd as modified* 136 Ariz. 58, 665 P.2d 40 (Ariz. Ct. App. Div. 2 1982) disallowed workmen's recovery when foreman was properly advised.

Is an Expert Required?

No, an expert is not absolutely required. In *Shell Oil Company v. Gutierrez,* 581 P.2d 271 (Ariz. Ct. App. Div. 2, 1978), the court stated, "The jury was as competent as any expert to determine whether the 'FLAMMABLE LIQUID' label was adequate…" Arizona has two tests to determine if a product is defective. One of those is the consumer expectation test. If the issue falls within the ordinary knowledge of a lay person, no expert is required. In *Long v. TRW Vehicle Safety Systems*, 796 F.Supp.2d 1005 (D. Az. 2011), the court held that an expert was not required and that the failure of a seat belt to secure passengers in a rollover accident was within the ordinary knowledge of lay persons. However, in *Baroldy v. Ortho Pharmaceuticals*, 157 Ariz. 574, 760 P.2d 574 (Ariz. Ct. App.Div.1, 1988), the court held that knowledge of pharmaceutical labeling was not known by lay persons and experts were required.

Post-Sale Duty to Warn

There is no post-sale duty to warn if the product as manufactured was free of defect. However, there is a post-sale duty to warn if a manufacturer, subsequent to the sale, learns that there was a defect when the product left its hands. This rule is explained in *Wilson v. United States Elevator,* 972 P.2d 235 (Ariz. Ct. App. Div. 2, 1998). In *Wilson,* plaintiff argued that the manufacturer should be liable for failing to notify known customers of an improved door opening system. Plaintiff did not claim that the original door opener was defective. The court held, after a review of case law from across the country, quoting a Pennsylvania appellate court: "Where, as here, no initial duty to warn exists, none can be said to continue."

Conklin v. Medtronic, 418 P.3d 912 (Ariz. Ct. App. Div. 1, 2017) recognizes a post-sale duty to warn with respect to a medical device.

Duty to Warn Pre-Empted

Arizona has held that the duty to warn can be pre-empted. In *Dillon v. Zeneca Corporation,* 42 P.3d 598 (Ariz. Ct. App. Div. 2, 2002), the court held that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) pre-empted any state law warning claim because the Act prohibited states from imposing different labeling requirements. However, in the earlier case of *Fiore v. Collagen Corporation,* 930 P.2d 477 (Ariz. Ct. App. Div. 1, 1996), the court declined to apply pre-emption to the Medical Device Amendments to the FDA.

Conklin v. Medtronic, 418 P.3d 912 (Ariz. Ct. App. Div 1, 2017) recognized that Federal law pre-empts a claim that the product manufacturer of a medical device failed to warn plaintiff. However, the court held that a plaintiff could sue the product manufacturer for its failure to advise the FDA of post-sale adverse consequences. Plaintiff would have to prove that the FDA would have acted on the adverse information in time to have prevented plaintiff's use of the product.

Restatement Third Adopted?

Arizona has not formally adopted the *Restatement (Third*). However, Arizona typically applies the Restatement when there is no Arizona precedent. In *Powers v. Taser*, cited above, the court, while declining to adopt a section of *Restatement (Third)* on the hindsight test, recognized that it normally follows the *Restatement,* absent controlling state precedence.

Watts v. Medics Pharmaceutical, 365 P.3d 944 (Ariz. 2016), while not formally adopting Restatement 3rd, relied on it extensively in its ruling. It would be difficult for any party to argue that Arizona does not follow the Restatement 3rd.

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