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ARIZONA GOVERNMENTAL TORT CLAIMS ACT

Drafted and Adopted

by

Governor's Commission

on

Governmental Tort Liability

December 16, 1983
Phoenix, Arizona

with

Majority and Minority

Reports

DEPARTMENT OF
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MAJORITY REPORT

OF

THE GOVERNOR'S COMMISSION

ON

GOVERNMENTAL TORT LIABILITY

The Governor's Commission on Governmental Tort Liability was established by The Honorable Bruce Babbitt at the close of the Thirty-Sixth Legislative Session of the State of Arizona. The Commission was charged with the responsibility for completing an in-depth study of the previously abolished rule of governmental tort immunity with the goal of proposing a recommended course of legislative action. Dean Roger C. Henderson of the University of Arizona College of Law was appointed to chair the Commission which consisted of ten members who represented various constituencies in the state. The membership of the Commission is shown below:

Roger C. Henderson, Chairman
Dean and Professor of Law
University of Arizona College of Law

Dale Chastain
Southern Arizona Homebuilders Ass'n.

David Childers
Acting Director
Risk Management, Dept. of Administration

Jack DeBolske
Executive Director
Arizona League of Cities and Towns

Jay Hansen
Insurance Industry Representative

William R. Jones, Jr.
Attorney at Law

Robert Kennerly
Yuma County Board of Supervisors

Jack Levine
President
Arizona Trial Lawyers Ass'n.

Richard McAnally
Attorney at Law

William Ordway
Director
Dept. of Transportation

Daniel Salcito
Attorney at Law

Ex-Officio Members

Honorable Don Jansen
House of Representatives

Martin Willett
Staff Director and Majority Attorney
Senate

Andrew Hurwitz
Lawrence Hecker
Office of the Governor

The Commission first met on June 24, 1983 and concluded its work on December 16, 1983. A total of six meetings were held. All meetings were announced in advance and were open to the public. The Commission members initially were provided with a considerable amount of written material pertaining to the matter of governmental tort liability. In addition, ample opportunity was afforded for each member of the Commission as well as other interested persons to make written and oral presentations to the Commission. Among others, representatives of the Arizona Department of Administrative Services (Risk Management), Arizona Department of Correc-

tions, Arizona Department of Transportation, Arizona Trial Lawyers Association, Phoenix Building Safety Department, Phoenix Police Department and Southern Arizona Homebuilders Association appeared before and provided information to the Commission. Several members of the Arizona legislature, legislative staff, representatives of the press, representatives of the Arizona Public Employees Association and others attended one or more of the Commission meetings.

At the October 6, 1983, meeting of the Commission, the chairman presented a tentative draft of a governmental tort claims act. This draft was based on the information presented to and the discussions held by the Commission at the previous three meetings which were devoted to marshaling information and discussing the issues concerning governmental tort liability in Arizona. Although there was no evidence presented to the Commission that led the majority of the members to conclude that a serious problem currently exists with regard to the management of tort liability exposure by governmental entities in Arizona in general, there was agreement that certain specific problem areas needed to be addressed and that overall legal guidelines should be embodied in a comprehensive tort claims act in the wake of the decision of the Supreme Court of Arizona in Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982). In Ryan, the Court overruled the vestiges of governmental immunity expressed in Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969) stating:

> We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery. * * * Thus, the parameters of duty owed by the state will ordinarily be coextensive with those owed by others. In this case, for instance, it appears that the existence of duty is dependent upon the application of the provisions of Restatement of Torts § 319.
>
> We are well aware that by removing the public/private duty doctrine, we have not solved all of the problems in this area. In electing to treat the state like a private litigant, we must hasten to point out that certain areas of immunity must remain. The more obvious of such immunities are legislative immunity, judicial immunity, and high-level executive immunity. We encounter difficulty when the alleged negligence occurs in quasi-judicial context. This court has already faced a portion of the problem in Grimm, supra, [footnote omitted] wherein a majority of the court held that members of the Board of Pardons and Paroles have only partial immunity from suit and can be held liable for grossly negligent or reckless acts.
>
> The federal courts in applying the Federal Tort Claims Act, 28 U.S.C. § 1346(b), have had trouble with the exemption of "discretionary acts." 28 U.S.C. § 2680(a). The federal statute does not define discretionary acts and the courts have struggled with its meaning. * * * We hope to avoid the semantic legerdemain involved in applying a "discretionary acts" exception to state liability for negligent acts. We deem an ad hoc approach to be most appropriate for the further development of the law in this field. We do not recoil from the thought that the legislature may in its wisdom wish to intervene in some aspects of this development.

After the first tentative draft was discussed at the October 6, 1983 meeting, suggested revisions to the act were drafted and circulated to the Commission members with a request that further comments and suggestions be made in writing to the Chairman so that the latter might be circulated for review by members prior to the next scheduled meeting on November 3, 1983. The November meeting was rescheduled twice

and ultimately convened on December 9, 1983. Other than one minor change, no written suggestions or comments regarding the second tentative draft were received by the Chairman prior to the December 9, 1983 meeting. At the December 9 meeting a motion was made, and duly seconded, that the Commission adopt the second tentative draft with certain amendments. It was agreed that another meeting should be scheduled so that all Commission members might make arrangements to attend and vote on the motion. This meeting was schedule for December 16, 1983.

Prior to the December 16, 1983 meeting, a proposed final draft of the act containing the amendments advanced at the December 9 meeting was circulated to Commission members. In response a set of amendments to the proposed final draft was also circulated to the Commission members (see Minority Report). At the December 16, 1983 meeting, a motion was made by Richard McAnally to adopt the proposed final draft. The motion was seconded by Jay Hansen. A further motion was made by Jack DeBolske, seconded by David Childers, to amend the McAnally motion by adopting the set of amendments which had been circulated. After some discussion and statements by Commission members, the question was called on the motion to amend the McAnally motion. The following voted in favor of the motion to amend:

David Childers
Jack DeBolske
William R. Jones, Jr.
Robert Kennerly
William Ordway

The following voted in opposition to the motion:

Dale Chastain
Jay Hansen
Jack Levine
Richard McAnally
Daniel Salcito

The Chair then voted against the motion to amend and it failed by a vote of 5 to 6.

The question was called on the McAnally motion. The Commission members again divided in their votes as they had on the motion to amend. Those who voted against the motion to amend voted in favor of the McAnally motion and those who voted in favor of the motion to amend voted against the McAnally motion. The Chair then voted in favor of the motion and it passed 6 to 5.

In conclusion, a majority of the Commission feels that the proposed Arizona Governmental Tort Claims Act is a fair and workable solution to any problems presently facing governmental entities in Arizona. The Act attempts to balance citizen rights and governmental responsibilities in such a way as to provide compensation for victims harmed through the fault of governmental employees without unduly hampering these employees in their efforts to carry out their duties. A majority of the Commission has concluded that government can function adequately under the present system as modified by the Act. To go further at this time, as suggested by a minority of the Commission, is not only unnecessary, but would strike the balance in a way that would absolve governmental entities from having to take responsibility for actions which they are fully capable of controlling through sound risk management practices. Thus, the undersigned fully

support the Act as proposed and urge that it be adopted without modification by the Arizona legislature.

Roger C. Henderson, Chairman

Dale Chastain

Jay Hansen

Jack Levine

Richard McNally

Daniel Salcito

SUMMARY

ARIZONA GOVERNMENTAL TORT CLAIMS ACT

The Arizona Governmental Tort Claims Act strikes a balance between the inherently unfair and inequitable results which occur to citizens of the state in the strict application of the traditional tort doctrine of sovereign or governmental immunity and the need for governmental immunity in limited situations because of the unique role of government and because of competing policy and fiscal considerations. While it is not a tort for government to govern, it is fundamental to the nature of any democratic legal system that the government be bound by the same laws that it would apply to its citizens. Thus, the Arizona Governmental Tort Claims Act declares in Section 12-820, as a general policy, that all governmental entities shall be liable for the tortious acts and omissions of their employees in the same manner and to the same extent as a private person or entity.

Accidents in modern industrial societies are inevitable, but prudence dictates that there be incentives to reduce accident losses to the minimum and that appropriate fiscal systems be maintained to compensate victims. The tort-liability insurance system that has evolved in the United States attempts to place responsibility for accident avoidance and compensation on those who as a result of fault cause injury to persons and property. In this respect, governmental entities in the main are no different from large corporations and others and similarly should be held accountable.

Immunity should be the exception rather than the rule and even then the citizens should demand that strong reasons exist for any exceptions. A victim seriously injured at the hands of an immune governmental entity in many instances not only becomes a burden to the immediate family but often ends up as a burden to another governmental agency and ultimately to the public. Thus, it is false economy for the government to attempt to enjoy privileges that citizens would not indulge for themselves. Moreover, the usual incentives to reduce accidents and to protect lives and property are missing when immunity exists. This runs counter to public demands for responsibility in government.

It should be remembered that private citizens are not liable for harm to persons and property unless the victim establishes that the harm was brought about through the fault of the defendant. The victim must establish that the defendant owed a duty of care, that this duty was breached, and that the breach caused the harm or that the defendant intentionally caused the harm. In only a few situations is liability imposed without regard to fault and these would rarely apply to government activities. In addition, the victim may be barred from recovery as a result of his or her contributory fault. Thus, the Act does not impose any greater burden on governmental entities than is already shouldered by private citizens.

The Arizona Governmental Tort Claims Act does provide for immunity in certain justifiable situations. First, Section 12-820.01 confirms existing law with regard to public

officers. Immunity of public officers is to be distinguished from immunity of the government itself. For example, by common law decision judges and certain other members of the judicial system are granted immunity as individuals. Thus, an action will not lie against a judge while acting in the course and scope of the office. By virtue of the judge's immunity, the government, which employs the judge, is also immune. However, the opposite result does not follow just because the governmental entity is immune. For example, if a law enforcement officer uses excessive force in perfecting an arrest, the officer, who is not a judge, legislator or other high public official enjoying the immunity provided to these public officers, is subject to liability as an individual and may be responsible for paying any judgment from personal resources. This is true even if the employing governmental entity is immune as was the situation under common law. If the officer is acting within the course and scope of his employment, the governmental entity, as his employer, is subject to liability under the doctrine of respondeat superior only where governmental immunity has been abolished. In that situation, the state also would be responsible for any judgment. The distinction lies in the difference in being subject to personal liability as an individual as contrasted to the governmental entity being liable in its corporate capacity. Section 12-820.01 preserves the immunity for individuals such as judges, legislators, high government officials such as the governor, and any other public officers who enjoy such immu-

nity. The Act does not alter or modify the law for these individuals.

With regard to the immunity of governmental entities in their corporate capacities, the Act makes a distinction between activities which are absolutely immune and those which are partially or qualifiedly immune. Section 12-820.02 recognizes absolute immunity for judicial and legislative acts or omissions. These are traditional immunities which all agree must exist to preserve and further our democratic form of government. The Act also recognizes absolute immunity for administrative acts and omissions involving the determination of fundamental governmental policy. The choice of the language "fundamental governmental policy" is taken from Sections 895B and 895C of the Second Restatement of Torts which was adopted in 1977 by the American Law Institute. It is an attempt to avoid the perplexities surrounding the term "discretionary act" which is found in the Federal Torts Claim Act and in a number of other state acts. As noted in the quotation from the Ryan case set out previously, the judicial interpretations of the latter term have left too much uncertainty as to when government will and will not be subject to liability and the courts of Arizona should not be burdened with the baggage that such a term carries with it. The act goes further and attempts to provide examples of the types of acts and omissions involving fundamental governmental policy and those are set out in subsection (B) of Section 12-820.02. Although it is not possible to detail in a statute every situation involving the determination of fundamental govern-

mental policy and it is necessary that these situations be identified by the courts as they arise, in the process of doing so the judiciary should pay heed to the following excerpt from Comment(d) to Section 895B of the Second Restatment of Torts:

> d. Administrative functions. Like the legislative branch of the government, the executive branch is coordinate with the judicial branch. But within the scope of the executive branch are many agencies, officers and employees that are merely administrative. The State does not retain immunity for all of the acts or omissions that they perform. It is only when the conduct involves the determination of fundamental governmental policy and is essential to the realization of that policy, and when it requires "the exercise of basic policy evaluation, judgment and expertise" that the immunity should have application. Evangelical United Brethren Church of Adna v. State, (1965) 67 Wash. 2d 246, 255, 407 P.2d 440, 445. The purpose of the immunity is "to insure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government . . . [if] such a policy decision, consciously balancing risks and advantages, took place." Johnson v. State, (1968) 69 Cal.2d 782, 794, 73 Cal. Rptr. 240, 249, 447 P.2d 352, 361. This means that the court should show self-restraint and not itself seek to make a policy decision that is better left to the administrative officials.

As contrasted with those situations calling for absolute immunity, Section 12-820.03 provides for qualified immunity for a number of other situations that have a common denominator. In all of these situations, the governmental entity has not injured a person or property directly through the acts of its employees. The injury has been inflicted by a private citizen for whom the government has been given the responsibility of control. For example, where an inmate of a correctional facility escapes and tortiously causes harm to a member of the public, the inmate is the immediate actor causing

harm. The governmental entity breached a duty, if it breached it at all, in failing to adequately control the inmate because it should have foreseen that the inmate would be likely to cause this type of harm if allowed to escape. A majority of the Commission felt that these situations placed governmental entities in a peculiarly vulnerable position in that, by hindsight, it is always easy to see how the incident could have been prevented. Yet, in many of these situations the government must be given some leeway in regulating or controlling the private citizen, whether it be a building subcontractor, inmate or parolee, to permit work to progress or to facilitate some goal such as rehabilitiation. Thus, to second guess the decisions of governmental employees in these areas on the basis of whether ordinary care was exercised under the circumstances might well lead to overly rigid and sometimes repressive actions which would be counterproductive and at odds with public policy in the long run. However, more egregious conduct should not be overlooked or tolerated; else the public will lose faith in those who are charged with the responsibility of carrying out the governmental duties involved. Although immunity is provided for ordinary, good faith mistakes, government should be responsible for more serious failures to protect members of the public as it has been charged. This type of dichotomy is supported by the decision of the Supreme Court of Arizona in Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977).

In addition to the two types of immunity provided in the Act, certain affirmative defenses are made available to governmental entities and their employees. These are set out in Section 12-820.04. First, neither the government nor its employees are liable for any damages which are attributable to the fault of the claimant and any damages sustained by the claimant shall be reduced in proportion to that fault. Second, a "state of the art" defense is provided for plans or designs for highways and other public improvements. Subsequent changes in technology will not invoke a standard different from that in existence at the time the plan or design was prepared. This, however, does not absolve the responsible governmental entity from a duty to exercise reasonable care in warning about hazards, such as a narrow bridge or a dangerous curve, even where at the time the highway was designed and built the "state of the art" was such that the hazard could not have been eliminated. Finally, there shall be no liability on the part of the government or its employees where an accident is caused by the fault of a drunk driver even where the governmental entity also may be at fault in some causal way in contributing to the accident. This defense, however, is not intended to apply to the situation where, due to the influence of intoxicating liquor, a government employee tortiously injures a third person as a result of driving a motor vehicle while on the job. In this case, the governmental entity and the employee would be subject to liability just as would a private employer and employee.

Most employers in the private sector carry liability insurance to protect their employees as well as themselves against tort liability for personal injury and property damage. On the other hand, some governmental entities are large enough that self-insurance becomes feasible for part or all of some activities. Section 12-820.05 provides that a government employee will be treated as an insured for purposes of tort actions brought against the employee while acting in the course and scope of the employment. This is the case regardless of whether the governmental entity for whom the employee works self-insures or purchases insurance in the private market. However, protection is not afforded to an employee who acts maliciously or whose conduct is criminal.

Section 12-820.06 merely reiterates current law that punitive damages are not assessable against the government because such damages would not achieve the purposes which underly such awards. However, acts of employees which are egregious enough to warrant exemplary damages should not go unpunished any more than their counterparts in the private sector. Thus, government employees are held to the same standard and are subject to exemplary damages to the same extent as private employees and other citizens.

The remainder of the Act contains provisions concerning limitation periods, service of summons, venue and court costs and does not work any serious changes in existing law with one possible exception. The bill repeals Section 12-821, Arizona Revised Statutes. This section provides that persons having claims on contract or for negligence against the

state, which have been disallowed, may bring an action thereon against the state and prosecute the action to final judgment. The same result is accomplished in the Act under Section 12-820 for tort actions as it authorizes such actions against the state and other governmental entities in the same manner and to the same extent as a private person or entity. However, the Act, since it is a tort claims act, does not deal with contract actions. Although it may not be necessary as a legal matter to have a statutory provision authorizing contract actions since there is common law precedent for such, it probably would be prudent to remove any doubt by enacting a separate statute authorizing contract actions against governmental entities. In addition, a separate statute prescribing uniform notice and claim procedures for all types of claims, including tort and contract, against state and local governmental entities in Arizona should be enacted.

ARIZONA GOVERNMENTAL TORT CLAIMS ACT

1 Be it enacted by the Legislature of the State of
2 Arizona:
3 Sec. 1. Legislative purpose and intent
4 A. The legislature recognizes the inherently unfair
5 and inequitable results which occur in the strict application
6 of the traditional tort doctrine of sovereign or governmental
7 immunity. On the other hand, while a private person or enti-
8 ty may appropriately be held liable for certain wrongful con-
9 duct under common law tort doctrines, governmental entities
10 in many instances occupy different and unique roles in our
11 society. While the legislature recognizes that in general
12 governmental entities should be responsible for the tortious
13 acts and omissions of their employees, it is not a tort for
14 government to govern. It is also well within the province of
15 government, through its elected representatives, to decide
16 that conduct which might otherwise be tortious if engaged in
17 by private persons or entities be absolutely or qualifiedly
18 immune from liability because of the unique role of govern-
19 mental entities in our society and because competing policy
20 and fiscal considerations take precedence over a rule of
21 liability. Consequently, it is hereby declared to be the
22 public policy of this state that governmental entities shall
23 be liable in tort within the limitations of and in accordance
24 with the fair and uniform principles established in this act.

1 All of the provisions of this act should be construed with a
2 view to carry out the above legislative purpose.
3 B. This act shall be known and may be cited as the
4 "Arizona Governmental Tort Claims Act."
5 C. This act is supplemental to existing statutes and
6 shall not be construed as repealing or amending such statutes
7 except where a specific statute is identified as being re-
8 pealed or amended.
9 D. The provisions of this act apply to causes of ac-
10 tion which arise after the effective date of the act.

11 Sec. 2. Heading change
12 The article heading of title 12, chapter 7, article 2,
13 Arizona Revised Statutes, is changed from "ACTIONS AGAINST
14 THE STATE ON CONTRACT OR FOR NEGLIGENCE" to "ARIZONA
16 GOVERNMENTAL TORT CLAIMS ACT".

17 Sec. 3. Title 12, chapter 7, article 2, Arizona Revised
18 Statutes, is amended by adding sections 12-820 and 12-820.01
19 through 12-820.07, to read:

20 12-820. Liability of Governmental Entities
21 A. Except as otherwise provided in this act, a govern-
22 mental entity shall be liable for the tortious acts and omis-
23 sions of its employees in the same manner and to the same
24 extent as a private person or entity.

1 B. As used in this act, "governmental entity" means
2 the state of Arizona, any political subdivision and any
3 agency, board, commission, department, institution or instru-
4 mentality of the state or a political subdivision.
5 C. As used in this act, "employee" means an officer,
6 agent, servant, board or commission member of a governmental
7 entity and any other person acting on behalf of the govern-
8 mental entity in any official capacity, temporarily or perma-
9 nently in the service of the governmental entity, whether
10 elected or appointed or with or without compensation, but the
11 term employee shall not mean a person or other legal entity
12 while acting in the capacity of an independent contractor.

13 12-820.01. Immunity of Public Officers
14 This act shall not be construed to affect, alter or
15 otherwise modify rules of tort immunity regarding public
16 officers as developed at common law and as established under
17 the statutes and the Constitution of the state of Arizona.

18 12-820.02. Absolute Immunity
19 A. A governmental entity shall not be liable for acts
20 and omissions of its employees constituting:
21 1. The exercise of a judicial or legislative function;
22 or
23 2. The exercise of an administrative function involv-
24 ing the determination of fundamental governmental policy.

1 B. The determination of a fundamental governmental
2 policy shall include, but is not limited to, the exercise of
3 discretion:
4 1. In determining whether to seek or whether to pro-
5 vide the resources necessary for:
6 (a) the purchase of equipment;
7 (b) the construction or maintenance of facilities,
8 (c) the hiring of personnel, or
9 (d) the provision of governmental services.
10 2. In determining whether and how to utilize or apply
11 existing resources, including those allocated for equipment,
12 facilities and personnel.
13 3. In adopting or failing to adopt a law.
14 4. In terminating or reducing benefit programs for
15 public assistance.

16 12-820.03. Qualified Immunity
17 A governmental entity and its employees while acting in
18 the course and scope of their employment shall not be liable
19 in the absence of proof of conduct more culpable than ordi-
20 nary negligence for any claim which arises out of:
21 1. A decision relating to probation, parole, furlough
22 or release from confinement of a person detained in or com-
23 mitted or sentenced to a correctional facility;
24 2. A decision relating to the placement or nonplace-
25 ment of a person in an inpatient, outpatient, or combined
26 inpatient and outpatient treatment plan or to the discharge

1 or release of a patient detained in the Arizona state hospi-
2 tal or any other mental health facility;
3 3. The escape or attempted escape of a prisoner from a
4 correctional facility or from the custody of a law enforce-
5 ment officer;
6 4. A failure or refusal of a law enforcement officer
7 to make an arrest, to attempt an arrest, or to retain an
8 arrested person in custody;
9 5. The issuance of or failure to revoke or suspend any
10 permit, license, certificate, approval, order or similar
11 authorization; or
12 6. The failure to discover violations of a statute,
13 rule, regulation, code, ordinance, or any other provision of
14 law requiring inspections of property other than property
15 owned by the governmental entity in question.

16 12-820.04. Affirmative Defenses
17 In any tort action against a governmental entity or its
18 employees, neither the governmental entity nor any of its
19 employees while acting in the course and scope of their
20 employment shall be liable for any damages:
21 1. Which are attributable to the fault of the claimant
22 and the trier of fact shall reduce any damages sustained in
23 proportion to the amount of fault so attributable;
24 2. Arising out of a plan or design for construction of
25 or improvement to highways, roads, streets, bridges, or other
26 public property where such plan or design is prepared in sub-

1 stantial conformance with generally accepted engineering or
2 design standards in effect at the time of the preparation of
3 the plan or design, provided that adherence to such standards
4 does not absolve the governmental entity or its employees
5 from liability for failure to provide adequate warnings about
6 unreasonable hazards or dangers that are known or that should
7 have been known through the exercise of ordinary care.
8 3. Which are attributable to the fault of a person
9 driving a motor vehicle under the influence of intoxicating
10 liquor.

11 12-820.05. Defense of Employees
12 A. A governmental entity shall provide a defense to
13 its employee and be responsible for the payment of any judg-
14 ment on any claim or civil lawsuit against an employee for
15 money damages arising out of any act or omission within the
16 course and scope of his employment; provided that to the
17 extent that there is valid and collectible, applicable
18 insurance or any other right to defense or idemnification
19 legally available to and for the protection of such employee,
20 the governmental entity's duty hereunder to indemnify and/or
21 defend such claim on behalf of such employee shall be second-
22 ary to the obligation of such insurer or indemnitor, whose
23 obligation shall be primary.
24 B. The defense of its employee by the governmental
25 entity shall be undertaken whether the claim and civil law-
26 suit is brought in a state or federal court. The governmen-

1 tal entity may refuse a defense or disavow and refuse to pay
2 any judgment for its employee if it is determined that the
3 act or omission of the employee was not within the course and
4 scope of his employment or included malice or criminal
5 intent.

6 C. A governmental entity shall not be entitled to con-
7 tribution or indemnification, or reimbursement for legal fees
8 and expenses from its employee unless a court shall find that
9 the act or omission of the employee was outside the course
10 and scope of his employment or included malice or criminal
11 intent. Any action by a governmental entity against its
12 employee and any action by an employee against the governmen-
13 tal entity for contribution, indemnification, or necessary
14 legal fees and expenses shall be tried to the court in the
15 same civil lawsuit brought on the claim against the govern-
16 mental entity or its employee.

17 D. The fact that a governmental entity may relieve an
18 employee from all necessary legal fees and expenses and any
19 judgment arising from the civil lawsuit shall not under any
20 circumstances be communicated to the jury in the civil
21 lawsuit.

22 12-820.06. Punitive damages

23 A governmental entity shall not be liable for punitive
24 or exemplary damages.

1 12-820.07. Severability

2 If any provision of this Act or its application to any
3 person or circumstances is held invalid, the invalidity does
4 not affect other provisions or applications of the Act which
5 can be given effect without the invalid provision or applica-
6 tion, and to this end the provisions of this Act are sever-
7 able.

8 Sec. 4. Repeal

9 Section 12-821, Arizona Revised Statutes, is repealed.

10 Sec. 5. Section 12-822. Limitation; disability

11 A. The action authorized under section 12-820 shall
12 not be maintained unless commenced within two years after the
13 cause of action accrues.

14 B. A minor, OR an insane or incompetent person may
15 commence the action within the period provided for in sub-
16 section A of this section after the disability ceases.

17 Sec. 6. Section 12-824, Arizona Revised Statutes, is
18 amended to read:

19 12-824. Service of summons; change of venue

20 A. Service of summons in an action AGAINST THIS STATE
21 authorized in section 12-820 shall be made upon the governor
22 and attorney general. IN AN ACTION AGAINST A GOVERNMENTAL
23 ENTITY OTHER THAN THIS STATE THE SERVICE OF SUMMONS SHALL BE
24 MADE UPON THE GOVERNING BODY OF THE GOVERNMENTAL ENTITY.

1 B. IN AN ACTION AGAINST THIS STATE upon written demand
2 of the attorney general, made at or before the time of
3 answering, served upon the opposing party and filed with the
4 court where the action is pending, the place of trial of any
5 action shall be changed to Maricopa County.

6 Sec. 7. Section 12-825, Arizona Revised Statutes, is
7 amended to read:

9 12-825. Judgment for plaintiff; amount; interest and
10 costs
11 If judgment is rendered for THE plaintiff, it shall be
12 for the amount actually due from the ~~state~~ GOVERNMENTAL
13 ENTITY to THE plaintiff, with legal interest thereon from the
14 time the obligation accrued and with~~out~~ costs.

A MINORITY REPORT OF THE GOVERNOR'S COMMISSION ON GOVERNMENTAL TORT LIABILITY

We, the undersigned members of the Governor's Commission on Governmental Tort Liability, respectfully submit this minority report on the conclusions reached by the majority of the Commission.

The subject of tort claims against governmental entities is an extremely complex issue that cannot be resolved simply. We do not suggest that we go back to the doctrine of complete sovereign immunity. Nor do we suggest that government be liable for all its actions - like a private individual. Neither of these extreme positions would be in the best interest of the citizens as a whole. The correct approach in our opinion is to provide a balance between the rights of an individual citizen injured by his government and the necessity for our government to govern!

We respectfully disagree that the proposed Arizona Governmental Tort Claims Act strikes a balance between the two sets of rights. Nor do we feel that the split vote of the members of the Commission (six to five) reflects an overwhelming vote of confidence for the majority position.

We do agree, however, that the public policy question of what government should be liable for or immune from should be established by the Legislative branch of government rather than the Judicial branch of government.

After reviewing the draft of the Arizona Governmental Tort Claims Act, the undersigned submitted to the Commission a series of amendments which we felt brought the proposed Act into appropriate balance. These amendments were rejected on a vote of five to six. Consequently, we are hereby enclosing the proposed amendments as a part of this minority report to indicate our concerns on areas which were not adequately or appropriately covered in the proposed act. In our opinion, careful review of these amendments will indicate the lack of definitiveness, clarity and equity in the majority's recommendations.

It is our considered opinion that if the proposed Act were to become law, all governmental entities would be in an intolerable position and subject to endless litigation. For example, the Act contains the concept of "qualified immunity" but allows damages on proof of conduct more culpable than ordinary negligence (whatever the term is defined to mean). Also, the Act provides for pure comparative negligence whereby a person 90% at fault can recover from a governmental entity but does not allow for contribution among joint tort-feasors!

Consequently, we recommend that the proposed Arizona Governmental Tort Claims Act approved by the majority be amended to include the amendments which are respectfully submitted by the minority members of the Commission.

DAVID CHILDERS JACK DEBOLSKE BILL JONES

ROBERT KENNERLY BILL ORDWAY

AMENDMENTS TO PROPOSAL TORT CLAIMS ACT

1. Page 1, line 21, after "liability." Strike balance of line

   Page 1, strike lines 22, 23 and 24.

2. Page 2, strike lines 3 through 10.

   Page 2, after line 19, insert:

   "12-820 Title and Scope of Article

   A. This act shall be known and may be cited as the "Arizona Governmental Tort Claims Act."

   B. This act is cummulative and supplemental to existing statutes and case law and shall not be construed as repealing or amending such statutes or case law except where a specific statute or case rule is identified as being repealed or amended.

   C. The provisions of this act which modify existing law apply to causes of action which arise after the effective date of the act.

   D. The provisions of this act shall not be construed to affect, alter or repeal any provision of the workmens compensation laws of this state.

   E. Any waiver of immunity and assumption of liability contained in this act does not apply in circumstances in which liability has been or is hereafter assummed by the United States, to the extent of such assumption of liability."

3. Page 2, strike lines 20 through 24.

   Page 3, strike lines 1 through 12 and insert:

   "12-820 Definitions

   A. As used in this act, "governmental entity" means the state of Arizona, any political subdivision and any agency, board, commission, department, institution or instrumentality of the state or a political subdivision.

   B. As used in this act, "employee" means an officer, agent, servant, board or commission member of a governmental entity and any other person acting on behalf of the governmental entity in any official capacity, temporarily or permanently in the service of the governmental entity, whether elected or appointed or with or without compensation, but the term employee shall not mean a person or other legal entity while acting in the capacity of an independent contractor.

12-820.01 Liability of Governmental Entities

Except as otherwise provided by law, a governmental entity or public employee is liable for injury if the injury arises from the negligence of a public employee in the same manner and to the same extent as a private individual under like circumstances."

4. Page 3, line 13, Strike "Public Officers" and insert:

"Governmental Entities and Employees"

Page 3, line 15, strike "public"
line 16, strike "officers" and insert:

"governmental entities and employees"

5. Page 3, Strike line 22.
Page 3, after line 24, insert:

"3. The escape or attempted escape of a prisoner from a correctional facility or from the custody of a law emforcement officer;

4. A failure or refusal of a law enforcement officer to make an arrest, to attempt an arrest, or to retain an arrested person in custody;

5. The issuance of or failure to revoke or suspend any permit, license, certificate, approval, order or similar authorization;

6. The failure to discover violations of a statute, rule, regulation, code, ordinance, or any other provision of law requiring inspections of property other than property owned by the governmental entity in question; or

7. The exercise of the decision to provide or not to provide police, fire services or for the failure to provide sufficient police or fire services."

6. Page 4, line 19, strike "conduct more culpable than ordi-"
line 20, strike "nary negligence" and insert:

"gross negligence, recklessness, or more culpable conduct"

7. Page 5, strike lines 3 through 15 and insert:

"3. For failure to provide supervision of public places or public recreational facilities.

4. For failure to provide ordinary traffic signals, signs, markings or similiar devices.

5. An injury caused by a condition of any unimproved public property, including any natural condition of any lake, stream, river or beach.

6. For his entry upon any property if such entry is expressly or impliedly authorized by law. This paragraph does not exonerate a

public employee from liability for an injury proximately caused subsequent to such entry by his own negligent or wrongful act or omission. In the event property is condemned any damages for injury to the property from entry by a condemning party under section 12-1115 shall be recoverable as part of the damages in the condemnation action.

7. An injury as a result of the condition of a public street, highway or right-of-way if a cause of such injury was the unlawful use of such street, highway or right-of-way by any person including, but not limited to, the person injured.

8. An injury caused by the plan, design or construction of a street, highway or right-of-way if:

   1. Such plan, design or construction has been approved in advance of the construction by an employee authorized to exercise discretion in giving approval of the plan, design or construction.

   2. The court determines that there is any substantial evidence on the basis of which a reasonable public employee could have adopted the plan or design or approved the construction.

9. An injury caused by the defective condition of a street, highway or right of way if the public employee of the governmental entity maintaining the street, highway or right-of-way does not have actual notice of a defective condition or does not have a reasonable time within which to remedy, warn against or otherwise correct any defect of which it has actual knowledge."

8. Page 5, line 20, strike ":",
   strike lines 21 through 23,
   line 24, strike "2. Arising" and insert:

   "arising"

9. Page 6, line 7, after "care." insert:

   "For the purpose of this paragraph, "adequate warnings" shall mean those warnings which are mandatory under the manual of Uniform Traffic & Control Devices as required by Section _____ Arizona Revised Statutes."

10. Page 7, line 23, after "entity" insert:

    "and a public employee acting within the scope of his employment"

11. Page 8, line 9, after "12-821," insert:

    "12-822 and 12-823,"

    line 9, strike "is" and insert:

    "are"

12. Page 8, strike lines 10 through 16, and insert:

"Sec 5. Title 12, Chapter 7, Article 2, Arizona Revised Statutes, is amended by adding a new section 12-822, to read:

12-822. Authorization of claim against public entity or public employee

A. Persons having claims against a governmental entity or public employee shall file such claims within one year of the occurrence complained of. Any claim which is not filed within one year of the occurrence that is the subject of the claim shall be barred and no action may be maintained which arises out of such occurrence.

B. A claim against a governmental entity or public employee filed pursuant to this section shall be deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiraion of sixty days.

13. Page 8, line 24, after "ENTITY" insert:

"OR AS OTHERWISE PROVIDED BY LAW"

14. Renumber to conform

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WRITER'S DIRECT LINE
263-1714

January 4, 1984

Dean Roger Henderson
UNIVERSITY OF ARIZONA
College of Law
Tucson, Arizona 85721

Dear Dean Henderson:

This letter will serve as my minority of one report regarding the recommendations of the Commission.

First, it would be rude of me not to offer my appreciation and congratulations for a job well done in chairing this commission with its diverse membership and with the most difficult issues which the commission faced. Your good humor and patience were outstanding.

Second, as I indicated to you in the first meeting the vote and outcome of the commission's work was, in my opinion, predetermined. Unfortunately, people on the committee considered themselves "representatives" rather than statesmen. The 6 to 5 votes along strict party lines are simply reflective of that philosophy. The resultant report is, therefore, not a product of compromise but a product of who had the chairman's vote.

Third, speaking solely as a private citizen, the proposed legislation is totally unacceptable to me. Contrary to what you propose to say in your majority report there are significant and severe problems in the governmental area with the tort liability. As examples I am attaching hereto the Complaints recently filed in three cases, Noble vs. Maricopa County, Robert Bellville vs. City of Phoenix and Paaverud vs. City of Phoenix. I selected these as only three examples of the post-Ryan problems. I defy any member of the commission

to tell me how I am to answer a police officer's question "Do I chase a speeding offender or do I let him escape?" As to the thrust of your comment that financial disaster has not fallen upon the public entities, you are correct. The only reason it has not, however, is that simply there has not yet been time for it to occur. In my humble opinion as an attorney who has probably tried more governmental cases than anyone in the state, that financial disaster will fall within three to five years and the degree of harm it will cause will depend on whether or not the legislature acts responsibly to determine public policy in the governmental liability area.

Further, the bill, in my opinion, does not produce any significant relief to governmental entities. Let me suggest some specific areas where the problems are made because of the bill:

(a) The proposition that a state employee would be liable for punitive damages but the state should not is ludicrous when that is examined in the spotlight of reality. There is a statute, A.R.S. §41-621, which requires the state to cover all liabilities where employees are in the course and scope of their employment. Thus to suggest that the state is not liable truly begs the question. They may not be liable but the taxpayers will pay the bill for the employees.

(b) The proposed limited immunities are myth. I spent three years in law school and I have spent 21 years trying cases and I have not the foggiest notion what is meant by "negligence greater than ordinary negligence". Obviously this is nothing more than a litigation breeder and that term will mean precisely what jurors say it means. These limited immunities are no immunities at all and more importantly will lull unsuspecting entities into a false sense of security.

(c) The injection of pure comparative negligence into this bill is, I respectfully submit, another litigation breeder and contrary to the best interests of the people of the state. It is, in my opinion, contrary to good public policy to say that the taxpayers of the state or any of its cities or counties should pay an individual, whether a citizen of this state or not, who is 90% at fault in causing an accident. This, however, is

the result permitted under this bill.

(d) This bill does not address the issue of claim statutes. It is critical that that issue be addressed.

(e) While some attempt is made to relieve the state of liability to drunk drivers using the highways of the state, it is unclear whether that relief extends to the passenger of the drunk and it is further unclear as to whether the drunkenness must be the sole cause of the accident. Nothing is done to give the entities any relief from other unlawful uses of their highways.

(f) While the issue of comparative fault is injected into the bill, nothing is done to permit contribution between joint tortfeasors and to outlaw the Gallagher covenants which are causing havoc. Is this a product of compromise?

There specifically are a number of other areas which could be gone into in connection with this proposal. No useful purpose would be served by dragging this out at this time. The proposed bill gives the entities no relief, in many areas little or no relief and in many areas makes the situation worse.

Please feel free to submit this as a minority report or throw it away as you choose.

Very truly yours,

William R. Jones, Jr.
For the Firm

WRJ/dgl
Encs.

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69821.001
ATTORNEYS FOR Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DEBRA NOBLE, Plaintiff, vs. UNIVERSITY SHADOWS HOMEOWNERS ASSOCIATION, an Arizona corporation; SUNSET POOLS WEST, INC.,an Arizona corporation; TASCHNER COMPANY, INC., a Washington corporation; KOEHNLEIN ARCHITECTS, INC., an Arizona corporation; SHIPSHAPE POOLS, INC., an Arizona corporation; EDWIN TASCHNER and JANE DOE TASCHNER, husband and wife; CHARLES MARTIN and JANE DOE MARTIN, husband and wife; MARICOPA COUNTY, a political subdivision; CITY OF TEMPE, a political subdivision. Defendants.	No._____ COMPLAINT

Plaintiff alleges as follows:

I

Plaintiff is a resident of the State of Virginia.

II

The Defendants, Maricopa County and City of Tempe, are Arizona municipal Corporations. Defendants, Sunset Pools West, Inc., Koehnlein Architects, inc., and Shipshape Pools are Arizona corporations. Defendant Taschner Company, Inc. is a Washington corporation authorized to do business in Arizona.

III

The defendants Taschner and Martin are residents of Maricopa County, Arizona. Any actions taken by Edwin Taschner or Charles Martin were taken on behalf of the respective marital communities.

IV

John Does I-CC are persons, partnerships, corporations, or unincorporated associations subject to suit in a common name, whose names are unknown to plaintiff and who are designated by fictitious names pursuant to Rule 10(f), Rules of Civil Procedure. These defendants negligently caused plaintiff's injuries or are otherwise legally responsible for causing plaintiff's injuries. John Does I-XX are more particularly identified as all persons or entities who participated in developing and marketing the design of the pool and jacuzzi and all persons or entities who maintained the pool and jacuzzi described below.

V

At all times mentioned in this complaint, defendants were the agents, servants and employees of other defendants and were acting within the scope and course of this agency and employment.

VI

On and before April 18, 1981,defendants owned, possessed, operated, maintained, controlled, designed, constructed, approved and tested, and/or resided in all or part of, a certain University Shadows, Phase I, located at 2502 East University, Tempe, Arizona ("University Shadows").

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VII

On or about April 18, 1981, plaintiff was swimming in a jacuzzi and swimming pool at University Shadows with the permission of and at the invitation of a tenant or owner of University Shadows.

VIII

On or about April 18, 1981, plaintiff dove into the swimming pool from its edge and sustained severe neurological injuries which rendered her a quadriplegic.

IX

On or before April 18, 1981, defendants were negligent and their negligence caused the injuries sustained by plaintiff.

X

Defendants are engaged in the business of selling swimming pools and jacuzzis and designing these products, and sold these products in a defective condition unreasonably dangerous to users which reached plaintiff without substantial change in the condition in which it was sold, including but not limited to an unreasonable dangerous design, poor lighting, poor markings, and improper positioning of swimming pool and jacuzzi with respect to each other.

XI

On April 18, 1981, the swimming pool and jacuzzi were dangerous and unsafe for their intended and forseeable uses by tenants and their guests including plaintiff, because of the faulty design, construction, latent defects, inadequate maintenance and management, poor lighting, and other acts of negligence.

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XII

Defendants negligently failed adequately to warn plaintiff and other defendants of the unreasonably dangerous conditions of the pool, both before and after it was sold and this failure to warn constituted a separate defective and unreasonably dangerous condition of this product.

XIII

Defendants knew or had reason to know that the pool and jacuzzi presented an unreasonable risk of harm to users of the pool, especially at night and should have expected that users of the jacuzzi and pool would not discover or realize the danger, and failed to exercise reasonable care to make the condition safe or to warn users of the pool of the condition and the risk involved.

XIV

Plaintiff did not know or have reason to know of the unreasonably dangerous condition of the swimming pool and jacuzzi, nor of the risk involved.

XV

As a result of the negligence of defendants, and their failure to warn, and the unreasonably dangerous design and condition of the swimming pool and jacuzzi, plaintiff sustained the following injuries and damages:

a) Plaintiff sustained severe and permanent injuries and was rendered a quadriplegic;

b) Plaintiff has suffered and will continue to suffer for the remainder of her life, extreme pain, anxiety, and emotional distress;

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c) Plaintiff has lost earnings and sustained a permanent impairment to her earning capacity;

d) Plaintiff has incurred expenses for medical and nursing care and will be required to incur additional such expenses in the future;

e) Plaintiff will be forced to incur expenses for a wide variety of personal services and personal property in the future as a result of being a quadriplegic.

WHEREFORE, plaintiff requests judgment against each of the defendants for the following:

1. All medical expenses and related expenses incurred and to be incurred;

2. All loss of income and earning capacity;

3. All pain, suffering, anxiety, frustration, emotional distress and other general damages;

4. All other expenses for personal services and personal property to be incurred by plaintiff as a result of being a quadriplegic;

5. Such other and further relief as is proper under the circumstances.

DATED this_____day of February, 1983.

TREON, WARNICKE & ROUSH, P.A.

By_____
Dick Treon
Anthony R. Lucia
Arthur G. Newman
Attorneys for Plaintiff

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HMW:ljo 9/12/83

SPACE BELOW FOR FILING STAMP ONLY)

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CITY CLERK DEPT.

Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ROBERT R. BELLVILLE, Plaintiff, vs. CITY OF PHOENIX, a municipal corporation; JOHN DOES 1-5; JANE DOES 1-5, Defendants.	NO. C496402 COMPLAINT (Tort Motor Vehicle)

The Plaintiff, for his cause of action against Defendants, alleges as follows:

I.

Plaintiff is a resident of Maricopa County, Arizona; the Defendant City of Phoenix is a municipal corporation located in Maricopa County, Arizona; the events which gave rise to this cause of action occurred in Maricopa County, State of Arizona.

II.

On or about December 16, 1981, Plaintiff was riding a motorcycle on east McDowell Road proceeding towards the intersection with north Third Avenue in Phoenix, Arizona.

III.

Shortly prior thereto a car being driven by Mary Olga Thorborsen was being pursued by officers and agents of the Defendan City of Phoenix, and who are Defendants fictitiously named herein, and whose true names are not known at this time but will be set forth by future amendment hereof.

IV.

While pursuing Mary Olga Thorborsen, said officers of the Phoenix Police Department were negligent in the operation of their motor vehicles and in the handling of the pursuit of Thorborsen so as to cause a dangerous and hazardous situation for Plaintiff and other members of the travelling public on the roadways in question.

V.

In so doing, the City of Phoenix Police Officers violated Department standards and policies as well as standards recognized nationwide by law enforcement agencies, and were negligent.

VI.

As Plaintiff was proceeding on his motorcycle he entered the intersection of McDowell Road and Third Avenue on a green light and was struck by the vehicle being driven by Thorborsen, who passed through a red light in her attempt to flee from the Defendants who were in hot pursuit.

VII.

As a direct and proximate result of the aforesaid tortious acts of the Defendants, Plaintiff suffered severe and permanent

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bodily injury, including medical expenses, lost earnings and property loss, all to his damage.

WHEREFORE, Plaintiff prays for Judgment against the Defendants, jointly and severally, in an amount which will fairly and reasonably compensate him for his damages, for his costs of suit and for such further relief as the Court deems just in the premises.

DATED this 12th day of September, 1983.

LAW OFFICES OF H. MICHEAL WRIGHT, P.C.

By _____
H. Micheal Wright
Attorney for Plaintiff

A TRIAL BY JURY IS HEREBY DEMANDED ON ALL ISSUES.

EAL WRIGHT
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COPY

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and

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Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CATHERINE C. PAAVERUD, the surviving natural mother of ELDRED BERTRUM PAAVERUD, for and on behalf of herself and ELDRED ROESLER, the surviving natural father of ELDRED BERTRUM PAAVERUD, Plaintiff, vs. GOLD'S GYM, an Arizona corporation, partnership or business association; THE CITY OF PHOENIX, ARIZONA, an Arizona municipality; GILBERT N. CISNEROZ and JANE DOE CISNEROZ, his wife; HARRY NIXON and MARY ANN NIXON, his wife; HAROLD SCHNURER and JANE DOE SCHNURER, his wife; XYZ PARTNERSHIPS 1-X; BLACK & WHITE CORPORATIONS I-X, JOHN DOES I-X and JANE DOES I-X, Defendants.	No. C455640 COMPLAINT (Tort-Wrongful Death)

Plaintiff, by and through her attorneys undersigned, alleges as follows:

I

The Plaintiff is a resident of Maricopa County, Arizona and is the surviving natural mother of the decedent, ELDRED BERTRUM PAAVERUD, and the proper plaintiff to bring this action for and on behalf of herself and ELDRED ROESLER, the surviving natural father of the decedent.

II

The Defendant GOLD'S GYM is a corporation, partnership, or other business entity doing business in the State of Arizona. Plaintiff will seek leave to amend this Complaint when the true nature of this entity is known. Defendant GOLD'S GYM caused an event to occur in this State out of which the claim which is the subject of this complaint arose.

III

The Defendant CITY OF PHOENIX is a municipality incorporated within the State of Arizona.

IV

On information and belief, the Defendants GILBERT N. CISNEROZ and JANE DOE CISNEROZ, husband and wife, (CISNEROZ) were at all times relevant to this complaint, residents of Maricopa County, Arizona. Defendant GILBERT N. CISNEROZ was acting for and on behalf of the marital community consisting of himself and JANE DOE CISNEROZ. Plaintiff does not at the present time know the true name of JANE DOE CISNEROZ and, thus, sues her by this fictitious name. When her true name has been ascertained, Plaintiff will seek leave of this Court to amend the complaint to

(602) 263-3811

reflect her true name. Defendants CISNEROZ caused events to occur in this State out of which the claim which is the subject of this complaint arose.

V

On information and belief, the Defendants HARRY NIXON and MARY ANN NIXON, husband and wife, (NIXON) were at all times relevant to this complaint, residents of Maricopa County, Arizona. Defendant HARRY NIXON was acting for and on behalf of the marital community consisting of himself and MARY ANN NIXON. Defendants NIXON caused events to occur in this State out of which the claim which is the subject of this complaint arose.

VI

On information and belief, the Defendants HAROLD SCHNURER and JANE DOE SCHNURER, husband and wife, (SCHNURER) were at all times relevant to this complaint, residents of Maricopa County, Arizona. Defendant HAROLD SCHNURER was acting for and on behalf of the marital community consisting of himself and JANE DOE SCHNURER. Plaintiff does not at the present time know the true name of JANE DOE SCHNURER and, thus, sues her by this fictitious name. When her true name has been ascertained, Plaintiff will seek leave of this Court to amend the Complaint to reflect her true name. Defendants SCHNURER caused events to occur in this State out of which the claim which is the subject of this complaint arose.

VII

Defendants DOES I-XX, XYZ PARTNERSHIPS I-X and BLACK &

WHITE CORPORATIONS I-X are fictitious defendants. The true identities of these defendants and the specifics of their conduct are not presently known to Plaintiff. Plaintiff will seek leave of this Court to amend this complaint once the identifies of these defendants and the specifics of their conduct are discovered. Upon information and belief, these fictitious defendants caused events to occur in the State of Arizona out of which the claim which is the subject of this complaint arose.

COUNT I - NEGLIGENCE

VIII

Plaintiff incorporates, by reference, all allegations contained in the preceding paragraphs of this complaint.

IX

Defendants GOLD'S GYM, CISNEROZ, NIXON and SCHNURER, as owners, operators, lessors, or lessees of property located at 4747 North Central Avenue, Phoenix, Arizona, negligently installed or caused to be installed electrical wiring which created a risk of harm to the Plaintiff.

X

Defendants GOLD'S GYM, CISNEROZ, NIXON, and SCHNURER, as owners, operators, lessors, or lessees of property located at 4747 North Central Avenue, Phoenix, Arizona, knew or should have known that the condition of this electrical wiring subjected the Plaintiff's decedent to a risk of death by electrocution.

XI

The Defendant CITY OF PHOENIX had a duty to inspect the

subject premises for compliance with the appropriate City Codes, but negligently failed to discharge this duty.

XII

Defendants GOLD'S GYM, CISNEROZ, NIXON, and SCHNURER negligently allowed dangerous and defective electrical equipment to be operated by patrons of the premises at 4747 North Central Avenue, Phoenix, Arizona.

XIII

Defendants GOLD'S GYM, CISNEROZ, NIXON, and SCHNURER negligently allowed dangerous and defective electrical equipment to be operated in the vicinity of standing water on the premises of GOLD'S GYM at 4747 North Central Avenue, Phoenix, Arizona.

XIV

As a result of the negligence of the defendants described herein, Plaintiff's decedent ELDRED BERTRUM PAAVERUD received a fatal electrical shock on or about September 3, 1982 while on the premises of GOLD'S GYM at 4747 North Central Avenue, Phoenix, Arizona.

XV

The death of Plaintiff's decedent ELDRED BERTRUM PAAVERUD was proximately caused by the negligence of the Defendants described herein.

WHEREFORE, Plaintiff prays for judgment for compensatory damages in an amount to be proved at trial, costs incurred herein and for such other and further relief as to the Court seems just.

COUNT II - PUNITIVE DAMAGES

XVI

Plaintiff incorporates, by this reference, the allegation contained in the preceding paragraphs of this complaint.

XVII

Defendants GOLD'S GYM, CISNEROZ, NIXON and SCHNURER were aware that the condition of the premises, as described herein, created a substantial risk of death by electrocution.

XVIII

Despite this knowledge, Defendants GOLD'S GYM, CISNEROZ, NIXON and SCHNURER allowed Plaintiff's decedent to encounter unreasonably dangerous conditions. This conduct constituted wanton and willful negligence, reckless indifference to the safety of Plaintiff's decedent and entitles Plaintiff to an award of punitive damages.

XIX

The gross and reckless negligence of Defendants GOLD'S GYM, CISNEROZ, NIXON and SCHNURER proximately caused the death of Plaintiff's decedent as a result of a fatal electrical shock which occurred on or about September 3, 1982.

WHEREFORE, Plaintiff prays for judgment for punitive damages in an amount of ONE MILLION DOLLARS ($1,000,000), costs incurred herein and for such other and further relief as to the

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A PROFESSIONAL ASSOCIATION
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Court seems just.

O'CONNOR, CAVANAGH, ANDERSON,
WESTOVER, KILLINGSWORTH & BESHEARS

By _____
M. E. Rake, Jr.
Attorneys for Plaintiffs

and

HARALSON, KINERK & MOREY, P.C.

By _____
D. Dale Haralson
Attorneys for Statutory
Beneficiary and Surviving
Natural Father Eldred Roesler

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