

TORTS

The Clarification of the Duty Concept in Personal Injury Suits in Arizona

The Arizona Supreme Court recently analyzed the duty element of a negligence case in *Markowitz v. Arizona Parks Board*.¹ Justice Feldman, writing for the court, held that the existence of a duty of care is determined by the nature of the relationship between the parties, and not by the specific details of the defendant's conduct.²

THE FACTS OF *MARKOWITZ*

In June of 1975, fifteen-year-old David Markowitz was camping with several friends at Lake Havasu, a recreation area maintained and operated by the State of Arizona.³ Approximately sixty yards from their campsite, Markowitz and his friends found a "well-worn path" leading to what appeared to be a diving and swimming cove. Upon reaching that spot, Markowitz noticed about fifteen people wading or swimming in the water below. After observing a boy dive into the cove, but without checking its depth, Markowitz dove into the water. Markowitz hit his head on a shallow ledge, causing an injury which left him permanently paralyzed.⁴

The parties did not dispute the fact that the state had posted no warning signs at or near the diving area.⁵ Markowitz testified that had he seen such a sign, he would not have dived off the cliff. Since he observed no warning sign, noticed several people swimming in the water below, witnessed another person dive in before him and climbed a well-worn path leading to the spot, Markowitz believed he could dive safely.⁶

The trial court granted summary judgment in favor of the Arizona Parks Board, ruling that the state owed no duty of care to Markowitz.⁷ Affirming the trial court's decision, the court of appeals held that two factors

1. 146 Ariz. 352, 706 P.2d 364 (1985). For a discussion of the supreme court's earlier analyses of the duty issue in *Beach v. City of Phoenix*, 136 Ariz. 601, 667 P.2d 1316 (1983) and *Coburn v. City of Tucson*, 143 Ariz. 50, 691 P.2d 1078 (1984), see *infra* notes 37-51 and accompanying text.

2. 146 Ariz. at 354, 706 P.2d at 376.

3. The facts of *Markowitz* are set forth in 146 Ariz. at 354, 706 P.2d at 376.

4. Markowitz admitted he was an experienced swimmer and was aware of the danger inherent in diving into waters of unknown depth. In addition, Markowitz knew that one should check the water's depth before diving. Opening Brief for Appellant at 3, *Markowitz v. Arizona Parks Bd.*, 146 Ariz. 260, 705 P.2d 937 (Ct. App. 1984).

5. Petition for Review for Appellant at 2, 146 Ariz. at 354, 706 P.2d at 366 (1985).

6. *Markowitz v. Arizona Parks Bd.*, 146 Ariz. 260, 262, 725 P.2d 937, 939 (Ct. App. 1984).

7. 146 Ariz. at 353, 706 P.2d at 365.

combined to eliminate any duty the state may have owed to Markowitz.⁸ First, the court stated the risk involved in diving into water of unknown depth presented an open and obvious danger, thereby terminating any liability the state might incur from injuries caused by the risk.⁹ Second, as the condition of the cove was naturally, not artificially, created, the court held the cove did not present an unreasonable risk of harm to Markowitz.¹⁰

The Arizona Supreme Court reversed and remanded, holding that the state owed Markowitz a duty of reasonable care because he was an invitee.¹¹ This duty might, on some facts, require measures to prevent injuries to people invited to the recreation area.¹² Rejecting the court of appeals' no duty

8. 146 Ariz. 260, 705 P.2d 937 (Ct. App. 1984).

9. *Id.* at 264, 705 P.2d at 941. The state conceded that Markowitz was an invitee. 146 Ariz. at 355, 706 P.2d at 367. Under Arizona law, a possessor of land is under an affirmative duty to keep the land in a reasonably safe condition for use by invitees. *Tribe v. Shell Oil Co.*, 133 Ariz. 517, 652 P.2d 1040 (1982). However, a possessor is not liable to an invitee for injuries caused by dangerous conditions which were obvious to both the invitee and the possessor. *Id.* at 519, 652 P.2d at 1042. *See also* Daugherty v. Montgomery Ward, 102 Ariz. 267, 428 P.2d 419 (1967). But the mere fact that a dangerous condition is open and obvious does not mean that the land possessor necessarily escapes liability, particularly if the possessor had reason to know that the invitee might be injured by the condition despite its obvious nature. *Murphy v. El Dorado Bowl, Inc.*, 2 Ariz. App. 341, 409 P.2d 57 (1965). *See also* RESTATEMENT (SECOND) OF TORTS § 343A comment f (1976). Under *Markowitz*, the fact that a hazard may be open and obvious is not a factor to be used in determining whether a duty exists. It is only an element to be considered in deciding whether or not the defendant's acts or omissions breached a standard of care. 146 Ariz. at 356, 706 P.2d at 368. In other words, *Markowitz* says that the existence of an open and obvious danger is a question of fact relating to the breach of duty, but not the duty issue.

10. 146 Ariz. at 264, 705 P.2d at 941. This is a curious conclusion, as the cove was not created by natural conditions. Lake Havasu, and its beaches and inlets, were created when the Parker Dam was completed, backing up the Colorado River. Thus, the condition of the cove was created artificially, not by natural forces.

11. 146 Ariz. at 359, 706 P.2d at 371. A recently enacted Recreational Use Statute is germane to land use personal injury cases. ARIZ. REV. STAT. ANN. § 33-1551 (1983) provides that an owner does not owe any duty to a recreational user. Recreational users are defined as persons to whom permission to enter the premises has been granted or implied without the payment of an admission fee. Had this statute been in effect at the time of Markowitz' accident, it would not have barred his suit. He was a guest of a family who paid for admission into the park. Opening Brief for Appellant at 37, *Markowitz v. Arizona Parks Bd.*, 146 Ariz. 260, 705 P.2d 937 (Ct. App. 1984). If an admission fee is charged, this section does not apply. ARIZ. REV. STAT. ANN. § 33-1551(B)(2) (Supp. 1985).

12. 146 Ariz. at 356, 706 P.2d at 369. The supreme court also found that questions of fact existed as to whether the state breached its duty to Markowitz, rejecting the court of appeals' opinion that, as a matter of law, the state was not negligent. *Id.* at 358, 706 P.2d at 370. In addition, the supreme court held that the issue of proximate cause should have been sent to the jury, because reasonable persons could conclude the lack of warnings concerning the shallow water was the cause of Markowitz' injury. *Id.* at 359, 706 P.2d at 371.

The court reasoned that Markowitz' admissions regarding his knowledge of the danger of diving into shallow water raised contributory negligence issues, which under Arizona Constitution Art. 18, § 5 are for the jury and are not properly decided by summary judgment. *Id.* at 359, 706 P.2d at 371. This part of the court's decision is troublesome. In Arizona, the rules enunciated in *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), are the law. *See, e.g., McFarlin v. Hall*, 127 Ariz. 220, 222, 619 P.2d 729, 731 (1980); *West v. Cruz*, 75 Ariz. 13, 19, 251 P.2d 311, 315 (1952). One *Palsgraf* rule is that liability is imposed only where both the risk and the plaintiff are reasonably foreseeable. *McFarlin*, 127 Ariz. at 222, 619 P.2d at 731. *See also* RESTATEMENT (SECOND) OF TORTS § 281c comment c (1976). The supreme court in *Markowitz* held that there was enough evidence to support a finding that the state was negligent in failing to post warning signs announcing the danger of diving into the water. Assuming the state was negligent in this regard, then the plaintiff that would be foreseeably injured is one who had no prior knowledge of the risks involved in diving into waters of unknown depth. Marowitz, by his admissions, would not fall within this class of plaintiffs. PROSSER AND KEETON ON THE LAW OF TORTS, § 43, at 284-85 (W. Keeton, 5th ed. 1984) [hereinafter PROSSER & KEETON]. As the court points out, these facts raise an issue of fact

analysis, the supreme court stated that since the relationship between the state and Markowitz created a duty, the issue for the trier of fact was whether the state's conduct fulfilled its duty.¹³

This Comment will provide an overview of the concept of duty in negligence law and will examine the Arizona Supreme Court's approach to the problem. The analysis will include how Arizona courts have dealt with the duty question in the past and will examine *Markowitz's* effect on the methods by which the courts must now address the duty issue. Finally, the Comment will discuss the impact of *Markowitz* on future determinations of the existence of a duty.

THE DUTY RULE IN ARIZONA

Arizona follows the usual rule that before an action for negligence can lie, the defendant must be found to owe a duty of care to the plaintiff.¹⁴ The existence or nonexistence of a duty is a question of law for the court.¹⁵ Courts determine whether a duty exists by ascertaining whether there is a relationship between plaintiff and defendant creating an obligation to exercise reasonable care to prevent the plaintiff from injury.¹⁶ Once the court decides a duty exists, the duty is generally that of a reasonable and prudent person acting under the same or similar circumstances.¹⁷ This duty remains the same in all instances; whether the defendant's conduct satisfies or breaches this duty varies according to the circumstances of the event.¹⁸ The question of the fulfillment of the duty is generally one of fact for the jury.¹⁹

regarding contributory negligence; however, contributory negligence is an affirmative defense and must be raised and proved by the defendant. Merely because the same facts can relate to both issues of causation, which must be proved by the plaintiff, and contributory negligence does not mean they must necessarily be considered as relevant only to contributory negligence. *Id.* at 275-76, 452.

13. *Markowitz*, 146 Ariz. at 356, 706 P.2d at 368.

14. *Arizona Public Service Co. v. Brittain*, 107 Ariz. 278, 280, 486 P.2d 176, 178 (1971). See also RESTATEMENT (SECOND) OF TORTS § 281(a) (1976).

15. *Markowitz*, 146 Ariz. at 354, 706 P.2d at 366. See also PROSSER & KEETON, *supra* note 12, § 37, at 236.

16. *Markowitz*, 146 Ariz. at 354, 706 P.2d at 367. See also PROSSER & KEETON, *supra* note 12, § 53, at 356. In some situations, the status of plaintiff and defendant may give rise to a duty. For instance, a possessor of land owes a duty of care to an invitee, a lesser duty to a licensee and perhaps no duty to a trespasser. *Id.*, § 57-64, at 386-450. Other such relationships include physician/patient, *Hales v. Pittman*, 118 Ariz. 305, 308, 576 P.2d 493, 496 (1978); and attorney/client, *Matter of Weiner*, 120 Ariz. 349, 352, 586 P.2d 194, 197 (1978). A duty may also arise from a contractual relationship between plaintiff and defendant. PROSSER & KEETON, *supra* note 12, § 92, at 663. In the absence of a status relationship, Arizona courts will find a duty when the injury sustained was a foreseeable result of defendant's act or omission. *Arizona Public Service Co. v. Brittain*, 107 Ariz. 278, 280, 486 P.2d 176, 178 (1971). See also *City of Scottsdale v. Kokaska*, 17 Ariz. App. 120, 125-26, 495 P.2d 1327, 1332-33 (1972) (foreseeability of risk as an element of duty, negligence and causation).

17. *Beach v. City of Phoenix*, 136 Ariz. 601, 603, 667 P.2d 1316, 1318 (1983). Cf. D. DOBBS, TORTS AND COMPENSATION 309-10 (1985) (Physicians are held to a higher standard of care than that of a reasonable person. Their duty is defined by the standard of the applicable medical profession). A person's status as a licensee or trespasser will mean they are owed a duty less than that of reasonable care by the landowner. See PROSSER & KEETON, *supra* note 12, §§ 53-54, 57-64, at 356-64, 386-450.

18. *Beach*, 136 Ariz. at 603, 667 P.2d at 1318.

19. *Id.* at 604, 667 P.2d at 1319; see also PROSSER & KEETON, *supra* note 12, § 37, at 237. In determining the sufficiency of the evidence, however, the court may say that as a matter of law no issue of material fact exists on the negligence issue and direct a verdict for the plaintiff or defendant.

If the jury finds that the defendant breached the duty, the defendant is negligent.

THE ARIZONA SUPREME COURT REQUIRES A TWO-PART DUTY ANALYSIS

In *Markowitz*, Justice Feldman explained the determination of duty analysis not once, but twice, possibly because the lower courts frequently apply an incorrect analysis.²⁰ The court utilized a two-part duty analysis,²¹ developed in *Coburn v. City of Tucson*²² and *Beach v. City of Phoenix*.²³ The first step is for the court to examine the relationship between the parties to determine if the defendant owes a duty of care to the plaintiff.²⁴ If the court determines no duty exists,²⁵ the defendant is not liable for his acts even if he

This outcome will occur when the trial judge rules that a reasonable jury could not reach a contrary result. *Markowitz*, 146 Ariz. at 357, 706 P.2d at 369.

20. *Markowitz*, 146 Ariz. at 354-55, 706 P.2d at 366-67. The court rejected the court of appeals' duty ruling, stating that recent decisions had "evidently failed to clarify" the supreme court's view of the duty analysis. *Id.* at 356, 706 P.2d at 368.

21. 146 Ariz. at 356, 706 P.2d at 368.

22. 143 Ariz. 50, 691 P.2d 1078 (1984).

23. 136 Ariz. 601, 667 P.2d 1316 (1983). Justice Feldman also authored the *Beach* and *Coburn* decisions.

24. *Markowitz*, 146 Ariz. at 356, 706 P.2d at 368. See *supra* note 16, describing various methods whereby a court may arrive at a decision concerning the existence of a duty. See also Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953). Dean Prosser opines that courts may use other factors in deciding whether or not a duty exists in a particular case. Such factors include the guidance of history, society's ideas of morals and justice, the administrative convenience of the rule and a judgment of who should bear the loss. *Id.* at 15.

25. The rule that the duty problem is for the court to resolve is not followed in every jurisdiction. In California, if the existence of a duty is dependent on the foreseeability of risk, it becomes a jury question. *Weirum v. R.K.O. General, Inc.*, 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975). But if substantial countervailing public policy considerations are present, the court will decide the duty issue. *Id.* See also Comment, *The Death of Palsgraf: A Comment on the Current Status of the Duty Concept in California*, 16 SAN DIEGO L. REV. 793 at 796, 809-10 (1979). Such policy considerations include protection of certain relationships and institutions and reducing excessive awards. *E.g.* *Walters v. Sloan*, 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977) (Police officer injured while attempting to make an arrest at a teenager's party sued the teenager's parents. Held: parents owed no duty to police officer under the "fireman's rule," citing availability of worker's compensation and other special disability pensions); *Baxter v. Superior Court*, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977) (California Supreme Court affirmed dismissal of negligence suit based on loss of parent-child consortium because of policy of protecting family harmony). *Goodman v. Kennedy*, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976) (Attorney gave poor advice to his client and a third party relied on the advice to his detriment. Held: No duty owed to third party as a policy matter). New Jersey and Texas follow schemes similar to California regarding the courts' minimal role in deciding the duty issue. *Foreign Auto Preparation Service, Inc., v. Vicon Constr. Co.*, 193 N.J. Super. 420, 474 A.2d 1088 (1984); *Bennett v. Span Indus. Inc.*, 628 S.W.2d 470 (Tex. Ct. App. 1982).

Interestingly enough, Arizona courts have alluded that they may also, under some circumstances, send the duty question to the jury. In *Griffith v. Valley of Sun Recovery, Etc.*, 126 Ariz. 227, 613 P.2d 1283 (Ct. App. 1980), the court stated that if "there is a debatable question on the foreseeability of harm, then such an issue is ordinarily a question for the jury." *Id.* at 230, 613 P.2d at 1286. See also *Davis v. Mangelsdorf*, 138 Ariz. 207, 208, 673 P.2d 951, 952 (Ct. App. 1983), ("Absent a question upon which reasonable minds could differ, the question of whether a duty exists is one of law for the court."); *Arizona Public Service Co. v. Brittain*, 107 Ariz. 278, 280, 486 P.2d 176, 178 (1971) ("[W]here the establishment of duty, i.e. foreseeability of harm, varies as a result of factual distinctions, we have held . . . what is foreseeable is a question for the trier of fact."). See also F. HARPER & F. JAMES, *THE LAW OF TORTS*, § 18.8, at 1258-60 (1956). However, the supreme court in *Markowitz* was clear that the question of duty is exclusively one of law for the court. 146 Ariz. at 356, 706 P.2d at 368.

acted negligently.²⁶ Only when the court holds that a duty is owed does the inquiry turn to the second step: whether the defendant's conduct breaches that duty.²⁷ Once again, the defendant's standard of care usually must conform to that of a reasonable and prudent person acting under the same or similar circumstances.²⁸

Arizona courts have shown an unfortunate tendency to confuse the concepts of duty and negligence.²⁹ While recognizing that the plaintiff must prove the four elements of a personal injury suit, duty, breach of that duty (the negligence issue), causation and injury, Arizona courts tend to frame the duty question in terms of the specifics of the defendant's conduct.³⁰ Sometimes Arizona courts do not analyze the duty issue at all, but rather decide whether the defendant's conduct is negligent.³¹ In other instances, courts analyze duty in terms of the specific obligation the defendant owes the plaintiff.³² For example, Arizona courts have decided whether or not defendants have a duty to maintain cattle fences,³³ to keep water from flooding neighboring property,³⁴ or to remove keys from an unattended car³⁵ without analyzing whether the particular defendant owed a duty to the particular plaintiff.

The problem with approaching the duty issue in the above manner is

26. For example, in Arizona a social host owes no duty to an individual injured by a drunken guest. *Keckonen v. Robles*, 146 Ariz. 268, 705 P.2d 945 (Ct. App. 1985). Absent a special relationship, one has no duty to control the conduct of a third person to prevent him from harming another. *Davis v. Mangelsdorf*, 138 Ariz. 207, 673 P.2d 951 (Ct. App. 1983). Arizona follows the rule that an owner or occupier of land owes no duty to trespassers, other than to not willfully nor intentionally injure them. *Payne v. Greenberg Const.*, 130 Ariz. 338, 345, 636 P.2d 116, 123 (Ct. App. 1981).

27. *Markowitz*, 146 Ariz. at 356, 706 P.2d at 368. This principle is in accord with Prosser and Keeton's statement that an examination of the particulars of the defendant's conduct is relevant in determining if the duty has been satisfied and not in determining if a duty exists in the first place. PROSSER & KEETON, *supra* note 12, § 53, at 356. This viewpoint was specifically adopted by the Arizona Supreme Court in *Coburn v. City of Tucson*, 143 Ariz. at 52, 691 P.2d at 1080.

28. *See supra* note 17.

29. 146 Ariz. at 355, 706 P.2d at 367.

30. Although it has generally been resolved that the duty a defendant owes to a plaintiff is an issue distinct from the specifics of the defendant's conduct, there existed a debate among the commentators that duty should be defined in terms of conduct. *See generally Green, The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1925). Professor Green argues that framing a duty in terms of reasonable care under the circumstances means little and is not much help to the courts in deciding the duty issue. Without a clear scope of duty, a defendant will never know what duty he was supposed to obey until the case is decided. *Id.* at 1022-26. *But see* PROSSER & KEETON, *supra* note 12, § 53, at 356. In accord with Professor Green, Chief Justice Holohan, specially concurring in *Markowitz*, disagrees with the court's adoption of a brand new concept of duty. He states that "there is enough vagueness in the law of negligence" and that defining duty in terms of specific conduct is good judicial policy because it provides certainty as to what people should expect is required in their relationships with other people. *Markowitz*, 146 Ariz. at 359, 706 P.2d at 371 (Holohan, C.J., concurring). The Chief Justice concurred in *Beach v. City of Phoenix*, 136 Ariz. 601, 667 P.2d 1316 (1983), without any opinion of his own. But in *Coburn v. City of Tucson*, decided one year after *Beach*, he entered a special concurrence stating, "I concur in the result." 143 Ariz. at 54, 691 P.2d at 1082.

31. *Morris v. Ortiz*, 103 Ariz. 119, 437 P.2d 652 (1968); *Downs v. Sulphur Springs Valley Elec. Coop.*, 80 Ariz. 286, 297 P.2d 339 (1956); *Powder Horn Nursery, Inc. v. Soil and Plant Lab*, 119 Ariz. 78, 579 P.2d 582 (Ct. App. 1978).

32. *Wisener v. State*, 123 Ariz. 148, 598 P.2d 511 (1979); *Dungan v. Brandenburg*, 72 Ariz. 47, 230 P.2d 518 (1951); *Salt River Valley Water Users' Ass'n v. Delaney*, 44 Ariz. 544, 39 P.2d 625 (1934).

33. *Wisener*, 123 Ariz. at 150, 598 P.2d at 513.

34. *Salt River Valley*, 44 Ariz. at 546, 39 P.2d at 626.

35. *Shafer v. Monte Mansfield Motors*, 91 Ariz. 331, 372 P.2d 333 (1962).

that by asking whether the defendant had a duty to act or refrain from acting in a certain manner, the duty question answers the negligence issue. For example, assume the question in a negligence suit is whether the defendant has a duty to fill potholes in a city-maintained street. If the court decides the city does owe such a duty, the only issue for the jury to resolve is whether the city filled the potholes. If it did not, the city must be found to have acted negligently. This removes from the jury any analysis of whether the city was not negligent even though it failed to fill the potholes. The point here is that whether one is negligent must vary according to the circumstances.³⁶ When the duty question is framed in terms of conduct, the negligence issue becomes rigid and invariable because there is no real analysis of whether the defendant's actions did in fact breach a duty of reasonable care.³⁷

THE BEGINNING OF THE END OF "DUTY" DEFINED IN TERMS OF SPECIFIC CONDUCT

In *Beach v. City of Phoenix*, the Arizona Supreme Court first noted its disagreement with previous Arizona decisions analyzing the duty issue.³⁸ In *Beach*, a tree had fallen across a city sidewalk forcing the plaintiff to avoid it by walking into the street. A car struck her as she was about to step back onto the sidewalk.³⁹ The city argued it owed no duty to the plaintiff because the danger was open and obvious. The trial court granted the defendant's motion for summary judgment and the court of appeals affirmed, holding that the open and obvious nature of the condition eliminated any duty the city may have owed to the plaintiff.⁴⁰ Reversing the court of appeals, the supreme court stated that the city owed a duty to pedestrians to maintain its sidewalks in a reasonably safe condition for travel.⁴¹ This duty remains constant although the acts necessary to fulfill it vary according to the circumstances.⁴² The fact that the condition may have been open and obvious is only a factor in determining whether the city was negligent; it is not a consideration in deciding if the defendant owed a duty to the plaintiff.⁴³

One year later, in *Coburn v. City of Tucson*, the supreme court again voiced its disapproval of an appeals court's ruling on the duty issue.⁴⁴ In *Coburn*, a car struck and killed the plaintiffs' seven-year-old son while he was riding his bicycle.⁴⁵ The plaintiffs argued that the city had a duty either to trim a bush that obstructed vision at the intersection, or to warn of the

36. *Coburn v. City of Tucson*, 143 Ariz. at 52, 691 P.2d at 1080.

37. *Id.*

38. 136 Ariz. 601, 667 P.2d 1316 (1983).

39. *Id.* at 602, 667 P.2d at 1317.

40. *Beach v. City of Phoenix*, 137 Ariz. 1, 2, 667 P.2d 1327, 1328 (1982).

41. *Beach*, 136 Ariz. at 603, 667 P.2d at 1318.

42. *Id.*

43. *Id.* See also Casenote, *Governmental Liability for Injuries Caused by Open and Obvious Dangers*, 27 ARIZ. L. REV. 285 (1985). The author points out that the open and obvious danger rule applies to negligence, not to duty. *Id.* at 292. But see *Southerland v. Kapp*, 59 N.C. App. 94, 295 S.E.2d 602 (1982) (The court held that because an icy condition was an open and obvious danger, the defendant, a beauty parlor, was under no duty to the plaintiff who slipped and fell on the steps leading to defendant's business).

44. 143 Ariz. 50, 691 P.2d 1078 (1984).

45. *Id.* at 51, 691 P.2d at 1079.

dangerous condition caused by the obstruction.⁴⁶ The court of appeals disagreed, and upheld the granting of defendant's motion for summary judgment, ruling that the city had no duty to remove obstructions at intersections.⁴⁷ In rejecting the conclusion that the city had no duty, the supreme court held that the city had a duty to keep its streets reasonably safe for travel.⁴⁸ Framing the issue as one of negligence, not duty, the court analyzed whether the city's failure to remove the bush was substandard conduct which breached the city's duty.⁴⁹ The supreme court stated that it was incorrect to use the presence of the bush as factor in deciding if the city had a duty to the plaintiff.⁵⁰ This fact was only important in considering whether the city breached its duty by not removing the bush. Looking at the case from this perspective, the court held, as a matter of law, the city was not negligent in failing to remove the bush.⁵¹

THE FUTURE IMPACT OF *MARKOWITZ* ON NEGLIGENCE LAW IN ARIZONA

The *Markowitz* case, when read in conjunction with the *Beach* and *Coburn* cases, makes it clear that Arizona courts must separate the duty issue from the specifics of the defendant's conduct.⁵² Thus, the trial court must first decide if the defendant owes a duty to the plaintiff.⁵³ This inquiry is made without regard to the condition of the instrumentality causing the injury or the area where the injury occurred.⁵⁴ In the context of an injury resulting from the condition of the defendant's land, the court will decide the issue of duty based on the plaintiff's relationship with the landowner; *i.e.* whether the plaintiff was an invitee, licensee, trespasser, child trespasser, pedestrian or motorist.⁵⁵ The court of appeals is therefore incorrect when it suggests that the condition of the land can somehow bear on the court's determination of the duty issue.⁵⁶

As the supreme court points out, considerations such as the condition of the defendant's land and whether or not the defendant warned of possible risks resulting from such a condition become important only after the court decides the defendant owes a duty of care to the plaintiff.⁵⁷ These facts, along with claims of the open and obvious nature of the land's dangers and specific details of the defendant's acts or omissions are relevant to the deter-

46. *Id.*

47. *Coburn v. City of Tucson*, 143 Ariz. 76, 78, 691 P.2d 1104, 1106 (Ct. App. 1984).

48. *Coburn*, 143 Ariz. at 52, 691 P.2d at 1080.

49. *Id.* at 53, 691 P.2d at 1081.

50. *Id.*

51. *Id.* at 54, 691 P.2d at 1082.

52. *Markowitz*, 146 Ariz. at 356, 706 P.2d at 368.

53. *Id.* See *supra* note 16 for a discussion of how courts may decide whether a duty exists.

54. *Id.* at 356, 706 P.2d at 369; *Coburn*, 143 Ariz. at 52, 691 P.2d at 1080.

55. PROSSER & KEETON, *supra* note 12, §§ 58-61, at 393-432.

56. *Markowitz*, 146 Ariz. at 356, 706 P.2d at 368. The court of appeals in *Markowitz* recognized that a land possessor's duty of care is related to the nature of its use. 146 Ariz. at 263, 705 P.2d at 940. Yet the court completely failed to mention the status categories of land users or the fact that *Markowitz* was an invitee.

57. *Markowitz*, 146 Ariz. at 355, 706 P.2d at 367. See also *Beach*, 136 Ariz. at 603, 667 P.2d at 1318.

mination of negligence; that is, whether defendant breached the duty of care.⁵⁸ The dissent in the court of appeals' decision in *Markowitz* correctly stated that the facts used by the majority to decide the state owed a duty to *Markowitz*⁵⁹ are relevant to the negligence, and not the duty, issue.⁶⁰

This two-part analysis should impact several areas of negligence litigation. The Arizona Supreme Court requires an analysis of the relationship between the plaintiff and defendant in deciding whether the defendant has a duty.⁶¹ This should result in Arizona courts finding a duty in more cases. In most instances where a person has been injured by the affirmative conduct of another, the requisite relationship of the parties will be established and the plaintiff will be within the scope of a duty of reasonable care.⁶² By showing its distaste for attempts to define duty through details of the defendant's conduct,⁶³ the supreme court seems to be saying that a particular precedent will in all likelihood not determine whether the defendant was negligent, as each case must be scrutinized on its particular facts.

The *Markowitz* decision should, at a minimum, foster a more careful analysis of the elements of a negligence suit.

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58. *Markowitz*, 146 Ariz. at 356, 706 P.2d at 369.

59. See *supra* text and notes at 8-10.

60. *Markowitz*, at 355, 706 P.2d at 373.

61. See *supra* note 24.

62. F. HARPER AND F. JAMES, THE LAW OF TORTS, § 19.2-19.4, at 1-19 (1956).

63. *Markowitz*, 146 Ariz. at 355, 706 P.2d at 367.